

## Chapter X

### EFFECTS OF ARMED CONFLICTS ON TREATIES

#### A. Introduction

178. The Commission, at its fifty-second session, held in 2000, identified the topic “Effects of armed conflicts on treaties” for inclusion in its long-term programme of work.<sup>939</sup> 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.<sup>940</sup> In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic’s inclusion.

179. During its fifty-sixth session, held in 2004, 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.<sup>941</sup> 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.

180. At its fifty-seventh session, held in 2005, the Commission had before it the first report of the Special Rapporteur<sup>942</sup> as well as a memorandum prepared by the Secretariat entitled “The effects of armed conflict on treaties: an examination of practice and doctrine”.<sup>943</sup> 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.<sup>944</sup>

#### B. Consideration of the topic at the present session

181. At the present session, the Commission had the second report of the Special Rapporteur (A/CN.4/570) before it. The Commission considered the Special Rapporteur’s report at its 2895th to 2898th meetings, from 18 to 21 July 2006.

##### 1. GENERAL REMARKS ON THE TOPIC

###### (a) *Introduction by the Special Rapporteur*

182. The Special Rapporteur observed that his second report, which had to be read together with his first report,<sup>945</sup> focused on two matters: (a) considering specific elements

of the debate in the Commission and the substantial points made by various Governments in the debate in the Sixth Committee at the sixtieth session of the General Assembly; and (b) implementing the first report by asking the Commission to consider the first seven draft articles with a view to referring them to the Drafting Committee or to a working group.

183. The Special Rapporteur noted that general support had been expressed for his view that the topic was generally part of the law of treaties and not of the law on the use of force. He also recalled the views expressed in the Sixth Committee that the subject was closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility.

###### (b) *Summary of the debate*

184. It was reiterated that it was not possible to maintain a strict separation between the law of treaties and other branches of international law such as that of the rules relating to prohibition of use or threat of force in international relations, international humanitarian law and the law of responsibility of States for internationally wrongful acts, which were also of relevance to the topic.

###### (c) *Special Rapporteur’s concluding remarks*

185. The Special Rapporteur was of the view that, given the nature of the debate in the Commission and the existence of substantial differences of opinion on important aspects of the subject, it would be premature to send the matter to a working group. In addition, a working group established in the first year of the new quinquennium of the Commission in 2007 would not necessarily be familiar with the debate on the topic during the present quinquennium. Accordingly, it was proposed that the best way forward would be for the Special Rapporteur to prepare a third report on the topic which could, together with the first two reports, form the basis for consideration by a working group in the future.

##### 2. ARTICLE 1. SCOPE<sup>946</sup>

###### (a) *Introduction by the Special Rapporteur*

186. The Special Rapporteur pointed to the suggestion made in the Sixth Committee that, since article 25 of the 1969 Vienna Convention allowed for the provisional application of treaties, it seemed advisable that the draft articles also cover treaties that were being provisionally

<sup>939</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

<sup>940</sup> *Ibid.*, Annex.

<sup>941</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

<sup>942</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

<sup>943</sup> Document A/CN.4/550 and Corr.1–2 (mimeographed).

<sup>944</sup> *Yearbook ... 2005*, vol. II (Part Two), p. 27, para. 112.

<sup>945</sup> See footnote 942 above.

<sup>946</sup> Draft article 1 reads as follows:

“Scope

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

applied. He also noted that some members of the Commission had suggested that a distinction be made between contracting parties, under article 2, paragraph (1) (f), of the 1969 Vienna Convention, and those which are not.

(b) *Summary of the debate*

187. It was suggested that consideration be given to including within the scope of the topic the effect on the rights of third States parties to the treaty in question; the distinction between effects on different provisions of the treaty as opposed to on the entire treaty, as well as that between the effects on the treaty itself and those on the obligations arising from it; and the distinction between suspension and termination of the treaty or provisions thereof.

(c) *Special Rapporteur's concluding remarks*

188. The Special Rapporteur accepted that he would have to explore issues related to the scope of the topic more thoroughly. Nonetheless, he cautioned against drawing a distinction between the effects on the treaty and those on the obligations arising from it which could upset the balance of the topic by entering into matters outside its traditional scope. He did not favour dealing with subjects like *force majeure* and supervening impossibility of performance, which risked replicating subjects already governed by the 1969 Vienna Convention.

3. ARTICLE 2. USE OF TERMS<sup>947</sup>

(a) *Introduction by the Special Rapporteur*

189. As regards subparagraph (a), the Special Rapporteur observed that there was support for the inclusion of treaties concluded by international organizations.

190. He noted that the most problematic issue was the definition of armed conflict, in subparagraph (b), which had been examined in his first report. He observed that the distinction between international and non-international armed conflict was still considered to be basic in character and noted that the question provoked marked differences of opinion in the Sixth Committee. He requested that the Commission provide a general indication on the inclusion or not of non-international armed conflicts. At the same time, he cautioned that it would be inappropriate for it to seek to frame a definition of "armed conflict" for all departments of public international law.

<sup>947</sup> Draft article 2 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 involves 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."

(b) *Summary of the debate*

191. As regards subparagraph (a), while general support was expressed for the definition of "treaty", a preference was also expressed for including treaties entered into by international organizations. Others were of the view that international organizations were best not covered in light of their specificity. It was proposed that consideration also be given to treaties which had not yet entered into force or which had not yet been ratified by the parties to the armed conflict. In terms of another suggestion, the definition could be more flexible so as to cover agreements between an occupying power and an administration of the occupied territory, such as the regime based on the *Oslo Accords*.<sup>948</sup> Others preferred restricting the topic to agreements concluded within the framework of international law.

192. The definition of "armed conflict" in subparagraph (b) was the subject of criticism: reference was made to the inherent circularity in defining the concept as "a state of war or a conflict which involves armed operations". It was suggested that the definition expressly include internal armed conflicts which were more common in the contemporary world, and a preference was expressed for the definition employed in the *Tadić*<sup>949</sup> case, because it included internal conflicts where government armed forces were not involved.

193. In terms of a further view, internal conflicts do not affect relations between the States parties to the treaty directly, but may give rise to circumstances which affect the application of the treaty indirectly. These may include impossibility of performance or a change of circumstances and therefore lead to the suspension or termination of a treaty to which the State involved in the internal conflict is a party and the other States parties to the treaty are not involved, and, as such, were best analysed within the framework of the 1969 Vienna Convention.

194. Support was also expressed for the view of the Netherlands that military occupations should also be included, as envisaged in article 18 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and reference was also made to the advisory opinion of the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.<sup>950</sup> Others opposed this proposal, noting that military occupations should more properly be seen as a consequence of armed conflict and not part of the definition of armed conflict itself. In terms of a further suggestion, it was necessary also to deal with territories under international administration. Others were of the

<sup>948</sup> Declaration of Principles on Interim Self-Government Arrangements, signed at Washington D.C. on 13 September 1993 by the Government of Israel and the Palestinian Liberation Organization (A/48/486, annex).

<sup>949</sup> *Prosecutor v. Duško Tadić a/k/a "Dule", Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-AR72, 2 October 1995*, International Tribunal for the Former Yugoslavia, Judicial Reports 1994-1995, vol. I, Kluwer Law International (The Hague), 1999, p. 429, para. 70. See also ILM, vol. 35 (January 1996), pp. 54-55, para. 70.

<sup>950</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.

view that such situations should not be considered as they did not constitute armed conflict. In terms of another suggestion, it had to be considered whether conflicts of the “third kind”, such as the “war on terrorism”, should be dealt with—even if only to exclude such conflicts from the scope of the topic. Others cautioned against including the activities of non-State actors since such an approach could threaten the stability of the treaty system.

195. It was reiterated that an aggressor State could not be placed on an equal footing with the State exercising its right to self-defence, whether individual or collective, in accordance with the Charter of the United Nations. Reference was made to the 1985 resolution of the Institute of International Law which had drawn such a distinction.<sup>951</sup> This opinion was shared by the majority of members of the Commission.

196. It was proposed that a third subparagraph be included to define the term “effects”.

#### (c) *Special Rapporteur's concluding remarks*

197. With regard to the inclusion of international organizations, while he preferred not to bring in material from other drafts by analogy, the Special Rapporteur acknowledged the practical point that it was not feasible to study the effects on treaties of international organizations as a separate topic, and therefore there was a case for dealing with such treaties in the present draft articles.

198. In response to comments on the definition of “armed conflict”, the Special Rapporteur confirmed his willingness to refer to internal armed conflict. The concern he had related to the implication from some of the comments that what was called for was a global definition of armed conflict, whereas the purpose of subparagraph (a) was to provide a definition solely for the purposes of the draft articles. To his mind, the concept of the inclusion of internal armed conflicts was governed by the intention of the parties in draft article 4. One of the criteria for discerning the intention of the parties was the nature and scope of the conflict in question. As to the illegal use of force, he reiterated his position from the previous year that draft article 10 would be carefully redrafted.

#### 4. ARTICLE 3. *IPSO FACTO* TERMINATION OR SUSPENSION<sup>952</sup>

##### (a) *Introduction by the Special Rapporteur*

199. The Special Rapporteur noted that draft article 3 was the primary article because it was based on the central proposition that the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation

of treaties. He noted that it was not strictly necessary, in the sense that draft article 4 could stand without it. Nonetheless it was useful to rebut the historical view that armed conflict, in effect, set treaties aside. He recalled that the phrase “*ipso facto*” would be replaced by “necessarily”.

##### (b) *Summary of the debate*

200. General support was expressed for the retention of draft article 3 which was considered central to the draft articles. Support was also expressed for the Special Rapporteur's proposal to replace the phrase “*ipso facto*” with “necessarily”, which would serve as an indication that in some cases armed conflict did lead to the suspension or termination of treaties, but in others it would not, i.e. different effects were possible for different treaties. Others opposed the proposed drafting change and preferred to retain the expression “*ipso facto*” to indicate that outbreak of an armed conflict does not have an automatic effect on terminating or suspending a treaty.

#### 5. ARTICLE 4. THE INDICIA OF SUSCEPTIBILITY TO TERMINATION OR SUSPENSION OF TREATIES IN CASE OF AN ARMED CONFLICT<sup>953</sup>

##### (a) *Introduction by the Special Rapporteur*

201. The Special Rapporteur pointed to the reliance on the concept of the intention of the parties, which had been the subject of strong scepticism. While he shared such scepticism, he was of the view that it was the only workable concept available. He noted that it was not infrequent that decision makers and tribunals had to construct the intention of the parties. At the same time, he recognized that it was necessary to include other factors, such as the object and purpose of the treaty and the circumstances of the armed conflict.

202. There remained the question of the relationship between draft articles 4 and 7. It was his intention that the two provisions would be applicable on a basis of coordination. In addition, draft article 4 referred to articles 31 and 32 of the 1969 Vienna Convention, which was necessary since there could be no question of fashioning “designer” principles of interpretation for exclusive use in the present context.

##### (b) *Summary of the debate*

203. The view was expressed that the criterion of intention had lost its significance after the Second World War, apart from some specific treaties, given the strengthening of the principle of the prohibition of recourse to armed

<sup>951</sup> Resolution entitled “The effects of armed conflicts on treaties” (art. 7), *Yearbook of the Institute of International Law*, vol. 61-II (1986).

<sup>952</sup> Draft article 3 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.”

<sup>953</sup> Draft article 4 reads as follows:

“*The indicia 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.”



force in international relations. In addition, agreement was expressed with the view that it was not realistic to think that parties contemplate the effect of an armed conflict on a treaty at the time of its conclusion. A preference was expressed for considering the viability of the continuance of the treaty, or one of its provisions, in the context of armed conflicts, as well as the legality of the actions of each of the parties to the conflict. Several members also referred to the criteria of the object and purpose of the treaty, the nature of the conflict or the situation that arises therefrom and the nature of the treaty obligation itself. It was also pointed out that it was necessary to take into account the subsequent history of the treaty as contemplated in articles 31 and 32 of the 1969 Vienna Convention.

(c) *Special Rapporteur's concluding remarks*

204. The Special Rapporteur confirmed that he intended to pursue the question of intention further. At the same time, he could not accept that intention was no longer a part of international law. It was quite common to see references to the intention of the parties or of the legislator. Indeed, the Commission itself was employing the concept in the context of reservations to treaties. Instead, the problem was the ascertainment of evidence of intention.

6. ARTICLE 5. EXPRESS PROVISIONS ON THE OPERATION OF TREATIES<sup>954</sup>

(a) *Introduction by the Special Rapporteur*

205. The Special Rapporteur remarked that the draft article was redundant under a strict view of drafting. However, he felt it helpful to have such a provision for the sake of clarity, and he noted that the Commission had expressed general support for it.

(b) *Summary of the debate*

206. It was suggested that the two paragraphs could be dealt with in separate draft articles. It was also proposed that paragraph 1 be replaced with the version proposed in article 35, paragraph (a), of the Harvard Research in International Law draft convention on the law of treaties.<sup>955</sup> Reference was made to the advisory opinion of the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case,<sup>956</sup> where the Court confirmed that human rights treaties were not excluded as a result of the operation of *lex specialis*.

<sup>954</sup> Draft article 5 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 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."

<sup>955</sup> Supplement to the AJIL, vol. 29 (1935), Codification of International Law, Part. III, "The Law of Treaties", p. 657, at p. 1183.

<sup>956</sup> See footnote 950 above.

7. ARTICLE 6. TREATIES RELATING TO THE OCCASION FOR RESORT TO ARMED CONFLICT<sup>957</sup>

(a) *Introduction by the Special Rapporteur*

207. The Special Rapporteur confirmed that he no longer supported draft article 6 since it was not strictly necessary in light of draft article 3. It was an attempt to deal with the special case where an agreement had been the subject of conflict and then some procedure of peaceful settlement ensued.

(b) *Summary of the debate*

208. General support was expressed for the Special Rapporteur's proposal to delete the provision.

8. ARTICLE 7. THE OPERATION OF TREATIES ON THE BASIS OF NECESSARY IMPLICATION FROM THEIR OBJECT AND PURPOSE<sup>958</sup>

(a) *Introduction by the Special Rapporteur*

209. The Special Rapporteur noted that the provision was complementary to draft article 4. It was also the main source of debate and comment by Governments. There were some convincing arguments, such as that by the United States that it was a mistaken approach to resort to the categorization of treaties. He noted some other suggestions to take into account possible guiding principles or policy elements in the discernment of the element of intention. Yet, it had to be recognized that there was customary law, or nascent customary law, supporting some if not all of the categories, and an appropriate

<sup>957</sup> Draft article 6 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."

<sup>958</sup> Draft article 7 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 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."

vehicle had to be found to reflect such practice. A possible approach was to include an annex containing an analysis of the State practice and case law, which could be prepared by the Secretariat with assistance from the Special Rapporteur.

(b) *Summary of the debate*

210. Different views were expressed on draft article 7. For some, the provision was useful but needed to be clarified. Reference was made to the memorandum prepared by the Secretariat entitled “The effect of armed conflict on treaties: an examination of practice and doctrine”<sup>959</sup> by way of suggestions for the expansion of the list. In addition, it was suggested that certain categories of treaties had to be listed in a more precise manner, e.g. multilateral law-making treaties. Support was expressed for the current inclusion of human rights treaties (para. 2 (d)).

<sup>959</sup> See footnote 943 above.

Others supported the proposal to delete the provision. It was pointed out that any list of examples of types of treaties created an *a contrario* presumption that treaties not covered by those categories would automatically lapse, which could amount to a potentially large, even if unintended, exception to the general rule in draft article 3. Support was expressed for the Special Rapporteur’s proposal to replace the list with an annex containing State practice and jurisprudence. Still others considered it more useful to enumerate the factors which might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict.

(c) *Special Rapporteur’s concluding remarks*

211. The Special Rapporteur recalled that the list of categories in draft article 7 was only meant to provide guidance for the discovery of intention in draft article 4, and reiterated that he was prepared to revisit the provision.