

Document:-
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Summary record of the 3377th meeting

Topic:
<multiple topics>

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

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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.

the Drafting Committee on the topic “Crimes against humanity”, as contained in document A/CN.4/L.892/Add.1.

2. Mr. RAJPUT (Chairperson of the Drafting Committee), introducing the fourth report of the Drafting Committee for the sixty-ninth session of the Commission, on the topic of crimes against humanity, said that he had introduced an earlier report of the Drafting Committee on the same topic (A/CN.4/L.892) during the first part of the session, on 1 June 2017. That report had reflected the discussions in the Drafting Committee and the consequential text of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee, all of which had subsequently been adopted by the Commission.

3. In the statement that he had made at that time, it had been expressly mentioned that the Drafting Committee had concluded its deliberations based on the draft preamble and draft articles proposed by the Special Rapporteur. The question of whether the draft articles should contain a provision on “immunity” had been raised in the Special Rapporteur’s report, discussed in the plenary and referred to the Drafting Committee for consideration. However, owing to a lack of time, the issue had been postponed until the second part of the Commission’s session, while other provisions had been adopted by the Drafting Committee and had thereafter been adopted by the plenary based on the previous report. Consequently, the Drafting Committee had been convened on 6 July to give thorough consideration to the topic of immunity.

4. The further report that he was introducing at the current meeting, as contained in document A/CN.4/L.892/Add.1, contained the text, as provisionally adopted by the Drafting Committee, of an additional paragraph, namely paragraph 4 *bis*, to be inserted in draft article 6.

5. He paid tribute to the Special Rapporteur, Mr. Murphy, whose mastery of the subject had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Drafting Committee for their active participation and valuable contributions, and the secretariat for its assistance.

6. During the discussions in the Drafting Committee, three alternatives had emerged. First, views had been expressed that a provision on immunity should not be added. Second, views had been expressed that such a provision should be included, although no specific proposal in that regard had been discussed. Third, views had been expressed that, while the question of immunity should not be addressed at all, a different issue should be addressed, by including a provision on the irrelevance of a person’s official position for purposes of substantive criminal responsibility in the context of allegations of the commission of crimes against humanity. The third alternative had found favour with the majority of the members of the Drafting Committee.

7. Accordingly, the Committee had decided to work on the basis of a proposal by the Special Rapporteur, which had subsequently been adopted as paragraph 4 *bis*, as formulated in the report under consideration.

8. The Drafting Committee had noted that the inability to assert the existence of an official position as a substantive defence to criminal responsibility before international criminal tribunals was well established in international law. The rule had been expressly reflected in the Charter of the International Military Tribunal³⁵⁵ and had appeared in a number of subsequent key instruments, including the Commission’s own draft code of crimes against the peace and security of mankind, adopted in 1996.³⁵⁶ A recent confirmation of the rule was to be found in article 27, paragraph 1, of the Rome Statute of the International Criminal Court. The inability to use one’s official position as a substantive defence to criminal responsibility was also addressed in article IV of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Some members of the Drafting Committee had initially expressed the view that such a provision might not be necessary, since it was such an entrenched principle of international criminal law. However, the majority view within the Drafting Committee had been that not having the provision might introduce inconsistency in relation to the aforementioned treaties and instruments. Therefore, an express provision in that regard was desirable.

9. Accordingly, for the purpose of the draft articles on crimes against humanity, the inclusion of paragraph 4 *bis* was to be understood as meaning that an alleged offender could not raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 4 *bis* had no effect on any procedural immunity that a foreign State official might enjoy before a national or international criminal jurisdiction, which continued to be governed by conventional and customary international law. Further, the decision to include paragraph 4 *bis* was without prejudice to the Commission’s work on the topic “Immunity of State officials from foreign criminal jurisdiction”.

10. Having agreed to base its work on the proposal of the Special Rapporteur, the Drafting Committee had focused on the formulation and location of the text. As to the former, it had considered a suggestion to make it also explicit in the text that official position would not, in and of itself, constitute a ground for reduction of a sentence handed down for a crime against humanity. The Drafting Committee had decided not to include such specification in the text, as it had been adequately covered by paragraph 6 of the same draft article. According to that paragraph, States were required, in all circumstances, to ensure that crimes against humanity were punishable by appropriate penalties that took into account their grave nature. Such language should be understood as precluding an alleged offender from invoking his or her official position as a ground for reduction of sentence.

11. The Drafting Committee had also considered several suggestions for locating the provision elsewhere, including higher up in draft article 6, possibly even as a component of paragraph 1, or as a self-standing draft article located either earlier or later in the draft articles. In

³⁵⁵ For the Charter of the International Military Tribunal, see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

³⁵⁶ The draft code adopted by the Commission in 1996 is reproduced in *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

the end, however, the Drafting Committee had accepted the Special Rapporteur's assessment that the provision was best located in draft article 6, as part of the logical sequence following paragraph 3, which dealt with command responsibility, and paragraph 4, which dealt with the unavailability of superior order defence. New paragraph 4 *bis* would accordingly complete the set of provisions dealing with the legal impermissibility of certain substantive defences.

12. The legal basis for including the provision, to which he had alluded earlier, as well as the question of relationship with the Commission's ongoing work on immunity of State officials, would be addressed in the corresponding commentary.

13. As the draft commentaries to the draft articles adopted in early June 2017 were currently in translation, the Drafting Committee had not proposed a renumbering of the new and subsequent paragraphs in draft article 6. Instead, should the Commission decide to adopt the recommendation of the Drafting Committee to include paragraph 4 *bis* in draft article 6, the Secretariat would introduce the necessary adjustments in the Commission's final report, including renumbering the paragraphs in the draft article and making any corresponding adjustments in the commentaries.

14. He hoped that the plenary would be in a position to adopt draft paragraph 4 *bis* of draft article 6, as presented.

15. Mr. JALLOH said that he had been a member of the Drafting Committee on crimes against humanity and that the latter had had several interesting formal and informal discussions on whether the Commission should take a position on the question of immunity or support a clause on irrelevance of official capacity. He had not wished to stand in the way of the Drafting Committee's consensus, but he had had some serious reservations about the decision by the Committee as a whole to proceed with a draft article only on irrelevance of official capacity. Those reservations concerned two key points. First, the Commission's project in respect of crimes against humanity had been predicated on the argument that the Commission would help fill a large gap in international criminal law, considering that the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the 1949 Geneva Conventions for the Protection of War Victims dealt respectively with the crimes of genocide and war crimes. The Commission had relied heavily on the Rome Statute of the International Criminal Court for the purposes of the project, including adopting verbatim its definition of the crime contained in article 7, which was widely said to be narrower than the customary international law definition. He had therefore been concerned that the Commission, by not taking a position on the question of immunity along the lines expressed in article 27 of the Rome Statute, which addressed both irrelevance of official capacity and substantive immunities from criminal responsibility, might produce a draft text for consideration by States that did not complement that instrument to the desired extent. Second, even though the clause in article 27 of the Rome Statute providing for the removal of immunities, which was applicable to the 124 States parties, applied vertically in respect of national systems *vis-à-vis* the International Criminal Court, a compelling argument had been made according to which the fact that those States had

accepted the removal of immunities ought to be relevant to the Commission's consideration. The Pre-Trial Chamber of the International Criminal Court had, in a recent judgment involving the failure by South Africa to arrest the allegedly fugitive Sudanese President Mr. Al-Bashir, suggested that there were article 27 implications for States parties at the horizontal level, *vis-à-vis* one another. In that regard, it was apparent that the States parties to the International Criminal Court at least were comfortable waiving or removing the immunities of their officials in respect of core crimes, including crimes against humanity. Although that admittedly applied to proceedings before the Court itself, there were consequences at the horizontal level as well, since other States parties could, in principle, also pursue investigations of crimes against humanity in fulfilment of their duties to investigate and prosecute such offences in other States parties irrespective of where and by whom they were committed. He expressed concern that the position adopted by the Drafting Committee could undermine the regime established by the International Criminal Court, which presupposed that, at the national level, countries would take steps to prosecute, and that only when they were unwilling or unable to do so as per article 17 of the Rome Statute would the Court's jurisdiction take effect. If that was true, and it was known from practice that the State of nationality of the suspect was typically reluctant to pursue its own officials for such crimes where the officials had committed or incited the commission of crimes against humanity, then the issue of immunity beyond irrelevance of official position to criminal responsibility was very relevant indeed for the effective investigation and prosecution of heinous crimes against humanity at the national level. In any event, even apart from arguments about more effectively complementing the Rome Statute system at the *inter partes* prosecution level, the Commission had a unique opportunity to recommend to States an exception removing immunity for crimes against humanity, which—because of their grave nature—ought to be prosecutable in national courts irrespective of whether they were committed by a State official or not. That it had chosen not to do so in its current draft articles on crimes against humanity, even as part of the progressive development of international criminal law, was highly regrettable.

16. Mr. PETER said that he wished to thank the Special Rapporteur for not standing in the way of including a provision on irrelevance of the official position of persons accused of crimes against humanity, which he had supported. He had raised the possibility of including such an important provision in the form of a conspicuous, stand-alone draft article with a view to ensuring conformity with the Rome Statute of the International Criminal Court, which the entire project was supposed to support. He had been concerned about the vague nature of the wording of the paragraph indicating that each State should take "the necessary measures" to give effect to the provision, since it allowed States too much latitude in its interpretation. He would have preferred wording indicating that each State should ensure implementation of the provision. While the Special Rapporteur had replied that such provisions were generally formulated in that way, he had found the argument unconvincing, since the Commission was not prevented from drafting a provision differently as long as it made that clear. While he would have been happier if such considerations had been taken into account, he would not stand in the way of the Commission adopting the proposed wording.

17. Ms. ESCOBAR HERNÁNDEZ said that she aligned herself with the consensus of the Drafting Committee and wished simply to place on record that the decision adopted by the Drafting Committee not to include a clause on immunity in the draft articles on crimes against humanity had no bearing whatsoever on, or implications for, the Commission's position in respect of other current projects, in particular the topic of immunity of State officials from foreign criminal jurisdiction, whose draft article 7—which had also been adopted by the Drafting Committee—included crimes against humanity as one of the exceptions to the application of immunity *ratione materiae*.

18. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 4 *bis* of draft article 6.

It was so decided.

19. The CHAIRPERSON said that he took it that the Commission wished to adopt the report of the Drafting Committee on crimes against humanity contained in document A/CN.4/L.892/Add.1.

It was so decided.

20. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries, for inclusion in the report of the Commission on its sixty-ninth session.

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)

21. The CHAIRPERSON invited the Commission to continue the debate on the Special Rapporteur's first report on "Succession of States in respect of State responsibility", contained in document A/CN.4/708.

22. Ms. LEHTO said that the Commission had already worked extensively on both State succession and State responsibility. The present topic was also linked to other topics taken up by the Commission, including diplomatic protection and unilateral declarations. The Special Rapporteur could therefore draw on the Commission's earlier work, which, as he noted, had already proved to be a successful method for the Commission to advance other topics.

23. The Commission had in the past shown little appetite for the question of State responsibility in the context of State succession. The 1978 Vienna Convention explicitly excluded issues of international responsibility from its ambit, and the 1983 Vienna Convention contained a general safeguards clause to the same effect. The articles on the responsibility of States for internationally wrongful acts³⁵⁷ had famously left open the question of whether there could be such a thing as succession to responsibility.

³⁵⁷ 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.

24. The position taken in the 1978 Vienna Convention and the 1983 Vienna Convention was understandable, as, at the time of their adoption, the Commission's work on State responsibility had been ongoing and nowhere near completion. The comments of the last Special Rapporteur on the topic of State responsibility, Mr. Crawford, in 1998, when he had denied the possibility of succession to responsibility, and in 2001, when the relevant commentary had characterized the issue as "unclear", might nevertheless be interpreted as indicating a certain opening and, possibly, recognition of the complexity of the issue.

25. Most academic texts no doubt still subscribed to the traditional non-succession theory, but there had been some academic interest and studies on the issue of succession relating to questions of responsibility. The Special Rapporteur and others had mentioned that the International Law Association and the Institute of International Law had recently studied the connections between State succession and State responsibility. That did not yet amount to a trodden path, however, and the Commission's future work on the topic could no doubt make a useful contribution to the law of State succession.

26. Some concern had been expressed about the potential reach of the topic. However, the Special Rapporteur's indication of his ambitions seemed quite appropriate in view of the novelty of some of the questions. The subsidiary nature of the rules he intended to propose and his emphasis on agreements between the States concerned could also be said to reflect the lessons learned regarding the role of the 1978 Vienna Convention and the 1983 Vienna Convention during the last wave of State succession, in Central and Eastern Europe.

27. The two Conventions had not been widely ratified at that time—nor were they at the present time. In particular, the 1978 Vienna Convention had not been recognized as representing existing law in the area of State succession. In the context of German unification, for instance, its provisions had been deemed "unpracticable", and recourse had been made to older concepts and principles. Later, the International Law Association's resolution on aspects of the law on State succession³⁵⁸ had also pointed out that the classification of different types of State succession adopted by the two Conventions did not fully correspond with international practice.

28. In the absence of a more authoritative codification, however, the provisions of the Conventions had been widely used as practical guidelines by States undergoing political and territorial transformations in the 1990s. Reference could, in that respect, also be made to recommendations of the Arbitration Commission of the Conference on Yugoslavia—the "Badinter Commission"—to the successor States of the former Yugoslavia, calling on them to resolve all aspects of the succession by agreement, while drawing inspiration from the rules of the 1978 Vienna Convention and the 1983 Vienna Convention.³⁵⁹

³⁵⁸ International Law Association, *Report of the Seventy-third Conference held in Rio de Janeiro, Brazil, 17–21 August 2008*, London, 2008, resolution No. 3/2008.

³⁵⁹ See *Opinion No. 9 of the Badinter Commission of 4 July 1992*, ILR, vol. 92, pp. 203–205, at p. 205, para. 4.

29. In practice, most of the issues related to that wave of State succession seemed to have been resolved in negotiations between the States concerned. Along those lines, the Special Rapporteur affirmed in paragraph 86 of his report that the rules to be codified should present a “useful model” that could be used and also modified by the States concerned, and that could serve as a default rule if the States were unable to come to an agreement.

30. In chapter II, section A, of his report, the Special Rapporteur considered the question of whether there was a general principle guiding succession in respect of State responsibility. His answer seemed to be that succession was possible in certain cases and that the theory of non-succession was no more the absolute rule. The Institute of International Law had reached the same conclusion. What those cases of possible succession might be would be the subject of the Special Rapporteur’s second report in 2018, which would address the issue in terms of the transfer of obligations, and of his third report in 2019, which would focus on the transfer of rights. The previous year’s syllabus contained three hypotheses that did not directly answer the question, but that might provide some indications.

31. First, the syllabus stated that “the continuing State should, in principle, succeed not only to the relevant primary obligations of the predecessor State but also to its secondary (responsibility) obligations”.³⁶⁰ That assumption did not seem to be problematic, as, in cases of continuity, there was no change of sovereignty. Second, it stated that “a newly independent State should benefit from the principle of a clean slate ... but it could freely accept succession with respect to State responsibility”.³⁶¹ That principle was consistent with the 1978 Vienna Convention and with the preceding work of the Commission on succession to treaties. Those two statements were basically uncontroversial. The syllabus added that “in the case of separation (secession), the successor State or States may also assume responsibility, in particular circumstances”.³⁶² Judging from that assertion, the Special Rapporteur was clearly not proposing an automatic rule of succession to replace the rule of non-succession.

32. The main policy reasons advanced in support of the possibility of succession in respect of rights and obligations arising from an internationally wrongful act and against a general rule of non-succession were mainly related to the need to ensure stability in international legal relations and to protect the interests of injured States. They were also related to reparation of damage suffered by groups or individuals as a result of human rights violations. In either case, the remark of the Institute of International Law seemed pertinent: non-succession as a “clean-slate” rule applicable to all cases of State succession in the field of international responsibility would mean that the consequences of illegal action were simply erased.

33. While chapter II, section B, of the report covered both older and newer cases of State succession, it seemed clear that the essential point of reference had

been provided by the events of the past 20 years. Developments were thus fairly recent, and practice was not very extensive. As Mr. Nguyen had pointed out, the relevant practice cited in the report was mostly related to the cases of State succession in Central and Eastern Europe in the 1990s. Those cases, such as the *Gabčíkovo–Nagymaros Project* case and the two cases of the International Court of Justice concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* were not, however, without interest for the present topic.

34. She agreed with the Special Rapporteur’s conclusion in paragraph 64 of the report that a distinction should be made between cases of dissolution and unification, where the original State had disappeared, and cases of secession, in which there was a continuator State. In 2008, the International Law Association had also pointed out that the existence or not of a continuator State was a key issue at stake.

35. As for the question of whether any of the rules of the 1978 Vienna Convention and the 1983 Vienna Convention applied, she agreed with the systemic approach proposed by the Special Rapporteur in paragraph 68 of the report. In particular, it made sense to use the relevant definitions of the two Vienna Conventions, as had been done in the Commission’s 1999 draft articles on nationality of natural persons in relation to the succession of States.³⁶³ It was also important to address certain issues of delimitation, as was done, for instance, in paragraph 73 of the report, with regard to the distinction between the applicability of the rules on succession of States in respect of treaties and in respect of responsibility for internationally wrongful acts and, in paragraphs 79 and 80, as to when to apply the rules concerning the succession of States with regard to debts, and when to identify the rules under that topic.

36. She generally agreed with the Special Rapporteur’s remark in paragraph 72 that the concept of universal succession was not useful and that it was better to look separately at different legal relations affected by a change of sovereignty.

37. In her view, draft article 1 would benefit from being made clearer. She agreed with Mr. Murase that the scope should be limited to succession to obligations or rights arising from internationally wrongful acts. As the Institute of International Law had pointed out, the relevant question was not whether there was succession of States with respect to responsibility *per se*, but instead whether there was succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State.

38. As for draft article 2, she supported using the definitions of the 1978 Vienna Convention and the 1983 Vienna Convention, but, like Mr. Murphy, she questioned the need to define international responsibility. Appropriate references to the general rules codified in the articles on the responsibility of States for internationally wrongful acts could be included in the commentary.

³⁶⁰ See *Yearbook ... 2016*, vol. II (Part Two), annex II, p. 243, para. 5.

³⁶¹ *Idem*.

³⁶² *Idem*.

³⁶³ 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.

39. Regarding draft article 3, it was not quite clear what was meant in paragraph 3 by the words “[a]nother agreement”. Furthermore, it was unclear whether the references to treaty law in paragraphs 3 and 4 were necessary or whether they could be discussed in the commentary. Mr. Murphy had made some interesting drafting proposals in that regard.

40. With regard to draft article 4, it should be ensured that paragraph 2 was in line with the Commission’s work on unilateral declarations.

41. She supported the Special Rapporteur’s proposed programme of future work on the topic. Nevertheless, she agreed with Mr. Hassouna that there might be cause to reconsider the final form of the work in the light of the content of the draft articles proposed.

42. She supported sending the draft articles to the Drafting Committee. Noting that some colleagues had expressed the view that draft articles 3 and 4 should be held back at the current stage, as they seemed to contain safeguard clauses applicable to general rules that had not yet been proposed, she said that she would prefer to hear from the Special Rapporteur why he thought those draft articles could be considered as self-standing provisions. It would then be for the Drafting Committee to decide whether to continue their consideration in 2018.

43. Mr. PARK said that he would like to thank the Special Rapporteur for his first report, which should be read in conjunction with the syllabus for the topic. He agreed that the scope of the topic should be limited to the transfer of rights and obligations arising from internationally wrongful acts and should exclude issues of international liability for injurious consequences arising out of acts not prohibited by international law and the question of succession in respect of the responsibility of international organizations.

44. Regarding international liability, if the question was considered solely from the standpoint of the consequences arising from an act—namely the obligation to repair it—there would be no need to separate the responsibility for a wrongful act from the liability entailed by it, because the consequences arising from the two would not necessarily differ. There were, however, considerable theoretical and practical differences between the two, and to extend the scope of the topic to include the consequences of liability would certainly complicate the Commission’s task.

45. As to the question of succession in respect of the responsibility of international organizations, it should be noted that an international organization might become entitled to claim reparation from a State that had committed an internationally wrongful act against it. In addition, there were situations in which the acts of an international organization *vis-à-vis* a third party engaged the responsibility of a member State. Those aspects should be included in the Commission’s discussion of the topic.

46. Another concern which related to the clarification of the scope of the topic was the exact form of the obligations and rights that could be transferred in the event of succession. Article 34 of the draft articles on the responsibility

of States for internationally wrongful acts indicated that full reparation for the injury caused by the internationally wrongful act should take the form of restitution, compensation and satisfaction. The focus of the first report, however, was primarily on compensation, namely the protection of acquired rights and debts, which could potentially be covered by the 1983 Vienna Convention. It was unclear whether other forms of reparation, namely restitution and satisfaction, could be transferred. The Commission’s discussion of the topic should consequently focus more clearly on the issue of the forms of the rights and obligations of States arising from international responsibility.

47. There were two aspects to that question. One was the transfer to the successor State of the obligations of the predecessor State to cease the act in question, to offer appropriate assurances and guarantees of non-repetition and to make full reparation for the injury caused by the internationally wrongful act. The other aspect was the transfer to the successor State of the right to claim reparation for such injury. The question also arose as to whether the successor State was entitled to take countermeasures, which, according to article 49 of the articles on the responsibility of States for internationally wrongful acts, an injured State could only take against a State which was responsible for an internationally wrongful act.

48. In order to orient the Commission’s work on the topic, it was necessary to state that the rules it codified were of a subsidiary nature. His preference would therefore be for that to be clearly enunciated in a separate clause or draft article.

49. At the current stage of the Commission’s work, the most important matter for it to address was whether there were general rules on the succession of States in respect of State responsibility that applied to different types of State succession, including those in which a predecessor State continued to exist or, on the contrary, ceased to exist, or those in which several States succeeded a predecessor State.

50. In his view, the Commission had two possible, but opposite, options. The first was to adhere to the traditional rule, according to which a successor State did not succeed to the responsibility for internationally wrongful acts done by a predecessor State, and then to attempt to identify the exceptions to that rule. Under that option, the starting point would be article 1 of the draft articles on the responsibility of States for internationally wrongful acts, which provided that every internationally wrongful act of a State entailed the international responsibility of that State. The second option was to depart from the traditional rule of non-succession and to seek to determine whether there were general rules that supported the succession of States in respect of State responsibility in each different type of State succession.

51. The Special Rapporteur seemed to suggest that the traditional theory of non-succession had evolved and had become more nuanced in certain contemporary cases. In his own view, it was too soon for the Commission to settle on either the automatic succession of responsibility or the non-succession of responsibility as a premise for its discussion.

52. However, there were two reasons why he had some doubts about the above-mentioned second option. First, there was no customary international law postulating an automatic transfer to a successor State of the obligations arising from the wrongful acts of a predecessor State. In his view, customary international law on the subject was not yet well developed, and the Special Rapporteur had admitted as much in paragraph 85 of his report, where he stated that any general customary norms of international law crystallized and were established only slowly in that area. However, that was not because of the lack of State practice as a whole, but because State practice was inconsistent and reflected the particularities of the various State succession contexts.

53. Second, it was not possible to clearly identify the approach to the matter in relevant judicial practice. In contrast to the decisions handed down in two notable cases, namely *Robert E. Brown* and *Redward*, the decision in the arbitration in the *Lighthouses case between France and Greece* was considered by some to favour succession with respect to responsibility in certain circumstances. Moreover, in *Gabčíkovo–Nagymaros Project* and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the International Court of Justice had examined the possibility of the transfer upon succession of the obligations and rights arising from State responsibility. However, neither of those cases could be clearly identified as having demarcated the succession of State responsibility. In paragraph 50 of his report, regarding the *Gabčíkovo–Nagymaros Project* case, the Special Rapporteur concluded that the Court seemed to recognize succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts. In his own view, the Court had not clearly recognized the obligations of Slovakia resulting from the transfer of secondary obligations arising from the responsibility of Czechoslovakia, but instead had noted the effect of the special agreement concluded between the parties in respect of rights and obligations relating to the *Gabčíkovo–Nagymaros Project* case.

54. Categorizing State succession was not an easy task, and careful consideration must be given to the matter before the overall approach to the topic was outlined. In several parts of his report, the Special Rapporteur regarded unification as a category of State succession. The 1978 Vienna Convention and the 1983 Vienna Convention referred to the “uniting of States”, while the draft articles on nationality of natural persons in relation to the succession of States had renamed the category “unification of States”. The 2015 Institute of International Law resolution on State succession in matters of State responsibility, on the contrary, referred to the categories “merger of States” and the “incorporation of a State into another existing State” rather than to the term “unification of States”.³⁶⁴

55. The incorporation of a State into another existing State applied to the unification of Germany, where the legal personality of the Federal Republic of Germany had remained, while that of the German Democratic Republic

had been extinguished. In such cases, the State responsibility of the dissolved State and that of the remaining State which became the successor State must be treated differently. By contrast, the merger of States that resulted in the disappearance of both predecessor States and the establishment of the new legal personality of the successor State—as illustrated by the example of Yemen in 1990—must be treated differently from the incorporation of a State into another existing State. Those two types of unification should be analysed separately.

56. The suggested timeline for the future programme of work on the topic seemed feasible. Special consideration, having regard to both reality and theory, should be given to two questions in particular: the extent to which the passage of time affected claims submitted by a successor State in which it invoked rights that had been transferred to it by its predecessor State; and the means available to a successor State for implementing reparation for injury caused by its predecessor. In the course of such considerations, the transfer of obligations relating to compensation must be distinguished from succession of debt.

57. Sir Michael WOOD said that his remarks on the Special Rapporteur’s first report would be preliminary in nature. Before giving more considered views, he needed to study in more depth than had been possible so far such State practice and case law as there was in the report, as well as the literature. While the first report provided some helpful references to practice, case law and doctrine, the Commission did not yet have an in-depth or systematic account of the materials, which was an important precondition for taking forward a new topic. As the Special Rapporteur had himself said when introducing the report, chapter II of the report presented only a “preliminary survey of State practice related to the topic ... including some judicial decisions” and focused mostly on “cases of succession in the post-decolonization context, mainly in Central and Eastern Europe”.³⁶⁵ Mr. Reinisch had raised some valid questions about the conclusions sought to be drawn from the materials, and especially the cases, in the first report.

58. He would therefore be interested to know the Special Rapporteur’s plans for making such materials available. For example, did the Special Rapporteur intend to propose that the Commission request States to provide it with an account of their practice and case law on the matter, in good time for him to take it into account in his second report? That would be in accordance with the Commission’s usual practice upon taking up a new topic. Had he considered whether there was anything that the Commission could usefully request from the Secretariat by way of a study? What plans did he have for making such materials available to the Commission, in his second report or otherwise?

59. He would also like to know the Special Rapporteur’s assessment of the recent work of the Institute of International Law on the topic, which had culminated in the resolution on State succession in matters of State responsibility adopted by the Institute at its 2015 Tallinn session.

60. Unfortunately, the *travaux préparatoires* of the Tallinn resolution gave little indication of the materials that the Institute had taken into account, although there were

³⁶⁴ See articles 13 and 14 of the 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.

³⁶⁵ See the 3374th meeting above, p. 231, para. 48.

quite a few references to authors. The Institute's resolution seemed to be based on policy rather than on practice. Its preamble stated, somewhat obscurely, that the Institute bore in mind "that cases of succession of States should not constitute a reason for not implementing the consequences arising from an internationally wrongful act". That seemed to be stated more directly in paragraph 53 of Professor Kohen's final report, in which he had noted that:

a fundamental goal that guides this report is to prevent situations of State succession from leading to an avoidance of the consequences of internationally wrongful acts, particularly in the form of the extinction or disappearance of the obligation to repair, by virtue of the mere fact of the State succession. This purpose excludes *per se* the doctrinal and old case law perception of a general rule of non-succession.³⁶⁶

61. Irrespective of the merits or otherwise of that policy, the fact remained that it was policy. The Commission would no doubt discuss those issues under the topic. However, since it was policy, above all, the Commission needed to know what States thought of that matter.

62. Other speakers in the debate had raised some very pertinent questions that would need to be considered in depth. Was the project to be an exercise in codification? Was that feasible given the available practice? Or was it to be an exercise where the Commission sought to propose new law to States?

63. The topic was undoubtedly complex and controversial. It was complex because it lay at the crossroads of two difficult areas of international law: responsibility and succession. It was controversial because it concerned a question that arose rarely, but often in wholly exceptional circumstances—often of great tension—and there was relatively little practice to guide States. Indeed, it might be that there were no rules of international law governing State succession to the rights and obligations arising from State responsibility. If so—and like the Institute—the Commission might find that it simply had to propose such rules as it considered to make good sense and good policy. That was all the more reason to seek the views of States at a very early stage.

64. It might turn out that States had resolved the matter case by case, or indeed preferred to leave matters unresolved. So, the Commission's conclusion might be that there was no rule of succession and that was what States were happy with. That seemed to have been a widely held view until the recent past. He was yet to be convinced that there had been such a dramatic and clear change as the Special Rapporteur claimed in his report. Certainly, the change of heart that the Special Rapporteur attributed to Mr. Crawford between 1998 and 2001 hardly seemed determinative. The real question was what State practice showed. To the extent that there was practice from regions other than Europe, it needed to be studied, assuming that the aim was to codify existing customary international law, as the report seemed to suggest. As Mr. Nguyen had put it the previous week, the Special Rapporteur seemed to have paid more attention to the views of authors and scholars on issues regarding succession of States than to actual State practice in that area.

65. There was much in the report with which he agreed. Regarding the scope of the topic, he agreed with the Special Rapporteur that it should not cover succession to liability for lawful acts; that issue could be covered in the commentary. Nor should it cover succession in respect of international organizations. Furthermore, he agreed that draft articles seemed to be the appropriate form for the Commission's outcome on the topic.

66. In his report, the Special Rapporteur dealt at some length with agreements concerning succession, including devolution agreements and unilateral declarations on succession. He tended to agree with other speakers that this was not the best way to start the topic and that the Commission should first tackle the basic rule: succession or non-succession. In any event, as the report and draft articles 3 and 4 showed, that was a particularly complex part of a complex topic. For that reason, he would prefer draft articles 3 and 4 to be held in abeyance for the time being. As others had already suggested, the Commission needed to deal at an early stage with the central question of what general rule, if any, applied to State succession in respect of rights and obligations arising from State responsibility. He trusted that the Special Rapporteur would address that all-important question in his second report.

67. The Special Rapporteur seemed to attach importance to the statement of the International Court of Justice in paragraph 115 of its 2015 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* to the effect that it considered that the rules on succession that might come into play in that case fell into the same category as those on treaty interpretation and responsibility of States referred to in an earlier judgment. In other words, the Court was saying that such rules would be rules of general international law to which the Court might refer when determining whether a State had breached its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide and were thus within its jurisdiction under article IX of that Convention. Since it had found that Croatia had not established genocide, the Court had not needed to consider whether Serbia had, in fact, succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia on account of acts alleged to have taken place before 1992. That case did indeed suggest that there might be rules on State succession to State responsibility, but it said nothing about the substance of any such rules.

68. He welcomed the fact that the Special Rapporteur was planning to follow the terminology that had been used by the Commission in earlier related topics. There was a particular need to clarify that the topic concerned responsibility for internationally wrongful acts, and not to refer to tort or delict.

69. An important question, which might go beyond terminology, was the suggestion that the topic was not concerned with succession to State responsibility as such, but with succession to rights and obligations arising from State responsibility. That distinction, which had been made by the Institute of International Law, was a very fine one, and one that was not apparent from the title of the Commission's topic. The Commission should perhaps consider reviewing the title, since the words "in respect of" were not entirely clear. In any event, he agreed with

³⁶⁶ M. Kohen, "State succession in matters of State responsibility", Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 511 *et seq.*, at p. 534.

other Commission members who had suggested that draft article 1 could and should be made clearer on that point.

70. On the other hand, he disagreed with Mr. Murase that the Commission should consider succession of Governments, as that would have no basis in international law and would run counter to the Commission's consistent approach to questions of succession.

71. Like Mr. Murphy, he was not convinced of the need to define international responsibility in the draft articles, and he did not find the text proposed by the Special Rapporteur in that regard particularly helpful.

72. He was not convinced that the draft articles proposed in the report, in particular draft articles 3 and 4, should be referred to the Drafting Committee before the Commission had had time to consider the materials to which he had referred at the beginning of his statement.

73. Mr. TLADI said that, while he supported the inclusion of the topic under consideration on the agenda, he agreed with Mr. Reinisch that the Commission needed a more transparent process for deciding how topics were chosen.

74. His comments would necessarily be of a preliminary nature, as he had not had enough time to study the subject in any depth.

75. A first report on any topic should explain why it was important. While it was true that there was a gap between the work which the Commission had done in the 1970s on State succession and the articles on the responsibility of States for internationally wrongful acts, which it had adopted in 2001, it was unclear how significant that lacuna was and what approach the Commission intended to adopt in order to fill it, given the limited amount of existing State practice in that area. It was therefore necessary to clarify whether the Commission was engaged in the codification or the progressive development of the subject matter. His own initial impression was that the Commission had insufficient material to engage in a codification exercise.

76. Although the above-mentioned articles on the responsibility of States for internationally wrongful acts did not address the question of responsibility in the event of succession, they were relevant to the Commission's current work. For example, paragraph (3) of the commentary to draft article 11 noted that the inference might be drawn that, if a successor State endorsed and continued a wrongful act, that article would apply. Obviously, the grounds for such responsibility would be the conduct of the successor State, a principle which was consistent with the decision in the arbitration in the *Lighthouses case between France and Greece*, to which the Special Rapporteur had referred. Although the report seemed to suggest that Greece had been held liable as the successor State, it was plain from the section of the decision quoted in paragraph 41 that Greece was responsible because it had adopted the illegal conduct of Crete. Moreover, the Court had found that Greece had not only endorsed the breach of the concession contract between the Ottoman Empire and the French company, but had continued it after its union with Crete. Cases like that, where the State responsibility

of a successor State stemmed from its own conduct, must be clearly distinguished from cases of responsibility by virtue of succession.

77. Despite the fact that it was not very common, the type of case on which the Commission should focus was that identified in paragraph 80, where the wrongful act occurred before the date of succession, and responsibility was not assumed by the successor State through the application of other existing rules of international law.

78. As for the approach which the Commission should adopt, he tended to share earlier speakers' assessment of the material presented in the report. The Special Rapporteur seemed to accept that the traditional rule of international law, the "clean-slate" or non-succession principle, applied to succession in relation to State responsibility. The acceptance of that proposition would essentially mean that, if any draft article was proposed which deviated from that rule, clear and unambiguous evidence of practice in support of such a departure would have to be provided. If, on the other hand, the Commission sought to progressively develop the law on the succession of States in respect of State responsibility, some practice, even if uneven, plus good policy reasons, would suffice.

79. In the interests of consistency, it might be wise to consider whether that basic principle, which was embodied in the 1978 Vienna Convention and the 1983 Vienna Convention, ought not to be tailored to the succession of States in respect of State responsibility and adopted. Yet the fact that, as several learned writers had noted, both Conventions upheld that principle might also lead to the conclusion that evidence not only of clear and unambiguous State practice, but also of decisions of international courts and tribunals, would have to be adduced in support of any shift away from it.

80. However, it would seem from the first report that the Special Rapporteur intended to proceed on the assumption that practice and doctrine did support some sort of transition from the non-succession principle towards an unspecified new position and that some judicial decisions possibly warranted that shift.

81. In his own opinion, the decision in the arbitration in the *Lighthouses case between France and Greece* concerned the responsibility of Greece for its own acts and was not predicated on the acquisition of responsibility through State succession. The paragraph of the judgment in the case concerning the *Gabčíkovo-Nagymaros Project*, to which the Special Rapporteur referred as an authority for some kind of shift, was not in fact confirmation of the proposition that general international law did contemplate succession in respect of State responsibility, because the International Court of Justice had apparently reached its conclusion regarding State succession in that case on account of the special agreement between the parties to the case, under the terms of which it had been agreed that Slovakia was the sole successor State of Czechoslovakia in respect of the rights and obligations relating to the Gabčíkovo-Nagymaros Project. Similarly, the judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* could not be taken

as clear evidence of any acceptance of a shift away from the non-succession principle, since the Court had not addressed the question of succession in that decision.

82. He was in favour of sending draft articles 1 and 2 to the Drafting Committee. However, it would be advisable not to refer draft articles 3 and 4 until the Special Rapporteur had clarified the point of departure for the Commission's consideration of the topic. He would not, however, stand in the way of a consensus on that matter.

Cooperation with other bodies (*continued*)

[Agenda item 11]

STATEMENT BY THE SECRETARY-GENERAL OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

83. The CHAIRPERSON welcomed Mr. Gastorn, Secretary-General of the Asian–African Legal Consultative Organization (AALCO) and invited him to take the floor.

84. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that, at the fifty-sixth annual session of AALCO, which had been held in Nairobi in May 2017, member States had hailed the Commission's immense contribution to the progressive development and codification of international law.

85. AALCO was an international organization working in the field of international law that tried to articulate the legal concerns of its member States from Asia and Africa. It currently comprised 47 member States, and a number of observer States and international organizations attended its meetings. As an advisory body, it played a vital role in promoting interregional cooperation and the exchange of information and views on matters with an international legal dimension. As a forum for legal consultation, it had greatly enhanced solidarity among its member States and had made an outstanding contribution to the emergence and concretization of a number of alternative ideas and practices in the field of international law that reflected the particular concerns of the developing world.

86. One of the functions of AALCO, that of studying the subjects which were being considered by the Commission, had made it possible to forge a close relationship with the latter. Indeed, the experience and expertise of Commission members meant that their presence at AALCO annual sessions was invaluable. For that reason, AALCO would do its best in future to arrange its annual sessions at a time when Commission members could attend them. The need to enhance cooperation and strengthen the relationship between AALCO and the Commission had again been stressed at the annual session held in Nairobi.

87. He explained that the verbatim records of the half-day special meeting held in the current year on some selected items on the agenda of the International Law Commission, which he had made available to the members of the Commission, were still only provisional as they had not yet been approved by member States.

88. The three agenda items of the Commission which had been considered during the fifty-sixth annual session were protection of the atmosphere, *jus cogens* and

immunity of State officials from foreign criminal jurisdiction. Members had, however, been free to make comments on other agenda items.

89. Many delegations had commended both the work of the Special Rapporteur on protection of the atmosphere and the draft guidelines on a matter that they regarded as a pressing issue for the international community as a whole. Several delegations had drawn attention to the interrelationship between that topic and other fields of international law, such as international trade law, investment law, the law of the sea and human rights law. One delegation had observed that the Special Rapporteur's decision to investigate the interrelationship between the law of the atmosphere and other fields of international law was of special relevance in view of the entry into force of the Paris Agreement under the United Nations Framework Convention on Climate Change in November 2016. Another delegation had noted that, as the effective protection of the atmosphere greatly depended on scientific knowledge, collaboration among scientists and the establishment of regional and international mechanisms to help developing countries to exchange information and conduct joint monitoring was welcome. Some delegations had held that, in dealing with the topic, the Commission must bear in mind developing countries' special circumstances and real needs. One delegation had added that this approach would be consistent with other international instruments such as the 1972 Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"),³⁶⁷ the 1992 Rio Declaration on Environment and Development³⁶⁸ and the aforementioned Paris Agreement under the United Nations Framework Convention on Climate Change. It had also been observed that the draft guidelines basically complied with the understanding reached in 2013³⁶⁹ and fairly objectively reflected the outcome of the relevant studies on the issue. Hope had also been expressed that the Commission would examine international practices under regional mechanisms in a comprehensive manner and would pursue its efforts to make headway with the topic. It had been contended that the Special Rapporteur's task was neither to fill existing gaps in the legal framework regulating protection of the atmosphere nor to provide a descriptive list of the existing principles of international environmental law, but that in fact the final outcome of the Commission's work on the topic should reflect a balance between those two approaches.

90. With regard to draft guideline 3, one delegation had recognized the importance of the obligation to protect the atmosphere through the effective prevention, reduction or control of atmospheric pollution and degradation and had underlined the significance of including an obligation to conduct environmental impact assessments in States' domestic law in order to ensure that activities under their jurisdiction complied with international standards. Another delegation appreciated the fact that the Commission had

³⁶⁷ *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

³⁶⁸ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

³⁶⁹ See *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

undertaken the analysis and discussion of the obligations to prevent, reduce or control transboundary atmospheric pollution and global atmospheric degradation. The view had been expressed that, as the Paris Agreement under the United Nations Framework Convention on Climate Change contained a reference to the “common concern of humankind” in its preamble, the Commission should reconsider the wording of the third paragraph of the preamble to its draft guidelines.

91. Many delegations had commended the work of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction and her careful analysis of limitations and exceptions to that immunity in her fifth report on the topic (A/CN.4/701). One delegation believed that immunity was procedural in nature and came under a category of rules that was entirely different to the substantive rules that determined the lawfulness of an act. Some delegations had argued that the immunity of State officials from foreign criminal jurisdiction while they performed official acts was a direct consequence of the principle of sovereign equality and was recognized by international law as a means of protecting sovereignty and ensuring peaceful international relations. One view which had been expressed was that the legal status of a Head of State was governed by diplomatic law, which was a branch of international law, and that, since international law recognized the principle of the sovereign equality of States, all sovereign Heads of State deserved similar international treatment. The Head of State, as the highest authority of the State, had autonomy and decision-making power and the State must bear all the consequences of that person’s actions and administrative steps, because the Head of State was the highest representative of a State. The rules of international law clearly established that the Head of State had to be protected against arrest and detention in all circumstances. For that reason, State authorities could not arrest or detain the Head of State in that person’s own State or in another State. Most case law agreed that a Head of State present outside his or her own State in his or her official capacity enjoyed full criminal immunity for acts carried out in an official or personal capacity and was therefore completely exempt from the criminal jurisdiction of the host State. While it had been noted that, for countries that had not ratified the Rome Statute of the International Criminal Court, the immunity of their Head of State was governed by customary international law, one delegation had expressed the opinion that it was impermissible for a non-signatory of the Statute to take measures that violated the rights of a Head of State. Hence the immunity of a Head of State before national courts was absolute even if that person had committed international crimes.

92. Another delegation had been of the view that the immunity of State officials from foreign criminal jurisdiction stemmed from customary international law, while another had held that immunity *ratione materiae* in respect of acts performed in an official capacity must be guaranteed to all State officials while they were in office and thereafter. Attention had been drawn to the fact that the immunity of State officials from foreign criminal jurisdiction in foreign courts and international criminal bodies were two different issues and, for that reason, it was questionable whether the theories and practices of the latter could be copied indiscriminately when determining the rules applicable to the former.

93. One delegation had maintained that there were no exceptions to immunity *ratione personae* and that the evidence of the three exceptions to immunity *ratione materiae* proposed by the Special Rapporteur was flimsy, as it rested on a few dissenting opinions to judgments of the International Court of Justice and on civil cases before some national courts and international judicial bodies such as the European Court of Human Rights. With regard to crimes in respect of which immunity did not apply, it was contended that a distinction had to be made between “crimes of international law” and “international crimes” and that, while it was impossible to overstate the importance of the fight against the former, it was the latter which were widely accepted by the international community as being determined by international law. Another delegation had expressed the view that the question of exceptions and limitations required further study because the report did not provide sufficient evidence that the three categories of limitations and exceptions it proposed were already established in international law. One delegation had agreed with the methodology used by the Special Rapporteur and with the title of draft article 7 (Crimes in respect of which immunity does not apply) given the normative implications of the phrase “limitations and exceptions”.

94. The Commission had been advised to proceed cautiously when deciding whether it should focus on the codification or the progressive development of the topic, owing to concerns related to the highly complex and politically sensitive nature of the issue of exceptions. A further concern had been that the relationship and fundamental difference between immunity *ratione personae* and immunity *ratione materiae* had been insufficiently analysed and required further study. One delegation had considered that exceptions to criminal jurisdiction called for further debate and that the notion of “acts performed in an official capacity” must be clarified. It had also been of the opinion that careful consideration should be given to the view that international crimes should not be deemed acts performed in an official capacity and that they should be defined more clearly. Another delegation had contended that evidence of sufficient State practice would have to be supplied in order to support the argument that the “crimes of corruption” to which draft article 7, paragraph 1 (b), referred were a serious international crime similar to the other international crimes listed in that draft article. To that end, it would be necessary to determine whether acts of corruption could be termed “acts performed in an official capacity” and therefore came within the scope of immunity *ratione materiae*.

95. Comments had also been made on *jus cogens*, as well as on the identification of customary international law, provisional application of treaties, protection of the environment in relation to armed conflicts and crimes against humanity.

96. The CHAIRPERSON thanked Mr. Gastorn for his statement and invited members of the Commission to put questions and to offer comments.

97. Mr. PARK, noting that AALCO was an intergovernmental organization, asked whether the statements by AALCO member States contained in the verbatim records of its annual sessions could be considered to be serious statements representing, for example, the *opinio juris* of

those States and, in that connection, whether any differentiation was made according to the seniority of the officials making such statements.

98. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that it was the usual practice of AALCO to publish the verbatim records of the proceedings of its annual sessions on its website. As an intergovernmental organization, AALCO represented the views of its member States, and therefore the statements of those States should, in his view, be considered to be serious statements.

99. Mr. HUANG said that he was pleased to note that AALCO had conducted a range of meaningful training programmes in the field of international law, including a long-term training programme in cooperation with the Government of China. He particularly welcomed the Secretary-General's comments on a very important and controversial topic on the Commission's current programme of work, namely the immunity of State officials from foreign criminal jurisdiction. Divergent views had been expressed on the topic within both the Commission and the Sixth Committee of the General Assembly, and diverse views continued to exist among Commission members on the issue of whether serious international crimes constituted an exception to the immunity enjoyed by State officials under customary international law. Noting that, according to the verbatim record of the fifty-sixth annual session of AALCO, seven delegations from AALCO member States had voiced their concerns and views on the topic, it would be helpful if the Secretary-General could provide further information on that issue, in particular on the position of AALCO as a whole and on whether there was any State practice of AALCO member States supporting the establishment of an exception to the immunity of State officials. Such information would be a very useful and timely contribution to the discussions taking place within the Commission. He also encouraged all Commission members to read carefully the statements made on the topic by AALCO members, in particular that of the delegation of Japan.

100. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that it was hoped that AALCO would organize further meetings on the topic of immunity of State officials from foreign criminal jurisdiction with a view to revisiting issues on which there remained divergent views among member States and to possibly developing a common position on the matter. Any development in that regard would be communicated to the Commission in a timely manner.

101. Ms. ORAL said that she wished to thank the Secretary-General for his informative presentation, which had highlighted the value of AALCO for the work of the Commission. As an organization with 47 member States, AALCO had been very influential in international law and, in particular, in providing a balance that was so necessary from the developing world's perspective. In that connection, she would be interested to know whether cooperation between AALCO and the Commission regarding information on State practice could be further strengthened.

102. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that work

was ongoing to make State practice on topics of interest available to the Commission and that he would strive to ensure that the matter was given the attention it deserved.

103. Mr. HMOUD said that he would welcome information on plans for developing the work of AALCO in the years to come and an update on legal research and training activities promoted by the Organization.

104. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO was indeed active in the fields of capacity-building, legal research and training. It was, for example, currently continuing to cooperate with the Government of China in conducting an annual training course on various international law issues that was attended by legal officers from AALCO member States. Several memorandums of understanding had been concluded with research institutions and universities in member States with a view to further developing training and legal research activities. In addition, AALCO carried out in-house training at its headquarters in New Delhi with the participation of various experts on international law, and a number of studies were produced annually on selected topics of international law under the auspices of the AALCO Centre for Research and Training.

105. Mr. HASSOUNA, welcoming the Secretary-General of AALCO on his first visit to the Commission, said that he wished to commend him on his willingness to engage with the Commission on topics of mutual interest. In recent years, AALCO had played an important role in seeking to coordinate the position of its member States on questions relating to the codification and progressive development of international law. The distribution of the verbatim record setting out the position of member States as expressed at the Organization's most recent annual session was a good way to show Commission members what had been achieved in that regard. It was important to bear in mind, however, that the record of those proceedings was of a provisional nature; it would be wise, therefore, not to treat it as a final record and not to quote States on that basis. Many of the issues addressed by AALCO member States at the session had also been a matter of debate within the Commission. However, he wished to point out that, when Commission members expressed a position, they did so in their capacity as independent experts and that they did not reflect the position of their national Governments.

106. It had been unfortunate that some Commission members who had been invited to participate in the half-day meeting on the Commission's work organized at the 2017 annual session of AALCO had been unable to do so because it had coincided with the start of the Commission's session in Geneva. He hoped that it would be possible to find a way for members to attend such meetings in the future. Regarding training, he asked whether AALCO cooperated in that area with the United Nations, in particular the Codification Division, which ran training programmes for different regional areas.

107. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO did indeed cooperate with the Codification Division, and arrangements for further joint training efforts were being developed.

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

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

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

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

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

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

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

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

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

The meeting rose at 1.05 p.m.

3378th MEETING

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

Chairperson: Mr. Georg NOLTE

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

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