Chapter V

EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Introduction

108. The Commission at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work.[42] A brief syllabus describing the possible overall structure and approach to the topic was annexed to the report of the Commission to the General Assembly on the work of its fifty-second session.[43] In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic.

109. During its fifty-sixth session, the Commission decided, at its 2830th meeting, on 6 August 2004, to include the topic "Effects of armed conflicts on treaties" in its current programme of work, and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic.[44] The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

B. Consideration of the topic at the present session

110. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/552) as well as a memorandum prepared by the Secretariat entitled, "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1–2).

111. The Commission considered the Special Rapporteur's report at its 2834th to 2840th meetings, from 6 to 18 May 2005.

112. At its 2866th meeting, on 5 August 2005, the Commission endorsed the Special Rapporteur's suggestion that the Secretariat be requested to circulate a note to Governments requesting information about their practice with regard to this topic, in particular the more contemporary practice as well as any other relevant information.

1. General remarks on the topic

(a) *Introduction by the Special Rapporteur of his first report*

113. The Special Rapporteur observed that he had produced an entire set of draft articles providing an overall view of the topic and of the issues that it involved, in order to assist the Commission and Governments in commenting on the topic, including providing State practice. The basic policy underlying the draft articles was to clarify the legal position and to promote and enhance the security of legal relations between States (thereby limiting the occasions on which the incidence of armed conflict had an effect on treaty relations).

114. The Special Rapporteur further pointed to the concerns expressed by writers regarding the uncertainty attending the subject; the nature of the sources presented problems, the subject was dominated by doctrine, and practice was sparse, with much of it being more than 60 years old. As regards the latter concern, in his view it was not necessarily the case that policy perspectives on the effect of armed conflict had changed qualitatively since 1920. Instead, the key change in the inter-war period had been the gradual shift towards pragmatism and away from the view that the incidence of armed conflict was beyond the realm of law and more or less non-justiciable.

115. The Special Rapporteur explained that the draft articles were intended to be compatible with the 1969 Vienna Convention. There was a general assumption that the subject matter under examination formed a part of the law of treaties, not a development of the law relating to the use of force, its being recalled that the Convention, in article 73, had expressly excluded the subject.

116. The Special Rapporteur further acknowledged that the subject of peaceful settlement of disputes was missing from the draft articles. To his mind, it was not a good idea to look at the question of the peaceful settlement of disputes until the work on the substantive draft was near completion, since there existed a close relationship between the matters of substance and the type of dispute settlement mechanism which would be appropriate.

(b) *Summary of the debate*

117. Members expressed support for the Special Rapporteur's decision to provide an entire set of draft articles. Reference was also made to the memorandum prepared by the Secretariat, which was considered extremely helpful in understanding the substance and complexity of the issues at hand.

118. Some members were of the view that the Special Rapporteur's report was too concise in that it provided little guidance as to how the solutions proposed related to past or existing State practice. It was pointed out that a thorough analysis of available practice could prove catalytic by inducing States to produce possibly divergent practice. Similarly, the relative lack of discussion in the report of the underlying policy considerations was regretted.

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[42] *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

[43] *Ibid*., annex.

[44] *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

119. Some members pointed out that the draft articles should be compatible with the purposes and principles of the Charter of the United Nations. In particular, they should take into consideration the illicit (wrongful) character of recourse to force in international relations and the fundamental distinction between aggression and legitimate individual or collective self-defence or the use of force in the context of the collective security system established by the United Nations.

120. Issue was taken with some of the views expressed in the report including the statement that "[i]t is generally recognized that municipal decisions concerning the effect of war on treaties are 'not of great assistance'".[45] It was observed that, while they were not always consistent, which could also be said of available State practice, municipal court decisions provided helpful evidence regarding State practice, the intention of parties in respect of certain kinds of treaties, and the effect of the nature of a conflict on the survival of a treaty. The importance of municipal case law was borne out by the Secretariat memorandum which referred to a number of such decisions.

121. Support was expressed for the Special Rapporteur's desire to encourage continuity of treaty obligations in armed conflict in cases where there was no genuine need for suspension or termination, as well as for the view that the Commission should not be bound by some of the rigid doctrines of the past which would inhibit such continuity. At the same time, the view was expressed that the effect of an armed conflict on treaties would depend more on the particular provisions and circumstances in question than on any general rules that might be articulated, and that it could be more effective to identify the considerations that States must take into account rather than to lay down definitive rules or categorizations that States must always follow.

122. Support was also expressed for approaching the topic within the context of the 1969 Vienna Convention. Others felt that it was not necessary to specify the location of the topic within the broader field of international law. Reference was also made to the fact that it was in the nature of the topic that it had undergone significant developments over time owing to changes in the formalities and modalities of modern armed conflict as well as in the international legal regime governing the recourse to armed force, particularly since the Second World War.

123. Various suggestions were made as to the way forward, including referring the draft articles (or only some) to the Drafting Committee, establishing a working group to consider the more contentious articles, or simply not taking any action at that stage in order to allow the Special Rapporteur time to reflect further on the observations made in the Commission as well as any contributions that may be received from States. It was also suggested that a questionnaire be prepared for circulation among member Governments.

[45] Para. 44 of the first report citing C. Parry, "The law of treaties", *in* M. Sørensen, ed., *Manual of Public International Law*, (London, Macmillan, 1968), p. 237.

(c) *Special Rapporteur's concluding remarks*

124. The Special Rapporteur reiterated the overall goals of his report, as enumerated during his introduction, and recalled that his chosen method of work was to provide a complete set of draft articles without prejudice to their final form. However, he clarified that the recourse to draft articles should not give rise to the assumption that he was rushing to judgement. He noted that the normative form had been accompanied by elements of open-mindedness and that he had deliberately left open several issues for the formation of collective opinion within the Commission. He also recalled that the draft articles enjoyed a provisional character and had been provided with a view to soliciting information (especially as to evidence of State practice) and opinions from Governments.

125. As regards the sources employed, the Special Rapporteur admitted that more reference to doctrine was called for. As for municipal cases, he clarified that it was not that he thought that they were of little value, but only that they tended to be contradictory. He also observed that domestic case law called for careful assessment; it was necessary to distinguish between those legal decisions where the court actually adverted to public international law as an applicable law and those cases where the court approached the legal problems at hand from the standpoint of municipal law exclusively. Similarly, the practice of international tribunals, when analysed carefully, was also not always very helpful.

126. The Special Rapporteur further identified several policy questions requiring consideration in the future, including the question of the applicable *lex specialis*[46] which could be referred to in the draft articles, as well as the question of introducing a distinction between bilateral and multilateral treaties. To his mind, however, there seemed to be no good case for seeking to design special criteria for the two categories. The principle of intention appeared to provide the general criterion.

127. Given the preliminary nature of the first report, the Special Rapporteur opposed the referral of draft articles to the Drafting Committee or the establishment of a working group. Instead, he suggested that a request be circulated to Governments requesting information about their practice with regard to this topic and, in particular, the more contemporary practice.

2. Article 1. Scope[47]

(a) *Introduction by the Special Rapporteur*

128. The Special Rapporteur explained that draft article 1 was based on the formulation of article 1 of the 1969 Vienna Convention.

[46] See the discussion on draft article 5, below.

[47] Draft article 1, as proposed by the Special Rapporteur in his report, reads as follows:

"*Scope*

"The present draft articles apply to the effects of an armed conflict in respect of treaties between States."

(b) *Summary of the debate*

129. Comments on article 1 were limited to suggestions for expansion of the scope of the topic. For example, several members supported the inclusion of treaties entered into by international organizations. Examples cited were regional integration treaties and treaties dealing with the privileges and immunities of the officials and staff of international organizations, especially in the context of peacekeeping operations undertaken during times of armed conflict. It was also noted that the Institute of International Law, in article 6 of its resolution II of 1985 entitled "The effects of armed conflicts on treaties",[48] had included treaties establishing an international organization. Another view was that the inclusion of international organizations was not entirely necessary. Reference was further made to article 74, paragraph 1, of the Vienna Convention between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).

130. It was suggested that a distinction be made between Contracting Parties, under article 2, paragraph (1) (*f*), of the 1986 Vienna Convention, and those which are not Contracting Parties. While some members preferred the inclusion of treaties which had not yet entered into force, others suggested that only treaties in force at the time of the conflict should be covered by the draft articles.

131. According to a further suggestion, the provision on scope could exclude the specific category of treaties prescribing the rules of warfare or rules of engagement, such as The Hague Conventions respecting the Laws and Customs of War on Land and the Geneva Conventions for the protection of war victims. As such treaties become operative only during armed conflicts, they would not fall under the categories of treaties described in draft article 7, paragraph 1, as the logic of "continue in operation during an armed conflict" in that paragraph would be inapplicable.

(c) *Special Rapporteur's concluding remarks*

132. The Special Rapporteur, referring to the suggestion that the draft articles cover treaties with international organizations, stated that while he shared some of the doubts expressed he would not oppose their inclusion.

133. Regarding the question of the relationship of the draft articles to other areas of international law, which had been referred to by some members in the context of specific articles, the Special Rapporteur advised caution; it was necessary to avoid simply adding other topics of international law to the draft without good cause. He agreed that a certain amount of overlap existed with regard to such topics as the use of force.[49] He was not troubled, however, by the existence of situations where the same subject matter responded to multiple classification, although he acknowledged that care had to be taken not to affect issues of the ordinary law of treaties, in order to avoid problems of compatibility with the law of treaties. He recalled further that some members had suggested, during the discussion on the lawful resort to the use of force (in the context of draft article 10), that account needed to be taken of the application of principles of *jus cogens*. He wondered, however, whether it were desirable to embark on a codification of *jus cogens* as a by-product of the topic under consideration. He did not even think it necessary to include a proviso for principles of *jus cogens*, since that would require defining which principles were being referred to. He also noted a suggestion that reference be made in the draft articles to principles of State responsibility. In his view, however, such principles stood in the background and were not part of the current project.

3. Article 2. Use of terms[50]

(a) *Introduction by the Special Rapporteur*

134. The Special Rapporteur recalled that draft article 2 defined the terms "treaty" and "armed conflict" in its subparagraphs (*a*) and (*b*), respectively. The definition of "treaty" followed that set out in the 1986 Vienna Convention (art. 2, para. 1 (*a*)) while the definition of "armed conflict" was based on the formulation adopted by the Institute of International Law in its 1985 resolution.[51] He recalled that when the topic had first been proposed for inclusion in the Commission's agenda, concerns had been expressed that it would lead to a general academic exposition of the concept of armed conflict. He hoped that the Commission would be satisfied with a working definition to be applied contextually, as opposed to attempting an unnecessarily complex codification. Although not comprehensive, the Special Rapporteur was of the view that the definition adopted by the Institute was preferable since it took a contextual approach.

135. The Special Rapporteur referred to a further general question of policy, namely whether or not armed conflict should also include internal conflicts. He expressed a preference for restricting, rather than extending, the situations in which armed conflict could interrupt the treaty relations among States, and therefore favoured excluding non-international armed conflict. At the same time, he was aware of the view that internal armed conflicts could involve external elements and thereby affect the operation of treaties as much as, if not more than, international armed conflicts. The wording of subparagraph (*b*) had left the question unresolved.

[48] *Yearbook of the Institute of International Law*, vol. 61, part II (1986), p. 281.

[49] See the discussion on draft article 10, below.

[50] Draft article 2, as proposed by the Special Rapporteur in his report, reads as follows:

"*Use of terms*

"For the purposes of the present draft articles:

"(*a*) 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

"(*b*) 'Armed conflict' means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict."

[51] See footnote 48 above.

(b) *Summary of the debate*

136. As regards subparagraph (*a*), it was pointed out that the term "treaty" had already been defined in three treaties: the 1969 Vienna Convention, the Vienna 1978 Convention on succession of States in respect of treaties (hereinafter the 1978 Vienna Convention and the 1986 Vienna Convention. The view was expressed that such a definition was not needed in the present draft articles.

137. Concerning subparagraph (*b*), agreement was expressed with the Special Rapporteur's suggestion that the Commission should not embark on a comprehensive definition of armed conflict. The view was expressed that the threshold contained in subparagraph (*b*), namely the test of "nature or extent" of the conflict, was too general. The view was also expressed that the definition, which referred to the conflict as "likely to affect the operation of treaties …", was circular in that it was for the draft articles to determine whether the operation of a treaty were or were not to be affected.

138. As for the scope of the definition of "armed conflict", support was expressed for the inclusion of blockades (although some members expressed doubts), as well as military occupation unaccompanied by protracted armed violence or armed operations,[52] even if this were not easy to reconcile with the express reference to "armed operations". It was queried whether such express reference to "armed operations" included broader conflicts such as the Arab-Israeli conflict. Concern was also expressed that the formulation employed could apply to situations falling outside the ordinary concept of armed conflict, such as violent acts by drug cartels, criminal gangs and domestic terrorists.

139. Different views were expressed as to the appropriateness of including within the scope of the topic the effects on non-international armed conflicts on treaties. Several members spoke in favour of such inclusion, noting, *inter alia*, that the guiding criterion on this point should be that of the relevance of the draft articles in the context of the kind of armed conflicts occurring in the present era, in which the distinction between international and internal armed conflicts was often blurred. It was noted that the effects of the two types of conflicts on treaties would not necessarily be the same, and accordingly should be considered. Others expressed reservations as to making such a distinction between the two types of conflict. It was suggested that the matter could be dealt with separately, even as a new topic on its own.

140. Suggestions for reformulating the provision included: adopting a definition which simply stated that the articles applied to armed conflicts, whether or not there existed a declaration of war, without going further, or taking as a basis the definition adopted in the *Tadić* case, namely that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[53] It was also suggested that account should be taken of the provisions of the Rome Statute of the International Criminal Court. As for drafting, it was suggested that the words "for the purposes of the present draft articles …" be included so as to limit the scope of the definition, that a reference to international organizations be made, and that the question of the relationship with third parties be examined within the context of subparagraph (*b*). Others queried whether a definition was even needed, and pointed to the fact that those multilateral treaties which contained a reference to "armed conflict" did not define it.

(c) *Special Rapporteur's concluding remarks*

141. The Special Rapporteur observed that while a majority in the Commission had favoured including non-international armed conflict within the definition of "armed conflict", many did not favour attempting to redefine the concept of armed conflict in the draft articles. He recalled that there were also suggestions along the lines of a simpler formulation stating that the articles applied to armed conflicts whether or not there were a declaration of war, without proceeding further.

4. Article 3. *Ipso facto* termination or suspension[54]

(a) *Introduction by the Special Rapporteur*

142. The Special Rapporteur characterized draft article 3 as being primarily expository in nature; in the light of the wording of subsequent articles, particularly draft article 4, it was not strictly necessary. Its purpose was merely to emphasize that the earlier position, according to which armed conflict automatically abrogated treaty relations, had been replaced by a more contemporary view according to which the mere outbreak of armed conflict, whether or not war was declared, did not *ipso facto* terminate or suspend treaties in force between parties to the conflict. He would, however, not oppose deletion of the provision if the Commission so desired. Its formulation was based on article 2 of the resolution adopted by the Institute of International Law in 1985.[55]

(b) *Summary of the debate*

143. While support was expressed for the Special Rapporteur's proposal, some members pointed out that examples existed of instances of practice, referred to in both the Special Rapporteur's report and the Secretariat's memorandum, which appeared to suggest that armed conflicts

[52] Further reference was made to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, which made provision for the situation of occupation.

[53] *The Prosecutor* v. *Duško Tadić a/k/a "DULE"*, International Tribunal for the Former Yugoslavia, Case No. IT-94-1-A72, decision of 2 October 1995, *Judicial Reports 1994–1995*, vol. I, p. 429, para. 70. See also ILM, vol. 35, No. 1 (January 1996), pp. 37–38, para. 70.

[54] Draft article 3, as proposed by the Special Rapporteur in his report, reads as follows:

"Ipso facto *termination or suspension*

"The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:

"(*a*) Between the parties to the armed conflict;

"(*b*) Between one or more parties to the armed conflict and a third State."

[55] See footnote 48 above.

cause the automatic suspension of various categories of treaty relations, in whole or in part. Indeed, it was suggested that the articles should not rule out the possibility in some cases of automatic suspension or termination. Another suggestion was that the provision could simply state that the outbreak of armed conflict did not necessarily terminate or suspend the operation of any treaty.

144. It was further suggested that a distinction be made between termination and suspension; an armed conflict would not *ipso facto* terminate the treaty between the parties to the armed conflict themselves, but the suspension of the operation of treaties between the parties to the armed conflict would be governed along the lines proposed by the Institute of International Law in articles 7 and 9 of its resolution of 1985.[56]

145. A further proposal was that the position of third parties could be clarified, particularly as to whether the situation *vis-à-vis* third parties might be different from that prevailing between parties to the conflict. One suggestion was to clarify in the text that with regard to effects on third States, the ordinary rules in the 1969 Vienna Convention would apply, such as those relating to fundamental change of circumstance and supervening impossibility of performance.

146. Agreement was also expressed with the proposal made in the Special Rapporteur's report that the phrase "*ipso facto*" be replaced with "necessarily", although some members were comfortable with the former phrase. Other suggestions included inserting a reference to international organizations in the context of draft article 3.

(c) *Special Rapporteur's concluding remarks*

147. The Special Rapporteur recalled that he had not strongly supported the draft article from the beginning. However, he was of the view that article 3, with improved wording (including replacing "*ipso facto*" with "necessarily"), should be kept. He noted that many members considered article 3 to be the point of departure of the whole draft and that it reflected the basic principle of continuity. He also took note of the various drafting suggestions that had been made.

148. With regard to the position of third parties, he observed that the distinction between third-party relationships and the relations between the parties to the armed conflict themselves was significant only within the framework of the criterion of intention. It was that criterion which would govern relations between belligerents and neutrals, although he conceded that the relevant practice had to be checked in order to see whether the possibility of different solutions existed. He noted that the point applied equally to draft article 4.

[56] See the discussion on draft article 10, at p. 36 below.

5. Article 4. The indices of susceptibility to termination or suspension of treaties in the case of an armed conflict[57]

(a) *Introduction by the Special Rapporteur*

149. The Special Rapporteur observed that there existed in the literature four basic rationales regarding the effects of armed conflicts on treaties: (1) that war was the polar opposite of peace and involved a complete rupture of relations and a return to anarchy; it followed therefore that all treaties were annulled without exception and that the right of abrogation arose from the occurrence of war regardless of the original intention of the parties; (2) that the test was compatibility with the purposes of the war or the state of hostilities, that is, that treaties remained in force subject to the necessities of war; (3) that the relevant criterion was the intention of the parties at the time they concluded the treaty; and (4) that since 1919, and especially since the appearance of the Charter of the United Nations, States no longer possessed a general competence to resort to the use of force except in the case of legitimate defence, and it followed therefore that the use of force should not be recognized as a general dissolvent of treaty obligations. In his view, the third rationale was the most workable and the most representative of the existing framework of international law.

150. Noting that draft article 4 was a key provision, the Special Rapporteur observed that modern doctrine contained two main streams of opinion: (1) that the intention of the parties is the solution to the problem of the effect of the outbreak of war, and (2) the doctrine of *caducité*, which featured prominently in French-language sources, consisting of an amalgam between the earlier and more recent positions according to which the effect of war was to terminate treaty relations, though with some important exceptions based upon intention or inferences of intention. He was, however, of the view that it was inherently contradictory to say that armed conflict was qualitatively incompatible with treaty relations and was therefore non-justiciable, while at the same time saying that there could be exceptions to that rule, the test being the object and purpose of the treaty. In the final analysis, however, both approaches seemed to his mind to end with the notion of intention, and therefore draft article 4 sought to universalize the test of intention, with regard both to the nature of the treaty itself and to the nature and extent of the armed conflict in question.

(b) *Summary of the debate*

151. On the four basic theories outlined by the Special Rapporteur as possibly governing the effect of armed

[57] Draft article 4, as proposed by the Special Rapporteur in his report, reads as follows:

"*The indices of susceptibility to termination or suspension of treaties in case of an armed conflict*

"1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

"2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

"(*a*) With the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties; and

"(*b*) The nature and extent of the armed conflict in question."

conflicts on treaties, several members commented on the Special Rapporteur's choice of the criterion of the intention of the parties. The view was expressed that the Special Rapporteur had not sufficiently explained why he could not support some of the other theories. For example, it was suggested that the criterion based on compatibility with the armed conflict was an important one, and that traces of it were to be found in some of the draft articles proposed by the Special Rapporteur. It was noted by some members that the principle of prohibition of the resort to the use of force was essential.

152. As for the proposed criterion of intention, while some members expressed support, others were of the view that it was vague, subjective or non-existent and that it raised complex issues regarding the application of the 1969 Vienna Convention. It was also considered problematic since there was normally no actual intent at the time of conclusion of the treaty; when concluding a treaty, States rarely reflect on the effect any possible armed conflict might have on it. This is particularly the case with treaties after the Second World War. It was suggested that if the purpose of selecting intention as the criterion was to establish a presumption, then that should be provided for in a different manner. Others were less critical of the concept, because it took into account the contextual factors in a particular situation and thereby allowed a more realistic and sensitive regulation of the matter.

153. It was suggested that while the intention of the parties was the most important criterion, there were other relevant criteria, and that the draft articles should avoid maintaining one exclusive criterion. Indeed, it was recalled that, in effect, the criteria for determining intention were the object and nature and extent of the armed conflict (in para. 2 (*b*)), the existence of an express provision in the treaty (art. 5, para. 1), and the object and purpose of the treaty (art. 7, para. (1), read together with para. (2) providing examples of pertinent categories of treaties). Another suggestion was that the object and purpose test could serve as the general guideline; the draft articles would simply provide that the general criteria applied when the treaty did not provide otherwise. Another opinion was that it was also important to consider subsequent actions in the application of the treaty, including those after the outbreak of the conflict.

154. As regards paragraph 2, doubts were expressed about the relevance of the two sets of criteria suggested for determining the intention of the parties. It was also suggested that the logic of subparagraph (*a*) was circular; it suggested that determination of the intention of the parties needed to be based on the intention of the parties. It was also noted that reference to articles 31 and 32 of the 1969 Vienna Convention was of limited use if there were no express intention at the time of conclusion of the treaty. Support was expressed for adding the nature of the treaty as an additional criterion under paragraph 2.

(c) *Special Rapporteur's concluding remarks*

155. The Special Rapporteur noted that the question of the criterion of intention had been the subject of much debate, and that several members had indicated major concerns, especially as regards the familiar problems of proof. At the same time, he recalled that the majority of the opinions expressed did not propose the replacement of intention by some other major criterion. He announced his intention to undertake a fuller examination of these issues in the second report, but cautioned that there was no avoiding the concept of intention since, for better or worse, it was the basis of international agreements. He stressed the complexity of the elements of intention relating to draft article 4, as had been raised in the debate. In particular, it seemed obvious that the nature and extent of the conflict in question were necessary criteria, since the criterion of intention was applied not in the abstract but within a particular context. Hence, he maintained that a sense of proportion was called for, since there was no simple solution to the problem of proving intention.

156. The Special Rapporteur further indicated that the debate had revealed a need for greater clarity as to the relation between draft articles 3 and 4 (including the possibility that they might be amalgamated), and that article 4 needed further development as regards the effects of termination or suspension.

6. Article 5. Express provisions on the operation of treaties[58]

(a) *Introduction by the Special Rapporteur*

157. Draft article 5 dealt with the situation where treaties expressly applicable to situations of armed conflict remained operative in the case of an armed conflict and where the outbreak of an armed conflict did not affect the competence of the parties to the conflict to conclude treaties. The Special Rapporteur pointed to well-known examples of belligerents in an armed conflict concluding agreements between themselves during the conflict, and noted that the principles enunciated in the draft article were also supported by the relevant literature.

(b) *Summary of the debate*

158. General support was expressed for the provision. The point was made that while the provision was, in a sense, obvious and superfluous, it could nonetheless be included for the sake of clarity.

159. Concerning paragraph 1, reference was made to the principle enunciated in the advisory opinion of ICJ regarding the legality of the threat or use of nuclear weapons, that while certain human rights and environmental principles did not cease in times of armed conflict, their application was determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[59] It was suggested that this principle be reflected in the draft arti-

[58] Draft article 5, as proposed by the Special Rapporteur in his report, reads as follows:

"*Express provisions on the operation of treaties*

"1. Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in the case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

"2. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the law of Treaties."

[59] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226 at p. 240, para. 25.

cles. It was likewise suggested that reference be made to peremptory norms of international law applicable during times of armed conflict. In addition, the inclusion of the qualifier "lawful" was queried.

160. With regard to paragraph 2, the view was expressed that its relationship with paragraph 1 was not clear. It was also suggested that the reference to the "competence" of the parties to the armed conflict to conclude treaties be replaced by the word "capacity".

(c) *Special Rapporteur's concluding remarks*

161. The Special Rapporteur noted that the provision, which complemented article 3, was uncontroversial. As for the reference to the word "lawful" in relation to agreements made between States which were already in a situation of armed conflict, he recalled that there existed examples of situations where pairs of States which were at war with each other nonetheless entered into special agreements during the state of war, even agreements which purported to modify the application of the law of war. Hence, the term "lawful" was included in order to ensure that such agreements would be in conformity with international public policy. The issue would be further elaborated on later in the commentary. The Special Rapporteur agreed that the principle enunciated in the advisory opinion of ICJ regarding the legality of the threat or the use of nuclear arms should be reflected appropriately.

7. Article 6. Treaties relating to the occasion for resort to armed conflict[60]

(a) *Introduction by the Special Rapporteur*

162. The Special Rapporteur explained that draft article 6 dealt with the specialized question of treaties relating to a situation which had occasioned resort to armed conflict. He remarked that although some earlier authorities had held the opinion that in cases where an armed conflict was caused by differences as to the meaning or status of a treaty, the treaty could be presumed to be annulled, the more contemporary view was that such a situation did not necessarily mean that the treaty in question would lose its force. The practice of States confirmed that, during the process of peaceful settlement of disputes, the existing treaty obligations remained applicable.

(b) *Summary of the debate*

163. While some agreement with the provision was expressed, some doubts were voiced as to the compatibility of draft article 6 with contemporary international law. It was noted that the subject matter of the provision depended much on the context and prevailing circumstances and that the more applicable principle would be that of the peaceful settlement of disputes. Another view was that the very fact that the Contracting Parties had to resort to armed conflict suggested that at least one of the Contracting Parties disagreed with the substance or continuance of the treaty. Another possibility was that the provision could apply in situations where the dispute concerned the interpretation of the treaty and not the validity of the treaty in its entirety.

164. The view was also expressed that draft article 6 was, strictly speaking, not necessary in the light of draft article 3 whereby no treaty is *ipso facto* terminated or suspended by the outbreak of armed conflict; this would include a treaty whose interpretation might be the occasion for a conflict. The matter could, accordingly, equally be dealt with in the commentary to article 3.

(c) *Special Rapporteur's concluding remarks*

165. The Special Rapporteur observed that the draft article had proved to be problematic, with justification. He explained that in his view, it was unreasonable to presume that a treaty which served as the basis for an armed conflict, and which later was the subject of some process in accordance with law, should be assumed to be annulled. He conceded, however, that the draft article was redundant in view of the earlier provisions of the draft.

166. It was further announced that the commentary to the draft article would be amended to include more apposite material, including the Eritrea-Ethiopia Boundary Commission decision of 13 April 2002 regarding delimitation of the border between the State of Eritrea and the Federal Democratic Republic of Ethiopia.[61]

8. Article 7. The operation of treaties on the basis of necessary implication from their object and purpose[62]

(a) *Introduction by the Special Rapporteur*

167. The Special Rapporteur observed that draft article 7 dealt with the species of treaties the object and purpose of

[60] Draft article 6, as proposed by the Special Rapporteur in his report, reads as follows:

"*Treaties relating to the occasion for resort to armed conflict*

"A treaty, the status or interpretation of which is the subject matter of the issue which was the occasion for resort to armed conflict, is presumed not to be terminated by operation of law, but the presumption will be rendered inoperable by evidence of a contrary intention of the Contracting Parties."

[61] *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, ILM, vol. 41, No. 5 (September 2002), p. 1057.

[62] Draft article 7, as proposed by the Special Rapporteur in his report, reads as follows:

"*The operation of treaties on the basis of necessary implication from their object and purpose*

"1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

"2. Treaties of this character include the following:

"(*a*) Treaties expressly applicable in the case of an armed conflict;

"(*b*) Treaties declaring, creating or regulating permanent rights or a permanent regime or status;

"(*c*) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

"(*d*) Treaties for the protection of human rights;

"(*e*) Treaties relating to the protection of the environment;

"(*f*) Treaties relating to international watercourses and related installations and facilities;

"(*g*) Multilateral law-making treaties;

"(*h*) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

"(*i*) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

"(*j*) Treaties relating to diplomatic relations;

"(*k*) Treaties relating to consular relations."

which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, that is, as evidence of the object and purpose of the treaty to the effect that it would survive a war. He clarified that while he did not agree with all the categories of treaties in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.

168. While there was a case for the inclusion of treaties for the protection of human rights, especially in the light of the inclusion of friendship, commerce and navigation and analogous agreements concerning private rights such as bilateral investment treaties, he was not entirely persuaded. Similarly, in the case of environmental law treaties, he noted that while there were some important pieces of law taken individually and some important standard-setting treaties, there was no unified law for the protection of the environment, and therefore there was no single position as to whether the incidence of armed conflict affected environmental treaties.

(b) *Summary of the debate*

169. A range of views were expressed in connection with paragraph 1. It was observed that the intention of the parties and the object and purpose of the treaty were different criteria and that it was difficult to establish a general criterion exactly because the applicable considerations were primarily contextual in nature. What seemed pertinent was more the type of the conflict rather than the intention of the parties. The view was also expressed that the emphasis was better placed on the nature of the treaty, rather than on its object and purpose. Others supported the criterion of object and purpose, particularly because of its connection to the 1969 Vienna Convention. Other suggestions included having a more general formulation such as: "in principle, provisions of a treaty continue to apply depending on their viability, taking into account the context of the armed conflict and depending on the position of the party on the legality of the conflict".

170. Concerning paragraph 2, while some support was expressed for the inclusion of an indicative list, several members expressed doubts. It was observed that treaties do not fall into neat categories and that, for example, bilateral treaties often include aspects of several different fields of law; that even within a particular category, some provisions of a treaty may logically be of such a nature as to be subject to suspension during armed conflict, while other provisions of the same treaty may not; that even with respect to particular types of provisions, the language of a treaty and the intention of its parties could differ from that of similar provisions in other treaties; that State practice was not consistent in most areas and did not lend itself to yes-or-no answers as to whether a category of treaties may or may not be suspended or terminated; and that it could be difficult to reach a reasonable consensus within the Commission or among States on such a catalogue of treaties. The view was also expressed that, strictly speaking, the list was not necessary in the light of the application of the general criterion of intention; that is, if the intention were known, an indicative list was not necessary. It was further suggested that the list could be included in the commentary.

171. As regards subparagraph (*a*), the view was expressed that this category was unnecessary as it was already covered by draft article 5. In addition, the category in subparagraph (*b*) seemed ambiguous, as it was not clear what rights and obligations were "permanent" and which sets of such rights and obligations amounted to a "regime" or "status". Furthermore, some provisions of these types of treaties could be inconsistent with the obligations and rights of occupying powers in armed conflict and, as such, would need to be temporarily suspended. The view was also expressed that subparagraph (*c*) provided a good example of treaties which contained some provisions that should ordinarily continue during armed conflict (such as the personal status and property rights of foreign nationals), as well as other provisions which might need to be suspended under some circumstances (such as the conduct of navigation and commerce between States engaged in armed conflict).

172. The view was expressed that the category of treaties in subparagraph (*d*) was one in which there probably was a good basis for continuity, subject to the admonition of ICJ, in the *Legality of the Threat or Use of Nuclear Weapons*,[63] that such rights were to be applied in accordance with the law of armed conflict.[64] Doubts were expressed as to the existence of a general presumption of continuity for the entire category in subparagraph (*e*), in the light of the fact that many environmental treaties imposed very specific technical limitations which could be inconsistent in some situations with the legitimate requirements of military operations in armed conflict. Others supported the inclusion of the category as part of the progressive development of international law. It was also suggested that treaties relating to groundwaters could be included.

173. On the category of treaties in subparagraph (*f*), doubts were also expressed as to whether there could be any general presumption of continuity, given that it could be imperative in wartime to prevent or restrict air or sea traffic to or from an enemy State. Concerning subparagraph (*g*), it was observed that it was not self-evident what might constitute a "law-making" treaty, given the fact that all treaties create law, and that many such treaties had provisions regarding personal rights which should be continued, together with other provisions that might be incompatible with the requirements of armed conflict and might have to be temporarily suspended. Other suggestions for additional categories included

[63] See footnote 59 above.

[64] See the discussion on draft article 5, at p. 32 above.

treaties establishing international organizations and those containing new conventional rules on international crimes.

(c) *Special Rapporteur's concluding remarks*

174. The Special Rapporteur observed that draft article 7 had elicited a variety of views. He noted that it was a corollary of article 4, although he acknowledged that such connection could be more clearly spelled out in the commentary. The content of article 7 was meant to be tentative and expository. While it could be deleted, he pointed out that a major feature of the literature on the topic was the indication of categories of treaties in order to identify types of treaties which are in principle not susceptible to termination or suspension in the case of armed conflict.

175. While he noted that doubts had been expressed, he nonetheless felt that there seemed to be general support for the basic concept of article 7, namely that it was merely expository in character and that it was intended only to create a rebuttable presumption. He suggested that some of the categories were worth distinguishing as they enjoyed a firm base in State practice, for example treaties creating a permanent regime, treaties of friendship, commerce and navigation, and multilateral law-making treaties.

9. Article 8. Mode of suspension or termination[65]

(a) *Introduction by the Special Rapporteur*

176. Article 8 was described as being fairly mechanical in its operation. A discussion of the possible outcome in terms of suspension or termination necessarily raised the question of the mode of suspension or termination. While not essential, it seemed useful to include the provision.

(b) *Summary of the debate*

177. It was suggested that the possibility of partial termination or suspension of treaties in particular situations should also be envisaged in the draft article, since there existed no *a priori* requirement that a treaty be suspended or terminated as a whole. Such a possibility would, further, serve to allow for the taking into account of the context within which the draft articles were to be applied. It was also suggested that termination and suspension be distinguished. Further suggestions included considering the article together with draft article 13 (while clarifying the relationship between the two) and giving consideration to the possible inclusion of a provision analogous to that in article 57 of the 1969 Vienna Convention.

(c) *Special Rapporteur's concluding remarks*

178. The Special Rapporteur noted that the draft article had been relatively uncontroversial. He took note of the suggestion that the possibility of the separability of provisions be given a clearer profile in the draft article, and observed that such a possibility had, in fact, been included by reference to article 44 of the 1969 Vienna Convention. He confirmed that the issue would be given greater prominence in the draft article.

10. Article 9. The resumption of suspended treaties[66]

(a) *Introduction by the Special Rapporteur*

179. The Special Rapporteur explained that, like article 8, draft article 9 was mechanical in nature. Reference was made to international experience, including some peace treaties such as the Peace Treaty with Italy, where serious attempts were made to clarify the position where, as a result of a major armed conflict, there was a great residue of legal relations the survival of which was in question. In such circumstances, States had adopted practical methods for removing substantial ambiguities in their relationships.

(b) *Summary of the debate*

180. Support was expressed for the position that the resumption of suspended treaties should be favoured when the reasons for suspension no longer applied. Many members raised the same points in connection with draft article 9 as had been made in the context of article 4. For example, it was again suggested that a reference to the nature of the treaty be included in a new subparagraph 2 (*c*). Similarly, any changes to draft article 4 would imply consequential amendments to article 9. It was also suggested that a provision be included stipulating that, in the case of doubt as to whether a treaty were suspended or terminated as a result of an armed conflict, it would be presumed that it was only suspended, thereby leaving open the possibility for the parties to agree otherwise.

(c) *Special Rapporteur's concluding remarks*

181. The Special Rapporteur noted that article 9 was ancillary to the purposes of article 4.

[65] Draft article 8, as proposed by the Special Rapporteur in his report, reads as follows:

"*Mode of suspension or termination*

"In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the law of treaties."

[66] Draft article 9, as proposed by the Special Rapporteur in his report, reads as follows:

"*The resumption of suspended treaties*

"1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

"2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

"(*a*) With the provisions of articles 31 and 32 of the Vienna Convention on the law of treaties; and

"(*b*) With the nature and extent of the armed conflict in question."

11. Article 10. Legality of the conduct of the parties[67]

(a) *Introduction by the Special Rapporteur*

182. The Special Rapporteur explained that in draft article 10 he had taken a different approach from that of the Institute of International Law in its resolution of 1985[68] which provided several articles on the question of the legality of the conduct of the parties to an armed conflict. He observed that the difficulty was the absence of a determination of an illegality by an authoritative organ. In the present draft article that issue was largely set aside. He explained that the character of the draft articles would change if they were to consider such questions.

(b) *Summary of the debate*

183. Several members spoke in favour of including similar provisions to those in articles 7, 8 and 9 of the resolution of the Institute of International Law, distinguishing the rights of the State acting in individual or collective self-defence, or in compliance with a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, from those of the State committing aggression.[69] The view was expressed that it was necessary to consider the situation in which the parties to an armed conflict had profited from an illegal war, and that resort to the sole criterion of the intention of the parties could lead to a different conclusion. Several members also expressed the view that the draft articles had to take into account developments since the Second World War, in particular as regards the prohibition of the use or threat of use of force, which constituted the cornerstone of the whole structure of the United Nations system for the maintenance of international peace and security. It was maintained that this could be done by focusing on what the effects on treaties would be of aggression or self-defence, without defining such acts. It was observed that only treaties incompatible with the exercise of the right to self-defence should be suspended or even repealed.

184. Another opinion offered was that while the question of the legality of armed conflict was not pertinent in connection with the rules of armed conflict, the same could not be said with regard to the termination or suspension of other categories of treaties. It was thus not clear that the provision conformed to the 1969 Vienna Convention, which singled out wrongdoing States for different treatment.

185. At the same time, opposition was expressed to the introduction into the draft articles of references to the inequality of belligerent parties. It was observed that, in practice, it was difficult to pass judgement on the parties to an armed conflict, and it was noted also that the matter was not without its complexity, especially in the light of the existence of views, in the international community, that there were other forms of lawful resort to the use of force, allegedly endorsed by customary international law.

(c) *Special Rapporteur's concluding remarks*

186. The Special Rapporteur acknowledged that the criticism of draft article 10 was justified and that the draft article accordingly needed to be redrafted. In his opinion, the matter could be resolved by means of resort to a proviso, cast in general terms, referring to the right to individual or collective self-defence. It could not be presumed that the States concerned could rely on such a proviso unless the legal conditions existed necessitating suspension or termination.

187. The Special Rapporteur stated that it was not his intention to examine the question of the validity or the voidability of treaties in terms of the Charter of the United Nations provisions relating to the use of force.

12. Article 11. Decisions of the Security Council,[70] Article 12. Status of third States as neutrals,[71] Article 13. Cases of termination or suspension,[72] and Article 14. The revival of terminated or suspended treaties[73]

(a) *Introduction by the Special Rapporteur*

188. The Special Rapporteur explained that while not strictly necessary, draft article 11 was useful in an expository draft. He further recalled the content of article 75 of the 1969 Vienna Convention. Draft article 12,

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[67] Draft article 10, as proposed by the Special Rapporteur in his report, reads as follows:

"*Legality of the conduct of the parties*

"The incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law or the provisions of the Charter of the United Nations."

[68] See footnote 48 above.

[69] The text of articles 7–9 of the resolution of the Institute of International Law appears in the first report of the Special Rapporteur (para. 123).

[70] Draft article 11, as proposed by the Special Rapporteur in his report, reads as follows:

"*Decisions of the Security Council*

"These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations."

[71] Draft article 12, as proposed by the Special Rapporteur, reads as follows:

"*Status of third States as neutrals*

"The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict."

[72] Draft article 13, as proposed by the Special Rapporteur in his report, reads as follows:

"*Cases of termination or suspension*

"The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

"(*a*) The agreement of the parties; or

"(*b*) A material breach; or

"(*c*) Supervening impossibility of performance; or

"(*d*) A fundamental change of circumstances."

[73] Draft article 14, as proposed by the Special Rapporteur in his report, reads as follows:

"*The revival of terminated or suspended treaties*

"The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties suspended or terminated as a result of the armed conflict, on the basis of agreement."

likewise, contained a savings clause, which, although also not strictly necessary, had a pragmatic purpose. With regard to draft article 13, the Special Rapporteur pointed to the fact that the subject matter of the report overlapped with other well-recognized aspects of the law of treaties, and that the provision took such overlap into account. The Special Rapporteur limited his introduction of draft article 14 to observing that there existed a substantial amount of practice on the revival of the status of pre-war treaties.

(b) *Summary of the debate*

189. General support existed for draft articles 11–14.

190. Support was expressed for the reiteration of the rules of the 1969 Vienna Convention in draft article 13. It was further suggested that treaties which might attract a defence of waiver or impossibility of performance in a situation of non-performance should be clearly distinguished for reasons of clarity and coherence.

(c) *Special Rapporteur's concluding remarks*

191. The Special Rapporteur took note of the fact that draft articles 11–14 had not attracted any criticism. He also observed that while article 11 was a necessary proviso, it could be incorporated into a more general proviso on the Charter of the United Nations.