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Summary record of the 2837th meeting

Topic:
Effects of armed conflicts on treaties

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have received more information on those matters. He was dismayed not to have found replies to those preliminary considerations in the report, which failed to provide either a method, an approach, a definition of the subject or a discussion of the issues.

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

[Agenda item 1]

72. The CHAIRPERSON said that if he heard no objection he would take it that the Commission wished to establish a Working Group on Transboundary Groundwaters.

It was so decided.

73. The CHAIRPERSON invited members who wished to participate in the Working Group to inform the Special Rapporteur on the topic of their interest.

74. He announced that it had also been proposed to hold a joint meeting of the Commission and the European Society of International Law on 27 May 2005 at 3 p.m., on the subject of the responsibility of international organizations. More than 100 members of the Society, including its president, Judge Simma, proposed to attend. Preliminary arrangements had already been made for that important event. If he heard no objection he would take it that the Commission agreed to the holding of that meeting.

It was so agreed.

The meeting rose at 12.45 p.m.

2837th MEETING

Thursday, 12 May 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/552 and A/CN.4/550 and Corr.1–2)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOSKENNIEMI commended the Special Rapporteur for preparing a comprehensive set of draft articles which gave an overview of the topic and placed the

* Resumed from the 2834th meeting.

articles in the public domain so as to elicit practical comments from Governments.

2. Like Mr. Gaja, he had initially been surprised at the peremptory tone of some of the Special Rapporteur's statements. In the introduction, after introducing four theories without explaining where they came from, the Special Rapporteur declared, in paragraph 6, that they were not of great assistance. Later, in paragraph 20, he said that the decisions of municipal courts were "not of much value". In paragraph 64, he spoke of "the available material, which is substantial", but gave no further details. However, the most striking statement was the one in paragraph 16, where he said: "There can be no doubt that the work of the Commission will be much delayed if a high level of sophistication is sought." The Special Rapporteur was clearly relying on his readers' willingness to take him on faith. He had undoubtedly rendered a great service to the Commission by submitting such a clear and forceful draft, but the Commission needed to decide if it was fully acceptable before sending it to the Drafting Committee.

3. It was unfortunate that whenever it approached a new topic the Commission did not give greater consideration to the overall direction of its work. It might ask, for example, what alternative solutions there were to the question of the effects of armed conflicts on treaties, what the repercussions of such alternatives might be in specific situations, such as the Israeli–Palestinian conflict, and what issues were at stake. All those points deserved to be discussed; otherwise the work of codification was in danger of being reduced to the drafting of a collective work on the law of treaties. That comment was not a criticism of the Special Rapporteur but was directed at the Commission's general methods of work.

4. The main problem was that an armed conflict was such a major, overwhelming event that when one occurred, the fate of treaties was of secondary importance. It was unlikely that those willing to breach the prohibition of the use of force would be impressed by a few rules on treaties. Moreover, against a background of death and destruction, formalism was out of place. The Commission needed to be both realistic and very sensitive if it expected compliance with the rules under consideration.

5. He had initially thought, like most members who had spoken before him, that the concept of "intention" was as general as the concepts of "reasonableness" or "equity", and that it was not a very useful one for jurists whose task was to determine what would become of a given treaty. On reflection, however, he thought that the reference to the fiction of intention actually made it possible, by introducing some flexibility, to take the context of a given situation into account and, consequently, to preserve the realism and effectiveness that had been mentioned.

6. According to draft article 4, paragraph 2 (b), draft article 5 and draft article 7, paragraph 1, intention was to be determined on the basis of the nature of the armed conflict, the express provisions of the treaty, and the object and purpose of the treaty. A list of examples of treaties that should remain in force was given in draft article 7, paragraph 2. That was the most important provision, as it provided the basis for any hypothesis about intention.

However, it was unclear why some treaties were on the list and others were not. An explanation was needed. In seeking one, three elements could be considered: the interests at stake, specific real-life cases and the historical development of doctrine. Clearly, a more thorough discussion of the direction the study should take would be useful.

7. He wished to make some specific suggestions: he first wished to know how the question of the use of force, which arose in connection with draft articles 10 and 11, could possibly be avoided. In paragraph 122, the Special Rapporteur said that it was not dealt with because illegality could not be determined, but that was not always true, which made it no different from other auto-interpretative rules. He agreed with the distinction drawn by Mr. Pellet between the effects of international armed conflicts and those of internal armed conflicts. The interests at stake were indeed quite different and, in the case of internal conflicts, the key issue was treaties involving third States. As Mr. Pellet had suggested, the possibility of partially terminating or suspending treaties in certain situations should be considered. In that respect, too, closer attention should be paid to the specific context in each case.

8. Mr. PELLET said that, in the first place, he certainly did not claim to have been the first to draw a distinction between the effects of internal conflicts and those of international conflicts; that distinction was in fact mentioned in the report, and he agreed with it. In the second place, he was not really sure there was much point in delving further into the “historical/doctrinal” aspect of the question. He did agree, however, that a casuistic approach must be followed in order to give due weight to the actual context in which problems arose and had been solved.

9. Mr. CHEE asked how treaties, which were international instruments, could be related to internal affairs.

10. Mr. PELLET replied that internal events could obviously have an impact on international instruments. Moreover, in keeping with what had been expressly stated when the topic had been adopted, the report itself said that the Commission would consider internal as well as international conflicts (paras. 17–18).

11. Mr. BROWNLIE (Special Rapporteur) said that he had distinguished four theories in paragraph 5 of his report only after going through a wealth of literature on the topic. One of the *raisons d’être* of a special rapporteur, it seemed to him, was precisely to save the Commission time by attempting to synthesize existing writings on the topic. Although the questions raised by the topic under consideration might not have been resolved, they certainly had not been ignored. That said, producing a synthesis did lead one to state generalities. He agreed that context was important, but one of the problems that arose was the wide range of armed conflicts, which predated by far the contemporary problem of foreign interference that turned some internal conflicts into semi-international conflicts. The range of conflicts itself affected the context, making it more difficult to legislate for every case. The references to the concepts of intention, object and purpose were therefore generalities, but it was very difficult to move from the general to the particular.

12. Mr. MATHESON agreed with the Special Rapporteur’s desire to encourage continuity of treaty obligations in cases of armed conflict where there was no real need to suspend or terminate them. Also, where treaty obligations did not continue, the presumption should be that they had been temporarily suspended rather than terminated. Such a complex topic should not, however, be reduced to categorical general rules. The effect of a conflict on treaties would depend more on the provisions of the treaty concerned and on the specific circumstances than on general rules. It would be better to set out the considerations that States needed to take into account rather than lay down definitive rules that they must always follow.

13. With regard to draft article 1, he wondered whether the draft articles as a whole should not also cover treaties to which international organizations were parties. With regard to the definitions, and particularly to draft article 2, subparagraph (b), he said that, while it was true that it was not the Commission’s task to redefine the concept of armed conflict, it might be useful to simplify the proposed text, which as it stood might not apply to situations that fell outside the ordinary definition of armed conflict, such as acts of terrorism.

14. He agreed with the idea in draft article 3 that the outbreak of an armed conflict did not necessarily terminate or suspend treaties. As drafted, however, the article applied only to the operation of treaties between parties to the conflict or between those parties and a third State. The article could perhaps be applied to treaties between third States or between States and international organizations. It might suffice simply to say that the outbreak of an armed conflict did not necessarily terminate or suspend the operation of any treaty.

15. With regard to draft article 4, he shared the concerns expressed by Mr. Gaja and Mr. Pellet. When the intention of the parties could be ascertained from the text or from the negotiating record, it should be carried out. However, the intention was not usually expressed clearly, and so it was necessary to consider other factors, including the object and purpose of the treaty, the nature of the specific provisions in question and the particular circumstances of the conflict. It would therefore be preferable to acknowledge that fact directly in draft article 4 rather than to assume that the parties always had an intention that needed only to be discovered or that could be presumed.

16. Although the provisions of draft article 5 appeared obvious and superfluous, it would be desirable, for the sake of clarity, to retain them. There was also another important point to be made about the treaties and rules that were expressly applicable in cases of armed conflict. As the ICJ had pointed out in its advisory opinion on the *Legality of the Threat or Use by a State of Nuclear Weapons*, certain human rights and environmental principles did not cease to apply in times of armed conflict, but their application was determined by the applicable *lex specialis*, namely, the law governing the conduct of hostilities.

17. Draft article 6 did not need to be included, as its provisions could be reflected in the commentary on draft article 3.

18. Draft article 7 was the most problematic and most complex of the draft articles, and even the Special Rapporteur was not sure it was necessary. He personally had serious doubts as to whether it was possible or desirable to attempt to designate categories of treaties whose object and purpose involved the necessary implication that they continued in operation during an armed conflict. First, treaties did not fall into neat categories. Second, some provisions of a treaty might by their very nature be subject to suspension during an armed conflict, while other provisions might not. Third, even with respect to particular types of provisions, the language of a treaty and the intention of the parties might well differ from one treaty to another. Fourth, State practice was not very consistent and provided no clear-cut answers as to whether a category of treaties could be suspended or terminated. There were gradations in the applicability of different categories of treaties. Fifth, any attempt to categorize treaties in such a way could lead to such a prolonged and contentious debate that it might not be possible to reach consensus in the Commission or among States. In short, it would be better to list the factors that might lead towards one conclusion or another, such as the degree to which the treaty provisions in question interfered with the requirements of armed conflict, the particular circumstances of conflicts that might lead to one outcome or another, and the importance of continuity when such fundamental values as the protection of human rights were involved. Moreover, State practice and the decisions of international tribunals could be summarized in the commentary.

19. With regard to the categories of treaties listed in paragraph 2 of draft article 7, he thought that the first one, in subparagraph (a), was unnecessary, as the matter was already covered by draft article 5. The second category, in subparagraph (b), was somewhat ambiguous. For example, it raised the question of which rights and obligations were “permanent” and which were tantamount to a “regime” or “status”. Furthermore, some provisions of treaties of that type might be incompatible with the obligations and rights of States under the law of armed conflict and might need to be temporarily suspended for that reason. The third category, in subparagraph (c), was a good example of treaties that contained provisions that ordinarily could and should continue during an armed conflict, such as those relating to the personal status and property rights of foreign nationals, while others might need to be suspended in certain circumstances, such as those relating to the regulation of navigation and commerce between the States parties to a conflict. The sources cited by the Special Rapporteur seemed to focus on specific types of provisions rather than on the treaties as a whole. In the memorandum by the Secretariat, such treaties were considered as not having a high likelihood of applicability (A/CN.4/550, paras. 70–75).

20. Treaties for the protection of human rights belonging to the fourth category, in subparagraph (d), were among those that would probably continue to apply. However, the ICJ had made it clear that human rights must be applied in accordance with the law of armed conflict.

21. In contrast, the presumption of continuity was not high in the case of treaties belonging to the fifth category, in subparagraph (e). The memorandum by the Secretariat

suggested that some environmental principles would generally apply in times of armed conflict, while others would not (paras. 58–63). There did not seem to be a general presumption of continuity for all treaties related to the protection of the environment.

22. With regard to treaties in the sixth category, in subparagraph (f), the scholarly opinion cited by the Special Rapporteur showed that the operation of such treaties could be partially suspended, subject to revival on the restoration of peace. State practice in that area was contradictory, and he had serious doubts as to whether there could be a general presumption of continuity for treaties related to international watercourses and related installations and works, given that it might be imperative in wartime to prevent or restrict air and sea traffic to or from an enemy State.

23. With regard to multilateral law-making treaties, in subparagraph (g), both the Special Rapporteur and the Secretariat (paras. 47–51) considered that there was a reasonable basis for continuity, though both recognized that State practice was not entirely consistent and that there were many examples of suspension or partial application of such treaties in wartime. It was, moreover, difficult to determine what constituted a “law-making” treaty, since all treaties created law.

24. To sum up, he said that it would be far more useful to identify the factors that would indicate continuity or the lack thereof and to supplement that exercise with an analysis of State practice in various areas.

25. With regard to draft article 9, he agreed that the Commission should favour the resumption of suspended treaties when the reasons for the suspension no longer applied. If draft article 4 was changed to reflect factors other than intention, draft article 9 would need to be revised accordingly.

26. As far as draft article 10 was concerned, it was incorrect to say that the incidence of termination or suspension of a treaty was not affected by the legality of the conduct of the parties. Where a State was exercising legitimate self-defence or complying with decisions taken by the Security Council under Chapter VII of the Charter of United Nations, the result might be, in some circumstances, the suspension of treaty provisions. That point could be made in the form of a savings clause or in the commentary, but for the time being the Commission should not attempt to define the scope of self-defence or the authority of the Security Council.

27. Lastly, he supported the reiteration in draft article 13 of the rules of the 1969 Vienna Convention, which might be triggered in appropriate circumstances by the outbreak of an armed conflict. In general, the Commission should analyse State practice more closely before drawing conclusions. It should therefore encourage Governments to provide more information on their practice and their views on the topic before it formulated definite rules.

28. Ms. ESCARAMEIA thanked the Special Rapporteur for his clear and comprehensive report and the Secretariat for its memorandum, an excellent compilation

of sources that ought to be published. She had found it difficult to comment on the report owing to the comprehensive scope of the topic, the Special Rapporteur's vast knowledge of it and his innovative approach of submitting a complete draft to test the general reaction of the Commission and of States. However, the report erred by omitting certain distinctions, thereby oversimplifying the situations contemplated. For example, distinctions should have been drawn between: the effects of armed conflicts on the parties to the conflict and the effects on third States; situations involving the suspension, termination or continuation of treaties during armed conflict; the effects of international and internal conflicts, both of which must be covered; the effects on different provisions of the same treaty; rights of an aggressor State and those of a State acting in self-defence or in compliance with a Security Council resolution on the use of force, as had been done in articles 7 to 9 of resolution II/1985 adopted by the Institute of International Law.¹

29. The relationship of the draft to the law of treaties, the law of war and the law of State responsibility was also problematic. She did not fully understand the Special Rapporteur's reasons for situating the draft articles in the context of the law of treaties rather than the law of war—that had not been the Commission's intention in article 73 of the 1969 Vienna Convention—unless he was simply reaffirming the old-fashioned theory that war was nothing more than a situation of total anarchy. Yet the legality of a war and the position of the party in question mattered. In the context of the law of treaties, consideration must be given to the relationship between the draft articles and the provisions of the 1969 Vienna Convention, in particular those on supervening impossibility of performance (art. 61), fundamental change of circumstances (art. 62), and even severance of diplomatic or consular relations (art. 63) and perhaps termination or suspension as a consequence of breach of a treaty (art. 60). Reference was made to those provisions in draft article 13, but more detail was needed.

30. She also had difficulties with the Special Rapporteur's choice of the criterion of the intention of the parties, which in most cases amounted to the presumed intention of the parties, a vague and subjective notion. For example, she wondered why a State conducting an illegal war of aggression would be allowed to terminate a treaty and benefit therefrom. Such a situation could arise if the Commission adopted the criterion of the intention of the parties. Some members felt that that criterion, which was stated in draft article 4, was further developed in draft article 7, which considered the object and purpose of treaties. In her opinion, however, articles 4 and 7 dealt with quite different criteria. Article 7 actually set as criteria the nature of the treaty and the type of conflict, and provided a list of categories of treaties that would continue to apply during armed conflicts. If any general criterion ought to prevail, it would probably be the notion that, in principle, the provisions of treaties would continue to apply depending on their viability, taking into account the existence of an armed conflict and the party's position regarding the legality of the conflict.

¹ See 2834th meeting, footnote 7.

31. She preferred the definition of armed conflict used in the *Tadić* case to the one contained in draft article 2, subparagraph (b), because the former more easily encompassed all problems stemming from civil wars as well as international wars, thereby avoiding difficulties involved in distinguishing between those two types of conflicts. The definition should be preceded by the words "For the purposes of this Convention" in order to avoid discussions of the definition of armed conflict; there should also be a reference to situations of occupation, even if the occupation met with no armed resistance, as stipulated in article 18 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.

32. Draft article 4 posed problems not only insofar as the criterion of the intention of the parties was concerned but also with regard to any general criterion such as the nature or object and purpose of a treaty. A treaty's susceptibility to termination or suspension would depend on the armed conflict in question and many other circumstances, such as the legality of the party's position or the treaty provisions at stake.

33. Draft article 6, on treaties relating to the occasion for resort to armed conflict, likewise seemed to depend on many particular circumstances, and more explanation and examples would be welcome.

34. The status of the treaties listed in article 7 would also seem to vary depending on the circumstances, with the exception of treaties that were expressly applicable. However, certain treaties must always apply: the intention of the parties could not prevail over *jus cogens*, several non-derogable human rights treaties or certain general provisions relating to environmental protection.

35. The best solution would be to establish a working group. Some non-controversial articles, however, such as articles 1 to 3, 5 and 13, could be submitted to the Drafting Committee immediately.

36. The CHAIRPERSON, speaking in his personal capacity, noted that the decision of the International Tribunal for the Former Yugoslavia in the *Tadić* case contained a definition of internal armed conflict that was nearly identical to the definition contained in article 8 of the Rome Statute of the International Criminal Court. He preferred the definition proposed by the Special Rapporteur, which was sufficiently broad to encompass both internal and international conflicts.

37. Mr. DUGARD said that there ought to be some mention of the development of international criminal law. He asked the Special Rapporteur whether he intended to enter into the debate on the legality of the use of force, which would oblige the Commission to undertake a definition of aggression, or whether he preferred not to address that question.

38. Mr. BROWNLIE (Special Rapporteur) said that he had tried to carry out his mandate as Special Rapporteur. Draft article 10 should be viewed as a kind of intellectual provocation, which had indeed been successful. He had no intention of avoiding any kind of debate. The list in

article 7 had been submitted to stimulate discussion by the Commission.

39. Ms. ESCARAMEIA thanked the Chairperson for his intervention regarding the definition of armed conflicts but said that she supported the broader definition of *Tadić's* Appeal Chamber of 1995 (para. 70), which covered both internal and international conflicts.

40. Mr. PELLET said he was surprised that the Special Rapporteur claimed not to be taking a position on the inclusion of civil wars in the current topic, since in paragraph 17 of his report he indicated that the definition of armed conflict and the report itself covered both internal and international conflicts. That seemed to him to be very important, if only because the distinction between the two types of conflicts was often blurred. Furthermore, the Commission could not avoid dealing with the issue of the legality of armed conflicts, although that did not mean that it had to undertake to define what was legal or what constituted aggression. It simply had to consider what effects aggression would have on treaties.

41. Mr. BROWNLIE (Special Rapporteur) recalled that recent doctrine, including the report by the Institute of International Law, drew an important distinction between internal and international conflicts.

42. Mr. Sreenivasa RAO said that he agreed with many of the views expressed by the Special Rapporteur in his first report, in particular the view that the Commission must not engage in a futile and time-consuming attempt to produce a general definition of the term "armed conflict". There were situations in the contemporary world in which it was impossible to distinguish clearly what constituted an armed conflict from what did not. That was a debate that the Commission could do without, and draft article 2 was a step in the right direction, even if the proposed definitions could certainly be refined and developed. The threshold set—the nature and extent of the conflict—was not the only possibility and should be more fully explained in the commentary. Furthermore, the distinction made in terms of the treaty relationship between the parties to the conflict on one hand and between those parties and third States on the other was very important and should be retained. Some members of the Commission, including Mr. Gaja and Mr. Pellet, had suggested that the draft articles should also cover the relationship between the parties to a conflict and international organizations. While he could see the merits of that proposal, he would be reluctant to accept it because such relationships were always treated separately, both in the law of treaties and in the law of State responsibility, not to mention the fact that including that aspect would delay completion of the work on the topic.

43. There was also a need to analyse the types of effects of armed conflicts that would be dealt with in the draft articles. Many had been identified in the Secretariat memorandum, and Mr. Pellet had likewise mentioned several. It would also be useful to state at the outset that the draft articles applied only to treaties in force at the time of the armed conflict and to distinguish between the termination or suspension of treaties as a result of an armed conflict and what might be called "impossibility of performance".

44. Another question that required the Commission's attention was whether an armed conflict could automatically serve as a ground for the termination or suspension of a treaty or whether additional criteria relating to a fundamental change of circumstances, as provided for in the 1969 Vienna Convention, was necessary. The extent to which State responsibility or liability would be incurred if a treaty was terminated or suspended as a direct result of an armed conflict should also be addressed.

45. Some members of the Commission had suggested that if a third party, such as the Security Council, determined that one of the parties in an armed conflict had engaged in the unlawful use of force, then the other party was automatically considered to have lawfully exercised its right to self-defence. In such a scenario, the responsibility of the offending State would be incurred not only for the wrongful use of force but also for the termination or suspension of any treaties in force. In the real world, however, it was difficult to pass judgment on the legality of conflicts, and the Security Council rarely made any such pronouncements. He wondered how one could evaluate claims of State responsibility in such grey areas. It might be useful to elaborate other provisions to cover the situations mentioned by Mr. Economides and Mr. Pellet.

46. The list of categories of treaties in draft article 7 was fairly standard. He supported the inclusion of treaties relating to the protection and preservation of the environment. As to whether internal armed conflicts ought to be included in the draft, he agreed with the Special Rapporteur and other members that they should, but believed that the effects of international and internal conflicts should be clarified.

47. Turning to the central theme of the draft articles, he wondered what criteria should be used to decide which treaties would be presumed to survive an armed conflict: the intention of the parties, the object and purpose of the treaty, or the nature of the treaty itself. There should not, however, be any presumption of automatic termination or suspension in the event of an armed conflict. It was also clear that in the context of the negotiation of treaties, whether bilateral or multilateral, the parties rarely included provisions indicating their intention regarding the operation of the treaty in the event of an armed conflict. Accordingly, a combination of approaches or hypotheses, as suggested by Mr. Pellet and other members of the Commission, seemed advisable.

48. Having concluded his general remarks, he requested clarification on draft article 6 (Treaties relating to the occasion for resort to armed conflict), which seemed to imply that even when the substance of a treaty was in dispute and an armed conflict was a direct result of that dispute, the treaty was presumed not to be terminated unless the contrary intention of the parties was clearly established. The very existence of an armed conflict indicated that at least one of the parties did not agree with the substance of the treaty or its continued applicability. Under those circumstances it might be impossible to obtain the agreement of both parties to the conflict unless the dispute involved only the interpretation of the treaty and not its validity. The parties could disagree on the continuance of a treaty or of some of its provisions due to a change in

circumstances because the historical circumstances that had justified the conclusion of the treaty were no longer valid or because the treaty had been concluded under duress, for example in the context of occupation or colonial domination. Armed conflict could result from those situations, and the entire treaty or parts thereof would have to be renegotiated. The Commission must decide how to address such situations in the draft articles.

49. He hoped that the Commission would move forward in its work, preferably within the context of a working group, with a view to adopting a draft instrument on first reading at its next session.

50. Mr. KOLODKIN thanked the Special Rapporteur for having submitted a complete set of draft articles at the outset, which was unusual and most useful. He also thanked the Secretariat for its very useful memorandum, which had provided him with much additional background on the topic at hand.

51. He suggested that it might be preferable not to deal with issues relating to the lawful or unlawful use of force in the draft articles. That would be possible if the Commission took the approach that armed conflict directly and automatically had effects on international treaties. In that case, knowing which of the parties to the conflict had violated international law by using force and which had acted lawfully in exercising its right to self-defence would be of no importance. It would appear, however, that the Special Rapporteur had taken another approach. According to draft article 3, the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of a treaty, which meant that it did not automatically have an effect on the treaty. If that was the case, then the status of the treaty depended also on the subsequently declared intentions of the parties to the treaty, who were often parties to the conflict. Obviously, it would then be legally possible for the State which had unlawfully used force and the State which had exercised its right of self-defence to find themselves in the same situation and enjoying the same rights with regard to the treaty that bound them. However tempted the Commission might be to exclude the effects of the legality of the use of force on treaties from its consideration of the topic, it could not do so unless, of course, it based its discussions solely on the rule of the automatic effects of armed conflicts on treaties. Yet that rule could not be included in the draft articles in that, at least as an absolute concept, it no longer existed. In that connection he drew attention to articles 7 to 9 of resolution II/1985 on that subject adopted by the Institute of International Law.

52. One might wonder, however, whether it was possible to totally reject the existence, even if only in a few specific cases, of direct automatic effects of conflicts on treaties. Although he had no firm opinion on that issue, he tended to believe that in certain cases it was nevertheless possible to say that an armed conflict would, by its very nature, automatically suspend, at the very least, the operation of an international treaty. That might happen in the case of a demarcation treaty or a treaty establishing a political union, or even just certain provisions of a treaty. In that regard, he recalled the conclusions drawn in paragraphs 162 and 163 of the Secretariat memorandum, which merited consideration.

53. Although draft article 3 did not state that it was an armed conflict *per se* but the outbreak thereof that did not *ipso facto* lead to the termination or suspension of the operation of treaties, he could not accept that formulation as a general rule. While such a position might be deduced from doctrine and judicial decisions, even though the latter were extremely diverse, it was not borne out by practice in the area of peace treaties between States. In any case, he would prefer that, as the Special Rapporteur had suggested in paragraph 28 of his report, if the Commission wished to retain the introductory part of draft article 3, the expression "*ipso facto*" should be replaced by the word "necessarily".

54. As had already been noted, the draft articles did not distinguish between situations in which both parties to a conflict were also parties to a treaty, and situations involving a treaty to which a State involved in a conflict and a third State were both parties. There were, however, objective reasons for making such a distinction. Political relations and, in particular, treaty relations between parties to a conflict could not as a rule be the same as the relations between a State that was involved in a conflict and a State that was not party to that conflict. In the former case one generally referred to temporarily hostile relations, whereas in the latter case relations could continue to be entirely normal, and could even go as far as to constitute an alliance. Naturally, the effects of an armed conflict could be identical in both those situations, as for example when the object of a treaty disappeared as the result of a conflict, or when for other reasons it became impossible for a treaty to operate between the parties to a conflict and also between a party to the conflict and a third State. However, that did not justify failing to make a distinction between those two situations as a general rule. He agreed with Mr. Gaja that the effects of armed conflicts on treaties between a party to a conflict and a third party could be considered in the context of the provisions of the 1969 Vienna Convention, in particular articles 61 and 62.

55. The effects of a non-international armed conflict on international treaties could likewise be considered in the context of the provisions of the 1969 Vienna Convention. He was not convinced that the effects of such armed conflicts should be considered in the context of the current topic. In any case, those effects could not be identical for objective reasons. An international armed conflict directly and inevitably affected the relations between the States parties to the treaty who were also parties to the conflict. Although, as had been stated, the distinction between international and non-international armed conflicts had become blurred, that was true above all with regard to the observance of humanitarian principles and international humanitarian and human rights law in the context of such conflicts.

56. If the draft articles under consideration must contain a definition of the notion of "armed conflict" it should be the one put forward by the Special Rapporteur, who in paragraph 21 of his report described his definition as contextual. Without wishing to go into detail, he wondered whether it was really necessary to define armed conflict. Many universal treaties that used the term "armed conflict" did not define it.

57. He wished to associate himself with those members of the Commission who had expressed doubts about basing the susceptibility to termination or suspension of a treaty in case of an armed conflict on the criterion of the intention of the parties to a treaty at the moment the treaty was concluded (draft art. 4). It would be more appropriate to refer to the object and purpose of the treaty or to its nature or substance. The Commission must consider the issue of whether to deal with the effects of conflicts on treaties in general or the effects of a conflict on specific provisions of a treaty or even the effects of a conflict on a treaty as a whole and/or on certain of its provisions. The Commission would also have to consider the issue from the point of view of the separability of treaty provisions. In that connection he commended the Secretariat memorandum and drew attention in particular to chapter VI of that document, which dealt with the relationship of the topic to other legal doctrines.

58. He considered the draft articles to be primarily expository in nature. It would not be appropriate at the current stage to refer all or even some of the draft articles to the Drafting Committee. The objective of the report and of the comments by Commission members which would be reproduced in the Commission's report was to elicit interest and reactions from States. The questions which members might put to Governments and, of course, the latter's responses would have a great influence on the Commission's future work on the topic.

59. The CHAIRPERSON, returning to the issue of the legality of the use of force, said that draft article 10 did not really deal with that question. He wondered whether that article did not in fact tend to favour the belligerent State, which might be tempted to resort to the use of force in order to void a treaty it was having difficulty applying.

60. Mr. BROWNLIE (Special Rapporteur) said that the wording of draft article 10 was somewhat provocative but nevertheless should be kept within certain limits. He believed it would be possible to find a middle ground between the current text and the position of members who would like the Commission to codify the legitimate use of force. As Mr. Kolodkin and others had pointed out, the issue of legitimate self-defence must be addressed, possibly in a specific provision.

61. Mr. DAOUDI said the issue of the aggressor State remained unresolved.

62. Mr. ECONOMIDES said the central issue was whether the Commission should deal with that question without taking into account the new situation introduced by the Charter of the United Nations or whether it should in fact deal with the Charter. The international community would never understand why the Commission might choose to disregard the Charter. An aggressor State and a State acting in self-defence could not be placed on the same footing. The Commission had an obligation to differentiate between the two, the issue being to define what the consequences of that distinction should be. He believed that an aggressor State should not have the right to suspend any treaty whatsoever, whereas a State acting in self-defence had the right to suspend only treaties

whose provisions were not compatible with its exercise of the right of self-defence.

63. Mr. GAJA wondered if the question raised by Mr. Kolodkin and others as to whether an armed conflict would affect certain provisions of a treaty more than the treaty as a whole had not already been dealt with in draft article 8, in the light of the reference contained therein to articles 42 to 45 of the 1969 Vienna Convention.

64. Mr. BROWNLIE (Special Rapporteur) said that that was indeed the case. The issue of the separability of the provisions of a treaty, which had been examined at greater length in the Secretariat memorandum, should surely be included in the draft articles in some form or another.

The meeting rose at 12.50 p.m.

2838th MEETING

Friday, 13 May 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/552 and A/CN.4/550 and Corr.1-2)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA congratulated the Special Rapporteur on his excellent report (A/CN.4/552), which was an intellectual *tour de force*, and expressed appreciation to the Secretariat for its useful memorandum (A/CN.4/550 and Corr.1-2).

2. Referring first to the report's conceptual framework and the approach to the subject, he said that the terms "armed conflicts", "treaties" and "effects" posed semantic and conceptual problems with regard to their definition, classification, consequences and scope *ratione personae, materiae, temporis* and *loci*. Following on from that, and more fundamentally, was the question of the link with positive international law and/or the prospects for the progressive development of law in respect of each of those elements.

3. With regard to the term "armed conflict", the questions that arose included whether it had a universally established and recognized definition; how positive