

## **EFFECTS OF ARMED CONFLICTS ON TREATIES**

### **Statement of the Chairman of the Drafting Committee**

**Mr. Pedro Comissário Afonso**  
**17 July 2008**

Mr. Chairman,

I have the honour to introduce the 6th report of the Drafting Committee, as contained in document A/CN.4/727/Rev.1/Add.1. This is the second report at this session on the topic “*Effects of armed conflicts on treaties*”.

It will be recalled that the Plenary considered the first report on its item on 6 June 2008, during which time it adopted 17 draft articles on first reading. It referred back to the Drafting Committee draft article 13. It was also reported then that the Special Rapporteur had undertaken, with respect to draft article 5, to prepare, during the break, an annex to the draft articles reflecting a number of categories of treaties the subject matter of which involves the implication that they continue in operation during armed conflict. The Drafting Committee held 2 meetings on 9 and 10 July 2008. I am pleased to report that it completed the work with which it was seized.

Before I address the outcome of the Committee’s work, allow me to pay tribute to the Special Rapporteur, Mr. Ian Brownlie whose mastery of the subject, perseverance, openness and positive spirit of cooperation greatly

facilitated the task of the Drafting Committee. I also wish to express my appreciation to the members of the Committee for their active and constructive participation in the deliberations of the Committee and their valuable contribution.

I take this opportunity to acknowledge, with gratitude, the important role played by Prof. Caflisch who chaired the Working Group on the topic. Under his chairmanship we were able to find very good and balanced solutions to difficult legal problems confronting the Committee. I reiterate my profound thanks to Prof. Caflisch for having replaced me as Chairman of the Drafting Committee and presented the Report of the Committee before the Plenary on 6 June 2008.

I shall now turn to the report, which contains two draft articles and an annex.

**Draft article 5: The operation of treaties on the basis of implication from their subject matter**

I shall first turn to draft article 5. As you recall, at its 2973rd meeting, on 6 June 2008, the Commission adopted draft article 5, with an amendment that the phrase “in whole or in part” be added at the end of the sentence. There was also a footnote which made an appropriate cross reference to the annex that the Drafting Committee was to consider. In its review of the annex containing an indicative list of categories of treaties referred to in article 5, the Drafting Committee, among other things, considered the implication of the phrase “in whole or in part” in draft article 5 to the whole

scheme under the draft articles. It was understood that it was not always the case that operation of the entire treaty would be affected; in some instances only certain provisions would be affected. This understanding is relevant to the indicative list of categories the subject matter of which involves the implication that they continue in operation during armed conflict. There was thus a general impression that, as a matter of drafting, it would be appropriate to insert the phrase, “in whole or in part” within the text between “operation” and “during armed conflict” instead of appearing at the end, a bit far removed from the operation of the treaties which it is supposed to qualify. Furthermore, the Drafting Committee, having adopted an annex which has an appropriate reference to draft article 5, it decided to delete the footnote which linked the draft article to the annex.

The title of the draft article remains the same.

It is my hope that the Commission will deem it appropriate to reconsider draft article 5 as amended in the light of the circumstances.

**Article 13 [10]: Effect of the exercise of the right to individual or collective self-defence on a treaty**

Draft article 13 is entitled “**Effect of the exercise of the right to individual or collective self-defence on a treaty**”. This draft article was referred back to the Drafting Committee by the plenary, at its meeting on 6 June.

The debate in plenary revolved around whether the reference in the latter part of the draft article to “subject to...a determination by the Security Council of that State as an aggressor”, as contained in the Drafting Committee report (document A/CN.4/L. 727) did not contradict the opening part of the sentence which speaks of self-defence "in accordance with the Charter". It also gave the impression to some members that a right of pre-emptive self-defence was being consecrated. It was further considered that there was an overlap between this draft article and draft article 14. At the time that the Plenary decided to refer the draft article back to the Committee, some suggestions had been made to address the problem. For example, it was suggested that the draft article could begin with the phrase “A State purporting to exercise its right of individual or collective self-defence...” Although some members found this proposal as meeting their concerns, some other members did not think so because they could not envision how an inherent right of self defence could be purportedly exercised. It was suggested that the latter part of the draft article should be deleted, since it contradicted the first part. Moreover, the situation foreseen in the last part was addressed in draft article 14.

When the Drafting Committee considered the draft article it was more favourable to the deletion of the phrase “*subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor*”, it being understood that the application of draft article 13 would be subject to any consequences that may ensue, given the “without prejudice provisions” of draft article 14.

Mr. Chairman, I now come to the **Annex**, which contains an **Indicative list of categories of treaties referred to in draft article 5.**

The annex before you contains an indicative list of categories of treaties referred to in draft article 5, namely a list of categories of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict.

The list of the 12 categories is only indicative. Moreover, there is an order of priority in the listing. Although the selection of the categories is based largely on doctrine and available State practice (admittedly there is more State practice in some categories than in others), it is recognized that the categories are not fixed and there may be overlaps. The Drafting Committee proceeded in its work on the basis of a proposal submitted by the Special Rapporteur.

In its consideration of the various categories, the Drafting Committee discussed whether treaties that embodied *jus cogens* norms should be included in the list. The preponderant view was that such a category would not be similar, qualitatively, to the list of the categories in the annex. The effect of principles and rules having the character of *jus cogens* are not prejudiced by the provisions of draft article 5. Moreover, to the extent that such norms are ubiquitous, they would cut across the various categories of treaties already identified. Some members nevertheless felt that it would have been appropriate to include such a category. A consensus was finally reached that treaties containing *jus cogens* provisions should be left out of the list of the categories under consideration since these categories were

based on a subject matter classification, while *jus cogens* was a cross-cutting notion that is of fundamental importance to the law of treaties as a whole. It was further agreed that the Special Rapporteur will clarify this issue in the Commentary.

Mr. Chairman,

The completion of the present report by the Drafting Committee means that the current stage of work on the present topic has been completed.

I invite the Commission to take action on the second report so that it may complete, on first reading, the draft articles on “*Effects of armed conflicts on treaties*”.

Thank you.