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**A/CN.4/2898**

**Summary record of the 2898th meeting**

Topic:  
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because nothing prohibited a State party to a treaty from expressly stating, or allowing it to be inferred from its intention, that a treaty or one of its provisions would or would not apply in the event of its lawful involvement in an armed conflict in which it might have to suffer the consequences of the use of force. Nothing precluded the Commission from envisaging such a hypothesis. The Special Rapporteur should explore the criterion of intention in greater depth. However, the other criterion, that of external factors, should also be included in draft article 4. Perhaps that was what the Special Rapporteur had in mind in paragraph 2 (b) of the draft article, with the formulation the “nature and extent” of the armed conflict, a formulation which could well refer to the external factors that would help to determine whether the treaty should or should not be applied.

74. While draft article 5 was acceptable in substance, it would be more logical to reverse the order of the two paragraphs: paragraph 2 set out the general rule, and should therefore precede paragraph 1. Lastly, he supported the Special Rapporteur’s proposal to delete draft article 6.

75. In conclusion, he agreed with the suggestion by Mr. Dugard that the Special Rapporteur should be given time to prepare his third report, with a working group on the topic to be set up in the coming quinquennium only if that proved absolutely necessary. However, if the third report met the desiderata expressed by the Commission, there would be no need to establish a working group.

76. Mr. BROWNLIE (Special Rapporteur), responding to the comments made by Mr. Melescanu, said that when the General Assembly had approved the agenda item, it had done so with certain expectations based on the Commission’s proposal for the item. That proposal had related to the specific question of the effect of armed conflicts on the operation of treaties. To include the general question of *jus ad bellum* would completely change the focus of the topic, creating a dilemma, studiously avoided by the Commission so far, about the interpretation of the Charter. To apply the distinction between aggression and self-defence, and between lawful and unlawful use of forces, would mean reverting to the definition of aggression adopted by the General Assembly in 1974 after many years of effort, a definition that itself was full of provisos as to its effect on the interpretation of the Charter. It was one thing to have a “without prejudice” article acknowledging that problems existed, but quite another to carry out a study on the legality of the use of force by States. He would like to know whether Mr. Melescanu was seriously suggesting that the Commission should carry out such a study.

77. Mr. ECONOMIDES said he supported Mr. Kamto’s very apposite remarks about the question of terrorism. In the first place, to attempt to tackle the question was outside the Commission’s mandate. Secondly, in the case of terrorism, there was no readily identifiable opposing party; in international or domestic conflicts, there always was. Thirdly, as Mr. Kamto had pointed out, addressing the issue would open a Pandora’s box, with incalculable consequences.

78. Moreover, it was not being suggested that the Commission should define aggression or self-defence; its provisions should be similar to those of resolution II/1985 of the Institute of International Law, referring to the exercise by a State of the right of self-defence in accordance with the Charter. The Special Rapporteur should take account of the current exchange of views to decide how the majority of members wanted the question to be handled.

*The meeting rose at 1.05 p.m.*

## 2898th MEETING

*Friday, 21 July 2006, at 10 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

### Effects of armed conflicts on treaties (*concluded*) (A/CN.4/560, sect. B, A/CN.4/570)

[Agenda item 9]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. MELESCANU, referring to the earlier debate, said that he had not intended to call for a study on the legality of the use of force, but merely to point out that, when discussing the effects of armed conflict, a distinction should be made, to the extent possible, between different categories of conflicts—*jus ad bellum*, self-defence, aggression, just and unjust wars, and so on—as set out in the Charter of the United Nations.

2. Mr. NIEHAUS welcomed the second report on the effects of armed conflicts on treaties. The Special Rapporteur’s goal of attracting the interest and participation of Member States had been largely attained and, although some criticism had been expressed, it showed how complex the topic was. Several members of the Commission had taken the Special Rapporteur to task for submitting a text that was virtually identical with the one from 2005, but it was clear that that was in keeping with the Special Rapporteur’s analytical method. He had also been criticized for not treating the whole set of draft articles in the second report, but such an approach was not unusual in the Commission and, far from preventing the topic from being considered coherently, it allowed it to be examined in greater depth.

3. Turning to the draft articles themselves, he said that draft article 1 on scope did not pose any problem, although it should be specified whether it applied solely

to treaties in force or also to those awaiting ratification. Draft article 2, on the other hand, had given rise to a lively controversy over the definition of armed conflict in paragraph 2 (b). The Commission should not try to come up with a very exhaustive definition because that would complicate its work, but it should at least include internal armed conflicts, which today were more numerous and could have identical or even greater effects on treaties than international armed conflicts. Mr. Pellet's proposal to include the fight against terrorism was innovative and interesting, provided that special care was taken with the wording and content of such a provision so as to avoid the dangers to which a number of members had referred the previous day.

4. Although it might be redundant, draft article 3 should be retained because, together with draft articles 4 and 7, it was the driving force behind the draft articles. It was not advisable to replace the words "*ipso facto*" by "necessarily", which did not mean the same thing and was much less categorical. Draft article 4 dealt with the intention of the parties, an essential but controversial concept. He asked the Special Rapporteur to clarify the interpretation of the concept on the basis not only of articles 31 and 32 of the 1969 Vienna Convention, but also of relevant doctrine. The intention of the parties was very difficult to define and some thought that it was an archaic criterion that had lost all relevance in international law, but the Special Rapporteur maintained that it would be unrealistic to give it a secondary role. Instead of abandoning the criterion completely, other factors might be added to it, such as the object and purpose of the treaty and the specific circumstances of the conflict.

5. The Special Rapporteur had described draft article 5 as useful, albeit redundant, but, as Mr. Pellet had rightly pointed out, it dealt with two separate and completely unrelated issues. Draft article 7 was probably the most complex and most heavily criticized of all. The Special Rapporteur stressed its indicative and expository nature and even contemplated its deletion, but, in his own opinion, it was useful, provided that it was reworked.

6. Most of the members of the Commission thought it would be premature to refer the draft articles to the Drafting Committee, given the many questions which they still raised, and suggested sending it to a working group. In his view, it would be preferable to follow the Special Rapporteur's own proposal and to have him produce a third report to serve as a basis for the future working group. That would be the best solution, especially given the changes that the end of the quinquennium would bring.

7. Mr. MOMTAZ said that the question of the effects of armed conflicts on treaties was closely linked to other areas of international law, such as the law on the use of force, international humanitarian law and the law on the responsibility of States; hence the importance of bearing in mind the fundamental rules that those areas of law set forth.

8. With regard to the scope of the draft articles, he was opposed to the inclusion of the so-called "war" against terrorism; if the objective was to protect persons suspected of terrorism, then international human rights law could deal with it. He was, however, in favour of the inclusion of treaties which had been signed or ratified, but had not yet entered into force, for the reasons given by Mr. Rodríguez Cedeño, as well as treaties concluded with international organizations, with the reservation that those bodies, and in particular the United Nations, had always stressed that they were not parties to conflicts. The inclusion of non-international armed conflicts was more complex and, in that connection, he endorsed Mr. Kamto's proposal that a distinction should be drawn between internal armed conflicts according to their scale and the involvement of foreign Powers. A similar distinction was contained in article 1, paragraph 4, of Protocol I to the Geneva Conventions, which considered international armed conflicts to be "armed conflicts in which peoples [were] fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". The draft articles should include those three categories of internal armed conflicts, which had international implications. Internal armed conflicts which did not have international repercussions could be dealt with under the law of the responsibility of States and, more specifically, the provisions on circumstances excluding wrongfulness, as suggested by Mr. Gaja.

9. There remained the difficult question of the definition of such internal armed conflicts. He did not at all think that the definition from the *Tadić* case could be used. The purpose of that definition, which was based on a criterion of time (prolonged armed conflict), was to improve the protection of victims of war, whereas the Commission needed to know to what extent the control of part of the territory of a State torn by an internal armed conflict could have effects on the operation of treaties. A State whose territory was occupied by rebels had serious difficulties in complying with its treaty obligations. A definition based on the territorial criterion, as in Protocol II to the Geneva Conventions, was thus preferable.

10. As to the question of which criteria to use to identify treaties and provisions that would remain in force in case of an armed conflict, he cautioned against applying the principle of the indivisibility of treaties because it might well compromise the stability of treaty relations in a situation of conflict. Draft article 4 was very useful. It was true, as Mr. Economides had pointed out, that States which were negotiating a treaty cared little at that stage whether it would be applicable in a situation of conflict. However, many treaties contained safeguard clauses or clauses referring to *lex specialis*, and that might reflect an intention to apply, for example, international humanitarian law in case of a conflict. That intention could exist even in the absence of such clauses. Thus, the fact that the negotiators of the United Nations Convention on the Law of the Sea had not prohibited hostilities on the high seas could indicate that they had intended to apply international humanitarian law in case of an armed conflict or, in other words, *not to apply* a number of provisions of the Convention. For example, the principle of freedom of the high seas embodied in the Convention would not be fully applied in case of a conflict on account

of the applications of rules of international humanitarian law, which required, *inter alia*, the inspection of neutral vessels.

11. The list given in draft article 7 was very useful, although the article itself should be changed. In the case of the war between Iran and Iraq, for example, the treaties contained in the list had, on the whole, been honoured. In particular, diplomatic relations had been maintained until the last year of the conflict. The smallest common denominator of those treaties was that most contained a set of *erga omnes* obligations. It could therefore be said that *erga omnes* obligations must continue to apply in case of armed conflict, at least in respect of relations between the belligerents and third parties.

12. He stressed the need to take account of the main provisions of international law on the use of force and hoped that the Special Rapporteur would give the necessary attention to resolution II/1985 of the Institute of International Law when he took up draft article 10 (Legality of the conduct of the parties) again.

13. Mr. Sreenivasa RAO commended the Special Rapporteur on his second report, which took a very flexible approach to the topic. On the definition of armed conflict, he thought that the Commission should not try to find a complete definition which covered all aspects of the question. Attempts to define war or armed conflicts had always failed and the provisions of international humanitarian law had never needed a strict definition in order to be applicable.

14. In his view, the effects of armed conflicts on treaties came under the law of treaties, although the subject was also related to other major areas of international law, such as the law of responsibility and international humanitarian law. It seemed reasonable to limit the scope to treaties concluded between States because it was difficult to imagine an armed conflict between a State and an international organization. In the case of sanctions imposed by the United Nations, the obligations of States were governed more by Articles 25 and 103 of the Charter than by any other principle. Treaties between States and international organizations should be governed *mutatis mutandis* by the same principles as those applicable to the obligations of States parties to a conflict *vis-à-vis* third parties.

15. He shared Mr. Gaja's opinion on the inclusion of non-international armed conflicts. Questions were more likely to come into play on suspension or termination resulting from the impossibility of performance or a fundamental change of circumstances, which would be discussed in greater detail during the consideration of draft article 13 (Cases of termination or suspension). With regard to the "war against terrorism", he agreed with Mr. Economides that the Commission could not do much and should approach the question with great caution.

16. The relevance of the concept of intention in assessing the effects of armed conflicts on treaties had given rise to a lively debate. Some thought that intention played a very limited role. That point was well taken

and the Special Rapporteur would do well to reconsider the matter. After having analysed it in detail in his first report, he had focused on the concept of intention rather than the other indicia of susceptibility. It went without saying that a clearly expressed intention could not be ignored, but the question remained which criteria would serve to ascertain intention when it was not apparent, as in many recent treaties. Articles 31 and 32 of the 1969 Vienna Convention were useful, but their application was not simple and could bring other legal questions into play. In any event, each armed conflict and each particular treaty in question would have to be considered in their context to arrive at a proper conclusion. The Special Rapporteur was fully aware of that possibility, as shown by his comments in paragraph 19 of the second report and the reference in paragraph 25 to the opinion of the United States delegation, according to which it was necessary to consider other factors, including the object and purpose of the treaty, the character of the specific provisions in question and the circumstances relating to the conflict. What was at issue was thus more a matter of presentation and emphasis than of a difference of opinion. Such a broad approach for enumerating relevant factors or presumptions for determining the effect of armed conflict on treaties was consistent with other policy decisions the Commission must take in the context of the topic. For example, it was not a question of studying the law relating to the use of force, but simply the effects which a decision concerning the right of self-defence might have on a treaty. Even more pertinent was the decision to establish a presumption that an armed conflict *per se* did not terminate treaty obligations, subject to other considerations provided for in the draft articles.

17. The various categories of treaties referred to in draft article 7 might be reformulated either by citing them as examples in the commentary to one of the draft articles or by deducing useful indicia, factors or presumptions on which to focus.

18. Given the general recognition today of the importance of the environment for the well-being and survival of mankind in the short term and in the long term, it must be stressed that the environment must never be deliberately targeted. If civilians and civilian objects could not be regarded as legitimate targets, he did not see why it should be any different for the environment, on which civilians depended so heavily. In that connection, the international community should go beyond the current threshold of "widespread, long-term and severe damage" set out in Protocol I to the Geneva Conventions. Aware that his comment was not directly related to the topic under discussion, he nevertheless took the opportunity to urge the Commission not to appear to lend support inadvertently to the idea that treaties on environmental protection could be dispensed with in the case of armed conflict.

19. The Commission should not take any decision on the continuation of work on the subject before the Special Rapporteur had submitted his third report.

20. Mr. ADDO, thanking the Special Rapporteur for his second report on the effects of armed conflicts on



treaties, said that, in paragraph 17 of his first report,<sup>297</sup> the Special Rapporteur had stressed that contemporary armed conflicts had blurred the distinction between international and internal armed conflicts, that the number of civil wars had increased and that, in addition, they included external elements, such as support and involvement by other States in varying degrees, supplying arms, providing training facilities and funds, and so forth. Internal armed conflicts could affect the operation of treaties as much as, if not more than, international armed conflicts. The draft articles proposed by the Special Rapporteur therefore included the effect on treaties of internal armed conflicts. In his second report, however, the Special Rapporteur seemed to have abandoned that idea. In paragraph 8, he said that “a proportion of the doctrine regard[ed] the distinction between international armed conflict and non-international armed conflict as basic in character, and would exclude the latter [from draft article 2 (b)]” and, in paragraph 9, he pointed out that the question had provoked marked differences of opinion in the Sixth Committee, five delegations having been opposed to the inclusion of internal armed conflicts, whereas six delegations had been in favour of including non-international armed conflicts. Then, in paragraph 13, the Special Rapporteur asked whether “a general indication on the inclusion or not of non-international armed conflicts could be obtained from the [Commission]” and added that “[i]t must be clear that it would be inappropriate to seek to frame a definition of “armed conflict” for all departments of public international law”.

21. He personally would like to see non-international armed conflicts included in the draft articles for the reasons given by the Special Rapporteur in his first report, as well as those set out in paragraphs 146 to 149 of the memorandum by the Secretariat,<sup>298</sup> namely, that internal armed conflicts could affect treaties in the same way as international armed conflicts. He gave the example of the civil war in Guinea-Bissau, which had caused the United States to suspend its bilateral treaty on the Peace Corps aid programme<sup>299</sup> in 1998 as a result of fighting in the capital between Government troops and rebel soldiers. Similarly, in 1982, the Government of the Netherlands had suspended bilateral treaties with Suriname<sup>300</sup> because of civil strife in the country, in accordance with the principle of *rebus sic stantibus*. Domestic hostilities in the former Yugoslavia had affected many treaties between Yugoslavia and several European Union countries. As pointed out in paragraph 392 of the third report on State responsibility, by Mr. Crawford, Special Rapporteur,<sup>301</sup> in justifying the suspension of the 1983 cooperation agreement with Yugoslavia, the member States of the European Community had explicitly mentioned the threat to peace and security in the region, but they had relied on fundamental change of circumstances rather than asserting a right to take countermeasures. With regard to the internal armed conflict in Kosovo, which had begun in February 1996, the same report noted that:

<sup>297</sup> *Ibid.*

<sup>298</sup> See footnote 266 above.

<sup>299</sup> United Nations, *Treaty Series*, vol. 2259, No. 40261, p. 209.

<sup>300</sup> *Netherlands Yearbook of International Law*, vol. XV (1984), The Hague, Martinus Nijhoff, p. 321.

<sup>301</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507, pp. 103–104.

In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban. For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the breach of bilateral aviation agreements. Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect.<sup>302</sup>

The two latter cases showed that internal armed conflicts could have an effect on treaties with third parties. Consequently, there should be no doubt that at all internal conflicts could have a significant effect on inter-State treaty relations and attention must be given to such cases. He agreed with Mr. Dugard on that point.

22. He had no problems with the rest of the draft articles and endorsed the deletion of draft article 6, but was opposed to the establishment of a working group because the Special Rapporteur must be allowed sufficient time to prepare his third report, taking account of all the concerns which had been expressed during the debate that had followed the introduction of his second report. At the next session, the new members of the Commission would also have contributions to make and a decision could then be taken on how to proceed. The Special Rapporteur did not need the assistance of a working group at the current stage because he was the right man for the job in that difficult and uncertain area of international law. He must be encouraged with constructive comments, not subjected to scathing criticism. He should be commended on the quality of his second report, which he had prepared despite his tight schedule.

23. Mr. CHEE paid tribute to the Special Rapporteur for his outstanding work on the effects of armed conflicts on treaties. He appreciated the wealth of sources of international law which the Special Rapporteur had consulted. Article 35 (a) of the Harvard Research in International Law Draft Convention on the Law of Treaties, according to which “[a] treaty which expressly provides that the obligations stipulated are to be performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties”<sup>303</sup> accurately reflected the nature of the topic.

24. He had no difficulty with draft article 1 (Scope), whose wording was based on that of article 1 (a) of the 1969 Vienna Convention.

25. In draft article 2, the Special Rapporteur excluded conflicts of a non-international nature from the scope of the topic. That seemed appropriate, given that the word “treaty” was taken to mean an agreement between States pursuant to article 2, paragraph 1, of the 1969 Vienna Convention and not between a State and a non-State actor. He noted that article 35 of the Harvard Research Draft Convention was hardly more categorical than draft article 3 because it stated that all writers currently held that

<sup>302</sup> *Ibid.*, p. 103, para. 391(f).

<sup>303</sup> See footnote 286 above.

*ipso facto* termination was the exception rather than the rule. In that connection, the Special Rapporteur concluded in paragraph 15 of his second report that his earlier position “had been replaced by a more contemporary view according to which the mere outbreak of armed conflict ... does not *ipso facto* terminate or suspend treaties in force between parties to the conflict” and, in paragraph 14, he also recognized that “[t]here is considerable support for the view that the formulation ‘*ipso facto*’ should be replaced with ‘necessarily’”.

26. With regard to draft article 4 on the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict, he said that paragraph 2 (a) provided the correct answer in referring to articles 31 and 32 of the 1969 Vienna Convention, which dealt with the general rules on the interpretation of treaties. Paragraph 2 (b) was right to provide that the intention of the parties could be determined on the basis of the nature and extent of the armed conflict in question, a position supported by Sir Gerald Fitzmaurice in his Hague Academy of International Law lectures in 1948, as noted by the Special Rapporteur in paragraph 34 of his first report.<sup>304</sup>

27. He shared the Special Rapporteur’s view that draft article 5 (Express provisions on the operation of treaties) was needed for the sake of clarity. He was in favour of the deletion of draft article 4 and he endorsed draft article 7, which listed the categories of treaties whose object and purpose implied that they were applicable in case of an armed conflict, on the understanding that the list was not exhaustive.

28. The second report did not include modalities for settling disputes which might arise in respect of the effects of armed conflicts on treaties and, in that context, he referred the Special Rapporteur to article 36 of the Harvard Research Draft Convention, which provided that “if the dispute cannot be settled by diplomacy, it ... shall be referred to the Permanent Court of International Justice ... under a special agreement between the parties”.<sup>305</sup> That classical mode of settling disputes was still practised by States.

29. He was in favour of referring the seven draft articles, apart from draft article 6, to the Drafting Committee or a working group.

30. Mr. AL-MARRI commended the Special Rapporteur on the quality of his report and said that, although the title of the topic was the effects of armed conflicts on treaties, the pyramid seemed to have been turned upside down, as though treaties influenced armed conflicts. As pointed out by several members of the Commission, States often tried to shirk their responsibilities with regard to armed conflicts. The relationship between the topic under consideration, the Charter of the United Nations and the 1969 Vienna Convention must always be borne in mind. Given the complexity of the topic, it was important to proceed on the basis of the opinion of the majority of the members of the Commission.

31. Mr. BROWNLIE (Special Rapporteur) said he was pleased that the presentation of his second report on the effects of armed conflicts on treaties had given rise to a lively and useful debate and he had taken due note of the various points of view expressed by the members of the Commission. He had originally thought that it would be sensible to refer his first two reports to a working group, which would be more suitable than a drafting committee for dealing with matters that had not yet been resolved. However, such a step would be very premature, since the debate in the Commission had revealed the existence of substantial differences of opinion on some important aspects of the topic. Hence his proposal to draft a third report, for which there was some degree of support among the members of the Commission.

32. He continued to think that the second report, with all its limitations, was a fair record of the views expressed by members in 2005. Instead of replying to comments on the individual articles, he would like to look at questions of methodology. First, with regard to Mr. Koskenniemi’s reservations about the expository nature of the draft articles, he said that, in his view, a special rapporteur should, at least in his early reports, set down what was available on the topic. He had no particular objection to articles 3, 4 and 7 being drafted in a single short text, but he doubted whether that would be helpful and it seemed to him that the draft articles, as formulated, reflected the shape and historical development of the topic. Secondly, some members had complained that he had not taken their comments into account; that was not the case at all. He had often given consideration to views, but decided that he did not agree with them, something that was legitimate for a special rapporteur, who could not be expected to accept all comments expressed. Thirdly, he recognized that the first report had not provoked all the reactions expected from States, although some States had taken useful positions in the Sixth Committee. However, it would be difficult to attract the attention of Governments as long as the Commission had not submitted a set of draft articles adopted on first reading. Fourthly, the comments on questions of intention and the relevance of rules of *jus cogens* were somewhat selective. On the question of intention, Mr. Pellet’s tenth report on reservations to treaties<sup>306</sup> dealt with a considerable amount of material, including the concept of intention or consent and, in paragraph 3 of his report, Mr. Pellet referred to the definition of reservations in the 1969 and 1986 Vienna Conventions. Thus, he did not see why the question of intention should be such a problem in one case and not in another. The same remark applied to the question of *jus cogens*. He wondered whether, when it considered a new agenda item, the Commission was always going to decide on the relevance of the rules of *jus cogens* to the topic. He did not believe that that had been the usual approach thus far in the work of the Commission.

33. He had shown great flexibility in drafting his report. The conditions under which he had produced it had been such that there was considerable latitude for defining the term “armed conflict”. His position on the definition was not fixed and he was open to proposals. Once he had determined which approach to take in his third report,

<sup>304</sup> See footnote 259 above.

<sup>305</sup> *Supplement to the AJIL* (see footnote 286 above), p. 1204.

<sup>306</sup> See footnote 160 above.

many changes would be made to the current definition in the light of new material and the debates at the previous and current sessions.

34. With regard to the important question of the scope of the draft articles, he accepted that he would need to deal with the matter more thoroughly in the third report in the light of comments by Mr. Pellet and others, even if he had his own views on the matter. On treaties concluded by international organizations, he was personally reluctant to bring in material from other drafts by analogy. He was not convinced by that approach and did not believe that it was very useful in the context of the responsibility of international organizations. However, Mr. Pellet had made the important practical point that it would not be feasible to study treaties of international organizations as a separate matter. As to the important question of internal armed conflicts, he thought he had made it clear that they should be included in the scope of the draft articles and the memorandum by the Secretariat on “The effect of armed conflict on treaties: an examination of practice and doctrine”<sup>307</sup> contained strong arguments in favour of so doing. The only problem was that a number of members, for example, Mr. Momtaz, had discussed the question of armed conflict in general terms. The words “[f]or the purposes of the present draft articles” at the beginning of draft article 2 indicated, however, that the question of the inclusion of armed conflicts was governed by the intention of the parties, as referred to in draft article 4 and, in a different manner, in draft article 7. One of the criteria for discerning the intention of the parties was the nature and extent of the armed conflict in question. It was thus not enough to consider whether or not to include internal conflicts because, even if they were included, they remained subject to the modalities of draft article 4, just as international armed conflicts did. Hence the need to be careful because the question of armed conflicts, including internal armed conflicts, had to be contextual, that context being the meaning and effect of the particular treaty.

35. In his third report, he would consider the effects of armed conflicts on treaty obligations, which had been raised by Mr. Pellet and others. While he could understand the point being made, he did not think that, when the Commission had proposed a study of the effects of armed conflicts on treaties and the Sixth Committee of the General Assembly had approved it, they had expected the Commission to deal with such questions as *force majeure* or supervening impossibility. If the Commission were to embark on that path, it would violate the principle that its new work should not replicate subjects already covered to a great extent by the 1969 Vienna Convention.

36. Draft article 10, which dealt with the question of the relevance of the legality of the use of force, would be carefully recast in the light of resolution II/1985 of the Institute of International Law<sup>308</sup> and whose text had been included in his first report. The question of intention should be given closer consideration and he could not subscribe to the view that it was no longer an integral part of international law; every document that he had seen referred to the concept, whether it was the intention of the

parties to a treaty or the intention of the lawmaker. The problem was to find evidence of intention and he would look into that question in the light of the debate.

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

[Agenda item 1]

37. The CHAIRPERSON announced that the Commission would suspend the meeting in order to proceed with the official closing of the International Law Seminar.

*The meeting was suspended at 11.30 a.m. and resumed at 11.50 a.m.*

### Cooperation with other bodies

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVE OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

38. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization (AALCO)) said that 2006 had been a milestone in the history of AALCO, marking its fiftieth anniversary. Established in 1956 at the conclusion of the Bandung Conference, it now had 47 members. At its forty-fifth session, held in New Delhi from 3 to 8 April 2006, many delegations had commented in detail on the main thrust of the Commission’s work on a number of topics and had set out their countries’ views on various sets of draft articles.

39. The member States of AALCO had welcomed the progress made on the topic of diplomatic protection and were pleased to note that the draft articles adopted by the Commission on first reading<sup>309</sup> reflected the customary rules of international law on the subject. They had hoped that the Commission would continue its efforts to improve the draft articles and their commentaries, taking into account comments from States, so that the second reading could be completed on schedule. A number of delegations had welcomed the Special Rapporteur’s conclusion that the clean hands doctrine should not be included in the draft articles<sup>310</sup> so that the Commission could focus more on matters of a practical nature that needed further elaboration.

40. Delegations had appreciated the comprehensive nature of the tenth report on reservations to treaties and had welcomed the preparation of a guide to practice. They had expressed the view that, once adopted, the guidelines and commentaries would reduce uncertainty and assist States and international organizations in their treaty practice. They had noted that the approach adopted for definitions should ensure uniformity in the formulation and admissibility of reservations. It had been pointed out that defining core terms would alleviate interpretation problems and thereby reduce subjectivity and the Special

<sup>307</sup> See footnote 266 above.

<sup>308</sup> See footnote 263 above.

\* Resumed from the 2894th meeting.

<sup>309</sup> See footnote 7 above.

<sup>310</sup> *Yearbook ... 2005*, vol. II (Part Two), paras. 226–236.



Rapporteur's efforts to define complex concepts such as "object and purpose" of a treaty had been welcomed. One representative had stressed that a reservation formulated by a State party to a treaty must not be incompatible with the object and purpose of the treaty. That would enhance customary international law and reaffirm the incontrovertible fact that, within the framework of unilateral acts, States could still refrain from committing themselves to a treaty that they might not agree with. The view had been expressed that the whole range of instruments on reservations, beginning with the 1969 and 1986 Vienna Conventions, had met the needs of the international community. The rules established by those conventions had acquired the status of customary norms and it would not be wise to call them into question.

41. In respect of unilateral acts of States, the member States of AALCO had welcomed the efforts of the Working Group and the Special Rapporteur to finalize the 10 draft guiding principles applicable to unilateral declarations of States capable of creating legal obligations and had expressed the hope that the Commission would adopt them in the near future.

42. It had been pointed out that the formulation of draft articles on the topic of responsibility of international organizations was timely in view of the increasing range of activities that international organizations had come to regulate in international affairs. Delegations had agreed with the Special Rapporteur that a wrongful act of an international organization could consist of an action or an omission<sup>311</sup> and they had been pleased to note that the draft articles covered both possibilities. It had also been observed that, in developing principles applicable to international organizations, the Commission should not go beyond the extent to which it would be appropriate in drawing analogies with regard to States.

43. Delegations had also appreciated the results achieved by the Study Group on fragmentation of international law. They had expressed the hope that the study would facilitate an international consensus on the issue, in addition to establishing the basic principles in the area and standardizing international practice. The study should help achieve the objective of promoting the rule of law throughout the international community.

44. The member States had expressed their deep appreciation for the considerable work carried out by the Special Rapporteur on shared natural resources and had emphasized that the draft articles should be aimed at formulating basic principles and should leave the drafting of specific rules to bilateral and regional arrangements. They had also recognized the need to prepare an international legal instrument to guide the use, allocation, preservation and management of transboundary aquifers or aquifer systems and expressed the hope that the framework would later be expanded to include other shared natural resources, such as oil and gas. They had expressed the view that it would be inappropriate to apply the principle of "equitable utilization" embodied in the 1997 Watercourses Convention for the purpose

of establishing a regime on groundwater, where the role of riparian rights in the utilization of water was less pronounced.

45. Representatives had emphasized that the study on the effects of armed conflicts on treaties should also cover treaties concluded by international organizations and that the scope of the expression "armed conflicts" in the draft articles should be strictly confined to international armed conflicts. The Commission might in future include the question of non-international conflicts, provided that that was done within the confines of principles of customary international law. Delegations had also stressed that a more in-depth study was needed on the issue of the legality of the use of force, since it had a bearing on treaty relations. Moreover, the subject was not limited to the law of treaties and was closely related to other areas of international law, such as international humanitarian law and, in particular, the law of self-defence and the law of the responsibility of States.

46. On the expulsion of aliens, the Commission should attempt to strike a balance between the right of a State to expel aliens and the human rights of those expelled, despite the fact that the decision to expel was the sovereign right of a State. States should exercise that right in accordance with established rules and principles of international law, particularly fundamental principles of human rights. Any expulsion should be based on legitimate grounds, as defined in domestic law, taking into account issues such as public order and security and other essential national interests. The topic of the expulsion of aliens was particularly relevant in the contemporary world, where globalization had intensified transboundary movements of people. Moreover, a State's right to expel aliens was inherent in its sovereignty, but it could not be considered absolute. The Commission should therefore undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law at the global and regional levels, as well as of national legislation and practice.

47. Those were, in brief, the opinions expressed by the member States of AALCO at its forty-fifth session and they would be published in volume IV of the AALCO *Yearbook* (2006). With a view to enabling the Commission to be informed of the law and State practice of Asian and African States, AALCO had adopted a resolution at the same session urging member States to communicate their comments and observations to the Commission on the topics on the current agenda. The resolution also welcomed the fruitful exchange of views on a number of topics during the joint AALCO–International Law Commission meeting held in conjunction with the AALCO legal advisers' meeting in New York in October 2005.<sup>312</sup> The member States of AALCO had requested him to continue to organize such meetings and he looked forward to receiving suggestions from the members of the Commission on topics which might be taken up at the next meeting, to be held at the end of October 2006 in New York.

<sup>311</sup> *Ibid.*, para. 206, general commentary to chapter III of the draft articles, para. (2).

<sup>312</sup> *Report of AALCO's Forty-Fifth Session: New Delhi (HQ), 2006*, resolution 45/S/1, 8 April 2006, p. 192.



48. As to future cooperation between AALCO and the Commission, the AALCO Secretariat would continue to draw up notes and comments on the topics under consideration in the Commission so as to assist the representatives of the member States of AALCO in preparing their deliberations on the Commission's report in the Sixth Committee.

49. An item entitled "Report on matters relating to the work of the International Law Commission at its fifty-eighth session" would be considered at the forty-sixth session of AALCO. The session would be held in Khartoum in 2007 and he invited members who so wished to attend.

50. Noting that the quinquennium was drawing to a close, he congratulated all the members for their outstanding contributions to the Commission's work over the past five years. The Commission had made considerable progress on all the topics on its agenda. It had completed much of its work on some of them, and the new topics which it had taken up were of immense significance. It was to be hoped that in its new composition, the Commission would continue its work with the same energy and enthusiasm.

51. The CHAIRPERSON said that the Commission had greatly benefited from its relations with AALCO for two reasons: first, because many of the representatives of its member States were distinguished legal specialists whose publications enriched legal research the world over; and, second, because most of the representatives of its member States were legal counsellors of Governments whose daily work related to the "State practice" which the Commission must take into account in its work of the codification and progressive development of international law.

52. Mr. DAOUDI, noting that the representatives of the AALCO member States had spoken at length on the topics on the Commission's programme of work, expressed surprise that, despite the resolution adopted by AALCO at its forty-fifth session and referred to by Mr. Kamil, most of the comments and observations addressed in writing to the Commission had come from industrialized countries. He asked whether AALCO had institutionalized mechanisms to help better familiarize the Commission with the views of its member States on the topics under consideration.

53. Mr. Sreenivasa RAO asked whether it might not be time for AALCO, which was celebrating its fiftieth anniversary and was moving into its new headquarters, to consider new fields of activity. He had five suggestions to make in that regard: establish working groups to study aspects of international law of relevance to the region; organize regional fellowship programmes; provide legal assistance to African and Asian States; organize exchanges of legal experts within and between those regions; and conduct a lecture series on subjects of interest to Africa and Asia.

54. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization), replying to Mr. Daoudi, said that interaction between AALCO and the Commission had grown over the years and that the views of the member States were communicated to the latter in various ways. First, the Commission was represented at

AALCO sessions. Secondly, its member States expressed their views to him on topics under consideration in the Commission, which he then forwarded to it, as he had done at the current session.

55. AALCO and the Commission also held a joint meeting in the framework of the meeting of legal counsellors of Governments which took place every year in New York. The records of the debates at the annual session of AALCO and at the joint meeting with the Commission were published in the AALCO *Yearbook*, a copy of which was sent to the Commission every year.

56. With regard to Mr. Sreenivasa Rao's suggestions, he said that he could not himself enlarge the mandate of AALCO and that any innovation must be approved by its member States. The suggestions were interesting and some of them were already being considered. For example, a training programme was to be started as soon as the organization had moved into its new headquarters.

57. Mr. KATEKA asked whether the AALCO secretariat could put a summary of the views expressed by its members on the various topics under consideration in the Commission on the AALCO website. AALCO should also update its website more often and flesh out the information offered.

58. Mr. GALICKI said that the relationship between AALCO and the Commission was very valuable for the latter, and especially for the special rapporteurs, and they enabled the Commission to be more closely in touch with the views of African and Asian legal experts.

59. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization) said that the organization was in a transition period because of its move to new headquarters. As soon as it was settled in, the centre for research and training which was to be established there would start functioning and the website would be completely reworked and expanded with much new information.

*The meeting rose at 1.05 p.m.*

## 2899th MEETING

*Tuesday, 25 July 2006, at 10.05 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeno, Mr. Valencia-Ospina, Mr. Yamada.