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Summary record of the 2895th meeting

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Extract from the Yearbook of the International Law Commission:-
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2895th MEETING

Tuesday, 18 July 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, 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. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Statement by the Under-Secretary-General for Legal Affairs, the Legal Counsel

1. The CHAIRPERSON invited Mr. Nicolas Michel, Under-Secretary-General for Legal Affairs, Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

2. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel), after congratulating the new member of the Commission, Mr. Valencia-Ospina, on his election, said that the General Assembly, in its resolution 60/22 of 23 November 2005, had expressed its appreciation to the International Law Commission for the work accomplished at its fifty-seventh session and encouraged it to complete its work, at the current session, on the topics that were nearing completion. He understood that considerable progress had been made during the current session, in particular, on the topics “Diplomatic protection”, “International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)” and “Shared natural resources”. That progress led him to hope that the Commission would be in a position to complete its second reading of the draft articles and draft principles on the first two topics and its first reading of the draft articles on the third topic in the coming weeks. He also congratulated the Commission on its progress on all the other topics in its programme of work.

3. In the same resolution, the General Assembly encouraged the Commission to continue taking cost-saving measures. He was aware that the Commission had taken the General Assembly’s oft-repeated request to heart; it would doubtless heed that request again when planning its next session. In particular, he noted with satisfaction that, according to statistics issued by the Conference Services Division, the Commission was using an extremely high percentage (98 per cent) of the conference servicing resources made available to it.

4. Still on the administrative and budgetary theme, he drew attention to the strategic framework that the United Nations was currently establishing for the period 2008–2009. The section relating to the codification and

progressive development of international law, especially in relation to the Commission, had been drawn up on the assumption that the length of the Commission’s sessions would be in conformity with the general approach indicated in paragraph 735 of the Commission’s report on its fifty-second session.²⁴⁴ In that connection, he urged members of the Commission to continue to cooperate with the Secretariat in the effort to cope with the large volume of documentation by doing their utmost to abide by the dates indicated for the submission of reports by special rapporteurs. Meanwhile, the Codification Division of the Office of Legal Affairs, in its capacity as the Commission’s Secretariat, would continue to make every effort to assist it in its work, a recent instance being its lengthy memorandum on expulsion of aliens (A/CN.4/565 and Corr.1).²⁴⁵

5. A considerable part of the Codification Division’s work was devoted to the preparation of publications, of which the Commission was a prime beneficiary. Thus the sixth edition of *The Work of the International Law Commission* had already appeared in five of the official languages of the United Nations²⁴⁶ and would shortly be followed by the Chinese version. Plans were already in hand for the preparation of the seventh edition, which would reflect recent developments. As for the Commission *Yearbook*, the Codification Division had completed the digitization of all volumes in English and French from 1949 onwards, and had posted them on the Internet. Internet access was also provided to recent documents that had not yet been included in a *Yearbook* but were available on the United Nations optical disk system. The Secretariat was currently looking into the possibility of having the *Yearbook* further disseminated through some of the existing commercial electronic databases, such as LexisNexis, and also of establishing a print-on-demand service in order to make out-of-print volumes—or entire sets of the *Yearbook*—available for special order. The Codification Division continued to expand its digitization efforts, and would shortly complete the digitization of the official records and proceedings of the various diplomatic conferences that had been held on the basis of the Commission’s work and that led to the adoption of major multilateral treaties. Efforts were also under way to digitize some of the other publications of the Division, particularly the *United Nations Juridical Yearbook* and the *Reports of International Arbitral Awards*, which currently numbered 25 volumes.

6. He wished to draw the Commission’s attention to three recent developments in the field of international law within the United Nations. First, in the field of elaboration of new international legal instruments on the recommendation of the Sixth Committee, the General Assembly had, in its resolution 60/42 of 8 December 2005, adopted the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, thus completing four years of negotiations conducted by the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel and the Working Group of the Sixth

²⁴⁴ *Yearbook ... 2000*, vol. II (Part Two), document A/55/10, p. 132.

²⁴⁵ Mimeographed; available on the Commission’s website.

²⁴⁶ United Nations publication (Sales No.: 04.V.6), New York, 2005.

Committee. The Optional Protocol expanded the scope of protection under the 1994 Convention on the Safety of United Nations and Associated Personnel to cover United Nations and associated personnel involved in delivering humanitarian, political or development assistance in peacebuilding, or in the delivery of emergency humanitarian assistance. It was an important instrument for those United Nations and other personnel who remained involved in dangerous missions all over the world in the service of humanity, and it was to be hoped that more and more States would become parties to the Optional Protocol.

7. Secondly, work had continued on a draft comprehensive convention on international terrorism, both within the Ad Hoc Committee established pursuant to General Assembly resolution 51/210 of 17 December 1996 and in the Working Group of the Sixth Committee. The Working Group had met during the sixtieth session of the General Assembly and the Ad Hoc Committee had convened in February 2006 in order to make further attempts to resolve outstanding issues, and in particular the question of the scope of application of the convention. Despite new proposals aimed at overcoming differences among the various viewpoints, a breakthrough in negotiations continued to remain elusive.

8. Thirdly, there had been significant developments in the field of transitional justice, with hybrid courts set up in Sierra Leone and Cambodia, and other courts in preparation, for Lebanon and, possibly, for Burundi. A number of trials were in progress before the Special Court for Sierra Leone, in Freetown. Charles Taylor, the former President of Liberia, had been transferred to the Special Court on 29 March 2006. Security Council resolution 1688 (2006) of 16 June 2006 had subsequently made it possible for Mr. Taylor to be transferred to The Hague for trial there by a chamber of the Special Court, after the Government of the United Kingdom had announced that, subject to the passage of the necessary legislation through Parliament, it would allow Mr. Taylor to serve his sentence in the United Kingdom, should he be convicted by the Special Court. Mr. Taylor's trial was expected to begin in The Hague early in 2007.

9. As for Cambodia, the Cambodian and international judges of the Extraordinary Chambers in the Courts of Cambodia had been sworn in at a formal ceremony in Phnom Penh on 3 July 2006. The Cambodian and international co-prosecutors and co-investigating judges had been sworn in at the same time. The two co-prosecutors had started work in the second week of July 2006. It was expected that they would open their first investigations at the end of the summer and, all being well, would refer the first case to the two co-investigating judges towards the end of 2006. One of the biggest challenges facing the Extraordinary Chambers was the advanced age of many of the likely targets for investigation and prosecution: only a fortnight earlier, a former Khmer Rouge leader, who had been held in detention by the Cambodian authorities for several years, had been hospitalized. A further major challenge was to reach out to the Cambodian public in order to explain the work of the Extraordinary Chambers. The work of the Extraordinary Chambers would be monitored

closely to ensure that international standards of justice, fairness and due process of law were observed.

10. With regard to Burundi, a United Nations delegation had visited that country from 27 to 31 March 2006, in accordance with Security Council resolution 1606 (2005) of 20 June 2005, to commence negotiations with the Government on the legal framework for the establishment of a truth and reconciliation commission and a special tribunal for Burundi. The discussions had focused on three issues, namely the nature of the national consultation process leading to the establishment of the truth commission, the non-applicability of amnesty for crimes of genocide, crimes against humanity and war crimes, and the relationship between the truth commission and the special tribunal. The second round of negotiations on a general framework agreement and the founding instruments of each mechanism could take place in the near future, if the Burundian authorities could provide some clarification on a limited number of key issues that had already been discussed.

11. As for Lebanon, the Secretary-General had been requested, pursuant to Security Council resolution 1664 (2006) of 29 March 2006, to enter into negotiations with the Lebanese authorities on "the establishment of a tribunal of an international character" to prosecute persons responsible for the assassination of the former Prime Minister, Rafiq Hariri, and others. Two draft instruments were currently under negotiation: an agreement between the United Nations and the Government of Lebanon on the establishment of a special tribunal for Lebanon and the statute annexed thereto. Significant progress had been achieved between the parties at a technical level. The drafts awaited formal negotiation with the Government of Lebanon and, subsequently, review by the Security Council before the signature of the agreement.

12. The establishment of transitional courts illustrated a major shift in the international legal culture over the past 10 to 15 years: the creation of such courts could not be viewed as isolated events, but instead formed part of a broader new culture. Although that culture was still emerging, it was not premature to draw a few provisional conclusions. First, whereas it had been thought, in the past, that peace should take precedence over justice, and those responsible for atrocities had not been prosecuted because it was thought that their cooperation was crucial to peace, it had now been understood that peace would not be achieved without justice, and vice versa. Both were essential, the question being how to achieve a balance between the two. Secondly, it had become clear that it was essential to insist on the impermissibility of amnesty for international crimes. Thirdly, in any consideration of the relationship between truth and reconciliation, on the one hand, and justice, on the other, there must be an absolute insistence on the independence of the criminal prosecutor, who alone must be in a position to decide whether to prosecute those implicated.

13. The CHAIRPERSON thanked the Legal Counsel for his statement, which had reminded the Commission of the close link between the codification and the implementation of international law. It was time for

humankind to rediscover some of its lost values for the sake of future generations. He invited members to make comments and ask questions.

14. Mr. GALICKI said he wished to commend the Codification Division's efforts to make the work of the Commission and other bodies easily accessible on the Internet. He believed that the Commission had reason to congratulate itself on the successful adoption of the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel. As one who had been involved in the *travaux préparatoires* for the Convention itself, beginning in 1984, he well recalled the difficulties encountered in ensuring that the Convention had the widest possible scope, and the Protocol took that process a step further. The situation with regard to transitional justice was less satisfactory. While he acknowledged the work of the transitional bodies, he wondered whether the Legal Counsel thought that a proliferation of *ad hoc* international courts was preferable to a fully functioning International Criminal Court.

15. Mr. DUGARD said he wished to comment on the Legal Counsel's reference to amnesty. As the Legal Counsel had said, justice had, in recent years, been placed above peace, and every effort was made to exclude amnesty, despite its long history of acceptance in international relations. He wondered whether it was realistic to pursue the aim of prohibiting amnesty in all situations. In Uganda, where the International Criminal Court was active, amnesty might be required as part of the peace negotiations currently under way. Insufficient attention was being paid to the possibility of qualified or conditional amnesty and, speaking from his own South African perspective, he would say that qualified amnesty had been successful in reconciling peace and justice. If the Rome Statute of the International Criminal Court had dealt with the issue, a total prohibition of amnesty might have been justified; however, the Statute studiously ignored the question. In his view, it would be wiser to pursue the goal of qualified amnesty than the pipe dream of a prohibition of all forms of amnesty.

16. Ms. ESCARAMEIA said that, like Mr. Galicki, she was concerned about the relationship between the International Criminal Court and the special courts. She wondered whether the United Nations had any strategy in place governing the establishment of special courts. It was true that the special courts dealt with cases over which, for one reason or another, the International Criminal Court did not have jurisdiction, but she wondered whether any policy had been developed to encourage or discourage the establishment of such courts, where the crimes involved were the same as those brought before the International Criminal Court. Her concern was that the use of special courts might discourage the activity of the International Criminal Court.

17. In a number of countries, including Timor-Leste, truth and reconciliation commissions had examined cases relating to lesser crimes, whereas special courts had been set up in those countries to hear and try persons accused of very serious international crimes. She wondered whether any criteria existed for deciding whether to allocate cases

to truth and reconciliation commissions or to special courts. If so, what were those criteria?

18. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) said his own personal view was that, even with an international system of criminal justice becoming more and more universally accepted, States would nevertheless continue to bear primary responsibility for prosecuting and punishing the most serious crimes. Only if States were unable or unwilling to accomplish that task should the International Criminal Court exercise jurisdiction over those crimes by virtue of the principle of complementarity.

19. Nevertheless that statement required some qualification. First, it was necessary to bear in mind that, even though the Rome Statute of the International Criminal Court had currently been ratified by 100 States, the Statute was not yet universally accepted. That obstacle could, however, be circumvented, as the Security Council could refer to the Prosecutor of the Court situations which would otherwise not fall within its jurisdiction owing to the fact that, for instance, the States concerned were not parties to the Rome Statute.

20. Secondly, it was clear that some States did not yet possess legal systems capable of fully addressing the question of individual criminal responsibility. Indeed, in some cases State systems had completely collapsed and it was therefore illusory to hope that those States would be able to fulfil their duty of prosecuting the perpetrators of serious crimes of concern to the international community. Two developments were therefore needed. First, more States must become parties to the Rome Statute of the International Criminal Court; secondly, it was essential to build the capacity of States' internal legal systems. To that end, the international community must devise a more substantial and effective programme of assistance to those States which would welcome the provision of training opportunities for the members of their legal services.

21. The questions put by members of the Commission seemed to imply that the international community should refrain from establishing *ad hoc* or mixed tribunals where the case fell within the jurisdiction of the International Criminal Court. If the system of international justice was to function, however, it was necessary to engage in creative thinking whenever a country's domestic courts were deemed capable in principle of exercising criminal jurisdiction but needed international assistance, not necessarily in the form of the participation of international judges or of the establishment of a mixed tribunal, but rather in the conducting of their day-to-day business.

22. On the vexed question of amnesty for international crimes such as war crimes, genocide and crimes against humanity, or other crimes that might be regarded as international crimes in the future, he was of the view that it was vital to learn lessons from the past and he was therefore grateful to Mr. Dugard for mentioning his country's experience. Before deciding whether it was realistic to seek a total ban on amnesty for such crimes, it was essential to ascertain what was meant by

“conditional” or “qualified” amnesty. Unfortunately, negotiations to secure peace agreements sometimes had to be conducted with persons who might be responsible for international crimes. The question could then arise whether it might be advisable to suspend prosecution, or not to initiate prosecution, in the phase leading up to the conclusion of a peace agreement and the establishment of the most vital State functions.

23. The state of affairs in certain countries where amnesty had been granted, or where the perpetrators of the worst crimes had not borne criminal responsibility for them, showed that, even after many years, those countries were still haunted by memories of the role which had been played by those persons, who, on occasion, had even returned to positions of power. It was plain that those countries were finding it extremely hard to lay the foundations for lasting peace.

24. Some flexibility therefore had to be allowed, in the light of what was understood by “qualified” or “conditional” amnesty. On the other hand, it would be difficult to compromise on the actual principle involved. The purpose of transitional justice processes was, of course, to punish the chief perpetrators of international crimes and to give the victims a sense that justice was being done. Over and above that, their purpose was to have an effect on society as a whole and to create conditions for lasting peace. In that context, it was essential to give thought to the whole issue of prosecuting and sentencing the chief culprits by way of redress. In Sierra Leone some tens of millions of dollars annually had been invested in the Special Court, but only 11 persons had ultimately been brought to trial. While he was convinced of the need for the process, there was a need to assess, for other similar situations, the best way to address the consequences to be faced by those perpetrators of major crimes who were not brought to justice before the Special Court. Mixed courts were so costly that there was probably a grey area between what could be achieved by a truth and reconciliation commission and the limited scope of activity of an international criminal tribunal or a mixed tribunal. Some thought should be given to the question how best to deal with criminals who ought to appear before a body other than a truth and reconciliation commission, but whose misdeeds did not come within the limited jurisdiction of an international criminal court. Creative thinking was needed to ensure that justice was done in such circumstances. Nevertheless, the hope that the national legal system might in due course be developed, reformed and reinvigorated so that it could itself handle cases which could not be heard by the International Criminal Court or by a mixed court, might not always be realistic.

25. Hence the solution must be an appropriate mix of measures and a diversification of those measures. Efforts should focus on putting an end to the old culture of impunity. When new truth and reconciliation commissions were created, the possibility of subsequently bringing to trial persons who had appeared before them should certainly not be automatically ruled out.

26. The Secretariat and the Security Council were currently going through a learning phase with regard

to the relationship between truth and reconciliation commissions and special tribunals. It was necessary to learn from past successes and mistakes and to think creatively, since no two situations were ever exactly the same. As for the relationship between truth and reconciliation commissions and tribunals, in Burundi, for example, account would have to be taken of the fact that the country had suffered from 40 years of repeated cycles of violence. Naturally it would be unrealistic to expect the tribunal to try all those who, over all those years, might have been responsible for war crimes or other international crimes. For that reason, appropriate mechanisms would have to be found for those persons who could not be allowed to pass solely through a truth and reconciliation process, but who were unlikely to be tried by an international court.

27. Mr. MOMTAZ said that one of the greatest obstacles to the determination of the United Nations to end the culture of impunity was the fact that persons suspected of having committed international crimes were still on the run. When the United Nations was present on the ground, it could play a very important role in locating and apprehending those persons. On 11 November 2005, the Security Council had taken the very important step of adopting resolution 1638 (2005) under Chapter VII of the Charter of the United Nations, which had broadened the mandate of the United Nations Mission in Liberia to include the apprehension and detention of former President Charles Taylor for transfer to Sierra Leone for prosecution.

28. Did the Legal Counsel consider that such a policy could be contemplated in the future? What were the dangers of such a policy? It had to be borne in mind that United Nations forces had to respect the principle of impartiality and neutrality, although frequently they alone were in a position to apprehend persons alleged to have committed international crimes.

29. Mr. BROWNLIE, referring to the various Security Council resolutions concerning the presence of the multinational force in Iraq, and especially Security Council resolution 1546 (2004) of 8 June 2004, said he would be interested to know how the Legal Counsel and his colleagues assessed the legal character of the regime created by that series of resolutions. There were several possibilities. The regime could be one of belligerent occupation within the meaning of the term in classical international law. In his own opinion, however, that possibility could probably be set aside: that position seemed not to be reflected in the resolutions; the regime had not been applied on the ground; nor, as far as he knew, had the States most directly involved recognized the existence of a belligerent occupation. The other two possibilities were, first, that the Security Council resolutions created a regime of military occupation *sui generis*; or, secondly, that the State of Iraq was independent, with visiting forces present on the basis of the consent of a lawful Government of Iraq.

30. Mr. KAMTO said he had some concerns with regard to the question of transitional justice. In developing countries, especially those in Africa, there was a lingering sense of unease because that justice was perceived as applying dual standards, or as being meted out only to the

weak and the poor. That explained the attitude of Senegal and the members of the African Union with respect to the case of former Chadian Head of State Hissène Habré.²⁴⁷ There was a feeling, even among developing countries, that nationals of those countries lacking sufficient support in the international community or in the Security Council were more likely to be arraigned before a court of justice. Was the United Nations aware of that perception, and did it have a strategy for mitigating it?

31. He also wished to know why the Legal Counsel had failed to mention the crime of aggression among those falling within the jurisdiction of the International Criminal Court. That crime was expressly mentioned in article 5 of the Rome Statute of the International Criminal Court and although it had not been defined there, it was deemed to be one of the four most serious crimes of concern to the international community. It could also be regarded as the mother of all crimes, since there could be no war without an initial act which, in all probability, would consist of an act of aggression. What progress had been made with endeavours to define that crime? Had they been abandoned? Had the time not come to make a more strenuous effort with a view to facilitating application of the Statute? Moreover, a definition of aggression might help to limit the conflicts which gave rise to the other crimes listed in article 5.

32. Mr. DAOUDI, endorsing the Legal Counsel's views with regard to the importance of the relationship between peace and justice, said that, although the United Nations had adopted numerous resolutions on problems, often of a regional nature, which had led to chronic conflicts in the course of which international crimes had been committed, the Organization had been unable to enforce those resolutions. As a result, over the past 10 to 15 years, the emphasis appeared to have been on the prosecution and punishment of those crimes, rather than on prevention. A system existed within the United Nations for protecting international peace and security, yet that system could be jeopardized by the absence of a regime of preventive diplomacy. Did the Legal Counsel agree on the need for a reform of the system in order to secure peace and, through peace, justice?

33. The CHAIRPERSON, speaking as a member of the Commission, noted that the United Nations was omnipresent in world affairs and that it was impossible to separate the law from people's perception of political or other action to uphold it. He asked what place the universal presence of the United Nations had in the broad process of reform launched by the Secretary-General. Would the attempt by the United Nations to deal with each and every conflict that arose help to expedite the reform process or would it, as was to be feared, act as a brake on it?

34. Mr. MICHEL (Under-Secretary-General for Legal Affairs, Legal Counsel) concurred with Mr. Momtaz's

concern that, all too frequently, persons suspected of having committed international crimes were still at large. The question of trials *in absentia* had been discussed during the drafting of the Statutes of the International Tribunal for the Former Yugoslavia²⁴⁸ and of the International Tribunal for Rwanda.²⁴⁹ There had been several reasons for the decision not to admit such trials. First, they had been regarded as inconsistent with the common law tradition. It had also been held that, if such tribunals were to achieve the aims set for them, those accused had to be present in person at their trial. The question was still open, however. As for the proposed tribunal for Lebanon, it was the first time that such a tribunal had been envisaged in a civil law tradition, since the Lebanese system was relatively close to the French system, in which trials *in absentia* were permissible.

35. At the same time, the European Court of Human Rights had held that criminal trials *in absentia* in which the accused was not entitled to defence counsel violated the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), even if the person convicted had the right to request a retrial and appear before the Court. While neither the United Nations nor States that were not parties to the Convention were bound by the Court's case law, the international community obviously had to take account of the case law of a court of such importance. In other words, if, in the future, new judicial systems were to permit trials *in absentia*, it would be necessary to ensure that suspects not present at their trial had access to defence counsel during the proceedings. It would also be necessary to consider what consequences the fact that a person convicted had been briefed and had been represented by defence counsel would have on that person's right to demand a retrial.

36. However, Mr. Momtaz's question related principally to the mandate of United Nations forces with regard to locating and apprehending persons being investigated or prosecuted by international tribunals. The mandate of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) could be interpreted, within certain limits and under certain conditions, as a mandate to locate and apprehend individuals wanted by the International Criminal Court. The evolving practice in that area was encountering challenges, chief among which was assigning priorities. If the priority in a given region was peacemaking, then when United Nations forces engaged in a determined effort to track down persons accused, they would almost certainly be perceived as enemies by the combatants and their main mission compromised. Hence the circumspect approach adopted applied by the Security Council in assigning such mandates. Opportunities for cooperation between the United Nations and the International Criminal Court had been arising more frequently of late, under various special cooperation arrangements, from which useful lessons were being learned.

²⁴⁷ See, in this regard, the "Letter dated 20 February 2006 from the Permanent Representative of the Congo to the United Nations addressed to the President of the General Assembly", A/60/693, annex I, Decisions, declarations and recommendation adopted by the Assembly of the African Union at its sixth ordinary session, and "Decision on the Hissène Habré Case and the African Union (Assembly/AU/Dec.103 (VI)), p. 16.

²⁴⁸ Report of the Secretary-General pursuant to paragraph 2 of resolution 808 (1993) of the Security Council (S/25704), annex.

²⁴⁹ Security Council resolution 955 (1994) of 8 November 1994, annex.

37. With regard to Mr. Brownlie's questions about the legal regime created by the resolutions on Iraq, he said that while one of the main missions of the Office of Legal Affairs was to give legal advice to the Secretary-General, the Secretariat and other principal organs of the United Nations, he did not recall, during his two years as Legal Counsel, his Office having been formally consulted by the Security Council on the substantive aspects of resolutions, except on limited technical issues. The fact of the matter was that his Office did not have a consolidated position on the legal regime created by such resolutions. Indeed, he found Mr. Brownlie's analysis of the various possible interpretations of the regime most helpful.

38. In connection with Mr. Kamto's questions, and by way of a preliminary observation, he welcomed the signing, on 12 June 2006, of the agreement between Cameroon and Nigeria on the implementation of the judgment handed down by the ICJ in the *Land and Maritime Boundary between Cameroon and Nigeria* case.²⁵⁰ Years of negotiation, the determination of the Secretary-General and the good will and personal involvement of the Heads of States had been needed for agreement to be reached. It was essential that States involved in proceedings before the Court should comply with their obligation to give practical effect to the judgments handed down. It was to be hoped that the provisions of the agreement would be faithfully implemented within the time frame envisaged.

39. Mr. Kamto had referred to a lingering sense of unease in some African countries over what seemed to be dual standards of justice. He was, of course, sensitive to such perceptions, since his role, and that of the Office of Legal Affairs, was to ensure that the needs of all countries were taken into account without any discrimination. Any strategy for overcoming such perceptions would require a major effort, not only by the United Nations, but also by the World Bank and other international donors, to respond to requests by countries for assistance in judicial reform. The best international legal system, one that would obviate the need for *ad hoc* tribunals, would be one in which, in principle, States had jurisdiction, with jurisdiction falling to the International Criminal Court only where necessary. Under such a system, States that had ratified the Rome Statute of the International Criminal Court, as so many in Africa had already done, would be unlikely to consider it an expression of dual standards in justice if a case that fell within the jurisdiction of the International Criminal Court was handed over to that Court for trial.

40. His allusion, when responding to the question by Mr. Dugard on amnesty, to "other crimes that might be regarded as international crimes in the future" had of course referred to the crime of aggression, although he would not wish to exclude the possibility that other crimes currently considered as national crimes might also in due course be deemed to be international crimes. The definition of aggression as a crime committed by an individual was being studied by the Assembly of States Parties to the Rome Statute of the International Criminal Court, whose deliberations fell outside the competence of

the United Nations as such. As he understood it, however, they had proceeded fairly slowly, although some progress had been made in 2005 in the context of informal discussions. He did not know whether the deliberations would result in a generally acceptable solution, but the forthcoming Review Conference would possibly provide new impetus, facilitating the adoption of rules giving the Court jurisdiction to prosecute individuals accused of the crime of aggression.

41. Mr. Daoudi had referred to the need to strike a proper balance between punishment and prevention. He agreed on the need to devote sufficient attention, energy and resources to prevention and to the effective implementation of Security Council resolutions. However, prosecution and punishment of crimes could also have a preventive dimension and some dissuasive effect. Recent experience showed that some warlords were not indifferent to the threat of prosecution before a criminal court. The more deeply the refusal to tolerate impunity took root, the more likely potential criminals would be to have second thoughts. Punishment and prevention should therefore be carefully balanced and neither approach excluded.

42. Replying to the Chairperson's question, he said that the United Nations must remain aware that law and justice were the very basis for its legitimacy. If it did not continue to take sufficient account of that fact, its very existence could be jeopardized. Accordingly, concern for the law must be integrated into the daily process of decision-making. That could best be achieved by ensuring that decision makers were aware of the legal dimension of issues and involved legal counsels in the decision-making process at an early stage. Legal counsels, on the other hand, while tirelessly promoting respect for the law, must also recognize that they were advisers rather than decision makers.

43. The United Nations was seeking to integrate the legal dimension more fully into its activities, *inter alia*, in post-conflict situations. One of the successes of the 2005 World Summit Outcome²⁵¹ was the establishment, by resolution 60/180 of 20 December 2005, of the Peacebuilding Commission whose support structures were to be given the resources to promote the rule of law in countries whose State infrastructure needed reconstructing. Concern for the rule of law should likewise prevail in all other areas at the national and international levels. The Secretariat and its relations with the principal and subsidiary bodies of the United Nations must be organized to take account of that need.

44. The Secretary-General had announced in 2004 that the rule of law was to be a priority until the end of his term, and he himself hoped that the next Secretary-General would be equally committed to that principle at both the national and international levels.

45. The CHAIRPERSON thanked the Legal Counsel for his comments and clarifications. His closing sentiments had been particularly stimulating and optimistic and all members of the Commission would undoubtedly share them.

²⁵⁰ Agreement between the Republic of Cameroon and the Republic of Nigeria concerning the modalities of withdrawal and transfer of authority in the Bakassi Peninsula (Greentree, New York, 12 June 2006) (United Nations, *Treaty Series*, vol. 2542, No. 45354).

²⁵¹ See resolution 60/1 of 16 September 2005 in which the General Assembly adopted the 2005 World Outcome Summit.

Responsibility of international organizations (continued) (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

46. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his fourth report, contained in documents A/CN.4/564 and Add. 1–2.

47. Mr. GAJA (Special Rapporteur), summing up the debate, said that although time constraints would prevent him from making a comprehensive analysis of all the remarks made during the course of the debate, they had been noted, and the Drafting Committee would consider them in due course. The subject was complex and not always easy to place in context. The five draft articles complemented one another. They attempted to give balanced protection both to those who suffered injury from a wrongful act of an international organization and to those who, as members of an international organization, could be exposed to international responsibility for an unlawful act committed by an international organization. The context, however, was wider, comprising the rules on attribution of conduct to States found in chapter II of Part One of the draft articles on responsibility of States for internationally wrongful acts.

48. In his second report,²⁵² which had dealt with attribution, he had referred to the controversy surrounding certain cases involving States alongside international organizations, one of which was the bombing of the territory of the Federal Republic of Yugoslavia in 1999. He had suggested that in such cases conduct should be attributed only to the member States concerned or to both the organization and one or more of its member States. He still disagreed with Mr. Pellet on that point. He had also held that the act of an organ of a State that was not placed under the effective control of an international organization had to be attributed to that State, irrespective of the involvement of an international organization, for instance by way of a decision binding the State. Those points must be kept in mind in considering the provisions on responsibility of States in general (arts. 25 to 27) and of Member States only (arts. 28 and 29) in relation to wrongful acts committed by international organizations.

49. Articles 25 to 27 replicated articles 16 to 18 on responsibility of States in order to cover the case of a State aiding or assisting, controlling and directing, or coercing an international organization in the commission of an internationally wrongful act. In his report he had given the basic reason for that replication, and that choice had been widely endorsed. Suggestions had been made for modifications to the wording of the articles on responsibility of States, but adopting them would mean modifying the text applicable in the relations between States, which had already been incorporated in articles 12 to 14 of the current draft. One provision

would then consider aid or assistance by an international organization, and a slightly different text would apply to aid or assistance on the part of a State. The reason adduced by Mr. Dugard for making such a distinction was that it was more likely that a State would control, direct or coerce an international organization than vice versa. While that might well be so, it did not seem to justify applying different standards to relations between a State and an international organization, on the one hand, and to relations between States, on the other. In addition, draft article 28 alleviated the need for special rules.

50. Several members had stressed the importance of the statement in paragraph 62 of the report, that influence amounting to aid or assistance, direction and control, or coercion, had to be used by the State as a legal entity that was separate from the organization: it could not consist in participation in the ordinary decision-making process of the organization in accordance with its pertinent rules. As Mr. Koskenniemi and Ms. Xue had pointed out, it would not always be easy to decide whether a State was acting only within the rules or was abusing its position as a member. However, the practical difficulty in applying a criterion to borderline cases should not necessarily lead to the abandonment of that criterion. An attempt to provide supplementary elements might be made in the commentary.

51. In his report he had noted that it was not necessary to replicate the saving clause in article 19 of the draft articles on responsibility of States for internationally wrongful acts.²⁵³ Since Mr. Pellet and others had requested an explanation of that assertion, he would cite the “without prejudice” clause in draft article 19. That provision concerned relations between among States and was intended to make it clear that the State that committed the wrongful act, even when assisted by another State, was not exonerated from responsibility in the case of aid or assistance, direction and control, or coercion. Paragraph (4) of the commentary added that the saving clause was also intended “to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance or from acts otherwise attributable to any State under chapter II”.²⁵⁴ Such might be the case under the Treaty on the Non-Proliferation of Nuclear Weapons with respect to assistance to a State in acquiring nuclear weapons, which was prohibited by a primary rule. Insofar as a State incurred responsibility, that situation was covered by the draft articles on responsibility of States and nothing needed to be said about it in the current draft.

52. One solution would be to transpose the wording of draft article 19 to the case of an international organization, so that the provision would read, for example: “This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the international organization which commits the act in question, or of any other international organization.” That was not strictly necessary, however, because the suggested title of the chapter was “Responsibility of a State in connection

²⁵² *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/541.

²⁵³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26.

²⁵⁴ *Ibid.*, p. 71.

with an act of an international organization,” and there was no need to specify that when a State aided or assisted, directed and controlled or coerced an international organization in the commission of an internationally wrongful act, the responsibility of the organization that committed the act was not prejudiced. The chapter did not as such deal with the responsibility of international organizations. Moreover, in the current draft, article 16 already specified that when an international organization aided or assisted another international organization in the commission of an internationally wrongful act, the responsibility of the latter international organization was not prejudiced. The same clearly applied when the aiding or assisting entity was not an international organization as provided for in draft article 16, but a State.

53. Thus, while he believed that a general saving clause was unnecessary, what was unnecessary could still be spelled out. Should the Drafting Committee feel that a “without prejudice” provision would contribute to clarity, one could be added, along the lines of the text he had just proposed. The provision would have to be placed at the end of the chapter, after draft article 29.

54. Turning to questions that had been the subject of intense debate at the current session, he noted that the idea of including a provision such as draft article 28 had been widely accepted. Various drafting suggestions had been made, some of them relating to the French version, which did not entirely render the meaning of the original English text. Other comments and suggestions related to the substance of the provision.

55. As was explained in paragraph 72 of the report, the reference to obligations relating to functions which had been transferred to an international organization by its member States had not been intended to be exhaustive, but to reflect existing practice. Such practice did not relate only to integration organizations (the European Space Agency, for example, was not an integration organization), nor did the transfer of functions necessarily refer to such organizations. Since the problem might also arise with regard to functions which had not been transferred, in the sense that there might be functions which the organization had but which the State did not have, it might be preferable to look for different wording.

56. Several members had expressed a preference for the word “circumvention”, which was employed in draft article 15, relating to the case in which an international organization used the separate legal personality of its member States to avoid complying with one of its obligations.

57. It had been held, especially by Mr. Matheson, that draft article 28 should not cover all cases in which an international organization might commit an act that, if committed by a member State, would infringe one of its obligations. According to that view, draft article 28 should cover only abuse of the separate legal personality, although a specific intention of abuse should not be required—an intention which in any case would be very difficult to prove. While the instances of practice to which he had referred in his fourth report went further in establishing the responsibility of member States, such practice was

limited and related to one particular geographical area, and it might seem reasonable, as a matter of policy, to limit responsibility in the draft to the case in which a member State circumvented one of its obligations by causing an international organization to commit an act that, if committed by the State, would be in breach of that obligation. The most likely scenario was that several member States, using the international organization, would together circumvent a shared obligation. One example would be the circumvention by member States of an obligation not to use force, which they could do by establishing an international organization and causing it to use force. As was specified in paragraph 2, member States would incur responsibility whether or not the act in question was internationally wrongful for the international organization. That also met one of the concerns voiced in discussions on draft article 29. In that case, draft article 28 would give protection to third parties. States could not create an organization for the purpose of circumventing an obligation.

58. Draft article 29 had been at the centre of debate in the Commission. It was clear that such a provision was needed; the problem was how to word it. The general question of responsibility of member States for the internationally wrongful act of an international organization had given rise to conflicting views, although no member had argued in favour of responsibility of member States in all cases. Prevailing State practice and judicial or arbitral precedents pointed to limiting the responsibility of member States. As he had noted in paragraph 89 of the report, resolution II/1995 of the Institute of International Law stated that “there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members”.²⁵⁵ He would have no difficulty in subscribing to that statement. The wording “no general rule” had been accepted by the Institute on the basis of the proposal which he himself had made in Lisbon. The original text had read “there is no rule of general international law ...”, and he had suggested that it read “general rule” and that cases should then be established in which, on the contrary, such responsibility applied. There had been support for that view, which had led to the current text of the resolution as set out in paragraph 89. The Drafting Committee might consider whether there was really a need to spell out such a general proposition, albeit only in order to identify cases in which, in addition to those listed in the previous draft articles, member States could be held responsible. If different wording could be found which made it clear that those were not the only cases in which member States were responsible, then it would be possible to dispense with the general statement that there was no responsibility on the part of member States.

59. Even if the view was held that the cases listed in subparagraphs (a) and (b) resulted from the application of general principles of international law, it was an essential part of the Commission’s work to specify what those general principles were.

²⁵⁵ Institute of International Law, *Yearbook*, vol. 66, Part II (see footnote 222 above), p. 449.

60. Resolution II/1995 of the Institute of International Law had referred to “abuse of rights”, which was arguably covered by draft article 28. It also referred to “acquiescence” and “undertakings by the State”. Both cases were covered in the draft article, which indeed gave further protection to third parties, in that it also envisaged the case in which a State had “led the injured third party to rely on its responsibility”. That might go beyond acquiescence. The wording suggested could include a reference to the circumstances which might have induced such reliance. This would cover some of the cases that troubled Ms. Escarameia, Mr. Economides and Mr. Yamada, especially those in which member States, after having led a third State to rely on their subsidiary responsibility, caused the organization to go bankrupt and then refused to stand in for it.

61. He had explained both in the report and during the debate why he had made no mention in draft article 29 of the nature of the responsibility which member States would incur. That was because member States could accept any type of responsibility, either subsidiary or concurrent, and the same would apply to the case of reliance—they could lead the injured third party to rely on their subsidiary or concurrent responsibility. However, he would not object if members wanted draft article 29 to state a presumption, which clearly should be that of subsidiary, and not concurrent, responsibility.

62. Several members had requested an examination of the responsibility of international organizations as members of other international organizations. As he had pointed out in paragraph 57 of his report, the problem was not whether the matter should be considered in the draft, but where. The appropriate place was not the present chapter, but chapter IV, the current title of which was “Responsibility of an international organization in connection with the act of a State or another international organization”. However, that chapter already contained provisions on aid or assistance, direction and control or coercion by an international organization, and it also had a circumvention provision. What would be required would be to introduce in that chapter two new draft articles, 15 *bis* and 15 *ter*, corresponding to draft articles 28 and 29, and to modify draft article 16 accordingly. Given the time constraints, it would be best to introduce those changes in the report to be submitted at the next session.

63. Lastly, some members would have preferred the draft articles to deal also with the responsibility of entities other than States and international organizations when those entities were members of international organizations. That seemed to go beyond the scope of the current mandate, as defined in draft article 1. The draft articles on responsibility of States did not rule out the possibility that a State could incur responsibility towards an entity other than a State. Indeed, that possibility was expressly set out in article 33 and was implicitly referred to in article 48 of those draft articles.²⁵⁶ However, those draft articles did not lay down any rule about the content of the responsibility which the State would incur in that case, nor the means of implementation that the entity might have for such responsibility. It seemed reasonable

for the current draft, which was addressing questions relating to international organizations, not to go any further in dealing with entities other than States and international organizations. Thus, it should not specify the rights which those entities had when an international organization was responsible or what those entities could do with regard to implementation, and it certainly should not state what kind of obligations and responsibility the entities might have.

64. The time might come for a general project on international responsibility which encompassed the responsibility of all possible actors: States, international organizations and other entities which were subjects of international law. For the time being, it seemed wise for the Commission to limit its ambitions and confine itself to the task of adding the draft articles on the responsibility of international organizations to those adopted on the responsibility of States adopted in 2001.

65. He proposed that draft articles 25, 26, 27, 28 and 29 should be referred to the Drafting Committee, which should also consider whether to include a saving clause in the current chapter along the lines of article 19 of the draft articles on responsibility of States.²⁵⁷

66. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 25 to 29 to the Drafting Committee, which should also be requested to consider whether a saving clause should be included in the chapter, as suggested by the Special Rapporteur, taking into account suggestions made to that effect by members during the general debate.

It was so decided.

**Effects of armed conflicts on treaties
(A/CN.4/560, sect. B, A/CN.4/570²⁵⁸)**

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

67. Mr. BROWNLIE (Special Rapporteur), introducing his second report on the effects of armed conflicts on treaties (A/CN.4/570), recalled that his lengthy first report²⁵⁹ had been presented in lieu of a preliminary report. That had been deliberate: he had found it more practical and more technically satisfying to attempt to produce a report that was essentially complete. The second report reviewed the debate in the Commission at its fifty-seventh session²⁶⁰ and the comments made by Governments in the Sixth Committee, and sought to implement the first report by asking the Commission to consider the first seven draft articles with a view, either to referring them to the Drafting Committee, or else to setting up a working group.²⁶¹ During the debate at the previous session, there had been some mention of the desirability of establishing

²⁵⁷ *Ibid.*, p. 27.

²⁵⁸ Reproduced in *Yearbook ... 2006*, vol. II (Part One).

²⁵⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

²⁶⁰ *Ibid.*, vol II (Part Two), pp. 27–37, paras. 110–191.

²⁶¹ *Ibid.*, p. 28, para. 123.

²⁵⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 28–30.

such a working group. That was not his preferred option, but was a possible way forward.

68. He had come to the conclusion that draft article 6 was not feasible and should be omitted. It had been pointed out in the debate that, strictly speaking, draft article 6 was unnecessary in the light of draft article 3.²⁶²

69. Draft articles 1 and 2 concerned the scope and the use of the terms “treaty” and “armed conflict”. Draft articles 3 to 7 were meant to be complementary and interactive. Draft article 3 was in a sense the key provision, because it was based on the most important element in the work of the Institute of International Law on that subject,²⁶³ namely the proposition that the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties (art. 2 of resolution II/1985). The policy substratum of that exercise had been to improve the stability of treaty relations.

70. There were a number of general issues which he hoped that the Commission would resolve, although, as Special Rapporteur, he did not have a strong personal commitment to any of the solutions. One such preliminary issue was that several delegations, listed in paragraph 3 of the second report, had favoured the inclusion of treaties concluded by international organizations. During the debate in the Commission, a number of members had also supported their inclusion. However, there had been no general agreement on the issue, and some members had made reference to article 74, paragraph 1, of the 1986 Vienna Convention. He had no enthusiasm for their automatic inclusion either on technical or on policy grounds. He was never very happy with the idea that the Commission should borrow heavily from a draft devoted to a different subject merely because of a superficial similarity of subject matter. That said, if members felt otherwise, he would include such treaties in his draft.

71. General support had been expressed in the Sixth Committee for his view that the topic should form part of the law of treaties and not part of the law relating to the use of force (A/CN.4/560, para. 46). At the same time, it had been observed that the subject was also closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility (*Ibid.*, para. 47).

72. With regard to draft article 1, the view had been expressed in the Sixth Committee that, since article 25 of the 1969 Vienna Convention allowed for the provisional application of treaties, it seemed advisable that the draft articles should apply to treaties that were being provisionally applied (*Ibid.*, para. 49). Similar views had been expressed in the Commission, where members had suggested that a distinction should be made between States which were contracting parties under article 2, paragraph (1) (f), of the 1969 Vienna Convention, and those which were not. While some members favoured including treaties which had not yet entered into force,

others considered that only treaties in force at the time of the conflict should be covered by the draft articles.

73. In draft article 2, the problematical element was the term “armed conflict”, the definition of which had been examined extensively in the first report. The draft articles deliberately included the effect on treaties of internal conflicts. At the same time, a proportion of the doctrine regarded the distinction between international and non-international armed conflict as basic in character. The policy considerations appeared to point in different directions, and the question had provoked marked differences of opinion in the Sixth Committee. Five delegations had been opposed to the inclusion of internal armed conflicts, while six had been in favour of their inclusion (see A/CN.4/570, para. 9). If the principle of continuity were to be adopted, then the inclusion of non-international armed conflicts would militate in favour of stability. However, the principle of continuity was in many ways conditional, and widening the definition of armed conflict would simply increase the scope of the problem.

74. In paragraph 10 of his report, he had referred to a number of sources relating to the task of definition. In paragraph 11, he took note of the view of the delegation of the Netherlands with regard to military occupation. Other special concerns were referred to in paragraph 12. His own view was that the definition of armed conflict should be dealt with on a pragmatic basis and that it was the task, not of the Special Rapporteur but of the Commission, to provide a general indication of whether or not the inclusion of non-international armed conflicts was desirable. He strongly believed that it would be inappropriate for the Commission to seek to frame a definition of “armed conflict” for all areas of public international law. That would impede its work and would in some ways distort the focus of the topic as placed on the agenda by the General Assembly.

75. Draft article 4 focused on the intention of the parties. There had been considerable opposition to and scepticism about the use of the criterion of intention, scepticism that he shared. The trouble was that if the concept of intention was discarded, the Commission would be abandoning the only lifeboat it had, leaky though it might be. It had repeatedly been necessary, for example in the *Gabčíkovo–Nagymaros Project case*, for decision makers and senior tribunals to “make up”, so to speak, the intention of the parties. While that was artificial, it was nonetheless a necessary operation in the decision-making process. Thus, he found it unhelpful that the Commission should want to do without the concept of intention.

76. Draft article 7, which was meant to complement draft article 4, had been the subject of vigorous debate. Persuasive comments had been made in the Sixth Committee, not least by the United States (see paragraph 35 (c) of the report), which argued that draft article 7 was laborious and clumsy and that to base it on special categories of treaties was a mistaken approach. However, several members of the Commission had made constructive comments, stressing that some of those factors should be taken seriously, possibly as guiding principles or as policy elements, in the interpretation, discernment or determination of the elements of intention in relation to particular subjects.

²⁶² *Ibid.*, p. 28, para. 127.

²⁶³ Institute of International Law, *Yearbook*, vol. 61, Part I (preparatory works) and Part II, Session of Helsinki 1985, Paris, Pedone, 1986. See, in particular, the resolution adopted on 28 August 1985 (hereinafter “resolution II/1985”).

77. The other problem which he had experienced with draft article 7 was that, whether or not the *modus operandi* of adopting categories was a good one, the fact of the matter was that there was quite a lot of customary law or nascent customary law supporting perhaps not all those categories, but certainly some of them.

78. In view of the late hour, he would complete the introduction of his second report at the next plenary meeting.

79. The CHAIRPERSON noted that the Special Rapporteur had mentioned the possibility of establishing a working group. For his own part, he believed that the second report, like the first one, posed a number of problems, and he would welcome the opportunity to participate in such a working group.

The meeting rose at 1 p.m.

2896th MEETING

Wednesday, 19 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, 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. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/560, sect. B, A/CN.4/570)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Special Rapporteur to introduce the final part of his second report on the effects of armed conflicts on treaties.

2. Mr. BROWNLIE (Special Rapporteur), after reminding the members of the Commission of the importance which he attached to the agenda item, said that consideration of the topic of the effects of armed conflicts on treaties had three main goals: to clarify the legal situation; to promote the security of legal relations between States, given in particular the erosion of the idea that an armed conflict immediately ruptured treaty relations; and to increase access to State practice, especially with regard to draft article 7.

3. He was not entirely convinced by the method of expanding the categories of treaties, the object and

purpose of which necessarily implied that they remained applicable, and he could easily be persuaded to revise draft article 7 to make a set of relatively flexible guiding principles. The problem was that parts of draft article 7 reflected important areas of State and judicial practice. If the Commission did away with that list of formal categories, it would have to find another vehicle for presenting State practice.

4. One possibility open to the Commission was not to refer the draft articles to the Drafting Committee and to establish a working group to consider certain issues in greater detail. Although he was not generally in favour of creating working groups, he admitted that several issues needed further consideration. However, it would be a pity if a number of substantive questions were not resolved in plenary. In some cases the Commission might take a vote—for example, to decide whether or not to include the effects of armed conflicts on treaties involving international organizations.

5. Draft articles 3, 4 and 7, which were the driving force behind the draft articles as a whole, were conceived to be applied together.

6. Draft article 3 (*Ipsa facto* termination or suspension) was mysterious in a way because the Commission could do without it. However, the doctrinal material which he had examined—some of which went back to the early nineteenth century—showed that there was a prevailing conception, especially among French authors, that the question of the effects of armed conflicts on treaties was almost beyond the scope of law, because armed conflicts automatically terminated treaty relations. It was not until the middle of the twentieth century that the doctrine had begun to change. It was against that background that draft article 3, the formulation of which was based on that of article 2 of resolution II/1985 of the Institute of International Law,²⁶⁴ was not superfluous. In the Commission's report on the work of its fifty-seventh session, it was stated that while support had been expressed for his proposal, some members had pointed out that there existed examples of instances of practice, referred to both in the Special Rapporteur's first report²⁶⁵ and the Secretariat's memorandum,²⁶⁶ that appeared to suggest that armed conflicts caused the automatic suspension of various categories of treaty relations, in whole or in part. Indeed, it had been suggested that the articles should not rule out the possibility of automatic suspension or termination in some cases. In terms of another suggestion, the provision could simply state that the outbreak of armed conflict did not necessarily terminate or suspend the operation of any treaty.²⁶⁷ He reminded the members of the Commission that there had been considerable support for the idea of replacing the words "*ipso facto*" with the word "necessarily".²⁶⁸

²⁶⁴ *Ibid.*, pp. 278–282.

²⁶⁵ See footnote 259 above.

²⁶⁶ A/CN.4/550 and Corr.1–2. Mimeographed, available on the Commission's website.

²⁶⁷ *Yearbook ... 2005*, vol. II (Part Two), Report of the Commission on the work of its fifty-seventh session (A/60/10), pp. 30–31, para. 143.

²⁶⁸ *Ibid.*, p. 31, para. 146.