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Summary record of the 2929th meeting

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2929th MEETING

Friday, 1 June 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

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

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, 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.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON announced that the Enlarged Bureau had met to consider a number of matters and make recommendations to the Commission. With the completion of the Commission's work on four topics at the end of the previous quinquennium, the Enlarged Bureau had agreed that it should select further topics to be included on the Commission's agenda. Following consultations, the Enlarged Bureau recommended the appointment of Mr. Valencia-Ospina as Special Rapporteur for the topic "Protection of persons in the event of disasters". Consultations were continuing on the appointment of further special rapporteurs.

2. The Enlarged Bureau also recommended the establishment of a working group chaired by Mr. McRae to examine the possibility of considering the topic "Most-favoured-nation clause". Members would recall that the Working Group on the Long-term Programme of Work, reporting through the Planning Group, had made no final recommendation on that topic, and that the Commission had decided to seek the views of Governments.¹⁹⁶ Only three Governments had commented; it was thus for the Commission to make a decision as to what course of action should be followed. In the view of the Enlarged Bureau, a working group should be established to reconsider the issue and report back to the plenary.

3. If he heard no objection, he would take it that the Commission agreed with the recommendations of the Enlarged Bureau.

It was so agreed.

Mr. Vargas Carreño (Vice-Chairperson) took the Chair.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/557 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

4. The CHAIRPERSON invited the Commission to resume consideration of the Special Rapporteur's third report on the effects of armed conflicts on treaties (A/CN.4/578).

5. Ms. ESCARAMEIA said she had a number of comments to make on several of the draft articles, above all as they related to the 1969 Vienna Convention.

6. In presenting draft article 8, the Special Rapporteur had argued that it was, strictly speaking, superfluous, since under draft article 3, treaties continued to apply. In her view, however, there was a very considerable difference between the assertion that the principle of continuity of treaties applied and the statement that the provisions of the 1969 Vienna Convention would also apply in time of armed conflict. While the principles contained in articles 42 to 45 of the Convention should in general be applied, the usefulness of some of the provisions was debatable. For example, it was questionable whether article 44, paragraph 2, of the 1969 Vienna Convention could be applied, since it provided that the suspension or termination of the treaty might be invoked only with respect to the whole treaty, the exceptions where separability of the provisions was possible being set out in paragraph 3. She wondered whether the opposite were not in fact the case, namely that the so-called exceptions actually constituted the rule. In any case, the Commission should take a closer look at article 44, paragraph 2, of the 1969 Vienna Convention.

7. That provision established the general principle that the suspension or termination of a treaty could take place only as a result of the application of the provisions of the treaty or of the 1969 Vienna Convention. Yet draft article 10 gave an additional ground for suspension or termination, namely self-defence. Thus, the Commission would be going beyond the grounds recognized in the Convention. Perhaps some adjustments were required.

8. Her main problem with the reference to the articles of the 1969 Vienna Convention was that it was not clear what procedure the Special Rapporteur was suggesting for suspension or termination of the treaty. The procedure laid down in articles 65 *et seq.* of the Convention was slow and cumbersome. Article 65, paragraph 2, for example, set a deadline of not less than three months for making objections to the notification of termination or suspension, except in cases of special urgency. However, all such cases were urgent, and a different formulation was needed. Further, the subsequent procedure for the peaceful settlement of disputes if objections were raised by another party (art. 65, para. 3) could not be easily applied in situations of armed conflict. Simple notification followed by automatic termination or suspension, where applicable, seemed a more attractive option. Those questions should be discussed in the Working Group.

* Resumed from the 2927th meeting.

¹⁹⁶ Yearbook ... 2006, vol. II (Part Two), p. 186, para. 259.

9. She welcomed the Special Rapporteur's decision to draw up a new draft article 10. Like Mr. Pellet, she had difficulty in understanding his reluctance to include it, which was apparently based on the reasoning that, pursuant to draft article 3, the question of legality was irrelevant, because the treaty would in any case continue in operation. She disagreed: there were some very important instances in which that would not be the case. For example, a State exercising self-defence had the right to denounce the treaty. She would appreciate some further explanation by the Special Rapporteur as to why he was so opposed to the inclusion of draft article 10.

10. Draft article 11 was not—unfortunately, in her view—a reproduction of the corresponding articles of the 1985 resolution of the Institute of International Law.¹⁹⁷ Instead, it was a simple “without prejudice” clause. That was not sufficient; in her view, it was very important to tackle those questions head-on. Articles 8 and 9 of the 1985 resolution of the Institute of International Law should be included in the draft articles so that the issue of the termination or suspension of a treaty incompatible with a Security Council resolution was addressed. In keeping with article 9 of the resolution, some wording should also be included in draft article 11 to the effect that the aggressor State could not terminate or suspend a treaty if it would benefit that State. In the context of draft article 10, perhaps the Working Group should also discuss the situation of bilateral treaties between the aggressor State and the State acting in self-defence; there again, it should be possible to envisage a speedier procedure which enabled a State to terminate or suspend the operation of a treaty incompatible with that State's right of self-defence.

11. She had a less important concern with regard to draft article 13, which was another “without prejudice” clause. Two of the situations listed, namely supervening impossibility of performance and a fundamental change of circumstances, seemed to be closely bound up with situations of hostilities. While those situations could arise for other reasons in situations of armed conflict, the initial outbreak of hostilities undoubtedly constituted a fundamental change of circumstances. The 1969 Vienna Convention had probably not considered it as such, because its article 73 addressed the outbreak of hostilities in another context, but it would nevertheless be useful to discuss the matter. Under article 61, paragraph 1, of the Convention, supervening impossibility of performance resulted from the “disappearance or destruction of an object indispensable for the execution of the treaty”, a situation so common in armed conflict that perhaps the Working Group should discuss the relationship between those two grounds for terminating or suspending a treaty and those same grounds in a situation of war or armed hostilities.

12. In short, she did not see how draft article 3, in enunciating the principle of continuity, could go so far as to assert that the 1969 Vienna Convention regime applied to all situations of armed conflict; as articles 73 and 75 of the Convention made clear, it did not; hence the need to draw some distinction with regard to the 1969 Vienna Convention regime.

13. Mr. YAMADA, welcoming the proposal to establish a working group on the topic, said that he had already had occasion to express his views on most of the proposed draft articles in 2005. He would now like to explain how he saw the scope of the topic and the purpose of the exercise.

14. In his view, treaties could be divided into three categories. Treaties belonging to the first category were those which operated only in time of armed conflict. They were rules of warfare and were outside the scope of the topic. Treaties in the second category operated only in time of peace and ceased to operate in time of armed conflict. Classic examples were the 1922 Treaty for the Limitation of Naval Armament between France, Great Britain, Italy, Japan and the United States and the 1930 International Treaty for the Limitation and Reduction of Naval Armament, regulating the number of warships and subsidiary naval vessels which each party could have. Those treaties ceased to operate as soon as armed conflict broke out among the contracting parties. Many disarmament treaties were in that category. For example, if an armed conflict broke out between a NATO State and a non-NATO State, what would be the status of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Partial Test-Ban Treaty)? Under the NATO policy of flexible response, even if an adversary used only conventional weapons, NATO retained the right to use nuclear weapons. Clearly, under such circumstances it could not be said that the adversary State was bound to honour the Partial Test-Ban Treaty. If the conflict developed into a nuclear war, it would be absurd to say that nuclear weapons could be employed, but not tested. Thus, treaties in that category were also outside the scope of the topic. He was not, however, suggesting any changes to draft article 1, but merely engaging in a conceptual exercise.

15. The treaties in the third category operated in time of peace and continued to operate as a whole or in part in time of armed conflict. That was the category which the Commission was addressing. The draft articles must provide practical and useful criteria for determining which provisions of such treaties continued in operation in time of armed conflict. He entirely agreed with the Special Rapporteur that the intention of the contracting parties at the time the treaty was concluded was the decisive factor. The problem was that in many cases, it was very difficult to obtain evidence that the parties had the intention to apply a given provision in time of armed conflict.

16. The object and purpose test was also important in that context and should be developed further. Citing an example, he recalled that he had been closely involved in the negotiation of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, which was a mixture of disarmament elements and rules of war. He had opposed the inclusion in that Convention of the provision on the prohibition of the use of chemical weapons, on the grounds that that prohibition was well established in treaty law, for example in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, and in customary law, and that to include it

¹⁹⁷ Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278.

in the Convention would complicate its interpretation. Unfortunately, that had been a minority view, and ultimately he had had to bow to the political mood of the time. The negotiating history of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction contained no indication as to whether the parties had had any intention to apply provisions other than the prohibition on the use of such weapons in time of armed conflict. If asked whether the Convention's prohibition on the production or possession of chemical weapons applied in time of armed conflict, his reply would be that he did not know, because production and possession were regulated in the same article that prohibited the use of chemical weapons. On the other hand, if asked whether its verification provision applied in time of armed conflict, he would answer confidently that it did not. He did not believe that the contracting parties would allow an intrusive inspection in time of armed conflict. Thus, there was a fine dividing line, and Governments would need to know what criteria would help to pinpoint it. Perhaps the Commission could use some of the treaties listed in draft article 7, paragraph (2), for the purposes of an in-depth study to identify factors relevant to determining which provisions would apply in time of armed conflict.

17. Those comments should not be construed as a criticism of the Special Rapporteur's excellent work. His suggestion was to build on the Special Rapporteur's proposals.

18. Mr. MCRAE said that the concerns he had expressed at the 2927th meeting about a general rule of intention as the foundation for determining whether a treaty was terminated or suspended in the event of armed conflict under draft article 4 also applied to draft article 9 relating to the resumption of suspended treaties. Intention in respect of resumption after suspension was just as much a fiction as intention in respect suspension, if not more so. Nor would the problem be resolved by deleting the words "at the time the treaty was concluded", as Ms. Xue and others had suggested in respect of draft article 4. It was true that, by taking account of a variety of factors, it might be possible to make an objective assessment of whether a treaty should or should not be terminated or suspended. Fixing the critical date for that determination at a time later than the time the treaty was concluded seemed sensible, and he therefore had no objection to deleting the words "at the time the treaty was concluded". His point had been that to characterize the determination of the effect of the armed conflict on the treaty as a gauge of intention was, in most instances, fictional. However, he shared with Mr. Wako, Ms. Xue and others the desire to find objective criteria for that determination, and in that sense their views might not be so far apart.

19. His second comment related to draft article 10, which was the only one to affirm a right to suspend a treaty, applicable to States exercising a right of individual or collective self-defence. According to draft article 8, the applicable "mode of suspension" would be that set out in articles 42 to 45 of the 1969 Vienna Convention. Under that Convention, the process for suspension could involve a three-month notice period and the possibility of

arbitration or judicial determination. None of that seemed remotely likely to happen in the case of suspension due to armed conflict. The protagonists were highly unlikely to give notice of suspension, let alone wait three months before suspending. In many instances, there might be a *de facto* suspension of the treaty, which was contrary to the spirit, at least, of draft article 3. If such a *de facto* automatic suspension occurred in some cases, he wondered whether the Working Group should not discuss the possibility of considering termination, which was generally not likely to occur, separately from suspension, which was a much more likely outcome.

20. Secondly, if the process for suspension under the 1969 Vienna Convention applied to parties exercising their individual or collective right of self-defence, he wondered whether the draft articles really provided any recognition at all of the illegality of armed conflict. After all, in the absence of a provision in the draft articles equivalent to article 9 of the resolution of the Institute of International Law adopted in 1985, prohibiting an aggressor State from suspending or terminating a treaty, the aggressor State was equally entitled to invoke draft article 8 and follow the 1969 Vienna Convention procedure for suspending the treaty. So, although draft article 10 appeared to distinguish between the aggressor and the victim of armed conflict—the State exercising the right of self-defence—perhaps all it really did was to recognize explicitly in the case of the victim State a right that the aggressor State implicitly had in any case. He therefore wondered whether the revised draft article 10 really addressed the concerns raised in the Sixth Committee.

21. His third and final comment related to the "without prejudice" provisions, namely the draft articles that simply preserved the law in certain areas and, as the Special Rapporteur pointed out, while not strictly necessary, were useful for expository purposes. The expository function was indeed useful, but so many of the draft articles had been characterized by the Special Rapporteur as expository and not strictly necessary that it seemed legitimate to ask which of the provisions *were* necessary, and what the draft articles achieved, apart from preserving the existing law in certain areas. In his view, the answer was that the draft articles performed at least two functions. First, they affirmed the principle of continuity of treaties in the event of armed conflict (draft article 3), and, secondly, they established a test of intention combined with object and purpose, together with some presumptions about, or an indicative list of, continuing treaties (draft articles 4 and 7). It might also be said that they performed the third function of affirming the right to suspend in the case of States exercising a right of individual or collective self-defence, but, as he had said earlier, that was just an explicit affirmation of a right that existed in any case. Further, as Ms. ESCARAMEIA had suggested, it was possible that draft article 8 set out a process for suspension that might not otherwise be apparent.

22. The other draft articles were essentially expository. Perhaps that was all that was necessary, but the Working Group might wish to reflect on whether the two areas on which the law had been identified and clarified constituted a sufficient output on the topic, or whether the draft articles should be more ambitious in scope.

23. Mr. KAMTO said that, in deciding whether non-international armed conflicts ought to be covered by the draft articles, the Commission should take account of an intermediate category, namely the familiar phenomenon of internationalized internal armed conflict. Such conflicts should be covered by the draft articles, but internal conflicts *stricto sensu* should not, as they did not produce the same kind of effects on treaties as international armed conflicts. Even though they could lead to non-execution of the treaty—for instance, as a result of fundamental change of circumstances—they did not fall within the scope of the topic.

24. On the indicia of susceptibility to termination or suspension of treaties, he believed that the criterion of intention was not sufficient, even in the context of draft article 4; there were numerous other possible criteria. That draft article was, however, interesting on account of its focus on the nature and extent of the armed conflict: the less intense the conflict, the fewer the consequences for the treaty. That reference hinted at the need, to which several speakers had adverted, for a provision expressly dealing with situations of aggression (as opposed to small-scale conflicts such as border skirmishes). Draft article 10 went some way towards meeting that need, but not far enough. A fundamental distinction needed to be drawn between wars of aggression and other types of armed conflict that could have an impact on the principle of continuity of treaties. The distinction between the two forms of conflict should also go hand in hand with a distinction between suspension and termination of the treaty. Perhaps a war of aggression, the most serious form of armed conflict, would automatically entail suspension—unless the State that was victim of the aggression decided to continue the application of the treaty—without necessarily leading to the termination of the treaty. Termination would occur only if the victim State took the initiative in notifying the aggressor State thereof. As a number of members had noted, a provision reflecting article 9 of the 1985 resolution of the Institute of International Law, covering States committing aggression, should be included in the draft.

25. A provision along the lines of draft article 7 was also well worth including. He was, however, concerned at the illustrative way in which it was worded, particularly in the list of types of treaty given in paragraph (2), the effect of which was to diminish rather than strengthen the normative authority of the draft article. The list should be retained, but in the commentary rather than the draft article itself.

26. With regard to draft article 12, he wondered whether “third States” were necessarily “neutral”, in the sense of that word under international law. If the two terms were not synonymous, it would suffice to omit the phrase “as neutrals”, since third States were by definition not involved in the armed conflict. On draft article 13, he wondered whether a material breach was indeed a traditional cause for the termination of a treaty. As for draft article 14, the wording of the French-language version should be tightened up.

27. Lastly, he welcomed the Special Rapporteur’s proposal to establish a working group on the topic, and

supported Mr. Pellet’s proposals on the working group’s mandate and the questions that required clarification or further study.

28. Mr. VÁZQUEZ-BERMÚDEZ, referring to draft article 9, said that in accordance with the principle of continuity of treaties, the aim of which was to create stability for treaties as a corollary of the principle *pacta sunt servanda*, if the effect of an armed conflict had been the suspension of the treaty, it must be presumed that, once the conflict was over, the treaty must be automatically resumed, unless it specifically provided otherwise. Under draft article 9, however, the resumption of a treaty suspended as a consequence of an armed conflict was made to depend on the intention of the parties at the time the treaty was concluded, and that intention was to be determined in accordance with the provisions of articles 31 and 32 of the 1969 Vienna Convention and with the nature and extent of the armed conflict in question. The provision, however, brought the same problems that affected draft article 4: where the treaty contained no explicit reference to the intention of the parties, it would be necessary to determine first whether there had been such an intention with regard to suspension or termination, and, secondly, whether there had been an intention for a suspended treaty to be resumed. He had already pointed out that, in some cases, a presumed intention might be fictitious. Draft article 9, paragraph (2), and draft article 4 should specify that the intention was to be determined, not in accordance with the nature and extent of the armed conflict in question, but in the context of that armed conflict, particularly if draft article 9 referred to the intention of the parties at the time the treaty was concluded. In that context, he wondered why draft articles 4 and 9 referred to the “nature and extent” of the armed conflict, whereas draft article 2 (b) referred to the “nature or extent” of armed operations.

29. Draft article 8 referred the reader to articles 42 to 45 of the 1969 Vienna Convention. Article 44, paragraph 1, of that Convention, in turn, referred the reader to article 56, paragraph 1 (b) of which referred to the “nature of the treaty”. The point was that, under article 56, two criteria were given for determining whether a treaty containing no provision regarding termination, denunciation or withdrawal was subject to denunciation or withdrawal, namely the intention of the parties and the nature of the treaty. In his view, “nature” referred to the subject matter of the treaty. The 1969 Vienna Convention thus contained two complementary criteria—one subjective and the other objective—that should also be applied to the susceptibility to suspension or termination of a treaty in the event of armed conflict.

30. That being so, the title of draft article 7 should read: “Continued operation of treaties on the basis of necessary implication from their nature”. The indicative list of treaties appearing in paragraph (2) of the draft article would thus be based on the second criterion, the nature of the treaty, although the object and purpose test would, of course, remain, since the object and purpose of the treaty was part of the process for determining the intention of the parties.

31. In draft article 14, the word “competence” should be replaced by “capacity”, in line with the text of draft

article 5 *bis*. In draft articles 3, 5 and 14, the term “parties” [to the armed conflict] should be replaced by “States parties”, as the former concept had a wider sense in international humanitarian law. If the omission of the word “States” was intentional, he would like to hear the reason why.

32. When considering draft articles 10 and 11, which constituted a step in the right direction, the Working Group should pay particular attention to the question of the right to individual or collective self-defence and the legitimate use of force under the Charter of the United Nations. In particular, it should, in considering the role of the Security Council in determining whether an act of aggression had taken place under Article 39 of the Charter of the United Nations, also take into account the fact that the Security Council—which was a political body par excellence—had, on a few occasions, indeed determined that a State was an aggressor. Perhaps the Institute of International Law had had that situation in mind when including in article 9 of its resolution of 1985 a reference to General Assembly resolution 3314 (XXIX) of 14 December 1974.

33. Mr. KAMTO said that, if draft article 10, or a similar provision, were to be retained, it would be essential to discuss the last phrase regarding a later determination by the Security Council of a State as an aggressor. Admittedly, under the Charter of the United Nations, the Security Council was the sole United Nations body which had jurisdiction to determine the existence of an act of aggression, but in fact other United Nations bodies were also competent in that respect. For example, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had found that the United States had breached its obligation under international customary law not to use force against another State. Similarly, other instances of the use of force had been termed “aggression” in some General Assembly resolutions. Draft article 10 should not therefore refer only to the Security Council in that connection.

34. Mr. CAFLISCH said that the mandate of the Working Group would not be to present draft articles. It would try to determine what direction the Commission’s debates should take and would tackle some substantive issues. If the Working Group attempted to address in depth all the numerous subjects raised by various speakers, it would still be meeting six months later. It would therefore have to concentrate on certain concerns, on which it would then submit a report which would, he hoped, have the approval of the Special Rapporteur. While the question raised by Mr. Vázquez-Bermúdez was undeniably of great significance, it was a moot point whether it should be considered in the Working Group.

35. Mr. FOMBA, endorsing the comments made by Mr. Pellet at the 2926th meeting, said that in draft articles 10 and 11, it would be better to focus on the impact of the principle that the use of force was prohibited. To that end, the content and structure of draft article 10 could be reconsidered, with a view to emphasizing the main adverse consequence for the aggressor State, as outlined in article 9 of the resolution adopted by the Institute of International Law in 1985, and the main beneficial consequence for the State which, as the victim of aggression,

was exercising its right to either individual or collective self-defence, as described in article 7 of the same resolution. Nevertheless, the Commission should then examine the contents of articles 7 and 9 of the resolution in order to ascertain whether all the elements thereof were still entirely necessary and justified. Some thought should likewise be devoted to the subsidiary consequences to be inferred from the two main consequences.

36. The content and structure of draft article 11 should be reviewed and the “without prejudice” formula dropped. As Mr. Pellet had suggested, in that context some consideration should also be given to the question of peacekeeping operations under Chapter VII of the Charter of the United Nations.

37. The CHAIRPERSON, speaking in his capacity as a member of the Commission, said that the very rich debate had shown not only that the excellent report presented by the Special Rapporteur had been rigorous, methodical and the fruit of thorough research, but also that there was agreement on many points. Differences remained as to whether it was appropriate to include articles on other subjects already covered by existing standards or provisions of international law. Like the Special Rapporteur, he thought that those areas should be covered in the draft articles.

38. The Working Group was also faced with the arduous task of reconciling wide differences of opinion on a number of other issues, especially in draft article 10. It was clear that, although Article 51 of the Charter of the United Nations gave a State the immediate or automatic right to respond to an armed attack, neither the Charter of the United Nations nor any other international instrument had regulated the legal consequences of that unilateral act of a State. Hence it was up to the Security Council to determine the consequences of that armed attack or act of aggression. Yet, as Mr. Vázquez-Bermúdez and Mr. Kamto had pointed out, Security Council practice in that respect was relatively scarce. It was even possible that the Security Council might not take any action, either on account of the complexity of the matter, or because the victim or the aggressor State was one of its permanent members. Moreover, he shared the concerns of the United Kingdom that the unilateral right of a State to suspend a treaty might be inimical to the stability of treaty relations.¹⁹⁸

39. Nevertheless, since the Institute of International Law had passed its resolution on the effects of armed conflicts on treaties in 1985 a number of developments had occurred, one of them being the adoption of instruments and conventions on weapons of mass destruction, a matter of growing importance in the twenty-first century. All 33 States of the region had become parties to the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (“Treaty of Tlatelolco”), which had in turn inspired similar treaties in the South Pacific, South-East Asia, Africa and Central Asia. Nevertheless, if such treaties were to be effective, the nuclear powers must undertake to respect the nuclear disarmament process and not to use nuclear weapons against the States parties. In the years following the adoption of the Treaty of Tlatelolco, various States including France had signed Additional Protocol I to the Treaty, in which they

¹⁹⁸ A/C.6/60/SR.20 (see footnote 191 above), para. 1.

undertook to maintain the denuclearized status of the territories for which they were internationally responsible in Latin America and the Caribbean—which, in the case of France, were French Guiana, Guadeloupe and Martinique. In the 1970s, China, France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America had signed Additional Protocol II, in which they undertook not to use nuclear weapons against the parties to that instrument. Nevertheless, on signing the additional protocols, France had issued interpretative declarations to the effect that, if one of the parties to the treaty attacked its territories with conventional weapons, it would no longer consider itself bound by the treaty and reserved the right to use nuclear weapons in those circumstances. That was a matter of concern to the Latin American and Caribbean States, which were striving to bring about general and complete disarmament.

40. It was therefore all the more disquieting that, according to one possible interpretation of draft article 10, a country would be entitled to use nuclear weapons. While he was pleased that Mr. Yamada had raised the issue, he disagreed with the view he had expressed. His own personal belief was that in times of armed conflict, it was possible to suspend certain clauses, such as the inspection clauses, of treaties prohibiting weapons of mass destruction, but that their substantive provisions should remain in operation. One solution might be to replace draft article 10 with article 9 of the 1985 resolution of the Institute of International Law. The other solution, proposed by Mr. Yamada, would be to include in the list in draft article 7 a reference to instruments or conventions on weapons of mass destruction, possibly distinguishing between the substantive and procedural aspects of those treaties. In any event, that was a matter that merited the scrutiny of the Working Group.

41. Mr. BROWNLIE (Special Rapporteur), summing up the debate, said that it had highlighted areas, such as the status of internal armed conflicts, in which members of the Commission held converging views. While he confessed to having felt some intellectual resentment at having to redraft article 10, since he considered that draft article 3 should apply anyway, he was willing to “go with the flow” and to bow to social pressure by reformulating that draft article.

42. He had approached the topic from three overlapping perspectives. First, like a research student embarking on a thesis, he had delved into the literature on the subject. The Secretariat had greatly assisted him by locating the substantial amount of material which existed. Although some monographs and articles dated back to the First World War or earlier, he considered that they were still of relevance. His three reports were largely based on State practice and what knowledge could be gleaned from learned authors. The commentary to draft article 7 in his first report¹⁹⁹ summarized much of the State practice, by which he meant State practice based on *opinio juris* concerning the effect of armed conflicts on treaties, rather than on related subjects such as fundamental change of circumstances or material breach.

43. Secondly, the draft articles constituted a clear but careful reflection of the fact that he had adopted the principle of stability, or continuity, as a policy datum. One of the difficulties shared by all the members of the Commission was that of understanding what was actually entailed by that principle. The Commission should not appear to espouse the view that an armed conflict never had any effect on treaties. A delicate balance was required between the principle of the integrity of treaties and the realities of different situations. His policy prejudice in favour of the principle of continuity was therefore qualified by the need to reflect the evidence in State practice that, to some extent, armed conflict did indeed result in the suspension or termination of treaties.

44. The third—and quite important—perspective was an attempt to protect the project by carefully segregating other, controversial areas that probably lay outside the scope of the topic as approved by the General Assembly. His dilemma was therefore not merely one of presentation. The drawing of a boundary between the topic selected and adjacent areas of international law was a problem frequently encountered in the issues considered by the Commission; the expulsion of aliens, for example, was also linked to other topics. Nevertheless, that problem was compounded by a semi-constitutional issue. It had always been his understanding that the Commission, along with many other bodies, faced a glass ceiling which prevented it from dealing with matters of law which might lead to the amendment of the Charter of the United Nations. The 1974 definition of aggression in General Assembly resolution 3314 (XXIX), for example, had been adopted only after strenuous efforts. That was why he had used “without prejudice” clauses. When a former member of the Commission, Mr. Economides, had, for good reasons, suggested that the Commission should place the use of force by States on its long-term programme of work, the reaction had been an uneasy silence, the feeling being that it was not for the Commission to tackle such issues, the consideration of which would not be acceptable to the General Assembly. Indeed, when it had approved the current topic for consideration by the Commission, the General Assembly had probably never supposed that the Commission would venture so close to the borderline with the law relating to the use of force by States.

45. Turning to the issues brought up during the debate, he said that in discussing draft article 1 on the scope of the subject, Mr. Fomba had raised the question of the status of treaties that were provisionally applied. He himself had raised it in both the first and third reports and had no strong position on it. It was quite a detailed and technical matter, however, and a collective view needed to be developed on whether such treaties should be included.

46. The question of the treaties of international organizations would no doubt be one of the issues of principle to be considered by the Working Group. Some members seemed not to have made a clear distinction between the question of whether the effects of armed conflict on treaties of international organizations was a viable subject—which it probably was—and the very different question of whether it could be grafted on to the topic that the General Assembly had requested the Commission to study. With all due respect to those who wished to see it included, he

¹⁹⁹ Yearbook ... 2005, vol. II (Part One), document A/CN.4/552.

did not think the General Assembly had envisaged that possibility; he himself certainly had not.

47. Draft article 2 (b) on the definition of armed conflict was central to the Commission's endeavour, yet it also came perilously close to the borderline with other areas of international law. The debate had revolved around the question of whether internal armed conflict was to be included, but the article was not drafted in those terms. It described armed conflict as a state of war or conflict which involved armed operations which by their nature or extent were likely to affect the operation of treaties. A number of speakers had made the point that the intensity of the armed conflict was of great relevance, but the present drafting covered that point, with the use of the phrase "by their nature or extent". Armed conflict should not be defined in quantitative terms; everything depended on the nature not only of the conflict but also of the treaty provision concerned. At least one speaker had also made the point that the Commission's definition would inevitably be cited in the world at large. Draft article 2 (b) was not, however, a categorical definition, but was quite flexible.

48. He had always considered draft article 3 to be problematical, and had said as much in paragraph 28 of his first report. There were three interrelated aspects of the provision. The first was the temporal aspect: the treatment was deliberately chronological. The main thrust of the resolution adopted by the Institute of International Law in 1985 had been that the incidence of armed conflict, lawful or unlawful, did not as such terminate or suspend the operation of a treaty, and that was all draft article 3 said. At a later stage, when the legality of the situation came to be assessed on the basis of the facts, the question of the applicable law might arise, and that law might not be the Charter of the United Nations. It could be a Security Council resolution under Chapter VII of the Charter of the United Nations or any one of several other applicable laws relating to the use of force.

49. The second aspect was that of continuity. Several speakers had said that draft article 3 stated the principle of continuity, and some had urged that this principle should be stated even more strongly. The difficulty was, however, that the draft article was deliberately not formulated in terms of the principle of continuity. One might say that it stated that principle indirectly, and that was probably true, but the idea came out much more clearly, though again mainly by inference, in draft articles 4, 7 and 9.

50. The third aspect of draft article 3 was that it was precisely the text that the Institute of International Law had adopted, after a great deal of discussion, in 1985. It had been a major historical advance in expert opinion that a significant majority of members of the Institute, from different nationalities and backgrounds, had been willing to move to that position. Thus, draft article 3 had a certain monumental significance that the Commission should try to retain. It was also necessary to preserve a proper relationship between draft articles 3 and 4, the first being a preventive principle and not strictly substantive, as he pointed out in paragraph 28 of his first report.

51. In draft article 4, he had carefully avoided saying that intention was the test or using the term in the abstract.

The issue was one of interpretation in accordance with articles 31 and 32 of the 1969 Vienna Convention. Moreover, draft article 4 also referred to the nature and extent of the armed conflict. Some speakers had suggested that a more direct reference was needed to specific criteria of compatibility, but he believed that those criteria were already covered, and that adding the phrase "principles of compatibility" would not make things easier. Relabelling might work in the world of politics, but it did not work in international law. Ms. Xue had pointed out that the reference to intention at the time the treaty was concluded must be qualified in the light of articles 31 and 32 of the 1969 Vienna Convention, which referred, *inter alia*, to the subsequent practice of the parties as evidence of intention.

52. Furthermore, in judicial practice, when discussing other topics of the law of treaties, intention was constantly referred to. It was sometimes called consent. Standard dictionaries, for example the *Dictionnaire de la terminologie du droit international* edited by Jules Basdevant, had an entry on intention in which the PCIJ was quoted.²⁰⁰ A more modern source, Jean Salmon's *Dictionnaire de droit international public*, contained a whole series of quotations on intention, from the ICJ and other sources.²⁰¹ Intention should accordingly not be dismissed as some kind of unsophisticated and outdated aberration. Besides, if intention were to be set aside, what would happen when there was direct evidence of it? Should that evidence be ignored? Mr. Yamada had given a number of examples of such evidence, to which one might add notes of diplomatic conferences—records kept by individual delegations or jointly. It was simply not true that States never envisaged what would happen in the event of an armed conflict. In the *Gabčíkovo–Nagymaros Project* case, the Court had relied upon a set of treaty provisions that were derelict and that neither party had been applying, but had done so to avoid having to declare a *non liquet*.

53. True, intention was often constructed—in that sense, it was fictitious. But did that matter? If intention was deliberately disregarded, there would often be no legitimate basis for approaching a problem. The real difficulty was proving intention, and the treaty must always be linked with the nature of the armed conflict concerned. That created another factual challenge and possible difficulties in establishing proof.

54. Draft article 6 bis had attracted a good deal of valid criticism and would need further work. His instructions had been to take into account what the ICJ had said in its advisory opinion in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, yet he now realized that the text should also refer to the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

55. Draft article 7, which he hoped would be retained in one form or another, had an important function. While State practice was not as plentiful as might be desired, in certain categories such as treaties creating a permanent status it was still fairly abundant. Draft article 7 was the vehicle for expressing that State practice in an orderly way.

²⁰⁰ Paris, Sirey, 1960, p. 341.

²⁰¹ Brussels, Bruylants, 2001, pp. 593–594.

It put the principle of continuity to work in the text without actually spelling it out. The Commission had to decide whether to include in the list in paragraph 2 treaties codifying *jus cogens* rules. The Secretariat memorandum²⁰² had suggested that such treaties should be included, but that raised the problem of borderlines with other subjects. He was not sure that it was even technically correct to include such treaties, and if they were to be included, yet another “without prejudice” clause would be necessary. Throughout its work on State responsibility, the Commission had carefully avoided straying into the sphere of *jus cogens*.

56. On draft article 10, the general view might be that the references to the law relating to the use of force should be strengthened. In its new, redrafted version, the draft article was a fairly careful compromise, and to go any further might be to venture into uncharted juridical territory.

57. One general problem was the question of the extent to which the draft articles should refer to other fields of international law such as neutrality or permanent neutrality. Armed conflict was self-evidently an ineradicable part of the topic, but other areas like neutrality were genuine borderline cases. As to other aspects of the law of treaties, draft article 13 simply made the obvious point that the draft was without prejudice to the provisions already set forth in the 1969 Vienna Convention. As in the law of torts, there might be several overlapping causes of action. Thus, the effect of war on treaties might be paralleled by other types of fundamental change of circumstances. Separability had not been overlooked, but deliberately left aside, although it could be argued that it was a subset of the whole question of evidence of intention.

58. There was also the problem of sources of law, which arose in the context of draft article 7. In categories such as the law relating to diplomatic relations, there was very little explicit or direct evidence of the effect of armed conflict. However, one could to some extent draw safe inferences from the literature, as could be seen from the Secretariat memorandum. Thus, although there was little or no State practice supporting the inclusion of some of the categories in draft article 7, there were some reputable legal sources that could be relied on.

59. He apologized to Mr. Kolodkin for the omission from paragraph 12 of the third report of the Russian Federation as one of the States opposed to inclusion of internal armed conflict in the scope of the draft. The tally now was 10 States opposed to inclusion and 10 in favour.

60. The expository style of drafting would, he hoped, be maintained. If the draft were couched in the language of a diplomatic conference involving two not very friendly parties, the result would be a very mathematical or very political text that would not really be helpful to the Commission’s end users. Draft articles 3 to 7 were meant to be read together and sequentially, not in isolation from one another.

The meeting rose at 12.40 p.m.

²⁰² A/CN.4/550 and Corr.1–2 (see footnote 164 above).

2930th MEETING

Monday, 4 June 2007, at 10 a.m.

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

Present: Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*)^{*}(A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Drafting Committee on the topic “Reservations to treaties” (A/CN.4/L.705).
2. Mr. YAMADA (Chairperson of the Drafting Committee) said that at its 2891st meeting, on 11 July 2006, the Commission had decided to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.²⁰³ The draft guidelines fell into four general clusters, namely: (a) draft guidelines concerning various ways of addressing the definition of the object and purpose of the treaty (draft guidelines 3.1.5 and 3.1.6); (b) draft guidelines concerning different kinds of reservations that would help to elucidate the notion of incompatibility with the object and purpose of the treaty (3.1.7 to 3.1.13); (c) draft guidelines concerning competence to assess the validity of reservations (3.2 and 3.2.1 to 3.2.4); and (d) draft guidelines concerning the consequences of the invalidity of a reservation (3.3 and 3.3.1). The Drafting Committee had considered the draft guidelines in question for eight meetings but had so far managed to complete only those in the first two clusters. He wished to pay a tribute to the Special Rapporteur, whose mastery of the subject and spirit of cooperation had greatly facilitated the Drafting Committee’s work, and to thank the members of the Drafting Committee for their active participation.

3. Introducing the first cluster of draft guidelines (3.1.5 and 3.1.6), he said that the Committee had had before it three alternative texts for draft guideline 3.1.5. The first two, entitled “Definition of the object and purpose of the treaty”, had been based on the proposals made by the Special Rapporteur in his tenth report²⁰⁴ and in the note presented by the Special Rapporteur in 2006.²⁰⁵ The third

* Resumed from the 2920th meeting.

²⁰³ Yearbook ... 2006, vol. I, 2891st meeting, p. 151, para. 44.

²⁰⁴ Yearbook ... 2005, vol. II (Part One), document A/CN.4/558 and Add.1–2.

²⁰⁵ Yearbook ... 2006, vol. II (Part One), document A/CN.4/572.