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**A/CN.4/3055**

**Summary record of the 3055th meeting**

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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.<sup>201</sup> 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.

<sup>201</sup> See footnote 138 above.

7. Draft article 9 should be retained as it stood, but the word “trite” in the commentary should be replaced with “self-evident”, as the Special Rapporteur had proposed. There was no need to revise the structure of draft article 10, as it was based on article 44 of the 1969 Vienna Convention. Although the United Nations Conference on the Law of Treaties had offered no guidance as to the meaning of the word “unjust” in 1968 and 1969, the Special Rapporteur’s interpretation of that term seemed to be correct.

8. Turning to draft article 11, he endorsed the view that a minimum of good faith must remain in times of armed conflict. In view of the somewhat ambivalent arguments put forth by China, to which reference was made in paragraph 104 of the report, it would indeed be wise to explain the exact meaning of the draft article in the commentary. With regard to the proposal to examine the relationship between draft articles 11 and 17, he suggested that the relationship seemed somewhat contradictory, since draft article 11 dealt with the maintenance of a treaty, while draft article 17 referred to situations in which it was not maintained.

9. Referring to the question raised in paragraphs 107 and 108 of the report as to whether termination of, withdrawal from or suspension of the operation of a treaty was a right or an option, he felt that it would be logical in that context to view the State’s conduct as a right, and he therefore endorsed the subtle argument put forward by the Special Rapporteur in paragraph 108. Accordingly, he was in favour of deleting the phrase in square brackets from the title of draft article 11. That deletion would not affect the *chapeau* of the article, since it was couched in negative and imperative terms.

10. Draft articles 12 and 18 seemed to be closely related, and it would therefore be better to merge them than to place them one after the other. He supported the proposal to amend the title of the new draft article 12 to “Resumption of treaty relations subsequent to an armed conflict”. The wording of the draft article would benefit from revision that made it clearer and highlighted the link between paragraphs 1 and 2.

11. He was in favour of referring all the draft articles to the Drafting Committee.

*Ms. Xue resumed the Chair.*

12. Mr. PERERA said that draft articles 3, 4 and 5, which formed the core of the draft articles on the effects of armed conflicts on treaties, were interlinked, as the Special Rapporteur explained in paragraph 59 of his report. Draft article 3 had been well received by States, and its importance for maintaining the stability of treaty relations, in keeping with the principle of *pacta sunt servanda*, had been recognized. The majority of States which had expressed an opinion on that issue had indicated a preference for the term “*ipso facto*” rather than “necessarily”, the word used in the draft article adopted on first reading. He also agreed with the Special Rapporteur that the term “*ipso facto*” captured more precisely the cardinal principle underlying the draft article, namely the continuity of treaties. Nevertheless, the title “Absence of

*ipso facto* termination or suspension” struck a somewhat discordant note and lacked elegance. More importantly, as several previous speakers had already noted, the title should reflect the thrust and substance of the draft article itself. The suggestion that the title should read “General principle of continuity” was thus a step in the right direction and should be given further consideration in the Drafting Committee.

13. He welcomed the proposed changes to draft article 4, namely the inclusion of an express reference to intention in subparagraph (a) and the addition of the phrase “intensity and duration of the armed conflict” to subparagraph (b). The lengthy debate surrounding the inclusion of intention as one of the indicia in the draft article had essentially been prompted by the difficulty of ascertaining the parties’ true intention when they concluded the treaty—in other words, prior to the outbreak of hostilities. The particular merit of the reformulated paragraph was that it sought to address that concern by stipulating that the intention of the parties was to be derived from the application of articles 31 and 32 of the 1969 Vienna Convention. Furthermore, the reformulation made the parties’ intention one of several indicia, but not the predominant factor for determining a treaty’s susceptibility to termination, withdrawal or suspension. In order to counter the impression that the current format of the draft article gave prominence to intention by devoting a separate paragraph to it, the Drafting Committee should examine the feasibility of formulating a composite draft article without separate paragraphs. The insertion of the phrase “intensity and duration of the armed conflict” in subparagraph (b) was welcome because it reinforced the idea that the treaty was not susceptible to termination, withdrawal or suspension unless the conflict was so intense that it interfered with the performance of treaty obligations.

14. The Special Rapporteur’s approach to draft article 5 and the annex thereto was entirely consistent with the underlying rationale of the draft article adopted on first reading. The form and content of the current text, which consisted of a statement of principle in the article itself, followed by an annex containing an indicative list of categories of treaties referred to in the article, essentially constituted a compromise between listing treaties in the text of the article, which introduced an element of selectivity, or consigning the list to the commentary, which would not offer the same degree of normativity as the current text. Although Switzerland had put forward a cogent argument for a separate paragraph 2 containing an express reference to specific treaties and the retention of a truncated list in an annex (para. 61 of the report), the crucial question was whether those arguments were strong enough to warrant a departure from the neutral approach adopted in the current text. Should it do so, the Commission would enter difficult and uncertain terrain, since any such choice would imply selectivity and might create the impression that different treatment was being given to different categories of treaties.

15. Quite apart from the substantive issues that would be raised by the approach outlined in paragraph 61 of the report, enhancing the status of specific treaties, no matter how important they might be, by transferring them from an indicative list in an annex to the operational part

of the text would create insurmountable difficulties that might impede the progress of work. The range of views expressed by States with regard to the list would only grow broader if any category of treaty was moved from an indicative list to an operational article (see A/CN.4/622 and Add.1). For instance, given the current importance of environmental protection, some States might wish to see an express reference to treaties on that subject in paragraph 2 rather than have it covered by a generic phrase. Similar situations might arise in respect of other categories of treaties.

16. The particular virtue of the annex was that, while it contained an indicative list of the categories of treaties referred to in draft article 5, it also gave some indication of the relative importance of their subject matter. He therefore supported the retention of the current text of draft article 5 and the annex as adopted on first reading, although he was not opposed to reconsidering it after further analysis of State practice.

17. He had no specific comments to make on draft article 6. As far as draft article 7 was concerned, he agreed with the Special Rapporteur's suggestion in paragraph 79 of his report that a logical order be imparted to the entire set of provisions dealing with the issues in question by placing draft article 7 immediately after draft article 3.

18. Although several interesting proposals had been made concerning draft article 8, the Commission must still be guided by the reasons that had originally led it to adopt a minimalist approach. While the draft article preserved the essence of article 65 of the 1969 Vienna Convention, it avoided a detailed enumeration of the dispute settlement procedures that would apply under normal circumstances. It would indeed be "unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict", as the Commission had found in 2008.<sup>202</sup> He concurred with Mr. Petrič that States had to be given the flexibility they needed to take the necessary action under the circumstances.

19. To promote the peaceful settlement of disputes, the Special Rapporteur proposed *inter alia* a new paragraph 5 for draft article 8 in the form of a "without prejudice" clause. While he had no strong reservations regarding the statement of principle set forth in that paragraph, he did have reservations about the stipulation of time limits in the addition to paragraph 3 and the new paragraph 4. Such time limits would tilt the careful balance that had been maintained in the draft article thus far. He supported the retention of the text of draft article 8 as adopted on first reading with the addition of the proposed new paragraph 5, which would become new paragraph 4 if the current paragraph 4 was deleted, as he hoped.

20. He agreed that draft articles 3 to 12 should be referred to the Drafting Committee.

21. Mr. PETRIČ said that draft article 3 did not raise any substantial difficulties; the terminological problems

posed by the title and the text were matters which could be resolved by the Drafting Committee. There was nothing wrong with using the Latin phrase "*ipso facto*", given that other Latin expressions such as "*jus cogens*" "*bona fides*" or "*mutatis mutandis*" were part of the *lingua franca* of international forums.

22. Two years earlier, he had already expressed some reservations concerning draft article 4, for although the draft article spoke of "indicia", it in fact established what might become legal criteria if the articles ever took the form of a convention, an optional protocol or guidelines for States. When establishing the indicia of susceptibility to termination, withdrawal or suspension of treaties, it was necessary to bear in mind that an armed conflict represented an exceptionally stressful situation for a State, given that its security and even its survival might be at stake. Under those circumstances, State organs might have to react quickly to terminate, suspend or at least modify a treaty which a State deemed to be no longer in its interest. That was why the Commission should not be overly prescriptive in establishing criteria or indicia in that draft article. That was all the more true since draft article 3 clearly established the principle of the continuity of treaties, draft article 5 specified the treaties which continued in operation and draft article 8 laid down rules for the termination of, withdrawal from and suspension of the operation of treaties in the event of an armed conflict.

23. The indicia in draft article 4 should not only be limited in number but should also be clear. Draft article 4 referred to the nature of a treaty, whereas draft article 5 spoke of the subject matter of a treaty. Both concepts were hard to define and should be dealt with either in draft article 4 or, preferably, in draft article 5, but not in both. It was debatable whether including a reference to articles 31 and 32 of the 1969 Vienna Convention was the best way to handle indicia in draft article 4, since those two articles of the Convention concerned the interpretation of treaties in what were basically normal circumstances rather than in a situation of armed conflict. Since the draft articles under consideration were supposed to constitute a kind of *lex specialis*, it was questionable whether they should mention the general rules for interpreting treaties, which would in any case still apply as *lex generalis*.

24. Similarly, the criteria of extent, intensity and duration of a conflict were somewhat arbitrary and vague. A State might wish, for good reasons and in good faith, to notify the termination or suspension of a treaty immediately after the outbreak of an armed conflict that might subsequently prove to be neither extended, intense nor of long duration. At the outbreak of a conflict, a State could hardly be expected to foresee the course that it would ultimately take. He was also unsure whether the number of parties to a treaty was of sufficient relevance to be included among the indicia. Furthermore, post-conflict situations could vary greatly, and thus the ways in which States dealt with terminated or suspended treaties might also be very different. Calling States to account for non-compliance with the terms of draft article 4 might make it more difficult for States to re-establish their treaty relations after a conflict. He asked the Special Rapporteur whether he thought that the draft articles should cover the modification of treaties in the case of an armed conflict.

<sup>202</sup> *Yearbook ... 2008*, vol. II (Part Two), p. 60, para. (1) of the commentary to draft article 8.

25. His remarks regarding draft article 4 should not be viewed as categorical opposition to it, but as an appeal to the Drafting Committee and to the Special Rapporteur to consider whether and to what extent draft articles 4 and 5 could be combined and whether draft article 4 could be confined to indicia that were really relevant. All the requisite explanations should be placed in the commentary.

26. Without prejudice to the remarks he had just made, he wished to commend the Special Rapporteur's approach to draft article 5. The addition of paragraph 2 was a significant improvement. Human rights treaties should be included in that paragraph as a matter of principle, but since "treaties for the protection of human rights" was a far-reaching concept that could encompass the protection of such diverse rights as economic, social or cultural rights, minority rights, rights under the conventions of the International Labour Organization, procedural rights in criminal proceedings and the rights of aliens, the Drafting Committee should endeavour to formulate draft article 5, paragraph 2, more precisely and clarify it in the commentary. Most human rights instruments allowed States to limit or suspend human rights that were not part of *jus cogens* when national security or public order was in danger. The outbreak of an armed conflict was a prime example of a threat to national security.

27. He agreed with the indicative list contained in the annex to draft article 5, but he was not in favour of consigning that list to the commentary or of transferring parts of it to paragraph 2 of the draft article while deleting the remainder. The list should remain an annex, but it could be modified by additions or deletions after consideration by the Drafting Committee.

28. Article 7 should be placed immediately after draft article 3. Draft article 8 did not pose any difficulties that could not be resolved by the Drafting Committee. The Commission should not, however, try to bind States by too many formalities because armed conflicts placed a great strain on States, and he agreed with what Mr. Perera had said on that point. He was unsure whether it was necessary to mention Article 33 of the Charter of the United Nations in the draft article, but those matters could be resolved by the Drafting Committee.

29. He had no objections to draft articles 9, 10 and 11 and agreed with the Special Rapporteur's basic approach to draft article 12. When treaties had been terminated or suspended as a result of an armed conflict, States should be given as much freedom as possible to revive them at the earliest opportunity in peacetime, if that was in their common interest.

30. All the draft articles presented in the report could be referred to the Drafting Committee, since States had not requested any major amendments. The Drafting Committee should recast some provisions and include some explanations in the commentary but should not reopen any basic issues.

31. Sir Michael WOOD said that although draft articles 3, 4 and 5 formed the core of the set of draft articles, the relationship between them was not entirely clear. Mr. Pellet had suggested that the Drafting Committee

clarify the articulation of those provisions: that, however, needed to be done in the commentary. The relationship between the three draft articles was currently addressed in various places in the commentary adopted on first reading and in the Special Rapporteur's first report, but not always in precisely the same terms. As a newcomer to the project, he would personally find it helpful to have a clear statement of that relationship in one place in the commentary.

32. Draft article 3 was a key provision, and he agreed with other members that as currently worded it struck a careful balance: the Commission needed only to state that the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties; it was not seeking to formulate any kind of presumption. He did not interpret the statements made by Member States in the Sixth Committee as objecting to the current draft. If the Commission found a better title, as the Special Rapporteur had requested, it must ensure that the new title did not distort the substance and the nature of the provision; the words "General principle of continuity" did not capture the essence of the draft article.

33. The version of draft article 4, subparagraph (a), adopted on first reading, had not made any reference to the intention of the parties but had simply cited articles 31 and 32 of the 1969 Vienna Convention. He agreed with those members who felt that it was neither necessary nor desirable to refer to the intention of the parties, as it seemed unlikely that the negotiating States would have considered the effect an armed conflict might have on a treaty at the time they had negotiated it. Had they done so, however, they would probably have dealt with the matter expressly, and draft article 7 would then apply.

34. Having carefully considered the Special Rapporteur's explanation of his new draft of article 4, subparagraph (a), and listened attentively to the views of other members, particularly Mr. Hmoud, he had concluded that the draft conflated two distinct matters: the intention of the parties to a treaty and the interpretation of a treaty in accordance with articles 31 and 32 of the Vienna Conventions. Like Mr. Gaja, Mr. Pellet and others, Sir Michael considered it strange to refer to articles 31 and 32 of the Vienna Conventions for the purpose of ascertaining the intent of the parties, rather than as a tool for determining the objective nature of the treaty with respect to armed conflict. Articles 31 and 32 set out rules for treaty interpretation that did not necessarily establish what the parties had subjectively intended; rather, they established what the parties had actually agreed.

35. Turning to draft article 5, he agreed that if the work of the Commission was to be of practical use, it was important to retain the list of categories of treaties that appeared in the annex. He did not agree with Mr. Pellet that to do so would be inappropriate in a legal text or share Mr. Murase's concern about the list, since it was illustrative and not mandatory. He endorsed the proposal to add to the list a reference to treaties establishing international organizations and suggested that the wording used should be based on the language of article 5 of the 1969 Vienna Convention and should read "treaties which are the constituent instruments of international organizations". He also hoped that the Special Rapporteur would consider

Mr. Gaja's suggestion to support the list by including further references to practice, including case law, in the commentary.

36. He was not convinced that it was necessary to add a second paragraph to draft article 5, for the reasons given by the Special Rapporteur in paragraph 61 of his report. However, if the Commission should decide to follow that suggestion, perhaps the new provision should take the form of a separate article, although that would entail defining with precision the categories of treaties concerned. He wondered what was meant by the category "treaties relating to international humanitarian law", and he shared the view of Mr. Petrič that the categories "treaties for the protection of human rights" and "treaties relating to international criminal justice" were also vague. In short, he was not in favour of the additional provision, which would amount to a fundamental change in the Commission's approach to the draft articles between first and second reading, something the Special Rapporteur rightly wished to avoid.

37. A less ambitious approach that would nevertheless address the main concern of some States would be to include an article reflecting article 11, subparagraph (a), of the 1978 Vienna Convention, indicating that an armed conflict did not as such affect a boundary established by a treaty. Failing that, the point should at least be highlighted in the commentary.

38. With regard to the drafting of draft article 5, Sir Michael insisted that it should be clearly spelled out, at least in the commentary, but also in the annex or the text of the draft article if possible, that the list of categories of treaties was non-exhaustive. The Special Rapporteur had explained that the list was "illustrative", but that term seemed to cover a number of different ideas. He also believed that there should be a cross reference to the annex in the text of the draft article itself.

39. Turning to draft article 6, he suggested that it would be more accurate to refer in paragraph 1 to concluding treaties "in accordance with international law" rather than "in accordance with the 1969 Vienna Convention on the Law of Treaties". As one member had observed at a previous meeting, cross references to other instruments that might not be applicable were best avoided where possible.

40. Notwithstanding the Special Rapporteur's stout defence of the word "lawful" in paragraph 2 and Mr. Murase's comments on the matter, he still considered the word to be out of place. It might be better to replace the expression "lawful agreements", which begged many questions, with the words used in paragraph 1, namely "in accordance with the 1969 Vienna Convention on the Law of Treaties" or, alternatively, "in accordance with international law".

41. Draft article 8 had been the subject of heated debate: its detailed provisions might be unduly formalistic for States engaged in armed conflict, who might simply not find it practical to fulfil the notification requirements during a conflict. Such difficulties had been acknowledged by the Special Rapporteur in paragraph 89 of his report but had not been reflected in the revised draft article. The

Drafting Committee might wish to consider wording to cover that situation.

42. In conclusion, he endorsed Mr. Candiotti's suggestion that the set of draft articles should be divided in accordance with the structure recommended by the Commission in paragraph (5) of the commentary to draft article 1, as adopted on first reading. That would be consistent with practice and would make the draft articles easier to follow. He was in favour of referring draft articles 3 to 8 to the Drafting Committee, together with draft articles 9 to 12, on which he had no substantive comments.

43. Mr. WISNUMURTI said that he wished to make a few comments on draft articles 3 to 12. Regarding draft article 3, he agreed that the words "*ipso facto*" in the *chapeau* of the draft article should replace the word "necessarily" adopted on first reading. However, he disagreed with the suggestion from a Member State that a reference be included in the draft article to treaties establishing or modifying land and maritime boundaries. While he recognized the importance of that category of treaties and their continuity in armed conflicts, he objected to the suggestion from a substantive point of view for reasons he would explain when discussing draft article 5. Furthermore, from a drafting standpoint, such a reference would disrupt the balance of the draft article, which dealt with a general principle on termination and suspension of a treaty in an armed conflict, and not on the continued operation of treaties dealt with in draft article 5. He was not comfortable with the title suggested by the Special Rapporteur: the use of the word "absence" was both unusual and unclear. Although various other suggestions had been made in the report and during the debate in plenary, his preference was for a shorter title, such as "Termination or suspension" or "General rule on termination or suspension of treaties".

44. The Special Rapporteur had improved on the text of draft article 4, in particular by adding a reference in subparagraph (a) to the intention of the parties to the treaty—an important criterion missing from the text adopted on first reading—which brought greater clarity. He endorsed the retention of the *chapeau* of the draft article and the reference to the nature and extent of the armed conflict in subparagraph (b), contrary to the suggestion of some Member States. He was also in favour of including "intensity" and "duration" as additional criteria for susceptibility to termination, withdrawal or suspension of treaties, since those criteria would reflect the reality of an armed conflict that might affect the continued performance of the treaty. However, he was not in favour of the suggestion to delete the criterion "subject matter" in subparagraph (b). The reason for the deletion, given in paragraph 48 of the report, was to avoid repetition of the words "subject matter", which also appeared in draft article 5, and might therefore lead to confusion. In his view, such repetition was necessary, as the words served different purposes in the two draft articles.

45. Draft article 5 had been the subject of lengthy discussions in the Commission and in the Sixth Committee, particularly with regard to the indicative list of categories of treaties that should survive armed conflicts because of their subject matter. He endorsed the current approach of

referring to such categories of treaties in an indicative list in an annex and rejected the idea of incorporating some or all of those categories in the text of the draft article. He therefore had difficulty with the suggestion made in paragraph 70 of the report to add a second paragraph to the draft article. While he recognized the importance of the treaties listed in the proposed new paragraph, he considered that the proposal would only reopen the long process of negotiations. More importantly, the proposed new paragraph did not go well with the current paragraph 1 of the draft article, which established a general principle. Furthermore, the Commission had already reached consensus on the idea that those categories of treaties should be included in an indicative list in annex.

46. He had no difficulty with draft article 6, since basically it retained the text adopted on first reading; however, he queried the addition of the phrase “During an armed conflict” at the beginning of paragraph 2. It seemed redundant, as a similar phrase—“during situations of armed conflict”—appeared at the end of the paragraph.

47. The revised version of draft article 7 proposed by the Special Rapporteur was clearer than the original draft article. His only suggestion would be to add the word “continued” before the word “operation”. He also considered that the word “express” was unnecessary, both in the title and in the body of the provision. He agreed with the Special Rapporteur that draft article 7 should be placed after draft article 3.

48. He was not in favour of the suggestion to extend the scope of draft article 8 to States that were not parties to the conflict but were parties to the treaty, as he considered it would have broader implications than intended and would affect the other draft articles on the topic. His preference was therefore to retain paragraph 1 of the draft article as adopted on first reading. However, he had no difficulty with the proposed addition of a provision on the time limit for raising an objection to termination, withdrawal from and suspension of the operation of the treaty at the end of paragraph 3 of the draft article.

49. He recalled that, on the question of the settlement of disputes, the Commission had decided in the past not to include a draft provision corresponding to article 65, paragraph 4, of the 1969 Vienna Convention. He upheld that position and the view that providing a peaceful settlement of dispute regime during an armed conflict was unrealistic. However, he would not object if the Commission agreed to the Special Rapporteur’s suggestion to add a new paragraph 5 concerning the peaceful settlement of disputes. Likewise, he would not object to the addition of the obligation in paragraph 4 for the States parties concerned to resort to Article 33 of the Charter of the United Nations if an objection to termination, withdrawal from or suspension of the operation of a treaty had been raised within the prescribed time limit. He also endorsed the suggestion to amend the title of draft article 8, as the new title was more accurate.

50. He endorsed the Special Rapporteur’s suggestion to retain the text of draft article 9 as originally drafted and to replace the word “trite” with the word “self-evident” in paragraph (2) of the commentary to the draft article.

He also agreed to the retention of draft article 10 with the clarification given by the Special Rapporteur in paragraph 100 of his report concerning the use of the word “unjust” in subparagraph (c) of the draft article.

51. The use of the word “right” in the title of draft article 11 had been questioned, on the grounds that it was not mentioned in the other draft articles. That argument would become moot if the Commission accepted the additional paragraph 3 of draft article 8, in which the word “right” was used. Furthermore, the word “right” was also used in the title of article 45 of the 1969 Vienna Convention, which dealt with similar subject matter and on which draft article 11 was based. There were therefore no strong grounds for changing the title of draft article 11 by replacing the word “right” with the word “option”, as the Special Rapporteur had proposed.

52. He commended the Special Rapporteur for his analysis of the close relationship between draft articles 12 and 18 as adopted on first reading and his proposal to merge the two, resulting in new draft article 12.

53. In conclusion, Sir Michael said that he was in favour of referring draft articles 1 to 12 to the Drafting Committee and reiterated his congratulations to the Special Rapporteur for a job well done.

54. Mr. VASCIANNIE said that his comments on the provisions in draft articles 3 to 12 were influenced to a considerable extent by the thought that the provisions were generally fit for their purposes. Had they constituted a first draft, he would have been willing to contemplate greater changes, but at the present stage he believed that the provisions should be submitted to the Drafting Committee. In other words, although some of the provisions merited further discussion, he was inclined to support them in principle.

55. Draft article 3 indicated that the outbreak of an armed conflict did not in itself terminate or suspend the operation of treaties between States that were parties to the conflict or between a State party to the treaty and the conflict and a treaty State not party to the conflict. The Special Rapporteur’s formulation of the law in article 3 was sound and based on State practice.

56. The draft article was supported by the high authority of Lord McNair. In *The Law of Treaties*, McNair had considered, *inter alia*, the practice of Great Britain and other States concerning the Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land, various common-law decisions giving effect to those Conventions and the 1856 Declaration of Paris.<sup>203</sup> McNair also quoted British authority, *contra proferentem*, to the effect that certain nineteenth century treaty obligations needed to be respected even though they were affected by war and had concluded: “It is thus clear that war does not *per se* put an end to pre-war treaty obligations in existence between opposing belligerents.”<sup>204</sup>

<sup>203</sup> A. D. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 696.

<sup>204</sup> *Ibid.*, p. 697.

57. McNair had adopted a similar, albeit strange position in respect of third States in a war when he wrote:

Distinct from the question of the effect of the outbreak of war upon treaties between opposing States is the effect of the existence of a state of war upon the operation of treaties between either of them and a third State. As a question of principle, there is no reason why such treaties should be affected in any way by the war; but, exceptionally, an implied condition may be found to exist.<sup>205</sup>

58. Thus there was, at the very least, an argument that draft article 3 represented codification, and the Special Rapporteur's perspective was reinforced by the fact that no State had openly challenged the idea in its comments on the provision. Variations on the wording had been proposed, with "*ipso facto*" being challenged by "automatically", "necessarily", "in itself" or "*per se*". He endorsed the Special Rapporteur's choice of "*ipso facto*", and would be prepared to use that term in the title of the draft article as well. The Drafting Committee would have great fun arguing over the felicity of the heading and the value of Latinisms versus Anglicisms in modern international law practice. In that connection, he wished to draw Mr. Petrič's attention to the fact that a number of international treaties used Latin words, including the United Nations Convention on the Law of the Sea ("*ipso facto*" in article 156) and the 1969 Vienna Convention ("*pacta sunt servanda*" in article 26). More importantly, however, the idea of a presumption of continuity was not clearly established in the *lex lata* insofar as treaty parties that were also parties to a conflict were concerned.

59. Draft article 4 retained the title that had been stoutly defended by Sir Ian Brownlie. The term "indicia of susceptibility" was not pervasive in the literature, but State practice did suggest that the law had ways of determining which treaties might be terminated or suspended and which would continue to apply during the course of an armed conflict. He supported the position taken by some States, including China, that the draft article should indicate that the list of indicia was not exhaustive. The Special Rapporteur did not seem to oppose that position in principle but feared that highlighting it in the text might weaken the normative value of the rule. Many rules drafted by the Commission carried an "*inter alia*" qualification, which seemed to be appropriate in the case at hand. It was a question of law whether there were other indicia, and if there were, the "*inter alia*" reference could be inserted at the end of the *chapeau* of the draft article, which would then read: "resort shall be had to, *inter alia*, the items listed in draft article 4, subparagraphs (a) and (b)".

60. As to draft article 4, subparagraph (a), he supported the insertion of the reference to the intention of the parties. It would give States a clear indication as to why they needed to look at articles 31 and 32 of the 1969 Vienna Convention: to find out what the parties might be deemed to have intended when they had entered into the treaty. It seemed unhelpful to state that the rules governing the interpretation of treaties should be examined in order to find out whether a treaty was to continue to apply during armed conflict.

61. Express reference to the intention of the parties in that context was well supported by doctrine. For example,

as Sir Ian Brownlie had noted in his first report on the topic,<sup>206</sup> in the *British Yearbook of International Law* for 1921–1922, Sir Cecil Hurst had submitted that "the true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty was concluded" (para. 32).<sup>207</sup> Lord McNair, meanwhile, had submitted in *The Law of Treaties* that:

It is believed that in the vast majority of cases, if not in all, either of these tests (intention of the parties or nature of the treaty) would give the same result, for the nature of the treaty is clearly the best evidence of the intention of the parties. Thus, it is obvious that a convention for the regulation of the conduct of war is intended by the parties to operate during war.<sup>208</sup> (para. 33)

62. There was thus an important doctrinal basis for retaining the reference to the intention of the parties in draft article 4. However, from McNair's perspective, which was built on State practice, there was also a strong case for including the nature of the treaty among the factors that would determine whether the treaty continued to operate. He believed that this consideration was fully incorporated into draft article 5 and the annex. The other factors mentioned as indicia of susceptibility in draft article 4, subparagraph (b)—the nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty—were also factors to be considered. He had cited Hurst and McNair partly because of their high authority, but also to address indirectly the point raised in some comments that aspects of the project did not take due account of State practice. McNair, in particular, had built his study of treaty law in time of war on the relevant State practice, and offered an approach similar to that taken in most of the draft articles submitted by the Special Rapporteur.

63. Draft article 4, contrary to draft article 3, mentioned withdrawal from treaties. That was not necessarily a contradiction, but the lack of symmetry between the two provisions made him wonder whether more needed to be said about withdrawal.

64. The relationship between draft articles 4 and 5 also gave rise to questions. At an earlier stage in the project, he would have supported a detailed review of the relationship between the two provisions. Taken together, however, the two draft articles addressed the main considerations that determined whether a treaty might or might not be suspended or terminated. He was therefore prepared to accept the current formulations, including the approach taken with respect to the annex, but there must be an express link between draft article 5 and the annex. He also supported the inclusion of a paragraph 2 and the removal of items (a), (b) and (c) from the list contained in the annex. However, the two paragraphs might have to be qualified, especially where the wide human rights guarantees contemplated therein were concerned, a point made by Mr. Petrič; some of the points made by Sir Michael in that connection should also be taken into account. He also supported the view that the reference to *jus cogens* was unnecessary. On the retention of the annex, he drew

<sup>206</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

<sup>207</sup> C. J. B. Hurst, "The effect of war on treaties", *BYBIL 1921–1922*, vol. 2, pp. 37–47, at p. 40.

<sup>208</sup> McNair (footnote 203 above), p. 698.

<sup>205</sup> *Ibid.*, p. 728.



attention in particular to the position of the Special Rapporteur and the arguments of Mr. Perera, among others.

65. He endorsed the Special Rapporteur's approach to draft article 6 and agreed to the placement of draft article 7, in its revised form, after draft article 3 for the reasons given by the Special Rapporteur.

66. He also endorsed draft article 8 as presented in the current report, but not the approach discussed in paragraph 92 of the report, which suggested that the scope of the draft article be extended to States that were not parties to the conflict but were parties to the treaty. The Special Rapporteur had noted that it would be easy to introduce such a reference. In his own view, the option of seeking to terminate, withdraw from or suspend the operation of a treaty should rest with the States engaged in the armed conflict; third parties to the conflict should not have that right. His perspective was based on the premise that it was the parties to the conflict that would be facing the exigencies that required them to consider whether a particular treaty rule should be applicable. That provision seemed to be presented for consideration *de lege ferenda* and thus admitted some scope for policy considerations. It might be important in that regard to reassure weak countries that happened to find themselves involved in an armed conflict, whether internally or externally propelled, that they would not be open to a raft of notifications in respect of treaty terminations from countries that had nothing substantial or direct to do with the armed conflict. One could argue that, as a matter of policy, the draft articles should be sensitive to the possibility of abuse by the powerful, and that therefore a high threshold was needed for determining the moment at which an armed conflict was actually taking place. Following that line of reasoning, it was again arguable that the *Tadić* approach did not set the threshold high enough. It seemed to him, however, that the way to safeguard against abuse was to maintain that non-parties to the armed conflict did not have the first option of withdrawing from their treaty commitments against a State that was involved in the armed conflict. Thus the wording in draft article 8 was an important safeguard to protect the interests of the vulnerable.

67. He was in general agreement with draft articles 9 to 12.

68. The CHAIRPERSON, speaking as a member of the Commission, said that a change of the title of draft article 3 needed to be carefully considered. "Non-automatic" termination or suspension was not the same as the "absence" of termination or suspension. The former implied that if certain conditions were met, treaties might be terminated or suspended; that was also in line with the provision that treaties were not necessarily terminated or suspended when there was an outbreak of an armed conflict. The latter term seemed to place more emphasis on the definitive nature of the continuity of treaties. Given the nature of armed conflicts, that conclusion was a bit too normative.

69. She believed that the Commission should try to avoid the use of such Latin terms as "*ipso facto*". However, having heard so many arguments in their defence, she had become somewhat flexible about their use.

70. Based on the presumption in draft article 3—and when she used the word "presumption", she took it to mean that the outbreak of armed conflict did not necessarily suspend or terminate a treaty—draft articles 4 and 5 were closely related. In draft article 4, the intention of the parties was a necessary element, and she agreed with the comment made in that regard by Mr. Vasciannie. Intention was also related to the subject matter of the treaty. The two elements set out in draft subparagraphs (a) and (b) of article 4, namely, the intention of the parties to the treaty and objective conditions such as the nature, extent, intensity and duration of the armed conflict, were relevant factors. She shared the view that draft article 3 did not in any way imply the automatic operation of a treaty, in whole or in part, in the event of an armed conflict, but it was clear that the question must be examined in the light of the criteria set forth in draft articles 4 and 5. To remove the reference to subject matter from draft article 4 would weaken, if not sever, the connection between the two draft articles. In general, she agreed with the comment that the relations between draft articles 3, 4 and 5 needed to be further clarified.

71. In draft article 5, the proposed additional paragraph would drastically change the approach originally taken by the Commission during first reading. She found it strange that certain types of treaties should be removed from the indicative list, as some of the conventions falling within those categories contained provisions that specifically addressed situations of armed conflict, for example article 29 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, relating to international watercourses and installations in time of armed conflict. In the *Oil Platforms* case, the ICJ had also invoked a treaty of friendship, commerce and navigation.<sup>209</sup> The main problem with the current drafting was that to single out certain treaties would send a clear but misleading message that those treaties were definitely applicable in time of armed conflict. Yet the Commission's intention was to show that the list was merely indicative, and not exclusive. Furthermore, under international covenants on human rights, some rights were derogable in emergency situations. The proper approach, then, was to retain the indicative list without adding a second paragraph in article 5. The subject matter and the nature of the list could be further explained in the commentary.

72. She had no objection to the changes suggested for draft article 6, and she endorsed the proposal to replace the phrase "in accordance with the 1969 Vienna Convention on the Law of Treaties" with the words "in accordance with international law". With regard to draft article 7, she said that, given the emphasis placed on the connection between draft articles 3, 4 and 5, article 7 could be placed either after draft article 3 or after draft article 5; the matter could be further examined in the Drafting Committee.

73. Turning to draft article 8, she noted that in paragraph 42 of his report the Special Rapporteur had described a scenario in which a State party to a treaty notified the other parties of its intention to terminate or suspend the

<sup>209</sup> Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (Tehran, 15 August 1955), United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

treaty under draft article 8, but the conditions under draft article 4 were not met. The question was whether the notifying State should be held accountable for non-compliance with its obligation in such a case. That was a typical example of treaty disputes that were likely to arise in practice. The procedural requirement of notification was desirable for the sake of stable treaty relations, but the more difficult part lay in determining whether there was a meeting of the minds of the States concerned.

74. With regard to dispute settlement, she said it was important that draft article 8 emphasize the obligations under Article 33 of the Charter of the United Nations and general international law. The wording of article 8, paragraph 5, however, was not clear: it could be interpreted to mean that even if an armed conflict had made it impossible for the treaty to remain in operation, the States concerned should nevertheless remain bound by the provisions on dispute settlement. If the obligation was defined in general terms, it would not be far from requirements of paragraph 4, but if it was defined in very specific terms with regard to procedural requirements, it would be difficult to invoke the terms by applying draft articles 4 to 7 under circumstances of armed conflict if the parties concerned did not intend to comply with those requirements. In other words, the question of dispute settlement would be determined on the basis of the intention of the parties rather than through the application of articles 4 to 7. Consequently, the draft articles should allow States a degree of flexibility as to the choice of means of a settlement. That was true in peacetime, and perhaps even more so in time of armed conflict.

75. Draft article 11 was quite strongly worded. Having carefully read the comments made by China, reflected in paragraphs 104 to 106 of the report, she said that three points needed to be made. First, loss of the right to terminate or suspend a treaty was not the consequence of an armed conflict, but of an express or implicit consent of the State concerned when it was clearly aware of the effects of the armed conflict. Secondly, such consent, whether expressed or construed from the State's conduct, should be given or taken into account after the armed conflict had begun. Thirdly, once such consent was given, if the armed conflict subsequently escalated in intensity and duration, fundamentally changing the circumstances, the State concerned should be allowed to reconsider its position on treaties. Those issues were difficult but not uncommon in practice, and they should be examined further, together with draft article 17.

76. Draft article 12, on resumption of suspended treaties, covered a narrow area. Nevertheless it should be considered together with draft article 18, on revival of treaty relations, to see whether the two articles could be combined into a single article so as to avoid any misunderstanding on the part of the reader.

77. Ms. Xue agreed that draft articles 1 to 12 should be referred to the Drafting Committee.

78. Ms. JACOBSSON, referring to draft article 3, said that she agreed with the approach that it should also cover situations involving a single State party to a conflict and third States, and she therefore welcomed the revised

formulation of the text, particularly the clarification of the meaning of the term "third State". She agreed that the title could be improved, and she endorsed the proposal by Mr. Vázquez-Bermúdez regarding the principle of continuity. If the reference to "principle" posed a problem, or if the Commission could not agree on whether it was talking about the principle of presumption, it could simply use the formulation "continuity" or "continuity of treaty relations". She had no objection to the use of the words "*ipso facto*", as long as they did not appear in the title, although they could be replaced by "in itself".

79. With regard to draft article 4, she agreed with those members who were in favour of including a reference to the intention of the parties as a way of ascertaining whether a treaty was susceptible to termination, withdrawal or suspension. It might be useful to attempt to merge the two subparagraphs.

80. Draft article 5 raised the crucial question of a possible differentiation among treaties. Such a differentiation obviously existed, with treaties on the laws of warfare, including humanitarian law, being obvious examples. The entire rationale of such treaties was that they were applicable in times of armed conflict. In the best of worlds, human rights treaties also continued to apply in parallel with the *lex specialis* of humanitarian law. Yet human rights treaties sometimes had a differentiation embedded in them, in that they allowed for certain provisions to be suspended in wartime. Border and boundary treaties were other examples, whereas common resource management treaties that might follow from a boundary agreement might be a totally different matter. She endorsed the Special Rapporteur's proposal to add a new paragraph to draft article 5. The list of categories in paragraph 2 served as good examples of treaties that should be subject to restrictions in situations of armed conflict. The wording of paragraph 2 and the content of the annex could be discussed further in the Drafting Committee.

81. Mr. Murase had made an interesting reference to armistice agreements and environmental treaties. His line of reasoning with regard to armistice agreements was very convincing, and the question could be discussed further in the Drafting Committee. She disagreed with him, however, on environmental treaties. It was true that the Geneva Conventions for the protection of war victims and the Protocols additional thereto afforded little protection for the environment. Other conventions might have stronger provisions, such as the Convention on the prohibition of military or any hostile use of environmental modification techniques. Mr. Murase had argued that military necessity implied that the environment could not be protected and that it was necessary to accept "collateral damage", although that was not exactly what treaties of international humanitarian law actually stated. He seemed to draw the conclusion that environmental treaties should not be included in the group of treaties in draft article 5 or its annex or in the commentary and that they might be suspended during an armed conflict. That view did not reflect the current state of international law. It was well known, for example, that one of the reasons why it had been so difficult to include environmental protection in the law of armed conflict had to do with nuclear weapons. Any rule that implied that nuclear weapons could not be used

because of their effect on the environment would not be acceptable to the nuclear Powers. Yet surely environmental protection had evolved beyond the stage it had been at when the Protocols—not to mention the Geneva Conventions for the protection of war victims themselves—had been concluded. If it had not, that would mean that those instruments had remained unaffected by developments in international law. That was obviously not the case, and the ICJ had made it very clear in paragraph 30 of its 1996 advisory opinion concerning *Legality of the Threat or Use of Nuclear Weapons* that:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

Thus a belligerent could not disregard the obligation to protect the environment. That did not mean that an act that would have been a violation of a provision of an environmental treaty in peacetime would be regarded as a violation in wartime. The exceptions provided for in articles 61 and 62 of the 1969 Vienna Convention would apply.

82. It would be wrong to conclude that environmental treaties should not continue to operate between non-belligerent States and a State that was a party to a conflict. It would send the wrong signal not to include environmental treaties in the annex. After all, the Commission's main objective was the continued application of a treaty in times of armed conflict. The Commission did not want to assume that the Convention on biological diversity, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes or other treaties would cease to operate or could be easily suspended, particularly since the Commission had expanded the categories of States to which the draft articles were applicable to include States that were not parties to the conflict.

83. With regard to draft article 6, she said that the phrase "in accordance with the 1969 Vienna Convention on the Law of Treaties" should be deleted, and she endorsed Sir Michael's proposal to replace it with "in accordance with international law".

84. Turning to draft article 8, she said that Mr. Vascianie's point on the interests of vulnerable States was well taken. She welcomed the improvements made to the draft article, and to paragraph 3 in particular, but was sceptical about the issue of a time limit and looked forward to discussing the matter in the Drafting Committee. She was in favour of retaining an obligation to continue to seek to resolve problems or disputes by peaceful means, either with a reference to Article 33 of the Charter of the United Nations or in an additional paragraph 5 to draft article 8. There was nothing in international law that relieved States of their obligation to try to settle conflicts by peaceful means, even in times of armed conflict. Any dispute that arose needed to be addressed in accordance with that basic principle.

85. Concerning draft article 10, she agreed with the Special Rapporteur that there was no need to replace the wording from the first reading in 2008.

**Protection of persons in the event of disasters (*continued*) (A/CN.4/620 and Add.1, sect. D, A/CN.4/629, A/CN.4/L.776)**

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

86. The CHAIRPERSON invited the Commission to continue its consideration of the third report on the protection of persons in the event of disasters (A/CN.4/629).

87. Mr. VARGAS CARREÑO commended the Special Rapporteur on the high quality of his third report and said that, on the whole, he was in agreement with its summary of the discussion on the introductory articles. He would, however, like to make a comment about draft article 4. The original text of draft article 4 had excluded armed conflicts. That exclusion had prompted a debate between those in favour of such an exclusion and those who had maintained that an armed conflict could be regarded as a disaster in certain circumstances and might thus fall within the scope of the draft articles. The Drafting Committee had provisionally adopted a text which appeared to have been to everyone's satisfaction. According to the version of draft article 4 adopted, the draft articles did not apply to situations in which the rules of international humanitarian law were applicable—in other words, they would be applicable in the event of armed conflict in all cases not regulated by international humanitarian law. He believed it was important to make that point because in paragraph 47 of his report the Special Rapporteur had stressed that armed conflict was to be excluded from the subject matter to be covered in the Commission's current work. Personally, he did not think that that was entirely correct.

88. In his third report, the Special Rapporteur presented three new draft articles. With regard to draft article 6, on humanitarian principles in disaster response, he stated, in paragraph 15: "Response to disasters, in particular humanitarian assistance, must comply with certain requirements to balance the interests of the affected State and the assisting actors. The requirements for specific activities undertaken as part of the response to disasters may be found in the humanitarian principles of humanity, neutrality and impartiality." He fully agreed with the Special Rapporteur that the principle of humanity was the cornerstone of the protection of persons in international law, as it marked the point where international humanitarian law intersected with human rights law. Accordingly, it was a necessary element for the development of mechanisms for the protection of persons in the event of disasters. Moreover, the principle of humanity was enshrined in a number of important international instruments.

89. On the other hand, he had grave doubts about including the principle of neutrality as one of the humanitarian principles to be applied in the event of disasters, particularly if the disaster was not the result of an armed conflict. To describe the principle of neutrality, the Special Rapporteur cited the Fundamental Principles of the Red Cross, which stated that humanitarian response must be provided without engaging in hostilities or taking sides "in controversies of a political, religious or ideological

nature”.<sup>210</sup> However, a disaster that was not caused by an armed conflict did not involve hostilities or political, religious or ideological controversies; at most, there might be disagreement as to the causes of the disaster or the priorities for reconstruction, but an excessively rigid interpretation of the principle of neutrality might inhibit some actors who—in the case of an earthquake, for example—wanted their contribution to be used for rebuilding schools or housing, whereas some groups within the State might attach greater importance to the rebuilding of infrastructure. He understood the Special Rapporteur’s concern for protecting certain fundamental principles relating to State sovereignty and ensuring that those who responded to disasters refrained from engaging in conduct that might be considered interference in the interests of a State, but that legitimate concern was not covered by invoking the principle of neutrality, which might affect the authority of actors who, through dialogue and flexible cooperation with the State under the latter’s supervision, wanted actively to assist the victims of the disaster.

90. Perhaps that concern might better be addressed by the principle of impartiality, which, according to the Special Rapporteur, encompassed three distinct principles: non-discrimination, proportionality and impartiality proper. The principle of non-discrimination, which had been established in the most basic international instruments, beginning with the Charter of the United Nations, had acquired the status of a fundamental rule of international humanitarian law and international human rights law. There was no question that it also belonged in the set of draft articles, as there should be no discrimination of any kind in the provision of assistance to persons affected by a disaster. Given its importance, the principle of non-discrimination should be mentioned explicitly in draft article 6, in place of the principle of neutrality.

91. It did not, however, seem appropriate to include the principle of proportionality as a component of impartiality. The principle of proportionality in international law had been developed primarily in the writings of legal scholars and through the precedent-setting interpretations of the ICJ, such as the one relating to the right of self-defence, which was reflected in Article 51 of the Charter of the United Nations. In his view, the disadvantages of incorporating the principle of proportionality in the present set of draft articles outweighed the advantages, even if it was mentioned only in the commentary.

92. According to the Special Rapporteur, “[t]he principle of proportionality recognizes that the response must be proportionate to the degree of suffering and urgency. In other words, the response activities must be proportionate to the needs in scope and in duration”. He disagreed, at least partially, with that criterion: disaster response obviously did depend, in part, on the degree of suffering and urgency and on the needs of the affected State, but it also depended on such other factors as the economic capacity of the entity providing the assistance. To establish a relationship of proportionality between suffering and needs, on the one hand, and the provision of assistance, on the other, would mean excluding the relief that many States, international organizations and agencies were prepared to

provide, according to their ability to do so. In the case of the recent earthquake in Chile, which was the fifth most devastating in recorded history, it was estimated that reconstruction would cost billions of dollars. While foreign aid was certainly among the resources that would pay for the reconstruction, no State could be required to ensure that its response was proportionate to the needs of Chile. The President of the Plurinational State of Bolivia, one of the poorest countries in Latin America and one with which Chile did not have diplomatic ties, had offered to donate a day’s wages to the reconstruction effort, as had several of his Ministers. That assistance was completely disproportionate to the needs of Chile, yet it was a gesture that was much appreciated by Chileans.

93. With regard to the principle of impartiality proper, it should be included in the set of draft articles in its narrower sense, meaning—as the Special Rapporteur had proposed and as an excellent memorandum by the Secretariat<sup>211</sup> had previously described it—the obligation to remove subjective distinctions between individuals based on criteria other than need.

94. In the light of those observations, he suggested that the term “neutrality” in draft article 6 be replaced by “non-discrimination”.

95. In draft article 7, the Special Rapporteur had proposed a provision concerning human dignity, a concept that was explicitly recognized in nearly all international and regional human rights instruments. While he personally would have preferred the inclusion of that necessary reference in the preamble, the Commission had already discussed the same issue under the topic of expulsion of aliens, and most members of the Commission and the Drafting Committee had favoured including a provision on the obligation to respect the dignity of persons being expelled in the body of the corresponding draft articles. He would not therefore insist on placing the reference to human dignity in the preamble of the current set of draft articles and could accept the text proposed by the Special Rapporteur for draft article 7. He wished to suggest, however, that an additional reference be included in the draft article, namely, to the obligation of States to respect fundamental human rights in accordance with the international instruments to which they were a party. Alternatively, such a reference could be set out in a separate draft article. In any case, such a reference was important because disasters generally affected human rights, both those of a general nature and those relating specifically to the most vulnerable categories of the population, such as children and disabled persons. Disasters inherently affected civil and political rights as well as economic, social and cultural rights. They affected non-derogable human rights and others that, under certain conditions, could be derogated from in an emergency and temporarily suspended. He therefore found it neither superfluous nor unnecessary to include such a general provision in the draft articles. On the contrary, it would strengthen the obligation to respect human rights, even in cases of emergencies, including disasters, and would authorize affected States to suspend the exercise of certain human rights temporarily, action that was contemplated in the

<sup>210</sup> See footnote 185 above.

<sup>211</sup> A/CN.4/590 and Add.1–3 (see footnote 182 above), para. 15.

International Covenant on Civil and Political Rights and in some regional instruments, such as the American Convention on Human Rights: "Pact of San José, Costa Rica".

96. In draft article 8, the Special Rapporteur had based his proposed provisions on an interesting study he had prepared on the subject of sovereignty and non-intervention and the primary responsibility of the affected State (paras. 64–95), which contained many references to scholarly opinion, relevant treaties, international case law and precedents set by international organizations, particularly in resolutions adopted by the General Assembly. Of all the instruments cited by the Special Rapporteur, his own preference was for General Assembly resolution 46/182 of 19 December 1991, on the strengthening of the coordination of humanitarian emergency assistance of the United Nations, which contained the following in paragraph 4 of its annex:

Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.

The language proposed by the Special Rapporteur in draft article 8 was similar to that used in the above-mentioned resolution, but he would have preferred for it to adhere even more closely to the wording of the resolution for two reasons: first, because it was language that had already been the subject of broad consensus and, secondly, because it was more suitable than the language contained in the Special Rapporteur's proposal. The General Assembly resolution referred to the affected State's primary—and therefore not sole or exclusive—role in the initiation, organization, coordination, and implementation of humanitarian assistance, whereas in the wording proposed by the Special Rapporteur, the State appeared to have a monopoly to direct, control, coordinate and supervise assistance.

97. He also had a problem with the wording of paragraph 2 of draft article 8, which stated that external assistance could be provided only with the consent of the affected State. Although no State was required to accept external assistance offered to it, the wording of paragraph 2 could be interpreted to mean that the affected State must give its prior and express consent before external assistance could be provided. That did not reflect State practice and might even hamper urgent disaster relief efforts. In the recent earthquake in Chile, medicine, food and other assistance had begun flowing into the country only hours after the event, without the prior or formal consent of Chile and merely upon receipt of the appropriate authorization for its entry into the country. In a disaster, what was important was adequate coordination between the affected State and the assisting parties, with the affected State playing the primary role in the initiation, organization and coordination of humanitarian assistance.

98. The issue of initiation was one that could potentially be of vital importance. Following the earthquake in Chile, people in large parts of the country were without electricity or telephone service for several hours and, in some places, several days. When the United States Secretary of State, Hillary Clinton, asked the Chilean authorities

what type of assistance the country needed, they replied that what Chile needed most were satellite phones. Those phones had proved to be crucial in re-establishing communication both within the country and with the outside world. He was citing that example in the hope that it might serve to supplement the excellent and well-documented report introduced by the Special Rapporteur.

99. He would be in favour of referring the draft articles, along with his comments and those of other Commission members, to the Drafting Committee.

100. Mr. HMOUD said that he agreed with the inclusion in the draft articles of the humanitarian principles of humanity, neutrality and impartiality because they constituted important safeguards for relations between actors in the event of a disaster while also ensuring that the needs of affected persons were given priority. Furthermore, they were well established in the field of humanitarian relief. Neutrality guaranteed that humanitarian assistance was not used as a means of interfering in the internal affairs of an affected State and that aid was used only for humanitarian, and not political, purposes. States were at their most vulnerable in a disaster situation, and to exploit that vulnerability as well as the people's needs for political ends not only defeated the humanitarian goal of disaster relief but also had a negative impact on other humanitarian actors. It was thus in the interest of both States and other humanitarian actors to include the principle of neutrality in the legal framework of the present draft articles.

101. As far as impartiality was concerned, he agreed with the Special Rapporteur that, in some conditions, directing the disaster response towards certain vulnerable groups, such as children, did not violate the principles of non-discrimination or impartiality.

102. The principle of humanity was important for guiding humanitarian relief in the wake of a disaster. It placed affected persons within the relief process and recognized that respecting the rights and needs of those persons was the ultimate goal. It also served as an important indicator against which actors in a disaster situation could measure the effectiveness of their performance.

103. However, while he agreed that the three principles should be included in the draft articles as guiding principles for humanitarian response to disasters, he believed it might also be useful to amend draft article 6 to reflect that their purpose was to provide guidance. The statement in draft article 6 that response to disasters must take place in accordance with the principles of humanity did not of itself impose any specific legal obligation on the actors involved. The reference to the principle of neutrality, on the other hand, was directed at providers of assistance other than the affected State and could entail the specific legal obligation of non-interference. The principle of impartiality, meanwhile, could be applied to all actors involved, including the affected State, and implied the key obligation of non-discrimination. Thus, although the three principles could be grouped together as guiding principles, the specific obligations to which they gave rise should be enumerated individually in the draft articles. In that connection, he proposed that the Commission give consideration to three options: first, draft article 6 should

be reformulated to indicate that the protection of persons in the event of disasters was guided by or based on the principles of humanity, neutrality and impartiality; alternatively, the reference to the three principles should be placed in the preamble to the draft articles; and, lastly, separate draft articles should be formulated to reflect the content of the principles of neutrality (the obligation of non-interference on the part of external providers of assistance) and impartiality (the obligation of all actors involved not to discriminate).

104. In his report, the Special Rapporteur made an elaborate case for the inclusion of human dignity as an obligation under the draft articles, but the fact remained that human dignity was a source of human rights and not a right *per se* entailing specific obligations. That issue had been debated in the Commission during its consideration of the topic of the expulsion of aliens. In that context, it had been agreed that, in order to avoid discussing whether human dignity should be constituted as a general right, the focus of the obligation should be respect for human dignity in the specific context of the treatment of persons who had been or were being expelled. He questioned whether that solution could be transposed to the topic under consideration, given the different contexts of the two topics. Whereas the first topic referred to the process of expulsion during which individuals were entitled to respect for their human dignity, the second topic, relating to disasters, referred to a situation, not a process. Nevertheless, if the Commission agreed that the treatment given to individuals affected by a disaster must show respect for their human dignity, then the content of the corresponding obligation had to be clearly enunciated.

105. In his report, the Special Rapporteur had thoroughly addressed a key issue that would help orient the draft articles: the primary responsibility of the affected State for organizing relief in the event of a disaster. Based on the instruments, jurisprudence and case law cited in his report, the Special Rapporteur demonstrated that international law considered that such responsibility lay with the affected State. That was an important pronouncement that served to safeguard the sovereignty of affected States; however, it also had significant legal consequences. Under the draft articles, the affected State had a duty to protect the individuals in its territory, and while it was entitled to refuse the provision of any external assistance offered it, it bore responsibility for its decision and could be found in breach of the draft articles if such refusal undermined the rights of affected individuals under the draft articles or general international law. The affected State could also incur international responsibility if it performed its obligations in a deficient manner, whether from a humanitarian or an operational perspective. The responsibility of an affected State in the event of a disaster had to be read together with the duty to cooperate, as the two obligations carried equal weight. Also, primary responsibility did not mean exclusive responsibility, and the affected State had to be aware that its rights stemmed only from its fulfilment in good faith of its obligations under the draft articles towards individuals in its territory.

106. He could therefore accept the content of draft article 8 reflecting the primary responsibility of the affected State for the protection of persons, its right to organize

humanitarian assistance and its right to consent to the provision of external assistance. He recommended referring draft articles 6, 7 and 8 to the Drafting Committee.

107. The CHAIRPERSON, speaking as a member of the Commission, commended the Special Rapporteur for his third report, which provided an in-depth analysis of the legal basis of the general principles of humanity, neutrality, impartiality, respect for human dignity and sovereignty in international law. On the whole, she agreed that those principles should be included in the draft articles, but she wished to make a few comments on the content of and the relationship between those principles.

108. As the Special Rapporteur pointed out, the three humanitarian principles of humanity, neutrality and impartiality had evolved from the International Red Cross and Red Crescent Movement and had subsequently become part of international humanitarian law. They were currently accepted as the leading principles governing various types of humanitarian assistance activities. In time of war, States on opposing sides of a conflict could allow humanitarian assistance to be made available to innocent civilians and the wounded on both sides by invoking those principles. Although that was easier said than done, the principles themselves had stood the test of time in international relations and had greatly promoted human progress. When emergency situations arose in times of peace, whether as a result of natural disasters or other catastrophes, the needs of victims became the highest priority, and assistance could be provided by actors of any kind. While such admirable efforts should be encouraged to the extent possible, it should be recalled that differences and even conflicts between States could arise and easily impede such efforts. The three humanitarian principles were intended to circumvent such differences in order to ensure the smooth operation of humanitarian assistance. From a certain perspective, therefore, those principles had the effect, not of weakening the principles of sovereignty and non-intervention, but rather of strengthening them, since all response operations must respect the principles of sovereignty and non-intervention. As the Special Rapporteur rightly pointed out in paragraph 27 of his report, a State's humanitarian response should not be used to intervene in the domestic affairs of another State. Thus the principle of neutrality was clearly subordinate to the principle of respect for the sovereignty of States: it obliged assisting actors to do everything feasible to ensure that their activities were not being used for purposes other than responding to the disaster in accordance with the humanitarian principles.

109. In his report, the Special Rapporteur highlighted the primary responsibility of the affected State, but only after discussing the three humanitarian principles. In her view, the principles of sovereignty and non-intervention that were reflected in draft article 8 should be established before the three humanitarian principles enumerated in draft article 6. Reversing the order of the placement of those draft articles would properly reflect both the rights of the affected State with regard to humanitarian assistance and the responsibility of that State for the overall rescue operation.

110. In substance, the principle of sovereignty referred not only to the primary responsibility and consent of the

affected State but also to the fact that those assisting, whether States or non-State actors, should follow the affected State's direction, respect its decisions and not interfere in its domestic affairs, threaten its political system or do anything unrelated to the rescue effort. If those principles were truly observed, an individual appeal for international relief should not pose any problem. China's recent experience in earthquake relief operations had shown that individual, collective and national appeals for international relief shared the common goal of rescuing and helping victims. Given that requests for assistance varied from individual to individual and from situation to situation, coordination at the local, national and international levels was crucial. It was not that the concept of an individual appeal for international relief was "in tension with the principles of sovereignty and non-intervention", as the Special Rapporteur stated in paragraph 6 of his report, but rather that the response from foreign countries to an individual appeal might not always be acceptable to the affected State for reasons unknown to the individual or because the affected State could not handle such a response, given the conditions in or the capacity of the country.

111. She was not certain why, in paragraph 15 of the report, the Special Rapporteur had referred to requirements for balancing the interests of the affected State and the assisting actors, since, in her view, those interests were identical—namely, to rescue the victims of a disaster. As the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and the ASEAN [Association of Southeast Asian Nations] Agreement on Disaster Management and Emergency Response made clear, the affected State exercised overall direction, control, coordination and supervision of assistance within its territory. When the normal social order was disrupted by the sudden occurrence of a disaster, responses to individual appeals should proceed alongside the general flow of assistance operations. The question was not so much one of balancing as it was one of coordinating and supervising.

112. It was likewise not quite clear what was meant by the requirement to "respect and protect human dignity" in draft article 7. She wondered also how draft article 7 related to draft articles 6 and 8, as it seemed to imply more than it expressed. In her view, draft article 7 should be interpreted to mean that every life should be rescued and every victim should be assisted. That was a code of conduct, rather than a code of results. The goal of the Commission was to ensure that no person was left on his or her own, but as a legal duty that goal had a direct bearing on the capacity of the affected State and the duty of other States to provide assistance. The meaning of draft article 7 should therefore be elucidated, and an explanation should be provided in the commentary.

113. In the contemporary world, disasters, whether of natural or man-made origin, had become one of the most important security issues for all countries. If the problems associated with disasters stemmed primarily from the responsibility of States to protect their citizens in such events, the task of international law would be made easier. Likewise, if such problems occurred mainly at the national level, it would be easier to find solutions. More often than

not, however, even when affected States, particularly developing countries, fully discharged their responsibilities, they still lacked either the capacity or the experience to deal with a major disaster, thereby making international cooperation crucially important. Moreover, a major disaster, such as a tsunami, could affect several States at once, thereby making international cooperation fundamental to the provision of assistance in the resulting large-scale rescue operations. That did not mean that other fundamental principles could be put aside; instead, they combined to form the legal basis for assistance operations.

114. She had checked the statement made by the delegation of China to which reference was made in the report (in the first footnote to paragraph 12<sup>212</sup>) and had discovered that the expression "moral value of cooperation" meant that the obligation to accept disaster relief by the affected State and the duty to fulfil requests for relief by assisting actors should not be construed as absolute legal obligations. In other words, the affected State could decline international assistance as it saw fit, and the assisting actor could also reject a request for relief, owing to its limited capacity. It should be possible for that understanding to be generally accepted without any difficulty.

115. In conclusion, she was in favour of referring draft articles 6, 7 and 8 to the Drafting Committee for further improvement.

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

[Agenda item 1]

116. The CHAIRPERSON drew attention to a study by the Secretariat entitled "Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'" (A/CN.4/630).<sup>213</sup>

117. Mr. PELLET said that, in his capacity as Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), he considered the study to be a particularly useful document for the Commission's forthcoming work on that topic. After consulting with Mr. Galicki, Special Rapporteur for the topic, he was in favour of deciding to issue it as an official document of the Commission, which would make it possible to have it translated from English into the other official languages of the United Nations, thus making it more accessible to the members of the Commission.

118. The CHAIRPERSON said that if she heard no objection, she would take it that the Commission wished to request that the study by the Secretariat entitled "Survey of multilateral conventions which may be of relevance

\* Resumed from the 3053rd meeting.

<sup>212</sup> "Solidarity and cooperation could then be included as moral values, provided that their inclusion could in no way be construed as an obligation on the part of disaster-affected States to accept relief or on the part of States providing relief to satisfy requests for assistance, since that depended on their capacity" (*Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 20th meeting (A/C.6/64/SR.20)*, para. 24).

<sup>213</sup> Reproduced in *Yearbook ... 2010*, vol. II (Part One).

for the work of the International Law Commission on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’” be issued as an official document of the Commission.

*It was so decided.*

*The meeting rose at 1 p.m.*

### 3056th MEETING

*Thursday, 3 June 2010, at 10.05 a.m.*

*Chairperson:* Ms. Hanqin XUE

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

#### **Protection of persons in the event of disasters (*continued*) (A/CN.4/620 and Add.1, sect. D, A/CN.4/629, A/CN.4/L.776)**

[Agenda item 8]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the agenda item on protection of persons in the event of disasters.

2. Mr. PERERA commended the Special Rapporteur on his comprehensive, well-structured third report (A/CN.4/629) which dealt with the key principles of the topic, namely humanity, neutrality and impartiality, and with the overarching concept of human dignity, which was intimately linked to those principles. The Special Rapporteur had also tackled the fundamental question of the primary responsibility of the affected State.

3. When the Sixth Committee had considered the second report,<sup>214</sup> States had expressed satisfaction with the Special Rapporteur’s dual-axis approach, which consisted in focusing first on States’ rights and obligations *vis-à-vis* each other and then on States’ rights and obligations *vis-à-vis* individuals (para. 5 of the third report). Most States had also approved of the Special Rapporteur’s emphasis on the rights and needs of affected persons (para. 6).

4. The Special Rapporteur noted that the principles of humanity, neutrality and impartiality were widely used in numerous international instruments, first and foremost in the guiding principles contained in the annex to General Assembly resolution 46/182 of 19 December 1991, on the strengthening of the coordination of humanitarian

emergency assistance of the United Nations. According to paragraph 22 of the report, the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance<sup>215</sup> emphasized that those humanitarian principles must not be used for extraneous purposes. Similarly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had found that humanitarian assistance must be limited to “the purposes hallowed in the practice of the Red Cross” in order to “escape condemnation as an intervention in the internal affairs” of the affected State (para. 243 of the opinion). As paragraph 25 of the report rightly stated, disaster response was conditioned at all stages on those humanitarian principles so as to preserve its legitimacy and effectiveness.

5. With regard to draft article 6, he said that since the Commission had decided to exclude situations of armed conflict from the scope of the draft articles, it should reflect further on the notion of “neutrality”.

6. Having traced the origins of the concept of human dignity and its incorporation in human rights instruments, the Special Rapporteur concluded in paragraph 61 that “dignity embodies the evolution beyond a mere contractual understanding of the protection of persons under international law, and points to a true international community, based on the respect of human beings in their dignity”. Draft article 7 sought to place the concept of human dignity in the context of efforts to devise a normative framework for the protection of persons in the event of disasters.

7. Part IV of the report dealt with the important matter of the responsibility of the affected State. The principles of sovereignty and non-intervention, both of which were well established in international law, were fundamental to the treatment of the affected State’s role and responsibility. The key guiding principles for disaster response were set forth in the annex to General Assembly resolution 46/182, which stated that “[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country” (annex, para. 3).

8. The Special Rapporteur dealt with the matter by indicating that two general consequences flowed from the affected State’s primacy in disaster response. The first was that that State bore the ultimate responsibility for protecting disaster victims in its territory and had a central role in facilitating, coordinating and overseeing relief operations in its territory. The second was that humanitarian aid could be supplied only with its consent. The Special Rapporteur was right in saying that this fundamental requirement, a necessary corollary of the principles of sovereignty and non-intervention, was “of a primarily ‘external’ character”, since it governed the affected State’s relationships with other international actors in the wake of a disaster (para. 90). Draft article 8 did reflect these “internal” and “external” aspects of the responsibility of the affected State.

<sup>214</sup> See footnote 178 above.

<sup>215</sup> See footnote 198 above.