ARTICLES ON THE EFFECTS OF ARMED CONFLICTS ON TREATIES

By Lucius Caflisch
Member of the International Law Commission of the United Nations
Emeritus Professor, Graduate Institute of International and Development Studies, Geneva

1. Introduction

What happens to treaties, as defined by article 2, paragraph 1(a), of the Vienna Convention on the Law of Treaties of 1969, when an armed conflict breaks out? This topic had been mentioned already but not dealt with in article 73 of the 1969 Vienna Convention. In 2004, the International Law Commission (“ILC” or “Commission”) included it in its programme of work. In 2011, the Commission adopted a set of 18 draft articles and an annex, with commentaries, on the subject (A/66/10, p. 179).

In accordance with articles 22 and 23 of the Commission’s Statute, the draft Articles were transmitted to the United Nations General Assembly with the recommendation to take note of them and to consider, at a later stage, the conclusion of a convention on the subject. This recommendation was accepted in General Assembly resolution 66/99 of 9 December 2011. The Assembly also decided to revert to the topic in 2014 in order to decide, inter alia, on the form to be given to the Articles. In General Assembly resolution 69/125 of 10 December 2014, it was decided to return to the issue in 2017 with a view to examining, inter alia, the form to be given to the Articles and to inviting Governments to comment on any future action regarding them.

The provisions on “The Effects of Armed Conflicts on Treaties” consist of a set of 18 articles, an annex and commentaries. They are divided into three parts: Part I, entitled “Scope and definitions” (articles 1 and 2); Part II on “Principles” (articles 3 to 13); and Part III, entitled “Miscellaneous” (articles 14 to 18). The annex contains a list of categories of treaties the subject-matters of which suggest that they will continue to operate, in whole or in part, in the event of armed conflict.

2. Scope and definitions (articles 1 and 2)

As a point of departure for the elaboration of the Articles on the Effects of Armed Conflict on Treaties, article 1 mentions article 73 of the 1969 Vienna Convention on the Law of Treaties. It provides that the Articles “apply to the effects of armed conflict on the relations of States under a treaty”. This wording shows that the Articles in question also cover the position of States which are not parties to an armed conflict but parties to a treaty with a State involved in the conflict. Three aspects are considered: (i) treaty relations between two States engaged in an armed conflict, on opposite sides or on the same side; (ii) treaty relations between a State involved in an armed conflict with another State, and a third State not party to the conflict; and (iii) the impact of a non-international armed conflict within a State on the treaty relations of that State. The effects of a non-international armed conflict will further be limited by the requirement of “protracted” resort to armed force formulated in article 2(b) and by the “degree of outside involvement” to be taken into consideration under article 6(b) of the
set of Articles presented here. In principle, typical non-international armed conflicts should not affect States’ treaty relations.

Article 2 defines the terms “treaty” and “armed conflict”. Regarding the term “treaty”, article 2(a) reproduces the wording of article 2, paragraph 1(a), of the 1969 Vienna Convention on the Law of Treaties, to which it adds a mention of “treaties between States to which international organizations are also parties”. Article 2(b) uses the definition of “armed conflict” supplied by the decision of the International Criminal Tribunal for the former Yugoslavia in the Tadić case (Prosecutor v. Dusko Tadić, IT-94-1-A 72, para. 70) – “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” – except for the last seven words, which are omitted, as the Articles presented here only cover situations involving at least one State as a party to an armed conflict.

It will further be noted that, unlike the 1985 resolution of the Institute of International Law on “The Effects of Armed Conflicts on Treaties” (article 1), the Articles presented here cover internal as well as international armed conflicts; indeed, the former are, today, far more frequent than the latter. One should also note that many “civil wars” include “external factors” such as the assistance of third States supplying arms, training facilities and funds, which may affect the nature of the conflict. Finally, the Articles in question extend to situations involving no armed actions, such as occupation and blockade.

3. Principles (articles 3 to 13)

The core principle of the Articles summarized here may be found in article 3, according to which the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties as between States parties to that conflict or between a State party to the conflict and a State which is not.

This principle is intended to favour legal stability and continuity, as is article 2 of the 1985 resolution of the Institute of International Law. It does not amount to an outright presumption of continuity, however, as such an approach might contradict the prevailing position under international law. A similar approach is followed by the case law of domestic courts, especially in the United States, Great Britain, Germany and France. While the leading cases in this matter are not always crystal-clear, it is evident that an armed conflict does not, in contemporary international law, ipso facto terminate or suspend existing treaties, although some of them may lapse or be suspended on account of their nature, commercial treaties or clauses, for example.

Article 4 deals with cases where the treaty itself contains provisions on its applicability in times of armed conflict. In such times, these provisions shall apply. Thus, the first step in any situation raising the issue of continued operation of a treaty in the event of an armed conflict is to ascertain whether the treaty itself provides for its continuation. Article 4 may appear redundant, but it contributes to the clarity of the set of Articles.
Article 5 prescribes that, to establish whether a treaty is susceptible to termination, withdrawal or suspension in case of an armed conflict, the rules of international law on treaty interpretation shall apply.

Article 6 completes the sequence initiated by articles 4 and 5. If investigations under those provisions are unsuccessful, article 6 shall apply. That article lists factors indicating whether a treaty is susceptible to termination, withdrawal or suspension in the event of armed conflict. It provides that regard shall be had to “all relevant factors”. These factors include: (a) the nature of the treaty, notably its subject-matter, object and purpose, its content and the number of parties to it; and (b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the event of a non-international armed conflict, the degree of outside involvement.

The chapeau of article 6 calls for “all relevant factors” to be considered; this means that elements other than those mentioned in sub-paragraphs (a) and (b) may be relevant.

The factors listed in sub-paragraph (a) pertain to the nature of the treaty. Not all of them may be of equal relevance when examining the treaty or the conflict; in addition, the presence of a high number of parties to the treaty not implicated in the armed conflict may suggest its continued applicability.

The factors enumerated in sub-paragraph (b), pertaining to the characteristics of the conflict, include the territorial scope of the conflict, its intensity and its duration. It may well be, for instance, that the operation of air transportation agreements should continue in areas outside the zones of hostilities. The reference to the “degree of outside involvement” is only relevant in the context of non-international armed conflicts. It limits the possibility, for States parties to a treaty, to assert the termination or suspension of treaties, or the right to withdraw from them: the greater the involvement of third States, the greater the possibility that the operation of treaties will be affected.

Article 7 is linked to article 6(a) in that it refers to the annex appended to the set of Articles. That annex lists the types of treaties susceptible of continuing to operate. The list includes:

(a) treaties on the law of armed conflict, including instruments relating to international humanitarian law;
(b) treaties establishing, declaring or regulating permanent regimes, including agreements on modifying land and maritime boundaries;
(c) multilateral law-making treaties;
(d) treaties on international criminal justice;
(e) treaties of friendship, commerce and navigation, and agreements concerning private rights;
(f) treaties for the international protection of human rights;
(g) treaties for the international protection of the environment;
(h) treaties on international watercourses and on related installations and facilities;
(i) treaties on aquifers and related installations and facilities;
(j) constituent instruments of international organizations;
(k) treaties for the peaceful settlement of international disputes; and
(l) treaties concerning diplomatic and consular relations.

The above enumeration is indicative and, therefore, not exhaustive. It was decided, furthermore, not to include agreements referring to jure cogens as the latter cuts across several subject-matters. The categories listed in the annex are examined, one by one, in the commentary, which describes the practice and the opinions of writers relating to each category on the list and which explains why some of them have been placed on the list even though practice is scant.

According to article 8, States involved in an armed conflict may continue to conclude treaties if they do so in conformity with the rules of international law; they may also conclude agreements on the termination or suspension of treaties or treaty rules, or amend or modify treaties. By participating in international and non-international armed conflicts, States obviously do not forfeit their capacity to conclude treaties. According to the opinion of writers, States also have the capacity to enter into treaties during the armed conflict. That capacity is used, in particular, for the conclusion of armistice agreements, agreements on the exchange of prisoners and agreements for the safe conduct of enemy personnel through States’ territory.

The intention to terminate a treaty, to withdraw from it, or to suspend its application must be notified to the other State(s) party(ies) or to the depositary of the treaty. This requirement forms the object of article 9. The notification takes effect when received by the other State party or States parties, unless a later date is provided for (article 9(2)). According to article 9, paragraph 3, nothing affects the right of another State party to object, within a “reasonable time” and in accordance with the provisions of the treaty or other applicable rules of international law, to the notification of termination, withdrawal or suspension. If an objection is lodged, says article 9, paragraph 4, the States concerned shall seek a solution through the means of dispute settlement indicated in Article 33 of the Charter of the United Nations. Finally, according to article 9, paragraph 5, nothing in the preceding provisions shall impair the rights and obligations of States regarding dispute settlement which have remained operational.

The text of article 9 is based on article 65 of the 1969 Vienna Convention on the Law of Treaties and has been adapted to the context of armed conflicts. The idea is that there is an obligation to notify termination, withdrawal or suspension, which entails a right for other States parties to the treaty to object to the notification; the ensuing disagreement remains pending until a solution is found by using the means of dispute settlement indicated in Article 33 of the Charter.

Under article 9, paragraph 1, the intention to terminate, withdraw or suspend must be notified. In the absence of notification, the treaty continues to apply under the general rule set out in article 3, according to which the existence of an armed conflict does not, in and of itself, put an end to treaties or suspend their operation. Pursuant to article 9, paragraph 2, the notification takes effect upon its receipt by the other State(s) party(ies), unless a later date is indicated by it; no mention is made here of the depositary, as there are treaties which do not
provide for such an entity or person. Where there is a depositary, the relevant date is that of the transmission of the notification by the depositary. Article 9, paragraph 3, deals with objections to notifications. Indicating a precise time-limit for voicing objections – see on this point article 65, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties – would have seemed unrealistic in situations of armed conflict; but setting no time-limit at all would have undermined the effectiveness of article 9. This is why article 9, paragraph 3, opts for a “reasonable” period of time for raising objections, such “reasonableness” having to be determined, in the event of a dispute, by the modes of settlement of Article 33 of the Charter referred to in article 9, paragraph 4. Thus a notification formulated under article 9, paragraph 1, takes effect at the moment indicated by article 9, paragraph 2. If no objection is made within a reasonable period of time, the notifying State may take the action notified. If there is an objection, the ensuing disagreement will, according to article 9, paragraph 4, remain moot until there is a diplomatic or legal settlement. Finally, article 9, paragraph 5, preserves the rights and obligations of States in matters of dispute settlement which have remained operational, so as to discourage any idea of interpreting article 9, paragraph 4, as implying that the rights and obligations in question have lapsed on account of an armed conflict. This provision is in line with paragraph (k) of the annex to article 7.

Article 10 makes it clear that the termination of a treaty, its suspension or the withdrawal from it as consequences of armed conflict do not affect the duty of any State to perform the obligations embodied in the treaty which also exist under international law independently of the treaty. As the Commission explains, the principle expressed in article 10 seems self-evident: customary international law continues to apply independently of treaty obligations (see the Nicaragua case, I.C.J. Reports 1984, p. 392, para. 83).

Article 11 is an important prescription which aims at “moderating” the impact of articles 4 to 7. It is modelled on article 44 of the 1969 Vienna Convention on the Law of Treaties. Article 11(a) to (c) reproduces verbatim the equivalent provisions of article 44 of the 1969 Vienna Convention on the Law of Treaties and states that the termination of, withdrawal from, or suspension of a treaty as a consequence of armed conflict shall take effect with respect to the whole treaty, unless the latter contains clauses that are separable from the rest of the treaty with regard to their application (article 11(a)), or unless it appears from the treaty or is otherwise established that the acceptance of these clauses was not an essential condition for the consent of the other party or parties to be bound by the treaty (article 11(b)), or unless the continued performance of the remainder of the treaty would be “unjust” (article 11(c)).

Regarding the last-mentioned requirement, the Commission recalls that this provision had been introduced into article 44 of the 1969 Vienna Convention on the Law of Treaties following a proposal by the United States, whose representative explained that:

“It was possible that a State claiming invalidity of part of a treaty might insist on termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties.”(Statement made by Mr. Kearney, Official Records of the United Nations Conference on the Law of Treaties, A/CONF.39/C.1/SR.41, para. 17.)
Therefore, as is the case of article 44(c) of the 1969 Vienna Convention, article 11(c) is a general clause that can be invoked whenever the separation of treaty provisions — to satisfy the wishes of the requesting party — would create a significant imbalance disadvantaging the other party or parties.

Article 12 pertains to the extinction of the right to terminate a treaty, to withdraw from it or to suspend its provisions as a consequence of the existence of an armed conflict. This right is forfeited if: (a) the State concerned has expressly agreed that the new treaty remains in force or in operation; or (b) if that State, by reason of its conduct, must be considered as having agreed to the treaty’s maintenance in force or continued operation.

This provision is based on article 45 of the 1969 Vienna Convention on the Law of Treaties. It recognises that, even in times of armed conflict, a modicum of good faith must be preserved. The extinction of the right in question can occur once the armed conflict has produced its effect on the treaty, as it is only at that time that the State concerned can take the positions described in sub-paragraphs (a) and (b) of article 12.

Article 13 allows States to agree, at the end of an armed conflict: (1) to the revival of the treaties terminated or (2) to the resumption (“snapping back”) of the treaties suspended.

According to paragraph 1, treaties can be revived, at the end of the armed conflict, by agreement between the States concerned. An example of such an agreement is provided by article 44 of the Peace Treaty with Italy of 10 February 1947. Under that article, each Allied Power may, within a time-limit of six months, notify Italy of the treaties it wishes to revive.

Paragraph 2 of article 13 deals with resuming the operation of treaties suspended on the basis of the factors of article 6. Resumption will take place at the request of a State party which was also a party to the armed conflict: the disappearance of these factors at the end of the armed conflict makes it possible to resume the treaty’s operation, unless, of course, other causes of termination, withdrawal or suspension have appeared in the meantime. Resumption may be requested by one or several States and is not a matter of agreement. The answer to such a unilateral request shall be determined in accordance with the factors listed in article 6.

4. Miscellaneous (articles 14 to 18)

Article 14 provides that a State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations may suspend, in whole or in part, the application of a treaty to which it is a party insofar as such application is incompatible with the exercise of the right of self-defence.

This provision, based on article 7 of the 1985 resolution of the Institute of International Law, recognises that an aggressor State should not be allowed to benefit from the continued operation of a treaty if such operation is incompatible with the exercise of the right of self-defence by the aggressed State. It also aims at preventing impunity for the aggressor and at avoiding any imbalance between the rights of the two States that would appear if the aggressor who has disregarded the prohibition of the use of force could claim the
strict application of existing treaty law, thereby depriving the aggressed State of all or part of its right of self-defence.

Article 14 primarily allows for the suspension – but not the termination – of agreements between the aggressor and the aggressed, yet does not rule out the suspension of treaties between the aggressed and third States. It does not apply in the context of non-international armed conflicts, as it only covers self-defence in the framework of Article 51 of the Charter of the United Nations. Finally, it must be stressed that article 14 is without prejudice to the rules of international law on notification, opposition, time-limits and peaceful settlement of disputes.

Article 15 deprives aggressor States, in the sense of the Charter and of General Assembly resolution 3314 (XXIX), of 14 December 1974 (Definition of Aggression), of the right to terminate or suspend treaties, or to withdraw from them, on account of an armed conflict resulting from the aggression, if such action would prove beneficial to the aggressor.

This provision, based on article 9 of the 1985 resolution of the Institute of International Law, prevents an aggressor State from taking advantage of its own unlawful conduct by cancelling treaty obligations towards the State victim of the aggression. The application of this provision presupposes that the aggressor State has been identified by the Security Council and that it is established that that State would benefit from the termination, withdrawal or suspension. The latter point may be assessed by the Council or by a judge or arbitrator.

The application of article 15 remains suspended until the decision of the Security Council. That decision will determine the following: if the State initially considered to be the aggressor is not characterized as such, or if it does not benefit from the aggression, the situation will be assessed in accordance with the ordinary criteria of the present set of Articles. If the aggressor status of the State in question is confirmed and if the latter would benefit from the cancellation of its treaty obligations, these criteria will not apply and the notification will have no effect, unless the treaty provides otherwise. Finally, the words “as a consequence of an armed conflict that results from the act of aggression” are intended to exclude interpretations under which a State would retain the label of “aggressor” acquired in earlier conflicts.

According to article 16, the Articles presented here are without prejudice to decisions taken by the Security Council in accordance with the Charter of the United Nations. In other words, the Council’s actions under Chapter VII or under other Charter provisions, for example Article 94 on the enforcement of judgments of the International Court of Justice, shall prevail. In this connexion, reference must be made to Article 103 of the Charter, which prescribes that in the event of a conflict between Member States’ Charter obligations and their obligations under other agreements, the former, including duties resulting from binding decisions taken by the Security Council, shall be paramount.

Article 17 determines that the present Articles shall be without prejudice to the rights and duties flowing from the laws of neutrality.
Neutrality established by treaty will become fully operational at the outbreak of an armed conflict between third States; it is precisely at that time that it begins to operate. Neutrality does not always derive from a treaty, however; in such cases too, the rights and duties of the neutral State shall prevail over the present Articles.

The final article 18, entitled “Other cases of termination, withdrawal or suspension”, provides that the Articles presented here are without prejudice to the termination, withdrawal or suspension of a treaty for other reasons, such as, inter alia, material breach, supervening impossibility of performance and fundamental change of circumstances.

Article 18 allows for invoking other provisions of the 1969 Vienna Convention on the Law of Treaties to terminate treaties, to withdraw from them or to suspend their application in the event of an armed conflict. This may amount to stating the obvious but has the advantage of dispelling any idea that the rules on the effects of armed conflict on treaties form a body of lex specialis precluding the reference to other grounds of termination, withdrawal or suspension.

Related Materials

A. Legal Instruments


B. Jurisprudence


International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Dusko Tadić (IT-94-1-AR-72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.

C. Documents

General Assembly resolution 3314 (XXIX) of 14 December 1974 (Definition of Aggression).


General Assembly resolution 69/125 of 10 December 2014 (Effects of armed conflict on treaties).


D. Doctrine


