

Effects of Armed Conflicts on Treaties

Statement of the Chairman of the Drafting Committee

17 May 2011

Mr. Chairman,

It is my pleasure, today, to introduce the first report of the Drafting Committee for the sixty-third session of the Commission. This report, which deals with the topic “Effects of armed conflicts on treaties”, is contained in document A/CN.4/L.777.

The report relates to draft articles 1 to 18 [17]¹ adopted by the Drafting Committee, following the referral last year of draft articles 1 to 17, as proposed by the Special Rapporteur in his first report. The Committee undertook its work in two parts. It held 6 meetings at last year’s session, from 14 to 22 July 2010, followed by a further 2 meetings held this year, from 29 April to 3 May 2011. Indeed, most of the work on the draft articles was undertaken last year under the able guidance of my predecessor, Mr. Marcelo Vazquez Bermudez. I am pleased to announce that the Drafting Committee concluded its work on a set of 18 draft articles, and decided to submit its report to the Plenary with the recommendation that the draft articles be adopted by the Commission, on second reading.

Before turning to the report, allow me to pay particular tribute to the Special Rapporteur, Mr. Lucius Caflisch, whose constructive approach and patient guidance greatly facilitated the work of the Drafting Committee. I also thank the

¹ Article numbers in brackets indicate the number of the corresponding draft article adopted on first reading, where applicable and where different from that adopted on second reading.

other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance.

Mr. Chairman,

The draft articles on the effects of armed conflicts, as adopted by the Drafting Committee, are structured into three parts. The first, entitled “Scope and Definitions”, includes draft articles 1 and 2. The second, entitled “Principles”, contains two chapters. Chapter I, entitled “Operation of treaties in the event of armed conflicts”, contains draft articles 3 to 7 [5]. Chapter II, entitled “Other provisions relevant to the operation of treaties”, contains draft articles 8 [6] to 13 [12]. Finally, draft articles 14 [13] to 18 [17] are to be found in Part Three, entitled “Miscellaneous”. The draft articles are followed by an annex which is connected to draft article 7 [5].

Draft article 1

Mr. Chairman,

Draft article 1 establishes the scope of the draft articles. The Drafting Committee considered three proposals for this provision. First, it discussed the possibility of incorporating within draft article 1 other provisions relating to the scope of the draft articles, such as draft article 2, subparagraph (a), defining armed conflict, and draft article 3, subparagraphs (a) and (b), which provide an indication of which States are to be covered by the draft articles. This would have amounted to a rearrangement of the content of several draft articles, but without change in substance. The Committee, however, decided to retain the existing structure since it followed a well-established pattern for instruments codifying international law.

The Drafting Committee then turned to an issue that has been raised during the plenary debate, namely the fact that defining the scope of the draft articles as covering treaties between States seemed to exclude multilateral treaties which, although overwhelmingly acceded to by States, also had international organizations as parties. The example mentioned in the plenary, and discussed in the Drafting Committee, was that of the United Nations Convention on the Law of the Sea. The Drafting Committee was of the view that the draft article was best reformulated in a manner which made it clear that such treaties would indeed be covered as well by the draft articles. The solution was found in the formula “relations of States under a treaty”, which was based on a similar formulation found in article 3, subparagraph (c), of the Vienna Convention on the Law of Treaties of 1969. Accordingly, the draft articles apply to the treaty relations between States, regardless of whether other subjects of international law, such as international organizations, are also parties to the treaty in question. This was further clarified through an addition to the definition of treaties, which I will revert to in the context of my introduction to draft article 2.

The third issue related to a proposal to include an express reference to the application of the draft articles to non-international armed conflicts which, by their nature or extent, are likely to affect the application of treaties between States parties. The idea behind the proposal was to make it clear that not every conflict of a non-international character would affect treaty relations between States, since that could have a destabilizing affect on such relations. Rather, only those such conflicts which “by their nature or extent” are likely to affect a treaty or treaties in question would be covered by the scope of the draft articles. The Drafting Committee, upon reflection, decided not to include the proposed reference as the point was already covered by the use of the adjective “protracted” in the definition of armed conflict in draft article 2, subparagraph (b), as well as by draft article 6 [4]. It also felt that the analysis was likewise applicable to treaties affected by international armed conflicts. It was agreed that the commentary would make it

clear that the typical non-international armed conflict should not call into question treaty relations.

As for the text itself, the Drafting Committee changed the earlier phrase “deal with” to “apply to”, which is more appropriate for a legal instrument. In addition, it replaced the words “in respect of” with “on”, so that the phrase in question now reads “effects of armed conflict on treaties”. It was also decided to delete the former concluding phrase “where at least one of the States is a party to the armed conflict” because it is not the only scenario covered by the draft articles. Instead, it was decided to include an outline of the different hypotheses of armed conflict that fall within the scope of the draft articles in the commentary to draft article 1. Furthermore, draft article 1 should be read in light of draft article 3 which expressly envisages such hypotheses.

The title of draft article 1 remains “Scope”.

Draft article 2

Mr. Chairman,

Draft article 2 provides some definitions of terms used in the draft articles.

Subparagraph (a) defines the word “treaty” for purposes of the draft articles. With one exception the definition remains that which was adopted on first reading, and which was based on the definition in the Vienna Convention on the Law of Treaties of 1969. As previously alluded to, the Drafting Committee decided, as part of the package solution to the problem of covering within the scope of the draft article treaties to which international organizations are also parties, to add the following phrase at the end of the definition of treaties “, and includes treaties between States to which international organizations are also

parties”. Allow me to clarify that this addition does not mean that the draft articles deal with the position of international organizations, but rather that the participation of an international organization in a treaty does not *per se* exclude the draft articles from applying to the relations between States under that treaty.

Subparagraph (b) contains a definition of “armed conflict” for the purposes of the draft articles. This definition differs from that adopted on first reading. If you recall, the Special Rapporteur, in his report, proposed replacing the first-reading definition with a modified version of the more contemporary definition employed by the ICTY in the *Tadic* decision. The majority of members supported this proposal during the plenary debate. The modification relates to the deletion of the final clause of the *Tadic* definition, which refers to the resort to armed force between organized armed groups within a State; leaving that clause in would be inappropriate in the context of the present draft articles.

The title of draft article 2 has been changed to “Definitions” so as to be aligned with the title of Part One.

Draft articles 3 to 7 [5]

Mr. Chairman,

I now turn to the group of articles contained in Chapter I of Part Two, namely draft articles 3 to 7 [5], which are central to the operation of the entire set of draft articles. Before analyzing each article in more detail, allow me briefly to explain the sequence in which they operate. Draft article 3 establishes the basic orientation of the draft articles: armed conflict does not *ipso facto*, in and of itself, terminate or suspend the operation of treaties. Continuity or not, therefore, depends on the circumstances of each case. Draft articles 4 [7] to 7 [5] seek to

guide the determination of whether a treaty survives an armed conflict. They are arranged in an order of priority. Accordingly, the first step is to look at the treaty itself. Under draft article 4 [7], if the treaty contains an express provision regulating its continuity in the context of an armed conflict, such provision would govern. In the absence of an express provision resort would next be had, under draft article 5, to the established international rules on treaty interpretation so as to ascertain the fate of the treaty in the event of an armed conflict. If no conclusive answer were found following the application of those two draft articles, the enquiry would then shift to considerations extraneous to the treaty, and draft article 6 [4] provides a number of contextual factors that may be relevant in making a determination one way or the other. Finally, the reader is further assisted by draft article 7 [5] which refers to the indicative list of treaties, contained in the annex, the subject-matter of which involves an indication that they continue in operation, in whole or in part, during armed conflict.

Draft article 3

Mr. Chairman,

Returning to the article-by-article exposition, draft article 3 recognizes the principle that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. There was a preliminary discussion in the Drafting Committee as to whether draft article 3 was better presented in an affirmative formulation establishing a principle of continuity, so as to emphasize the importance of the stability of treaty relations. The Committee had before it an alternative proposal for a positive formulation for draft article 3. Following an extensive discussion, the Committee decided to retain the approach adopted on first reading, as proposed by the Special Rapporteur. The purpose of draft article 3 is to make it clear that the existence of an armed conflict does not, in and of itself, affect treaties. Whether a particular conflict does or does not affect a treaty will

then be determined in accordance with the following draft articles. As such, draft article 3 establishes the basic orientation for the entire set of draft articles.

The Committee was of the view that it was preferable to limit itself to such simple a statement of principle, so as to dispel any assumption of discontinuity, and then proceed to describe situations where treaties are assumed to continue, as opposed to adopting a presumption in favour of continuity, and then attempting to list treaties or categories of treaties which presumably do not continue. It was felt that the net effect of the former approach was to strengthen the stability of treaty relations. The sense was also that a change in the orientation of draft article 3 would require a significant redraft of the articles that follow, which was something that the Committee was not inclined to undertake at such a late stage in the work on the draft articles and without clear instruction from the Plenary.

As regards the chapeau of the draft article, the Drafting Committee replaced the earlier reference to “outbreak” of an armed conflict by the word “existence”, so as to make it clear that the scope of the draft articles would not be limited to armed conflicts which affected treaties at the point of their outbreak. Instead, an effect on a treaty could occur later in time. Furthermore, the reference to “outbreak” suggested armed conflicts of an international character since it was unusual to speak of the “outbreak” of non-international armed conflicts. Hence, the word “existence” accorded more closely with the scope of the draft articles.

The Drafting Committee also had an extensive discussion on the Latin term “*ipso facto*”. While it is the practice not to use Latin terms where there is a non-Latin equivalent enjoying general agreement, the Committee could not agree on a suitable non-Latin replacement. Accordingly, it was decided to keep the words to “*ipso facto*”.

The drafting of subparagraphs (a) and (b) was also simplified in the text before you. The reference to the States in question being “parties to the treaty”, which had been proposed by the Special Rapporteur, was deleted because it was implied from draft article 1. It should be noted that no substantive change was intended by the redraft of the two subparagraphs.

Finally, as regarding the title of draft article 3, the Drafting Committee looked at a series of proposals. In the end, it decided that the best solution was for the title to give an indication of the nature of the provision in relation to the entire set of draft articles. The Committee considered the formulations “basic principle” or “general principle” and settled for the latter.

Draft article 4 [7]

Mr. Chairman,

Draft article 4 [7] covers the situation where provision is made in a treaty for its continued operation, or not, in situations of armed conflict. Such a provision or provisions would, of course, be applicable. If you recall, there was general agreement in the Commission on such a provision, and accordingly the focus in the Drafting Committee was only its position within the draft articles, and on the issue of whether its formulation might be further improved.

In the first reading, this provision appeared as draft article 7. The Drafting Committee accepted the proposal of the Special Rapporteur to relocate it immediately after draft article 3, the logic being that the statement of general principle in draft article 3 is followed by several articles providing guidance on how to ascertain the effect of the armed conflict on the treaty. The first such provision, draft article 4 [7], indicates that if the answer lies in the treaty itself, the treaty provision should be followed.

As for the formulation of the provision, the Drafting Committee proceeded on the basis of the reformulation proposed in the Special Rapporteur’s report, but decided not to include any reference to “express” provisions, an adjective that was considered redundant. It also discussed a proposal to refer to “specific” provisions

but decided against it since specificity is a contextual concept which could give rise to conflicting interpretations in practice.

The title of draft article 4 [7] has been shortened, with the deletion of “express” to now read “Provisions on the operation of treaties”.

Draft article 5

Mr. Chairman,

Draft article 5 is a new provision. As mentioned earlier, it focuses on the next stage of inquiry, i.e. when the treaty does not include an express provision on the effect of an armed conflict. Resort would then be had to the rules on treaty interpretation so as to ascertain any such indication. While the Drafting Committee recognized that the provision, to a certain extent, restates the obvious, it was nonetheless considered useful to include it, in an expository manner, so as to clarify the relationship between articles 3, 4 [7], 6 [4] and 7 [5].

In particular, the inclusion of draft article 5 arose out of the discussion concerning the inclusion or not, in draft article 6 [4], of a reference to the criterion of intention and a cross-reference to articles 31 and 32 of the Vienna Convention on the Law of Treaties. If you recall, this was a matter of some debate going back to the first reading. The matter emerged again during the second reading following the proposal of the Special Rapporteur to resurrect the reference to the criterion of intention.

The Drafting Committee was cognizant of the fact that there was no agreement in the Plenary to re-introduce the criterion of intention in draft article 6 [4], and that the Special Rapporteur had, in his closing statement, distanced himself from his earlier proposal to do exactly that. There were also divergent views in the Committee, as there had been in Plenary, on whether the criterion of

intention was reflected in articles 31 and 32 of the Vienna Convention or not. In the final analysis, the sense of the Committee was that the question of the interpretation of the treaty, through the application of articles 31 and 32 of the Vienna Convention, was an inquiry distinct from that of considering factors external to the treaty which might give an indication of the treaty's susceptibility to termination, withdrawal or suspension in the event of an armed conflict, which is the subject-matter of draft article 6 [4].

The question remained as to whether there ought to be a reference to the criterion of intention, in addition to a reference to the rules of interpretation in articles 31 and 32. Upon reflection, the Committee decided not to make such a reference. It was of the view that the drafters of treaties rarely provide an indication of their intentions should the parties to the treaties ever become engaged in an armed conflict. Furthermore, there was the concern that giving a prominent place to intention would divert from the position adopted at the Vienna Conference, which had been instead to provide other criteria in articles 31 and 32 so as to limit the possibility of treaty appliers relying solely on assertions of intention. In other words, making reference to intention would amount to re-introducing a subjective approach (focusing on the 'intention of the parties'), when the Vienna Convention had adopted an objective approach (focusing on the 'meaning of the text').

Nonetheless, in order to accommodate both views in the Commission, it was decided to not refer to the criterion of intention, as well as to make a more general reference to the "rules of international law on treaty interpretation". It was understood that those rules are reflected in the Vienna Convention, and exist also as a matter of customary international law for States which are not parties to the Vienna Convention.

The Committee considered different ways of expressing the concept, and settled for the formulation you have before you, which did not envisage treaty interpretation as providing the definitive answer, but rather left it open for the

application of draft articles 6 [4] and 7 [5] in situations where the exercise of interpreting the meaning of the treaty does not lead to a conclusive result.

The title of draft article 5 is “Application of rules of treaty interpretation”, which suggests that the provision is not concerned with the question of treaty interpretation generally, but rather with specific situations where the existing rules on treaty interpretation are to be applied with a view to obtaining a result.

Draft article 6 [4]

Mr. Chairman,

Draft article 6 [4] provides several factors to be taken into account – the enumeration is not exhaustive – for determining whether a treaty is susceptible to termination or suspension of operation. As already mentioned, such an exercise would be undertaken after the resort to articles 4 and 5 [7] proves inconclusive. The Drafting Committee held an extensive discussion on draft article 6 [4], resulting in a number of changes. I have already referred to one of the conceptual shifts that took place, namely, the de-linking of the issue of the intention of the parties and the rules on the interpretation of treaties, which became the subject of draft article 5. This decision helped clear the way to agreement on a reformulated draft article 6 [4].

A quick word on formulation: if you recall, during the first reading text, the Commission, at the suggestion of the then Special Rapporteur, used the word “indicia”. However, this term has not been favoured by many both within the Commission and States which have commented on the draft articles. The Drafting Committee was no exception, which is why it decided to employ the word “factors”.

The chapeau has in large measure been retained as it was in the first reading text, except that the words “resort shall be had to” used in the text of the first

reading were replaced by “regard shall be had to all relevant factors, including” at the end, expressly to confirm the fact that the lists of factors in subparagraphs (a) and (b) are non-exhaustive, and are offered to provide help in determining the effect of the armed conflict on treaties. This is confirmed by the use of the term “relevant factors”, which establishes a relative test (in the sense that some of the factors may be more relevant than others, depending on the treaty or conflict), as well as by the qualifier “including” which was introduced to make the point even clearer.

You may recall that the first-reading version included two sets of factors. The first, contained in subparagraph (a), related to the rules on treaty interpretation in the Vienna Convention on the Law of Treaties, while the second, contained in subparagraph (b), consisted of an enumeration of factors relating to both the conflict and the treaty in question, without the two categories being necessarily inter-related. With the removal of the question of treaty interpretation, the Drafting Committee was able to redistribute the second set of factors between new subparagraphs (a) and (b), the former listing factors relating to the treaty and the latter factors pertaining to the armed conflict.

Accordingly, subparagraph (a) places emphasis on the “nature” of the treaty, which it further indicates as relating in particular to the treaty’s subject-matter, its object and purpose, its content and the number of parties thereto. Subparagraph (b) focuses on the characteristics of the armed conflict. Here the suggested factors pertain to the territorial extent of the conflict (such as whether it is on land or at sea, which may be relevant, for example, in the context of ascertaining the impact on air transportation agreements), its scale, intensity and duration. In addition, given the scope of the draft articles, which includes conflicts of a non-international character, mention is made to the degree of outside involvement in such a conflict as one of the factors to be taken into account.

This latter element has been introduced as an additional threshold intended to limit the possibility for States to assert the termination or suspension of the operation of a treaty, or the right of withdrawal, on the basis of their participation

in such types of conflicts. In other words, the new element was intended as a factor of control so as to favour the stability of treaties. The rationale behind this provision is that non-international armed conflicts may potentially affect the relationship between parties to a treaty. The greater the involvement of third States in a non-international armed conflict, the greater the possibility that treaties will be affected, and vice-versa.

The title of draft article 4 is “Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension”.

Draft article 7 [5]

Mr. Chairman,

Draft article 7 [5] deals with the continued operation of treaties resulting from their subject-matter. As you can see, a new approach has been taken in draft article 7 [5]. This emerged from a revised proposal by the Special Rapporteur which included two paragraphs, the first based on the version adopted on first reading, and the second establishing a link to the annex containing a list of treaties, the subject-matter of which involved an indication that they continue in operation, in whole or in part, during armed conflict – something which was done in the first reading text only by means of a footnote.

The Drafting Committee was generally of the view that the provision adopted on first reading did not add much to draft article 3. Instead, it preferred to reformulate in a manner which presented draft article 7 [5] as a further elaboration of the element of “subject-matter” listed in draft article 6 [4], subparagraph (a), as one of the factors to be taken into account in ascertaining susceptibility to termination, withdrawal or suspension of operation in the event of an armed conflict. Such linkage also helps explain the basis on which the Commission

developed the list. Furthermore, it preserves the idea of the Special Rapporteur to include in the draft articles an explicit *renvoi* to the annex.

The commentary will clarify that the effect of the provision is to establish that the outbreak of an armed conflict involves an implication in favour of the continuation of the treaties identified in the annex.

The title of draft article 7 [5] has also been aligned to the new formulation so that it now reads, “The continued operation of treaties resulting from their subject-matter”.

Annex

Mr. Chairman,

With your permission, I propose to deal with the annex now, as it relates to draft article 7 [5]. The Drafting Committee decided to retain the annex in the draft articles, and locate it at the end, as had been adopted on first reading and contrary to the wishes of the Special Rapporteur who had preferred its insertion after draft article 7. The Committee proceeded on the basis of the recommendations of the Special Rapporteur, both for the refinement of the formulation and for its content. As regards the latter, the Special Rapporteur undertook further research into the existing case law, and provided a summary of his findings in a short paper. I recommend that the Secretariat be asked to reproduce the Special Rapporteur’s findings as an official document of the Commission in order to preserve it for the record.

As regards the contents of the list, the Drafting Committee decided to retain, in large part, the version adopted on first reading. In particular, it decided against transferring some of the categories of treaties into draft article 7 [5], as a second paragraph, so as to set them apart as a select set of treaties which, by their very nature and importance, would survive an armed conflict. This would

invariably have implied the recognition of a hierarchy of treaties; something which the Drafting Committee felt was not the purpose of draft article 7 [5] and the annex.

In terms of additions, the Drafting Committee accepted the proposal of the Special Rapporteur to include, as new paragraph (d), “treaties on international criminal justice”, as well as, a new paragraph (j), “treaties which are constituent instruments of international organizations”. Furthermore, the Drafting Committee decided to delete the entry “treaties relating to commercial arbitration”. The additional research of the Special Rapporteur had confirmed that the inclusion of the treaties in the list was not always supported by relevant practice, and in some cases, inclusion was being undertaken by way of progressive development of international law. Some practice does exist, it is true, concerning treaties relating to commercial arbitration. However, that practice was considered inconclusive and the Drafting Committee was of the opinion that there was insufficient agreement in the Commission for its inclusion by way of progressive development. At the same time, the commentary will clarify that the treaties mentioned in paragraph (e) (“Treaties of friendship, commerce and navigation and agreements concerning private rights”) would cover treaties for the protection of investments to the extent that they dealt with private rights. The Drafting Committee also decided not to include an entry for “*jus cogens* treaties”, as had been proposed in the Plenary. It took the view that while it was conceivable that treaties may contain provisions enjoying a peremptory status under international law, it was not common to refer to treaties containing such provisions as a category. Finally, the Drafting Committee considered and decided to retain an entry for “multilateral law-making treaties”, which was relocated higher in the list, in paragraph (c), for presentation purposes.

Besides the inclusion of the word “international” before “protection of human rights” and “protection of the environment”, in paragraphs (f) and (g) respectively, as well as the deletion of the word “analogous” before “agreements concerning private rights” in paragraph (e), which was considered obscure, and the

merging of diplomatic and consular treaties into a single entry, namely paragraph (l), the only significant redrafting occurred in paragraph (k). The phrase “settlement of disputes between States by peaceful means”, is now replaced by “international settlement of disputes by peaceful means”. The deletion of “between States” broadens the scope of the provision so as to include disputes involving other subjects of international law, particularly international organizations. Since such changes implied the settlement of disputes outside the jurisdiction of the International Court of Justice, the Drafting Committee replaced the reference to the Court at the end of the paragraph with the more generic reference to “judicial settlement”, which is the terminology used in article 33 of the Charter of the United Nations. I might add here that the Drafting Committee was of the view that treaty-based mechanisms for the protection of human rights were covered by paragraph (f).

Finally, the Drafting Committee decided to delete any reference to “categories” of treaties, which is not typically used in legal texts, particularly the Vienna Convention on the Law of Treaties. This change was made both in the title and in draft article 7 [5]. Another proposal to refer to the “provisions” of treaties was not accepted.

Allow me to conclude my review of the annex by emphasizing the point that the commentary will make it clear that the list of treaties is indicative in nature; that it is not presented in any particular order and does not reflect a “hierarchy” of instruments. Furthermore, no *a contrario* interpretation ought to be drawn from the fact that other treaties are not included in the list since their survival in the event of an armed conflict will continue to depend on the application of draft articles 4 [7] to 6 [4].

The title of the annex is “Indicative list of treaties referred to in draft article 7”.

Draft article 8 [6]

Mr. Chairman,

Turning to Chapter II of Part One, draft article 8 [6] concerns the question of the conclusion of treaties during armed conflict. The Drafting Committee opted to retain the draft article without major changes to the first-reading version. At the same time, it was recognized that the provision was largely expository in nature, since its inclusion was not strictly necessary.

Paragraph 1 confirms that armed conflicts do not affect the capacity of States parties to the armed conflict to conclude treaties. The earlier reference to the “outbreak” of an armed conflict was replaced by “existence” so as to accord with the changes made in draft article 3. Furthermore, in line with the general policy of not including references to specific treaties, the first reading reference to the Vienna Convention was replaced by the more generic “international law”.

Paragraph 2 refers to the specific possibility that States may agree *inter se*, during an armed conflict, on the termination or suspension of a treaty operative between them. The Drafting Committee retained the first-reading formulation, and added the possibility of agreement concerning the amendment or modification of the treaty. In including that possibility, the Drafting Committee had in mind the position of third States parties to the treaty but not parties to the armed conflict. Such States could conceivably not be in a position to justify termination or suspension of operation, thus only leaving them the possibility to seek modification or amendment.

A further issue discussed was the reference to “lawful” agreements in the first reading version, which was considered infelicitous since it suggested *a contrario* the possibility of concluding “unlawful” agreements. Alternatives considered included simply deleting the word, or replacing it with “valid”. The Drafting Committee settled for the former, as the latter could introduce

unnecessary confusion: the question of the validity of treaties was best left for the existing rules of international law.

The Drafting Committee also considered the possibility of locating draft article 8 [6] higher up in the order, after draft article 4 [7], but decided against doing so, in order not to disrupt the sequence of articles 3, 4 [7], 5, 6 [4] and 7 [5], which I alluded to earlier in my statement.

The title of draft article 8 [6] remains “Conclusion of treaties during armed conflict”.

Draft article 9 [8]

Mr. Chairman,

Draft article 9 [8] concerns the question of the requirement of notification of termination of or withdrawal from the treaty, or its suspension of operation, in the event of an armed conflict. As you can see, the version adopted on second reading includes two additional paragraphs, which were included on the basis of the recommendations of the Special Rapporteur.

Paragraph 1 retains, in essence, the version adopted on first reading with some drafting changes. The Drafting Committee sought closer to align it to that in article 65 of the Vienna Convention on the Law of Treaties by deleting the earlier reference to the State “engaged in armed conflict”, and with the addition of the clarifying qualifier “as a consequence of an armed conflict” after “operation of that treaty”.

The Drafting Committee decided to retain the first-reading text of paragraph 2.

The key issue concerning paragraph 3, raised in the Special Rapporteur’s report and during the debate in Plenary, was that of the time-period for objection. The Drafting Committee recalled that various suggestions had been made. It opted

for the inclusion of “within a reasonable time” (after the phrase “party to object”), which would be determined through the operation of the procedures envisaged in paragraph 4.

The Special Rapporteur, in his report, had proposed the inclusion of the additional qualifier “unless the treaty provides otherwise”. The Drafting Committee decided not to include such a reference since it could imply that the treaty was setting an unreasonable time period.

Paragraph 4 is new and is based on the version proposed by the Special Rapporteur in his report, with some slight adjustment, including the insertion of a cross-reference to paragraph 3. Under this paragraph, if an objection is raised under the terms of paragraph 3, the States concerned would be required to seek the peaceful settlement of their dispute through the means listed in Article 33 of the Charter of the United Nations.

The Special Rapporteur’s proposal for a new paragraph 5 also proved uncontroversial in the Drafting Committee. The paragraph contains a saving clause, preserving the rights or obligations of States with regard to the settlement of disputes, to the extent that they have remained applicable in the event of an armed conflict. The Committee considered it useful to include the provision so as to balance any interpretation of paragraph 4 as implying that States involved in an armed conflict operate from a clean slate when it comes to the peaceful settlement of disputes. The adoption of this provision further accords with the inclusion, in paragraph (k) of the annex, of treaties relating to the settlement of international disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement. The formulation is based on the proposal of the Special Rapporteur, made in his report, with the deletion of the reference to “the incidence of the armed conflict”, which was considered unnecessary.

The title of draft article 9 [8] remains “Notification of intention to terminate or withdraw from a treaty or to suspend its operation”. The Drafting Committee further sought to harmonize the draft articles by employing variations of the

formulation used in the title of draft article 9 [8], namely to “terminate or withdraw from a treaty or to suspend its operation”. It did this in paragraph 3 of draft article 9 [8], as well as in the title and chapeau of draft article 12 [11] and in the text of draft article 15.

Draft article 10 [9]

Mr. Chairman,

The Drafting Committee decided to retain draft article 10 [9] as adopted on first reading. The provision seeks to preserve obligations imposed by international law independently of the treaty, regardless of whether the treaty has been affected by the conflict through the application of the present draft articles.

The title of draft article 10 [9] remains “Obligations imposed by international law independently of a treaty”.

Draft article 11 [10]

Mr. Chairman,

Draft article 11 [10] deals with the question of the separability of treaty provisions. It should be recalled that the Commission had introduced this provision towards the end of the first reading, drawing inspiration from article 44 of the Vienna Convention on the Law of Treaties. The Drafting Committee decided to retain the draft article since it plays a key role in the whole text in “moderating” the impact of the operation of the provisions in Chapter I by providing the possibility of differentiated effects on a treaty. Other than a slight

amendment in the first line to refer to the “operation of a treaty” as opposed to the use of the definite article in “operation of the treaty”, the Committee decided not to change the first reading formulation, which was based on that in article 44.

It was recalled that the reference to “unjust” in subparagraph (c) had been queried in the Government comments received last year. The commentary will clarify that this is language contained in article 44, which was introduced during the Vienna Conference. The Committee felt it advisable not to introduce any changes in subparagraph (c).

The title of draft article 11 [10] remains “Separability of treaty provisions”.

Draft article 12 [11]

Mr. Chairman,

Draft article 12 [11] is also based on the Vienna Convention on the Law of Treaties, and deals with the question of the loss of the right to terminate or withdraw from the treaty, or to suspend its operation. The text before you is substantially the same as that adopted on first reading, with the following changes.

In the chapeau, the Drafting Committee decided to include, at the end, the phrase “after becoming aware of the facts”, so as to align the provision closer to its counterpart in the Vienna Convention, namely article 45. For the same reasons, the words “shall have” and “must” were introduced in subparagraphs (a) and (b).

The Drafting Committee understood the qualifier of awareness of the facts as relating not only to the existence of the armed conflict, but also to the practical consequences thereof in terms of the possible effect of the armed conflict on the treaty. This will be illustrated further in the commentary. The Committee considered making a reference to “relevant facts”, but decided against it.

The title of draft article 12 [11] remains “Loss of the right to terminate, withdraw from or suspend the operation of a treaty”.

Draft article 13 [12]

Mr. Chairman,

Draft article 13 [12] deals with the question of the revival or resumption of treaty relations subsequent to an armed conflict. The text before you is a combination of draft article 18, as adopted on first reading, the substance of which is now reproduced in paragraph 1, as well as the first-reading version of draft article 13 [12], which is now to be found in paragraph 2.

The Drafting Committee considered and accepted paragraph 1 on the basis of a proposal made by the Special Rapporteur in his report. It deals with situations analogous to “novations”, to use a term of the law of contracts, whereby treaties which have been terminated or whose operation has been suspended may be revived subsequent to the armed conflict, and anticipates the parties entering into agreements to do so.

The Drafting Committee adopted paragraph 2 on the basis of the version adopted on first reading. The only change introduced was replacing the word “indicia” with “factors”, by way of aligning the text with draft article 6 [4]. The paragraph confirms that the resumption of the operation of a treaty is to be determined in accordance with the factors listed in draft article 6 [4].

The title of draft article 13 [12] is “Revival or resumption of treaty relations subsequent to an armed conflict”.

Draft article 14 [13]

Mr. Chairman,

I turn now to Part Three of the draft articles.

Draft article 14 [13] deals with the exercise of the right to individual or collective self-defence on a treaty. The text is substantially that adopted on first reading. The Drafting Committee decided to refine the text through the inclusion of the qualifier “inherent” before “right” in the first line, so as to align it with article 51 of the Charter of the United Nations. A suggestion to replace the reference to the Charter by a more general formula (“in accordance with international law”) was not adopted out of recognition that it is the Charter which provides the contemporary legal framework for the exercise of the right of self-defence. The Committee further decided to include, after “operation of a treaty”, the phrase “to which it is a party insofar as that operation is”, so as to inject an element of relativity. The idea being that a treaty might only be partly incompatible with the exercise of the right.

The Special Rapporteur, in his report, had also proposed the inclusion of an opening qualifier which would make the provision subject to draft article 7 [5]. However, he subsequently distanced himself from his proposal, and the Drafting Committee decided not to take it up.

The title of draft article 13 is “Effect of the exercise of the right to self-defence on a treaty”. The title no longer includes the earlier reference to “individual or collective”. While this was deleted by way of streamlining the text, the Committee considered the concept to be implied in the words “right to self-defence”.

Draft article 15

Mr. Chairman,

Draft article 15 deals with the question of an aggressor State benefitting from the application of the draft articles. If you recall, this provision was included in the first reading by way of ensuring that any such benefit be prohibited. This position has generally been endorsed, and the only matter which the Drafting Committee faced was whether to keep the text as adopted on first reading, namely with the more limited reference to aggression as defined in General Assembly resolution 3314 (XXIX), or whether to adopt a broader formulation referring to the resort to force in violation of article 2, paragraph 4, of the Charter of the United Nations.

It was recalled that there were divergent views expressed during the Plenary debate. Nonetheless, the sense of the Drafting Committee was that the preponderant view in the Commission favoured retaining the narrower version, or at least that there was insufficient support in the Commission for it to deviate from the position taken at first reading. Accordingly, draft article 15 was adopted in the first-reading formulation with the added precision, in the last line after “armed conflict”, the phrase “that results from the act of aggression”.

The title of draft article 15 remains “Prohibition of benefit to an aggressor State”.

Draft article 16 [14]

Mr. Chairman,

Draft article 16 [14] seeks to preserve the decisions taken by the Security Council under the Charter of the United Nations. If you recall, this provision appeared in the first reading just before what is now draft article 15. It was placed to after draft article 15 so as to better group it with the other saving clauses at the end of the draft articles.

Several changes were introduced into the version adopted on first reading. First, the Drafting Committee replaced the words “legal effects of” by “relevant”, because not all decisions of the Security Council have legal effects. What is at issue here are those decisions which are of relevance to the application of the draft articles. The Drafting Committee further refined the wording by turning “decisions of the Security Council” into “decisions taken by the Security Council”. Finally, the first-reading version had been limited to decisions taken in accordance with “provisions of Chapter VII” of the Charter. This restriction has been deleted out of recognition that the Security Council acts under other provisions of the Charter, including article 94 on the enforcement of judgments of the International Court of Justice. Nonetheless, the deletion of the reference to Chapter VII is balanced by the newly introduced reference to “relevant decisions taken by the Security”. It is assumed that decisions concerning an armed conflict taken by the Security Council under Chapter VII would be relevant to the application of the draft articles, the point being that there may be other decisions by the Security Council, taken under other provisions of the Charter, which may also be relevant.

The title of draft article 16 [14] remains “Decisions of the Security Council”.

Draft article 17 [16]

Mr. Chairman,

The Drafting Committee adopted draft article 17 [16], which preserves the application of the laws of neutrality, in the form adopted on first reading, without change.

The title of draft article 17 [16] remains “Rights and duties arising from the laws of neutrality”.

Draft article 18 [17]

Mr. Chairman,

Draft article 18 [17] is the last of the saving clauses in the draft articles. It seeks to preserve a number of other grounds for the termination, withdrawal from or suspension of treaties, provided for in the Vienna Convention on the Law of Treaties. In addition to restructuring the provision in a single paragraph, the first-reading formulation was retained with one exception. At the first-reading, the Commission had included the agreement of the parties as one of the alternative grounds for termination, withdrawal or suspension. In light of the inclusion of new draft article 4 [7], relating to provisions on the operation of treaties, the Drafting Committee saw fit to delete that ground from this provision.

The title of draft article 18 [17] remains “Other cases of termination, withdrawal or suspension”.

Mr. Chairman,

This concludes my introduction of the first report of the Drafting Committee this year. It is my sincere hope that the Plenary will be in a position to adopt the draft articles on the effects of armed conflicts on treaties, on second reading, as presented.

Thank you.
