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Summary record of the 2839th meeting

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

The meeting rose at 1 p.m.

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.

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,

para. 42); he hoped that the Special Rapporteur would include groundwaters in his draft article 7.

8. Mr. CHEE said that the Special Rapporteur seemed to think that intention was the only criterion that seemed to be of any relevance in determining whether or not a treaty survived a war; however, the compatibility test was also fairly well accepted in case law. In the *Techt v. Hughes* case, for example, Judge Cardozo had said that “provisions compatible with a state of hostilities, unless expressly terminated, [would] be enforced”, and that treaties lost their efficacy in war only if their execution was incompatible with war. That ruling seemed to be in line with the view of the Special Rapporteur, for whom the intention of the parties governed the effects of war on treaties, although he did not reject the compatibility test; that showed that the compatibility test was also accepted in other cases. In that connection, it might be relevant to refer to the observation on the effects of war on treaties made by Jost Delbrück, who said that current legal doctrine appeared to be better characterized as a pragmatic approach, with a view not only to the intent of the belligerent parties but also to those of the international community, the basic idea being “to minimize the disruptive effects of war in the sphere of treaty law without overlooking the fact that in some areas of political and social relations between States, the continuing effectiveness of treaties [was] incompatible with a state of war”.¹ In other words, it was in the interest of the international community to minimize the effects of war in order to preserve the international legal order.

9. Draft article 1 did not specify whether “armed conflicts” were international or internal; it should be recalled that in the modern age, armed conflicts frequently took the form of a proxy war aided and directed by foreign powers, the classic case being the Spanish Civil War in the 1930s, with more recent examples having been witnessed in Asia and Africa. The two 1977 Protocols additional to the Geneva Conventions (Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II)) distinguished between international and internal conflicts, and it might be relevant to look into the reasons for that distinction. In draft article 2 the Special Rapporteur offered a definition of the notion of “armed conflict” to reflect the evolution of the traditional conception of war. He cited a number of authors in support of the proposition which he posited in draft article 3, including Herbert W. Briggs,² according to whom the mere outbreak of armed conflict did not *ipso facto* terminate or suspend treaties in force, the intention of the parties being decisive. He was not sure he agreed with the Special Rapporteur’s assertion in paragraph 44 of the report that “municipal decisions are ‘not of great assistance’”, and he drew attention to the *Techt v. Hughes* case on the effects of war on treaties decided by the Court of Appeals of New York. Noting that Richard Rank, in his article “Modern war and

the validity of treaties”,³ had also referred to decisions by United States courts, he stressed that international law was implemented and enforced by States. Draft article 5, meanwhile, stipulated that even during an armed conflict the belligerent parties needed some rules that would enable them to continue that conflict.

10. Although not exhaustive, the list of categories of treaties which continued to operate during an armed conflict, set out in draft article 7, would be very useful for the Commission’s deliberations. With regard to paragraph 2 (c), he said that in its judgment of 6 November 2003 in the *Oil Platforms* case, the ICJ had ruled that the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran had been in operation notwithstanding the hostilities between the two parties and had considered in detail potential breaches of the treaty.⁴ The 1976 Convention on the prohibition of Military or any Other Hostile Use of Environmental Modification Techniques was a good example of a treaty relating to the protection of the environment that continued in operation during an armed conflict (para. 2 (e)).

11. He wondered whether it was not really the “presumed” intention that was meant in draft article 9, paragraph 1, because it was difficult to imagine that the parties to a treaty, in particular a friendship, commerce and navigation treaty, would have contemplated what might happen to such an instrument in two opposite situations, namely in time of peace and in time of war, unless they had expressly agreed to do so.

12. He expressed support for draft article 10, on the legality of the conduct of the parties, and the commentary thereon and said that, according to W. E. Hall, “international law had [...] no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it might set up if they chose, and to busy itself only with regulating the effects of the relation”.⁵ As Professor Brierly had observed in 1932, that was an admission that international lawyers had failed to establish a distinction between the legal and illegal use of force.⁶ However, with the adoption of the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg–Briand Pact) in 1928, war had been condemned as a means of solving international disputes, and the contracting parties had renounced war as an instrument of their national policy. Moreover, given that Article 2, paragraph 4, of the Charter of the United Nations prohibited the use of force, the legality of the use of force, with the exception of self-defence, had to be decided by the Security Council. In that connection it should be noted that even acts of reprisal were prohibited under the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁷

³ *Cornell Law Quarterly*, vol. 38 (1952–1953), pp. 321–355.

⁴ Signed at Tehran on 15 August 1955 (United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93).

⁵ W. E. Hall, *A Treatise on International Law*, 8th ed., Oxford, Clarendon Press, 1924, p. 82.

⁶ J. L. Brierly, “International law and resort to armed force”, *Cambridge Law Journal*, vol. 4 (1930–1932), p. 308.

⁷ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

¹ War, effect on treaties”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4, Amsterdam, Elsevier, 2000, p. 1369.

² H. W. Briggs (ed.), *The Law of Nations*, 2nd ed., New York, Appleton-Century-Crofts, 1952, p. 938.

13. Lastly, he endorsed draft articles 8, 11, 12, 13 and 17, including the reference to the relevant provisions of the Charter.

14. Mr. GALICKI said that the first report on the effects of armed conflicts on treaties and the proposed draft articles should be viewed as a warm-up exercise that gave the Commission an opportunity to consider the various issues in greater depth. Given the introductory nature of the draft articles, they should not be sent to the Drafting Committee at the current stage; it would be preferable to establish a working group to discuss, analyse and complete the proposed text.

15. With regard to draft article 2, he said that the proposed definition of armed conflict, which included both international and non-international conflicts, was broader than that suggested by the Institute of International Law in its resolution II/1985.⁸ Although such an approach was acceptable in principle, in practice it might create problems in determining whether specific situations qualified as armed conflicts within the meaning of the draft articles. For example, in December 1981 the Polish authorities had declared martial law, which under internal law was tantamount to proclaiming a state of war; perhaps that situation could be treated as an armed conflict within the meaning of the draft articles. At first glance, that did not seem to be the case, but the fact that the United States had then unilaterally suspended the operation of binding aviation agreements with Poland might be regarded as an effect of an internal armed conflict. The situation became even more complicated in the light of article 9 (b) of the 1944 Convention on International Civil Aviation, which provided that “[e]ach contracting State reserve[d] the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory”. Consequently, restrictions introduced by the Polish authorities in connection with the proclamation of a state of war, including temporary restrictions on access to Polish airspace, could hardly be considered to be a legal justification for the suspension by the United States of a binding international treaty. If the Commission decided to extend the scope of the draft articles to include armed conflict of a non-international nature, a more detailed definition of internal armed conflicts would be needed, specifying the extent to which such conflicts were covered by the draft articles.

16. Another type of problem arose in connection with draft article 3, which categorically announced that “[t]he outbreak of an armed conflict [did] not *ipso facto* terminate or suspend the operation of treaties”. The Special Rapporteur himself felt that such wording was too rigid, because in paragraph 28 of his report he proposed replacing “*ipso facto*” by “necessarily”. While he fully agreed with that proposal, it would then become necessary to explain that in certain exceptional circumstances treaties could be terminated *ipso facto* following the outbreak of a military conflict. No one would contend, for example, that the Ribbentrop–Molotov Pact had not been terminated with the outbreak of the German–Soviet conflict in 1941.⁹

⁸ See meeting 2834, footnote 7.

⁹ Non-aggression Pact between Germany and the Union of Soviet Socialist Republics, signed at Moscow on 23 August 1939, *British and*

17. Turning to draft article 7, he suggested that the Commission should verify whether the list of treaties continuing in operation during an armed conflict was exhaustive. To complete it, the Commission could refer to the Secretariat memorandum (A/CN.4/550 and Corr.1–2), and some categories of treaty, such as “multilateral law-making treaties”, would have to be explained more clearly.

18. The Special Rapporteur had acknowledged that the question of possible separability of the provisions of treaties for the purpose of assessing the effects of armed conflicts on them had not been sufficiently developed in the draft articles or in the report. Clearly, that shortcoming should be addressed without delay.

19. Like some other members of the Commission, he doubted whether it was necessary to introduce into the draft articles more detailed provisions concerning the legality of armed conflicts. The Commission should avoid politicizing its work or entering areas in which other international bodies had competence. Accordingly, the wording proposed by the Special Rapporteur for draft article 10 seemed most suitable.

20. The CHAIRPERSON, speaking in his capacity as a member of the Commission, said that Mr. Galicki’s example of measures taken by the United States following the proclamation by Poland of a state of emergency prompted him to make two observations. First, he wondered whether those measures had been justified by the existence of an international conflict or whether they were countermeasures taken because of the violation of human rights treaties. Second, he pointed out that the threshold above which “domestic unrest” could be termed an “internal armed conflict” remained controversial. However, in view of the definition proposed by the Special Rapporteur in draft article 2, it could hardly be said that the example cited had involved an internal armed conflict.

21. Mr. COMISSÁRIO AFONSO thanked the Special Rapporteur for his first report, which dealt with a complex issue, and expressed agreement with his idea of proposing draft articles as “prophylactic measures” (para. 12). Commenting on the draft articles, he said that, with regard to the use of terms in draft article 2, a definition of the term “treaty” was unnecessary, since it was already defined in at least three Vienna Conventions. On the other hand, a clear and precise definition of the term “armed conflict” was needed. The one offered by the Special Rapporteur suited the Commission’s purposes perfectly.

22. Draft article 3, which was limited to a reaffirmation of an established principle of international law, should be regarded as the point of departure of the subject under consideration. Draft article 4 was problematic, to say the least. The Special Rapporteur’s doctrinal exposition was interesting, but the way in which those ideas were reflected in the draft articles was less persuasive. Since a process of codification was at issue, it was important to be as clear as possible. The expression “indicia of susceptibility” was likely to cause problems of interpretation; it should probably be defined in draft article 2. In order to determine the intention of the parties to a treaty, draft article 4 referred to articles 31 and 32 of the 1969 Vienna Convention. In

Foreign State Papers 1939, vol. 143 (1951), p. 503.

its commentary to article 31, which set out what could be called the “golden rule” of the interpretation of treaties, the Commission had said that the starting point in interpretation was the elucidation of the meaning of the text, not an investigation into the intentions of the parties. Accordingly, the intentions of the parties to a treaty should be derived mainly from the text of the treaty itself and, if need be, from the preparatory work (1969 Vienna Convention, art. 32). The question, however, was how the intention of the parties relating to the treaty in general could help determine their intention with regard to its susceptibility to termination or suspension. He therefore wondered whether the function of articles 31 and 32 of the 1969 Vienna Convention was compatible with the function the Special Rapporteur wanted to assign to draft article 4. That matter needed to be clarified. Rather than formulating an abstract principle, it might be preferable to find a more objective criterion that was linked mainly to the treaty itself and not solely to the intention of the parties or the nature and extent of the armed conflict.

23. Mr. Comissário Afonso agreed with Mr. Fomba that draft article 7 was not superfluous. On the contrary, for those who favoured neither the principle of intention nor the *principe de caducité*, compatibility with the object and purpose of the treaty might be the most useful, albeit not the sole, criterion. It would have the additional advantage of being connected to the Vienna regime in general and to each treaty in particular. Moreover, in an era when the use of force was prohibited, the nature and extent of armed conflict should not be allowed to determine the life and death of a treaty. The Secretariat study showed that the Second World War had had little effect on treaties. More recently, during the apartheid period, South Africa had been at war with most of its neighbours, yet the treaties it had concluded with them had remained in force. The Secretariat study used the criterion of likelihood of applicability. The treaties in chapter III, sections A and B, of that document, namely treaties exhibiting a very high or a moderately high likelihood of applicability, could fit well into draft article 7, paragraph 2. It was also important to refer to *jus cogens* in the draft articles. Another model that could be used was the one proposed by Daillier and Pellet, which classified treaties in four categories, depending on the effects that armed conflict might have on them.¹⁰ The advantage of that model was that it was both comprehensive and simple. The best solution for draft article 7 would probably be to combine several models and create a single text that was best suited to the Commission’s work. In closing, he said that he subscribed to the position of Mr. Economides on the use of force (Charter of the United Nations, Art. 2, para. 4).

24. Mr. ADDO noted that, in introducing the topic, which was a particularly difficult one, the Special Rapporteur had said that he was focusing on international armed conflicts. He himself did not agree with those members of the Commission who had argued that internal armed conflicts should be included in the study, because there were fundamental differences between international and internal conflicts. The inclusion of internal conflicts might lead the Commission into a quagmire. Moreover,

the definition proposed in draft article 2 did not fit a situation of internal conflict.

25. Draft article 3 could be taken to be *lex lata* because it reaffirmed an established principle of international law according to which the outbreak of an armed conflict did not *ipso facto* terminate or suspend treaties in force. That provision was a logical beginning for the study and an important source of clarification.

26. Under draft article 4, whether a treaty was terminated or suspended was determined in accordance with the intention of the parties at the time the treaty was concluded. The problem there was that it was not always easy to ascertain what those intentions were. According to Sir Gerald Fitzmaurice, the question of the survival of a treaty must be decided in each case on the basis of the nature of the treaty and the intention of the parties regarding it.¹¹ In his own view, either of those criteria would yield the same results because the nature of the treaty was clearly the best evidence of the intention of the parties.

27. He assumed that the list of treaties presented in draft article 7 was not exhaustive: for example, it did not include treaties governing intergovernmental debt. However, it was a well-established principle that an armed conflict between parties to a treaty of that type had no effect on the treaty. To cite one example, Great Britain had continued loan payments to Russia during the Crimean War, thus honouring an 1815 treaty that expressly provided for continued payments in case of war (Treaty between Great Britain, Russia, and The Netherlands, relative to the Russian Dutch Loan).

28. In closing, he said that, since the draft articles were in the public domain, it was to be hoped that Governments would forward their comments and information on State practice to the Commission, as that would greatly facilitate work on the topic.

29. Mr. CANDIOTI said that the effects of armed conflict on treaties could be studied from a historical perspective, since the way armed conflict was characterized under international law had changed radically in the past century and the legitimacy of the use of force under international law had been severely curtailed by the Charter of the United Nations. The Commission should accordingly take up the question of whether the use of force was lawful or unlawful without getting into a detailed examination of such issues as aggression, self-defence and the application of Chapter VII of the Charter.

30. The Special Rapporteur had thus been right to place the topic in the context of the law of treaties, thereby dispelling some of the ambiguity that had characterized the Commission’s previous position. The sources of law he had consulted and the Secretariat memorandum tracing the historical evolution of the topic provided interesting food for thought, but that documentation should be used with discretion. Adequate information on the current or recent practice of States and possibly of international organizations should be assembled and the opinions

¹⁰ P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed., Paris, Librairie générale de droit et de jurisprudence, 2002, pp. 309–310, para. 200.

¹¹ G. Fitzmaurice, “The juridical clauses of the peace treaties”, *Recueil des cours, 1948-II*, Paris, Librairie du Recueil Sirey, vol. 73, pp. 308–312.

of States and organizations should be sought on how to approach the codification and progressive development of the law in that area. He endorsed the Special Rapporteur's proposal to send out a questionnaire for that purpose.

31. Turning to the draft articles, he said that, like other members of the Commission, he believed that draft article 1 should also cover treaties to which international organizations were parties. The same applied to draft article 2 where the definitions of "treaty" and "armed conflict" were concerned. The latter definition, which seemed sufficiently detailed and appropriate at first glance, should also take into account armed conflicts in which international organizations were involved. In addition, article 2 or the commentary thereto should specify what effects were contemplated by the draft. They were obviously legal effects, but the draft did not indicate clearly enough all the effects of armed conflict on treaties. The concepts of applicability, validity, derogation, termination, suspension, extinction, modification and separability referred to in the report must at some point be duly analysed and classified.

32. Draft article 3 set out the draft's fundamental principle, namely the continuity of treaties in the event of armed conflict, but provisions on exceptions to that principle should be included: for example, the right of a State that was exercising its right of self-defence or complying with a decision of the Security Council under Chapter VII of the Charter to suspend the application of certain treaties. Another exception to the principle, mentioned in draft article 4, paragraph 2, was the intention of the parties at the time the treaty was concluded, which was to be determined in accordance with "the provisions of articles 31 and 32 of the 1969 Vienna Convention" and "the nature and extent of the armed conflict in question".

33. He endorsed the comments made by the Special Rapporteur in paragraph 47 of his report on the need to maintain an appropriate relation with the law of treaties and the provisions of the 1969 Vienna Convention, the importance of legal security and the application of the principle of *pacta sunt servanda*. He also agreed with the statement in paragraph 49 that "the reliance upon the principle of intention [was] without prejudice to the termination or suspension of treaties as a consequence of: (a) the agreement of the parties; or (b) a material breach; or (c) supervening impossibility of performance; or (d) a fundamental change of circumstances", all of which was expressly stated in draft article 13. The explanations provided in draft articles 5 and 6 were useful in that they were consistent with the basic principle established in draft article 3.

34. Draft article 7 had provoked intensive debate. The categories of treaty that must necessarily continue in operation owing to their object and purpose were given extensive coverage, both in the Special Rapporteur's commentary and in the Secretariat memorandum. In that connection he agreed with Mr. Matheson and others that unduly rigid or general categories should not be established. Given the wide range of matters that treaties could deal with, and the possibility that a single treaty might contain provisions that differed in nature and content, some of which might be affected by an armed conflict and

others not—in short, the diversity of international treaty law as it was manifested in reality—it would be better not to formulate categories that were too absolute. Since the basic, general and universal principle was that of the continuity of operation of treaties in the event of armed conflict, it seemed superfluous to specify exactly what types of treaties continued in operation. In addition, whereas draft article 4 attributed a decisive role to the intention of the parties, deemed to be indicative of the susceptibility of a treaty to termination or suspension, in draft article 7 it was the object and purpose of the treaty that necessarily implied that the treaty should continue in operation. That should be made clear both conceptually and linguistically, since the two criteria, though not incompatible, were not synonymous.

35. With regard to draft article 8, he pointed out that articles 42–45 of the 1969 Vienna Convention dealt less with the modalities or forms of suspension and termination than with the conditions for the continuance in force or termination of treaties. It should be made clear whether the decision of a State party to a treaty, defined in accordance with draft article 2, paragraph 1, to suspend, abrogate or continue the operation of the treaty, in whole or in part in the event of armed conflict, had to be notified in writing.

36. Draft article 9, on the resumption of suspended treaties, was in line with the general principle of continuity of treaties and the principle of *pacta sunt servanda*. It might perhaps include a provision stipulating that in case of doubt as to whether a treaty had been suspended or abrogated as a consequence of an armed conflict, it would be assumed to have been suspended unless the parties had agreed otherwise. Draft article 10 could be improved and supplemented by a provision derived from article 9 of resolution II/1985 of the Institute of International Law.

37. Lastly, he endorsed draft articles 11–14 and expressed his agreement with the suggestion that in future reports further consideration should be given to the consequences of the distinction between international and internal conflicts, the effects of armed conflict on treaties for the parties and for third States and for both belligerent and non-belligerent parties, the effects of suspension and termination, and the separability of treaties.

38. Mr. DAOUDI said that the effects of armed conflict on treaties remained a difficult topic of international law. State practice regarding the way such effects were viewed had greatly evolved, since the hypothesis that treaties were suspended or terminated by war had given way to the realization that war did not *ipso facto* put an end to treaties between the parties to an armed conflict. Resolution II/1985 of the Institute of International Law and the report of the Special Rapporteur reflected that evolution.

39. The Special Rapporteur took the intention of States parties to a treaty at the time of its conclusion to be the operative criterion for determining whether the treaty continued to produce effects in the relations between the parties during an armed conflict in which they were involved. Although that criterion was corroborated by legal theory and certain precedents in case law, it could not in itself explain situations in which treaties were suspended during armed conflict. At the time a treaty was

concluded the parties did not necessarily foresee the outbreak of hostilities. Consequently, when such a situation was not anticipated, the Special Rapporteur's proposal to refer to articles 31 and 32 of the 1969 Vienna Convention to determine the intention of the parties was not very helpful. It was essential to take account of other criteria, such as the object and purpose of the treaty and the nature and duration of the conflict, and he therefore believed that it was necessary to redraft articles 4 and 9.

40. Although the prohibition in the Charter of the United Nations of the use of force meant that international armed conflicts were occurring less frequently, internal armed conflicts were in fact proliferating. There was thus every reason to expand the definition of armed conflict to include internal armed conflict. The meaning of the term "third States" in draft article 2, subparagraph (b), should also be made clear. It might refer to a State that, without being the ally of one of the belligerents, expressed politically motivated support for that State by suspending the operation of commercial agreements with that State's adversary without declaring war or taking part in the hostilities. Such had been the case with the Syrian Arab Republic which, following the outbreak of hostilities between Iraq and the Islamic Republic of Iran in 1980, had closed its borders with Iraq, thereby prohibiting the passage of persons and goods for the entire duration of the hostilities. The term might also mean a neutral State; paragraph 118 of the Secretariat memorandum referred to the decision of the United States, a neutral country that was not participating in the armed conflict between Eritrea and Ethiopia, to suspend the operation of an agreement relating to the Peace Corps programme in Eritrea in 1998¹² and in Ethiopia in 1999.¹³ Clarification of the term "third State" would thus make it possible to differentiate between the effects of armed conflict on treaties and cases of international responsibility incurred through failure to implement a treaty.

41. Some members of the Commission regretted that the Special Rapporteur had omitted from the draft a reference to the Arab-Israeli conflict and its effect on treaties, yet there were virtually no treaty relations between the Arab States and Israel. The sole existing agreements between the antagonists were the General Armistice Agreements concluded under United Nations auspices at the end of the first Arab-Israeli war in 1948¹⁴ and the 1974 disengagement of forces agreement concluded between the Syrian Arab Republic and Israel after the 1973 war.¹⁵ The other applicable international conventions were part of international humanitarian law, such as the fourth

¹² Agreement between the United States of America and Eritrea, effected by exchange of notes, signed at Asmara May 20, 1994, *Treaties and Other International Acts Series*, No. 12103, Washington D.C., United States Government Printing Office.

¹³ Exchange of notes constituting an agreement relating to the Peace Corps Program (Addis Abeba, 23 May 1962), United Nations, *Treaty Series*, vol. 456, No. 6563, p. 293.

¹⁴ General Armistice Agreement between Israel and Egypt (Rhodes, 24 February 1949), United Nations, *Treaty Series*, vol. 42, No. 654, p. 251; General Armistice Agreement between Israel and Lebanon (Ras En Naqoura, 23 March 1949), *ibid.*, No. 655, p. 287; General Armistice Agreement between Israel and Jordan (Rhodes, 3 April 1949), *ibid.*, No. 656, p. 303; General Armistice Agreement between Israel and Syria (Hill 332, near Mahanayim, 20 July 1949), *ibid.*, No. 657, p. 327.

¹⁵ Signed at Geneva on 31 May 1974, S/11302/Add.1.

Geneva Convention of 12 August 1949, and were applicable solely during periods of armed conflict. Thus there were no instances of suspension or abrogation of treaties in the context of that conflict. It would be more interesting to study agreements concluded between the antagonists, particularly the Palestine Liberation Organization and Israel, during the peace process launched in Madrid in 1991, which would remain in force as long as neither of the parties involved formally announced its decision to terminate them.

42. Given that belligerents had the option of concluding such agreements, draft article 5, paragraph 2, ought to refer to "capacity" and not "competence" to conclude treaties.

43. Draft article 7, which the Special Rapporteur called superfluous, referred to the objective criterion of the object and purpose of treaties, and not to the subjective criterion of the intention of the parties, in determining which treaties would continue in operation during an armed conflict. That to him was proof positive that the criterion of intention was inadequate to the purpose. As to the non-exhaustive list of treaties that were meant to be applied during an armed conflict, some of them seemed to fall into more than one category. The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations to which draft article 7, paragraphs 2 (j) and 2 (k) alluded, were also multilateral law-making treaties, mentioned in paragraph 2 (g), and treaties expressly applicable in case of an armed conflict, cited in paragraph 2 (a), given the content of their provisions. As for the other categories of treaties, such as those relating to international watercourses, State practice was not necessarily unanimous where their operation during an armed conflict was concerned. Indeed, the Special Rapporteur himself felt that the arguments in favour of their inclusion were not conclusive. If a classification of treaties was really called for in the draft articles, it should be structured differently.

44. Draft article 10, which the Special Rapporteur called provocative, said nothing about the legality of the use of force and its subsequent effects on treaties and, consequently, about the distinction between an aggressor State and a State exercising its right to self-defence. The Commission ought to follow the approach taken by the Institute of International Law and build on articles 7-9 of the Institute's resolution II/1985. He could accept the principle of the separability of treaty provisions from the standpoint of their operation during an armed conflict, since that was entirely consistent with State practice.

45. Lastly, he thought it was too early to refer the draft articles even to a working group, much less to the Drafting Committee.

46. The CHAIRPERSON said that he was not in favour of making a distinction between non-belligerence and neutrality, even though certain States did so. The distinction, in his opinion, undermined the principle of equal treatment of belligerents. He also wondered, when two ex-belligerents were no longer actively engaged in hostilities, whether it was possible to speak of a state of war. In that connection he recalled the practice followed by the Security Council in the 1950s during the conflict between Israel and Egypt, when it had considered that,

in the absence of active hostilities, the 1888 Convention between Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain and Turkey respecting the Free Navigation of the Suez Canal (Constantinople Convention) was applicable.

Responsibility of international organizations¹⁶
(A/CN.4/549 and Add.1, sect. A, A/CN.4/547¹⁷ and
A/CN.4/553,¹⁸ A/CN.4/556,¹⁹ A/CN.4/L.666/Rev.1)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

47. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on responsibility of international organizations (A/CN.4/553).

48. Mr. GAJA (Special Rapporteur) said that his third report addressed two sets of issues which concerned, respectively, the objective element of internationally wrongful acts of an international organization and the responsibility of an international organization in connection with the act of a State or of another organization. Those issues corresponded to a large extent to those covered in part One, chapters III and IV, of the articles on responsibility of States for internationally wrongful acts.²⁰ The topics might at first seem different and might eventually lead to two different chapters, but they were not totally unrelated. There were also some issues that were specifically relevant to international organizations. His next report would deal with two further sets of issues. The first concerned circumstances precluding wrongfulness, and in that connection Governments and international organizations had been asked to comment on the state of necessity; the second concerned the responsibility that States or international organizations might incur for the internationally wrongful act of an international organization of which they were members.

49. He regretted that his third report gave the impression of being highly theoretical: it did so because available practice was very limited on the issues considered. He had tried to take into account all the practice that had been available and hoped that in the future there would be more. Several international organizations were taking a growing interest in the Commission's work on responsibility of international organizations and some had sent written comments and expressed their views, which was useful.

50. Several States had also made comments on subjects that the Commission had already discussed and on those currently under consideration, and those comments would be duly taken into account. Some comments, for example from the European Union and the German Government, were included in the document entitled "Comments and

observations received from Governments and international organizations" (A/CN.4/556), which for the time being was available only in English. Unfortunately, some interesting comments, particularly those made by Interpol, had not been taken into account in the report because they had reached the Special Rapporteur too late.

51. In the case of most of the issues discussed, there was little reason to depart from the content and wording of the draft articles on responsibility of States for internationally wrongful acts. Questions relating to the existence of a breach of an international obligation, the need for an obligation to exist at the time the act occurred, the extension of the breach in time and a breach consisting of a composite act did not vary according to the subject of international law that committed the breach. That remark applied also to wrongful acts caused through omissions, notwithstanding the doubts that had been raised in that regard by the General Counsel of the IMF (see paragraph 8 of the report). Whenever an international organization had an obligation to do something, it breached that obligation if it did not engage in the required conduct.

52. A question that had been raised concerning the objective element was particularly relevant to the European Union: the Legal Service of the European Commission had expressed criticism of the rules of attribution adopted by the Commission in 2004, maintaining that when a member State engaged in conduct in an area of exclusive competence of the European Union or in implementation of binding acts of the European Union, it was acting almost as an agent of that organization.²¹ That view, which was not a new one, had been endorsed by a WTO panel. The International Law Commission's position, on the other hand, was that conduct of State organs was always attributable to the State and not to the organization of which the State was a member, unless the organ was placed at the organization's disposal.

53. Without reverting to questions of attribution, there could be explanations of an organization's responsibility that did not derogate from the rules of attribution although that might not be totally obvious, and something might have to be said in the commentary about it. For instance, treaties like the WTO agreements might imply that the European Union was under an obligation to prevent certain conduct by its member States; if that was the case, while attention might be focused on the conduct of the member State, the breach really lay in the organization's failure to prevent that conduct, a view that was consistent with traditional rules of attribution. Another possible explanation was that the international organization's obligation was to achieve a certain result, irrespective of the entity that engaged in the conduct required for that purpose. For example, under agreements concluded with non-member States, the European Union might undertake an obligation not to levy import duty on a certain product. That result could be achieved only with the cooperation of member States which, as the German Government had

¹⁶ For the draft articles and the related commentary adopted on first reading by the Commission, see *Yearbook ... 2004*, vol. II (Part Two), chap. V, sect. C, pp. 46 *et seq.*

¹⁷ Reproduced in *Yearbook ... 2005*, vol. II (Part One).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26–27.

²¹ See *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 21st meeting (A/C.6/59/SR.21), paras. 17–18. See also P. J. Kuijper and E. Paasivirta, "Further exploring international responsibility: the European Community and the ILC's project on responsibility of international organizations", in *International Organizations Law Review*, vol. 1, No. 1 (2004), pp. 111–138, at p. 127 *et seq.*

stressed in its recent comments (see A/CN.4/556), were not bound under international law to non-member contracting States, but were under an internal obligation to contribute to the fulfilment of treaties. The existence of that internal obligation explained why the European Union could accept under treaties with non-member States certain obligations whose implementation was left to member States. In the event of a breach it was the responsibility of the organization and not of its member States that was incurred.

54. The phrase in draft article 8 that read “an act of that organization is not in conformity with what is required of it by that obligation” was not a very apt description of all the instances he had referred to, but the matter could be taken care of in the commentary; moreover, the phrase fully corresponded to article 12 of the draft articles on State responsibility.

55. Concerning the objective element, he said that the only specific provision that should be added to the text of the draft articles on State responsibility for internationally wrongful acts related to the rules of the organization. The legal nature of those rules—whether or not they were part of international law—was a controversial question. It did have practical importance, because even if one considered that the rules of the organization were special rules that prevailed over general international law, it must be acknowledged that they did not cover all questions relating to responsibility of the organization. It was therefore important to determine whether the international law of responsibility provided a backdrop that filled any gaps in the existing special rules. In draft article 8, paragraph 2, he proposed saying that the preceding paragraph should also apply “in principle” to the breach of an obligation set by a rule of the organization, because some organizations had achieved such a degree of integration that they could be considered to have given rise not to a special regime of international law but to a body of law that was separate from international law. Moreover, there were some issues relating to the responsibility of international organizations for which the rules the Commission was elaborating might not be applicable, and the words “in principle” left the door open to certain exceptions.

56. In his written comments made in April 2005, the General Counsel of the IMF had stated that when an international organization acted pursuant to its charter, it would not be subject to responsibility under general international principles, but its responsibility would be determined under its own charter (see A/CN.4/556). In other words, international law did not come into play because everything was covered by the rules of the organization. For his part, he found it difficult to say that an international organization that acted in conformity with its own rules could never be seen as breaching one of its obligations under general international law or a treaty binding it. The question was not whether the latter rules were rules of *jus cogens*, since there might well be no conflict between the rules of the organization and a particular rule of general international law.

57. Apart from draft article 8, paragraph 2, the wording of draft articles 8–11 reproduced articles 12–15 of the draft articles on State responsibility, simply replacing

the word “State” with “international organization”. Some members had feared that the Commission was relying excessively on that text, but there was no valid reason for distinguishing between the position of States and that of international organizations in that context.

58. The same observation applied to the second set of issues dealt with in his third report, namely the responsibility of an international organization in connection with the act of a State or another organization. Draft articles 12–15 reproduced verbatim articles 16–19 of the draft articles on State responsibility, except for the replacement of the word “State” by “international organization” and for the references to cases when an international organization was aided or assisted, directed, controlled or coerced.

59. Some cases did not appear to fall into any of the categories considered. For example, an international organization might prompt its members to take conduct that might be lawful or not for those members but implied the circumvention by the organization of one of its obligations. The member State was then used by the organization in a way similar to the way Venetian warships used to use unmanned barges loaded with explosives to attack the enemy fleet. It stood to reason that an international organization could not escape responsibility by acting through one of its member States.

60. The term “control” in draft article 13 had sometimes been understood as covering also what had been termed “normative control”. Draft article 13 related to a different issue, however, because it was based on the assumption that the act in question was unlawful for the State as well. For the purpose of circumventing one of its obligations an organization might use a binding decision that might or might not leave discretion to the member State, or it might recommend or authorize a certain act. If the position of the member State varied depending on the situation, from the standpoint of the organization, the distinction was not necessarily important, as some representatives in the Sixth Committee had pointed out. What was important was that at the organization’s prompting the conduct in question actually took place and that the organization’s obligation was circumvented. To avoid any misunderstanding, he wished to emphasize that the organization might incur responsibility if the authorized conduct enabled it to circumvent one of its obligations, but it would not be responsible for all the wrongful conduct that a member State might commit when availing itself of the recommendation or authorization. He had tried to express the conclusions of that analysis in draft article 16, but he realized that the text might not be sufficiently clear or, more fundamentally, that the approach he had taken might be held to be incorrect. He hoped in any event that his efforts would be considered useful.

The meeting rose at 1 p.m.