

Document:-
A/CN.4/2973

Summary record of the 2973rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2008, vol. I

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Accordingly, that rule needed to be supplemented by the second principle found in the Special Rapporteur's report, or at least by a variation of it, whereby a State could not denationalize an individual for the sole purpose of expulsion. The denationalization and expulsion of individuals considered to be a security threat might, in fact, violate that principle, but if the denationalization and subsequent expulsion of an individual resulted from his or her violation of the domestic law of the expelling State, then there seemed to be very little difference between denationalization as a result of committing a grave criminal offence and denationalization as a result of committing a security-related offence.

58. That was a variation on the Special Rapporteur's suggestion, based on the *Ethiopia/Eritrea* case, that denationalization should not be arbitrary or discriminatory. On balance, it therefore seemed better to include in the draft articles one principle prohibiting denationalization that led to statelessness and a second principle prohibiting denationalization for the sole purpose of expulsion. That suggestion did not, however, preclude the possibility of seeking to formulate better rules on the protection of dual nationals in the different context of a study of the law of nationality. All he was suggesting was that those were the minimum requirements to be included in the rules on expulsion of aliens in order to make the draft articles as exhaustive as possible. If no draft article on the non-expulsion of nationals was included, then all that would be needed was the rule prohibiting denationalization for the sole purpose of expulsion. Yet, so long as there was a draft article on non-expulsion of nationals, the other two principles, which were found in the Special Rapporteur's report, were necessary. It would not be sufficient merely to refer to them in the commentary.

59. Mr. KOLODKIN said that in paragraph 27 of his fourth report, the Special Rapporteur referred to cases involving the loss of nationality as "the consequence of an individual's voluntary act", whereas denationalization was "a State decision of a collective or individual nature". Paragraph 27 also contained a long list of States, including the Russian Federation, whose legislation allegedly contained rules prescribing the loss of nationality for individuals who acquired a foreign nationality. He wished to point out that there had never been a rule or a provision in the domestic law of the Russian Federation pursuant to which a Russian national lost his or her Russian nationality on acquiring another nationality. No such provision existed in the former law on citizenship of the Russian Federation of 1991,¹³⁸ to which the Special Rapporteur referred, nor in the 2002 law,¹³⁹ which was currently in force. Indeed, the current law contained a diametrically opposite provision, pursuant to which Russian citizens did not lose Russian nationality upon acquisition of another nationality. The information concerning former Russian legislation contained in the compendium published in the United States,¹⁴⁰ to which the Special Rapporteur referred in his report, appeared to be more or less correct;

¹³⁸ Law of the Russian Federation No. 1948-I of 28 November 1991 on the Citizenship of the Russian Federation.

¹³⁹ See footnote 134 above.

¹⁴⁰ United States Office of Personnel Management, Investigations Service, "Citizenship laws of the world", document No. IS-1 (March 2001), p. 184.

however, it provided no grounds whatsoever for including the Russian Federation in the list of States contained in paragraph 27.

60. Like Mr. McRae, he had some doubts regarding the Special Rapporteur's hypothesis that the loss of nationality referred to in paragraph 27 differed in principle from denationalization. It was true that the acquisition of another nationality was, in many cases, a voluntary act; however, if the legislation of the State of which the person acquiring a foreign nationality was a national provided, in such cases, for the automatic denationalization of the individual or loss of the first nationality, then there appeared to be no clear distinction between loss of nationality and deprivation of nationality. In his view, that situation might be referred to as the "automatic deprivation of nationality".

The meeting rose at 11.40 a.m.

2973rd MEETING

Friday, 6 June 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Cafisch, Mr. Candioti, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Expulsion of aliens (*continued*) (A/CN.4/588, sect. C, A/CN.4/594)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. NOLTE thanked the Special Rapporteur for his stimulating report. He agreed with certain parts of his analysis and, in particular, the concerns expressed in paragraphs 20 and 33 on the expulsion of persons to countries where their lives would be in danger.

2. The question whether a dual or multiple national was an alien in cases of dual or multiple nationality, as posed in chapter I, section A of the Special Rapporteur's fourth report (paras. 7–13), would take the Commission in a problematic direction. Nationals were not aliens, and that was not merely empty formalism. One purpose of establishing a clear distinction was to prevent States from creating different classes of nationals or citizens, as Mr. Petrič had pointed out. If States sometimes treated some of their nationals, for certain purposes, as if they were aliens, they either had a special justification or they were violating international law. Such exceptions could be justified only exceptionally, for example, if they were

for the benefit of a class of persons, as when an individual was given the possibility of consular protection by the State of his or her dominant nationality against the State of his or her less dominant nationality. States could also limit the right of certain dual nationals to be elected to certain positions. There was, however, no State practice that could legitimize the treatment of dual nationals as aliens for the purpose of expulsion. The distinction between a dominant and a non-dominant nationality had its place in the law of diplomatic protection where it did not serve to determine the legal relationship between the individual and his or her State, but only the consequences of that legal relationship between two States which apparently had the same entitlement as protector.

3. The award of 17 December 2004 in the *Ethiopia/Eritrea* arbitration was not an example to the contrary. In that case, Ethiopia had applied a law according to which an Ethiopian national lost his or her Ethiopian nationality if he or she voluntarily acquired the nationality of another State. That rule existed in many countries and was legitimate under international law: a person could automatically lose his or her nationality and become an alien and thus be subject to expulsion. Admittedly, the example of the *Ethiopia/Eritrea* arbitration was somewhat misleading as the Ethiopian law in question had apparently not had the effect of *ipso jure* terminating the citizenship of the persons who had acquired Eritrean citizenship by registering to vote in the referendum. It had therefore been necessary to publish an implementing act, which had then had to be monitored to determine whether it was arbitrary. Moreover, as some members of the Commission had stressed, that case was exceptional in nature.

4. In any event, the mere fact that dual nationals had been expelled without first having been denationalized by the expelling State, as indicated in paragraph 10 of the report, did not prove that such a practice was legal. Its legality could not be established by the fact that the expellees might possibly return more easily to the country from which they had been expelled if they had not been stripped of their nationality. That rather hypothetical advantage was contrary to the very real protection offered by the requirement that a State must not arbitrarily deprive a person of his or her nationality before expelling him or her.

5. He could not agree with the two conclusions the Special Rapporteur had reached in paragraph 12 of his report because they were too broad, even if the Special Rapporteur's interpretation of the material he had collected was correct. Taken at face value, principle (a), according to which "[t]he principle of the non-expulsion of nationals does not apply to persons with dual or multiple nationality unless the expulsion can lead to statelessness", would mean that States could freely expel their nationals who just happened to be dual nationals. Dual nationals would thus be second-class citizens who would be more liable to expulsion. Principle (b), according to which "[t]he practice of some States and the interests of expelled persons themselves do not support the enactment of a rule prescribing denationalization of a person with dual or multiple nationality prior to expulsion", was not based on a sufficiently comprehensive assessment of the legitimacy of the practice of States and the interests of the persons concerned.

6. He was also not persuaded by chapter I, section B of the report (paras. 14–24) for the simple reason that it was based on the reasoning and conclusions of section A. Even if he were persuaded by section A, however, he would have doubts about section B because he could not accept the statement in paragraph 18 of the report that dual or multiple nationals could be more freely expelled by or between the States of their nationalities, regardless of the nature of their attachment to each of those States.

7. Chapter II of the report dealt with the circumstances under which a person lost or was deprived of his or her nationality and then became an alien. That question must be considered on the basis of the fundamental right provided for in article 15 of the Universal Declaration of Human Rights,¹⁴¹ which stated that no one could be arbitrarily deprived of his or her nationality and which had been applied by the Ethiopia–Eritrea Claims Commission. Contrary to what was suggested in paragraph 30 of the report, that Commission had not considered "expulsion on the ground of dual nationality" permissible, but had, rather, assumed that such expulsion would have been admissible if the expelled persons had lost their nationality in a non-arbitrary way. It had never considered the expulsion of nationals to be permissible, even in the case of dual or multiple nationality.

8. It was perhaps worthwhile to recall the context in which the right to a nationality and the right not to be deprived of a nationality had been recognized in article 15 of the Universal Declaration of Human Rights. The recognition of those guarantees at the international level had been much influenced by the fact that Nazi Germany had stripped its Jewish citizens of their nationality. In his view, that experience did not show only that persons should not be deprived of their nationality if that made them stateless. It would have been equally powerful if the German Jews had all had another nationality because it also showed that the deprivation of nationality could take place only in generally recognized or clearly reasonable exceptional circumstances. The Commission's work should not suggest otherwise.

9. Despite those reservations, he agreed with the Special Rapporteur's conclusion that there was no need for an additional draft article because the general prohibition of the expulsion of nationals would be enough. That prohibition applied equally to dual and multiple nationals. In order to avoid any misunderstanding, however, nothing would prevent the Commission from including a provision expressly indicating that denationalization could not take place for the purpose of expulsion.

10. Ms. JACOBSSON said that, like Mr. Niehaus, she was convinced that the Commission had to establish minimum parameters and regulations and, unlike the Special Rapporteur and some members of the Commission, that the question of dual nationals and deprivation of nationality as a prelude to expulsion must be dealt with in at least one draft article, for two main reasons. The first had to do with structural consistency. Draft article 4 on non-expulsion by a State of its nationals, as proposed in the third

¹⁴¹ General Assembly resolution 217 A (III) of 10 December 1948.

report on the expulsion of aliens,¹⁴² provided for exceptions to that general rule, and that “right of exception” was clearly spelled out in draft article 4, paragraph 2. That article, and that paragraph, in particular, had given rise to a major debate during which some members had expressed the view that the prohibition of the expulsion by a State of its own nationals was—and should be—absolute. Although the Commission had not taken a position on whether that prohibition was absolute, there was a clear link between the inclusion of that article, especially given the exceptions proposed by the Special Rapporteur, and the issue of dual or multiple nationality. If the question of the expulsion of dual or multiple nationals was not expressly dealt with, the result would be unbalanced and legal uncertainty even greater, not to mention the fact that it might give rise to an “unreflected” practice of States that would upset the balance between the right of a State to expel aliens and the interest and legal protection of the individual. The Special Rapporteur admitted that there was limited modern State practice, i.e. State practice which had taken place in parallel with growing acceptance of dual and multiple nationality, which took account of the increasing importance of human rights law and which reflected the *opinio juris* of States. There was a great risk that dual nationality situations might be seen as yet another legitimate derogation from the prohibition of expulsion by a State of its nationals and that would create two categories of citizens: those who had only one nationality and could not be expelled and those who had two or more nationalities and could be expelled from one of their “mother countries”. That was not an acceptable legal consequence.

11. The Special Rapporteur correctly pointed out that recognition of dual or multiple nationality was a relatively recent trend. It was a trend that would continue and could not be reversed, not only on account of globalization, but also because of underlying factors that had made globalization possible, such as modern technology and, primarily, the development of human rights, democracy, freedom of movement and freedom of trade. In that context, it was particularly important to analyse the situation of women who, for one reason or another, had more than one nationality, since more than half the world’s adult population might be particularly vulnerable if there was no clear-cut prohibition of dual and multiple nationals. For such women, it was of the utmost importance that each nationality should offer the same protection as the others. There must be no grading of nationalities.

12. If the Commission did not address that issue at all, there was a great risk that it would be criticized for working in an ivory tower and for not having grasped the effects of the increasingly accepted trend towards dual or multiple nationality. From a legal point of view, it was unsatisfactory not to address the legal implications of this trend and not to draw conclusions from its relationship with the law of human rights. As stated by Mr. Gaja, the issue should not be buried.

13. In conclusion, she stressed that there were two elements that must be made clear in the Commission’s work

on the expulsion of aliens: first, the rights of dual or multiple nationals were no different from those of individuals who had only one nationality; and, second, denationalization for the purpose of facilitating expulsion was and should be prohibited. She believed that this had been the essence of the statement by Ms. Escarameia and a number of other members of the Commission. If that was the Commission’s sentiment, she did not see why it should not be included in a draft article.

14. Mr. PERERA recalled that, at the fifty-ninth session, he had said that the question of dual nationality should be discussed in the context of the topic under consideration, particularly the non-expulsion of nationals,¹⁴³ and he welcomed the fact that the report submitted by the Special Rapporteur had given rise to a very full debate. Like Mr. McRae and other members, he thought that the Commission should establish a fundamental rule offering a minimum degree of protection to dual nationals in the form of a prohibition of denationalization for the sole purpose of expulsion. As Ms. Jacobsson had said, it was better to discuss that question than to set it aside.

15. Mr. FOMBA said that the Special Rapporteur had made an excellent analysis of the main legal problems under consideration by basing his arguments on the need to strike a balance between the interests of the State and those of the individual, the distinction between nationals and aliens, the concern to understand the legal consequences of that distinction, the well-established rule of the non-expulsion of nationals and the cases where that rule would, might or should logically apply, if only with a view to the possible progressive development of international law. He therefore fully agreed with the Special Rapporteur’s approach and the arguments underlying it, as well as with the conclusions he had reached. Some members had said that they were somewhat perplexed about the notion of “dominant nationality”, even though it was well established in law, as had been recalled, or that it came within the field of private international law, an argument that was all the more irrelevant in that article 1, paragraph 2, of the Commission’s Statute did not preclude it from entering that field. While some members thought that no distinction should be made between nationals, whether they had one or more nationalities, and that the same rule should be applied to them, he had some doubts in that regard and was of the opinion that what were involved were situations that were not legally and factually the same. Other members had said that an obligation of denationalization should not be imposed as a prelude to expulsion. Even if that idea was logically conceivable, it would be contrary to the rule of non-expulsion and might go against the interests of the individual from the viewpoint of his protection. With regard to the criticism of the documentation and sources used by the Special Rapporteur and, in particular, the special nature of the *Ethiopia/Eritrea* case, it must not be forgotten that the Special Rapporteur had to make do with the means available to him.

16. In conclusion, he said that he had initially been in favour of the formulation of draft articles and had been convinced by the Special Rapporteur’s sound arguments, but he proposed that the Commission should think about

¹⁴² *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581, p. 121.

¹⁴³ *Yearbook ... 2007*, vol. I, 2942nd meeting, p. 178, para. 21.

other possible solutions, such as draft guidelines or recommendations to be included in an annex, the question being whether they would serve a practical purpose.

17. Mr. VÁZQUEZ-BERMÚDEZ said that, in its articles on the nationality of natural persons in relation to the succession of States, the Commission had reaffirmed that “nationality is essentially governed by internal law within the limits set by international law” and that the development of human rights standards after the Second World War had imposed new international obligations on States in respect of nationality.¹⁴⁴ In that context, it was not possible, either directly or indirectly, to compromise fundamental principles such as the right of individuals to a nationality, the prohibition of the expulsion of nationals and the prohibition of arbitrary deprivation of nationality, which were embodied in international human rights instruments of a universal and regional nature, including article 15 of the Universal Declaration of Human Rights, articles 20 and 22 of the American Convention on Human Rights: “Pact of San José, Costa Rica” and article 3 of Protocol No. 4 to the European Convention on Human Rights.

18. Deprivation of nationality for the purpose of circumventing the prohibition on expelling nationals was clearly contrary to international law, and a State could not just make it a simple procedural matter. The prohibition on expelling nationals did not depend on the number of nationalities or on whether a nationality was dominant. The concept of dominant nationality was, moreover, nothing new, as Mr. Pellet had pointed out, since it was recognized in the set of articles on diplomatic protection. However, it must be specified that its purpose was to enable a State to act on behalf of its national in order to guarantee his protection from another State of which he or she was also a national; it could in no case be extrapolated to another context and used against a dual or multiple national to facilitate his or her denationalization with a view to his or her expulsion on the grounds that his or her dominant nationality was the other nationality.

19. With regard to the countries listed in paragraph 27 under the heading of “Loss of nationality”, the inclusion of Ecuador might give rise to confusion as far as the provisions of the Constitution were concerned, because paragraph 26 implied that Ecuador prevented its nationals from holding another nationality or that they lost their Ecuadorian nationality if they acquired another nationality, while the related footnote implied that Spain was the only exception. However, since the 1995 constitutional reform, Ecuadorians kept their nationality if they acquired a new nationality, just as the nationals of another State did if they acquired Ecuadorian nationality.

20. The CHAIRPERSON said that the discussion had been extremely interesting and productive, like the report the Special Rapporteur had submitted. All members of the Commission seemed to agree with at least some of its conclusions. The majority considered that it was neither necessary nor relevant to formulate a draft

rule concerning the expulsion of holders of dual or multiple nationality. At the very most, as Mr. McRae had proposed, an explicit rule could be drafted prohibiting denationalization for the purpose of expelling someone. Although he agreed with many of the Special Rapporteur’s opinions, he did have doubts about the conclusion reached in paragraph 12 (a) of his report, since the principle of non-expulsion of nationals was provided for in international law, regardless of the origin of the nationality. As to the considerations relating to the dominant nationality, although that concept existed in international law and applied mainly in the area of diplomatic protection, it was not relevant in the case of the expulsion of nationals, as Mr. Vázquez-Bermúdez had pointed out, because it had been designed to protect persons in time of conflict and certainly not for other purposes. There was no rule making it possible to invoke the dominant nationality in a situation contrary to international law. As Ms. Escarameia and Mr. Nolte had rightly noted, the practice of some oppressive regimes of expelling dissident nationals was contrary to law and, in that regard, the Commission must reaffirm the right to a nationality provided for in the Universal Declaration of Human Rights. In the case of dual nationals, it could not be considered that deprivation of nationality was a prelude to expulsion: such deprivation could only be exceptional and reserved for very grave situations, as in the event of armed conflict and doubts about a person’s loyalty to his or her country. Nationality was a fundamental human right deriving from the Universal Declaration of Human Rights and provided for in other international instruments. As Earl Warren, former Chief Justice of the United States Supreme Court, had said in *Perez v. Brownell*, having a nationality was having “the right to have rights”, and that fundamental principle must be preserved.

21. Mr. KAMTO (Special Rapporteur), summing up the discussion, thanked the members who had taken part in the debate on the fourth report, which dealt with a very specific question that he had agreed to look into in greater depth, namely, the expulsion of persons with two or more nationalities. In that connection, he pointed out that criticism was always welcome, but, in order to be helpful, it must be levelled in legal, not subjective, terms, and have a basis in law. He also apologized to Ecuador and the Russian Federation for the incorrect information on their practice in respect of dual nationality, which had been taken from an official United States document entitled “*Citizenship laws of the world*”.¹⁴⁵

22. It appeared from the discussion that several members generally agreed with his conclusions, while others would prefer to have one or two draft articles on the question or at least deal with it in the commentary. He was not sure that his approach had been clearly understood: it was that the principle of the prohibition of the expulsion of dual nationals did not exist as an explicit rule of international law. The question was thus whether the rule applicable to persons who had one nationality could be extended to those who had two or more nationalities. In other words, for the purpose of expulsion, was there a difference between such persons?

¹⁴⁴ *Yearbook ... 1999*, vol. II (Part Two), chap. IV, sect. E, para. 48, p. 23 (Preamble of the draft articles) and p. 24 (para. (4) of the commentary thereto).

¹⁴⁵ See footnote 140 above.

23. If there was no difference, the study of the question was unnecessary, since the rule of the non-expulsion of nationals could simply be stated without any need to go into detail concerning dual, multiple and dominant nationality; that would be splitting hairs. If the applicable rule was the non-expulsion of nationals regardless of the number of nationalities they held, draft article 4, paragraph 2, could be deleted. However, if, as Mr. McRae had said, the Commission could not state that rule without referring to persons with more than one nationality, it could go even further and delete draft article 4 as a whole and deal with the question of expulsion in relation to aliens only without any reference to nationals, dual nationals or multiple nationals. The rule of the non-expulsion of nationals was so well established in international law that he had considered it useful to refer to it in the draft articles. The purpose of the paragraph 2 he was proposing was to leave a door open to the few exceptions to that rule that existed in State practice. It was now up to the Commission to decide whether it wanted to take account of those exceptions or establish an absolute rule from which there could be no derogations.

24. He stressed that the award by the Eritrea–Ethiopia Claims Commission had been based primarily on the common law and on English law, in particular. In any event, that award could be criticized, but not underestimated. The International Law Commission could not presume to assess the decisions of international courts. The concept of effective or dominant nationality was well established in nationality law. As far back as 1954, the Special Rapporteur on the elimination or reduction of statelessness,¹⁴⁶ Roberto Córdova, had proposed a draft article on that question and, as Mr. Pellet had recalled at the preceding meeting, the Commission itself had discussed it in connection with diplomatic protection. In Córdova’s view, persons with two or more nationalities should be deprived of those nationalities and keep only their effective nationality: “If, by application of the nationality laws of the Parties, a person has two or more nationalities, such person shall be deprived of all but the effective nationality that he possesses, as hereinafter defined, and his allegiance to all other States shall be deemed to have been severed.”¹⁴⁷ With regard to deprivation of nationality, he had written:

Deprivation of nationality by unilateral action of the State has been considered as a violation of an accepted principle of international law, since such deprivations, especially if applied on a large scale, will or may entail mass emigrations and, consequently, they may not only impose undue hardship on human beings, but also inundate foreign States with aliens. However, the principle is not respected by most modern legislation and it cannot be considered as an accepted tenet of international law.¹⁴⁸

As to multiple nationality, he had concluded, citing Frédéric-Henri Hool, that “from the point of view of ‘international order’, it is desirable that each person should possess a nationality, but only one, and that dual nationality is an anomaly and the source of numerous conflicts and difficulties”¹⁴⁹

25. A draft article providing that a State could not denationalize one of its nationals if it thus made him stateless would not add anything to contemporary law, since that rule already existed in the Convention on the reduction of statelessness. Mr. McRae had proposed that it should be stated more specifically that a State could not denationalize its nationals for the sole purpose of expulsion, but admitted that there were exceptional cases and that a distinction should therefore be made in event of expulsion for a crime or an offence, for example. He personally thought that there would be no basis for such a rule in international practice. The fact of the matter was that, at present, many States, particularly European States, denationalized in order to expel. Moreover, a single draft article on the question would not be sufficient, or it would have to be very long, because, as some members had suggested, the criteria for denationalization would have to be listed. One solution might be the proposal by Mr. Gaja that it should be mentioned in the commentary to draft article 4 that States must not, in so far as possible, denationalize for the purpose of expulsion and that, when they did so anyway, certain criteria should be respected, such as those of their internal law and others defined by the Commission.

26. In conclusion, he said that he was prepared to follow any guidelines the Commission might wish to give him, but he was still not convinced of the need for or the advisability of a draft article on the question. He did not see on what basis an explicit rule prohibiting the denationalization of persons with two or more nationalities could be established and was of the opinion that the Commission would be deviating from the topic if it dealt with nationalities in a draft article on the expulsion of aliens. It should either say as little as possible and content itself with draft article 4, possibly without paragraph 2, thereby ignoring practice, or recall in the commentary—and that it could certainly do—that States violated international law if they expelled nationals.

27. The CHAIRPERSON asked whether the Commission wished to entrust the Drafting Committee with the task of preparing one or more draft articles or follow the recommendation of the Special Rapporteur, who was not in favour of that idea.

28. Ms. ESCARAMEIA said that she was not sure whether the Commission could entrust such a task to the Drafting Committee if it did not even have an outline of a draft article. She thought it would be better to set up a working group. If time permitted, it would also be helpful to consult States.

29. Mr. WISNUMURTI said that he agreed with the Special Rapporteur’s proposal that the prohibition of the expulsion of aliens should be dealt with in the commentary to draft article 4.

30. Ms. JACOBSSON said that too many points had been raised to deal with in the commentary. If the Commission’s procedure allowed the question to be referred to the Drafting Committee for the preparation of a draft article even without a prior basis, that would be the best solution. Otherwise, a working group should be set up.

¹⁴⁶ *Yearbook ... 1954*, vol. II, document A/CN.4/81.

¹⁴⁷ *Ibid.*, document A/CN.4/83, p. 49 (Basis 2).

¹⁴⁸ *Ibid.*, document A/CN.4/84, p. 61, para. 38.

¹⁴⁹ *Ibid.*, p. 111, para. 383.

31. Mr. NOLTE said that he agreed with Ms. Jacobsson. Mr. McRae's proposal, with which several members agreed, should be taken into consideration, either by the Drafting Committee or else by a working group. If the idea of a draft article on the prohibition of the expulsion of nationals was adopted, that prohibition would have to be explained and it would have to be specified whether it applied to dual nationals.

32. Mr. KAMTO (Special Rapporteur) said that he did not see why draft article 4 was not clear enough. The rule it embodied—the prohibition of the expulsion by a State of its own nationals—was an established one, both by international instruments and by practice, whereas the prohibition of denationalization for the purpose of expulsion had no basis in treaty or customary law, and State practice even went in the opposite direction. The United Kingdom, for example, was considering a bill making it possible to deprive of their nationality, for the purpose of expulsion, persons who had preached radical sermons in mosques and, in France, there had been at least two cases where Franco-Algerian dual nationals had been expelled for the same reasons. That was why the Commission should refrain from establishing an explicit rule—unless it wished to engage in the progressive development of international law.

33. He was not opposed to the idea of establishing a working group, but he did wish to make it clear that, as Special Rapporteur, he did not intend to deal with questions of nationality because that was not the topic that had been entrusted to him or the topic that had been agreed on by States in the Sixth Committee.

34. Mr. McRAE said that the Commission could adopt innovative methods, even if there was no precedent in its practice, provided that it was expedient. He was not sure that he had understood what the Special Rapporteur had meant in the commentary to draft article 4. He wondered, for example, whether there were plans to include minimum criteria for the expulsion of a national. It would be helpful to have some explanations on the Special Rapporteur's position before possibly abandoning the idea of having a draft article on the question.

35. Mr. GAJA said that he supported Ms. Escarameia's proposal that a working group should be set up. The Commission not only did not have a draft article to refer to the Drafting Committee, but there was also no consensus on the content of any such draft article. Solving those problems in a working group would help allay the Special Rapporteur's concerns.

36. Mr. PETRIČ said that, at the current stage, it might be useful to prepare a draft article along the lines of the one Mr. McRae had proposed. The Commission could then decide either to keep it or to explain its content in the commentary. He was therefore in favour of the establishment of a working group.

37. Mr. SABOIA said that he was in favour of the establishment of a working group, which could discuss the question without prejudging the existence of a future draft article.

38. Mr. VASCIANNIE said that the two questions of the expulsion of dual nationals and the denationalization by a State of its nationals for the purpose of expulsion were closely linked to the question of the expulsion of aliens. He was therefore in favour of the establishment of a working group to consider them.

39. The CHAIRPERSON said that, following informal consultations, a consensus had been reached on the idea of establishing a working group which would be chaired by Mr. McRae and whose composition and mandate would be decided at the Commission's next session. If he heard no objection, he would take it that the Commission so agreed.

It was so decided.

Effects of armed conflicts on treaties (*continued*)*
(A/CN.4/588, sect. D, A/CN.4/589 and Corr.1, A/CN.4/592 and Add.1, A/CN.4/L.721, A/CN.4/L.726, A/CN.4/L.727/Rev.1 and Add.1)

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

40. The CHAIRPERSON invited Mr. Cafilisch to speak on behalf of Mr. Comissário Afonso, the Chairperson of the Drafting Committee, to introduce the text of the draft articles on the effects of armed conflicts on treaties, as provisionally adopted on first reading by the Drafting Committee on 4 June 2008 (A/CN.4/L.727¹⁵⁰).

41. Mr. CAFLISCH said that, at the preceding session, the Commission had referred draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special Rapporteur in his third report,¹⁵¹ to the Drafting Committee, together with draft article 4, as proposed by the Working Group on the effects of armed conflicts on treaties.¹⁵² At the current session (see 2968th meeting above, para. 10), it had referred draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14, as proposed by the Working Group, as well as draft articles 12 and 13, as proposed by the Special Rapporteur, to the Drafting Committee. The Drafting Committee had also had before it a set of policy guidelines prepared by the Working Group at the preceding session and at the current session.

42. The Drafting Committee had held four meetings on 29 May, 2, 3 and 4 June 2008 and had completed the first reading of 18 draft articles on the effects of armed conflicts on treaties. With regard to draft article 5, the Special Rapporteur would prepare during the intersession an annex containing a list of categories of treaties to which draft article 5 would apply that would be submitted to the Commission when it resumed its work in July 2008. The adoption of the draft articles by the Commission at the present stage would allow the Special Rapporteur sufficient time to prepare the commentaries.

* Resumed from the 2968th meeting.

¹⁵⁰ The wording of the draft articles in this document was subsequently revised and published on 31 July 2008 in document A/CN.4/L.727/Rev.1.

¹⁵¹ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578.

¹⁵² *Yearbook ... 2007*, vol. II (Part Two), p. 78, para. 324.

43. Before turning to the substance of the draft articles, he recalled that, in its report (A/CN.4/L.726), the Working Group had noted that the Drafting Committee should consider not only the suspension or termination of a treaty, but also the possibility that a party might withdraw from certain types of treaties (see 2968th meeting above, para. 5) as a consequence of the outbreak of armed conflict. The Drafting Committee had considered that possibility in relation to a number of draft articles, while recognizing that withdrawal had not been a major element of practice and doctrine, considerations relevant to withdrawal were not necessarily the same as for termination or suspension and withdrawal therefore had to be mentioned only where appropriate.

44. Structurally, the draft articles could be divided into several clusters: draft articles 1 and 2 were introductory in nature and dealt with scope and use of terms. Draft articles 3, 4 and 5 were the core provisions of the text and reflected the underlying foundation of the draft articles of favouring legal stability and continuity. Draft articles 6 and 7 extrapolated a number of basic legal guidelines from the basic principles embodied in draft articles 3 to 5. Draft articles 8 to 12 dealt with various ancillary aspects of termination, withdrawal and suspension. Draft articles 13 to 18 related to a number of miscellaneous issues and included some saving clauses.

45. Draft article 1 (Scope) showed that the point of departure for the formulation of the draft articles was article 73 of the 1969 Vienna Convention, which stated that the provisions of the Convention did not prejudice any question that might arise in regard to a treaty, *inter alia*, from the outbreak of hostilities between States. The draft articles under consideration thus applied to the effects of an armed conflict on treaties between States. That wording was based on article 1 of the 1969 Vienna Convention.

46. Bearing in mind the proposal by the Working Group, the Drafting Committee had amended the draft article by adding the following words at the end of the sentence: “where at least one of the States is a party to the armed conflict”. The Working Group had recommended that addition in order to indicate that the draft articles were also to cover the position of third States parties to a treaty in relation to a State involved in an armed conflict. The draft articles thus dealt with three scenarios: (a) the treaty relations between two States engaged in an armed conflict; (b) the treaty relations between a State engaged in an armed conflict and a third State not party to that conflict; and (c) the effect of an internal armed conflict on the treaty relations of the State in question with third States.

47. The Drafting Committee had decided, on the Working Group’s suggestion, that the question of the effect on treaties involving international organizations should not be considered in the draft articles at the present stage.

48. Draft article 2 (Use of terms) defined two key terms used in the draft articles. Subparagraph (a) defined the term “treaty” and reproduced the wording of article 2, paragraph 1 (a), of the 1969 Vienna Convention. Subparagraph (b) of the draft article, which defined the term “armed conflict”, was based on the version initially proposed by the Special Rapporteur, with some refinements,

in turn based on the resolution on that topic adopted in 1985 by the Institute of International Law.¹⁵³ There had been no intention of providing a definition of armed conflict for international law generally because that would have been difficult and beyond the scope of the topic. Instead, the proposed definition was intended as a working definition which applied to treaty relations between States parties to an armed conflict or between one of those States and a third State. The wording adopted, particularly the reference to “between a State party to the armed conflict and a third State”, was intended to cover the effects of an armed conflict which might vary according to circumstances. It thus also covered the situation where the armed conflict affected the operation of a treaty only with regard to one of the parties to that treaty, and it recognized that an armed conflict could affect the obligations of the parties to the treaty in different ways. It also served to include the possible effects of an internal armed conflict on a treaty with a third State within the scope of the draft articles.

49. Some members of the Drafting Committee had been of the opinion that the definition of armed conflict had an element of circularity to it in the sense that it sought to define armed conflicts by reference to conflicts “likely to affect” treaties, when such likelihood was established by the draft articles. The Drafting Committee had dealt with that issue by making it clear that the effect on the “application” of the treaty was the subject matter of the draft articles.

50. With regard to the requirement of intensity implied in the words “which by their nature or extent”, an element of flexibility had been introduced in the draft articles to take account of the wide variety of historical situations. Thus, in some cases, it could be said that the level of intensity was less of a factor, for example, in relation to low-level conflict in a border region which, despite the low level of intensity, drastically affected the application of bilateral treaties regulating the control of border traffic. The Drafting Committee had recognized that there were historical situations where the nature and extent of the armed conflict did have a bearing on the application of treaties.

51. The Drafting Committee had considered a proposal to make the inclusion of internal armed conflict more explicit, but had decided against doing so in order not to refer to specific factual scenarios in the draft articles and, accordingly, run the risk of a *contrario* interpretations excluding other scenarios. The commentaries would provide examples of a wide range of possibilities, including the situation where an entirely internal armed conflict had an effect on a treaty with a third State, the specific case of blockades and the situation of occupation during an armed conflict.

52. Draft article 3 (Non-automatic termination or suspension), the title of which remained unchanged, was of overriding significance. It established the basic principle of legal stability and continuity. It incorporated the key developments in the resolution of the Institute of International Law of 28 August 1985, which had shifted the legal position in favour of a regime establishing a presumption that the outbreak of armed conflict did not as such cause

¹⁵³ Institute of International Law, *Yearbook*, vol. 61, part II (session of Helsinki 1985), Paris, Pedone, 1986, pp. 278–282.

the suspension or termination of a treaty. At the same time, the Drafting Committee had recognized that it was not easy to reconcile the principle of stability, as stated in draft article 3, with the fact that, in practice, the outbreak of armed conflict did have the result of terminating or suspending treaty obligations.

53. The Drafting Committee had considered whether the word “necessarily” should be replaced by the word “automatically”, but had decided against that idea, since the word “necessarily” was closer to the term “*ipso facto*”, which the Special Rapporteur had used in his initial proposal,¹⁵⁴ on the basis of article 5 of the resolution of the Institute of International Law. It had refined the text to make it more consistent with that of draft article 2 by clarifying in subparagraph (a) that what was being referred to was “States parties” to the armed conflict and in subparagraph (b) that what was covered was the operation of treaties between a “State party” to an armed conflict and a third State.

54. The Drafting Committee had decided not to include the possibility of withdrawal from a treaty in draft article 3, since withdrawal involved a conscious decision by a State, whereas draft article 3 dealt with the automatic application of the law.

55. Draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties) followed from the content of draft article 3. The outbreak of armed conflict did not necessarily put an end to or suspend the operation of a treaty. It was another key provision of the draft articles, based on the reformulation prepared by the Working Group, which had replaced the initial reference to the “intention of the parties” by a number of specific indicia to be taken into account when considering the susceptibility of treaties to suspension or termination. The only change to the *chapeau* had been the addition of the withdrawal of a party as one of the possibilities open to States parties to an armed conflict. The question of withdrawal in draft article 4 provided an appropriate context for its inclusion in subsequent ancillary draft articles.

56. With regard to the indicia listed in subparagraphs (a) and (b), the Drafting Committee had considered proposals to replace the word “indicia”, but had decided to retain it in order to avoid any implication that they were established requirements. They were to be viewed as mere indications of susceptibility which would be relevant for particular cases depending on the circumstances. The Drafting Committee had also considered that the indicia listed in subparagraph (b) were not to be seen as exhaustive. It should be recalled that articles 31 and 32 of the 1969 Vienna Convention, as referred to in subparagraph (a), themselves contained a number of indicia to be taken into account.

57. The Drafting Committee had considered a proposal that the legality of the use of force was also one of the factors to be taken into consideration in draft article 4, but

it had decided to resolve that matter in the context of draft articles 13 to 15. It had also considered that it could not be assumed that the effect of armed conflict between parties to the same treaty would be the same as that on treaties between a party to an armed conflict and a third State. It had decided that this aspect would be dealt with in the commentary. It had discussed a number of formulations for the title, but had settled on the version initially proposed by the Special Rapporteur with the inclusion of a reference to withdrawal and the deletion of the words “in case of armed conflict”, which were superfluous.

58. Draft article 5 (Operation of treaties on the basis of implication from their subject matter) was a new provision, but it had its origins in former draft article 7, as proposed by the Special Rapporteur. The reference to “necessary” implication, as contained in the original text, had been deleted in order to avoid any possible contradiction with draft article 4. In addition, the initial reference to “object and purpose” had been replaced by “subject matter”, on the recommendation of the Working Group. At the end of the English text of the draft article, the word “inhibit” had been replaced by the word “affect”, which was more in line with the language used in the draft articles. The original draft article 7¹⁵⁵ had included a list of categories of treaties whose subject matter had involved the necessary implication that they would continue to be applicable during an armed conflict. The Working Group had recommended that the list should be appended to the draft articles. The Drafting Committee had decided that the content of former draft article 7, paragraph 1, should be adjusted and placed after draft article 4 as new draft article 5. A proposal to include it as an additional paragraph in draft article 4 had not been adopted, as it would have affected the balance of that draft article. In addition, the Drafting Committee had agreed to include an annex containing a list of categories of treaties whose subject matter involved the implication that they continued to apply in time of armed conflict, based on the list contained in the Special Rapporteur’s initial proposal for former draft article 7, paragraph 2. However, the consideration of those categories of treaties, including an exposition of State practice, would be reflected in the commentary to draft article 5. It had been understood that, in the preparation of the annex, account would be taken of the preferences expressed by States in the debate in the Sixth Committee and by members of the Commission in plenary. The Drafting Committee had, however, not had an opportunity to discuss the categories to be included in the annex. As indicated earlier, the Special Rapporteur would prepare a proposal for that annex that would be submitted to the Drafting Committee at the second part of the Commission’s current session. He drew the Commission’s attention to the footnote at the end of draft article 5, which referred to the annex.

59. Draft article 6 [5 *bis*]¹⁵⁶ (Conclusion of treaties during armed conflict) and draft article 7 [5] (Express provisions on the operation of treaties) should be read in

¹⁵⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, p. 216, paras. 24–28. Regarding the use of the terms “*ipso facto*” or “necessarily”, see also *Yearbook ... 2005*, vol. II (Part Two), pp. 30–31, paras. 142–148 and *Yearbook ... 2007*, vol. II (Part Two), pp. 72–73, paras. 289–291.

¹⁵⁵ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552, pp. 220–228, paras. 62–118.

¹⁵⁶ The number between square brackets refers to the corresponding article in the third report of the Special Rapporteur (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578) and in the report of the Working Group (A/CN.4/L.726).

sequence. They had been included to preserve the principle *pacta sunt servanda*, and they were in line with the basic policy of the draft articles, which was to ensure the legal security and continuity of treaties. Those two draft articles reflected the fact that, in time of armed conflict, States could have dealings with one another.

60. Draft article 6 contained two paragraphs. Paragraph 1 reflected the basic principle that an armed conflict did not affect the capacity of a State party to that conflict to enter into treaties. That provision had initially been draft article 5 *bis*, after what had now become draft article 7. The Drafting Committee had nevertheless decided to reverse the order of the two draft articles, since draft article 6, paragraph 1, dealt with a potential treaty, while draft article 7 referred to an existing treaty.

61. It had been proposed that it should be specified that what was meant was the “legal” capacity of States. The Drafting Committee had considered that, even if, technically speaking, the provision dealt with the effect of armed conflict on the capacity of States to enter into agreements, as opposed to the effect of a conflict on the treaty itself, it would be useful to retain the paragraph in the draft articles. The text had been further refined to refer to the capacity of “a State party to that conflict” in order to indicate that there might be only one State party to the armed conflict, as in situations of internal armed conflict. The Drafting Committee had also considered, but had not accepted, a proposal that the draft article should be deleted and reflected in the commentary.

62. Paragraph 2 had its origin in the Special Rapporteur’s initial proposal for draft article 5, which the Drafting Committee had divided into two provisions: one had been included in draft article 6 and the other had remained in draft article 7. It dealt with the practice of States parties to an armed conflict which expressly agreed during the armed conflict to suspend or to terminate a treaty which was operative between them.

63. Draft article 7 [5] (Express provisions on the operation of treaties) stated the general rule that, where a treaty expressly so provided, it continued to operate in situations of armed conflict. It had been noted that the draft article was based on a substantial amount of doctrine and practice which recognized the possibility of concluding lawful agreements even in time of armed conflict.

64. The Drafting Committee had considered that draft article on the basis of a proposal by the Special Rapporteur which contained two ideas: (a) the continued operation in time of armed conflict of a treaty in accordance with its own express terms; and (b) the possibility that the States parties to the treaty might subsequently agree, during the armed conflict, to suspend or to terminate the treaty. The Drafting Committee had finally decided to separate the two concepts, keeping the first as the subject of draft article 7 and the second as paragraph 2 of draft article 6.

65. With regard to the wording of draft article 7 [5], the Drafting Committee had proceeded on the basis of a proposal focusing on the fact that the “operativeness” of the treaties under consideration was not affected by a conflict. That proposal had been further refined to become the text

now before the Commission. Initially, the provision had referred to the continuation “in force” of the treaty. The Drafting Committee had decided to use the term “operate”, since the emphasis should be placed not on whether the treaty remained in force or was potentially applicable, but on whether it was actually operational in the context of armed conflict.

66. The Drafting Committee had also considered whether it should retain the reference to the treaty “expressly” providing for continuation during an armed conflict. One member had been of the opinion that such a qualifier was unnecessarily limiting, since there were treaties which, although not expressly so providing, continued in operation by implication. However, the Drafting Committee had decided that, on balance, a stricter formulation which clearly covered only treaties containing such an express provision should be retained and that draft articles 4 and 5 should be left to cover treaties which, by necessary implication, continued in operation. Other proposals had called for the deletion of that provision, as it was purely expository in nature, or its inclusion as an additional subparagraph of draft article 4.

67. Draft article 8 (Notification of termination, withdrawal or suspension) established a basic duty of notification of the withdrawal of a party or the termination or suspension of a treaty. The text adopted was substantially the same as the one worked out by the Working Group on the basis of article 65 of the 1969 Vienna Convention, as adapted to the context of armed conflict. The intention behind draft article 8 was to establish a basic duty of notification, while recognizing the right of another State party to the treaty to raise an objection, but not to go further. In other words, in such situations, there would be a dispute that would remain unresolved, at least until the end of the conflict. The Drafting Committee had thought that it was not feasible to maintain a fuller equivalent of article 65, as it was illusory to want to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict.

68. In paragraph 1, the Drafting Committee had aligned the text with the 1969 Vienna Convention, replacing the word “wishing” by the word “intending” and adding the words “of that intention” at the end in order to specify what the object of the notification was. It had also considered the possibility of using the words “of its claim”, as in the Convention, but had decided not to do so in order to distinguish that procedure more clearly from the one provided for in article 65 of the Convention. It had considered a proposal to replace the words “or its depositary” by the words “and its depositary” or to delete the words “other States”. However, it had finally retained the text as originally proposed, since it was the function of the depositary to notify the parties. It was aware, of course, that there were treaties that did not have depositaries. The possibility of notifying either the States parties or the depositary therefore had to be provided for in paragraph 1. However, with regard to the taking of effect of the notification, what was important was the moment at which the other State party or parties received the notification, and not the moment at which the depositary received the notification. Hence, no reference to the depositary was made in paragraph 2.

69. As to the wording of paragraph 2, the Drafting Committee had considered a proposal to specify that it was the “termination, suspension or withdrawal” which took effect upon receipt of the notification. It had, however, decided to retain the reference only to the “notification” taking effect, since the adoption of the proposed amendment would have had the effect of indicating that the termination, suspension or withdrawal of a party would take effect immediately upon receipt, whereas paragraph 3 provided that a party to the treaty retained the right to object to termination.

70. The initial proposal relating to paragraph 3 had referred to objection to “such” termination, withdrawal or suspension, thereby suggesting that the termination, withdrawal or suspension had already taken place by virtue of the notification, contrary to what was intended in paragraph 2. The intention of the paragraph was to preserve the right that might exist under a treaty or general international law to object to termination, suspension or withdrawal. Hence, the objection was to the intention to terminate, suspend or withdraw, as communicated by the notification provided for in paragraph 1. Proposals for refinement had included referring to “intention”, “claim”, “any attempt” and “purported termination, withdrawal or suspension”. The solution the Drafting Committee had settled on was simply to remove the word “such” to indicate that the objection was to the proposed termination, withdrawal or suspension, but without suggesting that the termination, withdrawal or suspension had already occurred. Those issues would be discussed more fully in the commentary.

71. Draft articles 9 to 11 sought to establish a modified regime modelled on articles 43 to 45 of the 1969 Vienna Convention. Draft article 9 [8 *bis*] (Obligations imposed by international law independently of a treaty), based on a proposal by the Working Group, derived from article 43 of the Convention. Its purpose was to preserve the requirement of the fulfilment of an obligation under general international law where that obligation appeared in a treaty which had been terminated or suspended or from which the State party had withdrawn as a consequence of an armed conflict. The latter point, i.e. the linkage to the armed conflict, had been added by the Drafting Committee in order to put the provision into its proper context for the Commission’s purposes. The words “as a result of the application of the present draft articles or of the provisions of the treaty”, which had been included in the earlier version on the basis of the text of article 43 of the 1969 Vienna Convention, had been considered unnecessary and had been deleted. The Drafting Committee had considered proposals that the words “independently of that treaty” should be deleted or replaced by the words “general international law”, but had finally decided that it was better to retain that aspect of the wording of the Convention.

72. Draft article 10 [8 *ter*] (Separability of treaty provisions) had been prepared by the Working Group during the current year on the basis of article 44 of the 1969 Vienna Convention.

73. The Drafting Committee had first considered the concern that the initial version of the *chapeau*, which was based on its counterpart in article 44 of the 1969 Vienna Convention, gave the impression that the ancillary rule

was that the entire treaty was either terminated or suspended. It had been noted that the issue of the effect of armed conflict was different from that envisaged in the Convention, since there was practice whereby the effect of an armed conflict on some treaties was only partial. To have it otherwise would suggest that the effect was always on the treaty as a whole. Suggestions on how to solve that problem had included deleting the draft article and adding a paragraph to draft article 4 indicating that, in some cases, the effect of an armed conflict on a treaty could be partial or referring in the *chapeau* of draft article 4 to “a treaty or provisions of a treaty”. The Drafting Committee had nevertheless decided to retain draft article 10 as it stood, but to deal with the matter by means of a reformulation of the *chapeau*, which no longer emphasized the pre-existence in the treaty of a right to terminate, withdraw from or suspend. It had seen no need to amend subparagraphs (a) to (c), which reproduced the exact wording of the corresponding subparagraphs of article 44 of the 1969 Vienna Convention.

74. Draft article 11 [8 *quater*] (Loss of the right to terminate, withdraw from or suspend the operation of a treaty) was also based on the equivalent provision of the 1969 Vienna Convention, namely, article 45. An express reference to the context of an armed conflict had been added to the *chapeau*, but the draft article had not given rise to any controversy.

75. Draft article 12 [9] (Resumption of suspended treaties) had been considered on the basis of wording proposed by the Working Group which had replaced an earlier reference to the criterion of the intention of the parties by a simple cross reference to the indicia in draft article 4. The Drafting Committee had considered a proposal to include the element of immediate resumption, but had decided against it in order to allow the question of when a treaty was resumed to be resolved on a case-by-case basis. Having chosen to use the term “indicia” in the title of draft article 4, it had decided to replace the words “the criteria in draft article 4” by the words “the indicia referred to in draft article 4”.

76. Draft article 13 [10] (Effect of the exercise of the right to individual or collective self-defence on a treaty) was the first of three articles which the Drafting Committee had, following the Working Group’s recommendation, based on the resolution of the Institute of International Law adopted at the Helsinki session in 1985.¹⁵⁷ It covered the situation of a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations. That State was entitled to suspend, in whole or in part, the operation of treaty incompatible with the exercise of that right, subject to the limitation that the Security Council could subsequently determine that such an act of self-defence was in reality an act of aggression. The last element was dealt with in draft articles 14 and 15. Draft article 13, which was based on the text of article 7 of the above-mentioned resolution, had not been amended as to substance.

77. Draft article 14 [11] (Decisions of the Security Council) was designed to preserve the legal effects of decisions of the Security Council under Chapter VII of

¹⁵⁷ See footnote 153 above.

the Charter of the United Nations. It had the same function as article 8 of the 1985 resolution of the Institute of International Law. The Drafting Committee had preferred the Special Rapporteur's approach of presenting the provision in the form of a "without prejudice" clause instead of adopting the wording used by the Institute in order to avoid dealing directly with the powers of the Security Council in the draft articles. The Drafting Committee had also thought that the text proposed by the Special Rapporteur was more precise, since it included a reference to decisions taken under Chapter VII of the Charter of the United Nations. In that connection, it had been suggested that the words "in accordance with the provisions of Chapter VII" should be deleted in order to reflect the possibility that the Council could take decisions under other Chapters of the Charter of the United Nations, but the Drafting Committee had decided to retain the reference to Chapter VII because the context of the draft articles was that of armed conflict.

78. Draft article 15 (Prohibition of benefit to an aggressor State) was a new provision. Following the recommendation by the Working Group that the resolution of the Institute of International Law should be considered, the Drafting Committee had decided to include a draft article to cover the content of article 9 of that resolution. The new provision prohibited an aggressor State from benefiting from the possibility of termination of, withdrawal from or suspension of a treaty as a consequence of the armed conflict it had provoked. The wording of the provision was based on the text of article 9 of the Institute's resolution, with some adjustments, particularly to include the possibility of withdrawal from a treaty and to specify that what were involved were treaties that were terminated, withdrawn from or suspended as a consequence of the armed conflict in question.

79. The Drafting Committee had considered proposals for refining the words "within the meaning of" in the first line, such as replacing them by the words "contrary to", but had decided to retain the text of the resolution of the Institute of International Law. The title emphasized that the provision dealt less with the question of the commission of aggression and more with the possible benefit, in terms of the termination of, withdrawal from or suspension of a treaty, that the aggressor State might derive from the armed conflict in question.

80. Draft article 16 [12] (Rights and duties arising from the laws of neutrality) was another "without prejudice" clause designed to preserve the rights and duties of States arising from the laws of neutrality. It was presented as a new formulation: the version which had been referred to the Drafting Committee by the Special Rapporteur had referred more specifically to the "status of third States as neutrals", but the Drafting Committee had considered that the term "neutrals" was imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency. The use of the words "laws of neutrality" was not a substantive change from the proposal made by the Special Rapporteur. The reformulation turned the provision into more of a saving clause.

81. Draft article 17 [13] (Other cases of termination, withdrawal or suspension) preserved the possibility of

termination or suspension of treaties arising out of the application of other rules of international law in the case of the four examples listed in subparagraphs (a) to (d) by the application of the 1969 Vienna Convention. The provision was uncontroversial and had been adopted in the form originally proposed by the Special Rapporteur, with two changes suggested by the Working Group, namely, adding "Other" to the title, to indicate that those grounds were additional to those provided for in the draft articles, and adding "*inter alia*" at the end of the *chapeau* to make it clear that what followed was an indicative list. The Drafting Committee had subsequently added withdrawal to the possible effects listed in the *chapeau*, whence the title of the draft article, "Other cases of termination, withdrawal or suspension".

82. Draft article 18 [14] (Revival of treaty relations subsequent to an armed conflict) covered the situation where the States parties to an armed conflict had, subsequent to that conflict, entered into specific agreements regulating the revival of treaties which might have been terminated or suspended as a consequence of the conflict. It provided that the draft articles did not prejudice the right of States to enter into such agreements. The Drafting Committee had worked on the basis of a revised text which had been agreed on in the Working Group and had been accepted by the Drafting Committee with some changes. The initial version had referred to the "competence" of the parties, which had been changed to the "right", as the concept of competence had a specific meaning in the 1969 Vienna Convention. The text had been further clarified to indicate that reference was being made to the right of "States" parties to the conflict.

83. In conclusion, the Drafting Committee recommended that the Commission should adopt, on first reading, the set of 18 draft articles on the effects of armed conflicts on treaties. At the second part of the session, the plenary would also have an opportunity to consider the Drafting Committee's proposal for an annex to the draft articles.

84. The CHAIRPERSON thanked Mr. Caflisch and the members of the Drafting Committee and proposed that the Commission should adopt draft articles 1 to 18 on the effects of armed conflicts on treaties, as provisionally adopted on first reading by the Drafting Committee.

Draft articles 1 to 4

Draft articles 1 to 4 were adopted.

Draft article 5

85. Mr. McRAE pointed out that the Drafting Committee had decided that the footnote on page 3 would read: "the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict". The words "in whole or in part" had been omitted.

86. Mr. CAFLISCH said that this was indeed an error and that the sentence must be completed.

Draft article 5, as corrected, was adopted.

Draft articles 6 to 12

Draft articles 6 to 12 were adopted.

Draft article 13

87. Mr. VALENCIA-OSPINA said that he had a problem with the last part of the sentence, which read: "subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor" because he did not see how the exercise of the right to self-defence in accordance with the Charter of the United Nations might be regarded, even *a posteriori*, as an act of aggression. Such self-defence would usually be exercised as a result of armed aggression, unless the provision was intended to refer to the preventive exercise of the right to self-defence. In any event, the situation would be covered by draft article 14.

88. Mr. BROWNLIE (Special Rapporteur) said that a sharp difference of opinion between himself and some members of the Drafting Committee, who had considered that the original wording did not take sufficient account of the question of illegality, had led to the adoption of wording that might be somewhat too closely based on that of article 7 of the resolution of the Institute of International Law. In order to meet Mr. Valencia-Ospina's concern, he proposed that the words "in accordance with the Charter of the United Nations" should be replaced by the words "by invoking the Charter of the United Nations".

89. Mr. VALENCIA-OSPINA, thanking the Special Rapporteur for his proposal, said that the amendment would not meet his concern. He proposed that the words: "A State intending to exercise its right to self-defence..." should be used instead and that any reference to the Charter of the United Nations should be deleted.

90. Mr. BROWNLIE (Special Rapporteur) said that he was prepared to agree to that amendment.

91. Mr. NOLTE said that he wondered what would happen in the situation where a State intended to exercise its

right to self-defence without justification and without the Security Council later designating it as the aggressor.

92. Mr. KOLODKIN said that he too had some concerns about that draft article, but, since there was little time available, the Commission should be careful not to adopt substantive amendments too hurriedly.

93. After a discussion in which Ms. ESCARAMEIA, Mr. KAMTO, Mr. YAMADA and Mr. BROWNLIE (Special Rapporteur) took part, Mr. McRAE suggested that, since Mr. Valencia-Ospina's proposal was more drastic than it looked and the Drafting Committee was to meet during the second part of the Commission's session to consider the question of the annex, draft article 13 should be referred to it so that there would be time to think about it more calmly.

94. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft article 13 to the Drafting Committee.

It was so decided.

Draft articles 14 to 17

Draft articles 14 to 17 were adopted.

Draft article 18

95. Mr. CANDIOTI said that, for the sake of clarity, the words "on the basis of an agreement" should be added after the words "subsequent to the conflict".

Draft article 18, as amended by Mr. Candiotti, was adopted.

Draft articles 1 to 18 on the effects of armed conflicts on treaties (A/CN.4/L.727/Rev.1), as a whole, were adopted on first reading, with the exception of draft article 13 [10], which was referred to the Drafting Committee.

The meeting rose at 1 p.m.