Document:-
**A/CN.4/2838**

# Summary record of the 2838th meeting

Topic:
**Effects of armed conflicts on treaties**

Extract from the Yearbook of the International Law Commission:-
**2005**, **vol. I**

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.*

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## 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. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

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### 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

international law currently stood on the matter; what relation there was between "armed conflict" and related terms such as "war", "state of war", "hostilities" and "armed operations"; whether the terms could be systematized; and what the significance was of the distinction between "international armed conflict" and "internal armed conflict" in the light of the nature of contemporary armed conflict, and the forms it took.

4. As to the term "treaty", although there was no real problem of definition, it might prove difficult to elaborate a clear and generally accepted classification. He also noted that the 1969 Vienna Convention did not contain any definition of the term "effects".

5. It might also be asked whether the focus was on the "juridical" or "extrajuridical"—i.e. practical—effects of armed conflicts on treaties, or on both. It should be borne in mind that armed conflicts were not "juridical acts", but "juridical events".

6. In respect of the scope *ratione personae*, the question arose whether the effects were confined to the belligerent States that were parties to the treaty or whether other States were also concerned. As to the scope *ratione materiae*, it needed to be asked whether the effect of the armed conflict concerned the treaty as a whole, certain provisions or only the obligations arising therefrom.

7. On the link between "armed conflict" and "treaty", Mr. Fomba agreed with the emphasis placed by Rousseau on the incompatibility between the two and the need to nuance their scope, and also with his conclusion that the situation was a complex one which was difficult to categorize by using general formulations (paragraph 37 of the report). That being said, an effort must still be made to find some such formulations, difficult though that enterprise might be.

8. He had a number of comments on specific paragraphs in the report. On paragraphs 4 to 10, the Special Rapporteur had been right to review the conceptual background of the draft, even if the priority given to the criterion of intention was debatable. It would, however, be useful to study all the rationales, not only from a strictly legal perspective, but also from a logical, practical and functional point of view. The statement made in paragraph 6 might then be qualified.

9. With regard to paragraph 10, whereas the Special Rapporteur was in favour of dealing with the topic in the framework of the law of treaties, he personally thought that it would be just as appropriate and sensible to consider possible links with other subjects, such as the law of responsibility. As to the approach, he agreed on the whole with the Special Rapporteur's comments in paragraphs 12 and 13.

10. Turning to the articles themselves, and first to article 2, paragraph (*b*), he agreed with the Special Rapporteur that the Commission would be much delayed if a high level of sophistication was sought (para. 16). In that connection, he recalled the difficulties posed by a strictly legal definition of the notion of aggression, and in particular the definition of crime of aggression in international criminal law.[1] That said, there was broad agreement as to what the notion of armed conflict basically covered in international law, even though not all aspects of the question were sufficiently clear to some. The Commission should therefore confine itself to those points that seemed to command consensus, with regard to doctrine and treaty practice, particularly that stemming from the law of armed conflicts. In his view, the Commission should adopt the broadest possible definition, one that included both international and internal armed conflicts, while remaining open to the possibility of taking other situations, such as the Israeli–Palestinian conflict, into account. Notwithstanding the questions it raised, the definition proposed in article 2, paragraph (*b*), was nevertheless a good starting point for discussion.

11. The Special Rapporteur was right to observe that contemporary armed conflicts had "blurred the distinction between international and internal armed conflicts" (para. 17). It was worth considering what were the significance and implications of the current tendency to link the two categories from the point of view not only of their actual scope but also of their legal regime. It was an interesting thought that "[i]nternal armed conflicts could affect the operation of treaties as much as, if not more than international armed conflicts" (para. 17). The Special Rapporteur had been right not to address the question of the legality of the use or threat of force in the definition. That vital legal principle, which was at the basis of the draft, should be taken up elsewhere.

12. Article 3 was important, and he endorsed the point made in paragraph 28 that, although it was not unproblematic, it was a useful and logical beginning which laid a foundation. By and large, its current wording seemed to be on the right track. But he did not see any fundamental difference between the terms "*ipso facto*" and "necessarily"; indeed, he preferred the former, since it denoted the necessary consequence inferred from an event.

13. With regard to article 4, the Special Rapporteur favoured the criterion of intention, but any attempt at decryption of the criterion of intention entailed reference to other criteria which were contained in other notions. That was a subtle way of relating ideas which at first glance seemed discrete. Whereas the criteria defined in the 1969 Vienna Convention were relatively clear, the criterion of the nature and extent of an armed conflict was not self-evident.

14. He concurred with the Special Rapporteur's preliminary positions set out in paragraph 45 and agreed that it was "more logical, and more coherent, to formulate a general principle based upon the intention of the parties in respect of all types of treaty" (para. 46). The explanation in paragraph 47 was acceptable, provided that the approach was as broad as possible.

15. On article 6, he supported the Special Rapporteur's conclusion in paragraph 61 that the supposition that a treaty forming an element in a dispute was a nullity,

[1] See *Yearbook ... 1995*, vol. II (Part Two), chap. II, Draft Code of Crimes against the Peace and Security of Mankind, pp. 20–22, paras. 60–73; and *Yearbook ... 1996*, vol. II (Part Two), article 16 and commentary, pp. 42–43.

simply because it formed part of the "causes" of an armed conflict, was unacceptable.

16. He agreed with the Special Rapporteur that the content of draft article 7 was, on a strict view, superfluous and that the criterion of intention was, in principle, of general application (para. 62), but nevertheless thought that such a provision was useful, given the importance of the criterion of the object and purpose, not only in the overall mechanism of the 1969 Vienna Convention, but also for an analysis of the concept of intention. He did not have a firm view on whether the list in article 7, paragraph 2, was necessary and, if so, what the chances were that the Commission could reach a broad consensus on which categories of treaty should be included therein. Another possibility would be to deal with the matter in the commentary, citing as illustrations only those categories of treaty which seemed least likely to cause problems.

17. With regard to draft article 10, the point was not to address the substantive question of the legality of the threat or use of force or the mechanism for identifying and applying rules of general international law, but rather to decide what consequences the legal or illegal nature of the conduct of the parties to the conflict would have for the exercise of the right to terminate or suspend the treaty. Clearly, the State that exercised the right of self-defence could not be placed on the same footing as the State that committed an act of aggression. The current text of article 10 was far from satisfactory, whereas articles 7 to 9 of resolution II/1985 of the Institute of International Law were a good basis for discussion.[2]

18. As to the working method to be adopted, in view of the arguments put forward by a number of members, it seemed sensible to establish a working group to consider the draft as a whole in order to find areas of consensus before referring it to the Drafting Committee. He doubted the wisdom of sending individual articles to the Drafting Committee at the current stage.

19. Mr. BROWNLIE (Special Rapporteur) agreed that it would be very premature to refer any of the articles to the Drafting Committee. His aim was to obtain the comments of members and subsequently those of Governments. In the light of the very helpful debate in the Commission and the responses awaited from the Sixth Committee and Governments, he would then produce a second report, at which stage the Commission could set up a working group or start to refer articles to the Drafting Committee. He saw no point in establishing a working group at the present time. It would be better to move more slowly and use his first, expository report as a way of collecting views of Governments and filling lacunae on recent practice. In that regard, he had to say that he did not find the section on practice in the Secretariat memorandum, which was excellent in most respects, to be cogent or useful.

20. Mr. KABATSI said that the Special Rapporteur deserved the thanks of all members of the Commission for producing, at short notice, not only a first report mapping out the entire spectrum of the topic but also a full set of draft articles. He also welcomed the Secretariat's useful and instructive memorandum. He noted the Special Rapporteur's intention to attract comments, especially from Governments, to assist the Commission in pursuing its task of codification and progressive development of a complex and problematic area of international law. Indeed, the Special Rapporteur's plan was already bearing fruit, to judge by the lively discussion and useful suggestions made for improving the draft. While the subject was fraught with uncertainties and contradictions, it was undoubtedly an important one.

21. He endorsed the Special Rapporteur's proposed approach, which linked the consequences of armed conflicts on treaties to the intention of the parties to the treaties, as agreed before the hostilities began, on whether the obligations undertaken would continue to be honoured, be it in whole or in part, temporarily or permanently. He agreed with the approach of adhering closely to the logic of the 1969 Vienna Convention. The Commission was in a better position to take up the topic than it had been in 1966, when it had been more concerned about the completion of the work on the Convention itself.[3] There was no longer any danger of muddying the waters of the treaties project by delving into the uncertainties and complications of the effects of armed conflicts on treaties.

22. There seemed to be near unanimity that the intention of the parties was the most important criterion in determining the susceptibility to termination or suspension of a treaty in case of an armed conflict, although factors such as the nature and object of the treaty and the nature and extent of the armed conflict must be taken into account. Even questions relating to the nature, purpose and object of the treaty, however, were linked to the intention of the parties in designing and entering into that treaty, and therefore strengthened the case for considering intention to be the most important criterion. In spite of attempts to categorize treaties according to their degree of likelihood of applicability, such as that attempted in the memorandum by the Secretariat (chap. III), the intention of the parties remained the most important determinant.

23. Problems arose, however, when that intention was not expressly stated in the treaty itself and had to be inferred. Even in cases which might seem obvious, such as the implementation of humanitarian law treaties, issues like the impossibility of performance due to armed conflict could still arise, at least temporarily. He agreed with Mr. Matheson that even in the situation presented in draft article 7, one could not be completely categorical. Each situation must be dealt with in a flexible manner as events presented themselves for each particular armed conflict, with the understanding that the outbreak of armed conflict did not *ipso facto* terminate or suspend the operation of treaties as between the parties and even as between them and third States, albeit with certain exceptions.

24. As suggested by the Special Rapporteur and other members of the Commission, the definition of a state of war should include situations where, although there were no armed operations under way, the belligerents were poised for war and the effect was the same; a blockade

[2] See 2834th meeting, footnote 7.

[3] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part Two, chap. II, p. 192, para. 29.

was an example of one such situation. The effects of international and internal conflicts on treaties, which could be significantly different, and the notion of separability, where certain treaty obligations might survive the outbreak of armed conflict, required further study.

25. It would likewise be difficult to avoid treating at some level the provisions of the Charter of the United Nations relating to the legitimacy of armed conflicts and the consequences thereof on treaties. The treatment of that issue needed to be strengthened, taking into account the position adopted by the Institute of International Law in its resolution II/1985. That subject involved important policy issues.

26. As to how the Commission should proceed in considering the draft articles, his own view was that since there appeared to be little disagreement on the principles underlying certain draft articles, those articles could be referred to the Drafting Committee, thereby enabling the Commission to make rapid progress. He nevertheless understood and supported the position adopted by the Special Rapporteur on that question.

27. Mr. KEMICHA thanked the Special Rapporteur for an excellent first report, and also the Secretariat for its memorandum on the topic. Such documents would be most welcome with regard to all the items on the Commission's agenda.

28. The first report had provoked fertile discussion, raising fundamental issues which the Special Rapporteur, with the assistance of the Commission, would have to address. One such issue was the Special Rapporteur's decision to categorize the problem of the effects of armed conflicts on treaties as a part of the law of treaties, rather than as a part of the law relating to armed conflict. He associated himself with those members who had raised points concerning the legality of the use of force, the distinction between aggressor and victim and the implications of internal conflicts with regard to their effect on treaties. The Special Rapporteur must take those issues into account, as well as the relevant provisions of the Institute of International Law's resolution II/1985, without however straying into the realm of the law of armed conflicts. That exercise, while fraught with hazards, was essential to the success of the project. Although the Special Rapporteur had raised those issues in passing in his comments on draft article 2, they had not been reflected in the texts of the draft articles.

29. The other fundamental question was the excessive and exclusive weight given by the Special Rapporteur to the intention of the parties in the text of draft article 4. Like other members of the Commission, he felt it would be extremely difficult to determine "the intention of the parties at the time the treaty was concluded" as provided for in draft article 4, paragraph 1. That implied rather Machiavellian intentions on the part of States when negotiating treaties, although he could not deny that that might sometimes be the case.

30. Advocates of the criterion of intention had to qualify that criterion with presumptions regarding the nature, object and purpose of the treaties in question, as the Special Rapporteur had done in draft article 7, which referred to "treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict". In paragraph 63 of the report he described such treaties as "exceptions to the general principle, based upon the object and purpose of the treaty". Draft article 4 should be reformulated in order to encompass all such criteria and better reflect the current situation and State practice.

31. Turning to the list of 11 categories of treaties "the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict", contained in draft article 7, paragraph 2, he recalled Mr. Matheson's comment on the risks and limitations of such a list, even though the Special Rapporteur had stated that the list was not exhaustive. Rather than establishing a list, which inevitably posed problems, the criteria mentioned should be incorporated into a new draft article 4.

32. Ms. XUE said that the topic of the effects of armed conflicts on treaties should be considered in the broad context of treaty law. She recalled that during negotiation of the 1969 Vienna Convention three relevant areas, namely, State succession in respect of treaties, State responsibility for breach of international treaty obligations, and the effects of armed conflicts on treaties, had been deliberately excluded.[4] Complete sets of legal rules and principles had since been codified and developed with regard to the first two areas. Although the remaining area, the effects of armed conflicts on treaties, was perhaps the most complicated, much could be learned from the discussions on the previous two topics, as the current topic was in many respects linked with the 1969 and 1986 Vienna Conventions, the 1978 Vienna Convention on succession of States in respect of treaties and the draft articles on responsibility of States for internationally wrongful acts.[5]

33. In codifying and developing the international treaty regime, the Commission must deal with treaty relations both in time of peace and in time of war. Those two terms were currently perceived to be relative, and there was no longer a clear-cut distinction between the law of peace and the law of war; treaty provisions therefore inevitably affected each other. For example, if an armed conflict resulted in a change of State or dissolution of a State, succession rules would apply in relation to treaties. However, if the result was a change of Government, it was not clear whether the rule of continuity, succession rules, *mutatis mutandis* or the rule of fundamental change of circumstances under article 62 of the 1969 Vienna Convention would apply. Practice pointed in differing directions, and she questioned whether the Commission could, or should, attempt to make those rules coherent.

34. Moreover, having prescribed the legal consequences of a serious breach of international obligations in the regime of State responsibility, the Commission should perhaps also examine the new conventional rules on international crimes under the current topic if they

[4] *Ibid.*, paras. 29–31.

[5] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26–143, paras. 76–77.

also covered acts which occurred during armed conflicts, because the question whether those conventions did or did not remain operative during armed conflicts would determine whether the State concerned would be held responsible for its acts under international law. The Special Rapporteur had made a few references to the provisions of the 1969 Vienna Convention in some of the draft articles, and further study of their applicability could well be necessary.

35. Further study of that issue might also help clarify the scope and ascertain the content of the draft articles. The Commission's objective should be to ensure treaty relations in accordance with the principles of free consent, good faith and the *pacta sunt servanda* rule in the event of an armed conflict; to clarify the rights and obligations of the States parties to the armed conflict as well as their relations with third parties, in the interests of the security and stability of international relations; and to determine the legal consequences arising out of the interruption of treaty relations as a result of armed conflict. It should be noted at the outset that some of the questions raised by members regarding, for example, whether the issue of use of force should be dealt with in the draft to some extent depended on what objectives the Commission was pursuing in endeavouring to progressively develop and codify that area of international law.

36. She welcomed the Special Rapporteur's timely submission of a comprehensive set of draft articles with a view to provoking discussion and reactions from Governments, and agreed that at the present stage the Commission should continue to discuss policy issues and that it would be premature to refer any of the articles to the Drafting Committee. The Commission should bear in mind that the topic was constantly evolving, not only because the nature of modern armed conflicts had changed greatly, in particular since the Second World War, but also because the content and regimes of international law had undergone tremendous changes which had a direct bearing on various aspects of State life, even in time of armed conflicts, whether internal or external. The Commission should bear those factors in mind when considering State practice.

37. She had found the introduction to the report very useful, and welcomed the succinct and straightforward summary of the four rationales underlying current doctrine. She regretted, however, that the Special Rapporteur had not fully explained his reasons for preferring the third rationale, namely, the criterion of the intention of the parties at the time they concluded the treaty. She wondered what empirical basis there was for the various doctrinal positions adopted, and why, after taking into account the many exceptions to each rationale, they did not appear to differ dramatically, so that the results would not necessarily differ, whichever of the four rationales was applied. That issue should be explored in greater depth.

38. Turning to the draft articles themselves, she wondered why draft article 1 did not include treaties with international organizations. There were obvious reasons to include them; for example, treaties on the privileges and immunities of international organizations should apply in armed conflicts where United Nations personnel and peacekeeping missions were involved. The draft article should make it clear that the relevant treaties between the belligerents and international organizations should continue to apply during armed conflicts. There was no need for a separate set of articles dealing with treaties involving international organizations.

39. Draft article 2, subparagraph (*b*), defined the term "armed conflict" and she could understand why the Special Rapporteur had suggested that internal armed conflicts should also be included. Although recent large-scale internal armed conflicts had led to serious human disasters as well as interruptions of normal international relations, including treaty relations, she noted that in internal armed conflicts it was often the interests of the third party, whether or not a neutral party, which were at stake. By referring simply to "a conflict" in subparagraph (*b*), rather than "international conflict", the term used in the text of resolution II/1985 of the Institute of International Law, the Special Rapporteur had broadened the scope of the term "armed conflict". As a result, at the domestic level, any military operation launched against rebel forces or even criminal organizations could affect treaty relations in areas such as trade, border controls, customs cooperation and narcotics control. She doubted whether the Commission wished to see such activities included. Although a perfect definition of armed conflict might not be possible, the current language of the draft article needed to be tightened. She also expressed concern that in including the concept of "blockade", even in the absence of armed actions between the parties, in his report (para. 16), the Special Rapporteur was again defining armed conflict too broadly.

40. Furthermore, determination of the continuing validity of existing treaties during armed conflicts would have a direct bearing on the issue of State responsibility, because if the State party to the armed conflict breached its treaty obligations, it would be held responsible under international law. In a domestic setting, however, the principle of abrogation should perhaps prevail, subject to certain exceptions. Her initial comment was that the effects of domestic armed conflicts on treaties should be given separate treatment.

41. She agreed with the principle laid down in draft article 3 on *ipso facto* termination or suspension but reiterated that treaties with international organizations should be included. It was a long-recognized principle of international law, reinforced by modern State practice, that treaties were not necessarily suspended or terminated in time of armed conflict. Unless otherwise indicated, States would consider it to be in their best interests to maintain existing treaty relations, which was in accordance with the general proposition on the criterion of intention and was a good policy basis for discussion of the effects of armed conflicts on treaties. That principle should therefore be clearly stated in the draft article.

42. On draft article 4, she agreed that in principle the intention of the parties should prevail in deciding whether a treaty was still applicable during and after armed conflicts, but felt that the current draft could be improved in some respects. In determining the intention of the parties, the nature and object of the treaty and its provisions were also relevant. They should be determined at the time of

the conclusion of the treaty, and in addition, subsequent actions taken in application of the treaty, including those taken after the outbreak of the conflict, should be considered. The element of intention, if related to the nature and extent of the armed conflict in question, should not be limited to the intention at the time the treaty was concluded. That was particularly true when determining whether the parties intended to terminate or suspend the treaty in the event of armed conflict. In practice, during armed conflict States did not express their intention regarding the application of existing treaties. That had to be presumed from relevant factors such as: the context in which the treaty was applied; the terms of the treaty; the particular circumstances of the armed conflict; and the treaty practice of the individual parties. The current drafting left too much room for subjective interpretation and would be difficult to apply.

43. Two points in draft article 5 required some explanation. First, she could not see what purpose was served by the word "lawful" in paragraph 1; if it meant that the parties should comply with existing treaty rules to formulate a new treaty or that the treaty should be governed by international law, it was redundant. Secondly, with regard to the capacity of parties to the armed conflict to conclude treaties, some rules, such as rules under international conventions on humanitarian law, were considered to be peremptory norms of international law. States parties could not opt out of their legal obligations by means of bilateral agreements. She wondered whether the Special Rapporteur intended to address that issue. In the contemporary practice of international law, the capacity of States to conclude treaties in times of armed conflict was seldom challenged, but the content of such treaties could be examined in the light of human rights law, humanitarian law and international criminal law.

44. If draft article 6 was meant to cover cases in which States resorted to armed conflict to resolve a territorial dispute and supported their territorial claims with differing interpretations of a treaty on the status of the territory concerned, she doubted whether the article was really necessary, since the principle applicable was the peaceful settlement of international disputes, rather than the maintenance of stable treaty relations.

45. The Special Rapporteur should explain the relationship between draft article 7 and draft article 3. If the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties, as stated in draft article 3, she saw no useful purpose in attempting an exhaustive categorization of treaties according to the likelihood of their being applicable in cases of armed conflict. Moreover, for the purposes of the draft articles, it was the nature of treaties that needed to be examined, rather than their categorization by subject matter. The Commission might like to consider taking an approach similar to the one taken during its consideration of State responsibility with regard to the nature or hierarchy of international rules.

46. Draft article 8, on the mode of suspension or termination, should be considered together with draft article 13 on the cases of termination or suspension. The relationship between the two was not clear, and the special circumstances of an armed conflict might make it impossible for the parties to follow the same procedure for suspending or terminating a treaty as in time of peace.

47. The idea of linking the resumption of the operation of a treaty that had been suspended to the intention of the parties at the time the treaty had been concluded, as expressed in draft article 9, paragraph 1, was problematic for the reasons she had already discussed in relation to draft article 4.

48. With regard to the issue of the legality of the use of force, she believed there was room to improve articles 10 and 11 of the draft in the light of article 7 of resolution II/1985 of the Institute of International Law on the effects of armed conflicts on treaties. The Special Rapporteur's comment in paragraph 122 of his report that "[i]n the absence of an authoritative basis for a determination of an illegality, the unilateral assertion of illegality would be self-serving and inimical to stability of relations" was a very strong argument, but the actual wording of draft article 10 gave the impression that the legality of the conduct of the parties to the armed conflict had nothing to do with treaty relations. Such an interpretation would be contrary to the fundamental principles of international law. In addition, draft article 11 addressed only Security Council decisions taken in accordance with the provisions of Chapter VII of the Charter of the United Nations, whereas other action taken by the United Nations to maintain international peace and security, such as the adoption by the General Assembly of resolution 377 (V) of 3 November 1950 on "Uniting for peace", might also affect treaty relations.

49. Mr. MANSFIELD said that the Special Rapporteur's first report was presented in such a way as to require the Commission to confront directly the essential policy choices involved in the complex subject of the effects of armed conflicts on treaties. He commended the Special Rapporteur for producing a full set of draft articles, a course which not only provided a comprehensive overview but would also be of practical value to the legal offices of ministries of foreign affairs around the world as they began to consider the topic.

50. One point that emerged very clearly both from the report and from the Secretariat's memorandum on the subject was that the codification of the topic would bring considerable benefits by helping to remove the significant uncertainties that stemmed largely from the practice of another era. Both the report and the memorandum were quite open about the underlying policy objective, which was to seek, in the interests of promoting the security of legal relations between States, to limit the cases in which armed conflict had an effect on treaties. While he could only support that objective, he was inclined to think that, in articulating the basis for it, more could have been made of the prohibition of the use of force by the Charter of the United Nations, and that earlier doctrine and practice should be reviewed in the light of the Charter. Such an approach would not in any way undermine the Special Rapporteur's view, which he shared, that the topic was properly located within the law of treaties.

51. The Special Rapporteur had basically incorporated the aforementioned policy objective into draft articles 3 and 4, in combination with draft article 7, by coupling the general proposition that armed conflict did not *ipso facto* terminate or suspend treaties with the central idea that any effect it had on them depended on the intention of the parties, and that if their intention was not clear, some assumptions could be made about their intention on the basis of the object and purpose of the treaty concerned and the category to which the treaty belonged.

52. He was less concerned than some previous speakers about whether further material relating to past practice, including municipal court decisions, would be needed to convince Governments to accept codification of the law on the basis of such propositions. His main concern was how useful the draft articles would be in practice. In particular, he wondered if they would be relevant to the kind of armed conflicts that arose in the contemporary era. Both the report of the Secretariat and the memorandum made the point that the distinction between international and internal armed conflicts had become blurred, and it was clear that whatever text the Commission adopted must be relevant to "untidy" conflicts that could not be neatly categorized as international or internal. Even if that did not mean that the Commission should attempt to produce a definitive definition of the term "armed conflict", or that the effects of the various forms of conflict on treaties would be uniform, he did think there was further work to do on the definition contained in draft article 2 (*b*). In that connection, he agreed with previous speakers who had emphasized that the effects of armed conflict might well be different in respect of States that were parties to the conflict and those that were not. He saw no reason why treaties to which international organizations were parties should be excluded from the scope.

53. Another question that sprang to mind when considering the usefulness of the draft articles in practice was whether they helped to distinguish treaties that would be affected by armed conflict from those that would not. That question, in turn, raised an issue that had been commented on by many speakers in the debate, that of determining the intentions of the parties. Whether or not it was in order to establish some fictional intent, he had serious doubts about the usefulness of using categories of treaties as a means of determining which treaty-based legal obligations would survive an armed conflict. Even if agreement could be reached on such categories, they might not be of much practical help, given the staggering range and diversity of treaties and the diversity and complexity of provisions within treaties of the same general type. Perhaps it would be more useful to identify the factors that might be relevant to whether a treaty or a particular treaty provision remained applicable, as suggested by Mr. Matheson, or to discuss the substantive interests involved in the applicability or non-applicability of treaty provisions, as suggested by Mr. Koskenniemi. In any event, if the outcome of the Commission's work on the topic was to be relevant and practical, it would be necessary to conduct some form of policy analysis, perhaps with the help of the Secretariat, and to test the results of such an analysis against State practice, particularly recent State practice. A policy analysis would provide some assurance that the Commission was not oversimplifying matters or ignoring significant issues.

54. It was important to make it clear that, as the Special Rapporteur had confirmed, draft article 8 was intended to cover the case of partial suspension or termination. There was also a need to acknowledge the possibility of suspending or terminating treaty provisions that were inconsistent with the exercise of legitimate self-defence. In that connection, he had to admit that he was rather uncomfortable with article 10 as currently drafted.

55. Mr. BROWNLIE (Special Rapporteur) stressed that the categories of treaties listed in draft article 7, paragraph 2, reflected the literature on the subject, although he was personally responsible for the inclusion of human rights treaties, since they were actually an extension of the protection of individuals provided by bilateral treaties of friendship, commerce and navigation. Although the Commission might well decide to discard the methodology of categorizing treaties, as it could study the object and purpose of treaties without categorizing them, he believed it should perhaps pay special attention to at least one or two of the categories listed. For example, the categories in subparagraphs (*b*) and (*c*) were based on a considerable amount of State practice and had long been recognized in relation to the effects of war on treaties, and the experience of municipal courts was closely related to treaties of friendship, commerce and navigation.

56. Mr. Sreenivasa RAO said it would not be helpful to dispense with the categories of treaty altogether. Rather, some way should be found to indicate that the list of categories was illustrative only.

57. Mr. KOSKENNIEMI agreed with Mr. Sreenivasa Rao that the categories should not be dispensed with altogether. Not only did the categories reflect the literature, as Mr. Brownlie had pointed out, but they were also included in the literature for good reason, and the rationale for their inclusion should therefore be explained. However, the Commission was not facing an either/or situation: it did not have to choose between including categories or providing criteria. The two approaches could be combined. The Commission might like to note that there were some categories which, for good reason, had become so well established that they could be listed as such, while also acknowledging the criteria that had led to the identification of those categories.

58. Mr. MANSFIELD said he had not suggested that categories should be discarded altogether. It was simply that he did not believe the Commission would be able to reach agreement on categories until a proper policy analysis had been carried out to establish the reasoning behind the categorization. To do that, a representative sample of treaties should be studied, in order to identify the treaties or treaty provisions that deserved to survive and group them together in categories on the basis of their commonalities.

59. Mr. CHEE said that the issue seemed to be whether to expand the categories of treaty. The Special Rapporteur had made a good start with draft article 7, paragraph 2,

on the basis of which the Commission could pursue its analysis.

60. Ms. XUE said that, while the approach taken by the Special Rapporteur in draft article 7 was very useful, the Commission should look hard at the categories of treaty listed therein, in order to bring out the underlying policy considerations. Draft article 3 indicated that the outbreak of an armed conflict did not terminate or suspend the operation of treaties, whereas draft article 7 said that the incidence of an armed conflict would not as such inhibit the operation of certain treaties. She sought further clarification of what distinction the Special Rapporteur had had in mind in drafting article 7.

61. In that regard, some aspects of the policy considerations underlying the rules on State responsibility were worth examining. While a categorization based on subject matter might be questionable, that did not mean that other types of categorization could not be attempted. There seemed to be general agreement that some areas were of particular relevance, but it would be very difficult to agree on which specific areas, elements or principles were to be singled out. At any event the Commission was not yet in a position to decide whether to incorporate a categorization of treaties into the text of the draft articles. It first needed to decide what objectives it had in mind in developing the draft articles.

62. Mr. ECONOMIDES said that before the Commission considered the categories or lists of agreements that should be envisaged in the draft, one question of capital importance had to be resolved, namely, what party would have the right to seek the termination or suspension of treaties. Could an aggressor State do so? In modern practice, everyone agreed that an act of aggression, which was an unlawful act, could not produce legal effects. To give an aggressor State the right to suspend or terminate certain treaties would be to abet it in an unlawful act. The draft articles on State responsibility had been aimed precisely at doing everything possible to put an end to wrongful acts. For the Commission now to make rules that would assist a State in perpetrating a wrongful act would be contrary to general international law. He could not condone the elaboration of any list that helped an aggressor State; however, one that helped a State in the exercise of legitimate self-defence would be acceptable.

63. Mr. MATHESON explained that it had not been his intention simply to dismiss the relevance of the way State practice had affected various kinds of treaties and treaty provisions: that, obviously, was quite important. He merely objected to making the continuity of treaty obligations turn upon whether a particular treaty fell within one or another category in a relatively arbitrary list. Obviously, specific treaties within a particular category varied among themselves, their provisions varied, circumstances varied, and all of that had to be taken into account. He was confident that, as the Commission discussed the matter further, it would be able to find some way of taking into account past practice regarding different kinds of treaty provisions that did not result in a rigid structure based on categorization but instead focused on the underlying factors and policies.

64. Mr. BROWNLIE (Special Rapporteur) said it should have been made much clearer in his commentary on draft article 7 that the effect of the categories was simply to create a rebuttable presumption. The categories were a series of weak legal presumptions constituting evidence of the object and purpose of certain types of treaty to the effect that they survived a war. Moreover, it was not just at the outset of a war or the conclusion of a treaty that certain problems were identified as legal issues: clearing up the legal detritus of a major armed conflict was a process that often took many years.

65. Mr. NIEHAUS said that while some members had criticized the Special Rapporteur for failing to explore the topic in sufficient depth and for adopting an overly cautious or abstract approach, in his view precisely the opposite was true. The Special Rapporteur had presented a stimulating report that invited analysis and discussion, which, after all, was the chief purpose of a first report. He had clearly outlined the long-standing uncertainty in the treatment of the topic in the literature. That was why the Commission must remain cautious and proceed slowly in its work. He agreed with Mr. Economides that, in view of the difficult and sensitive nature of the material, the Commission should begin with a general discussion aimed at clarifying major principles and problems.

66. The first general point he wished to make concerned the essential role played by the intention of the parties in determining the effects of armed conflict on a treaty. In draft articles 4, 6 and 9, the Special Rapporteur referred frequently to intention. Owing to the difficulty of establishing intention, however, he himself would have liked to see a better explanation of how that concept should be construed, based not only on articles 31 and 32 of the 1969 Vienna Convention but also on the relevant literature.

67. Draft article 4, paragraph 2 (*b*), adduced the "nature and extent of the armed conflict" as a factor determining the intention of the parties. Even though there was support for that approach in the literature, Mr. Niehaus had difficulty in understanding the relation between intention and the nature of the conflict. Could the Commission accept that the nature and extent of an armed conflict should determine the intention of the parties, an intention that had existed at the time the treaty had been concluded and thus predated the conflict? Was it not the real intention, rather than a presumed intention, that the Commission was seeking to determine? To what extent could intention be clearly expressed before the outbreak of an armed conflict? What if there had been no intention in that regard? Mr. Gaja had already pointed to the difficulty of identifying intention. In his own view, the whole subject required fuller consideration and analysis.

68. Another matter that needed to be better explained was the distinction between international and internal conflicts. Although modern-day doctrine tended to equate the two, especially because of the presence of external factors in so-called "civil wars", he did not think it was correct to do so. The effects and consequences of the two types of conflict were different. Hence the need for a broader definition of "armed conflict". It was also necessary to distinguish between a party that engaged in armed

conflict in breach of international law and one that did so in self-defence in accordance with the provisions of the Charter of the United Nations. In addition, the situation of third parties had to be made clear. The terms "continuity", "suspension" and "termination" had not been defined and should be better explained, not only in relation to the treaty as a whole, but also in relation to individual and separate parts or provisions thereof.

69. He wished to end by expressing the hope that all the comments made on the first report would be of use to the Special Rapporteur when he came to produce his second report. As the Special Rapporteur had stressed, the set of draft articles was expository in nature, and accordingly, the time was not ripe for referring any of them to the Drafting Committee. The Commission must continue to enrich the topic by its contributions, with a view to eliciting reactions from States.

70. Mr. KATEKA noted that the Special Rapporteur had shown an operational preference for draft articles, without prejudice to the final form the instrument would take, and wished to defer consideration of peaceful settlement of disputes until the end of the work on the topic. That seemed a wise approach, given its difficult nature.

71. None of the draft articles included a provision like that to be found in article 6 of resolution II/1985 of the Institute of International Law, which stated that a treaty establishing an international organization was not affected by the existence of an armed conflict between any of its parties. He would like to know the reason for that omission, since the effects of armed conflict could extend to an international organization. An obvious example was the United Nations involvement in military action in parts of the former Yugoslavia.

72. The definition of armed conflict in draft article 2 (*b*) had triggered controversy, some members wishing it to be restricted to international armed conflicts, while others believed that it should also cover internal conflicts. He supported the latter approach. Since the end of the Second World War, there had been more internal than international conflicts and they had in fact killed more people. Paragraphs 146 and 147 of the Secretariat memorandum stated that "any complete study of the effects of armed conflict on treaties [could] not ignore domestic hostilities", which could and did affect international treaties. Elements of the definitions of armed conflict used in the *Tadić* case, in article 8, paragraph 2 (*f*), of the Rome Statute of the International Criminal Court ("… armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups") and in the commentary to article 2, paragraph 1, of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("[a]ny difference arising between two States and leading to the intervention of armed forces …")[6] could be used to improve the definition of armed conflict in draft article 2 (*b*).

[6] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, J. Pictet (ed.), 1952, Geneva, International Committee of the Red Cross, p. 32.

73. A related matter was that of non-State actors involved in conflicts. In introducing his report, the Special Rapporteur had referred to irregular units and militias that were incorporated into the structure of regular armies. Another question was whether the term "armed conflict" should include the fight against terrorist organizations.

74. The Special Rapporteur had indicated, both in paragraph 23 of his report and in his oral presentation, that the legality of the use or threat of force was not directly addressed and that draft article 10 was intended to cover it. That seemed to be a fair approach. Any attempt to develop the question could lead the Commission to a dead end, as might an attempt to address situations of belligerent occupation such as the Israel/Palestine situation, as proposed by some members. It would do better to focus on the law of treaties rather than on the law of war.

75. Draft article 3 should be abbreviated so as to make it correspond more closely to the wording of article 2 of resolution II/1985 of the Institute of International Law. Draft article 4 laid emphasis on intention. One member of the Commission had described intention as a fiction, and another had suggested that it should be combined with the nature of the treaty. The Secretariat memorandum proposed a combination of intention and compatibility with policy during armed conflict (para. 11). In paragraph 29 of his report, the Special Rapporteur stated that intention was "supplemented by a series of presumptions related to the object and purpose of treaties". Yet in reality, the Commission could not avoid giving prominence to the intention of the parties in matters relating to the termination or suspension of the treaty.

76. Draft article 7, paragraph 2, categorized treaties according to type. That was of some help, but it also created controversy. He himself supported the inclusion of treaties on the environment, whereas the Special Rapporteur thought the subject too fragmented. Paragraph 160 of the Secretariat memorandum referred to treaties governing intergovernmental debt. In his view, the Special Rapporteur had been right to exclude that category of treaties from the draft. On the other hand, he supported the case for the continuity of treaties regarding non-derogable human rights, conventions on diplomatic and consular relations and those relating to the peaceful settlement of disputes. Thus, some of the categories in article 7 should be reviewed, or else consigned to the commentary.

77. In conclusion, while he had initially supported those who had called for the creation of a working group to consider the draft articles, he would be pleased to defer to the Special Rapporteur's preference for the matter first to be referred to States for their comments. He also supported those who wished to refer some of the draft articles to the Drafting Committee. His suspicion was that those opposed to such a course were fearful lest such early submission should set a precedent. Since the Special Rapporteur himself was not in favour of that course of action, it would be best to await the second report before referring any texts to the Drafting Committee.

78. Mr. BROWNLIE (Special Rapporteur) said he was not opposed to the creation of a working group at a later stage; he hoped, however, that the impressions of

Governments and the Sixth Committee could be gathered before such a course was taken.

*The meeting rose at 1 p.m.*

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## 2839th MEETING

*Tuesday, 17 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. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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### 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. YAMADA noted first that, as draft articles 1 and 2 indicated, the study seemed to cover every kind of treaty. However, some treaties governing the rules of warfare or engagement, such as the Hague and Geneva Conventions, although negotiated and technically valid in time of peace, became operative only in time of armed conflict. Those treaties did not fall under the categories of treaties described in draft article 7, paragraph 1, because they were not operative in peacetime and therefore could not logically "continue in operation during an armed conflict". When they became operative they were applied equally to the forces of belligerents, regardless of whether the States were aggressors or were fighting in self-defence or under the authorization of the United Nations Security Council. That category of treaties should be excluded from the scope from the outset, although in reality it was difficult to define such a category or separate it from others.

2. While he recognized that State practice before the Second World War had not lost its importance or effect, he nevertheless felt that the prohibition of the use of force by the Charter of the United Nations had influenced the rights and duties of States in the area under consideration, and he hoped that recent practice, notably in Asia, the Middle East and Africa, would be studied.

3. Draft article 10, as he read it, disregarded the legality of the conduct of the parties. Under the rules of warfare, the legality of an armed conflict should not be taken into account, but he doubted that that was the case where the termination or suspension of other categories of treaties was concerned, for that would be contrary to the rules of the 1969 Vienna Convention. Of course that instrument did not deal with armed conflicts but differentiated between defaulting States and others and stipulated, in article 60, article 61, paragraph 2, and article 62, paragraph 2 (*b*), that defaulting States were not entitled to terminate or suspend treaties.

4. Like many members of the Commission, he thought that the intention of the parties at the time the treaty had been concluded, to which draft article 4 referred, might not have existed in many cases or would at least be very difficult to prove even if it had. The determination of such intention in accordance with draft article 4, paragraph 2, might thus be subjective. It might be necessary to distinguish between termination and suspension. The 1969 Vienna Convention grouped them together because it dealt with elements that justified termination or suspension, whereas the Commission was dealing with the effects of conflicts on treaties. In that context suspension was more relevant. For example, Japan had not terminated most of its treaties during the war, nor had it taken formal action to suspend them and later revoke that suspension: what it had done amounted to a *de facto* suspension of their operation. If the Special Rapporteur's position was that the outbreak of an armed conflict did not by itself terminate or suspend the operation of treaties and that procedures to that end had to be taken, he had no objection to it as a statement of principle, but he wondered whether it conformed to State practice; due attention would also have to be given to the partial suspension of treaties.

5. It might also be necessary to distinguish between bilateral and multilateral treaties. As normative multilateral treaties were playing an increasing role, more information on practice in that area would have to be collected. Moreover, given the increased importance given to private persons and entities in international relations and the many treaties which dealt with their rights, the Commission would also have to consider how those rights were affected by armed conflicts.

6. He wished to address two specific points: first, he assumed that in paragraph 67 the Special Rapporteur was referring to the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, or Partial Test Ban Treaty (PTBT), and he agreed with the conclusion of the General Counsel of the United States Department of Defense, but not necessarily with his reasoning. That instrument was a disarmament agreement, which constituted a specific category of treaties whose object and purpose, which were to minimize the risk of and avoid armed conflicts, were lost if an armed conflict occurred, so that even though such treaties were not terminated, their operation became impossible, in the manner described in article 61 of the 1969 Vienna Convention.

7. Secondly, noting that the Special Rapporteur referred in draft article 7, paragraph 2 (*f*), to treaties relating to international watercourses and related installations and facilities and, in paragraph 97 of his report, cited article 29 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, he drew attention to article 20 of his own draft, which dealt with the protection of aquifers, related installations, facilities and other works in time of armed conflict (A/CN.4/551,