

Document:-  
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**Summary record of the 2896th meeting**

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

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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,<sup>264</sup> 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 report<sup>265</sup> and the Secretariat's memorandum,<sup>266</sup> 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.<sup>267</sup> 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".<sup>268</sup>

<sup>264</sup> *Ibid.*, pp. 278–282.

<sup>265</sup> See footnote 259 above.

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

<sup>267</sup> *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.

<sup>268</sup> *Ibid.*, p. 31, para. 146.

7. Draft article 4 (The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict) represented the method of practical implementation of the principle set out in draft article 3. The majority of responses accepted the principle underlying draft article 4; however, reservations had been expressed about the problem of proving intention. The reservations of Commission members (and of some delegations in the Sixth Committee) regarding the role of intention called for close examination. In the first place, given the character of the subject matter, which was part of the law of treaties, it was unrealistic to assert that the role of intention should be marginalized. He recognized that it was also necessary to consider other factors, including the object and purpose of the treaty and the specific circumstances of the conflict. The content of draft article 4 as it currently stood was certainly not incompatible with the attention given to those other factors. No doubt the formulation could be improved. However, it was important to avoid the idea that draft article 4 should cover all possible issues in the same text. Draft article 4 was a founding provision which prefigured the provisions that followed it, in particular draft article 7 in the first report,<sup>269</sup> which referred to abundant State practice relating to the contextual bases on which intention might be ascertained. Further materials were cited in the memorandum prepared by the Secretariat.<sup>270</sup> In addition, several decisions in municipal case law indicated the significance of implications that could be drawn from the object and purpose of a treaty. A number of decisions were set out in paragraph 22 of the report. The reactions of several delegations to the first draft had raised a particular question. The United States delegation, for example, had observed that the Special Rapporteur considered “that the intention of the parties at the time of the conclusion of the treaty should be determinative. [The Government of the United States] felt that approach was problematic, since parties negotiating a treaty generally did not consider how its provisions might apply during armed conflict.”<sup>271</sup> The observation introduced a false dilemma. It was a common experience in the interpretation of treaties (and of legislation) that the intention of the parties or other actors must be reconstructed, so to speak, as a practical hypothesis (para. 25 of the report). In that context, he agreed with the further observation by the United States delegation that other factors must also be considered, including the object and purpose of the treaty. Similar proposals had emerged during the debate in the Commission.

8. Several structural problems remained, including the relationship between draft article 4 and draft article 7. Those provisions were applicable on a basis of coordination. It could be argued that if draft article 4 was redrafted to refer to other factors, including object and purpose, then draft article 7 would become redundant, although the current content of draft article 7 could then be placed in the commentary. However, that way of proceeding might entail a loss of substance. Much, if not all, of draft article 7 reflected State practice and fairly uniform judicial

standards. An additional structural problem was that the wording of draft article 4 contained a reference to articles 31 and 32 of the 1969 Vienna Convention. That was somewhat mechanical, but there could be no question of fashioning “designer principles” of interpretation for exclusive use in the current context.

9. Draft article 5 (Express provisions on the operation of treaties) had enjoyed general support. It had been pointed out that it spoke for itself and could even be said to be superfluous, but that it should be included for the sake of clarity. Draft article 6 (Treaties relating to the occasion for resort to armed conflict) had been deleted for reasons which he had explained at the previous session.

10. Draft article 7 (The operation of treaties on the basis of necessary implication from their object and purpose) was meant to implement the principle set out in draft article 4. It had given rise to considerable criticism, in particular from Mr. Matheson, but he believed that it was justified in that it explained and applied the principle set out in draft article 4 to State practice and the decisions of municipal courts. From a drafting standpoint, it was, strictly speaking, superfluous. It was merely indicative, but it was useful in that it referred to the materials which he had employed in his research. In any event, a number of Commission members as well as Governments had argued that the use of categories as an analytical tool was inherently flawed, as had been clearly pointed out by the representative of the United States in the Sixth Committee, whose statement was reproduced in paragraph 35 of the report. In his own view, a distinction must be drawn. On the one hand, it might be accepted that the use of categories of the type set forth in draft article 7 was heavy-handed and unsuitable for drafting purposes. On the other hand, as indicated in his first report, most of the categories enumerated were derived precisely from the policy and legal assessments of leading authorities as well as from a significant amount of case law and practice. In other words, those materials enumerated factors—to which the representative of the United States had alluded in her statement—that might lead to the conclusion that a treaty should continue (or be suspended or terminated) in the event of armed conflict. Ultimately the solution might lie in the realm of presentation. On that basis, draft article 7 could be deleted. As had already been pointed out, its purpose was indicative and expository. The question, then, was to find an appropriate container, and to that end an annex containing an analysis of State practice and case law might be prepared by the Secretariat with his assistance.

11. The “system” problem which emerged from the overall discussion concerned the operation of *lex specialis* in time of armed conflict, such operation ruling out any principle of general continuity. That affected the sphere of human rights, for example. Although there was a good basis there for continuity, the protection of human rights must be related to the law of armed conflict. The same analysis held for the application of principles of environmental protection in time of armed conflict. In the light of such considerations, it was clear that the formulation of specific principles of continuity was problematical. The indicative list might reflect the policies adopted by municipal courts and advice to courts,

<sup>269</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, pp. 220–224, paras. 62–83.

<sup>270</sup> See footnote 266 above.

<sup>271</sup> *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 32.

but it was not possible to argue that the list was supported by State practice in the conventional sense.

12. He hoped that the Commission would take decisions at the current session on a number of points, such as whether or not to include treaties concluded by international organizations, how to define “armed conflict” and, in particular, whether that definition should also cover internal armed conflict.

13. Mr. ECONOMIDES said that the Special Rapporteur’s second report was somewhat odd, because it repeated the first seven draft articles introduced in the first report word for word, together with a few additional comments.

14. Two fundamental preliminary questions must be posed if the topic was to be properly addressed. The Commission must decide, first, whether it could consider the topic in disregard of the great principles embodied in the Charter of the United Nations, which, given its content, its crucial importance and the legal significance of its provisions, was by far the primary legal text of the international community, and, secondly, whether it could address the topic without taking account of certain peremptory norms of international law (*jus cogens*), in particular the prohibition of aggression. After all, the legal consequences of aggression had direct bearing on the effects of armed conflicts on treaties.

15. In his first report the Special Rapporteur had taken neither the Charter of the United Nations nor norms of *jus cogens* into account, and in the second he seemed to be following the same tack, albeit perhaps more cautiously. Yet it was clear that any draft articles on international armed conflicts and their effects on treaties must, pursuant to the Charter, proceed from the fact that armed conflicts were illegal, at least for one of the parties: the one that resorted unlawfully to the use of force, i.e. that committed the crime of aggression. It followed that, in accordance with the Charter, the aggressor State could not be placed on an equal footing with the State which was exercising its natural right of individual or collective self-defence. In its resolution II/1985, the Institute of International Law, whose experience and authority were well known, had wisely respected that pertinent distinction. Article 7 of that resolution provided that “[a] State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right”,<sup>272</sup> in other words, in such a case it could act unilaterally. Article 9 of the resolution provided that “[a] State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State”.<sup>273</sup> In his view, it was perfectly clear that the draft articles on the effects of armed conflicts on treaties should be based on those provisions, which could probably be improved upon. It might also be possible to use the text of

article 8 of the resolution, which provided that “[a] State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution”.<sup>274</sup> That provision was in accordance with the Charter and would strengthen the system of collective security of the United Nations.

16. Given that the Commission had always taken the Charter of the United Nations and the peremptory norms of international law into account, as could be seen from the draft articles on responsibility of States for internationally wrongful acts<sup>275</sup> and the conclusions of the Study Group on fragmentation of international law,<sup>276</sup> he failed to understand why, where the topic of the effects of armed conflicts on treaties, a topic closely linked to the Charter and peremptory norms, was concerned, the Special Rapporteur had not followed the long-established path of the prohibition and condemnation of war of aggression. Nor did he see why the Special Rapporteur had chosen to ignore war of aggression and had in a sense tried to conceal it or to include it in a “without prejudice” clause. In his view, that was a dangerous step backwards.

17. Draft article 4, which formed the basis of the second report, made the intention of the parties at the time the treaty was concluded the criterion *par excellence* for its termination or the suspension of its application in case of armed conflict. However, the influence of that criterion, which had peaked before the First World War and had remained predominant between the First and Second World Wars, had begun to fade with the adoption of the Charter of the United Nations. At present, apart from several specific treaties, namely those relating to international humanitarian law, the criterion of the intention of the parties had disappeared entirely from international treaties and thus was no longer relevant.

18. The Special Rapporteur was right to suggest the deletion of draft article 6 because the provision could not be applied.

19. Draft article 7 was a useful provision but required clarification, which would entail considerable work. He supported the Special Rapporteur’s proposal to replace it by an annex containing State practice and case law on treaties which continued to apply in the event of armed conflict.

20. It was to be hoped that the Special Rapporteur would bring the draft articles more closely into line with the great principles embodied in the Charter of the United Nations. For the moment, they could not be referred to the Drafting Committee.

21. Mr. BROWNLIE (Special Rapporteur) said that it was simply incorrect to say that his first report ignored those questions. They had been raised in draft article 10

<sup>272</sup> Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 271 above), p. 281.

<sup>273</sup> *Ibid.*, p. 282.

<sup>274</sup> *Ibid.*

<sup>275</sup> See footnote 8 above.

<sup>276</sup> *Yearbook ... 2006*, vol. II (Part Two), para. 251.

(Legality of the conduct of the parties).<sup>277</sup> He had already said that he would recast draft article 10 to take account of the criticisms formulated by other members of the Commission, and he would also allow for those voiced by Mr. Economides. It was a bit absurd to say that he was unaware of those problems. After all, he had published a book on international law and the use of force by States more than 40 years previously.<sup>278</sup> Moreover, he was only introducing the first seven draft articles.

22. Ms. ESCARAMEIA said she was glad that the Special Rapporteur had introduced all the draft articles at the previous session, as that made it possible to have an overview when considering those he was submitting at the current session, although one could ask why he had confined himself to the first seven. She also appreciated the flexibility he had shown in remaining open to all changes. However, the draft articles presented several problems of a structural nature.

23. First of all, a number of issues merited greater thought, such as the distinctions between the effects of treaties on the parties to an armed conflict and the effects on third States; between different provisions of the same treaty, some of which might continue to be applicable; between situations of suspension and situations of termination of treaties; between the effects of international conflicts and internal conflicts, assuming that both cases were covered; and between the rights of an aggressor State, those of a State that exercised its right of self-defence and those of a State that was complying with a resolution of the Security Council on the use of force (resolution II/1985 of the Institute of International Law, arts. 7–9, cited above).

24. Secondly, she did not see why the Special Rapporteur insisted on including the draft articles in the law of treaties and not in other areas of international law. Article 73 of the 1969 Vienna Convention gave the impression that, on the contrary, the effects of armed conflicts on treaties did not fall under treaty law. In fact, the draft articles were related to several areas of international law. For example, the law of war was relevant when deciding which State was the aggressor and which State had been the victim of an aggression, just as the law of State responsibility was relevant in assessing the consequences of non-compliance with treaties.

25. Lastly, the main structural problem had to do with the criteria. The criterion in draft article 4 was not the intention of the parties but their presumed or “reconstructed” intention. The presumed intention of the parties was taken to be the essence of the treaty, and it was on the basis of the determination of such intention that it was to be decided whether or not the treaty would remain in force in the case of armed conflict. Thus, the whole meaning of the treaty was subsumed under the presumed intention of the parties. In her view, intention was only one factor in assessing the meaning of the treaty. The draft articles were based on the following line of reasoning: the intention of the parties (art. 4, para. 1) must be ascertained by interpreting the treaty as a function of articles 31 and 32 of the 1969 Vienna Convention (art. 4, para. 2 (a)) and

by analysing the nature of the conflict (art. 4, para. 2 (b)). That would appear to lead to an assessment of the object and purpose of the treaty and to a determination of which treaties remained in force during an armed conflict, which was the object and purpose of article 7. That was a very complicated way, and one that combined many criteria, to ascertain the meaning of the treaty and determine whether or not it remained in force. Moreover, the intention of the parties was not a crucial aspect of such a determination. It would be preferable to adopt a general criterion such as the viability of the continued operation of all or some of the provisions of the treaty. Some treaties simply could not remain in force in case of armed conflict, regardless of the intention of the parties.

26. Turning to the articles themselves, she said that the definition in draft article 2 (b) (Use of terms), which covered conflicts “which by their nature or extent are likely to affect the operation of treaties”, was in contradiction with the general principle set out in draft article 3, namely that armed conflicts did not affect the operation of treaties. It would be preferable to use the definition given in the *Tadić* decision in order to include armed conflicts in which none of the parties was a State, while expanding it to cover military occupation based on article 18 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. That would take into account the point of view of the Netherlands (para. 11 of the report), which was shared by a number of members of the Commission. Draft article 2 might then read:

“For the purposes of the present draft articles, ‘armed conflict’ means:

(a) the resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State;

(b) situations of military occupation even if there is no organized armed resistance.”

That definition also answered the question raised by the Special Rapporteur in paragraph 13 as to whether or not to include non-international conflicts, which should definitely be included, given that their number continued to grow.

27. She agreed that draft article 3 was primarily expository in nature, and she was thus a bit surprised at the Special Rapporteur’s suggestion to delete it. She also had doubts about replacing “*ipso facto*” by “necessarily” and wondered whether that replacement would also be made in the title of draft article 3, since doing so would convey exactly the opposite of what was in the article.

28. With regard to draft article 4, which was very important, she continued to disagree that the termination or suspension of treaties should be determined in accordance with the intention of the parties, especially at the time the treaty was concluded. Paragraph 2 (b) referred to articles 31 and 32 of the 1969 Vienna Convention, which expressly included subsequent agreements and practice. In order to determine the meaning of a treaty, its whole history and not just the intention of the parties should be taken into account. The proposal by Guatemala reproduced in paragraph 20 of the report clarified the problem but did not resolve it because it retained the

<sup>277</sup> See the preliminary report of the Special Rapporteur (A/CN.4/552), paras. 122–123, in *Yearbook ... 2005*, vol. II (Part One).

<sup>278</sup> *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963.

criterion of the intention of the parties. The Special Rapporteur's proposal to include other factors was a good idea. One solution might be to draw up a list of factors together with a list of categories of treaties in which those factors were predominant.

29. With regard to draft article 7, she noted that the category of treaties referred to in paragraph 2 (a), namely treaties expressly applicable in case of an armed conflict, such as the 1949 Geneva Conventions, should be the subject of a separate article. There should also be an article on treaties whose parties had expressly provided that they would be applicable in case of armed conflict, provided that the relevant provisions were in conformity with *jus cogens*. A list of other categories would still be useful, but merely as an indication, after a list of factors; a list of other categories could also appear in the commentary. Due attention should also be given to the question of whether it was the whole treaty or only some of its provisions that remained applicable.

30. She suggested that, given the divergent views expressed, the draft articles should be referred not to the Drafting Committee but to a working group, so that discussion of the various points raised could continue.

31. Mr. PELLET said that the topic clearly came under the law of treaties, but that it was necessary to raise the question of the relationship between that law and the law of responsibility, particularly as it related to circumstances precluding wrongfulness, notably *force majeure*. It was unfortunate that the Special Rapporteur had not relied more heavily on the excellent study by the Secretariat, which analysed those questions in depth.<sup>279</sup>

32. Mr. GALICKI commended the Special Rapporteur on the quality of the second report on the effects of armed conflicts on treaties but wondered why he had confined himself to the first seven draft articles. A full set of draft articles together with comments and proposed modifications would have given the Commission a comprehensive picture of the topic. Moreover, the lack of proposed modifications gave the impression that the Special Rapporteur had ignored the comments made by members of the Commission and States. Apart from a few minor corrections, the only real change the Special Rapporteur suggested to the text contained in his first report was the deletion of draft article 6, which had been heavily criticized and would be better placed in the commentary.

33. The tendency to "conserve" the initial text was particularly visible in the case of draft article 3; for example, the Special Rapporteur had not made any changes to the initial text. He continued to reject the possibility that the outbreak of an armed conflict could lead to *ipso facto* termination or suspension of a treaty by the parties to the conflict, even though many members of the Commission and representatives in the Sixth Committee had stressed that this did indeed happen in certain situations, as in the case of a bilateral political or military alliance treaty, for example. The Special Rapporteur suggested replacing the words "*ipso facto*" with "necessarily", but it was not

clear whether he supported that suggestion or whether he was in favour of deleting the provision entirely if the Commission so desired.

34. Similarly, the Special Rapporteur did not take a position on the definition of "armed conflict" in draft article 2 (b). The proposed definition, which was based on resolution II/1985 of the Institute of International Law, retained the text contained in his first report and failed to resolve the question of whether it ought to include non-international conflicts, although he had indicated in paragraph 13 of his second report that an answer should be obtained from the plenary Commission, whereas at the previous session he had seemed to favour the exclusion of non-international conflicts. The report gave the impression that the Special Rapporteur was reluctant to introduce by himself any changes that might improve the text while also reflecting the suggestions made by the Commission and States. That could be seen, for example, in draft article 4, on the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict. While the Special Rapporteur agreed that it was necessary to consider other factors, such as the object and purpose of the treaty and the specific circumstances of the conflict, he did not make any concrete proposal to reflect that.

35. Another open question related to draft article 7, concerning the operation of treaties on the basis of necessary implication from their object and purpose. First of all, it must be determined whether a list of treaties that continued to operate during an armed conflict was exhaustive. Secondly, certain categories in the list, such as "multilateral law-making treaties", must be made more explicit. In any event, a number of members of the Commission as well as several delegations in the Sixth Committee had expressed doubts as to the inclusion of an indicative list of treaties, arguing that treaties did not automatically fall within one of the categories and that it would be preferable to enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue or be suspended or terminated in the event of armed conflict. Once again, the Special Rapporteur did not say whether he proposed to delete draft article 7, to retain it as it stood or to modify it.

36. It would be premature to refer the draft articles to the Drafting Committee. They did not take into account the many comments formulated, and it was not the role of the Drafting Committee to make such changes. Instead, a working group should be established which, together with the Special Rapporteur, could thoroughly analyse and resolve all the questions raised in the second report and produce a generally acceptable version of the draft articles. An analysis of State practice and case law with the assistance of the Secretariat, as the Special Rapporteur himself had suggested, would also be welcome.

37. Mr. BROWNLIE (Special Rapporteur) explained that the series of categories of treaties included in draft article 7 was not intended to be a list, whether exhaustive or otherwise, but was simply meant to provide guidance in discovering the intention of parties. The report had made it clear that draft articles 4 to 7 should be taken together. The Commission was not in the business of cataloguing treaties.

<sup>279</sup> See footnote 266 above.

38. Mr. GALICKI said that he had certainly not questioned the exhaustive nature of the list. He had merely wished to point out that when an article contained a list, the question of whether it was exhaustive arose automatically. To avoid any problems, it would be preferable to list not treaties but rather the factors or characteristics that enabled them to be classified.

39. The CHAIRPERSON, speaking in his capacity as member of the Commission, drew attention to draft article 7 and questioned how a treaty of friendship could continue in operation in the event of armed conflict between its two parties.

40. Mr. BROWNLIE (Special Rapporteur) noted that in the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ had had no problem in applying a 1956 treaty of friendship, commerce and navigation to relations between the United States and Nicaragua. Although those relations might not have amounted to armed conflict, they had nonetheless contained elements of conflict.

41. Mr. MOMTAZ said that many treaties of friendship, commerce and navigation contained dispute settlement provisions that could remain in operation even during an armed conflict.

42. Mr. PELLET said that the Commission must determine whether the study it was undertaking was about the effects of armed conflicts on treaties, on treaty provisions or on treaty obligations. The Commission needed to give some thought to that question and decide whether it was concerned with the instrument or with the obligation arising from the instrument.

43. Mr. GAJA said that at first sight, and given that the Special Rapporteur's second report reproduced without change the text of draft articles 1 to 7 as they appeared in his first report, it might seem that he intended to stick to the positions set out in the first report. However, one gained a different impression after reading the second report and listening to the Special Rapporteur's oral presentation. The Special Rapporteur had elaborated on his views concerning a number of points and shown flexibility, although that had not yet been reflected in a new set of draft articles. More generally, it was to be hoped that the Special Rapporteur would find time to provide an analysis of practice that would support his conclusions and to develop more fully the ideas which he wanted the Commission to endorse. That should be the desired outcome, and the Commission should also attempt to answer the questions raised by the Special Rapporteur in order to give him some guidance for continuing his work.

44. One of the questions to which the Special Rapporteur had specifically drawn the Commission's attention concerned the possible inclusion of internal conflicts in the study. According to article 73 of the 1969 Vienna Convention, "[t]he provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from ... the outbreak of hostilities between States". That was one of the major gaps in the codification of the law of treaties, which the current work sought to fill by addressing the question of whether the relevant

treaties between States in conflict continued to apply or whether their operation was terminated or suspended. Internal conflicts, like conflicts between a State party to a treaty and a third State, did not directly affect relations between States parties to the treaty, but they might give rise to circumstances which affected the application of the treaty indirectly, and those circumstances had not been excluded from the 1969 Vienna Convention. For example, an internal conflict might constitute an impossibility of application or a change of circumstances and therefore lead to the suspension or termination of a treaty to which the State involved in the internal conflict was a party. That did not mean that internal conflicts should necessarily be excluded from the study; questions concerning such conflicts should, however, be considered separately from those relating to the effects of hostilities between States parties to the treaty. The effects of internal conflicts should be analysed within the framework of the pertinent provisions of the Vienna Conventions.

45. Mr. BROWNLIE (Special Rapporteur), replying to a question raised by Mr. Pellet, said that, as he saw it, the Commission's task was to define the effects of armed conflicts on the operation of treaties and not on the obligations stemming from the treaties. He referred in that connection to draft article 13, which he had introduced in his first report,<sup>280</sup> and in particular to its paragraphs (c) and (d). A study of the effects of armed conflicts on the obligations stemming from treaties would unduly enlarge the topic which the Commission had been mandated to consider.

46. The CHAIRPERSON, speaking in his capacity as member of the Commission, wondered whether the wish to redefine the subject might not lead the Special Rapporteur to reconsider his proposed draft article 1.

47. Mr. DUGARD said that the book *International Law and the Use of Force by States*,<sup>281</sup> written and mentioned by the Special Rapporteur, had greatly influenced his own thinking on the subject, and he was therefore surprised that Mr. Brownlie had failed to pay sufficient attention to *jus ad bellum* and had concerned himself more with *jus in bello*.

48. He doubted whether the definition of the term "armed conflict" in draft article 2 (b) was adequate. Most of the authority invoked by the Special Rapporteur belonged to an era in which inter-State armed conflicts had dominated, whereas the situation had changed dramatically, and now non-international armed conflicts had become more common than international armed conflicts. The difference between the two was no longer fundamental, and recent doctrine clearly showed that it had to a large extent disappeared. The report of the High-level Panel on Threats, Challenges and Change,<sup>282</sup> to which the Special Rapporteur referred in paragraph 10 of his report, although without explaining how it might be relevant to the definition of armed conflict, did in fact consider non-international armed conflicts. Thus, the Special Rapporteur should expressly indicate in draft article 2 that the

<sup>280</sup> See footnote 259 above.

<sup>281</sup> Brownlie, *op. cit.* (footnote 278 above).

<sup>282</sup> "A more secure world: our shared responsibility" (A/59/565 and Corr.1).

term “armed conflict” included non-international armed conflicts. It was also necessary to refer clearly to the case of occupation in the proposed definition, and in that connection it was odd that the Special Rapporteur made no reference to the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had applied not only treaties on international humanitarian law, but also human rights treaties. The case of territories administered by the United Nations, such as Kosovo, should also be considered.

49. The Commission should ask itself, then, whether it wished to examine the topic solely in the context of old international law or whether it should also have regard to contemporary needs and expectations and whether in that connection it should relax the definition of treaty in order to cover agreements between an occupying Power and the Administration of an occupied territory, of which the Oslo Agreement (Declaration of Principles In Interim Self-Government Arrangements) was an example.<sup>283</sup>

50. The previous year he had expressed surprise that the definition of the term “armed conflict” had not taken account of the definition given by the International Tribunal for the Former Yugoslavia in the *Tadić* case (para. 70 of the decision) and subsequent developments in international law, as expressed, for example, in the Rome Statute of the International Criminal Court, and he was pleased that the *Tadić* decision was in fact mentioned in the report (para. 10 (a)). He suggested that, as in article 8, paragraph 2 (d), of the Rome Statute, the definition of armed conflict in draft article 2 should exclude “riots, isolated and sporadic acts of violence or other acts of a similar nature”.

51. Treaties concluded between international organizations or between States and international organizations should be included in the definition of the term “treaty” in draft article 2 (a). In draft article 4, paragraph 2 (b), no explanation had been given of the meaning of the phrase “nature and extent of the armed conflict”, and he saw in that reference an additional reason to expand upon the definition set out in draft article 2, paragraph (b).

52. He was not sure what draft article 5, paragraph 1, meant. The Government of the Netherlands had interpreted it as indicating that international humanitarian law should be seen as *lex specialis*, but once again account should be taken of the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had held that the fact that international humanitarian law was *lex specialis* did not exclude the application of human rights conventions. In that regard, he was pleased that in draft article 7, paragraph 2 (d), the Special Rapporteur had referred to treaties for the protection of human rights.

53. The draft articles should take account of contemporary needs and expectations. Since the

Commission was at the end of a quinquennium, it would be premature to establish a working group on the subject. A report reflecting the current debate, together with the Special Rapporteur’s first two reports, should be submitted to the Commission at its fifty-ninth session, when it would meet in its new composition, and the Commission could then decide whether or not to establish a working group on the subject.

54. Mr. BROWNLIE (Special Rapporteur) said that there was a big difference between defining the term “armed conflict” for the purposes of the draft articles in the context of the law of treaties and defining it for all purposes of international law, which the Commission had not received a mandate to do. He supported the suggestion to draft a third report that took greater account of contemporary developments, and he explained to Mr. Dugard that it had been owing to a lack of time that he had not taken a more innovative approach in his second report.

55. Mr. PELLET said that, like Mr. Gaja, he had initially thought that the Special Rapporteur had not taken any account of the comments made during the debate at the fifty-seventh session because the draft articles were identical to those introduced in the first report, but that a careful reading of the second report showed that the Special Rapporteur had in fact been sensitive to the criticism formulated both by members of the Commission and in the Sixth Committee of the General Assembly. Two points of criticism were worth mentioning, however. First of all, the Special Rapporteur had confined himself to pointing the way where each draft article was concerned but had not himself proposed more appropriate texts which, without binding the Drafting Committee, would have facilitated its task had the Commission decided to refer the draft articles to it. Incidentally, he did not share Mr. Galicki’s opinion that the Special Rapporteur should have proposed a whole new set of draft articles. On the contrary, two or three draft articles would have been largely sufficient if they had been analysed in greater depth. Secondly, it was unfortunate that, on several important points, the Special Rapporteur, although receptive to criticism, had not reopened the discussion but had limited himself at best to agreeing or disagreeing with suggestions, in most cases without explaining his position; this had not facilitated the discussion and might lead Commission members to repeat their comments from the previous year.

56. Draft article 1 and draft article 2 (a) were both confined, as in the previous year, to treaties between States and, if he understood correctly, the Special Rapporteur did not intend to expand the draft articles to encompass treaties concluded by international organizations. In his view, the argument put forward by the Special Rapporteur on that point in paragraph 3 was not a sufficient justification, and he continued to believe that it was preferable to kill two birds with one stone. If the problem arose in the case of international organizations, then it would arise in the same way for States, and he failed to see how the effects of armed conflicts on treaties concluded by international organizations could constitute a separate subject of study for the Commission.

<sup>283</sup> Declaration of Principles on Interim Self-Government Arrangements signed at Washington, D.C. on 13 September 1993 by the Government of the State of Israel and the Palestine Liberation Organization (A/48/486, annex).

57. He remained convinced of the need to clarify whether draft article 1 (Scope) covered only treaties in force or whether it also concerned treaties that had been concluded but had not yet entered into force. Personally, he was strongly in favour of the latter solution, and it would in fact be interesting to know what the effects of armed conflicts might be on treaties that had not yet been ratified. He also wondered whether the subject under consideration was really the effects of armed conflicts on treaties—and he wished to stress in that connection that the Commission should not sidestep the question of the divisibility of the provisions of a treaty, or the effects of armed conflicts on the resulting obligations, which seemed to him to be the case. Far from being extraneous, as the Special Rapporteur had stated, that was a key issue and a question of principle that should be discussed in a working group.

58. With regard to draft article 2 (b), he said that to state, without any further explanation, that “armed conflict” meant “a state of war” did not really define the term. Secondly, while he agreed that the aim of the draft articles was not to define armed conflicts in general, he had difficulty understanding what the Special Rapporteur had in mind when he wrote in paragraph 8 of his report that draft article 2 included the effect on treaties of internal conflicts, whereas the actual wording of the draft article seemed implicitly to exclude it, the word “State” being in the plural in the phrase “between States parties to the armed conflict and third States”. He continued to be a fervent supporter of including internal conflicts, and he hoped that the concept would be expressly incorporated in draft article 2 and perhaps even in draft article 1. Thirdly, he did not see what the Special Rapporteur meant by the words “principle of continuity” in paragraph 9 of the report. Fourthly, the reference to chapter IV of the report of the High-level Panel on Threats, Challenges and Change did not seem useful, as that document contained only general observations from which the Special Rapporteur did not draw any conclusions. Fifthly, it was unfortunate that the Special Rapporteur had not responded to the important point on military occupation made by the Netherlands (para. 11 of the report). Paragraph 19 of the first report on the effects of armed conflicts on treaties<sup>284</sup> had contained an element of a response because it had referred to article 18 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, whose procedure should be used. Personally, he was convinced that cases of occupation were covered by the term “armed conflict”, but he had reservations as to whether Mr. Dugard’s suggestion to add situations of international administration, such as the one in Kosovo, was well founded. On the contrary, the Commission should make it very clear in the commentary that this situation was not one of armed conflict within the meaning of the draft article. Sixthly, it would not be superfluous to ask whether the war against terrorism ought to be included in the draft articles, because once it was accepted that the law of war was applicable to that type of conflict, the Commission could not remain silent. Lastly, it was most unfortunate that the Special Rapporteur had not taken any account of the criticism formulated at the fifty-seventh

session, in 2005, and had still not addressed the question of the legality of the use of force. In that connection, he fully supported the view expressed by Mr. Economides that this question was of vital importance, although he personally did not have a firm opinion on it. Contrary to what Mr. Brownlie appeared to contemplate, he did not think that it was possible to wait until the Commission considered a reworded draft article 10 to take a position on the problem, which would automatically have an impact on the draft articles as a whole, because the point was not to codify rules of *jus cogens* but to specify the consequences of peremptory norms for the draft articles. He was therefore opposed to referring draft article 2 to the Drafting Committee; it would be wiser to establish a working group to consider all questions of principle in depth and in particular the impact of the principle of the prohibition of the use of armed force on the topic under consideration. The Special Rapporteur could then draft a third report on the basis of the work and conclusions of the working group.

59. Draft article 3 should be retained because it dealt with a matter of key importance. The Special Rapporteur did not draw any conclusions from the criticisms expressed in 2005 by several members of the Commission, reflected in paragraph 16 of the report, concerning the wording of the draft article. Yet those criticisms were fully justified, and at the very least the words “*ipso facto*” should be replaced by “necessarily”, because those terms meant very different things. “*Ipsa facto*” implied that the existence of an armed conflict was not sufficient for the conflict to have effects on treaties, whereas “necessarily” suggested that armed conflicts could lead to the suspension or termination of the treaty in some cases but not in others. Thus, draft article 3 was acceptable only if the word “necessarily” was used.

60. With regard to draft article 4, he thought that the wording could indeed be improved, as the Special Rapporteur acknowledged in paragraph 19 of the report; however, the problems posed by the draft article were not solely of a drafting nature. The question was not how to determine the intention of States but whether it was relevant to make use of that concept. On no account could the intention of the parties constitute the sole or even the main criterion, because, as explained in paragraph 24 of the report, States simply did not envisage the outbreak of armed conflicts and had accepted the principle of the prohibition of the use of force. As to the case law cited by the Special Rapporteur in paragraph 22 of the report, it was, apart from one or two cases, quite old, which confirmed the outdated nature of the criterion of intention. It would be useful for the Special Rapporteur, who cited the excellent memorandum by the Secretariat entitled “The effect of armed conflict on treaties: an examination of practice and doctrine”<sup>285</sup> in paragraph 21 of his report, to incorporate in the draft articles the outstanding material that that compilation contained. Thus, he was not in favour of referring draft article 4 in its current form to the Drafting Committee, because the text ought to give at least as much attention to such factors as the object and purpose of the treaty and the nature, extent and circumstances of the conflict as it had to the criterion of intention.

<sup>284</sup> See footnote 259 above.

<sup>285</sup> See footnote 266 above.

61. Turning to draft article 5, he said he had the impression that the two paragraphs concerned completely different questions which ought to be the subject of separate provisions. He also thought that paragraph 1 should be replaced by article 35 (a) of the Harvard Research Draft,<sup>286</sup> cited in paragraph 55 of the first report, which had much clearer wording and seemed to cover the same question. He had trouble understanding the meaning of paragraph 30 of the report and supported the Special Rapporteur's proposal to replace the word "competence" by "capacity" in draft article 5, paragraph 2. He fully agreed with the Special Rapporteur that draft article 6 was unnecessary and that the matter should be dealt with in the commentary.

62. With regard to draft article 7, he endorsed the position of the United States set out in paragraph 35 (c) of the report, according to which it would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. Those were the factors that must be taken into consideration, a situation that presupposed a radical revision of draft article 4, the current version of which was unsatisfactory because it focused almost exclusively on the criterion of intention. As to the various categories of treaties listed in draft article 7, they should be carefully analysed in the commentary in the light of practice, as suggested by the Special Rapporteur in paragraph 37 of his report.

63. He wished to thank the Special Rapporteur for showing a willingness to review in depth some of the draft articles introduced in 2005, but as he saw it, draft articles 1, 2 (b) and 4 still posed serious problems of principle, and it would be difficult, if not impossible, to refer them to the Drafting Committee at the current stage so long as the Commission was unable to take a decision on a number of the basic problems raised. It would therefore be wise to establish a working group, chaired by the Special Rapporteur if he so agreed, to define the guiding principles on the basis of which a new version of the draft articles would be prepared. If that proposal was rejected by the Commission, it would be up to the Special Rapporteur himself to propose new texts for those articles so that the Commission could take an informed decision on them.

64. Mr. CHEE pointed out with regard to Mr. Pellet's comments on draft article 3 that paragraph 14 of the report had clearly indicated that there was considerable support for the view that the formulation "*ipso facto*" should be replaced by "necessarily".

65. Mr. BROWNLIE (Special Rapporteur) said that, in view of the comments made, there was certainly no case for referring the draft articles to the Drafting Committee; however, it would also be very premature to establish a working group to consider them, and if that was the Commission's decision, he would not accept the role of Special Rapporteur. It would be preferable for the Commission to entrust him with the preparation of a third report, which would then provide a basis for a working group.

66. Mr. DUGARD supported the Special Rapporteur's proposal that he should prepare a third report. The advantage of that solution would be to enable the newly elected members of the Commission, who would be unfamiliar with the subject, to debate it before the question was taken up in a working group.

67. The CHAIRPERSON, speaking in his capacity as member of the Commission, said that two substantive questions should be considered in greater depth in connection with draft article 1. First of all, the very notion of the effects of armed conflicts on treaties had not been addressed anywhere; such effects were assumed to exist without further discussion. Secondly, the question of the nature of the weapons used must be taken into account in defining the concept of armed conflict. In defining the term "treaty", it was important to include treaties concluded by international organizations. Draft article 2 (b) should be clarified because its current wording was ambiguous. The Special Rapporteur had employed the phrase "outbreak of an armed conflict" twice, in draft articles 3 and 5, but whereas the outbreak had an effect on treaties, what happened, *a contrario*, when an armed conflict ended? The Commission should consider whether that question, which had not been raised in the second report, should be covered. Draft article 5, paragraph 2, also posed a substantive problem. Whereas the question of whether to replace the word "competence" by "capacity" was of minor importance, the Commission did need to decide whether the competence to conclude (or the capacity to conclude) treaties in the context of an armed conflict was not likely to affect the validity of those treaties, regardless of whether they had been concluded by both parties to the conflict or by one of the two with a third party.

*The meeting rose at 1.05 p.m.*

## 2897th MEETING

*Thursday, 20 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. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, 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. Mr. KOSKENNIEMI said that he supported the Special Rapporteur's proposal on how to proceed with the topic. He agreed with those members who had argued that, given all the questions of principle and formulation that

<sup>286</sup> *Supplement to the AJIL*, vol. 29 (1935), Codification of International Law, Part. III, "The Law of Treaties", p. 1183.