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Summary record of the 3376th meeting

Topic:
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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.*

Rapporteur on succession of States in respect of State responsibility (A/CN.4/708).

2. Mr. HASSOUNA said that he welcomed the Special Rapporteur's report on a complex topic for a number of reasons. It was especially timely in view of events in Eastern Europe over the last few decades and the increasing number of secessionist movements worldwide. The issue was no longer politically divisive, as borne out by the growing body of relevant State practice and general support by Member States and private organizations for the topic. The Commission had addressed various related aspects of international law since it had selected the topic in 1949, but codification gaps remained. It now had the opportunity for further codification and progressive development in the area.

3. Draft articles would be an ideal form for the outcome of the Commission's work on the topic if the Special Rapporteur sought to establish a coherent set of principles that could one day form the basis of an international convention. On the other hand, draft guidelines seemed better suited for the purpose of presenting a useful model for States to follow and a default rule to be applied in cases of dispute. He agreed with the Special Rapporteur not only that the rules on the succession of States in respect of State responsibility should be of a subsidiary nature, but also that States typically preferred to have freedom to negotiate the conditions of succession. The flexibility of draft guidelines would respond more adequately to the unique circumstances that sometimes arose in cases of State succession. That said, it would likely be best to discuss the form of the outcome of the Commission's work only once the Special Rapporteur had done more substantive research.

4. He supported the Special Rapporteur's overall approach to the scope of the topic, including his choice to exclude the responsibility of international organizations. However, given that rules and principles of liability could exist in customary international law and treaty law, it might be advisable not to completely rule out the exploration of such liability at the early stages of the Commission's work on the topic. At the very least, the issue could be addressed in the commentary. He agreed with other members that the Commission should not explore the succession of Governments, as that would likely overburden the topic. The relationship between the current topic and the Commission's work on the topic of provisional application of treaties should be clarified. In addition, the Special Rapporteur should explore how the current topic related to the right of self-determination—a concept that had assumed growing importance in international relations—since that right could constitute a legal basis for the creation of new States. The Special Rapporteur might therefore consider including a “without prejudice” clause in the commentary to underline that close relationship.

5. Draft article 1 should include a provision similar to article 6 of the 1978 Vienna Convention to make it clear that the draft articles applied only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. That same provision found further support in article 2 of the

resolution on succession of States in matters of international responsibility³⁴⁹ adopted in 2015 by the Institute of International Law.

6. He welcomed the fact that the definitions in draft article 2 took as their basis established international law. However, he suggested that the title of the definition contained in draft article 2 (e)—“international responsibility”—be replaced with the more specific title “international State responsibility”. The phrase “the relations” in the same provision should either be replaced with “the legal consequences” or clarified in the commentary. He proposed including two additional definitions for the terms used elsewhere in the draft articles—“devolution agreement” and “unilateral declaration”. The latter could be attributed the same definition as that contained in Guiding Principle 1 of the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.³⁵⁰ Definitions for the terms “international responsibility” and “internationally wrongful act” would best be included in the commentary so as not to overburden the text of the draft articles.

7. Regarding draft articles 3 and 4, the Special Rapporteur did not explicitly articulate the substance of a general principle that guided the succession of States in respect of State responsibility; further, it was unclear whether modern State practice existed to the extent that the traditional general rule of non-succession had been sufficiently challenged. However, as currently drafted, neither draft article was dependent on the resolution of that issue. Rather, the draft articles simply illustrated the established ways in which responsibility had been transferred with regard to State succession. As such, they could be considered by the Drafting Committee, on the understanding that the Special Rapporteur would take up the issue of the existence of a general rule of non-succession in a future report and propose a new article as appropriate.

8. The cases cited in the report illustrated that even if there was a general rule of non-succession, it was not absolute and was instead subject to various exceptions that found support in State practice. In several of those cases, the Court had not made any pronouncement on State succession in respect of State responsibility, but instead had taken note of agreements between the States regarding the transfer of State responsibility. If the theory of non-succession was firmly established in general international law, then surely it would have made a pronouncement. More specifically, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Croatia had argued that the Federal Republic of Yugoslavia had made a unilateral declaration that accepted the treaty obligations of the predecessor State, thereby succeeding to the latter's international responsibility. That confirmed the view that actions by successor States, like unilateral declarations, could transfer State responsibility—a practice reflected in draft articles 3 and 4.

³⁴⁹ 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-iil.org/Resolutions.

³⁵⁰ The Guiding Principles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 161 *et seq.*, paras. 176–177.

9. It was important to conduct more detailed research on cases outside of Europe. African practice, for instance, was varied, but there appeared to be a trend of successor States accepting responsibility for the obligations arising out of acts by predecessor States contingent upon agreements being concluded by the parties. For instance, courts in Belgium and France had issued judgments on the question of State responsibility in the context of the independence of the Congo and Algeria, respectively. In more recent cases, it had been debated what obligations South Sudan had towards third parties regarding resources from the Nile River, or whether South Sudan needed to negotiate with the Sudan only. The need to negotiate was covered in draft articles 3 and 4.

10. His last general comment on draft articles 3 and 4 was that in its examination of the topic, the Commission should bear in mind the words of Professor Marcelo Kohen that State succession should not be a pretext for creating a situation of impunity.

11. Turning to specific amendments, he suggested that in draft article 3, paragraph 3, the meaning of the phrase “full effects” be clarified. He further suggested that certain elements of the Commission’s 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations should be taken into account in draft article 4. He therefore proposed that the phrase “unless the other State or other subject of international law who committed the internationally wrongful act” be added at the end of draft article 4, paragraph 1, and that the end of draft article 4, paragraph 2, be amended to read “unless its unilateral declaration is made by an authority vested with the power to do so and stated in clear and specific terms”.

12. Lastly, he proposed the addition of a new draft article that would explicitly emphasize the subsidiary nature of the rules. Article 3 of the resolution on State succession in matters of international responsibility adopted by the Institute of International Law could serve as a useful model in that regard.

13. He applauded the Special Rapporteur’s intention to pursue a more nuanced approach regarding the classification of the different types of State succession. He suggested that he propose guidelines on identifying the existence or non-existence of continuator States and consider whether there was a difference between the dissolution of a centrally organized State and of a federally organized State, respectively. He was in favour of referring all the draft articles to the Drafting Committee.

14. Mr. HMOUD said that he welcomed the Special Rapporteur’s report, which provided a useful introduction to the core issues surrounding the succession of States in respect of State responsibility. Nevertheless, the report might have focused more on the purpose of the Commission’s work on the topic and on such issues as the topic’s relationship with the 1978 Vienna Convention and the 1983 Vienna Convention. Furthermore, State succession did not appear to be established as a distinct field of international law; the lack of widespread acceptance of the two Conventions was indicative in that regard. The same could be said of the Commission’s draft articles on nationality

of natural persons in relation to the succession of States,³⁵¹ which were described in the report as “largely followed in practice”. There was no proof provided in support of that statement. To the contrary, the General Assembly, in its resolution 55/153, had taken note of the draft articles and invited Governments to take them into account “as appropriate” (para. 3). The General Assembly had then regularly deferred the item until 2011, when it had decided that it would revert to the issue “at an appropriate time, in the light of the development of State practice”.³⁵² While the Commission’s work on the topic had better prospects of acceptance than the 1978 Vienna Convention and the 1983 Vienna Convention, the topic could not be said to have generated significant interest among Member States in the Sixth Committee; such lack of interest was understandable considering the limited practice in the field and its application to the international community in general.

15. The Commission would do well to study further the topic’s relationship to the Commission’s draft articles on the responsibility of States for internationally wrongful acts.³⁵³ If the outcome of the Commission’s work on the current topic was to be a set of special rules, the aforementioned articles on the responsibility of States would be considered the general rules on the matter. One such general rule was article 2 of the draft articles on the responsibility of States for internationally wrongful acts, which made responsibility of the State for an internationally wrongful act conditional on the conduct in question being attributed to that State. There was little or no discussion in the report of the element of attribution in cases of State succession, even though that was a key factor in determining whether there was a rule of negative or positive succession to State responsibility. The Commission, in its commentary to the draft articles on the responsibility of States for internationally wrongful acts, had considered it unclear whether a new State succeeded to any State responsibility of the predecessor State. In the context of the discussion of the articles on attribution, including on acts of insurrectional or separatist movements, the commentary did not provide any indication that there was an exception to the requirement of attributing the wrongful conduct to the State committing it.

16. It would have been useful for the report to elaborate on the issue of attribution of the wrongful act in relation to succession of States, especially with regard to its relationship with articles 2 and 11 of the draft articles on the responsibility of States for internationally wrongful acts; the latter article involved the assumption of responsibility by the State to the extent that it acknowledged and adopted the conduct as its own. Although the Special Rapporteur, in his report, stated that development over the previous 20 years had led to the reconsideration of the previously unquestioned rule of non-succession, it was not

³⁵¹ 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.

³⁵² See General Assembly resolution 66/92 of 9 December 2011, para. 4.

³⁵³ 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.

clear what those developments were, either in doctrine or in practice. The authors cited in the report provided solid arguments in favour of non-succession and of the notion that predecessor and successor States had different legal personalities. However, the report stated that none of the reasons given was wholly relevant, because they could not discard a possible transfer of at least some obligations of States arising from international responsibility and that, as a rule, they did not take into consideration new developments and changes of the concept of State responsibility. That seemed to be a circular argument and, in any case, was not supported by practice or the existence of an alternative doctrine. He agreed with other members that nothing in case law, the articles on the responsibility of States for internationally wrongful acts, practice or doctrine allowed the Commission to conclude that the rule on non-succession had been replaced by a rule on succession of the successor State by the predecessor State. The report should have dealt with such concepts and should have proposed a general rule on non-succession with possible exceptions or limitations on the basis of general international law and as recognized by doctrine.

17. A State might assume responsibility from a predecessor State for various reasons, mainly political: while more apparent in the context of decolonization, it was the case for virtually all agreements on the transfer of rights and obligations in the context of succession. It did not indicate that such a transfer was premised on a sense of legal obligation arising from a rule of general international law. States assumed obligations by agreement or by unilateral acts so as to settle political disputes, achieve independence or secure friendly relations and avoid conflict with other States. As with any other agreement, an agreement on succession involving State responsibility must be applied in good faith within the framework of the relevant rules of the 1969 Vienna Convention and, where applicable, the 1978 Vienna Convention.

18. The report did not indicate what the default rule would be in the event that no agreement was reached in a case of succession. It was critical, for the purposes of the topic, to determine the current default rule under general international law. It was one thing to state that no rule existed and another to state that the issue was nuanced and should be approached on a case-by-case basis. In the second proposition, a default rule might indeed exist, but exceptions or other rules might need to be taken into account. Even if the Commission agreed that a default or subsidiary rule should be progressively developed, it should be based on practice or on an emerging trend, which the report did not indicate existed. On the contrary, it seemed that the traditional doctrine of non-succession should be the default rule that could be overridden if a special rule, whether in an agreement or treaty, existed or an exception was to be applied. Care should be taken not to confuse treaty provisions with an emerging trend.

19. While the *pacta tertiis* rule contained in articles 34 to 36 of the 1969 Vienna Convention applied to succession agreements, it should be read in the context of the creation of new rights and obligations towards a third State. If such rights and obligations applied prior to an agreement that merely transferred existing rights or obligations, the rule would not be relevant. In that sense, draft

article 3, paragraph 4, correctly provided that the rules set out in the draft article were without prejudice to applicable rules of the law of treaties, including the *pacta tertiis* rule. That rule, however, would only come into play if new rights and obligations arose from a devolution agreement or other agreement on succession, in which case the issue of third State consent and the presumed assent of that State would become relevant.

20. While the distinction drawn in the report between classical devolution agreements, claims agreements and other “hybrid” agreements was useful in explaining succession agreements, he questioned its relevance in establishing a subsidiary rule on the effect thereof. It might be best suited to explaining the various succession situations in order to deduce rules on succession where no agreement existed. It would be sufficient to state that, where an agreement on succession existed, it must be applied in good faith in accordance with the general rules of treaty law. In that sense, only the “without prejudice” clause in draft article 3, paragraph 4, was needed. The preceding three paragraphs were unnecessary and could sow doubt as to the legal value of such agreements, particularly with regard to succession agreements arising over the previous two decades. The “without prejudice” clause also made the unsupported difference in treatment of devolution agreements and other agreements in those three paragraphs unnecessary. Despite the Special Rapporteur’s intention to tackle clauses on sharing responsibility and apportioning rights and obligations on the merits of each case, general draft conclusions could serve as useful guidance for States on how to share and apportion responsibility.

21. The report cited a number of examples of unilateral State acts relevant in the context of State succession, along with article 11 of the draft articles on the responsibility of States for internationally wrongful acts and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. While relevant, it was not clear how the instruments cited had become the basis for the result set out in draft article 4. Under that article, the rights and obligations of a predecessor State could not be assumed by a successor State only by reason of unilateral declarations by the latter assuming such rights or consenting to such obligations. From the examples given in the report, the opposite could be concluded. The negative formulation of the first two paragraphs of draft article 4 reflected neither the propositions in the Guiding Principles nor the practice cited in the report. Further explanation of the legal basis for the assumption of rights was needed, perhaps by analogy with private law principles on the transfer or assignment of rights. The requirement contained in draft article 4, paragraph 2, for unilateral declarations to be clear and specific was based on Guiding Principle 7 but did not address other acts of State whereby the successor State unilaterally assumed the wrongful conduct of a predecessor State or continued that conduct and adopted it as its own. Unlike a declaration, such an act did not have to be clear and specific in its terms: instead, the assumption of responsibility was presumed nonetheless. The draft articles should therefore also deal with unilateral acts of States other than declarations as a source of assumption of State responsibility.

22. With regard to draft articles 1 and 2, he expressed support for the suggestion that an internationally wrongful act be defined on the basis of article 2 of the draft articles on the responsibility of States for internationally wrongful acts. Although the issue of attribution ran counter to the development of a doctrine of succession of responsibility, it was nevertheless a core rule of responsibility that should not be avoided. The door should also be left open to amending the definitions of predecessor and successor States and to including a definition of the term "continuator State". The definitions of predecessor and successor States must be grounded in the context of succession of State responsibility in terms of the transfer of rights and obligations. The definition of international responsibility proposed in draft article 2 was taken from the Commission's commentary to the draft articles on the responsibility of States for internationally wrongful acts. However, he suggested that instead of the statement "means the relations which arise under international law", the words "covers international legal relations" might be used. In terms of scope, he favoured including the issue of the rights of international organizations as an injured party and proposed that, in draft article 1, the words "the effect of a succession of States" be changed to "the legal consequences of a succession of a State". He recommended that all four draft articles be referred to the Drafting Committee, while noting that further discussion was needed on the rule of non-succession with a view to adding a conclusion in that regard.

23. Mr. GROSSMAN GUILOFF said that the Special Rapporteur was to be commended for having produced a quality report in such a short period of time based on recent doctrine and practice. The topic covered an area ripe for codification and progressive development by the Commission, as supported by the majority of delegations that had commented on the issue within the Sixth Committee. The report nevertheless took account of the contrary views and doubts about its relevance expressed by some. In his view, the topic was relevant and would fill a gap, as topics in related areas of the Commission's work had already been the subject of codification and development and there was a need for a coherent normative framework covering all aspects of State responsibility, including succession of States. The International Law Association and Institute of International Law had tackled the subject, with the latter stressing the need for codification and progressive development in the area of State succession and State responsibility. He agreed with the Special Rapporteur's suggestion that the outcome of the Commission's work take the form of draft articles and with the methodology adopted, though he echoed concerns at the predominantly European focus of the report. He also welcomed the decision to restrict the topic to State responsibility for internationally wrongful acts, which should frame the debate, and to concentrate on secondary rules of international law. There were sound legal reasons why the issue of succession of Governments, while important, had also been excluded.

24. The report suggested that the current state of international law was best reflected by the theory of non-succession, but pointed out that some scholars had questioned that theory. It was regrettable that the report did not elaborate on the new developments and changes in the concept

of State responsibility that might have prompted them to do so. The source cited in that regard appeared to refer to the break-up of the Soviet Union and the former Yugoslavia and related debates, subsequent to which the theory of non-succession had not been rejected in State practice or judicial decisions, including judgments of the International Court of Justice. Mr. James Crawford's description of the partial rebuttal of the theory of non-succession doubtless carried weight and lent credence to the Special Rapporteur's view that the theory was no longer adequate, but the fact remained that it had neither been questioned for most of the twentieth century nor replaced. Perhaps the new trend only applied to certain types of succession and certain topics and did not affect the general principle. He asked whether the different types of succession identified in paragraph 25 of the report would affect the general conclusions to be drawn and whether early work on the topic might need to be reconsidered in the light of future consideration of the effects of succession of States on other subjects of international law. In any event, he endorsed Mr. Hassouna's comment that State succession should never be used as a pretext for impunity.

25. Drawing attention to the fact that there was no single word in Spanish to express the difference between responsibility for internationally wrongful acts and responsibility for acts not prohibited by international law ("liability"), he suggested that the scope of the draft articles be clarified by adding the words "for internationally wrongful acts" to the title of the topic. The Commission must be cautious in analysing the State practice and judicial rulings described in the report, which might refer only to certain types of succession and topics and which had been interpreted in various ways by scholars. Mr. Reinisch, for example, had questioned the Special Rapporteur's interpretations of the rulings in the arbitration in the *Lighthouses case between France and Greece* and the *Gabčikovo–Nagymaros Project* case. Such concerns should be taken into account. The Commission could not ignore the controversy surrounding State and judicial practice relating to the topic. The efforts of the Special Rapporteur to ensure consistent drafting and use of terminology in the report, as reflected in draft article 1, which was closely based on the draft articles on the responsibility of States for internationally wrongful acts, were to be commended. The Special Rapporteur had allowed for the possibility of adding further definitions to draft article 2 as work on the topic progressed; consideration should be given to including a definition of the term "another subject of international law", which appeared in draft article 3. While it might be possible to do without specific definitions and refer instead to general international law, it seemed more appropriate to be explicit. Basing the definitions used on the 1978 Vienna Convention and the 1983 Vienna Convention, despite the fact that they had not been widely ratified, also contributed to a harmonized approach across the whole field of State succession.

26. In paragraph 93 of the report, the Special Rapporteur expressed his intention to deal with the issue of non-State entities, among other things, at a later stage. A detailed analysis of agreements involving such entities was needed to see if any general conclusions could be drawn. The Special Rapporteur had referred to subsidiary rules serving as a model for agreements on succession.

What would be the nature of such rules, and would any of them apply automatically in the absence of a succession agreement? Such questions should not be left pending. Echoing the concerns expressed regarding the need to clarify the legal sense of draft article 3, he emphasized the importance of identifying the current state of international law and any exceptions in practice as the starting point for considering the topic; he would welcome the Special Rapporteur's views in that regard. He agreed that the text of draft article 3 could be simplified by the Drafting Committee. The first paragraph was worrying in its apparent restriction on States' freedom of contract, while the third and fourth paragraphs simply restated general rules of the law of treaties. That was a valid approach if it meant that the resultant draft articles were self-contained, but the drafting must aid comprehension, not create confusion.

27. Draft article 4, which dealt with the important and complex issue of unilateral declarations by successor States, could benefit from simplification. There also seemed to be a discrepancy between the third paragraph, which referred to rules of international law, and the second, which required only a "clear and specific" unilateral declaration in order for a successor State to assume its predecessor's obligations. Although the draft article should reflect the Commission's previous work on unilateral declarations of States, the Commission should be cautious in the legal value it ascribed to such declarations so as not to inhibit normal inter-State relations and dialogue. He expressed support for the proposed future programme of work and for referring the four draft articles to the Drafting Committee.

28. Ms. GALVÃO TELES said that she shared the view expressed by several other members that it would have been preferable to discuss the inclusion of the topic, which had only been added to the long-term programme of work at the previous session, in the agenda for the current session with the newly composed Commission. Although she understood that the work of the Commission carried on from one quinquennium to the next, it was important to ensure that the active agenda was balanced and that topics addressed different issues of international law that met the current needs of States. Depending on the topic and the purpose of its study, due consideration should also be given to the final outcome of the work of the Commission. Certainly, it would be helpful to have further discussions before more specific and active work was pursued, particularly when it was decided to move a topic from the long-term programme to the current programme of work.

29. Commending the Special Rapporteur on having prepared his first report in such a short space of time, she said that it raised important issues of a general nature, and it might be premature to begin a drafting exercise before they were discussed in full. Nevertheless, she agreed with the Special Rapporteur that the fact that private associations, such as the Institute of International Law and the International Law Association, had dealt with a topic in no way prevented the Commission from doing the same and arriving at different conclusions. On the contrary, the fact that such institutions had also studied a subject was a reason for the Commission to consider it itself, taking such previous work into account, even if it departed from it in terms of outcome.

30. An important part of the Commission's task was to ensure consistency with work on previous topics that touched on similar issues, as was the case with the topics of State succession and State responsibility. However, it might be too early to fully measure the impact of the draft articles on the responsibility of States for internationally wrongful acts, since they had not become a convention, although they might generally be considered as customary law. The same applied to the conventions on State succession, which had not yet entered into force and on which there did not seem to be an overall agreement as to which provisions were rules of customary law. Thus, it was always a challenge to replicate previously successful work of the Commission, and attempting to do so did not necessarily guarantee an equally successful outcome, especially on such a complex topic as succession of States in respect of State responsibility. Just like any other State succession issue, context played a very important role and, since the extraction of general rules through codification resembled progressive development, it might be difficult for States to accept some of the outcomes, especially when the issue of whether a general rule in favour of succession or non-succession could be established based on State practice was still to be debated.

31. Several important issues needed to be clarified. The scope of the topic should be the succession or transfer of rights and obligations stemming from internationally wrongful acts and not State responsibility *per se*. As had been the case for the Commission's work on treaties, the exercise should encompass all types of succession—including regarding newly independent States—even if that might lead to different solutions, particularly when there might or might not be a continuing State. The principles or rules that the draft articles would seek to identify or establish would be of a subsidiary nature, as the Special Rapporteur rightly noted in paragraph 86 of the report, since States would continue to prefer to resolve such matters essentially through unilateral undertakings or bilateral or multilateral agreements.

32. Bearing in mind those general comments, if the Commission was to embark on a drafting exercise at that stage, draft article 1 should define in more precise terms the scope of the draft articles, in line with paragraphs 19 and 20 of the report, which mentioned "the transfer of rights and obligations arising from internationally wrongful acts". Draft article 2 could include a more complete list of terms, covering all types of State succession, including in regard to newly independent States. However, the definition of international responsibility seemed to be out of place there and should be addressed in connection with the scope of the draft articles in draft article 1 and its commentary. Draft articles 3 and 4 could be merged and should focus on affirming the subsidiary nature of the draft articles before addressing the relevance of agreements and unilateral declarations.

33. In conclusion, she said that although it might be advisable to defer the work of the Drafting Committee until the topic could be given more thorough consideration, if a consensus emerged, she would support referring the draft articles to the Drafting Committee, taking into account the remarks made in the plenary debate.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

STATEMENT BY REPRESENTATIVES OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW

34. The CHAIRPERSON welcomed the representatives of the African Union Commission on International Law (AUCIL), Ms. Gueldich, Mr. Iyana and Ms. Kalema, and invited them to address the Commission.

35. Ms. KALEMA (African Union Commission on International Law) thanked the International Law Commission for its invitation to AUCIL to brief the Commission on its work and to share experiences on matters of common interest. As a young institution, AUCIL greatly valued its cooperation with the Commission. AUCIL, an independent advisory organ of the African Union, had been established in 2009 and had begun work in 2010. Its objectives were to strengthen and consolidate the principles of international law, to remain at the forefront of international legal development, and to work towards maintaining standards in important areas of international and African Union law. AUCIL was composed of 11 members with recognized competence in international law from different regions of Africa, serving in their personal capacity. Mr. Ebenezer Appreku, a member who had contributed a great deal to the work of AUCIL, had passed away in 2016. AUCIL headquarters were currently in Addis Ababa, although there was the possibility of events being hosted by another member State in order to enhance the visibility of the African Union and its work. As AUCIL had a mandate to undertake activities relating to the codification and progressive development of international and African Union law, it had much in common with the Commission. The second aspect of its mandate, which was currently being developed, was to encourage the teaching, study, publication and dissemination of literature on international law, in particular the laws of the African Union.

36. According to its statute, AUCIL was responsible for the codification of international law through the formulation of rules of international law in fields where there had already been extensive State practice, precedent and doctrine on the African continent. In addition, AUCIL had the task of considering mechanisms for making evidence of customary international law more readily available, through the collection and publication of documents concerning State practice and the decisions of national and international courts on questions of international law. Although there had not been many such publications to date, AUCIL was currently working on developing an African digest of international law, to be published in 2018. Its purpose was to restore historical records of the views and practices of African Union member States, based primarily on international sources, African Union sources from the past 50 years, and national sources, including State papers, diplomatic correspondence and judicial decisions. AUCIL also assigned members as special rapporteurs to undertake studies on areas of interest either on its own initiative or at the request of the African Union Assembly or Executive Council. To date, it had completed five studies; a further 12 studies were ongoing.

37. Ms. GUELDICH (African Union Commission on International Law) said that the fruitful cooperation between the two commissions provided AUCIL with the opportunity to learn and enhance its view of international law in a global context. AUCIL aimed to carry out in-depth studies on topics of interest to Africa through the prism of international and African Union law, bearing in mind the need to accelerate regional integration—the main objective of the Agenda 2063³⁵⁴ adopted in 2015 by the Governments of the African Union—and to enlighten African decision makers on the legal implications of such integration.

38. In addition to codification and development, AUCIL worked on the teaching, study, publication and dissemination of international law. As part of those activities, AUCIL had organized the first international law seminar for African universities in Accra in 2016, in close cooperation with the African Institute of International Law and the Codification Division of the Office of Legal Affairs of the United Nations. AUCIL also provided regular financial contributions to the United Nations Regional Course in International Law, which benefited from the political support of the African Union and the expertise of some of its members, who taught in the Course. AUCIL was also conducting a study on promoting the teaching, study and dissemination of international law and African Union law on the African continent, under the leadership of Ms. Kalema. It was a very ambitious study that aimed to identify the gaps and challenges faced by African universities in that field and to make recommendations for optimization and exchange of experiences.

39. AUCIL had published the first edition of its *Yearbook* in 2013 and was about to publish the second, which would cover the period from 2012 to 2016 and include the new strategic plan. Two issues of its *Journal of International Law* had been published, the second covering the work of the second and third AUCIL Forums on International Law on the themes of the law of regional integration in Africa and codification of international law at the regional level in Africa, respectively. Other themes discussed at the annual Forums, which were held in different cities on the continent and served as a platform for the exchange of views on international law, were Africa and international law, challenges of ratification and implementation of treaties in Africa, and the role of Africa in the development of international law. The theme for the 2017 Forum was the legal and socioeconomic consequences of immigration, refugees and internally displaced persons in Africa, which was particularly topical and of interest to the international community as a whole. The challenges faced by countries over the previous five years in particular had raised urgent humanitarian issues, but also political, economic and especially legal ones, and the traditional solutions to such problems were no longer sufficient. The Forum would provide a unique opportunity to review applicable international law and identify any gaps and the possible evolution of the rules of international law.

* Resumed from the 3371st meeting.

³⁵⁴ African Union Commission, *Agenda 2063: The Africa that We Want*, September 2015; available from the website of the African Union Commission: <https://au.int/>.

40. Possible forms of cooperation between AUCIL and the Commission included reciprocal visits and attendance at each other's sessions, exchanges on similar topics under consideration by both commissions between the special rapporteurs, interaction with similar regional international law institutions to discuss contemporary issues of international law, and the organization of joint seminars and conferences on international law. AUCIL regularly invited the Commission members to attend its Forums and covered the associated costs. Cooperation between the secretariats of the two commissions might also be enhanced with a view to building the capacity of the AUCIL secretariat in terms of archive management, preparation of materials, meetings and reports, website maintenance and the establishment of a research database. AUCIL, which did not have a permanent secretariat, faced many challenges, and it would welcome the opportunity to draw on the experience of the Commission's secretariat to improve its work. AUCIL would be open to any proposals concerning possible cooperation.

41. Mr. VÁZQUEZ-BERMÚDEZ said that he welcomed the information provided on the many activities conducted by AUCIL under its mandate on the codification and progressive development of international law, including various studies, some of which related to draft model laws. He asked what the criteria were for selecting the topics for study and whether the studies had resulted in any texts, such as model laws.

42. Mr. HASSOUNA said that the regular visits by representatives of AUCIL were important for the Commission. He welcomed the fact that AUCIL held its annual Forums in different cities in its member States—a good way of raising awareness and disseminating information about the work of the organization and international law. The Commission was currently considering possible topics for its long-term programme of work and would welcome input from AUCIL. He noted with interest that AUCIL had undertaken a study on delimitation and demarcation of boundaries in Africa; the topic had been proposed for inclusion in the long-term programme of work and thus the Commission would benefit from any information AUCIL might wish to provide. The Commission would also appreciate AUCIL input on regional international law, which would be particularly helpful for the topics of identification of customary international law and peremptory norms of general international law (*ius cogens*). He applauded the idea of increased cooperation between the two bodies through participation in meetings and training seminars. He had had the opportunity to participate in the AUCIL Forum in 2015 on the theme of challenges of ratification and implementation of treaties in Africa and had enjoyed useful exchanges, including on the topic of provisional application of treaties.

43. Ms. KALEMA (African Union Commission on International Law) said that topics for study were mostly selected based on the decisions of policy organs, like the Assembly of the African Union. However, AUCIL could also take the initiative and recommend topics that required study according to the needs of member States or proposals submitted. The five studies completed were pending approval by the Executive Council. They concerned, *inter alia*, a draft model law for the implementation of the

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, a preliminary study on the research and juridical basis of reparation for slavery and a preliminary report on the study, findings and recommendations on the harmonization of ratification procedures in the African Union. The latter had been proposed by the policy organs because of the considerable delays in ratification procedures in some member States.

44. Ms. GUELDICH (African Union Commission on International Law) said that although there were no guidelines on the selection of topics, factors such as the originality of the topic and the African Union's ultimate objective of regional integration were taken into consideration. Most of the studies undertaken resulted in agreements and dealt with priority issues for the African region such as peace and security, combating terrorism and the illicit arms trade, water resources management, food security, refugees and internally displaced persons. AUCIL focused on topics of regional concern, rather than those of universal concern like the Commission. AUCIL was a young organization and still had much work to do. Regional integration posed certain challenges as some member States lagged behind others; without the necessary political will, their integration would be difficult to achieve.

45. The CHAIRPERSON said that for an organization that was only seven years old, AUCIL had been very productive so far, which augured well for the future.

46. Mr. PETER said that, first, AUCIL was to be commended on its selection of topics for study, which touched on the real problems of Africa, such as territorial boundaries, terrorism, natural resources and the incorporation of treaty provisions into domestic legislation. However, looking at the list of ongoing studies, he was concerned that some rapporteurs had undertaken too much work and suggested that their workload might need to be shared.

47. Second, the United Nations, especially the Codification Division, had been making great efforts to disseminate international law in Africa, for example through seminars and training courses organized in Accra and Addis Ababa. However, Africa could not always expect the United Nations to organize such events and he therefore asked what the African Union was doing in that area. He nonetheless endorsed the Chairperson's comment regarding how much AUCIL had achieved in only seven years, compared with the Commission's almost 70 years of activities.

48. Ms. GALVÃO TELES said it was striking that the expected outcome of many of the topics covered by AUCIL were studies. She asked whether that was useful and whether any of the studies were likely to become conventions. She would welcome more information on the purpose and format of the annual Forums, including whether they were open to civil society.

49. Ms. ESCOBAR HERNÁNDEZ said that the clear presentations by the AUCIL representatives had highlighted potential areas of cooperation between the two bodies. The African digest of international law was an ambitious project and she would appreciate more information on its intended format and purpose. She asked how the data would be organized and whether it would be

an official African Union archive or a resource for public consultation. She assumed that the purpose of the digest was not only to collate information on the views and practices of member States, but also to influence the development of international law from an African perspective. In that connection, she asked how AUCIL studies and its other output were published.

50. Ms. KALEMA (African Union Commission on International Law) said that the purpose of the digest was to establish an archive of information on State practice relating to international and African Union law. It was intended to be a useful tool for African Union delegates, government officials and lawyers in their work; a considerable amount of information had been issued since the African Union's establishment but it was currently dispersed. It was hoped that several editions of the digest would be published.

51. Some of the studies undertaken by AUCIL would become conventions, while others would become draft model laws to help member States incorporate treaties into domestic law. It was not only the United Nations that was funding and spearheading activities relating to the dissemination of international law, the African Union contributed too. The United Nations had been a very good partner, but, gradually, with increased resources and capacity-building, African institutions would play a greater role in such activities. The African Union, other institutions based in Africa and elsewhere and some Commission members had already contributed to relevant training courses and seminars.

52. Older AUCIL members tended to have a heavier workload as rapporteurs than newer members. An effort was made to balance their respective workloads as the risk of overload was that studies might not be completed.

53. Ms. GUELDICH (African Union Commission on International Law) said that rapporteurs were not overburdened; however, sometimes their mandates expired before the studies were completed so volunteers were required to step in. That explained why some rapporteurs were responsible for more studies than others. An effort would be made to ensure a more equitable distribution of work in the future.

54. The themes of the annual Forums were proposed during the ordinary sessions of AUCIL and chosen by consensus. An invitation for contributions was subsequently posted on the organization's website and was open to a broad public that encompassed teachers, students, lawyers, international jurists, representatives of civil society and partner organizations. The purpose of the Forums was to enhance the visibility of AUCIL and to raise awareness of the need to accelerate regional integration. The Forums provided an opportunity to discuss problems and propose solutions that would help African decision makers on matters relating to international law. The annual Forums usually lasted two days and were held after the organization's second ordinary session towards the end of the year, in different locations.

55. As to the publication of its output, initially AUCIL had been somewhat overambitious in trying to publish an edition of its *Journal* every two years, when it had not

had the necessary resources or capacity to do so. It had therefore established a five-member editorial committee, which would issue clear guidelines on future publications; invitations for contributions would be posted on the related website. It was not only AUCIL studies that would be published but also all AUCIL texts useful for students and jurists, as well as articles by researchers and leading experts in international law.

56. Mr. GROSSMAN GUILOFF asked how effective the draft model laws prepared by AUCIL were in promoting the implementation of treaty law and customary law in African Union member States.

57. Mr. OUZZANI CHAHDI asked how information was collected from member States on the harmonization of ratification procedures and whether it was through questionnaires or by other means during seminars and forums.

58. Ms. KALEMA (African Union Commission on International Law) said that questionnaires were sent to member States to collect information on State practice; however, their responses were not always received as quickly as expected. There was no record of how effective the draft model laws were, although she was certain member States used them and found them helpful.

59. The CHAIRPERSON thanked the AUCIL representatives for their interesting presentations and said that the Commission looked forward to continued and improved cooperation with AUCIL in the future.

The meeting rose at 1.05 p.m.

3377th MEETING

Wednesday, 19 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

Crimes against humanity (concluded)* (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE (concluded)*

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the part of the report of

* Resumed from the 3366th meeting.