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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3521st meeting

Held at the Palais des Nations, Geneva, on Friday, 14 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. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	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 11.05 a.m.

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

Mr. Gómez-Robledo (Special Rapporteur), summing up the debate on his sixth report on the provisional application of treaties (A/CN.4/738), said that he wished to thank the Commission members for their valuable comments and suggestions.

The 23 members who had made statements on the report had generally expressed: (a) their agreement with the premises on which it was based and with the overall approach of the draft Guide to Provisional Application of Treaties, including its scope but also its limitations; (b) their conviction that the draft Guide was a useful tool for States, international organizations and legal practitioners in the broad sense of the term and represented another step in the Commission's never-ending task of interpreting the law of treaties; and (c) their determination to conclude the Commission's work on the topic at the current session. The members had been almost unanimous in deciding to refer the draft guidelines and the draft model clauses to the Drafting Committee.

Members had commented mainly on draft guidelines 1, 2, 3, 4, 6, 7 and 9, and on most of the draft model clauses. They had suggested amendments to those drafts and had made interesting proposals aimed at enriching the commentaries to the draft Guide. While he had noted every one of those proposals, he did not intend to review the commentaries until after the Drafting Committee had met to consider the draft guidelines and the draft model clauses.

Regarding draft guideline 1, members had broadly agreed, or had at least not objected, to the inclusion of a reference to "international organizations". He had taken note of the remarks made by Mr. Nguyen and Mr. Zagaynov concerning agreements concluded with non-State actors and of the practice that they had mentioned. He intended to include those examples and considerations in the commentary to the draft guideline.

Several members had expressed support, with varying degrees of conviction, for the merging of draft guidelines 1 and 2. Other members, meanwhile, had not been convinced by the arguments put forward. Although he stated in his report that he was flexible in that respect, he had come to the conclusion that it was appropriate to have two separate guidelines: one on the scope and the other on the purpose of the Guide. The inclusion of the two provisions was independent of the issue of the legal status of the Guide. As recalled by several members, including Mr. Tladi, the texts produced as part of the Commission's ongoing work on peremptory norms of general international law (*jus cogens*) and its recently concluded work on identification of customary international law and on subsequent agreements and subsequent practice in relation to the interpretation of treaties all contained provisions of that nature.

Mr. Jalloh had raised the possibility of having a guideline on the "use of terms", while the Chair had alluded to the desirability of including a definition of the provisional application of treaties. Both matters could be looked at by the Drafting Committee if there was support for doing so among its members. His proposed new wording of draft guideline 1 would read: "The present draft guidelines concern the provisional application of treaties by States and international organizations."

The discussion of draft guideline 2 had centred on the question of how to reflect the fact that the provisional application of treaties was based not only on the 1969 Vienna Convention on the Law of Treaties but also on the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, even though the latter Convention had not yet entered into force and there were doubts as to the extent to which it reflected customary international law. Mr. Rajput, supported by Mr. Hassouna, had proposed that the word "related" should be inserted before "rules of international law"; that was a good way of alluding, albeit indirectly, to the 1986 Vienna Convention. Mr. Grossman Guiloff and Ms. Escobar Hernández had proposed that the commentary should include a mention of the principles contained in article 25 of the 1969 Vienna Convention.

His proposal was that draft guideline 2 should read: “The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and any other relevant rules of international law.” He preferred the word “relevant” to “related”, as it had recently been used in the Commission’s work.

Draft guideline 3 had given rise to a discussion on whether the word “may” should be retained, with three members arguing that it should be kept in order to emphasize the optional nature of recourse to provisional application, while three others had stated that that did not justify a departure from the wording of article 25 of the 1969 Vienna Convention. Although he had been inclined to retain the word, he had reached the conclusion that the optional nature of recourse to provisional application was sufficiently established in the chapeau of draft guideline 4.

There had been general support for the use of the word “concerned” to refer to States or international organizations between which a treaty or a part of a treaty was provisionally applied, on the ground that it was broad enough to cover negotiating States or international organizations and all others. However, he believed that the concerns expressed, in particular by Mr. Park and Sir Michael Wood, should be addressed both to establish that an agreement on provisional application applied only to those that had decided to assume rights and obligations thereunder and to leave no doubt as to the fact that such agreements were absolutely voluntary. Thus, draft guideline 3 would read: “A treaty or a part of a treaty is provisionally applied pending its entry into force, by all States or international organizations assuming rights and obligations pursuant to its provisional application, if the treaty itself so provides, or if in some other manner it has been so agreed.”

Draft guideline 4 had sparked an interesting exchange that had convinced him of the need to strike a balance between two apparently contradictory objectives. On the one hand, the idea behind the requirement of explicit acceptance of any obligation under a treaty or a part of a treaty that was being applied provisionally was to ensure that States could not become bound by such obligations almost inadvertently. On the other, most members recognized that, in contemporary practice, among the other means or arrangements for agreeing to provisional application, there was frequent recourse to decisions, in the broadest sense, of international organizations.

A number of members had suggested alternative wording to preserve the indispensable element of acceptance. Indeed, the vast majority of members had expressed the view that the phrase “if such resolution has not been opposed by the State concerned” in draft guideline 4 (b) did not serve its intended purpose, since it did not take into account, among other things, the wide variety of rules governing the adoption of resolutions by international organizations. The validity of their adoption and the possibility for States to disassociate themselves from, or express disagreement with, their adoption depended on such rules.

As pointed out by Mr. Forteau, what really mattered was to establish that an agreement existed, regardless of the mechanism or means used to reach it. Thus, the draft guideline would begin by positing that such an agreement existed, before referring to the forms that it could take. Similarly, to address Ms. Escobar Hernández’s comment regarding decisions of the Council of the European Union that were particularly relevant in the context of the so-called “mixed agreements” that the European Union concluded with third States, the text could refer not only to “resolutions” but also to any other type of decision of international organizations.

With regard to Ms. Escobar Hernández’s proposal to refer to the decisions adopted at conferences of the parties to multilateral treaties, his preference, in order not to make the draft guideline too cumbersome, would be to mention them in the commentary, since such conferences were covered by the term “intergovernmental conference”. Thus, his proposal for the draft guideline would read:

> In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned, through:
>
> (a) a separate treaty; or

(b) any other means or arrangements, including a resolution, decision or other act of an international organization or of an intergovernmental conference adopted subject to the rules of the international organization or of the intergovernmental conference concerned, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Regarding draft guideline 5, Sir Michael Wood had argued that the phrase "pending its entry into force between the States or international organizations concerned" was redundant in that it contained language that already appeared in draft guideline 3. Mr. Forteau, meanwhile, had called for the inclusion of a reference to article 24 (4) of the 1969 Vienna Convention. To reflect those comments, he wished to propose that the draft guideline should read: "The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed, without prejudice to what is provided for under article 24, paragraph 4, of the Vienna Convention on the Law of Treaties and any other relevant rules of international law."

All but one of the Commission members who had addressed draft guideline 6 had agreed with his suggestion to delete the phrase "as if the treaty were in force". The apparent consensus in that regard among the members of the Commission was shared by States. However, it was worth recalling that, given the reluctance of many members to include the phrase at the first-reading stage on the ground that it implied that provisional application had the same effects as entry into force, the expression "produces a legally binding obligation" had been preferred. The phrase "as if the treaty were in force" had been retained to give States and Commission members the opportunity to reflect on it further, with the expectation that it would eventually be deleted.

Both of those expressions left unresolved the question of whether the draft guideline or even the set of draft guidelines as a whole referred primarily to the treaty or the part of a treaty that was being provisionally applied or to the agreement by which two or more States or international organizations decided to provisionally apply the treaty or a part thereof. The matter had been discussed at length in the Drafting Committee and was mentioned in, for example, paragraph (1) of the commentary to draft guideline 6. The Commission had always worked on the understanding that provisional application was relevant to the agreement to provisionally apply a treaty or a part of a treaty, but for the purposes of its consideration of the topic and draft guideline 6, it had been more interested in elucidating the legal effects of the treaty that was being provisionally applied. The Commission would no doubt have to return to the matter in the commentary. However, at the current stage of its work, finding new wording for draft guideline 6 would be extraordinarily complicated, and both States and the members of the Commission were generally satisfied with the text as it stood, minus the phrase "as if the treaty were in force". He agreed with Sir Michael Wood that the word "unless" should be replaced with "except to the extent that". He also wished to reflect the opinion expressed by Mr. Forteau in relation to article 26 of the 1969 Vienna Convention, which could be done by adding a sentence on the *pacta sunt servanda* rule, formulated in such a way as to cover both the agreement by which it was decided to provisionally apply a treaty or a part thereof and the treaty or part of a treaty that was being provisionally applied. Draft guideline 6 would thus read:

1. The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty provides otherwise or it is otherwise agreed.

2. The States or international organizations assuming rights and obligations pursuant to the provisional application of a treaty or a part of a treaty must perform them in good faith.

The title of the draft guideline should be changed accordingly to "Legal effect of provisional application and *pacta sunt servanda*". While he certainly did not consider the proposed new paragraph 2 indispensable, it seemed to be a good addition that made the draft guideline stronger.

He wished to thank the members of the Commission for addressing the subject of reservations, as he had requested when introducing his sixth report. Their verdict was clear: the vast majority had expressed support for retaining a draft guideline on the formulation of reservations. The challenge was to decide what form that draft guideline should take. His reflections on the matter could be condensed into four points.

Firstly, he did not agree with those members who had stated that leaving open the possibility of formulating reservations in the context of an agreement to the provisional application of a treaty or a part of a treaty could help to promote that treaty's entry into force. That argument struck him as a creative way of defending the inclusion of draft guideline 7 that was not substantiated by facts.

Secondly, he was also unconvinced by the argument that because the matter had not been addressed in the extensive Guide to Practice on Reservations to Treaties, the Commission was precluded from dealing with it in the context of provisional application.

Thirdly, he harboured doubts as to the alleged total absence of relevant practice. He had argued that no practice had been found, and even the examples that he had been able to analyse had led him to conclude that they did not fall into that category. However, having listened to several members of the Commission, he wondered whether, in fact, the problem was that the practice, if any existed, was not documented as such. Since a State could formulate reservations to a treaty at different stages of the process prior to the point of no return at which it consented to be bound by the treaty, and at the latest when it expressed its consent in that regard, it could possibly formulate a reservation and later consent to apply the treaty provisionally. If there was no objection to that reservation, would the reservation not be understood to generate legal effects during the period of provisional application? In other words, the two legal regimes would produce their effects in parallel, without ever intersecting or causing any dispute. It would have been interesting to investigate that scenario, but there would not be time to do so before the Commission concluded its consideration of the topic.

Fourthly, he believed that the Commission should consider whether a State could be subject to limitations in relation to a treaty prior to that treaty's entry into force for the State but, conversely, have the power to formulate reservations after the treaty's entry into force, when it became fully binding on the State. Such a situation would simply not be in keeping with the flexibility and freedom of contract inherent in provisional application. Therefore, he found no reason to conclude that the possibility of formulating reservations was incompatible with provisional application. Nevertheless, the current wording of draft guideline 7 was too problematic. He was of the view that, as suggested by Mr. Forteau and Sir Michael Wood, the Commission should opt for a "without prejudice" clause, which was precisely what he had proposed in his fifth report. The amended draft guideline could read: "The present draft guidelines do not preclude the possibility for a State or an international organization to formulate, when agreeing to the provisional application of a treaty or part of a treaty, a reservation in accordance with the Vienna Convention on the Law of Treaties and any other relevant rules of international law." He had been careful to use the word "possibility" rather than "right", as it seemed more appropriate in the context of reservations.

The discussion around draft guideline 9 had been very clear and conclusive. General agreement had emerged on the new wording of paragraph 2 and, with some slight changes, that of the new paragraph 4. The most significant contribution, however, had been Mr. Reinisch's proposal regarding the inclusion of a notice period for a decision by a State or international organization to terminate the provisional application of a treaty, based on article 56 of the 1969 Vienna Convention and taking into account article 29 of the Vienna Convention on Succession of States in Respect of Treaties. Mr. Reinisch had provided other relevant examples, and the proposal had garnered the support of several members of the Commission.

A provision relating to notice periods had not previously been included owing to the desire to ensure that the draft guidelines would not be excessively prescriptive. However, having listened to the remarks by other Commission members, he was now of the view that a reference to a notice period of reasonable length, in line with article 56 of the 1969 Vienna Convention, could be considered. He therefore wished to propose that in draft guideline 9 (2), the words "within a reasonable period" should be inserted before "irrespective of the reason

for such termination". In addition, for reasons of logic, the new paragraph 4 proposed in his report should be placed after paragraph 2 and renumbered as paragraph 3.

In draft guideline 12, he had made a minor amendment to accommodate Mr. Forteau's observation that the words "a State or an international organization" should appear in the plural form rather than the singular. He had also attempted to tighten up the language of the draft guideline, since its existing wording was somewhat unwieldy.

Turning to the draft model clauses, he said that he greatly appreciated the positive feedback from members regarding the idea of including a limited number of draft model clauses as a guide for States and international organizations. The idea had been put forward at the outset of the Commission's work on the topic. A number of obstacles had been overcome and a consensus appeared to have been reached on the inclusion of draft model clauses.

He was well aware that the draft model clauses had not undergone a first reading in the strict sense of the term. In an attempt to compensate for that, the Commission had held informal consultations in 2019, as explained in chapter XI of the Commission's report on the work of its seventy-first session (A/74/10). For that reason, he had refrained from making too many changes to the draft model clauses; however, the Commission could not ignore the fact that States had reacted positively to them.

While he did not wish to pre-empt the work of the Drafting Committee, he had noted with interest Mr. Zagaynov's proposal that the annex should be restructured so that the examples of practice that currently appeared in footnotes would instead appear in the body of the text, where they could be read more easily alongside the draft model clauses to which they related. The purpose of the draft model clauses was not to reproduce text that already appeared in existing treaties but to draw attention to the elements that such clauses could potentially encompass, as indicated in square brackets, and to alert States and international organizations to the issues that were most important or that arose most consistently. Mr. Forteau had kindly provided him with a handbook, which he would share with the Drafting Committee, drawn up by Switzerland and six other States Members of the United Nations on clauses relating to the acceptance of the compulsory jurisdiction of the International Court of Justice. The handbook contained examples of such clauses and the relevant sources.

He recognized that there was still room for more examples of practice, as had been noted by Sir Michael Wood, who had submitted an information note outlining recent practice in the United Kingdom. In any event, he believed that the many examples of practice already included in the draft had done much to persuade members to support the inclusion of the draft model clauses.

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

Mr. Rajput said that the topic of immunity of State officials from foreign criminal jurisdiction had taken longer than other topics on which the Commission had recently worked, owing to the sensitivities, complexities and deeply controversial nature of some of its fundamental aspects. The credit for bringing the first-reading stage close to completion belonged to the Special Rapporteur, who, through her hard work and dedication, and in a spirit of compromise, had bridged some of the major differences between Commission members. That spirit of compromise would help the Commission conclude the first reading of the draft articles under the topic.

Turning first to draft article 17, on settlement of disputes, he said that he fully agreed with the Special Rapporteur's arguments concerning the need to include a compulsory dispute settlement clause under which disputes would be referred to the International Court of Justice or, alternatively, to arbitration. That procedure was far superior to the creation of a standing body or other mechanism. He also agreed that, although the Commission usually refrained from drafting dispute settlement clauses, preferring to leave States to negotiate such matters themselves, there were good reasons for including a clause on dispute settlement under the current topic.

The draft articles, particularly draft article 7, dealt with a number of sensitive issues that had a tendency to escalate tensions in relations between States. Two good examples were the proceedings initiated in Spain against Chinese officials for crimes against humanity in Tibet, which had eventually been dropped, and the efforts to prosecute Rwandan officials in French courts, which had strained relations between the two States. A compulsory dispute settlement procedure would provide an avenue for resolving such disputes peacefully.

States were normally reluctant to accept compulsory dispute settlement clauses. In the case at hand, however, the dispute settlement clause would protect them from arbitrary and politically motivated proceedings before foreign courts. He therefore believed that there was value in including a draft article on settlement of disputes.

However, he had doubts about the 6- or 12-month time frame for negotiations that was proposed in draft article 17 (2). While providing a time frame might have been appropriate in the context of *jus cogens*, it was not appropriate in relation to the current topic. The time frames mentioned in the draft conclusions on *jus cogens* were intended to give States enough time to negotiate and resolve their disagreements, which might take longer to settle owing to the complex theoretical and practical matters associated with the existence and effects of a *jus cogens* norm. In matters of immunity of State officials, however, time was of the essence. According to the Special Rapporteur, the time frame was intended to ensure that diplomatic negotiations were not overly long and were not used as a tool to defeat immunity. While the Special Rapporteur's fears were justifiable, such a situation should not arise, since the jurisprudence on how much time ought to be spent on negotiations and whether an agreement was always necessary was well settled in the decisions of the Permanent Court of International Justice and the International Court of Justice. Both Courts had noted time and again that the obligation to negotiate was not an obligation of result; the parties did not need to wait until an agreement had been reached before approaching the Court, provided that the negotiations had been undertaken in good faith. If there was no prospect that a dispute would be resolved, one of the States could approach the International Court of Justice, provided that the jurisdictional requirements were satisfied, such as the existence of a dispute and others, as had been reiterated in a number of cases.

Providing a time frame would mean that States would have to wait for that time to expire before approaching the Court, whereas, in the ordinary course of events, one of the parties could approach the Court once there was no prospect of a negotiated settlement. Considering the sensitivities involved in relation to the exercise of criminal jurisdiction over foreign officials, six months might turn out to be an excessively long period. Furthermore, it would be difficult for the Commission to propose a certain period as being appropriate; the time frame would depend on the overall circumstances and the situation of the State concerned.

With respect to the drafting of the clause on settlement of disputes, the Commission should mirror draft article 15 (1) and (2) of the draft articles on prevention and punishment of crimes against humanity. It should not, however, replicate paragraphs 3 and 4 of that draft article, which allowed for reservations or exceptions.

He fully supported the wording of draft article 17 (3), under which the exercise of criminal jurisdiction by the forum State would be suspended until a final ruling on the dispute was issued.

Turning to draft article 18, he said that he was not convinced of the need for its inclusion. Firstly, in procedural terms, the Special Rapporteur had rightly recalled that the Commission had not delved into the question of cooperation with international criminal tribunals because the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* and a potential referral to the International Court of Justice for an advisory opinion were already pending on the agenda of the General Assembly. The Special Rapporteur had expressed willingness to await the decision of the International Criminal Court in that case but did not appear to wish to do the same for the International Court of Justice advisory opinion. According to paragraph 22 of the Special Rapporteur's report, the Commission should not wait for the decision of the International Court of Justice because "the assumption that the International Court of Justice could pronounce on the matter does not seem feasible at this stage, given that the African Union … decided to urge African countries to withdraw the

request for an advisory opinion". While he did not object to making a legal assessment, he did not think the Commission should make an astrological prediction as to whether States would follow the suggestion of the African Union and withdraw the topic from the agenda of the General Assembly. If the Commission commented on the issue, it would be attempting to pre-empt the opinion of the International Court of Justice. Since the Commission had waited for the International Criminal Court, propriety dictated that it should also wait for the International Court of Justice. The "without prejudice" wording of draft article 18 was insufficient, since even a "without prejudice" clause had serious implications. As Mr. Tladi had stated, it was a prejudicial "without prejudice" clause.

Secondly, the topic dealt with the criminal jurisdiction of national courts, not that of international criminal tribunals. The Special Rapporteur stated in paragraph 13 of the report that the topic had "nothing to do with immunities before international criminal tribunals". Nevertheless, vain attempts had been made to draw an artificial connection between the jurisdiction of national courts and that of international criminal tribunals in order to justify the inclusion of a draft article on that subject. Later in paragraph 13, the Special Rapporteur went on to argue that officials could be tried for serious international crimes before national courts and international criminal tribunals and that it was therefore impossible to deny the existence of a relationship between the current topic and international criminal jurisdiction. The mere fact that the same person could be tried in two different forums did not mean that the jurisdictions overlapped or that there was some relationship between the two. The nature of the relationship between national courts and international criminal tribunals was well captured in a fundamental tenet of international criminal law: the principle of complementarity, whereby the International Criminal Court would not deal with an issue that was being prosecuted under a national jurisdiction. The tenth preambular paragraph and article 1 of the Rome Statute of the International Criminal Court expressly recognized that rule. Draft article 18, however, contradicted the rule by seeking to give precedence to the jurisdiction of the International Criminal Court, thus, in effect, limiting the jurisdiction of national courts over serious international crimes and tilting the balance in favour of that Court. Above all, the "without prejudice" clause would be prejudicial to hybrid courts; as Mr. Jalloh had noted, draft article 18 would impinge on their jurisdiction as well.

Thirdly, the Special Rapporteur had quoted paragraph (6) of the commentary to draft article 1, which had already been provisionally adopted by the Commission and which stated that it was not possible at the current stage to definitively address the relationship between the jurisdiction of national courts and international criminal tribunals. The Special Rapporteur had also stated that, despite that situation, the Commission should make some observations on the matter because the creation of international criminal tribunals was the "new reality" and had to be taken into account. While the "new reality", which the Special Rapporteur had also mentioned in her introductory statement, might apply to those States that were parties to the Rome Statute, it did not apply to those that were not. The latter States, such as India, objected in principle to the way in which the International Criminal Court exercised jurisdiction. It was politicized by the possibility of referral by the Security Council, a body whose actions were based purely on political considerations. There was an inherent handicap in that system, since States that were members of the Security Council, in particular those with veto power, took precedence over other States. That reality, and the resentment it caused, could not be ignored.

The Special Rapporteur and the Commission had an important choice to make. By including draft article 18, the Commission would be sending a clear signal to States that the draft articles were only for those States that were parties to the Rome Statute, or worse, as Mr. Tladi had indicated, that they represented a back-door means of extending the jurisdiction of the International Criminal Court to States that were not parties to the Rome Statute, even without their consent. In effect, the Commission would be advising States that were not parties to stay away from its work on the current topic. Even States that were parties to the Rome Statute might not wish to be affected unknowingly and might not support the compulsory jurisdiction of the International Criminal Court.

His fourth objection to draft article 18 centred on another element of the justification given for its inclusion, namely the argument that the Commission should explore the relationship between the jurisdiction of international criminal tribunals and that of national

courts because the defence of acts performed in an official capacity fell within the jurisdiction of international criminal tribunals. Several substantive principles of criminal law could be raised before both national courts and international criminal tribunals; should the Commission therefore discuss the relationship between the two every time such a principle arose? Did the fact that the International Court of Justice dealt with some substantive issues of criminal law mean that the Commission should also discuss and limit the jurisdiction of that Court and force it to yield its jurisdiction to the International Criminal Court? That was precisely the effect that the "without prejudice" clause in draft article 18 would have.

His fifth point concerned the argument put forward in paragraph 14 of the Special Rapporteur's report regarding the principle of accountability. Interestingly, there was no footnote or clarification setting out that principle or its content. Could the so-called principle of accountability take precedence over jurisdictional requirements? Did accountability mean that rules of law should be ignored in favour of a subjective preference? The invocation of that principle as a basis for the inclusion of a provision on the jurisdiction of international courts and tribunals would raise questions even among those States that were most enthusiastic about the International Criminal Court, which would ask why such an elusive concept had been introduced. In his view, serious matters of jurisdiction should not be made subject to abstract and subjective principles.

His sixth comment related to the Special Rapporteur's fear, expressed in paragraph 30 of the report, that not referring to immunity before international criminal tribunals would "undermine the substantive and institutional norms developed in that area". In his view, that fear was misconceived, irrelevant and unsubstantiated. If the Commission was dealing exclusively with matters relating to the jurisdiction of national courts over foreign officials, he did not see how the question of undermining developments in the field of international criminal law arose or how the integrity of international criminal law or its institutions was being challenged. The Commission was not the guardian of international criminal tribunals or international criminal law. Its task was to codify international law and, as some of its members insisted, to progressively develop international law, but did not extend to defending judicial institutions, especially when they delivered incorrect and indefensible judgments and wished to be insulated from criticism they found hard to accept.

Lastly, he wished to comment on the Special Rapporteur's suggestion, in paragraphs 23 and 24 of the report, that the Commission should not engage in a full debate on the decision in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* and should focus only on the conclusions she had drawn therefrom. He agreed that the decision was deeply flawed and that the Commission had neither the time nor the need to join those who were criticizing it. However, the Special Rapporteur appeared to wish to insulate the decision against criticism, stating in paragraph 23 that the assessment made of it had "not been kind". The International Criminal Court was the first international tribunal in the history of international law to have put out a press release asking people not to criticize its decisions. He was unsure whether such an approach suited an institution that claimed to be upholding accountability. In his view, the Commission should not spend its intellectual capital defending the decisions of the International Criminal Court in a half-hearted manner.

In substance, the arguments supporting the inclusion of draft article 18 were based on policy preferences. In his view, the Commission was not competent to make policy choices, since such a task was even beyond the bounds of progressive development. Furthermore, although draft article 18 referred to international criminal tribunals, its focus was obviously limited to protecting the International Criminal Court. It would be inappropriate to give preference to the International Criminal Court at the expense of national prosecution and, most importantly, of hybrid tribunals, where the process of delivering justice was closer to the people who had suffered the injustice.

He agreed with Mr. Tladi that if the objective of draft article 18 was to force the jurisdiction of the International Criminal Court onto States that were not parties to the Rome Statute, that would represent a most unfortunate overreach, with disastrous consequences that would extend beyond the International Criminal Court and affect the overall stability of international relations and international law. Overenthusiasm always came with a heavy price, and the quest to universalize the International Criminal Court would irreparably damage the current architecture of international law, to which all States were expected to adhere. He

strongly objected to the referral of draft article 18 to the Drafting Committee and supported the referral of only draft article 17 to the Drafting Committee.

Mr. Forteau said that he wished to thank the Special Rapporteur for her clear, concise and substantive eighth report. The topic of immunity from foreign criminal jurisdiction was of great practical importance, political sensitivity and legal complexity. He therefore wished to acknowledge the Special Rapporteur's efforts in guiding the Commission through the technical difficulties of the topic.

He wished to touch, first, upon chapters I and III of the report. He supported the Special Rapporteur's approach in those two chapters, insofar as she had recommended that the Commission should not undertake a detailed analysis of the topic's relationship to international criminal tribunals or of recommended good practices.

With respect to international criminal tribunals, he agreed that only a "without prejudice" clause should be included. Entering into a debate on international criminal jurisprudence or the status of international criminal tribunals was neither useful nor necessary in the context of the current topic. What mattered was to reserve those questions by inserting a "without prejudice" clause.

At the same time, the "without prejudice" clause contained in draft article 18 would certainly benefit from drafting improvements, which fell within the remit of the Drafting Committee. He agreed with Mr. Jalloh that reference should be made to both the rules and the practices of international criminal tribunals. The word "functioning" was not the most appropriate choice; a term with a broader meaning should be found. He was sympathetic to Mr. Tladi's caution that a clearer distinction should be made between States that were parties and those that were not parties to the constituent instruments of international criminal tribunals. Lastly, he was open to any proposals aimed at merging draft article 18 with draft article 1.

Concerning recommended good practices, the Special Rapporteur's proposal, in chapter III of the report, that such practices should be addressed in the context of the draft articles already presented or in the commentaries thereto seemed sensible.

Turning to chapter II of the report, on settlement of disputes, he said that the Special Rapporteur's proposed draft article 17, while well intentioned, gave rise to many difficulties. Firstly, as had already been noted, the inclusion of a dispute settlement clause made sense only if the Commission's intended output was a draft treaty. Thus far, the draft articles did not appear to have been drafted in that spirit. While nothing prevented the Commission from changing direction, he was concerned that if it did so it would open a Pandora's box, the lid of which Mr. Tladi had begun to lift when he had indicated that if the Commission wished to propose a treaty, it would need to revisit some of the draft articles it had already adopted, in particular draft article 7. He doubted that the Commission wished to go down that route.

If there was no intention to propose a draft treaty, the scope and utility of a dispute settlement clause were hard to fathom, since the clause would be merely a recommendation and would not, in itself, provide a basis for the jurisdiction of an international court. A clause of that nature would thus not add anything concrete to existing international law.

The Commission had engaged in a similar debate when it had drafted its articles on responsibility of States for internationally wrongful acts. As indicated in the Commission's 2001 report on the work of its fifty-third session, it had ultimately taken the sensible decision not to include provisions for a dispute settlement machinery in the articles. In his view, the same decision should be taken with respect to the current topic, for reasons similar to those expressed in 2001 in relation to the articles on State responsibility.

Secondly, as currently worded, draft article 17 risked interfering with existing compromissory clauses. For example, an immunity dispute could arise in relation to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provided for an obligation to extradite or prosecute. Since the compromissory clause in that Convention differed from the one in draft article 17, the latter might create confusion.

Thirdly, he wondered why draft article 17 (2) mentioned only arbitration and the International Court of Justice as possibilities for the referral of disputes. A conciliation mechanism could also be effective in some situations, and the International Tribunal for the Law of the Sea might be competent in some cases involving immunity from criminal jurisdiction. The exclusion of such possibilities could not easily be reconciled with the principle that States had freedom of choice in selecting the means of settling disputes, as provided for under Article 33 of the Charter of the United Nations.

Fourthly, draft article 17 (3) raised a fundamental issue, in that it provided for suspension of the exercise of jurisdiction by the forum State if a dispute was referred to arbitration or to the International Court of Justice. If the triggering of such suspension was automatic, as the Special Rapporteur seemed to indicate in her report, a State wishing to block national prosecution could abuse the system by invoking the existence of immunities and referring the case to an international court, leading to the automatic suspension of the procedure at the national level during proceedings before the international court, which could take several years.

Another issue was that such suspension of the exercise of national jurisdiction was not reflected in contemporary practice. No such provision was included in clauses governing inter-State disputes in other areas of the law on immunities, such as section 30 of the 1946 Convention on the Privileges and Immunities of the United Nations, article 27 of the 2004 Convention on Jurisdictional Immunities of States and Their Property, or article 119 of the Rome Statute of the International Criminal Court. Furthermore, automatic suspension was not compatible with the principle of the independence of domestic justice, as national courts would be obliged to suspend the exercise of their jurisdiction merely because of a claim of immunity by the State of the official. Although the Special Rapporteur justified that proposal by highlighting the need to prevent the creation of a *fait accompli* that would be detrimental to immunity, there was also a need to avoid the *fait accompli* that could potentially be created through the abuse of the suspension rule to block domestic criminal prosecutions that were justified. A balanced solution that respected all the interests at stake, not only those of the State claiming that immunity existed, must be found. It would also be necessary to ensure that domestic laws contained appropriate procedural rules to give effect to the international obligation to suspend prosecution; for some States, that could require amendments to their domestic codes of criminal procedure.

Moreover, current practice before international courts was different from that proposed in draft article 17 (3): there was no automatic suspension of the exercise of domestic criminal jurisdiction in the case of a dispute between two States on a question of immunity. Under the existing practice, the State concerned could choose to submit a request for a provisional measure ordering the suspension of national procedures; the international court would then decide whether to accept the request, based not on an abstract principle but on the circumstances of the case at hand. Four cases that had come before the International Court of Justice illustrated that practice. In the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case – which concerned State immunity and not criminal immunity, though that did not matter in the current context – Germany had opted not to request provisional measures even though domestic procedures had been under way, and the Court had not ordered such provisional measures *ex officio*, meaning that domestic proceedings had continued despite the existence of international proceedings. In the 2003 *Certain Criminal Proceedings in France (Republic of the Congo v. France)* case, on the other hand, the Congo had filed a request for a provisional measure ordering the immediate suspension of the proceedings being conducted in France. The Court had rejected the request on the ground that the requesting State had not demonstrated any risk of irreparable prejudice. The same situation had arisen in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case in 2002: the Democratic Republic of the Congo had filed a request for a provisional measure ordering the immediate discharge of the disputed arrest warrant against its Minister for Foreign Affairs. The Court had rejected the request, also on the ground that there was no risk of irreparable prejudice. Lastly, in the *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* case, the requesting State had filed a request for provisional measures indicating that France should suspend all the criminal proceedings brought against the Vice-President of Equatorial Guinea. The Court had rejected the request

on the ground that it did not have *prima facie* jurisdiction in the case on the question of criminal immunity.

Such practice allowed international courts to decide whether they had *prima facie* jurisdiction and whether the suspension of domestic proceedings was merited in the circumstances of each case. That approach was more advisable, since it resulted in balanced solutions that took account of the specific interests involved and the facts of each case, whereas the practice proposed in draft article 17 (3) would impose a single solution, to the benefit of only the State invoking immunity. The practice that he had cited showed that the International Court of Justice saw no inherent difficulty in allowing domestic proceedings to continue while an inter-State dispute was being settled at the international level, although it could still find, in specific cases, that a suspension of such proceedings was warranted. Such practice was more balanced than the one proposed in draft article 17 (3).

He was therefore of the view that article 17, as currently worded, should not be included in the draft articles. With that reservation, he recommended the referral of the draft articles contained in the eighth report to the Drafting Committee.

Mr. Murphy, in a pre-recorded video statement, said that the Special Rapporteur had provided an interesting, thoughtful and useful discussion of the three issues covered in chapters I to III of her eighth report. Regarding the relationship of the topic to international criminal tribunals, he was not in favour of including, in the commentary to the draft articles, any discussion of the decision of the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, as he did not consider it well reasoned and he generally supported the views that Mr. Tladi had expressed on the matter at the Commission's 3520th meeting. He also agreed with the Special Rapporteur that the Commission did not need to take a position on the decision in the context of its current work and that the assertions of the Appeals Chamber related only to the context of a special legal regime and thus could not be extrapolated to the general framework of the topic under consideration.

He did not think it necessary to insert a new "without prejudice" clause concerning international criminal tribunals, either as draft article 18 or as part of draft article 1. As the topic was focused on the exercise of national jurisdiction in relation to foreign State officials, there was no need for any mention of the jurisdiction of international criminal tribunals, or immunity from such jurisdiction, in the draft articles. Noting that no "without prejudice" clause had been included in the draft articles on prevention and punishment of crimes against humanity, which the Commission had completed in 2019, and that none of the "without prejudice" clauses in the International Convention for the Protection of All Persons from Enforced Disappearance were related to international criminal tribunals, he was of the opinion that there was no need for such a clause in the draft articles, at least if its only purpose was to acknowledge the existence of the jurisdiction of international criminal tribunals.

However, draft article 18 appeared, rather, to be asserting that the rules governing the functioning of, for example, the International Criminal Court could alter the rules relating to immunity in national law as set forth in the draft articles, although how or to what extent they could do so was unclear. There was no indication of whether such an effect would arise only in very limited circumstances, such as in relation to the immunity of officials of States parties to the Rome Statute from the criminal jurisdiction of other States parties, or whether it could also arise in other circumstances such as in relation to the immunity of officials of States not parties to the Rome Statute from the criminal jurisdiction of States parties. The question of which body would decide on the scope of the rules governing the International Criminal Court was also left unaddressed.

Whenever one set of rules was said to be "without prejudice" to another set of rules, the implication was that, in the event of a conflict, the latter rules prevailed over the former. But it was not, in fact, the case that the rules governing the International Criminal Court could prevail over the immunity enjoyed by foreign State officials from the criminal jurisdiction of States not parties to the Rome Statute or the immunity enjoyed by the officials of States not parties from the national criminal jurisdiction of States parties. That situation was dictated not by the rules governing the functioning of the Court but by general international law,

particularly the rule in the 1969 Vienna Convention that a treaty did not create either obligations or rights for a third State without that State's consent.

Although Mr. Jalloh had said, at the Commission's 3520th meeting, that non-parties and their officials might nevertheless be affected if the Security Council referred a situation to the International Criminal Court, they would be affected not by the rules governing the functioning of the Court but, rather, by the Security Council resolution. Even in that case, the resolution might not have such an effect, depending on the actual wording. Further, if the Security Council could, in principle, change the law in that area, why did draft article 18 not include a statement that the draft articles were without prejudice to Security Council decisions? If draft article 18 was intended to establish a position of neutrality in relation to the functioning of the International Criminal Court, he did not think it achieved that aim; rather, it implied that the Court's rules could supersede the rules set forth in the draft articles. That implication was not neutral and might unnecessarily antagonize States that were not parties to the Rome Statute. He was therefore not in favour of referring draft article 18 to the Drafting Committee.

Regarding draft article 17, he found the Special Rapporteur's argument for the inclusion of a draft article on dispute settlement, of the kind contained in treaties, generally persuasive, given that draft articles were generally viewed as a potential basis for a convention whether or not the Commission recommended as much to the General Assembly. He nonetheless wondered why draft article 15 of the draft articles on prevention and punishment of crimes against humanity had not been taken as a model. Although draft article 17 was intended to offer greater flexibility, the proposed wording rather awkwardly combined a specific time limit for resort to the jurisdiction of the International Court of Justice with softer language whereby one party might "suggest" to the other party that the matter should be referred to the Court. A more specific and definite dispute settlement provision would be preferable.

Concerning best practices, more detailed information for States about practices in national systems throughout the world would have been helpful. The Commission could have offered a synthesis of the comments received from States, the information gathered by the two Special Rapporteurs, the Secretariat's memorandum and, perhaps, responses from States to further targeted requests. He understood, however, that the Special Rapporteur might prefer not to pursue specific proposals in that regard at the current stage of the process.

He was in favour of referring draft article 17, but not draft article 18, to the Drafting Committee.

Mr. Saboia, speaking via video link, said that, while the Special Rapporteur recognized in the eighth report that the scope of the topic did not encompass the issue of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, there was specific wording in the commentary to draft article 1 indicating that none of the rules that governed immunity before international criminal tribunals were to be affected by the content of the draft articles. The two spheres of jurisdiction shared certain goals, such as the promotion of accountability and the fight against impunity in regard to serious international crimes, and so could not be seen in entire isolation from each other.

In paragraphs 24 and 25 of the report, the Special Rapporteur mentioned some possible interfaces between the topic under consideration and the conclusions of the Appeals Chamber of the International Criminal Court, *inter alia* in its judgment on the appeal by Jordan against the decision of the Pre-Trial Chamber on the issue of non-compliance with the request by the Court for the arrest of Mr. Al-Bashir, then President of the Sudan. However, it was worth recalling that, while the International Criminal Court was currently the most relevant such court, it was not the only one: the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, established by Security Council resolutions 827 (1993) and 955 (1994), respectively, had existed for years and had created a jurisprudence that might also be relevant for the topic; they had had primacy over the national jurisdictions of the States under their jurisdiction *ratione loci*. All States, not only those within the geographical scope of the Tribunals' jurisdiction, had also been under an obligation to cooperate fully with the Tribunals and to comply with requests by them for

the arrest and surrender of accused persons. Those precedents constituted State practice that was also relevant in the analysis of the topic under consideration.

However, despite the importance of the findings of the International Criminal Court, the Special Rapporteur had concluded that the Commission did not need to take a position on the issue and had proposed only a "without prejudice" clause concerning international criminal tribunals, which was an appropriate way of reflecting the tangential relationship between the two spheres of jurisdiction. He was in favour of placing that clause under draft article 1 as an additional paragraph.

He supported the Special Rapporteur's proposal to include a clause on settlement of disputes, but remained flexible on that matter, in the light of the comments made by Mr. Murphy, and could possibly consider the adoption of a dispute settlement clause similar to the one in the draft articles on crimes against humanity.

Regarding recommended practices, he was in favour of the proposal to include practical recommendations to States on measures for improving their practice in the field of immunity of foreign State officials with regard to criminal jurisdiction. Some of the suggestions made by the Special Rapporteur could serve that purpose, if time limitations precluded a more ambitious format.

The meeting rose at 12.55 p.m.