Document:-
A/CN.4/2926

Summary record of the 2926th meeting

Topic:
<multiple topics>

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One possibility would be to await the submission of the Special Rapporteur's third report; another would be to set up a working group to crystallize some of the principles involved before the draft articles were referred to the Drafting Committee.

The meeting rose at 1.10 p.m.

2926th MEETING

Tuesday, 29 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Later: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue.

Expulsion of aliens (*continued*) (A/CN.4/577 and Add.1–2, sect. E, A/CN4/581)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on the expulsion of aliens to reply to Commission members' comments on his second report[148] and to present his conclusions.

2. Mr. KAMTO (Special Rapporteur) thanked Commission members for their contribution to the debate; some of their observations had been most pertinent and he had taken careful note of them. It was, however, regrettable that the debate had not focused exclusively on his second report on the expulsion of aliens; the new members of the Commission had expressed views on his preliminary report[149] and in so doing had made general comments on questions on which the Commission had already supplied very clear guidance, which had been endorsed by the Sixth Committee of the General Assembly (see paragraphs 10–14 of the second report) and to which there therefore seemed little point in returning.

3. As for the choice of topic, he was convinced that it was both useful and timely and, above all, more amenable to progressive development and codification than some other topics. Although he welcomed Mr. Pellet's overall support for the report under consideration, he did not quite grasp the distinction he had drawn between subjects which, like the expulsion of aliens, were allegedly a matter for political negotiation alone and those which were supposedly a matter for expert deliberation. In reality it seemed that every subject called for both. In every case, whether the 1969 and 1986 Vienna Conventions, the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction or the Rome Statute of the International Criminal Court, it was the experts who had proposed legal or technical standards and the States which had undertaken political negotiations on the final text. Generally speaking, each topic on the Commission's agenda raised legal problems to which the members, in their capacity as experts, had to find answers. In that context, he particularly wished to thank Mr. Fomba, whose lucid, measured replies to most of the general comments on the second report had evidenced a real understanding of the report's approach.

4. Turning to the scope of the topic, he noted that Mr. Yamada had wondered if it would be advisable to formulate rules applicable to all the categories of aliens listed in draft article 1, paragraph 2, or whether it would not be better to consider each category separately. The draft work plan in annex I to the preliminary report indicated very plainly that in Part 1, Chapter II, on general principles, he would endeavour to identify the general rules applicable to various categories of aliens before studying the more specific rules making up the particular regime for each category in Part 2, on expulsion regimes. Proceeding in that manner would obviate any risk of repeating either the grounds for expulsion or the legal consequences thereof.

5. He wished to reassure the Chairperson of the Commission, who had insisted that the legal consequences of expulsion, including the possible expropriation of the expellee and the question of the admission of aliens, should be included in the scope of the topic, that he firmly intended to study the various legal consequences of expulsion for aliens, and the means of redress available not only to aliens, but also to the State of which they were nationals. The work of the Institute of International Law[150] and the award in the *Ben Tillett* case had prompted some reflection on that question, which he would certainly examine at a later stage. Contrary to what Mr. McRae held, there was no *a priori* obstacle to mentioning the issue of expropriation from that angle, which would not interfere with the relevant national legislation. The Commission could simply remind States that they were bound to rigorously apply their law on the subject in good faith, or to adapt the principles embodied in international case law on the expropriation of foreign companies to natural persons. The notion of the responsibility of the expelling State and its corollary, compensation, to which reference was made in the draft work plan in annex I to the preliminary report, met those concerns. Nevertheless, it appeared unnecessary to spell out in draft article 1 that the draft articles would apply also to the legal consequences of expulsion. Otherwise, it would also be necessary to say that they likewise applied to the procedure and reasons for

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[148] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

[149] *Yearbook … 2005*, vol. II (Part One), document A/CN.4/554.

[150] See "Projet de déclaration internationale relative au droit d'expulsion des étrangers" (Draft international declaration on the right to expel aliens), *Annuaire de l'Institut de droit international*, 1888–1889, vol. 10 (Lausanne session), Brussels, Librairie européenne Muquardt, p. 244 (available only in French), and "Règles internationales sur l'admission et l'expulsion des étrangers..." (footnote 130 above).

expulsion, which did not seem sensible. The idea that the subject under examination was not confined to relations between the individual and the State could be conveyed by simplifying the wording of draft article 1.

6. For the reasons stated in his preliminary report and reiterated in his second report, he did not agree with Mr. Brownlie, Mr. Wako and Ms. Xue that non-admission should be included in the scope of the topic. His viewpoint had been endorsed by almost all of the Commission members when the preliminary report had been considered in 2005 and by States' representatives in the Sixth Committee, apart from the Representative of the Republic of Korea (see paragraph 12 of the second report). Expulsion concerned aliens legally or illegally present in the territory of a State, whereas non-admission concerned aliens who were not yet present. It was impossible to expel a person from a territory before he or she had been admitted to it. Admission and non-admission were indubitably matters that fell within the scope of State sovereignty and thus not matters for international law. Furthermore, to develop rules on admission or non-admission would be contrary to the principle, to which Mr. Brownlie had rightly drawn attention, that it was the duty of every State to create the conditions for security and public order in its territory. As Mr. Gaja had said, the dividing line between *refoulement* and non-admission was fine, but when *refoulement* occurred in a border area, before an alien had settled in any way in the territory of a State, it might arguably be tantamount to a refusal of admission, which lay within the discretion of a State. Nevertheless, that did not signify that an international zone in which the alien was seeking admission or awaiting expulsion was a legal vacuum. Wherever they were, the persons concerned enjoyed fundamental human rights and were entitled to the protection afforded by existing international legal instruments and the relevant national laws. He did not therefore intend to create new rules in a sphere where legal instruments were in fact tending to proliferate. When considering the rules on expulsion, it would be sufficient to draw attention to the principles which an expelling State must respect in waiting zones.

7. Some Commission members had proposed that refugees, stateless persons and nationals of an enemy State should be excluded from the scope of the topic on the grounds that their expulsion was already governed by specific texts; he personally was unable to concur with that opinion for a number of reasons, which would be set out in paragraphs 60 to 79 and 81 to 94 of his forthcoming third report on the expulsion of aliens (A/CN.4/581). It should, however, be noted that the 1951 Convention relating to the Status of Refugees merely laid down the principle of the non-expulsion of refugees and the circumstances in which derogations were permitted. That text rested on a restrictive, obsolete conception of the term "refugee" and did not encompass new notions generated by practice, such as "temporary protection" or "subsidiary protection". Moreover, neither the 1969 OAU Convention governing the specific aspects of refugee problems in Africa, the 1984 Cartagena Declaration on Refugees[151] nor the 1954 Convention relating to the Status of Stateless Persons dealt comprehensively with the expulsion of refugees. Furthermore the anti-terrorist dimension of the expulsion of aliens, which had been reflected in Security Council resolution 1373 (2001) of 28 September 2001, was absent from those texts, and that alone justified a re-examination of the expulsion of refugees and stateless persons in the light of current law and practice. It was surprising that some members of the Commission, in particular Ms. Jacobsson and Mr. Pellet, had argued that the expulsion of the nationals of an enemy State should be excluded from the scope of the topic because it was already covered by international humanitarian law, in particular by the 1949 Geneva Convention relative to the protection of civilian persons in time of war (Convention IV), considering that that instrument did not in fact contain any provisions concerning the expulsion of that category of aliens. That question would be dealt with in greater detail in paragraphs 125 to 127 of his third report. An examination of State practice with regard to the expulsion of nationals of an enemy State revealed that it was highly disparate, to say the least. Nevertheless, much theoretical discussion had surrounded the subject, and the decision issued in 2004 by the Eritrea–Ethiopia Claims Commission had paved the way for further reflection, even if that decision had disregarded some aspects of prevailing practice.[152] For all those reasons, he personally believed that it was imperative to include the nationals of an enemy State within the scope of the topic in order to fill the gaps in international law dealing with the matter.

8. Taking up a number of detailed points made about the scope of the subject, he agreed with Mr. Pellet that the commentary to article 1 should explain that the aliens in question were natural persons. Dual nationality and disguised extradition, two questions raised by Mr. Gaja, could be addressed in the fourth report on the expulsion of aliens, which would deal with the *ratione materiae* principles of expulsion, and in the sixth report, which would be devoted to grounds for expulsion. In addition, Mr. Gaja had advocated the inclusion of a provision stipulating that the rules proposed in the draft articles were without prejudice to other rules which might be established with a view to protecting aliens' rights, but he personally wondered whether the insertion of such a clause might not preclude any consideration of the legal consequences of expulsion. At all events, if that proposal was retained, that clause should be introduced at the beginning of part 3 of the study, which would in fact be devoted to the legal consequences of expulsion.

9. He was not opposed to the suggestion of Mr. Saboia and Mr. Vargas Carreño that the principle of *non-refoulement* should be included in the draft articles, provided that the principle was mentioned within the context of consideration of the rules governing the expulsion of refugees. On the other hand, it seemed unnecessary to include the question of transfer or surrender within the scope of the topic, as Mr. Hassouna had suggested, since it was covered by international criminal law and came under the heading of cooperation in combating national and transnational crime. Responding to his request for information in early May 2007, officials of the INTERPOL General Secretariat

[151] See footnote 131 above.

[152] Permanent Court of Arbitration, Eritrea–Ethiopia Claims Commission, *Partial award, 17 December 2004, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27–32* , UNRIAA, vol. XXVI (Sales No. E/F.06.V.7). See also www.pca-cpa.org.

had clearly indicated that if transfer or surrender was made subject to the normative constraints associated with the expulsion of aliens, the work of INTERPOL would be hampered and the whole system of international cooperation in combating crime rendered ineffective. Furthermore, such a move would seriously undermine the effectiveness of the fight against terrorism. For those reasons, it would be better to exclude that subject from the scope of the topic. If, however, the Commission felt otherwise, the Secretariat could ask INTERPOL directly for fuller information on the question. In any case, expulsion in connection with terrorism would be duly analysed in the third report (A/CN.4/581).

10. With reference to some terminological points raised by Commission members, he noted that Ms. Escarameia had wondered whether it might not be better to speak of aliens who were present in the host country "independently of the lawfulness of their status", rather than of aliens who were present lawfully or with irregular status. An examination of practice revealed that either expression could be employed equally well, and he therefore had nothing against the consistent use of the phrase "alien present lawfully or unlawfully". Ms. Escarameia had also commented that, contrary to the assertion made in paragraph 106 of the second report, the loss of nationality was not always voluntary, and she had cited the case of women who lost their nationality when they married a foreigner. Yet marriage was the result of a choice, and any choice constituted a voluntary act. Turning to Mr. Fomba's proposal to replace the words "*se trouvant sur le territoire*" ("present on the territory") with "*se trouvant dans le territoire*" ("present in the territory") in the French version, he explained that he had chosen the former wording in order to bring out the fact that, for the purposes of the topic under consideration, an alien was considered to be a person who had crossed the border of the State concerned. However, since both phrases seemed to mean the same thing, he could accept that proposal. Mr. Pellet had asked about the origin of the term "territorial State", which was in fact frequently used in legal writings and could also be found in studies by the Institute of International Law going back to the nineteenth century. He had thought it wise to employ that notion for there were situations in which it seemed impossible to speak of the "host State", especially in the case of a State which was expelling an alien, or of an "expelling State" when the expulsion decision was still pending. Nevertheless he was not opposed to the use of different terms when they reflected real practice. Lastly, he wished to assure Mr. Wako that he would distinguish between lawfully and unlawfully resident aliens when analysing expulsion regimes, but that this distinction would not constitute the backbone of the study. He recalled that in 2005 the Commission had given clear guidance on the topic,[153] which had been approved by the Sixth Committee, namely that he should elaborate a legal regime as comprehensive as possible on the expulsion of aliens and not just a set of residual principles.[154]

11. Turning to the two proposed draft articles, he noted that some Commission members had recommended the outright deletion of paragraph (2) of draft article 1, which would completely thwart his aim of precisely defining the scope of the future draft articles. If draft article 1 was reduced to its current paragraph (1) alone, the scope of the topic would be limitless, with the result that the draft articles could then apply to the expulsion of all types of aliens, including foreign diplomats or the military personnel of multilateral forces—in other words to categories which, it was generally agreed, must be excluded from the topic. It seemed that a simpler wording of paragraph (1) highlighting the terms "expulsion" and "aliens" would meet the justified concerns expressed by Commission members, while paragraph (2) must be worded in such a way as to clarify the general statement contained in paragraph (1). He therefore proposed recasting paragraph (1) of draft article 1 to read: "The present draft articles shall apply to the expulsion by a State of the aliens listed in paragraph 2 of this article who are present in its territory". Another possible formulation might be: "The present draft articles shall apply to the expulsion of the aliens listed in paragraph (2) who are present in the territory of the expelling State". Paragraph (2) might read: "They shall concern aliens lawfully or unlawfully present in the expelling State, refugees, asylum seekers, stateless persons, migrant workers, nationals (*ressortissants*) of an enemy State and nationals (*ressortissants*) of the expelling State who have lost their nationality or been deprived of it".

12. The repetition in draft article 2, paragraphs (1) and (2) (*b*), was probably due to his keen but unnecessary concern to be didactic and clear. Some members had proposed the deletion of paragraph (2) (*b*), as a way of solving the problem, but it would be preferable to delete paragraph (1), as Mr. Yamada had suggested, so that article 2 would have just one paragraph, the current paragraph (2), which would be redrafted. The debate on that paragraph had centred mainly on the definition of the term "*ressortissant*" and strong opposition, led by Mr. Pellet, had been voiced, with one Commission member going so far as to say that he did not see why the French language should have such a hold over the Commission's work. That linguistic controversy had obscured the real reasons for his choice of the term "*ressortissant*".

13. The first point to be made was that special rapporteurs worked in one of the official languages of the United Nations and that the reports that they drafted in that language constituted the authentic text, the other versions being translations. Secondly, translation problems, which were not new to the Commission, did not arise solely from French into other languages, which in the case at hand was English; it had often been hard to find the equivalent of an English word in French, yet that had not caused the term in question to be rejected. For example, the words "liability" and "responsibility" were translated by the single word "*responsabilité*", while "boundary" and "frontier" were rendered as "*frontière*". It was therefore surprising that Mr. Pellet had yielded so easily to the argument that there was no equivalent in other languages. Thirdly, his mother tongue was not Arabic, Chinese, English, French, Russian or Spanish, and he felt that one day some thought should be given to introducing an African language as a working language of the United Nations, even though that language would surely not be his own. That being so, he had tried, in paragraphs 147 to 149 of his second report, to explain why he did not think that it was enough to say

[153] See *Yearbook … 2005*, vol. II (Part Two), Chap. VIII.

[154] See paragraphs 10–14 of the Special's Rapporteur second report, *Yearbook … 2006*, vol. II (Part One), document A/CN.3/573.

that, for the purposes of expulsion, an alien was a person who did not have the nationality of the host State. In some cases a person who did not have the nationality of the host State was still not treated by that country as an alien and could not therefore be expelled. From that point of view, that person was in the same situation as a national. Mr. Kolodkin's comments regarding Russian and especially Hungarian practice confirmed that argument. The Commission would see that paragraph 46 of the third report mentioned the 1968 *Italian South Tyrol Terrorism* case, in which the Supreme Court of Austria had decided that Italian nationals born in the South Tyrol could not be expelled from Austria, because Austrian law required that they should be treated as nationals. Given that the ICJ, including in its most recent case law—which he had cited in his second report—used the terms "national" and "*ressortissant*" without distinction, and taking due account of the position of almost all Commission members who had spoken on the second report, he would in future use the term "*ressortissant*" as a synonym for "national". In order to solve the problem raised by the situation of certain non-nationals who enjoyed the same rights and protection as nationals, he proposed that an alien should be defined as a "person who does not have the nationality of the State in whose territory he or she is present, unless otherwise provided by the law of that State".

14. The members who had voiced criticism of the term "frontier" had obviously not given careful consideration to either the exact content of the definition proposed or the problem he had been trying to solve. In the context of expulsion, a frontier could not be regarded merely as a line. It appeared in fact to be a zone: a port or airport zone, a customs zone or a zone delimiting maritime areas constituted frontier zones as far as immigration was concerned. Furthermore, all airports of the world had an "international zone" where police formalities for entry into the country were completed. It was not a line, it was a zone. As long as one had not left that zone, one was certainly in the territory of the State concerned, but one could not be expelled from it. One could only be sent back, denied entrance. The case of the *MV Tampa* cargo vessel, apart from the human drama involved, had shown that as long as a person was on a boat offshore, that person was considered to be in the immigration zone at the limits of the State's territory. That was the nuance he had wished to introduce into his definition of the term "frontier".

15. As for the word "territory", he had merely used the classic definition unanimously accepted by legal writers, and in paragraphs 179 to 182 of his second report he had explained what it meant in physical terms. There was therefore nothing to discuss. Admittedly, one Commission member had proposed that maritime areas should not be included in the notion of territory, but he did not think that a clearly accepted definition could be truncated in that way. In point of fact, the concern expressed by that member could be dispelled by his definition of frontier in the context of expulsion.

16. He endorsed the suggestion made by Mr. Gaja and supported by Mr. Kolodkin and others that the criterion for the notion of "compulsion" contained in the definition of the term "expulsion" should be specified. That is what he had tried to do in the new version of article 2, which read:

"For the purposes of the draft articles:

"(*a*) *Expulsion* means a legal act or conduct by which a State compels an alien to leave its territory;

"(*b*) *Alien* means a person who does not have the nationality of the State in whose territory he or she is present, except where the legislation of that State provides otherwise;

"(*c*) *Conduct* means any act by the authorities of the expelling State against which the alien has no remedy and which leaves him or her no choice but to leave the territory of that State;

"(*d*) *Territory* means the domain in which the State exercises all the powers deriving from its sovereignty;

"(*e*) *Frontier* means the zone at the limits of the territory of an expelling State in which the alien does not enjoy resident status and beyond which the expulsion procedure is completed."

17. Apart from Mr. Niehaus, who had said that the two draft articles were not yet ready to be referred to the Drafting Committee, and Mr. Wako, who considered such referral to be premature and had even proposed that a working group be set up, all the Commission members who had participated in the debate were in favour of sending the draft articles to the Drafting Committee. Mr. Kolodkin had requested that the Commission should work on them a little longer, but that had already been done—he hoped to Mr. Kolodkin's taste. He informed Mr. Wako that it was the Commission's usual practice to set up a working group only when there was a deadlock on a topic, when debates in plenary had not provided any indication of the exact direction work should take, or when one aspect of the topic presented particular difficulties and the Commission was divided on that issue or on the topic as a whole. That did not seem to be the case as far as the expulsion of aliens was concerned, and the Drafting Committee ought to be able to settle some of the minor points which had been raised.

18. Two strands of opinion had emerged among the many proponents of referring the two draft articles to the Drafting Committee. Some would like the Drafting Committee to examine the two draft texts at a later stage, while others would like it to do so immediately. Initially he had had no objection to the principle of deferring consideration of the two draft articles by the Drafting Committee, but Mr. Pellet, supported by Mr. Fomba and the Chairperson of the Drafting Committee, Mr. Yamada, had convinced him that it would be better for the Commission's work on the topic if such consideration took place without delay. Accordingly, he had reworked the two draft articles in question since the previous meeting of the Commission.

19. The CHAIRPERSON said that if he heard no objection he would take it that the Commission accepted the proposal to refer draft articles 1 and 2 to the Drafting Committee.

It was so decided.

Effects of armed conflict on treaties[155] (A/CN.4/577 and Add.1–2, sect. D, A/CN.4/578,[156] A/CN.4/L.718[157])

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

Mr. Vargas Carreño took the Chair.

20. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on the effects of armed conflicts on treaties (A/CN.4/578).

21. Mr. BROWNLIE (Special Rapporteur) said that the circumstances in which he was introducing his third report were unusual in that a quinquennium had just ended and the Commission had 16 new members.

22. For practical reasons, neither his first nor his second reports[158] had been given full consideration. The draft articles he had proposed had not been referred to the Drafting Committee, partly because they had given rise to a considerable amount of controversy, but mainly because priority had been given to other topics that had absolutely had to be finished before the end of the quinquennium. In addition, as he had had to honour other professional commitments, the second report had been very succinct—in essence, a summary of the debate on the topic thus far, especially in the Sixth Committee. The first report was therefore still the foundation of the third, the more significant part of which was devoted to the commentary to draft article 7. In it he outlined examples of State practice and case law relating to the categories of treaties set forth in that article, which *prima facie* were not suspended or terminated as a result of an armed conflict. He drew attention to paragraphs 18 to 28—and especially paragraphs 22 and 23—of his second report, which listed municipal court decisions where emphasis had been placed on the criterion of the object and purpose of the treaty.

23. He also wished to draw attention to what he considered to be some very difficult problems which were in a sense related to sources. Since a number of delegations had pointed out that some of the categories listed as candidates for inclusion in draft article 7 had not found much support in State practice and that it would be very difficult to identify relevant State practice in that sphere, it would be inappropriate to insist that the categories admitted to draft article 7 should all be deemed to constitute part of existing general international law. He had explained that in more detail in paragraphs 46 to 48 of his third report.

24. He noted that the topic had been deliberately left out of the 1969 and 1986 Vienna Conventions and added that it was important to read the draft articles, particularly draft articles 3 to 7, as a coherent whole.

25. Taking up draft articles 1 to 7 in greater detail, he said that, given the nature of the subject matter and the issues which had emerged during the consideration of the first two reports, he thought that it was essential to set up a working group. He agreed with Mr. Kamto that the establishment of a working group must not be an automatic process, but he was convinced that in the context of the effects of armed conflicts on treaties there were a number of key issues on which the Commission had to reach a collective decision, one good example being whether the definition of armed conflict for the purposes of the draft articles should include internal conflicts. That question had given rise to strong differences of opinion in both the Commission and the Sixth Committee. A working group would permit progress on that point and on other important points.

26. One of the overall goals of his third report was to clarify the legal position, a task which was far from easy because the literature was quite varied, covered a very broad period of time and merely highlighted the uncertainty of the law in that connection. The general line he had taken in making choices had been to promote the security of legal relations between States. That was the whole point of draft article 3, which had essentially been borrowed from the work of the Institute of International Law between 1983 and 1986.[159] The main message of the draft article was that the outbreak of an armed conflict did not, as such, result in the termination or suspension of a treaty. He hoped that the Commission's work on the topic would encourage States to supply examples of their practice in that field, since direct evidence thereof had been quite limited to date. He was further of the opinion that the giving of executive advice to courts should be included in State practice.

27. Although he had deemed it simpler to present a complete set of draft articles, the Commission must not assume that he had been rushing to judgement, or that he was proposing a definitive and dogmatic set of solutions. While he had adopted a normative format, he had deliberately left issues open until the Commission had formed a collective opinion, which he was prepared to accommodate. Moreover, since some of the draft articles were simply expository in nature, it would be premature to send them to the Drafting Committee. As he had explained in paragraphs 47 to 49 of his first report, it was essential to take account of policy considerations. As to the current relevance of that question, one legal adviser from a Western country had said that he hardly ever had to deal with it in practice, while another had said that he encountered it constantly. For example, it had been central to the hearings of the Eritrea–Ethiopia Claims Commission in 2005,[160] during which his first report had been much cited.

28. Returning to his third report and the draft articles proposed therein, he said that, with reference to draft article 1 (Scope), he concurred with the opinion expressed by

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[155] For the discussion of draft articles 1 to 7 proposed by the Special Rapporteur in his second report, see *Yearbook ... 2006*, vol. II (Part Two), Chap. X, pp. 167–171, paras. 181–211. For the second report, *ibid.*, vol. II (Part One), document A/CN.4/570.

[156] Reproduced in *Yearbook … 2007*, vol. II (Part One).

[157] Mimeographed, available on the Commission's website. See also the summary record of the 2946th meeting, below, paragraph 50.

[158] *Yearbook … 2005*, vol. II (Part One), document A/CN.4/552 and *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

[159] See Institute of International Law, *Yearbook*, vol. 61, Session of Helsinki (1985), Part I (preparatory works), pp. 25–27, and Part II, pp. 278–283 (article 2 of the resolution on the effects of armed conflicts on treaties, of 28 August 1985).

[160] The partial awards of the Eritrea–Ethiopia Claims Commission rendered on 19 December 2005 are available on the website of the Permanent Court of Arbitration (www.pca-cpa.org).

the United Kingdom in the Sixth Committee to the effect that the proposed expansion of the draft articles' scope to encompass treaties concluded by international organizations raised difficulties which had been underestimated and which required in-depth consideration. The arguments relating to that question, which would be examined by the Working Group, were set out in greater detail in paragraphs 8 to 10 of the report.

29. In draft article 2 (Use of terms), subparagraph (*a*), which was preceded by the introductory phrase "For the purposes of the present draft articles", used the definition of the term "treaty" found in the 1969 Vienna Convention. In connection with subparagraph (*b*), he drew attention to the commentary contained in paragraphs 16 to 24 of his first report[161] and 8 to 13 of his second report,[162] which was supplemented by paragraphs 12 to 15 of his third report. Opinions in both the Commission and the Sixth Committee were widely divided on whether or not to include internal armed conflicts in the definition of "armed conflict", and policy considerations pointed in different directions. The Commission was engaged in the progressive development of the law and not its mere codification, to which the topic was not at all suited. It was a fact that in recent decades a number of armed conflicts had been fuelled by State agents located outside the territory of the State in which the armed conflict was taking place. Moreover, it would probably be unrealistic to pretend that a neat distinction could be made between internal armed conflicts in the strict sense and those which had foreign connections and causes. Acceptance of the view that a large number of armed conflicts were partly internal and partly external would cause greater harm to the integrity of treaty relations, because then any number of excuses with some sort of factual basis could be invoked to allege the existence of an armed conflict within the meaning of draft article 2, and that might have the effect of suspending or terminating treaty relations. For that reason, he again thought that collective work culminating in the formation of a collective opinion was essential. He gathered that there was a consensus for having armed conflicts include situations in which an invasion was so effective that it very rapidly resulted in an armed occupation of a State without any armed conflict in the conventional sense, situations that had been mentioned by the delegation of the Netherlands.[163]

30. Draft article 3 (Non-automatic termination or suspension) was central to the whole set of draft articles. Paragraphs 16, 17 and 19 of the third report retraced the background of that draft article and reminded the reader that the phrase "*ipso facto*" had been deleted from the title and replaced by "necessarily" in the body of the text. In draft article 4 (The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict), the reference to the intention of the parties had attracted considerable attention in the Sixth Committee, where nine States had been in favour of that criterion and eight had regarded it as problematical. The Commission's debates had revealed similar divergences of opinion, which were reflected in greater detail in paragraphs 22 and 23 of the report. Opposition to reliance upon intention was usually grounded in the difficulty of ascertaining the parties' intention with certainty, but that was also true for many legal rules, including legislation and constitutional provisions. In any event, the existence and interpretation of a treaty was not a matter of intention as an abstraction, but of the intention of the parties "as expressed in the words used by them and in the light of the surrounding circumstances". The ultimate consideration was the aim of interpretation. Surely that aim was to discover the intention of the parties and not something else.

31. In connection with draft article 5 (Express provisions on the operation of treaties) he drew attention to the commentary contained in paragraphs 55 to 58 of the first report and in paragraphs 29 to 31 of the second report. The draft article was redundant from the point of view of the drafting process, but it should be retained for the sake of clarity. The former paragraph 2 of the draft article formed the subject of a new draft article 5 *bis* (The conclusion of treaties during armed conflict), in which the term "competence" had been replaced by "capacity". The draft article reflected the fact that, in practice, belligerents did conclude treaties between themselves during an armed conflict. He had withdrawn draft article 6 and replaced it with draft article 6 *bis* (The law applicable in armed conflict), which sought to provide useful clarification of the relationship between human rights and the law applicable in armed conflicts, as indicated in paragraphs 30 to 31 of the third report.

32. Lastly, he drew attention to the commentary to draft article 7 (The operation of treaties on the basis of necessary implication from their object and purpose), which was to be found in paragraphs 62 to 118 of the first report; the draft article had attracted fairly numerous and very varied comments, which were summarized in the third report. It had been argued that article 7 was redundant because the criteria set out in draft article 4 permitted a classification of treaties susceptible to termination or suspension, so that there was no need for an indicative list. Others had taken the view that the principle of an indicative list was acceptable, but that further study should be devoted to the items to be included in it. His own opinion was that such a list must be kept in some form or other, although the sources posed a problem, for some items on the list were clearly not supported by State practice. Others, like permanent regimes, did have such support, and he had garnered what State practice was available. If the indicative list was not adopted, it would then be best to draw up an annex containing an analysis of State practice and case law. As the topic was extremely difficult and fraught with uncertainties, the Commission must be prepared to examine those categories that were not corroborated by State practice in the conventional form, but which did find backing in reputable legal sources: doctrinal material, some State practice and the decisions of municipal courts. The memorandum by the Secretariat[164] contained some very helpful suggestions in that respect. Whether or not draft article 7 survived in its current form, which created

[161] *Yearbook … 2005*, vol. II (Part One), document A/CN.4/552.

[162] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/570.

[163] *Official Records of the General Assembly, Sixth Committee, Sixty-first session*, summary record of the 18th meeting (A/C.6/61/SR.18), para. 33.

[164] A/CN.4/550 and Corr.1–2 (mimeographed, available on the Commission's website, documents of the fifty-seventh session).

a set of weak presumptions as to the types of treaty that did not necessarily entail termination or suspension, some other vehicle would still have to be found for recording legal practice that supported those categories.

33. The CHAIRPERSON thanked the Special Rapporteur for his introduction and invited members of the Commission to make comments.

34. Mr. PELLET recalled that in his first report in 2005 the Special Rapporteur had proposed a complete set of draft articles accompanied by commentaries, which had not been very well received. In his second report in 2006, he had confined himself to seven draft articles without proposing any modification of the previous year's work and without taking account of the Commission's substantive criticism, which had appeared only in the commentaries. It was scarcely surprising that the second report had not gone down any better than the first. What was surprising was that the third report simply reproduced the first, without any fundamental modification apart from the new draft article 6 and the splitting of draft article 5, which were in fact welcome changes. At least the observations made in the Sixth Committee and, to a lesser extent, those made in the Commission, had been reproduced after each provision. He had already commented at length on the first two reports and, given that the proposals contained in the third report were essentially unchanged, his observations also remained unchanged. However, it seemed useful at the beginning of a new quinquennium to outline in broad terms what he considered to be the difficulties raised, not by the draft articles themselves, but by the overall conception underlying them. Those problems could be divided into six categories.

35. First, generally speaking, it emerged from draft article 4, paragraph 1, that the whole set of draft articles was built on the criterion of the intention of the parties to the treaty, and the Special Rapporteur seemed unwilling to review that approach, despite the numerous critical remarks it had prompted. Even if it was one of the possible criteria for deciding the fate of a treaty in the event of an armed conflict, it should not be the only one, especially as it was plain that when parties concluded a treaty they did not usually contemplate the possibility that a conflict might break out. Although—as draft article 4, paragraph 2 (*b*), acknowledged—the nature and extent of the armed conflict could not be ignored, there was no reason to subsume them under intention. Similarly, while the object and purpose of a treaty, which were of fundamental importance, were related to intention, the meaning of "intention" would have to be spelled out. A mere reference to article 31 of the 1969 Vienna Convention was not sufficient. Furthermore, while he personally did not oppose the principle of a list as proposed in draft article 7, he thought that such a list must be based on a set of criteria and on an analysis of both international and domestic practice.

36. Secondly, it was inconceivable that the topic under consideration be studied without any reference whatsoever to the prohibition of the use of armed force in international relations, which had gradually taken shape over the past century. Yet the draft articles did not take account of that crucial development.

37. Thirdly, the Special Rapporteur contended that the topic was governed by the law of treaties. That was certainly one of its essential components, but its interest lay in the very fact that it was situated at the crossroads of several bodies of rules: the law of treaties, of course, but also the law of armed conflicts and the law of responsibility. In that connection, it was a pity that the Special Rapporteur had not drawn more on the Secretariat's remarkable memorandum on the question.

38. Fourthly, it was absolutely vital to decide whether to include non-international armed conflicts. He himself was convinced that, owing to their frequency and intensity, such conflicts should be addressed and that they actually constituted one of the main reasons for reopening the subject at the beginning of the twenty-first century; if they were ignored, the 1969 Vienna Convention alone might suffice. He did not see why it would be harder, as the Special Rapporteur asserted, to distinguish between non-international armed conflicts and other forms of violence in the context of the topic under consideration. The Rome Statute of the International Criminal Court in fact established a distinction between non-international armed conflicts and other forms of internal violence not coming under its article 8.

39. Fifthly, he thought that a distinction should be drawn between the status *vis-à-vis* a treaty of States that were a party to a conflict and States that were neutral. The effects of armed conflicts on treaties could not be examined in the abstract: the status of the States concerned was a crucial factor.

40. Sixthly, the draft articles did not differentiate clearly enough between highly disparate situations. Further distinctions must be made in order to delimit the scope of the topic before starting to draw up draft articles proper: for example, between treaties which had entered into force and treaties which had only been signed but had not yet entered into force owing to an insufficient number of ratifications; between the impact of an armed conflict on the contracting parties and the impact on mere signatories; and between treaties concluded between States alone and treaties concluded by States and/or international organizations whose members were parties to the conflict. Contrary to the Special Rapporteur's contention, that would by no means amount to an expansion of the topic, whose title on no account implied that it was confined to treaties between States. Lastly, a distinction should be drawn between provisions that were grouped together in the draft articles, since an armed conflict might very well affect only certain categories of provisions. It might even be possible to go a step further and to differentiate also between the obligations resulting from a treaty. In any case, that was a question that merited consideration.

41. He was pleased that the Special Rapporteur was receptive to the idea of referring the subject to a working group, which could solve the various problems before they reached the Drafting Committee stage. The working group should be mandated to formulate specific proposals so that the Commission could take a definitive position on the following questions: whether the topic should cover non-international armed conflicts; whether it was necessary to tackle the issue of treaties to which

international organizations were parties to consider only treaties between States; and what implications the interdisciplinary nature of the various branches of international law—law of treaties, law of armed conflicts, law of responsibility—and the prohibition of the use of force in international relations had for the Commission's consideration of the topic. Lastly, the working group should investigate the essential question of the divisibility of treaty provisions.

42. In addition to considering those major questions of principle, the working group should endeavour to develop a classification for criteria to be taken into account in determining the effects of armed conflicts on treaties (intention of the parties, nature of the conflict, object and purpose of the treaty, etc.), the treaty situations concerned (whether or not the treaty was in force), and the treaty parties' status *vis-à-vis* the conflict (belligerents or neutral), among others. It should also identify questions requiring clarification, taking as its starting point the comments already made by three Commission members on that subject[165] and also the memorandum by the Secretariat. Then and only then, on the basis of the replies obtained and the classification established, would the Commission, under the guidance of the Special Rapporteur, doubtless be able to formulate and adopt a genuinely useful set of draft articles very quickly.

43. Ms. ESCARAMEIA said that, owing to a lack of time, she would deliver her observations at the following meeting; however, she wished to know if the plan was to consider all the draft articles contained in the third report, or only the first seven.

44. Mr. BROWNLIE (Special Rapporteur) reminded Mr. Pellet that the question of the lawfulness of the use of force had been duly addressed in the first and third reports. He informed Ms. Escarameia that the plan was initially to discuss only the first seven draft articles.

The meeting rose at 12.55 p.m.

2927th MEETING

Wednesday, 30 May 2007, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO (*Vice-Chairperson*)

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue.

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[165] See *Yearbook ... 2006*, vol. I, 2896th meeting, p. 190, paras. 30 and 36, and 2897th meeting, p. 199, para. 46.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. D, A/CN.4/ 578, A/CN.4/L.718)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA commended the clarity of the third report (A/CN.4/578) and of the Special Rapporteur's approach, which left no doubt as to what the draft articles were to cover and made it easier to see what needed to be done. She had already commented on earlier versions of some of the draft articles, so would try to avoid repetition.

2. Her statement would fall into three parts. The first would consider some underlying problems of a structural nature in the draft articles; the second would consist of comments on the draft articles themselves; and the third would focus on action to be taken.

3. With regard to the structural problems, some issues needed to be addressed before the Commission could proceed with its work. First, a clearer distinction must be drawn between the effects of treaties on the conflicting parties and on third parties. Secondly, the differing effects of armed conflict on different provisions of the same treaty should be clarified. Thirdly, a distinction should be drawn between the suspension and the termination of a treaty; the Commission had tended to consider them as a single process, but in reality they might be quite different. Another question was the difference between the effects on a treaty of an international and of an internal conflict (assuming that both were to be covered by the draft articles). The same question arose as to the different effects of large-scale and small-scale conflicts. The "extent" of a conflict was mentioned in draft article 4, paragraph 2 (*b*), but only in relation to the question of determining the intention of the parties, which was a different issue altogether. A further question related to the differing effects of armed conflicts, and of termination or suspension, on bilateral and on multilateral treaties, particularly those multilateral treaties that had a large number of parties. Lastly, the legality of a State's position in relation to a given armed conflict needed further consideration. The issue was partially dealt with in draft article 10, but she would not comment in detail until that draft article had been introduced by the Special Rapporteur.

4. Another question was under which chapter of international law the draft articles belonged. The Special Rapporteur continued to assume, as in previous reports, that they formed part of the law of treaties. That, however, was to overlook the importance of other chapters, including the law of war. Draft article 10 had been added in recognition of that fact. Nonetheless, the criterion of the intention of the parties, which was typical of the law of treaties, was, along with the object and purpose of the treaty, cited as decisive. That was also the reason why so little attention had been devoted to internal conflicts—given that no treaty had been concluded between the parties to the conflict—or to the legality of a State's position in a situation of war, although draft article 10 did address the question of self-defence. The law of war was, however, important in assessing such legality, while the law of