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For participants only

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International Law Commission

Sixty-second session (first part)

Provisional summary record of the 3053rd meeting

Held at the Palais des Nations, Geneva, on Friday, 28 May 2010, at 10 a.m.

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Present:

Chairman:	Ms. Xue
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. Comissário Afonso
	Mr. Dugard
	Mr. Fomba
	Mr. Galicki
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. McRae
	Mr. Murase
	Mr. Niehaus
	Mr. Nolte
	Mr. Perera
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Valencia-Ospina
	Mr. Vargas Carreño
	Mr. Vasciannie
	Mr. Vázquez-Bermúdez
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Mikulka	Secretary to the Commission

The meeting was called to order at 11.05 a.m.

Programme, procedures and working methods of the Commission and its documentation (agenda item 11) (*continued*)

Mr. Dugard (Chairman of the Planning Group) said that at its second meeting, the Planning Group had considered the proposed strategic framework for the period 2012–2013. It had recalled the decision taken by the Commission at its fifty-second session that unless significant reasons related to the organization of its work otherwise required, the length of the sessions during the initial years of each quinquennium should be of 10 weeks and, during the final years, of 12 weeks (A/55/10, para. 735). It had also recalled that in 2012–2013, following the usual pattern of its sessions, the Commission was to hold split sessions for a total duration of only 10 weeks per year, since those sessions would take place at the beginning of the next quinquennium. He recommended that the Commission should take note of the proposed strategic framework for the period 2012–2013.

It was so decided.

Effects of armed conflicts on treaties (agenda item 5) (*continued*) (A/CN.4/627)

The Chairman invited the Commission to continue its consideration of the first report on the effects of armed conflicts on treaties (A/CN.4/627), in particular draft articles 1 and 2.

Mr. Hassouna thanked the Special Rapporteur for his clear and comprehensive introduction of his first report on the effects of armed conflicts (A/CN.4/627) – a report built on the outstanding work of the late Sir Ian Brownlie. He commended the Special Rapporteur on his pragmatic approach of avoiding major changes or the reopening of debate on controversial doctrinal issues. One thing in which the report was somewhat lacking, however, was State practice to substantiate its findings. In the commentaries to the draft articles, some reference to State practice, such as national legislation, and to relevant Security Council decisions would be useful.

He welcomed the Special Rapporteur’s wise decision to rely mainly on the views of Member States on the draft articles as adopted on first reading. Having assessed and analysed those views, he had adjusted the original draft articles accordingly.

Turning to draft article 1, he said he agreed with the Special Rapporteur that the scope of the text should be broad enough to cover the effects of armed conflicts involving only one State – for example, internal conflicts. However, he disagreed that the draft articles should not cover the effects of armed conflict on treaties to which international organizations were parties. The involvement of an international organization in an armed conflict was no longer an academic proposition – it was a contemporary reality. Reviewing the whole set of draft articles from that perspective was not a practical option, but the matter needed to be addressed briefly in order to highlight the difference between States and international organizations. That could be done in the draft articles themselves, in an addendum or in the commentary.

With regard to draft article 2, the majority of members of the Commission and of the Sixth Committee had indicated that they were in favour of including situations of non-international conflict in the definition of armed conflict. Most contemporary conflicts were non-international or mixed in nature. Any definition of armed conflict referring to “war”, “declared war” or “state of war” would be obsolete nowadays, in view of the new legal order established under the Charter of the United Nations. He therefore supported the comprehensive definition used by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.

The issue of occupation was of great importance and should be specifically referred to in the draft articles. The issues of Palestine and the Western Sahara had been raised during the discussion, yet the International Court of Justice had taken a different approach in each of them. While it had dwelt on the consequences of occupation in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it had framed its advisory opinion concerning Western Sahara in an historical context. The two conflicts thus raised different legal issues.

As to whether it was necessary to define the “outbreak” of an armed conflict, it was often difficult to determine that moment owing to the subjective positions of the parties to international conflicts. The situation was even more difficult in the case of an internal conflict that tended to escalate over time. The term “incidence” as used in draft article 5 seemed therefore more appropriate than “outbreak”.

Mr. Saboia commended the Special Rapporteur on his clear and well-thought-out report, which would greatly facilitate the Commission’s task of considering the draft articles on second reading. The Working Group on Effects of armed conflicts on treaties had made a significant contribution, working with the late Sir Ian Brownlie on a coherent and accurate text for first reading. The Special Rapporteur had carefully examined the comments and suggestions from States. He had adopted a rigorous but flexible approach so as to avoid a complete revision of important parts of the original draft articles yet to incorporate suggestions or indicate where comments would be covered in the commentaries. In general, he himself endorsed the draft articles.

The text of draft article 1 was basically the same as the one adopted by the Commission in 2008. The Special Rapporteur’s arguments for not altering it seemed convincing, including that treaties to which international organizations were parties should not be included. Some members of the Commission had argued in favour of their inclusion, but as the Special Rapporteur had indicated, a revision of all the draft articles seemed unrealistic. Perhaps problems relating to fulfilment of obligations by a State member of an international organization as a consequence of armed conflict could be addressed in the light of the rules of the organization and the decisions of its political bodies, or by reference to the pertinent rules of the current draft. To his recollection, that matter had not been discussed in plenary at the Commission’s sixtieth session or by the Working Group.

Regarding draft article 2, he endorsed the Special Rapporteur’s view that the definition of the term “treaty” should not be extended to treaties concluded between States and international organizations and that the notion of non-international armed conflicts should be retained. As the Special Rapporteur had observed in paragraph 16 of his report, the definition of armed conflict in draft article 2, subparagraph (b), was adapted to the specific needs of the draft articles, but it would be detrimental to the unity of the law of nations to use a definition that was completely different from those used in other fields of international law. He had reformulated the subparagraph based on the definition given in the *Tadić* case, which was also applicable to non-international conflicts and was more contemporaneous than the definition in the Geneva Conventions of 1949. He himself supported the result, which was more readable than the previous version.

After reviewing the comments of States and other issues, the Special Rapporteur proposed amendments to draft article 3. In subparagraph (b), the addition of the phrase “in relation to the conflict” with reference to “a third State” required some clarification as to the link between a third State and a conflict to which it was not party. Perhaps the matter could be clarified in the commentary. As for the title, he endorsed the proposal that it should be reworded to read: “General principle of absence of ipso facto termination or suspension” but would also be in favour of a more positive title, such as “General principle of continuity of treaties”.

Draft article 4 read clearly and had been improved by the explicit reference to the intention of the parties to the treaty. Concerning draft article 5, he endorsed the proposal to add a second paragraph referring to certain categories of treaties for which there was a strong assumption of continuity and to amend the indicative list contained in the annex accordingly.

He endorsed the idea of placing draft article 7 immediately after draft article 3. The Special Rapporteur had proposed important additions to draft article 8, many of them prompted by comments from States. The text now comprised five paragraphs making the regime applicable to treaty termination in the event of conflict subject to conditions that ensured compliance with the legal obligations contracted between States and including an explicit reference to seeking peaceful solutions to disputes.

Lastly, he expressed support for the suggestion to merge draft articles 12 and 18.

Mr. Hmoud commended the Special Rapporteur on his well researched first report. The Special Rapporteur had taken into account the views of States and had advanced sound arguments in favour of certain positions, resulting in amendments to the draft articles, or had explained thoroughly why other positions had not been accepted. That was crucial given that international practice on the effects of armed conflict on treaties was often scarce or contradictory. It was to be hoped that the adoption of the draft articles on second reading would gain the acceptance required to provide an effective legal framework. He paid tribute to the late Sir Ian Brownlie for his work on the topic, which had culminated in the draft articles now before the Commission.

As far as the scope of the topic was concerned, the Commission had debated extensively the question of whether to include two elements: treaties to which international organizations were parties and non-international armed conflicts. There was no doubt that more and more treaties had international organizations as parties and that such treaties would be affected by an armed conflict involving one or more of their State parties. However, to include such treaties would be to broaden the scope of the topic and would lead the Commission to delve into more complicated and uncertain areas of law, owing to the nature of organizations and their rights and obligations under international law. It was therefore prudent not to include such treaties in the scope of the topic.

The situation was totally different with respect to non-international armed conflicts. Most conflicts today were non-international in nature, and the Commission would be excluding a broad spectrum of situations, thereby limiting the usefulness of the draft, if it excluded them. They should come under the scope of the topic, provided that the definition of armed conflicts as including non-international ones received wide acceptance. The definition considered on first reading had been meant to be an operational one, without prejudice to definitions of armed conflict under international humanitarian law. It contained some substantive elements, such as the references to state of war and armed operations, both of which were covered under international humanitarian law by the definition of armed conflict.

Another substantive element mentioned in the definition was whether the nature and intensity of the conflict might affect the application of a given treaty. That element was meant to determine the scope of application of the articles without prejudging whether a certain conflict was an armed conflict under international humanitarian law. In the version proposed for consideration on second reading, the Special Rapporteur had opted to use the substantive definition adopted in the *Tadić* case in preference to a combination of those in the Geneva Conventions of 1949 and Additional Protocol II of 1977. That raised two issues. First, what was the added value of including a substantive definition that was not to be found in international humanitarian law? Second, the text was being considered on second reading, and to suggest a very broad definition without the certainty that it would be

well received could jeopardize its acceptance. The *Tadić* definition was an important and broad one – perhaps too broad. The Commission must resolve the two issues before definitively adopting a definition, bearing in mind that the term "armed operations" was sufficient to encompass non-international armed conflicts. Another point was that the *Tadić* definition mentioned resort to armed force between organized armed groups, but the scope of the draft covered armed conflict where at least one State was a party to the conflict, not conflicts between armed groups within a State. That part of the definition should therefore not be included.

Regarding draft article 3, he recalled that the Commission had decided against referring to the presumption of continuity of treaties during armed conflict for several reasons, including that it was neither found in international law nor realistic. The Special Rapporteur had quite rightly pursued that approach, retaining the previous version of draft article 3. It simply established the principle that the incidence of armed conflict did not in itself terminate or suspend treaties. In order to determine the nature and extent of the effect of an armed conflict on a treaty, a set of indicia and criteria, as listed in articles 4, 5 and 7, must be used.

With regard to the Special Rapporteur's proposal to replace the word "necessarily" by "*ipso facto*", he said that he preferred the words "in itself". Additional clarification had been brought to draft article 3 by specifying the types of actors involved.

On draft article 4, he welcomed the addition of a key criterion, namely the intention of the parties to the treaty, which was to be determined or interpreted in accordance with articles 31 and 32 of the 1969 Vienna Convention. According to the draft article, if the negotiating parties had not manifested an intention in relation to the effect of an armed conflict on a treaty, the presumed intention — a valid approach in treaty interpretation recognized by jurisprudence and international judicial bodies — could be determined through the criteria in articles 31 and 32, including the object and purpose. Concerning the removal from subparagraph (b) of the reference to the subject matter of the treaty, he said that despite the danger of overlap with draft article 5, his preference was to retain it. It did not add much to refer to the intensity and duration of the conflict, as that aspect was encompassed by the words "nature and extent".

On draft article 5, he said the fact that categories of treaties were listed therein did not mean that they continued to apply in all circumstances. The presence of a treaty in the list was indicative, not conclusive. Other factors needed to be taken into account: for example, examination according to the indicia set out in draft article 4 was crucial. As noted by the Special Rapporteur, some provisions of a treaty in a certain category might not be susceptible to continuation, some treaties might fall into a number of categories and for others, only a small aspect of their subject matter might be covered in the list. Nevertheless, it seemed preferable for the indicative list to be included in the annex so that the draft articles would not be viewed as an abstract exercise.

Concerning draft article 5, paragraph 2, which cited specific categories of treaties that continued to be operational during an armed conflict, he said he was not in favour of that approach, for several reasons. First, it would create a category of treaties which were deemed to apply during an armed conflict, irrespective of other factors that might rule out a specific treaty in whole or in part. Second, it defeated the purpose of the article, which stipulated that an armed conflict *as such* did not affect the operation of certain treaties, because of their subject matter. Such treaties might still cease to operate as a result of the conflict, yet according to paragraph 2, certain categories of treaties had to remain in operation. Third, draft article 5 said too many things at once. It set out a rule for a certain category of treaties and another for another, and it had an annex of treaty categories to which one rule applied.

On draft article 7, he agreed with the Special Rapporteur that it was preferable to place it after draft article 3, but he thought the wording used in the first reading text had been simpler.

Draft article 8 was important in that it set out the obligation to give notification of the intention to terminate, suspend or withdraw from a treaty if the State was going to carry out that intention. He supported the idea of setting a time limit for objection, although incorporating a given numerical figure in the text would be artificial. The important point was that the objecting State should act in good faith and make notification of its objection as early as possible. He also agreed that provisions on dispute settlement, insofar as they remained applicable during an armed conflict, should be activated in the event of a dispute over the continuation of application of a particular treaty. There was no real need for paragraph 5, but he did not see any harm in its inclusion.

Paragraph 4 was a different matter, however. While the premise that notice did not itself terminate or suspend the operation of a treaty was correct, the paragraph not only stated that fact but added an obligation to seek a solution through the means indicated in Article 33 of the Charter of the United Nations. It was important to clarify treaty relations when they were frozen as a result of an armed conflict, but the Commission should also be realistic, especially when the parties to the conflict were parties to the treaty. The same obligation should not be imposed in all situations. For example, if a State party to the treaty notified its ally, which was a party to the same treaty, of its intention to suspend, and the latter State objected, there should be a stronger obligation to seek a peaceful solution to the dispute than when the two parties to the treaty were adversaries in the conflict. A distinction should be made in terms of the content and extent of the obligation under paragraph 4, depending on the situation.

Mr. Vázquez-Bermúdez, referring to draft article 1 and the proposal to replace the words “apply to” with “deal with”, pointed out that the draft articles adopted on a number of other topics used such a phrase. He saw no reason to adopt a different approach in the current case: to do so would pose problems of interpretation in respect of the current draft articles and of other draft articles that had already been adopted. Regarding the inclusion in the scope of the draft of treaties to which international organizations were parties, he noted that the Commission had decided against it. However, if the Special Rapporteur thought it would be worthwhile to prepare a report on the implications of the inclusion and the changes that would be needed so that the draft articles could be considered at the next session, he himself would see it as a useful step, as long as it did not entail postponing the adoption of the draft articles beyond 2011.

The phrase “where at least one of these States is a party to the armed conflict” was clearer than the earlier wording. Taken together with draft article 2, it would include armed conflicts that were not international in nature and international armed conflicts which had an effect on a third State, one that was a party to the treaty but not a party to the conflict. He was in favour of including non-international armed conflicts in the scope of the draft, and it would appear that most States agreed. However, account must be taken of the comments made by China, Romania and Switzerland to the effect that, if the draft articles were to cover both international and internal conflicts, it would be necessary to consider whether the two categories of conflict had the same effects on treaties. Internal armed conflicts should be included because otherwise the draft articles would be of limited use, but that did not mean that their effects on treaties were the same as the effects of armed conflicts involving two or more States which were also parties to a treaty. When only one State was a party to the armed conflict, the conflict should not in principle produce effects on the treaties to which that State was a party. He agreed with Mr. Gaja that if only one State was involved in an armed conflict, it was difficult to see how the armed conflict could affect the application of a treaty. That aspect should be resolved in the text of the draft articles, and

not simply in the commentaries. When the Commission had discussed the inclusion of internal armed conflicts, Sir Ian Brownlie had warned of the potential damage to contractual rights and obligations and to treaty relations and of the danger that the relevant provision might be used as a pretext to justify the suspension or termination of treaties.

With regard to draft article 2, subparagraph (b), he supported the Special Rapporteur's proposal to define the concept of armed conflict on the basis of the modern, simple and comprehensive wording used in the *Tadić* case.

Ms. Jacobsson asked whether a treaty to which both an international organization and a number of States were parties such as the United Nations Convention on the Law of the Sea would be excluded from the scope of the draft articles. She requested the Special Rapporteur to confirm that the debate was not about cases in which an international organization was a party to the conflict, but in which it was a party to the treaty.

Mr. Vasciannie said with respect to draft article 1 that the responses of States suggested that two substantive issues required particular review: whether the draft articles should be restricted to inter-State treaties in which more than one State party was involved in the armed conflict, and whether they should apply to the effects of armed conflicts on treaties to which international organizations were parties.

He endorsed the Special Rapporteur's conclusion that the draft articles should apply to treaties in which one of the States was involved in the armed conflict. Clearly, there would be more armed conflicts in which one State party to a treaty would be involved than conflicts with more than one. Unless there was a good reason of principle to restrict the applicability of the draft articles, he supported the approach that would give them greater scope.

One argument for the two-State requirement pertained to article 73 of the 1969 Vienna Convention, which indicated that its provisions "shall not prejudge" any treaty question that might arise from the outbreak of hostilities between States. That meant that the Vienna Convention did not apply in that particular situation, but it had no bearing on the scope of draft article 1 of the current project. Perhaps one could squeeze out the following *a contrario* argument, however: article 73 did not prejudge situations when two States were involved in an armed conflict, but it did prejudge situations in which one State party to a treaty was involved in an armed conflict. That would mean, at most, that the 1969 Vienna Convention governed situations in which one State party to a treaty was involved in an armed conflict, the relevant rules being, for example, articles 61 and 62, but those rules did not expressly cover the situation of a State party involved in an armed conflict, and in any event they were not as specific as the Commission's draft articles. Thus, even the *a contrario* argument did not rule out the possibility or desirability of developing specific rules concerning the situation of a single State party to a treaty which found itself involved in an armed conflict. In his view, the Special Rapporteur's approach should be supported.

As to whether the scope should include treaties to which international organizations were parties, he also agreed with the Special Rapporteur, but with some reservation. He supported the approach of excluding treaties involving international organizations because the overall project to date had proceeded on the basis that only inter-State treaties would be within its scope. To change course so far downstream would be to set the work back considerably, as noted by the Special Rapporteur in paragraph 8 of his report.

Moreover, considerations that might be applicable in respect of treaties involving international organizations could be different from those applicable to States alone. A State was usually in control of a fixed territory, and that had implications for its power and authority under treaties; an international organization was not likely to be in that situation very often, if at all. Furthermore, different international organizations might have divergent

governance structures that determined issues concerning entry into armed conflict. Those issues might have a bearing on the way rules concerning the effects of armed conflicts on treaties were applied. Thus, the rules for States *inter se* might not be readily applied to treaties with international organizations. It would take time to examine the various possibilities that might arise from a change to incorporate treaties including international organizations.

On the other hand, as noted by China, international organizations were increasingly involved in international relations and entered into treaty commitments such as those pertaining to host State agreements that might well be affected by an armed conflict. In draft article 20 of the text on the responsibility of international organizations, the Commission had accepted the possibility that international organizations might act in self-defence and thus might be involved in an armed conflict, albeit in limited circumstances. That position should not be completely disregarded in the current project.

It also seemed a bit extreme to exclude major treaties from the scope of the draft articles simply because such treaties — which were predominantly between and among States — allowed an international organization to become a party. He had in mind the United Nations Convention on the Law of the Sea, which had been ratified by approximately 160 States and the European Union.

Perhaps the solution was to keep the scope limited to States alone, but for the commentary to suggest guidance as to possible ways in which the draft articles could be applied to treaties that included international organizations.

He had two minor comments on the drafting. First, in draft article 1, the Special Rapporteur had replaced the words “apply to” by “deal with”, in keeping with a proposal by the United Kingdom. There was probably little in the change, but both Vienna Conventions on the law of treaties used the words “apply to” in their provision on scope. The change to “deal with” might be justified by the fact that the draft articles were addressing effects and not applying to treaties. The other small drafting point concerned the fact that generally one tended to speak of the effects of armed conflicts on treaties, as in the title of the report and of the topic, but draft article 1 switched to the effects of armed conflict “in respect of treaties”. The pedant might enquire whether “in respect of” should be used when a good old “on” might suffice.

The definition of the term “treaty” in draft article 2 (a) was acceptable – it mirrored the one in the 1969 Vienna Convention. For the definition of “armed conflict” in draft article 2 (b), the Special Rapporteur had invited views as to whether the approach taken in common article 2 of the Geneva Conventions of 1949 and article 1, paragraph 1, of Additional Protocol II of 1977 was preferable to the definition in the *Tadić* case. He himself preferred the latter, for it captured the term concisely and was not much improved upon by the longer, slightly more ambiguous definition in the Geneva Conventions. If the *Tadić* definition was used, however, the phrase “or between such groups within a State” should be deleted. He also took it for granted that the term “armed conflict” applied to both international and non-international hostilities of a certain scale.

Concern had been expressed about the use of the term “protracted” in the *Tadić* definition, for it was inherently vague. Not every skirmish amounted to an armed conflict, but as the fighting was prolonged, it would begin to have an impact on treaty relations. However, the problem of grey areas would probably arise with most terms that might be used to distinguish minor outbreaks of violence from armed conflict on a significant scale. Hence, “protracted” seemed fine, *faute de mieux*.

As he read draft article 2, the existence of an armed conflict was what served as the threshold to bring the other rules into play – the trigger mechanism to which Mr. Murase

had referred. For that reason, there must be a definition of armed conflict in the draft articles.

Mr. Nolte said that the proposals made by the Special Rapporteur were a good mix between conservation of the groundwork that had been built under the able guidance of the regretted Sir Ian Brownlie and modifications resulting from comments by States and the Special Rapporteur’s own analysis. His work was a promising basis for successful completion of the project.

With regard to draft article 1, he agreed with the Special Rapporteur and a number of speakers that not only international but also non-international armed conflicts should be included in the scope of application. The practical importance of non-international armed conflicts today, the difficulty in distinguishing between international and non-international armed conflicts in some situations and the Commission’s decision to include both in the text adopted on first reading all spoke in favour of that approach, which also seemed to be accepted by a majority of States. It was true, however, that the effects on treaties would differ somewhat, depending on whether an international or a non-international armed conflict was involved.

He shared Mr. Gaja’s worries about whether it was appropriate for the scope of the draft to cover a treaty relationship between two States which were on the same side of an international armed conflict. A treaty would be affected by an international armed conflict for different reasons, depending on whether the parties stood on the same or opposing sides. Perhaps draft article 10 on separability of treaty provisions was the only possible answer, and it would be sufficient to include some criteria and references to practice in the commentary to draft articles 1 and 10.

With regard to draft article 2 (b), he supported the Special Rapporteur’s proposal to adopt a definition of armed conflict based on the *Tadić* decision of the International Criminal Tribunal for the Former Yugoslavia. That definition had received wide support among States and had been incorporated verbatim in article 8, paragraph 2 (f), of the Rome Statute of the International Criminal Court. The definition that the Commission had adopted on first reading had been somewhat circular, mixing terminological and substantive elements, and a number of States had expressed reservations. There was thus good reason to take a fresh approach.

The first place to turn in search of a more substantive definition, of course, would be common article 2 of the Geneva Conventions of 1949 and article 1 of Additional Protocol II. As the Special Rapporteur had pointed out, however, the definition in article 2 was not very clear, and the one in article 1 was too restrictive and not quite up to date. The *Tadić* decision was, in his view, the best definition available today.

Draft article 2 (b) added clarity to the Commission’s previous definition in that it focused on the actual use of armed force, explicitly mentioned armed groups and differentiated between the use of armed force in international as opposed to non-international armed conflicts, since in the latter, it needed to be “protracted”, in other words, to cross a certain threshold of intensity. That requirement was important in that it would prevent the draft articles from being applied to short spasms of internal violence that should not be able to invite the reconsideration of international treaty relations.

The proposed definition also had the advantage of leaving room for interpretations and future developments in that difficult and sometimes contested field of law. He sympathized with Mr. Murase’s desire for as much clarity as possible. It would indeed be a remarkable achievement if the Commission could resolve the age-old question of exactly when an armed conflict could be deemed to have broken out, but in the context of the current project, trying to do so might simply lead to fruitless argument. What was important

was to give at least some indication of under which circumstances there was actually an armed conflict, regardless of when it started and who started it.

That brought up the question of whether it was appropriate to transpose a definition of armed conflict that had been formulated in the context of international criminal law into the context of treaty law. Such a transposition had been revealed as not always appropriate in the discussion of attribution of acts of non-State actors to States in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and the *Tadić* case. In the present case, however, it was entirely appropriate to emphasize the unity of international law as the Special Rapporteur had done, although he might wish to explain in the commentary what the previous definition had said, namely that armed conflict did not presuppose a declaration of war or any other declaration. As far as occupation was concerned, he shared the Special Rapporteur's view that it should be mentioned in the commentary, as it was an instance of armed conflict.

The question of international organizations needed to be handled carefully. It would require much research, yet the Commission's goal should remain to complete the project before the end of the current quinquennium. One problem was that some organizations played a role within certain treaties, like the European Union in respect of the United Nations Convention on the Law of the Sea. He agreed with Ms. Jacobsson that it seemed unlikely that the Special Rapporteur had intended to exclude the United Nations Convention on the Law of the Sea from the scope of the draft articles.

Mr. Perera said he welcomed the pragmatic approach, described in paragraph 4 of the report, of not making drastic changes to the draft articles unless absolutely necessary. He was inclined to support the Special Rapporteur's position, detailed in paragraph 8, that the text should not cover the effects of armed conflicts on treaties to which international organizations were parties. As other speakers had suggested, it was perhaps an issue to be addressed in future, on the basis of emerging practice, and perhaps in the commentary, not in a draft article. The proposed replacement, in draft article 1, of the words "the States" by "these States" certainly added clarity to the text, which would nevertheless need further examination in the light of the outcome of discussion on draft article 2 (b).

The key issue to be addressed with respect to draft article 2 — one which had given rise to a sharp divergence of views — was whether it should cover internal as well as international conflicts. He had doubts about that. While he was fully aware of the prevalence of internal conflicts in the contemporary world, he was concerned over the possible impact an internal conflict might have on treaties between States, specifically whether it might affect the ability of the affected State to fulfil its treaty obligations. The nature or extent of an internal conflict thus became a critical factor in determining the scope of the draft.

In paragraphs 18 to 21 of the report, the Special Rapporteur presented several options for the definition of armed conflict in draft article 2 (b). While the definition provided by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case deserved careful examination, it lacked a key element that had been in the draft article as adopted on first reading, namely the phrase "armed operations which by their nature or extent are likely to affect the application of treaties". That phrase was preferable to the reference to "protracted resort" in the current version of the text, as it set a threshold, thereby excluding situations like internal disturbances. The Drafting Committee should consider reinstating the earlier wording. The Commission was formulating a definition of armed conflict, not in a vacuum, but with reference to its effects on treaties.

He endorsed Mr. Hmoud's warning that a very broad definition could prejudice the adoption of the draft articles by the Sixth Committee.

As to whether occupation should be mentioned in the definition of armed conflict, he agreed with the Special Rapporteur that it was something that occurred during armed conflicts — an approach that was consistent with that in the Geneva Conventions of 1949 — and that the matter was best left to be dealt with in the commentary.

He had no objection to the referral of draft articles 1 and 2 to the Drafting Committee.

Mr. Caflisch (Special Rapporteur) said that the question of the effect of internal, as opposed to international, conflicts on treaties, to which several speakers had adverted, would be dealt with in the addendum to his report. He therefore requested the Commission to leave it to one side for the time being.

Mr. Galicki said that the report before the Commission was a perfect continuation of the work done by the late Sir Ian Brownlie on the topic: it combined British accuracy with Swiss precision. The content and form of the draft articles adopted on first reading had been retained to a great extent, yet some corrections and improvements had been made on the basis of comments by States.

There was general agreement that the topic was situated in the realm of the law of treaties, the focal point of which was the 1969 Vienna Convention. Its article 73 provided the impetus for dealing with the effects of armed conflicts on treaties and should be kept in mind as general guidance when drafting the relevant rules, particularly with respect to the scope of the topic.

Turning to draft article 1, he noted that, after summing up the various opinions expressed by States, the Special Rapporteur had decided to retain the title, "Scope", and most of the substance. Changing the words "apply to" to "deal with" seemed more of a cosmetic than a substantive amendment.

On the other hand, the modifications proposed by the Special Rapporteur for draft article 2 did have a more serious, albeit indirect, impact on the substance of the provision. In subparagraph (a), the Special Rapporteur had retained the traditional definition of the word "treaty" contained in the 1969 Vienna Convention, yet in subparagraph (b), his approach to the definition of "armed conflict" was completely different. In response to States' opinions, the Special Rapporteur had departed from the text approved on first reading, which had been drawn from the resolution adopted in 1985 by the Institute of International Law, and had based the latest version on the "more modern, simple and comprehensive wording" used in 1995 by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadič* case.

The alternative definition certainly covered a wider range of situations than the one proposed on first reading, insofar as it encompassed internal and non-international armed conflicts. Since reference was made to "armed conflict" in draft article 1, the definition of that term had a bearing on the scope of application of all the draft articles. It was open to question, however, whether, for the purpose of the current exercise, the Commission should apply the notion of "armed conflict" so widely, extending it to "protracted resort to armed force ... between organized armed groups [...] within a State". Although the phrase "protracted resort" had been borrowed from the judgement in the *Tadič* case, it sounded rather artificial, and the very idea of expanding the concept of "armed conflict" to take in purely internal conflicts was debatable, since the treaties that could be affected by such non-international conflicts were clearly of an international character.

That matter required very careful consideration and the possibility of limiting the definition of "armed conflicts" and the scope of the draft articles to international armed

conflicts should be re-examined. Perhaps it might be advisable to follow article 73 of the 1969 Vienna Convention and to refer to the "outbreak of hostilities" instead of "armed conflict", since that would also make it possible to define the term more precisely and in such a way as to include occupation.

On draft article 3, he thought that the presumption of the continuous operation of treaties was a welcome notion, consonant with the 1969 Vienna Convention and consistent with the principle of *pacta sunt servanda*. The title of the draft article had given rise to differing opinions, however. "Absence of *ipso facto* termination or suspension" was not a very elegant formulation and used a Latin expression, which United Nations usage tended to avoid. Perhaps the Latin term and the rigid principle of a presumption of continuity could be avoided by using the phrase "Absence of presumed termination or suspension".

Mr. Comissário Afonso paid tribute to the memory of the late Sir Ian Brownlie, whose tragic death was a great loss to the Commission and to the cause of international law.

The Commission should retain the text of draft article 1 as adopted on first reading. Apart from the minor editorial correction suggested by the Special Rapporteur for the sake of clarity, no significant amendment appeared to be justified.

The draft articles should follow as closely as possible the provisions of the 1969 Vienna Convention, articles 1 (a) and 73 of which laid the foundations for the Commission's work by clearly indicating that the core issue was treaty relations between States. That meant that the draft articles should not apply to the effects of armed conflicts on treaties to which international organizations were parties. His objection was not a matter of principle but of methodology. While he agreed with members who had held that the Commission should not perpetuate the approach of separating States and international organizations when engaging in the progressive development and codification of international law, at the current stage of the work on the topic it seemed inadvisable to change course, since that would call for radical amendment of the draft articles adopted on first reading. At some point in the future the Commission might, however, wish to draw up a text covering both States and international organizations. He therefore supported the wording of draft article 1 as proposed by the Special Rapporteur.

As far as draft article 2 was concerned, he considered the definition contained in the resolution adopted in 1985 by the Institute of International Law, from which the definition in draft article 2 (b) as adopted on first reading had been drawn, to be the best model. It brought into play the crucial three concepts of the State, the treaty and armed conflict. The definition from the *Tadič* case did not include all those elements and was only a general one. However, paragraph (3) of the commentary to draft article 2 adopted on first reading stated that "It is not the intention to provide a definition of armed conflict for international law generally, which is difficult and beyond the scope of the topic". Paragraph (4) of that commentary explained in very clear terms that the definition applied to treaty relations between States and served to include within the scope of the draft articles the possible effect of an internal armed conflict on the treaty relations of a State involved in such a conflict with another State. That was the correct approach to which the Commission should adhere. It was perfectly compatible with the 1969 Vienna Convention and would be useful for the legal interpretation of the whole text. He would therefore opt for a definition of armed conflict taken from the resolution of the Institute of International Law rather than for the definition deriving from the *Tadič* case. Different definitions for dissimilar purposes would not affect the unity of international law. The Commission should therefore retain the draft article 2 as adopted on first reading.

Mr. Fomba endorsed the general methodological approach set out in paragraph 4 of the report.

For practical and legal reasons, no distinction should be drawn in draft article 1 between international and internal armed conflicts. An unduly simplistic or superficial conception of the scope *ratione personae* of treaties was to be avoided. To ignore treaties to which international organizations were parties would create a sizeable legal lacuna: they would have to be dealt with somehow, but the question was when and how. The Special Rapporteur was not in principle against doing so, despite the objective, convincing arguments he put forward regarding the impracticality of such an endeavour. There did not therefore seem to be any fundamental contradiction with Mr. Pellet's position, especially as at the end of paragraph 8 of the report the Special Rapporteur did not rule out the possibility of adopting a new series of rules to be based on article 74, paragraph 1, of the 1986 Vienna Convention. He was in favour of replacing "apply to" with "deal with" and of employing the phrase "where at least one of these States is a party to the armed conflict", since it was clearer.

In draft article 2, the Special Rapporteur was rightly reluctant to combine texts from the Geneva Conventions of 1949 and from Additional Protocol II of 1977 in order to define the scope *ratione materiae* of the notion of "armed conflict". The proposal to opt for wording similar to that used in the *Tadič* case was justified. The proposal to retain paragraph (6) of the commentary to draft article 2, which expressly stated that the definition included the occupation of territory, even in the absence of armed resistance, was acceptable.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Candioti (Chairman of the Working Group on Shared natural resources) said that the Working Group would be composed of the following members: Mr. Caflisch, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie (Rapporteur), *ex officio*, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue.

Other members of the Commission were welcome to join the Working Group.

The meeting rose at 1.05 p.m.