

EFFECTS OF ARMED CONFLICTS ON TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/L.721

Note by the Chairperson of the Working Group on effects of armed conflicts on treaties: Draft article 8

[Original: English]
[5 May 2008]

CONTENTS

	Paragraphs	Page
INTRODUCTION	1–2	99
I. SITUATIONS COVERED BY THE DRAFT ARTICLES	3–4	99
II. REFERENCES TO BE RETAINED IN DRAFT ARTICLE 8	5–15	100
A. The references to articles 42, 43 and 45 of the 1969 Vienna Convention.....	5–7	100
B. The reference to article 44 of the 1969 Vienna Convention.....	8–15	100
III. CONCLUSION: POSSIBLE SOLUTIONS	16–18	101

Introduction

1. The present Note is not in the nature of a report. It is a summary examination of the problems inherent in draft article 8 of the draft articles, intended to present to the Working Group some reflections on how these problems could be solved. As things stand (see third report of the Special Rapporteur,¹ Annex), draft article 8 of the draft articles runs as follows:

Draft article 8: Mode of suspension or termination

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

¹ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578, annex.

2. Draft article 8 seeks to answer the question of whether articles 42 to 45 of the Vienna Convention on the law of treaties² (hereinafter the 1969 Vienna Convention) should apply in the context of the present draft articles, and the present Note only covers that question. The issue of notification, addressed by articles 65 and following of the 1969 Vienna Convention, is dealt with in the Special Rapporteur's fourth report³ which, at paragraphs 43–47, offers three options.

² Signed in Vienna, 23 May 1969 (United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331).

³ Document A/CN.4/589, reproduced in the present volume.

I. Situations covered by the draft articles

3. The present version of the articles basically covers three types of situations:

(a) international armed conflicts involving all or several of the parties to a treaty or one of them;

(b) internal armed conflicts susceptible of affecting the performance of a treaty by the State party to the conflict;

(c) international or internal armed conflicts involving one or several States members of an international

organization which, on account of such a conflict, may experience difficulties in performing some of the obligations established by the organization's constitutive treaty or related agreements.

The last-mentioned instruments would seem to be within the purview of the present draft, unlike treaties concluded by international organizations.

4. The third hypothesis is not of central importance. If it were to arise, one could say that separability rather than withdrawal from or suspension of the whole treaty for the States concerned should be the rule; in addition,

the fate of treaty obligations in that context is likely to be determined by the treaty itself. The second hypothesis comes close to the situation envisaged in article 62 of the 1969 Vienna Convention (fundamental change of circumstances), so that a reference to articles 42–45 does not appear wholly absurd. The essential problem arises in the first hypothesis, i.e. situations involving all or several States parties to a treaty whose relations are perturbed by armed conflict. It is here that the problem of the applicability of articles 42–45 of the Vienna Convention, especially of article 44 (separability of treaty provisions), arises in acute form. That problem can be approached and solved by a process of elimination.

II. References to be retained in draft article 8

A. The references to articles 42, 43 and 45 of the 1969 Vienna Convention

5. As far as article 42 of the 1969 Vienna Convention is concerned, one should point out immediately that article 73 of that same Convention prescribes that the provisions of the latter “shall not prejudice any question that may arise in regard to a treaty ... from the outbreak of hostilities between States”. Whatever may be the precise meaning of “hostilities”, it is evident that article 73 excludes the effects of armed conflicts on treaties from the purview of the Vienna Convention. Therefore, one cannot say, as is done in article 42, paragraph 2, that “the termination of a treaty, its denunciation or the withdrawal of a party may take place only as a result of the application of the provisions of the treaty or of the present [Vienna] Convention”, or one may do so only in the framework of the Vienna Convention, but not in that of separate articles on the effects of armed conflicts on treaties. In other words, article 42 is not relevant in the present context, which is why it should not be mentioned in the future draft article 8 of the draft articles.

6. Under article 43 of the 1969 Vienna Convention, the termination of a treaty, withdrawal and the suspension of its operation, as a result of “the application of the present Convention” or of the provisions of the treaty “shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty”. This provision reflects a rule of general international law which applies even in the absence of article 43; but there was certainly no harm in including it in the Vienna Convention. Nor would there be any harm in restating it in the draft articles on the Effect of Armed Conflicts on Treaties, were it not for the phrase “as a result of the application of the present Convention”. This is why, if the future draft article 8 of the draft articles is to embody a reference to article 43, it would be prudent to add to the reference the expression “*mutatis mutandis*” or language to a similar effect.

7. Article 45 appears relevant: if a State expressly agrees that a treaty remains in force or continues to operate, or if that treaty must be considered as being maintained by reason of that State's conduct despite the outbreak of an armed conflict, there is no reason not to recognize that such circumstances deprive the State concerned of the right to terminate

or suspend the treaty or to withdraw from it. Accordingly, a reference to article 45 seems possible unless the third option proposed on page 20 of the Special Rapporteur's fourth report is retained. Moreover, the inclusion of the words “*mutatis mutandis*” seems appropriate since the scope of article 45 is limited to the grounds of invalidation, termination, withdrawal or suspension listed in articles 45–50 and 50–52, respectively, of the Vienna Convention.

B. The reference to article 44 of the 1969 Vienna Convention

8. It now remains to examine the problems connected with article 44 of the 1969 Vienna Convention (separability). Here again, one may proceed by elimination.

9. Article 44, paragraphs 1 and 2, establish a principle or presumption of non-separability. As the Special Rapporteur points out in his fourth report, armed conflicts are cataclysmal events in the life of treaties, certainly more so than other grounds of termination, withdrawal or suspension. Accordingly, and *a fortiori*, the principle of non-separability should be retained in the context of armed conflict as well. In other words, draft article 8 of the draft articles may include a reference to article 44, paragraphs 1 and 2 of the 1969 Vienna Convention.

10. Article 44, paragraph 5 of that Convention concerns the specific grounds set forth in articles 51–53 (coercion of State representative, coercion of State, conflict with existing *jus cogens*). This has nothing to do with the effect of armed conflicts on treaties, which is why no reference should be made to that provision.

11. The same situation prevails in respect of article 44, paragraph 4 of the 1969 Vienna Convention, which relates to the specific grounds set forth in articles 49 and 50 of that instrument (fraud, corruption of a representative of a State). This being the case, no mention of article 44, paragraph 4 should appear in draft article 8 of the draft articles.

12. It now remains to examine article 44, paragraphs 3 of the 1969 Vienna Convention, which allows Contracting States to terminate, suspend, or withdraw from a treaty only with respect to particular clauses if all the following conditions are met: (a) the ground of termination, suspension

or withdrawal exclusively relates to a particular clause, or particular clauses, of the treaty (article 44, paragraph 3, chapeau); (b) the clause or clauses are separable from the remainder of the treaty with regard to their application; (c) the clause(s) to be terminated, suspended or withdrawn from were not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (d) the performance of the treaty's surviving clauses would not be unjust.

13. A first question to be raised is whether the outbreak of an armed conflict can affect only a particular clause, or particular clauses, of a treaty. That this is possible can be shown by taking the example of a treaty on boundaries and a boundary regime between two States now at war: the boundary provisions undoubtedly survive, whereas the boundary regime will at least be suspended. Similarly, part at least of a treaty will survive in situations where only one of the contracting parties is involved in the armed

conflict. The same is true for States parties so involved which are members of international organizations. Here, in fact, things are "the other way around": the organization's constitutive treaty and related agreements survive, also for belligerent States (see the Iraq/Islamic Republic of Iran war), but the belligerents may have become unable to meet certain treaty obligations.

14. So, although armed conflicts are cataclysmic in nature, it seems possible that treaty clauses survive if the parties so agree despite the conflict, or if the cumulative conditions of article 44, paragraph 3 are met.

15. The conditions listed in article 44, paragraph 3, will have to be interpreted taking account of the specific circumstances of the case. The question of how to interpret these conditions is beyond the scope of this Note. But it can certainly not be said that they are wholly irrelevant when it comes to gauging the effects of armed conflicts on treaties.

III. Conclusion: Possible solutions

16. The brief examination in this Note shows:

(a) that no reference should be made to article 42 of the 1969 Vienna Convention;

(b) that a reference to article 43 of the 1969 Vienna Convention is possible if the words "*mutatis mutandis*" are added;

(c) that reference can be made to article 45 of the 1969 Vienna Convention, also adding the words "*mutatis mutandis*", provided that the language to be used in matters of notification is not borrowed from article 45 (option 3 in the Special Rapporteur's fourth report⁴); and

(d) that regarding article 44 of the 1969 Vienna Convention, reference may be made to paragraphs 1 to 3 but not paragraphs 4 and 5.

17. On the basis of the above conclusions, the following options could be discussed:

(a) *Option A*—No reference to articles of part V, section 1, of the 1969 Vienna Convention. The rationale of this option would be that it is not necessary to say

⁴ If that option were chosen, the language of article 45 to be used in a possible new provision on notification would have to be adapted as well as by eliminating the references to articles 45–50, 60 and 62 of the 1969 Vienna Convention.

everything in the draft articles, the drawback being, of course, that the question of separability would be eluded;

(b) *Option B*—Inclusion in the draft articles of a provision fully reproducing the (adapted) provisions of articles 43; 44, paragraphs 1–3; and 45 (unless the language of article 45 is used for the article on notification). Advantages: greatest possible clarity, especially about separability. Drawback: relative complexity;

(c) *Option C*—Language along the lines of draft article 8 of the draft articles as presented in the Special Rapporteur's third report⁵ and reference to articles 43 (*mutatis mutandis*); 44, paragraphs 1–3; and 45 (*mutatis mutandis*), unless the latter's language is used in the article on notification.⁶ Advantages: relative clarity, in particular, on the issue of separability; relative simplicity. Drawback: the clarity is not complete.

18. In the context of options B and C, it would be desirable entirely to separate the reference to part V, section 1, of the 1969 Vienna Convention from the issue of notification.

⁵ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578, Annex, p. 66. Perhaps that language ought to be modified somewhat. The expression "mode of suspension or termination" ("withdrawal" should be added) could be changed into "modes".

⁶ "*Mutatis mutandis*" could also be used so as to apply to all the references made in draft article 8. And if recourse to such language in the body of the article were regarded as cumbersome, qualifications could be formulated in the commentary on draft article 8.