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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3524th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 18 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. 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. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11.05 a.m.

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

The Chair invited the Commission to resume its consideration of the eighth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/739).

Ms. Lehto, speaking via video link, said that she wished to thank the Special Rapporteur for her report, which carefully tied up the last loose ends of the topic, and for organizing informal consultations both before and during the current session to facilitate the work of the Drafting Committee. She fully supported efforts to complete the first reading on the topic at the session.

In her report, the Special Rapporteur addressed three substantive issues, the first of which was the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal courts. She was grateful to the Special Rapporteur for her reflections on the issue. While it had been confirmed in the practice of international courts and tribunals that neither personal nor functional immunity could preclude prosecution by an international criminal court, there had been different interpretations of, and some confusion about, the scope of that principle and its practical implications for inter-State relations.

Reference had been made in that regard to various proceedings before the International Criminal Court concerning cooperation with the Court in the arrest and surrender of former President of the Sudan Omar Hassan Ahmad al-Bashir. She believed that it was appropriate that the Special Rapporteur and the Commission had waited for the Appeals Chamber of the Court to render its judgment in the *Jordan Referral re Al-Bashir* case before addressing the issue. She agreed that the judgment in question, dated 6 May 2019, touched on questions that were relevant to the topic, in particular the distinction between the exercise of criminal jurisdiction at the national level, on the one hand, and cooperation with the Court, on the other.

She concurred with the Special Rapporteur's conclusion that the draft articles should be generally applicable and that, similarly, the concept of criminal jurisdiction in the context of the draft articles should be understood in a general sense, as applicable to all States.

At the same time, the rules that the Commission was drafting should take into account the existing overlap in the vertical and horizontal exercise of jurisdiction that was created by the principle of complementarity enshrined in the Rome Statute, as well as the existence of hybrid and internationalized courts. Several members had stated that the Commission had to ensure that its work on the topic did not in any way cast a shadow over the interpretation and application of the substantive and institutional norms of international criminal law. A "without prejudice" clause was therefore necessary.

During the Commission's debate on the Special Rapporteur's eighth report, Mr. Murphy had voiced concern that a without-prejudice clause might indicate a hierarchy between the two sets of rules to which it related. That kind of clause was a tool that the Commission had used quite frequently and for different purposes. The Commission generally made it clear, in its commentaries, what it was seeking to achieve by including such a clause. In most cases, the clause served to delimit a topic by indicating that the Commission's work did not touch on, or was not intended to affect, other rules.

Looking back on the Commission's consideration of some twenty topics over the course of six decades, the only three cases in which the clause had been explained as having the effect referred to by Mr. Murphy all concerned the Charter of the United Nations. In the relevant commentaries, the Commission had referred to Article 103 of the Charter, according to which, "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

Article 103 was a specific case. A more relevant point of reference for the without-prejudice clause that the Special Rapporteur was proposing in draft article 18 was article 58 of the articles on responsibility of States for internationally wrongful acts, which established

that the articles were without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State. According to paragraph (1) of the relevant commentary, the article made clear that the articles as a whole did not address "any question of the individual responsibility under international law of any person acting on behalf of a State". Another without-prejudice clause, in article 57, similarly excluded from the scope of application of the articles questions related to the responsibility of international organizations.

Why had the Commission deemed it necessary to include those without-prejudice clauses? Had it not been clear from the title of the topic, from the draft articles and from the commentaries thereto that the Commission was dealing only with the international responsibility of States? Those questions had a bearing on what Mr. Park and Sir Michael Wood had said about there being no need for a without-prejudice clause because draft article 1 defined the scope of the topic. In 2001, when it had adopted its articles on responsibility of States for internationally wrongful acts, and on many other occasions, the Commission had opted for clarity. She believed that there was good reason to do so again given the confusion to which she had referred.

The clause that the Special Rapporteur was proposing as draft article 18 had first been discussed in 2017 as a possible third paragraph of draft article 7. At that time, it had received widespread support, although many members had indicated a preference for a general clause applicable to all the draft articles, not just draft article 7. She believed that it had been a wise decision to withdraw the provision and present it now as a separate draft article.

In sum, she was in favour of the proposed draft article 18 and considered that it was a necessary part of the draft articles. However, its wording could be improved, for example by referring to "rules and practices" and to "internationalized courts", as suggested by Mr. Jalloh and supported by others.

When the Special Rapporteur had mentioned, in discussing the future workplan in the seventh report (A/CN.4/729), the issue of the settlement of disputes, she personally had seen no reason to include a dispute settlement clause in the draft articles. In the eighth report, however, the Special Rapporteur presented an interesting argument in favour of its inclusion, namely that a provision on the settlement of disputes could serve as a final safeguard for the forum State and the State of the official in a situation in which, following consultations, there remained differences between them with regard to the determination and application of immunity.

Whether a draft article on the settlement of disputes would serve only as a reminder of the obligation of all States to settle their international disputes peacefully or whether it would become a genuine compromissory clause providing a basis for jurisdiction would, of course, depend on the final form that was given to the Commission's output. In either case, such a provision could be of value to the topic.

If it was intended as a reminder, the draft article should be of a general nature. There was no need for specific time limits, as currently proposed in paragraph 2. Regarding paragraph 3, as had been noted by Mr. Forteau, it would not be appropriate to require the forum State to suspend the exercise of its jurisdiction if the dispute was referred to arbitration or to the International Court of Justice. Rather, the State of the official should request the Court to order a suspension as a provisional measure.

It should be added that a referral to dispute settlement rarely had the effect of suspending other State activities. The only example that came readily to mind was that of countermeasures, which, under article 52 of the articles on responsibility of States for internationally wrongful acts, a State had to suspend without undue delay if the dispute was pending before a binding third-party dispute settlement mechanism. It was nevertheless hard to see a case for drawing an analogy between the exercise of jurisdiction and the taking of countermeasures.

As for recommended good practices, she could support the conclusion reached by the Special Rapporteur in paragraph 61 of the report. The few issues in relation to which good practices could already be identified, without additional contributions from States or

members of the Commission, could probably be addressed in the commentaries. To conclude, she supported sending both proposed draft articles to the Drafting Committee.

Mr. Petrič said that, while the Special Rapporteur's report should enable the Commission to complete its first reading on the topic, there remained several issues to be resolved in the Drafting Committee, notably with regard to draft article 7. He agreed with some previous speakers that, regrettably, the Commission would not have time to identify recommended good practices prior to concluding its first reading.

On a general point, when he had joined the Commission in 2007 the ambition for the topic had been clear: to draw on State practice and produce draft articles, not guidelines or rules. He saw no grounds for departing from that approach. The Commission's decision on what form its output should take would, naturally, have an impact on its work.

It was important to stress that the two legal regimes discussed in chapter I of the report were independent and would likely remain so. The regime of immunities before international criminal tribunals was a clear example of a supplementary or subsidiary regime. The immunity of State officials from foreign criminal jurisdiction was a norm of customary international law that was applied horizontally, among States. It was also an expression of State sovereignty. The same was true, *mutatis mutandis*, of diplomatic immunity. The scope, invocation and limitations of immunity of State officials from foreign criminal jurisdiction had already been shaped by State practice. The Commission's task was to establish what was already customary international law, and should be codified, and what had developed as practice, which should be the subject of an exercise in progressive development.

There was, of course, a relationship between the two regimes, and some degree of cooperation was possible and even necessary. Both were based on specific agreements and Security Council decisions, and were thus binding, *stricto sensu*, only on States parties to those agreements. In the early negotiations of the Rome Statute, in which he had participated, the understanding had been that the Statute should assist States that were unwilling or unable to prosecute the most heinous of crimes. History demonstrated that such crimes were committed not by individuals but by State authorities, and that responsibility for them fell primarily on the highest State officials. It was unrealistic, however, to expect all States to be prepared to prosecute their top-ranking officials.

In her report, the Special Rapporteur dealt extensively with the appeal by Jordan against the judgment of Pre-Trial Chamber II of the International Criminal Court of 11 December 2017 in the *Jordan Referral re Al-Bashir* case. The judgment, problematic though it might be, could only be understood as relating to States' obligation to cooperate with the Court. That obligation, as was clear from the judgment itself, concerned only parties to the Rome Statute.

In that regard, he could not help but mention similar judgments, such as that of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The Court had held that the Srebrenica massacre had been a genocide but that the Bijeljina massacre had not, despite the perpetrators and motive being the same. Indeed, the only major difference had been the number of victims. The case illustrated that even the best courts in the world could be guilty of inconsistency. He was of the opinion that the Commission did not have to deal with the International Criminal Court judgment in the commentaries, and certainly not at any length, though he was grateful to the Special Rapporteur for addressing it in her report as it was useful to the Commission's deliberations.

It was clearly stated in chapter I of the report, which contained a detailed discussion of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, that the topic had "nothing to do with immunities before such tribunals". The scope of the topic should remain limited to the immunity of State officials, whether *ratione personae* or *ratione materiae*, from the criminal jurisdiction of another State, as had been the case throughout the Commission's work on the topic. It was explained in the commentary to draft article 1, as provisionally adopted by the Commission, that the immunities enjoyed before international criminal tribunals, which were subject to their own legal regime, would remain outside the scope of the draft articles and that, as a result, none

of the rules that governed immunity before such tribunals were to be affected by the content of the draft articles.

Equally, however, the Commission had taken the position that the content of the draft articles should not be affected by the rules that governed immunity before international criminal tribunals. He wondered whether that position could be stated in the commentaries or perhaps even in an additional without-prejudice clause in order to address some of the concerns expressed regarding proposed draft article 18, in particular the concern that it might establish the superiority of the special regimes of international criminal tribunals and the concern that it might create obligations for States that were not parties to the Rome Statute of the International Criminal Court. Although he did not share those concerns, greater clarity would certainly be beneficial. Nevertheless, he could not see the need for the proposed draft article, which might in fact make the situation less clear, particularly as it took the form of a stand-alone provision. As a compromise, he would be prepared to accept the incorporation of the content of the proposed draft article into draft article 1, which concerned the scope of the project.

He was a committed supporter of the Rome Statute and considered the establishment of the International Criminal Court to represent a historic breakthrough in the development of international law. Nevertheless, immunity before international criminal tribunals and immunity from the criminal jurisdiction of foreign States were governed by two separate legal regimes, which had to remain independent of each other, regardless of any similarities that they might share. The former was governed by a specific regime, whereas, should the Commission's work on the topic ultimately lead to a convention, the latter would be governed by a general one.

Concerning the proposed draft article 17, which he found to be very useful, he agreed with the general approach that the Special Rapporteur had taken. It would be for States to decide, when drawing up a convention on the basis of the draft articles, whether to establish a special regime for the peaceful settlement of disputes. The Special Rapporteur's decision to propose a draft article on dispute settlement would give States the opportunity to provide further input on the issue before the second-reading stage.

Regarding the issue of negotiations, which was dealt with in paragraph 1, he agreed that States should endeavour to settle disputes concerning the determination and application of immunity as soon as possible. As immunity was a very sensitive matter and had the potential even to harm peaceful relations among States, some time limit should be set for the negotiations. However, negotiations were not always the best means of settling such disputes, particularly in the case of disputes between a large State and a small one. That aspect should also be taken into account.

As for paragraph 2, the reference to "arbitration" should be explained in the commentary, since that process could take various forms. More importantly, the use of the words "may suggest" begged the question of what would happen if such a suggestion was refused. The Commission should endeavour to answer that question to ensure that the draft article as a whole was sufficiently robust. In that regard, the draft articles on the prevention and punishment of crimes against humanity could serve as a useful source of guidance.

He agreed with the Special Rapporteur's conclusion that it was not necessary to formulate specific proposals regarding the issue of "recommended good practices".

He was in favour of referring draft article 17 to the Drafting Committee but had doubts regarding draft article 18. Nevertheless, he could also support the referral of draft article 18 to the Drafting Committee, where it could be discussed in greater detail, if other members of the Commission were in favour.

Mr. Reinisch said that he appreciated the Special Rapporteur's discussion of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals and was sympathetic to her proposal to add a without-prejudice clause at the end of the draft, in the form of draft article 18, although it might be preferable to replace the word "functioning" in the proposed text with "jurisdiction". In any event, the wording of the proposed text was clearly preferable to the reference made in the commentary to draft article 1, as provisionally adopted, to "immunity before such tribunals".

In his view, the term "immunity" should be reserved for exemptions from the jurisdiction of foreign national courts; it should not be used in the context of the jurisdiction of international courts, in particular international criminal tribunals. On a conceptual level, immunities were not applicable before international courts and tribunals. Of course, it was possible that, when establishing such a court or tribunal, States might make express provision for something functionally equivalent to immunity, as had been done in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol). However, the term "immunity" might prove confusing in that context. Such treaty-based exceptions were better understood as limits to the scope of jurisdiction of international courts and tribunals.

In paragraph 27 of her report, the Special Rapporteur expressed the view that the Commission did not need to take a position on the issue of cooperation with international criminal tribunals. It seemed to him that a provision on that issue did not belong in the draft articles, which focused, as they should, on immunity from foreign criminal jurisdiction.

With regard to the matter of dispute settlement, which was dealt with in proposed draft article 17, he agreed with the Special Rapporteur that, where existing forms of dispute settlement were appropriate for dealing with issues relating to the immunity of State officials, States should at least be advised to use them. In fact, strengthening dispute settlement would help to prevent forum States from depriving officials of foreign States of immunity without justification. To the extent that the draft articles proposed by the Special Rapporteur were intended to lead to a treaty, States should in no way be prevented from opting for an effective dispute settlement clause.

Both the International Court of Justice and international arbitral tribunals were well-tested dispute settlement bodies. As he had mentioned in his statement on the Special Rapporteur's seventh report, a practical problem might arise from the fact that the procedural rules of the International Court of Justice did not allow States to request an advisory opinion or follow a preliminary reference procedure in order to obtain a determination as to whether a State official was entitled to immunity in a specific case; such a determination could be used as a basis for further decisions by the forum State. One could hope for an amendment to the Statute of the International Court of Justice, but a more realistic alternative would be to consider establishing a kind of preliminary reference procedure to enable national courts to suspend criminal proceedings in the event that immunity had been invoked by the State of the foreign official and the matter could not be settled bilaterally. A third-party dispute settlement institution of that kind could take the form of an *ad hoc* tribunal or a permanent dispute settlement body.

However, in his view, it would be ill-advised to establish what the Special Rapporteur described, in paragraph 41 of the report, as a "permanent *ad hoc* international body". Aside from the apparent contradiction in terms – since a body could not be both permanent and *ad hoc* – the creation of a new dispute settlement institution might require a separate treaty basis, would incur costs and might not necessarily be beneficial, since it would have to rule on core issues of public international law in an area in which the existing dispute settlement mechanisms were sufficient.

It was commendable that the Special Rapporteur had based her proposed dispute settlement mechanism on draft provisions that the Commission had recently adopted in the context of its work on other topics, such as draft article 15 of the draft articles on the prevention and punishment of crimes against humanity and draft conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*). Nevertheless, he wondered whether the mechanism proposed by the Special Rapporteur was sufficient to achieve a comparable result. In several respects, it seemed rather incomplete. According to draft article 17 (3), the forum State was required to suspend the exercise of its jurisdiction until either the arbitral panel or the International Court of Justice had issued a final ruling, but such suspension was premised on an agreement to refer the dispute to either of those dispute settlement mechanisms. The draft article did not address the problem of what would happen if the parties could not reach such an agreement.

Draft article 17 also did not address the issue of the effect given to a final ruling of the International Court of Justice, an arbitral tribunal or other dispute settlement body. It

would be useful to include some indication that the parties should take that issue into account or that there would be a presumption of lawfulness if the forum State proceeded accordingly.

The main problem, however, was that draft article 17 (2) provided that, after a negotiation period, either the forum State or the State of the official could suggest that the dispute should be referred to arbitration or to the International Court of Justice. The question of what would happen if the other party did not agree to such a suggestion was not addressed. It was crucial to consider what would happen if, in that situation, the forum State proceeded with the exercise of its jurisdiction. One solution would be to consider that a suggestion by the forum State to refer the dispute to arbitration or to the International Court of Justice that was not accepted by the State of the official could be seen as a *prima facie* ground on which the forum State could proceed with the exercise of its jurisdiction. Another would be to follow more closely the procedural requirements set out in draft conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*). It could be envisaged that a State that objected to another's exercise of jurisdiction would have to suggest that the dispute should be referred to arbitration or to the International Court of Justice and that the forum State would then be prevented from exercising its jurisdiction unless it accepted international dispute settlement and awaited the outcome.

A further issue that was not addressed in draft article 17 was the situation of the State official whose immunity from foreign criminal jurisdiction was under examination. Would he or she remain in custody in the forum State? How would the potentially unclear time frame – involving consultations, a reasonable period of time for negotiations, and proceedings before a court or arbitration – impact the length of pretrial detention and thus the rights of the accused? Further guidance was certainly needed in that regard

To the extent that the draft articles were intended to lead to a treaty, he considered that an effective dispute settlement clause would be preferable to the rather weak advice that had been proposed. In that regard, he agreed with Mr. Rajput and Sir Michael Wood that draft article 15 of the draft articles on prevention and punishment of crimes against humanity could provide valuable guidance for drafting an effective dispute settlement clause.

Concerning the recommended good practices discussed in chapter III of the report, he shared the view of the Special Rapporteur and other members of the Commission that, while a guide to good practices would certainly be valuable, the preparation of such a guide should not delay the adoption of the draft articles.

Although he shared some of the concerns that had been expressed regarding draft article 18, he suggested that draft articles 17 and 18 should both be referred to the Drafting Committee for further discussion.

Mr. Valencia-Ospina, in a pre-recorded video statement, said that he wished to thank the Special Rapporteur for her thoughtful and concise eighth report on the immunity of State officials from foreign criminal jurisdiction and her dedicated work on the topic over a number of years.

As the Special Rapporteur noted in her report, the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals had been present in the Commission's work on the topic from an early stage. Although the Commission had made clear its intention not to interfere with the procedure of such tribunals, the relationship between them and the topic had always been within the Commission's field of inquiry.

As to whether it was necessary to include a reference to international criminal tribunals in the draft articles, he believed there were two distinct reasons for doing so. The first was the de facto relationship between foreign criminal jurisdiction and international criminal tribunals. An international criminal tribunal could issue an arrest warrant on the basis of which a State could arrest an individual. Such interactions were not unique to courts at the vertical level. For example, in the Pinochet case, magistrates in the United Kingdom had issued arrest warrants at the request of the Spanish courts. On the one hand, it would clearly be incorrect to say that the immunity of State officials barred States from exercising criminal jurisdiction in such contexts, since that would incapacitate the international criminal tribunals. Yet, if that were true, the absence of any reference in the draft articles to the

relationship between the Commission's work and international criminal tribunals would cast doubt on the authority of those tribunals. On the other hand, leaving aside that *reductio ad absurdum* argument, the question must at the very least be regarded as unresolved: the Commission must not assume that the statute of every international criminal tribunal – present or future – left untouched the duty of States to observe the immunity of foreign State officials. However, the absence of any reference to the relationship between the work of the Commission and international criminal tribunals assumed exactly that.

Some members had mentioned that, unless the Commission were to state otherwise, it would be accepting the idea that international criminal tribunals could function as a "workaround" to the immunity of State officials. However, such tribunals could already function as a workaround in that respect, and it was with such jurisdictional notions clearly in mind that a majority of States supported them. It was not for the Commission to tell States that the immunity of State officials functioned as some sort of peremptory norm of international law that prevented them from establishing international criminal courts.

The second reason for including a reference to international criminal tribunals in the draft articles had to do with the extensive customary international law developments in international criminal law in recent years, the important role played by international criminal tribunals in that regard and how the notion of immunity had been progressively weakened. A review of the developments in that area since the Second World War served as a reminder that the International Criminal Court was not the only international criminal tribunal and that the work of the Commission should take all such tribunals into account. International criminal tribunals were part of the customary law with which the Commission was dealing. In the absence of a reference to international criminal tribunals, the reader might naturally, though incorrectly, conclude that the Commission had deemed the developments in such tribunals as being insufficient to warrant their inclusion in the Commission's final product. That was not the Commission's intent.

For the reasons he had just outlined, he agreed that a "without prejudice" formulation was appropriate to refer to international criminal tribunals, as was concluded in the commentary to draft article 1 on the scope of the draft articles.

He supported the Special Rapporteur's proposal to include draft article 17 on dispute settlement in the first-reading text, as doing so would give Governments the opportunity to comment on its content. In that regard, it would be odd to give States procedural guidance on how to tackle issues of immunity – as was done in draft articles 8 to 16 – but to ignore the issue of how to proceed when proposals concerning the determination and application of immunity failed. The argument that the text should not include an article on dispute settlement because it was not necessarily intended to be a treaty was unconvincing. As the Special Rapporteur pointed out, the Commission's draft conclusions on peremptory norms of general international law (*jus cogens*) referred to a dispute resolution mechanism, even though they had never been intended to become a treaty.

As to the content of draft article 17, he supported the reference to negotiations, but proposed that conciliation should also be taken into account. The Special Rapporteur suggested that disputes could be referred to a permanent *ad hoc* international body, the International Court of Justice or to arbitration. A permanent *ad hoc* international body would be inappropriate in the context of immunity of State officials from foreign criminal jurisdiction, as such a body presumed the existence of a robust set of cases to resolve; otherwise its creation would involve the inefficient and unwise use of resources. Yet, looking at contemporary world practice, it was not apparent that the immunity of State officials was providing such a wealth of cases as to justify the creation of a permanent specialized *ad hoc* international body. Moreover, a permanent specialized body was best suited to particularly specialized legal fields, such as the law of the sea or international human rights law. He therefore did not consider a permanent *ad hoc* international body to be appropriate for the resolution of disputes related to the immunity of State officials from foreign criminal jurisdiction at any stage, and certainly not at the current stage in the codification and progressive development of the relevant law.

The usefulness of the International Court of Justice hardly warranted discussion. It had already resolved multiple disputes related to the immunity of State officials, as listed in

footnotes 50 and 51 of the report. As for arbitration, its use was justified in giving States the flexibility to define the parameters of the forum that was to resolve their dispute. In that regard, it was his understanding that draft article 17 (2) was not intended to preclude States from agreeing on their own methods for resolving their dispute prior to the activation of a compulsory dispute settlement procedure.

The Special Rapporteur argued that the forum State's suspension of the exercise of its jurisdiction if the dispute was referred to the International Court of Justice or to arbitration would prevent the possibility of a *fait accompli*. Such suspension was also justified by the risk of deterioration of the relationship between the States parties to the dispute. However, the issue of the continued imprisonment by the forum State of the foreign official, which, technically speaking, corresponded to the continued enforcement of its criminal jurisdiction, was not discussed in detail in the report. The Commission would be well advised to take a position on the matter or to rephrase draft article 17 (3) to proscribe the further implementation of the criminal procedure of the forum State with respect to the case of the foreign official, while leaving open the question of continued imprisonment.

With regard to the Special Rapporteur's proposed inclusion of two good practices to be recommended to States, the Commission would first need to clarify their utility and their placement in the text. The recommendation that decisions relating to the determination of immunity should be adopted by high-level national authorities seemed to assume that such determination would be made by the executive branch, as it was only in that context that the notion of a "high-level" national authority made sense. However, draft article 9 already provided that: "It shall be for the courts of the forum State that are competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction, without prejudice to the participation of other organs of the State which, in accordance with national laws, may cooperate with them." If the judiciary was to make the determination, but the executive was to play an internationally visible role, that would seem to invite conflict within the internal political system of the State.

The point regarding the status of the decision-making body also applied to the second good practice – the preparation of manuals or guides for the State organs that might have to be involved in the process of determining and applying immunity. That recommendation applied only to the executive branch and not to the legislative or judicial branches. After all, the Commission could not recommend as good practice that States should enact domestic laws to facilitate the execution of their international obligations: there was nothing particularly novel about the recommendation that would justify describing it as "good practice". In any case, the Commission should either adopt both of the closely related good practices or neither. He supported the Special Rapporteur's view that the good practices should not be included in a separate guide.

It had been suggested that the procedural parts of the draft should also be moved to the proposed guide, but that would change the nature of the work. Moreover, at the current stage, it would be unfair to the Special Rapporteur, who should be the one to decide on the design of the work entrusted to her. Nor did it seem appropriate to place the proposed good practices in the set of draft articles, as they were of a fundamentally different nature. He did not believe that such practical recommendations should be placed in the commentary either, since they would not be easily accessible there. In short, there did not appear to be any good place for the good practices. His suggestion would be to simply mention in the commentary that the Commission considered the two recommendations to be useful good practices, along with a brief analysis. States would then be able to adopt one or both good practices if they so wished.

In conclusion, he supported referring the two proposed draft articles to the Drafting Committee.

Ms. Galvão Teles said that the Special Rapporteur's report was clear and concise and provided a good basis for the Commission's work. Concerning the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, it was clear that the immunities enjoyed before international criminal tribunals were outside the scope of the Commission's draft articles. In her view, that had already been made clear in the commentary to draft article 1, which had been provisionally adopted, but perhaps

it needed to be made even clearer. On the other hand, the topic could not be completely dissociated from questions of international criminal jurisdiction, particularly in those cases where State officials committed crimes that could be prosecuted before both national courts and international criminal tribunals.

She agreed with other members that it was not for the Commission to assess the findings of the International Criminal Court in the *Jordan Referral re Al-Bashir Appeal* case. However, an important conclusion could be drawn from the debate that had followed that judgment, namely that there was no widespread agreement on the relationship between immunities enjoyed before foreign national jurisdictions and the obligation to cooperate with international criminal tribunals. Against that backdrop, she concurred that it would not be appropriate for the Commission to take a position on that judgment.

That did not mean, however, that a reference to international criminal tribunals was totally unwarranted in the draft articles or that the Commission should not recognize their role in the development of international criminal justice. A clause clarifying that the draft articles were "without prejudice to the rules governing the functioning of international criminal tribunals", as proposed in draft article 18, would ensure that, by setting out the regime for immunity before a foreign criminal jurisdiction, the draft articles did not hinder the progress made in international criminal law and the fight against impunity for the most serious international crimes.

That clause should be read together with the without-prejudice clause in draft article 1 (2) on the immunity from criminal jurisdiction enjoyed under special rules of international law. The Drafting Committee should consider whether draft article 18 might not be more appropriate as an additional paragraph in draft article 1. She was open to discussing the precise formulation of that clause in the Drafting Committee.

On the issue of the settlement of disputes between the forum State and the State of the official, the proposal to include a draft article providing for a dispute settlement mechanism was in line with the draft articles proposed in the seventh report, which mostly aimed to regulate the relationship between the forum State and the State of the official in cases where immunities might apply. To the extent that disputes could arise when States did not agree on the determination and application of immunity, only the inclusion of a provision on dispute settlement would ensure the completeness of the Commission's work on the topic. Moreover, at the seventy-first session of the Commission, many members had expressed support for including such a provision.

While any provision on a dispute settlement mechanism would not be binding unless the draft articles were to become a treaty, its inclusion could still be useful for States. The Special Rapporteur's proposal had, however, led to some misunderstandings and should therefore be reformulated for clarity. Some of the confusion had arisen because of the uncertainty surrounding the form the Commission's final output on the topic would take. In her view, it was one thing to have a general provision appealing to the States concerned to resort to dispute settlement mechanisms in the event of a dispute regarding the determination and application of immunity and quite another to have a standard dispute settlement clause on the interpretation and application of the draft articles should they become a convention.

The usefulness of the Special Rapporteur's proposal should lie in its flexibility, given that it should not depend upon the creation of new institutional structures, for which a treaty would be necessary. The inclusion of a dispute settlement provision would also be in line with the recent practice of the Commission, which had included similar provisions in the draft conclusions on peremptory norms of general international law (*jus cogens*). However, if that was to be the model, the clause should perhaps take the form of a "procedural requirement", as in the *jus cogens* draft conclusions, or a "procedural recommendation" for the settlement of disputes. If the draft articles were not intended to become a convention, a more general clause regarding a procedural recommendation for dispute settlement was warranted. If, on the other hand, the draft articles were to become a convention, the inclusion of a dispute settlement clause in line with previous examples in the Commission's work on topics such as crimes against humanity or jurisdictional immunities of States and their property could be justified.

With regard to the two good practices the Special Rapporteur proposed to recommend to States, she agreed that, as the procedural aspects of the determination of immunity were extensively dealt with in draft articles 8 to 16, some good practices could certainly be included in the commentary to the relevant draft articles. While not strictly necessary, their inclusion might prove very useful for States. She understood the concern expressed by the Special Rapporteur and some members that attempting to prepare a complete guide of good practices could delay the adoption of the draft articles. That difficulty could be surmounted, however, by taking as a starting point many of the elements that were already in the draft articles pending before the Drafting Committee.

It was her sincere hope that the Commission would be able to complete the first reading on the topic as soon as possible during the current quinquennium. She supported sending draft articles 17 and 18 to the Drafting Committee, taking into account the comments made in the plenary debate.

The meeting rose at 12.45 p.m.