Chapter VI

EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Introduction

184. During its fifty-sixth session (2004), the Commission decided[1301] to include the topic "Effects of armed conflicts on treaties" in its programme of work, and to appoint Sir Ian Brownlie as Special Rapporteur for the topic.

185. At its fifty-seventh (2005) to sixtieth (2008) sessions, the Commission had before it the first to fourth reports of the Special Rapporteur,[1302] as well as a memorandum prepared by the Secretariat entitled "The effects of armed conflict on treaties: an examination of practice and doctrine".[1303] The Commission further proceeded on the basis of the recommendations of a Working Group,[1304] chaired by Mr. Lucius Caflisch, which was established in 2007 and 2008 to provide further guidance regarding several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report.

186. At its sixtieth session (2008), the Commission adopted on first reading a set of 18 draft articles, and an annex, on the effects of armed conflicts on treaties, together with commentaries.[1305] At the same session, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.[1306]

187. At its sixty-first session (2009), the Commission appointed Mr. Lucius Caflisch as Special Rapporteur for the topic, following the resignation of Sir Ian Brownlie from the Commission.[1307]

[1301] 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 to the General Assembly 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.

[1302] First report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552; second report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570; third report: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578; and fourth report: *Yearbook ... 2008*, vol II (Part One), document A/CN.4/589.

[1303] Document A/CN.4/550 and Corr.1–2 (mimeographed; available on the Commission's website, documents of the fifty-seventh session).

[1304] *Yearbook ... 2007*, vol. II (Part Two), p. 78, para. 324, and *Yearbook ... 2008*, vol. II (Part Two), p. 44, paras. 58–60.

[1305] *Ibid.*, paras. 65–66.

[1306] *Ibid*., p. 45, para. 63.

[1307] *Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 229.

B. Consideration of the topic at the present session

188. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/627 and Add.1), containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments. The Commission also had before it a compilation of written comments and observations received from Governments (A/CN.4/622 and Add.1).

189. The Commission considered the Special Rapporteur's report at its 3051st to 3056th meetings, held from 26 May to 3 June 2010, as well as at the 3058th to 3061st meetings held from 5 to 8 July 2010.

190. At its 3056th meeting, on 3 June 2010, the Commission referred draft articles 1 to 12 to the Drafting Committee. The Commission further referred draft articles 13 to 17 to the Drafting Committee, at its 3061st meeting, on 8 July 2010.

1. General remarks on the topic

(a) *Introduction by the Special Rapporteur*

191. The Special Rapporteur paid tribute to the late Sir Ian Brownlie for his guidance of the work on the topic during its first reading, and observed that he intended to retain the broad outlines of the draft articles as were adopted in 2008. Accordingly, he stated a preference for focusing on the reactions of Member States to the first reading text, while introducing changes where necessary. He proposed to approach the topic in a reasonable, realistic and balanced manner which was based in practice and doctrine.

(b) *Summary of the debate*

192. General support was expressed for the methodology adopted in the preparation of the first report. It was suggested that increased emphasis be given to State practice. Other members noted that State practice is scarce and, at times, contradictory.

(c) *Special Rapporteur's concluding remarks*

193. The Special Rapporteur announced that he would endeavour to conduct additional research, with a view to identifying further State practice, when preparing the commentaries to the draft articles. He was also favourably disposed towards a proposal to organize the draft articles into a series of chapters.

2. Comments on the draft articles

Article 1. Scope[1308]

(a) *Introduction by the Special Rapporteur*

194. The Special Rapporteur observed that a key issue with draft article 1 was whether the draft articles should be applied solely to inter-State conflicts or also to non-international conflicts. He recalled that a majority of the Commission had favoured including non-international conflicts during the first reading, and that it had been observed, at the time, that the majority of contemporary armed conflicts fall within that category and if they were to be excluded, the draft articles would have only a limited scope. It was further observed that the draft articles adopted on first reading did raise the question of whether armed conflicts have different effects on treaties depending on whether they are international or not.

195. A further issue concerned the fate of treaties to which one or more intergovernmental organizations are parties. The Special Rapporteur recalled that the issue had been set aside by the Commission at first reading, but some States had expressed a preference for extending the draft articles to those types of treaties, whereas other States opposed such extension. He observed that the inclusion of international organizations within the scope of the articles would require additional research which could take time and delay the Commission's work. He suggested, therefore, that the Commission follow a proposal, made by a State, that the possibility of studying the issue be reserved until after the completion of the work on the current draft articles.

196. Another issue was whether, as was suggested by one State, the Commission should further restrict the scope of application by excluding the situations of international conflict where only one State party to the treaty was a party to the conflict.

(b) *Summary of the debate*

197. Several members supported the inclusion of internal armed conflicts within the scope of application of the draft articles (as per draft article 2, subparagraph (*b*)). It was noted that it was not always possible clearly to distinguish between international and non-international armed conflicts. Others expressed doubts, not because of any disagreement on the significance of such conflicts, but rather out of a concern that their effect on treaties (if any) would be different from that arising from traditional inter-State conflict. The view was expressed that the effect of internal disturbances on the operation of a treaty was adequately covered by article 61 of the 1969 Vienna Convention, on supervening impossibility of performance.

198. Support was expressed for the inclusion within the scope of application of the effect on a treaty where only one contracting State is a party to an armed conflict, which would, *inter alia*, accord with the inclusion of non-international armed conflicts. At the same time, the view was expressed that it was not clear that identical conclusions should be reached when only one State which is a party to the treaty is involved in the conflict (whether international or non-international). It was recommended that it be clarified why (and how) those cases of armed conflict should *as such* affect the operation of the treaty.

199. Different views were expressed regarding the exclusion from the scope of application of treaties to which international organizations are parties. Several members supported such exclusion, citing the complexities of dealing with international organizations in the draft articles and the fact that the topic was an outgrowth of the 1969 Vienna Convention, which dealt solely with treaties between States. Reference was further made to the difference in governance structures within international organizations which may have implications for the effects of armed conflict on treaties.

200. Other members were of the view that it was necessary to include treaties to which international organizations were parties since it was not uncommon for international organizations to be involved in some capacity in armed conflicts. It was also considered extreme to exclude major international treaties from the scope of application of the draft articles simply because they have international organizations that are parties to them. It was accordingly maintained that the matter could, at least, be referred to in the commentaries. Other suggestions included introducing an appropriate saving clause, or initiating a separate study by the Commission at a later time, which could, for example, include a consideration of the extent to which the effect on such treaties is addressed by the rules of international organizations (or by analogy thereto), and by the decisions of their political organs.

201. It was recalled that the question of treaties being provisionally applied, under article 25 of the 1969 Vienna Convention, had been one of the issues pertaining to the scope of the draft articles raised during the first reading. A preference was expressed for not including such agreements within the scope of the draft articles.

(c) *Special Rapporteur's concluding remarks*

202. The Special Rapporteur noted that the debate had given rise to expected controversy, particularly around the inclusion of treaties to which international organizations are parties. He remained of the view that the issue was more complex than initially thought and that practice was scarce. It was not enough simply to note that international organizations do not go to war, and accordingly to conclude that treaties in which international organizations participate continue to be applicable during armed conflict. He remained inclined to accept the suggestion that a separate study on the matter be conducted.

203. Nonetheless, the question had been raised during the debate whether or not the draft articles would be applicable to major law-making conventions to which international organizations are also parties, such as the case of the United Nations Convention on the Law of the

[1308] Draft article 1 read as follows:

"*Scope*

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

Sea, to which the European Union had become a party.[1309] Under the formulation of draft article 1, such agreements would be excluded from the scope of application of the draft articles. The Special Rapporteur was of the view that such conclusion might need to be revisited, and proposed to draw a working distinction between treaties that concern international organizations (such as treaties which are constituent instruments and agreements conferring specific rights, such as privileges and immunities, on the organization) and treaties to which international organizations are parties. In his view, the former category was clearly within the scope of the draft articles (and a proposal to include them as a distinct category in the annexed list was considered in the context of draft article 5). The difficulty related to the second category of treaties. In his view, the presence of an international organization as a contracting party to an international convention should not *per se* affect the relations between States parties to that treaty. He, accordingly, proposed the inclusion of the following new saving clause: "the present draft articles are without prejudice to any rules of international law that regulate the treaty relations of international organizations in the context of armed conflict".

204. He observed further that the majority of the Commission continued to favour the inclusion of non-international armed conflict despite the difficulties that potentially arose from such inclusion.

205. The Special Rapporteur further took the opportunity to point out the various hypotheses of conflicts and parties covered by the draft article: (*a*) armed conflict between opposing parties; (*b*) armed conflict where contracting parties are allies; (*c*) a conflict where only one contracting party is a party to the armed conflict; and (*d*) a non-international armed conflict. The last two were similar but not identical. Such hypotheses were to be examined in the commentary.

Article 2. Use of terms[1310]

(a) *Introduction by the Special Rapporteur*

206. The Special Rapporteur observed that the central difficulty in draft article 2 was defining "armed conflict". One aspect, already dealt with, was whether the term included non-international conflicts. In his view, the answer to that question was in the affirmative. A further problem was that the definition of the expression "armed conflict", contained in article 2, subparagraph (*b*), was circular by defining conflicts covered by the draft as being those which are likely to affect the application of treaties. Moreover, the first reading definition was *ad hoc* in nature, adopted for the purposes of the topic. It was preferable to choose a more neutral and generally valid definition. While he understood the underlying reasons for the suggestion, made by a State, that no definition be provided at all, he was of the view that the draft articles would no longer be viable and useful if there were no definition of this term (which also served to limit the scope of the draft articles).

207. Accordingly, while it was preferable to retain a definition, the Special Rapporteur proposed to reconsider the formulation adopted on first reading. There were two possibilities. The first was to combine article 2 of the Geneva Conventions for the protection of war victims[1311] and article 1, paragraph (1), of its Additional Protocol II.[1312] Such a solution would offer the advantage of using the same definition of "armed conflict" in the fields of international humanitarian law and the law of treaties. The disadvantage, however, was that it would be burdensome and also to a certain extent circular. The second option, was to turn to the more contemporaneous and concise definition used in 1995 by the International Tribunal for the Former Yugoslavia, in the *Tadić* decision.[1313] The Special Rapporteur noted that it reflected a more modern understanding of the concept, and was accordingly a preferable formulation, with the exclusion of the last clause dealing with armed force between organized armed groups within a State since the draft articles clearly only applied to situations involving at least one contracting State participating in the armed conflict.

208. As regards the possibility of the inclusion of a reference to occupation, while he recalled that, as had been pointed out by a Member State, the concepts of armed conflict and of occupation dealt with different realities, nonetheless, in his view, occupation was an integral part of an armed conflict, a point that would be confirmed in the commentary.

(b) *Summary of the debate*

209. A majority of members expressed support for the proposed reformulation of the definition of "armed conflict" along the lines of that adopted in the *Tadić* decision. It was noted that the definition in the *Tadić* case was more modern and had largely superseded that in the Geneva Conventions for the protection of war victims and Additional Protocol II thereto. It was also said to be a suitable replacement for the definition adopted on first reading, which was considered by some to be circular in nature, and that adopting a common definition was important for the unity of international law. It was further observed that the *Tadić* definition had the benefit of including non-international armed conflicts, which was necessary since most contemporary conflicts are non-international in nature.

[1309] The European Union deposited its instrument of formal confirmation on 1 April 1998.

[1310] Draft article 2 read as follows:

"*Use of terms*

"For the purposes of the present draft articles:

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

"(*b*) 'Armed conflict' means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups."

[1311] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

[1312] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), Geneva, 8 June 1977.

[1313] *Prosecutor* v. *Duško Tadić a/k/a "Dule", Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995*, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, pp. 352 *et seq.*, at pp. 428–430.

210. Other members expressed a preference for the more traditional definition contained in the Geneva Conventions for the protection of war victims, as augmented by Additional Protocol II. It was maintained that there was a need for objective criteria in determining when an armed conflict had broken out, and it was proposed that, at a minimum, the commentary make the point that the application of the draft articles did not depend on the discretionary judgment of the parties, but that they applied automatically as soon as the material conditions contained therein were fulfilled. It was further stated that the first reading definition was more operational in nature, and included several valuable threshold elements, such as "nature and intensity", which the Special Rapporteur was proposing to delete in favour of an overly broad definition in the *Tadić* decision. The concern was expressed that the new definition could be interpreted to include any use of armed force, whether or not such use would have an impact on the application of treaties. According to another view, it was not necessary to include a definition of armed conflict at all.

211. A preference was expressed for the deletion (or, if retained, clarification) of the word "protracted" in the proposed new definition. Other members preferred to retain the word, either not to change what has become an accepted definition, or so as to ensure that there is a minimum threshold, provided for in the element of duration and intensity, for the application of the draft articles. Accordingly, the draft articles would not apply to short spasms of conflict. It was clarified that the reference to "protracted" in the definition applied only to non-international armed conflict. Moreover, in order to be consistent with the definition in the *Tadić* case, the words "a situation in which there has been resort to armed force" should be replaced by "a situation in which there is resort to armed force".

212. Different views were expressed on the question of the inclusion of a reference to occupation. On the one hand, it was maintained that the issue was serious enough to warrant a reference in the definition of armed conflict itself, and that leaving it to the commentary would not clearly resolve the question of whether occupation was a form of armed conflict. Other members preferred to leave the matter for appropriate treatment in the commentary, since if the Commission were to deal with occupation in the draft articles, it would also have to consider other manifestations of armed conflict such as blockades and embargoes, which would make the definition unwieldy and complicated.

(c) *Special Rapporteur's concluding remarks*

213. The Special Rapporteur noted that key issues on the draft article related to the definition of armed conflict, including the question of the inclusion of non-international armed conflict. He recalled that the first reading text of the definition had not been unanimously agreed upon. His proposal to replace the definition with a formulation based on the definition in the *Tadić* case seemed to have gained favour among the majority of the Commission, although some members did oppose it. He was of the view that the reference to "protracted" should be retained. On occupation, he continued to believe that it would occur during an armed conflict and, accordingly, was covered by the draft articles; thus it sufficed to make such a clarification in the commentary.

Article 3. Absence of a rule under which, in the event of an armed conflict, treaties are ipso facto *terminated or suspended*[1314]

(a) *Introduction by the Special Rapporteur*

214. In introducing draft article 3, the Special Rapporteur pointed out that draft articles 3 to 5, and the annex to article 5, were to be assessed in the light of, and jointly with, each other. He recalled that draft article 3 was based to a certain extent on article 2 of the resolution of the Institute of International Law of 1985[1315] dealing with the same issue. He pointed out that draft article 3 had been, on the whole, welcomed by Member States, even if some did try to assign to it several meanings. None had formally opposed the provision. The focus, therefore, was on its formulation. He recalled that one State had expressed a preference for an affirmative wording which would establish a presumption of survival of the treaty. To his mind, this would be a change in direction which could lead to a rethinking of the entire draft articles. Moreover, such an affirmation did not seem realistic. Therefore, he preferred maintaining the first reading formulation, with the possibility of reverting to the reference to "*ipso facto*" as certain States had suggested. He also recalled that some States had criticized the title as being obscure.

(b) *Summary of the debate*

215. General agreement was expressed for the rule contained in draft article 3. The focus of the discussion related to its formulation and nature. Thus, a preference was expressed for not using Latin terminology ("*ipso facto*"), in line with the Commission's practice of avoiding Latin where possible. There was general agreement that the title of the provision required reformulation, and a number of alternative formulations were proposed. It was also suggested that the provision itself be reformulated in more affirmative terms.

216. A difference of opinion emerged as to the nature of the provision. While some members considered it as establishing a presumption in favour of continuity, or a "general principle" of continuity, others were of the view that it did not reflect the content of the draft article, which was more in the nature of a presumption against discontinuity as a consequence of the outbreak of armed conflict. It was further suggested that the relationship between draft articles 3, 4 and 5 needed to be clarified, even if only in the commentaries.

(c) *Special Rapporteur's concluding remarks*

217. The Special Rapporteur was of the view that the title should faithfully reflect the draft article's content,

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[1314] Draft article 3 read as follows:

"*Absence of* ipso facto *termination or suspension*

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

"(*a*) between States parties to the treaty that are also parties to the conflict;

"(*b*) between a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict."

[1315] Resolution by the Institute of International Law on "The effects of armed conflicts on treaties" adopted on 28 August 1985, Institute of International Law, *Yearbook*, vol. 61 (1986), Session of Helsinki (1985), Part II, p. 278 (available at www.idi-iil.org, under the tab "resolutions").

and since no presumption or general principle was being established, any such reference should be avoided. He further expressed incomprehension with the aversion to the use of Latin, which remained commonly used in international law. Nonetheless, he noted that satisfactory replacements for "*ipso facto*" could be found.

Article 4. Indicia of susceptibility to termination, withdrawal or suspension of treaties[1316]

(a) *Introduction by the Special Rapporteur*

218. The Special Rapporteur noted that the first reading version of draft article 4 had been the object of significant debate within the Commission. He recalled that the end result was to include a reference to the interpretation of the treaty in line with articles 31 and 32 of the Vienna Convention on the Law of Treaties, which would provide an indication of the will of the authors of the treaty. This was supplemented by the indicia of the nature and extent of the armed conflict, its effect on the treaty, the subject matter of the treaty and the number of parties to the treaty. Contrary to what certain States seemed to believe, these were to be resorted to in addition to the will of the parties and were not an elimination of that criterion.

219. He recalled that one of the comments on draft article 4 was that the reference to the effect of the armed conflict on treaties was circular, since the effect was the result to which the application of draft article 4 should lead rather than a criterion to achieve that result. Nonetheless, it was explained that it could be that the effect was one limited in time, in other words, that it could initially be a minor effect which could become significant were the conflict to be extended. Thus, the effect would vary over time and could affect the continuity of the treaty, thereby creating conditions which in the long term would make the survival of the treaty less likely.

220. He recalled that there were a variety of opinions among Member States as to the indicia in subparagraph (*b*), with some calling for the deletion of the reference to "the nature and scope of the armed conflict", while others preferred retaining such elements. The latter position accorded with his preference. Other Member States had suggested the addition of further indications, such as the change of circumstances, the impossibility of implementing the treaty and the material breach thereof. In his view, such additions were inappropriate since they covered matters already settled by articles 60 to 62 of the 1969 Vienna Convention. He also preferred not to include an express reference in the provision that the list of indicia was not exhaustive—a point made in the commentary—so as not to weaken the normative effect of the provision. Nonetheless, he did accept the suggestion that the reference to the "subject matter" of the treaty was not necessary since it was referred to in draft article 5. The Special Rapporteur further considered a proposal to delete the reference to "withdrawal", but decided to retain it.

221. Finally, he was of the view that the mere reference to articles 31 and 32 of the 1969 Vienna Convention was too elliptical, and that the text could be clearer if reference were made to the intention of the parties to the treaty, as evidenced by the application of articles 31 and 32.

(b) *Summary of the debate*

222. It was suggested that the relationship between draft articles 4 and 5 be clarified, since they represented opposite sides of the issue: draft article 4 dealt with the possibility of the operation of the treaty ceasing, while draft article 5 contemplated the continuation of treaties. It was also suggested that it be clarified why a reference to withdrawal was included in draft article 4, but not in draft article 3.

223. While support was expressed for resort, in subparagraph (*a*), to articles 31 and 32 of the 1969 Vienna Convention in determining whether the treaty gives an answer to the question of what are the consequences of an armed conflict between the contracting States parties, opposition was expressed regarding the reintroduction of the criterion of the intention of the parties. It was recalled that the criterion had been the subject of extensive discussion during the first reading, and that it had been finally agreed to exclude any reference to it. Furthermore, it was noted that draft article 4 did not deal only with the interpretation of the treaty, but also with the question of what to do when the treaty does not provide an explicit indication as to what are the effects on the treaty of the outbreak of armed conflict. According to another view, not even a reference to articles 31 and 32 was appropriate, since such types of cross-references to other instruments should, as a rule, be avoided. It was also pointed out that those two articles did not necessarily apply to situations of armed conflict, and existed at the level of general rules, whereas the task of the Commission was to develop a set of draft articles which would operate as a *lex specialis* in relation to such general rules.

224. Other members expressed a willingness to include a reference to the intention of the parties since even though such intention was constructed, it was nonetheless common to find such references in international instruments, and would not, accordingly, pose any problems in the application of the draft articles. It was also noted that there existed a strong doctrinal basis for the inclusion of the reference to intention, and that, in the new formulation proposed by the Special Rapporteur, intention was not predominant, but merely one of the indicia. Some members preferred to consider intention of the parties to be the key criterion in draft article 4.

225. The view was expressed that the "subject matter" of the treaty was a useful guide and, accordingly, that it ought to be reintroduced in draft article 4, regardless of the fact that it appeared in draft article 5. A similar view was that the reference to "subject matter" was the nexus between draft articles 4 and 5, and, accordingly, removing it from draft article 4 risked leading to an independent interpretation of each provision.

[1316] Draft article 4 read as follows:

"*Indicia of susceptibility to termination, withdrawal or suspension of treaties*

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

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

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

226. The view was further expressed that the new reference to the "intensity and duration of the conflict" did not add much, as the terms were covered by the criterion of "nature and extent". It was observed that such indicia were unclear. The concern was also expressed that the reference in subparagraph (*b*) to the "effect of the armed conflict on the treaty" rendered the provision circular in meaning, and required explanation in the commentary. Nor, according to another view, was the number of parties necessarily a useful guide. A further view was expressed that an indication could be included in the provision that the list of indicia was only indicative, implying that there could be other relevant indicia arising from the circumstances at hand. It was also suggested that the reference to "indicia" be replaced by "factors" or "criteria".

(c) *Special Rapporteur's concluding remarks*

227. The Special Rapporteur observed that there had been mixed support for his proposal to revert to an express reference to the intention of the parties to the treaties in the application of articles 31 and 32 of the 1969 Vienna Convention. He recalled that some who had opposed it had pointed out that the application of articles 31 and 32 was not primarily aimed at determining the intention of the parties, but determining the content of the treaty. In order not to reopen the discussion on the subject, he proposed to return to the first reading formulation of the draft article. As regards the multiple references to the "subject matter" of the treaty (in draft articles 4 and 5), he maintained the view that one reference was sufficient.

Article 5 and annex. Operation of treaties on the basis of implication from their subject matter[1317]

(a) *Introduction by the Special Rapporteur*

228. The Special Rapporteur observed that draft article 5, and the annex, had elicited many comments from Governments. As a general point, he recalled that the occurrence of an armed conflict, as such, never caused a treaty to come to an end, and the effect of an armed conflict could be that a treaty continued in whole or only in part. He further recalled that the list in the annex, which was to be read together with draft article 5, was indicative in nature.

229. The Special Rapporteur noted that it had been observed that draft article 5 lacked clarity, without explanation as to why that was the case. He noted, in response to the suggestion of a Member State that the Commission identify the factors that would determine if a treaty or some of its provisions would continue to be applicable, that this was precisely the function of draft articles 4 and 5, together with the list in the annex. He also disagreed with the assertion that draft article 5 was not necessary in light of the presence of a general provision in draft article 3. Draft articles 4 and 5, together with the annex, provided exogenous and endogenous indications for determining whether a treaty was to survive (whether in whole or in part) the outbreak of an armed conflict.

230. Reference was further made to a suggestion by a Member State that a second paragraph be added to draft article 5, which would expressly establish the applicability during armed conflict of treaties relating to the protection of human beings (international humanitarian law, human rights and international criminal law treaties), as well as the continued applicability of the Charter of the United Nations. While he was not necessarily opposed to the suggestion, the Special Rapporteur was of the view that it raised difficulties, relating, *inter alia*, to the delimitation of the scope of application between international humanitarian law and human rights treaties, the unclear extent of the general reference to "international criminal law", and whether it was necessary specifically to provide for the survival of the Charter of the United Nations, which by its very nature would continue in operation. He further expressed the concern that the inclusion of such a paragraph would inadvertently have the effect of establishing two "tiers" of categories, which might be difficult to substantiate in practice. Indeed, he wondered whether it would be possible to agree to limit the type of treaties in the paragraph to the proposed categories, and not to include, for example, treaties establishing borders. He observed that he had tentatively proposed the inclusion of such a second paragraph for the benefit of consideration by the Commission, and noted that if the Commission were to support the inclusion of such a paragraph, the corresponding deletions would have to be made to the list of categories in the annex.

231. With regard to the retention in the annex of the list of categories of treaties the subject matter of which involved the implication that they continued in operation, he noted that the opinion of Member States was divided, as had been the case in the Commission. He recalled that the suggestions

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[1317] Draft article 5 read as follows:

"*Operation of treaties on the basis of implication from their subject matter*

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

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

"*Annex*

"*Indicative list of categories of treaties referred to in draft article 5*

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

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

"[(*c*) treaties relating to international criminal justice;]

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

"[(*e*) treaties for the protection of human rights;]

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

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

"(*h*) treaties relating to aquifers and related installations and facilities;

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

"(*j*) treaties establishing an international organization;

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

"(*l*) treaties relating to commercial arbitration;

"(*m*) treaties relating to diplomatic and consular relations."

from States had ranged from incorporating the whole list in the draft articles under draft article 5, to reflecting it in the commentary. On balance, the Special Rapporteur was of the view that retaining the list in an annex to the draft articles, as had been done on first reading, was a viable compromise between those two positions.

232. Concerning the content of the list, the Special Rapporteur expressed support for the inclusion of treaties which are constituent instruments of international organizations, which would encompass the Charter of the United Nations. As to a proposal to eliminate categories from the list (treaties of friendship, commerce and navigation and analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to watercourses and related installations and facilities; and treaties relating to commercial arbitration), the Special Rapporteur noted that while it might be true that those categories of agreements did not always survive in their totality, the list was merely indicative and the possibility of separability of individual provisions was established by draft article 10. It was, therefore, neither necessary nor desirable to make the suggested deletions.

(b) *Summary of the debate*

233. Several members expressed support for the proposed inclusion of a new second paragraph in draft article 5. Others were of the view that it would lead to complexity by establishing different rules for different categories of treaties. It was also recommended that the proposed paragraph either be included in the annex itself, or be inserted as a separate provision in the draft articles.

234. With regard to the categories of treaties listed in the annex, it was recommended that emphasis be placed on including those categories which found support in State practice. Suggestions for the inclusion of additional categories included treaties including rules of a peremptory (*jus cogens*) nature, treaties concerning international criminal jurisdiction, and treaties which are constituent instruments of international organizations, as well as international boundary treaties. Doubts were expressed regarding the inclusion of categories of treaties, not all of which, according to that view, would continue in operation during armed conflict. It was further suggested that the categories in the list follow an established logic.

235. As for the location of the list, several members expressed support for retaining it in an annex to the draft articles, so as to make draft article 5 more concrete. Another view was that the list was best placed in the commentary since its content did not enjoy universal support and retaining it in the text risked making it "rigid". It was stated that, as a general rule, draft articles should only include substantive provisions, and not examples.

(c) *Special Rapporteur's concluding remarks*

236. The Special Rapporteur noted that a proposal to merge the draft article with article 4, as well as a proposal to include a new second paragraph dealing with treaties relating to the protection of persons, did not enjoy the support of the majority in the Commission. He confirmed his intention to explain the relationship between articles 4, 5 and 6, as well as the meaning of the various indicia in articles 4 and 5, in the commentary.

237. As for the location of the list of categories of treaties, the Special Rapporteur noted that the preference of the Commission seemed to be in favour of retaining it as an annex to the draft articles, as was done on first reading, with the qualification that it be augmented by the following new categories: treaties which are constituent instruments of international organizations, treaties relating to international criminal justice, and treaties including rules of a peremptory (*jus cogens*) nature. He noted that there was no opposition to inserting the first two categories of treaties. Regarding *jus cogens* rules in treaties, he was of the view that the survival of such rules was not dependent on the effect of armed conflict on the treaty in which they were reproduced. Instead, they survived as customary international law rules of a specific category. As such, they were strictly speaking beyond the Commission's mandate.

238. In addition, he considered a proposal to adopt a descending scale order for the list of categories as being problematic, since such classification of categories of treaties could be arbitrary or difficult. He also recalled that, according to draft article 10, treaties were separable, and parts thereof could survive or not survive for different purposes. He also took note of a suggestion that the possibility of the modification of treaties be referred to in the draft articles.

Article 6. Conclusion of treaties during armed conflict[1318]

Article 7. Express provisions on the operation of treaties[1319]

(a) *Introduction by the Special Rapporteur*

239. The Special Rapporteur observed that draft article 6 contained two ideas: that the States parties to an armed conflict continued to be able to conclude agreements or treaties, and that those States could agree to put an end to treaties which otherwise would continue to apply. The amendments proposed to the first reading version were minimal.

240. Draft article 7 gave precedence to the indication in a treaty that it continued to apply in situations of armed conflict. While admittedly obvious, the Special Rapporteur nonetheless considered it useful to include the provision, albeit as draft article 3 *bis*, since it referred to a treaty rule which derogated from the mechanism of draft articles 4 and 5.

[1318] Draft article 6 read as follows:

"*Conclusion of treaties during armed conflict*

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

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

[1319] Draft article 7 read as follows:

"*Express provisions on the operation of treaties*

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

(b) *Summary of the debate*

241. With regard to draft article 6, support was expressed for a proposal made by a Member State that the provision be without prejudice to draft article 9. Some members expressed doubts about the reference to "lawful" agreements, in the second paragraph, and proposed that the term be replaced by a more general reference: "in accordance with the Vienna Convention on the Law of Treaties" or "in accordance with international law". It was also suggested that the double reference to "during an armed conflict" be removed by deleting the opening phrase.

242. General support was expressed for the Special Rapporteur's proposal to relocate draft article 7 as draft article 3 *bis*. It was also suggested that the provision could be relocated as draft article 5 *bis*.

(c) *Special Rapporteur's concluding remarks*

243. The Special Rapporteur agreed with the drafting suggestions for draft article 6. He further observed that his proposal to relocate draft article 7 as new draft article 3 *bis* had enjoyed general support in the Commission.

Article 8. Notification of termination, withdrawal or suspension[1320]

(a) *Introduction by the Special Rapporteur*

244. The Special Rapporteur recalled that draft article 8 had been introduced towards the end of the first reading, and that it had been the subject of much debate. The 2008 version could be criticized on two counts. First, contrary to article 65, paragraph 2, of the 1969 Vienna Convention, no time frame was established for the formulation of objections to a notification. Secondly, the earlier version could have the consequence of preventing any solution from being found by peaceful means that existed between the States involved in the armed conflict, particularly with third States not involved in the conflict. It was recalled that the Commission had felt that it was not realistic to seek to impose a regime of peaceful settlement of disputes. However, the Special Rapporteur believed that such position could be revisited.

245. The proposed new formulation for draft article 8 sought to deal with both issues by seeking inspiration from article 65 of the 1969 Vienna Convention. The Special Rapporteur agreed with the view of a Member State that it was not clear why the controversy between the notifying State and the objecting State should, where some means of dispute settlement was available, remain suspended to the end of the armed conflict. The matter depended also on the solution provided for the question of the introduction of a time frame for raising an objection to the notification. He recalled that article 65, paragraph 2, established a time frame of three months. He had, however, refrained from indicating a specific time frame because he felt that the time frame could be longer, since considering the fate of treaties may not be a priority for a State involved in an armed conflict.

246. The Special Rapporteur made reference to the query raised by a Member State as to the effect of the notifications made in draft article 8. To his mind, there were two possibilities. If no objection was received within the prescribed time frame, the notifying State could go ahead and put an end to the treaty, withdraw from it or suspend it in whole or in part. Alternatively, if an objection was made and received then, where appropriate (and if available), the States concerned would resort to peaceful settlement means or mechanisms. He was of the view that it was not difficult to expect States to make notifications and objections while an armed conflict was going on. What was important was to make clear that to the greatest extent possible the requirements of article 65, paragraphs 1 and 2, of the 1969 Vienna Convention, had to be observed.

247. The Special Rapporteur further referred to a proposal made by a Member State to include within the scope of draft article 8 contracting parties to the treaty which were not party to the armed conflict. He noted that it was an easy thing to do from a technical perspective. Nonetheless, he sought the guidance of the Commission on the advisability of such suggestion.

(b) *Summary of the debate*

248. As a general point, it was recommended that the provision be drafted sufficiently flexibly to allow for the possibility that in certain cases notification would not be necessary. Several members expressed support for the proposal to include a time limit in paragraph 3; suggestions for what the limit should be varied from three to six months. Other members cautioned against the inclusion of time limits.

249. The view was expressed that the inclusion of a reference to the peaceful settlement of disputes, in paragraph 4, might not entirely take into account the reality of armed conflict. Other members found it to be a useful reminder of the fact that States are not relieved of their general obligation under Article 33 of the Charter of the United Nations. Different views were also expressed regarding paragraph 5. While several members supported its inclusion, others were of the view that it was not very clear. It was observed that if what was being referred to was the general obligation to seek the resolution of a dispute, then it was similar to paragraph 4. According to a further view, referral to specific dispute settlement procedures could be difficult to require,

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[1320] Draft article 8 read as follows:

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

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

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

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

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

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

and States ought to be allowed a margin of appreciation in the choice of means of settlement of disputes.

250. While some members expressed support for including within the scope of draft article 8 third States not parties to the conflict but contracting parties to the treaty, others expressed doubts, as it would have implications for the rest of the draft articles and could lead to abuse.

(c) *Special Rapporteur's concluding remarks*

251. The Special Rapporteur observed that, in his view, draft article 8 was an important provision. However, the first reading version had been incomplete. He noted further the concern raised by some members that formal notification might not always be necessary or possible, but felt that this was a concern which could be taken care of through appropriate drafting.

252. As to new paragraph 4, the Special Rapporteur was of the view that the obligation on Member States of the United Nations to resort to the peaceful settlement of disputes continued regardless of the outbreak of armed conflict. Nonetheless, he recalled that some members had opposed the inclusion of the provision, and expressed his willingness to accept the deletion of the proposed paragraph on the understanding that the point was covered by new paragraph 5.

253. He observed that new paragraph 5 had received lukewarm support. Nonetheless, he remained disposed to retaining it, because it would be in keeping with the list of categories in the annex linked to draft article 5, which confirmed the likelihood of the survival of such obligations despite the outbreak of an armed conflict.

254. As for the possibility that contracting States which are not parties to the armed conflict could resort to the procedure in draft article 8, paragraph 1, his reading of the debate was that such extension of the right in question would not be desirable. At any rate, any problems encountered by States parties not involved in the conflict could be resolved by resort to articles 60 to 62 of the 1969 Vienna Convention.

Article 9. Obligations imposed by international law independently of a treaty[1321]

Article 10. Separability of treaty provisions[1322]

(a) *Introduction by the Special Rapporteur*

255. The Special Rapporteur observed that draft article 9, as adopted on first reading, which had its origins in article 43 of the 1969 Vienna Convention, had not been contested.

256. He also recalled that draft article 10, which was based on article 44 of the 1969 Vienna Convention, was crucial since it dealt with the partial termination or suspension of a treaty, which could occur often in practice. The existence of draft article 10, as already mentioned, allowed for some flexibility in the operation of draft article 5 and the list of treaty categories related thereto. In his view, there was no reason to amend the draft article.

(b) *Summary of the debate*

257. General support was expressed for draft articles 9 and 10, and for the suggestions of the Special Rapporteur.

(c) *Special Rapporteur's concluding remarks*

258. The Special Rapporteur reiterated the importance of draft article 10. Despite proposals by some States to restructure the provision, it seemed to him preferable to maintain it in a structure that followed article 44 of the 1969 Vienna Convention.

Article 11. Loss of the right to terminate, withdraw from or suspend the operation of a treaty[1323]

Article 12. Resumption of suspended treaties[1324]

(a) *Introduction by the Special Rapporteur*

259. The Special Rapporteur observed that draft article 11, which was based on article 45 of the 1969 Vienna Convention, contemplated the persistence of a modicum of good faith between the contracting parties, which was to be expected even in situations of armed conflict. Accordingly, States that had explicitly accepted the continued applicability of a treaty, or that because of their behaviour or conduct were to be deemed to have acquiesced to the continuity of the treaty, would be deprived of the right to terminate, withdraw from or suspend the operation of the treaty.

[1321] Draft article 9 read as follows:

"*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."

[1322] Draft article 10 read as follows:

"*Separability of treaty provisions*

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

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

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

"(*c*) continued performance of the remainder of the treaty would not be unjust."

[1323] Draft article 11 read as follows:

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

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

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

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

[1324] Draft article 12 read as follows:

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

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

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

260. The Special Rapporteur noted that a Member State had expressed the view that the rule in draft article 11 was too rigid and that the perceptions and matter of survival of treaties could change as an armed conflict unfolded, and that, accordingly, the circumstances that led to the loss of the right to put an end to a treaty could sometimes only be appreciated once the armed conflict had produced its effect on the treaty, which was not necessarily the case at the outbreak of the conflict. While agreeing that the effect on a treaty was sometimes best understood in hindsight, he nonetheless preferred to make that point in the commentary, while retaining the draft article in the text.

261. The Special Rapporteur was of the view that draft article 12 ought to be studied jointly with draft article 18. He recalled that draft article 12 dealt with the resumption of a suspended treaty, which was to be determined in accordance with the indicia referred to in draft article 4. Such agreements became operational again, not because of subsequent agreement, but because of the disappearance of the conditions that had resulted in their suspension in the first place. Draft article 18, on the other hand, enabled contracting States voluntarily to implement once again or to renew the operation of the treaty through an agreement brokered after the conflict. This amounted to a novation of the treaty. He proposed to merge the two provisions into a new draft article 12 which would spell out the difference between them. In doing so, however, the content of draft article 18 would no longer be a "without prejudice" clause.

(b) *Summary of the debate*

262. While support was expressed for the Special Rapporteur's recommendations regarding draft article 11, several members expressed doubts as to the reference to an "option" to terminate, withdraw from or suspend the operation of the treaty. According to another suggestion, the two subparagraphs could be merged. The concern was further expressed that the provision was too strict; and it was recommended that it could include a *mutatis mutandis* cross-reference to article 62 of the 1969 Vienna Convention, relating to fundamental change of circumstances.

263. General support was expressed for the Special Rapporteur's proposal to merge draft article 12 with draft article 18, subject to a refinement of the proposed formulation of the provision and its title.

(c) *Special Rapporteur's concluding remarks*

264. The Special Rapporteur recalled the concern, raised by a State, that it might be difficult to determine the effect on the treaty at the moment of the outbreak of the armed conflict, and proposed that the commentary make clear that draft article 11 would be applicable to the extent that the effects of the conflict could be gauged in a definitive manner at the time the conflict took place. That would mean that draft article 11 would not be applied in situations where the length and duration of the conflict had altered the latter's effects on the treaty, which could not have been anticipated by the State upon giving its acquiescence to the continued application of the treaty.

Article 13. Effect of the exercise of the right of individual or collective self-defence on a treaty[1325]

(a) *Introduction by the Special Rapporteur*

265. The Special Rapporteur recalled that draft article 13 had been inspired by article 7 of the 1985 resolution of the International Law Institute. It sought to prevent the situation where compliance with a treaty deprived a State of its right to self-defence. It anticipated the possibility of suspension but not termination, and only applied in an inter-State context. The text adopted by the Institute of International Law had included a further clause anticipating the possibility that the Security Council could subsequently determine that, in fact, the possible victim State was, in reality, the aggressor, and reserved the consequences of such a finding. It was recalled that the Commission specifically considered this point during the first reading and decided not to include such an additional proviso. He concurred with that decision, and proposed that it be maintained during the second reading.

266. It was also recalled that a Member State had observed that the possibility of a State suspending treaties in a situation of the exercise of self-defence had to be subject to draft article 5. The Special Rapporteur was inclined to accept this clarification, although he preferred to refer to the content of both draft articles 4 and 5. He further recalled the suggestion, also by a Member State, that it be clarified in the commentary that the possibility of suspension of treaties by a State in a situation of self-defence could not include conventional rules designed to be applied in the context of international armed conflicts, such as the Geneva Conventions for the protection of war victims and Additional Protocol I thereto.

(b) *Summary of the debate*

267. Several members expressed support for the Special Rapporteur's view that draft article 13, as adopted on first reading, should be retained. Other members referred to the difficulty of determining, in practice, which side in an armed conflict was legitimately acting in self-defence. It was proposed to replace the draft article by a "without prejudice" clause, or a more general clause such as that in article 59 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.[1326] It was also noted that Article 51 of the Charter of the United Nations was itself a saving clause and did not set out all the conditions for the exercise of self-defence, such as the requirements of proportionality and necessity. It was further stated, in support of a without prejudice clause, that the content of Article 51 was less clear

[1325] Draft article 13 read as follows:

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

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

[1326] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

in light of recent developments in the law on the use of force. At the same time, it was recalled that the main purpose of the exercise was not to provide the State acting in self-defence with all the tools to do so, but rather, as per draft article 3, to preserve the stability of treaty relations in times of armed conflict.

268. Another suggestion was that the title had to be amended since it could be read as suggesting an automatic effect of the exercise of self-defence. A preference was expressed for keeping the formulation as close as possible to that in Article 51 of the Charter of the United Nations, including the phrase "individual or collective" in the title. Support was further expressed for indicating that the exercise of the right to self-defence should be "in accordance with the provisions of the Charter of the United Nations". According to another view, such a formulation was to be avoided since it left little room for customary international law rules on the exercise of self-defence. The view was also expressed that the opening phrase "Subject to the provisions of article 5" was problematic, since it suggested that draft article 5 had priority over draft article 13, and by implication changed the nature of draft article 5 to a more emphatic statement that the treaties referred therein would continue regardless of the situation. It was thus suggested that the phrase either be deleted or replaced by "Notwithstanding draft article 5". Others preferred to keep the cross reference to draft article 5 as proposed by the Special Rapporteur. It was pointed out that there were certain treaty rules, such as those of international humanitarian law and those establishing boundaries, which could not be terminated or suspended through the invocation of the right to self-defence. It was also suggested to clarify that a State acting in self-defence did not have the right to terminate or suspend a treaty as a whole, when only the termination or suspension of some provisions was necessary for the exercise of self-defence. Agreement was also expressed with the Special Rapporteur's preference for not including a reference to the subsequent determination by the Security Council.

(c) *Special Rapporteur's concluding remarks*

269. The Special Rapporteur remarked that difficulties in identifying the State exercising the right of self-defence in accordance with the requirements under international law did not justify the deletion of the draft article. It was a useful reminder that there were situations where the right to self-defence should hold sway over treaty obligations, but only to the extent that the treaty obligations in question restricted the exercise of such right to self-defence.

270. As regards the suggestion to subordinate the right to suspend treaty obligations to the conditions mentioned in draft articles 4 and 5, the Special Rapporteur acknowledged the difficulties caused thereby and withdrew his proposal. He also expressed a preference for the current wording "in accordance with the Charter of the United Nations" since it covered both self-defence provided for in the Charter of the United Nations, as well as that under customary international law. He reaffirmed his view that it was not necessary to reproduce the words "individual or collective" in the title as these words were already contained in draft article 13.

Article 15. Prohibition of benefit to an aggressor State[1327]

(a) *Introduction by the Special Rapporteur*

271. The Special Rapporteur observed that draft article 15 had also been inspired by a similar provision in the 1985 resolution adopted by the Institute of International Law. It reflected the policy position that an aggressor State should not be able to relieve itself of its treaty commitments as a consequence of a conflict that it had initiated. The draft article was limited to inter-State armed conflicts. The qualification of a State as an aggressor depended on the way in which that notion was defined and, from a procedural point of view, on the Security Council. The draft article prohibited a State claiming the right to terminate, suspend or withdraw from treaties from doing so if it was qualified as an aggressor by the Security Council, and where such termination, suspension or withdrawal would be to the aggressor State's benefit, and this could be ascertained by the Security Council itself, or *ex post* by an arbitration court or international judge. He noted that while a number of Member States had approved draft article 15, there had been disagreement on the inclusion of a reference to General Assembly resolution 3314 (XXIX) of 14 December 1974.

272. It was further recalled that a Member State had expressed the concern that, according to the version adopted on first reading, once a State had been designated as an aggressor in the context of a particular conflict, it might continue to carry this stigma in subsequent conflicts. The Special Rapporteur proposed making it clearer that the armed conflict referred to in draft article 15 resulted from the aggression referred to at the beginning of the article, by adding the words "that results from". The Special Rapporteur also drew the Commission's attention to a proposal that the scope of draft article 15 be extended beyond acts of aggression to any resort to force, or threat thereof, in violation of Article 2, paragraph 4, of the Charter of the United Nations. His preference was to limit draft article 15 to the consequences of aggression committed by States.

(b) *Summary of the debate*

273. Some members expressed concern regarding the difficulty in determining the existence of an act of aggression. It was asserted that the international community had not agreed on a sufficiently clear definition of aggression and that General Assembly resolution 3314 (XXIX) remained controversial. As such, it was proposed that draft article 15 be replaced by a "without prejudice" clause, or that its subject matter be covered by an appropriately expanded draft article 14. Other members preferred to retain the draft article in the affirmative drafting proposed by the Special

[1327] Draft article 15 read as follows:

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

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

Rapporteur. While not denying the complexity of determining the existence of an act of aggression, they nonetheless expressed support for the inclusion of a reference to resolution 3314 (XXIX), which had been supported by both case law and doctrine as a reflection of customary international law of at least a core set of possible manifestations of aggression. Different views were expressed regarding the relevance of the adoption of article 8 *bis* of the Rome Statute of the International Criminal Court, at the 2010 Review Conference to the Rome Statute of the International Criminal Court held in Kampala. According to one set of views, since the Statute was concerned with the criminal responsibility of individuals, its provisions on aggression were irrelevant to the effects of armed conflicts on treaties. Others noted that resolution 3314 (XXIX) had provided the basis for the definition of aggression adopted at the Review Conference, which was proof of its universal acceptance and relevance. It was further proposed that if the reference to resolution 3314 (XXIX) were retained, the formulation of draft article 15 would have to avoid the impression that the resolution operated on the same level as the Charter of the United Nations.

274. A difference of opinion also arose over the proposal to expand the scope of draft article 15 to cover any resort to armed force in contravention of the prohibition in Article 2, paragraph 4, of the Charter of the United Nations. Some members expressed support, as that would, *inter alia*, avoid the divisive issue of aggression. It was recalled that the Security Council had been reluctant to determine the existence of acts of aggression even in cases of egregious breaches of the peace. A broader formulation would also more accurately serve as counterpart to draft article 13 since the right to self-defence was not limited to responses to acts of aggression. Other members expressed concern regarding the possible expansion of the scope of the provision, since it would deprive the draft article of the specificity that the reference to a State committing aggression provided, making it easier for the provision to be asserted in practice and thereby increasing the possibility of abuse. Some members noted that the interpretation of Article 2, paragraph 4, of the Charter of the United Nations was also controversial and that this provision was not an exact counterpart to Article 51 of the Charter of the United Nations regarding the right to self-defence.

275. Doubts were also expressed as to the concluding qualifier that the effect of the act of aggression would have to be to "the benefit of" the aggressor State, which seemed difficult to establish conclusively in practice. It was suggested that the commentary make it clear that the "benefit" arising from the aggression should not be limited to military or strategic advantage.

(c) *Special Rapporteur's concluding remarks*

276. The Special Rapporteur recalled that the purpose of draft article 15 was to prevent an aggressor State from benefiting from a conflict it had triggered in order to put an end to its own treaty obligations. This led to a discussion on the definition of an act of aggression, and, in particular, on the merits of General Assembly resolution 3314 (XXIX). The Special Rapporteur reiterated his preference for retaining a reference to that resolution, in a formula that would also refer to the Charter of the United Nations, even if the two were to be placed on different levels. He furthermore opposed deleting the reference to the aggressor benefiting from the act of aggression. He also noted that the possibility of extending the scope of the provision to the violation of the prohibition on the use of force would mean that States could more easily rid themselves of their treaty obligations.

Article 14. Decisions of the Security Council

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

Article 17. Other cases of termination, withdrawal or suspension[1328]

(a) *Introduction by the Special Rapporteur*

277. The Special Rapporteur observed that draft articles 14, 16 and 17 dealt with the issues not affected by the draft articles. Draft article 14 reserved the decisions taken by the Security Council under Chapter VII of the Charter of the United Nations. While some Member States had been of the view that draft article 14 was superfluous, in light of Article 103 of the Charter of the United Nations, he nonetheless preferred to retain it in the draft article for the sake of clarity.

278. Draft article 16 preserved the rights and duties arising from the laws of neutrality. The Special Rapporteur recalled the suggestion that treaties establishing neutrality appear as an item in the annex related to draft article 5, instead of appearing as a "without prejudice" clause. He pointed out that neutrality was not always established by treaty and that since the status of neutrality was typically relevant during periods of armed conflict (except "permanent" neutrality which also had effect in time of peace), a reference in the annex related to draft article 5 was not useful.

279. Draft article 17 reserved the right of States to terminate, withdraw from or suspend the operation of treaties on other grounds recognized by international law, particularly those provided for by the 1969 Vienna Convention. The list of alternative grounds was not intended

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[1328] Draft article 14 read as follows:

"*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."

Draft article 16 read as follows:

"*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."

Draft article 17 read as follows:

"*Other cases of termination, withdrawal or suspension*

"The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (*a*) the provisions of the treaty; (*b*) the agreement of the parties; (*c*) a material breach; (*d*) supervening impossibility of performance; (*e*) a fundamental change of circumstances.

"[Or a general and abstract formulation:]

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

to be exhaustive. Acting on the suggestion of a Member State, the Special Rapporteur proposed an alternative, more general, formulation, although he preferred to retain the approach adopted on first reading of specifying examples of such "other grounds", including as suggested by a Member State, "the provisions of the treaty" as an additional ground.

(b) *Summary of the debate*

280. General support was expressed for draft article 14.

281. With regard to draft article 16, the view was expressed that it should be deleted since the law of neutrality had been overtaken, to a large extent, by the Charter of the United Nations, which required compliance by Member States. Other members expressed support for retaining the provision. It was noted that the institution was still relevant despite the universal adherence to the Charter of the United Nations.

282. Regarding draft article 17, some support was expressed for the more general formulation, but most members found the reference to specific grounds to be more useful. Support was also expressed for the inclusion of a new subparagraph referring to the "provisions of the treaty", which would be consistent with article 57, subparagraph (*a*), of the 1969 Vienna Convention. It was further observed that the other grounds identified in the provision had to be considered in light of the draft articles when being applied to cases falling within the scope of the draft articles.

(c) *Special Rapporteur's concluding remarks*

283. The Special Rapporteur was of the view that draft article 14, which had enjoyed general support, could be located after draft article 15. He preferred to retain draft article 16, since he was not convinced that the Charter of the United Nations negated the concept of neutrality. As for draft article 17, he observed that only some support had been expressed in the Commission in favour of a general formulation, and recommended that the text he had proposed be retained.

3. Other issues

(a) *Introduction by the Special Rapporteur*

284. The Special Rapporteur recalled that there had been a proposal to include an additional provision preserving the rules of international humanitarian law and international human rights law. Although not opposed to the idea in principle, he was of the view that the "without prejudice" clauses should be limited to what was strictly necessary in the context of the draft articles, and that such a provision was not *a priori* necessary. He noted a suggestion to include in the annex related to draft article 5 references to the category of transport-related treaties, specifically those concerning air transport. His preference was not to do so, given the specificities of such agreements. He also recalled the view expressed by Member States that the consequences of termination, withdrawal from or suspension of the operation of a treaty were not mentioned in the text. He was of the view that reference should be made to articles 70 and 72 of the 1969 Vienna Convention, which could be done in the commentary to draft article 8.

285. He further noted that there had been a suggestion in the Sixth Committee to clarify in the draft articles that States involved in non-international armed conflict could only demand suspension of a treaty—not termination—taking into account draft articles 4 and 5 as well as the categories in the annex. The hypothesis that had been put forward was that the purported difference in nature and scale between international and non-international armed conflicts required a differentiation in the applicable rules. The Special Rapporteur, while expressing doubts as to such categorical analysis, sought the views of the Commission on the proposal. He also reminded the Commission that thought ought to be given to the eventual form of the draft articles.

(b) *Summary of the debate*

286. General agreement was expressed with the Special Rapporteur's view that there was no need to include another saving clause covering the duty to respect international humanitarian law and human rights law.

287. The preponderant view in the Commission was that there should not be an express distinction in the draft articles between the effects of international and non-international armed conflicts. It was noted that the effects of an armed conflict could depend as much on its scale and duration as on whether it was international or non-international in character. Nor was there strong support for the suggestion that the effects of non-international armed conflicts be limited to suspension of the operation of treaties. Other members were prepared to consider such a provision, so as to accommodate the fact that a State engaged in an internal conflict might face a unique situation where it is temporarily unable to meet the obligations of a treaty. It was suggested that the commentary clarify that the inclusion of non-international armed conflicts, and the widening of the concept of armed conflict, was not meant to expand the possibilities for States to terminate or suspend treaty relationships in the context of traditional non-international armed conflicts where a government was alone facing an insurrection on its own territory. Instead, for non-international armed conflicts to have an effect on treaties, an additional outside involvement would be required.

288. As to the possible form of the draft articles, a member expressed support for their eventual adoption as a treaty, in light of their importance to the requirement of legal security, while another was of the view that it was still too premature to consider the issue.

(c) *Special Rapporteur's concluding remarks*

289. The Special Rapporteur confirmed that non-international conflicts were covered by the draft articles. The issue, however, was whether there were different effects according to whether the conflicts were international or non-international in nature. He noted that there was no strong support in the Commission for such a distinction. The effects of an armed conflict would have to be gauged by taking into account the concrete circumstances of each case.