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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3557th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 3 August 2021, at 10.30 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	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. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	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 10.30 a.m.

General principles of law (agenda item 7) (*continued*) (A/CN.4/741 and A/CN.4/741/Corr.1)

Report of the Drafting Committee (A/CN.4/L.955 and A/CN.4/L.955/Add.1)

Ms. Galvão Teles (Chair of the Drafting Committee) said that the report of the Drafting Committee on the topic "General principles of law" (A/CN.4/L.955 and A/CN.4/L.955/Add.1) contained the texts and titles of draft conclusions 1, 2, 4 and 5, as provisionally adopted by the Drafting Committee. At its seventy-first session, the Commission had referred draft conclusions 1, 2 and 3, as contained in the Special Rapporteur's first report (A/CN.4/732), to the Drafting Committee. At that session, the Drafting Committee had considered only draft conclusion 1, which it had subsequently provisionally adopted in English only. At the present session, the Commission had referred draft conclusions 4 to 9, as proposed by the Special Rapporteur in his second report (A/CN.4/741), to the Drafting Committee. The Drafting Committee had continued its consideration of draft conclusions 1 and 2, including some suggested reformulations presented by the Special Rapporteur in response to suggestions made and concerns raised during the debate in the plenary. The Drafting Committee had not taken up draft conclusion 3, entitled "Categories of general principles of law", at the request of the Special Rapporteur, who had suggested that it might be considered at a later stage together with draft conclusion 7, on "Identification of general principles of law formed within the international legal system"; the postponement would also allow views expressed during discussions in the Sixth Committee later in the year to be taken into account. The Drafting Committee had also begun to consider the draft conclusions proposed in the Special Rapporteur's second report, together with some suggested reformulations he had presented in response to suggestions made or concerns raised during the debate in plenary.

On draft conclusion 1, the members of the Drafting Committee had agreed that the scope of the draft conclusions was based on Article 38 (1) (*c*) of the Statute of the International Court of Justice, analysed in the light of the practice of States and the jurisprudence of international courts and tribunals, and that the expression "general principles of law" was to be understood in the sense of that article. In that connection, they had discussed whether the Spanish version should refer to "*principios generales de derecho*", in line with the wording in the Statute, or "*principios generales del derecho*", and the French version to "*principes généraux de droit*", as in the Statute, or "*principes généraux du droit*". Noting State practice and the jurisprudence of international courts and tribunals, which did not necessarily reproduce the exact words of the Statute, and recent practice, including the translation of the title of the topic into Spanish and French, they had decided to use the expressions "*principios generales del derecho*" in Spanish and "*principes généraux du droit*" in French, on the understanding that use of the terms neither changed, nor implied a change to, the substance of Article 38 (1) (*c*), that it represented an adaptation of, rather than a change to, that wording and that it was without prejudice to the scope of the draft conclusions.

The wording of draft conclusion 2, on recognition, reflected the vital element contained in Article 38 (1) (*c*) of the Statute, which provided that, for a general principle of law to exist or to form part of international law, it must be recognized by what were called the "civilized nations". After discussing whether the draft conclusion should serve as a definition or illustrate a condition for the existence of a general principle of law, as originally proposed by the Special Rapporteur, the members of the Drafting Committee had agreed on the latter. Bearing in mind the need to replace the anachronistic expression "civilized nations", and further to the debate in plenary at the seventy-first session, the Special Rapporteur had proposed using the term "community of nations", based on the wording of article 15 (2) of the International Covenant on Civil and Political Rights. After an extensive discussion, during which the terms "States", "community of States", "the international community", "nations", "nation States" and "nations as a whole" had been considered, the members had decided that, given that the Covenant had been widely ratified, "community of nations" should be used, on the understanding that there was no intention to alter the meaning and substance of Article 38 (1) (*c*) of the Statute. They had also agreed that the Commission was not thereby making a statement on the need for a unified or collective recognition of a

general principle of law by States, nor was it expressing a view that a general principle of law arose only within the international legal system. The expression was understood to reflect equality among nations; no analogy should be drawn with the expression “international community of States as a whole”, used in article 53 of 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 in the context of peremptory norms of general international law (*jus cogens*). Furthermore, it would be made clear in the commentary that the expression “community of nations” did not exclude international organizations from the process of recognition and the word “nations” did not encompass groups, such as ethnic groups, that might exist within a State. It had also been agreed that, rather than the equivalents used in the authentic language versions of the International Covenant on Civil and Political Rights, the term “*l’ensemble des nations*” should be used in French and “*communidad internacional*” should be used in Spanish.

After a lengthy discussion, the members of the Drafting Committee had agreed that it was not necessary to include the word “generally” before the word “recognized”; it was not present in Article 38 of the Statute and subsequent draft conclusions would address recognition. They had also agreed that it was unnecessary to include the words “as such” after “recognized”, because the specific requirements for recognition to be demonstrated would be addressed in subsequent draft conclusions.

The purpose of draft conclusion 4 was to address the basic methodology for the identification of general principles of law derived from national legal systems. As was indicated in the chapeau, the draft conclusion covered the determination of the existence and the content of a general principle of law derived from national legal systems, with subparagraphs (a) and (b) listing the relevant requirements. The members of the Drafting Committee had agreed that the process of identification involved a two-step analysis, to ascertain the existence of a principle common to the various legal systems, as described in subparagraph (a), and its transposition into the international legal system, as laid out in subparagraph (b). It had been pointed out that principles common to the various legal systems were not transposed in their entirety, as some elements of a common principle whose existence had been determined might not be suitable for application in the international legal system and might not be transposed. It was thus possible that the content of a general principle of law identified using the two-step analysis might not be identical to the relevant principle found in national legal systems. The members had been of the view that, for a general principle of law to be applied in the international legal system, its content ought to be determined; they had thus decided to retain the word “content”.

The members of the Drafting Committee had discussed whether the terms “identification”, used in the title, and “determine” and “ascertain”, used in the chapeau, had the same meaning for the purposes of the draft conclusion. They had recalled the Commission’s work on the topic of identification of customary international law, in which the words “identification” and “determination” had been used interchangeably. With respect to the expression “derived from national legal systems” in the chapeau, the view had been expressed that it might be seen to prejudge the outcome of the Commission’s consideration of the remaining draft conclusions on the topic by presupposing the existence of a category of general principles of law other than those derived from national legal systems. Some members had expressed concern that its use could give an incorrect impression that a general principle of law was automatically transposed into the international legal system. The terms “arising from” and “originating in” had also been considered. The Special Rapporteur had explained that the expression “derived from national legal systems” conveyed the idea of general principles of law in the sense of Article 38 (1) (*c*) of the Statute of the International Court of Justice and that the word “derived” did not imply automaticity.

Discussing the expression “the principal legal systems of the world” in subparagraph (a), the members of the Drafting Committee had considered whether the adjective “principal” was necessary; alternative terms proposed included “different legal systems”, “main legal systems” and “legal systems of the world as a whole”. While the word “principal” had its origins in the wording of the Statute of the International Court of Justice, it might be considered in the context of the topic under discussion to have the same connotations as the anachronistic expression “civilized nations”. The Drafting Committee had therefore decided

to replace “principal” with “various”, and agreed that the phrase “the various legal systems of the world” was to be interpreted as an inclusive and broad expression, covering the variety and diversity of national legal systems of the world. It had been noted that the requirement contained in subparagraph (a) was further elaborated in draft conclusion 5.

Draft conclusion 4 (b) introduced the concept of the transposition of a general principle of law into the international legal system. The members of the Drafting Committee had agreed that it addressed the manner and point in time when a general principle of law came into existence in the international legal system; they had also agreed that no formal act was required for that to happen. Following on from the debate in plenary, they had discussed whether the concept of “transposability” was more appropriate than “transposition”; they had agreed that, while the former might describe the potential character of a norm, it did not address the question of whether a general principle of law in fact existed at a given point in time. It was, furthermore, encompassed in the term “transposition”, which was addressed in greater detail in draft conclusion 6, as proposed by the Special Rapporteur in his second report. They had thus agreed to the wording of subparagraph (b) as proposed in the second report, on the understanding that the commentary would explain the difference and relationship between the terms “transposition” and “transposability” and the reasons for the use of “transposition” in the draft conclusion.

Draft conclusion 5 elaborated on draft conclusion 4 (a) and, in line with the decision taken on that subparagraph, the members had agreed to replace the word “principal” in the title and paragraph 1 with “various”. The three paragraphs of draft conclusion 5 were intended to provide guidance to practitioners on the analysis that must be conducted to identify a general principle of law common to the various legal systems of the world. It had been suggested that the words “content and” should be inserted before “existence” in paragraph 1, to mirror the wording of draft conclusion 4, but members had agreed that it should not, given that the first step of the two-step methodology, which the subparagraph addressed, required the ascertainment of “the existence of a principle common to the various legal systems of the world”.

In a lengthy discussion, some members had expressed the opinion that the inclusion of “comparative” before “analysis” suggested an excessively rigorous review employing the methodology of comparative law, which might create too high a threshold of review for the purpose of the draft conclusion. Considering the possibility of replacing it with the word “survey” to differentiate it from the methodology used in comparative law, the members had deemed it important that paragraph 1 should allow flexibility for practitioners and concluded that the word “survey” might appear too informal and risk setting too low a threshold of review. It had therefore been decided to retain the expression “comparative analysis”, as originally proposed by the Special Rapporteur, on the understanding that the commentaries would explain that the analysis should entail neither a casual assessment nor a strict application of comparative law methodology. As to whether it was sufficiently clear that the objective of the comparative analysis was to find a common denominator among the various national legal systems, the members had concluded that the objective was already expressed in the draft conclusion and that the purpose of finding a common denominator among the various national legal systems would be specified in the commentary.

With respect to paragraph 2, there had been a lengthy debate on whether the description “wide and representative” referred to the process of the comparative analysis itself or the object of the analysis, namely, the legal systems being analysed. In response to a suggestion that the word “sufficiently” should be added before “wide and representative”, to clarify that the comparative analysis did not require an analysis of every single national legal system in the world, but should take into account a variety of national legal systems, the concern had been expressed that such a formulation might allow a survey of just a few representative jurisdictions. The members had finally decided not to include the word “sufficiently”, on the understanding that the commentaries would explain that the analysis envisaged should strike a balance between flexibility and rigour.

The Drafting Committee had also considered whether the substance of the second part of paragraph 2, “including different legal families and regions of the world”, might be more appropriately dealt with in the commentaries, where it could be explained in detail, but concluded that it was important to refer expressly to different regions of the world in the draft

conclusion itself to ensure that they were covered in the analysis. The members had decided to omit the reference to “legal families”, finding that the wording “wide and representative, including the different regions of the world” was sufficient; the term “legal systems” was already referred to in the previous paragraph. The commentaries would include a detailed explanation of the scope of the comparative analysis and specify that the reference to the different regions of the world did not preclude practitioners from considering existing legal systems.

There had been extensive discussions on whether the content of paragraph 3 might be more appropriately placed in the commentaries and whether it provided the necessary guidance on the relevant sources for the assessment of the various national legal systems to determine the existence of a general principle of law derived from national legal systems. The members had agreed that explicit guidance was needed to indicate the sources to be reviewed in the comparative analysis. It should be useful, yet not restrictive, as national legal systems might accord different weight to different sources; for example, decisions of national courts might have different standing in different jurisdictions and doctrine might be accorded different weight depending on the jurisdiction.

With respect to the level of detail required in the sources listed, the Drafting Committee had considered adding a reference to constitutions, administrative or executive orders and doctrine, but had decided to avoid giving a detailed list, as it would make the paragraph overly prescriptive; that would be more appropriately dealt with in the commentaries. It had been decided to replace “national legislations” with the broader term “national laws”, which would capture the wide variety of legal instruments within national legal systems and thus afford practitioners greater flexibility in conducting the comparative analysis. The commentary would make it clear that “national laws” might include national constitutions, decisions from national courts and tribunals, including administrative tribunals, and all other sources that formed part of the legislative body of national legal systems. Following a lengthy debate, the Committee had also decided to add the phrase “and other relevant materials” at the end of paragraph 3, on the understanding that the commentary would provide guidance on the broad range of materials relevant to the identification of principles of law in the various national legal systems. As to whether to reformulate the paragraph to specify that the list of sources was not exhaustive, after discussing terms such as “*inter alia*”, “must include”, “as appropriate” and “in particular”, the members had eventually concluded that the word “includes”, as originally proposed by the Special Rapporteur, was non-exhaustive and appropriate, providing flexibility and encompassing other sources not expressly mentioned in paragraph 3.

The Drafting Committee had also held an initial exchange of views on draft conclusion 6, as proposed by the Special Rapporteur in his second report. However, due to a lack of time, the Committee had not been able to conclude its discussion and had decided to continue consideration of draft conclusion 6 at the seventy-third session of the Commission.

The Chair said that he took it that the Commission wished to adopt draft conclusions 1, 2 and 4, as contained in document A/CN.4/L.955, and to take note of draft conclusion 5, as contained in document A/CN.4/L.955/Add.1.

It was so decided.

Draft report of the Commission on the work of its seventy-second session (*continued*)

Chapter V. Provisional application of treaties (*continued*) (A/CN.4/L.945, A/CN.4/L.945/Add.1, A/CN.4/L.945/Add.2 and A/CN.4/L.945/Add.4)

The Chair invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.945/Add.2.

Commentary to draft guideline 9 (Termination) (*continued*)

Paragraph (6) (*continued*)

Mr. Forteau said that paragraph (6) did not cover situations involving States that had signed a treaty but had not agreed to apply it provisionally; in the case of the Arms Trade

Treaty, for example, signatory States could make a unilateral declaration agreeing to or refusing provisional application. He therefore proposed that the words “or can be” should be inserted before the words “provisionally applied”. Moreover, in footnote 42, the words “provisional application of” should be inserted after the words “as for the termination of”.

Mr. Gómez-Robledo (Special Rapporteur) said that he agreed with the amendments proposed by Mr. Forteau.

Paragraph (6), as amended and with an amendment to footnote 42, was adopted.

Paragraph (7)

Mr. Murphy proposed that the words “include an option for its termination on” should be replaced by the words “provide for advance” in the first sentence of the paragraph.

Paragraph (7), as amended, was adopted.

Paragraph (8)

The Chair said that the Special Rapporteur had proposed deleting the reference to paragraph 1 of draft guideline 9 in the first sentence.

Paragraph (8), as amended, was adopted with a minor drafting change.

Paragraph (9)

Mr. Forteau said that, in the second sentence, the phrase “decision to invoke other grounds” should be amended to “invocation of other grounds”, in order to align the text more closely with the statement of the Chair of the Drafting Committee at the Commission’s 3530th meeting, on the report of the Drafting Committee on the topic of provisional application of treaties (A/CN.4/L.952).

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Commentary to draft guideline 10 (Internal law of States, rules of international organizations and observance of provisionally applied treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

The Chair said that the Special Rapporteur had proposed replacing the words “internal law” with the word “provisions” in the last sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor drafting change.

Paragraph (5)

The Chair said the Special Rapporteur had proposed that the term “State responsibility” should be replaced with the term “international responsibility”. He took it that the Commission agreed to that amendment.

It was so decided.

The Chair said that a proposal had also been made to insert the words “or rules” after the words “internal law” at the end of the paragraph.

Mr. Rajput proposed that the words “or rules of an international organization”, instead of simply “or rules”, should be inserted at the end of the paragraph.

Mr. Murphy said that, if the Commission agreed to the amendment proposed by Mr. Rajput, the words “of a State” should be inserted after the words “internal law”. The entire phrase would thus read “internal law of a State or rules of an international organization”. That exact phrase was already contained in the first sentence of the paragraph; he wondered whether there was a need to repeat it.

Mr. Jalloh said that the phrase “internal law of States and rules of international organizations” was also explained in paragraph (6). He was unsure whether it was necessary to include a similar phrase in the final sentence of paragraph (5).

Mr. Rajput said that his proposed amendment would prevent confusion by bringing paragraph (5) into line with paragraph (6). He was open to Mr. Murphy’s proposal, but his preference was for inserting only the words “or rules of an international organization”.

Mr. Jalloh said that while he was not opposed to Mr. Rajput’s proposed amendment, it raised the question of whether paragraph (6) should be merged with paragraph (5).

The Chair said he took it that the Commission wished to amend paragraph (5) in line with the suggestion made by Mr. Rajput, as further amended by Mr. Murphy.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Commentary to draft guideline 11 (Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

The Chair said that the Special Rapporteur had proposed replacing the words “conducting itself” with the word “involved”.

Mr. Murphy said that he had suggested the amendment to the Special Rapporteur but he had since determined that the phrase “conducting itself” reflected the text of article 46 (2) of the 1969 Vienna Convention and article 46 (3) of the 1986 Vienna Convention, which were cited in footnote 53. He therefore proposed that the original text of paragraph (4) should be maintained.

The Chair said he took it that the Commission agreed to maintain paragraph (4) as originally drafted.

It was so decided.

Paragraph (4) was adopted.

Commentary to draft guideline 12 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations)

Paragraph (1)

Mr. Gómez-Robledo (Special Rapporteur) proposed that, on the basis of suggestions made by Mr. Grossman Guiloff and the Russian Federation, the word “regulations” should be inserted after the word “substantive” in the second sentence of paragraph (1). He also proposed, in line with a suggestion made by Mr. Zagaynov, that the phrase “reflecting them”, in the last sentence, should be amended to “reflecting such limitations”. A State might not necessarily provide, in the agreement to apply provisionally a treaty or a part of a treaty, an

explanation of all provisions of internal law that limited provisional application; however, such limitations should be reflected in the agreement.

Mr. Rajput said that internal law comprised much more than "regulations"; for example, constitutional law and legislation were not regulations. Regulation was often understood, in common-law jurisdictions, as reflecting the exercise of administrative authority. Inserting the word "regulations" into paragraph (1) would be tantamount to narrowing the scope of draft guideline 12 through the commentaries. He proposed that either the original text should be maintained or the first part of the second sentence should be amended to read "Such limitations may be substantive or procedural".

With regard to the proposal to amend the final clause of the last sentence to read "and reflecting such limitations in their consent to apply provisionally a treaty or a part of a treaty", the use of the word "and" could give the impression that the Commission was referring only to situations in which a reference to limitations derived from internal law was made at the time of expressing consent; however, that was only one of various possible scenarios. He therefore proposed that the word "and" should be replaced by a formulation that used the word "including".

Sir Michael Wood said that he agreed with Mr. Rajput's point with regard to the word "regulations" and supported his proposed reformulation of the first part of the second sentence. With regard to the last sentence, he proposed that the words "The provision acknowledges that such limitations may exist and, consequently, recognizes the right of" should be deleted and that the sentence should begin with the words "States and international organizations may agree to provisional application subject to limitations".

Mr. Grossman Guiloff said that he was not opposed to amending the text along the lines suggested by Mr. Rajput.

Mr. Murphy said that he supported Mr. Rajput's proposal to begin the second sentence with the phrase "Such limitations may be substantive or procedural" and Sir Michael Wood's proposal to delete the beginning of the third sentence. He proposed that "and reflecting them" in the last sentence should be replaced with "which may be reflected", so that the shortened version of the final sentence would read: "States and international organizations may agree to provisional application subject to limitations that derive from internal law or rules of the organizations, which may be reflected in their consent to apply provisionally a treaty or a part of a treaty."

Paragraph (1), as amended by Mr. Rajput, Sir Michael Wood and Mr. Murphy, was adopted.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that paragraph (2) had been the subject of an important change made in response to a suggestion put forward by several States, including Austria and Poland. Those States had requested that guideline 12 should make abundantly clear that the possibility of limiting the scope of the provisional application of treaties on the basis of limitations stemming from national law did not simply flow from the flexibility inherent in provisional application but was a right enjoyed by all States and international organizations. For that reason, he proposed that, in the first sentence, the word "flexibility" should be replaced with "right".

Mr. Forteau said that, although he understood the reasoning behind the proposed change from "flexibility" to "right", he found it strange to refer to a right in connection with the provisional application of treaties because, when application was provisional, States could effectively do as they pleased. He suggested "possibility" and "option" as suitable alternatives, noting that the former term was already used in the second sentence of the paragraph.

Mr. Murphy said that the paragraph was central to the topic. He noted that it was always possible that a treaty or other agreement that allowed for provisional application might not permit States to make their acceptance conditional upon the treaty or agreement's compatibility with the provisions of national law. Accordingly, if paragraph (2) was amended to refer to the "right" of States, a phrase that served as a caveat would need to be added. He

suggested that the caveat should read “unless the agreement on provisional application provides otherwise”, and could be placed at the end of the paragraph.

Mr. Forteau said that Mr. Murphy’s suggestion was not clear. The paragraph began by expressly recognizing that States could agree to provisional application, so it would be odd to end the paragraph with a phrase which suggested that, sometimes, an agreement between States might not allow for provisional application. The ambiguity might derive from the use of the words “agree”, in the first sentence, and “agreement”, in Mr. Murphy’s suggestion. It might be clearer to refer to unilateral acceptance of provisional application.

Mr. Rajput said that, in substance, Mr. Murphy’s suggestion implied that, if the agreement to provisionally apply a treaty did not allow for exceptions to comply with the provisions of national law, such exceptions could not be invoked. However, if that was the implication, the commentary would be contradicting the text of the guideline itself. The guideline was intended to accommodate States’ request that limitations deriving from their national laws should take precedence over provisional application. The Commission should therefore either retain the word “flexibility” or adopt one of the alternatives suggested by Mr. Forteau.

Mr. Gómez-Robledo (Special Rapporteur), acknowledging that paragraph (2) was very important, said that it would be wrong, in his view, to retain the word “flexibility”; however, if the Commission was opposed to replacing it with the word “right,” he was ready to accept one of Mr. Forteau’s suggested alternatives – namely “possibility” – as a compromise. He believed that option would satisfy those States who considered it important for the text to unambiguously convey the message that they had a “right” to limit provisional application. If that option was adopted, no additional text of the kind proposed by Mr. Murphy would be needed.

Mr. Grossman Guiloff said that he also supported Mr. Forteau’s suggestion. Although the question as to what the “possibility” would mean in practice was left open, clarification of the term’s meaning was provided by the general context.

Mr. Rajput said it appeared that States were expecting the Commission to recognize the possibility of restrictions on the provisional application of treaties in a manner that had a certain normative value and that the Special Rapporteur had proposed the word “right” for that reason. Since “possibility” had no normative value, he suggested that either “freedom” or “autonomy” would be a more appropriate alternative and would amply convey the message that, subject to compliance with their national laws, States were broadly free to do as they wished in the context of provisional application.

Mr. Petrič said he agreed that paragraph (2) made a point that was crucial to the entire topic. States had requested the term “right” to be used in connection with the possibility of restrictions on provisional application precisely because that term had an unambiguous meaning. Thus, although he would not object to any term, such as “possibility”, that might be adopted as a compromise, he supported the Special Rapporteur’s original proposal: the word “right” was clear and unambiguous.

Mr. Jalloh, noting that the term “right” was used in guideline 12 itself, said that the relevant commentary could either reproduce that term or use alternative language that explained the guideline. The words “possibility”, “option” and “freedom” were all good alternatives to “right” if explanation was the aim. With regard to the words “agree” and “agreement”, he wondered whether some of the ambiguity highlighted by members would be eliminated if the word “consent” was used instead. Such an amendment would also accommodate a comment made by Austria to the effect that the text was sometimes ambiguous when discussing consensual application of a treaty in that it was not clear whether the Commission was referring only to application by the parties to the treaty or also to States that had agreed to provisionally apply the treaty.

Mr. Murphy said that, in view of the direction that the discussion had taken, he was withdrawing his proposal for the inclusion of a caveat. If the word “possibility” was ultimately adopted for the first sentence, for reasons of grammar and readability, the words “to agree” would need to be changed to “agreeing”. However, given the concerns associated with the various alternatives put forward, he wished to suggest a simpler formulation that

read: “The present draft guideline recognizes that States or international organizations may agree to the provisional application of a treaty or a part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their respective internal provisions”. “Consent”, in his view, did not work as well as “agreement”.

Sir Michael Wood said that there was no reason to object to the use of the word “right”, given that it was used in the guideline itself. For that reason he favoured the Special Rapporteur’s initial proposal for the first sentence, although he would be happy with the alternative proposed by Mr. Murphy. He was opposed to the adoption of words such as “freedom” and “option” as alternatives to “right” since their use would introduce a completely new dimension.

Mr. Cissé said that, while Mr. Murphy’s suggestion was a good one, he had a further alternative to suggest, namely, “free choice” instead of “right”.

Mr. Jalloh said that he would withdraw his suggestion that “agree” and “agreement” should be replaced by consent. With regard to the choice between “right” and “possibility”, the decision should rest on whether the Commission was looking to emphasize or to explain the language used in the guideline. In the latter case, the formulation proposed by Mr. Murphy would underscore the flexibility expressed in the initial wording, besides addressing the concerns raised by States; it fleshed out the intended meaning of the guideline while avoiding the use of any of the various alternatives suggested during the discussion.

Mr. Gómez-Robledo (Special Rapporteur) said that he wished to assure the members of the Commission that the wording of paragraph (2) had been the subject of extensive, in-depth reflection on his part, in which he had taken account of the importance that certain States attached to the notion of “right” in the context of guideline 12. The discussion could no doubt continue, but, ultimately, the simplest and best solution was to retain his initial proposal, with “flexibility” replaced with “right” and no further changes.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Forteau said that the opening clause of the paragraph, which stated that the word “agreement” in the title of the draft guideline reflected the consensual basis of the provisional application of treaties, was problematic, since it was the title as a whole, not simply the term “agreement”, that performed the function described. The first sentence should therefore begin with the words “The title of the draft guidelines” and the reference to the “agreement” should be deleted.

The Chair, speaking as a member of the Commission and seconded by **Mr. Rajput**, said that the Special Rapporteur’s initial proposal posed no problem.

Sir Michael Wood said that Mr. Forteau’s suggestion was a neat way of ensuring that the whole of the title, which included the word “agreement” but also other elements, was encompassed in the paragraph.

Mr. Gómez-Robledo (Special Rapporteur) said that the title of the guideline had been discussed extensively by the Drafting Committee and it had not been easy to reach agreement. It was for that reason that he had perceived a need to clarify in the commentary why the title was worded in the way that it was. He thought that Mr. Forteau’s suggestion added clarity to the paragraph and was happy to adopt that formulation.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The Chair invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.945, sections C and D of which had been left in abeyance pending the adoption of the draft commentaries.

C. Recommendation of the Commission

Paragraph 9

The Chair said that the meeting number and date would be added so that the opening phrase read “At its 3557th meeting, held on 3 August 2021”.

Mr. Gómez-Robledo (Special Rapporteur) said that, to align the text of subparagraph (a) with the recommendations that the Commission had made to the General Assembly in respect of the Guide to Practice on Reservations to Treaties in 2011, he proposed that the words “annex the Guide to the resolution” should be deleted.

The content of subparagraph (c) had been discussed in detail during the debate on his sixth report. He had been working on the preparation of a new volume of the United Nations Legislative Series for many years, as it was some time since the last volume had been published. The secretariat had the necessary funds for such publications, which could be a useful tool for Member States and international organizations.

Mr. Jalloh said that it was not clear why the Special Rapporteur was proposing to delete the words “annex the Guide to the resolution”. When the Commission had adopted the draft conclusions on identification of customary international law on second reading, it had recommended that the General Assembly should annex the draft conclusions to the relevant resolution.

Mr. Forteau asked whether the phrase “annex the Guide to the resolution” covered the examples of provisions on provisional application of treaties as well as the guidelines.

Mr. Gómez-Robledo (Special Rapporteur) said that he had would prefer to avoid a discussion about what the General Assembly might or might not decide to do. The Commission had already had a discussion about the status of the annex containing examples of provisions on provisional application of treaties. The General Assembly, acting on the recommendation of the Sixth Committee, would certainly decide to annex some part of the Guide to the resolution and, in his view, it would make sense to annex the guidelines only. The rest of the Guide would probably be excluded from the resolution but included in the Commission’s report, which would contain, firstly, the draft guidelines, next, the commentaries. and, lastly, the annex and the bibliography. For paragraph (9), he had borrowed from the model used for the Guide to Practice on Reservations to Treaties, which did not specify what should or should not be annexed, leaving that decision squarely with the General Assembly. Ultimately, in that case only the guidelines had been annexed.

Paragraph 9, as amended, was adopted.

D. Tribute to the Special Rapporteur

Paragraph 10

The Chair said that the meeting number and date would be added, as in paragraph 9.

Paragraph 10 was adopted with minor drafting changes.

Chapter V as a whole, as amended, was adopted.

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.946, A/CN.4/L.946/Add.1 and A/CN.4/L.946/Add.2)

The Chair invited the Commission to consider chapter VI of its draft report, beginning with the portion contained in document A/CN.4/L.946.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

Paragraph 3 was adopted with minor drafting changes.

B. Consideration of the topic at the present session

Paragraph 4

Mr. Rajput said it was stated in the second sentence that good practices had been considered in the Special Rapporteur's eighth report. However, the Commission had considered only the possibility of including them, which had been rejected. It would be better to use the more neutral description that could be found in paragraph 9 of the text, "the possible inclusion of recommendations of good practices in the draft articles".

Ms. Escobar Hernández (Special Rapporteur) said that her eighth report contained a chapter entitled "Recommended good practices". The existing wording of the sentence could therefore be retained.

Mr. Park, supported by **Mr. Tladi**, **Mr. Jalloh** and **Mr. Saboia**, said that there was no need to amend the second sentence, which was merely a description of the content of the Special Rapporteur's eighth report.

Mr. Rajput said that the Commission should not lead Member States to think, wrongly, that good practices had been provided in the report.

Ms. Escobar Hernández (Special Rapporteur) said that the sentence accurately described the content of the relevant chapter of her eighth report, in which she had referred to two specific points: the desirability of decisions relating to immunity being adopted by high-level national authorities and the question of the preparation of a guide. She could not accept Mr. Rajput's proposal.

Mr. Rajput said the second sentence stated that the Special Rapporteur's eighth report had "considered good practices that could help to solve the problems that arise in practice in the process of determining and applying immunity". However, no such practices had been discussed in the report. Rather, it was explained in the report that, while the Commission had considered whether it should recommend good practices, it had ultimately decided not to do so. In accordance with that decision, no good practices had been provided in the report. He was proposing that the sentence should be amended to reflect the more accurate description of the relevant chapter of the report that could be found in paragraph 9 of the text.

The Chair, speaking as a member of the Commission, suggested that one way of addressing Mr. Rajput's concern might be to insert the words "the issue of" before "good practices" in the second sentence.

Ms. Escobar Hernández (Special Rapporteur) said that she was prepared to accept the Chair's suggestion.

Paragraph 4, as amended, was adopted.

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Paragraph 7

Ms. Escobar Hernández (Special Rapporteur) said that the paragraph would be supplemented with a reference to the fact that draft article 12 had been provisionally adopted at the current session and to the number of the meeting at which it had been provisionally adopted.

Paragraph 7 was adopted, subject to its completion by the secretariat.

Paragraph 8

Paragraph 8 was left in abeyance pending the adoption of the commentaries.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

Paragraph 11

Mr. Tladi, referring to the last part of the first sentence, said that he found the words "in the light of the difficult circumstances of and methods of work for the current session" difficult to follow.

Ms. Escobar Hernández (Special Rapporteur) said that the purpose of the first sentence was to explain why she had held two rounds of informal consultations before the start of the current session. For greater clarity, the last part of the sentence could be amended to read "formulate proposals that would allow the Drafting Committee to make progress, taking into account the difficult circumstances and methods of work that would have to be adapted at the current session".

Mr. Rajput said that another solution would be to delete the word "of" after "circumstances" and to add the word "adopted" after "methods of work".

Mr. Jalloh said that a third solution would be to insert the words "the COVID-19 pandemic" after "difficult circumstances of" and the words "that had to be adapted" after "methods of work".

Ms. Escobar Hernández (Special Rapporteur) said that Mr. Rajput's suggestion offered a good solution. She also had no objection to Mr. Jalloh's suggestion to add a reference to the coronavirus disease (COVID-19) pandemic.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

Mr. Rajput said that, in paragraph 13, the intention seemed to be to compare national and international criminal courts and tribunals. The focus was not on "international criminal jurisdiction" as such. He therefore proposed that the words "jurisdiction" in the fifth sentence should be replaced with "tribunals".

Ms. Escobar Hernández (Special Rapporteur) said that the paragraph was taken from a summary of her statement introducing the eighth report at the 3520th meeting of the Commission, when she had explicitly spoken about "international criminal jurisdiction". She therefore saw no reason to amend the paragraph.

Mr. Jalloh said that similar language could also be found in paragraph 13 of her eighth report, which stated that "some relationship could exist between the present topic and the phenomenon of international criminal jurisdiction". He was in favour of retaining the original wording.

Mr. Rajput said that, as far as he recalled, the emphasis in the debate had been on tribunals. He was trying not to put words into the Special Rapporteur's mouth but to improve the text. That said, he would not object to retaining the original wording.

Paragraph 13 was adopted.

Paragraph 14

Mr. Murphy proposed that, for greater clarity, the word "definition" in the second sentence should be replaced with "recognition" and the word "standing" in the third with "nature".

Ms. Escobar Hernández (Special Rapporteur) said that, with regard to Mr. Murphy's first proposal, she would prefer to retain "definition", which was a more neutral word in the context of the question of whether there existed an exception to immunity derived from the obligation to cooperate with an international criminal tribunal. In any case, it was stated later

in the paragraph that the Commission had decided not to retain such an exception in draft article 7. She had fewer difficulties with Mr. Murphy's second proposal, but she would nevertheless prefer to retain the original wording.

Paragraph 14 was adopted.

Paragraph 15

Paragraph 15 was adopted.

The meeting rose at 1 p.m.