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Summary record of the 3060th meeting

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53. Mr. WISNUMURTI, speaking as a member of the Commission, said that in paragraph 119 of the report, the Special Rapporteur pointed out the link between draft article 13, on what the attacked State could do, and draft article 15, on what the aggressor State could not do. He himself agreed with the Special Rapporteur's suggestion that the link should be highlighted in the commentaries to the two draft articles. One Member State had suggested that, like article 7 of the resolution of the Institute of International Law, draft article 13 should contain a reference to a determination by the Security Council that an attacked State exercising the right of self-defence was an aggressor. He agreed with the Special Rapporteur's position that the Commission should not follow that suggestion. The inclusion of a reference to the Security Council would be inconsistent with and superfluous to the provision in draft article 13 that, as a condition for the right to suspend the operation of a treaty, a State must exercise its right of self-defence in accordance with the Charter of the United Nations. He agreed that a reference to article 5 should be added to draft article 13 and endorsed the revised draft article 13 that appeared in paragraph 127 of the report, although he agreed with Mr. McRae that the word "notwithstanding" would be preferable to "subject to".

54. With regard to draft article 15, he disagreed with the suggestion by some Member States that the reference to General Assembly resolution 3314 (XXIX) be deleted. The definition of aggression contained in the resolution had been adopted by consensus following lengthy negotiations during the difficult period of the Cold War. Moreover, retaining a reference to the definition of aggression provided clear and necessary criteria for the Security Council in determining whether a State was an aggressor. He had difficulty with the idea, referred to in paragraph 139 of the report, that the scope of the draft article should be expanded by referring to a State that was unlawful rather than to a State committing aggression. To make the unlawful use of force a defining element in draft article 15 would raise the prospect of differing interpretations and deprive the draft article of the specificity that the reference to a State committing aggression provided. For those reasons, he favoured the retention of draft article 15 as adopted on first reading²⁴⁶ and as reproduced in paragraph 140 of the report, with the deletion of the words in square brackets in the title and in the body of the text.

55. He agreed with the view expressed by the Special Rapporteur in paragraph 146 of the report that the "without prejudice" clauses in draft articles 14, 16 and 17 should not be expanded to include provisions on the duty to respect international humanitarian law and human rights. Such an addition would not only water down the substance of the draft articles, it would also digress from the main thrust of the project. He agreed to the retention of draft article 14 as adopted on first reading. He had no problem with the wording of draft article 16. With regard to draft article 17, he endorsed the suggestion to add a new subparagraph referring to "the provisions of the treaty" as additional grounds for the termination, withdrawal or suspension of a treaty. That would be consistent with article 57, subparagraph (a), of the 1969 Vienna Convention and would complement the existing elements of draft article 17. He disagreed with the suggestion to

replace draft article 17 with a more abstract text referring to international law, and he accordingly endorsed the first version of draft article 17 proposed in paragraph 150 of the report instead of the alternative general formulation.

56. Concerning the scope of the draft articles, it had been suggested that once the text had been completed, consideration should be given to the possibility of extending it to cover treaties to which international organizations were parties. He had already expressed his reservations about that suggestion when the question had been discussed earlier by the Commission.

57. In paragraph 161, the Special Rapporteur referred to the comment by a Member State that, except in cases of impossibility of performance as stipulated in article 17 of the present draft articles and article 61 of the 1969 Vienna Convention, a State could not abandon its treaty obligations by reason of an ongoing internal conflict. He himself agreed with that comment. However, a State engaged in an internal conflict might face an unusual situation in which it was temporarily unable to meet the obligations of a treaty and needed to suspend—if not to permanently terminate—the operation of the treaty. That situation needed to be accommodated. He therefore welcomed the wording proposed in paragraph 162 of the report, to be incorporated in draft article 8.

58. Lastly, the Special Rapporteur recalled the need for the Commission to consider the form to be given to the draft articles. In view of the importance of the draft articles in the quest for legal certainty in situations of armed conflict, it was essential that the draft articles be transformed into a convention. With those comments, he agreed that the draft articles should be referred to the Drafting Committee.

The meeting rose at 11.45 a.m.

3060th MEETING

Wednesday, 7 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, 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 members of the Commission to pursue their consideration of the Special

²⁴⁶ *Yearbook ... 2008*, vol. II (Part Two), chap. V, sect. C.2, p. 62.

Rapporteur's first report on the effects of armed conflicts on treaties, in particular draft articles 13 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. VASCIANNIE said that draft article 13 acknowledged the relevance of the right of individual or collective self-defence in the context of the law on treaties. In essence, it suggested that when a State exercised its right of self-defence, it was entitled to suspend the operation of a treaty to which it was party, if the treaty's implementation was incompatible with the exercise of that right. That was a plausible and indeed useful rule. If a State exercising the right of self-defence were barred from suspending certain treaties, that State would, in some instances, find itself at a disadvantage compared to the offending State. For that reason, it was necessary to retain draft article 13 which, however, required further attention. First, the introductory clause "[s]ubject to the provisions of article 5" was problematic. The words "subject to" presupposed the subordination of draft article 13 to draft article 5, which meant that, in the event of a conflict between the two provisions, the latter would prevail. It seemed, however, that the Special Rapporteur's main objective was the opposite of that result, because it emerged from paragraph 124 of his report that both draft articles were on the same level and that the right established in draft article 13 existed notwithstanding the provisions of draft article 5. He therefore agreed with Mr. McRae's exposition at the previous meeting and with his proposal that the words "subject to" should be replaced with "notwithstanding", but that the indicative list annexed to draft article 5 should not be called into question. Secondly, as proposed by Sir Michael, it might be preferable to delete the phrase "in accordance with the Charter of the United Nations". In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had provided a firm reminder that rules on the use of force, including those on self-defence, existed in both the Charter of the United Nations and customary law. A State exercising its right of self-defence in accordance with customary law might therefore suspend the operation of a treaty in the same way as a State acting under the Charter of the United Nations. Thirdly, it was not entirely clear whether draft article 15 sought to suspend treaties only with a putative aggressor State, or with third States as well. It would seem, from reading paragraph 116 of the report, that the aggressed State could suspend only the application of treaties between itself and the aggressor. However, that point was not unequivocally captured in draft article 13, which merely introduced the criterion of incompatibility without further clarification. Arguably, when a treaty existed between the aggressor and the victim State, it was easy to ascertain whether that treaty was incompatible with the exercise of self-defence by the victim. But what would happen if the fact of exercising self-defence made it impossible for the victim State to meet treaty obligations to a third, non-aggressor State? The incompatibility test might suggest that this treaty could also be suspended. He was uncertain whether that was the solution intended by the Special Rapporteur.

3. With respect to draft article 15, some members of the Commission had argued against use of the terms "aggression" and "aggressor State" and against reference to General Assembly resolution 3314 (XXIX). Although

the arguments presented were important, they were not altogether convincing. International law recognized the concept of "aggression" and resolution 3314 (XXIX) had been adopted by consensus. Of course, when the Security Council found that a State was an aggressor, it was expressing deep and enduring criticism. Nonetheless, the fact that the term "aggressor" had pejorative connotations was not sufficient reason to avoid the terms employed by the Special Rapporteur in draft article 15, or a reference to resolution 3314 (XXIX). Similarly, although some aspects of the term "aggression" were not readily applicable in practice and the Security Council had not actively applied that term in Chapter VII situations, aggression remained a recognized concept in the law of the use of force. Furthermore, while the Charter of the United Nations was authoritative in matters concerning the use of force, it was doubtful that there was any drafting principle that forbade a reference, within the same article, to the Charter of the United Nations and other rules of law. There was nothing wrong in mentioning the Charter of the United Nations and resolution 3314 (XXIX) in the same article if that was appropriate for the purposes of a given rule. Nor was it convincing to suggest that use of the term "aggression" be confined to the context of the Rome Statute of the International Criminal Court. It seemed that the Review Conference of the Rome Statute held in Kampala in 2010 had concluded that the notion of aggression was applicable in the area of liability for international criminal acts, but there was no reason to believe that it must be ring-fenced into that context alone, as Mr. Kamto had indicated in his careful analysis, with which he personally agreed. The number of States opposed to a reference to that concept in draft article 15 was insignificant and it seemed that a majority, if not a large majority, of States considered it acceptable to mention resolution 3314 (XXIX). He therefore wished to retain draft article 15, as it stood.

4. In paragraphs 161 to 163 of his report, the Special Rapporteur had invited the members of the Commission to comment on whether the same rules should apply to both internal and international armed conflicts. His first reaction was that they should. In both cases, the State was subjected to special pressures resulting from an armed conflict, which might or might not undermine its capacity to meet its commitments. The same set of rules on treaty continuity or discontinuity should therefore apply, irrespective of whether the conflict was international or internal.

5. Mr. SABOIA said that he wished to retain draft article 13 for the same reasons that Mr. Vasciannie had so eloquently expressed in his statement, which he fully endorsed. He again emphasized that self-defence was an inherent right that any State could exercise immediately in the event of armed aggression, without a previous determination by the Security Council. Of course, it was an exception to the general prohibition of the use of force in international relations. It was therefore incumbent upon the State to produce convincing evidence in support of its allegation, in order to prove that there were genuine grounds for its recourse to force to repel an armed attack and that it was complying with the rules on proportionality and other standards of international law for determining what might be deemed an act of self-defence. While the right of self-defence must be preserved, caution was needed because States or groups of States had

often abused it for their own political or strategic ends. The Special Rapporteur had been right not to mention the Security Council in draft article 13. While the draft articles presumed that States were acting in good faith, the Security Council might find otherwise and that would have consequences which would depend on the political conditions of the Council—but that went beyond the scope of the topic under examination. The Commission must not pave the way for the flagrant abuse of the right of self-defence that the possible recognition of a right to pre-emptive self-defence, mentioned in paragraph 122, would constitute. He was dubious about the usefulness of the phrase “[s]ubject to the provisions of article 5” and would prefer its deletion.

6. Turning to draft article 15, he agreed with the members of the Commission who were in favour of a reference to resolution 3314 (XXIX) preceded by the phrase “within the meaning of the Charter of the United Nations” which logically included Article 2, paragraph 4, of the Charter of the United Nations. As for the “without prejudice” clauses, in draft article 17 he would prefer the adoption of a precise list to a broad, abstract formulation. It was unnecessary to have a draft article on the effects of internal armed conflicts, the issue raised in paragraph 162. The State in question, which could be that in which the internal conflict was taking place, or another country where the effects of the internal conflict were impinging on its capacity to fulfil its treaty obligations, could rely on the general rules set forth in the 1969 Vienna Convention.

7. Mr. NOLTE said that, at the previous meeting, Mr. Candioti had made a very important point when he had reminded the Commission that it should always remember that the main aim of its current exercise was to affirm the stability of treaty relations, even during an armed conflict. The principal purpose of the draft articles was to make it clear that the old principle that war ended the effects of treaties was no longer valid and had been replaced by a more differentiated set of rules and presumptions which emphasized the preservation, as far as was possible and reasonable, of treaty relations, even in a situation of armed conflict. Nevertheless, that exercise was situated within the bounds of general international law. That meant that the Commission must take account of some very important general concepts and rules, especially the concept of “armed conflict”, the right of self-defence and the prohibition of aggression, all of which had been debated and developed in a specific context and with certain policy considerations in mind. When the Commission had debated those concepts and rules in connection with the draft articles, it had sometimes focused too much on determining their relative importance and significance in relation to its general policy and had paid insufficient heed to the effects of the meaning given to the terms “armed conflict”, “self-defence” and “aggression” in the context of the effects of armed conflicts on treaties. He was part of the consensus within the Commission that the term “armed conflict” should refer to both international and non-international armed conflicts and that, in order to define “armed conflict”, it was necessary to adopt the same approach as that applied by the International Tribunal for the Former Yugoslavia in the *Tadić* judgement. The reason why that approach had been chosen had little to do with the issue of the effects of armed conflicts on

treaties, but was to be found more in the general development of the international law of armed conflict. In other words, it had been chosen because of the growing difficulty of distinguishing between international and non-international armed conflicts and because of the changing nature of armed conflicts in the current world. It was the right decision, but it had crucial implications for the draft articles. The possibility of terminating or suspending treaty relations as a result of an armed conflict had hitherto been debated mainly in respect of international armed conflicts. The primary purpose of the draft articles was, however, to confine belligerent States’ capacity to end or suspend treaty relations. By extending the concept of an armed conflict to non-international armed conflicts, the Commission was, on the contrary, offering States a possibility of terminating or suspending treaty relations that had not existed previously. By following that general trend in international law, it was undermining the draft articles’ principal purpose, namely to ensure the stability of treaty relations. It was therefore quite legitimate for the Special Rapporteur to ask the Commission repeatedly if it really wished to frustrate its chief aim, or whether it would not prefer to follow the suggestion made by one State that it should postulate the sanctity of treaty relations in the context of non-international armed conflicts. If non-international conflicts were limited to situations where the government of a State dealt by itself with an insurrection in its own territory, there would be no justification for their inclusion in the draft articles, for there was no reason why a classic civil war situation should give a State the possibility of terminating or suspending treaty relations with other States. The general rules of treaty law, especially those relating to impossibility of performance or a change in circumstances, would probably be sufficient to safeguard the legitimate interests of the States concerned. The term “non-international armed conflict” also covered other situations such as those in which third States’ forces fought alongside government troops to combat armed groups and, to some extent, those where States intervened in the territory of another State which was unable to control that part of its territory from which armed groups were launching operations against the intervening State. Those situations could give States legitimate grounds for ending or suspending treaty relations, especially States whose territory was being used for foreign troops’ operations with or without the consent of the government concerned.

8. If the definition of “armed conflict” was seen from that angle, it was quite logical to try to nuance the rules contained in the draft articles so that they did not unintentionally undermine the stability of treaty relations. Nevertheless, it would be inappropriate simply to exclude non-international armed conflicts from the scope of the draft articles, for it was often hard to tell the difference between them and international armed conflicts between States. He was not persuaded by the solution proposed by the Special Rapporteur, namely to allow States to suspend, but not terminate, treaty relations in the event of non-international armed conflicts. That distinction was misleading, because it wrongly suggested that the suspension of a treaty was a mild measure and it was based on the misconception that non-international armed conflicts involved only one government and rebels. What should therefore be done? First, the Special Rapporteur could

stress in the commentary that the purpose of including non-international armed conflicts and widening the concept of “armed conflict” was not to expand States’ possibilities of terminating or suspending treaty relations during classical armed conflicts where a government was contending on its own with an insurrection in its territory. He should likewise indicate that the draft articles did not address the potential difficulties which a party to the treaty could face in honouring its obligations because of a non-international armed conflict—that was a question of general treaty law; the draft articles had to do with the fact that relations between parties to a treaty altered as a result of an armed conflict. Such a change in relations could arise when a third State was involved in a non-international armed conflict, but obviously not when a State was dealing with an insurrection on its own. Secondly, the Commission could insert into the draft articles an additional paragraph that would read: “The present draft articles apply to non-international armed conflicts which by their nature or extent are likely to affect the application of treaties between States parties.” That sentence, which was borrowed from the previous definition of armed conflicts proposed by Sir Ian Brownlie, referred only to non-international armed conflicts. Its purpose was to serve as a reminder that non-international armed conflicts must have an additional, inter-State dimension before the principle of *pacta sunt servanda* could be called into question. In that connection, it was also necessary to consider the application of the rules of *jus ad bellum*, or to be more exact, of *jus contra bellum*. Of course, the right of self-defence should not be called into question and, equally plainly, an aggressor should not benefit from aggression. However, when reaffirming the basic rules of *jus contra bellum*, care should be taken not to reintroduce inadvertently possibilities that had been excluded or restricted at the outset. The Commission had agreed that, in the interests of the principle of *pacta sunt servanda*, the outbreak of an armed conflict did not *ipso facto* entail the termination or suspension of treaties. The way in which the Commission reaffirmed the basic rules of *jus contra bellum* should not therefore amount to an invitation to States to terminate or suspend treaty obligations by simply invoking their right of self-defence, or to deny their opponents that opportunity by branding them as aggressors. States would then only have to adjust their terminology in order to achieve undesirable goals.

9. That concern should, in principle, lead him to support the positions of Mr. Murase and Sir Michael who were in favour of deleting draft articles 13 and 15 and of replacing them with a “without prejudice” clause. However, as alluding to a problem was not enough to solve it, it would be preferable to reaffirm the existing rules as clearly as possible and to try to avert the possibility of the abuse to which Mr. Saboia had referred by careful formulation and explanatory commentaries. The fact that a determination of whether a situation constituted self-defence or aggression was infrequently or rarely objective was a general problem of international law that the Commission could not solve within the framework of the current topic.

10. Turning to draft article 13, he approved of the introductory clause “[s]ubject to the provisions of article 5”, since that reference was essential in order to limit abuse of the right of self-defence. Some treaty rules, especially

those of international humanitarian law, but also rules concerning borders, could not be terminated or suspended by invoking the right of self-defence. Since article 5 contained only an indicative list, the extent to which the exercise of the right of self-defence could override certain treaty obligations was not strictly limited, but open-ended to allow legitimate uses of that right. For that reason, unlike Mr. McRae, he did not think that the reference to draft article 5 would deprive draft article 13 of any effect. On the contrary, if the indicative list were to be discarded, which was apparently what Mr. McRae was suggesting, and if everything became dependent on the specific circumstances of the case in question, powerful States would have ample possibilities of defending their preferences or of accusing others, as the case might be. He concurred with the Special Rapporteur that the right of self-defence must be exercised “in accordance with the Charter of the United Nations” and not, as Sir Michael had suggested, “as recognized in the Charter of the United Nations”. The fact that the Charter of the United Nations did not explicitly mention the principles of necessity and proportionality could not be remedied by replacing the phrase “in accordance with the Charter of the United Nations” with the word “recognized”. The right of self-defence had two closely-linked sources, the Charter of the United Nations and customary international law.

11. Draft article 13 called for one last comment: it would be wise to make it clear that a State exercising its right of self-defence was not entitled to terminate or suspend a treaty as a whole when all that was needed was the termination or suspension of certain divisible obligations under the treaty. Admittedly that principle had already been set forth in a previous draft article, but it deserved an express mention in the context of self-defence. He therefore proposed that the end of draft article 13 be reformulated to read, “... a State ... is entitled to suspend in whole or in part the operation of a treaty to which it is a party as far as this treaty is incompatible with the exercise of this right”. As they stood, the words “or in part” did not allay his concerns, since they related only to the entitlement to suspend the treaty’s operation and not to any restriction of that entitlement.

12. Draft article 15 posed more difficulties than draft article 13. Once again, it was necessary to ensure that the legitimate principle that aggression must not pay could not be misused to undermine the basic aim of the current exercise, which was to uphold the *pacta sunt servanda* rule. As Mr. Dugard had pointed out at the previous meeting, the danger was that the word “aggression” was an evocative and emotive term. Nonetheless, the Commission should not attempt to ward off one danger by creating another. Acceptance of the alternative solution proposed by the Special Rapporteur and endorsed by Mr. Dugard and Sir Michael, namely a general reference to the prohibition of the use of force, would multiply the uncertainties and possibilities of abuse, as Messrs. Kamto, McRae, Melescanu, Saboia and Wisnumurti had pointed out. Violations of the prohibition of the use of force had been asserted and could arguably be asserted in so many situations that draft article 15 would almost always be cited if such a solution were to be adopted. He therefore preferred the solution proposed by the Special Rapporteur, namely that of limiting draft article 15 to situations

of aggression. The fact that hitherto the Security Council had rarely characterized a situation as one of aggression was not a vice but a virtue. That practice suggested that such a qualification had to be applied restrictively. In that context, he was likewise in favour of a reference to General Assembly resolution 3314 (XXIX). The resolution might not be entirely satisfactory and did not cover all conceivable forms of aggression, especially some of its modern manifestations, but it encompassed a generally accepted basic list that was not restrictive. Although the 2010 Review Conference of the Rome Statute had dealt only with the criminal aspect of aggression, it had undeniably reaffirmed the pertinence of resolution 3314 (XXIX) by adopting a definition of the crime of aggression based on it.

13. On the other hand, he agreed with Sir Michael that resolution 3314 (XXIX) should not be placed on an equal footing with the Charter of the United Nations. The wording of draft article 15 should indicate that there was room for the development of norms below the level of the Charter of the United Nations. He therefore proposed that the beginning of that provision should be reformulated to read, “A State committing aggression within the meaning of the Charter of the United Nations, in particular according to resolution 3314 ... shall not terminate...”. That wording allowed for the possibility that the Security Council might well qualify certain acts not explicitly mentioned in resolution 3314 (XXIX) as acts of aggression and it indicated that other forms of aggression might exist. Draft article 15 raised an issue of interpretation, insofar as it was not always easy to say when the termination or suspension of a treaty obligation was “of benefit” to the aggressor State. In some instances, the armed conflict caused by aggression might make the operation of certain treaties or the fulfilment of certain treaty obligations pointless. In such cases, it was conceivable that the aggressor could terminate or suspend a treaty which was equally senseless or burdensome for both parties, if such action did not give it a specific benefit that was unavailable to the other party.

14. In draft article 17, the situation with regard to a general saving clause covering other cases of termination, withdrawal or suspension, was more complex than the wording of that provision suggested. The draft articles did provide an indication of whether a situation had changed so radically that article 62 of the 1969 Vienna Convention could be invoked. In some ways, they clarified, illustrated or fleshed out article 62 of the Convention. Article 62 and possibly other grounds for termination, withdrawal or suspension were certainly preserved, but in the sense that they had to be interpreted in the light of the draft articles in cases which fell within their scope. That consideration might be too complicated to be expressed in the text of the draft articles, but it could be reflected in the commentaries.

15. Mr. KAMTO said that he had listened very carefully to Mr. Nolte’s lengthy exposition regarding draft article 13 and especially the definition of armed conflict. He had some doubts about the advisability of, or even the legal basis for, any extension of that definition to non-international armed conflicts for the purposes of the draft articles. The examples quoted by Mr. Nolte were covered

by international law, since modern case law recognized the responsibility of a State that supported armed gangs or groups of rebels operating in the territory of another State, although its armed forces did not directly intervene in the armed conflict. International law accepted that a purely internal conflict could become international. For example, in *Armed Activities on the Territory of the Congo*, the ICJ had examined whether the Government of Uganda had supported the armed groups led by Mr. Bemba in the Democratic Republic of the Congo.

16. Although the Security Council sometimes tended not to qualify as aggression certain conflicts that objectively displayed the characteristics of a situation of aggression—the invasion of Kuwait by Iraq in 1990 was one of the examples that had been mentioned—he had initially been in favour of a broad approach to the matter, but Mr. Melescanu’s arguments at the previous meeting and the statement just made by Mr. Nolte had caused him to change his mind. The provision should be limited to cases of aggression, because even if a State relied on self-defence and pleaded that it had been the victim of what it deemed to be aggression, if the competent organ under Article 39 of the Charter of the United Nations or an international legal body, such as the ICJ, subsequently found that there had been no aggression, the situation would then fall within the scope of the rules on the responsibility of States for internationally wrongful acts. Draft article 15 should not therefore be substantively amended on that point. On the contrary, with regard to the issue raised by Sir Michael at the previous meeting and to Mr. Nolte’s comments, if placing the Charter of the United Nations and resolution 3314 (XXIX) on the same footing was problematic, the solution might not be that proposed by Mr. Nolte. It was impossible to say “within the meaning” of the Charter of the United Nations because, although the latter referred to aggression, it did not define it, unlike resolution 3314 (XXIX). It would be more correct to say, for example, “*Un État qui commet une aggression telle que prévue par la Charte et définie dans la résolution 3314 (XXIX)*” (“A State committing aggression as referred to in the Charter of the United Nations and defined in resolution 3314 (XXIX)”).

17. Mr. CANDIOTI said that the Commission must explore the very serious issues raised by the draft articles. In that connection, at the beginning of draft article 13, reference should be made not only to the provisions of article 5, but also to those of draft articles 3 and 4; the purpose of the former was to safeguard the stability of treaty relations in the event of an armed conflict and that of the latter was to set out a series of parameters—the term “indicia” was perhaps unfortunate in that respect. Draft article 4 should be revised and it would be wise to indicate which characteristics of an armed conflict were pertinent and might justify the non-performance of treaty obligations. Moreover, as far as draft article 15 was concerned, it was necessary to remember that the United Nations Conference on the Law of Treaties, which had culminated in the adoption of the 1969 Vienna Convention, had deliberately refrained from dealing with the use of force, not because it considered that the matter was unrelated to the law of treaties, but because it had no mandate to consider the law of the use of force. It was therefore very important to retain a provision such as draft article 15.

18. Mr. MELESCANU said that he had been interested by Mr. Nolte's comments and drew his attention to the provisions of article 73 of the 1969 Vienna Convention. It was indeed necessary to be cautious about any widening of the definition of an armed conflict to encompass non-international conflicts. He fully agreed with Mr. Kamto's comments concerning the reference to the Charter of the United Nations and General Assembly resolution 3314 (XXIX) in draft article 15.

19. Mr. NOLTE said that he had not been the first person to suggest that the definition of armed conflict be extended. It had been proposed by the Special Rapporteur and debated at length during the first part of the current session. Initially, he had doubted the wisdom of broadening the definition, but he had come round to the idea because of the difficulty, in the modern world, of distinguishing between international and non-international conflicts.

20. Mr. CAFLISCH (Special Rapporteur) said that the Working Group had decided to study the effects of international and non-international armed conflicts and the Commission had approved that decision. He was therefore surprised that the point was being discussed again. On the other hand, one question, which he had already raised twice, still remained, namely that of the effects of both kinds of conflict on treaties. There were two possible answers to that question and he asked the members of the Commission to give their opinion.

21. Mr. VÁZQUEZ-BERMÚDEZ said that, with regard to draft article 13, which sought to preserve in full the individual or collective right of self-defence exercised in accordance with the Charter of the United Nations, he agreed with the Special Rapporteur that it was unnecessary to indicate that the Security Council might subsequently conclude that, in reality, it was the aggressed State which was the aggressor, since that clarification would conflict with the phrase "in accordance with the Charter of the United Nations" at the beginning of the draft article. Draft article 13, as adopted on first reading, clearly said that a State exercising its right of individual or collective self-defence could suspend in whole or in part the operation of a treaty, but only if the treaty was incompatible with the exercise of that right. Moreover, that right did not apply without restriction to any kind of treaty. That draft article must be read in conjunction with draft article 5, which contained the indicative list of categories of treaties in respect of which the outbreak of an armed conflict did not as such produce their suspension or termination. That should form the subject of a commentary to draft article 13.

22. The purpose of draft article 15 was to prevent an aggressor State from benefiting from the armed conflict which it had provoked, in spite of the prohibition of the use of force, by freeing itself of its treaty obligations. In that draft article, he was in favour of retaining the reference to General Assembly resolution 3314 (XXIX) on the definition of aggression. He proposed the deletion of the phrase "if the effect would be to the benefit of that State" from the end of the draft article. If no consensus were reached on that deletion, the commentary should at least explain that the benefit that an aggressor State

would derive by terminating, withdrawing from or suspending the operation of a treaty was not seen in solely military or strategic terms, but included any advantage of any kind, in any context.

23. The proposal made by some States to widen the scope of draft article 15 to encompass any unlawful use of force had met with the approval of some members of the Commission and might seem attractive at first sight, but it would be wiser to retain solely the reference to an act of aggression.

24. As adopted on first reading, the "without prejudice" clauses contained in draft articles 14 (relating to the decisions of the Security Council under Chapter VII of the Charter of the United Nations), 16 (relating to States' rights and duties arising from the laws of neutrality) and 17 (concerning other cases of termination, withdrawal or suspension) did not raise any problems.

25. He was in favour of merging draft article 12 proposed by the Special Rapporteur with draft article 18, which concerned States' right to regulate, on the basis of agreement, the revival of treaties terminated or suspended as a result of an armed conflict.

26. With regard to draft article 12 on the revival or resumption of the operation of a treaty that had been suspended solely because of an armed conflict, he said that if it was rare for States, when they adopted a treaty, to contemplate the possibility of terminating, withdrawing from or suspending its operation in the event of an armed conflict, it was even rarer for them to envisage its revival after a conflict. For that reason, the application of the indicia listed in draft article 4 would be extremely difficult, especially if they did not include the object of the treaty. It should be presumed that treaties whose operation had been suspended owing to an armed conflict would be revived automatically when the conflict was over. If the causes of the suspension of the treaty's operation had disappeared, it was to be hoped that the treaty would continue to apply in keeping with the principle of *pacta sunt servanda*, according to which treaties must be performed in good faith. That was also the intention behind article 11 of the resolution adopted in 1985 by the Institute of International Law²⁴⁷, which provided that at the end of an armed conflict the operation of a treaty that had been suspended should be resumed as soon as possible.

27. Lastly, he drew attention to the fact that the Commission's basic aim was to safeguard the stability of treaty relations and legal certainty, even in extreme circumstances such as armed conflicts.

28. Mr. PERERA said that, although draft articles 13 to 18 could be categorized as "secondary", they raised a series of complex issues which the Special Rapporteur had brought to the Commission's attention. He had also underlined the close linkage between some of the draft articles, for example between draft articles 13 and 15, an aspect which should be highlighted in the commentaries thereto.

²⁴⁷ See footnote 138 above.

29. The purpose of draft article 13 was to prevent an attacked State from being deprived of its natural right of self-defence by the treaties by which it was bound. That draft article therefore permitted a State that wished to exercise its right of self-defence temporarily to suspend a treaty to which it was a party. That being so, he shared the concerns expressed at the previous meeting by Mr. McRae that the inclusion of the phrase “[s]ubject to the provisions of article 5” was likely to deprive draft article 13 of its essential meaning and content. It should therefore be deleted.

30. The provisions of draft article 13 were counterbalanced by those of draft article 15, whose purpose was to prevent an aggressor State from benefiting from an armed conflict that it had provoked and to free itself of its treaty obligations. Draft article 15 raised some difficult questions, such as the definition of the terms “act of aggression” or “aggressor State”. Notwithstanding those difficulties, the draft article should be retained, since it rested on the principle that an aggressor State could not use an armed conflict which it had itself provoked as an opportunity to free itself of its treaty obligations. With that in mind, he would be in favour of widening the scope of the draft article to include the use of force contrary to Article 2, paragraph 4, of the Charter of the United Nations. If the aim was to prevent a situation in which a State provoked an armed conflict in order to put an end to its treaty obligations, the provisions applicable to the commission of an act of aggression applied with equal force to a violation of Article 2, paragraph 4, of the Charter of the United Nations. If the Commission were to limit the scope of that article to cases of aggression, it would be advisable to refer to resolution 3314 (XXIX).

31. He entirely agreed with the Special Rapporteur that, as it stood, draft article 17, which set out specific grounds for termination, withdrawal or suspension that were particularly relevant in the context of the effects of armed conflicts, tended to make the draft article’s purpose clearer than a general, abstract formulation. He therefore supported the current text with the addition of a new subparagraph (a) (“the provisions of the treaty”) which would be consonant with article 57 (a) of the 1969 Vienna Convention.

32. Adverting to the question raised by one member State whether the same rules applied, without distinction, to both internal and international armed conflicts, in paragraph 162 of his report the Special Rapporteur had proposed that a rule be added that would limit the right of exemption from treaty obligations to the right to request the suspension of those obligations since, in that type of conflict, the actual existence of the State bound by the obligations was not in question.

33. The members of the Commission who had reservations about extending draft article 15 to internal armed conflicts had continually asked the crucial question of what impact such a conflict would have on the continuance of treaty relations between States. Since the Commission had decided to include that kind of conflict in the scope of the draft articles, the question must be addressed by looking at the nature, extent and intensity of a particular situation and, having taken those criteria into

account, the relevant rules should then be applied, without differentiation, to both categories of conflict. Lastly, he proposed that draft articles 13 to 18 be referred to the Drafting Committee.

34. Mr. FOMBA endorsed the Special Rapporteur’s comments regarding the comparison of draft article 13 with article 7 of the 1985 resolution of the Institute of International Law and the caution required in interpreting the scope *ratione personae* and *ratione materiae* of the treaty relations in question. He approved of the explanations in paragraphs 118 and 119 of the report of the link between draft articles 13, 14 and 15, and of the proposal that this link be highlighted in the commentaries. As to the attitude that the Commission must adopt, the Commission might exceed its mandate if it tried to settle every detail of the issue, but it might not fulfil its mandate if it merely fell back on “without prejudice” clauses; it therefore had to find a happy medium.

35. The caution displayed and the questions raised in paragraph 122 of the report were warranted. He endorsed the comments made in paragraphs 124 and 125 in respect of the reference to draft article 5, but he preferred an express mention of draft article 5 to moving the reference to the commentary. As for paragraph 126, he agreed that it would be advisable to delete the phrase “individual or collective” from the title of draft article 13.

36. He was fully in favour of referring to General Assembly resolution 3314 (XXIX) on the definition of aggression, because of the convincing reasons put forward by the Special Rapporteur and, above all, because of Mr. Kamto’s eloquent and scientifically rigorous arguments. He concurred with the comments made in paragraph 134 with regard to the possible additional complication that might arise from conflict between the relevant provisions of a treaty and draft article 15 and with the proposal to mention that question in the commentary.

37. As to whether it was necessary to limit the scope of draft article 15 to aggression or expand it to include the use of force, he was in favour of the second course of action, and therefore of the examination of the phrase in square brackets by the Drafting Committee. However, it would be wiser to confine its scope to aggression in order to avoid problems of interpretation. As far as the “without prejudice” clauses were concerned, he approved of the comments made in paragraphs 142 to 144 of the report, especially the reminder that the context of the draft articles was that of armed conflicts. He agreed with the Special Rapporteur’s view as expressed in paragraph 146 that it was unnecessary to extend the list of “without prejudice” clauses, since it was crucial to focus on especially relevant cases.

38. As far as draft article 17 was concerned, he preferred the enumerative to the more general version, since it was more enlightening. The term “*inter alia*” showed that the list was not exhaustive. As for the scope of the draft articles, he agreed to take note of the suggestion that, at a later stage, the Commission study the possibility of extending the draft articles to treaties to which international organizations were parties. He approved of the conclusion drawn by the Special Rapporteur in paragraph 156

regarding the connection between the two subjects of the law of treaties and the law of the use of force.

39. The handling of articles 70 and 72 of the 1969 Vienna Convention was a crucial matter. He approved of the Special Rapporteur's proposal at the end of paragraph 160 of the report that both provisions be mentioned in the commentaries, perhaps the commentary to draft article 8.

40. The fundamental question raised by China and its accompanying observation regarding the possible need to distinguish between rules depending on whether the armed conflict in question was internal or international were important and relevant. The approach the Special Rapporteur proposed in paragraph 162 seemed to be going in the right direction. The additional rule proposed for incorporation in draft article 8 appeared *prima facie* to have the merit of being logical and justified from a legal point of view. The question of the form that the draft articles should take should be settled in due course. He was in favour of referring the draft articles under consideration to the Drafting Committee.

41. Mr. AL-MARRI said that Member States had submitted many comments on the draft articles and in particular on the question of whether they should be extended to non-international armed conflicts and to treaties to which international organizations were a party. The Commission must study those comments with great care. The Special Rapporteur had very wisely examined the draft articles that needed closer scrutiny. It was therefore unnecessary to review all the draft articles that had been adopted earlier or to look at jurisprudence.

42. It was inadvisable to widen the definition of "armed conflict", as some members of the Commission were proposing. All the draft articles presented by the Special Rapporteur were interesting and should be referred to the Drafting Committee. He hoped that the Commission would be able to complete its consideration of the draft articles on second reading before the end of the quinquennium.

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

[Agenda item 1]

43. Mr. McRAE (Chairperson of the Drafting Committee) said that the Drafting Committee on the effects of armed conflicts on treaties would comprise Mr. Candiotti, Mr. Fomba, Mr. Gaja, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vasciannie (*ex officio*), Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, as well as Mr. Cafilisch (Special Rapporteur).

The meeting rose at 11.30 a.m.

3061st MEETING

Thursday, 8 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

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

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the Special Rapporteur's first report on the effects of armed conflicts on treaties, in particular draft articles 13 to 18 and the other points raised by Member States and general issues (A/CN.4/627 and Add.1, paras. 115–164).

2. Ms. JACOBSSON said that the Special Rapporteur's first report took an open-minded and balanced approach that clearly took into consideration the views expressed by States, while also dealing squarely with problematic issues. She agreed with Mr. Candiotti that the Commission should not lose sight of the purpose of the current exercise, which was to ensure the continuation of treaty relations in the event of armed conflicts. The greatest challenge, as she saw it, was that the Commission had decided to cover both international and non-international conflicts, while also attempting to limit the number of situations in which treaties could be suspended or terminated during such conflicts. The Commission's aim was not to expand the scope of the exceptions contained in the 1969 Vienna Convention, but rather to lay down the legal framework for the stability and continued operation of treaties in times of armed conflict.

3. With regard to draft article 13, she agreed with the Special Rapporteur that it should be retained. She found it acceptable that the article was silent on questions relating to notification and opposition, time limits and peaceful settlement of disputes and thus did not cover every aspect of the suspension of the operation of a treaty in exercise of the right of self-defence. It was important to retain the phrase "in accordance with the Charter of the United Nations" so as to avoid conveying the message that the Commission was open to other interpretations. The only change she might propose was to insert the word "inherent" before "right".

4. Mr. McRae's proposal to have the draft article begin with the phrase "notwithstanding" (rather than "[s]ubject to") "the provisions of article 5" seemed logical at first

* Resumed from the 3058th session.