Chapter V

EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Introduction

55. During its fifty-sixth session (2004), the Commission decided[74] 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.

56. At its fifty-seventh (2005) to fifty-ninth (2007) sessions, the Commission had before it the first,[75] second[76] and third[77] 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".[78]

57. 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 that 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.[79] Also at the 2946th meeting, the Commission further 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, as well as draft article 4 as proposed by the Working Group, together with the recommendations of the Working Group.[80]

B. Consideration of the topic at the present session

58. At the present session, the Commission decided, at its 2964th meeting on 16 May 2008, to re-establish the Working Group on the effects of armed conflicts on treaties, under the chairpersonship of Mr. Lucius Caflisch, to complete its consideration of several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report during the fifty-ninth session in 2007.

59. The Working Group had before it the fourth report of the Special Rapporteur (A/CN.4/589), which was referred to it by the plenary, dealing with the question of the procedure for suspension or termination, and a note prepared by the Chairperson of the Working Group (A/CN.4/L.721) on the question of the applicability of articles 42 to 45 of the Vienna Convention on the Law of Treaties (hereinafter "1969 Vienna Convention"), as well as a compilation of comments and observations received from international organizations (A/CN.4/592 and Add.1).

60. The Working Group considered the following four issues: (*a*) the question of the applicability, in relation to draft article 8, of the procedure in article 65 of the 1969 Vienna Convention for the termination or suspension of treaties; (*b*) the question of the applicability, also in relation to draft article 8, of articles 42 to 45 of the 1969 Vienna Convention, and, in particular, article 44 on the separability of treaty provisions; (*c*) draft article 9, on the resumption of suspended treaties, as proposed by the Special Rapporteur in his third report; and (*d*) draft articles 12, 13 and 14, as proposed by the Special Rapporteur in his third report, relating to third States as neutrals, the termination or suspension of treaties by operation of the 1969 Vienna Convention, and the competence of parties to negotiate a specific agreement regulating the maintenance in force or revival of treaties, respectively. At its 2968th meeting, on 29 May 2008, the Commission adopted the report of the Working Group (A/CN.4/L.726).

61. At the same meeting, the Commission decided to refer to the Drafting Committee draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14, as proposed by the Working Group, as well as draft articles 12 and 13, as proposed by the Special Rapporteur, together with the recommendations of the Working Group contained in its report.

62. The Commission considered the reports of the Drafting Committee at its 2973rd and 2980th meetings, on 6 June and 17 July 2008, and at the latter meeting adopted on first reading a set of 18 draft articles on the effects of armed conflicts on treaties, together with an annex (see section C below). At the 2993rd

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[74] At its 2830th meeting on 6 August 2004, *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364. 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. The Commission had, at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work (*Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729). A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission on the work of its fifty-second session, *ibid.*, annex. In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

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

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

[77] *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578.

[78] Document A/CN.4/550 and Corr.1–2. At its 2866th meeting on 5 August 2005, the Commission endorsed the Special Rapporteur's suggestion that the Secretariat 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 (*Yearbook ... 2005*, vol. II (Part Two), p. 27, para. 112).

[79] *Yearbook ... 2007*, vol. II (Part Two), p. 78, paras. 323–324.

[80] 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, *ibid.*, p. 70, para. 272.

and 2994th meetings, on 6 August 2008, the Commission adopted a set of commentaries to the draft articles on the effects of armed conflicts on treaties, as adopted on first reading (see section D below).

63. At the 2993rd meeting, on 6 August 2008, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2010.

64. At its 2994th meeting, held on 6 August 2008, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Ian Brownlie, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the effects of armed conflicts on treaties. It also acknowledged the untiring efforts and contribution of the Working Group on the effects of armed conflicts on treaties under the chairpersonship of Mr. Lucius Caflisch.

C. Text of the draft articles on the effects of armed conflicts on treaties adopted by the Commission on first reading

1. Text of the draft articles

65. The text of the draft articles adopted at the sixtieth session by the Commission on first reading is reproduced below.

EFFECTS OF ARMED CONFLICTS ON TREATIES

Article 1. Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States where at least one of the States is a party to the armed conflict.

Article 2. 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 application of treaties between States parties to the armed conflict or between a State party to the armed conflict and a third State, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Article 3. 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 States parties to the armed conflict;

(*b*) between a State party to the armed conflict and a third State.

Article 4. 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*) 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.

Article 5. Operation of treaties on the basis of implication from their subject matter

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.

Article 6. 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 Vienna Convention on the Law of Treaties.

2. States may conclude lawful agreements involving termination or suspension of a treaty that is operative between them during situations of armed conflict.

Article 7. Express provisions on the operation of treaties

Where a treaty expressly so provides, it shall continue to operate in situations of armed conflict.

Article 8. Notification of termination, withdrawal or suspension

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.

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 or suspension of the operation of the treaty.

Article 9. Obligations imposed by international law independently of a treaty

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.

Article 10. 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.

Article 11. Loss of the right 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.

Article 12. Resumption of suspended treaties

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.

Article 13. 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.

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 15. Prohibition of benefit to an aggressor State

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 shall not terminate, withdraw from, or suspend the operation of a treaty as a consequence of an armed conflict if the effect would be to the benefit of that State.

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 agreement of the parties; or

(*b*) a material breach; or

(*c*) supervening impossibility of performance; or

(*d*) a fundamental change of circumstances.

Article 18. Revival of treaty relations subsequent to an armed conflict

The present draft articles are without prejudice to the right of States parties to an armed conflict to regulate, subsequent to the conflict, on the basis of agreement, the revival of treaties terminated or suspended as a result of the armed conflict.

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 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) treaties relating to aquifers and related installations and facilities;

(h) multilateral law-making treaties;

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

(j) treaties relating to commercial arbitration;

(k) treaties relating to diplomatic relations;

(l) treaties relating to consular relations.

2. Text of the draft articles with commentaries thereto

66. The texts of the draft articles with commentaries thereto as adopted by the Commission on first reading at its sixtieth session are reproduced below.

EFFECTS OF ARMED CONFLICTS ON TREATIES

Article 1. Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States where at least one of the States is a party to the armed conflict.

Commentary

(1) Draft article 1 situates, as the point of departure for the elaboration of the draft articles, the 1969 Vienna Convention, article 73 of which provides, *inter alia*, that the provisions of the Convention do not prejudge any question that may arise in regard to a treaty from the outbreak of hostilities between States.[81] Thus, the present draft articles apply to the effects of an armed conflict in respect of treaties between States.

(2) The formulation of draft article 1 is patterned on article 1 of the 1969 Vienna Convention. The reference at the end of the sentence to "where at least one of the States is a party to the armed conflict" is intended to specify that the draft articles are also to cover the position of third States parties to a treaty with a State involved in an armed conflict. Accordingly, three scenarios would be contemplated: (*a*) the situation concerning the treaty relations between two States engaged in an armed conflict; (*b*) the situation of the treaty relations between a State engaged in an armed conflict with another State and a third State not party to that conflict; and (*c*) the situation of the effect of an internal armed conflict on the treaty relations of the State in question with third States.

(3) In the Sixth Committee of the General Assembly, several delegations expressed the view that the draft articles should apply also to a treaty or a part of a treaty

[81] At its fifteenth session (1963), the Commission concluded that the draft articles on the law of treaties should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic might raise problems both of the termination of treaties and of the suspension of their operation. It felt that such a study would inevitably involve a consideration of the effect of the provisions of the Charter of the United Nations concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question. Consequently, it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties (*Yearbook ... 1963*, vol. II, document A/5509, p. 189, para. 14). Article 73 expressly reserving the problem was added at the United Nations Conference on the Law of Treaties.

which was being provisionally applied.[82] In the view of the Commission, the issue can be resolved by reference to the provisions of article 25 of the 1969 Vienna Convention itself.[83]

(4) The question of the effect on treaties involving international organizations has not been considered in the draft articles at this stage. Therefore, the present draft articles do not deal with the effect of armed conflict on treaties involving international organizations.

(5) Structurally, the present draft articles are divided into several clusters: first, draft articles 1 and 2 are introductory in nature, dealing with scope and use of terms. Secondly, draft articles 3, 4 and 5 constitute the core provisions, reflecting the underlying foundation of the draft articles, which is to favour legal stability and continuity. They are reflective of a presumption of continuity of treaty relations. Thirdly, draft articles 6 and 7 extrapolate from the basic principles in draft articles 3 to 5, a number of basic legal propositions. These draft articles are expository in character. Fourthly, draft articles 8 to 12 address a variety of ancillary aspects of termination, withdrawal and suspension, drawing upon corresponding provisions of the 1969 Vienna Convention. Finally, the incidence of armed conflict bears not only on the law of treaties but also other fields of international law, including obligations of States under the Charter of the United Nations. Accordingly, draft articles 13 to 18 deal with a number of miscellaneous issues with regard to such relationships through, *inter alia*, without prejudice or saving clauses.

Article 2. 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 application of treaties between States parties to the armed conflict or between a State party to the armed conflict and a third State, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Commentary

(1) Draft article 2 provides definitions for two key terms used in the draft articles.

(2) Paragraph (*a*) defines the term "treaty", by reproducing verbatim the formulation in article 2 (1) (*a*) of the 1969 Vienna Convention. No particular distinction is drawn between bilateral and multilateral treaties.

(3) Paragraph (*b*) defines the term "armed conflict" as a working definition for the purposes of the present draft articles only. It is not the intention to provide a definition of armed conflict for international law generally, which is difficult and beyond the scope of the topic.[84]

(4) The definition applies to treaty relations between States parties to an armed conflict, as well as a State party to an armed conflict and a third State. The formulation of the provision, particularly the reference to "between a State party to the armed conflict and a third State", is intended to cover the effects of an armed conflict, which may vary according to the circumstances. Accordingly, it also covers the situation where the armed conflict only affects the operation of a treaty with regard to one of the parties to a treaty, and it recognizes that an armed conflict may affect the obligations of parties to a treaty in different ways. That phrase also serves to include within the scope of the draft articles the possible effect of an internal armed conflict on treaty relations of a State involved in such conflict with another State. The emphasis of the effects is on the application or operation of the treaty rather than the treaty itself.

(5) As regards the requirement of intensity implied in the phrase "which by their nature or extent are likely to affect", an element of flexibility has been retained in the draft articles to accord with the wide variety of historical situations. Hence, in some situations, it is possible to say that the level of intensity is less of a factor, for example, in relation to low-level conflict in a border region which, despite such a low level of intensity, drastically affects the application of bilateral treaties regulating the control of border traffic. On the other hand, it is also recognized that

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[82] See comments by the Netherlands (2005), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 40, and Malaysia (2006), *ibid., Sixty-first Session*, 19th meeting (A/C.6/61/SR.19), para. 48.

[83] "*Article 25. Provisional application*

"1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

"(*a*) The treaty itself so provides; or

"(*b*) The negotiating States have in some other manner so agreed.

"2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

[84] See the resolution by the Institute of International Law entitled "The effects of armed conflicts on treaties", adopted on 28 August 1985, at its Helsinki session:

"*Article 1*

"For the purposes of this resolution, the term 'armed conflict' means a state of war or an international conflict which involve[s] 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."

Institute of International Law, *Yearbook*, vol. 61 (1986), Session of Helsinki (1985), Part II, p. 278 (available from http://www.idi-iil.org, resolutions). It should be noted that article 73 of the 1969 Vienna Convention refers to "the outbreak of hostilities between States", while in the *Tadić* case it was noted that "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" (*Prosecutor* v. *Duško Tadić a/k/a "Dule", Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995*, International Tribunal for the Former Yugoslavia, ILM, vol. 35, No. 1 (January 1996), p. 37. See also United Nations, *Juridical Yearbook 1995*, Part Three, p. 501).

there exist historical situations where the nature or extent of the armed conflict does have a bearing on the application of treaties.

(6) It was also considered that it was desirable to include situations involving a state of war in the absence of armed actions between the parties.[85] It thus follows that the definition includes the occupation of territory which meets with no armed resistance. In this context, the provisions of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict are of considerable interest. Article 18 provides in relevant part as follows:

Article 18. Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event 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 or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

(7) Similar considerations militate in favour of the inclusion of a blockade even in the absence of armed actions between the parties.[86]

(8) Contemporary armed conflicts have blurred the distinction between international and internal armed conflicts. The number of civil wars has increased and these are statistically more frequent than international armed conflicts. In addition, many of these "civil wars" include "external elements", such as support and involvement by other States in varying degrees, supplying arms, providing training facilities and funds, and so forth. Internal armed conflicts could affect the operation of treaties as much as, if not more than, international armed conflicts. The draft articles therefore include the effect on treaties of internal armed conflicts.

(9) The definition of "armed conflict" does not include an explicit reference to "international" or "internal" armed conflict. This is intended to avoid reflecting specific factual or legal considerations in the draft article, and, accordingly, running the risk of *a contrario* interpretations.

Article 3. 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 States parties to the armed conflict;

(*b*) between a State party to the armed conflict and a third State.

Commentary

(1) Draft article 3 is of an overriding significance. It establishes the basic principle of legal stability and continuity. To that end, it incorporates the key developments in the 1985 resolution of the Institute of International Law, shifting the legal position in favour of a regime establishing a presumption that an outbreak of armed conflict does not as such cause the suspension or termination of the treaty. At the same time, it is recognized that there is no easy way of reconciling the principle of stability, in draft article 3, with the fact that the outbreak of armed conflict may result in terminating or suspending treaty obligations.

(2) This formulation is a replication of article 2 of the resolution adopted by the Institute of International Law in 1985.[87] The principle has been commended by a number of authorities. Oppenheim asserts that "the opinion is pretty general that war by no means annuls every treaty".[88] Lord McNair, expressing what are substantially British views, states: "It is thus clear that war does not *per se* put an end to pre-war treaty obligations in existence between opposing belligerents."[89] During the work of the Institute of International Law in 1983, Professor Briggs said that: "Our first—and most important—rule is that the mere outbreak of armed conflict (whether declared war or not) does not *ipso facto* terminate or suspend treaties in force between parties to the conflict. This is established international law."[90]

(3) The possibility of replacing "necessarily" with "automatically" in order to be consistent with the title was considered, but it was decided against it, since "necessarily" was closer to "*ipso facto*", which was frequently used in this context as in articles 2 and 5[91] of the resolution adopted by the Institute of International Law.

(4) In order to be more consistent with draft article 2, Use of terms, subparagraph (*a*) refers to "States parties" to the armed conflict, while subparagraph (*b*) covers the operation of treaties between "a State party" to the armed conflict and a third State.

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[85] See A. D. McNair and A. D. Watts, *The Legal Effects of War*, 4th ed., Cambridge University Press, 1966, pp. 2–3.

[86] *Ibid.*, pp. 20–21.

[87] Article 2 of the resolution of the Institute of International Law 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" (Institute of International Law, *Yearbook* (see footnote 84 above), p. 280).

[88] L. Oppenheim, *International Law: a Treatise*, 7th ed., vol. II, *Disputes, War and Neutrality*, Hersch Lauterpacht (ed.), London, Longmans, 1952, p. 302.

[89] A. D. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, p. 697.

[90] Institute of International Law, *Yearbook*, vol. 61 (1985), Session of Helsinki (1985), Part I, pp. 8–9; see also *The Law of Nations: Cases, Documents and Notes*, 2nd ed., H. W. Briggs (ed.), New York, Appleton-Century-Crofts, 1952, p. 938.

[91] Article 5 of the resolution of the Institute of International Law reads as follows:

"The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of bilateral treaties in force between a party to that conflict and third States.

"The outbreak of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict".

(Institute of International Law, *Yearbook* (see footnote 84 above), p. 280)

(5) The possibility of including withdrawal from a treaty, as one of the consequences of an outbreak of armed conflict, alongside suspension or termination, in draft article 3 was considered but rejected, since withdrawal involves a conscious decision by a State, whereas draft article 3 deals with the automatic application of law.

Article 4. 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*) 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.

Commentary

(1) Draft article 4 follows from the content of draft article 3. The outbreak of armed conflict does not necessarily put an end to or suspend the operation of the treaty. It is another key provision of the draft articles.

(2) In contrast to draft article 3, withdrawal from treaties as one of the possibilities open to States parties to an armed conflict is included in the present draft article. The question of withdrawal in the present draft article provides an appropriate context for its inclusion in subsequent ancillary draft articles.

(3) As regards the indicia listed in subparagraphs (*a*) and (*b*), proposals were considered to replace "indicia" by terms such as "factors" and "criteria", but it was decided to retain "indicia" so as to avoid any implication that they are established requirements. They are to be viewed as mere indications of susceptibility which would be relevant for particular cases depending on the circumstances.

(4) It is also understood that the indicia listed in subparagraph (*b*) were not to be seen as being exhaustive. Indeed, it should be recalled that articles 31 and 32 of the 1969 Vienna Convention, which are referred to in subparagraph (*a*), themselves contain a number of indicia to be taken into account.

(5) The question of the legality of the use of force as one of the factors to be taken into consideration under draft article 4 was examined, but it was decided to leave the matter to be resolved within the context of the application of draft articles 13 to 15.

(6) It cannot be assumed that the effect of armed conflict between parties to the same treaty would be the same as that on treaties between a party to an armed conflict and a third State.

Article 5. Operation of treaties on the basis of implication from their subject matter

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.

Commentary

(1) Draft article 5 is expository in character and relates to cases where the subject matter of a treaty implies that the operation of treaty as a whole or some of its provisions is not affected by the incidence of armed conflict.[92]

(2) The reference to "necessary" implication, as contained in the original text, has been removed so as to avoid any possible contradiction with draft article 4. In addition, the initial reference to "object and purpose" has been replaced with "subject matter". The text was refined at the end with the replacement of "inhibit" by "affect", which is more in line with the language used in the draft articles.

(3) The proposal of the Special Rapporteur for former draft article 7 included a list of categories of treaties whose subject matter involved the necessary implication that they would continue in operation during an armed conflict. The identification of such a list gave rise to differences of opinion both in the Commission and in the Sixth Committee.

(4) In the debate in the Commission in the 2005 session, the policy of the provisions of former draft article 7 was explained by the Special Rapporteur as follows:

> … draft article 7 dealt with the species of treaties the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, that is, as evidence of the object and purpose of the treaty to the effect that it would survive a war. He clarified that while he did not agree with all the categories of treaties in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to draft articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.[93]

(5) In the Sixth Committee, the use of categories was, for example, the object of carefully articulated comment by the United States, at the sixtieth session of the General Assembly, in 2005:

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[92] This draft article has its origins in draft article 7, as proposed by the Special Rapporteur in his preliminary report (see footnote 75 above). This former draft article read 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: […]"

[93] *Yearbook … 2005*, vol. II (Part Two), pp. 33–34, para. 167.

Article 7 deals with the operation of treaties on the basis of implications drawn from their object and purpose. It is the most complex of the draft articles. It lists twelve categories of treaties that, owing to their object and purpose, imply that they should be continued in operation during an armed conflict. This is problematic because attempts at such broad categorization of treaties always seem to fail. Treaties do not automatically fall into one of several categories. Moreover, even with respect to classifying particular provisions, the language of the provisions and the intention of the parties may differ from similar provisions in treaties between other parties. It would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to States on how to proceed.[94]

(6) The Commission decided instead to include such a list in an annex to the draft articles. Thus an annex containing a list of categories of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict has been included in relation to the present draft articles. Although the emphasis is on categories of treaties, it may well be that only the subject matter of particular provisions of the treaty may carry the necessary implication of their continuance. Moreover, it was decided that the content of former draft article 7, paragraph 1, in an adjusted form, should be located after draft article 4, as present draft article 5. A proposal to include it as an additional paragraph in draft article 4 was not considered appropriate as it would have affected the balance of that article.

(7) The list is exclusively indicative and no priority is in any way implied by the order in which the categories appear in the annex. Moreover, it is recognized that in certain instances the categories are cross-cutting and there would be overlaps. The Commission decided not to include within the list an item referring to *jus cogens*. This category is not qualitatively similar to the other categories which have been included in the list. These categories are subject-matter based, whereas *jus cogens* cuts across several subjects. It is understood that the provisions of draft article 5 are without prejudice to the effect of principles or rules having the character of *jus cogens*. Some members nevertheless thought that a category of treaties embodying *jus cogens* norms merited being listed.

(8) The selection of categories of treaties is based in large part upon doctrine, together with available State practice. It is recognized that the likelihood of a substantial flow of information indicating evidence of State practice from States is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult. It is often the case that apparent examples of State practice concern legal principles which bear no relation to the effect of armed conflict on treaties as a precise legal issue. For example, some of the modern State practice refers, for the most part, to the effect of a fundamental change of circumstances, or to the supervening impossibility of performance, and is accordingly irrelevant. In some cases, such as treaties creating permanent regimes, there is a firm base in State practice. In relation to other categories, there is a firm basis in the jurisprudence of municipal courts and some executive advice to courts, but the categories are not necessarily supported by State practice in a conventional mode.

[94] Available from www.state.gov/s/l/2005/87206.htm. Summary in *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 20th meeting (A/C.6/60/SR.20), para. 34.

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

(9) The sources inevitably recognize that treaties expressly applicable to the conduct of hostilities are not affected in case of an armed conflict. The British practice is described by Lord McNair as follows: "There is abundant evidence that treaties which in express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination."[95]

(10) This principle is accepted generally both in the doctrine and in the practice of States. In 1963, the General Counsel of the United States Department of Defense, referring to the application of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water in time of war, stated the following: "It is my opinion, shared by the Legal Adviser of the Department of State, that the treaty cannot properly be so construed."[96]

He continued:

... it should be noted that it is standard practice in treaties outlawing the use of specified weapons or actions in time of war for the treaties to state expressly that they apply in time of war, in order to prevent possible application of the rule that war may suspend or annul the operation of treaties between the warring parties. (Cf., *Karnuth* v. *United States*, 279 U.S. 231, 236–239; Oppenheim's 'International Law', vol. II, 7th ed., pp. 302–306) ... [97]

[95] McNair, *op. cit.* (footnote 89 above), p. 704.

"There were in existence at the outbreak of the First World War a number of treaties (to which one or more neutral States were parties) the object of which was to regulate the conduct of hostilities, e.g., the Declaration of Paris of 1856 [Declaration Respecting Maritime Law], and certain of the Hague Conventions of 1899 and 1907. It was assumed that those were unaffected by the war and remained in force, and many decisions rendered by British and other Prize Courts turned upon them. Moreover, they were not specifically revived by or under the treaties of peace. Whether this legal result is attributable to the fact that the contracting parties comprised certain neutral States or to the character of the treaties as the source of general rules of law intended to operate during war is not clear, but it is believed that the latter was regarded as the correct view. If evidence is required that the Hague Conventions were considered by the United Kingdom Government to be in operation after the conclusion of peace, it is supplied by numerous references to them in the annual British lists of 'Accessions, Withdrawals, &c.', published in the British Treaty Series during recent years, and by the British denunciation in 1925 of Hague Convention VI of 1907 [Convention relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities]. Similarly in 1923 the United Kingdom Government, on being asked by a foreign Government whether it regarded the Geneva Red Cross Convention of 6 July 1906 [Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field] as being still in force between the ex-Allied Powers and the ex-enemy Powers, replied that 'in the view of His Majesty's Government this convention, being of a class the object of which is to regulate the conduct of belligerents during war, was not affected by the outbreak of war' " (*ibid*).

[96] M. M. Whiteman, *Digest of International Law*, vol. 14 (1970), p. 510 ("Hearings before the Senate Committee on Foreign Relations on the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water [...], 88th Cong., 1st sess.").

[97] *Ibid*. He also added:

"See, e.g.:

"'… Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg, November 29, December 11, 1868) [*British and Foreign State Papers, 1867–1868*, vol. LVIII, London, HM Stationery Office, 1873, p. 16].

"'… Declaration [concerning] Asphyxiating Gases, [The] Hague, July 29, 1899 [*The Hague Conventions and Declarations of 1899*

In the present case, language specifically prohibiting the use of nuclear weapons in wartime does not appear; it must, therefore, be presumed that no such prohibition would apply.[98]

(11) Some members of the Commission wondered whether this category was necessary in light of draft article 7 which states that where a treaty so provides, it shall continue to operate in situations of armed conflict. As pointed out, the list is only indicative in character. Moreover, the present rubric is broader than treaties expressly applicable during armed conflict. It covers broadly treaties relating to the law of armed conflict, including treaties relating to international humanitarian law. As early as 1785, article 24 of the treaty of amity and commerce between between His Majesty the King of Prussia and the United States of America expressly stated that armed conflict had no effect on its humanitarian law provisions.[99] Moreover, the *Restatement of the Law Third*, while restating the position under traditional international law that an outbreak of war between States terminated or suspended agreements between them, acknowledges that "agreements governing the conduct of hostilities survived, since they were designed for application during war".[100] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ found that

as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the [Charter of the United Nations]), to all international armed conflict, whatever type of weapons might be used.[101]

(12) In any event, the implication of continuity does not affect the application of the law of armed conflict as the *lex specialis* applicable to armed conflict. The identification of this rubric does not address numerous questions that may arise in relation to the application of that law. Nor is it intended to hold sway as to the conclusions to be drawn on the applicability of the principles and rules of humanitarian law in particular contexts.

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

(13) The doctrine ranging over several generations recognizes that treaties declaring, creating or regulating a permanent regime or status or related permanent rights are not suspended or terminated in case of an armed conflict. The types of agreements involved include cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, the creation of exceptional rights of use or access in respect of the territory of a State.

(14) There is a certain amount of State practice supporting the position that such agreements are unaffected by the incidence of armed conflict. McNair describes the relevant British practice,[102] and Tobin asserts that the practice is generally compatible with the view adopted in the doctrine.[103] In the *North Atlantic Coast Fisheries Case*, the Government of the United Kingdom contended that rights of the United States in respect of fisheries, by virtue of the Treaty of 1783,[104] had been abrogated as a consequence of the war of 1812. The Permanent Court of Arbitration did not share this view and stated that: "International law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but at most suspended by it."[105]

(15) Similarly, in the *In re Meyer's Estate* case, an appellate court in the United States of America addressing the permanence of treaties dealing with territory, held that "[t]he authorities appear to be in accord that there is nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war".[106]

(16) The writers recognizing this proposition include Hall,[107] Hurst,[108] Oppenheim,[109] Fitzmaurice,[110] McNair,[111]

and 1907, J. B. Scott (ed.), New York, Oxford University Press, 1918]; … Declaration [concerning] Expanding Bullets, [The] Hague, July 29, 1899 (*ibid.*).

"'[Hague] Convention [respecting] the Laws and Customs of War on Land, [The] Hague, October 18, 1899 (*ibid.*).

"'Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases, and of Bacteriological methods of Warfare, Geneva, June 17, 1925.

"'1949 Geneva Conventions [for the protection of war victims: Geneva Convention for the Amelioration of the Condition of the] Wounded and Sick [in Armed Forces in the Field] (art. 2); [Geneva Convention relative to the Treatment of Prisoners of War] (art. 2); [Geneva Convention relative to the Protection of Civilian Persons in Time of War] (art. 2)'" (*ibid.*).

[98] *Ibid*.

[99] Article 24 of the Treaty of amity and commerce between His Majesty the King of Prussia and the United States of America at The Hague (10 September 1785) (*Treaties and Other International Agreements of the United States of America, 1776–1949*, vol. 8, Department of State, 1971, p. 78), cited in *International Law in Historical Perspective*, J. H. W. Verzijl (ed.), Leyden, Sijthoff, 1973, at p. 371.

[100] *Restatement of the Law Third, Restatement of the Law, The Foreign Relations Law of the United States*, vol. 1, St. Paul (Minnesota), American Law Institute Publishers, 1987, para. 336 (*e*).

[101] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 261, para. 89.

[102] McNair, *op. cit.* (footnote 89 above) pp. 704–715.

[103] H. J. Tobin, *The Termination of Multipartite Treaties*, New York, Columbia University Press, 1933, pp. 137 *et seq*.

[104] Definitive Treaty of Peace signed at Paris on 3 September 1783, *Treaties and other International Acts of the United States of America*, H. Miller (ed.), vol. 2, documents 1–40 (1776–1818), Washington D.C., United States Government Printing Office, 1931, p. 151.

[105] *The North Atlantic Coast Fisheries Case, Award of 7 September 1910*, UNRIAA, vol. XI (Sales No. 61.V.4), p. 167, at p. 181. See also *A British Digest of International Law: Phase I: 1860–1914*, vol. 2B, C. Parry (ed.), London, Stevens and Sons, 1967, pp. 585–605.

[106] *In re Meyer's Estate*, 107 Cal. App. 2d 799, 805 (1981).

[107] W. E. Hall, *A Treatise on International Law*, 8th ed., A. Pearce Higgins (ed.), Clarendon, Oxford University Press, Humphrey Milford Publisher to the University, 1924, pp. 456–457.

[108] C. J. B. Hurst, "The effect of war on treaties", BYBIL, *1921–22*, pp. 37–47.

[109] Oppenheim, *op. cit.* (footnote 88 above), p. 304.

[110] G. G. Fitzmaurice, "The juridical clauses of the peace treaties", *Recueil des cours de l'Académie de droit international de La Haye, 1948-II*, vol. 73 (1948-II), pp. 312–313.

[111] McNair, *op. cit.* (footnote 89 above), pp. 704–710 and 720.

Rousseau,[112] Guggenheim,[113] Daillier and Pellet,[114] Aust,[115] Tobin,[116] Delbrück,[117] Stone[118] and Curti Gialdino.[119]

(17) The resort to this category does, however, generate certain problems. In particular, treaties of cession and other treaties effecting permanent territorial dispositions create permanent rights. As Hurst points out. "[i]t is the acquired rights which flow from the treaties which are permanent, not the treaties themselves".[120] Consequently, if such treaties are executed, they cannot be affected by a subsequent armed conflict between the parties.

(18) A further source of difficulty derives from the fact that the limits of the category are to some extent uncertain. For example, in the case of the use of treaties of guarantee, which is an extensive subject,[121] it is clear that the effect of an armed conflict will depend upon the precise object and purpose of the treaty of guarantee. Treaties intended to guarantee a permanent state of affairs, such as the permanent neutralization of a territory, will not be terminated by an armed conflict. Thus, as McNair observes, "the treaties creating and guaranteeing the permanent neutralization of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status".[122]

(19) A number of writers would include agreements relating to the grant of reciprocal rights to nationals and acquisition of nationality within the category of treaties creating permanent rights or a permanent status. However, the considerations leading to the treatment of such agreements as not susceptible to termination are to be differentiated to a certain extent from treaties concerning cessions of territory and boundaries. Accordingly, such agreements will be more appropriately associated with the wider class of friendship, commerce and navigation treaties and other agreements concerning private rights. This class of treaties is examined below.

(20) In their regulation of the law of treaties, the Commission and States have also accorded a certain recognition to the special status of boundary treaties. Article 62, paragraph 2 (*a*), of the 1969 Vienna Convention provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary. Such treaties were recognized as an exception to the rule because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions.[123] Similarly, the Vienna Convention on succession of States in respect of treaties (hereinafter "1978 Vienna Convention") reaches a similar conclusion about the resilience of boundary treaties, providing in article 11, that "[a] succession of States does not as such affect (*a*) a boundary established by a treaty; or (*b*) obligations and rights established by a treaty and relating to the régime of a boundary". Although these examples are not directly relevant to the question of the effects of armed conflict on treaties, they nevertheless point to the special status attached to these types of regime.

(c) *Treaties of friendship, commerce and navigation and analogous agreements concerning private rights*

(21) Such treaties form a very important class of international transactions and are the precursors of the more recent bilateral investment treaties. The nomenclature is varied and such treaties are often denominated "treaties of establishment" or "treaties of amity". They should not be confused with ordinary commercial treaties. A respectable consortium of writers refers to treaties of friendship, commerce and navigation (or establishment) as treaties which are not terminated as the result of armed conflict. The writers include Hurst,[124] Tobin,[125] McNair,[126] Fitzmaurice[127] and Verzijl.[128]

(22) This class of treaties includes other treaties concerned with the grant of reciprocal rights to nationals resident on the territory of the respective parties, including rights of acquisition of property, rights of transfer of such

[112] Ch. Rousseau, *Droit international public*, vol. I, Paris, Sirey, 1970, p. 223.

[113] P. Guggenheim, *Traité de droit international public*, 2nd ed., vol. I, Geneva, Librairie de l'Université, 1967, pp. 241–242.

[114] P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed., Paris, Librairie générale de droit et de jurisprudence, 2002, p. 309.

[115] A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 244.

[116] Tobin, *op. cit.* (footnote 103 above), pp. 50–69.

[117] J. Delbrück, "War, effect on treaties", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4, Amsterdam, Elsevier, 2000, p. 1370.

[118] J. Stone, *Legal Controls of International Conflict: a Treatise on the Dynamics of Disputes—and War—Law*, rev. ed., London, Stevens and Sons, 1959, p. 448.

[119] A. Curti Gialdino, *Gli Effetti della Guerra sui Trattati*, Milan, Giuffrè, 1959, pp. 240 and 245.

[120] Hurst, *loc. cit.* (footnote 108 above), p. 46. See also Fitzmaurice, *loc. cit.* (footnote 110 above), pp. 313, 314 and 317.

[121] See Verzijl (ed.), *op. cit.* (footnote 99 above), pp. 457–459; Tobin, *op. cit.* (footnote 103 above), pp. 55–69; G. Ress, "Guarantee treaties", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2, Amsterdam, Elsevier, 1995, pp. 634–637; and McNair, *op. cit.* (footnote 89 above), pp. 239–254.

[122] McNair, *op. cit.* (footnote 89 above), p. 703.

[123] See paragraph (11) of the Commission's commentary to draft article 59 [now article 62 of the Vienna Convention], *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 283; or *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), p. 79. The exception of treaties establishing a boundary from the fundamental change of circumstances rule, though opposed by a few States, was endorsed by a very large majority of the States at the United Nations Conference on the Law of Treaties.

[124] Hurst, *loc. cit.* (footnote 108 above), pp. 43–44.

[125] Tobin, *op. cit.* (footnote 103 above), pp. 82–87.

[126] McNair, *op. cit.* (footnote 89 above), pp. 713–715 and 718–719.

[127] Fitzmaurice, *loc. cit.* (footnote 110 above), pp. 314–315.

[128] Verzijl (ed.), *op. cit.* (footnote 99 above), pp. 382–385. See also "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), paras. 37–46. The memorandum notes, at para. 46, that "there is a very significant line of cases in the United States of America, supported by case law in Great Britain, that reciprocal inheritance treaties continue to apply during armed conflict. This jurisprudence is consistent with the general thesis among many courts and commentators that treaties consistent with national policy during armed conflict should be upheld, since the treaties in question concern only private rights. But, the French Court of Cassation has come to the opposite conclusion, leaving this an unsettled area of international law."

property and rights to acquire it by inheritance.[129] Associated with the class are agreements concerning the acquisition and loss of nationality, and other matters of status including marriage and guardianship.[130]

(23) The policy basis for according a special status to this category of treaties is essentially that of legal security for the nationals and other private interests involved, coupled with the condition of reciprocity. It is therefore not surprising that there is a quantity of State practice confirming the position that such treaties are not terminated in case of an armed conflict.

(24) In 1931, the Swiss Federal Department of Justice and Police did not accept that treaties of establishment and commerce could be abrogated or suspended as between a belligerent and a neutral State.[131] The position of the Government of the United Kingdom was opposed to the position of Switzerland in the pertinent negotiations. The practice of the United States was influenced by certain judicial decisions. The change in United States practice to the effect that a treaty remains in effect despite the outbreak of war is reflected in a 1945 letter from the Acting Secretary of State (Grew) to the Attorney-General.[132]

(25) In 1948, the position adopted was confirmed by the Acting Legal Adviser, Jack B. Tate. In his words:[133]

In a letter dated May 21, 1945 from the Acting Secretary of State to the Attorney-General, the Department of State set forth its views regarding the continuation in effect of Article IV of the above-mentioned treaty despite the outbreak of war. In the case of *Clark* v. *Allen* (1947), 91 L. Ed. 1633, 1641–1643, the Supreme Court decided that the provisions of Article IV of the 1923 treaty with Germany relating to the acquisition, disposition and taxation of property remained effective during the war. The Department observes that customarily, as indicated by the decision in *Clark* v. *Allen* and a number of other decisions of the United States Supreme Court, the determinative factor is whether or not there is such an incompatibility between the treaty provision in question and the maintenance of a state of war as to make it clear that the provision should not be enforced.

In connection with the property acquired in San Francisco by the German Government in 1941 for consular purposes, the relevant provisions of the 1923 treaty with Germany are those of the second paragraph of Article XIX ... The Department of State is of the view that the legal effect of these provisions was unchanged by the outbreak of war between the United States and Germany. This view is in complete accord with the policy long followed by this Government, both in time of peace and in time of war, with regard to property belonging to the government of one country and situated within the territory of another country. This Government has consistently endeavored to extend to the

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[129] See McNair, *op. cit.* (footnote 89 above), p. 711; Fitzmaurice, *loc. cit.* (footnote 110 above), p. 315; Verzijl (ed.), *op. cit.* (footnote 99 above), pp. 382–385; "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), paras. 37–46, 67 and 76; Oppenheim, *op. cit.* (footnote 88 above), p. 304.

[130] See McNair, *op. cit.* (footnote 89 above), p. 714; and Verzijl (ed.), *op. cit.* (footnote 99 above), p. 385.

[131] *Répertoire suisse de droit international public: documentation concernant la pratique de la Confédération en matière de droit international public, 1914–1939*, P. Guggenheim (ed.), Basel, Helbing and Lichtenhahn, 1975, vol. I, pp. 188–191.

[132] Whiteman, *op. cit.* (footnote 96 above), pp. 495–497; the letter read:

"In connection with litigation involving decedents' estates in which the Alien Property Custodian had vested the interests of German nationals, Attorney General Biddle inquired in 1945 whether the Department of State concurred with the position being advanced by the Department of Justice that the provisions of articles I and IV of the Treaty of Friendship, Commerce and Consular Rights of December 8, 1923, with Germany [*United States Treaty Series* 725; 44 *United States Statutes at Large* 2132; 52, *League of Nations Treaty Series*, 133] had not been abrogated by the war but were still effective. In Acting Secretary of State Grew's reply of May 21, 1945, to the Attorney General, it was stated:

'Article I of the Treaty covers a broad field, conferring upon nationals of each High Contracting Party the right to enter and sojourn in the territories of the other, to carry on specified types of occupations, to own or lease buildings and lease land, and to enjoy freedom from discrimination in taxes, freedom of access to the courts, and protection for their persons and property. Article IV relates to the disposition and inheritance of real and personal property.

'It appears that the law with respect to the effect of war upon treaties is by no means clear or well settled ... [Here follow references to and quotations from the cases *Karnuth* v. *United States*, 279 U.S. 231, 236 (1929), *Techt* v. *Hughes*, 229 N.Y. 222, 240 (1920), 128 N.E. 185, 191 (1920), certiorari denied 254 U.S. 643 (1920), and the Sophie Rickmers, 45 Fed.2d 413 (S.D.N.Y. 1930).]

' ...

'Applying the principles of these decisions to Article I of the Treaty of 1923 with Germany, there would appear to be considerable doubt as to the present effectiveness of some of the provisions of that article, such as those with respect to entry into the United States, the right to engage in certain occupations, et cetera. On the other hand, there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war.

'A provision in a treaty with Austria-Hungary similar to Article IV was held effective during war time in *Techt* v. *Hughes*, supra, ...

'This case was followed in *State ex rel. Miner* v. *Reardon* [120 Kans. 614, 245 Pac. 158 (1926)] ... The Supreme Court of Nebraska came to the same conclusion in *Goos* v. *Brocks* [117 Neb. 750 (1929), 223 N.W. 13 (1929)], ...

'While the treaty provision in the instant case is somewhat different from that in the *Karnuth* case, it should be noted that in the latter case the Supreme Court said that "there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: ... provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" ...

'Although Secretary of State Lansing wrote on September 10, 1918 that the Department did not regard such treaty provisions with respect to the disposition and inheritance of real property as in force during the war with Germany and Austria-Hungary ... that statement was made prior to the judicial decisions discussed herein and before the approach represented by those decisions had been so clearly adopted by the courts. There appears to be a trend toward recognizing greater continuing effectiveness of treaty provisions during war than in earlier times. It is believed that Secretary Lansing's statement does not represent the view which would now be held.

'It may be observed that the courts of this country appear to have taken a position somewhat more favourable to the continuing effectiveness of treaty provisions in time of war than have many of the writers on international law. Among modern writers there appears to be a trend in favor of the view that "the element on which must depend an answer to the question whether or not a particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the intention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself". (Sir Cecil Hurst, "The Effect of War on Treaties", 1921–1922 BYBIL, 37, 47.) See also C. C. Hyde, *International Law* (2nd ed. 1945), volume II, pp. 1546 *et seq.*; Harvard Research in International Law, *Law of Treaties*, 29 AJIL Supp. (1935), 1183 *et seq*. There does not appear to be any evidence as to the actual intention in this respect at the time when the treaty with Germany was concluded in 1923. However, in view of the then recent decision in *Techt* v. *Hughes, supra*, it would not be unreasonable to suppose that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war.

'In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that article IV of the Treaty of December 8, 1923, with Germany remains in effect despite the outbreak of war.' The Acting Secretary of State (Grew) to the Attorney General (Biddle), letter, May 21, 1945, MS. Department of State, file 740.00113 EW/4-1245."

[133] Whiteman, *op. cit.* (footnote 96 above), pp. 502–503, letter dated 10 November 1948 to the Attorney-General.

property of other governments situated in territory under the jurisdiction of the United States of America the recognition normally accorded such property under international practice and to observe faithfully any rights guaranteed such property by treaty. This Government, likewise, has been equally diligent in demanding that other governments accord such recognition and rights to its property in their territories.

The history of this Government's treatment of the German diplomatic and consular properties in the United States following the outbreak of war between the United States and Germany may be of interest in connection with this matter.

...

In view of these considerations, the Department of State perceives no objection to the position which the Office of Alien Property is advancing that the provisions of the second paragraph of Article XIX of the treaty signed December 8, 1923 with Germany remain in effect despite the outbreak of war between the United States and Germany.

(26) This view is reflected in the decisions of municipal courts in several States, but the jurisprudence is by no means consistent.[134]

(27) The jurisprudence of the ICJ concerning similar treaty provisions is not inimical to the legal positions presented above. However, the Court did not address the issue of the effects of armed conflict on validity or suspension in the *Military and Paramilitary Activities in and against Nicaragua* case.[135] Moreover, the Court did not make any finding on the question of the existence or not of an "armed conflict" between the parties.[136] It is to be recalled that the United States still maintained diplomatic relations with Nicaragua, and there had been no declaration of war or of an armed conflict.

(28) The decision of the Court in the *Oil Platforms* case[137] also rested upon the assumption that the Treaty of Amity, Economic Relations, and Consular Rights of 1955[138] between Iran and the United States remained in force. The relevance of these decisions is affected by the fact that the Treaty had remained in force.[139] This had not been contested by the parties.

(29) In addition, it is safe to assume that the present class of treaties include bilateral investment treaties. As Aust points out, the purpose of such agreements is the mutual protection of nationals of the parties.[140]

(d) *Treaties for the protection of human rights*

(30) The literature makes very few references to the status for present purposes of treaties for the protection of human rights. This state of affairs is in fact readily explicable. Much of the relevant literature is earlier than the emergence of human rights norms in the era of the Charter of the United Nations. Furthermore, the specialist literature on human rights has a tendency to neglect the more technical problems. The resolution of the Institute of International Law adopted in 1985 included the following provision (in article 4): "The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides."[141] Article 4 was adopted by 36 votes to none, with 2 abstentions.[142]

(31) The use of the category of human rights protection may be seen as a natural extension of the status accorded to treaties of friendship, commerce and navigation and analogous agreements concerning private rights, including bilateral investment treaties. There is also a close relation to the treaties creating a territorial regime and, in so doing, setting up standards governing the human rights of the population as a whole, or a regime for minorities, or a regime for local autonomy.

(32) The application of human rights treaties in time of armed conflict is described as follows:

Although the debate continues whether human rights treaties apply *to* armed conflict, it is well established that non-derogable provisions of human rights treaties apply *during* armed conflict. First, the International Court of Justice stated in its advisory opinion on nuclear weapons [*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226] that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency" [p. 240, para. 25]. The nuclear weapons opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its Commentary on the articles on the responsibility of states for internationally wrongful acts that although the inherent right to self-defence may justify non-performance of certain treaties, "[a]s to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct." Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict. Because non-derogable human rights provisions codify *jus cogens* norms, the application of non-derogable human rights provisions during armed conflict can be considered a corollary of the rule expressed in section 4 … that treaty provisions representing *jus cogens* norms, must be honoured notwithstanding the outbreak of armed conflict. [143]

(33) This description illustrates the problems relating to the applicability of human rights standards in case of armed conflict.[144] The task of the Commission is not to enter upon such matters of substance but to direct attention to the question of the effects of armed conflict upon the operation or validity of particular treaties. In this connection, the test of derogability is not appropriate, because derogability concerns the operation of the provisions and is not related

[134] R. Rank, "Modern war and the validity of treaties", *Cornell Law Quarterly*, vol. 38 (1952–1953), pp. 511–533; Whiteman, *op. cit.* (footnote 96 above), pp. 497–505; Verzijl (ed.), *op. cit.* (footnote 99 above), pp. 377–385.

[135] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at pp. 426–429.

[136] See "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), paras. 69–74.

[137] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 161. See also *Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803.

[138] Signed at Tehran on 15 August 1955, United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

[139] See *Oil Platforms, Preliminary Objection, Judgment* (footnote 137 above), p. 809, para. 15.

[140] See Aust, *Modern Treaty Law and Practice*, *op. cit.* (footnote 115 above), p. 244.

[141] Institute of International Law, *Yearbook*, vol. 61 (1986), Session of Helsinki (1985), Part II, p. 280.

[142] *Ibid.*, pp. 219–221.

[143] "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), para. 32 (footnotes omitted).

[144] See also R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002.

to the issue of validity or termination. However, the competence to derogate "in time of war or other public emergency threatening the life of the nation" certainly provides evidence that an armed conflict as such does not result in suspension or termination. At the end of the day, the appropriate criteria are those laid down in draft article 4. The exercise (or not) of a competence to derogate would not prevent another party to the treaty asserting that a suspension or termination was justified *ab extra*.

(e) *Treaties relating to the protection of the environment*

(34) Most environmental treaties do not contain express provisions on their applicability in case of armed conflict. The subject matter and modalities of treaties for the protection of the environment are extremely varied.[145]

(35) The pleadings relating to the advisory opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons* indicate, quite clearly, that there is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflict, subject to express provisions indicating the contrary.[146]

(36) In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ formulated the general legal position in these terms:

> The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
>
> However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.
>
> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.
>
> This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:
>
> > "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."
>
> The Court notes furthermore that Articles 35, paragraph 3, and 55 of [the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)] provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.
>
> These are powerful constraints for all the States having subscribed to these provisions.[147]

(37) These prescriptions are, of course, significant and they provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict. However, as the written submissions in the advisory opinion proceedings indicate, there was no consensus on the specific legal question.[148]

(f) *Treaties relating to international watercourses and related installations and facilities*

(38) Treaties relating to watercourses or rights of navigation are essentially a subset of the category of treaties creating or regulating permanent rights or a permanent regime or status. It is, nonetheless, convenient to examine this group separately. A number of authorities recognize this type of instrument as being unqualified for termination in time of an armed conflict. Such writers include Tobin,[149] McNair,[150] Fitzmaurice,[151] Rank,[152] Chinkin[153] and Delbrück.[154]

(39) The picture is, however, far from simple. The practice of States has been described as follows by Fitzmaurice:

> Where all the parties to a convention, whatever its nature, are belligerents, the matter falls to be decided in much the same way as if the convention were a bilateral one. For instance, the class of law-making treaties, or of conventions intended to create permanent settlements, such as conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives [on] the restoration of peace.[155]

(40) The application of treaties concerning the status of certain waterways may be subject to the exercise of the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations.[156]

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[145] See Ph. Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, 2003, pp. 307–316; P. W. Birnie and A. E. Boyle, *International Law and the Environment*, 2nd ed., Oxford University Press, 2002, pp. 148–151; and K. Mollard Bannelier, *La protection de l'environnement en temps de conflit armé*, Paris, Pedone, 2001.

[146] See "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), paras. 58–63.

[147] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 101 above), pp. 241–242, paras. 29–31.

[148] See D. Akande, "Nuclear weapons, unclear law? Deciphering the *Nuclear Weapons* Advisory Opinion of the International Court", BYBIL, *1997*, vol. 68, pp. 183–184.

[149] Tobin, *op. cit.* (footnote 103 above), pp. 89–95.

[150] McNair, *op. cit.* (footnote 89 above), p. 720.

[151] Fitzmaurice, *loc. cit.* (footnote 110 above), pp. 316–317.

[152] Rank, "Modern war and the validity of treaties", *loc. cit.* (footnote 134 above), pp. 526–527.

[153] C. M. Chinkin, "Crisis and the performance of international agreements: the outbreak of war in perspective", *The Yale Journal of World Public Order*, vol. 7 (1980–1981), pp. 202–205.

[154] Delbrück, *loc. cit.* (footnote 117 above), p. 1370.

[155] Fitzmaurice, *loc. cit.* (footnote 110 above), p. 316.

[156] See R. R. Baxter, *The Law of International Waterways, with Particular Regard to Interoceanic Canals*, Cambridge (Massachusetts), Harvard University Press, 1964, p. 205.

(41) In any event, the regime of individual straits and canals is usually dealt with by means of specific provisions. The examples of such treaties include the 1922 Convention Instituting the Statute of Navigation of the Elbe, the provisions of the 1919 Treaty of Peace between the Allied and Associated Powers and Germany relating to the Kiel Canal, the 1936 Convention regarding the Regime of the Straits, the 1977 Panama Canal Treaty[157] and the 1977 Treaty concerning the Permanent Neutrality and Operation of the Panama Canal.[158]

(42) Certain multilateral agreements provide expressly for a right of suspension in time of war. Thus article 15 of the 1921 Convention and Statute on the Regime of Navigable Waterways of International Concern provides that: "This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit."

(43) The Convention on the Law of the Non-navigational Uses of International Watercourses (1997) provides as follows in article 29:

International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.

(44) There is therefore a case for including the present category in the indicative list.

(g) *Treaties relating to aquifers and related installations and facilities*

(45) Similar considerations as above would seem to apply with respect to treaties relating to aquifers and related installations and facilities. Groundwater constitutes about 97 per cent of the world's freshwater resources, excluding water locked in the polar ice.[159] While there is considerable State practice regarding surface water resources, the same may not be said with regard to groundwater resources. In its work on the law of transboundary aquifers, the Commission has demonstrated what is achievable in this area.[160] The existing body of bilateral, regional and international agreements and arrangements on groundwaters is becoming noticeable.[161]

(46) Based on the underlying protections provided for by the law of armed conflict, the basic assumption is that transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.[162]

(47) Although the law of armed conflict itself provides protection, it may not be so clear that there is a necessary implication from the subject matter of treaties relating to aquifers and related installations and facilities that no effect ensues from an armed conflict. The vulnerability of aquifers and the need to protect the waters contained therein make a compelling case for drawing the necessary implication of continuance.

(h) *Multilateral law-making treaties*

(48) The category of law-making treaties is defined by McNair as follows:

Multi-partite law-making treaties. By these are meant treaties which create rules of international law for regulating the future conduct of the parties without creating an international régime, status, or system. It is believed that these treaties survive a war, whether all the contracting parties or only some of them are belligerents. The intention to create permanent law can usually be inferred in the case of these treaties. Instances are not numerous. The Declaration of Paris of 1856 [Declaration Respecting Maritime Law] is one; its content makes it clear that the parties intended it to regulate their conduct during a war, but it is submitted that the reason why it continues in existence after a war is that the parties intended by it to create permanent rules of law. Hague Convention II of 1907 [respecting the limitation of the employment of force for the recovery of contract debts] and the Peace Pact of Paris of 1928 [General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact)] are also instances of this type. Conventions creating rules as to nationality, marriage, divorce, reciprocal enforcement of judgments, &c., would probably belong to the same category.[163]

(49) The significance of this category is indicated in several other authorities, including Rousseau,[164] Fitzmaurice,[165] Starke,[166] Delbrück[167] and Curti Gialdino.[168]

(50) The term "law-making" is somewhat problematic[169] and may not lend itself to definitive contours. There is, however, a certain amount of State practice relating to multilateral treaties of a technical character arising from the post-war arrangements resulting from the Second World War. Starke states, "[m]ultilateral Conventions of the 'law-making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended and revived on the termination of hostilities, or receive even in wartime a partial application".[170]

(51) The United States position is described in a letter dated 29 January 1948 from the State Department Legal Adviser, Ernest A. Gross:

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[157] Signed at Washington D.C. on 7 September 1977, United Nations, *Treaty Series*, vol. 1280, No. 21086, p. 3. See also ILM, vol. 16 (1977), p. 1022.

[158] Signed at Washington D.C. on 7 September 1977, ILM (see footnote above), p. 1040.

[159] See Burchi and Mechlem, *op. cit.* (footnote 25 above), foreword.

[160] See chapter IV of the present report above.

[161] See generally, Burchi and Mechlem, *op. cit.* (footnote 25 above).

[162] See, above, article 18 of the draft articles of the law of transbounda ry aquifers adopted by the Commission at its current session.

[163] McNair, *op. cit.* (footnote 89 above), p. 723.

[164] Rousseau, *op. cit.* (footnote 112 above), pp. 223–224.

[165] Fitzmaurice, *loc. cit.* (footnote 110 above), pp. 308–309 and 313.

[166] *Starke's International Law*, 11th ed., I. A. Shearer (ed.), London, Butterworths, 1994, p. 493.

[167] Delbrück, *loc. cit.* (footnote 117 above), p. 1370.

[168] Curti Gialdino, *op. cit.* (footnote 119 above), pp. 225–239.

[169] See "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), paras. 49–50.

[170] Shearer (ed.), *op. cit.* (footnote 166 above), p. 493.

With respect to multilateral treaties of the type referred to in your letter, however, this Government considers that, in general, non-political multilateral treaties to which the United States was a party when the United States became a belligerent in the war, and which this Government has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realized that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.

It is considered by this Government that, with the coming into force on September 15, 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania ...[171]

(52) The position of the United Kingdom was reported in a letter from the Foreign Office dated 7 January 1948, as follows:

I am replying ... to your letter ... in which you enquired about the legal status of Multilateral Treaties of a technical or non-political nature, and whether these are regarded by His Majesty's Government in the United Kingdom as having been terminated by war, or merely suspended.

You will observe that, in the Peace Treaties with Italy, Finland, Roumania, Bulgaria and Hungary, no mention is made of such treaties, the view being taken at the Peace Conference that no provision regarding them was necessary, inasmuch as, according to International Law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the [Convention relating to the regulation of Aerial Navigation] of 1919 and various Postal and Telegraphic Conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions in so far as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. In some cases, however, such as the Red Cross Convention, the multilateral convention is especially designed to deal with the relations of Powers at war, and clearly such a convention would continue in force and not be suspended.

As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice.[172]

(53) The position of the Governments of Germany,[173] Italy[174] and Switzerland[175] appears to be essentially similar in relation to the present subject matter. However, the State practice is not entirely consistent and further evidence of practice and, especially more current practice, is needed.

(54) In this particular context, the decisions of municipal courts must be regarded as a problematical source. In the first place, such courts depend upon the explicit guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the municipal jurisprudence is not inimical to the principle of survival.[176] The general principle was supported in the decision of the Scottish Court of Session in *Masinimport* v. *Scottish Mechanical Light Industries Ltd.* (1976).[177]

(55) Although the sources are not all congruent, the category of law-making treaties can be recommended for recognition as a class of treaties having the status of survival. As a matter of principle, they should qualify and there is a not inconsiderable quantity of State practice favourable to the principle of survival.

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

(56) This category is not prominent in the literature and is probably assumed to be merged to some extent in the category of multilateral treaties constituting an international regime. Certain writers, however, give explicit recognition of the continuing operation of treaties constituting machinery for the peaceful settlement of

[171] R. Rank, "Modern war and the validity of treaties: a comparative study", *Cornell Law Quarterly*, vol. 38 (1952–1953), pp. 343–344.

[172] *Ibid.*, p. 346. See also Oppenheim, *op. cit.* (footnote 88 above), pp. 304–306. Fitzmaurice discusses the way in which the revival or otherwise of bilateral treaties was dealt with, which involved a method of notification, and notes:

"The merit of a provision of this kind is that it settles beyond possibility of doubt the position in regard to each bi-lateral treaty which was in force at the outbreak of war between the former enemy States and any of the Allied or Associated Powers, which would certainly not be the case in the absence of such a provision, having regard to the considerable difficulty and confusion which surrounds the subject of the effect of war on treaties, particularly bi-lateral treaties.

"This difficulty also exists in regard to multilateral treaties and conventions, but it is much less serious, as it is usually fairly obvious on the face of the multilateral treaty or convention concerned what the effect of the outbreak of war will have been on it. In consequence, and having regard to the great number of multilateral conventions to which the former enemies and the Allied and Associated Powers were parties (together with a number of other States, some of them neutral or otherwise not participating in the peace settlement) and of the difficulty that there would have been in framing detailed provisions about all these conventions, it was decided to say nothing about them in the Peace Treaties and to leave the matter to rest on the basic rules of international law governing it. It is, however, of interest to note that when the subject was under discussion in the Juridical Commission artiof the Peace Conference, the view of the Commission was formally placed on record and inscribed in the minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace without the necessity of any special provision to that effect. The matter is actually not quite so simple as that, even in relation to multilateral conventions, but at any rate that was broadly the basis upon which it was decided not to make any express provision about the matter in the Peace Treaties" (Fitzmaurice, *loc. cit.* (footnote 110 above), pp. 308–309).

[173] Rank, "Modern war and the validity of treaties: a comparative study", *loc. cit.* (footnote 171 above), pp. 349–354.

[174] *Ibid.*, pp. 347–348.

[175] *Répertoire suisse de droit international public* (see footnote 131 above), pp. 186–191.

[176] See Rank, "Modern war and the validity of treaties", *loc. cit.* (footnote 134 above), pp. 511 and 533; and Verzijl (ed.), *op. cit.* (footnote 99 above), pp. 387–391.

[177] *Masinimport* v. *Scottish Mechanical Light Industries Ltd.*, ILR, vol. 74 (1987), p. 559, at p. 564.

international disputes.[178] In accordance with this principle, special agreements concluded before the First World War were acted upon to effect the arbitrations concerned after the war.

(j) *Treaties relating to commercial arbitration*

(57) As a matter of principle and sound policy, the principle of survival would seem to apply to obligations arising under multilateral conventions concerning arbitration and the enforcement of awards. In *Masinimport* v. *Scottish Mechanical Light Industries Ltd.*, the Scottish Court of Session held that such treaties had survived the Second World War and were not covered by the Treaty of Peace with Romania of 1947.[179] The agreements concerned were the Protocol on Arbitration Clauses signed on 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards dated 26 September 1927. The Court classified the instruments as "multipartite law-making treaties". In 1971, the Italian Court of Cassation (Joint Session) held that the 1923 Protocol on Arbitration Clauses in commercial matters had not been terminated in spite of the Italian declaration of war on France, its operation having only been suspended pending cessation of the state of war.[180]

(58) The recognition of this family of treaties would seem to be justified and there are also links with other classes of treaty, including multilateral law-making treaties.

(59) There is a significant analogy with the question of the effect of an outbreak of hostilities upon a clause providing for arbitration under the rules of the International Chamber of Commerce. In the case of *Dalmia Cement Ltd.* v. *National Bank of Pakistan*, the sole arbitrator, Professor Pierre Lalive, referring to the hostilities which took place between India and Pakistan in September 1965, made the following determination: "To conclude, there is no doubt in my mind that, when the Claimant filed with the Court of Arbitration of the ICC [International Chamber of Commerce] a request for arbitration, there was in existence between the parties a valid and binding agreement to arbitrate under the ICC rules, even assuming that there had been a state of war between India and Pakistan."[181]

(k) *Treaties relating to diplomatic relations*

(60) Also included in the indicative list are treaties relating to diplomatic relations. While the experience is not well documented, it is not unusual for embassies to remain open in time of armed conflict. In any case, the express provisions of the Vienna Convention on Diplomatic Relations indicate its application in time of armed conflict. Thus article 24 provides that the archives and documents of the mission shall be inviolable "at any time", and this phrase was added during the Vienna Conference in order to make clear that inviolability continued in the event of armed conflict.[182] Other provisions, for example article 44, on facilities for departure, include the words "even in case of armed conflict". Article 45 is of particular interest and provides as follows:

> If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
>
> (*a*) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
>
> (*b*) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
>
> (*c*) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

(61) The principle of survival is recognized by some commentators.[183] The specific character of the regime reflected in the Vienna Convention on Diplomatic Relations was described in emphatic terms by the ICJ in the *United States Diplomatic and Consular Staff in Tehran* case. In the words of the Court:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the [Vienna Convention on Diplomatic Relations] of 1961 (cf. also Articles 26 and 27 of the [Vienna Convention on Consular Relations] of 1963.) Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State.[184]

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[178] See S. H. McIntyre, *Legal Effect of World War II on Treaties of the United States*, The Hague, Martinus Nijhoff, 1958, pp. 74–86; and McNair, *op. cit.* (footnote 89 above), p. 720. See also M. O. Hudson, *The Permanent Court of International Justice, 1920–1942*: *a Treatise*, New York, The Macmillan Company, 1943.

[179] *Masinimport* v. *Scottish Mechanical Light Industries Ltd.* (see footnote 177 above), p. 564.

[180] *Lanificio Branditex* v. *Società Azais e Vidal*, ILR, vol. 71 (1986), p. 595. See also the Swiss decision concerning the Protocol on Arbitration Clauses in *Telefunken* v. *N.V. Philips, ibid.*, vol. 19, p. 557 (Federal Tribunal).

[181] *Dalmia Cement Ltd.* v. *National Bank of Pakistan, Award of 18 December 1976, ibid.*, vol. 67 (1984), p. 611, at p. 629. He also said:

> "It is unnecessary to examine, then, whether submitting to arbitration does involve 'intercourse' with an 'enemy' and whether the authorities quoted to support this contention are relevant only to 'English' or local arbitrations but also to international arbitrations under the ICC rules. It would be equally superfluous to discuss the question whether the parties did, or could contemplate, when accepting the arbitration clause, the possibility that a 'state of war' or of an armed conflict short of war could or would arise between Pakistan and India.
>
> "For these reasons,
>
> "The undersigned Arbitrator
>
> "Finds that the arbitration proceedings instituted by the Claimant come within the competence of the Arbitration Court of the International Chamber of Commerce and that the Arbitrator has jurisdiction to adjudicate upon the dispute in conformity with Article 13 (3) of the Rules of Conciliation and Arbitration of the ICC" (*ibid.*).

[182] See E. Denza, *Diplomatic Law: a Commentary on the Vienna Convention on Diplomatic Relations*, 2nd ed., Oxford, Clarendon Press, 1998, p. 160.

[183] See, for example, Chinkin, *loc. cit.* (footnote 153 above), at pp. 194–195. See also "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), para. 36.

[184] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 40, para. 86.

(62) The Vienna Convention on Diplomatic Relations of 1961 was in force for both Iran and the United States. In any event, the Court made it reasonably clear that the applicable law included "the applicable rules of general international law", and that the Convention constituted a codification of the law.[185]

(l) *Treaties relating to consular relations*

(63) As in the case of treaties relating to diplomatic relations, so also in the case of treaties relating to consular relations there is a strong argument for placing such treaties within the class of agreements which are not necessarily terminated or suspended in case of an armed conflict. It is well recognized that consular relations may continue even in the event of war or severance of diplomatic relations.[186] The express provisions of the Vienna Convention on Consular Relations indicate its application in time of armed conflict. Thus, article 26 provides that the facilities to be granted by the receiving State to members of the consular post, and others, for their departure, shall be granted "even in case of armed conflict". And article 27 provides that the receiving State shall, "even in case of armed conflict", respect and protect the consular premises. The principle of survival is recognized by Chinkin.[187]

(64) The ICJ in the judgment in the *United States Diplomatic and Consular Staff in Tehran* case emphasized the special character of the two Vienna Conventions of 1961 and 1963.

(65) The Vienna Convention on Consular Relations was in force for both Iran and the United States. Moreover, the Court recognized that the Convention constituted a codification of the law and made it reasonably clear that the applicable law included "the applicable rules of general international law".[188]

(66) The practice of States relating to the consular provisions in bilateral treaties is not very coherent.[189] More information, and particularly information on recent practice, is needed.

Article 6. 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 Vienna Convention on the Law of Treaties.

2. States may conclude lawful agreements involving termination or suspension of a treaty that is operative between them during situations of armed conflict.

Commentary

(1) Draft articles 6 and 7 should be read in sequence. They have been included to preserve the principle *pacta sunt servanda* and they are in line with the basic policy of the draft articles, which seeks to ensure the legal security and continuity of treaties. These two draft articles reflect the fact that States may, in times of armed conflict, continue to have dealings with one another.

(2) Paragraph 1 of draft article 6 reflects the basic proposition that an armed conflict does not affect the capacity of a State party to that conflict to enter into treaties.

(3) While, technically speaking, the provision deals with the effect of armed conflict on the capacity of States to enter into agreements, as opposed to the effect on the treaty itself, it was thought useful nonetheless to retain the paragraph in the draft articles. The provision was further refined to indicate the capacity "of a State party to that conflict", so as to indicate that there may be only one State party to the armed conflict, as in situations of internal armed conflict.

(4) Paragraph 2 deals with the practice of States parties to an armed conflict expressly agreeing during the armed conflict either to suspend or terminate a treaty which is operative between them at the time. As McNair has remarked, "[t]here is no inherent juridical impossibility ... in the formation of treaty obligations between two opposing belligerents during war".[190] Such agreements have been concluded in practice and a number of writers have referred to pertinent episodes. Echoing McNair to some extent, Fitzmaurice observed in his Hague Lectures:

> Again, there is no inherent impossibility in treaties being actually concluded between two belligerents during the course of a war. This is indeed what happens when, for instance, an armistice agreement is concluded between belligerents. It also occurs when belligerents conclude special agreements for the exchange of personnel, or for the safe conduct of enemy personnel through their territory, and so on. These agreements may have to be concluded through the medium of a third neutral State or protecting power, but once concluded they are valid and binding international agreements.[191]

Article 7. Express provisions on the operation of treaties

Where a treaty expressly so provides, it shall continue to operate in situations of armed conflict.

Commentary

(1) To complement draft article 6, draft article 7 deals with the further possibility of treaties expressly providing for their continued operation in situations of armed conflict. It lays down the general rule that where a treaty so provides, it continues to operate in situations of armed conflict.

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[185] *Ibid.*, p. 24, para. 45; p. 41, para. 90 and, in the dispositive part, p. 44, para. 95.

[186] L. T. Lee, *Consular Law and Practice*, 2nd ed. Oxford, Clarendon Press, 1991, p. 111.

[187] Chinkin, *loc. cit.* (footnote 153 above), at pp. 194–195. See also "The effect of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 78 above), para. 36.

[188] *United States Diplomatic and Consular Staff in Tehran* (see footnote 184 above), p. 24, para. 45; p. 41, para. 90, and, in the dispositive part, p. 44, para. 95.

[189] See Rank, "Modern war and the validity of treaties: a comparative study", *loc. cit.* (footnote 171 above), pp. 341–355; and McIntyre, *op. cit.* (footnote 178 above), pp. 191–199.

[190] McNair, *op. cit.* (footnote 89 above), p. 696.

[191] Fitzmaurice, *loc. cit.* (footnote 110 above), p. 309.

(2) The formulation of draft article 7 focuses on the "operativeness" of the types of treaties under discussion not being affected by a conflict. Initially, the provision referred to the continuation "in force" of the treaty. Some proposals were made to refer instead to continuing to "apply" or to "operate". It was decided to settle on the latter option since it was felt that the emphasis should be placed not on whether the treaty remained in force or whether it was potentially applicable, but rather on whether it was actually operational in the context of armed conflict.

(3) Whether to retain the reference to the qualifier "expressly" was debated. There was a view that such a qualifier was unnecessarily limiting, since there existed treaties which, although not expressly providing therefore, continued in operation by implication. However, on balance, it was decided to retain a stricter formulation, which clearly covers only treaties containing such express provisions, and to leave treaties which by necessary implication continue in operation to be covered by the application of draft articles 4 and 5.

(4) On a strict view, this draft article may seem redundant, but it was generally recognized that such a provision was justified in the name of expository clarity.

Article 8. Notification of termination, withdrawal or suspension

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.

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 or suspension of the operation of the treaty.

Commentary

(1) Draft article 8 establishes a basic duty of notification of termination, withdrawal or suspension from the treaty. The text is based on article 65 of the 1969 Vienna Convention, albeit streamlined and adjusted to the context of armed conflict. The intention behind the draft article is to establish a basic duty of notification, while recognizing the right of another State party to the treaty to raise an objection, but not to go further. In other words, in such situations there would be a dispute that would remain unresolved, at least for the remainder of the conflict. It was recognized that it would not be feasible to maintain a fuller equivalent of article 65, as 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.

(2) In paragraph 1, the text has been aligned with the Vienna Convention, by replacing "wishing" with "intending", and then adding the words "of that intention" at the end in order to specify what the object of the notification was. The possibility of rendering the last phrase as "of its claim" which is the language in the Vienna Convention was also a subject of discussion, but it was decided against it so as to more clearly distinguish the present procedure from that in article 65 of the Vienna Convention.

(3) On the reference to "or its depositary", there were proposals to change it to "and its depositary", or to delete the reference to "other States". However, the text as initially proposed was finally retained since it is the function of the depositary to notify the parties. Furthermore, there are treaties which do not have depositaries. Accordingly, the possibility of notifying either the States parties or the depositary needs to be provided for in paragraph 1. However, as regards the notification taking effect, what is important is the moment at which the other State party or States parties receive the notification, and not the moment at which the depositary receives the notification. Hence, no reference to the depositary is made in paragraph 2.

(4) On the formulation of paragraph 2, a proposal to specify that it is the "termination, suspension or withdrawal" which takes effect upon receipt of the notification was the subject of consideration. However, it was decided to retain the reference only to the "notification" taking effect, since adopting the proposed amendment would have had the effect of indicating that the termination, suspension or withdrawal would take place immediately upon receipt, when it is anticipated in paragraph 3 that a party to the treaty retains the right to object to termination.

(5) The intention of paragraph 3 is to preserve the right that may exist under a treaty or general international law to object to the termination, suspension or withdrawal of the treaty. Hence, the objection is to the intention to terminate, suspend or withdraw, which is communicated by the notification envisaged in paragraph 1.

Article 9. Obligations imposed by international law independently of a treaty

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.

Commentary

(1) Draft articles 9 to 11 seek to establish a modified regime modelled on articles 43 to 45 of the 1969 Vienna Convention. Draft article 9 has its roots in article 43 of the Vienna Convention. Its purpose is to preserve the requirement of the fulfilment of an obligation under general international law, where the same obligation appears in a treaty which has been terminated or suspended, or from which the State party has withdrawn, as a consequence of an armed conflict. This latter point, namely, the linkage to the armed conflict, has been added in order to put the provision into its proper context for the purposes of the present draft articles.

(2) The principle set out in this draft article seems trite, as customary international law continues to apply *dehors* a treaty obligation. In its famous dictum in the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ said: "The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[192]

Article 10. 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.

Commentary

(1) Draft article 10 deals with the possibility of the separability of provisions of treaties which are affected by an armed conflict.

(2) There was a concern that the initial version of the *chapeau*, which was based on its counterpart in article 44 of the 1969 Vienna Convention, gave the impression that the default rule was that the entire treaty was either terminated or suspended unless there were grounds for separation of provisions. It was noted that the issue regarding the effect of armed conflict was different from that envisaged in the Vienna Convention, in the sense that there exists practice where the effect of an armed conflict on some treaties is only partial. To have it otherwise would be to suggest that the effect is always on the entire treaty. Draft article 5 therefore recognizes that the subject matter of a treaty may involve the implication that it continues in operation during armed conflict. It was nevertheless decided to retain draft article 10, but to deal with the matter by reformulating the *chapeau* to no longer emphasize the pre-existence of a right in the treaty to terminate, withdraw from or suspend.

(3) Subparagraphs (*a*) to (*c*) reproduce the text of their equivalents in article 44 of the Vienna Convention.

[192] *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment* (see footnote 135 above), p. 424, para. 73. See also Judge Morelli's dissenting opinion in *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 198.

Article 11. Loss of the right 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.

Commentary

Draft article 11 is based on the equivalent provision in the 1969 Vienna Convention, namely, article 45. This provision deals with the loss of the right to terminate, withdraw from or suspend the operation of a treaty. To provide the context of an armed conflict, an appropriate reference has been added in the *chapeau*.

Article 12. Resumption of suspended treaties

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.

Commentary

(1) This draft article constitutes a further development of draft article 4, and deals with the resumption of treaties which were suspended as a consequence of an armed conflict. The indicia referred to in draft article 4 are also relevant to the application of this draft article. Thus, articles 31 and 32 of the 1969 Vienna Convention, as well as 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 may be taken into account.

(2) The question of when a treaty is resumed should be resolved on a case-by-case basis.

Article 13. 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.

Commentary

(1) Draft article 13 is the first of three articles, based on the relevant resolution of the Institute of International Law, adopted at the Helsinki session in 1985.[193] Draft

[193] In particular, article 7 of the resolution of the Institute of International Law reads as follows:

"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" (Institute of International Law, *Yearbook* (see footnote 84 above), pp. 280 and 282).

article 13 reflects the need for a clear recognition that the draft articles did not create advantages for an aggressor State. The same policy imperative is reflected also in draft articles 14 and 15.

(2) This draft article covers the situation of a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations. Such State is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right. This draft article has to be understood against the background of the application of the regime under the Charter of the United Nations, as contemplated in draft articles 14 and 15.

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.

Commentary

(1) Draft article 14 seeks to preserve the legal effects of decisions of the Security Council, taken under Chapter VII of the Charter of the United Nations. It has the same function as article 8 of the 1985 resolution of the Institute of International Law.[194] The Commission preferred the approach of presenting the provision in the form of a "without prejudice" clause, instead of the formulation adopted by the Institute which was cast in more affirmative terms.

(2) Some members favoured the deletion of the reference to the "provisions of Chapter VII", so as to reflect the possibility that the Council could take decisions under other chapters of the Charter of the United Nations. However, the reference to Chapter VII has been retained because the context of the draft articles was that of armed conflict.

(3) Under Article 103 of the Charter of the United Nations, in the event of a conflict between the obligations of the Members of the United Nations under the Charter of the United Nations and their obligations under any other international agreement, their obligations under the Charter of the United Nations shall prevail. In addition to the rights and obligations contained in the Charter of the United Nations itself, Article 103 covers duties based on binding decisions by United Nations bodies. In particular, the primacy of Security Council decisions under Article 103 has been widely accepted in practice as well as in doctrine.[195]

(4) Draft article 14 leaves open the variety of questions that may be implicated as a consequence of Article 103.

Article 15. Prohibition of benefit to an aggressor State

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 shall not terminate, withdraw from, or suspend the operation of a treaty as a consequence of an armed conflict if the effect would be to the benefit of that State.

Commentary

(1) Draft article 15 prohibits an aggressor State from benefiting from the possibility of termination, withdrawal from or suspension of a treaty as a consequence of the armed conflict it has provoked. The formulation of the provision is based on the text of article 9 of the 1985 resolution of the Institute of International Law,[196] with some adjustments, particularly to include the possibility of withdrawal from a treaty and to specify that the treaties dealt with are those that are terminated, withdrawn from or suspended as a consequence of the armed conflict in question.

(2) The title of the draft article emphasizes the fact that the provision deals less with the question of the commission of aggression, and more with the possible benefit, in terms of the termination, withdrawal from or suspension of a treaty that might be attained by an aggressor State from the armed conflict in question.

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.

Commentary

Draft article 16 is a further "without prejudice" clause, in this case seeking to preserve the rights and duties of States arising from the laws of neutrality. This wording has been preferred to an earlier, more specific reference to the "status of third States as neutrals". It was felt that the reference to "neutrals" was, as a matter of drafting, imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency. The reformulation turns the provision into more of a saving clause.

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[194] Article 8 of the resolution of the Institute of International Law reads as follows:

"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" (*ibid.*, p. 282).

[195] See, in particular, the analytical study of the Study Group of the Commission on fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1) (mimeographed, available on the Commission's website, documents of the fifty-eighth session; the final text is reproduced in *Yearbook ... 2006*, vol. II (Part One), Addendum, paras. 328–340).

[196] Article 9 of the resolution of the Institute of International Law reads as follows:

"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 shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State" (Institute of International Law, *Yearbook* (see footnote 84 above), p. 282).

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 agreement of the parties; or

(*b*) a material breach; or

(*c*) supervening impossibility of performance; or

(*d*) a fundamental change of circumstances.

Commentary

(1) Draft article 17 preserves the possibility of termination, withdrawal or suspension of treaties arising out of the application of other rules of international law, in the case of the four examples listed in subparagraphs (*a*) to (*d*), by the application of the 1969 Vienna Convention, in particular articles 54 to 62. The reference to "Other" in the title is intended to indicate that these grounds are additional to those in the present draft articles. The words "*inter alia*" at the end of the *chapeau* seek to clarify that subparagraphs (*a*) to (*d*) constitute an indicative list.

(2) Whilst this reservation may be said to state the obvious, it was considered that the clarification was useful. It intends to avoid the possible implication that the occurrence of an armed conflict gives rise to a *lex specialis* precluding the operation of other grounds for termination, withdrawal or suspension.

Article 18. Revival of treaty relations subsequent to an armed conflict

The present draft articles are without prejudice to the right of States parties to an armed conflict to regulate, subsequent to the conflict, on the basis of agreement, the revival of treaties terminated or suspended as a result of the armed conflict.

Commentary

(1) This draft article has the specific purpose of dealing with the case in which the status of "pre-war" agreements is ambiguous and it is necessary to make an overall assessment of the treaty situation. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as terminated or suspended as a consequence of an armed conflict. Specific agreements regulating the revival of such treaties are not prejudiced by the draft articles.

(2) The draft article makes clear that the right in question is the right of "States" parties to the conflict.

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 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*) treaties relating to aquifers and related installations and facilities;

(*h*) multilateral law-making treaties;

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

(*j*) treaties relating to commercial arbitration;

(*k*) treaties relating to diplomatic relations;

(*l*) treaties relating to consular relations.