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Summary record of the 2927th meeting

Topic:
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international organizations were parties to consider only treaties between States; and what implications the interdisciplinary nature of the various branches of international law—law of treaties, law of armed conflicts, law of responsibility—and the prohibition of the use of force in international relations had for the Commission's consideration of the topic. Lastly, the working group should investigate the essential question of the divisibility of treaty provisions.

42. In addition to considering those major questions of principle, the working group should endeavour to develop a classification for criteria to be taken into account in determining the effects of armed conflicts on treaties (intention of the parties, nature of the conflict, object and purpose of the treaty, etc.), the treaty situations concerned (whether or not the treaty was in force), and the treaty parties' status *vis-à-vis* the conflict (belligerents or neutral), among others. It should also identify questions requiring clarification, taking as its starting point the comments already made by three Commission members on that subject¹⁶⁵ and also the memorandum by the Secretariat. Then and only then, on the basis of the replies obtained and the classification established, would the Commission, under the guidance of the Special Rapporteur, doubtless be able to formulate and adopt a genuinely useful set of draft articles very quickly.

43. Ms. ESCARAMEIA said that, owing to a lack of time, she would deliver her observations at the following meeting; however, she wished to know if the plan was to consider all the draft articles contained in the third report, or only the first seven.

44. Mr. BROWNLIE (Special Rapporteur) reminded Mr. Pellet that the question of the lawfulness of the use of force had been duly addressed in the first and third reports. He informed Ms. Escarameia that the plan was initially to discuss only the first seven draft articles.

The meeting rose at 12.55 p.m.

2927th MEETING

Wednesday, 30 May 2007, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Present: Mr. Brownlie, Mr. Cafisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA commended the clarity of the third report (A/CN.4/578) and of the Special Rapporteur's approach, which left no doubt as to what the draft articles were to cover and made it easier to see what needed to be done. She had already commented on earlier versions of some of the draft articles, so would try to avoid repetition.
2. Her statement would fall into three parts. The first would consider some underlying problems of a structural nature in the draft articles; the second would consist of comments on the draft articles themselves; and the third would focus on action to be taken.
3. With regard to the structural problems, some issues needed to be addressed before the Commission could proceed with its work. First, a clearer distinction must be drawn between the effects of treaties on the conflicting parties and on third parties. Secondly, the differing effects of armed conflict on different provisions of the same treaty should be clarified. Thirdly, a distinction should be drawn between the suspension and the termination of a treaty; the Commission had tended to consider them as a single process, but in reality they might be quite different. Another question was the difference between the effects on a treaty of an international and of an internal conflict (assuming that both were to be covered by the draft articles). The same question arose as to the different effects of large-scale and small-scale conflicts. The "extent" of a conflict was mentioned in draft article 4, paragraph 2 (*b*), but only in relation to the question of determining the intention of the parties, which was a different issue altogether. A further question related to the differing effects of armed conflicts, and of termination or suspension, on bilateral and on multilateral treaties, particularly those multilateral treaties that had a large number of parties. Lastly, the legality of a State's position in relation to a given armed conflict needed further consideration. The issue was partially dealt with in draft article 10, but she would not comment in detail until that draft article had been introduced by the Special Rapporteur.
4. Another question was under which chapter of international law the draft articles belonged. The Special Rapporteur continued to assume, as in previous reports, that they formed part of the law of treaties. That, however, was to overlook the importance of other chapters, including the law of war. Draft article 10 had been added in recognition of that fact. Nonetheless, the criterion of the intention of the parties, which was typical of the law of treaties, was, along with the object and purpose of the treaty, cited as decisive. That was also the reason why so little attention had been devoted to internal conflicts—given that no treaty had been concluded between the parties to the conflict—or to the legality of a State's position in a situation of war, although draft article 10 did address the question of self-defence. The law of war was, however, important in assessing such legality, while the law of

¹⁶⁵ See *Yearbook ... 2006*, vol. I, 2896th meeting, p. 190, paras. 30 and 36, and 2897th meeting, p. 199, para. 46.

State responsibility could apply when assessing the consequences of non-compliance with treaties suspended or terminated. The draft articles thus related to several areas of law. One possible explanation for the exclusion under article 73 of the 1969 Vienna Convention of situations of armed conflict might be that the drafters of the Convention had considered that armed conflict was covered by a special regime to which the law of treaties did not necessarily apply.

5. The issue that she found most problematic was that of the criterion for susceptibility to termination or suspension. Under draft article 4, the essence of the treaty lay in the presumed intention of the parties, which would determine whether the treaty remained in force in the case of armed conflict. As the *presumed* intention was, self-evidently, not expressed, the criterion given in draft article 4, paragraph 1, was the intention of the parties at the time the treaty was concluded, as determined by articles 31 and 32 of the 1969 Vienna Convention (draft article 4, paragraph 2 (a)) and by the nature and extent of the armed conflict in question (draft article 4, paragraph 2 (b)). Article 31 of the Vienna Convention, with its reference to the object and purpose of the treaty, seemed to provide the link to draft article 7, which gave the object and purpose of the treaty as a criterion for determining the types of treaties that were to continue in operation in the event of armed conflict. It was a complex chain of reasoning, which ended up with a mixture of criteria: not only intention in draft article 4 and object and purpose in draft article 7 but also, in the latter, a list of categories of treaty. Even if the presumed intention of the parties were the only criterion—which it was not—she did not believe it to be a fruitful point of departure, since account had to be taken of the future development of the treaty itself, particularly in circumstances as dramatic as the outbreak of war. In her view, a more satisfactory criterion would be the viability of the continued operation of the various provisions of the treaty in armed conflicts. That would make it possible to deal with the provisions separately, taking into account the type of conflict involved and the legality of the position of a given party. Moreover, as had been suggested by several members over the past few years, including Mr. Mansfield, Mr. Matheson, Mr. Pellet and herself, a list of factors or criteria could be drawn up, indicating whether the provisions of the treaty continued to apply. Such factors could include the object and purpose of the treaty; any textual reference to armed conflict in the treaty; the magnitude of the conflict; the number of parties to the treaty; the importance at the international level of the treaty's continued applicability in time of war; and the question of whether there was a high or a low probability of the treaty being applied in time of war. A list of categories of treaty likely to remain applicable in time of war could be appended in an indicative article. The Secretariat memorandum¹⁶⁶ offered a wealth of useful material in that regard. The intention of the parties could also be included, but as just one factor among many. She was aware that her suggestion did not provide a definitive solution; however, it was preferable to reliance on the intention of the parties.

6. Turning to the text of the draft articles themselves, she concurred with the Special Rapporteur that the scope of the draft, as set out in draft article 1, should not, for purely practical reasons, extend to treaties concluded by international organizations; the Commission's task was onerous enough as it was. The question of treaties provisionally applied between parties was more problematic: article 25 of the 1969 Vienna Convention, referred to in paragraph 7 of the report, could not resolve the issue, given that article 73 stated that the provisions of the Convention did not prejudice any question that might arise in regard to a treaty from the outbreak of hostilities between States. Further thought should be given to the issue.

7. With regard to the definition of armed conflict given in draft article 2, Ms. Escameia could not tell from the Special Rapporteur's comments whether he intended it to include internal armed conflict; the definition could be read either way. Given that internal conflicts were more common than international conflicts, and that the draft articles aimed to be of practical use, the scope should indeed include internal armed conflict. Situations of military occupation should be included for the same reasons. She would therefore prefer a definition of armed conflict that combined the wording used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case [decision on the defence motion of interlocutory appeal on jurisdiction, para. 70] and elements of article 18, paragraph 2, of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The definition would thus read:

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

“(a) 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.”

If it was decided that the scope of the draft articles would not extend to internal armed conflict, the current definition should, of course, be retained.

8. With regard to draft article 3, she recalled that when, at its fifty-eighth session, the Commission had discussed replacing the expression “*ipso facto*”, she had suggested the word “automatically” as an alternative.¹⁶⁷ The Special Rapporteur had replaced “*ipso facto*” with “non-automatic” in the title, but had opted for the word “necessarily” in the text itself. In the interests of securing consistency between title and text, the stronger word “automatically”—which was also closer in meaning to the term “*ipso facto*”—was preferable.

9. With regard to draft article 4, she could not accept the assumption that the interpretation of a treaty depended ultimately on determining the intention of the parties at the time that the treaty was concluded. That was not an

¹⁶⁶ A/CN.4/550 and Corr.1–2 (see footnote 164 above).

¹⁶⁷ *Yearbook ... 2006*, vol. I, 2911th meeting, p. 303, para. 5. See also the 2895th to 2898th meetings (*ibid.*).

easy or, indeed, always a practicable task, especially when an unforeseen event such as war between the parties occurred.

10. New draft article 6 *bis* gave rise to a number of problems, most notably the statement that the application of standard-setting treaties was determined “by reference to” the applicable *lex specialis*, namely, the law applicable in armed conflict. The law of armed conflict was not, however, necessarily the applicable *lex specialis* in human rights or environmental matters in which other law might well take precedence. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (paras. 102–113), the ICJ had referred to the advisory opinion of 1996 on the *Legality of the Threat or Use of Nuclear Weapons* and concluded that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the rights of the child continued to apply in times of war. The law of armed conflict could thus not be considered *lex specialis* in relation to human rights law and did not always prevail over it. Perhaps the Special Rapporteur could clarify the situation and redraft the article.

11. With regard to draft article 7, a difficult and controversial provision, she was opposed to its being annexed to the draft. The provision acted as a useful counterbalance to the criterion of the intention of the parties, which was contained in draft article 4, and to which she was opposed; relegating it to an annex would diminish its force. With regard to draft article 7, paragraph (2) (b), she did not understand the Special Rapporteur’s reasons for excluding treaties codifying *jus cogens* rules. True, such rules might be difficult to determine, but there would be no need to do so, and in any case the Commission had already tested them in its commentaries to the draft articles on responsibility of States for internationally wrongful acts¹⁶⁸ and the topic of fragmentation of international law: difficulties arising from the diversification and expansion of international law.¹⁶⁹ Moreover, paragraph 31 of the memorandum by the Secretariat on the effect of armed conflict on treaties¹⁷⁰ cited treaties or treaty provisions codifying *jus cogens* rules as exhibiting a very high likelihood of applicability in case of armed conflict. For all those reasons, she considered that the draft article should remain in the body of the text.

12. She would refrain from commenting on the remaining draft articles until they had been introduced by the Special Rapporteur. As to what action should be taken, some of the less problematic draft articles, such as draft articles 1, 3, 5, 5 *bis* and 10 to 14, could be referred to the Drafting Committee. The basic structural issues affecting the other draft articles would need to be discussed further. She commended the Special Rapporteur’s openness to the idea of setting up a working group with a mandate

to settle questions relating to the scope of the draft articles and the criteria to be employed.

13. Mr. McRAE said that the three reports on the effects of armed conflicts on treaties all evidenced the commitment to thorough analysis for which the Special Rapporteur was reknowned in academic circles. As the Special Rapporteur had pointed out, there was no agreed or settled position on the topic in the literature and thus there would clearly continue to be lively debate on the direction to be taken. The lack of any single solution or approach in the literature was reflected in State practice, as shown in the Secretariat’s excellent memorandum on the practice and doctrine.

14. He wished to set out his concerns about certain aspects of draft articles 4 and 7. The issues had been touched on by Mr. Pellet the previous day, and developed by Ms. Escameia; and, as a new member of the Commission, he wished to take a different approach, in an effort to ensure that he fully understood the implications of the Special Rapporteur’s own approach.

15. The Special Rapporteur’s starting point, as expressed in draft article 4, was that the effect of armed conflict on treaties was to be derived from the intention of the parties to the treaty at the time that it was concluded. In that, the Special Rapporteur was adopting the view of Sir Cecil Hurst in his classic article in the *British Year Book of International Law*,¹⁷¹ proposing an alternative to the view that it was the nature or character of the treaty provision itself that determined the consequence in the event of armed conflict. As an abstract proposition, there could be no quarrel with the idea that, where the parties to a treaty had expressed their view on whether the treaty or a provision thereof was to be terminated or suspended in the event of the outbreak of war, that view should govern. The problem was that this situation would seldom occur. In the vast majority of cases, the parties would not have expressed any opinion on the matter, as was evident from the Secretariat’s memorandum. Hurst had been aware of that, because he had said that the task of the international lawyer was to form a series of presumptions to determine the outcome, where the parties had not clearly expressed their intention in the treaty.¹⁷²

16. A general rule based on the intention of the parties would thus be of very limited application or utility, because the parties would generally have said nothing in the treaty about the consequences for the treaty of the outbreak of war. In effect, the general rule would become the exception, and another general rule would be needed. The problem was not resolved by the reference in the draft article to the use of articles 31 and 32 of the 1969 Vienna Convention as the touchstone for determining the intention of the parties. True, if there were words in the treaty that had to be interpreted, then articles 31 and 32 provided a framework for doing so; indeed, the Special Rapporteur linked the criterion of intention with the words of the treaty when he quoted from McNair, in paragraph 24 of the third report, that interpretation was not a matter of

¹⁶⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76, especially the commentary to draft article 26, pp. 84–85.

¹⁶⁹ See the conclusions of the Study Group in *Yearbook ... 2006*, vol. II (Part Two), p. 177, para. 251. The report of the Study Group (A/CN.4/L.682 [and Corr.1] and Add.1) can be found in its entirety on the Commission’s website. The final text will appear as an addendum to *Yearbook ... 2006*, vol. II (Part One).

¹⁷⁰ A/CN.4/550 and Corr.1–2 (see footnote 164 above).

¹⁷¹ C. J. B. Hurst, “The effect of war on treaties”, *BYBIL*, 1921–1922, vol. 2, pp. 37–47.

¹⁷² *Ibid.*, p. 40.

intention as an abstraction, but an intention of the parties “as expressed in the words used by them”.¹⁷³ Articles 31 and 32 of the 1969 Vienna Convention provided no basis, however, for ascertaining an abstract intention of the parties where the treaty was silent about the effect of armed conflict and there were no words to be interpreted. Interpretation under article 31 proceeded from the ordinary meaning of the terms of the treaty, in their context and in the light of the object and purpose of the treaty. The United Nations Conference on the Law of Treaties had, however, rejected the idea that intention could be determined independently of the words used in the treaty.

17. It was interesting to note that, in positing an intention test in his 1922 article, Hurst had relied on a domestic contract-law analogy. As quoted in paragraph 32 of the first report,¹⁷⁴ he had written that “just as the duration of contracts between private persons depends on the intention of the parties, so also the duration of treaties between States must depend on the intention of the parties”.¹⁷⁵ In saying that, he had been reflecting the nineteenth-century view of English contract law, which regarded the intention of the parties as the governing consideration. He might well have changed his mind if he had seen the development of English contract law in the twentieth century, when the common-law judges had come to reject the idea that the intention of the parties was the guide to determining the effect of impossibility or frustration on contracts, and had instead looked to the practical effect of the supervening event on the carrying out of the contract. The Special Rapporteur had made it clear that he viewed impossibility or the occurrence of supervening events as different from the effect of armed conflict, but that was nevertheless what Hurst had had in mind when drawing an analogy with domestic contract law. The problem with the current basis for draft article 4 was therefore that it relied for a general rule on what was essentially a fiction: the idea that, at the time they concluded the treaty, the parties must have thought about and decided upon the effect of armed conflict on the treaty, even though they had said nothing about it in the treaty.

18. He made that criticism with some hesitation because, in general, he agreed with the Special Rapporteur’s endeavours to counter the theory that armed conflict abrogated treaties, a theory that was of little utility, since it was, at the very least, contradicted by the practice outlined in the Secretariat memorandum. He therefore supported the objective of draft article 3, which was based on a theory of continuation, even though he was not convinced that there was any need to replace an inadequate abrogation theory with an intention theory. Nevertheless he could accept draft article 5, whose purpose, at least in part, was to indicate that, where the parties had expressed their intention with respect to armed conflict, that intention should prevail.

19. Since, in practice, the intention of the parties would rarely provide any guidance in determining whether the treaty should be terminated or suspended in the event of

armed conflict, the *de facto* general rule under the draft articles would not be intention, but the object and purpose of the treaty, as provided for in draft article 7, paragraph (1). An object and purpose test could certainly be viewed as an intention-based test: obviously the purpose of examining the object and purpose of a treaty was to discern the intention that the parties had had in mind. That was probably the opinion of the Special Rapporteur, because he indicated in paragraph 34 of his third report that in the Sixth Committee he had raised the possibility of deleting draft article 7. It was, he had said, merely “indicative and expository”—in other words, simply an application of the draft article 4 “intention” test.

20. However, if draft article 7, paragraph (1), was regarded as an intention-based test, then there were two different intention-based tests in the draft articles: one in draft article 4, which sought to establish intention by reference to all of the elements set out in articles 31 and 32 of the 1969 Vienna Convention, of which object and purpose were only a part; and the other in draft article 7, paragraph (1), under which intention was determined solely by reference to object and purpose without the other supporting elements of articles 31 and 32 of the 1969 Vienna Convention. Once again, it seemed that relying on the fiction of intention resulted in some confusion.

21. It therefore seemed that, apart from those cases where the parties had expressed their intention as to the effect of armed conflict on the treaty, it was necessary to make a pragmatic appraisal of that effect. The Commission would therefore have to move towards a compatibility test to ascertain whether the operation of the treaty could survive armed conflict. The answer would vary from one treaty to another and perhaps from one provision of a treaty to another. If the armed conflict made it permanently impossible to carry out the essential objectives of the treaty, then termination seemed to be the most probable course of action, but if it made carrying out those objectives only temporarily impossible, then suspension seemed likely. If continuation was theoretically possible, but to do so would make no sense in the light of the essential objectives of the treaty (an object and purpose test), then again termination or suspension might seem to be the logical consequence.

22. When, however, the logical consequence of the object and purpose was that the treaty should continue in the event of armed conflict then, obviously, it should continue. To that extent, there was some merit in the test put forward by the Special Rapporteur in draft article 7, paragraph (1). At that point, it might seem that an intention test and an object and purpose test had merged, because the consequences that flowed from the object and purpose could be characterized as presumed intent. Nonetheless, presuming intent was simply another way of applying a fictional intention test.

23. Hence there would be some basis for starting with an object and purpose approach viewed broadly and, as Ms. Escameia and Mr. Pellet had suggested, possibly a range of factors should be borne in mind. An object and purpose test which looked at the essential objectives of a treaty seemed to be a more appropriate approach to continuance than relying on some fictional intention.

¹⁷³ A. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 365.

¹⁷⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

¹⁷⁵ Hurst, *loc. cit.* (footnote 171 above), p. 40.

24. Even if the question of the general rule were to be resolved, he would still have some reservations about an approach involving listing categories of treaties that were presumed to continue. The whole treaty might continue or might be suspended in the event of armed conflict, but in some cases particular treaty provisions might be more susceptible to continuation than the treaty as a whole. Treaties of friendship, commerce and navigation might be an example of the latter. As the Secretariat memorandum pointed out, the fact that compromissory clauses in such treaties had been held to continue notwithstanding armed conflict had been the basis for establishing the jurisdiction of the ICJ. Indeed, it seemed to be a matter of common sense that such clauses would continue. Would that nonetheless be true of all provisions of a friendship, commerce and navigation treaty? Would the right of establishment, for example, which was a common provision in early treaties of that kind, not be at least suspended, if not abrogated, in the event of armed conflict? The Special Rapporteur had also pointed out in paragraph 83 of his first report¹⁷⁶ that modern bilateral investment treaties should be treated like treaties of friendship, commerce and navigation in that regard. But would an investor-State dispute settlement procedure under a bilateral investment treaty continue in the event of armed conflict between the contracting parties? Would it not at least be suspended, given that there was a conflict between those provisions of the treaty and any rights a State might have in respect of enemy aliens?

25. All of the foregoing suggested that categorizing entire treaties for the purpose of determining continuation might be too blunt an instrument and that, instead, much closer attention should be devoted to particular provisions, or types of provisions, of treaties. That might perhaps be more usefully done in the commentary than in the text of the draft articles.

26. Mr. VÁZQUEZ-BERMÚDEZ said he supported the Special Rapporteur's proposal that a working group should be set up. Such a move would help the Commission to make substantive progress on the topic.

27. On the definition of "armed conflict" for the purposes of the draft articles, he pointed out that the considerable rise in the number of internal armed conflicts in the last 10 or 20 years meant that they currently accounted for the majority of such conflicts. If they were excluded from consideration, the treatment of the topic would therefore be incomplete and the draft articles would not apply to most of the armed conflicts actually taking place. At the same time, he took note of the Special Rapporteur's word of warning with regard to potential damage to contractual obligations and treaty relations and the numerous additional excuses that could be proffered for suspending or terminating contractual relations.

28. For that reason, the draft articles should tender the principle of the continuity of treaties in the event of armed conflicts more categorical and decisive in content. In his first report the Special Rapporteur had presented a draft article 3 which read: "The outbreak of an armed conflict does not *ipso facto* terminate or suspend

the operation of treaties...". That formulation had been a replication of article 2 of the resolution adopted by the Institute of International Law in 1985,¹⁷⁷ which reflected the fact that legal writers had come to hold the opposite view to the one that had prevailed up until and during the nineteenth century, namely that war *ipso facto* terminated treaties. In his third report, the Special Rapporteur had altered the title of the article to "Non-automatic termination or suspension" and in the text itself the words "*ipso facto*" had been replaced by "necessarily". While draft article 3 constituted a major step towards upholding the principle of continuity, even as amended it did not sufficiently reinforce that principle. In the interests of treaty-based legal relations and the principle of *pacta sunt servanda*, all treaties bound the parties, who must comply with them in good faith.

29. In its current form, draft article 3 might be interpreted to mean that an armed conflict did not always terminate or suspend the operation of a treaty. In other words, it established a presumption, or general principle, in favour of termination or suspension. For that reason, it would be better for the draft article to be entitled "Principle of continuity", and worded: "In general, the outbreak of an armed conflict does not lead to the termination or suspension of the operation of treaties...". The phrase "in general" would indicate that continuity was the general rule, but that in some cases treaties might be terminated or suspended. In that connection, the Secretariat memorandum, on the basis of an exhaustive examination of the pertinent legal precedents, had yielded the surprising finding that few treaties had been suspended during the Second World War and that only in a few exceptional cases had treaties been terminated on the grounds of the conflict.¹⁷⁸ Most recent practice also bore out the presumption of the continuity of treaties.

30. As for draft article 4, the central element for determining the susceptibility to termination or suspension of treaties in case of an armed conflict was indeed the intention of the parties to the treaty. In many or most cases, however, no clearly discernible intention existed. On some occasions, that presumed intention could amount to a fiction. Hence the Working Group ought to consider not only the intention of the parties, but also alternative criteria, including, as suggested by Mr. McRae, the compatibility of the object and purpose of the treaty with the pursuit of the armed conflict. A further important factor to be borne in mind when considering the suspension or termination of treaties was the compatibility of the treaty with the exercise of the right to individual or collective self-defence in accordance with the Charter of the United Nations and with the use of force in general. The Special Rapporteur had referred to that matter in draft article 10. Of course, the nature and scope of an armed conflict also had a bearing on the determination of the susceptibility to termination or suspension of treaties.

31. Although draft article 7 already contained a useful list of treaties the object and purpose of which involved the necessary implication that they would continue in

¹⁷⁷ Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278.

¹⁷⁸ A/CN.4/550 and Corr.1-2 (see footnote 164 above), paras. 79-81.

¹⁷⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

operation during an armed conflict and whose operation would not be inhibited by the outbreak of armed conflict, the Working Group should perhaps consider the addition of some further categories to the list and should also investigate the termination and suspension of specific provisions of treaties, rather than the termination or suspension of treaties as a whole.

32. Mr. COMISSÁRIO AFONSO said that by revisiting some thorny issues the Special Rapporteur's third report had provided members with ample opportunity to ponder those issues more thoroughly. The excellent idea of setting up a working group to consider them in greater depth bore testimony to the Special Rapporteur's openness and flexibility. He hoped that an informal working paper would be prepared by way of guidance for members of the Working Group.

33. He stressed his continued support for draft article 1; the scope of the topic must be confined to States and, as the Commission had maintained from the outset, should exclude non-State actors, including international organizations, the reason being that two separate conventions governed the law of treaties: one applying exclusively to States, the other covering legal relations between States and international organizations, or between international organizations themselves. The same distinction had been drawn in the field of responsibility for internationally wrongful acts. The Commission should therefore honour that practice with respect to the topic under consideration.

34. The Commission should likewise be consistent when it came to the term "armed conflict" used in draft article 1 and defined in draft article 2 (*b*), in that it should be understood to refer solely to international, or inter-State, conflicts. Both logically and from a policy point of view, it seemed inappropriate to extend the concept of a treaty applying as between States to cover conflicts involving non-State actors. Any attempt to include the idea of non-international conflicts within the term could indirectly widen the scope of the topic, thereby undermining draft article 1. Furthermore, if that approach were to be adopted, the security and homogeneity of treaty relations between States would no longer be guaranteed. As a middle way, the Commission could, however, possibly suggest that the Working Group explore the viability of introducing a provision similar to that contained in article 3 of the 1969 Vienna Convention, which dealt with international agreements not within the scope of the Convention.

35. Draft article 3 required strengthening: it should not be just a point of departure, but a logical corollary of the fundamental principle of modern-day international relations that under the Charter of the United Nations the threat or use of force was prohibited. Accordingly, the life or death of a treaty should not be dependent on the outbreak of an armed conflict, but on the likelihood of compatibility of the conflict not only with the object and purpose of the treaty, but also with the Charter of the United Nations. As it stood, the article did not go far enough in that respect, particularly when read in conjunction with draft articles 4 and 7, as the report recommended.

36. The Special Rapporteur had asked whether there was any need for draft article 7 indicating that treaties, the object and purpose of which involved the necessary implication that they continued in operation during an armed conflict, were not terminated or suspended on the outbreak of such a conflict. In his view, the answer was that the provision was needed in order to strengthen draft article 3. The underlying idea could, however, be expressed more clearly.

37. Article 4 was problematic on at least two counts. First, the relationship between the principle of non-automatic termination or suspension of treaties and the relevance of the indicia of susceptibility to termination or suspension of treaties in cases of armed conflict should be more closely scrutinized. Moreover, in the past he had voiced his concern that the term "indicia of susceptibility" was too vague, and its intended meaning unclear. Secondly, while there could be no denying the importance of interpreting intention—indeed, articles 31 and 32 of the 1969 Vienna Convention set forth the golden rules of interpretation as they applied to all treaties without exception—it was not clear why the Special Rapporteur chose to highlight the important role of intention in draft article 4, rather than in draft article 3 or, for that matter, throughout the other draft articles.

38. He fully agreed with draft article 5 *bis*, since it had the merit of reaffirming the contents of article 6 of the 1969 Vienna Convention which provided that "[e]very State possesses capacity to conclude treaties".

39. Even though much progress had been made during the discussion of the three reports, much work remained to be done. In particular, the Commission had not yet resolved all the issues raised by the resolution adopted by the Institute of International Law at its Helsinki session in 1985. The 1969 Vienna Convention contained no provisions on the effects of conflicts on treaties; accordingly, consideration of the topic provided the Commission with an opportunity to address that matter in a comprehensive and satisfactory manner.

40. Mr. SABOIA said that the draft articles presented by the Special Rapporteur, combined with his lucid analysis of the topic, greatly contributed to the elucidation of a difficult and complex subject.

41. With reference to the conceptual background outlined in paragraphs 4 through 10 of the first report, it seemed particularly significant that, when elaborating the commentaries to the draft articles which had later become the 1969 Vienna Convention, the Commission had expressly opted to leave aside the question of the effect of armed conflicts on treaties since, as explained in paragraph 7 of the first report, "the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter [of the United Nations] concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question".¹⁷⁹ That position had been even more clearly stated in the commentary to draft article 69 set forth in the Commission's report to the

¹⁷⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, p. 214.

General Assembly on the work of its eighteenth session¹⁸⁰ and quoted by the Special Rapporteur in paragraph 9 of his first report. The omission from the 1969 Vienna Convention of any reference to the effects of armed conflicts on treaties therefore appeared to have been a deliberate attempt to preserve the stability of legal obligations contained in treaties and to avoid including a specific provision enabling States parties involved in a conflict to modify their obligations on sole account of that conflict.

42. The occurrence of an armed conflict might indeed have effects on the operation of treaties. On the one hand, the nature of those effects might stem from the parties' disinclination to continue to abide by their contractual obligations on account of the hostilities, in which case they could, when legally possible, avail themselves of the means provided for in the law of treaties for the termination or suspension of treaties. On the other, factual circumstances, including the outbreak of an armed conflict of a non-international nature, might render a treaty totally or partially inoperative, irrespective of the will of the State or States. In that event, those circumstances might be invoked either to justify the partial or total suspension of the treaty or, in accordance with the law of responsibility of States, to exempt the State from responsibility for non-compliance with its legal obligations under the treaty.

43. He was in favour of including non-international conflicts in the definition of armed conflict in draft article 2, for most of the reasons given by the Special Rapporteur in his first report and for those mentioned by Mr. Pellet in his statement at the previous meeting. Those armed conflicts, which had perhaps become more frequent than traditional conflicts between States, might well have effects on the operation of treaties. However, when hostilities involved States, the effects on treaties probably reflected the unwillingness of enemy States to continue to be bound by the obligations they had contracted, whereas in the case of non-international armed conflicts it was more probable that the conditions created by the conflict would affect the ability of the State concerned to ensure that all or part of the treaty remained operational. At first sight, the alternative wording proposed by Ms. Escameia was appealing.

44. If the intention to which reference was made in draft article 4, paragraph (2), was the intention when the treaty was concluded, it was unclear how "the nature and extent of the armed conflict in question" referred to in subparagraph (b) could be used to measure that intention, because the possibility of a conflict might not have been foreseen when the treaty was concluded, and also because the intensity of a conflict did not necessarily have any particular impact on certain treaties.

45. It was unnecessary to make specific reference to the law of armed conflicts as the applicable *lex specialis* in draft article 6 *bis*, since the principle of *lex specialis* would apply in any case if a specific situation warranted it. The explicit mention of the law of armed conflict might even undermine the standards set by the categories of treaty mentioned in that draft article.

46. He concurred with the Special Rapporteur that the non-exhaustive list of categories of treaties to be found in draft article 7, paragraph (2), contained the most significant examples of categories of treaties not susceptible to suspension or termination on account of an armed conflict and that it was helpful in establishing a *prima facie* presumption of the object and purpose of a treaty. He had taken particular note of the statement in paragraph 69 of the first report to the effect that the wording of paragraph 2 (b) of that draft article, namely "treaties declaring, creating, or regulating permanent rights or a permanent regime or status" involved treaties relating to boundaries.

47. In concluding, he supported the Special Rapporteur's suggestion that a working group should be established in order to expedite progress on the topic.

48. Mr. GAJA said that the Special Rapporteur's introductory remarks had been helpful, not only for new members of the Commission, but also as a summing-up of the work done on the topic so far. He himself had initially been surprised to see that a complete set of draft articles had been submitted in the first report, but it had soon become clear that the purpose was to provide a general overview of the topic, including a preliminary assessment of the various issues. It had been an unusual way of proceeding, but not without merit. Novelty was welcome in that it prompted a reassessment of the traditional manner of examining issues.

49. He had expected to see in the second report a detailed analysis, based as far as possible on State practice, of the questions that had been touched on in the first report. In his introductory remarks at the previous meeting, the Special Rapporteur had explained why such an analysis had been impossible. It was less clear, however, why the third report simply whetted the appetite for the next course.

50. At previous sessions he had raised points that he continued to see as important, so he would raise them again in the hope of putting them more persuasively than in the past. First, concerning the scope of the draft articles, article 73 of the 1969 Vienna Convention stated that the provisions of the Convention "shall not prejudice any question that may arise in regard to a treaty ... from the outbreak of hostilities between States". The Convention left open questions relating to the possible existence of special rules that would apply with regard to a treaty as a consequence of the outbreak of hostilities between States. Had those consequences been identical to those that generally applied, for example, in the event of a fundamental change of circumstances or supervening impossibility of performance, there would have been no need for the "without prejudice" clause: the general rules in articles 61 and 62 of the 1969 Vienna Convention would simply apply. If any special rule existed with regard to termination or suspension of a treaty in the case of outbreak of hostilities, it was likely to affect only the relations of a State that was a party to an armed conflict with another State that was also a party to that conflict. It was the armed conflict between them that, as article 73 of the 1969 Vienna Convention suggested, might trigger special consequences and create a need to devise special rules.

¹⁸⁰ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 267–268.

51. An armed conflict which a State party to a treaty might have with a third State should produce only the consequences generally provided by the 1969 Vienna Convention—in particular, fundamental change of circumstance or impossibility of performance. The same could be said of an internal armed conflict within a State party to a treaty. One would not have to look for special rules: the rules generally set for termination or suspension of treaties would simply have to be applied. His difficulty with the proposed text was that it was not possible to deal with international and internal conflicts affecting States parties to a treaty as if they all raised the same kind of problems. While he could sympathize with the case for dealing with internal conflicts, since they were more common than international ones, it would not be possible to devise special rules for such conflicts. On the other hand, the Commission could study the relationship between the application of treaties involving States in which internal conflicts were taking place and other obligations that States might have, in particular, the obligation of neutrality towards States involved in conflicts, whether internal or international. In other words, the Commission could reconsider the case regarding the *Kiel Canal* regime (*SS “Wimbledon”*) and see which obligation prevailed, and to what extent. That was a different kind of problem from the identification of special rules when two States parties to a treaty were directly involved in a conflict.

52. Having been the first to speak on the first report on the topic, he had been the first to voice criticism of the use of intention as the main criterion for establishing whether termination or suspension would take place. He had since realized that what was really envisaged was not intention, a concept that had been commonly used in the 1920s, but rather the interpretation of a treaty, hence the references in draft article 4 to articles 31 and 32 of the 1969 Vienna Convention. He could accept that reference, although it did not offer a solution in all cases. As Mr. McRae had said, it could not be a general rule, but it might be an exception. In addition, the words in draft article 4, paragraph (1), “at the time the treaty was concluded” should be deleted, since the phrase could not be fully reconciled with the rules of interpretation. Thus, rather than reconstruction of a fictitious and subjective intention, it was interpretation of a treaty that was involved, and draft article 4 then became coherent with draft article 7.

53. Although he would not quarrel with the approach taken by the Special Rapporteur in favour of stability in treaty relations, he would hesitate to state that an outbreak of hostilities between the parties to a treaty never entailed suspension of the treaty. True, the text of draft article 3—unlike the title, as had helpfully been pointed out by Ms. Escarameia—no longer indicated as much, but only that an armed conflict did not “necessarily” terminate or suspend the operation of treaties as between the parties to a conflict. He found that position acceptable, although the wording proposed by Mr. Vázquez-Bermúdez better captured the idea that it could not be taken for granted that termination or suspension never took place. However, he disagreed with the assertion in paragraph 18 of the third report that there was no evident difference of meaning between the terms “necessarily” and “*ipso facto*”. That was not true: the latter meant “automatically”. He likewise disagreed with the indication in paragraph 57 that

suspension or termination did not take place *ipso facto*. There were certainly instances in which a treaty could be regarded as automatically suspended because of the outbreak of an armed conflict between the parties—that was a regrettable but inevitable conclusion.

54. At the previous session he had given an example similar to the one just given by Mr. McRae, of a bilateral trade agreement, which was unlikely to be applied once an armed conflict had begun between the parties to it: goods could hardly be exchanged simultaneously with shellfire. Another example would be that of multilateral law-making treaties, which were included in the list in draft article 7 of categories of treaties that should continue in operation during an armed conflict. In paragraphs 101 to 103 of his first report,¹⁸¹ the Special Rapporteur had given three instances of State practice with regard to multilateral treaties of a non-political or technical nature. The views expressed in the texts cited showed that the treaty provision in question was not terminated because of the outbreak of hostilities; however, they also indicated that certain provisions of the treaty were automatically suspended.

55. He did not mean to suggest that any of the categories listed in article 7 should be deleted. He simply wished to express the hope that whatever relevant practice existed with regard to each of the categories would be collected and thoroughly analysed by the Special Rapporteur, who might, at the end of the day, conclude that practice was insufficient or not clear, or that it should be disregarded for other reasons. The Special Rapporteur had pointed out that the Commission must not be tied to old practice and should be free to develop other rules. Still, it would be interesting to look at practice first.

56. He welcomed the proposal to establish a working group, which might help the Commission to reach a consensus on the scope of the study and possibly also recommend a road map, but real progress would mostly depend on the Special Rapporteur, in whose ability to bring the study to a successful conclusion he had the fullest confidence.

57. Mr. PERERA thanked the Special Rapporteur for his reports on the topic and for his comprehensive introductory remarks. His approach of presenting a complete set of draft articles helped one to gain an understanding of the overall nature and scope of the topic. The Secretariat had provided very useful input into the Commission’s work, particularly in the memorandum entitled “The effect of armed conflict on treaties: an examination of practice and doctrine”,¹⁸² a comprehensive compendium which would make an invaluable contribution to the study of the topic.

58. Draft articles 4 and those following adopted the test of the intention of the parties at the time the treaty was concluded to determine the effect of armed conflict on treaties. While the use of the intention criterion was certainly supported by doctrine, that should not rule out the use of other criteria that could help discover the intention of the

¹⁸¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

¹⁸² A/CN.4/550 and Corr.1–2 (see footnote 164 above).

parties, particularly in dealing with the difficulties inherent in armed conflict situations. Mr. McRae had pointed out that in such situations, in assessing the intention of the parties, the intention criterion could well become the exception rather than the rule.

59. The Secretariat memorandum pertinently observed that modern consideration of the topic generally used a combination of the subjective test of the intention of the parties towards the treaty and an objective test of the treaty's compatibility with national policy during an armed conflict. The compatibility test could be particularly useful where there were difficulties in inferring the intention of the parties. He would accordingly support the resort to a range of criteria, as suggested by several speakers.

60. His second point related to the fact that in draft article 7, paragraph (2), the Special Rapporteur had presented an indicative list of treaties, the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. There was a substantial degree of convergence between the categories set out in draft article 7, paragraph (2), and those in the Secretariat memorandum. Although the support provided for some of those categories by State practice and legal doctrine varied considerably, he agreed with the Special Rapporteur that the draft article as currently formulated provided a useful starting point for further debate. The system of categorization employed in Chapter III of the Secretariat memorandum would also be an extremely useful guide in the Commission's further deliberations on the issue. He agreed with other speakers such as Mr. McRae that a distinction between specific provisions of a treaty—as opposed to broad categories of treaties—should be considered, with particular regard to dispute settlement provisions in treaties of friendship, commerce and navigation and investment treaties.

61. Accordingly, he supported the maintenance of draft article 7 in its present form pending further discussion. If, however, it was deleted, he agreed with the Special Rapporteur that an annex, which would constitute a valuable repository of existing State practice and case law on the subject, should be prepared. As Mr. Gaja had said, the Commission should compile additional practice for further analysis by the Special Rapporteur.

62. His third point related to the impact of domestic hostilities on treaties, a subject raised in relation to the use of the term “armed conflict” in draft article 2 (b) and in Chapter VII, Section B of the Secretariat memorandum. The applicability of international humanitarian and human rights law to non-international or internal armed conflicts and their role in affording maximum protection to the victims of such conflicts was now well established, both in practice and doctrine. However, it would take a substantial leap to conclude that such conflicts involving States and non-State actors or non-State actors *inter se* would have a substantial impact on treaties concluded between States. The thrust must be on the impact on treaties between States parties to a conflict. The crucial question was whether such conflicts, by their nature or extent, were likely to affect the operation of treaties between a State party to an internal armed conflict and

another State party or a third State. That, rather than the prevalence of internal conflicts in the contemporary world, should be the central consideration. Chapter VII, Section B of the Secretariat memorandum cited illustrations given by certain authors of hypothetical and concrete situations in which domestic conflicts could have an impact on treaties. However, there was some doubt as to whether they could be viewed as constituting significant State practice or established doctrine. As was pointed out in paragraph 146 of the memorandum, “[i]f the effect of armed conflict on treaties remains a vague area of international law, the effect of domestic hostilities on treaties is even more so”. He was therefore of the view that it would be premature to include the issue at the present stage, and that doing so could lead to further ambiguities and problems in the treatment of a complex topic. A decision on its inclusion should await the further evolution and precise identification of norms and principles concerning the effect of international armed conflicts on treaties concluded between States parties to an armed conflict or between such States parties and third States.

63. Lastly, he supported the proposal to constitute a working group to further consider those and other key issues that had been raised in the course of the plenary debate on the item.

64. Mr. KOLODKIN thanked the Special Rapporteur for his third report, which reflected some points raised in the debate in the Sixth Committee. He welcomed the replacement of the expression “*ipso facto*” by “necessarily” in draft article 3. While he also welcomed the withdrawal of draft article 6, he was not convinced that the new draft article 6 *bis* was a viable text in view of the two categories of treaties singled out therein and the inclusion of draft article 7. The phrase “but their application is determined ... in armed conflict”, was taken from paragraph 25 of the 1996 advisory opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons*, but it had been used there in a very specific context. The Court had been clarifying how article 6 of the International Covenant on Civil and Political Rights, concerning the right to life, was applied in situations of armed conflict. On the application in situations of armed conflict of human rights treaties and humanitarian law in general, however, the ICJ had given a more recent ruling in paragraph 106 of the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. If draft article 6 *bis* was retained, the model for its formulation should be drawn from the 2004 advisory opinion, not that of 1996.

65. Although the Special Rapporteur himself did not place much emphasis on its importance, the major innovation in the third report was the new draft article 10. Even though that draft article had not yet been introduced, he nevertheless wished to say a few words about it. The earlier text had been a neutral formulation that had drawn criticism, not least from himself. The new text clearly indicated that the consequences of a conflict for a treaty differed for an aggressor State and for a State exercising its right of self-defence. That was a step in the right direction. The only question was whether it was a big enough step.

66. Reverting to draft articles 1 to 7, he said that a few fundamental problems remained. He remained opposed to the inclusion in the draft of a definition of “armed conflict”, even for the sole purposes of the draft articles. The concept must be left to the sphere of humanitarian law. The definition to be found in draft article 2 (b) itself raised doubts. First, it was circular: a conflict was defined as a conflict. Secondly, the basic emphasis was on the nature and extent of armed operations. In other words, a conflict was one whose nature and extent were such that they might entail consequences for treaties. But the application of the 1949 Geneva Conventions for the protection of war victims, for example, did not require ascertaining the nature and extent of an armed conflict, or at least that was not envisaged in common article 2, which, in essence, simply said that the Conventions applied to cases of war or any other armed conflict.

67. Another aspect of the definition problem was that draft article 4, paragraph (2), said that the intention of the parties to a treaty relating to its susceptibility to termination or suspension was to be determined in accordance with the nature and extent of the conflict. If its nature and extent had to be assessed in each case when determining whether a treaty was susceptible to termination or suspension, then what need was there for a definition of “armed conflict”, a definition in which the nature and extent of the conflict featured as key elements?

68. He was likewise opposed to the inclusion of non-international armed conflicts in the scope of the draft. Incidentally, he noted that the Russian Federation did not appear among the States listed in paragraph 12 of the report as being opposed to the inclusion of internal armed conflict in the scope. Having consulted the statement made on 3 November 2005 by his country’s Representative in the Sixth Committee, Mr. Kolodkin had found that she had indeed spoken against defining armed conflict for the purposes of the draft articles and against the inclusion of internal conflicts in the scope.¹⁸³ The tally of States opposed to and in favour of inclusion was thus at least even. The argument frequently voiced that internal conflicts were proliferating and that they frequently became intermingled with international conflicts did not deserve the importance accorded to it. What mattered was quality, not quantity.

69. As he saw it, the basis of the topic was the objective fact that armed conflict changed the quality of relations between States, and consequently, depending on a variety of circumstances, might have consequences for the treaties regulating such relations. It was precisely international armed conflicts *per se* that changed the quality of relations between States and accordingly could have a direct influence on international treaties between them. Non-international conflicts *per se* did not have that qualitative influence on relations between States and accordingly on international treaties between them. They could create preconditions for invoking the impossibility of fulfilling treaties and other grounds for termination or suspension of treaties envisaged in general international

law and the 1969 Vienna Convention. But that was only an indirect influence on the operation of the treaty and should not be the subject of the Commission’s study.

70. Regarding the criterion of intention, the Special Rapporteur referred not only to the intention of the parties but also to their intention at the time the treaty was concluded. The Special Rapporteur had staunchly defended that criterion, but he himself continued to have doubts about its being used as the basic or sole criterion. Those doubts were confirmed by a reading of the draft. Only in draft article 4, paragraph (1), was it indicated that the intention of the parties at the time the treaty was concluded was the sole criterion to be applied for determining the fate of treaties in case of an armed conflict. Indeed, the second paragraph referred only to the intention of the parties, not to their intention at the time the treaty was concluded. Draft article 5 referred to treaties applicable to situations of armed conflict in accordance with their express provisions, not in accordance with the intention of the parties at the time the treaty was concluded. Draft article 7, which listed the categories of treaties that continued in operation during an armed conflict, identified such treaties on the basis of their object or purpose, not of the intention of the parties at the time the treaties were concluded.

71. One could of course legitimately say that the intention of the parties was reflected in the provisions of the treaty, its object and purpose and its nature. But why establish as a criterion something that was at times so difficult to determine and that had sometimes occurred many years previously? When the parties specifically formulated provisions of a treaty to deal with cases of armed conflict, problems in determining their intention should not arise. But in the modern-day world, the use of force was prohibited, and situations of armed conflict were an anomaly. In concluding treaties, States were generally not thinking about what would happen to the treaty’s provisions in case of armed conflict. It was therefore hard to see how it would be possible to determine their intentions as to the fate of the treaty provisions in the event of conflict.

72. Of course, the role of the intention of the parties should not be underestimated. It was important for determining the actual content of the treaty’s provisions, the rights and obligations of the parties and their expressed will. In most cases, however, armed conflicts arose irrespective of the treaty or the intention of the parties in concluding it. The context was entirely different. To take the intention of the parties at the time the treaty was concluded as a basis for determining its fate in a situation of armed conflict would be artificial in most cases.

73. In his view, the intention of the parties at the time the treaty was concluded could be only one of the circumstances to be taken into account in determining the fate of a treaty, or of some of its provisions, in the event of an armed conflict. The subject matter of draft articles 5 and 7, namely the nature of the treaty or its express provisions and the object and purpose of the treaty, and also the nature and extent of the conflict itself and the legality or illegality of the use of force by the parties thereto were of greater importance in determining the fate of the treaty or its individual provisions. Perhaps it would be useful to discuss the set of criteria, rather than singling out just one.

¹⁸³ *Official Records of the General Assembly, Sixth Committee, Sixtieth session, summary record of the 20th meeting (A/C.6/60/SR.20), para. 42.*

74. He had been referring to the fate of the treaty or of its individual provisions because he believed that treaties should not be considered only in their entirety. In many cases they were clearly divisible. Some provisions of a treaty could be terminated in the event of a conflict, while others remained in force.

75. He did not share the general hostility to the inclusion of treaties with international organizations. As in the case of the topic of responsibility of international organizations, he did not fully understand why the wide diversity of international organizations should be an obstacle to the elaboration of a few general minimum rules. He would need to hear more convincing arguments before he could conclude that treaties with international organizations should not be included.

76. He continued to believe that it was correct to analyse separately the effects of an armed conflict on the operation of treaties between States parties to the armed conflict and its effects on the operation of treaties between States parties to the conflict and third States. As yet, the reports of the Special Rapporteur had not undertaken any such analysis.

77. Lastly, he supported the Special Rapporteur's proposal that a working group be established.

78. Mr. PELLET said that Mr. Kolodkin's argument against the inclusion of non-international conflicts—namely that, unlike international conflicts, they did not affect the quality of relations between the parties, although they could have an indirect effect on the operation of the treaty—was true only of States that were parties both to the treaty and to the armed conflict, but not of relations between States parties to the armed conflict (and of course to the treaty) and third States. There was a much stronger case for third parties terms than for participants in non-international armed conflicts, and it would be unwise to exclude them from the scope of the topic. In any case, even if Mr. Kolodkin's argument on the change in the nature of the relations between the parties to the conflict might at first glance seem appealing, it did not justify the exclusion of non-international armed conflicts.

79. Mr. HMOUD thanked the Special Rapporteur for his third report, which reflected a scholarly and practical approach to a topic on which there was no settled State practice or consistent jurisprudence.

80. In his first report,¹⁸⁴ the Special Rapporteur had produced a defensible set of draft articles covering various aspects of the topic, in the expectation that they would be further amended on the basis, *inter alia*, of comments from States and authoritative sources. However, account must be taken of the fact that States' interests played a major role in the application or non-application of treaty provisions during war, hence the inconsistency of State practice. National interests were one reason why States were reluctant to put forward concrete views on key factors determining their approach to the draft articles and might be unwilling to commit themselves to positions

which they would be unable to adhere to if they became involved in an armed conflict. Thus, it was vital for the Commission to make its position clear on areas in which there were differences among States, while at the same time providing sufficient grounds for *opinio juris* to develop around the draft articles.

81. On draft article 1, he noted that, while State practice and national and international judicial decisions on the subject had usually concerned treaties between States, international organizations had increasingly become parties to multilateral treaties with States, a circumstance which should be taken into account in the approach to the topic. The Commission should consider whether the termination or suspension of treaties between States as a result of war was to be treated identically or differently when an international organization was a party. Complex issues were involved, but international organizations, like neutral States, were affected by the termination or suspension, as a result of war, of a treaty to which they were parties. The Commission should consider the effect of war on that growing number of treaties, even if it eventually decided not to include them.

82. With regard to the definition of armed conflict, the Special Rapporteur had rightly pointed out that in practice the distinction in international law between international and non-international armed conflict was sometimes blurred. That was especially true of the thin dividing line between wars of liberation and wars involving other non-State actors who had effective control on the ground in their battles against Government forces. The nature of the difference between international and non-international armed conflicts sometimes needed to be asserted by the international community.

83. The effect on treaty obligations of the increasing number of non-international armed conflicts must not be ignored. The definition of armed conflict in draft article 2 avoided dwelling on the international character of the conflict, thus allowing the articles to be applied flexibly, depending on the nature and intensity of the conflict. On the face of it, that approach seemed reasonable, pending a decision on whether to include treaties to which international organizations were parties.

84. Doctrine was perhaps the most important factor in guiding the Commission's work. What determined the effects of armed conflict on treaties? A consensus appeared to be emerging that the abrogation doctrine had been discarded, although some support remained in the literature and in recent State practice in favour of treaty abrogation in times of war. However, the general trend was in favour of maintaining treaty integrity during armed conflict. That principle had been reflected in the draft articles, beginning with draft article 3, pursuant to which treaties were not necessarily terminated or suspended during an armed conflict. While more assertive wording might be needed, the members of the Commission appeared to support the draft article's general thrust. A test was needed to determine the susceptibility of treaties to termination or suspension. Therein lay the major challenge, bearing in mind the differing tests that had been applied in national courts or accepted by legal scholars. The literature suggested that the starting point was the intention test. United States

¹⁸⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

courts and legal scholars had begun to adopt a supplementary test, namely whether the application of all or part of a treaty was incompatible with pursuit of the war. That approach allowed national courts to refer to what the State regarded as national policy to determine the susceptibility of a treaty or some of its provisions to continue in operation in time of war. The problem with that approach was that it would allow bodies other than the State which invoked national policy to decide whether the measure of abrogation was in conformity with national defence interests. Thus, for instance, one commentator had considered that the closure of the Suez Canal by Egypt in 1948 had exceeded national defence needs. The Commission must therefore decide whether intention was the appropriate test or whether another test was also required.

85. There was support for such a test in international practice, but the issue was the presumption of intention at the time of the conclusion of a treaty. If the Commission could not establish it through the methods of interpretation set forth in articles 31 and 32 of the 1969 Vienna Convention, it needed to find another solution. It could be said that the parties' presumed intention was its indefinite application, unless otherwise indicated in the treaty. That could be grounds for asserting the security of treaty relations and the continuation of the treaty's application during armed conflict, but it would not be helpful if States and scholars did not accept the notion of presumed intention when the treaty was silent and intention could not be established. That approach remained the most valid, but other factors might have to be taken into account, such as the nature and extent of the conflict, which he viewed as a separate factor. That factor was also helpful in determining whether a given treaty was terminated or suspended and whether certain provisions continued to apply even though other parts of the treaty had been suspended or terminated. National courts had often determined which provisions applied and which did not on the basis of the nature and extent of the conflict. There had also been support by some scholars and courts for deciding whether certain treaty provisions continued in operation on the basis of the nature of the obligation.

86. He welcomed the extensive list of treaties in draft article 7, the object and purpose of which implied the presumption that they continued in operation during an armed conflict. He understood that not all those treaties had the same sustainability in time of armed conflict. Further work was needed to establish which treaties or treaty provisions were presumed by virtue of their object and purpose to remain applicable. The Special Rapporteur took the object and purpose test into account in draft article 7, but that did not conflict with the draft article 4 test. There were several instances in the literature in which the object and purpose test was not viewed as separate from the intention test. That being the case, there was no reason why draft articles 4 and 7 should not be read together. The list of treaties the object and purpose of which created the presumption of applicability during armed conflict helped States develop their practice and understand their obligations before they embarked on suspension or termination or before applying a test which might be more theoretical and produce detrimental results for States, were they to opt for a wrong application of the test during armed conflict.

87. Mr. CANDIOTI said he agreed that the topic should be included as part of the subject of the law of treaties. However, the impact of other important branches of law, such as the law of armed conflict, the prohibition of the threat or use of force and the law of international responsibility for wrongful acts, must also be borne in mind.

88. On draft article 1, he did not believe that it was justified to exclude from the scope the effects of armed conflicts on treaties to which international organizations were parties. In that regard he agreed with the comments by Mr. Hmoud and Mr. Kolodkin : as a working hypothesis, the Commission should begin by analysing the classic topic of the legal effects of war on treaties. However, the rules which the Commission was elaborating could perhaps also apply to treaties to which international organizations were parties, which in many cases might be affected by an armed conflict, whether between States or of a non-international nature. The question should be left in abeyance and the working group should bear in mind the possibility of including treaties to which international organizations were parties.

89. He endorsed the definitions of the terms "treaty" and "armed conflict" in draft article 2. The latter definition was sufficiently comprehensive to reflect present international circumstances.

90. Draft article 3 clearly formulated the fundamental principle of continuity of the operation of treaties in the event of armed conflict, although the drafting could be improved, as could that of draft article 4. Whereas draft article 3 established the principle of continuity, draft article 4 established the exceptions to it, rightly focusing on the two elements that must without fail be borne in mind, namely the provisions of the treaty itself and the nature and extent of the armed conflict in question.

91. In the debate between those who were in favour of looking for the intention of the parties to the treaty at the time of its conclusion and those who favoured the object and purpose test, he preferred the latter criterion, which was used in draft article 7, paragraph (1), for inferring the continuity of certain treaties.

92. He had no objection to the inclusion of draft article 5 for the sake of clarity, although strictly speaking it was unnecessary. He endorsed the inclusion of draft article 5 *bis*, and also the deletion of draft article 6 and inclusion of the reference to the applicable *lex specialis* in the new draft article 6 *bis*.

93. On draft article 7, he had already expressed doubts about the wisdom of establishing strict general categories of treaties which, by virtue of their object and purpose, would necessarily entail the continuity of their operation. The great diversity of treaty law militated against the formulation of absolute positions. He was not opposed to the inclusion of an illustrative or indicative list; however, rather than referring to categories of treaties, the examples should cite types of treaty provisions which established rights and obligations that could not be suspended, interrupted or terminated in the event of armed conflict.

94. He supported the suggestion by the Special Rapporteur to set up a working group, with a view to facilitating the Commission's work on an important topic.

95. Mr. HASSOUNA said that the topic under consideration dealt with a difficult and controversial area of law, in which there was little consistent State practice. He welcomed the Special Rapporteur's cautious approach and his presentation of the various options available, and also wished to congratulate the Secretariat on its excellent memorandum on the subject.

96. He agreed that the Commission should not try to revise the 1969 Vienna Convention. That said, the Vienna Convention was not written in stone, and although the Commission should not contradict it, there was no reason it could not try to supplement it.

97. With regard to draft article 1, he was in favour of also including treaties involving international organizations. While that might cause problems if they were all to be enumerated, given the wide diversity of such treaties, the Commission should at least seek to define the broad issues and draw a distinction between treaties to which international organizations were parties and those concluded between States only.

98. In draft article 2 and elsewhere in the draft articles, reference was often made to "a state of war". Given the evolution of international law and the fact that war was prohibited under the Charter of the United Nations, he wondered whether it would be more appropriate to speak of "a state of belligerency". He supported the inclusion of some aspects of internal armed conflicts, in view of their growing frequency, their prevalence and the difficulty of distinguishing them from international armed conflicts. It would be short-sighted to exclude them completely. He also favoured the inclusion of situations of military occupation.

99. On draft article 3, he welcomed the changes made by the Special Rapporteur to the title and the replacement of the words "*ipso facto*" by "necessarily". He also favoured the insertion of wording which stressed the importance of continuity and stability in treaty relations.

100. With regard to draft article 4, the reference to the criterion of intention at the time the treaty was concluded might be insufficient and controversial. The concept of intention should be broadened to include all the circumstances surrounding the conclusion of the treaty, including its object and purpose.

101. He welcomed the deletion of draft article 6. Although he supported draft article 6 *bis*, it lacked clarity as currently worded.

102. As to draft article 7, he endorsed the identification of factors of relevance in determining whether a given treaty should continue in operation in the event of armed conflict, including the object and purpose of the treaty and the intention of the parties. The list of treaties in draft article 7, paragraph (2), should be indicative, rather than exhaustive.

103. He agreed with the Special Rapporteur's proposal to establish a working group to consider the topic. The Commission should address the potentially controversial issues of the composition, chairpersonship and mandate of the working group. Its mandate should cover basic practical issues and not open the door to a whole range of possible theoretical options and situations.

104. Mr. NOLTE said he agreed with the proposal that the draft articles should be referred to a working group for further consideration.

105. The Commission should try to steer a middle course between the competing goals of clarity and simplicity on the one hand, and comprehensiveness on the other. His sense was that the differences between the approach of the Special Rapporteur and that of Mr. Pellet and others originated, at least in part, in the different emphasis they placed on those two respective goals. Thus, whether to include treaties involving international organizations and non-international armed conflicts and whether to address substantive questions on the use of force and State responsibility should also depend on striking a balance, for each particular issue, between the competing goals of clarity and comprehensiveness.

106. With regard to draft article 3, the choice between the words "necessarily" and "*ipso facto*" (or "automatically") was an important one. "Necessarily" implied that armed conflicts might, under certain circumstances, have the effect of automatically and directly terminating or suspending a treaty, whereas "*ipso facto*" or "automatically" would mean that armed conflicts as such would never have such an effect and that, in order to suspend or terminate a treaty, the procedure under draft article 8 would have to be followed.

107. He shared the doubts of those who thought that draft article 4 placed too much emphasis on the intention of the parties. The formulation in article 31 of the 1969 Vienna Convention, in all its aspects, should provide the point of departure, rather than earlier formulations dating back to the 1920s. Otherwise, there would be a tension between the subjective general principle in draft article 4 and the much more objective approach in draft article 7.

108. He wondered whether draft article 6 *bis* should not reaffirm the *lex specialis* rule, namely the law applicable in armed conflict, in more general terms, rather than restricting it to standard-setting treaties.

109. There was a marked contrast between the strong language used in draft article 7 and the explanation in the report that draft article 7, paragraph (2), contained an indicative list of weak rebuttable presumptions. If it was retained, draft article 7 should be reformulated to reflect its stated purpose more clearly. As to the options available regarding draft article 7, he would favour combining the Special Rapporteur's approach with a list of relevant factors or criteria, bearing in mind that those factors or criteria should not create undue uncertainty and thereby undermine the usefulness of the articles.

Organization of the work of the session (continued)*

[Agenda item 1]

110. Mr. GAJA (Chairperson of the Working Group on the external publication of International Law Commission documents) said that the following members had expressed their willingness to participate in the working group: Mr. Candioti, Ms. Escarameia, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte and Ms. Xue. He encouraged other members to put their names forward.

*The meeting rose at 1 p.m.***2928th MEETING***Thursday, 31 May 2007, at 10 a.m.*

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Effects of armed conflicts on treaties (continued) (A/CN.4/557 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON reminded the Commission that the Special Rapporteur's suggestion that a working group be set up had been supported by all the members who had taken part in the discussion on the topic at the two previous meetings and that, following consultations, it had been suggested that the working group should be chaired by Mr. Caflisch. If he heard no objection, he would therefore consider that the Commission approved the creation of a working group on the topic of effects of armed conflicts on treaties, chaired by Mr. Caflisch.

It was so decided.

2. The CHAIRPERSON invited the Commission to comment on draft articles 1 to 7.

3. Ms. JACOBSSON said that the presentation of a whole set of draft articles facilitated analysis of the topic, since it enabled the Commission to understand how the Special Rapporteur himself viewed the topic in its entirety.

She also expressed appreciation of the open-minded spirit in which the Special Rapporteur had presented his third report, and endorsed the four objectives that he had set out.

4. With regard to draft article 1 (Scope), she agreed that both international and non-international armed conflicts should be covered, for the reasons given by the Special Rapporteur. In modern times, the distinction between the two had indeed been blurred and the analytical framework was often further complicated by the involvement of so-called "external elements". It was not unusual for States involved in the same international operation to be in disagreement as to whether the conflict was of an international or non-international nature. In fact, within a single country a conflict could have various different characters, depending on the situation on the ground where the operations took place, as in Afghanistan or Iraq. The distinction between international and non-international armed conflict was, therefore, artificial and theoretical rather than a reflection of reality. In the most recent regulations on *ius in bello*, moreover, the trend was clearly to regulate situations in all types of armed conflict without making such a distinction. It was a development that enhanced protection for both civilians and combatants and should be reflected in the Commission's work.

5. Moreover, she believed that the draft articles should deal with occupation, not only because it was covered by the various Hague Conventions respecting the Laws and Customs of War on Land (1899 and 1907), the fourth Geneva Convention and the first Protocol Additional thereto, as well as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, but also because occupation fell within the scope of the law of armed conflict and could put the validity of a treaty to the test. A State under occupation might find that its ability to fulfil its treaty obligations was affected. Such a risk arose in particular when an occupying power had to deal with commercial agreements relating to State-owned natural resources, such as oil and gas. National and international legal practice that existed in that connection had not yet been reflected in the Special Rapporteur's report, but it might prove useful for further analysis of the subject.

6. She doubted whether it would be wise to include in the scope of the topic treaties involving international organizations. In that connection, she endorsed the arguments put forward by the United Kingdom delegation in the Sixth Committee,¹⁸⁵ but there were other arguments against such a move. Above all, the inclusion of such treaties was likely to raise difficult questions, such as where to draw the line between different types of organizations, whether only governmental organizations should be covered, as Mr. Hassouna had suggested, or whether non-governmental organizations or mixed organizations could also be covered and, if so, which ones. There was also the question of what kind of treaties would be involved. Moreover, it was not always easy to define what constituted an international organization; it was worth noting that the Charter of the United Nations referred to "regional

* Resumed from the 2924th meeting.

¹⁸⁵ *Official Records of the General Assembly, Sixth Committee, Sixty-first session, summary record of the 19th meeting (A/C.6/61/SR.19), para. 44.*