

EFFECTS OF ARMED CONFLICTS ON TREATIES

[Agenda item 5]

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First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur

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Multilateral instruments cited in the present report

Source

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, Nos. 970–973, p. 31 <i>et seq.</i>
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	<i>Ibid.</i> , p. 135.
Geneva Convention Relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , p. 287.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, No. 17512, p. 3.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, No. 17513, p. 609.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 3.

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BEAUCHAMP, Sylvain <i>Explosive Remnants of War and the Protection of Human Beings under Public International Law</i> . Geneva, Graduate Institute of International and Development Studies, 2008, thesis.	FITZMAURICE, G. G. “The juridical clauses of the peace treaties”, <i>Recueil des cours de l’Académie de droit international de La Haye, 1948–II</i> , vol. 73, Paris, Sirey, pp. 239–364.
BOTHE, Michael “Occupation, belligerent”, in Rudolf Bernhardt (ed.), <i>Encyclopedia of Public International Law</i> . Amsterdam, North-Holland, 1985, vol. 3, pp. 763–766.	INSTITUTE OF INTERNATIONAL LAW “The effects of armed conflicts on treaties”, <i>Yearbook</i> , Session of Helsinki (1985), vol. 61, Part. II, p. 278. Paris, Pedone, 1986.
	McNAIR, Lord <i>The Law of Treaties</i> . Oxford, Clarendon Press, 1961.

Introduction

1. The draft articles on effects of armed conflicts on treaties will be given a second reading at the sixty-second session of the Commission, in 2010. The Special Rapporteur wishes at the outset to pay tribute to the memory of his predecessor, Mr. Ian Brownlie, and to thank him for his four reports¹ and, in general, for the remarkable work which he carried out on the topic.

2. The draft articles adopted on first reading in 2008² and subsequently sent to the General Assembly were

¹ First through fourth reports on the effects of armed conflicts on treaties, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4.552, p. 209; *Yearbook ... 2006*, vol. II (Part One), document A/CN.4.570, p. 251; *Yearbook ... 2007*, vol. II (Part One), document A/CN.4.578, p. 55; and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4.589, p. 81, respectively.

² The text of the draft articles and the corresponding commentaries approved by the Commission on first reading at its sixtieth session appear in *Yearbook ... 2008*, vol. II (Part Two), pp. 45–46, paras. 65–66.

commented on by 34 States during the Sixth Committee’s discussions in the same year. In addition, 13 Member States have submitted written comments on them.³ The present report considers these comments and proposes a number of changes to the initial set of draft articles.

3. While many questions were raised and suggestions made, the discussion seems to have focused on four themes: (a) the scope of the draft articles, in particular the question of including situations in which only one State party to a treaty is involved in an armed conflict, non-international armed conflicts, and agreements to which international organizations are parties (draft articles 1 and 2); (b) the “indicia” for identifying treaties that continue in operation (draft article 4); (c) the types of treaties whose subject matter implies their survival in

³ See document A/CN.4/622 and Add.1, reproduced in the present volume.

whole or in part (draft article 5 and annex); and (d) the (different?) effects of international or civil war conditions involving a single State party or several States parties to treaties.

4. When considering the comments of States, the Special Rapporteur will take a pragmatic approach: he will not make drastic changes to the draft, since it is due for its second reading; he will not focus excessively on doctrinal considerations, so as to ensure that the draft retains practical value; and, within this framework, he will attempt to take into account the comments made by Member States. These comments will be considered article by article.

A. Scope (draft article 1)

5. As one State has commented,⁴ the issue of scope should be studied further. Despite, or perhaps because of, its conciseness, draft article 1 has triggered an avalanche of comments, from the suggestion that the scope of the draft articles should be very broad to the suggestion that it should be very limited, with supporting arguments.

6. A first group of Member States would like to restrict the scope of the draft articles to treaties between two or more States of which more than one is a party to the armed conflict. The reasoning behind this view is that situations involving only one State—mainly but not exclusively non-international conflicts—are already covered by articles 61 (Supervening impossibility of performance) and 62 (Fundamental change of circumstances) of the Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”).⁵ This is not really accurate: the approach thus advocated would mean that, in cases of conflicts between two or more States, a number of provisions relating to the effects of inter-State armed conflicts would be applicable in addition to articles 61 and 62, while, in situations involving only one State, only those articles would be applicable, to the exclusion, therefore, of the present draft articles. The response will be that the effects of armed conflicts in the two situations are so different that they cannot be governed by the same provisions. The Special Rapporteur remains sceptical of this argument, considering that, since the trigger in both cases is an armed conflict, the solution should be sought in the factors mentioned in draft articles 4 and 5. Another argument refers to article 73 of the 1969 Vienna Convention, which states that the provisions of the Convention shall not prejudice the question of the effects of war now under discussion and which forms the framework for the present draft articles. Article 73 refers to “the outbreak of hostilities between States”, which would exclude situations in which the question of the effects of armed conflicts on treaties involves only one State.⁶ The Special Rapporteur considers that the Commission’s mandate should be interpreted flexibly and that it is sufficiently broad to encompass the effects of armed conflicts involving only one State.

⁴ Slovenia, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 26.

⁵ Burundi and Portugal, document A/CN.4/622 and Add.1.

⁶ Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 82.

7. In the view of another Member State,⁷ the question of the effects of international armed conflicts involving only one State party to the treaty in question should be excluded from the scope of the draft articles, as should the question of the effects of non-international armed conflicts involving only one State party to the treaty. If these views were accepted, the draft articles would serve to determine the fate of treaties between States which are parties to them and of which more than one is also participating in an international armed conflict. Such a restriction would reduce the scope and usefulness of the draft articles too much. It would also mean that there were armed conflicts and armed conflicts: the effects of some would be determined by the draft articles, while the effects of others would not. This does not seem to be a desirable approach.

8. One question that remains open⁸ is whether the draft articles should cover the effects of armed conflicts on treaties to which international organizations are parties. Some States have said that they are in favour,⁹ but the majority seem to be opposed.¹⁰ Mainly for practical reasons, the Special Rapporteur is inclined to follow the latter view. Reviewing the draft articles in their entirety from that perspective would greatly delay the successful completion of the Commission’s work. In addition—although this is not a crucial factor—the matter relates not to article 73 of the 1969 Vienna Convention but to article 74, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”).¹¹ Moreover, as the wording of the provision indicates, international organizations as such do not wage war; there will probably be few cases in which the obligations of States members of an organization have to be considered in the light of an armed conflict between them, and such cases could, where necessary, be resolved by adopting a new series of rules which would be based on article 74, paragraph 1, of the 1986 Vienna Convention.

9. Two Member States¹² have expressed the view that article 25 of the 1969 Vienna Convention should be mentioned in draft article 1; to be more precise, treaties that are applied provisionally on the basis of article 25 should continue to be applied provisionally to the same extent as treaties that were in force at the time of the outbreak of the armed conflict. This comment is perfectly justified: treaties applied provisionally pursuant to article 25 should

⁷ Portugal, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 26, and document A/CN.4/622 and Add.1; see also Poland, document A/CN.4/622 and Add.1.

⁸ *Yearbook ... 2008*, vol. II (Part Two), para. (4) of the commentary to draft article 1, p. 47.

⁹ China and Ghana, document A/CN.4/622 and Add.1.

¹⁰ Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 80; Poland, document A/CN.4/622 and Add.1; and Portugal, *ibid.* and *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 19th meeting (A/C.6/63/SR.19), para. 26.

¹¹ Article 74, paragraph 1, provides that the provisions of the Convention “shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations ... from the outbreak of hostilities between States”.

¹² Burundi, document A/CN.4/622 and Add.1; and Romania, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 21st meeting (A/C.6/63/SR.21), para. 51.

continue to be applied provisionally as long as their provisional application is not terminated and they have not disappeared or been suspended pursuant to the provisions of the draft articles applicable to treaties in general. The Commission makes this point in paragraph (3) of the commentary to draft article 1, and it is not essential to refer to article 25 in draft article 1.

10. We will turn now to some other issues raised in the comments of Member States. One comment consisted of a suggestion to replace the words “apply to” with the words “deal with”.¹³ This drafting change seems acceptable.

11. Another comment¹⁴ was that it should be made clear that the draft articles cover both bilateral and multilateral treaties. This seems to be self-evident: draft article 1 refers to “treaties”, as does article 1 of the 1969 Vienna Convention; this means both categories. This point is also made in paragraph (2) of the commentary to draft article 2.

12. The phrase “where at least one of the States is a party to the armed conflict” may seem unclear. In the Special Rapporteur’s view, it means that at least one State party to the treaty must also be a party to the armed conflict; this idea would be expressed more clearly as follows: “where at least one of these States is a party to the armed conflict”.

13. Thus, draft article 1 could read as follows:

“Scope

“The present draft articles deal with the effects of armed conflict in respect of treaties between States where at least one of these States is a party to the armed conflict.”

B. Use of terms (draft article 2)

14. Draft article 2, subparagraph (a), defines the term “treaty” in accordance with article 2, paragraph 1, of the 1969 Vienna Convention. Here, the main question that arises is whether the scope of the draft articles should include treaties concluded between States and international organizations. This question has already been mentioned in paragraph 8 above. The Special Rapporteur considers that it would be preferable not to extend the draft articles to the effects of armed conflicts on treaties to which international organizations are parties. The present draft articles are intended to complement the 1969 Vienna Convention. The Commission is still at liberty to supplement the 1986 Vienna Convention with another draft text.

15. Having thus attempted to resolve the question of whether to include treaties to which one or more international organizations are parties, we must now consider the question of whether to include situations of non-international conflict. There can be no doubt that the current draft article 2, subparagraph (b), does not provide for any exclusions in this regard and, therefore,

should apply to all armed conflicts, even though the draft article itself and the commentary are silent on this point. Although this approach has been criticized by some,¹⁵ it is supported by a majority of States.¹⁶ It may therefore be retained.

16. The concept of armed conflict still needs to be defined. As stated in paragraph (3) of the commentary to draft article 2, its subparagraph (b) contains a definition adapted to the specific needs of the draft articles and is limited to armed conflicts which “by their nature or extent are likely to affect the application of treaties”. Under the current draft articles, the definition of “armed conflict” may thus vary, depending on the field to which it is intended to apply. Some¹⁷ are in favour of this approach but others¹⁸ are not. The Special Rapporteur considers that it would be detrimental to the unity of the law of nations to apply a given definition in the field of international humanitarian law and a completely different definition in the field of treaty law.

17. The Special Rapporteur takes note of the doubts expressed by one State¹⁹ regarding the appropriateness of defining “armed conflict”. Even if these doubts are shared by others, it must be acknowledged that a set of draft articles such as that proposed by the Commission is not viable without a minimum of definitions, particularly of concepts that determine the subject matter of the draft articles.

18. Which definition should be used? Insofar as the draft articles are to cover internal as well as international conflicts, article 1 of the resolution on the effects of armed conflicts on treaties adopted in 1985 by the Institute of International Law²⁰ is not appropriate because, despite the title of the resolution, it covers only international conflicts. Moreover, the definition in that article is an *ad hoc* definition adopted for a specific purpose; this type of approach has already been dismissed, in principle, in paragraph 16 above.

19. Another approach would consist in using the definitions contained in the Geneva Conventions for the protection of war victims; the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); and the Protocol additional to the Geneva

¹⁵ Indonesia, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 49; Iran (Islamic Republic of), *ibid.*, para. 54; and Poland, 17th meeting (A/C.6/63/SR.17), para. 49, and document A/CN.4/622 and Add.1.

¹⁶ Burundi, document A/CN.4/622 and Add.1; Ghana, *ibid.* and *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 2; Greece, *ibid.*, para. 41; Hungary, 17th meeting (A/C.6/63/SR.17), para. 32; New Zealand, 18th meeting (A/C.6/63/SR.18), para. 18; Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), 16th meeting (A/C.6/63/SR.16), para. 31; and Switzerland, *ibid.*, para. 66, and document A/CN.4/622 and Add.1.

¹⁷ Burundi, document A/CN.4/622 and Add.1.

¹⁸ Ghana and Switzerland, *ibid.*; Japan, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 38; Slovenia, *ibid.*, para. 26.

¹⁹ United States, document A/CN.4/622 and Add.1.

²⁰ “The effects of armed conflicts on treaties”, resolution adopted in Helsinki on 28 August 1985.

¹³ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

¹⁴ Burundi, document A/CN.4/622 and Add.1.

Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II):

The ... Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

Article 1, paragraph 1, of Additional Protocol II defines non-international armed conflicts as

armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II].

20. The two articles could probably be combined with a view to defining the concept of armed conflict. This approach would have the advantage of specificity and of combining the concepts of “armed conflict” in the fields of international humanitarian law and treaty law. However, it would be cumbersome and the definition would be, to some extent, circular. Moreover, the former article has been somewhat overtaken by modern developments: it refers to “war”, “declared war” and “state of war”. Nonetheless, if there were a desire to take this approach without lengthening the draft article too much, that could be done simply by adding to draft article 2, subparagraph (b), a reference to common article 2 of the Geneva Conventions for the protection of war victims and article 1, paragraph 1, of Protocol II. In the Special Rapporteur’s view, this approach would not be ideal: references to other texts make the draft articles abstract and difficult to digest.

21. Another possibility is to opt for a more modern, simple and comprehensive wording, namely that used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case:

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.²¹

This wording, which could be considered for inclusion in draft article 2, subparagraph (b), appears to be sufficiently specific and comprehensive, particularly as it refers to “organized armed groups” without mentioning all the characteristics of such groups listed in article 1, paragraph 1, of Protocol II (responsible command; exercise of control over a part of State territory; capacity to carry out sustained and concerted military operations; capacity to implement Protocol II). If this wording is to be used, however, the last part (“or between such groups within a State”) should be deleted because, under draft article 3, subparagraphs (a) and (b), the draft articles apply only to situations involving at least one State party to the treaty that is a party to the armed conflict. That condition is not fulfilled when organized armed groups are fighting each

other within a State. With that reservation, the Commission could accept a solution based on the *Tadić* wording.

22. One Member State²² believes, however, that the draft articles should go further and deal with the legal effects of non-international conflicts and situations involving militias, armed factions, civilians who have become actors in a conflict, *ad hoc* soldiers or mercenaries recruited for a specific situation. The presence of such actors could certainly be included in the circumstances to be taken into account when deciding whether or not the treaty continues in operation (in the context of draft article 4, subparagraph (b)?).

23. If the draft articles are to cover both international and internal conflicts, an idea which was accepted in the draft articles as adopted on first reading, it will be necessary to consider whether the two categories of conflict have the same effects on treaties.²³

24. Let us now consider a number of issues related to those just addressed. Two Member States²⁴ would like it to be made clear that the draft articles are without prejudice to international humanitarian law, which constitutes the *lex specialis* governing armed conflict. This could be stated in the commentary to draft article 2. It could also be stated in the draft articles themselves by adding a new provision to the “without prejudice” provisions (draft articles 14, 16, 17 and 18).

25. One Member State²⁵ has quite rightly drawn attention to an inconsistency between the draft articles and the wording of article 73 of the 1969 Vienna Convention, which is the basis for the Commission’s work on this issue. The article in question specifies that the provisions of the Vienna Convention “shall not prejudice any question that may arise in regard to a treaty from... the outbreak of hostilities between States”. This article is mentioned in support of the view that non-international armed conflicts should be excluded from the scope of the draft articles, as the Commission’s mandate, on the basis of article 73, is limited to conflicts between States. However, article 73 cannot be seen as a categorical prohibition on examining issues which have not yet been considered. The same State admits that fact when arguing for the inclusion of international organizations on the basis of article 74, paragraph 1, of the 1986 Vienna Convention.

26. Another State²⁶ has requested that the definition of armed conflict should include the concept of “embargo”. It is difficult to agree to that suggestion because an embargo is a coercive measure that may be used, under certain

²² Burundi, document A/CN.4/622 and Add.1.

²³ China, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 53; Romania, 21st meeting, (A/C.6/63/SR.21), para. 52; and Switzerland, 16th meeting (A/C.6/63/SR.16), para. 66, and document A/CN.4/622 and Add.1.

²⁴ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs; and United States, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 21.

²⁵ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 53.

²⁶ Cuba, document A/CN.4/622 and Add.1.

²¹ International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić a/k/a “Dule”*, Appeals Chamber, case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Judicial Reports 1994–1995*, p. 429, para. 70.

conditions, in situations of peace as well as in situations of armed conflict. If such a measure is taken in time of peace, it has nothing to do with the topic currently under discussion. If it is adopted during an armed conflict, it is the conflict that has effects on treaties, not the embargo, which is merely an incidental element of the conflict.

27. One Member State²⁷ has suggested replacing the term “state of war”, used in draft article 2, subparagraph (b), with the expression “state of belligerency” on the grounds that article 73 of the 1969 Vienna Convention refers to the “outbreak of hostilities”. It is unclear how this change would improve the provision in question: the concepts “state of belligerency” and “outbreak of hostilities” are not identical to each other, nor are they identical to the concept of armed conflict. In any case, this issue would no longer arise if the suggestion, made in paragraph 21 above, of using the *Tadić* wording were accepted.

28. This also applies to the suggestion made by one Member State²⁸ that the word “operations”, which appears in draft article 2, subparagraph (b), and is generally reserved for the context of inter-State armed conflict, should be avoided. This issue would also not arise if the *Tadić* wording were used. However, the word “operations” is in any case used even for the activities of organized armed groups, as shown by article 1, paragraph 1, of Protocol II (see para. 19 above), which defines these groups in accordance with the criterion of their exercise of such control over a part of State territory “as to enable them to carry out sustained and concerted *military operations**”.

29. Lastly, there is the issue of occupation. When occupation occurs in the context of an armed conflict, is it part of the conflict to the extent that there is no need for specific mention of it? The Member State which raised the issue²⁹ believes that the two terms have distinct meanings. The Special Rapporteur does not consider this to be the case: occupation is an event that occurs during armed conflicts, as reflected in common article 2 of the Geneva Conventions for the protection of war victims, which states that the Conventions apply to cases of occupation. However, in order to maintain the greatest possible clarity, it is recommended that paragraph (6) of the commentary to draft article 2 be retained, as it states expressly that the draft articles apply to occupation even in the absence of armed actions between the parties.

30. Draft article 2 could therefore read 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;

²⁷ Hungary, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 32.

²⁸ Switzerland, document A/CN.4/622 and Add.1.

²⁹ United States, *ibid.* and *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 21.

“(b) ‘Armed conflict’ means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.”

C. Absence of a rule under which, in the event of an armed conflict, treaties are *ipso facto* terminated or suspended (draft article 3)

31. Draft article 3 provides that the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as between the States parties to the conflict or between a State party to the conflict and a third State. This provision, entitled “Non-automatic termination or suspension”, is derived directly from article 2 of the resolution of the Institute of International Law, which reads as follows:

The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.³⁰

32. However, there are two differences between these two provisions: (a) whereas the Institute of International Law’s resolution is concerned only with the fate of treaties in force between the parties to the armed conflict, the Commission’s draft is intended to cover the effect of armed conflicts either between parties to the treaty that are also parties to the armed conflict, or between a single State party to the conflict and a “third” State, that is, a State party to the treaty which is not a party to the conflict; (b) the Institute’s text uses the term “*ipso facto*”, whereas, in the Commission’s draft article 3, that term was replaced by “automatically” and, later, “necessarily”.

33. In general, draft article 3 has been well received. No State has objected to the basic idea that the outbreak of an armed conflict involving one or more States parties to a treaty does not, in itself, entail termination or suspension. In other words, there are agreements whose subject matter (draft article 5) or attendant circumstances (draft article 4) suggest or imply their continuity. This means that there are agreements which survive by reason of their subject matter or certain indicia. It may be, as noted by some States in their comments, that the words “necessarily” and “automatically” are ambiguous.³¹ The expression “*ipso facto*”, on the other hand, seems to reflect quite accurately what both the Institute of International Law and the Commission wanted to say. The Special Rapporteur, following the view of the majority of States which have commented,³² suggests that the Commission return to the expression “*ipso facto*”, despite the preference expressed by one State for the word “necessarily”.³³

³⁰ “The effects of armed conflicts on treaties”, p. 280.

³¹ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 55; and Poland, document A/CN.4/622 and Add.1. This could mean, for example, that there may be other criteria that justify the survival of the treaty in question, in addition to the indicia set out in draft article 4 and the indicative information relating to the subject matter of the treaty referred to in draft article 5 and in the annex to the draft articles.

³² Greece, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 42, and Ghana, Poland and Switzerland, document A/CN.4/622 and Add.1.

³³ Malaysia, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 10.

34. One Member State³⁴ would like to go further, and, without offering specific wording for draft article 3, has suggested that a positive formulation is needed. If the Special Rapporteur has understood correctly, the draft article should affirm that in principle treaties continue to operate in the event of armed conflict. It would be difficult to go so far, given the present state of international law, and also in view of the comments made on draft article 3. Moreover, a “positive” formulation of this provision might entail a complete rethinking of the draft articles.

35. The same State has requested that reference be made in draft article 3 to treaties establishing or modifying land and maritime boundaries.³⁵ Admittedly, that category of agreements is of great importance, as attested to by the fact that boundaries remain in place until the end of an armed conflict (occupation may occur, but not annexation)³⁶ and also by the fact that that type of agreement is given second place in the list contained in the annex to the draft articles, immediately following the category of treaties relating to the law of armed conflict, which become operative in the event of armed conflict. All of the foregoing serves to indicate that the stability of land or river boundaries, including maritime delimitation and territorial regimes, is a fundamental principle.³⁷ Removing this category from the list contained in the annex to the draft articles and incorporating it into draft article 3 would distort the essential elements of the draft articles, which state, firstly, that existing treaties do not cease, *ipso facto*, to have effects and, secondly, that, under draft article 5, the subject matter of certain treaties—including those on boundaries, delimitation and territorial regimes—is the reason for their continued operation. On this specific point, therefore, it should be maintained that, in accordance with generally accepted practice, this category of treaty is one of those whose continued operation is the best assured. There is no reason to modify draft article 3 in the manner requested. However, there is every reason to refer to this category of treaties in draft article 5; on this point, see paragraph 61 below.

36. According to another State which has commented,³⁸ draft article 3 concerns the operation of treaties: (a) between States parties to a treaty that are also parties to an armed conflict; and (b) between a State that is a party to the treaty and a party to the armed conflict, on the one hand, and a third State, on the other, that is, a State party to the treaty that is not a party to the conflict. The effects of the outbreak of a conflict could be different in the two cases, and that difference should be reflected in the draft.

37. Lastly, there is a terminology issue to resolve.³⁹ Under the current draft article 3, the “actors” in the

situations in question are: (a) States parties to a treaty; (b) a State party or States parties to an armed conflict; and (c) “third States”. It is important to specify, where there may be doubt, whether a State is a party to a treaty, an armed conflict, or both. As for “third States”, that term could refer to countries not parties to the armed conflict, countries not parties to the treaty, or countries not parties to either. An attempt could be made to clarify these issues in draft article 3; see paragraph 40 below.

38. Another criticism⁴⁰ is that the title of draft article 3 (Non-automatic termination or suspension) is unclear; a suggestion has been made to replace it with “Presumption of continuity”. The Special Rapporteur agrees with the diagnosis but not with the proposed treatment. Draft article 3 does not deal with a presumption that remains until it is contradicted; as indicated in draft articles 4 and 5, the fate of treaties involving one or more States that are parties to a conflict—whether or not it is an international conflict—will be determined by a number of factors: the *indicia* referred to in draft article 4 and the treaty’s subject matter, as referred to in draft article 5. An expression that is both neutral and clear should therefore be found. At present, the only wording that comes to mind is “Absence of *ipso facto* termination or suspension”. This formulation lacks elegance but reflects the content of the draft article.

39. The last issue to be considered in relation to this draft article is whether the Commission should also consider cases in which two States parties to a treaty are on the same side in an armed conflict.⁴¹ The answer seems to be yes; at least the current content of draft article 3 does not exclude such cases, which does not mean that the Commission could not exclude them if it so desired.

40. Taking account of the above considerations, draft article 3 could read as follows:

“Absence of *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 States parties to the treaty that are also parties to the conflict;

“(b) Between a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict.”

D. Indicia of susceptibility to termination, withdrawal or suspension of treaties (draft article 4)

41. Draft article 4 provides that, in order to ascertain whether a treaty is terminated or suspended in the event of an armed conflict, resort shall be had to: (a) articles 31 and 32 of the 1969 Vienna Convention, which relate to the interpretation of treaties; and (b) the nature and extent of the armed conflict and its effect on the treaty, the subject matter of the treaty and the number of parties to the treaty.

³⁴ Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 55; and document A/CN.4/622 and Add.1.

³⁵ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 53.

³⁶ See Bothe, “Occupation, belligerent”, p. 764.

³⁷ *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, decision of 31 July 1989, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 119.

³⁸ Italy, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16) para. 72.

³⁹ Poland, document A/CN.4/622 and Add.1.

⁴⁰ Switzerland, *ibid.*

⁴¹ Italy, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 72.

42. Before dealing with the substance of this provision and the controversy it has generated within the Commission and among Member States, the preliminary questions posed by one Member State⁴² should be answered, namely: what is the purpose of the provision and for whom is it intended? Does it seek to guide States in their conduct in such a situation, or does it seek to guide international courts in assessing whether, in acting on the basis of draft article 8 (Notification of termination, withdrawal or suspension), a State has followed the applicable rules of international law? The Special Rapporteur's response will be brief: the provision serves both purposes. Draft article 4 highlights the criteria used to ascertain, in a specific case, whether a treaty is susceptible to termination, withdrawal or suspension. If, during an armed conflict, a State concerned makes the notification provided for in draft article 8 without complying with the conditions set out in the draft article—should the interpretation of the treaty pursuant to articles 31 and 32 of the 1969 Vienna Convention show that the parties to the treaty had not expressed a common desire to allow for termination, withdrawal or suspension, and that there is no valid ground for such a request arising from the nature and extent of the conflict, the likely effect of the conflict on the treaty, the subject matter of the treaty or the number of parties to the treaty—the State that has so acted would, at the end of the armed conflict, be considered accountable for such non-compliance.

43. The criteria to be included in draft article 4 were contested in the Commission and are still being contested by States that are critical of the Commission's draft. One criticism is that criteria such as the “nature and extent of the armed conflict” and “the effect of the armed conflict on the treaty” amount to a “circular definition”.⁴³ It is not clear to the Special Rapporteur what constitutes an obstacle here. It is possible, for example, that a large-scale armed conflict concerning a territory over which, pursuant to the agreement at issue, a cooperation regime has been established, might terminate that agreement on account of either the extent or the duration of the conflict. Obviously, these criteria, the second of which can be established only with the passage of time, may create conditions that make performance of the treaty impossible and that undermine the trust of the parties to the conflict.

44. Some States that have commented on draft article 4⁴⁴ seem to think that the Commission has abandoned the criterion of the intention of the States at the time of conclusion of a treaty, while another State⁴⁵ seems to feel that this criterion will be of little practical use. Other States⁴⁶ and the Special Rapporteur think that the intention expressed by the States parties at the time of conclusion of a treaty or during a subsequent period—insofar as it reveals anything about the point under discussion here—is an important criterion derived from the application of

articles 31 and 32 of the 1969 Vienna Convention. Therefore, there is no need to add a reference to the intention of the States parties, as one Member State appears to wish.⁴⁷ Nonetheless, if there were a desire for even more explicit wording, draft article 4, subparagraph (a), could be reformulated as follows: “the intention of the parties as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties”. In any event, draft article 4, subparagraph (a), should be retained.

45. Another comment⁴⁸ was that the reference to “the nature and extent of the armed conflict” in draft article 4, subparagraph (b), should be deleted, either because it could contradict draft article 2, subparagraph (b),⁴⁹ or because it should be connected to the traditional grounds for terminating and suspending treaties in order to maintain the stability of treaty relations between States. The same should apply to criteria such as the nature and intensity of the armed conflict, the effects of the conflict on the treaty, the subject matter of the treaty, and the number of parties, all of which were said to be “abstract” concepts.⁵⁰ On the other hand, other Member States⁵¹ and the Special Rapporteur would like to maintain these criteria. First, it is not clear that there is a contradiction between the current draft article 2, subparagraph (b)—which requires some level of intensity for a conflict to qualify as an “armed conflict”—and the idea of increased intensity, which would be one of the indicia for ascertaining susceptibility to termination or suspension pursuant to draft article 4, subparagraph (b). Second, if the new text of draft article 4, subparagraph (b), proposed in paragraph 51, were accepted, the alleged contradiction would, in any event, disappear. With regard to other considerations put forward by one of the States that has expressed opposition to the inclusion of the criterion “nature and extent of the armed conflict”, it should be noted that the same State has requested that additional criteria such as the intensity and duration of the conflict should be taken into account.⁵²

46. Several ideas for additions to draft article 4 have been put forward. One suggestion was to add new “indicia” such as change of circumstances, impossibility of performance⁵³ and material breach of the treaty.⁵⁴ These additions are already covered by articles 60 to 62 of the 1969 Vienna Convention and draft article 17, and hence seem unnecessary.

47. According to another commenting State,⁵⁵ draft article 4 should include other important factors, such as the

⁴⁷ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

⁴⁸ Austria, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 36; Belarus, *ibid.*, para. 40; and Iran (Islamic Republic of), 18th meeting (A/C.6/63/SR.18), para. 56.

⁴⁹ Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 56).

⁵⁰ Belarus, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 40.

⁵¹ China, document A/CN.4/622 and Add.1.

⁵² Belarus, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 40.

⁵³ *Ibid.*

⁵⁴ Cyprus, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 8.

⁵⁵ China, document A/CN.4/622 and Add.1.

⁴² Poland, document A/CN.4/622 and Add.1.

⁴³ Austria, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 36.

⁴⁴ Burundi, document A/CN.4/622 and Add.1; Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 83; and New Zealand, 18th meeting, para. 18.

⁴⁵ Belarus, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 40.

⁴⁶ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54.

possible results of terminating, withdrawing from or suspending a treaty. This suggestion is covered in the proposed text of draft article 4 contained in paragraph 51 below.

48. The subject matter of the treaty is the key element in draft article 5. It is also mentioned, as one Member State has pointed out,⁵⁶ in draft article 4, subparagraph (b). Nonetheless, and in order to avoid any confusion, it would be appropriate to delete the reference to the subject matter of the treaty in draft article 4, subparagraph (b).

49. Some Member States⁵⁷ would like draft article 4, subparagraph (b), to indicate that the list of indicia contained therein is not exhaustive, but this information is already contained in paragraph 4 of the commentary to the current draft article 4. It is true that it could be moved to the draft article itself, but such a change would weaken the normative value of the text.

50. Lastly, it has been observed⁵⁸ that it is inappropriate to refer to “withdrawal” in draft article 4, since it would contradict draft article 3. The Special Rapporteur fails to see what would constitute the contradiction and hence proposes that the existing text be retained.

51. In the light of the foregoing considerations, draft article 4 could read as follows:

“Indicia of susceptibility to termination, withdrawal or suspension of treaties

“In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:

“(a) The intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

“(b) The nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty.”

E. Operation of treaties on the basis of implication from their subject matter (draft article 5 and annex)

52. The subject matter of a treaty may involve the implication that it continues in operation, in whole or in part, during armed conflict. Draft article 5 states that, in such cases, the incidence of an armed conflict will not as such affect the operation of the treaty. The draft articles are accompanied by an annex entitled “Indicative list of categories of treaties referred to in draft article 5”. The list contains the following categories: (a) treaties governing armed conflicts; (b) treaties establishing a boundary, delimitation or permanent regime; (c) treaties

of friendship, commerce and navigation and analogous agreements concerning private rights; (d) treaties for the international protection of human rights; (e) treaties relating to the protection of the environment; (f) treaties relating to watercourses; (g) treaties relating to aquifers; (h) multilateral law-making treaties; (i) treaties relating to the peaceful settlement of disputes between States; (j) treaties relating to commercial arbitration; (k) treaties relating to diplomatic relations; and (l) treaties relating to consular relations. These are all categories of agreements whose survival, in the opinion of the States concerned, is necessary—so necessary that the States in question have continued to apply them, in whole or in part, despite having experienced the catastrophic consequences of the incidence of an armed conflict.⁵⁹

53. Before examining the reactions to draft article 5 and the list contained in the annex, four preliminary comments may be made. First, in the types of situations envisaged, the incidence of an armed conflict will not as such affect the continued operation of the treaty, although such continued operation may be jeopardized by factors other than the incidence of the conflict. Second, continuity may apply to the treaty as a whole or to only a part thereof; in the Special Rapporteur’s view, the question should be resolved by referring to the indicia set out in draft article 4. Third, the list contained in the annex to the draft articles is described as “indicative” in paragraph 7 of the commentary to draft article 5. This seems to mean: (a) that other factors may be taken into consideration; and (b) that treaties do not continue in operation simply because they fall into one of the listed categories. In addition, treaties may fall into one category or another, or they may not fall into any of the categories yet contain provisions that do. Nonetheless, and considering the other variables included in the draft articles, the text offers approximations rather than hard and fast rules, which is hardly surprising, given the nature of the issue under discussion. Fourth, the list contained in the annex, the content of which has been questioned by a number of States that wish, for example, to supplement or update the list, to make it more abstract, or to spell out the criteria for the survival of treaties,⁶⁰ is, as another State has pointed out,⁶¹ indicative and does not suggest that the kinds of treaties mentioned would never be affected by the outbreak of an armed conflict.

54. The Special Rapporteur’s task now is to consider some specific comments made in relation to draft article 5. One comment⁶² was that the wording of the draft article should be made clearer. The Special Rapporteur is willing, but cannot propose changes without more specific comments. One group of States⁶³ seems to take the view that, in the context of draft article 5, the treaty or

⁵⁹ Detailed commentary on the categories listed here can be found in *Yearbook... 2008*, vol. II (Part Two).

⁶⁰ Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 12; Greece, 18th meeting (A/C.6/63/SR.18), para. 44; Israel, *ibid.*, para. 33; Japan, *ibid.*, para. 38; Italy, 16th meeting (A/C.6/63/SR.16), para. 73; Malaysia, 17th meeting (A/C.6/63/SR.17), para. 10; and Poland, *ibid.*, para. 49.

⁶¹ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54.

⁶² Republic of Korea, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 53.

⁶³ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *ibid.*, para. 32.

⁵⁶ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

⁵⁷ China, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 54; El Salvador, *ibid.*, para. 12; and Israel, 18th meeting (A/C.6/63/SR.18), para. 33.

⁵⁸ Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 56.

clauses that survive do not necessarily have to be applied as they are, but that some basic treaty principles need to be taken into account during armed conflict. If this comment means that draft article 5 should be applied with some flexibility, it could well be endorsed, as flexibility is built into the current wording of the provision. Another Member State⁶⁴ has expressed concern about the survival, in whole or in part, of treaties whose subject matter seems to imply a degree of continuity. It may be assumed that, if the answer cannot be deduced from the subject matter of the treaty alone, the indicia contained in draft article 4 will come into play.

55. It has also been pointed out⁶⁵ that certain treaties are concluded with the specific purpose of being applied in times of armed conflict, particularly treaties on international humanitarian law, but also those relating to human rights, territorial boundaries, limits or regimes, and the establishment of intergovernmental organizations. It seems obvious that international humanitarian law should survive, since it applies largely to times of armed conflict,⁶⁶ whereas treaties constituting international organizations, for example, may remain partially suspended in time of conflict. The Special Rapporteur believes that it would be preferable, for reasons of clarity, to have an article containing a statement of principle followed by a separate list. For the same reasons—and in order to achieve some flexibility—it would be better, contrary to the suggestion made by one Member State,⁶⁷ not to incorporate the list into draft article 5.

56. One Member State⁶⁸ has expressed the wish to know the factors that make it possible to determine whether a treaty or some of its provisions should continue in operation (or be suspended or terminated) in the event of armed conflict. It seems to the Special Rapporteur that these factors can be determined by first consulting draft article 5, which relates to the subject matter of the treaty, then the indicative list in the annex to the draft articles and lastly, if necessary, the indicia contained in draft article 4 (see in this connection the position taken by China⁶⁹). Another State⁷⁰ has proposed that “relevant factors or general criteria” should be identified. In fact, the factors in question are a combination of general and specific criteria—the indicia mentioned in draft article 4 and the subject matter of the treaty mentioned in draft article 5. The latter criterion is based on international practice, which is the only factor of relatively reliable value in a field full of uncertainties. If its value were disregarded, the decisions to be taken in this regard would be even more arbitrary.

57. With regard to the survival, in whole or in part, of certain treaties referred to in draft article 5, one Member State⁷¹ feels rightly that partial survival is possible

only if the treaty provisions are separable. According to that State, a reference to draft article 10 (Separability of treaty provisions) should therefore be considered. Likewise, draft article 5 should contain an explicit reference to the list contained in the annex to the draft articles. Lastly, it has been suggested that other treaties should be considered for inclusion in the scope of draft article 5 on a case-by-case basis. The Special Rapporteur thinks that a reference to draft article 10 (also advocated by Switzerland) is neither necessary nor useful. All the draft provisions that allow for termination or partial suspension are subject to the conditions set out in draft article 10, and it would suffice to confirm this in the commentary to draft article 5. It is also superfluous to refer to the list in draft article 5 itself, since the list contains a reference to that draft article. In general, cross references within the draft articles should be limited, so as to prevent the absence of a reference in one case from being used in another case as evidence of a lack of connection between one article and another. As for the third comment—that other types of agreement should be considered for inclusion in the scope of draft article 5 on a case-by-case basis—this possibility already exists, since the list contained in the annex to the draft articles is indicative rather than exhaustive (see para. 53 above).

58. Contrary to the opinion expressed by one Member State,⁷² the Special Rapporteur is not of the view that draft article 5 is superfluous, given that termination and suspension are non-automatic. Since this principle is embodied in a general rule—draft article 3—the State in question argues, there is no need to enumerate the specific categories of agreements whose subject matter involves the implication that they continue in operation. The Special Rapporteur does not share this view. Draft article 3 does not in any way imply the automatic operation, in whole or in part, of a treaty in the event of armed conflict. It is clear from this and subsequent provisions that the question must be examined in the light of the criteria set forth in draft articles 4 and 5 and the list annexed to the draft articles in connection with draft article 5. Draft article 5 is thus a key provision.

59. As a further consideration,⁷³ the Commission has been invited to examine the relationship between draft article 5 and draft article 10. As explained above (para. 57), the Special Rapporteur takes the view that there is a link between these two provisions, as well as between draft articles 4 and 10. As stated, draft articles 4 and 5 establish the indicia, criteria and elements giving substance to draft article 3; their application leads to a determination of the survival in whole or in part of a treaty, or, on the contrary, to its disappearance. This conclusion must then be considered in the light of draft article 10, and also draft article 11. Where reference to draft articles 4 and 5 suggests survival of a treaty in part, reference to draft article 10 will indicate: (a) whether the provisions in question are separable from the rest of the treaty; (b) whether acceptance of the provisions in question constituted, for the other party or parties, an essential element in their consent to be bound

⁶⁴ Italy, *ibid.*, para. 73.

⁶⁵ Belarus, *ibid.*, para. 41.

⁶⁶ On this point, see draft article 7, which concerns treaties that contain express provisions on their operation in times of armed conflict.

⁶⁷ Hungary, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 33.

⁶⁸ India, *ibid.*, para. 47.

⁶⁹ *Ibid.*, para. 54.

⁷⁰ Israel, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 33.

⁷¹ Greece, *ibid.*, para. 43.

⁷² Poland, document A/CN.4/622 and Add.1.

⁷³ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 32.

by the treaty as a whole; and (c) whether implementation of that part of the treaty that survives is unfair. That is to say, the conditions laid down in draft article 10 are in addition to those provided for in draft articles 4 and 5. Similar reasoning may, moreover, be applied to draft article 11 (Loss of the right to terminate, withdraw from or suspend the operation of a treaty) in that, even where a right to call for suspension or termination, in whole or in part, existed, that right may no longer be invoked once renounced by the State in question.

60. One Member State⁷⁴ has complained of the lack of clarity of draft article 5 and has encouraged the Commission to give examples of treaties or treaty provisions that might continue in operation. The Special Rapporteur acknowledges that the latter is an elusive goal but would point out that a degree of clarity is provided by the list contained in the annex to the draft articles, while the commentary, in fact, gives such examples.

61. Another State⁷⁵ has proposed the addition of a second paragraph to draft article 5, to read:

“2. Treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict.”

This proposal is attractive. If a clear majority of the Commission is in favour, the Special Rapporteur would not be opposed, notwithstanding his view that the proposed amendments may well complicate rather than simplify matters. In particular, the question arises, given the contentious issue of determining to what extent human rights treaties continue to operate in time of armed conflict and to what extent international humanitarian law supplants them,⁷⁶ of whether it is possible to assume the continuity of treaties for the international protection of human rights. Consideration must also be given to the precise meaning of the term “international criminal law”, and to whether it might not be preferable to refer to treaties on international criminal justice. A third issue is whether it is useful and necessary to refer to the Charter of the United Nations. Be that as it may, such a change, which might well also encompass treaties on boundaries and limits (in this regard, see para. 35 above), would undoubtedly lead to the disappearance of several categories in the list contained in the annex to the draft articles.

62. If the idea of such an amendment were accepted, it would need to be drafted as precisely as possible. The following text might serve as a basis:

“Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties creating or regulating a regime, including those establishing or modifying land or maritime

boundaries, remain in or enter into operation in the event of armed conflict.”

63. We will now consider the list annexed to the draft articles, examining in turn the idea of having such a list, its nature and content, and its relationship to draft article 5.

64. Certain States⁷⁷ take the view that it is not desirable to have such a list; or it could be incorporated into the commentary to draft article 5, with determinations as to the survival of treaties being made case by case.⁷⁸ Other States would incorporate the list into draft article 5.⁷⁹ Still others endorse the Commission’s solution, namely a list annexed to the draft articles.⁸⁰ There is cause for hesitation, at least between annexing a list in connection with draft article 5 and incorporating it into the commentary (there being no prospect that a solution involving insertion of a list into the text of draft article 5 would find acceptance). The Special Rapporteur favours retention of the current text since it offers a greater degree of normativity than if the list were consigned to the commentary.

65. Following these preliminary observations, some general remarks are in order. The indicative nature of the list cannot be overemphasized.⁸¹ The title of the list reaffirms this element. Consequently, the subject matter of the treaty determines its inclusion in the “categories” of agreements that, in practice, survive in whole or in part. However, being indicative, the list cannot be considered complete; moreover, the indicia in draft article 4 may enter into consideration. All this is relevant to the question⁸² of what will become of the categories of treaties not on the list: since the list is merely indicative, they may still fall within the scope of draft article 5.

66. Another general remark was that the question has been inadequately examined and that further study of practice is required by seeking the views of Member States through questionnaires. In addition, it has been said that the practice referred to in the commentary is too focused on practice and doctrine in common law countries.⁸³ In response, it may be stated that: (a) the commentary is certainly not confined to the practice of common law authorities but it must be based on existing, accessible practice (and practice is perhaps more accessible in common law countries than in others); (b) while it may be that some precedents are not referred to, notwithstanding the meticulous research undertaken by the current Special Rapporteur’s late predecessor, that research was thoroughly conducted and there should

⁷⁷ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 32.

⁷⁸ In this vein, see China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54.

⁷⁹ Hungary, *ibid.*, para. 33.

⁸⁰ Cyprus, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 9; Indonesia, 18th meeting (A/C.6/63/SR.18), para. 49; and Republic of Korea, 16th meeting (A/C.6/63/SR.16), para. 53.

⁸¹ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 54; Malaysia, *ibid.*, para. 10; Poland, *ibid.*, para. 49; Cyprus, 19th meeting (A/C.6/63/SR.19), para. 9; Japan, 18th meeting (A/C.6/63/SR.18), para. 38; and United States, document A/CN.4/622 and Add.1.

⁸² Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 12.

⁸³ Greece, *ibid.*, 18th meeting (A/C.6/63/SR.18), paras. 43 and 44.

⁷⁴ Colombia, document A/CN.4/622 and Add.1.

⁷⁵ Switzerland, *ibid.*

⁷⁶ On this issue, see, for example, Beauchamp, *Explosive Remnants of War and the Protection of Human Beings under Public International Law*, pp. 114–157.

be no major omissions; and (c) any further research based on questionnaires addressed to States would delay the conclusion of work on this topic indefinitely.

67. With regard to the content of the list, some would prefer more categories, others fewer. Certain States have argued for a more comprehensive list;⁸⁴ others have suggested the inclusion of additional categories: treaties embodying rules of *jus cogens*⁸⁵ and treaties relating to international criminal justice.⁸⁶ With regard to treaties embodying rules of *jus cogens*, such rules will survive in time of armed conflict, as will rules of *jus cogens* that are not embodied in treaty provisions; otherwise they would not be rules of *jus cogens*. Thus, the inclusion of this category of treaties does not seem essential. It is certainly the case, on the other hand, that the relatively recent rules of international criminal justice should form a new category and be included in the list, despite the absence or near absence of relevant practice; it may, moreover, be maintained that the aim of at least some of these rules is precisely to protect individuals in the event of armed conflict.

68. One State commenting on the list would like to go further.⁸⁷ To the types of agreement that it wishes to see included in the body of draft article 5 (treaties on international humanitarian law, human rights and international criminal law, Charter of the United Nations (see para. 61)), it has added a new category—treaties establishing an international organization. But it has also proposed the deletion of five categories: treaties of friendship, commerce and navigation and analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to international watercourses and related installations and facilities; treaties relating to aquifers and related installations and facilities; and treaties relating to commercial arbitration.

69. While the Special Rapporteur is agreeable to the inclusion of treaties establishing international organizations in the list, he sees no need to delete the five categories mentioned in the preceding paragraph. Their inclusion reflects practice, and the list is indicative in nature. In addition, it is evident from draft article 5 that it is the treaty either in whole or in part that continues in operation, which means that the survival of a treaty belonging to a category included in the list may be limited to only some of its provisions.

70. For the reasons elaborated on at length above, the text of draft article 5 and the attendant list might read:

“The operation of treaties on the basis of implication from their subject matter

“[1.] In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.

⁸⁴ Japan, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 38; Malaysia, 17th meeting (A/C.6/63/SR.17), para. 10; and Poland, *ibid.*, para. 49.

⁸⁵ Hungary, *ibid.*, para. 33; and Portugal, document A/CN.4/622 and Add.1.

⁸⁶ Switzerland, document A/CN.4/622 and Add.1.

⁸⁷ *Ibid.*

“[2. Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land boundaries or maritime boundaries and limits, remain in or enter into operation in the event of armed conflict.]”⁸⁸

“Annex

“Indicative list of categories of treaties referred to in draft article 5

“[(a) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;

“(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;]

“[(c) Treaties relating to international criminal justice;]

“(d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

“[(e) Treaties for the protection of human rights;]

“(f) Treaties relating to the protection of the environment;

“(g) Treaties relating to international watercourses and related installations and facilities;

“(h) Treaties relating to aquifers and related installations and facilities;

“(i) Multilateral law-making treaties;

“(j) Treaties establishing an international organization;

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

“(l) Treaties relating to commercial arbitration;

“(m) Treaties relating to diplomatic and consular relations.”⁸⁹

F. Conclusion of treaties during armed conflict (draft article 6)

71. Draft article 6 enunciates two rules: (a) a State party to an armed conflict retains the capacity to conclude treaties; and (b) in time of armed conflict, States may

⁸⁸ The text between square brackets reflects the discussion in paragraphs 62–64 of the present report.

⁸⁹ The categories between square brackets are those that could be incorporated into a new draft article 5, paragraph 2.

conclude lawful agreements providing for the termination or suspension of treaties that would otherwise remain in operation.

72. One Member State⁹⁰ takes the view that this provision should be deleted since the Commission, in including it, has broached a non-existent problem. Capacity to conclude treaties derives from the independence of the State and its international personality. No peace treaty or armistice would ever have seen the light of day had the States parties to an armed conflict not retained this capacity. An express statement that the capacity to conclude treaties subsists sows doubt and confusion.

73. These criticisms concern paragraph 1 of draft article 6, which, as stated in paragraph (2) of the commentary to the draft article, enunciates the “basic proposition” that an armed conflict does not affect the capacity of States parties to the conflict to enter into treaties. This statement does not require any justification.⁹¹ That said, the proposal to delete draft article 6 takes no account of the fact that paragraph 1 serves as an introduction to paragraph 2; the latter must in no event disappear since it allows the States concerned to suspend or terminate treaties or parts of treaties which would otherwise remain in operation in time of armed conflict. This latter assertion appears less obvious than the rule in paragraph 1 of draft article 6.

74. Another Member State⁹² seeks clarification—if only in the commentary—that draft article 6, paragraph 2, is without prejudice to the rule embodied in draft article 9, which provides that the termination or suspension, in whole or in part, of a treaty as a consequence of an armed conflict does not exonerate the States concerned from the duty to comply with the rules of international law other than those in the treaty which is terminated or suspended. Thus, two belligerent States could not agree, with a stroke of the pen, to terminate, in relations between themselves, application of the Geneva Conventions for the protection of war victims, or of Protocols I and II. The Special Rapporteur considers it justifiable to retain draft article 6 and to specify, in the commentary, that the article is without prejudice to draft article 9.

75. The reference in draft article 6, paragraph 2, to “lawful agreements” has the same purpose: to prevent an agreement between certain States parties *inter se* (see the 1969 Vienna Convention, art. 41, para. 1 (b)) from undermining the object and purpose of treaty or customary provisions such as those of the Geneva Conventions for the protection of war victims, or of Protocols I and II. For this reason, the Special Rapporteur is reluctant to delete the adjective “lawful”, contrary to the suggestion made by certain States.⁹³ But there should, perhaps, be an explanation in the commentary of the importance of this adjective.

⁹⁰ Poland, document A/CN.4/622 and Add.1.

⁹¹ However, as noted in paragraph (4) of the commentary to draft article 6, eminent experts such as McNair (*The Law of Treaties*, p. 696) and Fitzmaurice (“The juridical clauses of the peace treaties”, p. 309) have deemed it appropriate to comment on the question.

⁹² Switzerland, document A/CN.4/622 and Add.1.

⁹³ Colombia, document A/CN.4/622 and Add.1; and United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

76. In view of the foregoing, draft article 6 could read:

“Conclusion of treaties during armed conflict

“1. The outbreak of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with the 1969 Vienna Convention on the Law of Treaties.

“2. During an armed conflict, States may conclude lawful agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict.”

G. Express provisions on the operation of treaties (draft article 7)

77. Draft article 7 provides that “where a treaty expressly so provides, it shall continue to operate in situations of armed conflict”. To cover all eventualities, it would probably have been preferable to say “if insofar as”, in order to take into account the possibility of partial operation. However, if the new language proposed in paragraph 81 below is approved, this change would no longer be necessary.

78. Two Member States⁹⁴ have proposed that this draft article be deleted or modified.⁹⁵ The Special Rapporteur, like Colombia,⁹⁶ does not agree with the proposal to delete it, but considers that it is not in the right place and could be better drafted.

79. With regard to the proper place for this provision, one State⁹⁷ has suggested moving it close to draft article 5. Another State⁹⁸ thinks that draft article 7 should follow draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties), since it is simply a case of the application of draft article 4. The Special Rapporteur shares the view that draft article 7 is not in the proper place. However, he would not place it after draft article 5 or 4, but rather after draft article 3. This solution would impart a logical order to the entire set of provisions applicable to the issues to be resolved: (a) general principle of the absence of a rule entailing *ipso facto* termination or suspension (draft article 3); (b) first possible solution: the provisions of the treaty itself provide the answer (draft article 7, which would become draft article 3 *bis*); (c) second option: review of a series of indicia in order to ascertain whether the treaty continues in operation, is suspended, in whole or in part, or is terminated (draft article 4); (d) third option (which may be combined with the second): on account of its subject matter, the treaty is one which, on the outbreak of armed conflict, continues in operation, in whole or in part, or, on the other hand, one which ceases to operate on the outbreak of armed conflict (draft article 5); and, lastly, (e) fourth

⁹⁴ Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 13; and Poland, document A/CN.4/622 and Add.1.

⁹⁵ Chile, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 22nd meeting (A/C.6/63/SR.22), para. 13.

⁹⁶ Document A/CN.4/622 and Add.1.

⁹⁷ Romania, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 21st meeting (A/C.6/63/SR.21), para. 53.

⁹⁸ Switzerland, document A/CN.4/622 and Add.1.

option: the States in question have concluded, during the armed conflict, agreements involving termination or suspension of the treaty which would otherwise continue in operation (draft article 6, para. 2). In other words, once the rule (or rather the absence of a rule) applicable to the central issue addressed in the draft articles has been stated in draft article 3, the possible solutions are presented in a logical order.

80. One Member State has requested that the Commission should indicate the factors for identifying treaties which, on account of their nature, are not affected by armed conflicts under any circumstances. It is difficult to give a definitive response to this request, but the Special Rapporteur believes that no treaty is untouchable. Obviously, the treaties referred to in draft article 7 continue to operate because they provide for their own survival, not because they are untouchable on account of their nature. The treaties referred to in draft article 5 and in the list annexed to the draft articles may also continue to operate because of their subject matter, but such continued operation does not necessarily apply to the treaty as a whole and, moreover, it may be subject to the application of the criteria set forth in draft article 4.

81. In the light of the foregoing remarks, draft article 7 should be retained, but it should follow draft article 3 and should be redrafted to read as follows:

“Express provisions on the operation of treaties

“Where a treaty itself contains [express] provisions on its operation in situations of armed conflict, these provisions shall apply.”

H. Notification of termination, withdrawal or suspension (draft article 8)

82. This provision has generated heated debate. Under the current text, the notifications referred to in draft article 8, paragraph 1, are unilateral acts through which a State, on the outbreak of armed conflict, informs the other contracting State or States or the depositary, if there is one, of its intention to terminate, withdraw from or suspend the operation of the treaty. Performance of this unilateral act is not required when the State in question does not wish to terminate, withdraw from or suspend the operation of the treaty. This is a consequence of the general rule set out in draft article 3, which provides that the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.

83. Draft article 8, paragraph 2, specifies that the notification takes effect upon receipt by the State or States in question. The same should apply when the notification is addressed to the depositary: the notification takes effect when the State for which it is intended receives it from the depositary.

84. In accordance with draft article 8, paragraph 3, nothing in paragraphs 1 and 2 shall affect the right of the notified party to object, in accordance with the terms of the treaty or other rules of international law, to termination, withdrawal from or suspension of the operation of the treaty.

85. Draft article 8, paragraph 3, therefore allows the notified State to object to the content of the notification if it considers it to be contrary to draft articles 3 to 7. This provision is aligned with article 65, paragraphs 3 to 5, of the 1969 Vienna Convention. However, the Commission decided not to include a draft provision corresponding to article 65, paragraph 4, of the Vienna Convention, which provides that nothing in the foregoing paragraphs shall affect the rights or obligations of the parties with regard to the peaceful settlement of disputes. In other words, following the notification and any objection to its content, the dispute settlement process would remain suspended until the end of the armed conflict. Consequently, in practice, the treaty will remain paralysed until the peaceful settlement of the dispute concerning the content of the notification. The Commission opted for this approach because it considered that

it was unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict.⁹⁹

In other words, a period during which one or more States are involved in an armed conflict would not be, in the Commission’s opinion, the ideal time for setting in motion the existing dispute settlement mechanisms: the State or States in question will consider that they have more urgent things to do and will have no inclination to address that issue at that particular time. While such an attitude may seem understandable, it does not help advance the cause of the peaceful settlement of disputes.

86. The Commission’s approach has been endorsed by some States¹⁰⁰ and criticized by another State,¹⁰¹ which considers that there is no reason to put on hold a State’s obligations with regard to the peaceful settlement of disputes in the context of the effects of armed conflicts on treaties.

87. The Special Rapporteur would not see any insurmountable difficulty in providing that settlement procedures shall remain accessible in times of armed conflict, or at least not precluding that possibility. It should also be noted that treaty obligations in this area are among those that may continue to operate pursuant to draft article 5 and item (i) of the corresponding list contained in the annex. Draft article 8 could therefore be supplemented with wording drawn from article 65, paragraph 4, of the 1969 Vienna Convention, as follows:

“Nothing in the preceding paragraphs shall affect the rights or obligations of the States parties with regard to the settlement of disputes insofar as, despite the incidence of an armed conflict, they have remained applicable pursuant to draft articles 4 to 7.”

This text would become paragraph 5 of draft article 8.

⁹⁹ *Yearbook ... 2008*, vol. II (Part Two), para. (1) of the commentary to draft article 8, p. 60.

¹⁰⁰ Hungary, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 33; and Malaysia, *ibid.*, para. 10.

¹⁰¹ Switzerland, document A/CN.4/622 and Add.1.

88. Another State¹⁰² would like to know the effects of notification on the rights and duties of States parties to the treaty. The response depends on the content of the notification: in the immediate term, the notification would lead to the total or partial paralysis of the treaty. If it is followed by an acknowledgement of receipt, a right to object to the content of the notification is triggered; otherwise, the State making the notification may carry out the measure which it has proposed.

89. Two Member States¹⁰³ have expressed the view that it may not always be practical to fulfil the notification requirement, a remark which also applies to acknowledgement of receipt, particularly if the other State or States or the depositary State are parties to the conflict. This difficulty cannot be denied. However, what would be the substitute for notification and acknowledgement of receipt? Without the duty to notify, the rules set out in the draft articles would become largely theoretical. The Special Rapporteur is of the view that, where difficulties emerge, the States concerned should be pragmatic in fulfilling their duties of notification and acknowledgement of receipt; what is certain is that these acts must be performed, to the extent possible, in a manner similar to that provided in article 65 of the 1969 Vienna Convention, and that an announcement “to the general public”, *urbi et orbi*, would probably not be sufficient.

90. One Member State¹⁰⁴ has questioned the substance of draft article 8, paragraph 3, which states that nothing shall prevent a State party from objecting, in accordance with the terms of the treaty or (other) rules of international law, to the termination, withdrawal or suspension of the operation of the treaty. This State has also requested information on the relationship between draft article 8, paragraph 3, and article 73 of the 1969 Vienna Convention. First, the Special Rapporteur believes that draft article 8, paragraph 3, is indispensable; if it disappeared, the issue of the effects of armed conflicts would be dominated by the State making the notification. As for the relationship between draft article 8, paragraph 3, and article 73 of the 1969 Vienna Convention, it should simply be noted that the latter article states that the Convention does not prejudge the question of the effects of the “outbreak of hostilities between States” on treaties, while the draft articles are designed to address that question, following the path set out in the Vienna Convention as far as possible.

91. Another issue is that no time limit has been set for objecting to a notification, contrary to article 65, paragraph 2, of the 1969 Vienna Convention, which sets a time limit of three months. The Commission took the view that it was difficult to provide for time limits in the context of armed conflicts. However, it may have to make such provision if the text proposed in paragraph 87 of the present report is accepted. Nonetheless, given that the context is one of armed conflict, the time limit should probably be longer than three months.

92. One interesting suggestion¹⁰⁵ was that the scope of draft article 8 should be extended to States that are not parties to the conflict but are parties to the treaty. Technically, this would be an easy matter: it would suffice to replace the current text of draft article 8, paragraph 1, with the following: “A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, whether or not it is a party to the conflict, shall notify... of that intention”. Since the State that made this suggestion has said that the Commission “should... consider” this possibility, the Special Rapporteur is submitting the observation in question to the members of the Commission for their consideration.

93. Another comment¹⁰⁶ was that the title of draft article 8 is imprecise: the notification that is the subject of the draft article is not of termination, withdrawal or suspension, but of the intention to terminate, withdraw from or suspend the operation of a treaty. According to the State that made this comment, it is clear that notification in itself cannot terminate or suspend the treaty obligations in question. It is the absence of objections within a given time limit (see para. 88 above) that will trigger this consequence. If an objection has been raised, the issue will remain frozen until a diplomatic or legal settlement is reached. In order to clarify the situation, a fourth paragraph could be inserted into draft article 8; it would be aligned with article 65, paragraph 3, of the 1969 Vienna Convention and would provide as follows:

“If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.”

This text would be preceded by the current paragraph 3 of draft article 8.

94. Draft article 8 has generated a great deal of interest and divided opinion among States, which have formulated other proposals in that regard. For example, one Member State¹⁰⁷ has requested that the right to make a notification within the meaning of draft article 8 should be limited to treaties other than those the subject matter of which, on the basis of draft article 5, involves the implication that they continue in operation. However, as has been noted during the consideration of draft article 5, neither it nor the corresponding list contained in the annex to the draft articles establishes the absolute certainty that would make draft article 8 as restrictive as desired.

95. In conclusion, it is worth noting the wish expressed by one Member State¹⁰⁸ to add, at the end of draft article 8, paragraph 2, wording along the lines of “unless the notice states otherwise” (unless it provides for a “subsequent” date).

¹⁰² Belarus, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 42.

¹⁰³ United Kingdom, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 59; and Greece, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 45.

¹⁰⁴ Greece, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 45.

¹⁰⁵ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 55.

¹⁰⁶ Poland, document A/CN.4/622 and Add.1.

¹⁰⁷ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 57.

¹⁰⁸ United States, document A/CN.4/622 and Add.1.

96. The text of draft article 8 could therefore be improved and clarified to read as follows:

“Notification of intention to terminate, withdraw from or suspend the operation of a treaty

“1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.

“2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.

“3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty. Unless the treaty provides otherwise, the time limit for raising an objection shall be... after receipt of the notification.

“4. If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

“5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as, despite the incidence of an armed conflict, they have remained applicable, pursuant to draft articles 4 to 7.”

I. Obligations imposed by international law independently of a treaty (draft article 9)

97. Draft article 9, which has its roots in article 43 of the 1969 Vienna Convention, provides that the termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty. This text has not given rise to any comments. Paragraph (2) of the commentary to this draft article describes the principle set out in the draft article as “trite”, which has led one Member State¹⁰⁹ to respond that, on the contrary, it is an important principle. The Special Rapporteur proposes to retain the draft article as it is and to replace the words “seems trite” in paragraph (2) of the commentary with the words “seems self-evident”.

J. Separability of treaty provisions (draft article 10)

98. Draft article 10, as adopted by the Commission on first reading, provides as follows:

Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(a) The treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) Continued performance of the remainder of the treaty would not be unjust.

99. It is stated in the commentary that this draft article reproduces verbatim article 44 of the 1969 Vienna Convention, except for paragraphs 4 and 5 of that article, which are of no relevance to the draft articles. Draft article 10 is of some importance in the present context because the partial survival or suspension of a treaty cannot be envisaged in the absence of separability.¹¹⁰ Since the draft article is clearly modelled on article 44 of the Vienna Convention, the Special Rapporteur sees no need to examine its structure further, contrary to the suggestion made by one group of States.¹¹¹

100. One Member State¹¹² has queried the meaning of the word “unjust”, used in draft article 10, subparagraph (c). An answer can be obtained by referring to the deliberations of the United Nations Conference on the Law of Treaties. It was not the Commission that originated article 44, paragraph 3 (c), of the 1969 Vienna Convention and hence draft article 10, subparagraph 3 (c). It was the United States that proposed this text at the Conference, fearing that a State might insist on the termination or invalidity of a treaty by giving an unduly narrow interpretation to the word “separable” in article 44, paragraph 3 (a), and the words “essential basis” in article 44, paragraph 3 (b). As Mr. Kearney, the United States representative, explained:

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.¹¹³

101. This explanation highlights the purpose of the United States proposal, which was to limit the separability of treaty provisions in order to protect the other contracting party or parties. However, the proposal is silent on the meaning of the word “unjust”. The Special Rapporteur believes, nonetheless, that article 44, paragraph 3 (c), of the 1969 Vienna Convention is a sort of general clause that may be invoked if the separation of treaty provisions—to satisfy the wishes of the requesting party—would create a significant imbalance to the detriment of the other party or parties. It thus complements paragraphs 3 (a) (separability with regard to application)

¹¹⁰ Greece, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 43.

¹¹¹ Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 32.

¹¹² Colombia, document A/CN.4/622 and Add.1.

¹¹³ *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11) (United Nations publication, Sales No. E.68.V.7), 41st meeting of the Committee of the Whole, para. 17. For the United States proposal, see A/CONF.39/C.1/L.260, in *ibid.*, *First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (A/CONF.39/11/Add.2) (United Nations publication, Sales No. E.70.V.5), para. 369.

¹⁰⁹ Switzerland, *ibid.*

and 3 (b) (which provides that acceptance of the clause or clauses whose termination or invalidity is requested was not an essential basis of the consent of the other party or parties to be bound by the treaty).

102. Under these circumstances, the Special Rapporteur sees no need to modify the text of draft article 10.

K. Loss of the right to terminate, withdraw from or suspend the operation of a treaty (draft article 11)

103. According to the Commission's commentary, draft article 11 is based on the equivalent provision in the 1969 Vienna Convention, namely article 45. It provides that a State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if it has "expressly agreed" that the treaty remains in force or continues in operation (subpara. (a)) or if it can "by reason of its conduct" be considered as having acquiesced in the maintenance in force of the treaty. The replication of this rule, which has been endorsed explicitly by some States,¹¹⁴ means essentially that a minimum of good faith must remain in times of armed conflict.

104. One Member State¹¹⁵ considers that this rule is "too rigid" and that a State cannot always anticipate the course of an armed conflict and its potential effects on the State's capacity to continue to fulfil its treaty obligations. In addition, the same State has stated its understanding that the circumstances resulting in a State's loss of the right to terminate, withdraw from or suspend the operation of a treaty arise after the armed conflict has produced its effect on the treaty.¹¹⁶ The arguments thus summarized may seem contradictory. The first argument seems to be that the course of armed conflicts is unpredictable and that the States concerned should be able to reconsider their position during the conflict; if this argument were generally accepted, then draft article 11 would become redundant. The second argument, by contrast, seems to be that article 45 of the 1969 Vienna Convention, as replicated in the Commission's draft article 11, means that the situation can be assessed only after the armed conflict has "produced its effect on the treaty" and that draft article 11 may be retained if this point is clarified.

105. In the Special Rapporteur's opinion, the commentary to draft article 11 could specify that the draft article covers positions adopted "after the armed conflict has produced its effect on the treaty", although it would be preferable to replace the words "its effect" with the word "effects", so as not to dilute the normative content of the provision in question too much. A simpler solution would be to suggest, in the commentary, that States refrain from the actions referred to in the draft article until the effects of the conflict on the treaty have become partially clear. The Special Rapporteur prefers the latter solution.

106. According to the same State,¹¹⁷ the Commission should examine the relationship between draft articles 11

and 17. Draft article 17 provides that the draft articles (and hence draft article 11) are without prejudice to termination, withdrawal or suspension on other grounds—agreement of the parties, material breach, impossibility of performance, or fundamental change of circumstances—although this list is not exhaustive. In the Special Rapporteur's opinion, this means that a State may very well decide to invoke—even if it has lost the right to termination, withdrawal or suspension under draft article 11—other grounds set out in the 1969 Vienna Convention. This conclusion is bolstered by the title of draft article 17, which uses the words "other cases", and by the explanation contained in paragraph (1) of the commentary to that draft article ("the reference to 'Other' in the title is intended to indicate that these grounds are additional to those in the present draft articles"). The question, however, seems largely theoretical, particularly in the scenario envisaged in draft article 11, subparagraph (b): it seems unlikely that it can be deduced from the mere "conduct" of the State concerned that its acquiescence in the maintenance of the treaty was based on the incidence of an armed conflict rather than on one of the items listed in draft article 17.

107. Using rather strong language—referring, for instance, to sloppy drafting—another State¹¹⁸ has claimed to have identified a fundamental contradiction: while the title of draft article 11 refers to the right to terminate, withdraw from or suspend the operation of a treaty, no such right is mentioned anywhere else. That, according to the State in question, is a fundamental flaw in the draft articles.

108. The Special Rapporteur believes that to be an overly formalistic point of view. The provisions preceding draft article 11 indicate what States have a right to do and under what conditions it is possible to maintain, terminate, withdraw from or suspend the operation of a treaty. Draft article 8 sets out what States must do and when they may do it. If these provisions do not amount to the definition of a right and the limits on that right, then the Special Rapporteur does not see how they can be characterized. However, if the Commission wished to take into account this criticism, it would suffice to replace, in the title of the draft article, the words "of the right" with "of the option".

109. Draft article 11, with a slight drafting change, would read as follows:

"Loss of the right [of the option] to terminate, withdraw from or suspend the operation of a treaty

"A State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if:

"(a) It has expressly agreed that the treaty remains in force or continues in operation; or

"(b) It can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force."

¹¹⁴ Colombia, document A/CN.4/622 and Add.1.

¹¹⁵ China, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 56.

¹¹⁶ Document A/CN.4/622 and Add.1.

¹¹⁷ See footnote 115 above.

¹¹⁸ Poland, document A/CN.4/622 and Add.1.

L. Resumption of suspended treaties (draft article 12)

110. The resumption of the operation of a treaty suspended as a consequence of an armed conflict is determined in accordance with the indicia referred to in draft article 4: articles 31 and 32 of the 1969 Vienna Convention, the nature and extent of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty (see para. (1) of the commentary). The question of when a treaty is resumed should be resolved on a case-by-case basis (para. (2) of the commentary). *Prima facie*, this provision seems obscure and requires clarification.

111. One important question¹¹⁹ is that of the relationship between draft articles 12 and 18. Draft article 18 provides that the draft articles are without prejudice to the right of States parties to a treaty and to an armed conflict to regulate, subsequent to the conflict, on the basis of a new agreement, the revival of treaties terminated or suspended as a result of the conflict. On this point, it should be noted that draft articles 12 and 18 are indeed closely linked and should be placed close to each other. For the sake of clarity, draft article 18 could first become draft article 12 because, in a sense, it contains the general rule: that, whether a treaty has been terminated or suspended in whole or in part, the States parties may, if they so agree, still conclude an agreement to revive or render operative even agreements or parts thereof that have ceased to exist. This is a consequence of the freedom to conclude treaties. It is also obvious that these are not unilateral decisions.

112. The scope of draft article 12 is narrower: it applies only to treaties that have been suspended in connection with the indicia referred to in draft article 4. Since the treaty in such a case has been suspended at the initiative of one State party—a party to the armed conflict—on the basis of the prescribed indicia, it would appear that, when the armed conflict is over, these indicia cease to apply. As a result, the treaty may or should become operative once again, unless other causes of termination, withdrawal or suspension have emerged in the meantime (see draft article 17), or unless the parties have agreed otherwise. Resumption may be called for by one or more States parties, because it is no longer a matter of an agreement between States, but an initiative that may be taken unilaterally and whose result will depend on compliance with the conditions for resumption set forth in draft article 4—an issue which will be resolved, if necessary, through the available dispute settlement procedures.

113. The foregoing is a brief analysis of the relationship between draft articles 12 and 18, the question of who may take the initiative to resume the operation of a treaty in accordance with draft article 12 and under what conditions,¹²⁰ and the question of how the scope of the two provisions should be defined.¹²¹ The analysis suggests that draft article 18 should be incorporated into draft

article 12¹²² and that the latter should no longer take the form of a “without prejudice” clause.

114. The new draft article 12 (into which draft article 18 would be subsumed) could read as follows:

*“Revival or resumption of treaty relations
subsequent to an armed conflict*

“1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a result of the armed conflict.

“2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in draft article 4.”

M. Effect of the exercise of the right to individual or collective self-defence on a treaty (draft article 13)

115. Draft article 13 is based on article 7 of the above-mentioned resolution of the Institute of International Law,¹²³ which provides as follows:

A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

116. Draft article 13 and article 7 of the resolution of the Institute of International Law have elements in common. Both seek to prevent a situation in which an attacked State, on account of treaties by which it is bound, is deprived of its natural right of self-defence (Article 51 of the Charter of the United Nations). At the same time, the draft article aims to prevent impunity for the aggressor and any imbalance between the two sides, which would undoubtedly emerge if the aggressor, having disregarded the prohibition on the use of force set out in Article 2, paragraph 4, of the Charter, were able at the same time to require the strict application of the existing law and thus deprive the attacked State, in whole or in part, of its right to defend itself. In addition, both provisions seem to imply that suspension relates to agreements between the aggressor and the victim; neither excludes cases—perhaps less likely to occur—of treaties between the State that is the victim of the aggression and third States. On the other hand, the provisions do not cover internal conflicts, since they refer to self-defence within the meaning of Article 51 of the Charter. The third element which they have in common is that they refer only to suspension and not to termination. Lastly, neither provision identifies the treaties that may be suspended, except indirectly, by referring to treaties that are “incompatible” with the exercise of the right of self-defence.

117. The main difference between the two provisions is that article 7 of the resolution of the Institute of International Law states that, at a later stage, the Security Council may, in the exercise of its powers under Article 51 of

¹¹⁹ Raised by Colombia, Poland and Switzerland, *ibid.*

¹²⁰ United Kingdom, statement dated 27 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

¹²¹ Colombia and Switzerland, document A/CN.4/622 and Add.1.

¹²² Colombia, *ibid.*

¹²³ “The effects of armed conflicts on treaties”, pp. 280 and 282.

the Charter of the United Nations, come to the conclusion that the attacked State is in fact the aggressor, and that the fate of the suspended instrument and questions of responsibility that may arise are subject to any consequences of such a determination. The Commission's draft article is silent on this point.

118. Nonetheless, it is clear that there is a close link between draft articles 13 and 14, the latter of which states that the draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations. It is the Council that will ultimately determine the legality of a suspension announced pursuant to draft article 13; it is also the Council that may, in the context of an armed conflict, decide to take coercive measures with regard to the operation of treaties. Under Article 103 of the Charter, the Council's decisions prevail over the other obligations of the States concerned.¹²⁴

119. There is also a close link between draft articles 13 and 15: the former sets out what the attacked State may do, while the latter sets out what the aggressor State may not do; that is, terminate, withdraw from or suspend the operation of a treaty if the effect would be to the benefit of that State. Thus, the two provisions are complementary. This link should be highlighted in the commentaries to draft articles 13 and 15.

120. One Member State¹²⁵ has expressed the view that the draft articles should focus on the law of treaties and the fate of treaties rather than the use of force, self-defence and their consequences. Moreover, this State, citing a previous report of the Commission,¹²⁶ asserts that "the illegality of a use of force [does] not affect the question whether an armed conflict [has] an automatic or necessary outcome of suspension or termination". The Special Rapporteur does not share this point of view entirely. Although it is true, as the Commission states in the quoted passage, that the legality or illegality of the use of force does not automatically or necessarily determine the fate of treaties, this does not mean that it never does so. It is important, in this context, to preserve the right of self-defence in its entirety. Draft article 13 aims to do this by allowing a State that wishes to exercise this right to set aside temporarily, by means of suspension, possible obstacles arising from treaties. Given the relationship between this question and that of the effects of armed conflicts on treaties—a relationship confirmed by the wording of article 7 of the resolution adopted by the Institute of International Law—the Special Rapporteur recommends that draft article 13 be retained.

121. Before continuing consideration of the comments made on draft article 13, the Special Rapporteur wishes to point out that the provision does not cover every detail of the issue: it is silent on the questions of notification and opposition and does not mention time limits or peaceful settlement. This can probably be explained by the fact that the draft article in question does not occupy a key position

in the Commission's text—which, it should be remembered, relates to treaty law—and by the fact that self-defence is an exceptional measure in the context of public international law. The Commission risks exceeding its mandate if it attempts to resolve every aspect of the question. This response applies also to the suggestion¹²⁷ that the issue should be addressed in a more specific manner.

122. Unlike article 7 of the resolution adopted by the Institute of International Law, draft article 13 contains no reference to the Security Council. This is why it has been suggested¹²⁸ that the last phrase of article 7 of that resolution ("subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor") should be added to draft article 13. The Special Rapporteur is not in favour of this suggestion. The question is whether the inclusion of this wording would not contradict the opening phrase of the article, which refers to the exercise of the right of individual or collective self-defence "in accordance with the Charter of the United Nations". Moreover, it might be feared that the proposed addition would be interpreted as recognition of a right of pre-emptive self-defence.

123. That said, it must be admitted that a State that believes it is exercising the right of self-defence is not always actually exercising that right, and that the Security Council may come to the conclusion, at some point, that the State was not acting in self-defence, which will mean that any measures which the State has taken to suspend treaties are no longer legal. It is also possible that the State, although genuinely acting in self-defence, has taken steps to suspend a treaty that were not justified because the treaty in question did not in fact have the effect of restricting the exercise of the right of self-defence or because an unjustified suspension has caused harm to third States. In the Special Rapporteur's view, existing means of peaceful dispute settlement could come into play in such cases.

124. The Commission's attention has been drawn to a point that requires clarification: where suspension is possible because a treaty obligation is incompatible with the exercise of the right of self-defence, this possibility exists only subject to the provisions of draft article 5.¹²⁹ A consequence that would not even be tolerated in the context of armed conflict cannot be accepted in the context of self-defence. However, given that the list annexed to the draft articles in connection with draft article 5 is indicative in nature, and that draft article 5 itself is not applied in isolation,¹³⁰ the effect of a reference to draft article 5 remains uncertain.

125. Similarly, it has been noted that the current draft article 13 suggests that a State exercising the right of self-defence may suspend any treaty provision that may affect that right¹³¹ and that it should be made clear, at least in the commentary, that the right provided for does not prevail

¹²⁴ See paragraph 143 below.

¹²⁵ Portugal, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 19th meeting (A/C.6/63/SR.19), para. 27.

¹²⁶ *Yearbook ... 2007*, vol. II (Part Two), p. 75, para. 308.

¹²⁷ Republic of Korea, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 53.

¹²⁸ Japan, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 39.

¹²⁹ Switzerland, document A/CN.4/622 and Add.1.

¹³⁰ See paragraphs 54 and 59 above.

¹³¹ United States, document A/CN.4/622 and Add.1.

over treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and the law of armed conflict, such as the Geneva Conventions for the protection of war victims. However, it will be recalled that the two categories of rules mentioned appear in the list contained in the annex to the draft articles, to which it is proposed that reference be made in draft article 13. If, for one reason or another, such a reference seems excessive, it may be moved to the commentary to the draft article.

126. The last point, which is a drafting issue, is that the reference to the right to “individual or collective” self-defence in the title of draft article 13 could be deleted, since this point is covered in the body of the draft article.

127. Bearing in mind the aforementioned considerations, draft article 13 could read as follows:

“Subject to the provisions of article 5, a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party and which is incompatible with the exercise of that right.”

N. Prohibition of benefit to an aggressor State (draft article 15)

128. The purpose of draft article 15 is to prevent an aggressor State from using an armed conflict that it has provoked—in spite of the prohibition of the use of force—as an opportunity to free itself from treaty obligations which it finds inconvenient. The provision is based on article 9 of the resolution adopted by the Institute of International Law.¹³² Draft article 15 differs, however, from that article in two respects: (a) it adds withdrawal from a treaty to the measures which the aggressor State is prohibited from taking; and (b) it states that the prohibition with respect to the aggressor State applies in the event of “an armed conflict”.

129. As stated in the previous paragraph, draft article 15 means that an aggressor State may not use an armed conflict which it has itself provoked as an opportunity to free itself from its treaty obligations. The characterization of a State as an aggressor will depend fundamentally on the definition given to the word “aggression” and, in terms of procedure, on the Security Council. If the Council determines that a State wishing to terminate, withdraw from or suspend the operation of treaties—which presupposes that the case has been referred to the Council—is an aggressor, that State may not take those measures or, in any case, may do so only insofar as it does not benefit from them; this latter point may be assessed either by the Council or by a judge or arbitrator. In the absence of such a determination, the State may act under draft articles 4 *et seq.*

130. *Ratione temporis* and *ratione materiae*, the first thing that happens is that aggression is committed. From that time, the State characterized as an aggressor by the attacked State may no longer, under draft article 8, claim the right to terminate, withdraw from or suspend the

operation of treaties, unless it derives no benefit from doing so. As a general rule, it will claim the right anyway, arguing that no aggression has been committed or that its adversary is the aggressor. The situation will therefore remain in limbo until the second stage, which is determination by the Security Council. That action determines what follows: if the State initially considered to be the aggressor turns out not to be, or if it does not benefit from the aggression, the notification that it may have made under draft article 8 will be assessed in accordance with the ordinary criteria established in the draft articles. If, on the other hand, the State is confirmed as the aggressor and has benefited from setting aside its treaty obligations, these criteria are no longer applicable when it comes to determining the legitimacy of termination, withdrawal or suspension.

131. Similarly, it has been commented¹³³ that the current draft article 15 provides that, under certain circumstances, the aggressor State loses the right to terminate a treaty; nonetheless, the consequences of the Security Council’s determining that that State is an aggressor should be specified. As explained in the previous paragraph, such a determination is made by the Council. As to the question of whether the aggressor State benefits from termination, withdrawal or suspension, existing means of peaceful dispute settlement would, where necessary, provide an answer.

132. The principle set out in draft article 15 has been endorsed by a number of Member States.¹³⁴ However, for different reasons, three States¹³⁵ would like to delete the reference to General Assembly resolution 3314 (XXIX), entitled “Definition of aggression”: the first two wish to avoid prejudging possible future developments, such as the outcome of the work of the Special Working Group of the Assembly of States Parties to the Rome Statute of the International Criminal Court on the Crime of Aggression; the third State¹³⁶ has observed that the current draft article 15 emphasizes the law applicable to determination of the aggressor rather than the process to be followed in making that determination. This is why that State has proposed that the beginning of draft article 15 should read as follows: “a State committing an act of aggression as determined in accordance with the Charter of the United Nations shall not terminate...” According to the State in question, this language would have the advantage of averting the risk of unilateral determinations.

133. The Special Rapporteur sees no reason to delete the reference to General Assembly resolution 3314 (XXIX). The resolution was adopted by consensus and the Institute of International Law, which refers to it in article 9 of its resolution, seems to regard it as a generally accepted text. The argument that the current draft article 15 does not take sufficient account of procedural questions is also

¹³³ Japan, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 39.

¹³⁴ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 57; Hungary, *ibid.*, para. 33; Cyprus, 19th meeting (A/C.6/63/SR.19), para. 9; and Iran (Islamic Republic of), 18th meeting (A/C.6/63/SR.18), para. 58.

¹³⁵ El Salvador, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 13; Portugal, 19th meeting (A/C.6/63/SR.19), para. 27; and United States, document A/CN.4/622 and Add.1.

¹³⁶ United States, document A/CN.4/622 and Add.1.

¹³² “The effects of armed conflicts on treaties”, p. 282.

not persuasive, since the draft article refers to the Charter of the United Nations and, thus, to the Security Council. However, if the Commission so wished, the wording set out at the end of the preceding paragraph¹³⁷ could be inserted at the beginning of the draft article, without, however, deleting the reference to resolution 3314 (XXIX). As to the reservations expressed by the other two States,¹³⁸ which have advocated the deletion of the references both to the Charter and to the resolution, there is a risk that this double deletion would make draft article 15 too vague and unusable; moreover, the possibility of future development of the rules on aggression is not a reason to delete the references in question.

134. Another Member State¹³⁹ has commented that, if an aggressor State decides to terminate or suspend the operation of a treaty, a conflict may arise between the relevant provisions of the treaty and draft article 15. The Special Rapporteur considers that, when a State gives notification of termination, withdrawal from or suspension of the operation of a treaty and is then determined as an aggressor, it will be necessary to establish whether it benefits from the termination, withdrawal or suspension. If it does benefit, the notification has no effect unless the treaty in question sets out particular rules in that regard. Such an additional complication is possible but will rarely occur; it could be mentioned in the commentary to draft article 15, accompanied by the preceding explanation.¹⁴⁰

135. According to one Member State, the current draft article 15 contains a drafting error:¹⁴¹ it suggests that, once a State has been determined as an aggressor in a particular conflict, it would then be prevented from terminating, withdrawing from or suspending the operation of a treaty on the outbreak of any armed conflict. In other words, if State Y is determined as an aggressor with respect to State X, it will retain this determination even in the context of a subsequent, entirely different, conflict with the same State or even with a third State Z, which is clearly not the purpose of draft article 15. A similar concern seems to be behind the comment that it should be specified that the “armed conflict” mentioned in draft article 15 must be the result of the aggression referred to at the beginning of the draft article.¹⁴² This objective will be achieved by referring to a “consequence of an armed conflict that results from the act of aggression”.

136. The same Member State has argued that factors other than aggression may become important in prolonged conflicts, which would mean that the benefits that an aggressor State may derive from termination, withdrawal or suspension would not be the result of the

aggression alone. The Special Rapporteur is of the view that this would amount to approval of the aggressor State’s actions; if the principle set out in draft article 15 were immediately qualified, the draft article would lose much of its force.

137. Another State¹⁴³ has asked the Commission to establish a clear distinction between illegal use of force and self-defence. This comment relates to draft article 13 as well as draft article 15. The Special Rapporteur does not believe that the current set of draft articles is the ideal place to distinguish between, and therefore define, the concepts of aggression and self-defence. In addition, General Assembly resolution 3314 (XXIX), referred to in the draft article in question, contains a definition of aggression.

138. Another Member State¹⁴⁴ has expressed the view that the question of the effects of armed conflicts on treaties should be separated from the question of the causes of conflicts (such as aggression and self-defence). This view amounts to support for the deletion of draft articles 13 and 15—in other words, precisely the provisions that aim to introduce a moral dimension to the question of the survival of treaties in cases of armed conflict. The Special Rapporteur sees no need to return to this point.

139. Some States¹⁴⁵ have expressed concern about the question of whether the scope of draft article 15 should be limited to aggression—as it is currently—or whether it would be preferable to expand it to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. Such an expansion is clearly possible, but the Special Rapporteur would prefer to retain the present text of the draft article, which is limited to acts that are punishable under instruments relating to international crimes¹⁴⁶ and that are more or less certain to be considered, and their nature determined, by the Security Council. However, if there were a desire to follow the suggestions made by these States, the first part of draft article 15 would have to be reformulated as follows: “a State using force in violation of Article 2, paragraph 4, of the Charter of the United Nations...”

140. Bearing in mind the above observations, draft article 15 could read as follows:

*“Prohibition of benefit to an aggressor State
[a State that uses force unlawfully]*

“A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations [A State using force in violation of Article 2, paragraph 4, of the Charter of the United Nations] shall not terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict that results from the act of aggression [from the unlawful use of force] if the effect would be to the benefit of that State.”

¹³⁷ United States proposal, *ibid.*

¹³⁸ El Salvador, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 13; and Portugal, 19th meeting (A/C.6/63/SR.19), para. 27.

¹³⁹ China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 57.

¹⁴⁰ In addition, the question arises of whether the rule embodied in draft article 15—consequences of the prohibition of the use of force, which is a rule of *jus cogens*—is not also a rule of *jus cogens*. If that were the case, the relevant special rules in the treaty would not apply and no conflict would arise.

¹⁴¹ Israel, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 34.

¹⁴² Colombia, document A/CN.4/622 and Add.1.

¹⁴³ Iran (Islamic Republic of), *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 58.

¹⁴⁴ Burundi, document A/CN.4/622 and Add.1.

¹⁴⁵ China and Switzerland, *ibid.*

¹⁴⁶ See article 5, paragraph (d), of the Rome Statute of the International Criminal Court, which mentions “the crime of aggression”.

O. The “without prejudice” clauses (draft articles 14, 16 and 17)

141. Draft articles 14, 16 and 17 deal with areas of international law that are on the margins of the rules set out in the draft articles as a whole. Draft article 14 states that the draft articles are without prejudice to decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations. Its function is similar to that of article 8 of the resolution of the Institute of International Law.¹⁴⁷ Draft article 16 provides that the draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality; the resolution does not contain a corresponding clause. Lastly, draft article 17 states that the draft articles are without prejudice to causes of termination, withdrawal or suspension of treaties other than those provided for in the draft articles: agreement of the States parties, material breach, impossibility of performance and fundamental change of circumstances. The Institute’s resolution is silent on this point also.

142. Before we discuss each of these draft articles, it will be noted that they are limited to referring to the existence of other rules that could be relevant in specific situations. There is therefore no need to examine the substance of the rules referred to.

143. Draft article 14 provides that the draft articles are “without prejudice” to the legal effects of decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations. This reference is thus limited to the obligations of States Members arising from Chapter VII; however, it could be extended to all obligations arising from decisions of the Council, since Article 103 of the Charter¹⁴⁸ establishes the primacy of all decisions of the Council, not only those taken under Chapter VII. In paragraph (2) of the commentary to draft article 14, the Commission explains that the reference to Chapter VII has been retained because the context of the draft articles is that of armed conflict.

144. Some States¹⁴⁹ think that Articles 25¹⁵⁰ and 103 of the Charter of the United Nations make draft article 14 superfluous. They are right in the sense that the substantive issue—the compulsory or optional nature of Security Council decisions—is effectively embodied in these two provisions and not in draft article 14. The latter is merely a reference to the provisions in question, in particular the

provision that establishes the primacy of the obligations arising from the Charter.

145. Should a distinction be drawn between decisions of the Security Council relating to self-defence (Article 51 of the Charter of the United Nations; draft article 13) and those relating to aggression (Chapter VII of the Charter)?¹⁵¹ Since Article 51 is part of Chapter VII of the Charter and draft article 14 functions merely as a reference, this does not seem to be essential.

146. To conclude our discussion of draft article 14, let us turn to the suggestion¹⁵² that further “without prejudice” clauses referring to the duty to respect international humanitarian law and human rights should be added to the draft articles. The Special Rapporteur has no strong position on this matter but takes the view that, in the current draft articles, the “without prejudice” clauses could remain limited to collective security, neutrality and the place accorded to the effects of armed conflicts in the context of treaties. He is concerned that the addition of other clauses could “water down” the substance of the draft articles.

147. Pursuant to draft article 16, the draft articles in no way affect the rights and duties of States arising from the laws of neutrality. While one Member State with the status of permanent neutrality¹⁵³ has endorsed the current content of the draft article, another¹⁵⁴ would like a clear distinction to be drawn between relations between belligerent States and those between belligerent States and other States. The Special Rapporteur is willing to draw such a distinction, but is not sure how to do it in the context of draft article 16. A third State¹⁵⁵ would like to know why the exception relating to the laws of neutrality is set out in draft article 16 as a “without prejudice” clause rather than in the indicative list contained in the annex to the draft articles. The response to this question is that, as a status derived from a treaty, neutrality becomes fully operational only on the outbreak of an armed conflict between third States; it is therefore clear that it survives the conflict, since it is precisely in periods of conflict that it is intended to apply. Moreover, the status of neutrality is not always derived from a treaty. Lastly, the question of the applicability of the laws of neutrality does not generally arise in terms of the survival of the status of neutrality but in relation to the specific rights and duties of a State that is neutral and remains neutral; pursuant to draft article 16, these rights and duties prevail over the rights and duties arising from the draft articles.

148. Draft article 17 reserves the right of States, in situations of armed conflict, to terminate, withdraw from or suspend the operation of treaties for reasons other than the outbreak of the armed conflict. Even if a State party cannot or will not terminate a treaty, temporarily or permanently, on account of the outbreak of such a conflict, it

¹⁴⁷ The article provides: “A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution” (“The effects of armed conflicts on treaties”, p. 282).

¹⁴⁸ This article reads as follows: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

¹⁴⁹ Czech Republic, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 83; and Iran (Islamic Republic of), 18th meeting (A/C.6/63/SR.18), para. 58.

¹⁵⁰ Article 25 establishes the following: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

¹⁵¹ Japan, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 39.

¹⁵² Ghana, document A/CN.4/622 and Add.1.

¹⁵³ Switzerland, *ibid.*

¹⁵⁴ Austria, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 16th meeting (A/C.6/63/SR.16), para. 36.

¹⁵⁵ Japan, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 39.

may still invoke other grounds, such as impossibility of performance or a fundamental change of circumstances. It could also be argued that, in the context of some treaties, the outbreak of an armed conflict could also be characterized as a fundamental change of circumstances entailing a temporary or permanent impossibility of performance. As a “without prejudice” clause, draft article 17 has a degree of importance: it states that other grounds for the termination or suspension of treaties remain applicable even when the outbreak of an armed conflict does not entail termination or suspension. From this perspective, draft article 17 may also be seen as a counterbalance to draft article 3, which establishes the principle of non-automatic termination or suspension in the event of armed conflict.

149. It has been suggested¹⁵⁶ that it would suffice to include in the draft articles a general clause referring to other causes of termination, withdrawal or suspension recognized under international law. This is perfectly true, but the current draft article 17, which mentions specific grounds that are particularly relevant in the context of the effects of armed conflicts, perhaps makes the purpose of the draft article clearer than a general and abstract reference would. Another State¹⁵⁷ has proposed that “the provisions of the treaty itself” should be included as another ground, since such an addition would be consonant with the 1969 Vienna Convention (art. 57, subpara. (a)). This proposal could be opposed on the grounds that the list set out in the current draft article 17 is in no way exhaustive and that, therefore, no addition is necessary; on the other hand, such an addition would have the advantage of rounding out subparagraph (a) (agreement of the parties). The Special Rapporteur would be willing to accept this suggestion, if the proposal to replace the current draft article with a general and abstract reference is not adopted. Lastly, a third State¹⁵⁸ has requested a definition of the expressions “material breach” and “fundamental change of circumstances” used in draft article 17, subparagraphs (b) and (d). Since the definitions requested are contained in articles 60 and 62 of the 1969 Vienna Convention, and paragraph (1) of the commentary to draft article 17 refers to those articles, the proposed addition does not seem to be necessary.

150. In the light of the foregoing, the “without prejudice” clauses in the draft articles could read as follows:

“Article 14. Decisions of the Security Council

“The present draft 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.”

“Article 16. Rights and duties arising from the laws of neutrality

“The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.”

“Article 17. Other cases of termination, withdrawal or suspension

“The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*:

- “(a) the provisions of the treaty;
- “(b) the agreement of the parties;
- “(c) a material breach;
- “(d) supervening impossibility of performance;
- “(e) a fundamental change of circumstances.”

[Or a general and abstract formulation:]

“The present draft articles are without prejudice to termination, withdrawal or suspension of operation on other grounds recognized under international law.”

P. Revival of treaty relations subsequent to an armed conflict (draft article 18)

151. This issue has been examined in paragraphs 110 to 114 above, in relation to draft article 12.

Q. Other points raised by Member States and general issues

152. A number of general comments have been made by Member States alongside their positions on specific points. These comments may be grouped into five categories: (a) the quality of the draft articles; (b) the scope of the draft articles; (c) the possible responsibility of States that have provoked a conflict and suspended treaties; (d) the fate of the “without prejudice” clauses; and (e) other questions. We will also come back to the question of whether the outbreak of an armed conflict could or should produce different effects depending on the nature of the conflict (see para. 23 above). In addition, it will be necessary to decide on the final form of the draft articles and the recommendations to be submitted to the General Assembly.

1. QUALITY OF THE DRAFT ARTICLES

153. This section contains fundamental criticisms of the draft articles, including, first of all, that of one State¹⁵⁹ which has questioned whether the topic is ripe for codification and progressive development, and has suggested that a questionnaire on the issue should be circulated to States. In the Special Rapporteur’s view, it is rather late for such a step, and its usefulness would be questionable. While it is true that the rules set out in the draft articles may seem very general, they nonetheless allow for substantial progress in a field which, to date, has proved particularly unamenable to regulation.

154. Another State¹⁶⁰ has requested, at this advanced stage of work, that all national practices, in particular the

¹⁵⁶ Colombia, document A/CN.4/622 and Add.1.

¹⁵⁷ Greece, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 18th meeting (A/C.6/63/SR.18), para. 46.

¹⁵⁸ Cuba, document A/CN.4/622 and Add.1.

¹⁵⁹ Poland, *ibid.*

¹⁶⁰ Argentina, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 22.

decisions of national courts, should be examined or re-examined, that such analysis should not be limited to only a few countries, and that each State should then be invited to endorse the results of the analysis. This proposal would undermine the Commission's mandate and independence. Another Member State¹⁶¹ has expressed the view that the Commission's commentaries focus on doctrine to the detriment of practice. The Special Rapporteur does not share this view, especially as most of the doctrine is concerned precisely with examining practice. The State in question has also requested that State practice should be re-examined and the results reflected in the commentary. The Special Rapporteur feels that it is a little late to start again from scratch, especially as such a step is unlikely to generate new, original conclusions that are fundamentally different from those on which the current draft articles are based.

2. SCOPE OF THE DRAFT ARTICLES

155. Notwithstanding a comment¹⁶² emphasizing, once again, the special status of treaties concerning boundary regimes, the *erga omnes* nature of these treaties and their permanence, as confirmed by the 1969 Vienna Convention (art. 62, para. 2 (a)) and the Vienna Convention on Succession of States in respect of Treaties (art. 11), we will here mention a suggestion¹⁶³ that, once the present draft articles have been completed, consideration should be given to the possibility of extending them to treaties to which international organizations are parties. The Special Rapporteur invites the Commission to take note of this suggestion.

156. Still on the subject of the scope of the draft articles, it will be recalled that one Member State¹⁶⁴ (see para. 120 above) has commented that the scope should be limited to the law of treaties and should not be extended to the law governing the use of force. However, there is no way of separating two subjects that are linked; therefore, the use of force cannot be completely disregarded here (see draft articles 13 to 15).

157. One Member State¹⁶⁵ has expressed concern about the fate of treaties dealing with international transport, such as air agreements. Certainly, many such instruments do not fall within the categories contained in the list annexed to the draft articles, which, as has been said before, is not exhaustive. Their survival may also particularly depend on the nature and extent of the conflict. It is certain, for example, that an interruption of the applicability of this type of agreement is justified for conflicts that cover the whole territory, airspace and territorial waters of a State party, whereas the opposite may be true for more localized conflicts; also, a conflict may escalate the longer it goes on. This is an area where it is particularly difficult to formulate general and abstract rules. It therefore seems preferable to limit the factors to be considered when deciding the fate of the treaties in question to those set out in draft articles 4 and 5.

¹⁶¹ Italy, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 74.

¹⁶² Iran (Islamic Republic of), *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 52.

¹⁶³ Belarus, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 44.

¹⁶⁴ Portugal, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 27.

¹⁶⁵ Ghana, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 2.

3. RESPONSIBILITY OF STATES

158. A question has been raised¹⁶⁶ about the responsibility of a State party to a treaty that has provoked an armed conflict, where the treaty ceases to operate on account of the conflict, and particularly where the other party or parties to the treaty had no desire to terminate or withdraw from it. The same State has also asked whether the extent and duration of the conflict and the existence of a formal declaration of war are factors that should be taken into account with regard to the effects of armed conflicts on treaties. The Special Rapporteur would prefer to retain the current content of draft articles 13 to 15 and not venture to address the question of the international responsibility incurred by the State that provoked the armed conflict. As to the implications of the extent and duration of the conflict when it comes to determining whether a treaty continues to operate, reference will be made to draft article 4. In order to determine what treaty obligations remain in force during and after the conflict,¹⁶⁷ draft articles 3 to 7, 11 and 12 should provide an answer in each case. With regard to the mechanism for the resumption of the operation of suspended treaties,¹⁶⁸ draft article 12, which has been the subject of extensive comments in the present report (see paras. 110–114 above), will be consulted. Lastly, the various aspects of the fate of treaties that put an end to conflicts, as well as the development of peacekeeping mandates and regional integration treaties,¹⁶⁹ seem to fall outside the scope of the topic.

4. "WITHOUT PREJUDICE" CLAUSES

159. As noted by one Member State,¹⁷⁰ if the draft articles do not ultimately take the form of binding rules, the need for the "without prejudice" clauses could be reconsidered. In the Special Rapporteur's opinion, it is premature to decide on this question, but, whatever decision is made, the clauses could remain anyway, since they merely clarify the limits on the application of the material rules set out in the draft articles.

5. OTHER QUESTIONS

160. One Member State¹⁷¹ has commented that the consequences of termination, withdrawal from or suspension of the operation of a treaty, which are covered by articles 70 and 72 of the 1969 Vienna Convention, are not examined anywhere in the draft articles. The Special Rapporteur sees no need to do so because it is so clear that these articles 70 and 72 are applicable by analogy, on the understanding that, if there is a notification followed by an objection (draft article 8), the question of justification of the termination or suspension, and of the objection, itself remains open. In the Special Rapporteur's view, it would suffice to mention the two articles of the Vienna Convention in the commentaries, perhaps in the commentary to draft article 8.

¹⁶⁶ Ghana, statement dated 28 October 2008, available from the Codification Division of the United Nations Office of Legal Affairs.

¹⁶⁷ Argentina, *Official Records of the General Assembly, Sixty-third Session, Sixth Committee*, 17th meeting (A/C.6/63/SR.17), para. 23.

¹⁶⁸ Cyprus, *ibid.*, 19th meeting (A/C.6/63/SR.19), para. 9.

¹⁶⁹ Ghana, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 2.

¹⁷⁰ United States, *ibid.*, 18th meeting (A/C.6/63/SR.18), para. 22.

¹⁷¹ Belarus, *ibid.*, 16th meeting (A/C.6/63/SR.16), para. 43.

161. To conclude, we must return to the fundamental question mentioned in paragraph 23 above, which was raised by one Member State¹⁷² in the context of draft article 2, subparagraph (b), namely whether the same rules apply, without distinction, to both internal and international armed conflicts. Also on the subject of draft article 2, subparagraph (b), the Member State in question has commented that, in principle and except in cases of impossibility of performance (where draft article 17 and article 61 of the 1969 Vienna Convention would apply), a State may not abandon its treaty obligations by reason of an ongoing internal armed conflict.

162. This question and the accompanying observation might suggest that a rule should be added, limiting the right of exemption from treaty obligations to the right to request the suspension of these obligations, since, usually in this type of conflict, the actual existence of the State that is bound by the obligations is not in question, even

¹⁷² China, *ibid.*, 17th meeting (A/C.6/63/SR.17), para. 53, and document A/CN.4/622 and Add.1.

if the rebel side prevails. A rule to this effect could read as follows: “A State engaged in non-international armed conflict may request only the suspension of treaties to which it is a party”, and it could be incorporated into draft article 8. Of course, if the conflict resulted in permanent impossibility of performance or a fundamental change of circumstances (arts. 61 and 62 of the 1969 Vienna Convention), a State could, on those grounds, call for the total or partial termination of the treaty under draft article 17.

163. For the moment, the Special Rapporteur will refrain from making any specific proposal and invites the members of the Commission to give their opinions on the matter.

R. Form to be given to the draft articles

164. In due course, the Commission will have to consider the form to be given to the draft articles and the recommendations to be submitted to the General Assembly. The time has not yet come, as a number of important points are still outstanding.