Provisional

For participants only

23 June 2021

Original: English

International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3527th meeting

Held at the Palais des Nations, Geneva, on Friday, 21 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. 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 11.05 a.m.

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

Ms. Escobar Hernández (Special Rapporteur), summing up the debate on her eighth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/739), said that the number of statements made, as well as their content, attested to the interest that the topic had generated and showed that members had examined her reports in great detail.

She was aware that several substantive issues would require further consideration before the draft articles could be adopted on first reading. Specifically, several members had referred to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) as a pending issue that must be resolved before the draft articles as a whole could be adopted on first reading. In response, she wished to point out that the Commission was making good progress on a topic that was highly sensitive politically and presented major legal challenges; that progress had been possible thanks to a workplan and a methodology that had received broad support, and had been endorsed, over two quinquenniums. She was confident that the Commission's collegial spirit would enable it to work through the issues that inevitably arose as part of any process involving the progressive development and codification of international law.

As for the form that the final outcome of the Commission's work on the topic should take – an issue that had arisen during the consideration of draft article 17 – the text had thus far taken the form of draft articles intended to offer States a set of proposed rules pertaining to the immunity of State officials from foreign criminal jurisdiction, in line with the Commission's mandate to promote the progressive development and codification of international law. There was no reason, in her opinion, to change the format of the Commission's work after nearly three quinquenniums. She would not be in favour of drafting conclusions, recommendations or even a guide to practice, since the Commission's work on the topic clearly had a normative dimension that could be addressed only through draft articles. That opinion appeared to be shared generally by the members of the Commission. The question of whether the Commission should recommend to the General Assembly that the draft articles should form the basis of a potential treaty was a separate issue that would be decided upon at the second-reading stage.

Several members had asserted that it was not necessary for the Commission to examine the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, since that relationship was outside the scope of the topic at hand, as was made clear in draft article 1 and the commentary thereto. According to those members, the Commission should limit itself to considering the immunity of State officials from the criminal jurisdiction of national courts. While she was not opposed in principle to that description of the topic, those same members had gone on to state that there was no need to analyse the topic of immunity before international criminal tribunals, let alone to consider the potential impact that the Commission's work on the topic might have on international criminal tribunals. Several members had furthermore suggested that draft article 18 seemed to be a back-door means of reintroducing an issue that had been settled with the adoption of draft article 1 and that it was no more than an excuse to include in the commentary a lengthy disquisition on international criminal tribunals or on the judgment of the Appeals Chamber of the International Criminal Court on the appeal lodged by Jordan in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*. For those who took that position, the principle of accountability, which Mr. Rajput had inexplicably described as a "subjective preference", the fight against impunity for the most serious crimes under international law and the need to avoid undermining the strides made in the area of international criminal law appeared not to be relevant.

The broad majority of Commission members, however, had expressed support for the examination of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals and, thus, for draft article 18. According to those members, the fact that the scope of the draft articles was limited to immunity from national criminal jurisdiction did not preclude the inclusion of an explicit reference, in the draft articles, to the rules governing international criminal tribunals, by way of a "without

prejudice" clause. A number of arguments had been put forward in support of that position. First, immunity of State officials from foreign criminal jurisdiction could not be considered in isolation, given that accountability and the fight against impunity played a prominent role in international law and that international criminal courts and tribunals represented an integral part of the new model of international criminal law, which the Commission could not ignore. Second, the Commission must ensure that its work on the current topic did not undermine the strides made in the area of international criminal law in the last few decades; the inclusion of a "without prejudice" clause would make it clear that the special regimes of international criminal tribunals would not be affected. Third, the fact that the commentary to draft article 1 stated that none of the rules governing the operation of immunities before international criminal tribunals were to be affected by the content of the draft articles meant that there was no objective reason not to include a similar statement in a draft article. Lastly, draft article 18 would ensure that the text could not be read as implying that the Commission did not acknowledge or was not aware of the role of international criminal tribunals in contemporary international law.

She herself supported the majority view. The deliberate exclusion of any reference to the autonomy of the regimes applicable to international criminal tribunals was difficult to justify, especially as a good number of cases in which the topic of immunity from foreign criminal jurisdiction had arisen dealt with the same crimes that had been tried by international criminal tribunals. Recognizing the existence of such a link and formally affirming the autonomy of the legal regimes applicable to international criminal tribunals did not in any way undermine the scope of the current topic and, as noted by Ms. Lehto, would help to resolve the confusion between immunity before national criminal courts and immunity before international criminal tribunals.

Several members of the Commission had expressed concern that draft article 18 appeared to be directly connected to the judgment in the *Jordan Referral re Al-Bashir* appeal, based on the fact that she, the Special Rapporteur, had decided to postpone examination of the issue until after the judgment had been issued in mid-2019. Those members believed that draft article 18 could be read as an endorsement of that judgment and were therefore opposed to the inclusion of the draft article. Although some of those members were willing to consider the inclusion of the content of draft article 18 in draft article 1, they had noted that the language should be changed to refer only to immunity before international criminal tribunals, while avoiding a generic reference to the regime applicable to those tribunals. Lastly, those members had said that the commentary to draft article 18 should make no mention of the judgment.

Those concerns were in her view unjustified. While she had indeed proposed that the Commission should postpone its consideration of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, she had nonetheless reserved the right to return to the subject. Accordingly, neither chapter I of her eighth report nor draft article 18 should have come as a surprise. Furthermore, in 2019, she had noted that it was not necessary for the Commission to examine or assess the judgment in the *Jordan Referral re Al-Bashir* appeal – an assertion that she had reiterated in her eighth report – not because the Commission should not comment on court decisions in general, but rather because she believed that the judgment was not relevant to the Commission's work. The assertion that draft article 18 had its origin in that judgment was unfounded, as the issue addressed by the draft article had been mentioned in earlier reports by the Special Rapporteur. In her view, draft article 18 could not be interpreted as validating or endorsing the judgment in any way; that view had been supported by a number of Commission members during the debate. She regretted that a few members had considered it necessary to assess the judgment, even though she herself had refrained from doing so. She especially thanked those members who had publicly disclosed their involvement in the case as counsel to Jordan and had thus contributed to the transparency of the Commission's work.

She remained convinced that there was no need for the Commission to consider the judgment. Nevertheless, she wished to respond to remarks made by several members regarding the statement, in paragraph 23 of the report, that the response by States and academics to the judgment had "not been kind". Noting that the original Spanish phrase "*no*

ha sido pacífica" had been translated as "*a suscité de vives critiques*" in the French text, she suggested that "has been contentious" might have been a more precise rendering in English.

Mr. Murphy had expressed the view that, by including a "without prejudice" clause in the draft articles, the Commission would be indicating that the rules governing the functioning of international criminal tribunals were hierarchically superior to the norms applicable to immunity of State officials from foreign criminal jurisdiction, and could even be detrimental to the rules set forth in the Commission's draft articles. According to that reasoning, including a "without prejudice" clause was tantamount to acknowledging that a treaty establishing an international criminal tribunal could create obligations for third States that were not parties to the treaty, thereby infringing the principle set out in article 34 of the 1969 Vienna Convention on the Law of Treaties. She agreed that treaty rules that governed the functioning of an international criminal tribunal, in particular the Rome Statute of the International Criminal Court, were applicable only to States parties; nevertheless, that principle was not affected in any way by draft article 18. As Ms. Lehto had noted, the Commission had made frequent use of "without prejudice" clauses in the texts it had adopted in the past, and the commentaries to such clauses did not imply that there was a hierarchy in which the rules to which the texts in question were "without prejudice" were regarded as prevailing over those texts. Other members had expressed a similar view, suggesting that draft article 18 served merely to preserve the validity and scope of each of the different legal regimes. She wholly shared that view.

Recalling that, when introducing her eighth report, she had mentioned the possibility of moving the content of draft article 18 to draft article 1 as a new paragraph 3, she said that virtually all the members who supported draft article 18, and even a few members who had expressed reservations or concerns about it, had said that they were in favour of that idea. Draft article 18 was closely related to the scope of the draft articles and would supplement the "without prejudice" clause in draft article 1 (2), which referred to special immunity regimes that applied to certain categories of State officials. Accordingly, she would make the relevant proposals to the Drafting Committee.

In addition, various Commission members, including Mr. Tladi, Mr. Jalloh, Mr. Grossman Guiloff and Mr. Reinisch, had made specific drafting proposals in respect of draft article 18; Mr. Jalloh, for example, had suggested that the term "international tribunals" should be replaced with "internationalized tribunals". Such proposals would also be addressed in the Drafting Committee.

Turning to draft article 17, she said that the proposal to include a draft article on dispute settlement had been welcomed by the majority of Commission members. However, a number of very pertinent comments and criticisms had been made with regard to the relationship between draft article 17 and the final form of the draft articles, the means of dispute settlement referred to in the draft article, and the nature of the dispute settlement mechanism proposed. She would address each of those issues in turn.

The question of the final form of the Commission's work on the topic at hand had been raised directly in relation to draft article 17. Several Commission members had argued that a draft article on dispute settlement should be included only if the Commission was preparing a draft treaty; indeed, some of those members supported the inclusion of draft article 17 precisely because they were of the view that the final form of the Commission's work should be a draft treaty. Several other members had argued that, even if the draft articles were not intended to serve as the basis for a draft treaty, it would still be useful to include a draft article on dispute settlement, which should be understood as a final procedural safeguard for States and should thus be presented under part four of the draft articles. Draft article 17 had been proposed for precisely that purpose, as was clear from paragraph 39 of the eighth report. She had accordingly proposed the draft article on dispute settlement as the seventeenth draft article, placing it directly after the last draft article under part four, which she had submitted for the Commission's consideration in her seventh report (A/CN.4/729). She therefore did not agree that a dispute settlement clause should be included in the draft articles only if the Commission decided that it was preparing a draft treaty. However, the final form of the Commission's work undoubtedly would influence the content of draft article 17: if the draft article was part of a draft treaty, it could essentially take the form of a traditional dispute settlement clause, including a compromissory clause; otherwise, it should be aimed primarily

at providing guidance to States on how to resolve any disputes that arose between them in the process of determining and applying immunity.

In preparing the eighth report, she had borne in mind the distinction between those two types of dispute settlement clause. She had proposed draft article 17 after comparing the two dispute settlement clauses most recently adopted by the Commission, namely draft article 15 of the draft articles on prevention and punishment of crimes against humanity and draft conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*). Some Commission members had expressed a preference for the formulation used in draft article 15 of the draft articles on prevention and punishment of crimes against humanity; Mr. Murphy had even expressed regret that draft article 15 had not been taken as a model. In the eighth report, she had not attempted to assess the technical superiority or inferiority of either provision; rather, her choice of wording had been based on its suitability for the purpose that draft article 17 was intended to serve, which was not necessarily to become a compromissory clause. Nonetheless, she was open to discussing the members' comments and suggestions in that regard in the Drafting Committee. Irrespective of the decision that the Commission ultimately took on the nature of its work on the topic at hand, the inclusion of a dispute settlement clause in the draft articles adopted on first reading would have unmistakable practical value, since it would allow the Commission to take stock of the views of States when considering the draft articles on second reading. That objective, which was explained in the eighth report, had been widely supported by the members of the Commission.

With regard to the means of dispute settlement referred to in the draft article, some Commission members had argued for the inclusion of other means such as conciliation. Others had suggested a more general reference to international courts, since tribunals other than the International Court of Justice, such as the International Tribunal for the Law of the Sea, might be competent to rule on cases involving immunity. She fully understood those concerns but wished to point out that draft article 17 was intended to provide a simple and effective model for dispute settlement. Clearly, the States concerned could use any means of dispute settlement provided for by international law, but it did not strike her as useful to include a list of all existing means of settlement in the draft article, since such a list would not provide any added value. She was open to discussing, in the Drafting Committee, the possibility of including references to other specific means of dispute settlement, if it was ultimately decided that referring to such means would be particularly useful for the intended purpose of draft article 17.

She took a similar view with regard to the proposal to refer to international courts other than the International Court of Justice. While other international tribunals had indeed addressed the issue of immunity, they had always done so for the specific purpose of settling a dispute concerning the application of an individual instrument, such as the United Nations Convention on the Law of the Sea. Such specialized means of dispute settlement would always be open to States. However, as reiterated several times during the plenary debate, draft article 17 was clearly intended to be general in scope; with that in mind, she remained convinced that it was sufficient to refer only to arbitration and the International Court of Justice.

As she had noted in her introductory statement, several matters relating to the immunity of State officials had come before the International Court of Justice. Sir Michael Wood had stated that the Court had not ruled on questions relating to immunity of State officials in the case of *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*. While it was true that the Court had not ruled on the merits of the case for lack of jurisdiction, the fact that the case had been submitted to the Court showed that States considered recourse to the Court to be an appropriate means of resolving disputes relating to the immunity of State officials from foreign criminal jurisdiction. As Mr. Reinisch had pointed out, the International Court of Justice had no jurisdiction to issue preliminary rulings, but she did not consider that to be a formal obstacle, since the States concerned could refer the case to the Court for the settlement of a dispute over the interpretation of the rules applicable to immunity.

The reference to arbitration, which had been criticized by some Commission members as being too general, was in line with the principle of free choice of means. Arbitration as an

alternative to settlement through the International Court of Justice was not unheard of in international practice relating to the judicial settlement of disputes or in the Commission's practice in respect of proposed dispute settlement clauses. She did not agree that the general nature of the reference to "arbitration" could lead to confusion, since the context clearly indicated that the draft article was not referring to commercial or investment arbitration but to inter-State arbitration in the classic sense of the term. In her view, the question of how such arbitration should be carried out and whether or not States should have to resort to a long-standing institution such as the Permanent Court of Arbitration should not be addressed in the draft article; however, such issues could be considered in the Drafting Committee and reflected in the commentaries, if necessary. She had observed that the Commission members who had participated in the debate were unanimous in their view that the establishment of a specialized body would not be useful. She had carefully noted the interesting arguments made by Mr. Valencia-Ospina and others in that regard, which should be added to the arguments already included in her eighth report.

With regard to the scope of the dispute settlement mechanism proposed in draft article 17, Mr. Park had asked for clarification with regard to the distinction between the terms "negotiations" and "consultations" in draft article 17 (1). She recalled that the proposed dispute settlement system was divided into three consecutive phases: consultations, negotiations and recourse to judicial settlement. Although it was true that consultations and negotiations could overlap, the distinction between the two was not contentious in practice and was determined by their differing levels of formality, as well as by the purpose of negotiations, which was to try to find a bilateral solution.

Mr. Forteau had pointed to the negative effects that the suspension of the exercise of national jurisdiction might have in cases where the States concerned decided to submit the dispute to arbitration or the International Court of Justice. In his opinion, automatic suspension of the exercise of national jurisdiction was incompatible with the principle of the separation of powers and judicial independence, and the suspensive effect of such a request for dispute settlement should be determined by the international court itself. Mr. Park and Mr. Reinisch had also raised concerns about the effect that such a suspension could have on the official of the State concerned, who would be left in an indeterminate situation until the international procedure – which often took a long time – had been completed. However, a number of Commission members had reiterated in recent years that the suspension of the forum State's exercise of criminal jurisdiction must be understood as a procedural guarantee for the State of the official intended to prevent abusive or politically motivated proceedings. The tension between those two positions was not easy to resolve and merited in-depth consideration in the Drafting Committee, which should take due account of the need to ensure an appropriate balance between the protection of the interests of the forum State and those of the State of the official, in order to avoid *faits accomplis* that could affect both the former, by blocking or limiting its right to exercise criminal jurisdiction, and the latter, by rendering immunity ineffective.

Mr. Reinisch had also highlighted certain aspects of the proposed dispute settlement model that required further consideration; in particular, the fact that draft article 17 did not specify what would happen if a suggestion to refer a dispute to the International Court of Justice or an arbitral tribunal was rejected by the other party, or what legal effect the Court's or tribunal's final decision should have for the national courts. Those important issues were touched upon in the eighth report but were not formally reflected in the draft article. They should be considered in the Drafting Committee, alongside the question of the practical consequences arising from the optional nature of the referral of disputes to the Court or to arbitration.

The members of the Commission had been virtually unanimous in supporting her proposal not to include a special provision on recommended good practices in the draft articles. She welcomed their support and noted that, as indicated in the eighth report, she would include a reference to examples of good practice in the commentaries, which would be submitted to the Commission for consideration in due course.

In summing up the debate on her eighth report on immunity of State officials from foreign criminal jurisdiction, she had tried to reflect, in a balanced manner, the various positions expressed within the Commission, particularly with regard to the central issues that

had arisen during the debate. She had taken careful note of the interesting remarks made by all the Commission members who had participated in the debate, both for the purposes of the future work of the Drafting Committee and in order to enrich the commentaries to the draft articles. She wished to request the Commission to refer draft articles 17 and 18 to the Drafting Committee, on the understanding that they would be considered in the light of all the comments made in the plenary debate, in keeping with the Commission's usual practice.

The meeting rose at noon.