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Summary record of the 3375th meeting

Topic:
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75. Consequently, to adopt rules stipulating State succession in State responsibility would erode the existing core principles of State succession law. States might well be willing to adopt such new rules; however, it should be made clear from the outset that this was the Commission's intention. It was highly misleading to label the exercise as a codification task when it was a clear example of progressive development. Given the Commission's disappointing experience with its previous codification and progressive development endeavours in the field of State succession, it was questionable whether the project would be widely accepted. The statement in paragraph 24 of the report that the succession of States in respect of State responsibility was a topic of general international law where customary international law had not been well established in the past still rang true. He was not suggesting that the Commission's task should be limited to codifying international law: the task relating to progressive development was equally important. Nevertheless, before embarking on an exercise to establish rules *de lege ferenda*, it would have been advisable for the Commission to consider what such rules might look like—an exercise more suited to a study group.

76. Therefore, he could not recommend the referral of the four draft articles in the first report to the Drafting Committee. Further reflection on the actual purpose of the topic was needed.

The meeting rose at 1 p.m.

3375th MEETING

Friday, 14 July 2017, at 10.05 a.m.

Chairperson: Mr. Eduardo VALENCIA-OSPINA
(Vice-Chairperson)

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. 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. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on succession of States in respect of State responsibility (A/CN.4/708).

2. Mr. MURPHY said that, at the outset, he would like to express agreement with several positions taken by the Special Rapporteur in his report. First, he agreed that the Commission should seek to maintain harmony with its prior work, and in particular with the two Vienna Conventions on succession of States, namely the 1978 Vienna Convention and the 1983 Vienna Convention. Second, as the Special Rapporteur indicated, the studies of the International Law Association and of the Institute of International Law were important reference points that should be fully considered, but that should not necessarily be followed if the Commission's judgment led to other conclusions. Third, like Mr. Murase, he agreed that the Commission should exclude the responsibility of international organizations from the scope of the current project. Finally, he agreed with the Special Rapporteur's decision to move forward with the project through the formulation of draft articles with commentaries thereto, rather than some other form of final product.

3. Regarding draft article 1, he agreed that it was necessary to start with an article that addressed the scope of the current project, in accordance with the Commission's usual practice. That said, its text might be somewhat improved in the Drafting Committee. Unlike Mr. Murase, however, he would prefer that the scope of the project did not include State liability or issues relating to succession of Governments, as those issues would take the Commission too far from its principal task.

4. Regarding draft article 2, he agreed with the definitions provided in subparagraphs (a) to (d) of the terms "succession of States", "predecessor State", "successor State" and "date of the succession of States", which were essentially borrowed from the relevant Vienna Conventions. He was not convinced, however, of the need for subparagraph (e), which attempted to define the term "international responsibility". That term had not been defined in prior draft articles of the Commission, including its draft articles on the responsibility of States for internationally wrongful acts³⁴⁴ and its draft articles on the responsibility of international organizations.³⁴⁵ The report did not explain why it was critical to define such a term in the present draft articles. He was not persuaded that it was necessary or desirable to do so and would prefer that the matter should be addressed in the commentary, as had been done in prior work. For the same reason, little was to be gained by trying to define "internationally wrongful act", as had been suggested by Mr. Murase.

5. With respect to draft article 3, he agreed with Mr. Murase that it was problematic to deal with draft articles 3 and 4 without first addressing an important, antecedent question, namely: what was the general rule that applied in respect of the transfer of responsibility to a successor State, both in terms of rights and obligations?

³⁴⁴ 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.

³⁴⁵ The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

6. The report noted that the general rule articulated in scholarly writings was that there was no transfer of responsibility from a predecessor State to a successor State, at least with respect to obligations. At the same time, the report appeared strongly to suggest that contemporary practice pointed in an opposite direction: that today there might well be automatic transfer of responsibility from a predecessor State to a successor State. Yet, the report took no definitive position as to which view was correct, nor did it advance any draft article that articulated the general rule one way or another.

7. Not resolving the content of a general rule made it difficult—although perhaps not impossible—to determine how best to write draft articles 3 and 4, because those articles were essentially trying to explain when it was that there might be divergences from the general rule. Draft article 3 was focused on the possibility of a bilateral agreement setting forth a special rule that governed in a particular situation, while draft article 4 was focused on the possibility of a unilateral declaration by a successor State setting forth a special rule that governed in a particular situation. Knowing the content of the general rule would help in determining how best to characterize those divergences.

8. Perhaps scholars were right that there was no succession of States in respect of State responsibility. If so, then draft article 3 would indicate the circumstances under which succession of responsibility might be agreed upon by treaty, while draft article 4 would indicate the circumstances under which a successor State might accept succession of responsibility through a unilateral declaration, such as an acceptance of succession of obligations.

9. Alternatively, perhaps scholars were wrong, and there was now a general rule favouring succession of States in respect of State responsibility. If so, then draft article 3 would indicate when it was, through treaties, that agreement might be reached limiting or eliminating such succession, while draft article 4 would indicate whether a State through a unilateral declaration could affect such succession, such as by renouncing a succession of rights. Or perhaps the general rule was somewhere between those two positions, such as automatic succession of obligations, but not of rights.

10. If, despite that difficulty of not first knowing the general rule, the Commission decided to send draft article 3 to the Drafting Committee, then he wished to make the following remarks. The essential concern of paragraphs 1 and 2 was the effect of agreements concluded by a predecessor State and a successor State upon third parties. Those two paragraphs were unnecessarily complicated and might be collapsed together in a more succinct fashion. For example, language along the lines of the following might be appropriate:

“A predecessor State and a successor State may conclude an agreement providing that rights or obligations in respect of an internationally wrongful act of the predecessor State devolve upon the successor State, but such agreement does not necessarily affect the rights or obligations of another State or subject of international law.”

11. The purpose of paragraph 3 was somewhat unclear from its text. Based on the discussion in the first report,

paragraph 3 appeared to be trying to clarify the difference between devolution agreements, on the one hand, and claims or other agreements, on the other hand. Unlike devolution agreements, which were concluded exclusively between the predecessor or successor States and did not involve third States as a party, a claims agreement or other agreement concluded by a successor State with a third State could result in enforceable rights and obligations as among those States.

12. Paragraph 3 might not be necessary since it was just restating basic rules of treaty law. However, if there was a desire to retain the paragraph, it might be reformulated to be more direct in terms of what was being said. Thus, the text could perhaps read: “The rights and obligations arising from a claims or other agreement between a successor State and a third State are binding as between the parties to that agreement.”

13. While he had no substantive problem with the content of paragraph 4, which indicated the existence of the *pacta tertiis* rule, it was, in his view, unnecessary. Paragraph 4 was essentially restating what was said in paragraphs 1, 2 and 3. It might therefore be better placed in the commentary.

14. Draft article 4 was focused on unilateral declarations of successor States, which was an important issue, but one that probably should not be tackled without knowing the general rule on succession of States in respect of responsibility. If that draft article was referred to the Drafting Committee, his principal concern would be with the final clause of paragraph 2. That clause was a partial statement of the criteria necessary for a unilateral declaration to be legally binding, referring solely to the criterion that the unilateral declaration must be “stated in clear and specific terms”. Yet the Commission’s work on unilateral declarations included other requirements: first, that the statement should be made by someone with the authority to make such statements; second, that the declaration could not conflict with a peremptory norm of international law; and, third, that when assessing the legal effect of a unilateral declaration, account must be taken of the content and context of, and reaction to, the unilateral declaration.

15. Accordingly, the final clause of draft article 4, paragraph 2, could be altered to take account of all relevant criteria for unilateral acts to be regarded as legally binding. Thus, that clause might instead read: “unless its unilateral declaration is legally binding in accordance with the rules of international law applicable to unilateral acts of States”. Adding such a phrase would likely eliminate the need for draft article 4, paragraph 3.

16. He had no concerns with respect to the future programme of work or timetable, as envisaged by the Special Rapporteur.

17. In conclusion, he supported sending draft articles 1 and 2 to the Drafting Committee but suggested that the Special Rapporteur consider holding back draft articles 3 and 4 until the plenary had had an opportunity to debate fully the general rule on succession of States in respect of responsibility, with respect both to the successor State’s rights and obligations.

18. Mr. NGUYEN said that the issue of State continuity and succession, especially with regard to the obligations and responsibilities of a successor State, was a vast subject that encompassed, among other things, treaties, State property, nationality, and public and foreign debts, as well as rights and obligations arising from internationally wrongful acts. In its previous work on the topic of succession of States, which had resulted in the 1978 Vienna Convention and the 1983 Vienna Convention, the Commission had decided to leave the issue of rights and obligations arising from internationally wrongful acts for possible future development. However, despite the emergence of new States during the 1960s as a result of decolonization processes and a wave of dissolution of States during the 1990s in Central and Eastern Europe, there had been long periods during which the emergence or disappearance of a State had been rare. Indeed, the rarity of such events posed difficulties in identifying a unified and clear trend of State practice and, consequently, establishing rules and principles of international law governing the succession of States in respect of responsibility. He therefore highly appreciated the Special Rapporteur's efforts to provide a comprehensive view of general State practice and the legal basis and nature of State succession in respect of State responsibility.

19. He particularly agreed with the proposed methodology for analysing the topic. In paragraph 13 of the report, the Special Rapporteur stated that the definitions contained in the draft articles on the responsibility of States for internationally wrongful acts and in the 1978 Vienna Convention and the 1983 Vienna Convention were applicable to the present topic. However, those definitions should take into account the new global political and legal settings. For example, the case of Hong Kong under the policy of "one State, two regimes" was an exceptional case of transfer of rights from the predecessor State to the successor State. In the case of Timor-Leste, there had been a transitional period of transfer of rights and obligations from the predecessor State to the successor State via the United Nations provisional administration.

20. In determining whether there was a general principle guiding the succession of States in respect of State responsibility, the Special Rapporteur seemed to have paid more attention to the views of authors and scholars than to actual State practice in that area, which, in his view, was of prime importance to the topic at hand. When the Special Rapporteur referred to State practice, he gave more attention to cases in Europe than to those in other regions. For instance, five pages of the report were devoted to cases of succession relating to Central and Eastern Europe during the 1990s, while barely one page was given over to cases in Latin America and Asia. The Soviet Union was mentioned in the report as a case of State succession, but it received relatively little attention despite its relevance to the topic. Furthermore, many other relevant cases were absent from the report, such as those relating to Algeria and Viet Nam.

21. As the Special Rapporteur rightly pointed out, various situations involving the succession of States, such as the transfer of a part of a territory, secession, dissolution, unification and the creation of a new independent State, should be examined in order to categorize the

different responsibilities arising from such scenarios. In fact, if the Commission failed to establish sufficient evidence of State practice or *opinio juris* on the succession of States in respect of State responsibility, the outcome of its work would be no different from that of the two earlier Conventions on State succession. Owing to the scarcity of State practice in the field under consideration, every instance thereof should be taken into account. Therefore, the Special Rapporteur should consider addressing other classic instances of succession of States when preparing his second report, especially cases where internationally wrongful acts done by the predecessor State concerned a violation of customary international norms, *jus cogens* or international law in general.

22. The topic under consideration had been extensively analysed by the Institute of International Law. However, he agreed with the Special Rapporteur that the work of the Institute, which was a private codification body and different from the Commission in terms of legitimacy and authority, should not limit the latter's work on the topic.

23. Regarding draft article 1 on the scope of the topic, the general language in which it was couched might confuse rather than enlighten readers. In particular, the word "effect" failed to convey adequately the focus of the topic, namely the legal rights and obligations arising from internationally wrongful acts. Moreover, since the issue of State succession usually involved a predecessor State transferring its legal rights and obligations arising from internationally wrongful acts to one or several successor States, the draft article failed to make clear which State bore the responsibility referred to and towards whom, and whether responsibility towards international organizations was also included. In paragraph 22 of the report, the Special Rapporteur stated that the scope of the topic would not include questions of the succession in respect of the responsibility of international organizations. However, the scope should cover situations where States members of an international organization incurred responsibility in connection with the conduct of an international organizations *vis-à-vis* third parties, as Mr. Murase had indicated at the previous meeting.

24. Regarding draft article 2, most of the terms defined therein were identical to the corresponding terms as defined in the 1978 Vienna Convention and the 1983 Vienna Convention and in the Institute of International Law resolution on State succession in matters of State responsibility. However, consideration should be given to whether the word "replaced" as used in subparagraphs (b), (c) and (d) was appropriate, since, in practice, as noted by the Special Rapporteur in paragraph 71 of the report, there were cases of succession, such as transfer of territory or separation of part of the territory, where the predecessor State was not replaced in its entirety by the successor State. The case of Hong Kong in 1997 seemed not to be covered by draft article 2. State succession was, in fact, the change of sovereignty over a territory or part of a territory. As for subparagraph (e), which defined the term "international responsibility", he supposed that, when referring to "the relations which arise under international law", the Special Rapporteur meant "the legal relations which arise under international law". However, in his view, the term should clearly signify the consequences in terms of rights and

obligations arising from the internationally wrongful conduct of a State rather than a general legal relation arising from internationally wrongful acts, since, as currently formulated, it might be misunderstood as also including an indirect legal relation with respect to injured third-party States.

25. He had two comments regarding draft article 3. First, in line with his earlier suggestion, it should be made clear in the commentaries that the obligations referred to in paragraph 1 concerned general obligations arising from an internationally wrongful act that violated a commitment made under a treaty, a customary norm, a *jus cogens* norm or other rules of general international law. Accordingly, other examples supporting practice in that regard should be addressed and analysed on an equal basis. Second, the term “[a]nother agreement” in paragraph 3 should specify the parties to such agreement and whether the agreement was only between the predecessor and successor State or whether it was between those two States and any other third States concerned. The first sentence of paragraph 3 should also specify the subject of such “another agreement” to be the acceptance by the third party of the succession of States in respect of responsibilities under a particular treaty or the agreement to modify the scope of responsibilities of a succession State under such treaty.

26. In conclusion, he was in favour of sending draft articles 1 and 2 to the Drafting Committee for consideration.

Protection of the environment in relation to armed conflicts³⁴⁶ (A/CN.4/703, Part II, sect. D)³⁴⁷

[Agenda item 4]

27. The CHAIRPERSON suggested, on the basis of consultations with the Bureau, that the Commission establish a working group on the topic “Protection of the environment in relation to armed conflicts” to consider how to proceed with that topic.

28. Mr. GÓMEZ ROBLEDO asked whether the proposed working group would also consider the draft commentaries prepared for the current session by the previous Special Rapporteur, Ms. Jacobsson.

29. The CHAIRPERSON said that the Bureau’s position was that the working group would, in particular, reflect on the way forward regarding the topic. However, it would be for the working group, once it had been established, to assess the current situation. It was his understanding that the text of the commentaries as submitted by Ms. Jacobsson to the secretariat was not yet ready for consideration by the working group.

30. Mr. LLEWELLYN (Secretary to the Commission) said that Ms. Jacobsson had submitted what she had described as an incomplete and unedited first draft of the

commentaries. In her estimation, they were not a basis on which the working group could work substantively. Nevertheless, the draft would be circulated to the members of the working group, and it would be for the chairperson of the working group and the working group itself to determine how to move forward.

31. The CHAIRPERSON said that he wished to draw the attention of members, in particular those who had been recently elected to the Commission, to chapter X of the report of the Commission on the work of its sixty-eighth session,³⁴⁸ which provided a clear overview of work on the topic to date.

32. If he heard no objection, he would take it that the Commission wished to establish the Working Group on protection of the environment in relation to armed conflicts.

It was so decided.

33. The CHAIRPERSON suggested, on the basis of the same consultations with the Bureau, that Mr. Vázquez-Bermúdez be appointed Chairperson of the Working Group on protection of the environment in relation to armed conflicts.

It was so decided.

The meeting rose at 10.50 a.m.

3376th MEETING

Tuesday, 18 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special

³⁴⁶ For the history of the work of the Commission on the topic, see *Yearbook ... 2017*, vol. II (Part Two), chap. X, sect. A, p. 146.

³⁴⁷ Available from the Commission’s website, documents of the sixty-ninth session.

³⁴⁸ *Yearbook ... 2016*, vol. II (Part Two), pp. 185 *et seq.*