

Document:-
A/CN.4/3058

Summary record of the 3058th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2010, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-SECOND SESSION

Held at Geneva from 5 July to 6 August 2010

3058th MEETING

Monday, 5 July 2010, at 3.10 p.m.

Acting Chairperson: Mr. Christopher John Robert DUGARD (Vice-Chairperson)

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Election of a new Chairperson

1. The ACTING CHAIRPERSON informed the members of the Commission that on 29 June 2010, the Chairperson of the Commission, Ms. Xue, had been elected to the International Court of Justice and that in a letter addressed to the Legal Counsel on that same date, she had submitted her resignation from the Commission. He extended congratulations to Ms. Xue and wished her every success in her new functions.

2. In accordance with rule 105 of the rules of procedure of the General Assembly, the Commission was required to elect a new Chairperson for the remaining term of office. In 2010, the Chairperson of the Commission should be from among the members of the Asian Group.

Mr. Wisnumurti was elected Chairperson for the remainder of the sixty-second session of the International Law Commission by acclamation.

Mr. Wisnumurti took the Chair.

3. The CHAIRPERSON said that it was an honour to have been elected. Aware of the task before him, he was encouraged by the confidence placed in him. He paid tribute to Ms. Xue for the effective manner in which she had

chaired the first part of the session. Recalling that she had been the first woman to hold that position, he thanked her for her invaluable contribution to the work of the Commission. He trusted that he could count on the help and understanding of the members of the Commission to ensure that the second part of the sixty-second session would be productive and rewarding.

4. He proposed that the Commission amend its agenda in order to include a new item entitled "Filling of a casual vacancy in the Commission (article 11 of the statute)" and said that he would consult with members of the Bureau on the timing of the election to fill the vacancy left by Ms. Xue.

5. If he heard no objection, he would take it that the Commission wished to adopt that proposal.

It was so decided.

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

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (*continued*)

6. The CHAIRPERSON invited the members of the Commission to proceed with the adoption of the draft guidelines contained in document A/CN.4/L.760/Add.1.

4. *Legal effects of reservations and interpretative declarations*

Draft guideline 4.1 (*Establishment of a reservation with regard to another State or organization*)

Draft guideline 4.1 was adopted.

Draft guideline 4.1.1 (*Establishment of a reservation expressly authorized by a treaty*)

Draft guideline 4.1.1 was adopted.

Draft guideline 4.1.2 (*Establishment of a reservation to a treaty which has to be applied in its entirety*)

Draft guideline 4.1.2 was adopted.

Draft guideline 4.1.3 (*Establishment of a reservation to a constituent instrument of an international organization*)

Draft guideline 4.1.3 was adopted.

4.2 *Effects of an established reservation*

Draft guideline 4.2.1 (*Status of the author of an established reservation*)

Draft guideline 4.2.1 was adopted.

Draft guideline 4.2.2 (*Effect of the establishment of a reservation on the entry into force of a treaty*)

Draft guideline 4.2.2 was adopted.

Draft guideline 4.2.3 (*Effect of the establishment of a reservation on the status of the author as a party to the treaty*)

Draft guideline 4.2.3 was adopted.

Draft guideline 4.2.4 (*Effect of an established reservation on treaty relations*)

Draft guideline 4.2.4 was adopted.

Draft guideline 4.2.5 (*Non-reciprocal application of obligations to which a reservation relates*)

Draft guideline 4.2.5 was adopted.

4.3 *Effect of an objection to a valid reservation*

Draft guideline 4.3.1 (*Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*)

Draft guideline 4.3.1 was adopted.

Draft guideline 4.3.2 (*Entry into force of the treaty between the author of a reservation and the author of an objection*)

Draft guideline 4.3.2 was adopted.

Draft guideline 4.3.3 (*Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required*)

Draft guideline 4.3.3 was adopted.

Draft guideline 4.3.4 (*Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect*)

Draft guideline 4.3.4 was adopted.

Draft guideline 4.3.5 (*Effects of an objection on treaty relations*)

Draft guideline 4.3.5 was adopted.

Draft guideline 4.3.6 (*Effect of an objection on provisions other than those to which the reservation relates*)

Draft guideline 4.3.6 was adopted.

Draft guideline 4.3.7 (*Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation*)

Draft guideline 4.3.7 was adopted.

4.4 *Effects of a reservation on rights and obligations outside of the treaty*

Draft guideline 4.4.1 (*Absence of effect on rights and obligations under another treaty*)

Draft guideline 4.4.1 was adopted.

Draft guideline 4.4.2 (*Absence of effect on rights and obligations under customary international law*)

Draft guideline 4.4.2 was adopted.

Draft guideline 4.4.3 (*Absence of effect on a peremptory norm of general international law (jus cogens)*)

Draft guideline 4.4.3 was adopted.

The draft guidelines contained in document A/CN.4/L.760/Add.1, as a whole, were adopted.

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*)*

7. The CHAIRPERSON invited the Special Rapporteur to introduce the rest of his first report on the effects of armed conflicts on treaties (A/CN.4/627/Add.1), which covered draft articles 13 to 18 adopted by the Commission on first reading in 2008.²³⁶

8. Mr. CAFLISCH (Special Rapporteur) recalled that the Commission had considered the first part of the report before the break in the sixty-second session and had referred draft articles 1 to 12 to the Drafting Committee (3056th meeting above, para. 97). By and large, the initial remarks made during the introduction of the first part also applied to the second part, in particular the fact that it was no longer a question of completely recasting the draft articles, unless absolutely necessary, or of carrying out new large-scale studies, but of considering the comments of Member States on the current version of the draft articles (A/CN.4/622 and Add.1), to which the Special Rapporteur and other members of the Commission could of course add new ideas.

9. At first glance, the six draft articles to be considered might seem secondary compared to those already examined, but appearances were deceiving and, as would be seen, some of those provisions might be controversial. Moreover, an important question had not yet been addressed: whether it was necessary to distinguish between the effects of international armed conflicts and the effects of non-international armed conflicts.

10. In his introduction, he would consider successively the effects of the exercise of the right to self-defence (art. 13), prohibition of benefit to an aggressor State (art. 15), "without prejudice" clauses (arts. 14, 16, 17 and 18), and other points raised by Member States and general issues (scope of the draft articles, responsibility of States and other questions).

* Resumed from the 3056th meeting.

²³⁶ *Yearbook ... 2008*, vol. II (Part Two), pp. 61–63.

11. Draft article 13, entitled “Effect of the exercise of the right to individual or collective self-defence on a treaty”, was based on article 7 on self-defence of the 1985 resolution of the Institute of International Law.²³⁷ Both articles sought to introduce a moral dimension by preventing the existence of treaties binding a State from depriving it of the exercise of the right to self-defence and, at the same time, permitting the aggressor State to insist on the strict application of those treaties by the attacked State. They primarily concerned agreements between the aggressor and the attacked State, while not excluding treaties between the aggressor State and one or more third States. Moreover, both articles provided for the possibility of suspension but not termination, and they were only applicable in an inter-State context. However, article 7 of the resolution of the Institute of International Law stipulated that, at a later stage, the Security Council of the United Nations might, in the exercise of its powers under Article 51 of the Charter of the United Nations, come to the conclusion that the attacked State was in fact the aggressor, and that the fate of the suspended instrument and questions of responsibility that might arise were subject to any consequences of such a determination, whereas draft article 13 was silent on that point for the reasons set out in paragraph 121 and upon which he would like to expand. Initially, the Drafting Committee had adopted article 7 of the resolution of the Institute of International Law as it stood: with its last phrase on any consequences resulting from a later determination by the Security Council of the State exercising the right to self-defence as an aggressor. The Commission in plenary had been opposed to that version of draft article 13 because of the presence of that phrase and had referred it back to the Drafting Committee for further consideration. The text that the Drafting Committee had produced, with the deletion of the controversial phrase, had been adopted by the Commission in plenary on first reading. In his opinion, it should be retained, because the Commission could not constantly change its mind, and also for the reasons set out in paragraph 122 of the report. Moreover, the draft articles concerned the law of treaties, and thus an addition along the lines of the last phrase of article 7 of the resolution of the Institute of International Law might exceed the Commission’s mandate; in any event, the subject was covered by draft article 14 (Decisions of the Security Council). However, a State that believed or claimed that it was exercising its right to self-defence did not always fulfil the necessary conditions, and measures of suspension taken by it might then be illegal. Such measures might also be unjustified because in reality the suspended treaty had not been prejudicial to the right to self-defence; they might also cause harm to third States.

12. One Member State had pointed out that the possibility of suspending treaties offered to a State in a situation of self-defence should be included in the framework of the parameters set in draft article 5 (Operation of treaties on the basis of implication from their subject matter). It was inconceivable that, in situations of self-defence, the power of suspension could be broader than in situations of armed conflicts in general. That point, which did not seem indispensable, should, if included, concern the content of draft articles 4 (Indicia of susceptibility to

termination, withdrawal or suspension of treaties) and 5; that was not specified in paragraph 124 of the report. In its current form, draft article 13 suggested that a State in a situation of self-defence could suspend any treaty rule, and one Member State had proposed stating, at least in the commentary, that this power did not extend to treaty rules meant to be applied in the context of armed conflicts, such as the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions on 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). That seemed superfluous: the text of draft article 13 would be enhanced by a reference to articles 4 and 5, since those provisions referred to the content of the treaty. In that connection, it should be noted that the category of treaties in question appeared in the first part of the list annexed to draft article 5.

13. Draft article 15, entitled “Prohibition of benefit to an aggressor State”, had been adopted on first reading in 2008 and was based on article 9 of the 1985 resolution of the Institute of International Law, the scope of both texts being limited to inter-State conflicts. It was the expression of the French saying “*bien mal acquis ne profite jamais*” (“ill-got, ill-spent”): the aggressor State must not be able to use the outbreak of an armed conflict that it had itself provoked to free itself from its treaty obligations. Once again, that was a principle aimed at introducing a moral dimension to the rules of international law in question. Of course, the characterization of a State as an “aggressor” depended fundamentally on how the word was defined and, in terms of procedure, on the Security Council. If the Security Council determined that a State claiming to be able to terminate, suspend or withdraw from treaties was an aggressor, the measure contemplated by that State was prohibited, or in any case insofar as it benefited from it, a point which might be assessed either by the Security Council or by an international arbiter or judge. In the absence of such a determination, the State could take the desired measure in the framework of the parameters established in draft articles 4 and 5. Although several Member States had endorsed the principle enunciated in draft article 15, some had suggested deleting the reference to General Assembly resolution 3314 (XXIX) of 14 December 1974, on the definition of aggression, notably to avoid creating an obstacle to any developments in the area because of the supposed risk that the text might encourage unilateral determinations. The two arguments did not seem very relevant, as he had explained in detail in paragraphs 133 and 134 of the report. It had been pointed out that the text of the draft articles contained a drafting error: the State determined as an aggressor would bear that stigma even in the context of a subsequent, entirely different, conflict. In other words, it would retain that determination forever, although a State that had been the aggressor in one conflict could very well find itself in a situation of self-defence in another. Hence the need to ensure that the “armed conflict” in question in the text of draft article 15 was in fact the result of the “aggression” referred to in the first line. That could be done by adding the words “*dû à l’agression*” (that results from the act of aggression) after the phrase “*du fait d’un conflit armé*” (as a consequence of an armed conflict).

²³⁷ See footnote 138 above.

14. It had also been argued that factors other than the act of aggression might become important in prolonged armed conflicts, which would mean that the benefits that an aggressor State might derive from termination, withdrawal or suspension would not be the result of the aggression alone. Although he appreciated the subtlety of the argument, that would correspond to approval of the aggressor State's actions. Any watering down of the rule set out in draft article 15 should be rejected. One Member State had taken the view that the question of the effects of armed conflicts on treaties should be separated from the question of the causes of conflicts; that would amount to calling for the deletion of draft articles 12 and 13, a proposal that he obviously did not support. Lastly, with regard to whether the scope of draft article 15 should be confined to aggression or whether it should be expanded to include any use of force prohibited under Article 2, paragraph 4, of the Charter of the United Nations, he preferred to retain the current scope. Article 39 of the Charter of the United Nations referred to the concept of aggression, as had also been done in article 5, paragraph 1 (*d*), of the Rome Statute of the International Criminal Court, which concerned the international criminal responsibility of individuals, the application of those provisions depending on the Security Council's determination. In his view, the aim of draft article 15 should remain limited to the consequences of armed aggression committed by States when they attempted to avoid their treaty obligations. However, if the Commission decided to enlarge the scope of the draft articles to include the use of force, as set out in Article 2, paragraph 4, of the Charter of the United Nations, it would suffice to reformulate the beginning of the text in the manner indicated in paragraph 139 of the report. In paragraph 140 of his report, the Special Rapporteur had suggested that draft article 15 be retained as it had appeared in the original draft of 2008.

15. On the "without prejudice" clauses, he said that draft articles 14 and 16 to 18 dealt with areas of law that were on the margins of the topic under consideration and served to make clear that those areas were not affected by the provisions of the text. Pursuant to draft article 14, the draft articles were without prejudice to decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations and thus followed article 8 of the 1985 resolution of the Institute of International Law. Draft article 16 (Rights and duties arising from the laws of neutrality) provided that the draft articles were without prejudice to the rights and duties of States arising from the laws of neutrality, something which the resolution of the Institute had omitted. Under draft article 17 (Rights and duties arising from the laws of neutrality), the draft articles were without prejudice to causes of termination, withdrawal or suspension of treaties not provided for in the provisions but permitted by the 1969 Vienna Convention, notably termination as a consequence of the agreement of the parties, a material breach of the treaty, a supervening impossibility of performance, either temporary or definitive, or a fundamental change of circumstances at the time of the conclusion of the treaty. Draft article 18 concerned the revival of treaty relations subsequent to an armed conflict.

16. Draft article 14 stipulated that the draft articles were "without prejudice" to the legal effects of decisions of the Security Council in accordance with the provisions

of Chapter VII of the Charter of the United Nations. That provision, which was limited to the decisions based on Chapter VII, might however be enlarged to include all coercive decisions taken by the Security Council, because Article 103 of the Charter of the United Nations held for all Security Council decisions and not only for those adopted in the framework of Chapter VII. Pursuant to Article 103, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the ... Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". As pointed out by a number of Member States, it was possible that draft article 14 was made superfluous by Articles 103 and 25 (Obligation for Member States to accept and carry out the decisions of the Security Council) of the Charter of the United Nations. However, he preferred to be very clear on the subject and thus to retain the draft article.

17. Pursuant to draft article 16, the draft articles in no way affected the rights and duties of States arising from the laws of neutrality. While one Member State with the status of neutrality had endorsed the provision, another would like a clear distinction to be drawn between relations between belligerent States and those between belligerent States and other States. The case of relations between neutral States could also be added. He did not see how the Commission could allow such a request in the context of draft article 16, which merely pursued the limited objective of excluding the laws of neutrality from the draft articles. Another State would like neutrality to appear in the list annexed to draft article 5, instead of making it the subject of a "without prejudice" clause, but that would overlook that the status of neutrality was not always of a treaty nature. Given that neutrality was a status which was applicable in time of armed conflict (apart from permanent neutrality, which also gave rise to obligations in peacetime), it did not seem useful to refer to it in the list in draft article 5, because the case envisaged was covered by draft article 7 (Express provisions on the operation of treaties).

18. Draft article 17 reserved the right of States, in situations of armed conflict, to terminate, withdraw from or suspend the operation of treaties for reasons other than the outbreak of the conflict. Even if a State could not or would not invoke the existence of a conflict to terminate treaties temporarily or permanently, partially or totally, it could do so on other grounds provided under the 1969 Vienna Convention, for example material breach of the treaty by the other party, supervening impossibility of performance (art. 61) or a fundamental change of circumstances (art. 62). For some treaties, notably in the framework of non-international conflicts, the outbreak of conflicts could in itself be qualified as a fundamental change of circumstances entailing a temporary or permanent impossibility of performance.

19. Draft article 17 had been criticized. One Member State noted that it would suffice to replace it by a general clause referring globally to other causes of termination, withdrawal or suspension. Although that was true, he still preferred the current text, because it gave examples of "other grounds" that could be invoked and, what was more, were particularly relevant in the context of the outbreak of armed conflicts. Another State suggested the insertion of an

additional example, that of termination as a consequence of “the provisions of the treaty itself”, which was a reference to article 57 (*a*) of the 1969 Vienna Convention. He agreed to that addition, which would have the advantage of rounding out the current formulation under article 17 (*a*).

20. Draft article 18, which had been discussed at length in the debate on the first part of the report, concerned the right of States to revive treaty relations subsequent to termination or suspension. It had been proposed and, apparently agreed, to merge draft article 18 with draft article 12 (Revival or resumption of treaty relations subsequent to an armed conflict). If that was done, it would do away with the function of draft article 18 as a “without prejudice” clause.

21. With regard to such clauses, it had been proposed to insert in the draft articles an additional rule referring to the duty to respect international humanitarian law and human rights. He was not opposed to that idea on the substance, but it was always important to bear in mind the purpose of the draft articles. “Without prejudice” clauses should not become an end in themselves, but should be limited to what was strictly necessary, namely to preserve collective security, neutrality and other causes of termination and suspension of treaties. The addition of other “without prejudice” clauses could “water down” the actual subject, as pointed out in paragraph 146 of the report.

22. Turning to other points raised and general issues, he noted that a number of States and their representatives had sharply criticized the draft articles. Some States suggested starting again from scratch. Others thought that there was too much doctrine, to the detriment of practice, or that both the draft articles and the doctrine and practice cited were too focused on common-law thought. Those comments led him to conclude that he would need to conduct an additional study on practice (for which he hoped to receive the Secretariat’s assistance), but he cautioned against expecting too much. The topic of the effects of armed conflicts on treaties was not blessed with an abundance of accessible practice, whereas from a doctrinal viewpoint, it had been discussed at great length.

23. Concerning the scope of the draft articles, the idea had again been broached that the Commission, once it had terminated its work on the topic, might undertake a study of the effects of armed conflicts on treaties to which international organizations were parties. One State had also suggested that the scope be strictly limited to the law of treaties and that any extension to the law governing the use of force be avoided. In his view, that seemed quite difficult: the two subjects were inseparable, although the focus was obviously on the law of treaties. Thus, some aspects of the law on the use of force could not be ignored.

24. One Member State had proposed that the list annexed to article 5 also include treaties on international transport, such as air agreements. At first glance, that seemed reasonable, but a closer examination indicated that it all depended on the circumstances, for example whether the armed conflict, international or internal, affected the part of the territory in which the treaty was applicable. All things considered, it seemed preferable to apply the criteria in draft articles 4 and 5 to such treaties and not to place them on the list.

25. On the responsibility of States, one State had asked about the responsibility of a State party to a treaty that had provoked an armed conflict, where the treaty ceased to operate on account of the conflict, and particularly where the other party or parties to the treaty had no desire for its application to be terminated. The same State had also asked whether the extent and duration of the conflict and the existence of a formal declaration of war were factors that should be taken into account in assessing the effects of armed conflicts on treaties. In his opinion, it was preferable to remain within the areas covered by the current draft articles and not to venture into the field of international responsibility.

26. As to the extent of the conflict, that factor had already been referred to in draft article 4, subparagraph (*b*). The duration of a conflict could be a function of its extent. As for the existence of a declaration of war, that requirement had long been irrelevant.

27. One State was of the view that if the draft articles did not take the path of an international conference with a view to negotiating a convention, the need for the many “without prejudice” clauses in the draft articles could be reconsidered. No decision had been taken on that question, which thus was premature. Moreover, even if the draft articles were not meant to lead to a convention, it was still necessary to determine their effects and limits, which was precisely what those clauses did.

28. With regard to the other points raised, one State had commented that the consequences of termination, withdrawal from or suspension of a treaty had not been examined in the draft articles. He thought, however, that articles 70 and 72 of the 1969 Vienna Convention were applicable by analogy, on the understanding that, if there was a notification followed by an objection (draft article 8), the question of justification of the notification remained open. In his view, it would suffice to mention articles 70 and 72, perhaps in the commentary to draft article 8 on notification of termination, withdrawal or suspension.

29. The draft articles adopted in 2008 had not been created in a day or in one piece. They had been drawn up in several stages, and sometimes the rest of the text had not been brought into line with the changes made. That had been the case when, in 2008, it had been decided to include non-international armed conflicts in the draft articles. Thus, one State had rightly asked whether the same rules applied, without distinction, to both internal and international armed conflicts. In his opinion, it seemed clear that this question must be answered by indicating, somewhere in the draft articles, either that those effects were identical, or that they were different; otherwise, the draft articles would lose some of their utility. The State that had posed that question had also answered it by noting that in the framework of article 2, subparagraph (*b*), of the draft articles, in principle, and in the absence of other grounds for termination or suspension based on articles 60 to 62 of the 1969 Vienna Convention, “a State does not have the right to claim exemption from its [treaty] obligations by reason of an ongoing internal armed conflict”.²³⁸ That question and the accompanying

²³⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/622 and Add.1, commentary by China to draft article 2.

observation might suggest that, for non-international armed conflicts, a rule should be added pursuant to which a State engaged in non-international armed conflict could request only the suspension of treaties whose continuation was not imposed under draft articles 4 and 5 and the annexed list. The difference in treatment proposed by that State appeared to reflect the difference between international and internal armed conflicts: international armed conflicts could result in a disaster, a veritable “earthquake” between two or more States, and put at stake their existence and their international relations, and even those of third States, whereas an internal armed conflict usually resulted in a temporary or partial incapacity at inter-State level that did not give rise to disproportionate reactions affecting third States. Moreover, it would not be the first time that, in the context of the draft articles, the reaction of the State concerned would be limited to suspension. He recalled in that regard the explanations given on draft article 13; a State hindered in the exercise of its right to self-defence by the existence of treaty ties only had the right to suspend those ties, not to demand their termination. He would like to hear the views of other members of the Commission before making any proposal on the question.

30. At some point, and the time had not come yet, because all the important questions had not yet been definitively resolved, the Commission should consider what form the draft articles should take.

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

[Agenda item 1]

31. Mr. McRAE (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of protection of persons in the event of disasters would be composed of the following members: Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie (*ex officio*), Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

The meeting rose at 5.05 p.m.

3059th MEETING

Tuesday, 6 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report on the effects of armed conflicts on treaties, in particular articles 3 to 18 and the other points raised by Member States and general issues (A/CN.4/627 and Add.1, paras. 115–164).

2. Mr. MURASE said that he wished to make two points relating to draft articles 13 and 15. The first was the difficulty of determining which side in an armed conflict could claim to be acting in legitimate self-defence; the second was the difficulty of determining aggression. The Special Rapporteur had stressed the need to retain the two draft articles, but he was not fully convinced that the Commission needed to address the specific issues of self-defence and aggression in the context of the law of treaties.

3. With regard to the first point, in theory, one side had a legitimate claim and the other side an illegitimate claim concerning the exercise of self-defence in a given conflict. However, in practice, it was often very difficult to determine which side was acting in legitimate self-defence. An example was the Iran–Iraq war in the 1980s, in which both parties had claimed that their exercise of self-defence was legitimate; the Security Council had refrained from making any determination on the matter. He feared that such a situation might give rise to confusion, or even abuse, in the actual application of draft article 13. He therefore suggested that the article be deleted and replaced by a “without prejudice” clause along the lines of draft article 14, or article 59 of the draft articles on responsibility of States for internationally wrongful acts,²³⁹ which was broader in scope. Nevertheless, since the draft articles on State responsibility had a provision on self-defence (art. 21), the Commission might prefer to retain draft article 13. In that case, he would suggest that the commentary to the draft article elaborate on the need for prudence in its application.

4. As for the second point, the Security Council had never employed the term “aggression” but had used the words “threat to the peace” and “breach of the peace”, which fell short of aggression. Likewise, the ICJ had avoided any pronouncement of aggression in cases where it might have been possible, and the international community had not yet reached a sufficiently clear definition of aggression.

5. In that connection, reference might be made to the amendments to the Rome Statute of the International Criminal Court adopted by consensus at the recent Review Conference of the Rome Statute as article 8 *bis*,²⁴⁰ where the definition of an act of aggression reproduced the wording of General Assembly resolution 3314 (XXIX)

²³⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 143.

²⁴⁰ *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, International Criminal Court publication RC/9/11, Resolution 6 “The crime of aggression” (RC/Res.6), Annex I, p. 17.