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Summary record of the 3052nd meeting

Topic:
Effects of armed conflicts on treaties

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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. Candiotti, 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.

matter of the treaty as the primary indicium of whether a treaty could be suspended or denounced in the event of armed conflict. Moreover, in the introduction to draft article 5, the Special Rapporteur consciously or unconsciously tended towards that view, because he repeatedly stressed the need to read draft articles 4 and 5 together in order to decide whether a treaty could be suspended or denounced. He therefore proposed that those two draft articles should be merged into one, since that would mirror reality much better. On the other hand, he had no problem with subparagraph (b) of draft article 4; the Special Rapporteur was absolutely right in wishing to limit one draft article's reference to another, because the text in question was not a guide to practice, but a relatively short holistic set of provisions, each of which had to be read in the light of the others. In respect of draft article 5, he was distinctly less unenthusiastic than the Special Rapporteur about the proposal by Switzerland to add the paragraph reproduced in paragraph 61 of the report, provided that the phrase "as well as the Charter of the United Nations" was deleted from it and border treaties were included, to which the Special Rapporteur agreed, if he had understood him correctly. In other words, he very much liked the wording proposed in paragraph 62 of the report and he hoped that the Commission meeting in plenary session would expressly refer that provision to the Security Council, for the Drafting Committee would be far overstepping the limits of its competence if it were to make a decision on that point. It was, however, within the powers of the Drafting Committee to study in detail the list annexed to draft article 5, if it were retained. Even if the second paragraph that he had just mentioned were added to that provision, he wondered whether that non-exhaustive explanatory list should really be incorporated into the draft text and, on reflection, he shared the viewpoint of China and the Nordic States in that respect (see paragraph 64 of the report). First, the Special Rapporteur said that the current solution offered "a greater degree of normativity", which was correct and the reason why it would be better to put the list in the commentary (*ibid.*). Formally annexing the list to draft article 5 would make it more rigid and would detract from the flexibility and pragmatism so convincingly championed elsewhere by the Special Rapporteur. Secondly, speaking both generally and as a matter of principle, he was not a proponent of the hybrid solution which always consisted in including examples, or a non-exhaustive list, in a codification exercise. The latter had to remain general and non-subjective, especially as such texts were, by definition, accompanied by commentaries that made it possible to add details which should not figure in the draft article itself. Thirdly, it was clear that even if the list was only indicative, there was far from unanimous agreement on it. Some States proposed that it should be shortened, while others, sometimes the same ones, suggested that it should be lengthened. Since it was controversial, at times justifiably so, it would be preferable not to cast it in stone in the text, especially if there were plans to turn it into a "hard" law instrument, a separate convention or a protocol to the Vienna Conventions. He would therefore not add to the cacophony by commenting on the proposed list. It should become part of the commentary and, if necessary, he would then adopt a position on it.

4. With regard to draft article 6, he endorsed the proposal by Switzerland, to which reference was made in

paragraph 74, that this provision should have made it clear that it was without prejudice to the duty of belligerent parties to comply with the rules of international law to which they were subject independently of the treaty between them. Even if that went without saying, that clarification was sufficiently important to require inclusion in the draft articles. Since, however, it already appeared in draft article 9, he wondered about the linkage between the latter and the additional paragraph to draft article 6. While he fully agreed with the beautifully Cartesian structure proposed by the Special Rapporteur in paragraph 79 of the report, which directly influenced the positioning of current draft article 7 in the set of draft articles, he had difficulty in understanding the passions that draft article 8 seemed to have aroused. He was sceptical about the additional paragraph suggested by the Special Rapporteur in paragraph 87 and reproduced in paragraph 5 of draft article 8, as it seemed both complicated and self-evident. On the other hand, he agreed with the suggestion by China that was contained in paragraph 92 of the report. It would be logical and useful if notification under draft article 8 were to be sent to all the parties to the treaty, as provided for in the first paragraph.

5. He did not like the idea expressed in brackets in the title of draft article 11 that a State would lose an "option". That was not a term of art. In law, a right could be lost or won. Even if the text did not expressly say so, State parties could indeed assert such a right if the conditions set out in the draft article were met. Moreover, the Drafting Committee should thoroughly rework draft article 11 whose two subparagraphs should be merged harmoniously in order to avoid ambiguity. While he was in favour of merging former draft articles 12 and 18, he was unconvinced by the somewhat esoteric title of that provision and the wording of paragraph 2. In the title, so as not to confuse the lay reader, it would be preferable to speak more generally of the "*Reprise des relations conventionnelles après un conflit armé*" (Resumption of treaty relations subsequent to an armed conflict). In paragraph 2, he had great difficulty in understanding the reference to draft article 4 and why it differed in wording, and even spirit, from paragraph 1.

6. In conclusion, he recommended referral to the Drafting Committee of draft articles 1 to 18. The Special Rapporteur had already considerably improved a draft which had scarcely filled him with enthusiasm at first reading. He greatly hoped that the Commission would send to the Drafting Committee the text of additional draft paragraph 2 to draft article 5, as proposed by the Special Rapporteur in paragraphs 62 and 70 of the report.

7. Mr. CANDIOTI, noting that Mr. Pellet had proposed that draft article 3 be entitled "General principle of termination or suspension", drew attention to the fact that the text dealt more with the general principle of the continuity of treaties and asked for some clarification on that point.

8. Mr. DUGARD agreed with Mr. Pellet that it would be unwise to omit a reference to international organizations in draft article 1 for reasons of convenience or propriety. However, if international organizations were to be included, it would be necessary to explore the nature of an armed conflict to which an international organization

was party. That would require the Special Rapporteur to reconsider other provisions as well, such as the definition of armed conflict in draft article 2. The task would not therefore be easy, because it would probably entail a complete revision of all the draft articles. As for draft article 4, where the Special Rapporteur referred to the need to consider the intention of parties to the treaty, Mr. Pellet was right to say that the intention of parties was a fiction, but it was a fiction that was well known in both municipal and international law systems, because in some respects law was based upon fictions. He did not see why that fiction should not be included in draft article 4, subparagraph (a). Mr. Pellet's suggestion that the items listed in the annex to draft article 5 be placed in the commentary raised the question of whether it was appropriate to leave important issues of that kind to the commentary. The Commission seemingly had a tendency, when it wished to avoid dealing properly with issues, to relegate them to a commentary, but many people read only the text and not the commentary. The Commission should therefore decide whether it preferred the formulation proposed in paragraph 62 to an indicative list, but in either case its choice should be placed in the text itself rather than in the commentary.

9. Mr. CAFLISCH (Special Rapporteur) said that, as Mr. Dugard had rightly pointed out, inclusion of international organizations would entail reconsideration of all the draft articles and it was far from certain that the requisite support for that would be obtained.

10. He recognized that the title of draft article 3 was far from satisfactory and he therefore invited Commission members to follow Mr. Pellet's example by proposing alternatives. However, there must be no reference to a presumption, because that would be incorrect.

11. Mr. VÁZQUEZ-BERMÚDEZ said that draft article 3 did contain a general principle, as Mr. Pellet had stated—that of the stability and continuity of treaties. In 2007, he himself had proposed that the draft article should be entitled “Principle of continuity”.¹⁵⁶ Of course, that general principle admitted exceptions that had to be determined in the light of the indicia set forth in draft article 4, but in that case it would then be necessary to ascertain, not whether the treaty continued to apply, but whether, having regard to the principle of continuity, it was susceptible to termination or suspension. Draft article 5 established that the subject matter of some treaties meant that they remained unaffected by armed conflicts.

12. Sir Michael WOOD agreed that draft article 3 laid down a general principle, but the title must accurately reflect the gist of the provision, which was that the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties. That general principle was not one of continuity.

13. Mr. HMOUD shared Mr. Dugard's opinion with regard to the need to retain the criterion of parties' intention in draft article 4. During the first reading, the Working Group had ultimately decided on the compromise of not employing the term “intention”, even if reference were made to it in articles 31 and 32 of the 1969 Vienna

Convention. However, a treaty had to be interpreted in the light of the parties' intention; if the latter was unclear, it had to be worked out from the content of the treaty. The previous Special Rapporteur had already made it clear that case law had held that, for the purposes of deciding on the termination or suspension of a treaty, the parties' intention always had to be examined in the light of the articles of the Vienna Convention.

14. Mr. PELLET, replying to Mr. Candiotti, explained that he had meant to speak of a “general principle” of the absence of a rule entailing termination or suspension in the title of draft article 3. That would make it possible to delete the words “*ipso facto*”. The expression was used by the Special Rapporteur himself in paragraph 79 of the report. It would also be possible to speak of a “general principle of the continuity of the treaty” if some members preferred that formulation. The main thing was to make it clear that what was concerned was a general principle to which exceptions could be made. On the other hand, as the Special Rapporteur had said, no reference should be made to a presumption.

15. He still thought that the practice of drawing a distinction between international organizations and States had never produced very convincing results and that leaving them out would complicate work at a later stage. Having said that, the annex to draft article 5 remained the main problem. It had to be solved by the inclusion of rules in the article itself and not by means of a list, even an annexed one. Giving examples was tantamount to commenting and that was not the purpose of a legal text. Above all, the Commission should avoid drawing up another list like the one that had been contained in article 19, paragraph 3, of the draft articles on State responsibility adopted by the Commission on first reading.¹⁵⁷ That was why the solution proposed by Switzerland for draft article 5 seemed appropriate.

16. Lastly, turning to the criterion of the parties' intention, he emphasized that trying to ascertain that intention was not the same thing as trying to determine the purpose of the treaty. The former consisted in trying to reconstruct what the parties had had in mind, at a time when their relations were harmonious, should an armed conflict occur—in other words, a situation which they were not then contemplating. That was not therefore a feasible test. Moreover, article 31 of the 1969 Vienna Convention indicated that, when interpreting a treaty, it was necessary to begin by disregarding the parties' intention and to abide by the text. The Commission was therefore in the process of reinventing that article. Reference could certainly be made to it as one of several indicia, but that would probably complicate, rather than simplify matters. The real, reliable, objective indicia were those mentioned in draft article 5, in other words the subject matter, nature and object of the treaty which, of course, had to be interpreted.

The meeting rose at 11 a.m.

¹⁵⁶ *Yearbook ... 2007*, vol. I, 2927th meeting, p. 78, para. 29.

¹⁵⁷ *Yearbook ... 1976*, vol. II (Part Two), pp. 95 *et seq.*, especially pp. 120–121, paras. (65)–(71) of the commentary.