

Document:-
A/CN.4/3379

Summary record of the 3379th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2017, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

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*.

subject. At the same time, he was in favour of limiting the scope of the topic to the succession of States in respect of State responsibility for internationally wrongful acts, and excluding from it international liability for injurious consequences arising out of acts not prohibited by international law, as well as matters of succession in respect of the responsibility of international organizations. He supported Mr. Grossman Guiloff's proposal to change the title in order to reflect that understanding.

5. He shared the view that it was necessary to study a greater number of cases in order to confirm or deny the existence of a general rule, identify a trend or establish differences between various types of State succession in respect of State responsibility for internationally wrongful acts. Accordingly, he subscribed to the comments made by several other Commission members about the need to consider the practice of States on continents other than Europe. That would be important for the purposes of the realistic approach advocated by the Special Rapporteur, which, as noted in paragraph 64 of the report, warranted a distinction between cases of dissolution and unification, where the original State disappeared, and cases of secession, where the predecessor State remained, and should also take into account the fact that negotiated secession created better conditions for agreement on all aspects of succession, including those aspects related to potential international responsibility for internationally wrongful acts. The need to review more examples of practice was further confirmed by the Special Rapporteur's statement, in paragraph 83 of the report, that the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needed to be proved on a case-by-case basis.

6. He agreed with the Special Rapporteur's use of the relevant terms and definitions contained in the 1978 Vienna Convention and the 1983 Vienna Convention and in the draft articles on nationality of natural persons in relation to the succession of States.³⁸⁵ Like Mr. Murphy, he was in favour of replicating those instruments' definitions of "succession of States", "predecessor State", "successor State" and "date of succession of States". He also supported Mr. Hmoud's proposal to add the term "continuator State".³⁸⁶ He agreed with the Special Rapporteur that the adoption of certain terms did not imply that all or most rules of these two Conventions were applicable to the topic under consideration.

7. The various types of agreements on State succession between the States concerned, to which the Special Rapporteur referred in the report, were highly relevant for the Commission's consideration of the topic. However, he shared Mr. Hmoud's view that, in attempting to reach a conclusion in that regard, the Commission should refer in general to the priority of such agreements and to the need to interpret and apply them in accordance with the relevant rules of international law. Similarly, he agreed with the Special Rapporteur on the relevance of unilateral acts of successor States, whose effects were governed by the

applicable rules of international law. He was in favour of referring the Special Rapporteur's proposals to the Drafting Committee.

8. Mr. PETER said that there were several reasons why the succession of States in respect of State responsibility was an important topic for the Commission to consider. The first was that its development would serve to complete the series of outputs that the Commission had produced previously on other aspects of State succession, which was a core area of public international law. He agreed with the Special Rapporteur that this was a normal and largely successful approach that the Commission had taken in the past. Unlike the other aspects of State succession with which the Commission had dealt, the succession of States in respect of State responsibility had direct implications for persons, both natural and juridical, and consequently also had practical value.

9. He supported the views expressed by Mr. Nguyen at the Commission's 3375th meeting, to the effect that, in discussing State practice, the Special Rapporteur paid significantly more attention to European countries than to those in other regions, such as Asia and Latin America.³⁸⁷ That had resulted in the marginalization of developing countries; Africa, in particular, was virtually ignored, given that the word "Africa" appeared only once in the entire report, even though the African continent had been a major victim of colonialism and had witnessed many succession processes.

10. In paragraph 96 of his report, the Special Rapporteur indicated that the devolution agreements concluded between the United Kingdom and its former dominions and territories were examples of treaties between a predecessor State and a successor State under the *pacta tertiis nec nocent nec prosunt* rule, meaning that they were binding on the parties only and did not create obligations for third States. Those agreements emphasized two main elements: the inclusion of a bill of rights in the constitution of the new State and the full adoption of the inheritance principle, as opposed to the clean slate principle, in State succession in order to ensure continuity. A few brave countries, however, had rejected continuity. Tanganyika, for instance, had opted for the formula which had come to be known as the Nyerere doctrine of State succession. That doctrine had been followed by other African States such as Botswana, Burundi, Kenya, Lesotho, Malawi, Swaziland and Uganda. Over time, it had been the subject of discussions and academic writings, but the Special Rapporteur did not refer to it even in passing in his first report.

11. Apart from ignoring the developing States generally and Africa in particular, the Special Rapporteur did not refer to actual cases relating to succession in respect of international responsibility in Africa, including well-publicized cases involving Algeria, Egypt, Ghana, Madagascar, Namibia and South Africa. In the report, only Egypt was given a certain amount of coverage in relation to its union with Syria to create the United Arab Republic. Namibia was referred to in passing in paragraph 117, where article 140 of its Constitution was cited as an example of legislation that could be interpreted as

³⁸⁵ The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

³⁸⁶ See the 3376th meeting above, p. 242, para. 22.

³⁸⁷ See the 3375th meeting above, p. 237, para. 20.

acknowledging the conduct of the organs of the predecessor State. However, the context in which the Constitution of Namibia had been formulated and the role that the United Nations had played in its independence were not explained in the report.

12. To do justice to the African continent, at least two cases, involving Algeria and Ghana, ought to have been included in the report. In short, Africa had contributed considerably to the development of the theory and practice of State succession and should have been given fair treatment in the report. He hoped that the Special Rapporteur would rectify that oversight in future reports by demonstrating a global outlook that extended beyond Europe.

13. Another area in which Africa offered examples that could enrich the Special Rapporteur's research on the topic was the unification of States. The Special Rapporteur referred to the example of the United Arab Republic, but there were other examples that had legal and political implications relating to issues of State succession: the union between the Republic of Tanganyika and the People's Republic of Zanzibar in 1964 to form the United Republic of Tanzania, which was the only such union still in existence in Africa, and the union between the Gambia and Senegal in 1982 to form the Senegambia Confederation.

14. Turning to the draft articles, he noted that draft articles 1 and 2 were patterned after articles 1 and 2 of both the 1978 Vienna Convention and the 1983 Vienna Convention. If the Commission's aim was to develop articles for a third convention on the theme of State succession, then the Special Rapporteur had been right to adopt that approach. It made sense to support the two draft articles as they currently stood, given that innovation at the current juncture was unnecessary.

15. Draft articles 3 and 4, on the other hand, were independent provisions that had to be weighed on their own merits. The research and analysis on which they were based was extremely weak and insufficient. Neither draft article possessed the required depth, and the examples selected to support them were from only a few chosen parts of the world. In order to do justice to the topic, the Special Rapporteur should start over and address some of the issues that Commission members had raised.

16. He was concerned that the Special Rapporteur's proposed future programme of work might be misleading and problematic, in particular with regard to the indication that his third report—to be introduced at the seventy-first session of the Commission—would focus on the transfer of the rights or claims of an injured predecessor State to its successor State. In his own view, the Special Rapporteur should address the procedure for the determination of such claims before even contemplating their transfer. Failing that, the process amounted to a purely technical exercise not based on adequate reflection. More importantly, the Special Rapporteur's proposal focused only on cases involving an injured predecessor State, not cases involving an injured successor State. The interests of predecessor and successor States should be addressed equally in the third report, or the successor State should be given equal weight and attention in a separate report, if that was considered necessary.

17. Historically, predecessor States had generally succeeded in avoiding responsibility. In some cases, they were still in denial more than 100 years after the succession of States, even when they had committed serious crimes, some of which could be considered core crimes. In cases where predecessor States had committed atrocities during the colonial era, they sometimes attempted to distinguish their responsibility from that of the colonial regimes that they had established and backed, and from whose actions they had benefited for years. In order to produce a balanced report, the Special Rapporteur should therefore address the question of the responsibility of predecessor States.

18. The topic of succession of States in respect of State responsibility touched on the rights of individuals and their companies, corporations or other institutions that could be affected by the process of State succession. Responsibility had to lie with either the predecessor or the successor State, and the assignment of responsibility was determined not by logic or common sense, but by the politics of international law-making. The Special Rapporteur was therefore brave to take up the topic, and should strive for balance in his research, analysis and presentation. The sources used in the preparation of his reports should be included in a bibliography, in keeping with the Commission's practice.

19. He was in favour of referring draft articles 1 and 2 to the Drafting Committee. However, draft articles 3 and 4 required additional work in order to strike a better balance among the sources of case law and practice on which they were based, and were thus not ready to be referred to the Drafting Committee.

20. Mr. RAJPUT said that he had some reservations about the inclusion of the topic in the programme of work, both because it might have been wiser to apply the Commission's limited resources to address some more pressing issues with a wider impact on the international community as a whole and because it was doubtful whether the general principles proposed in the report really did exist in the field of succession of States in respect of State responsibility. Furthermore, he questioned whether any value could be added by conjuring up practice when, in reality, the matter had been resolved in the past through simple consensual arrangements between the entities concerned. In fact, after reading the report, he concluded that non-succession was the rule.

21. The report could have been more clearly structured. The draft articles which followed each explanatory section did not seem to be an outcome of the discussion in that section. For instance, draft article 2 (Use of terms) had nothing to do with chapter II, sections A and B; it was only chapter II, section C, that really provided the background for that draft article. In reality, the discussion in chapter II, sections A and B, was more closely related to section D of that chapter, which provided the background for draft article 3. Unilateral declarations could have formed the subject of a separate section. A more organized structure would have made the report easier to read.

22. While it would be wise to be consistent with the 1978 Vienna Convention and the 1983 Vienna Convention on

matters relating to the succession of States, that quest for harmony should not be taken too far and the provisions drawn from those instruments should be adapted to the context and demands of the topic under consideration. For example, it should be made clear that draft article 1 dealt with rights as well as obligations, since the draft articles covered both State succession and State responsibility. Draft article 1 could nonetheless be referred to the Drafting Committee.

23. He had no objection to draft article 2 (b) and (d), but he had difficulty with (a) and (e). Paragraph (a) repeated, word for word, article 2, paragraph 1 (b), of the 1978 Vienna Convention, where territoriality was the sole test for succession. However, territoriality was not the only test for succession in that Convention, because article 6 added the test of legality. As the Commission did not know whether the Special Rapporteur planned to have a separate legality test in the draft articles, or whether he proposed to include it in paragraph (a), it was premature to refer draft article 2 (a) to the Drafting Committee. It should be revisited once the situations it was intended to cover had been clarified. If, however, the Commission did decide to send it to the Drafting Committee, the Special Rapporteur should explain whether he intended to encompass all or most of the situations covered by the 1978 Vienna Convention. Regarding paragraph (e), the mere fact that “international responsibility” had not been defined in the past did not mean that there was any need to embark on such a complex and controversial exercise in the context of the draft articles under consideration; hence it was not necessary to define “international responsibility”.

24. He said that he took issue with the three conclusions drawn in paragraph 83 of the report, namely that the rule of non-succession was questioned in modern State practice; that this did not mean, conversely, that there was always an automatic succession of responsibility; and that responsibility in specific kinds of succession was transferred on a case-by-case basis. His own understanding of State practice and literature was that non-succession to responsibility was still the rule, unless the entities concerned agreed to other arrangements.

25. In order to establish that non-succession was no longer a rule, the Special Rapporteur had relied on State practice, the literature and judicial decisions, including the 1956 decision in the *Lighthouses case between France and Greece*, whereas several earlier speakers had put forward compelling arguments to show that those decisions did not suggest that there had been any change in the non-succession rule. In paragraph 39 of his report, the Special Rapporteur contended, on the basis of a passage in the Restatement (Third) of the Foreign Relations Law of the United States,³⁸⁸ that the position had changed. The contents of the Restatement were not based on State practice. The conclusions in the Restatement were based on an entry in an encyclopedia and related to shareholder rights under domestic law. The conclusions on which the Special Rapporteur rested his thesis concerned shareholder rights in domestic law, did little

to prove that the rule of non-succession had changed and were scarcely a reason to upset the settled case law of international courts and tribunals.

26. He disagreed with the Special Rapporteur’s interpretation of paragraph (3) of the commentary to article 11 of the articles on the responsibility of States for internationally wrongful acts.³⁸⁹ The sentence quoted at the end of paragraph 123 of the report suggested that two things were necessary in order to infer responsibility. First, the wrongful act should be continuous, meaning that it should start before the date of succession and continue during and beyond it. Second, the succeeding State should endorse and continue the situation. That was not a situation of succession in respect of responsibility *per se*, but one where the succeeding State bore responsibility because it had participated in the commission of the wrongful act. Furthermore, the requirement of endorsement showed that responsibility also had a consensual basis.

27. Chapter II, section B, of the report discussed several instances of State practice which, however, demonstrated that the rule was that of non-succession in the absence of agreement to the contrary. In the case of the United Arab Republic, State responsibility had been assumed only in relation to some private British and French corporations’ claims arising from the nationalization of the Suez Canal. It was not an example of circumstances where succession in respect of responsibility had been accepted for all acts of the predecessor State, but one where succession in respect of responsibility had been the outcome of an arrangement between the entities concerned; thus, no general conclusion could be drawn from it. In the case of Panama, the claims of succession had related solely to a fire in the city of Colón and had been limited to nationals of the United States; the case had not concerned general responsibility or the nationals of other States. The situations involving the cession of the Tarapacá region by Peru to Chile, the reunification of Germany and the disintegration of the Socialist Federal Republic of Yugoslavia had not been very different. In fact, the opinions of the Badinter Commission which were cited in the report did not appear to support the position that there were general rules of international law that regulated succession in respect of State responsibility. That Commission had expressed the view that some principles of international law were related to State succession, but none of the situations with which it had dealt had involved succession in respect of responsibility. It had been silent on the existence of rules of international law in relation to succession to State responsibility and had commented only on succession to property, archives and debts, which were matters covered by the 1983 Vienna Convention. In its Opinion No. 13, it had not apportioned responsibility for war damage and had made it clear that this was something that should be decided by mutual agreement between the parties, expressing the view that the rules applicable to State succession and the rules of State responsibility fell within two distinct areas of international law.³⁹⁰

³⁸⁸ American Law Institute, *Restatement of the Law Third: the Foreign Relations Law of the United States*, vol. 1, St. Paul, American Law Institute Publishers, 1987.

³⁸⁹ 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.

³⁹⁰ See *Opinion No. 13 of the Badinter Commission of 16 July 1993*, ILM, vol. 32, No. 6 (November 1993), p. 1591.

28. The fundamental point to remember with reference to the Indian Independence (Rights, Property and Liabilities) Order, 1947, which was mentioned in paragraph 46 of the report, was that it had been passed by the British Parliament, not by India. It did not relate to succession in respect of responsibility, but to the granting of independence to the Dominions of India and Pakistan. Neither the Order nor the Indian Independence Act, 1947, had been passed with any involvement of Indians. As a matter of fact, the Act had been repealed when the Constitution of India had entered into force on 26 January 1950.

29. The decisions of Indian courts, which were not cited directly in the report but were indirectly referred to through the mention of scholarly works in the second and third footnotes to paragraph 46, had concerned former princely States, which were actually provinces and not States in international law. Reliance on those cases was therefore misguided, as none of them had related to succession in respect of State responsibility. Since they had pertained to the responsibility of State entities for municipal torts and breaches of domestic law, relying on those cases would surreptitiously introduce municipal torts into the draft articles, which was probably not what the Special Rapporteur intended.

30. In his own opinion, the existing rule of international law was non-succession to responsibility, which meant that the Commission had entered the domain of policy choices, with the risk that the choices made might be unacceptable to States. Despite his substantial reservations about the contents of the report, he did not have any serious objections to draft article 3 as such, if the intention was to propose guidelines or model principles. However, he agreed with Mr. Murphy that this draft article should not be referred to the Drafting Committee until the Commission had seen the draft articles which the Special Rapporteur intended to propose on specific instances of succession. He also concurred with Mr. Murphy that draft article 4 should not be sent to the Drafting Committee at the current stage.

31. Mr. HUANG said that, first, the way in which the Commission selected topics for inclusion on its agenda merited review. In recent years, the Commission had relied too much on the personal interests or professional background and expertise of its members. It was easily swayed by some non-governmental academic groups, primarily the International Law Association and the Institute of International Law, while it neglected the practical needs of the international community. It paid insufficient attention to whether there was enough State practice in a given area to support either codification as customary international law or progressive development, whether the possible outcome of its work had any practical value as a guide, or whether that outcome could form the basis of a convention or a legally binding instrument. As a result, its studies were too much akin to purely academic research and, as such, had been criticized by States Members of the United Nations.

32. Although the almost unprecedented speed with which draft articles had been produced after the topic had been chosen and the Special Rapporteur had been appointed was, of course, due to the latter's diligence and

efficiency, there was a danger that the Commission, in its haste, might have overlooked some important issues. Some thought should therefore be given to the questions raised by Mr. Reinisch at the Commission's 3374th meeting. As many members of the Commission, especially those who were newly elected, were insufficiently acquainted with its previous work on the subject of succession, and as many delegations in the Sixth Committee in 2016 had expressed opposition to the topic's inclusion in the long-term programme of work, or had considered that it was of no practical significance, the Commission should reflect on whether it might be premature to start work on the subject.

33. Second, the scope of the topic must be strictly defined and a clear distinction must be drawn between succession of States and succession of Governments, which were two quite different legal concepts that should not be confused. At the Commission's 3374th meeting, Mr. Murase had referred to the *Kokaryo (Guanghualiao) Dormitory* case, which was a typical example of the succession of Governments. It would be advisable for the Special Rapporteur to focus solely on the succession of States in respect of State responsibility and not to expand his study to encompass the succession of Governments.

34. Third, the "one country, two systems" arrangements in Hong Kong and Macao did not involve succession of States. The same was true of the return of Hong Kong from Britain to China and the return of Macao from Portugal to China. There had been many cases in the past where part of a State's territory had been occupied by or ceded to another State. Some cases had been settled, others had not, but none should form the subject of research under the topic. He asked the Special Rapporteur to confirm his acceptance of that position.

35. Fourth, the general rules governing the succession of States in respect of State responsibility must be established on the basis of a broader approach to State practice. Draft articles 3 and 4 were related to the effect of agreements or unilateral acts on the succession of States in respect of State responsibility. He agreed with Mr. Murase and Mr. Murphy that those two draft articles were of limited practical significance in the absence of clear general rules on the matter and that they applied only in certain special circumstances. Unless general rules were determined first, the special rules would have no foundation or point of reference. The codification and development of international law had to go beyond factual statements and draw conclusions, or even make judgments, in order to give clear guidance to States on specific issues.

36. The Special Rapporteur's first report set out two positions: the conventional view that the responsibility of one State could not be transferred to another, and the new, diametrically opposite view. The top priority when embarking on the topic was therefore to determine which of those two views reflected general rules of international law by examining the wealth of State practice in the area of State succession; examples included the break-up of the Union of Soviet Socialist Republics, the Socialist Federal Republic of Yugoslavia and the Czech and Slovak Federative Republic in the 1990s and the independence processes of countries in Africa, Asia and Latin America.

The first report was not comprehensive, because the cases cited came mainly from Europe. He hoped that the Special Rapporteur would extend his study of the relevant State practice to other regions, legal systems and civilizations, because the general rules of international law on the topic had to be established on the basis of global practices.

37. In the light of the lack of agreement on the need to consider the topic, or of any clear and general rules on the succession of States in respect of State responsibility, he would prefer not to refer the four draft articles to the Drafting Committee at that juncture.

38. Mr. MURASE said that, although he was not suggesting that the succession of Governments should be included in the topic, he thought that some reference should be made to such situations. The *Kokaryo (Guanghualiao) Dormitory* case referred to by Mr. Huang concerned the property rights, not the responsibility, of a predecessor Government. It might be argued, however, that if property rights were understood to be transferred to a successor Government, the same was true of responsibility. The situation resembled that of State succession. In the case in question, the Japanese Supreme Court had referred the matter back to the Kyoto District Court, which was still waiting to receive the views of the Government of the People's Republic of China.

39. He recalled that the members of the Commission served in their individual capacity as experts. They should work with complete independence from any Government, especially their own. For example, he was a member of the Japanese Prime Minister's panel on security issues, yet he still retained the capacity to be critical of his own Government when necessary; that should be the practice among all Commission members. He appreciated the fact that his Government respected his independence as a member of the Commission, and he hoped that the other Commission members enjoyed similar independence in relation to their Governments.

40. Mr. CISSÉ said that, while the Special Rapporteur's first report on succession of States in respect of State responsibility drew on a wealth of different sources of law, its analysis was largely confined to a particular geographical area, namely Europe, and gave virtually no consideration to other parts of the world, such as Africa.

41. The report indicated that the scope of the topic would be determined by its title, "Succession of States in respect of State responsibility", but the Special Rapporteur's further elaborations in that regard, especially in paragraph 20 of the report, indicated that the topic would concern, more specifically, the responsibility of States for internationally wrongful acts. His own view was that, in the context of State succession, those two aspects of the topic were not mutually exclusive. On the contrary, they were closely related, as both types of responsibility could entail international obligations arising from State succession. The Special Rapporteur should focus on identifying and analysing those obligations and defining the conditions in which they were enforceable.

42. The aim of the Commission's work on the topic thus was not to determine the international responsibility of

States in the context of State succession, but to determine the international obligations of the predecessor State that could arise from a succession of States. Unlike some of the other Commission members, he advocated the in-depth consideration of international responsibility as part of the topic, because State succession covered more than just the responsibility of States for internationally wrongful acts. At the Commission's 3378th meeting, Mr. Kolodkin had put forward pertinent arguments in favour of considering both types of responsibility: international liability for acts not prohibited by international law and international responsibility for internationally wrongful acts.

43. International responsibility did not necessarily arise from an internationally wrongful act. In the African context of colonization, decolonization and independence, the issue of State succession had generally arisen in terms of succession to colonial borders. When the African States had gained independence in the 1960s, they had faced the question of whether to inherit the artificial borders that colonialism had left in its wake or to wipe the slate clean and rethink those borders. In his view, wisdom and pragmatism had won out over emotion, as the principle of State succession to colonial borders and of the inviolability of borders had been largely accepted and applied by the African States thanks to the Cairo Declaration adopted by the Organization of African Unity, the predecessor to the African Union.³⁹¹

44. More than 50 years after the African States had become independent, another issue had arisen in relation to the succession of States: that of succession to archives concerning the colonial borders. In 2013, France had officially handed over to the African Union copies of French archives concerning the African borders established during the colonial period. Those archives, dating from 1845 to 1956, related to 45 border treaties involving 20 countries in West, North and East Africa. With that unprecedented act, France, as a predecessor State, had freely fulfilled an international obligation towards the African successor States. That example bore out the hypothesis that international responsibility did not necessarily involve responsibility for internationally wrongful acts. Rather, the predecessor State's unilateral and voluntary decision to hand over long-held colonial archives seemed to show that the case was one of international liability for an act not prohibited by international law. In that case, the succession of States had given rise to the performance of an international obligation that was not the consequence of an internationally wrongful act, namely the transfer of colonial archives from a predecessor State to the successor States.

45. The succession of States in respect of State archives was an aspect of the topic that merited the Commission's close attention. The Special Rapporteur should explore that issue and should broaden the scope of his research to include other parts of the world, in particular Africa. Questions concerning State archives had arisen in the Sudan, in places where unmarked colonial borders were a potential source of conflict and in relation to African maritime boundaries, some 70 per cent of which had yet to be determined. The handover of colonial archives would

³⁹¹ See, in particular, resolution AHG/Res.16 (I) adopted on 21 July 1964 by the First Ordinary Session of the Assembly of Heads of State and Government held in Cairo from 17 to 21 July 1964.

shed light on such border issues, which were of great political and social sensitivity. The omission of that aspect of the topic from the Special Rapporteur's report seemed unjustified, as archives could help to establish historical facts and, more specifically, could provide evidence of internationally wrongful acts for which successor States might seek compensation or other reparation.

46. In conclusion, he recommended that all the draft articles should be referred to the Drafting Committee.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

STATEMENT BY THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

47. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the Inter-American Juridical Committee (IAJC), as one of the principal organs of the OAS, served as an advisory body to the OAS on juridical matters, promoted the progressive development and the codification of international law, studied juridical problems related to integration and sought to harmonize the legislation of the different member States, bearing in mind their various legal systems and traditions.

48. The IAJC had held two regular sessions in 2016, at which it had adopted two reports concerning, respectively, principles and guidelines on public defence in the Americas and electronic warehouse receipts for agricultural products. The reports had been prepared and adopted in response to mandates from the OAS General Assembly.

49. The principles and guidelines on public defence established that access to justice was a fundamental human right that was not limited to ensuring admission to a court, but applied to the entire process. They also referred to the role of public defenders in preventing and reporting torture and in assisting victims of torture. It was emphasized that public defenders must be independent and enjoy functional, financial and budgetary autonomy and that public defender services should encompass legal assistance in all jurisdictions, not just criminal jurisdiction. Lastly, the principles provided that States had an obligation to remove obstacles that might impair or limit access to public defender services and that cost-free State-provided legal counsel services should be offered to all persons.

50. The IAJC had also adopted a set of principles for electronic warehouse receipts for agricultural products, as a means of addressing the lack of access to credit among many agricultural producers in the Americas. Warehouse receipt systems enabled producers to delay the sale of their products until after the harvest, when prices were generally more favourable, and also to gain access to credit by borrowing against the products in storage. Given the importance of agriculture as an engine of economic growth and development in the region, he hoped that the OAS General Assembly and Permanent Council would adopt those principles.

51. Also in 2016, the IAJC had adopted a resolution on international protection of consumers. By that resolution, the Committee recognized the challenges that individual consumers faced in their cross-border dealings, and accordingly expressed the intention to focus its efforts on mechanisms for online settlement of disputes arising from cross-border consumer transactions.

52. At its ninetieth regular session, held in March 2017, the IAJC had concluded its consideration of the immunity of States and had begun to consider new reports on the immunity of international organizations, the law applicable to international contracts, representative democracy and mechanisms for enhancing the implementation of the Inter-American Democratic Charter, application of the principle of conventionality, and online arbitration arising from cross-border consumer transactions. In exercise of its authority to undertake studies at its own initiative, the IAJC had introduced two new agenda items: one on non-binding international agreements and one on the validity of foreign judicial decisions.

53. At its eighty-ninth regular session, held in October 2016, the IAJC had included in its agenda the two new mandates adopted by the OAS General Assembly: "Conscious and effective regulation of business in the area of human rights" and "Protection of cultural heritage assets". Concerning the first of those items, the IAJC had prepared a compilation of good practices, legislation and jurisprudence, together with options for moving forward with such regulation, including the proposed guidelines concerning corporate social responsibility in the area of human rights and environment in the Americas that the IAJC had adopted in 2014. The IAJC report on the protection of cultural heritage assets included an analysis of regional and universal legal instruments on that topic, proposals for further developing national implementing legislation and recommendations on inter-State cooperation mechanisms for facilitating regional implementation of those instruments, in particular the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador). It also put forward a suggestion that a user's guide be developed for the implementation of both treaties and soft-law instruments, including strategies for the recovery and restitution of cultural heritage assets, which were part of the region's identity.

54. At its forty-seventh regular session, held in June 2017, the OAS General Assembly had adopted a resolution³⁹² on a model law on the simplified stock corporation, which provided for a hybrid form of corporate organization that made the incorporation of small businesses and microenterprises less costly and cumbersome, building on the experience of Colombia in that area. The adoption of such laws by States could help to promote economic and social development. While the resolution did not impose substantive obligations on States, it clearly called upon them to "adopt, in accordance with their domestic laws and regulatory framework, those

* Resumed from the 3377th meeting.

³⁹² OAS resolution AG/RES.2906 (XLVII-O/17) of 20 June 2017.

aspects of the model law ... that are in their interest". The OAS General Assembly had also agreed to follow up on States' implementation of the recent mandates on cultural heritage assets, conscious and effective regulation of business in the area of human rights, and electronic warehouse receipts for agricultural products.

55. As the views of the OAS policy organs were of paramount importance for the work of the IAJC, feedback and dialogue were essential. The IAJC workplan was based on the input it received from member States, *inter alia*, by means of a questionnaire. That feedback had been vital to its effort to develop new items for inclusion in its agenda. In 2016, it had met with the OAS Secretary General to discuss topics of interest in the field of international law. The Secretary General had expressed particular interest in the Inter-American Democratic Charter, especially its article 20 and the concept of "government"; regulations concerning political parties; protection of children from sexual harassment and sexual violence; and cybersecurity issues, with a view to penalizing Internet fraud, especially at the transnational level. Further feedback had been provided to the IAJC during meetings with legal advisers to the OAS member States.

56. The IAJC had also sought to provide its members with opportunities to discuss matters of private international law and to meet with experts from the region. Valuable feedback had been received from various associations dealing with private international law, in particular the American Association of Private International Law.

57. In October 2016 the IAJC had conducted its forty-third annual international law course, which had been attended by 35 participants, 15 of whom had been awarded OAS scholarships. The distinguished legal experts who had served as lecturers included former IAJC Chairperson Fabián Novak Talavera and Judge Antônio Augusto Cançado Trindade of the International Court of Justice.

58. In conclusion, he said that the IAJC greatly valued its interactions with the Commission and would be pleased to welcome any Commission members who wished to visit the headquarters of the IAJC. Its next regular session would be held in Rio de Janeiro from 7 to 16 August 2017.

59. Mr. VALENCIA-OSPINA said that the IAJC and the International Law Commission had a long-standing history of cooperation. Article 26 of the Commission's statute went so far as to cite by name the Pan American Union, the predecessor to the OAS, when giving examples of intergovernmental organizations for the codification of international law with which the Commission should hold consultations. Clearly, the Commission had long held the inter-American system in high regard. Noting the personal ties between the members of the two bodies, he said that their history of cooperation had provided an excellent example that had been followed for the development of constructive relations with other regional bodies, including those whose representatives had visited the Commission during the current session. The two bodies shared a mandate to promote the progressive development and the codification of international law.

60. Among the topics taken up by the IAJC, representative democracy was of particular importance, especially in the light of recent developments in the Americas. In addition, issues related to immunity were clearly of interest to the Commission, which had submitted a set of draft articles on jurisdictional immunities of States and their property to the General Assembly in 1991.³⁹³ That draft had in 2004 given rise to the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Commission was currently considering the topic "Immunity of State officials from foreign criminal jurisdiction". The IAJC too had a long history of consideration of the topic of immunity. A draft convention had been produced in 1986 but had never come to fruition as a treaty, and yet, as the IAJC Chairperson had just reported, the Committee had only recently concluded its work on the subject. He asked what the final outcome of its work had been: had the IAJC reworked the 1986 draft or had it decided to discontinue its consideration of the topic owing to the existence of the United Nations Convention?

61. The Commission had begun to study the topic of immunity of international organizations in 1949. After years of consideration, it had decided, and the United Nations General Assembly had agreed, that it should suspend its consideration of that topic. The IAJC, on the other hand, had continued to consider the subject. He asked what the future prospects were for its work in that area.

62. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the countries of the Americas were increasingly interested in issues related to the immunities of international organizations, particularly the issue of immunities *vis-à-vis* the right to justice, especially in the field of labour law. The IAJC Rapporteur on the subject had already submitted two reports, and a third report was expected in August 2017. The aim was to produce a guide on the topic that would be useful to the States of the region. In respect of immunity of States, the IAJC had started from the question of whether it was possible to revive the draft inter-American convention on jurisdictional immunity of States. For the time being, the issue was not thought to be very pressing; although the United Nations Convention had not been ratified by many of the States of the region, the principles it put forward were being implemented. The approach of the IAJC was to complement, rather than duplicate, the work of other bodies, taking into account the specificities of the countries of the region.

63. Mr. VÁZQUEZ-BERMÚDEZ said that he appreciated the work of the IAJC in disseminating inter-American law and international law in the Americas. He had been invited by the OAS Secretary of Legal Affairs to serve as a lecturer for the next annual OAS international law course, to be held in Rio de Janeiro. Representative democracy had been identified by the OAS as one of the four pillars of its action, along with human rights, multi-dimensional security and integral development. He asked what form the IAJC outputs in that area would take. For example, might it produce a set of recommendations for enhancing the effective implementation of existing

³⁹³ The draft articles on jurisdictional immunities of States and their property and the commentaries thereto are reproduced in *Yearbook ... 1991*, vol. II (Part Two), pp. 13 *et seq.*, para. 28.

instruments, including the Inter-American Democratic Charter and the Charter of the Organization of American States? What questions were likely to be taken up by the Committee in the future?

64. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the IAJC agenda included an item on the strengthening of representative democracy, in particular through the strengthening and implementation of mechanisms for safeguarding democracy, with a focus on chapter IV of the Inter-American Democratic Charter. It was understood that those efforts must not involve a modification of the Charter itself, as the wording of that instrument had been formulated in a highly sensitive process. The agenda item had first been suggested by the former OAS Secretary General, José Miguel Insulza, who had drawn attention to the Charter's lack of provisions on preventive measures. As Rapporteur for the topic, he had produced three reports and had noted that the OAS Secretary General was empowered by the Charter of the Organization of American States to play a more active and effective role in terms of preventive measures for defending representative democracy. His preliminary proposal was to strengthen early warning and monitoring mechanisms. The work was not easy, however, because within the IAJC there was no consensus on the subject. Some members considered that such mechanisms could interfere in the internal affairs of States. He hoped nonetheless that the Committee would be able to make some progress as it continued its debate on the issue.

65. The topics that would be on the IAJC agenda in the future were determined largely through its interactions with the member States and the OAS policy organs. That ensured that the agenda was practical, not merely academic, and provided some benefit to the OAS and its member States. Among the topics that would be taken up in the near future were cybersecurity, consumer protection, immunity of international organizations and the legal validity and effects of non-binding international agreements.

66. Mr. RUDA SANTOLARIA asked how the IAJC intended to approach the work in relation to the nature, effects and use of non-binding international agreements. The subject had apparently emerged as an important topic in the discussions between the IAJC and legal advisers of the ministries of foreign affairs of the OAS member States.

67. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the IAJC had recently appointed a Rapporteur for the topic, Mr. Hollis, who was due to present his first report in August 2017.

68. Ms. ESCOBAR HERNÁNDEZ, noting the immense variety of work done by the IAJC, including its activities in the field of private international law, said that the Commission had never focused on that area owing to its concentration on public international law. The question of non-binding international agreements went well beyond the context of the Americas and was of interest to all the States and legal advisers of the world. Did the IAJC intend to discuss the question of the type of persons or bodies that could enter into such agreements? In relation to the work of the IAJC on the protection of cultural property,

she asked whether any applicable universal agreements that dealt with the issue outside the context of armed conflict, such as the Convention on the Protection of the Underwater Cultural Heritage and other conventions adopted by the United Nations Educational, Scientific and Cultural Organization, had been taken into account.

69. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that in his own country, Chile, various State subdivisions and regional bodies had concluded non-binding international agreements, and the question of the legal nature and effects of those agreements had indeed arisen. That matter featured prominently in the discussions on the topic. The protection of cultural heritage was a major concern for the peoples of Latin America, who felt the need to protect their cultural property from illicit export and theft. The IAJC had discussed the Convention on the Protection of the Underwater Cultural Heritage referred to by Ms. Escobar Hernández and had adopted a resolution calling explicitly for its ratification by all the States of the region. It had also urged the OAS member States to ratify the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador). In addition, the user's guide that he had mentioned in his presentation would include the principles set forth in the Convention on the Protection of the Underwater Cultural Heritage.

70. Mr. GÓMEZ ROBLEDO said that, in the interest of ensuring that the Committee's model legislation on protection of cultural property in the event of armed conflict reflected the latest developments in that area, the IAJC might wish to note that the most recent instrument in that regard was the Council of Europe Convention on Offences relating to Cultural Property, signed in Cyprus in May 2017. That instrument was intended to prevent and punish criminal offences related to trafficking in cultural property and had been adopted to replace a similar treaty signed in Delphi in 1985, which had never entered into force. In comparison with the Convention on the Protection of the Underwater Cultural Heritage, the Council of Europe text was much more advanced, as it provided for the return of cultural property as one of the possible forms of redress. Mexico, as an observer to the Council of Europe, had signed the treaty.

71. In the light of the role of the IAJC as an advisory body not only to the OAS policy organs but also to the member States, he wondered whether the IAJC had been requested to provide a legal opinion regarding the denunciation by the Bolivarian Republic of Venezuela of the Charter of the Organization of American States. That denunciation was unprecedented; even Cuba, which did not participate in the OAS, nonetheless remained a member. The denunciation of the Charter must have raised questions regarding which of the State's obligations under inter-American treaties subsisted and which did not. Had the IAJC taken up such questions?

72. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that he appreciated the information on the recently adopted Council of Europe Convention, which was obviously relevant and

should be taken into account in the work of the IAJC on the protection of cultural property. As for the question of requests for legal opinions, the Committee had held discussions with the OAS Secretary General on legal aspects of the Inter-American Democratic Charter but had not yet received any specific requests for an opinion on that subject or on the denunciation of the Charter of the Organization of American States. He would not be surprised if the IAJC soon received such a request.

The meeting rose at 1 p.m.

3380th MEETING

Tuesday, 25 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, 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.

Organization of the work of the session (*continued*)^{*}

[Agenda item 1]

1. The CHAIRPERSON invited Mr. Vázquez-Bermúdez to read out the composition of the Working Group on protection of the environment in relation to armed conflicts.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on protection of the environment in relation to armed conflicts) said that the Working Group would be composed of Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia and Sir Michael Wood.

3. The CHAIRPERSON said that an additional plenary meeting would be held that afternoon to conclude the debate on the topic of succession of States in respect of State responsibility. He proposed that the Bureau meet on Wednesday or Thursday of that week in order to prepare for the final week of the session and the adoption of the report.

4. Ms. ESCOBAR HERNÁNDEZ said that she had expressly called for an urgent meeting of the Bureau to discuss issues related to the content of the chapter on immunity of State officials from foreign criminal jurisdiction.

5. Mr. VALENCIA-OSPINA proposed that the Bureau meet the following day so that it would still have time to hold another meeting that week if necessary.

6. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission agreed that the Bureau meet on Wednesday, 26 July.

It was so decided.

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*)

7. The CHAIRPERSON invited the Commission to resume its consideration of the Special Rapporteur's first report on succession of States in respect of State responsibility (A/CN.4/708).

8. Mr. LARABA said that, since the Special Rapporteur had stressed that his first report was preliminary in nature—despite the fact that it included four proposed draft articles—his own comments should also be seen as preliminary. During the debate in the Sixth Committee in 2016, several States, including Austria, Slovakia and Slovenia, had drawn attention to the complexity of the topic, although they supported its inclusion in the Commission's programme of work. That complexity was reflected in the first report in the sense that the Special Rapporteur's general approach to the topic was somewhat difficult to grasp. He agreed with the view expressed by Ms. Brigitte Stern that any reflection on international responsibility and succession of States would necessarily be immersed in the tensions and controversies of international law. It echoed the observations made by Mr. Georges Abi-Saab in 1987 that the succession of States raised questions related to the distribution of values, something which international law had traditionally avoided. Referring to the statement in paragraph 85 of the report that succession of States was of a highly political nature, in particular if contested, he questioned whether there were any cases of succession that were not contested. All cases were obviously contested and negotiated and involved political issues, whether they were explicit or implicit in the relations between the States and/or entities involved. However, the Special Rapporteur seemed to suggest that successions took place in a peaceful context and involved only technical matters. A more detailed and broader examination of State practice, which might reveal the contrary, should be carried out as soon as possible. Now that time had passed, it might be possible to debate issues related to the succession of States that had caused such tensions more calmly.

9. Furthermore, the report was based on an unconvincing and unfounded premise. The Special Rapporteur's thesis essentially centred on two propositions which, when read together, were problematic. In paragraph 83, the Special Rapporteur concluded that the rule of non-succession had been questioned by modern practice, but that did not mean that the opposite thesis—automatic succession in

^{*} Resumed from the 3370th meeting.