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Summary record of the 3054th meeting

Topic:
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69. As far as draft article 2 was concerned, he considered the definition contained in the resolution adopted in 1985 by the Institute of International Law, from which the definition in draft article 2 (b) as adopted on first reading had been drawn, to be the best model. It brought into play the crucial three concepts of the State, the treaty and armed conflict. The definition from the *Tadić* case did not include all those elements and was only a general one. However, paragraph (3) of the commentary to draft article 2 adopted on first reading stated that “[it] is not the intention to provide a definition of armed conflict for international law generally, which is difficult and beyond the scope of the topic”.¹⁶⁴ Paragraph (4) of that commentary explained in very clear terms that the definition applied to treaty relations between States and served to include within the scope of the draft articles the possible effect of an internal armed conflict on the treaty relations of a State involved in such a conflict with another State.¹⁶⁵ That was the correct approach to which the Commission should adhere. It was perfectly compatible with the 1969 Vienna Convention and would be useful for the legal interpretation of the whole text. He would therefore opt for a definition of armed conflict taken from the resolution of the Institute of International Law rather than for the definition deriving from the *Tadić* case. Different definitions for dissimilar purposes would not affect the unity of international law. The Commission should therefore retain the draft article 2 as adopted on first reading.

70. Mr. FOMBA endorsed the general methodological approach set out in paragraph 4 of the report.

71. For practical and legal reasons, no distinction should be drawn in draft article 1 between international and internal armed conflicts. An unduly simplistic or superficial conception of the scope *ratione personae* of treaties was to be avoided. To ignore treaties to which international organizations were parties would create a sizeable legal lacuna: they would have to be dealt with somehow, but the question was when and how. The Special Rapporteur was not in principle against doing so, despite the objective, convincing arguments he put forward regarding the impracticality of such an endeavour. There did not therefore seem to be any fundamental contradiction with Mr. Pellet’s position, especially as at the end of paragraph 8 of the report the Special Rapporteur did not rule out the possibility of adopting a new series of rules to be based on article 74, paragraph 1, of the 1986 Vienna Convention. He was in favour of replacing “apply to” with “deal with” and of employing the phrase “where at least one of these States is a party to the armed conflict”, since it was clearer.

72. In draft article 2, the Special Rapporteur was rightly reluctant to combine texts from 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), in order to define the scope *ratione materiae* of the notion of “armed conflict”. The proposal to opt for wording similar to that used in the *Tadić* case was justified. The proposal to retain paragraph (6) of the commentary to draft article 2, which expressly stated

that the definition included the occupation of territory, even in the absence of armed resistance, was acceptable.

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

[Agenda item 1]

73. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) said that the Working Group would be composed of the following members: Mr. Cafilisch, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie (Rapporteur), *ex officio*, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue.

74. Other members of the Commission were welcome to join the Working Group.

The meeting rose at 1.05 p.m.

3054th MEETING

Tuesday, 1 June 2010, at 10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Murase, 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 continue the debate on the first report on the effects of armed conflicts on treaties, beginning with draft articles 1 and 2.

2. Mr. WISNUMURTI said that he appreciated the Special Rapporteur’s decision not to make drastic changes to the draft articles adopted on first reading, not to focus excessively on doctrinal considerations and to take into account the comments of Member States. Draft article 1 had raised a number of important issues that were carefully analysed in paragraphs 6 to 12 of the report. It was clear that the inclusion of international organizations in the scope of the topic would require substantial adjustments

¹⁶⁴ *Yearbook ... 2008*, vol. II (Part Two), chap. V, sect. C.2, p. 47.

¹⁶⁵ *Ibid.*

* Resumed from the 3051st meeting.

that would delay the Commission's work. Furthermore, as aptly stated by the Special Rapporteur, "international organizations as such do not wage war". In the context of the topic on responsibility of international organizations, the Commission had already had a similar debate on their right to self-defence. The inclusion of international organizations in the topic under consideration would thus have wider implications.

3. With regard to draft article 1, he recognized that treaties applied provisionally on the basis of article 25 of the 1969 Vienna Convention should continue to be applied provisionally at the time of the outbreak of armed conflict, but he did not think it necessary to include a reference to article 25. It was also proposed to say that the draft articles "deal with" rather than "apply to", as in the earlier version, but that was not specific enough, especially since draft article 1 concerned the scope "of application". It would be preferable to retain the original formulation and to give it a more legalistic drafting with the words "shall apply".

4. On draft article 2, subparagraph (b), the Commission should maintain the decision taken in 2008¹⁶⁶ and adopt a definition of armed conflict that was broad enough to cover non-international conflicts without it being expressly enunciated.

5. The Special Rapporteur had sought to improve the definition of armed conflict by drawing on various legal instruments and decisions, in particular the wording used by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case. However, unlike the Tribunal, the draft article referred to situations in which "there has been" a resort to armed force, which excluded any protracted situation, even though the word "protracted" was used in the second part of the sentence. The word "protracted" had given rise to a mini-debate, but did not pose a problem as such, apart from giving the impression that it placed the resort to armed force by governmental authorities and by organized armed groups on an equal footing, which was inappropriate. On the other hand, a reference was needed, either in the commentary or in a "without prejudice" clause, to international humanitarian law as a *lex specialis*.

6. Sir Michael WOOD also welcomed the Special Rapporteur's pragmatic approach. He agreed with the Special Rapporteur—and the majority of Member States seemed to have done so as well—about not extending the draft articles to treaties to which international organizations were parties. Mr. Dugard had already explained the complexities that such an undertaking would entail.

7. He did so with some regret, since such treaties played an ever increasing role in international relations, to which the extensive treaty relations of the European Union testified. Moreover, he was not sure that international organizations could not become parties to armed conflicts: that did not necessarily follow from article 74, paragraph 1, of the 1986 Vienna Convention, nor was it the case in practice. However, he was not in favour either of the Commission taking up the matter subsequently and separately.

The best solution would be to add an article 2 *bis*, based on article 3, subparagraph (b), of the 1969 Vienna Convention, which would read:

"The fact that the present draft articles do not apply to international agreements concluded between States and other subjects of international law, or to international agreements not in written form, shall not affect the application to them of any of the rules set forth in the present draft articles to which they would be subject under international law independently of the draft articles."

8. The suggestion by the United Kingdom to replace "applies" by "deals with" was not an improvement. Despite the somewhat different context, the Commission should not depart from the language of the Vienna Conventions.

9. The Special Rapporteur's suggestion for the definition of armed conflict to follow the *Tadić* formula was entirely satisfactory, because it was based on a careful and convincing analysis. If the Commission decided to include non-international armed conflicts in the draft articles, it would have to consider the differences between the effect in practice, if any, of such armed conflicts on treaties and the effect of armed conflicts between States. Draft article 2 made clear that the definition of armed conflict was solely "[f]or the purposes of the present draft articles", but that definition might nevertheless influence the interpretation of treaties that were not directly affected by the outbreak of armed conflict because of their subject matter. Some treaties contained derogation clauses applicable in time of armed conflict which might be interpreted in the light of the definition of armed conflict decided by the Commission. Thus, a broad definition of armed conflict might inform the understanding of what constituted a permissible derogation under article 4 of the International Covenant on Civil and Political Rights or the interpretation of necessity clauses in bilateral or multilateral investment treaties.

10. In his view, draft articles 1 and 2 could be referred to the Drafting Committee.

11. Mr. CANDIOTI recalled that the topic under consideration was particularly complex due to existing uncertainties in sources and doctrine, the great diversity of State practice and new forms of armed conflict. It had thus been necessary for the Commission to undertake to clarify and codify law in the area. The starting point of its work was clearly the law of treaties as defined in the 1969 Vienna Convention, which regulated treaty relations both in time of peace and in time of war. The objective was not to establish a list of all possible effects of an armed conflict on treaties. In general, a conflict did not produce any significant effect on treaties: practice showed that treaties usually remained in force in most conflicts. Thus, the draft articles focused on the exceptional effects that a conflict could have on a treaty, namely its termination or the suspension of its operation. The case in which a conflict could have the effect of modifying a treaty without necessarily resulting in its termination or suspension had not yet been envisaged, and it should perhaps be mentioned, for example in draft article 6, paragraph 2, adopted on first reading.¹⁶⁷

¹⁶⁶ *Yearbook ... 2008*, vol. II (Part Two), chap. V, sect. C.2, p. 47.

¹⁶⁷ *Ibid.*, p. 59.

12. The form of the draft articles still had to be decided: draft convention, protocol to the Vienna Convention or declaration of principles, for example. To start with a declaration enunciating rules would leave open the possibility of subsequently elaborating a binding instrument. Moreover, a preamble should be added which recalled the objectives of the draft articles and their underlying principles. There was no need for the Commission to do so at the current stage, but it should bear those tasks in mind; that would help in deciding what direction to take. One of the chief objectives of its work was respect for the prohibition on the use of force as regulated by the Charter of the United Nations and the principle of *pacta sunt servanda*. The draft articles should therefore exclude the possibility for a State that illegally made use of force to take advantage of the armed conflict to stop complying with its treaty obligations. At the same time, the draft articles must aim to protect and promote the stability and continuity of legal treaty relations in the event of armed conflict. As to its final structure, it could be based on paragraph (5) of the commentary to article 1 approved on first reading¹⁶⁸ and could be made up of a preamble followed by an introductory chapter covering scope and definitions (arts. 1 and 2), a chapter on general provisions, a chapter containing special or ancillary provisions and a chapter on “without prejudice” clauses.

13. With regard to the text of the draft articles, he approved the definition of scope in draft article 1. However, if the exclusion of the effects of armed conflicts on treaties to which international organizations were parties was maintained, it would need to be explained in the commentary. It was useful to make it clear that the scope of the draft articles extended to all armed conflicts involving at least one State party to the treaty. Article 2, paragraph 1, did not call for any remarks, because it reproduced the classic definition of a treaty from the Vienna Conventions. Paragraph 2 defined the term “armed conflict”, thereby clarifying the scope. It was appropriate to draw on the definition used in the *Tadić* case, but the commentary should explain why the report made the subtle and perhaps unnecessary distinction between “*recours à la force armée*” for armed conflicts between States and “*recours aux armes*” for conflicts between governmental authorities and organized armed groups (“resort to armed force” in both cases in the English version). He also wondered why such resort was termed “protracted” only in the latter case. On a final point, he said that other definitions might need to be added later. For the moment, draft articles 1 and 2 could be referred to the Drafting Committee.

14. Ms. JACOBSSON welcomed the Special Rapporteur’s decision, despite the avalanche of comments triggered by draft article 1, not to modify the text adopted in 2008, apart from a minor change of form. However, as noted in paragraph 8 of the report, the difficult question remained of whether or not the draft article should also “cover the effects of armed conflicts on treaties to which international organizations are parties”. She had already expressed her opposition in 2007 to the introduction of a provision along those lines, because it would complicate and delay the work of the Commission. Moreover, the issue could be addressed separately at a later stage. In

any event, the question as posed was not clear. Was the point to exclude from the scope all treaties of which one party was an international organization, such as the case of the United Nations Convention on the Law of the Sea and treaties to which the European Union was a party? It would be unfortunate if such treaties were excluded simply because the Commission had not considered the question. It was true that an instrument such as the United Nations Convention on the Law of the Sea might also be excluded under article 5 and its annex, but that was far from clear and had to be clarified before the draft articles were referred to the Drafting Committee.

15. Nor was it clear that “armed conflict” in draft article 2 needed to be defined. There were far too many definitions of “armed conflict” and similar concepts, which were always given for the sole purposes of a particular convention, but she failed to see how they made the application of the article in question more predictable and lucid. However, if a definition was needed, she agreed with the Special Rapporteur that, as pointed out in paragraph 16 of the report, it would be detrimental to the unity of the law of nations to apply a given definition in the field of international humanitarian law and a completely different definition in the field of treaty law. The question was: would the *Tadić* definition do the trick? Admittedly, the tendency in the development of international law had been to do away with the distinction between international and non-international armed conflicts, a circumstance which the *Tadić* definition took into account, the aim being to ensure that the law of war, and in particular international humanitarian law, applied as equally as possible to all situations of armed conflict, irrespective of its nature. That was a development in the context of *jus in bello*, but the question was whether it would have as positive an effect in the case of treaty law. Would the positive effect be welcome if emphasis was placed on the rule (the continuity of the treaty) rather than on the exception (its termination or suspension)? She hoped so, but was not entirely convinced. However, given the Commission’s view that international law was and should remain a unified whole, that was the only possible approach. Thus, irrespective of whether a definition of armed conflict was included, the draft articles on the topic must cover all conflicts, both international and non-international.

16. Another question was whether occupations and blockades should be included. As she saw it, the latter had no place in the draft articles. A blockade had no separate standing from other measures taken during an armed conflict and thus was subject to the law of war. The question might arise as to whether it could be used in an internal armed conflict, but that was a different issue. On the other hand, the question of occupation was regulated under a special branch of the law of war. If the Commission explicitly included occupation in the scope of the draft articles, it would avoid a discussion of whether occupation constituted an armed conflict as defined in draft article 2 (b). If the Commission decided to maintain the definition in its current wording, it should expressly include occupation. Clearly, there were other situations of occupation in addition to those cited. An occupation could be temporary or geographically limited. The same area could be occupied successively by different parties to the conflict. However, since the Commission was considering

¹⁶⁸ *Ibid.*, p. 47.

a situation in which the occupation prevented the parties to the conflict from fulfilling their treaty obligations, it would be preferable to say so clearly.

17. She was in favour of referring draft article 1 to the Drafting Committee. Although reluctant to have a definition of armed conflict in draft article 2, she would bow to the majority view on that question.

18. The CHAIRPERSON, speaking as a member of the Commission, expressed appreciation to the Special Rapporteur for his careful analysis and consideration of each of the issues raised by Member States. An examination of State practice was also important in order to ascertain the legal effects of armed conflicts on treaties. The main aspects of the topic were treaty relations between States and the operation of treaties in time of armed conflict. The starting point was the assumption that treaty relations should not necessarily be considered to cease in the event of an armed conflict. At the same time, it must be borne in mind that situations of armed conflict were very complex and varied. Any sweeping conclusions drawn on the basis of that assumption might not be able to stand the test of State practice. For that reason, the Special Rapporteur had rightly stressed that many of the elements contained in the draft articles must be examined in the particular circumstances of each case. Thus, the general approach followed on first reading should be retained.

19. The question of whether to include international organizations in the scope of the draft articles had become a matter of convenience rather than principle, because of the delay that such a review would entail. The fact that the Special Rapporteur was working on the basis of article 73 of the 1969 Vienna Convention but not article 74, paragraph 1, of the 1986 Vienna Convention should not prevent the Commission from taking up the issue. Technically, however, she understood that substantial research should be conducted before any decision on that point was taken.

20. With regard to draft article 2 (Use of terms), the change made to subparagraph (b) was substantial. The Special Rapporteur had proposed the definition used by the International Tribunal for the Former Yugoslavia in the *Tadić* case, but the point needed to be examined more closely. If the object and purpose of the draft articles was to maintain the stability and continuity of treaty relations as well as the treaty rights and obligations of States in the event of an armed conflict, the scope of the articles should perhaps be directly linked to treaties. That meant that the draft articles did not deal with any situation in which there was resort to armed force if such resort did not reach a level, intensity and duration likely to affect the application of treaties between States. However, the current revised wording of subparagraph (b) could be interpreted as including any type of use of armed force, regardless of whether such use had an impact on the application of treaties.

21. The concern expressed by a number of members about the word "protracted" was justified, since it was not clear how long an event had to last for it to be so qualified, and it opened the door to subjective decisions. The original wording ("a state of war or a conflict which

involve armed operations") provided a higher threshold than the phrases "resort to armed force" and "protracted resort to armed force". Adding the condition that such a situation was likely to affect the application of treaties between States would make the scope of the draft articles more manageable: only when an armed conflict, either international or internal, was likely to have effects on the application of treaties would those effects be considered in the context of the law of treaties. Otherwise, such legal issues did not arise under the draft articles.

22. Another point in favour of a more strict scope was that nowadays, when the traditional distinction between the law of peace and the law of war had become blurred, general international law, in the current case the 1969 Vienna Convention, should remain applicable to the extent possible, because it was in the general interest of States to maintain the normal legal order as far as necessary.

23. The view taken by some States, as set out in paragraph 6 of the report, that the scope of the draft articles should be restricted to treaties between two or more States of which more than one was a party to the armed conflict, was interesting, but it was tenable only to the extent that armed conflicts to be excluded from the scope were unlikely to produce effects on the application of treaties between States parties. Otherwise, the States concerned, whether engaged in the armed conflict or affected by it, should be able to invoke the draft articles to determine their treaty relations.

24. Therefore, the question was not whether the current draft articles should only cover international armed conflicts or both international and internal armed conflicts, but what kind of armed conflicts should be considered to be excluded from the scope of the Vienna Conventions under article 73 and what should be left to the domain of domestic law. The revised version of draft article 2 (b) could be given a very broad interpretation to include domestic demonstrations and riots that eventually resulted in the resort to armed force or became protracted and continuous events. Under such circumstances, if the government concerned claimed that there was a supervening impossibility to perform some of its treaty obligations, the matter should come under articles 61 and 62 of the Vienna Convention rather than the draft articles. She did not see any contradiction if such situations were excluded from the scope.

25. She could fully understand the policy consideration of the International Tribunal for the Former Yugoslavia in adopting a broad definition of armed conflicts, the aim having been to prevent impunity. If the Commission adopted a stricter definition, it did not mean that more treaties would not operate in time of armed conflicts. On the contrary, treaties would continue to be governed by the 1969 Vienna Convention. She did not agree with the Special Rapporteur that the adoption of a definition of armed conflict different from the one applied by international criminal courts would be detrimental to the unity of the law of nations. First of all, it was questionable whether the Tribunal's definition of armed conflict in the *Tadić* case could be regarded as authoritative, replacing existing definitions, and as such applicable across the board in all areas of international law. The scope of application of treaties relating to international humanitarian law and

those applicable in time of armed conflict was determined by the terms of each convention as intended by the States parties and therefore should not and could not be changed by the scope of the draft articles. Moreover, a high threshold for the scope would mean that States would have less ground to terminate, suspend or withdraw from their treaty obligations, because the draft articles were meant to address exceptional circumstances resulting from the outbreak of armed conflict. Only when certain conditions were met would general treaty law not be applied in the event of armed conflict. Finally, the scope as proposed by the Special Rapporteur differed from that in the *Tadić* case because it excluded armed conflicts between organized armed groups. Those were different definitions that should not unduly affect the unity of the law.

26. Having carefully studied the report, she was inclined to retain the general elements of the original text of the first two draft articles. In her view, the proposed versions should be referred to the Drafting Committee.

27. Mr. MURASE said that, like a number of other members of the Commission and the Sixth Committee, he was troubled by the negative formulation of draft article 3. The article was supposed to be the “core provision” of the entire draft articles, and thus the Commission should adopt a more positive or affirmative formulation, stating first the general rule and then the exceptions to it. As currently worded, draft article 3 suggested that the Commission had not reached a consensus on first reading on a crucial point, namely which general rule had been adopted.

28. There were three schools of thought about the effects of armed conflicts on treaties: the theory of treaty termination by war; the theory of treaty continuity; and the theory of differentiation, or compromise theory. The Commission must take a clear position and decide where it stood. He agreed with Mr. Vázquez-Bermúdez and others that the Commission should clearly state in draft article 3 that the continuity of treaties was a general rule and then provide for the exceptions.

29. In his view, draft article 4 (b) was a tautology as long as it stipulated that resort was to be had to “the effect of the armed conflict on the treaty” to ascertain the effects of an armed conflict. It was appropriate to refer to the nature, extent, intensity and duration of the armed conflict, but the reference to the effect of the armed conflict on the treaty should be deleted (para. 51 of the report). The proper criterion seemed to be the compatibility of a treaty with a given armed conflict rather than the effect of the armed conflict on the treaty. Moreover, the elements for ascertaining such compatibility were the subjective elements of the intentions of the parties to the treaty and the objective elements of the nature, extent, intensity and duration of the conflict. He hoped that the commentary would elaborate on those four criteria.

30. Although he agreed with the Special Rapporteur’s approach of enunciating a general provision in draft article 5, he had reservations about having an annexed list of indicative categories of treaties. He doubted whether it would be possible to make such a simple, unqualified and sweeping enumeration of, say, commercial treaties,

human rights treaties or environmental treaties (para. 70). He would confine his remarks to subparagraph (f) of the annex, namely treaties relating to the protection of the environment. From the point of view of *jus in bello*, as long as the environmental damage was below the equilibrium point of military necessity and humanitarian considerations, they were permissible as “collateral damage”. It should be noted that article 35 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) prohibited the use of weapons and methods of warfare only if they caused “widespread, long-term and severe damage to the natural environment”. It was not inconceivable that a party might justifiably consider it necessary to suspend a bilateral or regional environmental treaty during an armed conflict. He did not believe that a treaty had to continue to be operative just because its subject matter was the environment. The same could be said with regard to other categories of treaties enumerated in the annex, and appropriate qualifications were needed. The list was problematic in its current form and should be moved to the commentary.

31. With regard to draft article 6 (Conclusion of treaties during armed conflict) (para. 76), he was in favour of deleting the phrase “in accordance with the 1969 Vienna Convention on the Law of Treaties” in paragraph 1. Under common article 6 of the Geneva Conventions for the protection of war victims, on special agreements, it was considered that States were not bound by the formal requirements of treaty-making, such as signature and ratification, since in wartime it was often necessary to take immediate steps under circumstances that made it impracticable to observe the formalities normally required. An armistice agreement was another typical example of a treaty concluded during an armed conflict. Armistice agreements were sometimes concluded *ultra vires* in violation of the internal law of a State, especially martial law. Article 46, paragraph 1, of the Vienna Convention provided that *ultra vires* treaties might lead to invalidity. During an armed conflict, however, ensuring international public order might prevail over the consideration of securing the internal order of a State. For those reasons, he suggested that the words “in accordance with the 1969 Vienna Convention on the Law of Treaties” be replaced by “in accordance with the rules of international humanitarian law”.

32. On draft article 6, paragraph 2, he understood why the Special Rapporteur was of the view that the word “lawful” was necessary. States were required to observe the rules of international humanitarian law and not to derogate from them by *inter se* agreements. However, the word “lawful” was inappropriate, and he proposed replacing it by the phrase “unless otherwise prohibited by international humanitarian law”.

33. Another question concerned the effect of a material breach on armistice agreements. In that connection, article 40 of the Regulations concerning the Laws and Customs of War on Land provided that “[a]ny serious violation by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately”. However, according to Professor Richard Baxter, that could no longer be said to be a rule of general application, because under the

Charter of the United Nations the parties to an agreement for suspension of hostilities could not lawfully denounce it or resume hostilities.¹⁶⁹ Already in 1951, the Security Council had stated in resolution 95 (1951) of 1 September 1951 on the Suez Canal conflict that “since the armistice regime ... is of a permanent character, neither party can reasonably assert that it is actively a belligerent”.

34. In that context, he drew attention to the current controversy between the Democratic People’s Republic of Korea and the Republic of Korea, both of which claimed violations of the 1953 Armistice Agreement.¹⁷⁰ There was nothing wrong with the two sides basing their claims on the Armistice Agreement; on the other hand, it would be quite another matter if one or the other party referred to its suspension or termination.

35. On 27 May 2009, the Democratic People’s Republic of Korea had announced that it would no longer be bound by the 1953 Armistice Agreement, since the Republic of Korea, in violation of the Agreement, had joined the Proliferation Security Initiative¹⁷¹ created by the United States of America and that since the Agreement had lost its binding force, the Korean Peninsula was bound to immediately return to a state of war *from a legal point of view*. The example demonstrated that the question of the suspension of an armistice agreement was a real and serious problem in international relations. He hoped that in the commentary to draft article 6, the Commission would make it clear that armistice agreements could no longer be so easily abrogated.

36. Mr. VÁZQUEZ-BERMÚDEZ said that, as recalled by the Special Rapporteur, draft article 3 was derived from article 2 of the 1985 resolution of the Institute of International Law, which read: “The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.”¹⁷²

37. Following comments made by States as to the use in the previous version of the draft article of the word “necessarily”, the Special Rapporteur had reverted to “*ipso facto*”, as in the 1985 resolution. Personally he did not think it appropriate to use Latin expressions, since everyone did not necessarily attribute the same meaning to a given expression. He therefore suggested replacing “*ipso facto*” by words that reflected its meaning and scope and proposed the following formulation for draft article 3: “The outbreak of an armed conflict does not, in itself, terminate or suspend the operation of treaties.”

¹⁶⁹ R. R. Baxter, “Armistices and other forms of suspension of hostilities”, *Collected Courses of the Hague Academy of International Law*, vol. 149 (1976), pp. 357–390, at p. 382.

¹⁷⁰ “Letter dated 7 August 1953 from the Acting United States Representative to the United Nations, addressed to the Secretary-General, transmitting a special report of the Unified Command on the armistice in Korea in accordance with the Security Council resolution of 7 July 1950 (S/1588)”, p. 20 [reproduced in English in *Treaties Governing Land Warfare*, Department of the Army, Washington, D.C., pamphlet 27-1 (7 December 1956), appendice B, p. 197].

¹⁷¹ See the media note by the United States Department of State of 26 May 2009, “ROK endorses proliferation security initiative principles”, available from www.state.gov/r/pa/prs/ps/2009/05/123842.htm.

¹⁷² Institute of International Law, *Yearbook*, vol. 61 (1986), Part II (see footnote 138 above), p. 200.

38. As stressed many times by the first Special Rapporteur, Sir Ian Brownlie, draft article 3 was of primary importance, because it posed the fundamental principle of stability and legal continuity by reaffirming the continued operation of treaties in the event of an armed conflict. Although not absolute, the principle responded to the need to safeguard the stability of treaty relations and legal certainty, and it clearly constituted a corollary of the principle of *pacta sunt servanda*. In paragraph 33 of the report, the current Special Rapporteur noted that “[n]o State has objected to the basic idea that the outbreak of an armed conflict involving one or more States parties to a treaty does not, in itself, entail termination or suspension”. Many States, including Austria, China, the Islamic Republic of Iran, Poland, Portugal and Switzerland, had expressly indicated that in their view, draft article 3 enunciated a principle.

39. It should also be recalled that the reasoning of the Institute of International Law and the text of the article on which draft article 3 had been based referred to treaties in operation between two States that were both parties to an armed conflict. The version adopted on first reading and the one proposed by the Special Rapporteur at the current session also envisaged the case, evoked in subparagraph (b), of treaties in operation as “[b]etween a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict”.

40. For all those reasons, draft article 3 must be regarded as enunciating the principle of the continuity of the operation of treaties. He reiterated his proposal that this principle be stated in the title of the draft article.

41. With regard to draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties) (para. 51 of the report), subparagraph (a) of which read: “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”, he noted that the intention of the parties had been reintroduced, as originally proposed by the previous Special Rapporteur but rejected by the majority of members.¹⁷³

42. He pointed out in that connection that, in the event of an armed conflict, it was extremely difficult to ascertain the intention of the States parties to the treaty, because they usually did not contemplate the eventuality of an armed conflict and the effects that it might have on the treaty. Consequently, in virtually every case an obstinate search would only lead to a fictive, non-existent intention. In other words, it was not appropriate to apply a legal fiction in the vast majority of cases.

43. He was in favour of maintaining draft article 4 (a), which referred to the application of articles 31 and 32 of the Vienna Convention, without an express mention of intention, in order to ascertain the susceptibility of a treaty to termination, suspension or withdrawal. With regard to subparagraph (b), he agreed with the Special Rapporteur’s proposal to add the criteria of the intensity and duration of the armed conflict, which earlier had been implicit in the words “the nature and extent of the armed conflict”. The

¹⁷³ See *Yearbook ... 2007*, vol. II (Part Two), p. 73, paras. 293–295.

meaning of the phrase “the effect of the armed conflict on the treaty” should be made clear.

44. Draft article 5 (Operation of treaties on the basis of implication from their subject matter) provided for the case of treaties whose subject matter implied that they continued in operation, in whole or in part, during an armed conflict. The criterion of the subject matter or content had been chosen by the Commission on the basis of a proposal that he had made to add the “nature” of the treaty to intention as a fundamental element for ascertaining whether the treaty continued in operation. When he had made that proposal, he had drawn on the Vienna Convention itself, in which the concept of the “nature of the treaty” was used specifically in the context of the termination or suspension of treaties. He had argued in favour of applying the two criteria set out in article 56, paragraph 1, of the Convention, which read:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

45. It should be noted, however, that in the case of denunciation or withdrawal, intention in fact played a more important role, but the point of the provision above all was that the Vienna Convention acknowledged that, even in those cases, it was not always possible to determine the intention of the parties, and it was necessary to refer to another criterion, namely the nature of the treaty.

46. If the Drafting Committee decided to reconsider draft articles 4 and 5, it must maintain the fundamental criterion of the subject matter or nature of the treaty. If draft article 5 was retained, he would not object to the deletion, as the Special Rapporteur had done, of the reference to the subject matter of the treaty in draft article 4 (b). In the draft approved on first reading, the words “subject matter of the treaty” had been used instead of “nature of the treaty”, chiefly in order to be able to employ the latter wording in draft article 4 to designate one of the indicia for ascertaining the nature and extent of the armed conflict. However, if that was the sole argument, reference could very well be made to the character and extent of the armed conflict, on the one hand, and the nature of the treaty, on the other: in international humanitarian law it was a question of armed conflicts of a non-international “character”, and not “nature”.

47. If the Commission decided to keep draft articles 4 and 5 separate, the logical order of application of a specific case should begin with draft article 3, concerning the general principle of continuity, followed by the current draft article 5, on treaties regarding which the principle of continuity was self-evident because of their nature or subject matter and, lastly, if it proved necessary, the current draft article 4, which contained indicia or indicators for ascertaining exceptions to the general principle.

48. He agreed with the Special Rapporteur that the indicative list should be kept in the annex and that broad

reference should be made to it in the commentary to the current draft article 5. The list might be enlarged through suggestions from States, for example by including treaties that reflected rules of *jus cogens* and treaties concerning international criminal justice. On the other hand, the suggestion by Switzerland to give absolute protection to treaties relating to the protection of the human person would pose problems; instead, the second paragraph that it had proposed for addition to draft article 5 should be incorporated into the annex (para. 61 of the report) as a first category of treaties, following the reference to *jus cogens*, and the commentary should focus on the continuity of human rights treaties. Switzerland had cited other criteria that should be taken into account when modifying the indicative list (A/CN.4/622). Draft article 5 and the indicative list made reference to categories of treaties whose subject matter clearly implied that they continued to be in operation in whole or in part during an armed conflict. Those categories were well identified in both practice and doctrine.

49. Draft article 7, as amended by the Special Rapporteur, was acceptable, although there was no need for the word “express”. Draft article 7 could be placed after draft article 5.

50. He disagreed with the Special Rapporteur’s assertion in response to a Member State that “no treaty is untouchable” (para. 80 of the report). One need only think of the Charter of the United Nations and treaties relating to international humanitarian law.

51. On draft article 8 relating to notification of termination, withdrawal or suspension, the time limit set for objecting to notification should not be less than six months, since a State engaged in armed conflict had many other priorities.

52. Lastly, with regard to the point raised in paragraph 92 of the report, a State that was not a party to the conflict but was a party to the treaty should not have the possibility of terminating or withdrawing from the treaty or suspending its operation: it was difficult to see how a treaty relation could be affected by an armed conflict to which a State was not a party.

53. Mr. NOLTE said that draft article 3 appropriately expressed an important general principle which, as the Special Rapporteur noted, was not a presumption. It provided a necessary clarification before draft article 4 set out the most important fundamental rule: the continuation of treaty obligations depended on more specific circumstances than the outbreak of an armed conflict, namely the nature of the specific treaty, its obligations and its relation to the armed conflict. He agreed with those speakers who would like the term *ipso facto* to be replaced by a non-Latin wording.

54. With regard to draft article 4, he endorsed the remarks of those who were in favour of deleting the reference to the intention of the parties. The Commission had already examined the question and had decided not to include intention, not because it was very often a fiction, but because neither in article 31 nor anywhere else in the 1969 Vienna Convention was there any reference to it,

and because the omission had been a conscious decision on the part of the drafters of the Convention, namely the Commission and the States parties.

55. He agreed with the other explanations provided by the Special Rapporteur on draft article 4, with the exception of his comments in paragraph 48 of the report on why he had not specifically mentioned the subject matter of the treaty as one of the *indicia*. He did not think that draft article 5, which dealt with certain aspects of subject matter, was a sufficient reason not to include a general reference to it in draft article 4. As the title of draft article 5 indicated, the subject matter served to establish the circumstances in which a treaty continued in operation, but draft article 4 enunciated a more general norm, namely that the subject matter of the treaty, together with other factors, determined whether it could be concluded that the treaty continued in operation. Although the Special Rapporteur indicated in paragraph 48 that draft article 4 (*b*), mentioned the subject matter, it should be spelled out more clearly. The Drafting Committee should also replace “*indicia*” by “*factors*” or some other more common word.

56. He supported the compromise solution proposed by the Special Rapporteur to annex an indicative list of different categories of treaties. To place the list in the commentary would render the draft articles less useful in practice, whereas to incorporate them into the body of the text might soon make the articles seem outdated.

57. Draft article 5 should include a reference to draft article 10 (Separability of treaty provisions), which embodied a particularly important principle in the current context. It would be preferable to be somewhat more cautious and to include in the indicative list only those categories of treaties for which it could be said with a degree of certainty that practice or their nature and subject matter clearly implied that they continued in operation in the event of an armed conflict. The longer the list, the more important it became to emphasize the separability of the respective treaties. As to the sequence of the various categories of treaties, it should follow, if possible, a visible logic. One possibility would be to arrange the treaties depending on the extent to which they reflected choices of international public policy, such as treaties on international humanitarian law and borders, or the degree to which they protected private interests.

58. He agreed with the Special Rapporteur that treaties concerning international criminal jurisdiction should be added to the indicative list. However, the Drafting Committee should ensure that only those international criminal jurisdictions were included which actually applied international criminal law. After all, it could not be ruled out that international criminal courts or tribunals would be established in the future whose task would be to apply national criminal law as well.

59. On draft article 6, he wondered whether the unclear reference to “*lawful*” agreements could not be replaced by a reference to article 41 of the 1969 Vienna Convention. He agreed with the Special Rapporteur concerning the substance of draft article 7 and had no objection to it being moved forward so that it followed draft article 3.

60. The notification procedure set out in draft article 8 was convincing (apart, of course, from the reference to “*intention*”), and the requirement to raise an objection within six months would constitute an appropriate progressive development of international law, for the reasons given by the Special Rapporteur.

61. As to draft article 11, he shared the concern of those who thought that, given that it was virtually impossible to foresee how an armed conflict would unfold, and in particular in view of the innumerable possibilities for escalation, it was difficult to accept such a strict rule on the loss of the right (or possibility) to terminate or suspend a treaty. A reference—*mutatis mutandis*—to article 62 of the 1969 Vienna Convention would take due account of any fundamental change of circumstances.

62. He thanked the Special Rapporteur for his clear and balanced report and hoped that the draft articles introduced therein could be referred to the Drafting Committee.

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]

SIXTEENTH REPORT OF THE SPECIAL
RAPporteur (*concluded*)**

63. The CHAIRPERSON invited the Special Rapporteur to continue the debate on the draft guidelines contained in the sixteenth report on reservations to treaties (A/CN.4/626 and Add.1).

64. Mr. PELLET (Special Rapporteur) thanked the members of the Commission who had made the effort to read and comment on his sixteenth report, which touched on very technical questions, and he was pleased that they had been in favour of referring the 20 draft guidelines contained therein to the Drafting Committee.

65. A number of interesting remarks had been made during the debate, the first one by speakers who, proceeding on the principle that it was not logical to begin with the situation of newly independent States, were of the view that the order of the draft guidelines in the fifth part of the Guide to Practice should be changed. He wished to make his position clear on that point, which did not appear to go beyond one of form and could therefore be dealt with by the Drafting Committee.

66. He was opposed, for a number of reasons, to any half-measures that would lead solely to a “*relegation*” of the case of newly independent States to a later place in the Guide to Practice. Before explaining why, it would be useful to recall that he had proposed, without being contradicted, to follow the definitions and rules of the 1978 Vienna Convention, not only when they were directly relevant for the Guide to Practice, which was only the case for article 20, but also to embody in law the situations envisaged by the Convention. Moreover, it was

* Resumed from the 3051st meeting.

** Resumed from the 3050th meeting.

important to dispel any uncertainty about the definition of newly independent States, because some members of the Commission did not appear to have a clear idea of what was meant by the term, which was in fact deceptive. Article 2 (f), of the 1978 Convention gave the following definition:

“newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

In contemporary diplomatic language, a dependent territory was a colony. He fully agreed with a number of members of the Commission that States formed from a secession or dissolution of States were new States, but it happened that, rightly or wrongly, the drafters of the 1978 Convention had reserved a separate fate for decolonized States, which he urged the Commission, as the vigilant guardian of the Vienna Conventions on the Law of Treaties, not to reconsider, because if it did, it would call into question the entire 1978 Convention.

67. For the same reason, he was hostile to the proposal of some speakers to “declassify” newly independent States. First, the predecessors of the Commission in that area had wanted to reserve a special fate for newly independent States as they were defined, namely States emerging from decolonization, and he did not see why the Commission should make any changes in that regard. Secondly, the Commission was on relatively solid ground there, whereas, as rightly noted, the practice followed for separation—or for secession—of States (notably in the Balkans) and for a merging—or unification—of States fluctuated, as did the vocabulary employed. Rules concerning succession in respect of treaties for newly independent States were reasonably stable and constituted a starting point for articulating other situations that must be taken into account by comparison—either *a fortiori* or *a contrario*. Thirdly, he was not convinced by the argument that colonization was a thing of the past and that therefore the fate of treaties in relation to decolonized States was of no interest. To start with, he was not certain that there was no place for decolonization in the future. Moreover, decolonization had been such a vast, important movement which had affected so many States—and continued to make its effects felt—that he had difficulty seeing how it could be relegated to the past. Since they continued to produce effects, the rules applicable to reservations and to objections to and acceptances of reservations in the case of decolonized States continued to be of great practical importance.

68. That all appeared to argue in favour of maintaining the order of the draft guidelines in the sixteenth report (and not the numbering, which should be changed). However, if there really was strong opposition to doing so, he would then prefer a more radical reorganization, which seemed to have been suggested by some of the participants in the debate and which would entail regrouping the rules applicable to reservations and related declarations (objections and acceptances) no longer as a function of the type of succession concerned (decolonization, separation or unification of States), but as a function of the mechanism of succession, which would amount to distinguishing automatic successions from accepted successions, in other words, successions resulting from a voluntary acceptance

of the treaty concluded by the predecessor State, a mechanism that had an impact on the regime of reservations and related declarations.

69. That proposal was more attractive than a simple “downgrading” of decolonization, but it had two drawbacks. First, even if it was feasible, the Drafting Committee, by proceeding in that manner, would take on an enormous amount of work, and it was not certain that the issue was so important. Secondly, the Commission would be calling into question, albeit indirectly, the framework chosen by the 1978 Vienna Convention, and he feared that it might be opening a Pandora’s box, making it possible to challenge the cases individually defined by the Convention. As several members had stressed, by redrafting the fifth and final part of the Guide to Practice, the Commission was not contesting the rules of State succession, but was merely applying them to reservations to treaties. Like the majority of speakers, he was not in any case convinced by the “invention” of a new category of succession resulting from the exercise of the right to self-determination, which he did not think was so special—the creation of a State in the context of decolonization was a classic way for a colonial people to exercise that right, of which separation and unification were other manifestations.

70. In sum, he was not opposed to the Drafting Committee trying to reconstruct the draft guidelines along the lines that he had indicated, provided it did not call into question the wording of the 1978 Vienna Convention and the distinctions which it made between various forms of State succession. On the other hand, he saw no point in simply moving draft guideline 5.1: all that could be done would be to reverse the order of draft guideline 5.2 and draft guideline 5.1, although no one had provided a convincing explanation of why that was necessary. In particular, he failed to see why the case of newly independent States should be regarded as an “exception”. Decolonization was not an exception, and notwithstanding the importance of the cases of secession and dissolution of States in Europe and in the former Soviet Union in the past two decades, most States today had emerged from decolonization and thus were newly independent States within the meaning of the 1978 Vienna Convention. Consequently, the fate of treaties concluded by a predecessor State and any reservations made to those treaties continued to be a contemporary problem.

71. Some speakers had also argued that draft guideline 5.1 did not address the important question as to when the reservation formulated by a newly independent State became an established reservation, in other words, able to produce effects. As he saw it, however, draft guideline 5.8, which stipulated that a reservation formulated by a successor State, when notifying its status as a contracting State, became operative as from the date of such notification, and draft guideline 5.1, paragraph 3, which referred to the relevant rules set out in draft guideline 5.8, sufficed to reply to the question. For the sake of convenience, however, some speakers had wanted the idea included in draft guideline 5.1 itself. He had no objection to that suggestion.

72. His remarks on draft guideline 5.1 also applied to draft guideline 5.2, concerning which he agreed with the comment that the conditions of permissibility should be mentioned in paragraph 3.

73. Some speakers had maintained that draft guideline 5.3 was too “dogmatic” or “rigid”, although he did not see why. It merely specified that when a treaty had not been in force with regard to one of the predecessor States, it did not come into force in the case of a unification of States, and any reservations disappeared with it. That seemed logical rather than dogmatic, but he would have no objection if the Drafting Committee wished to soften the text and could find a good way to do it.

74. Some speakers had also contended that draft guideline 5.3 would not address a more serious problem: what if the reservations of the predecessor States of a newly unified State formed by a merging of States were not compatible? The answer to that question was to be found in draft guideline 5.2, paragraph 1, which admittedly did not resolve the problem completely, because it might happen that, although it could put an end to such a situation, a successor State formed in such a manner might not denounce any of the incompatible reservations. However, even if it seemed somewhat convoluted, draft guideline 5.6 made it possible to avoid that situation by indicating that incompatible reservations applied only to the territories to which they applied prior to unification.

75. A number of speakers found draft guideline 5.4 difficult to understand. He did not see why, but if that was the opinion of the Drafting Committee, he would be happy to simplify it. That was all the more true for draft guideline 5.5, which really was complicated, but difficult to simplify, because it addressed a number of diverse and complex cases.

76. Those few members who had referred to the square brackets in draft guidelines 5.7 and 5.8 had called for their removal and were in favour of maintaining the phrase within. He was inclined to agree, but the Drafting Committee should perhaps decide the question on the basis of comparable draft guidelines. He saw no reason why the Drafting Committee should not merge draft guidelines 5.7 and 5.8, as suggested, if it was considered to be a more elegant solution. The proposal by one speaker that the wording in article 20, paragraph 4 (b), of the Vienna Conventions be used in draft guideline 5.8 was of a more fundamental nature. He had no objection, but disagreed with the comment that draft guidelines 5.8 and 5.9 implied that successor States were always required to indicate their status. What the draft guidelines said was that when succession was not automatic, the successor States must make either a global notification of succession or a notification of succession to the treaty. That was essential, but it was not an “invention” of the draft guidelines: it was part of the logic of optional succession.

77. He was pleased that no one had had anything to say about draft guideline 5.9, which was along the lines of guideline 2.3.1, and he would be very reluctant to reconsider it.

78. Draft guideline 5.10 had given rise to more comments, in particular by speakers calling for the deletion of the final phrase “at the time of the succession”, which he had himself proposed during his introduction. If the Drafting Committee endorsed the proposal, it would have to examine whether the deletion was consistent with the

definition of reservations and with the current wording of draft guideline 5.9.

79. He was pleased that draft guidelines 5.11, 5.12, 5.14 and 5.16 had not given rise to any remarks or objections. He accepted the criticism of draft guideline 5.13, which one speaker had deemed too strict because the proposed wording did not take into account the situation in which, in the case of unification, the maintaining of a reservation and its extension to the new State as a whole might make the reservation unacceptable for a State which until then had refrained from objecting to it. He did not know whether that exceptional case deserved the addition of a new paragraph or whether it should be covered in the commentary, but a new paragraph would probably be welcome.

80. Concerning draft guideline 5.15, it had been asked whether cases did not occur in which the successor State might object to a reservation of the predecessor State; in his opinion, they did not, but the example cited by the speaker who had raised the point, in which the predecessor State made a reservation concerning a territory which had become the territory of the successor State, did not seem to arise from the point of view of the objection to the reservation, but rather from the perspective of the territorial scope of the reservation.

81. As to the four draft guidelines proposed in the addendum to the sixteenth report (which should all be renumbered, because the first one should have been 5.17 and not 5.16), only draft guideline 5.19 had given rise to constructive criticism. One of the few members to speak on the question had argued that it was necessary to go further and to pose the principle that, in the absence of a repudiation by the successor State, the latter should be deemed to have accepted the views of its predecessor. As a long mini-debate had taken place on another point following that comment, which no one had contested and with which he had agreed, he supposed that it should be assumed that the Drafting Committee could include an explanation to that effect in draft guideline 5.19.

82. He had three final remarks. First, several members had stressed that, even more than elsewhere, it should be understood that the guidelines in the fifth and last part of the Guide to Practice were merely indications to be followed in the absence of an intention to the contrary expressed by the States concerned. It was true that, as their name indicated, the guidelines did not by any means claim to be binding, and even less to be legally obligatory for the States concerned. However, that was true for the entire Guide to Practice, which he did not want to strengthen *a contrario* by placing too much emphasis on the fact that the fifth part was not obligatory.

83. Secondly, it had been pointed out, and rightly so, that practice was uncertain. That meant that the part of the Guide under consideration was more *de lege ferenda* than a reflection of *lex lata*. However, for reasons analogous to those just evoked concerning the binding nature of the Guide to Practice in general, that uncertainty should be reflected in the commentary, because it was not a reason for the wording of the Guide to be particularly “soft”. On the contrary: as practice was uncertain, it was preferable

to give it relatively stable points of reference, from which States could depart if they wished to do so.

84. Thirdly, as he had said several times and as some members had also stressed, in his enthusiasm for the admirable memorandum by the Secretariat on reservations to treaties in the context of succession of States,¹⁷⁴ he had lost sight of the numbering of the guidelines in the Guide to Practice, which the numbering of the draft guidelines in the sixteenth report did not follow. He would address that matter without delay if, as he hoped, the Commission agreed to refer the 20 draft guidelines contained in his sixteenth report to the Drafting Committee.

85. The CHAIRPERSON said that if she heard no objection, she would take it that the members of the Commission wished to approve the Special Rapporteur's proposal to refer draft guidelines 5.1 to 5.20 to the Drafting Committee.

It was so decided.

Protection of persons in the event of disasters¹⁷⁵
(A/CN.4/620 and Add.1, sect. D, A/CN.4/629,¹⁷⁶
A/CN.4/L.776¹⁷⁷)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

86. The CHAIRPERSON invited the Special Rapporteur, Mr. Valencia-Ospina, to introduce his third report on the protection of persons in the event of disasters (A/CN.4/629).

87. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, although his third report had recently been distributed in the six official languages, the original version, which he had drafted in English in order to facilitate its consideration, had been made available to the members of the Commission much earlier, which should make it possible to conclude the debate in plenary by the last meeting of the first part of the current session.

88. The third report built on the second report, which the Commission had considered at its 2009 session.¹⁷⁸ The second report contained the first three draft articles, which had set the scope and purpose of the draft articles, defined the word "disaster" and its relationship to armed conflicts, and established the principle of cooperation. It had been referred to the Drafting Committee, which had increased the number of draft articles to five, its reasoning being that the three draft articles that he had proposed concerned five distinct concepts which should be addressed separately. Thus, the five draft articles, approved by

consensus in the Drafting Committee,¹⁷⁹ dealt with scope, purpose, definition of disaster, relationship with international humanitarian law and duty to cooperate. The Drafting Committee had stated in a footnote that draft article 5 had been adopted on the understanding that a provision on the primary responsibility of the affected State would be included in the set of draft articles in the future. Accordingly, he had elaborated draft article 8, to which he would return in greater detail later. On 30 July 2009, the penultimate day on which the Commission had been able to consider in plenary questions of substance other than the adoption of its annual report to the General Assembly, the Drafting Committee had submitted the five draft articles to the Commission, which had approved them.¹⁸⁰ As there had not been enough time to draft and approve the corresponding commentary, and in keeping with the Commission's practice, the text of the five draft articles had not been included in the report of the Commission on the work of its sixty-first session. The accompanying commentary would be submitted to the Commission for approval in August 2010, when the report of the Commission on the work of its current session was adopted. As indicated in the summaries of the discussions in the Commission and the Sixth Committee in 2009, the members of the Commission and delegations had considered that the third report should focus on two aspects of particular importance for the study of the topic: the responsibility of the affected State to protect persons within its jurisdiction—which, given the fundamental principles of sovereignty and non-intervention, was a primary responsibility; and a group of principles more directly concerning the human person, in particular the humanitarian principles of neutrality, impartiality and humanity. He had taken those two aspects into consideration in his third report, within the limits of the number of pages allowed for United Nations documents. On the first point, he intended to propose in his fourth report, which he would submit in 2011, one or more provisions specifying the scope and limits of the exercise by a State of its primary responsibility as affected State. As to the second point, given that the Commission had entitled his topic "Protection of persons", he had deemed it appropriate to add to the three humanitarian principles of neutrality, impartiality and humanity covered in draft article 6 the principle of dignity as a guiding principle from which the human rights recognized by international law stemmed, and to devote a separate provision to it, namely draft article 7. Thus, as indicated in paragraph 71 of the second report,¹⁸¹ the third report would aim to identify "the principles that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection".

89. Draft article 6 (Humanitarian principles in disaster response), proposed in paragraph 50 of the third report, provided that "[r]esponse to disaster shall take place in accordance with the principles of humanity, neutrality and impartiality". As indicated in paragraph 11 of the memorandum by the Secretariat,¹⁸² distributed at the sixtieth session

¹⁷⁴ See footnote 12 above.

¹⁷⁵ At its sixty-first session in 2009, the Commission discussed draft articles 1 to 3, introduced by the Special Rapporteur in his second report (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615), and took note of draft articles 1 to 5 provisionally adopted by the Drafting Committee (*Yearbook ... 2009*, vol. II (Part Two), chap. VII, *passim* and especially paras. 159–183).

¹⁷⁶ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

¹⁷⁷ Mimeographed. See the 3067th meeting below, paras. 40–65.

¹⁷⁸ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

¹⁷⁹ A/CN.4/L.758 (mimeographed; available on the Commission's website).

¹⁸⁰ *Yearbook ... 2009*, vol. I, 3029th meeting, pp. 200–204, paras. 1–33.

¹⁸¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

¹⁸² A/CN.4/590 and Add.1–3 (mimeographed; available on the Commission's website, documents of the sixtieth session).

in 2008, the three principles covered by draft article 6 were “core principles regularly recognized as foundational to humanitarian assistance efforts generally”. That had been highlighted, for example, during the recent panel discussion in the Economic and Social Council on guiding principles of humanitarian assistance¹⁸³ and in paragraph 23 of the report of the Secretary-General for 2009 entitled “Strengthening of the coordination of emergency humanitarian assistance of the United Nations”, according to which “[r]espect for and adherence to the humanitarian principles of humanity, neutrality, impartiality and independence are ... critical to ensuring the distinction of humanitarian action from other activities, thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need”.¹⁸⁴ Those three humanitarian principles, which had originally been found in international humanitarian law and in the Fundamental Principles of the Red Cross,¹⁸⁵ were widely used and accepted in a number of international instruments in the context of response to disasters. He referred in that connection to General Assembly resolutions 43/131 of 8 December 1988, 45/100 of 14 December 1990 and 46/182 of 19 December 1991, the above-mentioned report of the Secretary-General and the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief.¹⁸⁶ Those three principles were essential to maintaining the legitimacy and effectiveness of disaster response. The principle of neutrality, which presupposed abstention, referred to the apolitical nature of disaster response. It implied that assisting actors refrained from committing acts likely to constitute interference in the internal affairs of the affected State. Respect for that principle facilitated an adequate and effective response to disasters, as set out in draft article 2, and ensured that the needs of the persons affected by the disaster were the primary concern of the assisting actors. Neutrality was not impracticable. As such, the principle of neutrality provided the operational mechanism to implement the ideal of humanity.

90. With regard to the principle of impartiality, any response to disasters should be aimed at meeting the needs and fully respecting the rights of those affected and giving priority to the most urgent cases of distress. The principle of impartiality was commonly understood as encompassing three distinct principles: non-discrimination, proportionality and impartiality proper. The modern origins of the principle of non-discrimination could be found in international humanitarian law; it had developed not only there but also in international human rights law,

where it had become a fundamental provision. It was also enshrined in Article 1, paragraph 3, and Article 55, subparagraph (c), of the Charter of the United Nations. The prohibited grounds for discrimination had been expanded and made non-exhaustive. They included non-discrimination based on ethnic origin, sex, nationality, political opinions, race or religion. In certain circumstances, however, preferential treatment could, and indeed must, be granted to certain groups of victims, depending on their special needs. In accordance with the principle of proportionality, the response must be consistent with the degree of suffering and urgency: it could and must be proportionate to the needs in scope and in duration, as set out in article II, paragraph 3, of the resolution adopted in Bruges in 2003 by the Institute of International Law, which referred to the “needs of the most vulnerable groups”.¹⁸⁷ Lastly, the principle of impartiality in the narrow sense was the obligation not to make a subjective distinction between individuals in need, necessity being the criterion which must guide relief operations.

91. The third and last principle was the principle of humanity, to which Jean Pictet, drawing on resolution VIII of the twentieth International Conference of the Red Cross, held in Vienna in 1965, had attributed three constituent elements: to prevent and alleviate suffering, to protect life and health and to assure respect for the human being.¹⁸⁸ Humanity was a long-standing principle in international law. In its contemporary sense, it was the cornerstone of the protection of persons in international law, as it was at the point of intersection between international humanitarian law and international human rights law. It was, in that sense, a necessary source of inspiration in the development of mechanisms for the protection of persons in the event of disasters. The principle of humanity had gained its central status in international law with the development of international humanitarian law. It had been expressed in the Declaration of Saint Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime¹⁸⁹ and in the Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land, from which the Martens clause had been derived, and it was also one of the founding principles of the ICRC and the IFRC. Moreover, many international conventions, to which paragraph 39 of the report referred, set forth the obligation of humane treatment. The principle of humane treatment as established in common article 3 of the Geneva Conventions for the protection of war victims was an expression of general values that guided the international legal system as a whole both in war and in peace. That had been confirmed by the ICJ and other international tribunals in their jurisprudence, as explained in paragraphs 40 to 46 of the report. As the principle of humanity was an established principle of international law that was applicable both in time of armed conflict and in time of peace, and was a pivotal principle of international humanitarian law that explained the application of human rights law in an armed conflict, it had its place in the draft

¹⁸³ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 3 (A/64/3/Rev.1)*, p. 42, paras. 4–7. See in particular the analytical summary of the panel discussion on “Respecting and implementing guiding principles of humanitarian assistance at the operational level: assisting the affected populations”, held on 20 July 2009 (E/2009/SR.29), *passim*.

¹⁸⁴ A/64/84–E/2009/87, para. 23.

¹⁸⁵ *International Review of the Red Cross*, No. 56 (November 1965), Resolution VIII, adopted by the twentieth International Conference of the Red Cross, entitled “Proclamation of the Fundamental Principles of the Red Cross”, pp. 573–574.

¹⁸⁶ *Ibid.*, No. 310 (January–February 1996), The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, adopted by the twenty-sixth International Conference of the Red Cross and Red Crescent (Geneva, 3–7 December 1995), annex VI, p. 119. Available from www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf.

¹⁸⁷ Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), p. 269.

¹⁸⁸ J. Pictet, *The Fundamental Principles of the Red Cross: Commentary*, Geneva, Henry Dunant Institute, 1979, p. 21.

¹⁸⁹ *Handbook of the International Red Cross and Red Crescent Movement*, 14th ed., Geneva, ICRC and the International Federation of Red Cross and Red Crescent Societies (IFRC), p. 331.

articles, because cases of disaster contained the same elements that served as the basis of its application in other contexts. It must be borne in mind that it was the widespread loss of life, great human suffering and distress, and large-scale material and environmental damage that justified the Commission's inclusion of the topic in its programme of work, as he had noted in his preliminary report to the Commission in 2008¹⁹⁰ and in the definition of the word "disaster" in draft article 3, which had been provisionally adopted by the Drafting Committee.¹⁹¹ Although, under draft article 4, the draft articles did not apply to situations in which the rules of international humanitarian law were applicable, the principle of humanity required that persons must be protected in the event of disasters, as proclaimed by the General Assembly in a number of resolutions, in particular resolution 46/182.

92. Draft article 7 (Human dignity), which was set out in paragraph 62 of the third report, specified that "[f]or the purposes of the present draft articles, States, competent international organizations and other relevant actors shall respect and protect human dignity". At the current session, the members of the Commission had had the opportunity to continue the debate, both in plenary and in the Drafting Committee, on the concept of human dignity, which had begun at the previous session in connection with draft article 10 (Obligation to respect the dignity of persons being expelled) during consideration of the topic on expulsion of aliens.¹⁹² In the light of that debate, at the current session, the Special Rapporteur on expulsion of aliens had proposed a revised draft article 9,¹⁹³ which had been referred to the Drafting Committee following consideration in plenary.¹⁹⁴ He hoped that he was not divulging a secret when he said that the Drafting Committee had approved a restructured draft article relating to the obligation to respect the human dignity and human rights of persons being expelled. As the Drafting Committee had not yet officially submitted the draft article to the Commission in plenary,¹⁹⁵ there was no need to go into the details, apart from simply noting the decision to include a separate article on respect of human dignity in the draft articles on expulsion of aliens. With regard to the subject under consideration, although draft article 7 was closely linked to draft article 6, the principle of human dignity differed from that of humanity, which was why they were the subject of two separate draft articles. Unlike the principle of humanity, whose origins were to be found in international humanitarian law, the concept of human dignity, although recognized in common article 3, paragraph 1 (c), of the Geneva Conventions for the protection of war victims, articles 75 and 85 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and article 4 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), was interpreted as providing the ultimate foundation of human rights law since the Charter of the United Nations, which reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person". It had also inspired the Universal Declaration of Human Rights,¹⁹⁶ international and regional human rights covenants and other instruments, as well as decisions of the ICJ and other international tribunals. Moreover, many countries recognized in their constitutions that human dignity was a fundamental element of human rights protection, to which the importance attached to it by the international community also testified. The central role played by the principle of human dignity in international human rights law was sufficient to warrant its inclusion in the draft articles under consideration, not as a human right in the strict sense, but as a principle for guiding action to be taken in the event of disasters. Like the concept of humanity, the concept of human dignity was a basic principle rather than an enforceable right. It had served as a source of inspiration for many international human rights instruments, and it should also do so in the framework of the protection of persons in the event of disasters, because it was at the core of many instruments elaborated by the international community to guide humanitarian relief operations. Suffice it to refer in that regard to the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies¹⁹⁷ and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,¹⁹⁸ adopted in 2007 by the thirtieth International Conference of the Red Cross and Red Crescent. In order to ensure the protection of human beings, which was the purpose of the topic under consideration, the provisions of draft article 7, together with the humanitarian principles enunciated in draft article 6, constituted a complete framework for the protection of the human rights of affected persons and made superfluous a detailed enumeration of those rights. Moreover, as the principle of human dignity was recognized in international law, there was no need to define it in draft article 7, not even for the purposes of the draft articles.

93. Draft article 8 (Primary responsibility of the affected State), which was set out in paragraph 96 of the third report, read:

"1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.

"2. External assistance may be provided only with the consent of the affected State."

¹⁹⁰ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, paras. 1–8.

¹⁹¹ A/CN.4/L.758 (see footnote 179 above). See also *Yearbook ... 2009*, vol. I, 3029th meeting, paras. 1–33.

¹⁹² *Yearbook ... 2009*, vol. II (Part Two), p. 129, para. 96.

¹⁹³ See footnote 19 above.

¹⁹⁴ See the 3036th meeting above, paras. 21–43.

¹⁹⁵ See the 3068th meeting below, para. 5.

¹⁹⁶ See footnote 22 above.

¹⁹⁷ J. M. Ebersole, "The Mohonk Criteria for humanitarian assistance in complex emergencies: task force on ethical and legal issues in humanitarian assistance", *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192–208.

¹⁹⁸ *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, IFRC, 2008, p. 8. Available from www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf (accessed 15 January 2016).

94. As he had pointed out earlier, draft article 8 was in response to the wish expressed by the Drafting Committee for the inclusion in the draft articles of a provision on the primary responsibility of the affected State. Its wording implied the reaffirmation of two fundamental principles of international law: sovereignty and non-intervention. Although he had not deemed it necessary to expressly reformulate those universally accepted principles for the purposes of the draft articles, he had analysed them in detail in paragraphs 64 to 75 of his third report so that the provisions of draft article 8 were perfectly understood. In conformity with the principle of State sovereignty, which stemmed from the fundamental notion of sovereign equality, every State was free and independent and could, within its own territory, exercise its functions to the exclusion of all others. Thus understood, sovereignty was a fundamental principle in the international order, and its existence and validity had been enshrined in Article 2, paragraph 1, of the Charter of the United Nations and in many international instruments, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970. International courts and tribunals had considered that sovereignty was a principle of general law, and the ICJ had made it clear that State sovereignty was also part of customary international law. The concepts of sovereign equality and territorial sovereignty were widely invoked in the context of disaster response, notably in General Assembly resolution 46/182. It was also worth noting that the Commission, in its work on the non-navigational uses of international watercourses, had set forth in general terms the relationship between sovereignty and the duty of cooperation among States,¹⁹⁹ which was enunciated in draft article 5 provisionally adopted by the Drafting Committee.²⁰⁰ Closely linked to the principle of sovereignty, the principle of non-intervention by a State in the affairs of any other State served to ensure that the sovereign equality of States was preserved. There again, both Article 2, paragraph 7, of the Charter of the United Nations and General Assembly resolution 2625 (XXV) referred to the principle of non-intervention, although only the United Nations was explicitly concerned by the prohibition on intervention in the Charter of the United Nations. The principle had likewise been recognized as a rule of customary international law by the ICJ. In view of those firmly established principles of international law, it was clear that a State affected by a disaster was free to adopt whatever measures it saw fit to ensure the protection of persons within its territory. Consequently, third parties, whether States or international organizations, could not legally intervene in the process of response to a disaster in a unilateral manner and must act in accordance with draft article 5 on the obligation to cooperate. That did not mean that the sovereign authority of the State, which was based on the two correlated principles of sovereignty and non-intervention and remained central to the concept of statehood, was absolute. When it came to the life, health and physical integrity of the individual person, areas of law such as international minimum standards, international humanitarian law and

international human rights law demonstrated that the principles of sovereignty and non-intervention constituted a starting point for the analysis, not a conclusion. As noted by the eminent Latin American jurist Alejandro Álvarez in his separate opinion in the *Corfu Channel* case, “[s]overeignty confers rights upon States and imposes obligations on them” [p. 43].

95. With regard to the primary responsibility of the affected State, international law had long recognized that the Government of a State was best placed to gauge the gravity of emergency situations and to implement policies in response. Examples could be seen in the “margin of appreciation”, given by the European Court of Human Rights to domestic authorities in determining the existence of a “public emergency”, and the law of internal armed conflicts, in particular 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), governing situations of non-international armed conflict, which recognized “the principle that States are primarily responsible for organizing relief”. As far as disasters were concerned, the General Assembly had reaffirmed the primacy of the affected State in disaster response numerous times, notably in resolution 46/182. Two general consequences flowed from the primacy of the affected State in disaster response. First was the recognition that the affected State bore ultimate responsibility for protecting disaster victims on its territory and had the primary role in facilitating, coordinating and overseeing relief operations on its territory. The other general conclusion was that international relief operations required the consent of the affected State. Many international instruments—multilateral and bilateral conventions, draft principles and guidelines elaborated by humanitarian organizations and independent experts—recognized explicitly or implicitly, bearing in mind the principles of sovereignty and non-intervention, the fundamental role played by the primary responsibility of the affected State, as illustrated in paragraphs 79 to 89 of the third report. The relevant provisions cited were clear proof that States and humanitarian organizations had incorporated the principle of the primary responsibility of the affected State.

96. Whereas the foregoing discussion had focused on the “internal” aspects of the State’s primary responsibility, the requirement of State consent was of a primarily “external” character, because it governed the affected State’s relations with other actors—States, international organizations or other humanitarian organizations. The consent of the affected State was a necessary consequence of the principles of sovereignty and non-intervention. It must be given before the initiation of relief operations and was needed for the duration of the operations. The consent requirement also appeared in the provisions of international instruments governing the primary responsibility of the affected State, as indicated in paragraphs 91 to 94 of the report. In its current wording, draft article 8 recognized the responsibility of the affected State with regard to the population on its territory and covered both the “internal” operational aspects and the “external” aspect, namely consent. It thus incorporated mutually reinforcing elements in the same provision. Paragraphs 97 to 100 of the report provided a detailed analysis of the form of the two paragraphs of draft article 8.

¹⁹⁹ See *Yearbook ... 1994*, vol. II (Part Two), pp. 105–107 (article 8 of the draft articles on the law of the non-navigational uses of international watercourses).

²⁰⁰ A/CN.4/L.758 (see footnote 179 above). See also *Yearbook ... 2009*, vol. I, 3029th meeting, paras. 1–33.

97. Draft articles 6, 7 and 8 proposed in the third report highlighted the two aspects which he envisaged, namely the relations of States *vis-à-vis* each other and their relations *vis-à-vis* individuals. They contained provisions which were indispensable in order for the Commission to continue its work, because they placed the human being at the centre of the draft articles but did not leave out the role of States providing assistance. Needless to say, consideration of those two aspects had not yet been completed and would be continued in his future reports, but the draft articles that he had presented should be able to meet the concerns expressed by the members of the Commission and several delegations in the Sixth Committee of the General Assembly.

The meeting rose at 1.10 p.m.

3055th MEETING

Wednesday, 2 June 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Mr. Dugard, Vice-Chairperson, took the Chair.

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. Mr. FOMBA, commenting on draft articles 3 to 12, said that paragraphs 31 and 32 of the Special Rapporteur's report (A/CN.4/627 and Add.1) provided a lucid comparison of the current draft article 3 with the previous version based on article 2 of the resolution adopted in 1985 by the Institute of International Law.²⁰¹ Although he did not believe that the terms "automatically" and "necessarily" were really ambiguous, he agreed that it would be advisable to return to the expression "*ipso facto*", since the subject was being approached from a factual standpoint. Nonetheless, the Latin term might be more readily understood if it was translated.

2. The wording of draft article 3 should reflect the fact that conflicts might well have a variety of effects on treaties depending on the different situations covered by the article. It was therefore vital to clarify terminology as

far as possible. With regard to the draft article's title—and thus its subject matter—it was plain that what was involved was not a presumption but a general principle. Accordingly, the title could be amended to read "General principle of continuity", as suggested by Mr. Vázquez-Bermúdez. Furthermore, as currently worded, the draft article did not exclude cases in which two States that were parties to a treaty were on the same side in an armed conflict. However, there was no reason for specifically mentioning such an eventuality unless it could be legitimately established that an armed conflict might alter the operation or pattern of treaty relations *inter se* and with regard to third parties, in which case more thought should be given to the matter.

3. Turning to draft article 4, he said that he had initially seen little justification for retaining intention as a criterion, but Mr. Pellet's arguments had persuaded him otherwise. On the other hand, the true indicia of susceptibility to termination, withdrawal or suspension of treaties were those listed in subparagraph (b) of that article. He concurred with Mr. Murase that the phrase "the effect of the armed conflict on the treaty" was tautological. There was nothing, however, to prevent the Commission from examining such practice as might exist in order to make sure that intention was not a fiction.

4. He approved of the new paragraph 2 in draft article 5 and the inclusion of an annex containing an indicative list of treaties. However, the list ought to be placed in the commentary in order to preserve the normative value of the draft articles. He agreed that the two paragraphs of draft article 6 should be linked by specifying in the commentary that paragraph 2 was without prejudice to the rule embodied in draft article 9. The term "lawful agreements" in paragraph 2 should be retained, and its meaning should be explained in the commentary.

5. From a logical standpoint, it would be preferable to place draft article 7 after draft article 3. The new wording of draft article 7 was acceptable, but it would be a good idea, albeit not essential, to retain the word "express" in the body of the text in order to harmonize it with the title.

6. He agreed with the suggestion made with regard to draft article 8 that all States parties to a treaty should be notified of the intention of a State engaged in armed conflict to terminate, withdraw from or suspend the operation of a treaty, whether or not they were parties to the conflict. He wondered what justification there was for including the phrase "unless it provides for a subsequent date" in paragraph 2 of that article and how it would operate in practice: would the instrument of notification itself specify the date on which notification took effect? The time limit for raising an objection to such terminations, withdrawals or suspensions should be the three months stipulated in article 65, paragraph 2, of the 1969 Vienna Convention, notwithstanding the Special Rapporteur's preference for a longer period of time to take account of the context in which that legal rule would apply. The new paragraph 5, a safeguard clause whose wording was drawn mainly from article 65, paragraph 4, of the 1969 Vienna Convention, was vital, because every effort should be made to apply that principle of customary international law in all circumstances.

²⁰¹ See footnote 138 above.