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Held at the Palais des Nations, Geneva, on Wednesday, 27 July 2016, at 10 a.m.

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Kolodkin
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Provisional application of treaties (agenda item 5) (*continued*) (A/CN.4/699 and Add.1)

The Chairman invited the Special Rapporteur to sum up the debate on his fourth report on the provisional application of treaties (A/CN.4/699 and Add.1).

Mr. Gómez-Robledo (Special Rapporteur), welcoming the valuable comments and criticisms made during the Commission's debate, said that, since the start of work on the topic, members of the Commission had been largely supportive of the need to consider the extent to which other provisions of the 1969 Vienna Convention on the Law of Treaties were relevant in establishing the full scope and meaning of article 25 thereof. Various Member States had expressed the same view within the Sixth Committee. In both cases, suggestions had been made as to which provisions of the Convention should be examined. His fourth report covered articles 46 and 60 of the Convention in line with one such suggestion. Although some members of the Commission had expressed doubts about the usefulness of the exercise, no one had actually objected the previous year. While the choice of provisions might seem haphazard in the overall context of the topic, all information was welcome when faced with an aspect of the law of treaties about which so little had been known before the Commission had begun its work on the topic. Mr. Hassouna had highlighted the importance of knowing the context in which article 25 of the 1969 Vienna Convention operated, pointing out that the principal aim of the Commission's work was to increase understanding of the provisional application mechanism and provide States and international organizations that had recourse to it with some legal certainty. Given the practical interest of the topic to States, their suggestions were of great importance, and, as Special Rapporteur, he felt duty bound to take them into account.

Of course, many provisions of the 1969 Vienna Convention, such as article 53 on *jus cogens*, did not need to be examined closely in seeking to better understand article 25. It was not the aim of the Commission's work, nor had it ever been the focus of the Special Rapporteur, to draft a convention on the provisional application of treaties. Mr. Kolodkin had, however, wondered whether the Commission should produce more detailed guidance, particularly in the area of State succession. He hoped that a fifth report could conclude the topic and suggested that it should focus on article 34 of the 1969 Vienna Convention, which contained the general rule regarding third States.

Although some members of the Commission, notably Mr. Kamto, had questioned various aspects of the argumentation and reasoning in the fourth report, in general there had been no objection to the conclusions drawn therein. The Commission was not engaged in progressive development, nor even, arguably, in true codification, but its work should certainly help to clarify the meaning and scope of an aspect of treaty law that had given rise to practice that was confusing and erratic. He did not intend to propose a draft guideline for every provision of the 1969 Vienna Convention that might be considered in future reports, but having a broad view of which provisions of the Convention applied to any given case of provisional application would be useful for States and international organizations when it came to the possibility of applying a treaty provisionally. In that respect, the value of the reports taken together should be borne in mind, without every issue raised therein necessarily needing to be reflected in one or more draft guidelines.

Concerning whether article 25 of the 1969 Vienna Convention encapsulated a self-contained regime, which had implications for the scope of the topic, he cautioned against such an approach. The concept of self-contained regimes had been very damaging to the idea of universalism in international law; moreover, accepting such a notion would limit the legal effects that the Commission had already ascribed to article 25 and the consequences thereof. Under article 31 of the Convention, a treaty must be interpreted in the context of the treaty itself, which meant that article 25 of the Convention should be interpreted in the

context of the Convention's other provisions. The Commission had recognized that a treaty being applied provisionally produced legal effects as if it were in force; it must next identify the minimum set of rules of general international law that would apply in a specific situation, so as to give guidance to States. Viewing article 25 as a self-contained regime would also suggest that it was a form of *lex specialis*, to which a separate set of rules applied. The legislative history of article 25 did not provide evidence that the States negotiating it had intended that to be the case. It might be worth considering drafting a general guideline clarifying that the Vienna Convention rules applied to provisional application *mutatis mutandis* as a general framework.

The Commission's discussions of reservations demonstrated exactly what linkages there could be between article 25 and other articles of the 1969 Vienna Convention. Paragraph 34 of the fourth report, while indicating that no treaty had yet been seen that provided for the formulation of reservations as from the time of provisional application, nor had provisional application provisions been encountered that referred to the possibility of formulating reservations, did not discount the possibility that reservations to a treaty could be formulated in the context of provisional application or that a provisional application agreement could provide for reservations, so long as the treaty did not clearly prohibit them. He reiterated, however, that he had not yet found any such examples and that the issue at hand was reservations to treaties, not to provisional application agreements. Even during the Commission's discussions, no clear-cut case had been identified of a specific provision that dealt with provisional application of a treaty and at the same time provided for reservations to be made. Paragraph (5) of the commentary to guideline 2.2.2 of the Guide to Practice on Reservations to Treaties made no mention of provisional application clauses that allowed for reservations, as was indicated in paragraph 26 of the fourth report, referring as it did to hypothetical cases rather than specific examples.

Two of the examples cited by Mr. Forteau did not seem to involve reservations. The Soviet Union was not among the States listed in the depositary notification as having notified provisional application of the 1986 Wheat Trade Convention, although it was given as a State that had submitted a declaration of acceptance of the Treaty, which raised the question of whether what was being discussed was actually a reservation made in the context of the provisional application of a treaty. In his view, it might be a matter of a reservation made in the context of the State's expression of its consent to be bound by the Treaty. The declaration made by the United States with respect to the 1962 International Coffee Agreement did not seem to be a reservation but a clause limiting its provisional application. In line with the constitution, the clause required the adoption of legislation to implement the Agreement. Nevertheless, he welcomed the examples that Mr. Forteau had provided and would study them in greater detail.

Another aspect of the fourth report that had been criticized was the frequent use of analysis by analogy. Since the second report, Mr. Forteau had been saying that the approach taken should be inductive rather than deductive. In the Special Rapporteur's view, however, analogy was often the only way of proceeding given the scarcity of State practice in a number of specific areas, as Mr. Petrič had observed. Although, as indicated in paragraph 116 of the report, the United Nations Secretariat had registered 1,733 treaties that provided for provisional application, that did not necessarily mean that States had applied those treaties provisionally or that any case had occurred in which such provisional application had involved reservations, invalidity, termination or suspension on grounds of breach or of State succession.

In that connection, there was one aspect of the Secretariat's registry functions to which the Commission seemed not to have given due consideration. Its discussion had proceeded on the assumption that all available practice could be analysed in the light of the legal regime create by article 25 of the 1969 Vienna Convention; however, both the 1946

regulations on registration of treaties and the 1955 *Repertory of Practice of United Nations Organs* predated that Convention, while the *Treaty Handbook* was based on the 1946 regulations. While it was for the General Assembly to update those regulations, the fact that the applicable legal framework was out of date could not be ignored in studying the topic, particularly as it served to perpetuate erratic practices when States looked to it for inspiration in drafting treaties.

As to why he had accorded some importance to the practice of international organizations in their registration and depositary roles, he first explained that, when — in the absence of a search tool for external users to access the 1,733 treaties that provided for provisional application — he had approached the Treaty Section for examples of State practice, it had transpired that no such tool existed even for internal users. The Section was to be commended on promptly designing an internal search tool, but the fact remained that external users were unable to search the treaty database using provisional application as a search criterion. It had not been possible to annex a list of relevant treaties to the report as they would all have needed to be checked individually to confirm that they contained provisional application clauses, which was beyond the Special Rapporteur's means. The search criteria mentioned in paragraph 119 of his fourth report were different, as they referred to actions by States associated with provisional application, not with the content of treaties. As the criteria had been defined to reflect references that States made in respect of their actions, they were largely neither systematic nor uniform in practice. In addition, a maximum of 500 search results were displayed.

There was clearly a vast number of examples both of treaties that provided for provisional application and of actions by States in respect of those treaties, but the available information was limited and difficult to access, which made it hard to get an overall view of the situation. Given the need for more information on State practice, he suggested that the Commission should consider requesting the Secretariat to provide a representative sample of bilateral and multilateral treaties from various regions covering provisional application over a specified period, such as the previous 20 years, which could serve as a basis for studying provisional application clauses and the actions of States in respect of provisional application. International organizations, particularly the United Nations, were a vital repository of information in their role as depositaries and registries, but how that repository was managed could have an effect on State practice insofar as States often sought guidance on treaty matters from those organizations. The omission of the practice of the African Union and other organizations from his fourth report reflected lack of time rather than lack of interest, and he intended to rectify it in his next report by continuing his direct contacts with regional organizations.

Concerning the final outcome of the Commission's work on the topic, he recalled that it had always been the intention to provide States with something of practical value. He maintained a preference for the current approach of producing guidelines, but that did not preclude the possibility of drafting model clauses, as suggested by various members. He would also take due account of the notes of caution sounded by Mr. McRae and Mr. Hmoud. Draft guideline 10, as he had explained, sought to situate the question of the legal effects of article 25 of the 1969 Vienna Convention in the context of the provisions of article 27, as a general rule, and article 46, as an exception. Article 27 had been covered in his third report. Paragraph 66 of his fourth report highlighted the fact that both articles dealt with two different issues: the fact that a State could not invoke the provisions of its internal law as justification for its failure to meet its international obligations; and the fact that a State could only invoke violation of a provision of its internal law with regard to its competence to conclude treaties if that violation was manifest and concerned a rule of fundamental importance. Those two concepts should be properly reflected in the draft guidelines and he had included them in draft guideline 10 accordingly, in the same order as they appeared in article 27 of the Convention.

It was an entirely different matter, as stated in paragraph 49 of the fourth report, for negotiating States to agree on a limitation clause for a treaty to be applied provisionally, based on internal law. In view of States' interest in that aspect of the topic, as evidenced by two recent cases, and the need to clarify the issue, he agreed with those who had expressed support for covering that situation in future draft guidelines. From a didactic point of view, however, it might have been preferable to tackle the three issues — article 27, article 46 and limitation clauses based on internal law — separately. Paragraphs 43 and 44 of his fourth report should be read in the light of the commentary contained in paragraph 57: an overly broad interpretation of article 46, such that every State must review the diversity of internal laws of its contractual partners *a priori*, would obviously not be reasonable.

With regard to future work, he welcomed the suggestion made by Ms. Escobar Hernández to include a general overview of work done on the topic to date in the next report, with as many examples of practice as possible, so as to guide new members of the Commission and help to streamline the draft guidelines. He intended to continue producing draft guidelines and commentaries to accompany them. In conclusion, he requested the Commission to refer draft guideline 10 to the Drafting Committee.

The Chairman said he took it that the Commission wished to refer draft guideline 10 to the Drafting Committee.

It was so decided.

Mr. Saboia asked whether there would be an opportunity for the Commission to discuss the proposal by the Special Rapporteur to request the Secretariat to obtain a representative sample of treaties.

Mr. Nolte asked the Special Rapporteur whether there was a relationship between that proposal and draft guideline 10.

Mr. Gómez-Robledo (Special Rapporteur) said that there was no direct relationship. His proposal was to request the Secretariat to conduct a detailed search of its database of 1,733 treaties that provided for provisional application in order to extract a representative sample that would enable the Commission to determine with greater certainty the state of current practice. It would be necessary to ask the Secretariat because, although the treaties in question were publicly available, the database search tool was not. He would liaise with the Chief of the Treaty Section of the Office of Legal Affairs beforehand to ensure that the proposal could be implemented within existing resources and that it would not put undue pressure on the Section.

Mr. Llewellyn (Secretary to the Commission) said that the proposal would be brought to the attention of the Treaty Section and that, if it was considered feasible, a request would be drafted by the secretariat in collaboration with the Special Rapporteur for consideration by the Commission prior to the adoption of its annual report.

Mr. Valencia-Ospina asked whether the proposed study would involve a cooperative exercise in which the Treaty Section identified treaties and the Codification Division of the Office of Legal Affairs analysed their legal meaning, or whether it would involve only one of them.

Mr. Llewellyn (Secretary to the Commission) said that it was his understanding that the Treaty Section would be requested to provide the Special Rapporteur with a representative sample of treaties to assist him in the preparation of his next report and that the Codification Division would not be asked to undertake a study.

Sir Michael Wood said that, as he understood it, the proposal would involve an informal request for assistance by the Special Rapporteur rather than a formal request by the Commission.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (*continued*) (A/CN.4/701)

The Chairman invited the Commission to adopt the text of draft articles 2 (f) and 6, as provisionally adopted by the Drafting Committee at the sixty-seventh session and contained in document A/CN.4/L.865.

Draft article 2 (f)

Definitions

Draft article 2 (f) was adopted.

Draft article 6

Scope of immunity ratione materiae

Mr. Candioti said that, while he did not object to the content of draft article 6, the use of Latin terms such as *ratione materiae* should, in future, be avoided in titles so as to facilitate understanding. On second reading, the Commission should seek to use only the six official languages of the United Nations.

Draft article 6 was adopted.

Document A/CN.4/L.865, as a whole, was adopted.

The Chairman invited the Commission to pursue its consideration of the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

Mr. Kittichaisaree said that he wished to thank the Special Rapporteur for her comprehensive, detailed and well-researched report, which dealt with one of the most complex aspects of the topic, namely exceptions to immunity.

He would begin with some comments on methodology before turning to the substantive parts of the report. First, the Special Rapporteur should have faithfully followed the analytical process of identification of customary international law summarized in paragraph 183 of the report. Had she done so, it would have been clear whether proposed draft article 7 reflected, in whole or in part, established rules of customary international law (*lex lata*) or progressive development of international law (*lex ferenda*). As pointed out in paragraph 20 (a) of the report, several States had indicated that that distinction should be made clear; the distinction was even more important in relation to the different exceptions proposed by the Special Rapporteur in draft article 7.

Secondly, the Special Rapporteur could have used as a starting point the conclusions drawn by the previous Special Rapporteur on the topic, Mr. Kolodkin, which were outlined in paragraph 16 of the report, and determined whether and, if so, how those conclusions were still justifiable in the light of the most recent developments in international law, as analysed in section II of the report.

Thirdly, because the Special Rapporteur had not taken the approach described, the practice studied in section II of the report was subject to varying interpretations. For example, the jurisprudence of the International Court of Justice and the European Court of Human Rights, cited by the Special Rapporteur in paragraphs 61 to 95, dealt only with State immunity *stricto sensu* in respect of civil jurisdiction and might not sufficiently support the conclusions made by the Special Rapporteur in paragraph 95. While the judgments in question might not provide an adequate basis for confirming that the immunity of State officials from foreign criminal jurisdiction was of an absolute nature or without exceptions,

they might not provide evidence of the existence of such exceptions, either. Moreover, the practice of the International Criminal Court and other international criminal tribunals with respect to immunity *ratione materiae* might not necessarily be helpful in determining whether customary international law recognized the existence of exceptions to such immunity before national criminal courts. In other words, it might not be possible to draw an analogy between the two jurisdictions, because the principle of *par in parem non habet jurisdictionem*, from which immunity was derived, did not apply when a State official was tried before an international court.

As to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia mentioned in paragraphs 98 to 100, paragraph 41 of the Tribunal's judgment in *Prosecutor v. Tihomir Blaškić*, cited by the Special Rapporteur to support the existence of exceptions to immunity in respect of international crimes, came from a part of the judgment analysing whether international tribunals could direct binding orders to State officials. Moreover, as the Special Rapporteur recognized in paragraph 99 of the report, the exception seemed to be limited to the exercise of jurisdiction by the Tribunal, as supported by its subsequent jurisprudence, and did not cover cases brought before domestic courts. The same was true in the case of the Special Court for Sierra Leone, cited by the Special Rapporteur in paragraph 100. The appeals chamber of the Court recognized that immunity had no relevance, but only before international criminal tribunals. The same reasoning was applicable to the exception recognized before the International Criminal Court, to which reference was made in paragraph 107 of the report.

The case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, which was before the International Criminal Court and which was studied in sections II and III of the report, deserved closer attention, in particular with regard to the cooperation of domestic courts with the International Criminal Court, which was addressed in paragraph 108 *et seq*. There were some elements that needed to be clarified. For the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the obligation to cooperate stemmed from relevant resolutions of the United Nations Security Council acting under Chapter VII of the Charter of the United Nations. Pursuant to Article 103 of the Charter, that obligation would prevail over any other kind of international legal obligation that United Nations Member States might have, such as respect for the immunity of State officials. While, in the case of those two tribunals, the obligation to cooperate was binding on all Members of the United Nations under the vertical model of cooperation provided for by their respective statutes, the obligation to cooperate under the Rome Statute of the International Criminal Court was a treaty obligation binding only on States parties to the Statute. Some of the conditions for cooperation by States parties were set out in article 98 (1) of the Statute, to which reference was made several times in the report. By virtue of that provision, the International Criminal Court "may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State unless the Court can first obtain the cooperation of that third State for the waiver of the immunity". The provision tried to reconcile the obligations of States parties under the Rome Statute with their other obligations under international law in relation to third States that were not parties to the Statute. The Special Rapporteur jumped to the conclusion, in paragraph 105 of the report, that there had been a so-called implicit waiver of immunity by the Security Council in the *Al-Bashir* case, without carefully analysing whether article 98 (1) of the Rome Statute in fact recognized that a waiver of immunity had to come from the State of the official who had committed the crime and which was not a party to the Statute and could not, as such, be inferred from a Security Council resolution in respect of the International Criminal Court, as might have been the case for the *ad hoc* tribunals created under Chapter VII of the Charter of the United Nations for the reasons that he had explained. While he believed that Mr. Al-Bashir

should be put to trial in order to ensure that justice was done, the Special Rapporteur should have made clear in the report the basis for a waiver of immunity in his case.

The Special Rapporteur had taken a long and winding road to arrive at draft article 7, devoting many pages to theoretical discussions, albeit of a legal nature. After reading section III of the report and listening to the Special Rapporteur's oral introduction and answers to his questions at the previous meeting, he still did not find her explanations and underlying rationale for the use of the terms "limitations" and "exceptions" fully satisfactory.

The journey taken by the Special Rapporteur in the report could be likened to the one taken by Dante Alighieri in his *Divine Comedy*, which was divided into three parts: hell, purgatory and paradise. The first part of the journey, hell, consisted of the commission of crimes by State officials that led to grave human suffering. The second part, purgatory, involved the criminal prosecution of those officials, with remediation and soul-searching on all sides. In the second phase, procedural bars and exceptions to immunity might come into play. Paradise was the climax, when the protagonists fully realized the "values and legal principles" of the international community mentioned in paragraphs 17 and 190 to 217 of the report, which prevailed over the procedural bars raised in purgatory and allowed the victims to obtain redress. He could only wish that the Special Rapporteur had arrived at paradise by strictly following the process of identification of customary international law summarized in paragraph 183 of the report.

He appreciated the balance that the Special Rapporteur was trying to strike between the stability of international relations and sovereign equality, on the one hand, and the need to provide redress for victims of acts committed by State officials, on the other. As the Special Rapporteur herself recognized in paragraph 214 of the report, the right to reparation did not constitute in and of itself an autonomous legal basis for an exception to the immunity of State officials from foreign criminal jurisdiction. Consequently, the conclusion that there existed a limitation or exception to immunity should reflect customary international law, be supported by a normative source of some sort or, as a last resort, be labelled as progressive development of international law.

Turning to the substantive aspects of the report, he noted that, in respect of *ultra vires* acts, the Special Rapporteur suggested in paragraph 121 that, with regard to immunity *ratione materiae*, it could be concluded that the majority trend was to accept the existence of certain limitations and exceptions because the crimes in question could not be regarded as acts performed in an official capacity, since they went beyond or did not correspond to the ordinary functions of the State. He agreed that the attribution of *ultra vires* acts committed by State officials to a State for the purpose of State responsibility was different to the issue of *ultra vires* acts that did not entitle the official concerned to functional immunity.

Proposed draft article 7 (1) (a) included a list of crimes to which immunity should not apply: crimes of genocide, crimes against humanity, war crimes, torture and enforced disappearances. As she noted in paragraph 219 of the report, the Special Rapporteur had drawn up the list on the basis of conduct that could be considered to constitute an "international crime". The crime of apartheid was also mentioned in that paragraph, but had not been included in the draft article, without any explanation for the omission. In paragraph 222, the Special Rapporteur explained why she had excluded the crime of aggression from the list; however, not all the reasons given were well founded. He supported Mr. Murase's opinion on that point for several reasons: although, as the Special Rapporteur had mentioned, the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind did not include aggression as a crime for which States parties were obliged to exercise national criminal jurisdiction, given the possible political implications for the stability of relations between States, the situation had changed since the

adoption of the Code. Referring to the Commission's commentary to article 8 of the Code, he said that the presumptions that had been made at that time were no longer valid in many respects, especially since the adoption of the Kampala Amendments to the Rome Statute of the International Criminal Court on the crime of aggression in 2010. Once the International Criminal Court exercised jurisdiction over the crime of aggression, it was not required, in the event of a deadlock in the Security Council, to await final determination by that body that an act of aggression had taken place. Furthermore, States that had accepted the Kampala Amendments were likely to criminalize the crime of aggression under their domestic criminal law, as they had done in relation to the other crimes under the Rome Statute. The incorporation of the crime of aggression into the Rome Statute in 2010 had not altered the complementarity mechanism. States had thus not objected to the possibility, albeit within a framework of narrow jurisdictional conditions, of the domestic courts of States parties exercising jurisdiction over the crime of aggression when committed by their nationals. The Commission could not rule out the possibility that a State might pursue domestic criminal prosecution of persons responsible for committing an act of aggression against it, as objectively determined. Assessment by an objective body such as an independent international inquiry sanctioned by the United Nations or an objective credible report such as the Report of the Iraq Inquiry of 6 July 2016, which aimed to assess the policy of the United Kingdom on the Iraq war from 2001 to 2009, could be used to help substantiate a charge of aggression by individuals.

The Special Rapporteur also referred to the lack of national criminal legislation addressing the crime, as well as the absence of cases of State practice. However, as she recognized in paragraph 224 of the report, the national case law that had given rise to the limitation or exception analysed in respect of international crimes had been derived primarily from a large number of torture cases. If the lack of jurisprudence in respect of other international crimes had not been decisive to their inclusion in the exceptions given under draft article 7 (1) (a), the same should be true for the crime of aggression.

There had been attempts to prosecute individuals for aggression. For example, in Thailand, a criminal prosecution had been brought against the Prime Minister who had declared war against the Allies during the Second World War. The charge of being a war criminal, or warmonger, had been dismissed in that particular instance because the conduct had not been criminalized at the time it had taken place, and a prosecution would therefore have violated the principles of legality and non-retroactivity of criminal law.

He agreed with Mr. Murase that the crime of aggression was a leadership crime that could only be committed by a person in a position effectively to exercise control over or to direct the political or military action of a State. That meant that an act of waging war was, more often than not, carried out by persons with governmental authority; hence, as it was committed in the exercise of official functions, its perpetrators would normally be entitled to immunity *ratione materiae* lasting permanently, even when they were no longer in office. Aggression usually led to other grave crimes of international law, including crimes against humanity, war crimes, and even genocide. In the future, when the International Criminal Court exercised jurisdiction over the crime of aggression or when criminal prosecution of a person accused of aggression was undertaken in a domestic court of a State which had been a victim of aggression, the accused would be likely to invoke immunity from foreign criminal jurisdiction. It was therefore essential that the crime should be included in the list of exceptions to immunity *ratione materiae* in draft article 7. Otherwise, such an act would always fall within the category of official acts and, as such, would be covered by immunity *ratione materiae*.

Lastly, he reminded the Commission that the question of immunity of private contractors was still pending.

Mr. Hmoud said that the question concerning the crime of aggression and determination thereof by the Security Council raised by Mr. Kittichaisaree was extremely important. He asked how, in the context of the articles under discussion, a national court would determine that an act of aggression had been committed and then deal with the question of immunity, where the Security Council had not done so. In the case of the Rome Statute, that issue had been discussed and resolved in Kampala.

Mr. Kittichaisaree said that, currently, a person for whom the International Criminal Court had issued an arrest warrant for a crime of aggression might invoke immunity. If, as a result of political deadlock in the Security Council, that body was not able to determine whether an act of aggression had taken place, a national court could make use of reports from credible sources, such as international inquiries set up by the United Nations, that clearly indicated that an act of aggression had taken place, and then issue its own arrest warrant. There was, however, no certainty that such action was justifiable under international law, as the State would be exercising its own domestic criminal jurisdiction; other States that agreed that the State in question had been a victim of aggression might cooperate with it. In theory, therefore, two parallel prosecutions might be brought for a crime of aggression, one through the International Criminal Court and the other through the domestic courts.

Mr. Saboia said that he shared the concern of Mr. Kittichaisaree that the crime of aggression could be the source of many terrible offences. However, Mr. Kittichaisaree had also seemed to contradict his own criticism of the methodology used by the Special Rapporteur concerning the issue of exceptions: while he had pointed out that the obligation to cooperate with the International Criminal Court was binding only on States parties to the Rome Statute because it was not customary international law as such, the same could be said of the crime of aggression under the Rome Statute.

The implicit conclusion that the Special Rapporteur had drawn concerning the willingness of the Security Council to refer the situation in Sudan to the International Criminal Court would be meaningless if the whole competence of the Court were not included, notably the obligation to cooperate with the Court in the surrender of the indicted individual or alleged offender. He therefore suggested that the Commission might consider including a "without prejudice" clause referring to the development of international criminal law with regard to the crime of aggression.

Mr. Murphy said that one concern that had been discussed at the Kampala Conference in the context of national prosecutions of perpetrators of acts of aggression was the possibility that, whenever armed conflict occurred between two States, each State would consider the other to be the aggressor, would find what it viewed as credible sources to back up its position and then might pursue indictments in its own national courts of the other State's leaders, particularly if a statute providing for such action existed. It had been considered that such a situation might not be conducive to bringing a negotiated end to the armed conflict. To a large extent, that had been the reasoning behind the fifth understanding regarding the amendments to the Rome Statute reached at Kampala, which stated that "the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State".

Mr. Gómez-Robledo said that the very interesting issue raised by Mr. Kittichaisaree and the comments thereto made by various members of the Commission raised the question of whether the Security Council was recognized as having a monopoly on determining whether a crime of aggression had occurred and if that capacity could be seen as taking precedence over the law of national courts. Although the Kampala Amendments were likely to enter into force in the near future, they would be far from universally applicable; it would therefore be useful to include the crime of aggression in proposed draft article 7.

Mr. Kittichaisaree, responding to the comments made by Mr. Saboia and Mr. Murphy, said that he had not in fact stated that the arguments he had raised concerning article 98 (1) of the Rome Statute were correct; rather, he had wished to say that, instead of simply referring to the assertion that there had been an implicit waiver of immunity by the Security Council in the *Al-Bashir* case, the Special Rapporteur should have also considered the contrary arguments and rebutted them. He had taken good note of the point raised by Mr. Murphy; however, what he had said with respect to the prosecution in national courts of perpetrators of the crime of aggression could equally well apply to other crimes such as the crime of genocide, or accusations of torture of a State's own citizens. The draft articles prepared by the Special Rapporteur might, at some point, become a convention or take on another long-lasting form, by which time the practice of prosecuting persons accused of the crime of aggression on the basis of credible evidence might have become accepted by the international community of States.

The meeting rose at 11.40 a.m. to enable the Drafting Committee on Protection of the environment in relation to armed conflicts to meet.