Chapter VII

EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Introduction

266. The Commission, at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work.[328] A brief syllabus describing the possible overall structure and approach to the topic was annexed to the report of the Commission to the General Assembly on the work of that session.[329] In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

267. During its fifty-sixth session (2004), the Commission decided, at its 2830th meeting, on 6 August 2004, to include the topic "Effects of armed conflicts on treaties" in its current programme of work, and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic.[330] The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

268. At its fifty-seventh (2005) and fifty-eighth (2006) sessions, the Commission had before it the first[331] and second[332] reports of the Special Rapporteur, as well as a memorandum prepared by the Secretariat entitled "The effects of armed conflict on treaties: an examination of practice and doctrine".[333] At its 2866th meeting, on 5 August 2005, the Commission endorsed the Special Rapporteur's suggestion that the Secretariat be requested to circulate a note to Governments requesting information about their practice with regard to this topic, in particular the more contemporary practice, as well as any other relevant information.[334]

B. Consideration of the topic at the present session

269. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/578). The Commission considered the Special Rapporteur's report at its 2926th to 2929th meetings, from 29 May to 1 June 2007.

270. At the 2928th meeting, on 31 May 2007, the Commission decided to establish a working group, under the chairpersonship of Mr. Lucius Caflisch, to provide further guidance regarding several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report. At its 2946th meeting, on 2 August 2007, the Commission adopted the report of the Working Group (see section C below).

271. Also at the 2946th meeting, the Commission decided to refer to the Drafting Committee draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, together with the guidance in subparagraph (1) (*a*) to (1) (*d*) of paragraph 324 below containing the recommendations of the Working Group (see section C below), as well as draft article 4, as proposed by the Working Group.

272. The Commission also approved the recommendation of the Working Group that the Secretariat circulate a note to international organizations requesting information about their practice with regard to the effect of armed conflict on treaties involving them.

1. General remarks on the topic

(a) *Introduction by the Special Rapporteur*

273. The Special Rapporteur briefly recapitulated the circumstances of the consideration of his first and second reports.[335] It was pointed out that the first report continued to be the foundation for the subsequent reports, and that all three reports had to be read together. He recalled that he had proposed an entire set of draft articles as a package so as to present a comprehensive scheme. However, there was no intention to produce a definitive and dogmatic set of solutions. Moreover, a portion of the articles was deliberately expository in character.

274. The Special Rapporteur recalled that the overall goals of his reports were to: (*a*) clarify the legal position; (*b*) promote the security of legal relations between States, through the assertion in draft article 3 that the outbreak of an armed conflict does not as such involve the termination or suspension of a treaty; and (*c*) possibly stimulate the appearance of evidence concerning State practice.

275. The Special Rapporteur referred to the problem of sources, particularly the problem of the significance of State practice. Having surveyed the available legal sources, there were two different situations: (*a*) treaties creating permanent regimes which did have a firm base in State practice; and (*b*) legal positions which had a firm basis in the jurisprudence of municipal courts and executive advice to courts but were not supported by State practice in the conventional mode. In the view of the

[328] *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

[329] *Ibid*., Annex, p. 135.

[330] *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

[331] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

[332] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

[333] Document A/CN.4/550 and Corr.1–2 (mimeographed; available on the Commission's website, documents of fifty-seventh session).

[334] *Yearbook ... 2005*, vol. II (Part Two), p. 27, para. 112.

[335] See footnotes 331 and 332 above.

Special Rapporteur, it seemed inappropriate to insist that the categories of treaties listed in the second paragraph of draft article 7 should all constitute a part of existing general international law. Furthermore, as regards the question of the evidence of State practice, it was noted that the likelihood of a substantial flow of information from States was low,[336] and that the identification of relevant State practice was unusually difficult. It often was the case that some of the modern State practice which was sometimes cited referred for the most part to the different questions of the effects of a fundamental change of circumstances or to that of the supervening impossibility of performance of the treaty and was accordingly irrelevant. Furthermore, the Special Rapporteur reiterated his position that, in view of the uncertainty as to sources, it was more than usually pertinent to refer to considerations of policy.

276. In terms of the Commission's working methods, the Special Rapporteur proposed the establishment of a working group in order to consider a number of key issues on which the taking of a collective view was necessary.

(b) *Summary of the debate*

277. Some members identified several issues regarding the general approach taken in the draft articles for further consideration. These included: the continued reliance on the criterion of intention throughout the draft articles; the proposed reliance on a list of categories of treaties presumed to continue in operation during armed conflict, without a clear indication of the criteria applied in drawing up the list; the need for further consideration of all aspects of the effects that the prohibition of the threat or use of force would have on treaties; the idea that the topic is primarily a matter of the law of treaties; and the exclusion of non-international armed conflicts. It was further suggested that several distinctions be drawn, for example, between parties to an armed conflict and third States, including neutral States; between States parties to a treaty and signatories; between treaties in force and those which have been ratified by an insufficient number of parties; between treaties concluded between the States themselves or between those States and international organizations that the States parties to a conflict are members of; between the effects on specific provisions of a treaty as opposed to the entire treaty; between situations of suspension and situations of termination of treaties; between the effects concerning international conflicts and internal conflicts, between the effects on treaties of large-scale conflicts as opposed to those of small-scale conflicts; and between the effects on bilateral treaties as opposed to multilateral treaties, especially those multilateral treaties which were widely ratified.

278. The Secretariat was again commended for the memorandum on the topic it submitted to the Commission in 2005.[337]

[336] No response had been received to a note from the Secretariat, circulated to Governments in 2005 upon the request of the Commission, seeking information about their practice, particularly contemporary practice, on the topic. See footnote 334 above.

[337] See footnote 333 above.

2. Comments on draft articles

Article 1. Scope[338]

(a) *Introduction by the Special Rapporteur*

279. The Special Rapporteur recalled that draft article 1 had not caused much difficulty in the Sixth Committee. He was of the view that such suggestions to expand the scope of the topic to include treaties entered into by international organizations failed to consider the difficulties inherent in what was a qualitatively different subject matter.

(b) *Summary of the debate*

280. Support was expressed for the inclusion of international organizations within the scope of the topic. Issue was taken with the Special Rapporteur's position that the inclusion of international organizations would amount to an expansion of the topic, since the subject did not automatically imply that it was restricted to treaties between States. Nor was it considered as necessarily being too complex a matter to take on in the context of the Commission's consideration of the topic. It was noted that, given the increased numbers of treaties to which international organizations were parties, it was conceivable that such organizations could be affected by the termination or suspension of a treaty to which they were a party as a result of the use of force.

281. Other members agreed with the Special Rapporteur's reluctance to include international organizations within the scope of the topic, for the practical reasons he mentioned. It was noted that separate conventions had been developed for the law of treaties, and that the Commission was following that exact pattern with regard to the topic of responsibility of international organizations. In terms of a further suggestion, any decision on such expansion of the scope of the topic could be postponed until the work on the topic had been developed further.

282. As regards the position of third States, it was suggested that if any special rule existed with regard to the termination or suspension of a treaty in case of outbreak of hostilities, such rule would likely affect only the relation of a State which is a party to an armed conflict with another State which is also a party to that conflict. As a matter of treaty law, an armed conflict which a State party to a treaty may have with a third State would only produce the consequences generally provided by the 1969 Vienna Convention, in particular fundamental change of circumstances and the supervening impossibility of performance.

283. As to the suggestion that the draft articles cover treaties being provisionally applied between parties, some members expressed doubts about the Special Rapporteur's view that the matter could be resolved through the application of article 25 of the 1969 Vienna Convention.

[338] Draft article 1 reads as follows:

"*Scope*

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

Article 2. Use of terms[339]

(a) *Introduction by the Special Rapporteur*

284. In introducing draft article 2, the Special Rapporteur emphasized the fact that the definitions contained therein were, under the express terms of the provision, "for the purposes of the present draft articles". Subparagraph (*a*) contained a definition of the term "treaty", based on that found in the 1969 Vienna Convention. The provision had not given rise to any difficulties. On the contrary, the definition of "armed conflict" in subparagraph (*b*) had been the subject of much debate. There had been an almost equal division of opinion both in the Commission and in the Sixth Committee on, for example, the inclusion of internal armed conflict. In addition, he noted that part of the difficulty was that the policy considerations pointed in different directions. For example, it was unrealistic to segregate internal armed conflict strictly speaking from other types of internal armed conflict which in fact had foreign connections and causes. At the same time, such an approach could undermine the integrity of treaty relations by expanding the possible factual bases for alleging that an armed conflict existed for the purposes of the draft articles and with the consequence of the suspension or termination of treaty relations.

(b) *Summary of the debate*

285. General support existed for the definition of "treaty" in subparagraph (*a*).

286. As regards the definition of "armed conflict" in subparagraph (*b*), views continued to be divided. Support existed among several members for the express inclusion of non-international armed conflicts. It was noted that their frequency and intensity in modern times, and the fact that they may have effects on the operation of treaties between States, militated in favour of their inclusion. Including such conflicts would enhance the practical value of the draft articles. It was noted that such an approach would be commensurate with recent trends in international humanitarian law which tended to de-emphasize the distinction between international and non-international armed conflicts. Support was expressed for a definition of "armed conflict" which encompassed military occupations. A definition, based on the formulation in the *Tadić* case[340] as well as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, was preferred.

287. Other members preferred to confine the definition exclusively to international or interstate conflicts. It was noted that such an approach would maintain consistency with how the phrase was used in draft article 1. It was suggested that the guiding criteria was whether internal conflicts by their nature were likely to affect the operation of treaties between a State party in which the conflict took place and another State party or a third State, as opposed to the frequency of internal conflicts. While it was conceded that some examples of such an impact might exist, it was doubted whether those constituted significant State practice or established doctrine. The view was also expressed that there existed a qualitative difference between international armed conflicts and non-international armed conflicts. It was also noted that it was not feasible to deal with all conflicts, international and internal, in the same manner. Instead, the focus could be on considering the relationship between the application of treaties involving States in which internal conflicts take place and other obligations that States might have, in particular the obligation of neutrality towards States involved in conflicts.[341] One should also consider the relationship between obligations created under a treaty and other obligations.

288. It was further suggested that a possible compromise could be found in a provision similar to that contained in article 3 of the 1969 Vienna Convention, dealing with international agreements not within the scope of that Convention. It was also noted that the phrase "state of war" was outmoded, and could be replaced with "state of belligerency". Another suggestion was that the definition should not cover "police enforcement" activity.

Article 3. Non-automatic termination or suspension[342]

(a) *Introduction by the Special Rapporteur*

289. The Special Rapporteur pointed out that two alterations to the text had been made in the third report: (1) the title had been changed; and (2) the phrase "*ipso facto*" had been replaced by "necessarily". It was recalled that the provision remained central to the entire set of draft articles, and that it was based on the resolution adopted by the Institute of International Law in 1985.[343] It was noted that the majority of the delegations in the Sixth Committee had not found draft article 3 to be problematical.

(b) *Summary of the debate*

290. There was general recognition among members of the importance of the doctrine of continuity in draft

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[339] Draft article 2 reads as follows:

"*Use of terms*

"For the purposes of the present draft articles:

"(*a*) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

"(*b*) 'armed conflict' means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict."

[340] *Prosecutor* v. *Duško Tadić, Case No. IT-94-1-A, Judgement of 15 July 1999*, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 84:

"It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State" (*Judicial Supplement No. 6*, June/July 1999. See also ILM, vol. 38 (1999), p. 1518).

[341] See the case of the *SS "Wimbledon"* (footnote 148 above).

[342] Draft article 3 reads as follows:

"*Non-automatic termination or suspension*

"The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

"(*a*) between the parties to the armed conflict;

"(*b*) between one or more parties to the armed conflict and a third State."

[343] See *Institute of International Law*, *Yearbook,* vol. 61 (1986), Session of Helsinki (1985), Part II, pp. 278–283.

article 3 to the entire scheme of the draft articles. It was suggested that draft article 3 be presented more affirmatively by, for example, reformulating the provision as follows: "[i]n general, the outbreak of an armed conflict does not lead to the termination or suspension of the operation of treaties". In terms of a further suggestion the following additional clause could be added to the new formulation: "save in exceptional circumstances where armed conflict is lawful or justified under international law". It was also noted that the survival of treaties was not exclusively dependent on the outbreak of armed conflict, but also on the likelihood of the compatibility of such armed conflict not only with the object and purpose of the treaty, but with the Charter of the United Nations.

291. While support was expressed for the new terminology employed by the Special Rapporteur, reference was also made by a member to the inconsistency between the use of the phrases "Non-automatic" in the title, and "not necessarily" in the provision itself. A preference was expressed for using "non-automatic" in the text. Other members also took issue with the view that "*ipso facto*" and "necessarily" were synonymous.

Article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict[344]

(a) *Introduction by the Special Rapporteur*

292. The Special Rapporteur recalled that opinion in the Sixth Committee on the inclusion of the criterion of intention had been almost equally divided (as had been the case in the Commission itself). He noted that the opposition to the reliance upon intention was normally based upon the problems of ascertaining the intention of the parties, but this was true of many legal rules, including legislation and constitutional provisions. Furthermore, the difference between the two points of view expressed in the Sixth Committee was probably not, in practical terms, substantial. The existence and interpretation of a treaty was not a matter of intention as an abstraction, but the intention of the parties as expressed in the words used by them and in the light of the surrounding circumstances.

(b) *Summary of the debate*

293. The Commission's consideration of draft article 4 focused on the appropriateness of maintaining the criterion of the intention of the parties at the time the treaty was concluded as the predominant criteria for determining the susceptibility to termination or suspension of a treaty because of an armed conflict between States parties. Such an approach was again criticized by several members who reiterated their view that the resort to the presumed intention of the parties remained one of the key difficulties underlying the entire draft articles. It was maintained that while the intention of parties to treaties could be one possible criterion for the fate of a treaty in the case of armed conflict, it could not be the exclusive or the predominant criterion. Nor was it feasible to anticipate that the States parties to the treaty would at the time of concluding the treaty anticipate its fate should an armed conflict arise between them. Nor was the reference to articles 31 and 32 of the 1969 Vienna Convention deemed sufficient; the incorporation by reference, *inter alia*, to the criteria of the object and purpose (a criterion also referred to in draft article 7) as a means of determining the intention of the parties to a treaty was too complicated or too uncertain and risked mixing several criteria, some subjective and others objective. Furthermore, those provisions of the 1969 Vienna Convention dealt with the interpretation of the provisions of a treaty; however, in most cases, there would be no specific reference in the treaty to the consequence of the outbreak of armed conflict between the States parties.

294. It was proposed that more suitable criteria be adopted, such as the viability of the continuation of the operation of certain provisions of the treaty in armed conflicts. This could be assisted through the inclusion (in draft article 7, or equivalent thereto) of a list of factors that could be taken as indicative of whether the treaty continued to operate in a situation of armed conflict, including: the nature of the treaty, i.e. its subject matter; the object of the treaty, i.e. whether continuation is viable; the existence of an express provision in the treaty to armed conflict; the nature and extent of the conflict; the number of the parties to the treaty; the importance of the continuation of the treaty even in situations of war; and the compatibility of the performance under the treaty with the exercise of individual or collective self-defence under the Charter of the United Nations.

295. Other members pointed out that the differences in position were not as broad as it seemed: resort to the criterion of intention, even if presumed intention, was a common practice in the interpretation of domestic legislation. The possible source of confusion, therefore, was the inclusion of the phrase "at the time the treaty was concluded". It was proposed that this phrase be removed. Furthermore, it was suggested that draft article 7 could be included under draft article 4, as a new paragraph 3.

Article 5. Express provisions on the operation of treaties[345]

Article 5 bis. The conclusion of treaties during armed conflict[346]

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[344] Draft article 4 reads as follows:

"*The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict*

"1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

"2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

"(*a*) with the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

"(*b*) the nature and extent of the armed conflict in question."

[345] Draft article 5 reads as follows:

"*Express provisions on the operation of treaties*

"Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties."

[346] Draft article 5 *bis* reads as follows:

"*The conclusion of treaties during armed conflict*

"The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties."

(a) *Introduction by the Special Rapporteur*

296. The Special Rapporteur recalled that, on a strict view of drafting, draft article 5 was redundant, but it was generally accepted that such a provision should be included for the sake of clarity.

297. It was noted that draft article 5 *bis* had previously been included as paragraph 2 of draft article 5, but was now presented as a separate draft article following suggestions that the provision was to be distinguished from that in draft article 5. The term "competence" had been deleted and replaced by "capacity". The draft article was intended to reflect the experience of belligerents in an armed conflict concluding agreements between themselves during the conflict.

(b) *Summary of the debate*

298. No opposition to draft article 5 was expressed during the debate. General support was expressed for draft article 5 *bis*, and for its placement as a separate provision. As regards replacing the term "competence" by "capacity", it was pointed out that during an armed conflict the parties maintained their treaty-making power. So what was at stake was less the capacity or competence but the freedom to conclude a treaty.

Article 6 bis.[347] *The law applicable in armed conflict*[348]

(a) *Introduction by the Special Rapporteur*

299. Draft article 6 *bis* was a new provision. It had been included in response to a number of suggestions made both in the Sixth Committee and the Commission that a provision be included to reflect the principle, stated by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion[349] relating to the relation, in the context of armed conflict, between human rights and the applicable *lex specialis*, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. The Special Rapporteur noted that while the principle was, strictly speaking, redundant, the draft article provide a useful clarification in an expository manner.

(b) *Summary of the debate*

300. While several members agreed with the inclusion of draft article 6 *bis*, it was suggested that consideration also had to be given to the formulation adopted by the ICJ in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[350] so as to clarify that human rights treaties were not to be excluded as a result of the operation of the *lex specialis* which consists of international humanitarian law. Another suggestion was to reformulate the provision in more general terms without restricting it to standard-setting treaties. A further view was that it was unnecessary to make specific reference to the humanitarian law of armed conflict as *lex specialis* since the operation of the *lex specialis* principle would occur in any case if the specific situation so warranted. Some other members were of the view that the draft article should be deleted because the application of human rights law, environmental law or international humanitarian law depended on specific circumstances which could not be subsumed under a general article.

Article 7. The operation of treaties on the basis of necessary implication from their object and purpose[351]

(a) *Introduction by the Special Rapporteur*

301. The Special Rapporteur emphasized the importance of draft article 7 to the entire scheme of the draft articles. The key issue had related to the inclusion of an indicative list of categories of treaties the object and purpose of which involved the necessary implication that they continued in operation during an armed conflict. He recalled the different views expressed on the matter in the Sixth Committee and the Commission, and reiterated his own preference to retain such a list in one form or another, including possibly as an annex to the draft articles. He further noted that, given the complexity of the topic, room had to be found in the list for those categories which were based on State practice as well as those which were not, but which enjoyed support in legal practice of a reputable character.

(b) *Summary of the debate*

302. Support was expressed for the principle enunciated in draft article 7 as well as the list of categories contained therein, so as to counterbalance the criterion of intention

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[347] Draft article 6 was withdrawn by the Special Rapporteur. See *Yearbook ... 2006*, vol. II (Part Two), p. 170, paras. 207–208, and the third report of the Special Rapporteur, para. 29.

[348] Draft article 6 *bis* reads as follows:

"*The law applicable in armed conflict*

"The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict."

[349] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 240, para. 25.

[350] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 99 above), p. 178, para. 106.

[351] Draft article 7 reads as follows:

"*The operation of treaties on the basis of necessary implication from their object and purpose*

"1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

"2. Treaties of this character include the following:

"(*a*) treaties expressly applicable in case of an armed conflict;

"(*b*) treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

"(*c*) treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

"(*d*) treaties for the protection of human rights;

"(*e*) treaties relating to the protection of the environment;

"(*f*) treaties relating to international watercourses and related installations and facilities;

"(*g*) multilateral law-making treaties;

"(*h*) treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

"(*i*) obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

"(*j*) treaties relating to diplomatic relations;

"(*k*) treaties relating to consular relations."

in draft article 4. It was suggested that further categories could be added to the list. Other members pointed out that any illustrative list of categories of treaties had to be based on a set of agreed upon criteria, which, in turn, had to be rooted in State practice. It was also noted that the list approach was limited by the fact that while some treaties might, as a whole, continue in the event of armed conflict, in other cases it may be more a matter of particular treaty provisions that are susceptible to continuation rather than the treaty as a whole. Another suggestion was to take a different approach whereby, instead of a list of categories of treaties, the provision would list relevant factors or general criteria which could be taken into account when ascertaining whether their object and purpose implied that they continued in operation during an armed conflict.[352] Furthermore, a distinction could be made between categories of treaties which in no circumstances could be terminated by an armed conflict, and those which could be considered as suspended or terminated during an armed conflict, depending on the circumstances.

303. Disagreement was expressed with the Special Rapporteur's preference not to include treaties codifying rules of *jus cogens*. It was also suggested that the list include treaties or agreements delineating land and maritime boundaries which by their nature also belong to the category of permanent regimes. Another view was that the discussion on the particular provisions or types of provisions in treaties which would continue in the event of armed conflict was best dealt with in the commentaries. It was further proposed that draft article 7 could be included in draft article 4.

Article 8. Mode of suspension or termination [353]

(a) *Introduction by the Special Rapporteur*

304. The Special Rapporteur noted that, as was the case with a number of the provisions in the second half of the draft articles, draft article 8 was, strictly speaking, superfluous because of its expository nature. To his mind, it would not be necessary to attempt to define suspension or termination.

(b) *Summary of the debate*

305. It was observed in the Commission that the expository nature of the provision did not preclude the possibility of in-depth discussion of the consequences of the application of articles 42 to 45 of the 1969 Vienna Convention, and that such further reflection might reveal the fact that those provisions would not all necessarily be applicable to the context of treaties suspended or terminated in the event of an armed conflict. Some members also stated that the procedures foreseen in articles 65 *et seq.* of the 1969 Vienna Convention might not be applicable to situations of armed conflicts for which the procedure should be simpler.

[352] See above the discussion on draft article 4.

[353] Draft article 8 reads as follows:

"*Mode of suspension or termination*

"In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the Law of Treaties."

Article 9. The resumption of suspended treaties [354]

(a) *Introduction by the Special Rapporteur*

306. The Special Rapporteur recalled that draft article 9 was also not strictly necessary, but constituted a useful further development of the principles in draft articles 3 and 4.

(b) *Summary of the debate*

307. It was noted that the same concerns as to the general rule of intention as the foundation for determining whether a treaty is terminated or suspended in the event of armed conflict, raised in the context of draft article 4, applied to draft article 9. It was also observed that, in accordance with the principle of continuity in draft article 3, if the effect of the armed conflict were to be the suspension of the application of the treaty, then it should be presumed that once the armed conflict ceased, the resumption of the treaty should be automatic unless there was a contrary intention.

Article 10. Effect of the exercise of the right to individual or collective self-defence on a treaty [355]

(a) *Introduction by the Special Rapporteur*

308. The Special Rapporteur pointed out that it was not true that he had not dealt with the question of illegality. In his first report[356] he had proposed a provision which was compatible with draft article 3, and had also set out the relevant parts of the resolution of the Institute of International Law in 1985,[357] which took a different approach. He maintained further that his initial proposal, namely, that the illegality of a use of force did not affect the question whether an armed conflict had an automatic or necessary outcome of suspension or termination, had been analytically correct for the reason that at the moment of the outbreak of an armed conflict it was not always immediately clear who was the aggressor. However, in response to the opposition to his initial proposal, the Special Rapporteur

[354] Draft article 9 reads as follows:

"*The resumption of suspended treaties*

"1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.

"2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:

(*a*) with the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(*b*) with the nature and extent of the armed conflict in question."

[355] Draft article 10 reads as follows:

"*Effect of the exercise of the right to individual or collective self-defence on a treaty*

"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 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."

[356] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552 (see footnote 331 above).

[357] *Institute of International Law*, *Yearbook,* vol. 61 (1986), Session of Helsinki (1985), Part II, pp. 278–283 (see footnote 343 above).

had included a new draft article 10 as an attempt to meet the criticism that his earlier formulation appeared to ignore the question of the illegality of certain forms of the use or threat of force. The provision was based on article 7 of the resolution of the Institute of International Law adopted in 1985.

(b) *Summary of the debate*

309. While the inclusion of draft article 10 was welcomed as a step in the right direction, it was suggested that provision also be made for the position of the State complying with a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, as well as that of the State committing aggression, which were covered in articles 8 and 9 of the resolution of the Institute of International Law. It was further suggested that the illegality of the use of force and its linkage to the subject required a more in-depth consideration, particularly as regards the position of the aggressor State and the determination of the existence of an act of aggression, so as to draw more detailed conclusions on the fate of treaties which are already in force in the relationship between the parties to the conflict, and between those parties and third parties. It was also suggested that it was worth considering the situation of bilateral treaties between the aggressor and the self-defending State and the possibility of having a speedier procedure for the self-defending State to terminate or suspend a treaty. This was especially the case given the reference, in draft article 8, to the applicability of the procedure in articles 42 to 45 of the 1969 Vienna Convention for the suspension or termination of treaties, which established procedures which did not accord with the reality of an armed conflict.

Article 11. Decisions of the Security Council[358]

Article 12. Status of third States as neutrals[359]

Article 13. Cases of termination or suspension[360]

Article 14. The revival of terminated or suspended treaties[361]

[358] Draft article 11 reads as follows:

"*Decisions of the Security Council*

"These 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."

[359] Draft article 12 reads as follows:

"*Status of third States as neutrals*

"The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict."

[360] Draft article 13 reads as follows:

"*Cases of termination or suspension*

"The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

"(*a*) the agreement of the parties; or

"(*b*) a material breach; or

"(*c*) supervening impossibility of performance; or

"(*d*) a fundamental change of circumstances."

[361] Draft article 14 reads as follows:

"*The revival of terminated or suspended treaties*

"The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement."

(a) *Introduction by the Special Rapporteur*

310. The Special Rapporteur observed that draft articles 11 to 14 were primarily expository in character. As regards article 12, the Special Rapporteur explained that he had attempted to make a reference to the issue without embarking on an excursus on neutrality under contemporary international law, which was a complex subject. The point was that the issue of neutrality had not been ignored; it was just that the draft articles were to be without prejudice to it. He noted that it was useful to retain draft article 13 given the amount of confusion there existed between cases of termination or suspension as a consequence of the outbreak of armed conflict as opposed to the situations listed in the draft article.

(b) *Summary of the debate*

311. Regarding draft article 11, the concern was expressed that the issue of the application of Chapter VII of the Charter of the United Nations, which related to threats to the peace, breaches of the peace, and acts of aggression, was too central to the topic at hand to be relegated to a "without prejudice" clause modelled on article 75 of the 1969 Vienna Convention. While that solution was understandable in the context of the Vienna Convention, it was considered insufficient specifically in terms of the effects of armed conflicts on treaties. It was proposed that the provision be replaced by articles 8 and 9 of the resolution adopted by the Institute of International Law in 1985.

312. Difficulties were expressed with the use of the word "neutral" in draft article 12: would it apply to those States which declared themselves neutral or those which enjoyed permanent neutrality status? The situation had evolved since the establishment of the United Nations, and in some cases, neutrality was no longer possible, for example, in the context of decisions taken under Chapter VII of the Charter of the United Nations. Reference was further made to the existence of examples of States which were non-belligerents but not neutrals. That distinction was important for the debate on the impact on third States: third States were not automatically neutral, and neutral States were not automatically third States. It was further proposed that the reference to neutrality be deleted from the provision entirely.

313. With regard to draft article 14, it was suggested that the word "competence" be replaced by "capacity", in line with the text of draft article 5 *bis*.

3. Special Rapporteur's concluding remarks

314. The Special Rapporteur referred to the areas of convergence in the debate, such as on the inclusion of internal armed conflicts. He noted that he had approached the topic from three overlapping perspectives. First, he had delved into the literature of the subject, with the assistance of the Secretariat. His three reports were largely based on State practice and what knowledge could be gleaned from learned authors. Secondly, the draft articles constituted a clear but careful reflection of the fact that he adopted the principle of stability, or continuity, as a policy datum. However, in his view, the principle of continuity

was qualified by the need to reflect the evidence in State practice that, to some extent, armed conflict did indeed result in the suspension or termination of treaties. Thirdly, he had consciously attempted to protect the project by carefully segregating other controversial areas, such as the law relating to the use of force by States, that lay outside the scope of the topic as approved by the General Assembly.

315. With regard to draft article 1 (Scope), the Special Rapporteur confirmed that he had no strong position on the issue of the provisional application of treaties. The question of international organizations was also one of the issues of principle to be considered. Some members seemed to have not distinguished between whether the effects of armed conflict on treaties of international organizations was a viable subject—which it probably was—and the very different question of whether it could be grafted on to the topic that the General Assembly had requested the Commission to study.

316. As for draft article 2 (Use of terms), the Special Rapporteur noted that the definition of "armed conflict" was central to the Commission's project, yet it also came close to the borderline with other areas of international law. The debate had revolved around the question of whether internal armed conflict was or was not to be included, but the article was not drafted in those terms. He noted that the issue of the intensity of the armed conflict was covered by the use of the phrase "nature or extent". To his mind, armed conflict should not be defined in quantitative terms. Everything depended on the nature not only of the conflict but also of the treaty provision concerned.

317. The Special Rapporteur acknowledged that draft article 3 (Non-automatic termination or suspension) was problematical, and recalled that he had said as much in his first report. There were three related aspects of the provision. First, it was deliberately chronological: it simply asserted that the outbreak of armed conflict did not, as such, terminate or suspend the operation of a treaty. At a later stage, when the legality of the situation came to be assessed on the basis of the facts, the question of the applicable law would arise. The second aspect was that of continuity, and he noted the suggestion that the draft article should be reformulated to state the principle of continuity more forcefully. The third aspect of draft article 3 was that it represented a major historical advance at the doctorinal level that a significant majority of members of the Institute of International Law from different nationalities and backgrounds had been willing to move to that position.

318. The Special Rapporteur remarked that, in draft article 4 (The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict), he had carefully avoided using the term "intention" in the abstract. The issue was one of interpretation, in accordance with articles 31 and 32 of the Vienna Convention. Moreover, draft article 4 also referred to the nature and extent of the armed conflict. In response to the suggestion that a more direct reference was needed to specific criteria of compatibility, he maintained that those criteria were already covered. Furthermore, he recalled that in judicial practice, when discussing other topics of the law of treaties, intention was constantly referred to. It also featured in standard legal dictionaries. Accordingly, intention could not be simply dismissed out of hand. Furthermore, if intention were to be set aside, what would happen when there was direct evidence of it? While it was correct to say that intention was often constructed and accordingly fictitious, there was no particular difficulty with that. The real difficulty was proving intention.

319. With regard to draft article 6 *bis* (The law applicable in armed conflict) the Special Rapporteur noted that the provision had attracted a good deal of valid criticism and would need further work. His instructions had been to take into account what the ICJ had said in its advisory opinion in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, yet he now conceded that the text should also refer to the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

320. The Special Rapporteur observed that draft article 7 (The operation of treaties on the basis of necessary implication from their object and purpose), which he hoped would be retained in one form or another, played an important function. While State practice was not as plentiful as might be desired in certain categories, it was fairly abundant. Draft article 7 was the vehicle for expressing that State practice in an orderly way. The Commission had to decide whether to include in the list in paragraph 2 treaties codifying *jus cogens* rules. The Secretariat memorandum had suggested that such treaties be included, but that raised the problem of borderlines with other subjects. He was not sure that it was even technically correct to include such treaties, and if they were to be included, yet another "without prejudice" clause would be necessary.

321. With regard to draft article 10 (Effect of the exercise of the right to individual or collective self-defence on a treaty), the Special Rapporteur noted the general view in the Commission that references to the law relating to the use of force should be strengthened. However, he noted that the redrafted version of the draft article was a careful compromise, and to go any further might be to venture into uncharted juridical seas.

322. The Special Rapporteur pointed out that, in connection with draft article 12 (Status of third States as neutrals), there had arisen the question of the extent to which the draft articles should refer to other fields of international law such as neutrality or permanent neutrality. In his view, the Commission had to be careful: armed conflict was self-evidently a core part of the topic, but other areas like neutrality were genuine borderline cases. It was recalled that draft article 13 (Cases of termination or suspension) simply made the obvious point that the draft was without prejudice to the provisions set forth in the 1969 Vienna Convention. As in the law of tort, there might be several overlapping causes of action. Thus, the effect of war on treaties might be paralleled by other types of fundamental change of circumstances. Furthermore, separability had not been overlooked, but deliberately left aside.

C. Report of the Working Group

1. Introduction

323. The work programme of the Working Group was organized into three clusters of issues: (*a*) matters related to the scope of the draft articles; (*b*) questions concerning draft articles 3, 4 and 7, as proposed by the Special Rapporteur in his third report; and (*c*) other matters raised during the debate in the plenary. The Working Group completed its consideration of the first two clusters, but was unable to complete its work on the third cluster. The Working Group held eight meetings from 10 to 24 July 2007.

2. Recommendations of the Working Group

324. The Working Group recommended that:

(1) Draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, be referred to the Drafting Committee, with the following guidance:

(*a*) As regards draft article 1:

(i) the draft articles should apply to all treaties between States where at least one of which is a party to an armed conflict;

(ii) in principle, the consideration of treaties involving international intergovernmental organizations should be left in abeyance until a later stage of the Commission's work on the overall topic, at which point issues of the definition of international organizations and which types of treaties (namely whether treaties between States and international organizations or also those between international organizations *inter se*) would be considered;

(iii) the Secretariat should be asked to circulate a note to international organizations requesting information about their practice with regard to the effect of armed conflict on treaties involving them.

(*b*) With regard to the definition of "armed conflict" reflected in article 2, paragraph (*b*), for purposes of the draft articles:

(i) in principle, the definition of armed conflict should cover internal armed conflicts with the proviso that States should only be able to invoke the existence of internal armed conflicts in order to suspend or terminate treaties when the conflict has reached a certain level of intensity;

(ii) occupation in the course of an armed conflict should not be excluded from the definition of "armed conflict".

(*c*) Concerning draft article 7:

(i) the phrase "object and purpose" in paragraph 1 should be replaced by "subject matter" to be in line with the formulation proposed for draft article 4 (see below); and the provision be placed closer to draft article 4;

(ii) paragraph 2 should be deleted and the list contained therein be included in an appendix to the draft articles with the indication that:[362]

– the list is non-exhaustive;

– the various types of treaties on the list may be subject to termination or suspension either in whole or in part;

– the list is based on practice and, accordingly, its contents may change over time.

(*d*) As regards draft articles 10 and 11, the Drafting Committee should proceed along the lines of articles 7, 8 and 9 of the resolution of the Institute of International Law adopted in 1985.

(2) The following revised formulation for draft article 4 should be referred to the Drafting Committee:

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

(*a*) articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(*b*) the nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject matter of the treaty and the number of parties to the treaty."

(3) Draft article 6 *bis* should be deleted and its subject matter reflected in the commentaries, possibly to draft article 7.

(4) The Working Group should be re-established at the sixtieth session of the Commission, in 2008, to complete its work on remaining issues relating to draft articles 8, 9, and 12 to 14.

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[362] The Drafting Committee should reconsider the list taking into account the views expressed in the plenary debate.