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Summary record of the 3059th meeting

Topic:
Effects of armed conflicts on treaties

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observation might suggest that, for non-international armed conflicts, a rule should be added pursuant to which a State engaged in non-international armed conflict could request only the suspension of treaties whose continuation was not imposed under draft articles 4 and 5 and the annexed list. The difference in treatment proposed by that State appeared to reflect the difference between international and internal armed conflicts: international armed conflicts could result in a disaster, a veritable “earthquake” between two or more States, and put at stake their existence and their international relations, and even those of third States, whereas an internal armed conflict usually resulted in a temporary or partial incapacity at inter-State level that did not give rise to disproportionate reactions affecting third States. Moreover, it would not be the first time that, in the context of the draft articles, the reaction of the State concerned would be limited to suspension. He recalled in that regard the explanations given on draft article 13; a State hindered in the exercise of its right to self-defence by the existence of treaty ties only had the right to suspend those ties, not to demand their termination. He would like to hear the views of other members of the Commission before making any proposal on the question.

30. At some point, and the time had not come yet, because all the important questions had not yet been definitively resolved, the Commission should consider what form the draft articles should take.

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

[Agenda item 1]

31. Mr. McRAE (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of protection of persons in the event of disasters would be composed of the following members: Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie (*ex officio*), Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

The meeting rose at 5.05 p.m.

3059th MEETING

Tuesday, 6 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report on the effects of armed conflicts on treaties, in particular articles 3 to 18 and the other points raised by Member States and general issues (A/CN.4/627 and Add.1, paras. 115–164).

2. Mr. MURASE said that he wished to make two points relating to draft articles 13 and 15. The first was the difficulty of determining which side in an armed conflict could claim to be acting in legitimate self-defence; the second was the difficulty of determining aggression. The Special Rapporteur had stressed the need to retain the two draft articles, but he was not fully convinced that the Commission needed to address the specific issues of self-defence and aggression in the context of the law of treaties.

3. With regard to the first point, in theory, one side had a legitimate claim and the other side an illegitimate claim concerning the exercise of self-defence in a given conflict. However, in practice, it was often very difficult to determine which side was acting in legitimate self-defence. An example was the Iran–Iraq war in the 1980s, in which both parties had claimed that their exercise of self-defence was legitimate; the Security Council had refrained from making any determination on the matter. He feared that such a situation might give rise to confusion, or even abuse, in the actual application of draft article 13. He therefore suggested that the article be deleted and replaced by a “without prejudice” clause along the lines of draft article 14, or article 59 of the draft articles on responsibility of States for internationally wrongful acts,²³⁹ which was broader in scope. Nevertheless, since the draft articles on State responsibility had a provision on self-defence (art. 21), the Commission might prefer to retain draft article 13. In that case, he would suggest that the commentary to the draft article elaborate on the need for prudence in its application.

4. As for the second point, the Security Council had never employed the term “aggression” but had used the words “threat to the peace” and “breach of the peace”, which fell short of aggression. Likewise, the ICJ had avoided any pronouncement of aggression in cases where it might have been possible, and the international community had not yet reached a sufficiently clear definition of aggression.

5. In that connection, reference might be made to the amendments to the Rome Statute of the International Criminal Court adopted by consensus at the recent Review Conference of the Rome Statute as article 8 *bis*,²⁴⁰ where the definition of an act of aggression reproduced the wording of General Assembly resolution 3314 (XXIX)

²³⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 143.

²⁴⁰ *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, International Criminal Court publication RC/9/11, Resolution 6 “The crime of aggression” (RC/Res.6), Annex I, p. 17.

of 14 December 1974. Those amendments, however, had no bearing on the Commission's current work for two reasons. First, the International Criminal Court was concerned with the criminal responsibility of individuals, which was not relevant to States' loss of rights to terminate or suspend treaties. Second, the Review Conference itself had adopted an understanding that the amendments addressing the definition of the act of aggression and the crime of aggression were for the purpose of the Statute only; in accordance with article 10 of the Statute, they should not be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

6. It could not be denied that the adoption of the amendments concerning aggression might have some indirect effect on international law, but that came under the scope of future development. In his view, the definition of an act of aggression adopted by the Review Conference virtually equated aggression with the unlawful use of force. Even the qualification, in paragraph 1 of new article 8 *bis*, "which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" was ambiguous, and thus the definition might not be sustained under general international law.

7. In view of the difficulty of applying the notions of self-defence and aggression, he suggested that draft articles 13 and 15 be replaced by "without prejudice" clauses. Perhaps draft article 14 could be expanded to cover those two situations, since the draft was concerned with the law of treaties and not with the question of the use of force. He could agree to retaining draft article 13 with an appropriate commentary, since the concept of the right of self-defence was clearly established, and his sole concern was its application. By contrast, the concept of aggression was not as well established in international law, and he would be reluctant to endorse its inclusion in draft article 15 as currently worded. He had no difficulty with the other draft articles, and was in favour of their referral to the Drafting Committee.

8. Sir Michael WOOD said that he agreed with Mr. Murase that not all the draft articles in the addendum were necessary. Some seemed to have been included because they were based on the 1985 International Law Institute resolution, "The effects of armed conflicts on treaties"²⁴¹ and, as the comments of Member States and Mr. Murase indicated, some posed problems. He recognized that at the second reading stage it was probably too late to reopen debate on the need for the draft articles, yet, Mr. Murase's suggestion for "without prejudice clauses" to replace draft articles 13 and 15 warranted consideration. On the assumption, however, that most of the draft articles would be retained, he wished to make the following points.

9. He had no substantive problem with draft article 13, which concerned the inherent right of self-defence, although the Drafting Committee might wish to consider beginning it with wording that would more accurately reflect Article 51 of the Charter of the United Nations, as follows: "A State exercising the right of individual or collective self-defence recognized in the Charter of the

United Nations". Article 51 was in fact a "without prejudice" clause and by no means set out all the conditions that had to be met for the proper exercise of the right of self-defence; in particular, it made no mention of proportionality and necessity.

10. The Drafting Committee might also wish to amend the title of article 13, but not as suggested by the Special Rapporteur. The current title might imply some automatic effect of the exercise of the right of self-defence, which was not, he believed, the intention. Paragraph 116 of the report suggested that draft article 13 did not cover internal conflicts. That would normally be so, although it was not excluded that the exercise of the inherent right of self-defence could lead to what might be qualified as a "non-international" armed conflict. In any event, such a possibility should be covered in the commentary to the draft article.

11. As originally conceived, draft article 15 had been limited to the case of an aggressor State, whereas the alternative version would cover all uses of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. If the draft article was retained—he hoped not—his preference would be for the broader approach offered by the alternative version. As Mr. Murase had noted, the Security Council had been reluctant to label States as aggressors, even in the most egregious breaches of the prohibition of the use of force, and had confined itself to a determination of a threat to the peace or breach of the peace. Such reluctance was unlikely to diminish once the International Criminal Court was in a position to exercise jurisdiction over the crime of aggression. Another reason for preferring the broader approach was that it would bring draft article 15 more in line with draft article 13. Self-defence did not apply only in the case of aggression (notwithstanding the French text of Article 51). Moreover, confining article 15 to the case of an aggressor State would set a very high threshold for its applicability. It might well exclude situations where both sides of the conflict had the right to suspend or withdraw from treaties during an armed conflict. If the concept of aggression was retained, then he would be in favour of omitting or at least amending the reference to General Assembly resolution 3314 (XXIX) on the definition of aggression. The resolution should not be placed on an equal footing with the Charter of the United Nations, as implied by the current draft. He shared Mr. Murase's view that the definitions of crime of aggression and act of aggression adopted by the Review Conference of the Rome Statute had no bearing on the Commission's work. They were as yet untested and had been developed in their own very special context. They did, however, display a rather more nuanced use of General Assembly resolution 3314 (XXIX) than did draft article 15.

12. The "without prejudice" clauses in draft articles 14, 16 and 17 did not raise particular problems. He supported the retention of draft article 14, concerning the decisions of the Security Council under Chapter VII of the Charter of the United Nations, and had taken note of Mr. Murase's suggestion to transform the draft article into a "without prejudice" clause covering the use of force. Of the two alternative versions of article 17, his preference was for the second one, which was simple yet comprehensive. It would be helpful if the commentary to the draft article explained how the set of draft articles differed

²⁴¹ See footnote 138 above.

conceptually from the ordinary rules of treaty law, such as those on fundamental change of circumstance or impossibility of performance, which applied regardless of whether there was an armed conflict.

13. He agreed with the Special Rapporteur that there was no need to add yet another “without prejudice” clause covering the duty to respect international humanitarian and human rights law. He also endorsed the Special Rapporteur’s comments on the scope of the draft articles and on other points.

14. With regard to the possibly different effects on treaties of international and non-international armed conflicts, he had formed no clear opinion and looked forward to hearing the views of other members. The effects could depend as much on the scale and duration of the conflict as on whether it was international or non-international. Many current conflict situations were hard to classify, and he was not certain that a clear distinction could be made for the purposes of the draft articles. The suggestion that a State engaged in a non-international armed conflict be permitted only to suspend treaties did not seem particularly logical or substantiated by practice. The argument that in such cases a State could fall back, where applicable, on the ordinary rules of treaty law, was hardly an answer. The same held true, perhaps even more so, for a State engaged in an international armed conflict.

15. He hoped that the Drafting Committee would consider favourably the Special Rapporteur’s suggestion to reorganize the draft articles, including by combining articles 12 and 18. He also hoped that the Drafting Committee would consider Mr. Candiotti’s suggestion to divide the set of draft articles into parts, which would be in accordance with practice and would make the draft articles easier to follow. In conclusion, he was in favour of referring to the Drafting Committee draft articles 13 to 18 and the drafting suggestions made by the Special Rapporteur in his first report.

16. Mr. KAMTO noted that the Special Rapporteur had continued his work on the topic with the same respect for Sir Ian Brownlie’s efforts and the same careful attention to the comments, sometimes critical, from States on the draft articles adopted on first reading. His own comments would address draft articles 13 and 15 only; his silence on the other draft articles signified approval.

17. Draft article 13 was useful, and the approach adopted by the Commission on first reading was appropriate. However, with reference to paragraph 122 of the report, he would stress that not only could the proposed addition be interpreted as recognition of a right of pre-emptive self-defence, it could also give the false impression that the Security Council had a monopoly on determining aggression. That was not the case, as was borne out by jurisprudence, doctrine and the practice of the General Assembly, as well as the statements made by many States during the Review Conference of the Rome Statute held recently in Kampala. He questioned the appropriateness of the Special Rapporteur’s suggestion to delete the adjectives “individual or collective” modifying self-defence from the title of draft article 13. To be sure, they were covered by the phrase “in accordance with the Charter of the United

Nations”, but the reference to those adjectives meant two different things in the context of draft article 13. On the one hand, it signified that legitimate self-defence could be individual or collective, as enshrined in the Charter of the United Nations. On the other hand it meant that, in all cases, self-defence must be exercised in accordance with the Charter of the United Nations. The current wording of draft article 13 should therefore be retained.

18. Regarding draft article 15, he supported the argument put forward by the Special Rapporteur in paragraph 133 of the report. There was no legal reason to delete the reference to General Assembly resolution 3314 (XXIX), which jurisprudence had amply demonstrated to be part of customary international law. A case in point was the judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*. No doubt the previous speakers would disagree, but the content of the resolution had recently been enshrined in a treaty of universal scope: article 8 *bis* of the Rome Statute of the International Criminal Court had been adopted in Kampala not merely by consensus, but in fact unanimously. He knew because he had been there. The debate had not centred on the content of article 8 *bis*, which had been considered established law, but on the role of the Security Council in the exercise of jurisdiction.²⁴² Article 8 *bis* defined not only the crime of aggression, but also an act of aggression, and not only made explicit reference to General Assembly resolution 3314 (XXIX) but reproduced its contents in full. It could therefore be said that article 8 *bis* had been incorporated into the Statute, although jurisdiction could not be exercised until 2017.²⁴³ The time lag was a matter of political expediency, not a legal issue. It had been generally accepted that General Assembly resolution 3314 (XXIX) was part of customary international law. Only two States had raised objections on that score, and he was not certain what legal weight should be given to their statements; it must be remembered that the Review Conference had been open to States not parties to the Statute as well as to States parties.

19. Therefore, it hardly seemed appropriate to assert that the Review Conference had no bearing on the Commission’s work because it had defined only the crime of aggression or that matters relating to the use of force were not relevant to the law of treaties, when the topic under discussion was the effects of armed conflicts on treaties. The Commission should not take such a narrow view when framing the draft articles. There was a tendency to compartmentalize different aspects of international law and claim that they did not fall within the purview of the Commission. However, international law was one and the same and, inevitably, some of its aspects touched upon others. The Commission could not simply avoid addressing them by drafting “without prejudice” clauses. For all those reasons, the reference to General Assembly resolution 3314 (XXIX) should be retained.

20. He was in favour of expanding the scope of draft article 15 to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations and endorsed Sir Michael’s comments on the subject. In

²⁴² *Official Records of the Review Conference of the Rome Statute of the International Criminal Court* (see footnote 240 above), Annexes VII, VIII and IX, pp. 121–127.

²⁴³ *Ibid.*, p. 6, para. 32.

certain cases which, objectively, had all the characteristics of aggression, the Security Council and even the ICJ did not employ the term. yet it could not be claimed that Security Council had never done so. According to his own recent research, there had been a few cases where the Security Council had explicitly referred to aggression, such as in the case of the invasion of Benin in 1977.²⁴⁴ Moreover, in *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had not used the term “aggression”, but had accepted that the definition of aggression contained in General Assembly resolution 3314 (XXIX) formed part of customary law. There was also fairly widespread use of the term by the General Assembly. Accordingly, the Commission should guard against being categorical.

21. However, apart from those few cases, the Security Council generally refrained from using the term even in situations where it would seem to be justified, but probably more for reasons of internal politics within the Security Council than on legal grounds. A case in point had been the invasion of Kuwait by Iraq in 1990, where, incredibly, the Security Council had not used the term “aggression”.²⁴⁵ For that reason, the Commission should adopt a broader approach in draft article 15, based on Article 4, paragraph 2, of the Charter of the United Nations, namely the alternative version in square brackets proposed by the Special Rapporteur.

22. Mr. CAFLISCH (Special Rapporteur) said that in his report he had not advocated expanding the scope of the draft articles to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations, but had remained neutral on that point. He was, however, seeking the Commission members’ opinion on whether internal and international armed conflicts would have different or similar effects on treaties. That question had been raised during the debate in the Sixth Committee and was a new aspect not covered by the draft articles. He therefore required the members’ advice on the matter, because without it there would be little point in referring the draft articles to the Drafting Committee, since the latter had to obtain the opinion of the plenary Commission before reaching a decision on that kind of question.

23. Mr. MELESCANU said that the arguments put forward by previous speakers showed that the real obstacle faced by the Commission was that, at the outset, it had not identified the fundamental principles on which its work on the topic under consideration should rest. If it accepted the premise that the aim of the draft articles was to offer an attacked State all possible means of defending itself in conformity with the Charter of the United Nations—and those means would include the suspension of the provisions of certain bilateral agreements—the contents of the draft articles should be geared towards giving substance to that principle. The attacked State would have the right to use force, which was of course an exceptional measure, but it would also have the right to employ other legal tools, including the suspension of agreements. Acceptance of that premise would help the Commission to reach agreement on the draft articles.

²⁴⁴ Security Council resolution 419 (1977) of 24 November 1977, para. 1.

²⁴⁵ Security Council resolution 660 (1990) of 2 August 1990.

24. A second fundamental premise was that the Charter of the United Nations and the definition of aggression adopted by the General Assembly in resolution 3314 (XXIX) formed the cornerstone of the draft articles. If the Commission opted for another rationale, it would arrive at different conclusions regarding the contents of the draft articles. It was vital to adopt a logical approach, and the basic logic currently underpinning the draft articles was indeed flawlessly Cartesian. If both the above-mentioned premises were accepted, the text of all the draft articles could clearly take the direction proposed by the Special Rapporteur, namely to offer an attacked State additional means of defending itself.

25. In fact it was essential to follow that logic: otherwise, the Commission might arrive at a very short set of draft articles which merely indicated that without prejudice to all the provisions of the Charter of the United Nations, the 1969 and 1986 Vienna Conventions and international customary law, a State could also defend itself against an aggressor by suspending international treaties. The text drafted by the Commission ought, however, to be able to stand alone, since references to other sources of law and conventions would greatly complicate the task of those who would have to apply the text and who, unlike the members of the Commission, would not have had the privilege of participating in the debates on the topic and of knowing what lay behind each full stop and comma.

26. As far as draft article 13 was concerned, Sir Michael had been right to contend that the draft article’s title might be interpreted as suggesting some automatic effect of the exercise of the right of self-defence. It should be remembered that if aggression occurred, a range of immediate effects were possible. The actual effects would depend on the attacked State, because it was up to the latter to decide which of the possibilities open to it was the most efficient means of exercising its right to self-defence in the circumstances. The Drafting Committee could easily solve that problem by introducing the adjective “possible” before the word “effect”, or by adding any other word which would clearly convey the message that there was nothing automatic about the effect of the exercise of the right to individual or collective self-defence on a treaty.

27. Turning to draft article 15 (Prohibition of benefit to an aggressor State), he said that if the aim of the draft articles was to give an attacked State means of self-defence which encompassed legal action, it was logical to have an article specifying that a State might not derive any benefit from aggression in the field of treaty law. For that reason, he strongly supported the version referring to aggression within the meaning of the Charter of the United Nations and General Assembly resolution 3314 (XXIX) at the beginning of draft article 15. The resolution could not be mentioned without incorporating a reference to the Charter of the United Nations in the same sentence. He honestly thought that it would be hard to argue against the inclusion of a reference to the resolution, since the Charter of the United Nations and the resolution, which was based on the Charter of the United Nations, were central to the set of draft articles. Failure to mention the resolution in draft articles dealing with the effects of armed conflicts on treaties might lead to some undesirable interpretations. Its inclusion was therefore essential.

28. With regard to the “without prejudice” clauses contained in draft articles 14, 16 and 17, he noted that draft article 14 dealt with an issue that was regulated by the Charter of the United Nations. He therefore agreed with the Special Rapporteur that the draft article was essentially a reminder of the pre-eminence of the Charter of the United Nations with regard to the subject matter under consideration, and for that reason, he supported the wording of the draft article. As someone from an aligned State, he found it difficult to comment on the rights and duties of States arising from the laws on neutrality, on which the Special Rapporteur was a renowned specialist. In his view, it was useful to have a special article, in other words draft article 16, on the specific rights of neutral States, especially as their neutrality was not always enshrined in treaties and was operational at all times. In draft article 17, although a general formulation might have some advantages and might be more readily accepted, his own view was that the Commission should endeavour to make the text as specific as possible and to identify situations in which termination, withdrawal or suspension would be permissible. If the Commission was unable to agree, it could always fall back on the somewhat vague general formulation, but at the current stage of its work it would be worthwhile to ascertain whether there were any other cases where termination, withdrawal or suspension would be possible and to include them in draft article 17.

29. With regard to State comments on the quality of the draft articles, from his own experience as a Commission member, he feared that the Commission’s progress would be impeded if it tried to embark on a comprehensive study of national practices. Only three States had urged such a study. The draft articles rested on a sufficient amount of doctrine and were firmly based on the Charter of the United Nations, the work of the United Nations Special Committee on the Question of Defining Aggression and the *travaux préparatoires* to the Rome Statute of the International Criminal Court. He therefore encouraged the Special Rapporteur to continue along his chosen route.

30. Questions on the scope of the draft articles included the issue of whether their application should be confined to acts of aggression, or whether it should be extended to use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. Generally speaking, the Commission should be cautiously ambitious, but given that Article 51 formed the cornerstone of the draft articles, in that context it should confine itself to acts of aggression as defined in General Assembly resolution 3314 (XXIX). With all due respect to Mr. Kamto, he was skating on thin ice, as the issue was not purely legal in nature, but had substantial political implications as well.

31. In response to the question of whether the draft articles should cover both internal and international conflicts, he was of the opinion that since the draft articles were rooted in Article 51 of the Charter of the United Nations, it would be logical for them to refer solely to international conflicts, otherwise the Commission would be extrapolating provisions on aggression to internal conflicts, which might prove somewhat difficult. It was premature to decide what form the draft articles should take. In conclusion, he was in favour of referring draft articles 13 to 17 to the Drafting Committee.

32. Mr. KAMTO, replying to Mr. Melescanu, asked whether in draft article 15 the Commission deemed aggression to be a situation characterized as such by the attacked State, or whether it considered that aggression could be said to have occurred only after determination of the aggressor by the competent organs, in other words the Security Council. If one accepted the hypothesis that an attacked State could characterize a situation as aggression, because the Charter of the United Nations stated that measures taken in the exercise of the right of self-defence must be immediately reported to the Security Council, which would subsequently determine which State was the aggressor, he would agree with Mr. Melescanu that the Commission must remain within the framework of Article 51 of the Charter of the United Nations. His concern was, however, that if the Commission thought that it was necessary to wait until the competent organ had determined that a situation amounted to aggression, there was a risk that a situation like that of the Iraqi invasion of Kuwait in 1990 might not be qualified as aggression because the Security Council had not employed that term and that consequently a State in the position in which Kuwait was would be unable to avail itself of the possibility of not applying a given treaty in accordance with the instrument proposed by the Commission.

33. Positive international law recognized General Assembly resolution 3314 (XXIX) as part of international law. If the Commission did not include a reference to the resolution in draft article 15, it would give the impression that it was backtracking on the advances made in international law towards the definition of aggression, and that would be the wrong signal to send to the international community. That was why it would be wise to buttress that resolution which, as Mr. Melescanu had pointed out, was based on the Charter of the United Nations and enjoyed wide support.

34. Sir Michael WOOD, responding to Mr. Kamto’s comments regarding the definition of aggression, said that General Assembly resolution 3314 (XXIX) was of course very important and had been referred to in judgments of the ICJ. His own concern was with the wording of draft article 15, which placed the resolution on the same level as the Charter of the United Nations. That was not the case in resolution 6, on the crime of aggression, adopted by the Review Conference on the Rome Statute held in Kampala. His main point was that if the Commission were to expand draft article 15 so that it covered all uses of force in violation of Article 2, paragraph 4, of the Charter of the United Nations, it would not need to redefine aggression, since the language proposed by the Special Rapporteur for the broader approach did not require the use of the term.

35. Mr. SABOIA said that self-defence under Article 51 of the Charter of the United Nations was an inherent right. Of course, in the light of its assessment of the facts, the Security Council could subsequently determine that aggression had not taken place. He agreed with Mr. Kamto that General Assembly resolution 3314 (XXIX) was part of international law and should be mentioned in draft article 15. On the other hand, he was sceptical about expanding that article’s scope to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations.

36. Mr. CANDIOTI, replying to Mr. Melescanu's comments regarding the purpose of the draft articles, said that Mr. Melescanu was mistaken in his belief that their main aim was to offer attacked States all possible means of defence, including the suspension of a treaty, in other words the non-fulfilment of treaty obligations. Their main aim, as set forth in draft article 3, was to preserve the stability of international law and the continuity of treaty relations in the event of an armed conflict, in other words, to preserve the principle of *pacta sunt servanda*.

37. While it was important to consider the issue of the illegal use of force and not to reward the aggressor, it was equally essential to maintain the right balance in a situation created by an armed conflict. In that respect it was unfortunate that no preamble had yet been drafted, as it could have defined the purposes of the draft articles. Even before its session in Helsinki in 1985, the Institute of International Law had set itself the task of considering the preamble to the resolution adopted at that session and of deciding on the main principles on which the resolution should rest and on the strategic aims of the exercise. He regretted that the Commission was similarly unclear about the form that the draft articles should ultimately take, which was not a matter of secondary importance since it had a bearing on the contents of the draft articles.

38. Mr. MELESCANU said that his position and that of Mr. Candiotti were not mutually exclusive. One of the primary objectives of the draft articles was to promote the application of the principle of *pacta sunt servanda*. In some cases, however, that fundamental principle must be tempered by the additional condition of *rebus sic stantibus*—that international treaties and agreements were to be observed unless some important change occurred. Aggression was the most obvious case in which an exception to the rule that treaties must be respected was permitted, on the grounds of a fundamental change of circumstances.

39. Mr. McRAE said that the report demonstrated the careful attention devoted by the Special Rapporteur to the comments of States on the draft articles as adopted on first reading. He himself generally agreed with the Special Rapporteur's analysis of those comments. He disagreed, however, with the suggestion by Mr. Murase and Sir Michael that draft articles 13 and 15 be replaced by a "without prejudice" clause. True, it might be difficult to determine whether a given act was one of self-defence or of aggression, but that was insufficient reason for omitting useful provisions from the text.

40. In the revised version of draft article 13, the addition of the words "[s]ubject to the provisions of article 5" was problematic. As the Special Rapporteur himself pointed out in paragraph 124 of his report, the effect of a reference to draft article 5 was uncertain. He himself would go further: the reference to draft article 5 suggested a hierarchy between draft articles 5 and 13. That changed the very nature of what draft article 5 said, which was simply that for certain treaties, the mere fact of armed conflict would not affect their operation. The actual wording, "will not as such", suggested not that the treaties were inviolable, but only that armed conflict alone did not affect their operation. There could be other reasons for the treaties not to continue in operation in the event of

armed conflict, however, and draft article 5 did not rule out that possibility.

41. Draft article 13 had a different objective, namely, to allow States to suspend treaties if they were involved in an armed conflict but were exercising the right of self-defence. It allowed them to suspend only a limited category of treaties—those that were incompatible with the exercise of the right to self-defence—that they could not otherwise suspend, perhaps including, depending on the circumstances, a treaty that fell within the scope of draft article 5. Thus, to make draft article 13 subject to draft article 5, the provision that purported to prevent suspension, would deprive draft article 13 of any real effect. For treaties that could otherwise be suspended in the event of an armed conflict, there was no need for the exception laid down in draft article 13. Indeed, one might argue that draft article 13 should be worded "notwithstanding draft article 5", to make it clear that the State's right to self-defence was not curtailed by draft article 5 in the event that a treaty that fell under draft article 5 impeded the exercise of that right.

42. There was another reason for deleting the words "subject to the provisions of article 5", and it related to the indicative list of categories of treaties referred to in draft article 5. If draft article 5 took priority over draft article 13, then the content of the indicative list took on particular significance. Yet as the Special Rapporteur pointed out in paragraph 124 of his report, the list was intended only to be indicative. He himself would have argued strongly from the start against having any list at all. To give some examples in the commentary was appropriate, but a list created expectations about the status of the categories on the list and of those that were not. If the words "subject to the provisions of article 5" were included in draft article 13, then the nature of the list changed still further. It became a list of treaties that were in some sense overriding, something that went beyond the intent of draft article 5. He accordingly urged that the words "subject to the provisions of article 5" be deleted.

43. With respect to draft article 15, he did not favour extending its scope beyond aggression to any use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. A reference to Article 2, paragraph 4, would raise the potential for considerable disagreement over what constituted a violation of that provision, thus creating uncertainty, and would broaden the scope of the draft article beyond the original intent. The advantage of the term "aggression" was that it was a more readily defined violation of Article 2, paragraph 4, as recent events had helped to show. He agreed with Mr. Kamto that the Commission could not ignore the amendment made recently to the Rome Statute of the International Criminal Court at the Review Conference of the Rome Statute in Kampala. Although, as Mr. Murase had pointed out, a definition of aggression for the purposes of criminal responsibility was not necessarily the same thing as a definition for the purposes of the current draft, the basic problem was the same, and it could be argued that the Kampala definition of aggression was relevant to the Commission's work on the effects of armed conflicts on treaties. That made the reference in draft article 15 to the Charter of the United Nations and to General Assembly

resolution 3314 (XXIX) problematic, however, as it did not cover the latest developments. On the other hand, it would be premature to cite the amendment to the Rome Statute of the International Criminal Court in the draft article. As a solution, he would suggest that draft article 15 simply make a general statement about aggression contrary to the Charter of the United Nations, and the commentary explain the evolution of the definition of aggression, including reference to General Assembly resolution 3314 (XXIX) and the results of the Review Conference of the Rome Statute in Kampala.

44. With regard to draft article 17, he preferred the more specific version, no doubt because of his background in common law as opposed to civil law, but he could go along if other members preferred the more general version.

45. Turning to issues addressed by the Special Rapporteur under "Other points raised by Member States and general issues", he said that he agreed that no special provision should be made for air transport agreements, even though in many instances they might continue in operation in the event of an armed conflict. However, that question again highlighted the problem of the indicative list in the annex to draft article 5. The list would continue to create controversy over which agreements should be included and which should not, inclusion implying a status that was different from non-inclusion.

46. On the question of whether there should be a special rule for internal armed conflicts, the Special Rapporteur seemed to suggest that a State involved in such a conflict could only suspend but not terminate its treaty obligations, or perhaps could only request their suspension, so that the other party to the treaty could veto the suspension of the agreement. Neither solution would be appropriate. While he agreed with Mr. Candioti that one of the objectives of the draft was to uphold the sanctity of agreements, another objective must be to deal with circumstances when their sanctity was not upheld. With the exception of cases when the treaty itself provided for the consequences of an armed conflict, the draft articles were intended to make it possible to suspend treaties when, in the light of the nature of the treaty and of the conflict, it was simply not possible for them to continue in operation. The Special Rapporteur had mentioned impossibility, and in a sense what the draft articles did was to recognize a particular form of impossibility, one that could arise in a State-to-State conflict just as much as in an internal conflict. He agreed with the Special Rapporteur that a State involved in an internal conflict could not use that as a pretext for abandoning its treaty obligations, but neither could a State involved in an international armed conflict do so. In each case, the principle of good faith applied. Thus, he saw no need to have a special rule for internal conflicts that would limit the State to suspension or to requesting suspension. The rights of that State in respect of treaties affected by an internal conflict that effectively rendered the operation of the treaty impossible should be the same as the rights of a State in respect of treaties affected by an international conflict.

47. In conclusion, he supported the referral of the draft articles to the Drafting Committee.

48. Mr. DUGARD said that he agreed with many of the points made by Mr. Murase on draft article 13. The Special Rapporteur appeared to have been unduly influenced by the 1985 resolution of the Institute of International Law. There had been a number of important developments since 1985 in respect of international humanitarian law and the use of force. States had presented new arguments in favour of extending the scope of Article 51 of the Charter of the United Nations, rendering its content more uncertain than in the past. For that reason, it would be wiser simply to deal with the use of force in a "without prejudice" clause. That might also help to overcome some of the difficulties raised by Mr. McRae regarding the relationship between draft articles 5 and 13.

49. With regard to draft article 15, it was difficult to know whether it was wiser to refer to the prohibition of the use of force under Article 2, paragraph 4, of the Charter of the United Nations, to aggression or to both. There were words in the vocabulary of international law that were highly evocative and emotional in content: genocide, terrorism and aggression were among them. While the resolution adopted at the Review Conference of the Rome Statute in Kampala was an important development, General Assembly resolution 3314 (XXIX) had been and remained highly controversial. It might be many years before the International Criminal Court, through its jurisprudence, gave substance to the definition of aggression. Indeed, many believed it should confine itself to prosecuting persons for war crimes and crimes against humanity and not deal with the crime of aggression at all. Although he understood Mr. McRae's criticism of the idea of referring to the use of force, it was nevertheless more clear-cut, less emotional and preferable to a reference to aggression.

50. Draft articles 14 and 17 were useful and necessary, but he was not sure the same was true of draft article 16. It raised the question of what remained of the once-substantial law of neutrality, since the Charter of the United Nations in Article 2, paragraph 6, required Member States and even non-Member States in certain circumstances to comply with the directives of the Security Council.

51. Lastly, on the question of the extent to which the draft articles should apply to internal armed conflicts, he thought they should: the object of the exercise was to cover both internal and international armed conflicts. The title of the topic and the definition in draft article 2 certainly made that clear. He agreed with Mr. McRae that each situation had to be judged on its own merits to determine whether a departure from draft article 3 was warranted. He accordingly opposed the Special Rapporteur's suggestion in paragraph 162 of his report that a special rule for non-international armed conflict be inserted in the draft.

52. Mr. CAFLISCH (Special Rapporteur) said that there was no doubt that the draft articles as they stood were applicable to both international and internal armed conflict. However, several States had asked whether those two types of armed conflicts had the same effects on treaties. As Special Rapporteur, he had the duty to draw attention to such questioning, but he had taken no position on the matter. He simply wished to know the Commission's views on that point.

53. Mr. WISNUMURTI, speaking as a member of the Commission, said that in paragraph 119 of the report, the Special Rapporteur pointed out the link between draft article 13, on what the attacked State could do, and draft article 15, on what the aggressor State could not do. He himself agreed with the Special Rapporteur's suggestion that the link should be highlighted in the commentaries to the two draft articles. One Member State had suggested that, like article 7 of the resolution of the Institute of International Law, draft article 13 should contain a reference to a determination by the Security Council that an attacked State exercising the right of self-defence was an aggressor. He agreed with the Special Rapporteur's position that the Commission should not follow that suggestion. The inclusion of a reference to the Security Council would be inconsistent with and superfluous to the provision in draft article 13 that, as a condition for the right to suspend the operation of a treaty, a State must exercise its right of self-defence in accordance with the Charter of the United Nations. He agreed that a reference to article 5 should be added to draft article 13 and endorsed the revised draft article 13 that appeared in paragraph 127 of the report, although he agreed with Mr. McRae that the word "notwithstanding" would be preferable to "subject to".

54. With regard to draft article 15, he disagreed with the suggestion by some Member States that the reference to General Assembly resolution 3314 (XXIX) be deleted. The definition of aggression contained in the resolution had been adopted by consensus following lengthy negotiations during the difficult period of the Cold War. Moreover, retaining a reference to the definition of aggression provided clear and necessary criteria for the Security Council in determining whether a State was an aggressor. He had difficulty with the idea, referred to in paragraph 139 of the report, that the scope of the draft article should be expanded by referring to a State that was unlawful rather than to a State committing aggression. To make the unlawful use of force a defining element in draft article 15 would raise the prospect of differing interpretations and deprive the draft article of the specificity that the reference to a State committing aggression provided. For those reasons, he favoured the retention of draft article 15 as adopted on first reading²⁴⁶ and as reproduced in paragraph 140 of the report, with the deletion of the words in square brackets in the title and in the body of the text.

55. He agreed with the view expressed by the Special Rapporteur in paragraph 146 of the report that the "without prejudice" clauses in draft articles 14, 16 and 17 should not be expanded to include provisions on the duty to respect international humanitarian law and human rights. Such an addition would not only water down the substance of the draft articles, it would also digress from the main thrust of the project. He agreed to the retention of draft article 14 as adopted on first reading. He had no problem with the wording of draft article 16. With regard to draft article 17, he endorsed the suggestion to add a new subparagraph referring to "the provisions of the treaty" as additional grounds for the termination, withdrawal or suspension of a treaty. That would be consistent with article 57, subparagraph (a), of the 1969 Vienna Convention and would complement the existing elements of draft article 17. He disagreed with the suggestion to

replace draft article 17 with a more abstract text referring to international law, and he accordingly endorsed the first version of draft article 17 proposed in paragraph 150 of the report instead of the alternative general formulation.

56. Concerning the scope of the draft articles, it had been suggested that once the text had been completed, consideration should be given to the possibility of extending it to cover treaties to which international organizations were parties. He had already expressed his reservations about that suggestion when the question had been discussed earlier by the Commission.

57. In paragraph 161, the Special Rapporteur referred to the comment by a Member State that, except in cases of impossibility of performance as stipulated in article 17 of the present draft articles and article 61 of the 1969 Vienna Convention, a State could not abandon its treaty obligations by reason of an ongoing internal conflict. He himself agreed with that comment. However, a State engaged in an internal conflict might face an unusual situation in which it was temporarily unable to meet the obligations of a treaty and needed to suspend—if not to permanently terminate—the operation of the treaty. That situation needed to be accommodated. He therefore welcomed the wording proposed in paragraph 162 of the report, to be incorporated in draft article 8.

58. Lastly, the Special Rapporteur recalled the need for the Commission to consider the form to be given to the draft articles. In view of the importance of the draft articles in the quest for legal certainty in situations of armed conflict, it was essential that the draft articles be transformed into a convention. With those comments, he agreed that the draft articles should be referred to the Drafting Committee.

The meeting rose at 11.45 a.m.

3060th MEETING

Wednesday, 7 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to pursue their consideration of the Special

²⁴⁶ *Yearbook ... 2008*, vol. II (Part Two), chap. V, sect. C.2, p. 62.