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Summary record of the 3051st meeting

Topic:
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issue either in the commentary or in a "without prejudice" clause in order to take account of the evolution of the situation and of the policies of States.

The meeting rose at 11.15 a.m.

3051st MEETING

Wednesday, 26 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

Effects of armed conflicts on treaties[133] (A/CN.4/622 and Add.1,[134] A/CN.4/627 and Add.1[135])

[Agenda item 5]

First report of the Special Rapporteur

1. The CHAIRPERSON invited Mr. Caflisch, Special Rapporteur, to introduce his first report on the effects of armed conflicts on treaties (A/CN.4/627 and Add.1).

2. Mr. CAFLISCH (Special Rapporteur) said that he would introduce at the present meeting articles 1 to 12 of the draft adopted on first reading by the Commission at its sixtieth session in 2008 and, later in the session, he would present the sections related to draft articles 13 to 18 as well as a few general questions. His introduction would focus on scope (draft article 1), use of terms (draft article 2), survival, suspension or termination of treaties (draft articles 3 to 8) and various other provisions (draft articles 9 to 12).

3. The report before the Commission concerned a set of draft articles for which the Commission was indebted to Sir Ian Brownlie,[136] and he was determined to continue in the spirit of Sir Ian's work. At issue was the second reading of a text, the general thrust of which had been approved on first reading with the help of the Drafting Committee. Thus, a major recasting of the text should not be necessary, nor should new research be undertaken unless it was absolutely essential. Instead, the Commission should consider the reactions of Member States to the draft and decide which of their comments ought to be taken on board, either in full or in part. That did not mean that the Commission should refrain from introducing changes where doing so appeared useful. The topic, which had been debated at length as far back as the nineteenth century, should be the subject of an approach that was grounded in practice and in doctrine, and was acceptable to most States. In other words, the approach should be reasonable, realistic and balanced.

4. He drew attention to two errors in the text which had been pointed out to him by Mr. Vázquez-Bermúdez. First, at the end of paragraph 21, the words "or between such groups within a State" should be deleted. Secondly, paragraph 41, subparagraph (*b*), of the French text should read "*à la nature et à l'ampleur du conflit armé et son effet sur le traité, au contenu de celui-ci et au nombre des parties au traité*", with the other language versions aligned as necessary.

5. Some 34 Member States had expressed their views during the debate in the Sixth Committee[137] and 11 Member States had submitted written observations (A/CN.4/622). Additional written observations had been forwarded to the Secretariat well after the deadline of January 2010, and for that reason it had not been possible for the Special Rapporteur to take them into consideration (A/CN.4/622/Add.1). That situation suggested the existence of a problem that the Commission might do well to look into when it addressed its working methods.

6. Turning to the first issue discussed in the report (paras. 5–13), the scope of the draft articles, he said that the question had arisen as to whether the draft should apply solely to inter-State conflicts or also to non-international conflicts, and whether it should only cover inter-State treaties or also deal with treaties involving international organizations.

7. With regard to the first question, he said that a majority in the Working Group had favoured the inclusion of non-international conflicts, arguing that most armed conflicts in the contemporary world fell under that category, and that if they were excluded the draft article would be of limited impact. That argument served to justify *a fortiori* the suggestion by one State to restrict the scope by also excluding situations of international conflict in which only one State party to the treaty was involved in the conflict. However, the approach chosen in the text raised the question of whether armed conflicts had different effects on treaties according to whether or not they were international, a question that he took up in paragraphs 161 and 162 of the report.

8. The second point—the fate of treaties to which one or more international organizations were parties—had been placed in limbo by the Commission. A number of States wished to see the draft articles extended to include that type of agreement, whereas others were opposed to such an extension. It was clear that if that type of treaty was

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[133] For the draft articles and commentaries thereto adopted on first reading by the Commission at its sixtieth session in 2008, see *Yearbook ... 2008*, vol. II (Part Two), chapter V, section C, pp. 45 *et seq.* At its sixty-first session, the Commission appointed Mr. Lucius Caflisch Special Rapporteur for the topic, after the resignation of Sir Ian Brownlie (*Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 229).

[134] Reproduced in *Yearbook … 2010*, vol. II (Part One).

[135] *Idem*.

[136] See footnote 133 above.

[137] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat (A/CN.4/606 and Add.1), sect. B (mimeographed; available on the Commission's website, documents of the sixty-first session).

included, new research would be needed, which would take considerable time and delay the Commission's work. He therefore suggested that the Commission should take the approach proposed by one State, which was discussed in paragraph 158 of the report, and leave open the possibility of studying the matter after the current draft articles were completed. For all those reasons, he was in favour of retaining draft article 1 as it stood.

9. In draft article 2 (Use of terms), the problem centred on the definition of "armed conflict". One aspect had already been commented on: whether the definition included non-international conflicts. In draft article 2, he had proposed that it should. The description of the term "armed conflict" in draft article 2, subparagraph (*b*), was not really a definition: it defined conflicts covered by the draft articles as being those likely to affect the application of treaties, which made it somewhat circular and not very useful. Moreover, it was an *ad hoc* definition for the sole needs of the draft articles; it would be preferable to choose a more neutral, more generally valid definition.

10. One State had suggested that the concept of "armed conflict" should not be defined. He understood the reasons for that suggestion, but the draft articles would cease to be viable without a definition of this expression, which established the limits of the scope of the draft articles. A definition was therefore needed, but it should be better than the one contained in article 2, subparagraph (*b*), as currently worded.

11. Two approaches to that problem were possible. The Commission could combine common article 2 of the Geneva Conventions for the protection of war victims (international conflicts) and article 1, paragraph 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (non-international armed conflicts). That approach would have the advantage of using the same definition of the term "armed conflict" in the fields of international humanitarian law and treaty law. The disadvantage was that it was cumbersome and, once again, somewhat circular.

12. The other approach would be to opt for the more modern and comprehensive wording used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case: "an armed conflict exists whenever there is 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" [para. 70 of the decision]. Yet that wording was perhaps too modern: it even included armed rivalries between organized groups within a State, which was inappropriate in the context of the draft articles, since under draft article 3, subparagraphs (*a*) and (*b*), the draft articles applied only to situations involving at least one State party to the treaty that was a participant in the armed conflict. Accordingly, the final portion of the Tribunal's definition—"or between such groups within a State"—should be deleted, as he suggested in paragraph 21 of his report.

13. Lastly, there was the issue of occupation. One Member State had argued that the concepts of armed conflict and occupation had different meanings. That was no doubt true for occupations that went beyond the framework of an armed conflict, whereas the draft articles concerned armed conflicts, of which occupation was an integral part. That would need to be reaffirmed in the commentary.

14. Paragraph 30 of the report proposed new wording for article 2, subparagraph (*b*), based on the *Tadić* wording, and he invited members to indicate whether they could agree to it. More specifically, he wished to know what they thought about using the wording from the Geneva Conventions for the protection of war victims or the wording from the *Tadić* case.

15. Articles 3 to 8 lay at the heart of the draft articles and at the centre of the controversies as well. The provisions of draft articles 3 to 5 and the annex to draft article 5 formed an inseparable whole, and each text should be assessed in conjunction with the others. The basic rule was that set out in draft article 3, which drew to a certain extent on article 2 of the resolution adopted in 1985 by the Institute of International Law on the same subject.[138] Draft article 3 had been well received in the sense that, although some had sought to modify it slightly, no one had expressed an outright objection to it (see paragraph 34 of the report). However, one Member State had suggested, without offering specific wording, that a positive formulation was needed, along the lines of "treaties shall survive, unless …"; in other words, there was a presumption of survival. Of course, that would constitute a change of direction which might entail a complete rethinking of the draft articles. Moreover, such an affirmation was not in keeping with reality. It was important to be realistic, and he therefore favoured retaining the provision, although he endorsed the suggestion of some Member States to return to the expression "*ipso facto*" and agreed with the remark about the unclear title. He was not certain that the title "Presumption of continuity", proposed by one State and used provisionally, was correct. Perhaps a member of the Commission had a better suggestion.

16. In view of the "negative" content of draft article 3, it was necessary to determine the elements that would make it possible to identify agreements likely to be affected by the outbreak of an armed conflict, which could thus be the subject of the notifications referred to in draft article 8 and could, where appropriate, help settle any disputes that might arise.

17. The earlier version of draft article 4 had been the subject of considerable debate in the Commission. It had been based on the notion of interpreting the treaty in accordance with articles 31 and 32 of the 1969 Vienna Convention, an interpretation that was supposed to reveal the intention of the authors of the treaty. The Commission and its Working Group had ultimately decided to include among the criteria to be used the nature and extent of the conflict, its effect on the treaty, the subject matter of the treaty and the number of parties to the treaty. Contrary to what some States apparently believed, those criteria were intended to supplement the criterion of the intention of the parties and not to replace it.

[138] Institute of International Law, *Yearbook*, vol. 61 (1986), Session of Helsinki (1985), Part II, p. 200 (available from www.idi-iil.org, resolutions).

18. One comment concerning draft article 4 had been that the reference to the "effect of the armed conflict on the treaty" was circular, since that effect was the result which the application of article 4 ought to achieve and not a criterion for achieving it. Yet as he had explained in the report (para. 43), it was possible that the effect might be of short duration, suggesting that it was minimal, but could become significant if the conflict should last longer. Thus, the fact that the effect could vary might make the survival of the treaty impossible in the long run.

19. Some Member States wanted to delete the reference to "the nature and extent of the armed conflict" while others wanted it to be retained, as he himself did (para. 45). Some States had suggested the addition of new "indicia", such as change of circumstances, impossibility of performance and material breach of the treaty. However, such additions were not really appropriate, as they were already covered by articles 60 to 62 of the 1969 Vienna Convention (para. 46). Another State wished to insert a reference to the subject matter of the treaty, but as subject matter was dealt with in draft article 5, that addition did not seem appropriate either (para. 48). Some Member States thought that the list of indicia in draft article 4 was not exhaustive (para. 49), but that fact was made clear by paragraph (4) of the commentary to the draft article.[139] Adding a statement to that effect to draft article 4 would weaken the normative value of the text.

20. Lastly, it had been suggested that draft article 4 should include other factors, such as the possible results of terminating, withdrawing from or suspending a treaty, but that was already covered implicitly. However, given that the criterion of the subject matter of treaties was dealt with in draft article 5, he wondered whether the reference to that criterion in draft article 4, subparagraph (*b*), ought not to be deleted.

21. He failed to see why a State could not speak of a "withdrawal" from a treaty in the context of draft article 4. He also thought that the simple reference to articles 31 and 32 might be too elliptical and that the text might become clearer if article 4, subparagraph (*b*), spoke of "the intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties".

22. Turning to draft article 5 and its annex, which had elicited many comments, he said that a few preliminary remarks would be useful: first, the outbreak of an armed conflict itself never terminated a treaty; secondly, the continuity of a treaty might involve the treaty as a whole or only a part thereof; and thirdly, the list contained in the annex to draft article 5 should be described as "indicative".

23. One State had criticized draft article 5 for its ostensible lack of clarity, but had failed to specify what was unclear, and a group of States had asserted that treaty clauses that survived did not necessarily have to be applied as they were, but that "some basic treaty principles need to be taken into account during armed conflict". If that meant that they must be applied flexibly, he had no objection; he sought further clarification of that comment.

24. One Member State had wished to know the factors that made it possible to determine whether a treaty or some of its provisions should continue in operation. The answer to that question was to be found in draft articles 4 and 5, read together with the annexed list. Another State had proposed that "relevant factors or general criteria" should be identified. In fact, draft articles 4 and 5 clearly identified general "criteria" or "factors", and the annex explained the meaning of draft article 5 in an indicative fashion.

25. It had also been asserted that, given that a general provision existed in the form of draft article 3, draft article 5 was superfluous. He disagreed: draft article 3 specified that termination was not automatic, while draft articles 4 and 5 and the annex provided criteria for determining whether a treaty survived in whole or in part (para. 58). In that connection, he wished to point out that draft article 10, on the separability of treaty provisions, made it possible to apply draft articles 3 to 5 with the necessary flexibility, a matter that had perhaps not been sufficiently stressed in the course of the debate.

26. One Member State wanted a second paragraph added to draft article 5 to specify the applicability, in times of armed conflict, of treaties relating to the protection of the human person (humanitarian law, human rights, "international criminal law") and of the Charter of the United Nations. Although he did not object to that suggestion *a priori*, it did pose a number of problems (para. 61). For example, where exactly did the boundary between the scope of humanitarian law and human rights law lie? Would it not be preferable to refer to treaties on international criminal justice rather than speak of "international criminal law" as a whole? Was it really necessary to ensure the survival of the monument that was the Charter of the United Nations? And could or should the list of categories include, as another State wished, treaties relating to boundaries and limits? Assuming that the idea of such an amendment was accepted, a text for a second paragraph was proposed in paragraph 62 of the report. It should be noted that the categories that would thus be incorporated into draft article 5 would then be deleted from its annex. The disadvantage of that proposal was that it created two categories of treaties that could survive.

27. Like the members of the Commission, Member States were divided on whether to retain the list. One State was in favour of incorporating the entire list into the text of draft article 5, whereas others wanted it consigned to the commentary. The list retained was the one that the Commission had ultimately adopted on first reading, on the understanding that it was indicative and that the continued application of the categories of treaties contained in it could be partial or complete, given that some treaty instruments were separable under draft article 10. That solution was, in his view, a realistic one.

28. As to the content of the list, the Special Rapporteur said that if the Commission endorsed the suggestion to incorporate the reference to certain categories of treaties into the body of draft article 5, those categories would have to be deleted from the annex. He agreed with the suggestion of one State to include treaties establishing an international organization, which would also cover the

[139] *Yearbook ... 2008*, vol. II (Part Two), p. 46, para. 66.

Charter of the United Nations (para. 68). The same State had also suggested deleting five categories from the list: treaties of friendship, commerce and navigation as well as analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to international watercourses and related installations and facilities; treaties relating to aquifers and related installations and facilities; and treaties relating to commercial arbitration. Those categories of agreements did not survive every time or in full, but the list was indicative and, once again, the question of separability was addressed in draft article 10. Thus the proposed deletion was neither necessary nor desirable. Moreover, retaining draft articles 4 and 5 along with the list would afford greater stability.

29. His proposed texts for draft articles 4 and 5 appeared in paragraphs 51 and 70 of the report. The Commission should decide whether the texts should be retained more or less in their current form, whether a reference to certain categories of treaties should be included in the body of draft article 5, whether a new category of agreements—"international criminal justice"—should be incorporated into the list and whether other categories, namely treaties of friendship and treaties relating to the protection of the environment, watercourses, aquifers and commercial arbitration, should be excluded.

30. Draft article 6 (Conclusion of treaties during armed conflict) embodied two ideas that appeared obvious: a State party to an armed conflict retained the capacity to conclude treaties, and such States could agree to terminate treaties that would otherwise continue in operation. Since he had proposed only minor changes to the existing text of draft article 6, he drew the Commission's attention to paragraphs 71 and 76 of his report.

31. Draft article 7 (Express provisions on the operation of treaties) stipulated that where a treaty expressly provided that all or part of the text should continue to apply during an armed conflict, that provision prevailed. It was in fact useful to state that rule even if it seemed obvious. However, thought must be given to the placement of article 7 within the draft, and he would like to know the views of the members of the Commission in that regard. His own choice would be to place it after draft article 3, because draft article 7 referred to a treaty rule that departed from the system established in draft articles 4 and 5 and the latter's annex. His rationale for doing so could be found in paragraph 79 of his report.

32. The last in the cluster of draft articles concerning the survival, suspension and continuity of treaties in the event of an armed conflict was draft article 8 (Notification of intention to terminate, withdraw from or suspend the operation of a treaty). That provision had been introduced rather late in the day and had given rise to a heated debate both within the Commission and subsequently among Member States. As currently drafted, article 8, paragraph 1, provided that a State that was involved in a situation of armed conflict and wished to terminate, withdraw from or suspend the operation of all or part of a treaty was required to notify the other State party or States parties or the treaty depositary of its intention to do so. According to paragraph 2, such notification took effect at the time of receipt of notification by the State or States concerned, even if the notification had been sent to the depositary. Under draft article 8, the State or States concerned could formulate an objection if they considered that the measure notified was not in accordance with the rules of international law. That was as far as the current draft of article 8 went.

33. That text could be criticized as incomplete on two grounds. First, unlike article 65, paragraph 2, of the 1969 Vienna Convention, it did not set a time limit for raising objections to the contents of notifications, which would have the effect of rendering the announced measures ineffective until the end of the armed conflict. Secondly, that lacuna would also prevent the peaceful settlement of dispute by any means available to the States concerned, not all of which were involved in the armed conflict. While in its commentary to draft article 8, the Commission had considered it "unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of the operation of treaties in the context of armed conflict",[140] he believed that there were good reasons to review that conclusion.

34. The new text that he proposed in paragraph 96 of his report addressed the two lacunae he had just mentioned by drawing on article 65 of the 1969 Vienna Convention. As one Member State had explained, there did not appear to be any reason why a dispute between the notifying State and the objecting State should remain suspended until the end of the armed conflict, when a means of settling the dispute existed. That consideration obviously depended on the solution to the other issue—namely, the introduction of a time limit for raising an objection to the notification. Article 65, paragraph 2, of the 1969 Vienna Convention established a three-month deadline. He had left a blank space for the time limit, on the reasoning that it should in any event be longer than three months, since worrying about the status of treaties was probably not the foremost concern of a warring State.

35. One Member State had asked what effects would be produced by a notification made under the terms of draft article 8. According to the proposed new text contained in paragraph 96 of his report, there were two possibilities: either no objection was raised within the prescribed time limit, which meant that the notifying State could proceed to terminate, withdraw from or suspend the operation of the treaty in whole or in part; or else an objection was raised and recourse could be had, where necessary, to existing mechanisms for the peaceful settlement of disputes.

36. Contrary to what certain States believed, he did not see why it should be unreasonably difficult for States to make notifications and raise objections during an armed conflict. What the draft article needed to specify was that the provisions of article 65, paragraphs 1 and 2, of the 1969 Vienna Convention must be complied with to the greatest extent possible.

37. One interesting suggestion was to extend the scope of draft article 8 to contracting States that were not parties

[140] *Ibid.*, p. 60, para. (1) of the commentary.

to the conflict. Technically, that would be an easy matter: the current text of draft article 8, paragraph 1, could simply be replaced with the following: "A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, whether or not it is a party to the conflict, shall notify … of that intention." He invited Commission members to express their views on the substance of that suggestion, as well as on his proposed wording for draft article 8, which could be found in paragraph 96 of the report.

38. The final part of his introduction dealt with draft articles 9 to 12. Draft article 9 (Obligations imposed by international law independently of a treaty), which had been based on article 43 of the 1969 Vienna Convention, had not been contested and did not require any comment.

39. Draft article 10 (Separability of treaty provisions) had been modelled after article 44 of the 1969 Vienna Convention and was of crucial importance, given that it would govern the termination or partial suspension of the operation of a treaty, which in practice could occur frequently. Draft article 10 listed the cases in which separability applied. In his view, there was no reason to amend the text.

40. Draft article 11 (Loss of the right [of the option] to terminate, withdraw from or suspend the operation of a treaty) was derived from article 45 of the 1969 Vienna Convention. It was essentially aimed at protecting the good faith of the other contracting parties, which even in situations of armed conflict should be preserved to some extent. States that lost the right covered by the draft article were those that had expressly agreed that the treaty should remain in force and those that by reason of their conduct could be considered as having acquiesced in the continued operation of the treaty.

41. One Member State felt that that rule was "too rigid" and that perceptions regarding the survival of treaties could change over the course of an armed conflict (see paragraph 104 of the report). The same State had pointed out that the circumstances that led to the loss of the right to terminate, withdraw from or suspend the operation of a treaty could sometimes be assessed only after the armed conflict had produced its effects on the treaty. Those effects did not appear immediately but only after the conflict was well under way. Draft article 11 could be maintained if the point he had just raised was included in the commentary.

42. That left draft article 12 (Revival or resumption of treaty relations subsequent to an armed conflict), which must be considered together with draft article 18, on the same subject. Draft article 12 provided that the resumption of the operation of a treaty suspended as a consequence of an armed conflict was determined in accordance with the indicia enumerated in draft article 4: articles 31 and 32 of the 1969 Vienna Convention, the nature and extent of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty. Draft article 18 enabled States parties, subsequent to an armed conflict, to regulate, on the basis of agreement, the revival of treaties that had been terminated or suspended. He believed that merging the two articles into a text that would replace draft article 12 would clarify the meaning and highlight the difference between the two existing provisions. It should be noted that as the result of that merging draft article 18 would no longer be a "without prejudice" clause. Commission members were invited to express their views on the proposal to merge draft articles 12 and 18. The new text suggested for draft article 12 was contained in paragraph 114 of his report.

43. In order to facilitate the discussion of the report in plenary, he suggested that the Commission might wish to organize its debate around three clusters of draft articles: draft articles 1 and 2; draft articles 3 to 8; and draft articles 9 to 12.

44. The CHAIRPERSON invited the members of the Commission to consider the first cluster of draft articles indicated by the Special Rapporteur.

45. Mr. GAJA said that the Special Rapporteur's first report was remarkably clear and well organized, and contained reasonable proposals for either confirming or amending the draft articles that had been adopted on first reading. The fact that some of the Special Rapporteur's proposals had not found specific support among Member States should not prevent the Commission from endorsing amendments that were considered to improve the text.

46. There was, however, one aspect of the report with which he had been disappointed. Given that the 2008 commentary to the draft articles made only limited reference to State practice, he had hoped that the Special Rapporteur would support his review of the subject by including additional references to such practice, especially in relation to draft articles 4 and 5. Regrettably, there were none. However, a thorough analysis of practice was required when the Commission embarked on the codification of a subject that was covered, at least to some extent, by practice.

47. He had one major concern relating to the substance of the draft articles. Draft article 1 essentially confirmed the scope of the draft articles as adopted on first reading. In paragraph 39 of his report, the Special Rapporteur stated that the draft articles also covered cases in which two States parties to a treaty were on the same side in an armed conflict. Moreover, the majority of States had endorsed the Commission's approach not to restrict the draft articles to cases in which two States parties to a treaty were engaged in an armed conflict as adversaries, while the bulk of State practice related to such cases. It was far from clear, however, whether the same conclusions should be drawn in those cases and in cases in which only one State party to the treaty was involved in an armed conflict, whether internal or international in nature. It was difficult to see how an armed conflict as such would affect the operation of a treaty in conflicts involving only one State party. A specific analysis of cases other than those involving a conflict between States parties to a treaty was missing from the first report, and the Commission should address that omission before completing its second reading of the draft articles. He welcomed the fact that the Special Rapporteur intended to address that question in the forthcoming addendum to his report, as it might affect the wording of some of the draft articles included in the present report.

48. He welcomed the inclusion in draft article 2 of a definition of the term "armed conflict" with the corrections proposed at the outset by the Special Rapporteur. That definition was based on the wording used in the *Tadić* judgement. In his view, another reason to prefer the *Tadić* definition over those contained in the Geneva Conventions for the protection of war victims and the Additional Protocols of 1977 was that it was better suited to the purpose of the draft articles, which concerned something other than the extension of the application of international humanitarian law. The wording of the *Tadić* judgement with the abridgement suggested by the Special Rapporteur met the Commission's needs and reflected what had been implied by the Commission in its consideration of the topic.

49. He agreed with the Special Rapporteur's suggestion in paragraph 81 to place draft article 7 after the general statement contained in draft article 3. Draft article 3 contained a Latin expression, and preferably those should be avoided, but that was a matter perhaps best left to the Drafting Committee. He also agreed to the deletion of the word "express" in current draft article 7, since the effects of an armed conflict on treaty relations might be regulated implicitly in a treaty.

50. Although the criteria referred to in articles 31 and 32 of the 1969 Vienna Convention, which were mentioned in draft article 4, subparagraph (*a*), were certainly helpful in ascertaining whether a particular treaty addressed the issue of the consequences of an armed conflict on treaty relations between the States parties or on the treaty in general, Mr. Gaja saw no need to reintroduce a reference to the intention of the parties to the treaty in draft article 4. The goal of treaty interpretation was not to ascertain the intention of the parties with regard to the effects of an armed conflict, and it was in fact highly unlikely that any such intention existed.

51. The subject matter of a treaty, which was considered in draft article 5, was also likely to provide some useful elements for the interpretation of treaties. However, the criteria listed in draft article 4 (*b*), useful though they were, might or might not be relevant for interpreting treaties. Yet draft article 4 did not deal exclusively with interpretation: it also dealt with the major issue of what to do if the treaty failed to address the effects of an armed conflict on treaty relations. It was necessary to establish a general rule to address the case of such treaties.

52. Draft articles 4 and 5 looked, respectively, at the dark side and the bright side of the operation of treaties. Draft article 4 concerned the "indicia"—another Latin word that he believed ought to be changed—of susceptibility to termination, withdrawal or suspension of treaties, or the fact that the operation of a treaty could cease. Draft article 5, meanwhile, concerned treaties whose operation was implied from their subject matter, or the fact that the treaties continued to operate. It was possible, however, that draft article 5, paragraph 2, could be construed as implying that categories of treaties not included in the indicative list provided in the annex were susceptible to termination, withdrawal or suspension. In his view, the relationship between the dark and the bright sides of treaty operation should be clarified. It might in fact be useful to consider draft articles 4 and 5 together, with a view to their possible combination.

53. One thing was certain: the Commission should give greater weight to State practice concerning identified categories of treaties that continued in operation during an armed conflict. One example was treaties relating to international commercial arbitration: the Commission should review practice in that area to determine whether it was justified in including that category of treaties in the indicative list, or whether it was better to remove it because the jurisprudence of various countries was divided on the issue of the continued operation of such treaties during an armed conflict.

54. Draft article 8 assumed that the termination or suspension of the operation of a treaty was always conditional on notification by the State intending to produce those effects; however, that approach did not fully reflect State practice. States usually did not make such notifications. While the introduction of the notification requirement could be a positive development, the Commission might wish to consider the possibility that in certain cases notification would not be required. An extreme example was a bilateral treaty that provided for joint military parades on a particular date. Such a treaty could not be applied during an armed conflict between the States parties, irrespective of notification.

55. He was in favour of referring most of the draft articles to the Drafting Committee; however, he would like to see his general concerns regarding cases other than those involving a conflict between States parties to a treaty, which he understood would be taken up in an addendum to the first report, and the need for an analysis of State practice, adequately addressed before the Commission adopted the draft articles on second reading.

56. Mr. NIEHAUS said that the Special Rapporteur had done well to begin his first report with words of appreciation addressed to his predecessor, Sir Ian Brownlie, whose contribution to the topic had provided an excellent basis for its continued development. The current Special Rapporteur's clarity and incisiveness had resulted in an excellent synthesis of the four main areas covered by the draft articles, the comments of representatives of States put forward in the Sixth Committee and the written comments submitted by Member States. He agreed with the Special Rapporteur that the Commission should limit its changes to those that were absolutely necessary, as the draft articles had already been adopted on first reading.

57. With regard to article 1 and the fact that certain Member States would like to restrict the scope of the draft articles to treaties between two or more States of which more than one was a party to the armed conflict, he noted that the Commission had considered the issue in depth at its sixtieth session, and that the vast majority of members had chosen to have article 1 include the effects of armed conflicts involving only one State. The Special Rapporteur endorsed that view, as he himself did. He objected, however, to the exclusion from the scope of the draft articles of the effects of armed conflicts on treaties to which international organizations were parties. Given the important role of many international organizations in that area, such

exclusion was not advisable. However, since it appeared that most Commission members as well as representatives of Member States in the Sixth Committee were inclined to exclude treaties to which international organizations were parties, he would go along with the wording of draft article 1 proposed by the Special Rapporteur.

58. Draft article 2, on use of terms, raised the fundamental issue of whether the scope of the draft articles should include treaties between States and international organizations, and the Special Rapporteur had concluded that it would be preferable not to do so. A further question was whether the draft articles ought to cover non-international conflicts. There was no doubt that this idea had been accepted. Thus the proposed text was satisfactory as it stood, apart from the reference to a "protracted" resort to armed force in subparagraph (*b*), since it was unclear whether the period of time in question was to be measured in months or years. Moreover, since the existence of conflicts between States should plainly not be determined by any reference to the length of resort to armed force, it was illogical and confusing to apply that criterion to internal conflicts. He would therefore be inclined to delete the word "protracted".

59. In draft article 3, concerning the absence of *ipso facto* termination or suspension, the difficulty apparently stemmed from the replacement of "*ipso facto*", the term employed in the *chapeau* of the original text with the word "automatically" and, subsequently, the word "necessarily". The Special Rapporteur was suggesting that the Commission should revert to the original expression. Since the matter had been discussed at length both in plenary meetings and in the Drafting Committee, it would be helpful if colleagues who had objected to the use of the term "*ipso facto*" could remind the Commission of their arguments. The title of the article was indeed far from clear: the phrase "absence of" was particularly infelicitous; "principle of application", "principle of maintenance" or "continuity" would all be preferable.

60. He endorsed the Special Rapporteur's suggestion that the current version of draft article 4 be retained. Draft article 5 and the annex thereto were important and aptly worded. Despite the indicative nature of the list of categories of treaties contained in the annex, he, like Ms. Escarameia, was of the opinion that it would be logical for it to include treaties embodying *jus cogens* rules.

61. Draft article 6 did not present any difficulties, but he suggested that it would be more logical to place draft article 7 between draft articles 3 and 4. The amended wording of that draft article was acceptable. The amended version of draft article 8 was an intelligent response to all the comments made by Member States during the extensive debate on that article in the Sixth Committee, and the supplementary wording proposed by the Special Rapporteur constituted a substantial improvement. Further reflection was needed, however, on the interesting suggestion put forward in paragraph 92 of the report that the scope of draft article 8 be extended to cover States that were not parties to the conflict but were parties to the treaty.

62. Draft articles 9 to 11 did not pose any problems and should be retained as they stood. The Special Rapporteur's suggestion that draft articles 12 and 18 should be merged because they were closely linked was logical, and the text that he had proposed was a definite improvement on the two original provisions.

63. Mr. MURASE said that since the draft articles supplemented the 1969 Vienna Convention, they should be confined to treaties concluded between States and exclude treaties involving international organizations. He was unsure whether they should cover non-international or internal armed conflicts. He noted that Austria, China and Portugal had been omitted from the list of States that had criticized the Special Rapporteur's inclusive approach and said that, at best, States' views on that matter had been divided (see the footnotes to paragraph 15 of the report). The Commission should therefore give further consideration to the issue, but in doing so should take a minimalist approach in order to safeguard the effectiveness of the draft articles.

64. The lack of a trigger mechanism or trigger article was a matter of great concern, since there was no way of knowing when the draft articles became applicable. There was no clear definition of the terms "armed conflicts" or "outbreak of an armed conflict" in any of the draft articles. A more detailed definition of "armed conflict" was required in draft article 2, subparagraph (*b*), in order to clarify the point at which the draft articles started to operate. Since the definition of "treaty" in subparagraph (*a*) of that draft article reproduced verbatim the definition of the 1969 Vienna Convention, there was nothing to prevent the Commission from borrowing the definition of armed conflict from common article 2 of the Geneva Conventions for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). Even though the language of the Geneva Conventions needed updating, it was nonetheless preferable. Accordingly, he suggested that draft article 2, subparagraph (*b*), should be revised to read:

> " 'Armed conflict' means:
>
> "(i) all cases of hostilities which may arise between two or more States, even if the existence of such a conflict is not recognized by one of them; and/or
>
> "(ii) all cases of partial or total occupation of the territory of a State, even if the said occupation meets with no armed resistance; and/or
>
> "(iii) all cases which take place in the territory of a State between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement international law relevant to armed conflicts."

65. It was surprising that no one in the Commission or the Sixth Committee had ever seen a need to define the word "outbreak", which appeared in draft article 3 and draft article 6, although it was crucial to the whole set of draft articles. Presumably there were certain objective criteria for determining the date on which an armed

conflict broke out. That date had to be ascertained in order to determine when a treaty could be suspended or terminated, since such action could not be taken unilaterally. Furthermore, determination of that moment had a direct bearing on the rights and obligations of the States concerned. One instance of a war whose exact starting date was uncertain was the Iran–Iraq war in the 1980s, where both States claimed to be the victims of initial armed attacks that had in fact occurred on different dates. That disparity demonstrated the difficulty inherent in the application of the draft articles in the absence of a more specific definition. For that reason, unambiguous criteria for identifying when the "outbreak" occurred should be set forth in a separate article, which could be numbered article 2 *bis*. The intensity of the conflict should be one of those criteria, in order to avoid any abuse of the draft articles in the event of sporadic incidents that did not constitute a true armed conflict.

66. If that proposal was not accepted, a clear explanation of the term should be included in the commentary. While it was true that the Geneva Conventions for the protection of war victims did not define the notion "outbreak of armed conflict" in the texts of the Conventions themselves, the commentary to common article 2 stated that:

> The Convention becomes applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation. … Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of [such a conflict].[141]

Similar wording should be included in the commentary to draft article 3, which should stipulate that the application of that provision should not depend on the discretionary judgement of the parties and that the draft articles should apply automatically as soon as the material conditions defined in that commentary were fulfilled.

67. Mr. DUGARD, after paying a tribute to the substantial contribution made to the topic by the former Special Rapporteur, Sir Ian Brownlie, said that the report before the Commission was a model report: it was clear, concise and took account of the views expressed by Member States.

68. He agreed with the Special Rapporteur's approach to draft article 1, because international organizations must be excluded from the scope of the draft articles for the reasons cited in the report.

69. It was essential that draft article 2, subparagraph (*b*), cover both international and non-international armed conflicts. He therefore disagreed with Mr. Murase's proposal. The Commission must face the fact that most conflicts in the modern world were non-international or did not fit neatly into the category of international armed conflicts. For that reason, the definition of "armed conflict" contained in common article 2 of the Geneva Conventions for the protection of war victims was unsuitable for the draft articles. The definition in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) was acceptable, although it had been superseded by the definition provided by the International Tribunal for the Former Yugoslavia in the *Tadić* case. While he shared Mr. Niehaus's view that the word "protracted" was not the best adjective to use in the context, it was the term accepted by international criminal tribunals. It would therefore be unwise for the Commission to set about redefining the notion. Thus he once again agreed with the Special Rapporteur's approach.

70. On the other hand, he was unsure as to the advisability of addressing the question of occupation in the commentary. While it was always difficult to decide what to include in a provision and what to leave to the commentary, he believed it would be wise to make some reference to occupation in the definition. Many current situations involving armed conflict concerned occupation, the three most obvious cases being northern Cyprus, Palestine and Western Sahara. In paragraph 29 of the report, the Special Rapporteur drew attention to the need for clarity; the best way of achieving such clarity was to make some mention of occupation in the text of the draft article itself.

71. One conundrum, which should perhaps be dealt with in the commentary, was that of State succession. For example, what had been the position of Western Sahara immediately after the withdrawal of Spain? Had it succeeded to treaties to which Spain was a party, or had those treaties been suspended or terminated? The same issue arose in the context of some of the treaty obligations of Palestine.

72. Mr. PETRIČ commended the Special Rapporteur on his precise and balanced report, and endorsed his methodology. The Commission should not make too many alterations to the text of the draft articles at the current stage, but should confine itself to making amendments to take account of Member States' comments.

73. The Commission should bear in mind that armed conflict represented a stressful situation for a State. In such circumstances, States might be unable to comply with formalities but might have to take action to protect their interests and ensure their survival. For that reason the Commission should not be too formalistic, but should leave room for flexibility. It should be guided by the notion that a State should be allowed scope to take *bona fide* action—for example, to avoid obligations that might impede its fight for survival.

74. The Commission had decided after much discussion that internal conflicts should be included within the scope of the draft articles and, notwithstanding some Member States' comments, there was no reason to depart from that position. If internal conflicts were excluded from the draft articles, the Commission's work would be of limited usefulness, since inter-State conflicts were already rare, and it was to be hoped that they would become even rarer in the future.

75. Turning to draft article 1, he said that he supported the Special Rapporteur's amendment of the phrase "at least one of the States" to read "at least one of these

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[141] J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949–Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, vol. I, Geneva, ICRC, 1952, p. 32.

States". He also agreed with the Special Rapporteur that treaties between States and international organizations should be excluded from the draft articles. He endorsed the reasoning set out in paragraph 14 of the report and the conclusion that the Commission was at liberty to supplement the 1986 Vienna Convention with another draft text at some point in the future.

76. As for the definitions set out in draft article 2, Mr. Petrič believed that internal conflicts should, as he had just explained, be encompassed therein. It would, however, be better to deal with the issue of occupation in the commentary, because it posed problems that could not be resolved satisfactorily in the body of the draft article. Furthermore, if occupation was defined in the draft article, it might be necessary to include definitions of such concepts as "embargo" and "blockade" as well. He therefore agreed with the Special Rapporteur that it was better to tackle those matters in the commentary.

77. Turning to draft article 2, subparagraph (*b*), he endorsed the Special Rapporteur's approach of building a definition based on the wording used in the *Tadić* case—a modern and appropriate definition. He had been concerned about the phrase "or between such groups within a State" and therefore welcomed its deletion. He was also concerned about the use of the word "protracted" in the phrase "protracted resort to armed force", but believed nevertheless that an appropriate term was needed to convey the idea of situations lasting longer than a few days. He suggested that the Drafting Committee might wish to pursue the matter and that, in any event, some explanation be provided in the commentary to the draft article.

Reservations to treaties (*continued*) (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)

[Agenda item 3]

Report of the Drafting Committee

78. Mr. McRAE (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee on reservations to treaties (A/CN.4/L.760), said that it concerned 11 draft guidelines that had been provisionally adopted by the Drafting Committee during the second part of the sixty-first session, in the course of four meetings that had taken place on 23, 28 and 30 July 2009.

79. The first two draft guidelines, 2.6.3 and 2.6.4, related, respectively, to the freedom to formulate objections to reservations and the freedom for the objecting State or international organization to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation. Those two draft guidelines had been proposed by the Special Rapporteur in his eleventh report[142] and had been referred to the Drafting Committee in 2007.[143]

80. The other nine draft guidelines, namely guidelines 3.4.1 to 3.6.2, concerned the permissibility of reactions to reservations and the permissibility of interpretative declarations and reactions thereto. The original proposals had been contained in the Special Rapporteur's fourteenth report.[144] However, following the plenary debate in 2009, the Special Rapporteur had presented a revised version of those draft guidelines, with the exception of draft guidelines 3.5.2 and 3.5.3, which had been not revised.[145] The revised guidelines had been referred to the Drafting Committee at the sixty-first session.

81. Before introducing the details of the Drafting Committee's report, he wished to pay a tribute to the Special Rapporteur, Mr. Alain Pellet, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the other members of the Drafting Committee for their active participation and essential contributions, as well as the Secretariat for its valuable assistance.

82. Turning to the substance of the report, he said that draft guideline 2.6.3. had been retitled "Freedom to formulate objections". A discussion had taken place in the Drafting Committee on whether the draft guideline should refer to the "freedom" or to the "right" to formulate an objection; after careful consideration, the Committee had decided to retain the term "freedom" ("*faculté*" in French) which had appeared in the text originally proposed by the Special Rapporteur and referred to the Drafting Committee. It had been observed in particular that the term "right" might not be appropriate in the current context because, unlike the freedom to formulate an objection, a right could be regarded as implying the existence of a correlative obligation and, possibly, of a remedy in the event of its violation. Furthermore, in order to harmonize the text and the title of the draft guideline, the word "make" in the title had been replaced by the word "formulate".

83. That said, the main change introduced into the text referred to the Drafting Committee had been the replacement of the expression "for any reason whatsoever" by the expression "irrespective of the permissibility of the reservation". During the debate in plenary at the fifty-ninth session, the expression "for any reason whatsoever" had been criticized by some members who had been of the view that the formulation needed to be qualified, at least by a reference to the 1969 and 1986 Vienna Conventions and to general international law.[146] Similar concerns had been raised in the Drafting Committee, particularly with respect to the limitations on the freedom to formulate objections that would arise, according to some members, from *jus cogens* norms.

84. Moreover, some members had been of the view that objections to reservations expressly authorized by the treaty were not allowed.[147] After extensive discussion, and on the basis of a revised text proposed by the Special Rapporteur, the Drafting Committee had agreed on wording that had been deemed to convey, in a more accurate manner, the original intent of the draft guideline as proposed by the Special Rapporteur. That original intent

[142] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/574.

[143] *Yearbook ... 2007*, vol. II (Part Two), p. 16, para. 45.

[144] See footnote 9 above.

[145] *Yearbook ... 2009*, vol. II (Part Two), chap. V, p. 80, para. 60 and p. 83, para. 82.

[146] *Yearbook ... 2007*, vol. II (Part Two), p. 19, para. 74.

[147] *Ibid.*, para. 75.

had been to state that, in contemporary international law, and contrary to what had been suggested by the ICJ in its advisory opinion of 28 May 1951 on the question concerning *Reservations to the Convention on Genocide*, the freedom to formulate objections to reservations was not limited to the case of impermissible reservations, such as reservations incompatible with the object and purpose of the treaty. The commentary would provide the necessary explanations regarding that point while also indicating that, according to some members, the freedom to formulate objections had been subject to certain limitations, such as those arising from *jus cogens* norms and certain general principles such as good faith and non-discrimination. Lastly, the Drafting Committee had not considered it necessary to repeat in the draft guideline that the freedom to formulate an objection should be exercised in accordance with the provisions of the Guide to Practice.

85. Draft guideline 2.6.4 was entitled "Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation", as originally proposed. As in the case of draft guideline 2.6.3, several members of the Drafting Committee had expressed concerns about the expression "for any reason whatsoever", which they had regarded as too broad or excessively strong. After careful consideration, and on the basis of a revised text proposed by the Special Rapporteur, the Drafting Committee had opted for simplified wording that established the freedom of a State or an international organization that formulated an objection to oppose the entry into force of the treaty as between itself and the author of the reservation. The commentary would clarify that, as similarly provided in draft guideline 2.6.3 dealing with the freedom to formulate objections, the freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation was not limited to those cases in which the reservation was incompatible with the object and purpose of the treaty or was regarded as such by the objecting State or international organization. Furthermore, as in draft guideline 2.6.3, the Drafting Committee did not deem it necessary to repeat that the freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation was to be exercised in accordance with the provisions of the Guide to Practice.

86. Turning to the set of draft guidelines dealing with the permissibility of reactions to reservations and the permissibility of interpretative declarations and reactions thereto, he drew attention first to the two guidelines on reactions to reservations, which would constitute section 3.4 of the Guide to Practice, entitled "Permissibility of reactions to reservations". Draft guideline 3.4.1 had been retitled "Permissibility of the acceptance of a reservation". It stated that the express acceptance of an impermissible reservation was itself impermissible.

87. The text referred to the Drafting Committee had been introduced in the plenary by the Special Rapporteur at the sixty-first session in 2009[148] in an effort to address the concerns expressed by some members who had felt that, contrary to what the Special Rapporteur had suggested in his fourteenth report, issues of permissibility did arise with respect to the acceptance of an impermissible reservation.

88. The Drafting Committee had adopted the text referred to it with some linguistic changes. Pursuant to a decision taken by the Commission at its fifty-eighth session, which had been reflected in the general commentary to the third part of the Guide to Practice,[149] the Drafting Committee had replaced the terms "substantive validity" and "validity" in the English text of the draft guideline with the word "permissibility", while in the French text the expression "*validité matérielle*" had been replaced by "*validité substantielle*". Those changes had been also introduced, as appropriate, in the other draft guidelines contained in the report before the Commission. He recalled in that connection that "permissibility" ("*validité substantielle*") referred to the substantive conditions for the validity of a reservation set forth in article 19 of the 1969 and 1986 Vienna Conventions and mentioned also in draft guideline 3.1, as opposed to the formal and procedural requirements, which had been addressed in article 23 of the Vienna Conventions and in the second part of the Guide to Practice. Furthermore, in the English text of draft guideline 3.4.1, the word "explicit", used to qualify "acceptance", had been replaced by the word "express".

89. Draft guideline 3.4.2 had been retitled "Permissibility of an objection to a reservation". He recalled that in his fourteenth report the Special Rapporteur had taken the position that objections to reservations were not subject to any conditions for permissibility. However, during the plenary debate in 2009, some members had argued that such conditions did exist with respect to the so-called objections "with intermediate effect"—in other words, objections purporting to exclude the application of provisions of the treaty to which the reservation did not relate.[150] The Special Rapporteur had then submitted a new draft guideline,[151] which the plenary Commission had referred to the Drafting Committee, establishing two conditions for the permissibility of an objection by which the objecting State or international organization purported to exclude, in its relation with the author of the reservation, the application of provisions of the treaty not affected by the reservation.

90. The text provisionally adopted by the Drafting Committee was based largely on the text that had been referred to the Committee by the plenary. Some minor changes had nevertheless been introduced. Thus, the term "permissibility", rather than "substantive validity" or "validity", had been inserted both in the title and in the text. Also, in order to follow more closely the terminology employed in article 21, paragraphs 1 (*a*) and 3, of the 1969 and 1986 Vienna Conventions, the Drafting Committee had preferred to refer in the draft guidelines text to an objection purporting to exclude the application of "provisions of the treaty to which the reservation does not relate" rather than "provisions of the treaty not affected by the reservation".

91. The first condition for the permissibility of an objection with intermediate effect, as stated in the first subparagraph of draft guideline 3.4.2, concerned the required link between the provision to which the reservation related and the additional provisions that the objection with

[148] *Yearbook … 2009*, vol. II (Part Two), p. 83, para. 82, footnote 371.

[149] *Yearbook … 2006*, vol. II (Part Two), pp. 143–145.

[150] *Yearbook … 2009*, vol. II (Part Two), p. 82, para. 76.

[151] *Ibid.*, p. 83, para. 82, footnote 372.

intermediate effects purported to exclude. After extensive discussion regarding the nature of that link, the Drafting Committee had decided to retain the expression "sufficient link", which had been proposed by the Special Rapporteur. It had been felt in particular that this wording would accommodate the two different views expressed in the Drafting Committee: the view that the link between the provisions concerned should be particularly strong, or even inextricable, and the view that an adequate link was sufficient and that no substantive relationship between those provisions was required. It had also been felt that the use of flexible terminology such as "sufficient link" was particularly appropriate in view of the fact that the condition probably pertained to the progressive development of international law.

92. The second condition for the permissibility of an objection with intermediate effect, enunciated in the second subparagraph of draft guideline 3.4.2, was that such an objection must not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection. The wording of that subparagraph had been based largely on the text proposed by the Special Rapporteur; however, the beginning of the sentence had been simplified by using the words "would not defeat the object and purpose of the treaty".

93. Turning to the draft guidelines dealing with the permissibility of interpretative declarations, he said that draft guideline 3.5, which had been retitled "Permissibility of an interpretative declaration", provided that a State or an international organization might formulate an interpretative declaration unless the interpretative declaration was prohibited by the treaty or was incompatible with a peremptory norm of general international law. The first exception to the freedom to formulate interpretative declarations had already appeared in the text originally proposed by the Special Rapporteur. The second exception had been included by the Special Rapporteur following the plenary debate at the sixty-first session, in the revised text of the draft guideline that had subsequently been referred to the Drafting Committee.

94. The Drafting Committee had adopted the text that had been submitted to it, although it had been hesitant to accept the replacement of the words "substantive validity" by "permissibility" in the title or the deletion of the adjectives "express or implicit" before the word "prohibited"[152] because it wished to ensure consistency with the text of the other draft guidelines. The commentary would explain that a prohibition of interpretative declarations that might be contained in a treaty could be either explicit or implicit.

95. Draft guideline 3.5.1 had been retitled "Permissibility of an interpretative declaration which is in fact a reservation". It stated that if a unilateral statement that purported to be an interpretative declaration was in fact a reservation, its permissibility must be assessed in accordance with the guidelines relating to the permissibility of reservations.

96. The text referred to the Drafting Committee had been a revised version submitted by the Special Rapporteur in the light of the plenary debate at the sixty-first session,[153] the title of which referred explicitly to the recharacterization of an interpretative declaration as a reservation. While preserving the substance of the original text, the Drafting Committee had nevertheless introduced a number of changes. Apart from the replacement of the word "validity" with "permissibility", the Committee had opted for a reformulation in which the text would begin with a conditional sentence introduced by "If". In addition, the words "recharacterized as a reservation" in the title had been replaced by the phrase "which is in fact a reservation". Those changes had been intended to make it clear that the recharacterization of an interpretative declaration could not in itself change the nature of the declaration—in other words, make it into a reservation—and that the determination of whether a statement was by nature an interpretative declaration or a reservation must be made on the basis of objective criteria.

97. The view had been expressed in the Drafting Committee that a draft guideline addressing those situations should also be included in the second part of the Guide to Practice which dealt with the procedure for the formulation of reservations and interpretative declarations.

98. Draft guideline 3.5.2 had been retitled "Conditions for the permissibility of a conditional interpretative declaration". It stated that the permissibility of conditional interpretative declarations must be assessed in accordance with the guidelines relating to the permissibility of reservations. That guideline complemented draft guideline 2.4.7, relating to the formal requirements for the formulation of a conditional interpretative declaration.

99. During the plenary debate at the sixty-first session and also in meetings of the Drafting Committee, the point had been made that if a conditional interpretative declaration provided the correct interpretation of the treaty or was to be accepted by the contracting States or international organizations, such a declaration should not be treated as a reservation for permissibility purposes. However, the opposite view had been also expressed, according to which the nature of a conditional interpretative declaration would not depend on the correctness of the interpretation formulated therein.[154] It had been also observed in the Drafting Committee that the issue could be revisited in the light of the Commission's consideration of the effects of reservations, interpretative declarations and reactions thereto. Furthermore, some doubts had been raised in the Drafting Committee as to the appropriateness of a complete alignment of the legal regimes of reservations and conditional interpretative declarations.

100. The Drafting Committee had nevertheless decided to retain the text proposed by the Special Rapporteur, although using the term "permissibility" instead of "substantive validity" in the title and in the text of the draft guideline; it had also corrected a typographical error in the cross reference to the relevant draft guidelines. He noted, however, that draft guideline 3.5.2 should be placed in square brackets pending a final decision by the Commission regarding the treatment of conditional interpretative declarations in the Guide to Practice.

[152] *Ibid.*, footnote 373.

[153] *Ibid.*, footnote 374.

[154] *Ibid.*, p. 82, para. 77.

101. Draft guideline 3.5.3, which had been retitled "Competence to assess the permissibility of a conditional interpretative declaration", stated that the provisions of guidelines 3.2 to 3.2.4, relating to the competence to assess the permissibility of reservations, applied *mutatis mutandis* to conditional interpretative declarations. It had been well received during the plenary debate at the sixty-first session; consequently, apart from the replacement of the word "validity" with "permissibility", as in the previous guidelines, and a few editorial changes, the text adopted by the Drafting Committee corresponded to the text originally proposed by the Special Rapporteur.

102. Regarding the set of draft guidelines dealing with permissibility of reactions to interpretative declarations, he said that draft guideline 3.6, which had been adopted by the Drafting Committee on the basis of a new text submitted to it by the Special Rapporteur,[155] was entitled "Permissibility of reactions to interpretative declarations". It stated the principle according to which an approval of, an opposition to, or a recharacterization of an interpretative declaration should not be subject to any conditions for permissibility, subject to the provisions of draft guidelines 3.6.1 and 3.6.2.

103. Draft guideline 3.6.1, which was entitled "Permissibility of approvals of interpretative declarations", stated that an approval of an impermissible interpretative declaration was itself impermissible. The substance of the draft guideline corresponded to that of the first paragraph of the revised text of draft guideline 3.6, which had been submitted to the plenary by the Special Rapporteur at the sixty-first session in the light of comments made during the debate and had subsequently been referred to the Drafting Committee. It would be recalled that the Special Rapporteur had initially proposed a draft guideline indicating that reactions to interpretative declarations were not subject to any conditions for permissibility. While some members had supported that position, others had been of the view that, in certain circumstances, an approval of, or opposition to, an interpretative declaration could be impermissible. Accordingly, at the 3025th meeting the Special Rapporteur had submitted to the plenary a revised text indicating that a State or an international organization might not approve an interpretative declaration that was expressly or implicitly prohibited by the treaty.

104. While retaining the substance of that proposal, the Drafting Committee had opted for simpler wording, stating more directly the impermissibility of an approval of an impermissible interpretative declaration. In order to ensure consistency with the text of other draft guidelines, the words "expressly or implicitly", used to qualify the prohibition of an interpretative declaration that might be contained in a treaty, had been omitted from the text. The possibility of express or implicit prohibitions of interpretative declarations in a treaty would be referred to in the commentary.

105. Lastly, draft guideline 3.6.2 was entitled "Permissibility of oppositions to interpretative declarations". It stated that an opposition to an interpretative declaration was impermissible to the extent that it did not comply with the conditions for permissibility of an interpretative declaration set forth in draft guideline 3.5.

106. It should be recalled that in the second paragraph of the revised version of draft guideline 3.6 that had been referred to the Drafting Committee in 2009, the Special Rapporteur had maintained his position that an opposition to, or a recharacterization of, an interpretative declaration was not subject to any condition for permissibility. Later, however, in order to accommodate some concerns that had already been expressed during the debate in plenary and which had been reiterated by some members in the Drafting Committee, the Special Rapporteur had submitted to the Drafting Committee a new text that had now become draft guideline 3.6.2.

107. The draft guideline purported to indicate that, in certain circumstances, an opposition to an interpretative declaration might itself be impermissible to the extent that it would not comply with the conditions for permissibility of an interpretative declaration. Thus, in the event that a treaty prohibited an interpretative declaration, as contemplated in draft guideline 3.5, the prohibition would also cover an opposition to that declaration if the opposition suggested an alternative interpretation.

108. The Drafting Committee recommended to the Commission that it adopt the set of draft guidelines he had introduced.

109. The CHAIRPERSON invited the Commission to adopt the draft guidelines contained in document A/CN.4/L.760.

110. Mr. CANDIOTI observed that there were many inconsistencies in the way that the term "permissibility" had been translated in the Spanish version of document A/CN.4/L.760 and said that they must be rectified lest they give rise to substantive problems.

111. Mr. McRAE (Chairperson of the Drafting Committee) said that the language groups would meet later in the week to deal with the type of concern raised by Mr. Candioti.

Draft guidelines 3.4.1 to 3.5.1

Draft guidelines 3.4.1 to 3.5.1 were adopted.

Draft guideline 3.5.2

112. Mr. HASSOUNA requested clarification of the status of draft guideline 3.5.2 and asked whether it would be subject to further review.

113. Mr. McRAE (Chairperson of the Drafting Committee) said that draft guideline 3.5.2 should be left in square brackets and adopted provisionally, pending a final decision on the treatment of conditional interpretative declarations in the Guide to Practice.

On that understanding, draft guideline 3.5.2 was provisionally adopted.

[155] *Ibid.*, p. 83, para. 82, footnote 375.

Draft guidelines 3.5.3 to 3.6.2

Draft guidelines 3.5.3 to 3.6.2 were adopted.

The draft guidelines contained in document A/CN.4/L.760 were adopted.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

114. Mr. NOLTE (Chairperson of the Study Group on treaties over time) announced that at the next meeting of the Study Group on treaties over time, to be held that afternoon, he would summarize the discussion that had taken place at the Study Group's previous meeting and would introduce the next part of the report to be considered.

The meeting rose at 1.05 p.m.

3052nd MEETING

Thursday, 27 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the agenda item devoted to effects of armed conflicts on treaties.

2. Mr. PELLET congratulated the Special Rapporteur on his excellent, very painstaking report and said that he would confine his comments to points where he was uncertain whether he was entirely of one mind with the Special Rapporteur, or which seemed to require some clarification. He broadly agreed with the Special Rapporteur's positions on the whole, but the argument for excluding agreements to which international organizations were parties was still rather weak. One aspect of the subject could not be dismissed by pleading the need for further research—which would probably not be that discouraging—and, above all, it would not be good practice for the Commission always to accompany draft texts on inter-State relations by draft texts on institutions or organizations. Previous experiences with the law of treaties, the law of responsibility or the law of immunities had been rather unsatisfactory, because when specific issues raised by international organizations were addressed separately from those posed by purely inter-State relations, it had proved very difficult to identify distinctive features and to examine them without reference to the provisions concerning inter-State relations. He therefore regretted the Special Rapporteur's position on that point and hoped that, at the next session, he would present an additional clause that would not prevent the adoption of the draft articles, but would include the requisite amendment of the wording of draft articles 1 and 2 to encompass international organizations. With that reservation, he approved of the proposed wording for draft article 1. Notwithstanding his intention to refer only to points of disagreement, he wished to express his admiration for the Special Rapporteur's endeavours to find an elegant definition of armed conflict that was suited to the purposes of the draft articles. He had been completely won over by those efforts, especially by paragraph 29 of the report because it included the vital subject of occupation, which was one of the real problems that made the subject worthwhile.

3. On the other hand, the current title of draft article 3 not only lacked elegance, as the Special Rapporteur had said, it was also vague and did not mean much. Draft article 3, which did not establish a presumption but noted a general principle, should be entitled "*Principe général d'extinction ou de suspension*" (General principle of termination or suspension), the expression "*principe général*" (general principle) having been used by the Special Rapporteur in paragraph 79. By definition, a general principle presupposed clarification, or exceptions which were in fact set forth in the subsequent articles. In draft article 4, a much discussed and extremely debatable provision, he still had his reservations about exclusively focusing subparagraph (*a*) on the intention of the parties, which was a pure fiction. Generally speaking, States did not contemplate the possibility of an armed conflict arising between them and he saw no point in claiming that they had any intention to do so. He was likewise doubtful that the general rule of interpretation taken from article 31 of the 1969 Vienna Convention should serve to determine the parties' intention. That would be using article 31 the wrong way round for, on the contrary, the parties' intention had to serve to interpret the treaty. The spirit of article 31 clearly required that the text take precedence over intention, as was demonstrated by the very subsidiary role that the Vienna Convention assigned to preparatory work, although it was the best means of ascertaining intention. A more minor consideration was that he was against having one convention refer to another when that could be avoided and even more so when that must be avoided, as was the case in that context. Above all, he still thought that the true indicium—which was almost a criterion—of susceptibility to termination, withdrawal or suspension of the operation of a treaty was not the fictional intention of the parties, but the nature, object and purpose of a treaty, or its subject matter. But since the latter was not covered by draft article 4, but by draft article 5, that raised the fundamental problem of the linkage between those two draft articles, a problem that had to be solved. Undoubtedly the simplest solution would be to merge them and to mention the object and subject

[*] Resumed from the 3040th meeting.