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Summary record of the 2897th meeting

Topic:
Effects of armed conflicts on treaties

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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, 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 an armed conflict. Those were the factors that must be taken into consideration, a situation which 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. As 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 version of the draft articles could 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. BROWNLEE (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. Sreenivas Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


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

arose, concerning the draft articles, it would be pointless to refer them to the Drafting Committee at the current stage. Like a smaller number of members, he was sceptical about the usefulness of setting up a working group, especially at the current session. The newly constituted Commission could make a fresh start at the next session.

2. The wisest course was the one proposed by the Special Rapporteur, namely, that he should produce a third report. Such a document would need to address, concisely but in greater depth than in the second report, the various issues that had arisen in the General Assembly and especially in the Commission in the course of the past two sessions. He would try to help the Special Rapporteur by singling out a number of problems of principle, and in so doing, would closely follow the comments by Ms. Escarameia at the previous meeting. While he himself did not have ready solutions to those problems, the Special Rapporteur might consider the relevant arguments for and against and then perhaps make concrete proposals, either in terms of positions of principle or of draft articles.

3. As he saw it, six matters needed to be clarified in the third report. First, the Special Rapporteur should examine the seemingly perplexing issue of the differing effects of armed conflicts on treaties for the parties to the conflict and for third States—it seemed obvious that the effects could not be identical. The problems related, for instance, to limited multilateral or regional treaties in the case of an armed conflict between two members of the region, and were potentially of great complexity.

4. Second was the question of the differing effects of armed conflicts on the treaty as a whole and on parts thereof. Was it feasible to consider that some parts of the treaty were in force while other parts were not? Many members had also asked to what extent a war of aggression might affect the legal status of the parties. That, too, raised a complex and bewildering set of problems and configurations.

5. A third matter, also raised by Ms. Escarameia and others, was the distinction between suspension and termination. Surely the two had very different legal effects. It would be interesting to learn from the Special Rapporteur what those differences were and how they might be treated in the draft articles.

6. Fourth, most members had referred to the distinction between internal and international armed conflicts. Like a majority of members, he supported the idea that the draft articles should also cover internal armed conflicts. As many had pointed out, most contemporary armed conflicts were hybrid in nature, containing both international and internal aspects. It would be a mistake to exclude the great majority of contemporary conflicts from the scope of the draft articles. However, as had been noted by Mr. Gaja, the effects of an internal and of an international armed conflict on a treaty, for example on third States, could not be identical.

7. Fifth, he supported Mr. Pellet’s intriguing distinction between effects on the treaty, effects on the treaty provisions and effects on the obligations in the treaty. Admittedly, that distinction might have merely been the fruit of a Cartesian mindset which was not always helpful for the drafting of practical directives, but if the effects of armed conflicts were considered with reference to obligations in a treaty, that suggested a different approach from the one suggested when the treaty was thought of as an instrument and the armed conflict as doing away with the instrument and its obligations altogether. That was clearly a matter on which some elaboration would be helpful.

8. Sixth, he wished to return to the Special Rapporteur’s often reiterated view that some approaches to the topic were inappropriate because they went beyond the Commission’s mandate, for example, issues having to do with the law relating to the use of force and the law of war. He understood the Special Rapporteur’s desire to confine the topic to the law of treaties and not to let it spill over into other areas on which it might be difficult to produce specific draft articles. That said, the procedural argument that the Commission did not have a mandate to elaborate on aspects of the use of force or State responsibility presupposed a particular understanding of the topic which not all members shared. Thus, there was a disagreement in the Commission as to the very scope of the topic. He could not imagine that the General Assembly had already decided that the topic should be considered in the narrow sense proposed by the Special Rapporteur. It might be useful for the Special Rapporteur to address the issue in his third report so that the Commission could decide whether it agreed with that understanding.

9. He would welcome enlightenment on those six points. On the structure of the draft articles themselves, he noted that the key to the structure lay in the relationship between draft articles 3, 7 and 4. It was unclear how they were interlinked. Draft article 3 seemed to set the scene, being based on the presumption that the outbreak of an armed conflict did not terminate or suspend the operation of treaties. That was clearly a starting point, but, if that was so, he was puzzled about the meaning of draft article 4 needed to produce indicia of susceptibility to termination or suspension of treaties, given that draft article 3 already established that treaties remained in force. All that was needed was a set of exceptions to that rule. Draft article 7 also seemed to be oddly parallel to draft article 3. The types of treaties it listed which would remain in force, would in any case remain in force pursuant to draft article 3. As currently drafted, draft article 7 thus created the odd presumption that categories of treaties not listed therein were important exceptions to the main rule in draft article 3, although nowhere was such a set of exceptions to the main rule identified. The exceptions thus formed a very broad category, and the implication was that any treaty not included in draft article 7 would automatically lapse. He did not think that anyone held that view, or that the Special Rapporteur was making such a suggestion.

10. He did not understand what the Special Rapporteur had in mind when he described some of the draft articles as being “expository in nature”. Draft articles were above all normative, helping legal practitioners to decide particular issues. Draft article 7 was perhaps expository in the sense that it provided, almost as an afterthought, a list of examples illustrating the rule set forth in draft
article 3, but as the illustrative list was not exhaustive, it undermined the force of the rule in draft article 3. He suggested that the Commission should adopt a provision along the lines of draft article 3 as the main rule and then take up exceptions to the rule one by one, on the clear understanding that, as exceptions, they had to be interpreted in a limited manner. That way, all conceivable situations were covered: either the presumption or the exception applied; tertium non datur.

11. His final point had to do with draft article 4 and the question of consent. Many members had pointed out the relative ineffectiveness of consent as a criterion of anything at all. Nevertheless, as the Special Rapporteur noted in paragraph 19 of his second report, it was unrealistic to marginalize the role of intention. While States themselves were eager to think of that part of the law of treaties in terms of the consent of the parties, such an approach was irrelevant and unhelpful: the question was never about consent, but about where consent was found. It might be found in the text of a treaty, in the context of its object and purpose, or elsewhere. He had already stated his opinion on how the draft should be structured, and he did not believe that the issue of consent entered into it. The Commission should proceed either on the basis of the general rule, namely the presumption that treaties continued to operate, or else on the basis of some of the exceptions listed. It should never be necessary to revert to the issue of consent, unless it proved impossible to enumerate the exceptions exhaustively and necessary to move instead from individualized categories to some characterization of categories. If the Commission found itself in that position, the Special Rapporteur should resist the temptation to identify the remaining categories in terms of consent, but should instead resort to a contextual appreciation of the situation that had arisen, drawing on indicia such as whether the armed conflict was of an internal or international nature, whether the treaty should be seen to lapse in part or as a whole, or whether the treaty was susceptible to suspension or to termination.

12. Mr. FOMBA commended the quality of the Special Rapporteur’s report, which bore the mark of a great scholar and practitioner, although it might at times seem unduly concise.

13. On the second report’s conceptual framework and method, he said that, in order for one to have a clear idea of all aspects of the subject, the key concepts contained in the title of the topic, namely “treaty”, “armed conflict” and “effect”, needed to be identified, being that war or armed conflict was considered by the Special Rapporteur to be a juridical event. It was necessary to pinpoint their contours and interconnections and, above all, to draw conclusions for the codification or progressive development of international law. That was not an easy exercise. The most important and difficult task was to identify and analyse the practice with regard to the effects of both international and non-international armed conflicts on treaties.

14. On the scope ratione materiae of the study, the question was whether treaties concluded by international organizations should or should not be included. In paragraph 3 of the report, the Special Rapporteur refrained from giving his own point of view, instead noting that there was no general agreement on the question and that States had referred to article 74, paragraph 1, of the 1986 Vienna Convention. International organizations were subjects of international law; they had an international legal personality, in particular the capacity to conclude treaties, which was laid down in the 1986 Vienna Convention and international case law; they played an important role in international relations; they were not indifferent to armed conflicts, subject to the question whether and to what extent they could be actively involved in them; and article 74, paragraph 1, reserved the question of the possible effects of armed conflicts on treaties to which international organizations were parties. Accordingly, it was only logical that treaties to which international organizations were parties should be included, on the understanding that it should first be decided whether any relevant practice existed or whether the question was one of de lege ferenda.

15. There had been general support for the Special Rapporteur’s view that the topic should form part of the law of treaties and not part of the law relating to the use of force. Although there was a causal relationship between the two aspects of the question, the emphasis was on the scope ratione temporis of treaties. Consequently, he could endorse the Special Rapporteur’s position, although the fact remained that there was a link between the topic and other basic issues, such as the law of responsibility and jus cogens, in particular the principle of the prohibition of the use of force. Account should be taken of the pertinent comments made in that regard by Mr. Economides and Mr. Pellet, in particular on the possible benefit to be derived from resolution II/1985 of the Institute of International Law.

16. Three questions had been posed in connection with draft article 1, although the Special Rapporteur did not express a view on them. First, the Netherlands delegation had suggested taking into account the case of treaties which were provisionally applicable, pending their entry into force. Given that such a case was expressly provided for in the 1969 Vienna Convention, that the scope ratione temporis of the treaty was limited and that an armed conflict could occur in that period of time, and where provisional application had not been terminated in accordance with article 25, paragraph 2, of the 1969 Vienna Convention, it could be argued on the face of it that there was a logical and valid reason to cover such a case. That said, it would be preferable to give the matter further consideration.

17. The second question concerned the proposal to make a distinction between States that were contracting parties under article 2, paragraph 1 (f), of the 1969 Vienna Convention and others which were not. It should be borne in mind that the term “contracting parties” was an ambiguous concept used to express either the notion of “contracting State” or that of “party”; in accordance with the specific but different meanings of those terms in the 1969 Vienna Convention. The meaning of “contracting parties” thus depended on the context. Subject to that reservation, if the Commission confined itself to the strict application of the principle of the relative effect of treaties, the problem would not arise, given that a treaty could create obligations or rights for third States,
provided that this was done in accordance with articles 34 to 38 of the 1969 Vienna Convention. If that proved to be the case, those States would then be concerned by the question of the continuity or non-continuity of the life of those treaties.

18. A third question that should also be given careful consideration was whether only treaties in force at the time of the conflict should be covered by the draft articles or whether treaties that had not yet entered into force should also be included.

19. On the text of draft article 1, he noted that if the words “in respect of treaties between States” were retained, that would leave open the question of the fate of the treaties concluded by international organizations.

20. On draft article 2, he noted that, in the French version of the text, the words “effets des traités sur les conflits internes” should read “effets des conflits internes sur les traités”. He agreed with the Special Rapporteur that draft article 2 included the effects of internal conflicts on treaties. However, the Special Rapporteur did not provide any reasons in support of his point of view. The question was whether and to what extent an internal armed conflict could have effects on the treaty obligations of the State party, in particular with regard to a third State which had recognized and supported the rebel party.

21. The Special Rapporteur referred to the differences of opinion among legal authorities and in the Sixth Committee as to the definition of the term “armed conflict”, invoking a number of sources of relevance to the question, in particular the Tadić case of the International Tribunal for the Former Yugoslavia (para. 10), and discussing a point raised by the Netherlands (para. 11).

22. He fully supported the Special Rapporteur’s conclusion in paragraph 13.

23. On the title and chapeau of draft article 3, he was inclined to think that the effects should be listed in ascending order of significance, referring to “suspension or termination” rather than “termination or suspension”—although admittedly that was not the order used in the 1969 Vienna Convention. As for the suggestion, noted in paragraph 14 of the report, that the term “ipso facto” might be replaced by the word “necessarily”, the former expression was, in his view, preferable, in that it emphasized the factual causal link between the conflict and the treaty, though he conceded that Mr. Pellet’s subtle argumentation might cause him to have two second thoughts. With regard to the possibility of deleting the draft article, he concurred with the reasoning set out in paragraphs 15 and 16 of the report but not with the conclusion drawn, namely that the provision was not strictly necessary. On the contrary, it was crucial, in that it formed the basis for the following articles and itself was founded on an important and relevant reversal of the traditional doctrine.

24. With regard to draft article 4, he endorsed the views expressed in paragraph 19 of the report and agreed that the wording of the provision could be improved. In that regard, the proposal by Guatemala, cited in paragraph 20, might well be useful. As for the structural problems, relating principally to the relationship between draft articles 4 and 7 and discussed in paragraphs 26 to 28, no definite conclusion could be reached until it was clearly established that draft 7 article accurately reflected practice and case law. If it did, there would be a valid reason to retain it. That would be the point at which the issue of the other factors to be taken into account should be settled, either in the text of article 4 or in the commentary. As for the other structural problem—the incorporation of a reference to articles 31 and 32 of the 1969 Vienna Convention—he concurred with the Special Rapporteur’s view that such a reference was necessarily mechanical; but the technique was, after all, standard practice in international law.

25. Turning to draft article 5, he noted the reference made to the principle which had been enunciated in the advisory opinion of the ICJ concerning the Legality of the Threat or Use of Nuclear Weapons that the application of certain human rights and environmental principles was determined, in time of armed conflict, by the applicable lex specialis (para. 25 of the opinion), and endorsed the Special Rapporteur’s view that the principle should be reflected in the draft articles. As for the suggestion that the term “competence” in paragraph 2 of the draft article should be replaced by the term “capacity”, he noted that the latter was the terminology used in article 6 of the 1969 Vienna Convention.

26. With regard to draft article 6, the Special Rapporteur had concluded, following criticism from members of the Commission and the Sixth Committee, that the draft article should be deleted and that the issue should be referred to, if at all, only in the commentary to draft article 3. He had no objection to that course of action, although there would be no harm in retaining the draft article for the additional clarity and precision it offered.

27. On draft article 7, in view of the Special Rapporteur’s reasoning, he supported the solution proposed in paragraph 37 of the report, that the draft article should be deleted and that an analysis of State practice and case law should be annexed to the draft articles. More fundamentally, he shared the view expressed by the United States and cited in paragraph 35 of the report, that the emphasis should be placed on 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.

28. As to what action should be taken on the draft articles, opinions had varied greatly. Some members thought that they should be referred, in whole or in part, to the Drafting Committee, while others thought that premature. It had been suggested that a working group should be set up to consider the more difficult issues, while others had recalled that the composition of the Commission was due to change. Still others believed that the Special Rapporteur should be given time to digest what had been said and to produce a third report in 2007. The choice was wide. Ultimately, in his view, priority should be given to the opinion of the Special Rapporteur himself. He was, however, prepared to go along with any compromise that the Commission might reach.
29. Mr. MOMTAZ said that Mr. Fomba had, like a number of other speakers, referred to the proposal by the Netherlands delegation that military occupations should be included in the definition of armed conflict. To do so, however, was mistakenly to equate the two. Armed conflict might sometimes involve the occupation of territory belonging to one or other of the parties, but, in that case occupation should be considered a consequence of such conflict. The regime of occupation was in any case governed by the 1949 Geneva Convention relative to the protection of civilian persons in time of war (Convention IV), article 6 of which drew a clear distinction between armed conflict and occupation.

30. Mr. KAMTO said that contemporary situations were rarely as clear-cut as they had been at the time of the drafting of the fourth Geneva Convention. Although certain kinds of occupation—such as that of Germany after the Second World War—were exclusively concerned with post-conflict situations, they could also coincide with situations of armed conflict.

31. Mr. MOMTAZ said that, although the draft articles should undoubtedly deal with the consequences of military occupation on treaties, his point was that military occupation had no place in the definition of the term “armed conflict”.

32. Mr. COMISSÁRIO AFONSO, after commending the clarity and conciseness of the report on the topic, one that deserved the Commission’s closest attention, said that, by defining the scope of the topic, draft article 1, together with draft article 2 (a), helped to provide the basis for a cautious approach to the thorny concept of “armed conflict”, which should be restrictively defined for the purposes of the draft articles. In other words, the definition should, as far as possible, in the interests of logic and consistency, be confined to States that were involved in armed conflicts and had the capacity to conclude treaties. The possibility of including non-international armed conflicts should be considered only on an exceptional basis and with due caution. The inclusion of non-State actors, as would be implied by a broader definition of armed conflict, could, he believed, militate against the stability and security of the treaty system as a whole, although he conceded that his views differed from those of other members in that respect. Armed conflicts between States could be, and usually were, symmetrical in nature; although they might differ in size, in power and in their capabilities, States were homogeneous and offered similar legal and political frameworks for analysis. A quite different situation arose in the case of non-international conflicts, in which non-State actors could display enormous diversity in their nature and motivation. That category might include national liberation movements, terrorist groups or even armed gangs. The actions of such non-State actors—which enjoyed varying degrees of legitimacy—should not necessarily be equated with those of States. Such factors should be taken into account in the draft articles if they were to be widely accepted by member States. If only for pragmatic reasons, the best strategy was to restrict the draft articles to actions by States. Not even international organizations should be included, since they, too, had their own specific characteristics, as was clear from the Commission’s debates on the responsibility of international organizations.

33. Draft article 3 was also important, since it was indeed, as the Austrian delegation had said, “the point of departure of the whole set of draft articles”. It expressed a fundamental principle, namely that the life or death of a treaty should not be held hostage to the existence or non-existence of armed conflict. The use of the term “ipso facto”, however, was unfortunate, because the long-held view that a treaty ended ipso facto with the outbreak of war was outmoded. He therefore suggested that the article should be redrafted in plain English.

34. Much had already been said by previous speakers concerning draft article 4. As stated in the Commission’s report on the work of its fifty-seventh session, “the Special Rapporteur noted that the question of the criterion of intention had been the subject of much debate” and it was gratifying to note that, in paragraph 19 of his second report, the Special Rapporteur recognized that other factors should be considered, including the object and purpose of the treaty and the specific circumstances of the conflict. That position would be welcomed by those members of the Commission who had from the outset defended the inclusion of the criterion of the object and purpose of the treaty. Several other aspects of the draft article, however, remained to be settled, some of which were more substantive than others. First, as Mr. Koskenniemi had said, the text would, as it stood, serve only to weaken draft article 3. Secondly, the title of the draft article seemed less than clear and might give rise to problems of interpretation. The third point of difficulty related to the circular logic of paragraph 2 (a), which suggested that, in order to establish the intention of the parties, one needed to base oneself on the intention of the parties. Doubtless the working group and, later, the Drafting Committee would take the matter into consideration in due course. What was important for the time being was the acknowledgment that the criterion of intention alone was not paramount. At the previous meeting, Ms. Escarameia had spoken of the possibility of using the criterion of viability as a test for the survival of a treaty. While agreeing that this was a possible test, he also wished to draw the Commission’s attention to the categorization theory admirably expounded in chapter III of the memorandum prepared by the Secretariat entitled “The effect of armed conflict on treaties: an examination of practice and doctrine”, according to which the relevant test was the degree of likelihood of applicability of a treaty. He urged the Special Rapporteur to take the memorandum into account in preparing his third report.

35. He fully endorsed the content of draft article 5, and the Special Rapporteur’s comments in paragraphs 29 to 31 of the report. As for draft article 6, he supported its deletion.

36. Draft article 7 contained valuable aspects of doctrine and State practice that should be safeguarded independently or by combining them with other articles.

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289 Ibid., para. 154.
Once that principle was agreed, there would remain only the task of redrafting. In particular, draft article 7, paragraph 1, could be merged with draft article 4. As for draft article 7, paragraph 2, he concurred with the position of the United States, cited in paragraph 35 of the report, which represented the most sensible approach for the purposes of the draft article.

37. He had expressed his views with regard to the use of force at the previous session. In a nutshell, he believed that, in an era when the United Nations had assumed ever-increasing importance, the Commission should give due account to Article 2, paragraph 4, of the Charter of the United Nations and articles 7 to 9 of resolution II/1985 of the Institute of International Law in 1985. It would be pointless to consider the topic without addressing such crucial issues.

38. The CHAIRPERSON, speaking as a member of the Commission, wondered whether treaties such as the recent agreement between the Government of Angola and the separatist faction in the Cabinda enclave merited consideration as a specific category within the topic under discussion.

39. Mr. MOMTAZ said that if the draft articles were intended to encompass internal armed conflicts, it was self-evident that they would then likewise cover agreements between States and non-State entities. His plainly stated that the outbreak of an armed conflict did not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the 1969 Vienna Convention, was that those parties could include non-State entities.

40. Mr. RODRÍGUEZ CEDEÑO said that further study of the topic would necessarily entail the examination of other legal regimes in addition to the law of treaties, namely the law of war or the law of armed conflicts, because it was in that context that the question of the application, suspension or termination of a treaty or treaty relationship arose. He agreed with other speakers that it was necessary to distinguish between an aggressor State and a State which was the victim of aggression. The Commission should also direct its attention to aggression as an international crime even though it had not been defined and should likewise look into the question of the application of treaties when a State was militarily occupied or under the administration of an entity other than its own Government, although that was a more complex issue. Other important questions were, first, whether the draft articles should encompass treaties to which international organizations were parties, and secondly, whether they should apply only to treaties which had already entered into force at the time of the conflict.

41. He believed that the draft articles could include treaties concluded between international organizations and one or more States engaged in an armed conflict, because a conflict could have repercussions on the application of treaties to which international organizations were parties, just as it could on treaties between States. Hence, if it were decided that the scope of the draft should be extended, draft article 1, paragraph (a), should be amended accordingly.

42. The draft text should further include treaties which had been signed but not yet ratified, because such treaties gave rise to obligations for parties and, in the event of an armed conflict, States might, in certain conditions, be released from the obligations stemming from a treaty that had not been ratified. That eventuality had been contemplated by the 1969 Vienna Convention. It was also vital to examine the situation carefully with regard to third parties.

43. The term “armed conflict” should embrace non-international armed conflicts, for such conflicts undoubtedly had an effect on the application of treaties. He was not, however, personally convinced that the draft articles should cover situations arising as a result of the military occupation or administration of territories. In that connection, the observations made by Mr. Montaz and Mr. Kamto on the subject of occupation had been most pertinent. Although occupation was a situation which certainly affected, or could affect, the application of treaties, it should not be included in the definition of armed conflict. The inclusion of occupation in the draft articles would alter their scope and a more general title would then have to be found to encompass all the situations covered.

44. Draft article 3 was a constitutional provision and, as such, central to the text. It was essential to make it clear that the outbreak of a conflict did not inexorably lead to the suspension or termination of a treaty. That was plainly the message the Special Rapporteur had wished to convey by his use of the term “ipso facto”. Draft article 3 was of course closely linked to draft articles 4 and 7.

45. Draft article 4 was a very important provision in that it referred to intention as a factor for determining the susceptibility to termination or suspension of a treaty. Intention could not, however, be the sole or even the main factor since, despite its significance in the treaty relationship, intention to assume obligations in the event of an armed conflict would not be easy to prove. In most cases, it was indeed probable that no such intention existed. Other factors, such as the object and purpose of the treaty or the nature and specific circumstances of the conflict, should likewise be borne in mind.

46. Given the intricacy of the subject matter some clarification was required, not only of notions and principles, but also of the scope of the draft text. Decisions would have to be taken on what types of armed conflict were envisaged and on whether the text should be extended to cover other situations, such as occupation, administration or general instability in the territory of a State, which could equally well have a bearing on the application of treaties. For that reason, it was essential to set up a working group before referring the text to the Drafting Committee. The working group should look at all those ideas, arrive at a definition of “armed conflict”, and take any other decisions necessary to make further progress and facilitate the preparation of the third report.

291 “The Memorandum of Understanding for Peace and Reconciliation in the Province of Cabinda, signed on August 1, 2006 and approved by the Angolan parliament on August 16, 2006”, Diário da República, 16 August 2006, 1st series, No. 99, resolution No. 27-B/06.
47. Mr. MELESCANU, having explained that his statement would refer to both the first and the second reports on the effects of armed conflicts on treaties, thanked the Special Rapporteur for proposing the addition of the topic to the Commission’s programme of work. The Secretariat memorandum on the topic had also been most helpful.292

48. The Commission’s debates had shown that the stage at which the draft articles could be referred to the Drafting Committee had not yet been reached. The setting up of a working group would, however, have two major disadvantages. The first was that the Special Rapporteur had not evinced any enthusiasm for the idea. The second was that, were the Commission to create a working group, it could only reiterate the arguments already rehearsed in plenary meetings. Perhaps the best solution would be for the Special Rapporteur to prepare a third report, bearing in mind the comments made in plenary meetings, on the basis of which the Commission could move on to a stage at which it would be possible to formulate draft articles.

49. The debate on the draft articles had likewise shown that the Commission was still facing some serious issues of principle, even with regard to the approach to be adopted to the topic, a matter on which there were fundamental divergences of opinion. It was first necessary to ask what aim the Commission had in mind in considering the topic. That aim could only be to endeavour to draw up articles which would reflect all the developments which had taken place in the international community’s conception of war and armed conflicts between Clausewitz’s definition of war as “the continuation of policy by other means”293 and the adoption of the Charter of the United Nations. Those articles should buttress the principle that wars of aggression and the use of force should be prohibited. At the same time, it would be necessary to find a strategy for studying collateral issues, such as military occupation and its effects on treaties, terrorism and other questions not encompassed by the classical notion of war. Although it would be quite feasible to include the question of internal conflicts, he did not believe that they came within the ambit of the topic as approved by the General Assembly, as the term “international treaties” could refer only to those concluded between States. At the same time, the Commission should not let slip the opportunity of considering non-international agreements and internal conflicts.

50. The Commission’s aim should not be to engage in a theoretical study or to draw up a few articles on very general questions touching on the possible effects of armed conflicts on treaties; it should be to ascertain what kind of measures could be adopted to address developments in the international community and in the regime governing the use of force at the international level. The topic could not therefore be dealt with in the framework of the law of treaties. Moreover, in 1963, the Commission had excluded it from its draft articles on the law of treaties.294 Debates at the current session had indicated that the relationship between the topic and legal institutions such as international responsibility, international humanitarian law and human rights tended to fall more under the heading of the fragmentation of international law. If the Commission persisted in its attempts to deal with the topic as part of the law of treaties, it would not make much headway with its mandate.

51. For that reason, he was in favour of Mr. Pellet’s idea of focusing on the effects of conflicts on obligations flowing from international treaties. While that might require much research and pose administrative problems, given the mandate that had been approved by the General Assembly, it was an idea that merited further consideration. The issue of real interest was the extent to which certain obligations remained valid and continued to produce effects during conflicts. It would be worth investigating that question in greater depth if it were possible to find satisfactory answers to it without destroying the whole structure of the Special Rapporteur’s report.

52. One point which had triggered a spirited debate between Mr. Economides and the Special Rapporteur was that of the relationship between the topic itself and the provisions of the Charter of the United Nations. The effect of an act of aggression on an international treaty could not be treated in the same manner as the effect of the exercise of self-defence on that treaty. The proof was that article 75 of the 1969 Vienna Convention was a “without prejudice” clause concerning the case of an aggressor State. The International Law Commission of the United Nations could not, in all honesty, consider the effects of armed conflicts on treaties without taking account of the provisions of the Charter. Such a discussion might assist the Commission in finding the right approach, because if, from the outset, it was clearly accepted that war was prohibited as a means of international action, and that military action was permissible only in exceptional circumstances under Chapter VII of the Charter, that might help it to solve certain other questions.

53. One such question was the termination or suspension of international treaties. If the view was taken that war was an exceptional circumstance, it would not be possible to hold that a treaty was terminated; instead, it would be suspended for the duration of the armed conflict. A second question was the fate of treaties after the end of a conflict. If war was seen as an exceptional situation, once normality was restored, treaties should obviously continue to produce their effects.

54. Another question of principle which had prompted intense debate was that of the criteria to be applied when analysing the legal effects of armed conflicts on treaties. He disagreed with the Special Rapporteur as to the advisability of using intention as the basic criterion, not only on account of the practical difficulty of ascertaining what the parties’ intentions had been at the moment of concluding the treaty, but also on account of the principle that war was not a lawful activity, except in a few exceptional cases. Mr. Pellet had therefore been right to maintain that, when signing an international agreement, the parties could not have intended to consider the potential

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292 See footnote 266 above.
impact of an impermissible war on the provisions of that agreement. Multiple objective criteria, rather than a single subjective yardstick, were needed. They could include, for example, the object and purpose of the treaty, the nature and scope of the treaty, the special circumstances of the conflict and the viability of certain obligations even during a conflict.

55. Notwithstanding the great disparity between internal and international conflicts, he would prefer the former to be included in the scope of the draft articles since, although they affected States indirectly, they nonetheless tended to render the application of an international treaty impossible. Moreover, it should be borne in mind that internal conflicts were currently more numerous than international conflicts. He would likewise be in favour of including international organizations in the scope of the draft articles. While he agreed with Mr. Montaz that it might be hard to imagine the United Nations becoming embroiled in an international conflict unless it was striving to restore peace in accordance with the provisions of the Charter, the position with regard to many other organizations—above all regional organizations such as NATO—might be less clear-cut and they ought therefore to be covered by the draft articles.

56. He wondered whether it would be possible for the Special Rapporteur, in his third report, to draw a distinction between two categories of international agreements: those not affected by conflicts, and those in respect of which it was unclear whether, ipso facto, international conflicts would have any effects on them. The first category would include those agreements which were intended to operate in wartime, such as the 1949 Geneva Conventions and the Protocols additional thereto, human rights treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, as well as other treaties and agreements concluded with a view to securing the respect of certain fundamental human rights in peacetime and wartime, which was more or less the idea underlying draft article 7. Such a distinction might be of practical assistance.

57. He had confined his statement to general observations, rather than making specific comments on each draft article, because he believed that if agreement could first be reached on a broad line of approach, it would then be possible to make more rapid progress towards the adoption of draft articles.

58. Mr. CHEEE said that any discussion concerning the wisdom of including internal conflicts within the scope of the draft articles ought to take due account of the fact that the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) had received far fewer ratifications than the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

59. Mr. KAMTO said that Mr. Brownlie was ideally qualified to serve as Special Rapporteur on the complex topic under consideration in view of his impressive experience as a practitioner of international law and his involvement in the work of the Institute of International Law on the effects of armed conflict on treaties. It was doubtless his mastery of the topic that had led the Special Rapporteur to submit to the Commission a full set of draft articles reflecting his overall conception of the issue.

60. He himself wished to address five points regarding the topic, the first of which related to terminology. The terms used occurred so commonly that the need to define them for the purposes of the topic could easily be overlooked. The Special Rapporteur had defined the terms “treaty” and “armed conflict”, and the former definition was acceptable, corresponding as it did to the 1969 Vienna Convention. While, on the face of it, there might seem to be a case for considering non-international agreements or treaties, the Commission must, pursuant to its primary task, concern itself with such treaties only insofar as they were concluded under the auspices of international law.

61. However, the definition of armed conflict left something to be desired. As Mr. Pellet had pointed out, the definition was circular, in that the term “conflict” was defined by itself, and the references to the concept of “war” added nothing, as that too required definition. He himself would propose defining “armed conflict” thus: “An armed conflict means a breach of the peace due to recourse to force by use of the means of warfare.” That definition included both the causal and the instrumental elements bringing about a situation of armed conflict.

62. Another concept contained in the title of the topic, which, as Mr. Fomba had pointed out, also required definition, was “effects”. The term might be defined as “the consequences of the armed conflict for the life of a treaty, whether for its entry into force, for its application as a whole or in part, or for compliance with the obligations arising therefrom”.

63. A second point that arose was whether the topic’s scope and the definitions of its key terms should relate only to the treaty’s provisions (instrumentum), or also to the obligations it set out (negotium). His own view was emphatically that both of those aspects needed to be considered: the treaty must be viewed as a legal instrument, but also as a set of rules, provisions and obligations. While seeking to clearly delimit the scope of all the topics it considered, the Commission generally tried to establish the most comprehensive legal regime possible. The draft articles contained in the first report showed that it was possible to go beyond resolution II/1985 of the Institute of International Law, which nevertheless constituted a good basis for the Commission’s work.

64. Should treaties that had not yet entered into force be included, as had been suggested? His first reaction was to say that they should, because as Mr. Rodríguez Cedeno had pointed out, they too created obligations for States parties. That did not, however, preclude the Commission from exploring the question more fully, to enable the Special Rapporteur to determine whether expanding the scope in that way would unduly complicate the topic and prevent it from being covered comprehensively.
65. He was also inclined to agree with those who had proposed extending the scope to include treaties concluded by international organizations, since at first glance their legal regime did not seem to be substantially different from that of treaties concluded by States. When the United Nations was involved in a military operation for the purpose of restoring peace, it was nevertheless involved in an armed conflict, and the regime to be established under the topic could well apply.

66. His third point related to the Special Rapporteur’s conscious choice to address armed conflicts generally, without singling out aggression or the use of force as envisaged by the Charter of the United Nations. As Mr. Economides had rightly emphasized, the Charter did indeed distinguish between aggression and self-defence. In its resolution II/1985, the Institute of International Law had also taken that essential distinction into account. Certainly, the Special Rapporteur could not be accused of inadvertently overlooking the issue: he had addressed it in his first report. But the Special Rapporteur’s decision had the unfortunate effect of suggesting that all wars were alike and that a war of aggression or other unlawful recourse to force had the same effects on a treaty as did the exercise of the right of self-defence. However, aggression and unlawful recourse to force could not have effects on treaties: articles 7 and 9 of the Institute’s resolution II/1985 expressed that point very well. That text had been adopted almost unanimously, although Professor Herbert Briggs had argued, unconvincingly, that the resolution sought to establish separate rules on the basis of the different legal consequences of aggression and self-defence in the absence of any international tribunal or institution competent to determine whether a State was guilty of aggression or acting in self-defence. In fact, however, not only did the Security Council have such competence under the Charter, but a State that rejected the accusation that it was an aggressor was also entitled to take the dispute to a tribunal. The fact that such disputes might arise in respect of countermeasures had not prevented the Commission from codifying rules on countermeasures.

67. The definition of aggression by a State had been established in international law by General Assembly resolution 3314 (XXIX) of 14 December 1974. The 1986 decision by the ICJ in the Military and Paramilitary Activities in and against Nicaragua case, with which the Special Rapporteur was well acquainted since he had served as counsel in that case, had described that resolution as expressing customary law. The “without prejudice” clauses in draft articles 10 and 11 submitted by the Special Rapporteur simply shrugged off the problem.

68. His fourth point related to the question whether the scope of the topic should be expanded to include internal or non-international armed conflicts and what, in non-juridical parlance, was referred to as “the war on terrorism”. As the Special Rapporteur had rightly indicated in paragraph 17 of his first report, contemporary armed conflicts had blurred the distinction between international and internal armed conflicts, with many “civil wars” involving “external elements”. On the basis of that observation, the Special Rapporteur had proposed a draft article that would cover both types of armed conflict. However, a number of different situations needed to be distinguished.

69. The first situation was when an armed conflict was purely internal: in such cases it should be examined from the standpoint of force majeure, which could be invoked as a circumstance impeding or rendering impossible the application of the treaty by the State concerned. The second situation was when an internal armed conflict had external elements. In that second case there were three possible outcomes: first, a State could invoke the conflict as a cause for suspending or terminating the treaty if it could prove that another State party to the treaty was involved in it, even indirectly as an organizer. Second, a multilateral treaty could remain in force between a State faced with an internal armed conflict and third States, which would preserve perfectly normal legal relations with that State, unless the treaty provided otherwise. And third, a treaty might be suspended with third States for reasons of force majeure yet suspended with a State party involved in an internal armed conflict precisely because of its involvement. Such cases must be studied carefully in order to determine whether or not to include them.

70. On the question whether the scope should be broadened, to cover “the war on terrorism”, he enjoined extreme caution. The Commission must not commit the Special Rapporteur to the perilous path of elaborating primary rules on a question that gave rise to such intense controversy within the international community. If he were to do so, the Special Rapporteur and the Commission would have to formulate a definition of terrorism, albeit one tailored to the topic, and he did not think the General Assembly was looking to the Commission to perform that task. To broaden the topic to include terrorism would be to open a Pandora’s box, giving many States a convenient pretext to suspend whole treaties or some of their provisions by invoking the war on terrorism.

71. On the individual draft articles, as indicated earlier, he endorsed the definition of “treaty” in draft article 2 (a), but would like to see the definition of “armed conflict” in subparagraph (b) improved. He further suggested the inclusion of a definition of the term “effects”.  

72. Draft article 3 was not only useful, but in his view central, and the Special Rapporteur should not yield to those who proposed deleting it. It set the scene for the remainder of the draft, and if combined with draft article 7, would set out a general rule, followed by possible derogations. However, the enumeration of various types of treaty in draft article 7, paragraph 2, was not the ideal approach. It might be better to try to enunciate general criteria in the article, with a list of categories of treaty incorporated in the commentary, as one member had suggested.

73. On draft article 4, he favoured a position that would reconcile the criterion of intention with that of external factors. Intention should be taken into account,
because nothing prohibited a State party to a treaty from expressly stating, or allowing it to be inferred from its intention, that a treaty or one of its provisions would or would not apply in the event of its lawful involvement in an armed conflict in which it might have to suffer the consequences of the use of force. Nothing precluded the Commission from envisaging such a hypothesis. The Special Rapporteur should explore the criterion of intention in greater depth. However, the other criterion, that of external factors, should also be included in draft article 4. Perhaps that was what the Special Rapporteur had in mind in paragraph 2 (b) of the draft article, with the formulation the “nature and extent” of the armed conflict, a formulation which could well refer to the external factors that would help to determine whether the treaty should or should not be applied.

74. While draft article 5 was acceptable in substance, it would be more logical to reverse the order of the two paragraphs: paragraph 2 set out the general rule, and should therefore precede paragraph 1. Lastly, he supported the Special Rapporteur’s proposal to delete draft article 6.

75. In conclusion, he agreed with the suggestion by Mr. Dugard that the Special Rapporteur should be given time to prepare his third report, with a working group on the topic to be set up in the coming quinquennium only if that proved absolutely necessary. However, if the third report met the desiderata expressed by the Commission, there would be no need to establish a working group.

76. Mr. BROWNlie (Special Rapporteur), responding to the comments made by Mr. Melescanu, said that when the General Assembly had approved the agenda item, it had done so with certain expectations based on the Commission’s proposal for the item. That proposal had related to the specific question of the effect of armed conflicts on the operation of treaties. To include the general question of *jus ad bellum* would completely change the focus of the topic, creating a dilemma, studiously avoided by the Commission so far, about the interpretation of the Charter. To apply the distinction between aggression and self-defence, and between lawful and unlawful use of forces, would mean reverting to the definition of aggression adopted by the General Assembly in 1974 after many years of effort, a definition that itself was full of provisos as to its effect on the interpretation of the Charter. It was one thing to have a “without prejudice” article acknowledging that problems existed, but quite another to carry out a study on the legality of the use of force, but merely to point out that, when discussing the effects of armed conflict, a distinction should be made, to the extent possible, between different categories of conflicts—*jus ad bellum*, self-defence, aggression, just and unjust wars, and so on—as set out in the Charter of the United Nations.

77. Mr. ECONOMIDES said he supported Mr. Kamto’s very apposite remarks about the question of terrorism. In the first place, to attempt to tackle the question was outside the Commission’s mandate. Secondly, in the case of terrorism, there was no readily identifiable opposing party; in international or domestic conflicts, there always was. Thirdly, as Mr. Kamto had pointed out, addressing the issue would open a Pandora’s box, with incalculable consequences.

78. Moreover, it was not being suggested that the Commission should define aggression or self-defence; its provisions should be similar to those of resolution II/1985 of the Institute of International Law, referring to the exercise by a State of the right of self-defence in accordance with the Charter. The Special Rapporteur should take account of the current exchange of views to decide how the majority of members wanted the question to be handled.

The meeting rose at 1.05 p.m.

2898th MEETING

Friday, 21 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Cautiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gallicki, Mr. Kabarsi, Mr. Kamto, Mr. Katcha, Mr. Kermich, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivas Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Effects of armed conflicts on treaties (concluded)


[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. MELESCANU, referring to the earlier debate, said that he had not intended to call for a study on the legality of the use of force, but merely to point out that, when discussing the effects of armed conflict, a distinction should be made, to the extent possible, between different categories of conflicts—*jus ad bellum*, self-defence, aggression, just and unjust wars, and so on—as set out in the Charter of the United Nations.

2. Mr. NIEHAUS welcomed the second report on the effects of armed conflicts on treaties. The Special Rapporteur’s goal of attracting the interest and participation of Member States had been largely attained and, although some criticism had been expressed, it showed how complex the topic was. Several members of the Commission had taken the Special Rapporteur to task for submitting a text that was virtually identical with the one from 2005, but it was clear that that was in keeping with the Special Rapporteur’s analytical method. He had also been criticized for not treating the whole set of draft articles in the second report, but such an approach was not unusual in the Commission and, far from preventing the topic from being considered coherently, it allowed it to be examined in greater depth.

3. Turning to the draft articles themselves, he said that draft article 1 on scope did not pose any problem, although it should be specified whether it applied solely