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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3520th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 12 May 2021, at 11 a.m.

Contents

* Reissued for technical reasons on 16 December 2021.

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. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	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.

Provisional application of treaties (agenda item 4) (*continued*) (A/CN.4/737 and A/CN.4/738)

The Chair invited the Commission to resume its consideration of the sixth report of the Special Rapporteur on the provisional application of treaties (A/CN.4/738).

Mr. Ouazzani Chahdi, speaking via video link, said that he wished to thank the Special Rapporteur for his well-structured and eminently readable report. Generally speaking, the work on the topic "Provisional application of treaties" was aimed at clarifying article 25 of both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and at helping States to make better use of the provisional application of treaties, which formed an exception to the rule on entry into force of treaties and which some authors had characterized as an ambiguous notion. Such ambiguity had also been underlined by Sir Humphrey Waldock in his fourth report on the law of treaties submitted in 1965. Governments and international organizations had generally welcomed the draft Guide to Provisional Application of Treaties and commentary thereto; nevertheless, in their comments, they had stressed that the draft guidelines should not constitute a legally binding instrument or establish any preference for or presumption in favour of provisional application and that an interpretation suggesting that the provisional application of treaties constituted the default rule that necessarily prevailed over entry into force should be avoided. Furthermore, as pointed out by the United Kingdom, provisional application was not, and could not, be used as a means of bypassing parliamentary procedures; retaining the flexibility of the provisional application mechanism was therefore crucial.

With regard to the draft guidelines themselves, he supported the proposal made by several Governments that draft guideline 2 should be merged with draft guideline 1, on the grounds that draft guideline 1 was redundant. Regarding draft guideline 3, he endorsed the comment by Slovenia that the verb "may" might cause confusion, even if read together with the commentary, by suggesting that the agreement on provisional application as such was optional in respect of its legal effects. He proposed that the words "may be" should be replaced with "is", in accordance with article 25 of both the 1969 and the 1986 Vienna Conventions. As for the merging of draft guidelines 3 and 4, he agreed with the Special Rapporteur that the two should remain separate. The wording of subparagraph (b) of draft guideline 4 was sufficiently flexible to allow for the use of means other than a specific treaty to agree on provisional application. However, some such means – for example, a resolution adopted by an international organization or at an international conference or a declaration by a State or an international organization that was accepted by the other States or international organizations concerned – were somewhat problematic. He was of the view that the acceptance of a declaration of provisional application, by all the other States or organizations concerned, must be explicit and not limited to mere acquiescence inferred from an absence of objections. The Special Rapporteur might wish to clarify such issues in relation to his proposed amendment to draft guideline 4. It might also be useful for the Special Rapporteur to respond to the request from a couple of States for clarification regarding when a resolution adopted by an international organization or at an international conference should be considered an agreement on the provisional application of a treaty.

Noting that some States had considered the phrase, in draft guideline 6, "as if the treaty were in force" to be excessive and contrary to paragraph (5) of the commentary, he said that it might be wise to delete that phrase from the draft guideline. Draft guideline 7 continued to be the subject of much debate, given that article 19 of the 1969 Vienna Convention did not provide for reservations in the context of provisional application and there was little practice involving reservations made in that context. Indeed, even the Guide to Practice on Reservations to Treaties did not deal with the matter. He endorsed the comment made by certain States that, in the absence of a prohibition in the treaty concerned, nothing prevented a State from formulating a reservation upon accepting the provisional application of that treaty. He was of the view that article 19 of the 1969 Vienna Convention also applied to the provisional application of treaties and that draft guideline 7 should be retained.

He congratulated the Special Rapporteur for having proposed model clauses, but wished to reiterate that they could have both positive and negative effects. They should be put forward merely for information purposes, since States had no lack of expertise in the formulation of such clauses. He had no objection to the referral of the draft guidelines and model clauses to the Drafting Committee.

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

Ms. Escobar Hernández (Special Rapporteur), introducing her eighth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/739), recalled that she had concluded the analysis of the issues included in the programme of work submitted for the Commission's consideration in the seventh report (A/CN.4/729), but that, in chapter V of that report, she had also drawn attention to three issues that warranted examination prior to the conclusion of the first reading of the draft articles. The analysis of those issues – the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, the definition of a mechanism for the settlement of disputes, and the inclusion in the draft articles of recommended good practices – constituted the eighth report on the topic.

The introduction to her report described the evolution of the Commission's consideration of the topic; chapter I examined the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals; chapter II was devoted to the issues surrounding the settlement of disputes and the establishment of related mechanisms; and chapter III dealt with recommended good practices. The issues were examined in the light of the comments made by Commission members at the seventy-first session and by States in the Sixth Committee in 2019, as well as States' written comments, for which she was particularly grateful. The four annexes to the report contained the draft articles provisionally adopted by the Commission to date, one draft article provisionally adopted by the Drafting Committee, draft articles that had been submitted to the Commission but had not yet been taken up by the Drafting Committee, and the draft articles submitted to the Commission for consideration at its current session.

Given the large number of draft articles yet to be considered by the Drafting Committee, she had proposed that informal consultations with members of the Commission should be held, with a view to reviewing the current status of the work on the topic and to formulating proposals that would enable the Drafting Committee to make rapid progress at the current session, especially taking into account the difficult circumstances in which the session was being held. She wished to express her appreciation for the participation of Commission members in the informal consultations, which had been held on 12 and 19 April 2021, and for the support of the Secretariat. She was also grateful for the ongoing informal consultations, which were taking place with the participation of Drafting Committee members, and which had proved positive and fruitful thus far.

It had been her intention as early as 2018 to submit for the Commission's consideration some reflections on the potential influence that the obligation to cooperate with an international criminal tribunal could have on the immunity of State officials from foreign criminal jurisdiction. However, those reflections had not been included in her seventh report because the issue of the relationship between immunity and the obligation to cooperate had been raised before the International Criminal Court in the appeal by Jordan against the judgment of Pre-Trial Chamber II of 11 December 2017 in the *Jordan Referral re Al-Bashir* case, which had been pending at the time of finalization of the Special Rapporteur's seventh report. In addition, she had wished to take account of the fact that the African States Members of the United Nations had requested the inclusion, in the agenda of the seventy-third session of the General Assembly, of an item regarding a request for an advisory opinion of the International Court of Justice on the immunities of Heads of State and their relationship to the obligation to cooperate with that Court.

Since the request for an advisory opinion seemed not to have been pursued further and the International Criminal Court had issued a judgment in the aforementioned case on 6 May 2019, the Commission was now in a position to consider the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal

tribunals. The issue, which had been referred to by both of the Special Rapporteurs who had worked on the current topic, was closely linked to the scope of the topic, as defined in draft article 1 (1). It was clear that the present topic had nothing to do with immunities before international criminal tribunals. However, it was also true that immunity from foreign criminal jurisdiction did 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. Given that such crimes could also be committed by State officials who could be prosecuted in both national and international criminal tribunals, it seemed impossible to deny that some relationship could exist between the present topic and international criminal jurisdiction. In any event, that interaction was intricately linked to the principle of accountability and to the fight against impunity for crimes under international law, which had been recurrent themes in the debates of the Commission.

There were two specific areas in which the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal tribunals had been raised: the possible definition of an exception to immunity derived from the obligation to comply with the obligation to cooperate with an international criminal tribunal; and the characterization of a foreign criminal jurisdiction in the light of that same obligation to cooperate with an international criminal tribunal. The first of the two issues had been dealt with by the Commission in 2016 and 2017, when it had decided not to retain such an exception. The second had been raised in the *Jordan Referral re Al-Bashir* case and was reflected in the judgment of the Appeals Chamber of 6 May 2019, in which the Court stated that "the requested State Party [was] not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party: it [was] only lending assistance to the Court in its exercise of the Court's jurisdiction". In her opinion, it was neither useful nor necessary to examine the judgment for the purposes of the Commission's work on the topic at hand, not even in order to define the concept of foreign criminal jurisdiction. The case was in fact irrelevant to the Commission's work, for the reasons she set out in her report – in particular, the fact that the statement by the International Criminal Court must be understood in the context of a specific legal system that had been established by the Rome Statute and that it did not seem possible to extrapolate such findings to the Commission's work on the topic at hand, which was of a more general scope.

However, it would not be reasonable for the Commission to ignore the existence of international criminal tribunals given their connection with the topic, if only because crimes under international law could be prosecuted before both national criminal courts and international criminal tribunals. It was true that the scope of the topic was limited to immunity from foreign criminal jurisdiction, but it was also true, as some members of the Commission and some States in the Sixth Committee had pointed out, that the Commission's work must not ignore the achievements of the international community in the field of international criminal law and must not undermine the rules developed.

Draft article 18 was intended to respond to those concerns. It was presented in the form of a "without prejudice" clause that safeguarded the two elements of the equation: the separation and autonomy of the regimes applicable to immunity before national criminal courts and international criminal tribunals; and the preservation of the special rules governing the functioning of international criminal tribunals. The formulation of the draft article as a "without prejudice" clause had parallels with draft article 1 (2) as provisionally adopted by the Commission. Draft article 18 could therefore be included either as a stand-alone article or as paragraph 3 of draft article 1.

As she pointed out in the eighth report, one of the purposes of the set of procedural measures proposed in the sixth and seventh reports was to help build trust between the State of the official and the forum State, thereby facilitating the settlement of disputes that might arise between them in the process of determining and applying immunity. It was also true, however, that in certain circumstances the discrepancy between the legal positions of the two States might persist, leading to a dispute that could be resolved only through the means of peaceful settlement of disputes generally applicable in contemporary international law. In her view, it was therefore necessary to consider the inclusion in the draft articles of a specific provision on dispute settlement. That proposal had met with a mixed reaction at the Commission's seventy-first session.

It was obvious that any dispute that might arise between the forum State and the State of the official could be submitted to the dispute settlement systems accepted by the States, as had already happened in the past. However, in such cases, the traditional dispute settlement mechanisms operated *ex post facto* as a last resort for identifying a potentially wrongful act and restoring international legality, but did not serve the purpose of offering States ways of settling a dispute at an early stage.

The consultation system set out in draft article 15 and the mechanisms for the exchange of information provided for in draft article 13 served that purpose. However, if neither of those mechanisms worked, it might be appropriate to establish a settlement mechanism that provided for the possibility of referring a dispute to a neutral and impartial third party. The referral of the dispute to a third party must result in the suspension of the exercise of criminal jurisdiction by the forum State, while the decision adopted by the third party would be binding on the forum State and the State of the official.

The third-party role could be attributed to the International Court of Justice, an arbitral tribunal or an *ad hoc* body. Recourse to arbitration or to the International Court of Justice would avoid the lengthy negotiation process involved in the creation of an *ad hoc* body. Moreover, both the Court and arbitral tribunals were institutions that were well known to States, and access to them was governed by rules that were known and potentially applicable to such cases. In addition, there was no doubt that the configuration of the Court as the "ordinary court of international law" made it particularly well placed to rule on the complex issues arising from the immunity of State officials from foreign criminal jurisdiction, as it had already done in the past.

On the basis of those considerations, draft article 17 outlined a dispute settlement system that was divided into three consecutive phases: consultations, negotiations and recourse to arbitration or to the International Court of Justice. In her opinion, that model offered States a useful instrument to defend their rights and interests, helping to avoid *faits accomplis* that could irrevocably damage the immunity of State officials from foreign criminal jurisdiction.

She was fully aware that, until recently, the Commission had not included in its draft texts specific provisions on dispute settlement. However, that practice had changed recently, for example in the draft conclusions on peremptory norms of general international law (*jus cogens*). She was also aware that dispute settlement systems were particularly linked to normative instruments and that the Commission had not yet commented on whether or not it would recommend to the General Assembly that its work on the topic at hand should be converted into a treaty. If that were the case, draft article 17 would have a twofold justification. If not, she believed that it would also be fully justified in the context of Part Four of the draft articles, on procedural provisions and safeguards.

In her seventh report, she had raised the possibility of including in the draft articles a reference to "good practices" and a recommendation that States should adopt them, stressing in particular the desirability of decisions relating to the determination and application of immunity being adopted by high-level national authorities and the usefulness of States preparing manuals or guides for the State organs that might have to be involved in the process of determining and applying immunity. That suggestion reflected, in particular, the finding that, in a number of cases, the State organs responsible for adopting decisions in that regard were not familiar with the particular problem of immunity in international law, its relationship with the fundamental principles of international law and the impact that decisions concerning the immunity of a foreign official might have on the State's international relations.

During the debate in the Commission, members had expressed varying opinions on the question, including the suggestion that Part Four of the draft articles should be made into an annex of good practices to be recommended to States. She did not consider that approach to be appropriate. Other members had pointed out that they did not see the usefulness of including good practices in the draft articles. A third group, while recognizing the usefulness of the proposal, had considered that drawing up the list of good practices would delay the completion of the Commission's work on the topic.

In the report on its seventy-first session, the Commission had requested States to provide information on the existence of manuals, guidelines, protocols or operational

instructions addressed to State officials and bodies that were competent to take any decision that might affect foreign officials and their immunity from criminal jurisdiction in the territory of the forum State. Unfortunately, only one State, the Netherlands, had responded to the request, informing the Commission that it had no such guides. Consequently, she had not included any specific proposal on "recommended best practices" in her report. That did not preclude the two issues that she had identified in 2019 from being reflected in the draft articles in some other way, either in a draft article in Part Four or in the general commentary to the draft articles.

She looked forward to hearing the comments of Commission members on her report. She formally requested that draft articles 17 and 18 should be referred to the Drafting Committee, recalling that draft articles 8 to 16, as well as some definitions contained in draft article 2, were still pending consideration by the Committee. She hoped that following the discussion in the plenary and the consideration of the draft articles by the Drafting Committee, the Commission would soon be in a position to adopt on first reading the draft articles on immunity of State officials from foreign criminal jurisdiction.

Mr. Jalloh said that the Special Rapporteur's eighth report on the immunity of State officials from foreign criminal jurisdiction was clear, well researched and well written. The topic had been on the programme of work since 2007, making it the longest-running item currently before the Commission. He therefore appreciated the Special Rapporteur's diligent efforts to advance the work pending on the topic. He remained hopeful that the Commission might be able to adopt a full set of draft articles, together with commentaries, at the present session. States – ideally from all five geographic regions of the United Nations – would then be able to submit comments, which would enrich the Commission's work and ground it in the reality of international life.

He wished to express his overall support for the Special Rapporteur's choice of issues to be addressed in the report: the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals; settlement of disputes; and recommended good practices. He also appreciated her summary of the history of the topic and the helpful grouping together in the annexes of the draft articles at various stages of consideration and adoption by the Commission. The Commission must now, as a matter of priority, allocate sufficient time to the topic both in the plenary and in the Drafting Committee.

The Special Rapporteur argued in her report that, while the scope of the topic did not enable the Commission to address the issue of immunity before international criminal tribunals directly, the Commission could not complete its work without examining at least the possible interaction between foreign criminal jurisdiction and international criminal jurisdiction in relation to immunity. He agreed with the Special Rapporteur that, as set out in draft article 1 and in the accompanying commentary, the question of immunities before international criminal tribunals concerned self-contained legal regimes. That was evident from the establishment of, among others, the International Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and, most prominently, the International Criminal Court. For two reasons, he fully concurred with the Special Rapporteur that the Commission should not deny the existence of a dialectical and symbiotic relationship between the topic of immunity in national courts and immunity before international criminal jurisdictions.

First, while it was true that, in technical terms, the immunities regime applicable before international criminal tribunals fell outside the scope of the topic, the reverse proposition was likely not true. As the Commission itself had already acknowledged in the commentary to draft article 1, the relationship at the horizontal level between the courts of one State and those of another could be altered by the prevalence of so-called hybrid criminal tribunals. Those *ad hoc* tribunals were said to be hybrid or mixed because they did not fall neatly into either the category of national courts or the category of international courts. In other words, depending on their legal basis, those chameleonic courts might not necessarily exercise their jurisdiction in one or the other category but in both. In fact, their statutes might well envisage them as functioning on both the horizontal and vertical levels, often with specific procedural and substantive consequences for the immunity of State officials in relation to the investigation and prosecution of the core international crimes, which fell within the ambit of draft article 7.

Second, while the preceding argument could be questioned on the basis that *ad hoc* hybrid tribunals were exceptions to normal jurisdictions, it was made very clear in the preamble and articles 1 and 17 of the Rome Statute of the International Criminal Court that the jurisdiction of the Court was designed to ensure that the most serious crimes of international concern did not go unpunished. Consequently, the Rome Statute recalled that it was the duty of every State to exercise its national criminal jurisdiction to investigate and prosecute atrocity crimes. Article 27 of the Rome Statute established the irrelevance of immunity for the officials of States parties, subject only to the limitations set out in article 98.

For those reasons, while he generally agreed with the points made by the Special Rapporteur in paragraphs 11 to 24 of the report, he disagreed with her two conclusions in paragraph 27. She was right that the Commission's focus was on the general body of rules governing immunity, but the existence of a specific treaty regime such as that of the International Criminal Court might actually have an impact on those general rules for both the 123 States parties to the Rome Statute and other States. Regardless of whether or not a State was a party to the Rome Statute or had made a declaration under article 12 accepting the jurisdiction of the Court, the immunities of foreign State officials might still be implicated in circumstances where the Court's actions were mandated and thus binding on all 193 United Nations Member States pursuant to Chapter VII of the Charter of the United Nations. The decisions of the Security Council taken under Chapter VII, which might either explicitly or implicitly lift immunities, would then prevail over any conflicting treaty obligations, as established by Article 103 of the Charter. Moreover, in the light of article 17 of the Rome Statute, according to which national courts were the default first-responders to the atrocity crimes committed within their territories, it was totally plausible to have a national court exercising foreign criminal jurisdiction over the foreign official of another State who might well be entitled to a claim of immunity.

His second concern with the conclusions in paragraph 27 of the report was that the findings of the Appeals Chamber of the International Criminal Court cited there expressly contemplated not only vertical but also horizontal effects in relation to the question of immunity. The effects were both procedural and substantive in nature and might have implications at both the national and international levels. In his remarks in plenary at the sixty-ninth session of the Commission, in 2017, he had supported the proposal by the Special Rapporteur to retain draft article 7 (3) – a "without prejudice" clause – as the provisions were not prejudicial to ongoing judicial proceedings. Nevertheless, the obligation to cooperate with an international tribunal would obviously arise for States parties to the Rome Statute but might not arise for States that were not parties, unless that obligation was imposed by a Security Council resolution adopted under Chapter VII. The legal link between the invocation of Chapter VII and the Rome Statute system was established in articles 13 (b) and 16 of the Statute.

That said, he agreed with the first sentence of paragraph 27 and was in full agreement with the Special Rapporteur that the Commission should avoid lengthy debates on the International Criminal Court's ruling, which would be neither appropriate nor legally sound. Although he disagreed with some of the reasoning in chapter I of the report, he agreed with the Special Rapporteur's excellent argument in paragraphs 28 to 32 for the inclusion of a draft article in the form of a "without prejudice" clause.

Nonetheless, he had two comments on the content of the proposed article 18. First, although it was probably a simple oversight, the draft article did not have a title. Possible options might include: "Without prejudice"; "Relationship to specialized treaty regimes"; "Cases outside the scope of the present draft articles"; or "Relationship between the present draft articles and instruments establishing international criminal tribunals".

He also wished to propose some amendments to the wording of draft article 18 to enhance its comprehensiveness. The Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations both contained "saving" clauses. In order not to leave a gap, since the regime of international criminal tribunals could be invoked by States to refer cases they might otherwise prosecute to another jurisdiction, he believed that draft article 18 could benefit from borrowing some pertinent language from those conventions, by adding, for example, the word "practices" and substituting "internationalized" for

"international". The amended draft article 18 would then read: "The present draft articles are without prejudice to the rules and practices governing the functioning of internationalized criminal tribunals."

While he supported the proposed inclusion of the new draft article 18, he believed it would be better included as paragraph 3 of draft article 1. Draft article 1 already demarcated the scope of the entire draft articles in paragraph 1, while it also entered a caveat in paragraph 2 to expressly make the project "without prejudice" to the rules of immunity under special rules of international law. It would therefore be logical to add the "without prejudice" clause for the specialized regime of international criminal courts as a new paragraph 3 in that draft article.

With regard to chapter II, on the settlement of disputes, he commended the Special Rapporteur's decision to propose a draft article that allowed for a peaceful means of settling disputes. However, when assessing the proposed draft article 17, it might have been useful to know whether that decision meant that the draft articles would ultimately be presented as the basis for a convention. In any event, as he had stated in 2019, he strongly supported the inclusion of a mechanism for the settlement of disputes between the forum State and the State of the official, although he agreed with the Special Rapporteur that, as set out in paragraphs 36 to 53 of the report, the draft article should not be treated as a typical dispute settlement clause. Certainly, it did not serve the same function as the dispute settlement clauses adopted in other texts, such as those included in the topics "Peremptory norms of general international law" and "Crimes against humanity". Rather than being a stand-alone clause, draft article 17 was part of a procedural continuum that began with notification and continued with the exchange of information and the holding of consultations, all of which corresponded roughly to draft articles 12 to 15; in other words, it was part of a procedural guardrail system intended to promote inter-State cooperation while finely balancing the interests of the forum State and those of the State of the foreign official.

A system of that kind would be useful; indeed, concerns about the exercise of jurisdiction over African officials raised in various decisions of the African Union had already given rise to proposals to establish a similar system, and African States had been calling for a similar type of mechanism at the international level since at least 2009, albeit in that case one related to the application of universal jurisdiction and its intersection with the question of immunity for African officials in foreign national courts. The African Union was calling for the establishment of an international watchdog that would have competence to review and resolve inter-State complaints, which suggested that, in principle, a proposal of that kind from the Special Rapporteur might well be of great interest to African States.

Furthermore, although it could be considered that no proposal on the settlement of disputes should be included because the Commission did not yet know whether the draft articles would form part of a draft treaty and such decisions were in any case typically reserved for States, he believed that, in the report, the Special Rapporteur set out strong grounds to justify the issue's inclusion. He agreed with her reasons for its inclusion, and particularly her assertion that the text should be considered a full set of draft articles that offered States a complete view of what the Commission was proposing with regard to the topic, thus allowing States to submit comments and observations for the Commission to consider when adopting the draft articles on second reading.

He likewise supported the Special Rapporteur's assertion that it was obvious that any dispute that arose between two States in relation to the immunity of a State official from foreign criminal jurisdiction could be settled through traditional means of dispute settlement, including through the courts. However, while, as he had already noted, the dispute settlement clause proposed was of a very specific nature, it was important to also highlight that, pursuant to Article 2, paragraph 3, and Article 33 of the Charter of the United Nations, States were under an obligation to settle their differences by peaceful means in such a manner that the peace and security of all and justice were not endangered.

He also concurred with the Special Rapporteur's statement that the purpose of offering States ways of settling a dispute at an early stage could be achieved through the procedural steps set out in draft articles 13 and 15, but that, if neither of those mechanisms was effective, it might be appropriate to propose a dispute settlement mechanism that provided for the

possibility of referring an incipient dispute to a third party. Ideally, that third party should be recognized as having the capability to settle the dispute in a neutral and impartial way, while also issuing some form of out-of-court ruling. However, pacific means of dispute settlement were not limited to judicial means; the range of options might therefore be much broader – since any solution reached by negotiation, enquiry, mediation, conciliation, arbitration, resort to regional agencies or arrangements, or any other peaceful means of the parties' own choosing could be relied upon – and more closely aligned with State practice.

With regard to draft article 17, he supported the Special Rapporteur's decision to include the option of referring a case to the International Court of Justice or to an arbitral body. It was worth noting, however, that only a relatively small number of States – a total of 73 the last time he had checked – had formally accepted the compulsory jurisdiction of the International Court of Justice. At the same time, it was possible that regional and subregional arrangements, including regional courts of justice with general jurisdiction such as the proposed African Court of Justice and Human Rights, might also have jurisdiction, and that that might be preferable for States in certain regions. Extrajudicial means of settling differences, such as the African Union-European Union Technical *ad hoc* Expert Group on the Principle of Universal Jurisdiction established in 2009 to provide a means of identifying differences of opinion and areas of agreement between African and European States on the universality issue, might also be noted.

Although he agreed with the Special Rapporteur's proposal that a deadline should be established for the bilateral settlement of a dispute through consultations or negotiations before the matter was referred to an external system, he had doubts about imposing a 6- or 12-month deadline on States, given the diverse circumstances that might arise. In addition, he was concerned that the current draft did not specify what would happen if either the forum State or the State of the official rejected the "suggestion" made by the other State or remained silent on the request. It would be prudent, in his view, to consider what should happen once the deadline for settlement had passed. Certainly, the referral to an external system should result in suspension of the exercise of jurisdiction by the forum State until the body responsible for settling the dispute adopted a final decision that was binding on both parties.

In the light of those considerations, he suggested that draft article 17 (1) should be revised in order to give States more flexibility, by providing that they should endeavour to settle their differences not "as soon as possible" but rather "as soon as practicable". He also suggested that the words "or any other means of their own choosing" should be added at the end of the paragraph, after the words "through negotiations". With regard to draft article 17 (2), he would support the inclusion, in addition to arbitration, of other possible means of dispute settlement that might be attempted before a dispute was referred to the International Court of Justice, such as conciliation and mediation and the use of good offices. Furthermore, it would be preferable for the draft article to specify the consequences of the other State not accepting the invitation to dispute settlement; he would be happy to make some textual proposals to that effect for the Drafting Committee. In draft article 17 (3), it was important to make clear that the effect of choosing one of the means of dispute settlement mentioned in draft article 17 (2) would be to suspend the exercise of the forum State's jurisdiction until the competent authority issued a final ruling, and that States thereby undertook to comply with any such decisions.

Turning to chapter III, on recommended good practices, he said that he supported the Special Rapporteur's thoughtful recommendations but would like to suggest that the notion that States should be aware of the foreign affairs implications of decisions concerning the immunity of a foreign official should be incorporated. It was also important to note that States' awareness of the effects of immunity on the international community stemmed from a purely, or at least largely, domestic law perspective rather than an international law perspective, and that separate political, judicial and other organs might be involved.

He was in favour of creating a guide on recommended practices for States, as he had stated in 2019. At that time, however, he had been concerned that, if the Commission addressed scenarios already dealt with under national criminal procedure laws, its approach might be perceived as being too prescriptive. That said, provided that the Commission exercised a great deal of caution, a draft guide on practice that was not binding on States could be very useful for State officials, especially if the Commission were to recommend that

decisions on immunity should be taken at the highest possible level and that States should consider preparing manuals which could be shared with national law enforcement authorities as a way to resolve any practical difficulties that might arise when the immunity of a foreign official was at stake. The Commission might even put forward the idea of providing uniform training for the competent officials on State obligations in questions of immunity from criminal jurisdiction for foreign officials, as the United States of America already did.

He was firmly opposed to the idea, mentioned in paragraph 58 of the report, of turning draft articles 8 to 16 into a sort of "practical guide" such as those that the Commission was developing for other topics. Such a decision would create unnecessary confusion and would undermine the ultimate outcome of over a decade and a half of study that had led to the adoption of some extremely important draft articles on a difficult issue of international law that had not previously been addressed. Furthermore, he shared the Special Rapporteur's view that the preparation of such a guide would add unnecessary delays to the Commission's work on the topic; it was imperative that the Commission should do its utmost to complete the first reading of the draft articles at the present session.

Lastly, he wished to remind Commission members that the topic had, not surprisingly, again attracted the keen interest of States, legal scholars and global civil society. The global interest in the Commission's work on that sensitive topic had been manifest in extensive academic commentary on immunity, and also in the statement on immunity issued by Amnesty International in April 2021. In addition, several national courts had recently issued judicial rulings on the immunity of State officials; particularly interesting examples included the ruling of the German Federal Court of Justice on the question of the functional immunity of a Syrian official and the ruling of the Supreme Court of the Gambia on the functional immunity of Yankuba Touray. According to Professor Claus Kress, who had provided an English summary of the German Court's decision, the Federal Court of Justice had expressly engaged with both the majority and minority views of the Commission on the current state of international law immunities. The Gambian Supreme Court decision, while it did not refer to the work of the Commission, did demonstrate how the courts of one State might address treaty and customary international law obligations when interpreting domestic functional immunity statutes. The Special Rapporteur and the Commission might take those decisions into account, at least when updating the relevant parts of the commentaries.

To conclude, he said that he wished to again extend his thanks and congratulations to the Special Rapporteur for her impressive work, tireless efforts and amazing dedication, as a result of which the Commission appeared to be on the cusp of adopting, on first reading, a full set of draft articles on the topic. He supported sending the draft articles to the Drafting Committee.

Mr. Tladi said that he wished to express his gratitude to the Special Rapporteur for a particularly clear, well-reasoned and well-thought out report, which, despite covering much ground, was also concise. He hoped, somewhat less ambitiously than Mr. Jalloh, that a full set of draft articles could be adopted in the current quinquennium, and was in favour of sending draft articles 17 and 18 to the Drafting Committee; he had some concerns about certain aspects of the way that draft article 18 was worded, but with careful re-drafting those concerns could be alleviated.

To place his concerns in context, he recalled that, from the outset, he had adopted a fairly progressive attitude towards the topic, which was a very important one; at times, he had even been more progressive than the Special Rapporteur. On draft article 3, on the scope of immunity *ratione personae*, together with Mr. Petrič and others, he had argued, unsuccessfully, that immunity *ratione personae* should be limited to Heads of State, while, with regard to draft article 7, he had supported the inclusion of exceptions to immunity. He was recalling those historical arguments in order to make the point that, while he supported the erosion of immunities as a normative proposition, it should be done in a manner that took account of the basic tenets and framework of international law. That meant that, where reasonable legal arguments and avenues were available for limiting immunities, they should be taken advantage of, and that, in the context of the relationship between the current draft articles and the rules of international criminal courts and tribunals, States could decide, in their relations with each other, not to recognize immunities. Based on subsequent practice, it could reasonably, though not easily, be argued that article 27 of the Rome Statute had the

effect of removing immunities as between parties to the Statute. He fully endorsed that reasonable, yet somewhat difficult, argument. What was not acceptable, however, was the notion that parties to a treaty system could extend those same rules to States that were not parties to the treaty system. However, it was precisely that notion that the Appeals Chamber of the International Criminal Court had applied in its judgment in the appeal filed by Jordan in the *Jordan Referral re Al-Bashir* case.

In paragraph 23 of the report, the Special Rapporteur stated that it would not be helpful to "examine" or "assess" the Appeals Chamber's judgment in the appeal by Jordan. Indeed, if the Commission were to assess or examine that judgment, it might infer that the Court's conclusion was based on nothing more than whim. There was not a single element of authority to support the Court's conclusion that the creative but reasonable interpretation of article 27 of the Rome Statute as applying to relations between States parties applied also to relations between States parties and non-States parties – none, that was, other than the 198-page explanatory opinion appended to the judgment, although anyone hoping to find authority for the proposition in that disquisition would be disappointed. The explanatory opinion addressed immunity before international courts and the history of that immunity but offered no substantiation for the incredible conclusion that the rules on immunity before international courts were applicable also to domestic action to give effect to the Court's jurisdiction. No explanation was given, in either the main judgment or the explanatory opinion, of how the Appeals Chamber understood the formation or identification of customary international law or the proper interpretation of the Statute.

The Special Rapporteur had therefore been wise to decide not to seek to assess what was a poorly reasoned judgment, particularly because of its far-reaching conclusion, which demonstrated that there was not always a correlation between length and quality – a point that he had often tried to make before the Commission. The Special Rapporteur was correct to state that: "… the assessment made of the judgment from different academic positions and by some States … has not been kind"; in fact he was assuming that "has not been kind" was a euphemism for "has been ruthless". However, as the Special Rapporteur correctly noted, not everything in the judgment was incorrect. Certainly, it was true that the rules of international law on immunity governing national courts on the one hand and international courts on the other were not identical. For that reason, he might add a slight caveat to paragraph 24 (b) of the report; it was not so much that Heads of State did not enjoy immunity before international courts, but rather that the immunity they enjoyed was dependent on the relevant instrument governing the Court.

He agreed with paragraph 27 of the report insofar as its intended meaning was that the Commission should adopt a restrictive interpretation of the judgment issued in the appeal by Jordan in the *Jordan Referral re Al-Bashir* case, taking it that the appeal should be understood as addressing the obligations of States parties *inter se*; he assumed that that was what was meant by the phrase "exclusively in the context of the obligations assumed by States parties under the Rome Statute". In his view, such obligations could only affect other States that had assumed those same obligations. The statement could, however, mean something entirely different, namely, that, under the Rome Statute system, States parties could assume obligations that permitted them lawfully to free themselves from obligations owed to non-States parties, in contravention of article 34 of the Vienna Convention on the Law of Treaties. If that was the intended meaning of paragraph 27, he respectfully, but very strongly, disagreed.

With regard to the connection between those arguments and the proposed draft article 18, which stated that the draft articles were without prejudice to the rules governing the functioning of international criminal tribunals, he wholeheartedly accepted that proposition, provided that the intended meaning of draft article 18 was that the Commission accepted that States parties to an international criminal law treaty could regulate immunities as they wished as between each other. However, draft article 18 could also be read as addressing not only relations between States parties *inter se*, but broadly as also applying to relations between States parties and third States. If that was what the Special Rapporteur meant by "rules governing the functioning of international criminal tribunals", the draft article would amount, in effect, to an endorsement of a judgment that was so poorly reasoned that the Special Rapporteur had deemed it wise not to enter into an assessment or examination of its content,

and of a position that, as the Special Rapporteur herself euphemistically acknowledged, had met with an unkind reception. That, in his view, would be a rather prejudicial "without prejudice" clause, and Mr. Jalloh's eloquent arguments had not been sufficient to convince him otherwise.

His preference would be to remove draft article 18 entirely, but since he recognized that the Special Rapporteur would like to include such a provision and assumed that many Commission members would support her view, he would instead like to propose a redrafting. Firstly, since there was already a "without prejudice" clause in draft article 1, he suggested that the content of draft article 18 should be incorporated into that article. Secondly, since it was important to avoid ambiguity, the revised text should make plain that the article related to treaty rules governing the functioning of international criminal tribunals in relation to immunity. The revised article should not be open to an interpretation that permitted the treaty regime itself to prejudice the draft articles. A balanced text might read: "The present draft articles are without prejudice to the applicability of immunity before international criminal tribunals under the relevant constituent instruments establishing such international criminal tribunals." He noted, however, that even that language could be misconstrued, as article 27 of the Rome Statute had been.

Thirdly, given the Special Rapporteur's description of the judgment issued in the appeal by Jordan in the *Jordan Referral re Al-Bashir* case, the commentary should not in any way suggest that the language used in draft article 18 was inspired by that judgment. Indeed, although the *Jordan Referral* case might be referred to elsewhere in the commentary, it should not be mentioned in that part of the commentary, other than to say that the judgment had met with an unkind reception.

He did not have strong views about draft article 17, although he was struggling with its content on various levels. The first and most important issue to consider was whether, conceptually, the draft articles should include a dispute settlement clause at all. Although, as the Special Rapporteur had noted, the draft conclusions on the topic "Peremptory norms of general international law", for which he served as Special Rapporteur, contained a dispute settlement provision in draft conclusion 21, two elements made the situation in respect of draft article 17 different. Firstly, draft conclusion 21 was necessitated by the peculiarities of *jus cogens*; its content, and its necessity, flowed from the very content of *jus cogens* and the fact that States had accepted article 53 of the Vienna Convention on the Law of Treaties on the understanding that it would be underpinned by a dispute settlement provision. Secondly, draft conclusion 21 was, at least as he, as Special Rapporteur, had proposed and as he still understood it, a recommended procedure. It was the Drafting Committee that had turned it into what might appear to be an outright dispute settlement provision, but, on the strength of the comments made by States in the Sixth Committee and the written submissions received thus far, the Commission should probably reconsider that decision; to say that draft conclusion 21 had not been well received by the Sixth Committee would be an understatement.

Unlike article 53 of the Vienna Convention on the Law of Treaties, the proposed draft article 17 was not burdened with the need for conditional acceptance, so it was not clear to him why the Commission would want to go in that direction. As he saw it, draft article 17 should be included only if the Commission was proposing a treaty for States to consider, in much the same way as it had done with the topic "Crimes against humanity". That said, if the Commission was proposing a treaty, it would need to rework draft article 7 to include immunity *ratione personae*; in other words, the draft article would need to state that, in the event that the instrument was adopted as a treaty, and for those States that became parties to that treaty, immunity should not apply in respect of the listed crimes in all scenarios, and States that became parties could apply immunity in any way they wished. If the draft articles did not become a treaty, their provisions could be taken with a pinch of salt; and even if they did become a treaty, their provisions would be effective only as between the parties to that treaty. He suggested that the Special Rapporteur should give serious consideration to those issues.

He also had questions about the meaning of the proposed draft article 17. As it currently stood, he was not sure that it added much to the text. Paragraph 1 was fine, but, in paragraph 2, the meaning of the phrase "which may not exceed a period of [6] [12] months"

was unclear. Did it mean that, at the end of the 6- or 12-month period, the parties might not agree to submit the matter to the International Court of Justice; and that, if the parties had decided to submit the matter to the Court before the expiry of the deadline, the agreement became invalid? The inclusion of a deadline normally only made sense if a compulsory compromissory clause was also adopted, for example, in that case, a clause stipulating that, if, after the expiry of the deadline, the parties had not reached an amicable solution, either party could submit the dispute to adjudication by the International Court of Justice. It was also unclear whether the relevant States could opt for a different settlement mechanism, or whether the effect of draft article 17 was rather to prevent that possibility. Mr. Jalloh had raised some of those issues, but the dispute settlement provision contained in draft article 17 differed from those referred to by Mr. Jalloh in relation to the universal jurisdiction issue, because in that case the African States were proposing something compulsory, but in draft article 17 nothing was compulsory.

He would not oppose the adoption of the proposed draft article 17, even in its current form; he simply wished to place on record that he had doubts as to its meaning and that, in his view, unless the Commission wanted a compulsory compromissory clause, it should not include a time limit. In any event, assuming the Commission wished to maintain the dispute settlement provision, draft article 17 should be simplified. As one of many possible reworkings, he suggested the following text: “If the parties are not able to reach agreement within a reasonable period of time, then either Party may, subject to the agreement of the other Party, submit the matter to adjudication …” In the likely event that there was a strong push within the Commission to maintain that article, it should be redrafted to take account of the issues he had raised. In any case, he was in favour of sending draft articles 17 and 18 to the Drafting Committee.

The meeting rose at 12.40 p.m.