Summary record of the 2928th meeting

Topic:
Effects of armed conflicts on treaties

Extract from the Yearbook of the International Law Commission:-
2007, vol. I
Organisation of the work of the session (continued)

[Agenda item 1]

110. Mr. GAJA (Chairperson of the Working Group on the external publication of International Law Commission documents) said that the following members had expressed their willingness to participate in the working group: Mr. Candioti, Ms. Escarameia, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte and Ms. Xue. He encouraged other members to put their names forward.

The meeting rose at 1 p.m.

2928th MEETING

Thursday, 31 May 2007, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO (Vice-Chairperson)

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comisarió Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.


[Agenda item 5]

Third report of the Special Rapporteur (continued)

1. The CHAIRPERSON reminded the Commission that the Special Rapporteur’s suggestion that a working group be set up had been supported by all the members who had taken part in the discussion on the topic at the two previous meetings and that, following consultations, it had been suggested that the working group should be chaired by Mr. Caflisch. If he heard no objection, he would therefore consider that the Commission approved the creation of a working group on the topic of effects of armed conflicts on treaties, chaired by Mr. Caflisch.

It was so decided.

2. The CHAIRPERSON invited the Commission to comment on draft articles 1 to 7.

3. Ms. JACOBSSON said that the presentation of a whole set of draft articles facilitated analysis of the topic, since it enabled the Commission to understand how the Special Rapporteur himself viewed the topic in its entirety.

She also expressed appreciation of the open-minded spirit in which the Special Rapporteur had presented his third report, and endorsed the four objectives that he had set out.

4. With regard to draft article 1 (Scope), she agreed that both international and non-national armed conflicts should be covered, for the reasons given by the Special Rapporteur. In modern times, the distinction between the two had indeed been blurred and the analytical framework was often further complicated by the involvement of so-called “external elements”. It was not unusual for States involved in the same international operation to be in disagreement as to whether the conflict was of an international or non-international nature. In fact, within a single country a conflict could have various different characters, depending on the situation on the ground where the operations took place, as in Afghanistan or Iraq. The distinction between international and non-international armed conflict was, therefore, artificial and theoretical rather than a reflection of reality. In the most recent regulations on jus in bello, moreover, the trend was clearly to regulate situations in all types of armed conflict without making such a distinction. It was a development that enhanced protection for both civilians and combatants and should be reflected in the Commission’s work.

5. Moreover, she believed that the draft articles should deal with occupation, not only because it was covered by the various Hague Conventions respecting the Laws and Customs of War on Land (1899 and 1907), the fourth Geneva Convention and the first Protocol Additional thereto, as well as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, but also because occupation fell within the scope of the law of armed conflict and could put the validity of a treaty to the test. A State under occupation might find that its ability to fulfill its treaty obligations was affected. Such a risk arose in particular when an occupying power had to deal with commercial agreements relating to State-owned natural resources, such as oil and gas. National and international legal practice that existed in that connection had not yet been reflected in the Special Rapporteur’s report, but it might prove useful for further analysis of the subject.

6. She doubted whether it would be wise to include in the scope of the topic treaties involving international organizations. In that connection, she endorsed the arguments put forward by the United Kingdom delegation in the Sixth Committee, but there were other arguments against such a move. Above all, the inclusion of such treaties was likely to raise difficult questions, such as where to draw the line between different types of organizations, whether only governmental organizations should be covered, as Mr. Hassouna had suggested, or whether non-governmental organizations or mixed organizations could also be covered and, if so, which ones. There was also the question of what kind of treaties would be involved. Moreover, it was not always easy to define what constituted an international organization; it was worth noting that the Charter of the United Nations referred to “regional

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* Resumed from the 2924th meeting.
arrangements or agencies” rather than regional organizations. Lastly, given the close connection between the topic of effects of armed conflicts on treaties and that of responsibility of States and, mutatis mutandis, of organizations, to which Mr. Pellet had drawn attention, and the fact that the Commission’s work on the responsibility of international organizations was not yet concluded, it would seem premature to include treaties concluded by international organizations.

7. With regard to draft article 2 (Use of terms), she had no problem with the definition of the term “treaty”, although she wondered how agreements concluded by parties to a conflict that were not States should be handled. As for the definition of the term “armed conflict”, however, she not only wholeheartedly agreed with the Special Rapporteur’s view that it was not the business of the Commission to find an all-purpose definition of the term, but she felt it was risky to try to come up with a definition even for the sole purpose of the consideration of the topic. The Commission was an important organ in the international legal field and its work, discussions and conclusions were widely circulated, read and used. Any definition that it adopted was likely to be used both within and outside the parameters determined by the Commission, and that could have negative side effects in other areas of international law, and principally international humanitarian law.

8. If the Commission decided, all the same, to take another look at the definition, it would have to conclude that the definition in draft article 2 was very wide, embracing as it did situations that could not necessarily be characterized as armed conflicts, such as territorial disputes or responses to territorial infringements. The qualifying statement in the definition—that it related to “armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States”—was useful but not sufficient. The Special Rapporteur seemed to have dismissed the concerns expressed at the previous sessions of the Commission, but they remained a problem, as noted by Mr. Kolodkin. Even so, she did not think that the definition proposed by the Special Rapporteur could be taken as intended to cover police enforcement operations, despite the fact that such operations might be of a semi-military nature or that it was sometimes difficult to determine whether an operation was one governed by the law of armed conflict or a police law enforcement activity. Such problems were not new, but they were made more complicated by the modern phenomenon of mixed conflicts. They also underlined the difficulty of defining the term “armed conflict”, which she doubted could be overcome by any tinkering with the definition. A reference to the formula in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Tadić case was a step in the right direction, even though the definition given in the latter had been criticized. States involved in an operation had to deal with the categorization of a given conflict at a very practical and detailed level, since the rules of engagement for their troops had to be adjusted, depending on whether they perceived the situation as an armed conflict. Modern international humanitarian law treaties refrained from defining the term “armed conflict”. The Commission should seek a definition of the term only if there was a clear need for one, and she remained to be convinced of such a need.

9. She would appreciate clarification of what was meant by the statement in paragraph 16 of the first report\(^{186}\) that “[p]olicy reasons indicate the inclusion of a blockade even in the absence of armed actions between the parties”. Such an inclusion was, in her view, in fact justified for legal reasons, since a blockade was an act of aggression, governed by special requirements with regard, inter alia, to its establishment, its notification, its application and its maintenance. The Special Rapporteur might perhaps be intending to refer to an embargo, but it was important to distinguish between the two concepts.

10. With regard to draft article 3 (Non-automatic termination or suspension), she agreed with Mr. Vázquez-Bermúdez that the principle of continuity should be clearly spelled out, in order to show clearly that it should act as the starting point. The phrase “parties to the armed conflict” should be replaced by the phrase “States parties to the armed conflict”, since, whereas non-State actors could be parties to a conflict, only States could be parties to a treaty, according to the definition in draft article 1.

11. With regard to draft article 4 (The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict), she agreed with other members, including Mr. McRae and Mr. Perera, that the intention criterion should not exclude other criteria.

12. As for draft article 5 bis (The conclusion of treaties during armed conflict), the reference there, too, should be to “States parties to the armed conflict” and not to “parties to the armed conflict”, since not all the latter had the capacity to conclude a treaty.

13. With regard to draft article 6 bis (The law applicable in armed conflict), she said that she was slightly concerned by one aspect of the debate. She had the feeling that the law of armed conflict, including international humanitarian law, was viewed by some members as an enemy to be kept at bay. She did not share that assumption. International humanitarian law frequently offered a higher degree of protection of humanitarian values than “general” rules of international law. While it might be possible to derogate from human rights treaties, it was not possible to derogate from international humanitarian law. A person sentenced to death in time of war who was protected by the rules and provisions of international humanitarian law enjoyed stronger legal safeguards than a person sentenced to death (outside the European legal context) in time of peace. The same applied to some environmental protection provisions under international humanitarian law. It would undoubtedly be safer to rely on the detailed provisions of the Convention on the prohibition of military or any other hostile use of environmental modification techniques than on a general reference by the ICJ to the need to protect the environment in times of armed conflict [see *Legality of the Threat or Use of Nuclear Weapons*, paras. 27–32 of the advisory opinion].

\(^{186}\) *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.
14. Draft article 7 (The operation of treaties on the basis of necessary implication from their object and purpose) contained a useful indicative list, on which she intended to comment further when it was discussed in the working group that was to be set up.

15. Although she was fully aware that her statement should focus on draft articles 1 to 7, she could not refrain from making some comments about draft article 12 (Status of third States as neutrals). There was, in her view, a problem with the way that the term “neutrals” was used in the draft article: she wondered whether it referred to States that had declared themselves neutral when an armed conflict broke out or only to States that enjoyed permanent neutrality. If the reference was only to the latter, the provision was not, as pointed out by the Special Rapporteur, strictly necessary, since a State’s neutral status could never be altered by the draft articles. Few States were currently neutral, which was probably why the draft article had received general support in the Sixth Committee. That did not, however, solve the problem of neutrality versus non-belligerency. When the 1907 Hague Conventions respecting the Laws and Customs of War on Land had been concluded—and even earlier—it had been assumed that, if a war broke out, States that were not parties to the conflict were automatically neutral. The situation had changed, however, particularly after the establishment of the United Nations. First of all, there were situations in which neutrality was not possible, the prime example being those on which the Security Council had taken a decision. Secondly, the practice was that States declared themselves to be non-belligerent, as Sweden had done during the war between Finland and the Union of Soviet Socialist Republics in 1939. The distinction between neutral and non-belligerent States was thus highly relevant in the context of the current discussion, since there was a connection between neutrality and third States. Third States were not automatically neutral and neutral States were not automatically third States. Such concepts and their role in the wider context undoubtedly merited further consideration by the Commission.

16. Lastly, she expressed appreciation of both the method used by the Special Rapporteur and the reports that he had produced. She looked forward to taking part in a working group on the topic.

17. Ms. XUE congratulated the Special Rapporteur on his third report and said that, after listening to his detailed presentation, she had gained a better understanding of all three reports submitted to date. On the key issues, the Special Rapporteur’s comments were helpful, and the set of draft articles he proposed could serve as a basis for the Commission’s deliberations.

18. With regard to the scope of the draft articles and the definition of the term “armed conflict”, she noted that in draft article 2 (b) the Special Rapporteur had taken account of the variety of opinions within the Sixth Committee and tactfully avoided defining the term. Indeed, as some members of the Commission and some delegations to the Sixth Committee had pointed out, the nature and modalities of armed conflict had changed considerably, particularly over recent decades, and international theory on the use of force had also developed significantly since the end of the Second World War. Nevertheless, the question of whether the topic should cover non-international armed conflicts deserved serious consideration. In her view, it was clear, as she had stated on previous occasions, that internal armed conflicts should not be covered, first and foremost because the topic related rather to the law of treaties than to the law of armed conflict. In other words, it concerned treaty relations between States in the context of armed conflict and not the rules of State conduct in armed conflict, even though the two areas were related.

19. That point was particularly important if it was agreed that the principle of continuity and stability set out in draft article 3 should be the starting point. In the case of internal armed conflict, the normal operation of treaties might be interrupted, but treaty relations under the law of treaties were quite different from those prevailing in the case of international armed conflict, particularly when such conflicts remained purely internal in nature, as they most often did. In internal armed conflict, the State remained responsible for its treaty obligations at the international level, unless and until the conditions for the suspension or termination of the treaties concerned were met in accordance with treaty law. Draft article 3 was important because it clarified the treaty relations between States in international armed conflict. In internal armed conflict, the belligerent party or local rebel forces were not bound by treaty obligations undertaken by their Government, either at times of ceasefire or at any other time. To what extent a Government should be held responsible for the discharge of treaty obligations entered into by such bodies was another question. In Asia, for example, there had long existed local armed forces, with internal armed conflict occurring from time to time. Treaties concluded by the countries concerned, for example in relation to judicial assistance, applied, in law, to the whole territory of the country but in practice were not operational in areas beyond Government control. To recognize the specific nature of internal armed conflict would help to preserve the integrity of the law of treaties and the law of State responsibility. In paragraphs 18, 21 and 22 of his first report, the Special Rapporteur, while confirming that there was a consensus in the doctrine on the basic character of the distinction between international and non-international armed conflict, had said that two factors should be taken into consideration, namely the nature or extent of the armed conflict, on the one hand, and the content of the treaty concerned and the intention of the parties, on the other. Although such indicators were practical and useful, they could not address the difference in the treaty relations in the two types of armed conflict.

20. With regard to the criterion of intention, she noted that views were divided as to its applicability in determining treaty status in the case of armed conflict. In principle, she agreed with the Special Rapporteur that the criterion of presumed intent was the most appropriate for the purposes of the draft articles. Having listened carefully to all the arguments, particularly the eloquent statement by Mr. McRae at the previous meeting, her view was that there was not much difference in substance between the various positions, since the wording of draft article 4, paragraph (2), actually included all the elements, apart

187 Idem.
from the subjective intention of the parties, including the object and purpose of the treaty, subsequent circumstances and the nature and extent of the armed conflict. There were, however, two problems with the draft article. The first arose from the phrase “at the time the treaty was concluded” in paragraph (1). The report drew attention to the content of article 31 of the 1969 Vienna Convention, which contained all the elements relevant to the interpretation of a treaty, including its object and purpose, subsequent agreements between the parties and subsequent practice in its application. It was well known, however, that rules of interpretation were normally applied not at the time of the conclusion of the treaty but at the time of its execution. The phrase “at the time the treaty was concluded” therefore conflicted with article 31 or, at least, was likely to give rise to dispute or misunderstanding. If the phrase was deleted, the term “intention of the parties” would be left in general terms and the detailed provisions contained in paragraph (2) of draft article 4 would gain in meaning. Of the two criteria, that of the object and purpose of the treaty and that of intention, with all its attendant elements, the latter was the more reliable. The second problem arising out of draft article 4 was the relationship between the criterion of intention and the criterion of the object and purpose of the treaty. In other words, when the criterion of intention included the object and purpose of the treaty, in line with article 31 of the 1969 Vienna Convention, it seemed that another criterion had been created. The problem might, perhaps, relate rather to draft article 7 than to draft article 4.

21. Draft article 7, which was related to draft articles 3 and 4, had a twofold aim: one was to further clarify the criterion for the automatic operation of treaties in case of armed conflict, and the other was to consider the potential issue of severability. The treaties listed in the draft article did not, however, seem to fall into any particular category and the criterion of the object and purpose of the treaty was rather vague for the purposes of the draft article. Some of the treaties listed should be automatically operative in the case of armed conflict, either by their very nature or by their object and purpose. Since international law was not clear in that regard, the issue could provide material for its progressive development and codification. For instance, the legal regimes established by the law of the sea, the Antarctic Treaty, the outer space conventions and the Charter of the United Nations, among others, should by their very nature continue to apply in the case of armed conflict. Draft articles 3 and 7 would be useful and relevant with regard to diplomatic protection. When NATO had bombed the Chinese Embassy in Belgrade in 1999, she had, as a legal adviser, given it as her opinion that, in invoking the international responsibility of the wrongdoer, China should base its claim both on the Geneva Convention and the Vienna Convention relative to the protection of civilian persons in time of armed conflict, and should not base its claim both on the Geneva Convention and on the Vienna Convention relative to the protection of civilian persons in time of armed conflict.

22. The question of severability inevitably arose in connection with the topic under consideration. In practice, if the Commission wished to ensure legal stability and security, it should allow partial suspension or termination of treaties in time of armed conflict. What was needed, therefore, was not an indicative list—such lists did not provide much guidance, as a rule—but a qualitative provision indicating which types of treaties should automatically continue to operate and to what extent a treaty could operate partially. Since the Commission was still at the initial stage of drafting, it was too soon to tell where such a provision should be inserted. Once the criterion on the susceptibility to suspension or termination had been defined or refined, the issue should become clearer.

23. Lastly, she supported the proposal that a working group should be set up to discuss such key issues before the draft articles were referred to the Drafting Committee. She also wished to thank the Special Rapporteur for his valuable contributions to the study of the topic.

24. Mr. SINGH thanked the Special Rapporteur for his lucid and detailed presentation of the complex topic of the effects of armed conflicts on treaties; the decision to present a full set of draft articles enabled the Commission to get an overview of the topic. He also thanked the Secretariat for the very useful memorandum it had prepared, which contained a comprehensive examination of practice and doctrine in that regard. While the topic was generally part of the law of treaties, it was also closely related to other domains of international law, such as international humanitarian law, State responsibility and the peaceful settlement of disputes.

25. With regard to draft article 1, the scope of the topic should be limited to treaties concluded between States and should not include those concluded by international organizations. In that regard, he supported the arguments put forward by the Representative of the United Kingdom to the Sixth Committee, as quoted by the Special Rapporteur in his third report.

26. In draft article 2, the term “armed conflict” should be limited to conflicts between States parties to the conflict and should not extend to internal conflicts, in view of the fact that treaties were entered into by States and supplemented by contentious customary international law, treaty provisions should have the same legal status. In that regard, the principle of continuity was also important. In draft article 7, the treaties listed in paragraph 2, subparagraphs (a), (b), (g), (j) and (k), could easily be identified as treaties of automatic application. As for the other categories, one of two situations might apply: either the treaty was wholly operative even in time of armed conflict, as was, in the human rights field, the Convention on the Prevention and Punishment of the Crime of Genocide; or else certain of its provisions might be suspended, as was the case with the International Covenant on Economic, Social and Cultural Rights. The same went for treaties on the environment, such as the 1997 Watercourses Convention, some provisions of which continued to apply even during armed conflict.

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190 See footnote 185 above.
internal conflicts did not directly affect treaty relations. Although, as stated in paragraph 17 of the first report, \(^{190}\) "[c]ontemporary armed conflicts have blurred the distinction between international and internal armed conflicts", the involvement of "other States" in such conflicts in varying degrees was significant. The definition of the term "armed conflict" given in draft article 2 \((b)\) appeared to make the existence of an armed conflict contingent on its likely effect on the operation of treaties between the States parties to the conflict. The nature and extent of the conflict were already factors to be taken into account under draft article 4 in determining the intention of the parties and the question of whether an armed conflict had occurred should be considered independently of its effects on treaties.

27. Draft article 3 was useful, since it promoted the continuity and certainty of treaty relations. As for draft article 4, while the intention of the parties was relevant to the interpretation of a treaty, such intention should be determined on the basis of the text and the context of the treaty. It was highly unlikely that, at the time of the conclusion of the treaty, the parties would have contemplated or provided for the likelihood of a situation of armed conflict between them. Accordingly, all the relevant circumstances—the object and purpose of the treaty, the nature and extent of the conflict or the situation arising therefrom, the nature of the treaty obligation itself, the subsequent actions of the parties in relation to the treaty and the legality of the actions of each of the parties to the conflict—should be taken into account in determining whether the treaty or some of its provisions could continue in force in the context of an armed conflict.

28. In the new draft article 6 bis, the listing of standard-setting instruments needed further consideration and elaboration in the light of comments made by other members of the Commission. Moreover, although the Special Rapporteur had indicated, in paragraph 10 of the first report, that the topic fell within the law of treaties, the only lex specialis identified was "the law applicable in armed conflict".

29. In draft article 7, it would be useful to identify some general criteria for determining the type of treaties that would continue to apply, whether in whole or in part, during an armed conflict. In particular, treaties that expressly applied in case of or during an armed conflict, or those, such as boundary treaties, that created a permanent regime and could therefore in no circumstances be terminated by an armed conflict, might be considered separately. It might also be possible to identify categories of treaty that could be considered to be suspended or terminated during an armed conflict, including treaties that operated through the cooperation and interaction of States parties, whether at the governmental level or through individuals and companies, such as treaties of trade and commerce.

30. In concluding, he supported the Special Rapporteur’s proposal that the draft articles should be referred to a working group.

31. Mr. Fomba said that it was not clear from draft article 1 whether the question of the effect of armed conflicts related to treaties which were being provisionally applied as well as to those already in force. At first sight, that did not appear to be the case. As for the question of extending the scope of the topic to treaties concluded by international organizations, he had two comments on the view expressed in paragraph 9 of the third report: first, there was no reason to suppose that their situation was qualitatively different and, secondly, the difficulties mentioned by the Special Rapporteur were not necessarily real or insuperable.

32. He noted that while the title of the topic contained three key concepts—"treaty", "armed conflict" and "effect"—draft article 2 covered only the first two. He asked whether the reason no mention was made of the word "effect" was that it was not problematic in the particular context of the topic. In paragraph 48 of the third report, however, the Special Rapporteur took pains to draw a distinction between "the effect of armed conflict on treaties as a precise legal issue" and the effects of other circumstances. The question therefore arose whether such situations were really all that different from situations of armed conflict, and, if so, to what extent. Surely the debate had not been definitively concluded on that point. As for the question whether the term "armed conflict" also applied to non-international armed conflicts, there was a real possibility that, in non-international armed conflicts stricto sensu, treaty relations between a State party and a third State would be changed. The matter should therefore be given further serious consideration, perhaps along the lines that Mr. Gaja had interestingly indicated.

33. With regard to draft article 3 and the replacement in the text of the words "ipso facto" by "necessarily", he concurred with the Special Rapporteur’s view that there was no fundamental difference between the two terms, although "ipso facto" conveyed more faithfully the idea that there was no automatic termination or suspension following the outbreak of an armed conflict.

34. With regard to draft article 4, he noted that the plural word "indicia" was used, although it denoted only the criterion of intention, which was to be determined or identified in accordance with articles 31 and 32 of the 1969 Vienna Convention. To that criterion the Special Rapporteur added the nature and extent of the armed conflict in question. Several questions arose in that connection: whether the intention to suspend or terminate the application of a treaty in a situation of armed conflict was, as a rule, clearly indicated by the parties to the treaty; what the practice was in that regard; and to what extent it could be said that the nature and extent of an armed conflict constituted indicia of intention. Surely the two were different. It was also worth asking how far articles 31 and 32 were relevant in the particular context of the topic or, in other words, whether all the provisions they contained were valid and applicable to the effects of armed conflicts on treaties—which presupposed that all the criteria were evaluated. If the explicit reference in the draft article to articles 31 and 32 of the 1969 Vienna Convention was inadequate, as some States and members of the Commission believed, paragraph 2 \((a)\) should perhaps be reformulated to contain a reference to

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the text of the treaty or to its object and purpose. As for the problem of establishing the intention of the parties with certainty, the Special Rapporteur had rightly stated that it should be seen in context, since the 1969 Vienna Convention contained effective methods for determining the meaning of a treaty. As for the legal consequences of the termination or suspension of treaties, which were governed by articles 70 and 72 of the Convention, the question arose whether the general regime should apply or whether some specific aspect of the effect of armed conflicts could or should justify a change in those articles and a different approach.

35. With regard to draft article 5 bis, he said that treaties could and should also play an important role in the process of settling armed conflicts. The relevant factor, in his view, was not so much the “competence” or “capacity” to conclude a treaty, which remained intact, as the “faculty” or the “need” to do so, or the “opportuneness” of doing so.

36. With regard to draft article 7, he supported the proposal by the United States of America that the Commission should enumerate the factors that might lead to the conclusion that a treaty should continue, be suspended or be terminated in the event of armed conflict, the identification of which would be of practical use to States. He wondered, however, whether the United States and the Special Rapporteur attached the same meaning to the word “factors”, since the latter seemed to consider that they already appeared in the proposed list of treaties. As for the question whether the concept of State practice should also encompass the case law of domestic jurisdictions and the opinions relating thereto issued by the executive, of which the Special Rapporteur claimed to have found no trace in State practice, as traditionally understood, he believed that all sources that might throw light on the issue should be taken into account. In that regard, he noted that, in 2003, the French Society for International Law had organized a symposium in Geneva on practice and international law, during which an interesting discussion had been held on the concept of “practices” in international law. As for the categories of treaty to be included in draft article 7, the current wording was, in his view, a useful starting point and he was in favour of the principle of classifying treaties, so long as such a classification was made on the basis and in the light of a whole range of criteria or factors to be determined. Of the four possible options set out in paragraph 56 of the third report, his preference was for the one appearing in subparagraph (c), according to which the list would rely not upon categories of treaties but upon relevant factors or criteria.

37. Lastly, he expressed support for the establishment of a working group and supported Mr. Pellet’s proposal regarding the working group’s terms of reference, which would cover practically all the important underlying issues.

38. Mr. WISNUMURTI said that he had no difficulty with the formulation of draft article 1 on scope. He had an open mind as to the proposal to expand the scope by including treaties entered into by international organizations and was prepared to listen to the views of other members of the Commission in plenary and in the working group to be established.

39. Draft article 2, paragraph 1, on the definition of “treaty”, seemed to be adequate, as it virtually reproduced article 2 (a) of the 1969 Vienna Convention. Nevertheless, the question whether the definition of “armed conflict” should include “internal armed conflict” was a serious issue that had proved to be divisive and on which the Commission should take a decision. As stated by the Special Rapporteur in paragraphs 17 of his first report and 14 of his third report, internal armed conflict could affect the operation of treaties, and sometimes there was no distinction between international and non-international armed conflicts. Indeed, while some internal armed conflicts escalated to such a degree that they affected treaty relations between the State party involved in them and another State party, not all internal armed conflicts affected treaties. In his view, the effects of an internal armed conflict on treaties depended on the nature and gravity of the conflict: if it affected the strategic interests of another State party, that might prompt the State party in question to become involved—directly or indirectly—in the conflict, thereby creating a hostility between the two countries that provided grounds for suspension or termination of a treaty by one or both of the States parties. It was essential, however, not to draw the over-hasty conclusion that the definition of “armed conflict” should include internal armed conflict. That would entail venturing into the very sensitive terrain of national sovereignty, since it would imply that one State party was involved in the internal armed conflict of another State party. For those reasons, the definition proposed by the Special Rapporteur in draft article 2 (b) was adequate to accommodate a situation where an internal armed conflict affected the operation of a treaty.

40. He welcomed the fact that, in draft article 3, the term “ipso facto” had been replaced with “necessarily”, which better conveyed the meaning of the chapeau. It might also be better to replace the word “non-automatic”, in the title, by “non-automaticity of”.

41. Regarding draft article 4, he said that while he agreed in principle that the test of the intention of the States parties was an important factor in the interpretation of a treaty, the use of that criterion in article 4, paragraph (1), seemed to him to be unrealistic. The paragraph referred to the intention of the parties “at the time the treaty was concluded”. The fundamental reason for States to conclude a treaty was to promote friendship and cooperation in various fields of common interest or to settle a problem or dispute. To include a provision expressing their intention regarding the operation of the treaty in case of armed conflict would run counter to that aim. If the Commission really wanted to retain draft article 4, extensive redrafting would be needed.


42. On draft article 5, he welcomed the Special Rapporteur’s decision to split it into two separate articles, a change which reflected the views expressed earlier in the Commission and in the Sixth Committee. Draft article 5 bis stated the accepted legal principle that it was not juridically impossible for two belligerents to conclude treaties during the course of a war—for instance, an armistice agreement or an agreement on exchange of prisoners. However, he had doubts about the viability of the reference to the applicable lex specialis, as that might undermine the purpose of the draft article. After all, standard-setting treaties were also lex specialis. On the other hand he could endorse draft article 7, and welcomed the adoption of the object and purpose of a treaty as a test for the treaty’s continued operation during an armed conflict. He also agreed with the Special Rapporteur’s approach of including an indicative list of treaties that fell within the meaning of draft article 7, paragraph (1), and with his decision as stated in paragraph 44 of his third report to maintain the original approach to draft article 7, reflected in option (b) in paragraph 56 of the report. That did not preclude the need for a review of the indicative list of treaties that had the character of permanent regimes. In that connection, he proposed that the indicative list should include treaties or agreements delineating land and maritime boundaries, which by their nature also belonged within the category of permanent regimes.

43. Regarding draft article 6 bis, he said that the principle of continuity of the application of standard-setting treaties, including treaties on human rights and environmental protection, was an essential part of the draft articles. However, he had doubts about the viability of the reference to the applicable lex specialis, as that might undermine the purpose of the draft article. After all, standard-setting treaties were also lex specialis. On the other hand he could endorse draft article 7, and welcomed the adoption of the object and purpose of a treaty as a test for the treaty’s continued operation during an armed conflict. He also agreed with the Special Rapporteur’s approach of including an indicative list of treaties that fell within the meaning of draft article 7, paragraph (1), and with his decision as stated in paragraph 44 of his third report to maintain the original approach to draft article 7, reflected in option (b) in paragraph 56 of the report. That did not preclude the need for a review of the indicative list of treaties that had the character of permanent regimes. In that connection, he proposed that the indicative list should include treaties or agreements delineating land and maritime boundaries, which by their nature also belonged within the category of permanent regimes.

44. In conclusion, he thanked the Special Rapporteur for his excellent work and welcomed the idea of continuing the task in a working group to be chaired by Mr. Cafisch.

45. Mr. WAKO, referring to draft article 1, said that if the Commission decided to include non-international armed conflicts in the scope of the topic, it would be necessary to amend the draft article to include treaties entered into between States and international organizations. That change would also constitute recognition that the topic was based on the law of treaties but also cut across other domains of international law such as international humanitarian law, the law of warfare and the law of the responsibility of States.

46. In draft article 2, the definition of “armed conflict” had remained the same as in the first report and opinion was divided as to whether to include internal armed conflicts. Some members, such as Mr. Comissário Afonso, Mr. Kolodkin and Ms. Xue, believed, for good reason, that doing so would entail the danger of including non-State actors. What was not in dispute was that traditional warfare, which had begun with official proclamations and denunciations, was on the wane, while the number of internal armed conflicts was increasing. It was also recognized that those conflicts could and usually did affect the operation of treaties as much as, if not more than, international armed conflicts. Many internal conflicts had been ended by the conclusion of a peace treaty between the State and non-State actors directly involved that was guaranteed by or entailed certain duties or obligations for other States, either individually or through regional, international, intergovernmental or non-governmental organizations. The issue that arose was whether the peace treaty could be suspended or even abrogated in the event of renewed hostility, and, if so, what was the required level of intensity of hostilities. One might also ask whether the suspension or abrogation of a treaty, in whole or in part, by a State, non-State actor or organization triggered its responsibility.

47. Other issues arose if internal armed conflict was to be included in the scope of the topic. For example, in most international human rights instruments, States undertook to ensure that their people enjoyed human rights. Some internal armed conflicts were caused by the State’s failure to fulfill those obligations. The issue then was whether a State that could be blamed for an internal armed conflict could use that conflict to abrogate or suspend a treaty or a provision of a treaty. It was doubtful whether a State could cite an internal civil war for which it was responsible as grounds for abrogating its responsibility in respect of treaty obligations. At most, it could suspend its fulfilment of those obligations on the grounds that it was unable to perform them, but even then other States and actors could hold it accountable. On the other hand, a State whose territory was the theatre of an internal armed conflict caused by other States or non-State actors could probably abrogate or suspend the application of a treaty. In any event, whether to include internal armed conflicts was a question of immense consequences to which the Commission must give due consideration and which, given that opinion on it was divided, should indeed be referred to the working group. An in-depth study by the Secretariat on the question would also be of benefit. The remarks made by Ms. Escaramiea and Ms. Jacobsen should likewise be taken into account.

48. In article 3, the question was whether the word “necessarily”, which had replaced the term “ipso facto” used in the first report, should be retained. He was not sure that it adequately reflected the impact of prohibition of recourse to the use of force. Clearer and stronger language would be preferable; perhaps the word “necessarily” could be deleted in the first part of the draft article and the words “save in exceptional circumstances where the armed conflict is ‘lawful’ or ‘justified’ under international law” added at the end.

49. Draft article 4 should definitely be referred to the Working Group. Despite the differing views on it, it had not been changed since the first report; the Special Rapporteur had simply given additional explanations to justify his approach. For those of the common law tradition, however, the differences were not as wide as it might seem. Any interpretation of a text, whether a constitution, legislation or contract, aimed to arrive at the “intention” of the authors. Even if the “intention” might not have been contemplated by the parties at the time the text was drafted, the authors would be presumed to have had it if that was the conclusion reached by following the established rules of interpretation. It was true, as Ms. Xue had pointed out, that the phrase “at the time the treaty was concluded” was confusing. If it was to be retained, it should be made clear that it was the “express” intention, as opposed to the “presumed” or “implied” intention, that was meant. The first two paragraphs could then refer to “express intention”, which was defined by a reading.
of the treaty itself and by the rules set out in articles 31 and 32 of the 1969 Vienna Convention. Paragraph (2) (b) could become paragraph (3) and deal with the factors to be taken into account in arriving at the “implied” or “presumed” intention, such as the nature and extent of the armed conflict, the object and purpose of the treaty (which it would be useful to cite even though the phrase “express intention” took it into account), bilateral or multilateral treaties, and the international standards to be applied. Lastly, the current draft article 7 could become paragraph (4) of draft article 4. That idea might seem controversial, but it could be considered by the Working Group. The content of draft article 7 was important enough not to be relegated to an annex. Even if the Special Rapporteur considered that its current placement was logical in view of the sequence of the draft articles, it could also form a part of draft article 4.

50. Mr. NIEHAUS said that the third report on the effects of armed conflict on treaties was clear and structured logically, but offered little that was new in comparison with the two previous reports. Some members reproached the Special Rapporteur for working at a slow pace, but it must be borne in mind that the topic was extremely complex and controversial, requiring painstaking analysis. The Secretariat study was particularly useful in that regard.194 Having already spoken on the two previous reports, he would limit himself to recalling his position on certain specific points, especially as the Special Rapporteur’s comments were so comprehensive that any additional remarks were likely to be superfluous. The topic obviously fell under the law of treaties, but its connections to other issues such as the law of war, the prohibition of the use of force and the law of responsibility should not be overlooked.

51. Concerning draft article 1, on the scope of the topic, he said that while the Commission’s task was not to redefine the relevant provision of the 1969 Vienna Convention, nothing prevented it, as Mr. Hassouna had pointed out, from engaging in codification that might supplement the Convention without contradicting it. Not to do so would be to go against the development of international law. He did not agree with those members who opposed the inclusion of treaties concluded by international organizations because of the difficulties involved, but he could accept that the idea might be considered at a later stage if at some point the Commission was asked to look into that category of treaties, even though the problems posed by armed conflicts for international organizations were quite different from those posed for States. That fact was self-evident, but it must not be overlooked, even if the matter was considered later.

52. Regarding draft article 2, he endorsed Mr. Hassouna’s proposal to replace the term “state of war” in subparagraph (b) with the term “state of belligerency”, which was more compatible with the Charter of the United Nations and the development of international law. He also endorsed the inclusion of internal conflicts in the scope of the topic, particularly since they had become the most common kind and because it was sometimes difficult to distinguish between international and non-international armed conflicts, not to mention situations of military occupation.

53. Draft article 3, as Mr. Comissário Afonso had pointed out, was particularly important in that it by and large formed the basis for the whole draft. That was why it might be better couched in more categorical terms. The replacement of “ipso facto” by “necessarily” was no improvement, since the phrases were not synonymous and, as had been pointed out in the Sixth Committee, the latter was weaker than the former. The most appropriate term might be “automatically”, as someone had suggested, since it had the advantage of being both more emphatic and more coherent with the title of the draft article, at least in the English and Spanish versions.

54. Draft article 4 was in principle satisfactory, although its wording should perhaps be revised to delineate more clearly the two fundamental concepts of intention and object and purpose of the treaty. The criterion of object and purpose of the treaty was perhaps preferable, given that intention was generally difficult to identify.

55. The new draft article 5 was clearer for having been broken into two articles and presented no particular problems. Similarly, the reference to lex specialis in the new draft article 6 bis provided welcome clarification.

56. Draft article 7, on which the Special Rapporteur had commented more extensively than on any other, was in no way superfluous and provided a good counterweight to the element of the intention of the parties, as Ms. Escaramelia had pointed out. The link it created with the element of the object and purpose of the treaty was extremely apposite, and the list it contained should be retained, even if it was not possible to endorse all the categories listed. In that connection, he failed to understand why the Special Rapporteur had chosen not to include treaties that codified rules of jus cogens. He believed that this category of treaties ought in fact to be included at the beginning of the list.

57. In conclusion, he endorsed the establishment of a working group that would surely, under the guidance of its chairperson and the Special Rapporteur, bring the study of an important and interesting topic to fruition.

58. Mr. KEMICHA endorsed the Special Rapporteur’s decision to propose a full set of draft articles with commentary, as that provided the Commission, and States, with a finished product—a “package”. The discussions since the first report nevertheless revealed that there was still a need for consensus on the overall approach and that substantive problems remained.

59. Regarding draft article 1, there were diverging views on the proposal to extend the scope of the topic to treaties concluded by international organizations. With all due respect for the reservations expressed on that point by the Special Rapporteur and the arguments put forward in the Sixth Committee by the Representative of the United Kingdom, he believed that such an extension was justified or at least merited thorough consideration before it was rejected, should that prove necessary.

60. The inclusion of internal armed conflicts in the definition of “armed conflict” in draft article 2 (b) had likewise given rise to a significant divergence of views. It would be difficult to settle for a combined reading of that text and

draft article 3, as the Special Rapporteur suggested should be done, in order to cover a situation that was supposed to form part of a definition of “armed conflict”, even if that definition was proposed solely “[f]or the purposes of the present draft articles”. As to matters relating to the legality of the use of force, the Special Rapporteur would surely have to take them into account, just as he would the resolution adopted on 28 August 1985 by the Institute of International Law.195

61. He welcomed the improvements made to the wording of draft article 3 by the Special Rapporteur and agreed with others that it helped to consolidate the principle of continuity.

62. Draft article 4 raised another fundamental issue: the excessive and exclusive emphasis given to the intention of the parties. In determining the susceptibility of a treaty to termination or suspension in case of an armed conflict, it was erroneous to look for “the intention of the parties at the time the treaty was concluded”. The criterion of intention needed to be supplemented with presumptions relating to the nature and the object and purpose of the treaty. That was what the Special Rapporteur had done in draft article 7, where he had proposed a list of treaties whose object and purpose necessarily implied that they would continue to operate. A rewording of draft article 4 that incorporated all the various criteria would better reflect the current state of affairs and State practice.

63. The changes made to draft article 5 were welcome, as was the new draft article 6 bis on the law applicable in armed conflict, which had been proposed in response to comments made by members of the Commission.

64. Lastly, he noted that many members had drawn attention to the dangers and limitations of the list proposed in draft article 7. Since such a list was inevitably problematical, he thought that an effort should be made to incorporate the relevant criteria in paragraph 1 of that article. The other option, which he preferred, was to keep the list by way of illustration and have it preceded by a revised paragraph (1) that would define the “factors to be taken into account when determining whether a treaty should remain in force in case of an armed conflict”. In paragraph 56 of his third report the Special Rapporteur himself had put forward four options in order to take account of the problems and questions raised by the draft article. It would be for the Working Group to consider all the options and help the Commission settle the outstanding substantive problems.

65. The CHAIRPERSON invited the Special Rapporteur to introduce the seven other draft articles (8 to 14) contained in his third report on the effects of armed conflict on treaties.

66. Mr. BROWNLIE (Special Rapporteur) said that draft articles 8 to 14 dealt with matters that inevitably had strong connections with other areas of international law such as the law of armed conflict or State responsibility, but that it was not easy to define jus cogens as part of the present draft. The draft articles were purely expository and were not strictly necessary, especially draft article 8 (Mode of suspension or termination), which referred to the 1969 Vienna Convention. If, as many members of the Commission had suggested, the Working Group on the effects of armed conflict on treaties wished to define the modes of suspension and termination of a treaty, he saw no problem with that, even though it did not seem to be the best way forward.

67. Draft article 9 (The resumption of suspended treaties) was unchanged from the earlier version and further developed the general criterion of intention laid down in draft article 4. Draft article 12 (Status of third States as neutrals) was also not strictly necessary and referred back to the law of neutrality, an especially complex area of international law that was also difficult to define in the draft articles. Despite the reservations expressed by some members of the Commission, he thought that the criterion of intention, linked with the general rules of interpretation set out in article 31 of the 1969 Vienna Convention, should be applied in the draft articles. Draft articles 13 (Cases of termination or suspension) and 14 (The revival of terminated or suspended treaties) were not strictly necessary either and were expository in nature.

68. Turning to draft article 10 (Effect of the exercise of the right to individual or collective self-defence on a treaty), he said first of all that it was not true, as certain members of the Commission had suggested, that he had said nothing about the illegality of the use of force by States: he had referred to it in his first report and had reverted to it in paragraphs 59 to 62 of his third report. It was after having examined the relevant sources of law, including the resolution adopted by the Institute of International Law in 1985, that he had taken the view that the legality of the use of force did not affect the outcome of suspension or termination of a treaty, and that what was needed was simply the strict application of draft article 3. That analysis was correct, because at the time an armed conflict broke out it was impossible to know who the aggressor was. However, he had tried to take account of the criticism voiced by members of the Commission and to show more clearly in the wording of the new draft article 10 that the question of the illegality of certain forms of the use of force was not being overlooked. Similarly, it was to show that the Commission was conscious of the work of the Security Council and to address the criticism that had been voiced in that connection that he had included draft article 11 (Decisions of the Security Council), which remained as initially drafted. An understanding of his analysis was to be found in paragraphs 59 to 62 of his third report, wherein he explained that the outbreak of an armed conflict did not in itself entail termination or suspension of a treaty, whether or not the armed conflict was lawful. Only at a later stage, when the facts had been established, could one determine which rules on the use of force were applicable and then say that a State engaging in self-defence could not be viewed in the same light as an aggressor State.

69. Mr. PELLET said it was surprising to see that the entire set of draft articles submitted by the Special Rapporteur consisted of “without prejudice” clauses, except for the new version of draft article 10, which meant that the practical issues that actually lay at the core of the topic and raised the most complex and interesting problems.

had been ignored. As to draft article 10, its new wording represented a marginal improvement over the “without prejudice” clause contained in the first report, but he was not convinced that it fully met the concerns he and other members of the Commission had raised about the need to take account of the fundamental principle of prohibition of the use of force in international relations when considering the topic. While indifference to that principle had now been replaced by its being taken partially into account with the incorporation of article 7 of the 1985 resolution of the Institute of International Law, the Special Rapporteur should have selected article 9 of that resolution, which precluded the possibility that an aggressor State might take advantage of the situation by terminating or suspending a treaty and would seem to be more essential. In his view, the question whether the principle of prohibition of the use of force in international relations had an impact on the handling of the topic—and, if so, what kind of impact—must be addressed comprehensively and discussed in depth by the Working Group.

The Special Rapporteur seemed to think that that was not the case, given the explanations he gave in paragraph 61 of the third report, which stated that the new version of draft article 10 was a clarification of the earlier version, whereas it actually went further towards taking account of the prohibition of the use of force and differed considerably from the previous version. In addition, the point made in paragraph 62 was not clear to him, and he wished to be enlightened on that subject. In any case, he remained convinced that the topic’s relationship to the principle of prohibition of the use of force deserved more extensive consideration and that much more detailed conclusions should be drawn therefrom with reference, on the one hand, to the fate of treaties in force between the parties to the conflict and between those parties and third parties, and, on the other hand, to the fate of treaties that parties to the conflict might conclude with third parties during the armed conflict. The question of the effect of armed conflict and of the prohibition of the use of force on the conclusion of treaties in the course of a conflict, which presupposed the drawing of a distinction between treaties connected with the hostilities and treaties totally extraneous to them, could not be ignored, for that would amount to dismissing an important aspect of the topic.

70. He found draft article 11 (Decisions of the Security Council), whose wording was unchanged, particularly perplexing, since in drafting it the Special Rapporteur had drawn on article 75 of the 1969 Vienna Convention. While it had been logical to include in that instrument a “without prejudice” clause on something of marginal importance in the context of the law of treaties, the legal effects of decisions taken by the Security Council under Chapter VII of the Charter of the United Nations, namely in the event of a breach of the peace or act of aggression, and thus of armed conflict, were central to the topic under consideration. In a sense, draft article 11 amounted to a statement that the draft articles on the effects of armed conflicts on treaties were without prejudice to the law of the Charter of the United Nations applicable to armed conflicts, and that was not acceptable. Then there was the question of whether the topic under consideration encompassed peacekeeping operations carried out under Chapter VII of the Charter of the United Nations, which the Working Group would also have to consider. In his view, that line of reasoning showed how difficult it was to define the boundaries of the topic and to distinguish between international armed conflicts and non-international armed conflicts. The Working Group might wish to refer in that connection to paragraphs 143 to 145 of the excellent study prepared by the Secretariat entitled “The effects of armed conflicts on treaties: an examination of practice and doctrine”, even though the question was touched on only superficially. In most instances, peacekeeping operations under Chapter VII of the Charter of the United Nations that had a large international component and arguably constituted international armed operations were authorized in connection with internal armed conflicts, and that was a major argument in favour of including that question within the topic under consideration, contrary to what had been said by a number of members of the Commission.

71. Mr. BROWNLIE (Special Rapporteur) said that he had no objection to the Working Group studying various aspects of the law relating to the use of force by States or peacekeeping operations. Nevertheless, the Commission should not lose sight of the fact that, as he sought to explain in paragraph 62 of his report, at the time an armed conflict broke out, the principle of continuity enunciated in draft article 3 was applied, since very little was known about the nature of the conflict. It was only later, when an authorized body made findings as to which State was the aggressor and which was acting in self-defence, that draft article 10 came into play, bringing in the applicable law, which might be the Charter of the United Nations, a previous set of Security Council resolutions or a regional arrangement. There was thus a chronology to the application of draft articles 3 and 10; moreover, regardless of what the provisions on the legality of the use of force might be, draft article 3 continued to apply and could not be ignored, something that Mr. Pellet did not seem to take sufficiently into account.

72. Mr. PELLET, returning to the question of the relationship between draft articles 3 and 10, said that, in his view, draft article 3 was not chronological in nature; if that had been the case, he would not have supported it. The article did not state merely that treaties were not necessarily terminated or suspended at the “start” of an armed conflict but that treaties remained in force a priori between the parties to the conflict. That starting point was indisputable, but then exceptions to that principle should be identified, contrary to the views of the Special Rapporteur, for whom draft article 10 matched up with draft article 3. In reality, draft article 10 said that a State could be acting in self-defence and that that situation might have consequences for determining which treaties remained in force and which were suspended or terminated. However, it should be made clear just what a State acting in self-defence had the right to do with regard to treaties and what its adversary, the aggressor State, did not have the right to do. The fact that it was not possible to know which State was the aggressor until the Security Council had made a determination was indeed an additional complication, but that should not preclude a more thorough consideration of the vast and complex issues which draft article 10 only began to answer.

The meeting rose at 12.55 p.m.