

Document:-  
**A/CN.4/2861**

**Summary record of the 2861st meeting**

Topic:  
**Draft report of the International Law Commission on the work of its  
fifty-seventh session**

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

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be of great assistance to participants in the forthcoming meeting of the Study Group.

*The meeting rose at 1.05 p.m.*

## 2861st MEETING

*Tuesday, 2 August 2005, at 10.05 a.m.*

*Chairperson:* Mr. Djamchid MOMTAZ

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, 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. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

### Draft report of the International Law Commission on the work of its fifty-seventh session

1. The CHAIRPERSON invited the Rapporteur of the Commission to introduce the draft report of the Commission on the work of its fifty-seventh session.

2. Mr. NIEHAUS (Rapporteur) said that the draft report was divided into 12 chapters: chapter I contained the introduction, chapter II provided a brief summary of the work of the Commission at its fifty-seventh session and chapter III dealt with specific issues on which comments from Governments would be of particular interest to the Commission. Chapters IV to XI dealt with the substantive topics considered by the Commission at the current session, while chapter XII concerned other decisions.

#### CHAPTER IV. *Shared natural resources* (A/CN.4/L.667)

3. The CHAIRPERSON invited the members of the Commission to consider chapter IV of the draft report of the Commission (A/CN.4/L.667).

##### A. Introduction

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

##### B. Consideration of the topic at the present session

Paragraph 3

4. Ms. ESCARAMEIA asked why the presentation on the joint management of the Geneva aquifer system was not mentioned in the paragraph. Had it not been an informal technical presentation?

5. The CHAIRPERSON said that that question had been raised in the Working Group.

6. Mr. CANDIOTTI said that the final sentence of the paragraph should be completed by inserting figure 11 in the blank space.

7. Mr. GAJA asked whether the report of the Working Group on Shared Natural Resources would be included in the Commission's report or whether it was only mentioned by way of reference.

8. Mr. YAMADA (Special Rapporteur) said that the Chairperson of the Working Group, Mr. Candiotti, would give a presentation the following day in plenary meeting that ought to be mentioned; perhaps the paragraph should be set aside, as it would have to be redrafted.

9. The CHAIRPERSON said that a sentence would be added to that effect.

10. Mr. MANSFIELD said that the chapter should reflect the fact that the Working Group had worked tirelessly, had reached agreement on several draft articles and was continuing its work. It was not enough to say that the Working Group had held 11 meetings.

11. The CHAIRPERSON replied that it would be preferable to have the Working Group's report in hand before adding a sentence or paragraph that would reflect those concerns.

*Paragraph 3, as amended, was adopted.*

Paragraphs 4 to 11

*Paragraphs 4 to 11 were adopted.*

Paragraph 12

12. Mr. PELLET said that it had been his understanding that the principle of reasonable utilization applied to non-recharging aquifers and asked whether the first sentence did not contain a mistake.

13. Mr. YAMADA (Special Rapporteur) said that the sentence summarized the introduction to his report in which the application of the principle of reasonable utilization had been considered in respect of two categories, namely recharging and non-recharging aquifers. He recalled that under the 1997 Watercourses Convention the principle of sustainable utilization applied to surface waters but not to groundwaters.

14. Mr. MANSFIELD said that he, too, thought that the wording of the first sentence did not reflect the content of the two draft articles and proposed that it should be amended to read: "Paragraph 2, on reasonable utilization (i.e. sustainable utilization), was divided into subparagraphs (a) and (b) to reflect the practical application of this principle in different circumstances of a recharging and a non-recharging aquifer."

*Paragraph 12, as amended, was adopted.*

Paragraphs 13 to 17

*Paragraphs 13 to 17 were adopted.*

Paragraph 18

15. Mr. ECONOMIDES proposed that the word “politically” should be replaced by a more neutral term, such as “generally”.

*Paragraph 18, as amended, was adopted.*

Paragraphs 19 to 21

*Paragraphs 19 to 21 were adopted.*

Paragraph 22

16. Ms. ESCARAMEIA drew attention to the first sentence and proposed that the words “reliance on” should be replaced with the words “reference to” and that the word “other” should be deleted from the English version, which appeared to be in contradiction with the word “generally”. Ms. ESCARAMEIA proposed that in the interest of balance a new sentence should be added after the third sentence, which would read: “Some members considered that the present topic was substantially different from that of watercourses and that therefore the 1997 Convention should not be taken as a guide.”

17. Mr. MANSFIELD proposed that the words “largely non-renewable nature and” in the third sentence should be deleted, since some aquifers were renewable.

*Paragraph 22, as amended, was adopted.*

Paragraph 23

*Paragraph 23 was adopted.*

Paragraph 24

18. Mr. PAMBOU-TCHIVOUNDA said that he failed to grasp the meaning of the phrase “there was a contextual role for the principle in the draft articles”.

19. The CHAIRPERSON suggested that the words “a contextual” should be replaced by the word “any”.

*Paragraph 24, as amended, was adopted.*

Paragraphs 25 to 27

*Paragraphs 25 to 27 were adopted.*

Paragraph 28

20. Mr. GAJA thought that the word “conductive” in the second sentence, the meaning of which was not clear, should be replaced and that the final sentence should be deleted, as it appeared to contradict what preceded.

21. The CHAIRPERSON suggested that the word “conductive” should be amended to “helpful” and that the final sentence should be deleted.

*Paragraph 28, as amended, was adopted.*

Paragraph 29

*Paragraph 29 was adopted.*

Paragraphs 30 and 31

22. Mr. GAJA proposed that the word “third” should be deleted from the first sentence of paragraph 30 as well as from paragraphs 31 and 74 of the English text.

*Paragraphs 30 and 31, as amended, were adopted.*

Paragraphs 32 to 37

*Paragraphs 32 to 37 were adopted.*

Paragraph 38

23. Ms. ESCARAMEIA proposed the insertion of a phrase that would read “recharge and discharge zones” in the territories of third States in draft article 13, paragraph (3),” after the phrase “in draft article 7 *et al.*”.

*Paragraph 38, as amended, was adopted.*

Paragraph 39

*Paragraph 39 was adopted.*

Paragraph 40

24. Mr. PELLET proposed that the phrase “an equal opportunity of participation”, the meaning of which was unclear, should be amended to read “for participation on flexible terms”.

*Paragraph 40, as amended, was adopted.*

Paragraph 41

*Paragraph 41 was adopted.*

Paragraph 42

25. Ms. ESCARAMEIA proposed that the following sentence should be inserted after the first sentence: “Some members thought, however, that the expression ‘consider harmonizing’ was too weak and needed to be replaced.”

*Paragraph 42, as amended, was adopted.*

Paragraph 43

26. Mr. PELLET said that the second time the term “*projet d’article*” appeared in the first sentence of the French text it ought to be rendered in the plural. That error occurred frequently in both the French and English texts, and he urged the Secretariat to review the entire text.

*Paragraph 43 was adopted.*

Paragraph 44

27. Mr. GAJA proposed that the second sentence should be broken into two sentences: the phrase “to the extent that it presupposed that” in that sentence should be replaced by the word “if” and the words “in which case” should be replaced by “according to some members”. The newly formed sentences would thus read: “Such a proposition would only be valid if all States which shared an aquifer were parties to the 1997 Convention. According to some members, it would be reasonable to contemplate ...”.

28. Mr. PAMBOU-TCHIVOUNDA said that he did not understand what was meant by the phrase “*tant sur le plan juridique que sur celui des principes*” (“legally and policy-wise”) in the French version of the last sentence of the paragraph and asked whether they referred to methodological rather than legal principles.

29. The CHAIRPERSON asked whether it might be possible simply to delete the words “legally and policy-wise”.

30. Mr. PELLET said that the problem was one of translation and proposed replacing the words “*des principes*” in the French text with “*de l’opportunité*”.

31. Mr. MANSFIELD said that during the debate legal reasons and general policy reasons had been advanced specifically with regard to the vulnerability of water-courses to pollution; he admitted, however, that the word “policy-wise” was odd.

32. Mr. BROWNLIE said that the words “legally and as a matter of policy” would be preferable.

*Paragraph 44, as amended by Mr. Gaja and Mr. Brownlie, was adopted.*

Paragraph 45

33. Mr. MANSFIELD proposed that the reference to the framework instrument should be deleted and that the first sentence should be reworded to read: “Although attention was drawn to article 311 (2) of the United Nations Convention on the Law of the Sea, some members doubted that that article could serve as a precedent for paragraph 2.”

*Paragraph 45, as amended, was adopted.*

Paragraphs 46 to 48

*Paragraphs 46 to 48 were adopted.*

Paragraph 49

34. Mr. PELLET said he found the penultimate sentence to be incomprehensible and proposed replacing it with a sentence that would read: “It was suggested that one of the factors to be taken into account in subparagraph (c) was the importance of drinking water.”

*Paragraph 49, as amended, was adopted.*

Paragraph 50

35. Mr. PELLET noted that in the last sentence of the French version the words “*autres que l’État de l’aquifère*” should read “*autres que les États de l’aquifère*”.

36. Ms. ESCARAMEIA said that the phrase “since the effects on groundwaters may take years before they are detectable” should be added to the seventh sentence.

37. The CHAIRPERSON suggested that the Commission should adopt paragraph 50 with the amendments proposed by Mr. Pellet and Ms. Escarameia.

*Paragraph 50, as amended, was adopted.*

Paragraph 51

*Paragraph 51 was adopted.*

Paragraph 52

38. Mr. MANSFIELD pointed out that the word “operate” in the first sentence of the English text should read “cooperate”.

*Paragraph 52 was adopted with a minor drafting change.*

Paragraphs 53 to 55

*Paragraphs 53 to 55 were adopted.*

Paragraph 56

39. Ms. ESCARAMEIA said that the second sentence seemed to contradict the first and proposed replacing “for example” with “however”.

*Paragraph 56, as amended, was adopted.*

Paragraph 57

40. Mr. GAJA proposed that the beginning of the last sentence, which read “Such States benefit highly from aquifers, and”, should be deleted and that the words “no legal basis” in that sentence should be amended to read “any legal basis”.

*Paragraph 57, as amended, was adopted.*

Paragraph 58

41. Mr. GAJA proposed that the word “of precaution” should be added after the word “principle” in the first sentence.

42. Ms. ESCARAMEIA said that the last sentence did not reflect her statement in plenary and asked that it should be reworded to read: “The principle was well recognized as a principle of international environmental law and needed to be stressed in the draft articles.”

43. The CHAIRPERSON suggested that the Commission should adopt the paragraph as amended by Mr. Gaja and Ms. Escarameia.

*Paragraph 58, as amended, was adopted.*

Paragraph 59

44. Mr. PELLET said that he would like to settle once and for all the question of when the term “draft article” should be written with an “s”, as doing so could change the meaning. He himself thought that it should be written without an “s” when reference was being made to a single draft article and with an “s” when the reference was to several draft articles or the draft articles as a whole; the problem was particularly in evidence in paragraph 59: was the Commission talking about the objectives of the draft articles as a whole or of draft article 14? The second hypothesis would appear to be the correct one, and if that was the case, then the final “s” must be deleted.

45. Mr. YAMADA (Special Rapporteur) said that the reference in paragraph 59 was solely to draft article 14, and that the term “draft articles” should read “the draft article”.

46. The CHAIRPERSON suggested that the Commission should adopt paragraph 59 as amended.

*Paragraph 59, as amended, was adopted.*

Paragraphs 60 to 66

*Paragraphs 60 to 66 were adopted.*

47. Mr. GALICKI said that the references to the subject matter of individual draft articles in all the paragraphs that had just been adopted should be standardized in the English version; either “on” should be used in every case or it should be deleted throughout.

48. The CHAIRPERSON said that Mr. Galicki’s proposal would be transmitted to the Secretariat.

Paragraphs 67 and 68

*Paragraphs 67 and 68 were adopted.*

Paragraph 69

49. Mr. PELLET said that the phrase “in accordance with the General Assembly mandate” in the fourth sentence was ambiguous and proposed that it should be amended to read “in accordance with the mandate given to it by the General Assembly”.

*Paragraph 69, as amended, was adopted.*

Paragraphs 70 to 75

*Paragraphs 70 to 75 were adopted.*

Paragraph 76

50. Mr. PELLET said that the Commission should clarify what was meant by the term “administrative organization” in the first sentence.

51. Mr. Sreenivasa RAO suggested that the text should instead read “institutional mechanisms and management of transboundary aquifers”.

52. Mr. PAMBOU-TCHIVOUNDA wondered whether the use of the term “*rivières*” in the second sentence of the French text was deliberate or whether the term used ought to be “*fleuves*”.

53. The CHAIRPERSON suggested replacing the word “*rivières*” in the French text with “*cours d’eau*”; the word “rivers” in the English text would thus become “watercourses”.

54. Mr. CANDIOTI proposed that the name of the organization appearing in the second sentence should be corrected in the English version to read “Franco-Swiss Genevese Aquifer Authority.”

55. The CHAIRPERSON suggested that the Commission should adopt the paragraph with the amendments proposed by Mr. Pellet, Mr. Sreenivasa Rao, Mr. Pambou-Tchivounda, himself and Mr. Candiotti.

*Paragraph 76, as amended, was adopted.*

Paragraph 77

*Paragraph 77 was adopted.*

*Section B, as amended, was adopted.*

*Chapter IV of the draft report, as amended, was adopted.*

#### CHAPTER V. *Effects of armed conflicts on treaties* (A/CN.4/L.668)

56. The CHAIRPERSON invited the members of the Commission to consider chapter V of the draft report, on effects of armed conflicts on treaties (A/CN.4/L.668).

##### A. Introduction

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

##### B. Consideration of the topic at the present session

Paragraphs 3 to 4

*Paragraphs 3 to 4 were adopted.*

Paragraph 6

57. Mr. GAJA observed that the manner in which chapter V was presented was unusual but seemed to constitute an interesting innovation. Some problems of a chronological order were nevertheless apparent: for example, in paragraph 25, concerning article 1, reference was made to a proposal that had been made at a later time, in the context of article 10. The Special Rapporteur’s conclusions should therefore be grouped together at the end of the report, or else amendments should be made to a number of paragraphs.

58. Mr. PELLET said he thought that the new format was an excellent initiative on the part of the Special Rapporteur, and he disagreed with Mr. Gaja that the Special Rapporteur’s conclusions should be placed at the end of the chapter. He thought that the chapter should be left as it stood, subject to a few changes to correct chronology where necessary.

59. Mr. ECONOMIDES said that there was a considerable disparity between various chapters of the draft report. While the chapter on shared natural resources was excellent, the chapter under consideration did not adequately reflect the positions taken by members. He himself had been unable to find any trace of his statements, and he wondered what criteria the Secretariat had used in summarizing the debate. That led to the more general question of working methods and transparency.

60. The CHAIRPERSON said that Commission members, and Mr. Economides in particular, were entirely free, as the various paragraphs were considered, to request that a sentence should be added to reflect the views they had expressed.

61. Mr. BROWNLIE (Special Rapporteur) said that the problem of determining the extent to which members' views should be reflected in a report such as the one before the Commission was not a new one.

62. Mr. GAJA, referring to the new format used in chapter V, said he wished that the Commission would adopt a standard format.

*Paragraph 6 was adopted.*

Paragraph 7

63. Mr. PELLET said that the word “*justifiable*” in the French text should read “*justiciable*”.

*Paragraph 7 was adopted, with a minor drafting change to the French version.*

Paragraphs 8 and 9

*Paragraphs 8 and 9 were adopted.*

Paragraph 10

64. Ms. ESCARAMEIA proposed that the word “*extremely*” should be inserted before the word “*helpful*” in the second sentence, as the Secretariat memorandum had indeed been very helpful.

*Paragraph 10, as amended, was adopted.*

Paragraph 11

*Paragraph 11 was adopted.*

65. Mr. ECONOMIDES said that the question that had dominated the debate was barely mentioned in the summary; accordingly, he proposed that a new paragraph 11 *bis* should be added after paragraph 11, which would read:

Several members observed that the draft articles should be compatible with the purposes and principles of the United Nations. In particular, they should take into account the unlawful character of the use of force in international relations and above all of the fundamental distinction between aggression on the one hand and individual or collective self-defence or the use of force in the context of the collective security of the United Nations on the other.

66. The CHAIRPERSON said it was his understanding that the Commission wished to adopt the new paragraph 11 *bis* proposed by Mr. Economides.

*It was so decided.*

Paragraph 12

67. Mr. GAJA proposed that the last sentence of paragraph 12 should be reworded to read: “The importance of municipal case law was borne out by the Secretariat memorandum which referred to a number of such decisions.”

*Paragraph 12, as amended, was adopted.*

Paragraphs 13 to 18

*Paragraphs 13 to 18 were adopted.*

Paragraphs 20 and 21

*Paragraphs 20 and 21 were adopted.*

Paragraph 22

68. Mr. GAJA proposed that the first sentence and the word “*accordingly*” in the second sentence should be deleted, and that the last sentence should be reworded to read: “Some members said that they favoured including treaties which had not entered into force, while others maintained that only treaties in force at the time of the conflict should be covered by the draft articles.”

*Paragraph 22, as amended, was adopted.*

Paragraphs 23 to 31

*Paragraphs 23 to 31 were adopted.*

Paragraph 32

69. Ms. ESCARAMEIA, supported by Mr. GAJA, proposed that the final clause of the first sentence, beginning with the word “*although*”, should be deleted.

70. Mr. PELLET said that the words “*the scope of*” should be inserted after the word “*limit*” in the third sentence.

*Paragraph 32, as amended, was adopted.*

Paragraphs 33 to 36

*Paragraphs 33 to 36 were adopted.*

Paragraph 37

71. Mr. MANSFIELD proposed that the word “*as*” in the first sentence should be replaced by “*from*”.

*Paragraph 37, as amended, was adopted.*

Paragraph 38

72. Mr. ECONOMIDES said that the last sentence made little sense as currently worded. He proposed that the words “*in the context of draft article 3*” should be added at the end of that sentence.

*Paragraph 38, as amended, was adopted.*

Paragraphs 39 and 40

*Paragraphs 39 and 40 were adopted.*

Paragraph 41

73. Mr. GALICKI said that the phrase “war was the polar opposite” should be amended to read “that war was the polar opposite”, to make it consistent with the other numbered clauses in that paragraph.

*Paragraph 41, as amended, was adopted.*

Paragraph 42

*Paragraph 42 was adopted.*

Paragraph 43

74. Mr. PELLET said he found the last sentence of paragraph 43 to be extremely weak; the problem could be solved by replacing the words “could also play a role” with the words “was essential”.

75. Mr. BROWNLIE (Special Rapporteur) said that a clear distinction must be made—and it was that distinction that he had had in mind when he had submitted his original, deliberately provocative, version of article 10—between making the ban on the use of force and the lawfulness or unlawfulness of a particular armed conflict a condition for applying the draft articles, which he opposed, and preserving the question of the legal effect of such lawfulness or unlawfulness. It would in fact be most upsetting to arrive at a solution in which, so long as the lawfulness or unlawfulness had not been authoritatively assessed, the draft articles would simply not apply.

76. Mr. PELLET said that, as some members of the Commission considered that to be a key element, it should be reflected in the report. Similarly, he proposed that the words “a plausible” in the penultimate sentence of the paragraph should be replaced by the words “an important”.

77. Mr. ECONOMIDES, supporting Mr. Pellet, said that the equality of the belligerents was acceptable only in the context of international humanitarian law. In all other areas there could be no equality, since aggression could not produce legal effects.

78. The CHAIRPERSON pointed out that the last sentence of the paragraph reflected what some members had said during the debate. It was not an affirmation but a position. If Mr. Brownlie felt it necessary to do so, he could include an explanation to that effect in his conclusions.

79. Mr. Sreenivasa RAO said that he endorsed the Chairperson’s suggestion. It was important to mention all the positions taken by Commission members, provided that it was done proportionately.

80. The CHAIRPERSON suggested that the Commission should adopt paragraph 43 as amended by Mr. Pellet.

*Paragraph 43, as amended, was adopted.*

Paragraph 44

81. Mr. ECONOMIDES proposed that the words “vague and subjective” in the first sentence should be replaced with the words “vague, subjective or non-existent”. He

further proposed adding the phrase “at least insofar as treaties concluded after the Second World War were concerned” at the end of the second sentence.

82. Ms. ESCARAMEIA said that she could support Mr. Economides’ first proposal; she believed that the report should make clear that one of the criteria that could be used was the type of treaty and its compatibility with situations of armed conflict.

83. Mr. GAJA said that Mr. Economides’ second proposal tended to narrow the scope of the sentence. He did not think that such precision was really necessary, but he would not object to its inclusion.

84. Mr. KOSKENNIEMI said that he agreed with Mr. Gaja and proposed that a new sentence should be added after the second sentence, to read: “When concluding a treaty, States rarely reflect on the effect any possible armed conflict might have on it.”

85. Mr. PELLET said that he was prepared to accept Mr. Koskenniemi’s proposal, although it did not mean the same thing as Mr. Economides’ second proposal. In his view, both amendments should be accepted. Ms. Escarameia’s proposal was substantively correct, but that clarification should be made in paragraph 45 rather than in paragraph 44.

86. The CHAIRPERSON suggested that the Commission should adopt paragraph 44 as amended by Mr. Economides and Mr. Koskenniemi.

*Paragraph 44, as amended, was adopted.*

Paragraphs 45 to 52

*Paragraphs 45 to 52 were adopted.*

Paragraph 53

87. Mr. MATHESON said that a sentence should be added at the end of the paragraph that would read: “The Special Rapporteur agreed that the principle enunciated in the Legality of the Threat or Use of Nuclear Weapons advisory opinion should be appropriately reflected.”

*Paragraph 53, as amended, was adopted.*

Paragraph 54

*Paragraph 54 was adopted.*

Paragraph 55

88. Mr. ECONOMIDES proposed that the phrase “others expressed some doubts” should be amended to read “doubts were expressed as to the provision’s compatibility with contemporary international law”.

*Paragraph 55, as amended, was adopted.*

Paragraph 56

*Paragraph 56 was adopted.*

Paragraph 57

89. Mr. PELLET said that the word “*préserver*” in the second sentence of the French text should be replaced with the word “*présumer*”.

*Paragraph 57 was adopted with a minor drafting change to the French version.*

Paragraphs 58 to 73

*Paragraphs 58 to 73 were adopted.*

Paragraph 74

90. Mr. PELLET said that the word “*article*” in the last sentence of the French text should be in the plural.

*Paragraph 74 was adopted with a minor drafting change to the French version.*

Paragraph 75

91. Mr. ECONOMIDES said that since articles 7, 8 and 9 of Resolution II/1985 of the Institute of International Law were cited in the paragraph, the text of those articles should be provided in a footnote, in order to facilitate comparison.

92. In addition, he wondered what was meant by the adjective “different” in the second sentence of the paragraph. He proposed that a new sentence should be added at the end of the paragraph, to read: “It was noted that only treaties incompatible with the exercise of the right to self-defence should be suspended or abrogated.”

93. The CHAIRPERSON suggested that the word “different” should be replaced by the word “conflicting”.

94. Mr. BROWNLIE said that he did not recall that that position had been expressed during the debate.

95. Mr. ECONOMIDES said that he himself had upheld that position, and he insisted that the sentence he had proposed should be included in the text.

96. The CHAIRPERSON, speaking in his personal capacity, recalled that one of the articles of the Institute of International Law dealt with that very aspect of the question. He suggested that the Commission should adopt paragraph 75 as amended by Mr. Economides.

*Paragraph 75, as amended, was adopted.*

Paragraphs 76 and 77

*Paragraphs 76 and 77 were adopted.*

97. The CHAIRPERSON announced that the Commission would conclude its consideration of document A/CN.4/L.668 at its next meeting.

*The meeting rose at 1.10 p.m.*

## 2862nd MEETING

*Tuesday, 2 August 2005, at 3.10 p.m.*

*Chairperson: Mr. Djamchid MOMTAZ*

*Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Mr. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.*

### Draft report of the Commission on the work of its fifty-seventh session (*continued*)

CHAPTER V. *Effects of armed conflicts on treaties (continued) (A/CN.4/L.668)*

#### B. Consideration of the topic at the present session (*continued*)

Paragraph 78

1. Mr. PELLET sought clarification regarding the last sentence, which read: “At the same time, he pointed out that such proviso would not solve the problems of legal causation, i.e. it was not clear to what extent the States concerned could rely on it as a basis for suspending treaties unless there existed some causal connection necessitating suspension or termination.”

2. Mr. BROWNLIE (Special Rapporteur) said that the last sentence concerned the problem of *ipso facto* termination, which was supposed to have been clarified by his ill-fated version of draft article 10. As he had repeatedly explained, apparently to no avail, the intent of the draft article was to raise an intellectual problem, not to prove that he did not accept the post-1945 version of the use of force. The issue at stake was *ipso facto* suspension or termination and the principle stated in article 3 based on one of the more important parts of the Institute of International Law’s resolution II/1985, according to which there was no *ipso facto* effect. The *ipso facto* effect problem was two-pronged. First there was causation: there had to be some factual basis for suggesting that armed conflict affected the treaty. Second, there was a need to distinguish between a proviso making it clear that the contents of the Commission’s draft would not have any effect on the provisions of the Charter of the United Nations relating to the use or threat of force, and the situation in which the principles relating to the use of force—the substantive principles—were brought into play to deal with the question of the legal validity of the use of force concerned. That did not come under the topic under consideration, which explained his reaction during the previous meeting when the Chairperson had accepted a statement that represented the view of only one member of the Commission. Some members of the Sixth Committee would be justifiably concerned if the Commission embarked en passant on a codification of the legal principles relating to the use of force by States.