Provisional

For participants only

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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3526th meeting

Held at the Palais des Nations, Geneva, on Thursday, 20 May 2021, at 11 a.m.

Contents

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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. 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. Vázquez-Bermúdez, speaking via video link, said that he was grateful to the Special Rapporteur for her eighth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/739). Owing to her dedicated and serious work on a topic of particular complexity and sensitivity, the Commission would be able to adopt a full set of draft articles before long. The issues addressed in the Special Rapporteur's eighth report, namely the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the settlement of disputes, and recommended good practices, merited consideration by the Commission in the interest of ensuring that its approach to the topic was as comprehensive as possible.

As the Special Rapporteur noted in her eighth report, the question of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals had been present in the Commission's work on the topic from a very early stage. In fact, the commentary to draft article 1, as provisionally adopted, stated that the draft articles would be applied solely with respect to immunity from the criminal jurisdiction "of another State" and that, consequently, the immunities enjoyed before international criminal tribunals, which were subject to their own legal regime, would remain outside the scope of the draft articles. It was also stated in that commentary that such exclusion must be understood to mean that none of the rules that governed immunity before such tribunals were to be affected by the content of the draft articles.

The Special Rapporteur had weighed up the question of whether to include some explicit reference to international criminal tribunals in the draft articles. On the basis of several considerations, which he considered valid, she was proposing draft article 18, which stated explicitly that the draft articles were without prejudice to the rules governing the functioning of international criminal tribunals. In his view, such a draft article should indeed be included. The fact that the draft articles did not apply to international criminal tribunals should not have to be deduced, *a contrario sensu*, from draft article 1 (1) but should instead be stated clearly. In addition, it was important to forestall any interpretation that might somehow undermine the development of the institutions and norms of international criminal law. International criminal tribunals were key institutions created by the international community to combat impunity for the perpetrators of the most serious crimes of concern to the international community as a whole. As the Special Rapporteur noted in her eighth report, the International Court of Justice, in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, had identified such tribunals as an alternative means of preventing impunity in cases where the criminal courts of a State could not exercise jurisdiction.

The Special Rapporteur had explained that the proposed draft article would ensure, on the one hand, the separation and autonomy of the regimes applicable to immunity before national criminal courts and immunity before international criminal tribunals and, on the other, the preservation of the special rules governing the functioning of international criminal tribunals. It would also serve to recognize the importance of international criminal tribunals, including both the International Criminal Court and *ad hoc* tribunals, and to preserve their position by averting any possibility that they might be affected by the application of the draft articles. In his view, although the commentary to draft article 1 stated that international criminal tribunals would remain outside the scope of the draft articles, such tribunals also warranted a reference in the text of the draft articles, given their importance in combating impunity.

Lastly, the Commission often included "without prejudice" clauses in its draft provisions, and he believed that such a clause should be included in the context of the topic under consideration. Overly broad interpretations of the scope and nature of "without prejudice" clauses should be avoided; additional consequences and meanings should not be read into draft article 18. As other members of the Commission had argued, the draft article should not be interpreted, for example, as an allusion to the relations between the States parties to the Rome Statute of the International Criminal Court and third States. In any event,

in order to clarify the situation and avoid any problems of interpretation, the Drafting Committee could work on the clause, and further clarification could be provided in the commentary.

He agreed with other members of the Commission that the text of proposed draft article 18 should be moved to draft article 1 as a new paragraph 3, since it helped to further define the scope of the draft articles. Moreover, it would then follow draft article 1 (2), which contained another "without prejudice" clause. In addition, something similar to the content of draft article 18 could already be found in the commentary to draft article 1.

Disputes would doubtless arise between the forum State and the State of the official with regard to the determination and application of immunity. While the procedural measures proposed by the Special Rapporteur in her seventh report (A/CN.4/729) were intended to build trust, thereby facilitating the settlement of disputes, such measures would not always be sufficient, and the States concerned could resort to the means of dispute settlement provided for under international law. For that reason, in her eighth report, the Special Rapporteur was proposing draft article 17, which provided for an optional dispute settlement mechanism.

It would make sense to include a dispute settlement clause in a treaty. Although the Commission had yet to decide on the final form that it would recommend for its work on the topic, it could not rule out the possibility that it would eventually recommend that the draft articles should serve as the basis for a treaty. The inclusion of a draft dispute settlement clause at the current stage would give States the opportunity to provide input on the provision before the second reading. A dispute settlement mechanism could be useful in helping States to settle any disputes that might arise in the context of immunity from foreign criminal jurisdiction. The most appropriate options for such a mechanism could be discussed in the Drafting Committee on the basis of the text proposed by the Special Rapporteur.

In her eighth report, the Special Rapporteur mentioned the possibility of including references to "good practices", whether in the draft articles or elsewhere. However, while such references might be useful to States, their preparation might needlessly delay the adoption of the draft articles.

The Special Rapporteur's tireless work had allowed the Commission to address all the issues that might be of interest to it as part of the consideration of the important and complex topic of immunity of State officials from foreign criminal jurisdiction. The Commission was now in a position to adopt the full set of draft articles on first reading. He supported the referral of proposed draft articles 17 and 18 to the Drafting Committee.

Mr. Gómez-Robledo said that he wished to thank the Special Rapporteur for her eighth report on immunity of State officials from foreign criminal jurisdiction.

In his comments, he would focus largely on proposed draft article 18, which concerned international criminal tribunals. In the report, the Special Rapporteur had carried out a rigorous analysis of issues that could not be overlooked in the consideration of the full set of draft articles. None of those issues came as a surprise; indeed, they had been foreseen from the outset of the Commission's work on the topic. Consequently, no direct or indirect intention to deviate from the course that had been set for the topic could be inferred from the Special Rapporteur's eighth report. To his mind, the scope of the topic was absolutely clear. That said, as was rightly stated in the commentary to draft article 1, as provisionally adopted, the topic as a whole could not be considered without taking other regimes of immunity into account.

The failure to recognize that the various regimes of immunity were not self-contained had, in his view, caused immense damage to international law. As he had noted in his statement on the Special Rapporteur's seventh report, those regimes operated in a wider context in which the international community of States as a whole tended to place accountability above the prerogatives of sovereign States. The regimes were therefore autonomous, but they by no means operated in isolation from the wider context that surrounded them.

The Special Rapporteur had shown exemplary caution in refraining from an assessment of the judgment of the Appeals Chamber of the International Criminal Court in

the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*. Nevertheless, while there were reasons for maintaining such caution, the fact remained that, whatever the Commission's views on the matter, that judgment formed part of a wider context. Since the Rome Statute had 123 States parties, it was not far-fetched to imagine a case in which a State party had to determine whether an official of a foreign State enjoyed immunity from its criminal jurisdiction but also had to respond to a request to cooperate with the International Criminal Court in some way. In other words, concurrent requests were possible. However, even without going that far, the same situation would arise in the event that a State detained an official of a foreign State in pursuance of an international legal cooperation and assistance mechanism or a provisional arrest warrant for extradition purposes, which were acts issued by the judicial authorities of a third State, and, at the same time, received a request for cooperation from an international criminal tribunal.

Another issue that should be considered, although he was by no means suggesting that the Special Rapporteur should address it in a dedicated report, was the role that the Security Council could play in ordering a State to make certain information available to another State or to an international criminal tribunal. A request of that kind did not seem unlikely, particularly in respect of the international criminal tribunals established by the Security Council under Chapter VII of the Charter of the United Nations. Of course, he was fully aware that the work of those tribunals was close to completion, but other such tribunals might be established in the future. For that reason, the Commission could not rule out the possibility that a request for information might be received in a situation involving the exercise of domestic criminal jurisdiction in which the immunity of an official of a foreign State was at issue.

The facts of the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* included the Security Council's decision to order Libya not only to extradite the alleged terrorists but also to hand over the files related to the investigations that had been carried out at that time. In a 1991 joint declaration (A/46/827-S/23308), the United States of America and the United Kingdom had declared that Libya must "disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers". The Security Council had endorsed that request in its resolution 731 (1992). That was but one example, which dated from a time long before the establishment of a permanent international criminal court. The role of the Security Council in ordering the handover of documents or the execution of International Criminal Court arrest warrants in situations referred to the Court by the Council could thus not be overlooked. Indeed, the Council had already played such a role on two occasions.

In short, as the Special Rapporteur noted in the report, the Commission should take care both to avoid undermining the strides that had been made in related areas, such as the establishment of the International Criminal Court, and to ensure that its work was not seen as somehow weakening the fight against impunity. Those two risks should be borne in mind, since many States had drawn attention to them. For that reason, although the Drafting Committee would not have time to discuss draft article 18 at the current session, he was in favour of its referral. States would have the opportunity to comment on the eighth report during the forthcoming debate in the Sixth Committee at the seventy-sixth session of the General Assembly.

With regard to draft article 17, his view was that a provision on dispute settlement should be retained in the draft articles, since it would be highly desirable in the event that the Commission decided to recommend, and the General Assembly to accept, that the draft articles should serve as the basis for a treaty.

The meeting rose at 11.30 a.m.