Provisional

For participants only

23 June 2021

Original: English

International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3525th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 19 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. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Šturma
	Mr. Tladi
	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. Zagaynov said that he wished to thank the Special Rapporteur for the preparation and presentation of her eighth report (A/CN.4/739), which had elicited a wide range of views during the discussion of the complex questions it raised. Unfortunately the disagreement over draft article 7 that had become evident at the Commission's sixty-ninth session continued to affect the work on the topic, and new differences, including on fundamental questions, had arisen.

At previous sessions of the Commission he had stated that issues related to international criminal justice should not be considered in the framework of the topic at hand. He therefore agreed with those Commission members who opposed the proposed draft article 18. That had been an understanding from the beginning of the Commission's work on the topic, as the Special Rapporteur mentioned in paragraph 11 and footnote 28 of the report; there was a clear and unambiguous statement in the syllabus that only immunity from domestic jurisdiction would be covered, as was reflected in draft article 1 (1) and the commentary thereto. However, despite that decision and understanding, the Commission was again considering aspects of international criminal justice.

In that context, the Special Rapporteur referred to "the possible interaction between foreign criminal jurisdiction and international criminal jurisdiction in relation to immunity", considering that "that interaction is intricately linked to the principle of accountability and to the fight against impunity for crimes under international law". The terms "immunity" and "impunity" were not synonymous and should not be confused. It was true that "immunity from foreign criminal jurisdiction does not operate in the abstract", but the search for a "relationship … between the present topic and the phenomenon of international criminal jurisdiction" seemed superfluous, for the reasons he had just given.

As Mr. Petrič had pointed out, the international criminal tribunals were of a particular legal nature and functioned exclusively in the framework of special legal regimes established either by treaties, such as the Rome Statute of the International Criminal Court, or by Security Council resolutions. They thus afforded no scope for the codification or progressive development of international law.

Several Commission members had pointed out that the wording of proposed draft article 18 could be interpreted as indicating that the rules of international criminal tribunals would prevail in the case of their conflict with the norms of general international law concerning immunity of officials from foreign criminal jurisdiction.

It would be useful to compare the proposed wording of draft article 18 with draft article 1 and the commentary thereto. Mr. Murphy had highlighted that, according to draft article 1 (2), the draft articles were "without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law". The commentary to draft article 1 (1), to which Mr. Reinisch had drawn attention, specified that "none of the rules that govern immunity before such tribunals are to be affected by the content of the present draft articles". The proposed wording of draft article 18 stated that "the present draft articles are without prejudice to the rules governing the functioning of international criminal tribunals". There was a clear difference between those statements. In departing from the wording previously published in the context of the project, the report left out any mention of the term "immunity" in relation to the functioning of international criminal tribunals. He did not agree with Mr. Reinisch that the proposed wording was preferable, particularly in the context of immunity of officials of States that were not parties to the international agreement concerned. He did not think that a given group of States, each individually bound by the rules of general international law on immunity, could create a structure for which such rules would not exist by concluding a treaty between themselves.

The discussion of the proposed wording was taking place against the background of the decision of the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, which was very questionable from the point of view of general international law. He was therefore pleased that the Special Rapporteur

did not intend to discuss that decision. However, the decision was mentioned in the report and in almost all the statements made during the current discussion; he hoped that it would not be referred to in the commentary. The discussion showed that the Special Rapporteur's proposed position was being used to support the findings and logic of the Appeals Chamber, which he considered to be poorly reasoned. Norms of general international law on immunity did not undergo some sort of transformation for States that were not parties to the Rome Statute. He agreed with the Special Rapporteur that, whatever the decision of the Appeals Chamber, its findings should, in any case, "be understood exclusively in the context of the obligations assumed by States parties under the Rome Statute" and could not be extrapolated to other situations.

The Special Rapporteur had concluded that a provision on the settlement of disputes between the forum State and the State of the official could be included in the draft articles and proposed that the potential issues on which such States might disagree should be described as "differences with regard to the determination and application of immunity". He wished to suggest that the provision should be considered together with the question of the form that the Commission's final product on the topic would take. As dispute settlement provisions were a characteristic feature of treaties, further work should proceed on that basis.

The work on peremptory norms of general international law (*jus cogens*), which was mentioned in the Special Rapporteur's report, had not been completed and could not therefore be taken as a precedent. Mr. Tladi, the Special Rapporteur for that topic, had not excluded the possibility that draft conclusion 21 might be reviewed to take account of the reactions of States, while noting that the wording "recommended practice" had been used in the original text of the draft conclusion.

Concerning draft article 17, other Commission members had raised a number of issues, including the meaning of the time periods of 6 and 12 months specified in paragraph 2 and the relationship between consultations and negotiations.

Regarding the suspension of the exercise of jurisdiction, mentioned in draft article 17 (3), as Mr. Forteau had said at the Commission's 3521st meeting, the International Court of Justice had rejected requests for such suspension submitted by a State of the official. Apparently, the Court assumed that such exercise of jurisdiction was justified.

Draft article 17 concerned the settlement of "differences with regard to the determination and application of immunity". The draft article addressing the determination of immunity situated that step, in chronological terms, after a series of events and acts that included, *inter alia*, examination of immunity by the forum State, notification of the State of the official, invocation of immunity, waiver of immunity and exchange of information. He would like to know, as Ms. Galvão Teles had asked at the Commission's 3524th meeting, whether draft article 17 was intended to apply also to differences arising in relation to those stages, prior to the determination of immunity, and whether it encompassed the settlement of disputes arising in respect of all the draft articles or only those in part four of the text. If it covered only part four, he wondered whether the exclusion of parts two and three, concerning immunity *ratione personae* and immunity *ratione materiae*, including draft article 7, which had aroused the most disagreement between States, was justified. Clarification of those questions by the Special Rapporteur would be helpful for the work of the Drafting Committee.

As to the question of recommended practices, he fully understood the doubts expressed by the Special Rapporteur in the report and agreed with her proposed approach.

In his view, the Commission could only overcome, or at least avoid exacerbating, the disagreements on the topic if the Commission's members did not insist on taking decisions at all costs on issues where consensus had clearly not yet been reached and the differences were of a fundamental nature. The more responsible approach would be to set aside consideration of those issues, including the provision on international criminal tribunals.

Ms. Oral, commending the Special Rapporteur on her clear and informative presentation and her diligently prepared eighth report, said that there was no doubt that the scope of the draft articles concerned the immunity of State officials from the criminal jurisdiction of other States, as the commentary to draft article 1 made clear. She agreed with the Special Rapporteur, however, that "immunity from foreign criminal jurisdiction does not

operate in the abstract, outside the new reality represented by international criminal tribunals established to prosecute the most serious crimes of concern to the international community" and that the possible nexus between the two levels of criminal jurisdiction could not be ignored. Draft article 18 should be seen within the context of the complementarity principle enshrined in the Rome Statute and the sometimes fluid nature of domestic and international courts and "hybrid" tribunals, as highlighted by Mr. Jalloh at the Commission's 3520th meeting.

The Special Rapporteur's decision not to engage in an analysis of the decision by the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* was wise; while the case could not be ignored, the right balance had been struck in the eighth report. As she understood it, the purpose of draft article 18 was to make it clear that the draft articles did not apply to the self-contained regimes of international criminal tribunals. The inclusion of such a "without prejudice" clause would ensure that the Commission's work on the draft articles would not influence substantive developments in relation to those regimes and would preserve the rightful place of international criminal tribunals, which played a critical role in the fight against impunity for the most serious of international crimes. Draft article 18 clearly demarcated the two spheres and should not be read as in any way implicitly condoning the decision of the Appeals Chamber in the *Al-Bashir* case regarding States that were not parties to the Rome Statute or the notion that the non-application of immunity *ratione personae* in cases before international courts was a rule of custom. Ms. Lehto's analysis at the Commission's 3524th meeting had shown very clearly and persuasively that the inclusion of the "without prejudice" clause proposed in draft article 18 did not run the risk of creating some type of hierarchy, which would certainly exceed the role of the draft articles.

She agreed with the Commission members who had suggested that draft article 18 should be moved to draft article 1 as a new paragraph 3. She also agreed that the word "functioning" should be reconsidered and that Mr. Jalloh's proposal to replace the word "rules" with "rules and practices" was a good alternative, which had found support among some members. It was regrettable that a few members wished to close down the debate on draft article 18; a robust exchange of views could take place in the Drafting Committee, where a compromise could be found, if necessary.

She had some reservations about draft article 17. If the draft articles were intended to become a draft convention, the inclusion of a provision on dispute settlement would make sense, although the clause should not be overly prescriptive or detailed. Given previous instances in the Commission's work, such as the 1994 draft articles on the law of the non-navigational uses of international watercourses, in which the detailed dispute settlement clause had been significantly modified when the corresponding Convention had been adopted, or the 1994 draft statute for an international criminal court, where a reference to dispute settlement in an appendix, rather than a provision on that subject, had been included, she would be in favour of more general wording.

If, however, the draft article was meant to be part of the safeguard provisions in part four, the clause should be directly linked to those provisions and moved to part four. That would show that it was not intended to be a general compromissory clause but the final procedural step of the safeguard provisions, after which, if the measures did not succeed, the State could then proceed to dispute settlement. If that was the intention, a possible model could be found in the dispute settlement provision contained in the draft conclusions on peremptory norms of general international law (*jus cogens*). Draft conclusion 21 was not intended to be a general compromissory clause but was limited to a specialized purpose, when a State wished to object to the invocation of a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law. It was thus integrated into the procedural safeguard process and was not a stand-alone dispute settlement provision, as Ms. Galvão Teles had said, at the Commission's 3524th meeting, when she had suggested that draft article 17 should be identified as "Procedural requirements" or a "Procedural recommendation" for the settlement of disputes regarding the determination of immunity.

If draft article 17 was included in part four, it could include a time limit, which was not usual in conventional dispute settlement provisions. The inclusion of a "without prejudice"

clause would make it clear that draft article 17 was not intended to pre-empt any dispute settlement clauses in existing treaties; that might address the concerns raised by Mr. Forteau.

Regarding recommended good practices, she concurred with the Special Rapporteur that the time required to prepare a guide to good practices would prevent the adoption of the draft articles on first reading at the current session; the development of such a guide might also open up new controversy. She therefore welcomed the Special Rapporteur's view that there was no need to formulate specific proposals regarding recommended good practices.

She fully supported the Special Rapporteur's intention to complete the first reading of the draft articles at the current session and recommended that draft articles 17 and 18 should be referred to the Drafting Committee.

Mr. Ruda Santolaria, speaking via video link, said that he wished to congratulate the Special Rapporteur on her indefatigable work on the topic and to thank her for presenting her eighth report. He agreed that international criminal courts were bound by their own legal regimes; consequently, none of the rules governing the functioning of immunity before them would be affected by the provisions of the draft articles under consideration. He also recognized, however, the undeniable link that existed in cases where officials of a State committed international crimes that could be prosecuted before both domestic courts and international criminal courts. In either case, the intention was to prevent any crime repugnant to the conscience of humanity from going unpunished.

He agreed that it would not have been appropriate to include a reference to the issue in draft article 7, on crimes in respect of which immunity *ratione materiae* would not apply to officials before the criminal courts of another State. A comparison between that draft article and the wording of article 27 of the Rome Statute showed clearly that immunities and special procedural rules which might attach to the official capacity of a person under national or international law would not bar the International Criminal Court from exercising its jurisdiction over such a person, even in the case of a Head of State or a Head of Government acting as Head of State. Since the International Criminal Court's jurisdiction extended even to persons who enjoyed immunity *ratione personae*, the inclusion of a "without prejudice" clause in respect of the rules governing the functioning of international criminal tribunals seemed appropriate, given that the draft articles on immunity from foreign criminal jurisdiction dealt with a different situation: the possibility that an official of one State could be tried in the courts of another State.

Regarding draft article 18, he was in favour of the wording proposed by the Special Rapporteur, but thought it would be more logically placed in a new paragraph 3 of draft article 1. Draft article 1 (1) would thus address the scope of the draft articles and paragraphs 2 and 3 would take the form of "without prejudice" clauses, so that the draft articles were without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State, as well as without prejudice to the rules governing the functioning of international criminal tribunals.

Concerning draft article 17, he agreed that, if any dispute between the forum State and the State of the official could not be settled through consultations, the determination and application of immunity should be decided on the basis of negotiations; if that means was not successful, either State could suggest to the other that the matter should be referred to arbitration or to the International Court of Justice. He also agreed that in the event of such a referral, the forum State should suspend the exercise of its jurisdiction until a final ruling was issued.

Regarding recommended good practices, such as that States should take decisions on immunity at the highest possible level and that they should prepare manuals or guides on situations involving foreign officials who might enjoy immunity, there was no need for a draft article or an annex on that matter. Such questions could be addressed in the general commentary to the draft articles.

He agreed that the draft articles proposed in annex IV of the eighth report should be referred to the Drafting Committee.

Mr. Šturma, thanking the Special Rapporteur for her concise, well-structured and readable report, said he was convinced that the Commission would be able to overcome the remaining problems in order to adopt the full set of draft articles on first reading.

It was understandable that the report should deal with the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, as the intention to do so had been announced a long time previously. He agreed with the Special Rapporteur that the Commission did not need to take a position on the decision of the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, and that the Chamber's conclusions related only to the context of the special legal regime established by the Rome Statute and thus did not directly concern the topic at hand.

He agreed with those members of the Commission who had cautioned against a possible interpretation of the "without prejudice" clause in draft article 18, or of the commentary thereto, as a kind of endorsement of the Appeals Chamber decision in that case, a decision to which the reactions of some States and academics had "not been kind", as the Special Rapporteur had noted. At the same time, however problematic that ruling might be, it was only one particular decision of the International Criminal Court. The legitimate critique of one decision should not be a reason to question the important achievements in international criminal law that were intrinsically linked to the emergence and functioning of international criminal courts and tribunals. Moreover, in his view, there were also some systemic relations between international and internal criminal jurisdictions, such as the principle of complementarity.

He did not, therefore, see anything wrong in the inclusion of a "without prejudice" clause, provided that it was reformulated and placed in draft article 1 as a new paragraph 3, in order to ensure that it was not prejudicial in any way to the draft articles at hand. In his view, it could not and should not create a kind of "back door" for rules other than those codified and developed in the draft articles. On the one hand, it was clear that the current topic addressed immunity of State officials only from the criminal jurisdiction of another State, meaning that it concerned horizontal relations between States, not States' relations to international tribunals. On the other hand, the jurisdiction of the International Criminal Court and other international and internationalized tribunals was governed by special rules that limited immunities to a larger extent than did customary rules on immunity of State officials from foreign criminal jurisdiction. Of course, those rules were binding only on States that were parties to the Rome Statute or to the statutes and instruments of other international tribunals. Thus, it was fair to say that the draft articles were without prejudice to the jurisdiction of international criminal tribunals. Like Mr. Reinisch, he was of the opinion that "jurisdiction" was the right word to use. He also thought that Mr. Jalloh had made a convincing argument for adding the term "internationalized tribunals". As shown by the judgment of the Special Court for Sierra Leone in *The Prosecutor v. Charles Ghankay Taylor*, those tribunals should be treated as international tribunals.

Concerning the settlement of disputes, it was well known that the Commission usually left dispute settlement clauses to be formulated by States at such time as they decided to draft a convention on the basis of draft articles adopted by the Commission. However, there were examples of dispute settlement provisions under two of the Commission's recent topics, namely the draft articles on prevention and punishment of crimes against humanity and the draft conclusions on peremptory norms of general international law (*jus cogens*). Those provisions differed from each other because they served different purposes. Under the topic at hand, it was not yet clear whether the draft articles were intended to form the basis for a future convention, as had been the case with the topic of crimes against humanity. There was no risk of interference with the procedural requirements in the Vienna Convention on the Law of Treaties, which had been the reason for the inclusion of procedural requirements in the draft conclusions on *jus cogens*, specifically in draft conclusion 21.

Although he still saw the potential utility of draft article 17, in his view it should be redrafted by the Drafting Committee. Draft article 17 could be understood as a continuation of the procedural provisions and safeguards in part four of the draft articles. From that perspective, paragraph 1 was useful and not problematic. Paragraph 2, however, posed some problems. In its current formulation, it was not a real compromissory clause. The wording

"may suggest" was only recommendatory. He was not in favour of converting it to a compromissory clause at the current stage. Therefore, the paragraph should not include a specific time frame. The provision should perhaps be even more general and also include other means of peaceful settlement of disputes in addition to arbitration and the International Court of Justice. Paragraph 3 might create unwanted consequences, as had been explained by Mr. Forteau and Mr. Reinisch, with whom he fully agreed.

Lastly, regarding the issue of recommended good practices, while such practices might be useful if shared by States, the Commission should perhaps leave well enough alone. If it decided to draft good practices, it would need much more time in which to do so, meaning that it would not be able to complete, at the current session, the first reading of the draft articles on what was a very important topic.

In conclusion, he recommended that draft articles 17 and 18 should be referred to the Drafting Committee, taking into account all the comments made in the plenary debate. He hoped that the Commission's collegial spirit would enable it to adopt the draft articles and the commentaries thereto on first reading.

Mr. Cissé said that he wished to congratulate the Special Rapporteur on her excellent eighth report, which was of high quality and remarkably concise.

With regard to the relationship between immunity from foreign criminal jurisdiction and international criminal tribunals, draft article 1 (1) clearly established that the draft articles applied to the immunity of State officials from the criminal jurisdiction of another State. International criminal tribunals were therefore rightly excluded from the topic, which concerned the competing interests of two States, the forum State and the State of the official.

Nevertheless, although the report could cover only the role of foreign criminal courts, the Commission should not lose sight of the potential, and sometimes obvious, links between national criminal courts and international criminal tribunals, since there were occasions when they were required to cooperate. That was the case, for example, when the question of immunity arose in connection with acts performed in an official capacity by a State official, or when the acts amounted to the most serious international crimes.

The length of the arguments set out in chapter I of the report did not detract from their pertinence in justifying the relevance of the "without prejudice" clause in draft article 18. Although he supported the adoption of that draft article, in his view the issue at hand related to the jurisdiction of international criminal tribunals rather than to their functioning. The "without prejudice" clause should therefore relate to the rules governing the jurisdictions of international criminal tribunals. He was intentionally using the word "jurisdictions" in the plural because, in addition to the International Criminal Court, *ad hoc* criminal tribunals might also need to examine matters relating to immunity in connection with certain international crimes.

Turning to the settlement of disputes, he said that a clause on that matter in the context of immunity of State officials from foreign criminal jurisdiction seemed appropriate. If the forum State and the State of the official were unable to resolve a dispute by diplomatic means, they should be obliged to make use of a supranational dispute settlement mechanism in accordance with the rules and principles of international law, such as the means set out in Chapter VI, on pacific settlement of disputes, of the Charter of the United Nations, including international judicial settlement by the International Court of Justice or an arbitral body. In his view, regional, subregional and continental courts should also be included.

Although he supported the Special Rapporteur's proposal to include a dispute settlement clause, such a clause should be as broad and flexible as possible and leave room for States to choose the most appropriate forum in which to settle their dispute. That aim could be achieved through compromissory clauses, as Ms. Lehto had noted. Several other members of the Commission, including Mr. Forteau and Mr. Park, had highlighted the prescriptive nature of the draft article. The dispute settlement model established by the United Nations Convention on the Law of the Sea could serve as inspiration. In his view, draft article 17 should be redrafted to allow for a broader choice of options for States in the settlement of disputes.

Paragraph 1 of draft article 17 began to address his concerns, but paragraphs 2 and 3 were too detailed and prescriptive and might make the draft article somewhat difficult to apply.

Turning to recommended good practices, he said that he fully understood the practical and theoretical utility of providing States with a guide to good practices. However, he had reservations about the advisability of doing so in the context of the topic at hand. If the final outcome of the Commission's work was to be a draft convention, the Commission should focus only on producing draft articles on immunity of State officials from foreign criminal jurisdiction. If the Commission insisted on developing a guide to good practices, it would need to take great care to avoid creating conflicts of interpretation between the guide and the draft articles. In so doing, the Special Rapporteur would gain both time and efficiency.

The question of whether the Commission should work on a guide to good practices led him to wonder what the legal scope of such practices would be, even if the Commission took pains to specify that the guide was merely an adjunct to the draft articles, whose purpose was to form the basis for actual treaties and was thus the complete opposite of the aim of a guide or handbook. In his view, the secretariat of the Commission could perhaps take charge of such a project, as the secretariat of the United Nations Convention on the Law of the Sea had done when it had developed the *Handbook on the Delimitation of Maritime Boundaries* and the *Training Manual for Delineation of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles and for Preparation of Submissions to the Commission on the Limits of the Continental Shelf*.

Lastly, he wished to reiterate his appreciation for the Special Rapporteur's patience, determination and flexibility in guiding the Commission's work on the topic. He wished to recommend that the report and draft articles 17 and 18 should be referred to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that he wished to thank the Special Rapporteur for her eighth report. Like her other reports, it was comprehensive and extensive in its analysis and in the arguments put forward. The report also reflected the various legal perspectives that had informed the content of the proposed draft articles. The Special Rapporteur had presented an honest and objective assessment of the underlying issues, most notably the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, and of the value of including a dispute settlement mechanism.

Over the years, he had been supportive of the Commission's goal of concluding the work on the topic at hand and producing an outcome that could be adopted by the General Assembly. Since its inclusion on the Commission's agenda in 2007, the topic had been debated extensively in both the Commission and the Sixth Committee, as well as among legal scholars and proponents of international criminal justice. The controversial issues relating to certain substantive rules on immunity persisted, but the introduction of procedural rules should mitigate such disagreements. Any outcome should respect the other rules of international law, including sovereign equality, while not undermining the international community's interest in fighting impunity for international crimes. That was not a far-fetched goal, and he hoped that the Commission could adopt the draft articles on first reading at the current or subsequent session.

Several draft articles had yet to be adopted in the Drafting Committee, including those on definitions and on procedural provisions and safeguards. The consideration of the pending draft articles should be expedited, taking into account the limited time available during the current session owing to the coronavirus disease (COVID-19) pandemic. Those remaining articles would require further discussion, either later in 2021 or in 2022, in order for the Drafting Committee to agree on their content.

Procedural guarantees for the application of draft article 7 were important to ensure that exceptions to immunity *ratione materiae* would not be abused and to avoid politically motivated prosecutions. In his view, draft article 8 *ante* did not achieve that purpose. He therefore urged the Commission to consider introducing a provision on the suspensive effects of the invocation of immunity *ratione materiae* against the exercise of foreign criminal jurisdiction, while ensuring that the process was not abused by the State of the official.

The final form of the draft articles was also an important element for the successful conclusion of the topic. While the Commission would usually leave that matter until the second reading, when it would make a recommendation to the General Assembly, it should reach an early understanding in that regard under the topic at hand. A key point on which there was a divergence of views within the Commission was the legal basis for exceptions to immunity *ratione materiae* under draft article 7. He did not expect the positions within the Commission to change on the matter, but an agreement to recommend that the final outcome of the draft articles should take the form of a convention or a treaty would help the Commission to reach consensus. The commentary should reflect the existing practice and developments in international law on the issue of limits to immunity *ratione materiae*. It would then be for States and their courts to decide how to treat the draft articles and the rules contained therein.

Both the right of the forum State to exercise its criminal jurisdiction and the right of the State of the official not to be subject to unlawful jurisdiction should be respected. That was a reflection of the principle of sovereign equality, to which the draft articles should, and did, adhere. Such legal interests, as well as the interest of the international community as a whole in fighting impunity for international crimes, should be balanced.

In chapter I of the report, on the relationship of the draft articles to international criminal jurisdiction, the Special Rapporteur described the reasons behind her decision to tackle the issue and proposed a draft article on that relationship, namely draft article 18. The main reason she had put forward was the decision of the Appeals Chamber of the International Criminal Court on the appeal lodged by Jordan in relation to the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, which was discussed at length in the report. Nonetheless, in paragraph 23, the Special Rapporteur argued that the Commission should not examine the Appeals Chamber's decision, noting that the assessment of that decision had "not been kind". In fact, in light of the strong criticism of the decision, the Court, in an unprecedented move, had published a "questions and answers" document to explain its own reasoning. Like Sir Michael Wood and Mr. Murphy, he had acted as counsel for Jordan in the appeal, and he agreed that there was no need to discuss the decision except as a prelude to the proposal of draft article 18. In that regard, he agreed with Mr. Tladi's analysis of the decision and supported the conclusion that discussion of the decision should be excluded from any future commentary on the issue of the relationship with international criminal jurisdiction.

Nonetheless, he wished to stress that the decision on the appeal lodged by Jordan had seriously erred with respect to key aspects of the law, mainly its finding that sitting Heads of State did not enjoy immunity under customary international law from foreign criminal jurisdiction when such a jurisdiction acted "on behalf of" an international court. That finding was very problematic, as it was based neither on practice nor on solid legal doctrine. It had been described in some quarters as a legal fiction; it had been proposed by one legal scholar, taken up by the prosecutor and then adopted by the Court without any basis under international law. According to the Appeals Chamber, there was "neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court". The Chamber further stated that that point was "relevant" to the "horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State". It also considered that when a State proceeded to execute an arrest warrant at the request of an international court, the State concerned was not exercising its own national jurisdiction but rather that of the international court and, further, that such courts acted on behalf of the international community.

An example of the relevance of that question to the Commission's discussion of draft article 18 could be found in the Chamber's reasoning. If two States wished to prosecute a sitting Head of State or a high-ranking official who enjoyed immunity from their foreign criminal jurisdiction, they could agree to establish an international court in order to do so. Such an international court would be able to issue a warrant for the official's arrest. The two States would then be absolved of their customary international law obligation to respect the official's immunity, because they were acting on behalf of that international court. According to the Appeals Chamber's reasoning, those States would merely be "agents" or "proxies" of

the international court and would not be exercising their own national jurisdiction but rather enforcing the international court's jurisdiction. No horizontal immunity existed by virtue of the official's lack of immunity *vis-à-vis* the international court.

While fighting impunity for international crimes was an objective of the international community, such logic with regard to the lack of immunity under customary international law might have the opposite effect of undermining the cause of fighting impunity and respecting the rule of international law. That was because States would be hesitant to support institutions that purported to undermine their sovereign rights and mutual legal obligations.

It was in that context that the Commission should carefully examine the "without prejudice" clause in draft article 18. He agreed with the Special Rapporteur's remark, in paragraph 13 of the report, that immunity from foreign criminal jurisdiction did not operate in the abstract, outside the "new" realities represented by international criminal tribunals established to prosecute international crimes. However, the Appeals Chamber's reasoning was not a convincing basis for the inclusion of a "without prejudice" clause on the relationship with international criminal jurisdiction.

If the idea behind the clause was to resolve a potential conflict between treaty obligations of States parties and the draft articles, then the general rule applied with regard to the hierarchy between international obligations: the treaty obligation prevailed among States parties. Thus, a "without prejudice" clause was not needed. But if the idea was to make such treaty obligations prevail over the draft articles even in relations between States parties and States not parties, and between States not parties, when international law preserved the immunity of the official, that position risked undermining peaceful relations among States. When the Commission had adopted draft articles 3 and 4, it had not included exceptions to immunity *ratione personae*. That meant that under customary international law, a sitting Head of State, for example, enjoyed immunity from the criminal jurisdiction of the forum State, even if the latter was bound by other treaty obligations towards third States and their officials. A provision on the relationship with international jurisdiction must not have the unintended effect of creating an exception that did not exist under customary international law. In his view, the "without prejudice" clause suggested by the Special Rapporteur did not achieve that goal. He also did not see how, without that clause, the draft articles would undermine the "substantive and institutional strides made in the area of international criminal law", as stated in paragraph 14 of the report, or the treaty obligation of States parties to cooperate with international tribunals. The topic dealt with immunity of State officials from foreign criminal jurisdiction. If it had dealt with national criminal jurisdiction, then the Commission would have been able to discuss the relationship with international criminal jurisdiction. As matters stood, however, the two issues were distinct and should remain separate unless the Commission wished to start a debate on international criminal liability and international criminal tribunals.

Like Mr. Petrič, he was hesitant, to say the least, to accept the language of draft article 18. If a provision on the matter was included, it should state only that the draft articles did not deal with the issue of immunities before an international criminal tribunal or jurisdiction.

In any case, the commentary to the draft articles should not deal with the decision on the appeal lodged by Jordan for the reasons he had already mentioned, as well as those that had been mentioned by other Commission members. The International Criminal Court was a cardinal institution in the international community's fight against impunity for international crimes. Its interests would be better served if the commentary did not discuss that controversial decision. In his view, the existing commentary to article 1 (1) provided a sufficient statement on the issue of the relationship with international criminal tribunals, but he was open to further elaboration on that point if the Special Rapporteur deemed it appropriate.

He supported the inclusion of a draft article on the settlement of disputes. He also agreed that the Commission could wait until the second reading to take a final decision on the matter. Nonetheless, a dispute settlement provision should be proposed at the first-reading stage, and States' reactions to its inclusion and content should be sought. Considering how important procedural guarantees and safeguards were to the implementation of the immunity regime and the exceptions thereto set out in the draft articles, the issue of dispute settlement

was intrinsically linked to the matter. If a forum State proceeded to exercise its criminal jurisdiction over a foreign official whose State objected to such exercise, there should be a robust mechanism for ensuring a peaceful resolution of the dispute. That was important not only with regard to exceptions to immunity *ratione materiae*, but also for the exercise of any form of criminal jurisdiction despite the objection of the State of the official. He would not repeat the arguments put forward by other Commission members for using stronger and more binding language while ensuring that the proposed language did not interfere with States' other obligations under existing dispute settlement mechanisms. There should also be a link between exercise of criminal jurisdiction, invocation of immunity, consultations and the dispute settlement procedure under draft article 17. Time limits should be set for both consultations and negotiations in order to achieve the purpose of including a dispute settlement procedure. He had already expressed his views on the suspensive effects of such a procedure, which would significantly increase the likelihood that the draft articles would be widely or universally accepted.

He agreed with the Special Rapporteur that the inclusion of recommended good practices was not necessary or feasible in the Commission's work on the topic. Practice in that area was very diverse, and it would be very hard to deduce a set of good practices that applied across the board to the various national legal regimes.

In conclusion, he wished to reiterate his appreciation for the Special Rapporteur's excellent and comprehensive report. He also wished to recommend that draft article 17 should be referred to the Drafting Committee. With respect to draft article 18, he would await the Special Rapporteur's summing-up of the debate but would support her decision on referral, on the understanding that an alternative to the proposed "without prejudice" clause would be considered in the Drafting Committee.

The meeting rose at 12.15 p.m.