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Summary record of the 3378th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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108. Mr. MURASE said that he very much appreciated the fact that, at its 2017 annual session, AALCO had devoted a half-day session to topics under consideration by the Commission. Noting that its current membership of 47 States represented only half of the total number of Asian and African countries, he asked whether there was, for instance, any possibility of inviting Pacific Island States to join the Organization.

109. Mr. JALLOH asked whether there was any possibility of the annual sessions of AALCO being held earlier in the year, for example in January or February, as that would allow for the verbatim record of proceedings to be published in time for the views expressed by States within the framework of AALCO to be taken into account by Commission members in their interventions during the Commission's session. Noting that a meeting had been organized by AALCO in Malaysia in 2015 on the identification of customary international law, with the participation of Sir Michael Wood, and that other special rapporteurs were interested in participating in such events, he said that it would be helpful if further seminars could be held as part of increased cooperation efforts, in particular on topics for which a full set of draft articles had been adopted by the Commission. Lastly, noting that in 2015 the AALCO secretariat had published a note on its website seeking comments from member States on new topics on the Commission's agenda, he wondered whether there had been any discussions within AALCO with a view to suggesting possible future topics. Given the membership of AALCO, it would be very helpful for the Commission to hear member States' views in that connection both within the framework of AALCO and also, perhaps in a coordinated manner, within the Sixth Committee of the General Assembly.

110. Mr. GASTORN (Secretary-General of the Asian-African Legal Consultative Organization) said that one of his main activities as AALCO Secretary-General was to consider ways to increase the Organization's membership. Currently, efforts were being made to increase the representation of African States, in particular francophone States, since only 14 of the Organization's current members were from Africa, as well as that of Central Asian countries. It was the Organization's intention to extend invitations to the Pacific Island States, whose membership would be an asset in terms of their jurisprudence on various issues, including the law of the sea.

111. Although the exact timing of the annual sessions of AALCO was to a large extent determined by the host country, it was his Organization's intention that they should, as far as possible, take place before the Commission's sessions. He reiterated the critical importance to AALCO of the presence of Commission members at its annual sessions. As to proposing new topics for inclusion on the Commission's long-term programme of work, members of the AALCO Eminent Persons Group were actively exploring possibilities in that regard.

112. Mr. VALENCIA-OSPINA said that the work of AALCO, as reflected, for example, in the records of its proceedings, was immensely valuable to the Commission in the preparation of its drafts. AALCO also played an important role in later stages of the Commission's work, for

example within the framework of diplomatic conferences. In that connection, he recalled that the Commission had recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters,³⁷⁰ for which topic he had been the Special Rapporteur. He would therefore be interested to know whether that recommendation was the subject of discussion within AALCO in terms of coordinating the position of member States with a view to the debate in the General Assembly on the matter due to take place in 2018.

113. Mr. VÁZQUEZ-BERMÚDEZ, referring to topics on the current programme of work of AALCO, said that he would like to know what specific aspects of the law of the sea it was dealing with, in particular whether there had been any coordination between member States regarding the negotiations in New York on protection of the marine environment in areas beyond national jurisdiction with a view to developing a binding instrument. He would also be interested to know what developments had taken place within AALCO in terms of its work on international law in cyberspace.

114. Mr. GASTORN (Secretary-General of the Asian-African Legal Consultative Organization) said that, although AALCO itself did not directly engage in discussions in the General Assembly, it organized consultations in that connection among its member States to allow them to share experiences with a view to reaching a common position on various issues. Following discussions within AALCO on the subject of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, a study had been developed that raised critical issues that were under consideration during the ongoing discussions in New York.

115. The CHAIRPERSON thanked the Secretary-General of AALCO for the valuable information he had provided on his Organization and for his responses to the various questions put by Commission members.

The meeting rose at 1.05 p.m.

3378th MEETING

Thursday, 20 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, 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. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

³⁷⁰ The draft articles on the protection of persons in the event of disasters and the commentaries thereto are reproduced in *Yearbook ... 2016*, vol. II (Part Two), pp. 25 *et seq.*, paras. 48–49.

Immunity of State officials from foreign criminal jurisdiction (*concluded*)* (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. RAJPUT (Chairperson of the Drafting Committee) introduced the titles of Parts Two and Three and the titles and texts of draft article 7 and annex provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.893, which read:

PART TWO

IMMUNITY *RATIONE PERSONAE***

...

PART THREE

IMMUNITY *RATIONE MATERIAE***

...

Article 7. Crimes under international law in respect of which immunity ratione materiae shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- (a) crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of apartheid;
- (e) torture;
- (f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Annex

**LIST OF TREATIES REFERRED TO IN
DRAFT ARTICLE 7, PARAGRAPH 2**

Crime of genocide

Rome Statute of the International Criminal Court, 17 July 1998, article 6;

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

Rome Statute of the International Criminal Court, 17 July 1998, article 8, para. 2.

* Resumed from the 3365th meeting.

Crime of apartheid

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, para. 1.

Enforced disappearance

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

** The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

2. The Drafting Committee had devoted seven meetings, from 30 May to 7 July 2017, to the consideration of draft article 7, as proposed by the Special Rapporteur in her fifth report (A/CN.4/701). It had also considered a number of suggested reformulations and a proposed annex, presented by the Special Rapporteur in response to suggestions made and concerns raised in the course of its work. The Drafting Committee had provisionally adopted draft article 7, together with an annex to the draft articles, on 7 July 2017. He paid tribute to the Special Rapporteur, Ms. Escobar Hernández, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee.

3. Before focusing on the details of the draft article, members of the Drafting Committee had made general comments on the text as a whole, which had helped to contextualize the work. The comments had related, *inter alia*, to the structure of the draft article and its relationship to existing and future draft articles on the topic; the scope and nature of the crimes referred to in paragraph 1 of the draft article and their possible definition; and the scope of paragraphs 2 and 3. Comments had also addressed the distinction between limitations on and exceptions to immunity, including the question of to what extent the crimes listed constituted “acts performed in an official capacity”.

4. The Drafting Committee had proceeded on the general understanding that the outcome of its work was without prejudice to, and took no position on, the question of whether the text of draft article 7, or any part thereof, codified existing law, *lex lata*, or whether the result constituted an exercise in progressive development, *lex ferenda*. Indeed, some members of the Drafting Committee had underlined the fact that their participation was without prejudice to the fundamental problems that they had with the text. The view had been expressed that the Drafting Committee was essentially embarking on a policymaking exercise, as opposed to seeking the codification or progressive development of the law. Some members would have preferred the draft article to be retained within the Drafting Committee until 2018 and considered together with any proposals on procedural aspects to be made by the Special Rapporteur. However, other members had considered that the time was right for the Drafting Committee to proceed with the issue.

5. Second, the Drafting Committee had agreed that the procedural aspects of immunity of State officials from foreign criminal jurisdiction were closely related to the question of limitations and exceptions, as well as to the draft articles as a whole. Procedural aspects would be addressed the following year in the sixth report of the Special Rapporteur. In its work during the current session, the Drafting Committee had stressed the importance, for the draft article under consideration and for the draft articles as a whole, of procedural safeguards and guarantees. That concern was reflected in a footnote that the Drafting Committee had decided to insert in the text.

6. The report of the Drafting Committee contained in document A/CN.4/L.893 included the text of the draft article together with an annex, as provisionally adopted by the Drafting Committee. Paragraph 1 of draft article 7 consisted of a *chapeau* and six subparagraphs. The Drafting Committee had decided to make it explicit in the *chapeau* that the limitations and exceptions set out in the draft article had a bearing solely on immunity *ratione materiae*, reflecting a desire by members to be as specific as possible when dealing with matters in the sphere of criminal law. The Drafting Committee had underlined the restricted application of the limitations and exceptions by placing draft article 7 within Part Three of the draft articles, which dealt with immunity *ratione materiae*.

7. The Drafting Committee had considered that, since paragraph 1 explicitly limited the scope of draft article 7 to immunity *ratione materiae*, the reference to immunity *ratione personae* in paragraph 2 as originally proposed by the Special Rapporteur had become superfluous and could be deleted. The commentary would further emphasize the fact that the limitations and exceptions listed in draft article 7 did not apply with respect to immunity *ratione personae* and would clarify that those limitations and exceptions were applicable to officials who enjoyed immunity *ratione personae* and whose term of office had come to an end.

8. The desire for specificity had also informed the Committee's decision to include the phrase "from the exercise of foreign criminal jurisdiction" in the *chapeau*, so as to indicate that immunity did not apply to the crime itself, but to the exercise of foreign criminal jurisdiction. The placement of the phrase directly after the words "immunity *ratione materiae*" corresponded to the wording of draft articles 3 and 5.³⁷¹

9. After considering various options, the Drafting Committee had decided to retain the phrase "shall not apply", as originally proposed by the Special Rapporteur. The term "shall" had been preferred over "should", "will" or "does", as it was considered most appropriate. It corresponded to wording used in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, particularly articles 10 and 11 thereof. The Drafting Committee had entertained the possibility of starting the paragraph with the phrase "State officials do not enjoy". Although that would have reflected the language

used in draft article 6, paragraph 1,³⁷² members had expressed concern that such wording could be interpreted as excluding from the scope of draft article 7 former State officials, to whom the limitations and exceptions set out therein were also intended to apply. The Drafting Committee had decided against including the phrase "cannot be invoked", which would have introduced procedural elements into the text. Draft article 7 did not deal with procedural questions of invocation, but rather with substantive issues of applicability: it identified types of activity to which immunity *ratione materiae* did not apply. The Drafting Committee had replaced the phrase "in relation to" with "in respect of" in order to harmonize the text of the *chapeau* with the proposed title of the draft article.

10. After some debate, the Drafting Committee had decided to include the phrase "crimes under international law" in paragraph 1 to highlight the fact that draft article 7 related only to crimes that had their foundation in the international legal order and that were defined on the basis of international law, rather than domestic law. The phrase reflected wording used previously by the Commission, for example in the 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal³⁷³ (Principles I to III and V to VII), the 1954 draft code of offences against the peace and security of mankind³⁷⁴ (article 1) and the 1996 draft code of crimes against the peace and security of mankind³⁷⁵ (article 1, para. 2). The commentary would emphasize the fact that the phrase "under international law" related to "crimes".

11. The Drafting Committee had debated extensively whether paragraph 1 should list specific crimes and, if so, what crimes ought to be included and whether or how they ought to be defined. Some members had favoured a general reference to "the most serious crimes recognized under international law", or a similar formulation, instead of listing specific crimes, leaving the scope of the paragraph open and allowing it to incorporate new developments in international law, in particular in international criminal law. The commentary would then have specified which "serious crimes" fell within the scope of the paragraph. Other members had been of the view that a reference to "serious crimes" was too vague. They had preferred the inclusion of a detailed list of crimes, noting that criminal law demanded specificity. That was the position to which the Drafting Committee had eventually agreed. Further, it had been decided to list the crimes *seriatim*, in individual subparagraphs, rather than to group them together in a single subparagraph.

12. The discussion had then turned to the crimes to be included in the draft article. Members had considered whether there was a need to agree first on an underlying theory, basis or criterion or criteria on which certain crimes would be included and others not. In the final analysis, the preponderance of views had favoured the

³⁷¹ *Yearbook ... 2013*, vol. II (Part Two), p. 43 (draft article 3); and *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 146 (draft article 5).

³⁷² *Yearbook ... 2016*, vol. II (Part Two), p. 162 (draft article 6).

³⁷³ *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

³⁷⁴ *Yearbook ... 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

³⁷⁵ The draft code adopted by the Commission in 1996 is reproduced in *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

inclusion of genocide, war crimes and crimes against humanity, as the core crimes contained in the Rome Statute of the International Criminal Court and prohibited in customary international law. To some members, their prohibition constituted *jus cogens*. A suggestion to refer to the “crime of genocide” rather than simply “genocide”, had been adopted by the Drafting Committee, in order to mirror the wording used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court.

13. Some members had reiterated that the Drafting Committee ought to justify its selection on the basis of a set of predetermined criteria, for example crimes that could only be committed by Governments, crimes whose prohibition concerned peremptory norms of international law (*jus cogens*), crimes listed in the Rome Statute of the International Criminal Court, or crimes that were subject to a conventional *aut dedere aut judicare* regime. It was noted that all possible theories had their shortcomings. Some members had stressed the need to adopt a more pragmatic approach, based upon what might be acceptable to States. In that regard, the Special Rapporteur had clarified that the crimes had been selected on the basis of their status in treaties and in practice. The fifth report had accordingly proposed the inclusion of torture and enforced disappearance. Some members had argued that those crimes fell within the scope of crimes against humanity and that their inclusion in draft article 7 was superfluous. Other members had maintained that crimes against humanity were subject to a threshold, as they had to be committed as part of a widespread and systematic attack directed against a civilian population. Those members had maintained that acts of torture and enforced disappearance might not always reach such a threshold.

14. The same had been said of the crime of apartheid, the inclusion of which had been supported by some members. A view had been expressed that the crime of apartheid was a “historical” crime and that its inclusion was unnecessary. Some had viewed apartheid as covered under crimes against humanity. However, the majority had felt that apartheid should be mentioned separately. Some members had questioned why apartheid should be included, but not slavery or human trafficking as a modern form of slavery, since both were also the subject of international conventions.

15. Ultimately, the prevailing view within the Drafting Committee had been to include torture, enforced disappearance and apartheid as separate crimes. For historical reasons, it had listed the crime of apartheid immediately after the core crimes, followed by torture and enforced disappearance. It had also decided to refer to enforced disappearance in the singular, in line with the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

16. Members had debated whether to include the crime of aggression. Some members had expressed their strong support for its inclusion. They considered the crime of aggression to be the supreme international crime and had pointed to its inclusion in earlier work of the Commission in the field of international criminal law, such as the 1950 Principles of International Law recognized in the Charter

of the Nürnberg Tribunal and in the Judgment of the Tribunal, the 1954 draft code of offences against the peace and security of mankind and the 1996 draft code of crimes against the peace and security of mankind. Members had also referred to the pending activation of the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression adopted in Kampala by the Assembly of States Parties to the Rome Statute of the International Criminal Court and had suggested that any decision on inclusion should be postponed until 2018. It had been asserted that the crime of aggression was not necessarily more political than other crimes included in the list, such as war crimes and crimes against humanity, which were often perpetrated by political leaders.

17. Other members had expressed reservations regarding the inclusion of the crime of aggression, noting that national courts were not necessarily well placed to prosecute all crimes falling under the jurisdiction of an international court. Members had also raised concerns about the political nature of the crime of aggression and the potential for abuse were it to be included as a crime to which immunity *ratione materiae* did not apply. Furthermore, it had been pointed out that there was no practice of national courts in prosecuting the crime of aggression. In the end, the Drafting Committee had decided not to include the crime of aggression, but had suggested that the Special Rapporteur should reflect the various viewpoints on the issue in the commentary. Such a course of action would afford States an opportunity to comment on the matter.

18. In her fifth report, the Special Rapporteur had proposed including corruption as a crime to which immunity did not apply. Several members had supported that proposal, pointing out that corruption, particularly wide-scale or “grand” corruption, severely affected the stability and security of States and societies. Those members had drawn attention to the close link between corruption and official acts. In their view, the dividing line between public and private acts was very difficult to draw in cases of corruption, as the crime was typically committed on the basis of official authority or under cover of authority by individuals taking advantage of their public position. Members had also noted that corruption was already the subject of various treaties, including the 2003 United Nations Convention against Corruption.

19. Other members had questioned the inclusion of corruption, arguing that it could never constitute an official act or be performed in an official capacity, as it was always committed with the objective of private gain. In their view, corruption was already excluded from the domain of immunity *ratione materiae* on the basis of draft article 6, paragraph 1. The view had also been expressed that corruption was not an international crime, as it did not derive its criminal character from international law. Rather, it was a crime under domestic law that often required transnational cooperation for its effective prevention and punishment. In that regard, it had been recalled that the United Nations Convention against Corruption did not actually define corruption, but rather called for measures to prevent and combat it more effectively. There were many crimes dealt with in treaties that did not qualify as “crimes under international law”. In the end, the Drafting Committee had decided not to include the crime of corruption in draft article 7, even though it

had underscored its seriousness. Its exclusion signified only that it was a crime to which immunity did not apply.

20. The Drafting Committee had received several other suggestions for crimes to be included, including slavery, human trafficking, child prostitution and child pornography, piracy and terrorism. Upon reflection, it had decided not to incorporate them into draft article 7, but that was no reflection upon their severity.

21. The Drafting Committee had discussed whether it should refer to modes of perpetration or ancillary crimes, such as attempting to commit an international crime, aiding and abetting, and complicity. Ultimately, it had considered that immunity was a preliminary issue that typically arose before questions of modes of liability were dealt with. It had therefore deemed it unnecessary to refer to the issue.

22. The Drafting Committee had extensively debated whether draft article 7 or the commentary should include definitions of the crimes listed. Various suggestions had been made, such as including the definitions in the text or in the commentary or not providing any definitions at all. Several members had emphasized that the crimes listed must be defined according to international law, otherwise it would result in confusion before domestic courts, and that domestic judges should not be left any discretion to interpret the relevant crimes according to national law. For that reason, it was felt necessary for the definitions to be part of the text of the draft article, rather than the commentary.

23. In order not to overburden the text, the Drafting Committee had decided not to include definitions of the crimes listed in paragraph 1 directly in the draft article but in an annex, ensuring that they would be read as part of the text. The exercise had been inspired by the Commission's work on what had become the Rome Statute of the International Criminal Court and on the articles on the effects of armed conflicts on treaties.³⁷⁶ Paragraph 2 provided the link between paragraph 1 and the annex. It confirmed that the crimes listed in paragraph 1 must be understood according to international law, in particular their definition in the treaties enumerated in the annex to the draft articles. The phrase "For the purposes of the present draft article" indicated that the draft article and the annex did not provide definitions of the crimes for the purposes of criminal prosecution, but only for determining whether immunity *ratione materiae* applied. It also made clear that the references to treaty definitions in the annex were without prejudice to the status of the crimes under customary international law.

24. The words "the crimes under international law" reflected the wording of the *chapeau* of paragraph 1. The phrase "mentioned above" referred to the crimes listed in paragraph 1. The phrase "are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles" emphasized that national judges or prosecutors must interpret the crimes listed as defined in international law, not as defined in their respective domestic legal systems.

25. The Drafting Committee had decided to limit the list of treaties in the annex to international or universal conventions and not to include regional instruments. For each of the crimes listed in draft article 7, paragraph 1, the annex identified the relevant provision in one or two treaties that defined the crime. Some members had suggested including references to all treaties that provided definitions of the crimes, in order to be as comprehensive as possible and demonstrate wide participation in the treaties and wide acceptance of the definitions. Other members had maintained that participation was irrelevant for the purposes of the annex, as it was concerned only with definitions. They had also pointed out that definitions varied among treaties, which might be confusing to domestic judges and prosecutors. For those reasons, the Drafting Committee had decided to refer only to the most pertinent treaties.

26. With regard to the crime of genocide, the Committee had listed both article 6 of the Rome Statute of the International Criminal Court and article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, on the understanding that the definition of genocide in the two instruments was identical. It had also referred to the Statute for the definitions of crimes against humanity and war crimes, contained in article 7 and article 8, paragraph 2, thereof, respectively. The Committee had considered that the Statute provided the most modern definition of such crimes, particularly war crimes. It had noted that the Statute contained the most up-to-date list of war crimes and incorporated "grave breaches" of the 1949 Geneva Conventions for the Protection of War Victims and the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), war crimes under customary international law, including crimes committed in non-international armed conflict, and war crimes flowing from other treaties on international humanitarian law.

27. Owing to the concern regarding the threshold for certain crimes, the Rome Statute of the International Criminal Court had not been listed as relevant for the definition of the other crimes (apartheid, torture and enforced disappearance). In those cases, the annex listed the pertinent provisions of the relevant international conventions: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention for the Protection of All Persons from Enforced Disappearance.

28. In her fifth report, the Special Rapporteur had proposed including a version of the "territorial tort" exception as a ground for the non-application of immunity *ratione materiae*. It had been pointed out that the United Nations Convention on Jurisdictional Immunities of States and Their Property did not contain such an exception for crimes, and that in any case the exception could not apply to acts *jure imperii*. Some members had considered the provision superfluous, since it would only cover acts not performed in an official capacity. Some members had expressed the view that it was not an issue covered by exceptions because immunity would not arise,

³⁷⁶ The draft articles on the effects of armed conflicts on treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

and there was no need to create an exception to something that did not exist. The Drafting Committee had not, therefore, incorporated the proposed provision into draft article 7. Instead, the commentary would clarify that, to the extent that such acts were subject to the principle of territorial sovereignty, they did not enjoy immunity *ratione materiae*.

29. Another proposal made in the fifth report was the inclusion of two “without prejudice” clauses in what had originally been paragraph 3 of the draft article. The Drafting Committee had decided that, if they were to be included, the clauses ought to apply to the draft articles as a whole. To that end, it had been decided to take the clauses out of draft article 7 and to consider them together with other procedural aspects at the Commission’s next session. They might, for instance, be placed in a separate draft article.

30. At the outset of its deliberations on draft article 7, the Drafting Committee had acknowledged the need to consider the close relationship between the question of limitations on and exceptions to immunity and the procedural aspects of immunity, which would be addressed in the Special Rapporteur’s sixth report. In addition to a reference to the issue, to be included in the commentary to draft article 7, the Committee had contemplated several ways to reflect that need in the text thereof. It had eventually agreed to do so in a footnote, in preference to other suggestions, such as the inclusion of a placeholder or safeguard clause in the *chapeau* of draft article 7. It had been noted that none of the draft articles adopted so far contained a placeholder or safeguard clause. The Drafting Committee had also decided against explicit reference to particular procedural mechanisms, such as waiver of immunity. Members had been of the opinion that to do so would mix substantive and procedural aspects of limitations on and exceptions to immunity, which they would prefer to deal with in separate draft articles.

31. The footnote read: “The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.” The reference to “provisions and safeguards” indicated that the procedural aspects of immunity were not restricted to the question of limitations on and exceptions to immunity, but affected the draft articles as a whole. To underline that, the Drafting Committee had attached the footnote to the headings of Part Two, on immunity *ratione personae*, and Part Three, on immunity *ratione materiae*, rather than to the title of draft article 7, “Crimes under international law in respect of which immunity *ratione materiae* shall not apply”. Draft article 7 would be placed within Part Three.

32. Some members of the Drafting Committee had been opposed to transmitting draft article 7 back to plenary at that time, for a number of reasons. They were firmly of the view that it did not reflect existing law and wanted that to be clearly acknowledged; they considered that the provision should only be forwarded together with procedural safeguards, given the serious risk of abuse; and they did not support the proposal, even as one of new law.

33. The CHAIRPERSON explained that the commentary to draft article 7 would be issued in all six languages

during the final week of the Commission’s session. The Commission’s usual practice in such cases was to consider adopting the text of the draft article provisionally, pending final adoption, together with the commentary, as part of its report to the General Assembly. He took it that the Commission agreed to that course of action.

It was so decided.

34. The CHAIRPERSON asked whether the Commission wished to adopt the report of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction, contained in document A/CN.4/L.893.

Explanations of vote

35. Mr. KOLODKIN said that draft article 7 was a construction based on quasi-legal theoretical premises, neither having a basis in nor reflecting existing international law, nor did it reflect any real, discernible trend in State practice or international jurisprudence. If, as appeared to be the case, the aim was to develop customary international law, it was neither progressive nor desirable development. Nothing prevented the Commission from explaining that, cognizant of the state of *lex lata* in the field, it had nevertheless decided to propose—to those States that were willing to entertain the possibility of prosecuting one another’s officials for international crimes—a model draft article to be included in a treaty or treaties that they might wish to conclude. It seemed, however, that the Special Rapporteur and the majority of the Commission aspired to a much more far-reaching outcome. He did not share those ambitions.

36. Of greater concern was the fact that the draft article and the way in which the Commission intended to present it to the General Assembly invited unilateral actions—actions which were contrary to international law, had a very slim potential of contributing to the fight against impunity and the protection of human rights and might be genuinely detrimental to inter-State relations. The real test would be States’ reaction to draft article 7, but he firmly disagreed with the proposal to adopt it.

37. Mr. MURPHY said that, like Mr. Kolodkin, he could not join the consensus on the adoption of draft article 7. The essential problem was that the exceptions identified in the draft article were not grounded in existing international law, nor could it be said that there was a trend towards such exceptions. The Commission was proceeding with draft article 7 even though there was only a handful of national laws and cases and no global treaties or other forms of State practice supporting such exceptions. As had become very clear in the Drafting Committee, there were no legal criteria for inclusion in or exclusion from the list of crimes that appeared in the annex to draft article 7. The list was purely an expression of the policy preferences of some members, largely grounded in the Rome Statute of the International Criminal Court, which many States had not ratified, and which said nothing about the immunity of State officials from prosecution in national courts. Nonetheless, the Special Rapporteur and some members of the Commission were unwilling to acknowledge that draft article 7 was a proposal for entirely new law, not codification or progressive development of

international law. As a result, adopting draft article 7 at that stage, especially without having established procedural provisions and safeguards, risked unleashing confusion and abuse in national legal systems.

38. What had happened in the Drafting Committee further demonstrated that draft article 7 was not based on existing law: the Special Rapporteur had claimed that there was existing practice and a trend to support the exceptions related to corruption and territorial crime, but those exceptions had now disappeared from the draft article. On the other hand, she had argued that there was insufficient practice and no trend to support an exception for apartheid, yet such an exception now appeared in the draft article. The fifth report cited no national law or national or international case law supporting an exception to immunity *ratione materiae* in a national criminal proceeding for the crime of apartheid. Nor was there any treaty containing such an exception: the International Convention on the Suppression and Punishment of the Crime of Apartheid was silent on the issue. If no treaties, national laws or national or international case law were needed to provide support for the listing of a crime in the annex to draft article 7, one wondered why other serious crimes that were addressed in treaties, such as slavery and human trafficking, were not included in that list. He encouraged the members of the Commission not to vote to adopt draft article 7, but rather to send it back to the Drafting Committee for further work in 2018 in conjunction with the issue of procedural provisions and safeguards.

39. Sir Michael WOOD said that, having opposed the substance of the draft article in the plenary debate, he had made his position on draft article 7 clear in the Drafting Committee. He was of the firm view that the text did not reflect existing international law or a trend, was not desirable as new law and should not be proposed to States. If it was nevertheless proposed, the Commission must make it clear that it was a proposal for new law, and not codification or progressive development of existing law. The materials cited by the Special Rapporteur in her report simply did not support draft article 7. He was therefore opposed to the plenary provisionally adopting draft article 7. It should be sent back to the Drafting Committee for review in the light of the procedural provisions and safeguards to be proposed in the Special Rapporteur's sixth report in 2018. If, however, the Commission did proceed to provisionally adopt the draft article, there was no consensus to do so and it would be necessary to proceed by way of a vote.

40. Mr. HUANG said that the report by the Chairperson of the Drafting Committee faithfully reflected the fact that it had decided to provisionally adopt draft article 7 in spite of the strong opposition expressed by several members. Such a hasty decision went against the fine tradition of the Commission. He fully agreed with Mr. Kolodkin, Mr. Murphy and Sir Michael Wood, and wished in turn to express his strong opposition to the Drafting Committee's decision regarding draft article 7.

41. The number of members for or against a proposition could not serve as the only basis for decision-making. Currently, it seemed that more members were in favour of draft article 7 than against. However, the views of the

minority should also be given due attention, particularly when it came to such an important topic. The reasons for opposing draft article 7 were not merely related to technical matters or wording, but to certain fundamental issues on which some members had different views from the Special Rapporteur. In the light of that substantive division, it would be reckless to proceed on the basis of majority rule; instead, the Commission should do its utmost to seek consensus. If a consensus could not yet be reached, the Commission should temporarily put the issue aside and come back to it later.

42. He recalled that article 8 of the Commission's statute provided that "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". In his opinion, that was a requirement for both the composition of the Commission and its work. The members, of course, served in their individual capacity, not on behalf of their Governments, but their views on specific legal issues could reflect the views of the civilization and legal system they represented. The Commission could not ignore the representative nature of opposing voices. Three of the four members representing the Group of 7 major advanced economies were against it, and the fourth's views were not in line with his Government's. All four members representing Permanent Members of the Security Council were opposed to it, as were at least 6 of the 11 members from the Group of 20, whose population, territory and gross domestic product accounted for 67 per cent, 60 per cent and 90 per cent of the world totals, respectively. It was abundantly clear from that analysis which of the "for" and "against" camps was the most representative.

43. Just the day before, the Commission had heard from the Secretary-General of the Asian-African Legal Consultative Organization, which represented 47 countries, that of the seven Government representatives that had spoken on the issue, none had supported the views expressed in the Special Rapporteur's fifth report. Was the Commission, a subsidiary body of the General Assembly, going to go against the position of so many Member States? Against that backdrop, he would find it difficult to accept the controversial adoption of draft article 7, still less its submission to the Sixth Committee—something which would no doubt provoke vehement criticism.

44. He was also dissatisfied with the methods of work in the Drafting Committee. During the consideration of draft article 7, time pressure had repeatedly been cited as a reason to push forward. However, time pressure should not be used as an excuse for haste; a solid outcome always carried much greater weight than the speed of the work. The more important the topic, the more time was needed for a thorough discussion: focusing on immediate results was counterproductive. An immature draft article that was rushed through adoption would undoubtedly be rejected in international practice. It was precisely for that reason that the Commission had consistently adopted a consensus-based approach to important and controversial topics. It had patiently sought appropriate solutions, sometimes at the expense of efficiency, to ensure that the final outcome was able to stand the test of time and that controversial issues were not simply passed on to the Sixth Committee or the public.

45. Draft article 7 was a critical article and, if not handled properly, risked undermining the draft articles as a whole, to the detriment of inter-State relations. Consequently, many members, himself included, had repeatedly stressed the need for prudence. Regrettably, those warnings had not been heeded. Given the major controversy in the Commission over draft article 7 during the first half of the session, more in-depth deliberations should have been continued in the second half. Now, the major differences of opinion had not disappeared. The Drafting Committee should have reviewed the exceptions set out in draft article 7 individually, but instead had opted to review them as a package. Despite his repeated requests, no basic selection criteria had been given that would ensure that the exceptions were not chosen at the whim of the members.

46. Both the re-elected and newly elected members should refuse to be led by their own subjective preferences and should seek an appropriate balance between the codification and progressive development of international law. The Commission's rigorous scholarship and scientific approach, for which it had won the respect of the international community, should not be abandoned. Regrettably, that rigorous scholarship and scientific approach had not been apparent during the consideration of draft article 7. The provisions were too far removed from the practice of States, and the specific wording did not stand up to scrutiny. Specific crimes, such as genocide, crimes against humanity and war crimes, were cited in certain subparagraphs, while in others, acts, such as torture and enforced disappearances, were mentioned. Torture was obviously a different concept from the crime of torture.

47. Substantive provisions should be considered in conjunction with those on procedures and safeguards, as international law required both procedural and substantive justice. International criminal justice must be achieved, but must follow the proper procedures. Justice without the necessary safeguards was not dependable. Immunity was part of the procedural rules, and its unique value lay in procedural justice. Any mandatory expansion of the exceptions to immunity could easily turn the procedural safeguards of immunity into empty formats, leading to factual injustice.

48. In conclusion, he believed that the conditions were not yet in place for the adoption of draft article 7 and was firmly opposed to its submission to the General Assembly. He agreed with others that draft article 7 should be considered together with the procedural safeguards that would be presented in the sixth report.

49. Mr. RAJPUT (Chairperson of the Drafting Committee), speaking in his personal capacity as a member of the Commission, said that he was unable to support the adoption of draft article 7. His views, which were strictly personal and expressed in the tradition of the complete independence of the members of the Commission, should not be classified into any geographical or political grouping. It was clear from the statements in plenary that there was neither support in State practice nor any trend, since there was an inconsequentially small number of cases from domestic jurisdictions and no examples of domestic legislation or treaties. The Drafting Committee's conclusions

had been based simply on preferences and choices rather than legal or policy reasons, as was evident from the fact that serious international crimes such as terrorism, slavery and human trafficking were not mentioned in the list of exceptions. The exercise embarked upon by the Drafting Committee went beyond the mandate and functions of the Commission. He was therefore compelled to disagree with the adoption of draft article 7.

50. Mr. PETRIČ said that the topic was clearly a sensitive and important one. In such cases, the Commission's usual practice was to proceed *festina lente*, or to make haste slowly. There was no urgent need to take a decision on the topic now, as the Commission still had four years left in its current composition, sufficient time to come up with a more consensual proposal to present to States. As a member of the Commission, he spoke in his individual capacity and never on behalf of his Government: he did not wish his views to be assigned to any particular group. The Commission was producing a work of codification with the ambition that it would one day become an international instrument ratified by States. As such, the Commission must bear in mind States' need for extreme clarity on the matters covered in the draft articles, particularly with respect to exceptions. That clarity had not yet been achieved. Particularly for crimes with a political dimension, such as corruption, clarity on exceptions was vital. He proposed that the Special Rapporteur and the Commission members give the list of exceptions further consideration in the intersessional period so as to lay the foundations for a more productive discussion at the next session. Given the very serious objections raised, he did not support the provisional adoption of draft article 7 at that stage.

51. Mr. GÓMEZ ROBLEDÓ said that the Commission should now proceed to a vote, rather than entering into a second debate, which would be inappropriate at that stage. He had been very surprised by Mr. Huang's characterization of the work of the Commission. According to article 8 of the Commission's statute, "the persons to be elected to the Commission should individually possess the qualifications required" and "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". The Commission should allow itself to be guided by the main legal traditions represented by the members and not the political groups to which their Governments belonged. The General Assembly would obviously review the Commission's work, perhaps with greater interest than in other years, and would send its comments for further work on the topic, which would continue for the rest of the quinquennium.

52. Mr. HUANG, speaking on a point of order, said that his comments appeared to have been misunderstood. He recognized that members served on the Commission in their personal capacity and that the majority of members were in favour of draft article 7.

53. Mr. RUDA SANTOLARIA said that he agreed with Mr. Gómez Robledo that the proper procedural approach had been followed with respect to draft article 7. The text had been discussed in plenary, where many useful comments had been made, and it had then been referred to

the Drafting Committee, where a fruitful discussion had taken place. It was now time to submit the text to States and see what their opinions might be. He was in favour of the adoption of draft article 7.

54. The CHAIRPERSON, speaking as a member of the Commission, said that he was opposed to the adoption of draft article 7. Neither of the two main objections to the text that he had outlined in an earlier statement to the plenary³⁷⁷ had been adequately addressed. First, the exceptions to immunity *ratione materiae* formulated in the draft article were not based on customary international law, nor had it been established that there was any trend to that effect. There had been no effort in the Drafting Committee to agree that the commentary would clarify the character of draft article 7 as expressing *lex lata* or *lex ferenda*, existing law or new law. Even if it was sometimes difficult to make such distinctions, the Commission needed at least to make an effort to do so. That was particularly important when the outcome of its work was not merely addressed to States, but also to national courts, as in the present case. National courts needed to apply existing law, *lex lata*, and they were often not sufficiently experienced to distinguish existing law from proposals for new law. It was therefore necessary for the Commission to be as clear as possible; otherwise, the draft article risked being misleading.

55. Second, the crucial relationship between any possible exceptions to immunity *ratione materiae* and the procedural safeguards that would ensure that such exceptions were not abused had not been sufficiently recognized. The draft article should only be adopted in conjunction with procedural safeguards. It should therefore have been retained in the Drafting Committee until the Commission's next session.

56. Everyone agreed that the questions addressed in draft article 7 were very important. He had made a constructive proposal to reconcile the requirements deriving from the principle of sovereign equality with the goal of ending impunity for international crimes, thereby trying to bridge the differences between members of the Commission. That proposal had not been explored.

57. For those reasons, he could not agree to the adoption of draft article 7.

58. Mr. OUAZZANI CHAHDI said that, given the sensitive nature of the matter, he proposed that the meeting be suspended to facilitate consultations among the members of the Commission.

*The meeting was suspended at 11.35 a.m.
and resumed at 11.50 a.m.*

59. The CHAIRPERSON, noting that informal consultations had been held during the suspension of the meeting, invited the Commission to carry out a roll-call vote, by alphabetical order, on the adoption of draft article 7 (A/CN.4/L.893).

In favour: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Ms. Lehto,

Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez.

Against: Mr. Huang, Mr. Kolodkin, Mr. Laraba, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Rajput, Sir Michael Wood.

Abstaining: Mr. Šturma.

Number of members present and voting: 30.

Draft article 7 (A/CN.4/L.893) was adopted by 21 votes to 8, with 1 abstention.

Explanations of vote

60. Mr. TLADI said that although he had voted in favour of draft article 7, he wished to register his extreme displeasure that the Drafting Committee and the Commission had not been able to see their way clear to including the crime of aggression in the list of crimes for which immunity was inapplicable. There was no legal reason whatsoever that other crimes should have been included, yet aggression, a crime that had featured in the work of the Commission since 1950, had been excluded. If the criteria by which crimes had been included concerned their *jus cogens* nature, there was no question that the crime of aggression ought to have been included. In 1966, it had been the sole example given by the Commission of what might constitute a *jus cogens* norm. Furthermore, the International Court of Justice had referred to it countless times as one with *jus cogens* status. If the criterion by which crimes were included was gravity, there was, again, no question that the crime of aggression ought to have been included. Both the General Assembly and the Commission had described aggression as the gravest of all crimes against peace and security throughout the world. He could see no legal or logical reason why the crime of aggression had been singled out for exclusion. The only rationale that he could see—and that was why he had felt duty-bound to make his explanation of vote—was that it was a crime that was most likely to be committed by the powerful. The Commission had just taken the decision that the most powerful ought to be beyond the reach of justice. He regretted that the Commission had decided to perpetuate the double standards and inequity that so many had complained about.

61. Mr. ŠTURMA said that he had abstained during the voting in order to express his dissatisfaction over the regrettable division in the Commission and its work. He was deeply convinced that exceptions to State immunity *ratione materiae* needed to be progressively developed. He hoped that, after longer debate, it would be possible to overcome at least some of the deep divisions within the Commission. He still supported exceptions and hoped that after further debate, draft article 7 could be adopted in a form acceptable to most members of the Commission.

62. Mr. HMOUD said that he had voted in favour of draft article 7 even though, like Mr. Tladi, he would have preferred aggression to be included among the crimes to which immunity did not apply. Although it could be an act of State,

³⁷⁷ See the 3365th meeting above.

it was a criminal act committed by an individual. In that sense, it was no different from other crimes of international concern committed by individuals when exercising governmental authority such as crimes against humanity or war crimes. He looked forward to seeing next year's report on procedural guarantees, as that might allay the concerns of members who had voted against draft article 7 because of the premise that there was a lack of procedural guarantees associated with the draft article. Its adoption was only provisional: when it came up for consideration on first reading, the Commission would have had a chance to hear the reactions of the international community, including States in the Sixth Committee and other actors.

63. Mr. JALLOH said, with respect to draft article 7, that he had not been convinced by the explanations given by the Special Rapporteur in her fifth report on immunity (A/CN.4/701) as to why she wished to exclude the crime of aggression. The other core crimes enumerated in the Rome Statute of the International Criminal Court, namely genocide, crimes against humanity and war crimes, had been included in the list of exceptions contained in draft article 7, but, arguably the most serious crime known to international law, the crime of aggression, had been excluded. The crime of aggression had been incorporated in the Charter of the International Military Tribunal,³⁷⁸ under which defendants from 12 States had been found guilty in trials conducted by the International Military Tribunal. The judgment of the International Military Tribunal, dated 30 September 1946, stated that “[t]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”.³⁷⁹ In General Assembly resolution 3314 (XXIX) of 14 December 1974, a definition of aggression had been adopted by consensus by Member States of the United Nations. The crime of aggression had been included in article 8 *bis* of the Statute. A sufficient number of States parties had ratified the Amendments on the crime of aggression adopted in Kampala for the Assembly of States Parties in New York in December 2017 to be scheduled to decide whether to activate the crime of aggression for the purposes of prosecutions before the International Criminal Court. About 40 States were also reported to have passed domestic legislation prohibiting the crime of aggression. Several instruments developed by the Commission referred to the crime of aggression, including Principle VI (a) of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,³⁸⁰ article 2, paragraph 1, of the 1954 draft code of offences against the peace and security of mankind, article 16 of the 1996 draft code of crimes against the peace and security of mankind and article 20 (b) of the 1994 draft statute for an international criminal court.³⁸¹ All those examples demonstrated the grave nature of the crime

of aggression for States and the rest of the international community.

64. Against that backdrop, he wished to register his deep disappointment over the deep divisions within the Commission. Members were entitled to give their views, but some statements had effectively suggested, inadmissibly, that individual members were working against the interests of the leaders of their own States and that other members should follow the lead set by the members from the major Powers, as measured by political and economic might. Such a political argument, essentially that might made right and that right should become law, was highly regrettable. In many ways, by implicitly downgrading the status of the crime of aggression as “the supreme international crime” and creating a bifurcated system implying that some offences listed in the Rome Statute of the International Criminal Court were more important than others through their sole exclusion from the list of crimes in respect of which immunity *ratione materiae* would not apply, the Commission was reinforcing the argument that in international law, which was supposed to be a system where all were equal, there were double standards. He hoped that, when draft article 7 was considered at the next session, the Commission would take a decision that complemented the fledgling system of international criminal law anchored around the International Criminal Court, rather than undermined it.

65. Mr. MURASE said that he, too, wished to express dissatisfaction over the fact that the crime of aggression had not been included in draft article 7; he endorsed the arguments just given in favour of its inclusion.

66. Mr. Cissé said that, although he had voted in favour of the adoption of draft article 7, he wished to indicate his dissatisfaction over the fact that grave crimes such as slavery, corruption, human trafficking, piracy and international terrorism had not been included in the list in paragraph 1, and that not a single legal explanation had been given as to why apartheid and enforced disappearance had been included.

67. Mr. HASSOUNA said that he had voted in favour of the adoption of draft article 7. On procedure, he considered that the Commission had worked correctly by debating the text fully in plenary, referring it to the Drafting Committee for further discussion and bringing it back to plenary, where the majority of members had endorsed the Drafting Committee's report and supported draft article 7. On substance, however, he would have strongly supported the inclusion of the crime of aggression, for the reasons presented by previous speakers.

68. Mr. OUZZANI CHAHDI said that he had voted in favour of draft article 7 but was disappointed at the politicized climate surrounding the discussion and deplored the fact that the crimes of aggression and corruption had not been included in the list of exceptions to immunity.

69. Mr. PARK said that he had voted in favour of the adoption of draft article 7 but, like other members of the Commission, he believed that the crime of aggression should have been included among the exceptions listed in the text.

³⁷⁸ For the Charter of the International Military Tribunal, see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

³⁷⁹ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 22, Nuremberg, 1949, p. 427.

³⁸⁰ *Yearbook ... 1950*, vol. II, document A/1316, p. 376, para. 109.

³⁸¹ The draft statute for an international criminal court adopted by the Commission in 1994 is reproduced in *Yearbook ... 1994*, vol. II (Part Two), pp. 26 *et seq.*, para. 91.

70. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had voted in favour of the adoption of draft article 7, convinced that it reflected the position of the Commission and that both the Commission and the Drafting Committee had acted entirely within the Commission's mandate, namely to promote the codification and progressive development of international law. She asserted that the Commission's own procedure for dealing with proposals for draft articles had been strictly followed: (a) the plenary had debated the report submitted by the Special Rapporteur and had decided by consensus to refer draft article 7 to the Drafting Committee, noting that the latter should take into account all the comments made by members; (b) the Drafting Committee had considered the draft article in detail, analysing both the observations made in plenary and the various comments expressed in the Drafting Committee by its members; and (c) on the basis of that work, the Drafting Committee had adopted draft article 7 and had decided to send it to the plenary for its approval. Lastly, all the Commission members who had participated in the Drafting Committee, including those who had reserved their position on draft article 7, had done so in an active and constructive manner with a view to finding a formulation that would reflect the consensus of the Commission on the matter. Furthermore, the members who had considered it necessary to do so had reserved their position with a view to expressing it in the plenary.

71. She emphasized that a spirit of collegiality had inspired the whole process and, for that reason, she regretted that, ultimately, some members of the Commission had not been able to join the consensus and had requested a vote, exercising a legitimate right of all Commission members. In any event, that did not detract from either the quality or the validity of the work of the Commission.

72. Lastly, she reiterated her conviction that the Commission should deal thoroughly with procedural issues, including the necessary procedural guarantees and safeguards to prevent politicization and possible abuse in the exercise of criminal jurisdiction. As confirmation of that conviction, she recalled that, at her request, the Commission had already held informal consultations on that subject and that her sixth report would be devoted to procedural questions.

73. Mr. NGUYEN said that he had voted in favour of adopting draft article 7. However, he wished to express his deep regret that the crime of aggression had not been included in the list of exceptions to immunity, even though that crime had more serious and negative consequences for many countries than other crimes, such as the crime of apartheid. As to the legal basis for its inclusion, the crime of aggression had been incorporated into the main international law instruments.

Report on informal consultations on procedural provisions and safeguards

74. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that informal consultations on immunity of State officials from foreign criminal jurisdiction had been held on 18 July 2017 under her chairpersonship. The consultations had been open to all Commission members and

had been based on an informal concept paper that she had prepared on procedural provisions and safeguards. The concept paper dealt with three main issues: (a) the concept of jurisdiction and its scope, as well as other matters traditionally linked to procedural aspects, such as the moment when immunity should be considered, invocation of immunity and waiver of immunity; (b) the procedural safeguards that must be established to ensure the balanced treatment of immunity, in particular from the standpoint of the relationship between the forum State and the State of the official, including questions relating to communication between the forum State and the State of the official, the potential for the exercise of jurisdiction by the State of the official or an international criminal jurisdiction, and mechanisms to facilitate international cooperation and legal assistance; and (c) the procedural safeguards that must be established in respect of the official concerned, including fair trial guarantees and rights of the defence.

75. The informal consultations had underlined the importance of procedural provisions and safeguards in the overall scheme of the topic under consideration. She was grateful to all members that had participated in the consultations for their comments and observations, of both a general and a specific nature, which she had noted for the purpose of preparing her sixth report.

76. Lastly, she proposed that a paragraph on the informal consultations be added to the Commission's annual report.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

77. Mr. KOLODKIN thanked the Special Rapporteur on succession of States in respect of State responsibility for his interesting first report (A/CN.4/708) and his attempt to approach the topic in a balanced manner. Only about 10 delegations had taken part in the Sixth Committee's discussions on the topic in 2016, with three of them stating that the Commission's work would help to fill gaps in international law. The question that arose, however, was whether such gaps actually existed.

78. The Special Rapporteur himself, in paragraph 19 of his report, referred to "the question" of whether there were rules of international law governing the transfer of obligations and rights arising from the international responsibility of States for internationally wrongful acts. That would suggest that the Commission's task must be to study State practice and other evidence in order to determine whether such rules existed. However, in the same paragraph, the Special Rapporteur went on to say that his reports would delve into the rules on State succession "as applicable in the area of State responsibility". That would seem to indicate that he was already of the view that such rules existed.

79. That point was further confirmed by the Special Rapporteur's thesis that the outcome of the topic should be either codification or both codification and progressive

development of international law. It was clear that codification was possible only if norms of customary international law existed in the field under consideration. The Commission needed to know from the very start which exercise was to be undertaken. Having read the report, he was still not clear about what the Special Rapporteur was intending to codify. He gave examples of court decisions which he saw as attesting to a trend towards revision of the general rule of non-transfer to successor States of responsibility for internationally wrongful acts. However, there were varying interpretations of those court decisions; many writers were of the view that they did not provide grounds for positing a trend towards non-succession of responsibility.

80. The Special Rapporteur also gave examples of agreements on devolution as proof of movement away from the rule of non-succession of responsibility. However, he provided no background information on such agreements or analysis of the relevant texts. If parties to such agreements concluded them proceeding from the existence of an international law norm which provided for transfer of responsibility upon succession, then such agreements evidenced the existence of such a norm or, at least, of a tendency to its emergence. However, such agreements might be concluded for a wide variety of reasons and not out of a conviction that a subject of law having suffered harm from a predecessor State should receive compensation for such harm, or that the successor State should receive compensation for harm caused by the violation of international law by a predecessor State. Those agreements could be viewed as exceptions to the rule of non-succession.

81. As it seemed to him, therefore, the most plausible candidate for codification would be a rule on non-succession and exceptions to that rule. There was no justification for codifying a rule on transfer of responsibility, since there was no evidence of its existence. Nevertheless, the Special Rapporteur seemed inclined to go in the latter direction, even though it would constitute progressive development of international law or the formulation of new law. He himself had no objection to that, although the question was whether States would be in favour. The Commission must focus on the views of States, since it was a subsidiary organ of the General Assembly, in contrast to the Institute of International Law, which could work out legal positions on the basis of the views prevailing therein at the time. The form to be taken by the outcome of the Commission's work also had a bearing on the question of whether codification of existing law or development of new law was involved. He was not against the formulation of draft articles. However, the fact that the Commission's previous work on the succession of States had taken that form was not sufficient justification for such an exercise now: the door should be left open to other possible end results.

82. He was not convinced that liability for acts not prohibited under international law should be excluded from the scope of the topic. The approach might be to begin with work on succession in respect of responsibility for internationally wrongful acts, and then to take up liability for acts not prohibited by international law. He agreed with other members of the Commission that the scope should

be limited to cases of succession that took place in accordance with international law. He questioned whether the scope should include continuity of States. Cases in which the responsibility of a predecessor State that continued to exist was entailed, but in which the successor State was not involved, did not fall within the purview of the topic: they were not cases of State succession. That aspect of the scope of the topic should be mentioned in draft article 1, or else in the commentary thereto. As Mr. Park had noted, it was also necessary to decide whether countermeasures should be covered.

83. The Special Rapporteur, following the lead of the Rapporteur of the Institute of International Law, proposed speaking, not of the transfer of responsibility, but of the transfer of rights and obligations. He himself questioned whether there was an objective foundation for such a change. It seemed to be a fairly artificial construct, perhaps to evade the hypothesis of a close link between responsibility and the legal personality of the State. If the Special Rapporteur truly adhered to such a distinction, there should be a stronger basis for it in the commentary. Further elucidation was needed in other areas as well: for example, the Special Rapporteur referred to the importance of distinguishing between negotiated and contested (revolutionary) secession, but gave no indication of why that was important and what was the distinction.

84. Concerning the draft articles themselves, he noted the proposal in paragraph 26 of the report that the first focus of work on the future text be general provisions on State succession, stressing in particular the priority of agreement. Draft articles 3 and 4, on the relevance of agreements to succession of States in respect of responsibility and on unilateral declarations by a successor State, respectively, should accordingly be taken up at a later stage of the work, after a fuller analysis of such agreements and of unilateral acts relating to various scenarios of succession had been carried out.

85. With those comments, he had no objection to the referral of the draft articles to the Drafting Committee, on the understanding that they would remain there pending further elaboration on the basis of further work by the Commission on the topic.

86. Mr. VÁZQUEZ-BERMÚDEZ said that he welcomed the Special Rapporteur's decision to limit the scope of the topic to the transfer of rights and obligations arising from internationally wrongful acts; as he pointed out in paragraph 23 of his report, that did not preclude the possibility of addressing at a later stage certain issues such as how the rules on succession with respect to State responsibility applied to injured international organizations or injured individuals. In considering the topic, the Commission should rely on its previous work, such as its articles on the responsibility of States for internationally wrongful acts;³⁸² the relevant provisions of the 1978 Vienna Convention and the 1983 Vienna Convention; the practice of States and international and domestic case law; and the literature, in particular, the report of the

³⁸² The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

International Law Association on its seventy-third conference³⁸³ and the resolution on State succession in matters of State responsibility,³⁸⁴ adopted by the Institute of International Law in 2015.

87. Regarding draft articles 3 and 4, it would be advisable not to address the relevance of devolution agreements, claims agreements, other agreements and unilateral declarations and other acts, without first clarifying the general rules relative to succession and responsibility. That was especially important in the light of the Special Rapporteur's suggestion that the traditional, absolute principle of non-succession of rights and obligations in the case of succession of States was being replaced by other rules arising out of recent practice. However, that principle was central to the entire set of draft articles; a more robust analysis of the relevant material and more research on State practice and case law were thus warranted. In particular, the factors to be considered in relation to responsibility in different situations of succession should be clarified. As pointed out in the arbitral tribunal decision in the *Lighthouses case between France and Greece*, a multitude of concrete factors affected whether the principle of succession could be deemed a general rule.

88. The Special Rapporteur was taking what he called a realistic approach that warranted making a distinction between cases of dissolution and unification, where the original State disappeared, and cases of secession, where the predecessor State remained; he also distinguished between negotiated secession and contested or revolutionary secession. However, the relevance of other factors and support of their existence in practice, case law and the literature should also be studied so as to facilitate a deeper analysis of the factors applicable to questions of responsibility in various situations. In particular, the reasons for the transfer of rights and obligations needed to be clarified in order to work out a general rule. He was in favour of referring draft articles 1 and 2 to the Drafting Committee and, although he was not opposed to the referral of draft articles 3 and 4, he thought it might be preferable to postpone it in order to take into account the Special Rapporteur's second report on the topic.

The meeting rose at 1.05 p.m.

3379th MEETING

Friday, 21 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter,

Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Succession of States in respect of State responsibility (continued) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. RUDA SANTOLARIA said that he wished to commend the Special Rapporteur for his clear and coherent report (A/CN.4/708), which contained many useful references. In the future, however, it would be useful if, in deciding whether to transfer a topic from the long-term programme of work to the current one, the Commission held a more open exchange of views about the advantages and disadvantages of doing so. While he appreciated the work done by the Special Rapporteur in such a short period of time, it might have been more appropriate for the latter to have taken a more preliminary approach to the topic, focusing on the issue of whether a general rule existed on the succession of States in respect of State responsibility for internationally wrongful acts or whether any trend along those lines could be identified, rather than to have formulated draft articles, even on a provisional basis.

2. In general, he agreed that the Commission's consideration of the topic could be of interest to States and would complement the Commission's earlier work on the succession of States. However, he wished to make a few observations based on the Special Rapporteur's indication, in paragraphs 31 and 84 of his report, that the relationship between the succession of States and international responsibility remained largely neglected in international legal scholarship and that situations of succession of States were relatively infrequent and that cases involving State responsibility were even more so; that the transfer of rights or obligations arising from State responsibility was at issue only in certain cases of succession of States; and that the situation might differ in cases of negotiated succession and contested succession.

3. In view of those circumstances, and considering the small number of ratifications of the 1978 Vienna Convention and the 1983 Vienna Convention, it did not make sense to insist yet again that the outcome of the Commission's work should be a set of draft articles, given the high probability that history would repeat itself. In his view, the outcome should take the form of a set of guidelines to which States could refer in cases of State succession in respect of State responsibility for internationally wrongful acts.

4. He agreed with the Special Rapporteur that the previous consideration of the issue by private institutions, including the International Law Association and the Institute of International Law, could be useful and informative, but that it did not condition, limit or prejudice the manner in which the Commission would deal with the

³⁸³ International Law Association, *Report of the Seventy-third Conference held in Rio de Janeiro, Brazil, 17–21 August 2008*, London, 2008.

³⁸⁴ Resolution on State succession in matters of State responsibility, Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 711–719; available from: www.idi-iiil.org, *Resolutions*.