

# EFFECTS OF ARMED CONFLICTS ON TREATIES

[Agenda item 4]

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## Note on the recommendation to be made to the General Assembly about the draft articles on the effects of armed conflicts on treaties, by Mr. Lucius Cafisch, Special Rapporteur

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### Multilateral instruments cited in the present document

	<i>Source</i>
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, Nos. 970-973, pp. 31 <i>et seq.</i>
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV)	<i>Ibid.</i> , No. 973, p. 287.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.

#### A. The types of recommendations the Commission may make

1. The International Law Commission's main activities unquestionably are the progressive development of international law and its codification.<sup>1</sup> These activities include the preparation of draft conventions.<sup>2</sup> The preparation of such conventions is not an immutable objective, as is shown by article 23 of the Commission's statute.

2. Under that provision, the Commission may make the following types of recommendations to the United Nations General Assembly:<sup>3</sup>

<sup>1</sup> International Law Commission statute, arts. 15–24.

<sup>2</sup> *Ibid.*, art. 15.

<sup>3</sup> On the whole issue, see *The Work of the International Law Commission*, vol. I, 7th ed., United Nations, New York, 2007, pp. 48–49.

– To take no action, the Commission's report having been published already;

– To take note of or adopt the Commission's report by resolution;

– To recommend the draft articles to Members with a view to negotiating and concluding a general convention;

– To convoke a conference to elaborate a convention.

The difference between the last two possibilities seems to be that in the former case the initiative is taken by Member States, whereas in the latter the initiative belongs to the Organization.

3. In practice, however, intermediary types of recommendations have emerged. In certain situations, the

Commission has at least partly moved away from the convention pattern. It has done so where the nature of the “product” so warranted, e.g. the draft statute for an international criminal court<sup>4</sup> asked for by the General Assembly. In other instances, the Commission resolved that the result of its work was not to take the form of a convention because of its limited scope or for other reasons. This was the case for the second part of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law,<sup>5</sup> for the guiding principles applicable to unilateral declarations of States capable of creating legal obligations,<sup>6</sup> and for the conclusions of the Study Group on the fragmentation of international law,<sup>7</sup> which the Commission asked the General Assembly to “endorse” or which it “commended to the attention” of the Assembly. Regarding the nationality of natural persons in relation to the succession of States,<sup>8</sup> the Commission suggested that the draft articles “be adopted in the form of a declaration”.<sup>9</sup>

4. In two recent instances, the Commission has formulated very specific and special proposals. Regarding the international responsibility of States (2001), it recommended that the General Assembly “take note” of its draft articles on responsibility of States for internationally wrongful acts,<sup>10</sup> annex them to its resolution 56/83 of 12 December 2001, and envisage the convocation of a conference at a later stage. Concerning the draft articles on transboundary aquifers (2008),<sup>11</sup> the Commission suggested that the General Assembly take note of its draft articles and append them to its resolution; that it recommend them to Members “without prejudice” to their future adoption in treaty or any other appropriate form; that it encourage Members to conclude bilateral or regional treaties; and that it place this item on the agenda of its next session with a view to having it examined and, in particular, to discussing the form to be given to the draft articles.<sup>12</sup>

5. These are welcome developments. While it remains true that the preparation of conventions for the progressive development of international law and for its codification is and must remain one of the main objectives of the Commission’s activity, the focus on convention-making seems inappropriate, for instance, when the Commission has elaborated “guidelines” or codes of conduct, i.e. texts of an advisory character, or when a text has not been prepared by the Commission as a whole, as was the case for the principles on fragmentation, or possibly also when, on account of a variety of circumstances, it appears that States would not be overly keen to adopt a general convention on the matter. In such cases, a failed attempt to conclude a codification treaty might cause considerable harm, whereas a more circumspect approach—such as that followed by the Commission in respect of the international responsibility of States—may prove far more effective.

<sup>4</sup> *Yearbook ... 1994*, vol. II (Part Two), p. 26, para. 91.

<sup>5</sup> *Yearbook ... 1998*, vol. II (Part Two), p. 21, para. 55.

<sup>6</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 161, para. 176.

<sup>7</sup> *Ibid.*, p. 177, para. 251.

<sup>8</sup> *Yearbook ... 1998*, vol. II (Part Two), p. 19, para. 47.

<sup>9</sup> *Ibid.*, para. 44.

<sup>10</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

<sup>11</sup> *Yearbook ... 2008*, vol. II (Part Two), p. 19, para. 53.

<sup>12</sup> *Yearbook ... 2010*, vol. II (Part Two), para. 375.

## B. The draft articles on the effects of armed conflicts on treaties

6. In the Special Rapporteur’s view, the greater part of the draft articles, as adopted on second reading<sup>13</sup> on 17 May 2011,<sup>14</sup> find their origin or justification in rules belonging to related fields of international law (law of treaties, law relating to the use of force). This suggests that many of the draft’s provisions should be non-controversial; this is not true, however, of the core of the draft, namely, draft articles 1 to 7 and the annex. To this one should add that, unlike the 1985 resolution of the Institute of International Law on the Effects of Armed Conflicts on Treaties,<sup>15</sup> the present text extends to *internal conflicts*—a largely untouched domain calling for the progressive development of the law rather than codification.

## C. Analysis

7. At least part of the field—the effects of *international* armed conflicts—has been well travelled by both practitioners and academics. If the subject had been limited to that aspect, a codification of the relevant rules might have been possible—but perhaps of little interest.

8. To this, it must be added that the Commission’s draft articles contain a large number of *procedural prescriptions* and references to *rules in other areas of international law* which also appear largely accepted and, therefore, would seem to suggest the conclusion of a treaty. It could furthermore be argued that draft article 3, which states that the existence of an armed conflict does not *ipso facto* terminate or suspend treaty rights and obligations, together with the criteria and categories indicated in articles 4 to 7 and the annex, could provide a solid basis for such a conventional instrument.

9. A third reason for envisaging the convocation of a conference is the eternal quest for stability of international law. This is particularly true regarding the relationship between treaties and armed conflicts—of which there are a sizeable amount at the present time. A further indication favouring the conclusion of a general convention is that in situations of armed conflict, it is the innocent bystanders—the civilians—who are likely to suffer most. To protect them, the Geneva Convention relative to the Protection of Civilian Persons in Time of War was concluded; and it would appear desirable to ensure the survival of the rights enjoyed by them as a result of the treaties concluded by their State, or the speedy restoration of these rights once the conflict is over. These objectives might best be served by a general convention, which would make it possible to preserve a maximum of the peacetime *status quo*, to restore such a status speedily, and to protect the rights of individuals from neutral States.

10. There are also arguments, however, which suggest that no conference should be planned for the immediate future.

<sup>13</sup> *Yearbook ... 2011*, vol. II (Part Two), para. 100.

<sup>14</sup> *Ibid.*, vol. I, 3089th meeting.

<sup>15</sup> Institute of International Law, *Yearbook*, Session of Helsinki, 1985, vol. 61, Part II, p. 278.

11. A first argument against the immediate holding of a codification conference is that the Commission's draft articles are not limited to the impact of *international* armed conflicts on treaties, but cover *internal* conflicts as well. While there may have been in the past non-international conflicts which generated some practice regarding their effects on treaties, it could be difficult to identify a firm and coherent body of rules on that issue. Whatever may have been said and done in this respect needs strengthening by the progressive development of international law. It seems unlikely that at the present time a large majority of States would be prepared to accept an extension of the existing rules on international conflicts to non-international ones.

12. Armed conflict—international or not—is a cause of anxiety and stress for the States involved. They may find it difficult—except, possibly, in the realm of international humanitarian law—to submit to legal rules regarding the fate of their treaties, especially if they are required to do so *beforehand*.

13. In situations of internal conflict, the question of their effects on treaties arises between the belligerent State and a third country toward which it has treaty obligations. Such situations are not unlike those where, on account of a temporary impossibility of performance or a fundamental change of circumstances, treaties come to an end or are suspended (articles 61 and 62 of the Vienna Convention on the Law of Treaties). To be sure, there will be situations where the belligerent State will be at least temporarily unable to perform some of its treaty obligations *on account of the conflict* (e.g. the granting of landing rights on airports that have fallen into rebels' hands). But will third States be prepared to accept, in advance, rules which make it easier for States participating in an internal conflict to terminate or suspend their treaty obligations?

14. The example of the draft articles on responsibility of States for internationally wrongful acts shows that the "success" of a set of draft articles is not contingent upon an immediate attempt at transforming that draft into treaty law. What is more, any failure of such an attempt—through the absence of any agreement at all, or an insufficient number of ratifications—may discredit the work of the Commission on the subject. The authority of the latter's work will be undermined by a failure to reach an agreement because the terms on which agreement was sought proved unacceptable; and they did prove unacceptable—this would be the inference—because the Commission did not do its work properly. This is not, of course, the only reason to oppose the conclusion of a convention. As has been pointed out (see para. 12 above), States may be reluctant to limit their freedom of action in time of conflict by subscribing rules on the continuity or otherwise of their treaty rights and obligations.

15. Mindful of these reasons, and the necessity not to jeopardize the work on the effects of armed conflicts on treaties, the Special Rapporteur encourages the Commission to move cautiously, as it did for the draft articles on responsibility of States for internationally wrongful acts, and to request the United Nations General Assembly to: (a) take note of the draft articles on the effects of armed conflicts on treaties and to append them to its resolution; and (b) suggest the convocation of a diplomatic conference at a later stage.

16. This prudent way of approaching the matter may enable Member States to familiarize themselves with the issues examined and the rules proposed and, above all, to convince themselves that the adoption of a set of treaty provisions on the matter examined by the Commission is both necessary and in their best interest. Moreover, the absence of such provisions at the present time will not bar the actors—States and their courts—from applying as of now the rules elaborated by the Commission.