

# **Draft articles on the effects of armed conflicts on treaties, with commentaries**

**2011**

Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 101), appears in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.



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*Article 10. Obligations imposed by international law independently of a treaty*

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

*Article 11. Separability of treaty provisions*

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

- (a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and
- (c) continued performance of the remainder of the treaty would not be unjust.

*Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation*

A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:

- (a) it shall have expressly agreed that the treaty remains in force or continues in operation; or
- (b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

*Article 13. 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 consequence 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 factors referred to in article 6.

PART THREE

MISCELLANEOUS

*Article 14. Effect of the exercise of the right to self-defence on a treaty*

A State exercising its inherent 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 insofar as that operation is incompatible with the exercise of that right.

*Article 15. Prohibition of benefit to an aggressor State*

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

*Article 16. Decisions of the Security Council*

The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.

*Article 17. Rights and duties arising from the laws of neutrality*

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

*Article 18. 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) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

ANNEX

INDICATIVE LIST OF TREATIES REFERRED TO IN ARTICLE 7

- (a) Treaties on the law of armed conflict, including treaties on 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) multilateral law-making treaties;
- (d) treaties on international criminal justice;
- (e) treaties of friendship, commerce and navigation and agreements concerning private rights;
- (f) treaties for the international protection of human rights;
- (g) treaties relating to the international protection of the environment;
- (h) treaties relating to international watercourses and related installations and facilities;
- (i) treaties relating to aquifers and related installations and facilities;
- (j) treaties which are constituent instruments of international organizations;
- (k) treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;
- (l) treaties relating to diplomatic and consular relations.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

101. The text of the draft articles with commentaries thereto as adopted by the Commission, on second reading, at its sixty-third session is reproduced below.

EFFECTS OF ARMED CONFLICTS ON TREATIES

PART ONE

SCOPE AND DEFINITIONS

*Article 1. Scope*

The present draft articles apply to the effects of armed conflict on the relations of States under a treaty.

*Commentary*

(1) Article 1 situates, as the point of departure for the elaboration of the draft articles, the 1969 Vienna Convention on the law of treaties, article 73 of which provides, *inter alia*, that the provisions of the Convention do not

prejudge any question that may arise in regard to a treaty from the outbreak of hostilities between States.<sup>398</sup> Thus, the present draft articles apply to the effects of an armed conflict in respect of treaty relations between States.

(2) The formulation of article 1 is patterned on article 1 of the 1969 Vienna Convention. By using the formulation “relations of States under a treaty”, the draft articles also cover the position of States not parties to an armed conflict but are parties to a treaty with a State involved in that armed conflict. Accordingly, three scenarios would be contemplated: (a) the situation concerning the treaty relations between two States engaged in an armed conflict, including States engaged on the same side; (b) the situation of the treaty relations between a State engaged in an armed conflict with another State and a third State not party to that conflict; and (c) the situation of the effect of a non-international armed conflict on the treaty relations of the State in question with third States. Article 1, accordingly, should be read in the light of article 3, which expressly envisages such hypotheses. The scope of the third scenario is further limited by the requirement of “*protracted* resort to armed force between governmental authorities and organized armed groups”, reflected in the definition of armed conflict in article 2, subparagraph (b), as well as by the inclusion of the element of “the degree of outside involvement” as a factor to be taken into account, under article 6, subparagraph (b), when ascertaining the susceptibility of a treaty to termination, withdrawal or suspension. The typical non-international armed conflict should not, in principle, call into question the treaty relations between States.

(3) Several Governments expressed the view that the draft articles should apply also to treaties or parts of treaties that are being provisionally applied.<sup>399</sup> In the Commission’s view, the issue can be resolved by reference to the provisions of article 25 of the 1969 Vienna Convention.<sup>400</sup>

<sup>398</sup> At its fifteenth session (1963), the Commission concluded that the draft articles on the law of treaties should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic might raise problems both of the termination of treaties and of the suspension of their operation. It felt that such a study would inevitably involve a consideration of the effect of the provisions of the Charter of the United Nations concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question. Consequently, it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties, *Yearbook ... 1963*, vol. II, document A/5509, p. 189, para. 14. Article 73 expressly reserving the problem was added at the United Nations Conference on the Law of Treaties.

<sup>399</sup> See the comments by the Netherlands (2005), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 18th meeting (A/C.6/60/SR.18), para. 40; Malaysia (2006), *ibid.*, *Sixty-first Session, Sixth Committee*, 19th meeting (A/C.6/61/SR.19), para. 48; Romania (2008), *ibid.*, *Sixty-third Session, Sixth Committee*, 21st meeting (A/C.6/63/SR.21), para. 51; and Burundi (2010), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/622 and Add.1.

<sup>400</sup> Article 25 of the 1969 Vienna Convention reads as follows:

“Article 25. *Provisional application*

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

“(a) The treaty itself so provides; or

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

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

(4) The Commission decided not to include within the scope of the draft articles relations arising under treaties between international organizations or between States and international organizations, owing to the complexity of giving such an additional dimension to the draft articles, which would likely outweigh the possible benefits of doing so, since international organizations rarely, if ever, engage in armed conflict to the extent that their treaty relations may be affected. While it is conceivable that such treaty relations could be affected *qua* third parties in the second scenario envisaged in paragraph (2) above, and that, accordingly, some of the provisions of the present draft articles might apply by analogy, the Commission decided to leave the consideration of such issues to a possible future topic for inclusion in its work programme. However, article 1 should not be read as excluding multilateral treaties to which international organizations are parties in addition to States. This point is made in subparagraph (a) of article 2, which clarifies that the definition of treaties given in the draft articles “includes treaties between States to which international organizations are also parties”. Similarly, the formulation “relations of States under a treaty”, found in article 1, is drawn from article 2, subparagraph (c), of the 1969 Vienna Convention, and places the focus on the relations existing under the treaty regime in question, thereby making it possible to distinguish the treaty relations between States, which are included within the scope of the draft articles, from the relations between States and international organizations or between international organizations arising under the same treaty, which are excluded from the scope of the articles.

(5) Structurally, the present draft articles are divided into three parts: Part One, entitled “Scope and definitions”, includes articles 1 and 2 which are introductory in nature, dealing with scope and definitions. Part Two, entitled “Principles”, consists of two chapters. Chapter I, entitled “Operation of treaties in the event of armed conflicts”, includes articles 3 to 7 that constitute core provisions reflecting the foundations underlying the draft articles, which are to favour legal stability and continuity. They are reflective of the general principle that treaties are not, in and of themselves, terminated or suspended as a result of armed conflict. Articles 4 to 7 extrapolate, from the general principle in article 3, a number of basic legal propositions which are expository in character. Chapter II, entitled “Other provisions relevant to the operation of treaties”, comprises articles 8 to 13, which address a variety of ancillary aspects relevant to the application of treaties during armed conflict, drawing, where appropriate, upon corresponding provisions of the 1969 Vienna Convention. Finally, the incidence of armed conflict bears not only on the law of treaties but also on other fields of international law, including obligations of States under the Charter of the United Nations. Accordingly, Part Three, entitled “Miscellaneous”, includes draft articles 14 to 18 which deal with a number of miscellaneous issues with regard to such relationships through *inter alia* “without prejudice” or saving clauses. An indicative list of treaties whose subject matter involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles, which is linked to article 7.

## Article 2. Definitions

### 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, and includes treaties between States to which international organizations are also parties;

(b) “armed conflict” means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

### Commentary

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

(2) Subparagraph (a) defines the term “treaty” by reproducing the formulation found in article 2 (1) (a) of the 1969 Vienna Convention, to which it adds the words “and includes treaties between States to which international organizations are also parties”. This inclusion should not be regarded as an indication that the draft articles deal with the position of international organizations. As already explained in paragraph (4) of the commentary to article 1, the treaty relations of international organizations are excluded from the scope of the present draft articles, and the concluding phrase cited above was included to forestall an interpretation of the scope which would have excluded multilateral treaties that include international organizations among their parties.

(3) No particular distinction is drawn between bilateral and multilateral treaties.

(4) Subparagraph (b) defines the term “armed conflict” for the purposes of the present draft articles. It reflects the definition employed by the International Tribunal for the Former Yugoslavia in the *Tadić* decision,<sup>401</sup> except that the concluding words “or between such groups within a

<sup>401</sup> *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, p. 428, para. 70. In this decision, the Tribunal noted that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.

It should be noted that this definition differs from that adopted by the Institute of International Law in its resolution on “The effects of armed conflicts on treaties” adopted on 28 August 1985, at its Helsinki Session:

#### “Article 1

“For the purpose of this Resolution, the term ‘armed conflict’ means a state of war or an international conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict” (Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278; available from [www.idi-iiil.org](http://www.idi-iiil.org), “Resolutions”). See also article 73 of the 1969 Vienna Convention, which refers to “the outbreak of hostilities between States”.

State” have been deleted since the present draft articles, under article 3, apply only to situations involving at least one State party to the treaty. The use of this definition is without prejudice to the rules of international humanitarian law, which constitute the *lex specialis* governing the conduct of hostilities.

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

(6) It was also considered that it was desirable to include situations involving a state of armed conflict in the absence of armed actions between the parties.<sup>402</sup> Thus the definition includes the occupation of territory which meets with no armed resistance. In this context the provisions of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict are of considerable interest. In its relevant part, article 18 provides as follows:

#### Article 18. Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

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

(7) Similar considerations militate in favour of the inclusion of a blockade even in the absence of armed actions between the parties.<sup>403</sup>

(8) Contemporary developments have blurred the distinction between international and non-international armed conflicts. Non-international armed conflicts have increased in number and are statistically more frequent than are international armed conflicts. In addition, many “civil wars” include “external elements”, such as the support and involvement by other States to varying degrees, supplying arms, providing training facilities and funds, and so forth. Non-international armed conflicts could affect the operation of treaties as much as international ones could. The draft articles therefore include the effect on treaties of non-international armed conflicts, which is indicated by the phrase “resort to armed force between governmental authorities and organized armed

<sup>402</sup> See A. D. McNair and A. D. Watts, *The Legal Effects of War*, 4th ed., Cambridge University Press, 1966, pp. 2–3.

<sup>403</sup> *Ibid.*, pp. 20–21.

groups". At the same time, a threshold requirement is introduced by the inclusion of a qualifier to the effect that such a type of armed conflict needs to be "protracted" in order to constitute the type of conflict covered by the draft articles. As mentioned in paragraph (2) of the commentary to article 1, this threshold serves to mitigate the potentially destabilizing effect that the inclusion of internal armed conflicts within the scope of the present draft articles might have on the stability of treaty relations.

(9) The definition of "armed conflict" includes no explicit reference to "international" or "non-international" armed conflict. This is intended to avoid reflecting specific factual or legal considerations in the article, and, accordingly, running the risk of a *contrario* interpretations.

## PART TWO

## PRINCIPLES

### CHAPTER I

## OPERATION OF TREATIES IN THE EVENT OF ARMED CONFLICTS

### Commentary

Articles 3 to 7 are central to the operation of the entire set of draft articles. Article 3 establishes their basic orientation, namely, that armed conflict does not, *ipso facto*, terminate or suspend the operation of treaties. Articles 4 to 7 seek to assist the determination of whether a treaty survives in an armed conflict. They are arranged in order of priority. Accordingly, the first step is to look at the treaty itself. Under article 4, an express provision within a treaty regulating its continuity in the context of an armed conflict would prevail. In the absence of an express provision, resort would next be had, under 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 is yielded by the application of those two articles, the enquiry will shift to considerations extraneous to the treaty, and article 6 provides a number of contextual factors that may be relevant in making a determination one way or the other. Finally, the determination is further assisted by article 7, which refers to the indicative list of treaties, contained in the annex, the subject matter of which provides an indication that they continue in operation, in whole or in part, in time of armed conflict.

### Article 3. General principle

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

- (a) as between States parties to the conflict;
- (b) as between a State party to the conflict and a State that is not.

### Commentary

(1) Article 3 is of overriding significance. It establishes the general principle of legal stability and continuity. To that end, it incorporates the key developments embodied

by the Institute of International Law in its 1985 resolution: the existence of an armed conflict does not *ipso facto* cause the suspension or termination of a treaty. At the same time, it must be recognized that there is no easy way of reconciling the principle of stability, in article 3, with the fact that the existence of armed conflict may result in the termination or suspension of treaty relations. The Commission consciously decided not to adopt an affirmative formulation establishing a presumption of continuity, out of concern that such an approach would not necessarily reflect the prevailing position under international law, and because it implied a reorientation of the draft articles from providing for situations where treaties are assumed to continue, to attempting to indicate situations when such a presumption of continuity would not apply. The Commission was of the view that such a reorientation would be too complex and fraught with risks of unanticipated *a contrario* interpretations. It considered that the net effect of the present approach of seeking merely to dispel any assumption of discontinuity, together with several indications of when treaties are assumed to continue, was to strengthen the stability of treaty relations.

(2) The formulation is based on article 2 of the resolution adopted by the Institute of International Law in 1985.<sup>404</sup> The principle has been commended by a number of authorities. Oppenheim asserts that "the opinion is pretty general that war by no means annuls every treaty".<sup>405</sup> McNair states that "[i]t is thus clear that war does not *per se* put an end to pre-war treaty obligations in existence between opposing belligerents".<sup>406</sup> During the work of the Institute of International Law in 1983, Briggs said that

[o]ur first—and most important—rule is that the mere outbreak of armed conflict (whether declared war or not) does not *ipso facto* terminate or suspend treaties in force between parties to the conflict. This is established international law.<sup>407</sup>

The same conclusion results from the case law. While the British High Court of Admiralty found in 1817, in "*The Louis*" case, that "[t]reaties ... are perishable things, and their obligations are dissipated by the first hostility",<sup>408</sup> other judgments are less categorical and, as is now provided for by article 3 of the present draft articles, hold that the existence of armed conflict does not, in and of itself, do away with treaties or suspend them. This is, in particular, the conclusion reached by United States courts, the leading case being that of *Society for the Propagation*

<sup>404</sup> Article 2 of the resolution of the Institute of International Law reads as follows: "The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict" (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 280).

<sup>405</sup> L. Oppenheim, *International Law: a Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht (ed.), London, Longman, 1952, p. 302.

<sup>406</sup> A. D. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, p. 697.

<sup>407</sup> Institute of International Law, *Yearbook*, vol. 61, Part I, Session of Helsinki (1985), pp. 8–9; see also H. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed., London, Stevens and Sons, 1953, p. 938.

<sup>408</sup> 15 December 1817, *British International Law Cases*, vol. 3, *Jurisdiction*, p. 691, at p. 708.

of the *Gospel v. Town of New Haven* (1823), where the Supreme Court said that

treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, suspended while it lasts.<sup>409</sup>

A more recent case is that of *Karnuth v. United States* (1929), where the United States Supreme Court, dealing with article III of the Treaty of Amity, Commerce, and Navigation of 1794 between Britain and the United States,<sup>410</sup> confirmed and developed its earlier ruling:

The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which “is to promote relations of harmony between nation and nation”, are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war.<sup>411</sup>

Although the above passages could suggest that a treaty may be suspended as long as the war lasts, this is no longer the line followed. The new line, rather, is to limit termination to “political” treaties, treaties incompatible with the existence of hostilities and treaties the maintenance of which is “incompatible with national policy in time of war”.<sup>412</sup>

While the leading judgments on this matter are not always models of clarity, it has become evident that, under contemporary international law, the existence of an armed conflict does not *ipso facto* put an end to or suspend existing agreements, although a number of them may indeed lapse or be suspended on account of their nature, commercial treaties for instance.<sup>413</sup>

(3) The reference in the *chapeau* to the “existence” of an armed conflict indicates that the draft articles cover the effect on treaties not only at the outbreak of the conflict, but also throughout its duration.

(4) Subparagraphs (a) and (b) establish the various hypotheses of parties covered by the present draft articles,

<sup>409</sup> *Society for the Propagation of the Gospel v. Town of New Haven*, AILC 1783–1968, vol. 19, pp. 41 *et seq.*, at p. 48, 21 U.S. (8 Wheat.) 464.

<sup>410</sup> Treaty of Amity, Commerce, and Navigation between His Britannick Majesty and the United States of America (Jay Treaty), signed at London on 19 November 1794, H. Miller (ed.), *Treaties and Other International Acts of the United States of America*, vol. 2, Washington, D.C., United States Government Printing Office, 1931, document No. 16, pp. 245 *et seq.*, at pp. 246–247 (art. 3).

<sup>411</sup> *Karnuth v. United States*, AILC 1783–1968, vol. 19, p. 49, at pp. 52–53.

<sup>412</sup> *Techt v. Hughes*, United States, Court of Appeals of New York, AILC 1783–1968, vol. 19, pp. 95 *et seq.* (see also ILR, vol. 1, Case No. 271); and *Clark v. Allen*, United States, Supreme Court, AILC 1783–1968, vol. 19, pp. 70 *et seq.*, at pp. 78–79.

<sup>413</sup> *Russian–German Commercial Treaty* case, German Reichsgericht, 23 May 1925, ADPILC 1925–1926, Case No. 331, p. 438. See also *Rosso v. Marro*, France, *Tribunal civil de Grasse*, 18 January 1945, ADPILC 1943–1945, Case No. 104; and *Bussi v. Menetti*, France, *Cour de cassation (Chambre sociale)*, 5 November 1943, *ibid.*, Case No. 103.

as described in paragraph (2) of the commentary to article 1. The article is therefore to be distinguished from that adopted by the Institute of International Law in that, while the Institute’s resolution is concerned with the fate of treaties in force between States parties to the armed conflict, the present draft articles cover the additional hypotheses discussed in the context of article 1.

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

#### Article 4. Provisions on the operation of treaties

**Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.**

##### Commentary

(1) Article 4 recognizes the possibility of treaties expressly providing for their continued operation in situations of armed conflict. It lays down the general rule that a treaty, where it so provides, continues to operate in situations of armed conflict. The effect of this rule is that, in principle, the first step of the inquiry should be to establish whether the treaty so provides, since it will, depending on the terms of the provision and its scope, settle the question of continuity. This is indicated by placing article 4 immediately after article 3.

(2) The Commission considered whether to include the qualifier “expressly”, but decided against doing so as it regarded it as being redundant. Furthermore, it was found that such a qualifier could be unnecessarily limiting, since there were treaties which, although not expressly providing therefor, continued in operation by implication through the application of articles 6 and 7.

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

#### Article 5. Application of rules on treaty interpretation

**The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.**

##### Commentary

(1) Article 5 follows from article 4 in that it represents the next stage of the inquiry if the treaty itself does not contain a provision regulating continuity or if the application of article 4 proves inconclusive. It is also the second provision, in sequence, focusing on an investigation internal to the treaty as distinct from the consideration of factors external to the treaty, referred to in article 6, which might provide an indication on the treaty’s susceptibility to termination or withdrawal or suspension of operation. The provision is intentionally drafted in an open-ended manner (“to establish whether”), so as to anticipate the possibility of applying articles 6 and 7 if the process of interpreting the treaty, too, proves inconclusive.

(2) Article 5 thus requires that, in the absence of a clear indication in the text of the treaty itself, one should seek to ascertain its meaning through the application of the established rules of international law on treaty interpretation, by which the Commission chiefly had in mind articles 31 and 32 of the 1969 Vienna Convention. The Commission preferred to retain a more general reference to the “rules of international law”, however, out of recognition that not all States are parties to the 1969 Vienna Convention, and in deference to its general policy of not including in its texts cross references to other legal instruments.

(3) The Commission rejected the inclusion of a reference to the intention of the parties to the treaty. This idea had proved controversial both among Governments and in the Commission itself. It was acknowledged that the drafters of treaties rarely provide an indication of their intention regarding the effect of the existence of an armed conflict on the treaty. Wherever such an intention is discernible, it would most likely be through a provision of the treaty—a practice worth encouraging. Such a case would be covered by article 4. A reference to the intention of the parties could also have been interpreted as a reintroduction of a subjective test, despite the fact that the United Nations Conference on the Law of Treaties had clearly opted for an objective test focusing on the “meaning” of the treaty. Nonetheless, it is acknowledged that the criterion of the intention of the parties is implicit in the process of making the determinations set out in article 31 of the 1969 Vienna Convention.

(4) The title of article 5 is formulated in such a manner as to confirm that the provision is not concerned with treaty interpretation generally, but rather with specific situations where the existing rules on treaty interpretation are to be applied. As with article 4, the provision is strictly not necessary as one would typically seek to interpret the treaty in any event. Nonetheless, the provision was included for expository clarity.

**Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension**

**In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:**

**(a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and**

**(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.**

*Commentary*

(1) Article 6 derives from article 3. The existence of an armed conflict does not *ipso facto* put an end to or suspend the operation of the treaty. It is another key provision of the present draft articles and follows, in sequence, the investigation undertaken on the basis of the treaty itself, pursuant to articles 4 and 5. If the analysis under

those provisions proves inconclusive, article 6 will apply. The article highlights certain criteria, including criteria external to the treaty, which may assist in ascertaining whether the treaty is susceptible to termination, withdrawal or suspension.

(2) With regard to the *chapeau* of the provision, and in contrast to article 3, withdrawal from treaties as one of the possibilities open to States parties to an armed conflict is included as it provides an appropriate context for its inclusion in subsequent ancillary draft articles. The article enumerates, in subparagraphs (a) and (b), two categories of factors which may be relevant in ascertaining its susceptibility to termination, withdrawal or suspension in the event of an armed conflict. This indication of factors is not exhaustive, as is confirmed by the concluding clause of the *chapeau*: “regard shall be had to all relevant factors, including”. This suggests (a) that there may be factors others than those listed in the subparagraphs which may be relevant in the context of a particular treaty or armed conflict; and (b) that not all factors are equally relevant in all cases—some may be more relevant than are others, depending on the treaty or the conflict. As such, the factors in subparagraphs (a) and (b) of the article are to be viewed as a mere mention of the factors that could prove relevant in particular cases, depending on the circumstances.

(3) Subparagraph (a) suggests a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of parties to the treaty. While a measure of overlap exists with regard to the inquiry undertaken under article 5, for example, the object and purpose of the treaty, when taken in combination with other factors such as the number of parties, may open up a new perspective. Although the Commission did not find it practicable to suggest more specific guidelines on how to assess the nature, subject matter, object and purpose, and content of a treaty in the context of an armed conflict, given the wide variety of treaties, it has suggested a list of categories of treaties in the annex linked to article 7 which exhibit a high likelihood of continued applicability, in whole or in part, during armed conflict. As regards the number of parties, no definitive position is being taken except to suggest that the potential effect on treaties with numerous parties, which are not parties to the armed conflict, should, as a matter of policy, be mitigated.

(4) Subparagraph (b) provides a second set of suggested factors, this time pertaining to the characteristics of the armed conflict. Here, the suggested factors are the territorial extent of the conflict (and whether it takes place on land or at sea, which may be relevant, for example, when it comes to ascertaining the impact of an armed conflict on air transportation agreements) and 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 of “the degree of outside involvement” in such a conflict. This latter element establishes an additional threshold intended to limit the possibility for States to assert the termination or suspension of the operation of a treaty, or a right of withdrawal, on the basis of their participation in such types of conflicts. In other words, this element serves as a factor of control to favour the stability

of treaties: 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.

(5) The question of the legality of the use of force as one of the factors to be considered under article 6 was examined, but it was decided to resolve the matter in the context of articles 14 to 16.

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

**Article 7. Continued operation of treaties resulting from their subject matter**

**An indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles.**

*Commentary*

Article 7, which is expository in character, is linked to article 6, subparagraph (a), in that it further elaborates on the element of the “subject matter” of a treaty which may be taken into account when ascertaining susceptibility to termination, withdrawal or suspension of operation in the event of an armed conflict. The provision establishes a link to the annex, which contains an indicative list of categories of treaties involving an implication that they continue in operation, in whole or in part, during armed conflict. The commentary relating to each category of treaties will be found in the annex at the end of the present draft articles.

CHAPTER II

**OTHER PROVISIONS RELEVANT TO THE OPERATION OF TREATIES**

**Article 8. Conclusion of treaties during armed conflict**

**1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.**

**2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.**

*Commentary*

(1) Article 8 is in line with the basic policy of the draft articles, which seek to ensure the legal security and continuity of treaties. Both provisions reflect the fact that States may, in times of armed conflict, continue to have dealings with one another.

(2) Paragraph 1 of article 8 reflects the basic proposition that an armed conflict does not affect the capacity of a State party to that conflict to enter into treaties. While the

provision includes a general reference to “international law”, the Commission understood this as referring to the international rules on the capacity of States to conclude treaties reflected in the 1969 Vienna Convention.

(3) While, technically speaking, paragraph 1 deals with the effect of armed conflict on the capacity of States to enter into agreements, as opposed to the effect on treaties themselves, it was thought useful to retain it for expository purposes. The provision refers to the capacity “of a State party to that conflict” so as to indicate that there may be only one State party to the armed conflict, as in situations of non-international armed conflict.

(4) Paragraph 2 deals with the practice of States parties to an armed conflict expressly agreeing, during the conflict, either to suspend or to terminate a treaty which is operative between them at the time. As McNair remarked, “There is no inherent juridical impossibility ... in the formation of treaty obligations between two opposing belligerents during war”.<sup>414</sup> Such agreements have been concluded in practice, and a number of writers have referred to them. Partly echoing McNair, Fitzmaurice observed in his Hague lectures that

there is no inherent impossibility in treaties being actually concluded between two belligerents during the course of a war. This is indeed what happens when, for instance, an armistice agreement is concluded between belligerents. It also occurs when belligerents conclude special agreements for the exchange of personnel, or for the safe conduct of enemy personnel through their territory, and so on. These agreements may have to be concluded through the medium of a third neutral State or protecting power, but once concluded they are valid and binding international agreements.<sup>415</sup>

(5) The Commission decided not to make reference to the “lawfulness” or “validity” of the agreements contemplated in paragraph 2, preferring to leave such matters to the operation of the general rules of international law, including those reflected in the 1969 Vienna Convention.

(6) Reference is made, at the end of paragraph 2, to the possibility of agreeing on the amendment or modification of the treaty. The Commission had in mind the position of States parties to the treaty which are 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 the modification or amendment of the treaty.

**Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation**

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

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

<sup>414</sup> McNair, *The Law of Treaties* (footnote 406 above), p. 696.

<sup>415</sup> G. G. Fitzmaurice, “The juridical clauses of the peace treaties”, *Recueil des cours de l’Académie de droit international de La Haye, 1948-II*, vol. 73, p. 309.



**3. Nothing in the preceding paragraphs shall affect the right of a party to object within a reasonable time, in accordance with the terms of the treaty or other applicable rules of international law, to the termination of or withdrawal from the treaty, or suspension of its operation.**

**4. If an objection has been raised in accordance with paragraph 3, the States 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 they have remained applicable.**

#### *Commentary*

(1) Article 9 establishes a basic duty of notification of termination, withdrawal or suspension of the treaty. Its text is based on that of article 65 of the 1969 Vienna Convention, but streamlined and adjusted to the context of armed conflict. The intention behind article 9 is to establish a basic duty of notification, while recognizing the right of another State party to the treaty to raise an objection, which would remain unresolved, however, until a solution is reached through any one of the means listed in Article 33 of the Charter of the United Nations.

(2) Paragraph 1 formulates the basic duty for a State intending to terminate or withdraw from a treaty, or to suspend its operation, to notify that other State party or States parties to the treaty, or its depositary, of its intention. Such notification is a unilateral act through which a State, upon the existence of an armed conflict, informs the other contracting State or States, or the depositary if there is one, of its intention to terminate the treaty, to withdraw from it or to suspend its operation. Performance of this unilateral act is not required when the State in question does not wish to terminate or withdraw from the treaty or to suspend its operation. This is a consequence of the general rule set out in article 3, which provides that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.

(3) Paragraph 2 establishes the point in time when the notification takes effect: upon its receipt by the other State party or States parties, unless a later date is provided for in the notification. Contrary to paragraph 1, no reference is made to the date of receipt by the depositary. There are treaties which do not have depositaries. Accordingly, the possibility of notifying either the States Parties or the depositary had to be provided for in paragraph 1. However, as regards the taking effect of the notification, what is important is the moment at which the other State party or States parties receive the notification and not the moment at which the depositary receives it. Nonetheless, for those treaties which do have depositaries through whom the notification is made, the notification takes effect when the State for which it is intended receives it from the depositary.

(4) The purpose of paragraph 3 is to preserve the right that may exist under a treaty or general international

law to object to the proposed termination, suspension or withdrawal of the treaty. Hence, the objection is to the intention to terminate, suspend or withdraw, which is communicated by the notification envisaged in paragraph 1. While the Commission acknowledged that it was somewhat unrealistic to impose time limits in the context of armed conflict, especially in the light of the difficulties to establish a definitive point in time from which such limit would run, it was nonetheless of the view that the lack of a deadline would undermine the efficacy of the provision and could give rise to disputes as to the legal consequences of the notifications envisaged in paragraph 1. With both considerations in mind, the Commission decided against indicating a specific time period and instead opted for a “reasonable” period (“within a reasonable time”). What is “reasonable” in relation to a particular treaty and conflict would be the subject of determination by the dispute-settlement procedure envisaged in paragraph 4 and would depend on the circumstances of the case, taking into account, *inter alia*, the factors enumerated in article 6.

(5) Paragraph 4 establishes the procedural requirement that, in the event of an objection having been raised, pursuant to paragraph 3, the States concerned would need to seek the peaceful settlement of their dispute through the means listed in Article 33 of the Charter of the United Nations, which provides as follows:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

(6) A notification made by a State party under paragraph 1 takes effect when it has been received by the other State party or States parties, unless the notification provides for a subsequent date (para. 2). If no objection is received within a reasonable period of time, the notifying State may take the measure indicated in the notification (para. 3). If an objection is received, the issue will remain open between the States concerned until there is a diplomatic or legal settlement pursuant to paragraph 4.

(7) Paragraph 5 contains a saving clause preserving the rights or obligations of States in matters of dispute settlement, to the extent that they have remained applicable in the event of an armed conflict. The Commission considered it useful to include this provision so as to discourage 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 is also in line 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.

#### ***Article 10. Obligations imposed by international law independently of a treaty***

**The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty**

**of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.**

#### *Commentary*

(1) Articles 10 to 12 seek to establish a modified regime modelled on articles 43 to 45 of the 1969 Vienna Convention. Article 10 has its roots in article 43 of that Convention. Its purpose is to preserve the requirement to fulfil an obligation under general international law in cases where the same obligation appears in a treaty which has been terminated or suspended, or from which the State party concerned has withdrawn as a consequence of an armed conflict. This latter point, namely, the linkage to the armed conflict, has been added in order to put the provision into its proper context for the purposes of the present draft articles.

(2) The principle set out in this article seems self-evident: customary international law continues to apply independently of treaty obligations. In a famous *dictum* in the *Military and Paramilitary Activities in and against Nicaragua* case, the International Court of Justice stated as follows:

The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.<sup>416</sup>

#### **Article 11. Separability of treaty provisions**

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

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

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

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

#### *Commentary*

(1) Article 11 deals with the separability of provisions of treaties affected by an armed conflict. This provision plays a key role in the present draft articles by “moderating” the impact of the operation of articles 4 to 7 by providing for the possibility of differentiated effects on a treaty.

<sup>416</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, p. 392, at p. 424, para. 73; see also Judge Morelli’s dissenting opinion in *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p. 3, at p. 198.

(2) The present provision is based on its counterpart in article 44 of the 1969 Vienna Convention. Subparagraphs (a) to (c) reproduce verbatim the text of their equivalents in that Convention.

(3) Regarding the requirement that the continued performance of the remainder of the treaty not be “unjust”, the Commission recalled that this provision was introduced into article 44 of the 1969 Vienna Convention at the behest of the United States of America. As Mr. Kearney, the representative of the United States, explained,

It was possible that a State claiming invalidity of part of a treaty might insist on termination of some of its provisions, even though continued performance of the remainder of the treaty in the absence of those provisions would be very unjust to the other parties.<sup>417</sup>

In other words, as is the case with article 44, paragraph 3 (c), of the 1969 Vienna Convention, subparagraph (c) of draft article 11 is a general clause that may be invoked if the separation of treaty provisions—to satisfy the wishes of the requesting party—would create a significant imbalance to the detriment of the other party or parties. It thus complements subparagraphs (a) (separability with regard to application) and (b) (acceptance of the clause or clauses whose termination or invalidity is requested was not an essential basis of the consent of the other party or parties to be bound by the treaty).

#### **Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation**

**A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:**

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

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

#### *Commentary*

(1) Article 12 is based on the equivalent provision of article 45 of the 1969 Vienna Convention. It deals with the loss of the right to terminate a treaty, to withdraw from it or to suspend its operation. It amounts to a recognition that a minimum of good faith must prevail even in times of armed conflict.

(2) To make it clear that article 12 is to apply in the context of an armed conflict, an appropriate reference has been added in the *chapeau*. The Commission understood the part of the sentence referring to “becoming aware of the

<sup>417</sup> Statement made by Mr. Kearney, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 41st meeting of the Committee of the Whole, 27 April 1968, para. 17. For the proposal by the United States, see A/CONF.39/C.1/L.260, which was reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), para. 369.

facts”, drawn from article 45 of the 1969 Vienna Convention, 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 conflict on the treaty.

(3) It is acknowledged that the situation pertaining to a treaty in the context of an armed conflict can only be assessed once the conflict has produced its effect on the treaty—which may not have been the case at its outbreak. The most that can be said is that States are encouraged to refrain from undertaking the actions referred to in this article until the effects of the conflict on the treaty have become reasonably clear.

(4) The reference in the title to the various actions which can be taken (“to terminate or withdraw from a treaty or to suspend its operation”) is to be understood as a reference to the preceding articles which set out what rights a State would have and the applicable conditions.

***Article 13. 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 consequence 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 factors referred to in article 6.**

*Commentary*

(1) Article 13 concerns the question of the revival (para. 1) or resumption (para. 2) of treaty relations subsequent to an armed conflict.

(2) Paragraph 1 formulates the general rule that, whether a treaty has been terminated or suspended in whole or in part, the States parties may, if they wish, conclude an agreement to revive or render operative even agreements or parts thereof that have ceased to exist. This is a consequence of the freedom to conclude treaties and cannot be undertaken unilaterally. Accordingly, the paragraph deals with situations where the status of “pre-war” agreements is ambiguous and where it is necessary to draw an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as terminated or suspended as a consequence of an armed conflict. Specific agreements regulating the revival of such treaties are not prejudiced by the present provision. An agreement of this type can be found, for example, in article 44 of the Treaty of Peace with Italy, concluded on 10 February 1947 between the Allied Powers and Italy. That article provides that each Allied Power may, within a time limit of six months, notify Italy of the treaties it wishes to revive.

(3) Paragraph 2, which deals with the resumption of treaties that were suspended as a consequence of an armed conflict, is narrower: it applies only to treaties that have been suspended as a consequence of the application of article 6.

Since, in such a case, the treaty has been suspended at the initiative of one State party—also a party to the armed conflict—on the basis of the factors mentioned in article 6, those factors cease to apply when the armed conflict is over. As a result, the treaty can become operative once again, unless other causes of termination, withdrawal or suspension have emerged in the meantime (in accordance with article 18), or unless the parties have agreed otherwise. Resumption may be called for by one or several States parties, as it is no longer a matter of agreement between States. The result of such an initiative will be determined in accordance with the factors listed in article 6.

(4) The question of when a treaty is resumed should be dealt with on a case-by-case basis.

PART THREE

MISCELLANEOUS

***Article 14. Effect of the exercise of the right to self-defence on a treaty***

**A State exercising its inherent 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 insofar as that operation is incompatible with the exercise of that right.**

*Commentary*

(1) Article 14 is the first of three articles which are based on the relevant resolution of the Institute of International Law adopted at its Helsinki session in 1985.<sup>418</sup> It reflects the need for a clear recognition that the article does not create advantages for an aggressor State. The same policy imperative is reflected in articles 15 and 16, which complement the present provision.

(2) The article covers the situation of a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations. Such State is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right. The article has to be understood against the background of the application of the regime under the Charter of the United Nations, as contemplated in articles 15 and 16. It accordingly also aims at preventing impunity for the aggressor and any imbalance between the two sides, which would undoubtedly emerge if the aggressor, having disregarded the prohibition on the use of force set out in Article 2, paragraph 4, of the Charter of the United Nations, were able, at the same time, to require the strict application of the existing law and thus deprive the attacked State, in whole or in part, of its right to defend itself. At the

<sup>418</sup> In particular, article 7 of the resolution of the Institute of International Law reads as follows:

“A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor” (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 247).

same time, article 14 is subject to the application of articles 6 and 7: a consequence that would not be tolerated in the context of armed conflict can equally not be accepted in the context of self-defence. For example, the right provided for does not prevail over treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and on the law of armed conflict, such as the 1949 Geneva Conventions for the protection of war victims.

(3) While the provision envisages the suspension of agreements between the aggressor and the victim, it does not exclude cases—perhaps less likely to occur—of treaties between the State that is the victim of the aggression and third States. The article does not, however, concern non-international armed conflicts since it refers to self-defence within the meaning of Article 51 of the Charter of the United Nations. The right envisaged in article 14 is limited to suspension and does not provide for termination.

(4) No attempt has been made to prescribe a comprehensive treatment of the legal consequences of the exercise of the inherent right to self-defence. Article 14 is, therefore, without prejudice to the applicable rules of international law concerning issues of notification, opposition, time limits and peaceful settlement.

#### ***Article 15. Prohibition of benefit to an aggressor State***

**A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.**

#### *Commentary*

(1) Article 15 prohibits an aggressor State from benefiting from the possibility of termination of or withdrawal from a treaty, or of suspension of its operation, as a consequence of the armed conflict that this State has provoked. Its formulation is based on article 9 of the resolution of the Institute of International Law,<sup>419</sup> with some adjustments, particularly to include the possibility of withdrawal from a treaty and to specify that the treaties dealt with are those that are terminated, withdrawn from or suspended *as a consequence* of the armed conflict in question.

(2) The characterization of a State as an aggressor will depend, fundamentally, on the definition given to the word “aggression” and, in terms of procedure, on the Security Council. If the Council determines that a State wishing to terminate or withdraw from a treaty or suspend its

operation—which presupposes that the case has been referred to the Council—is an aggressor, that State may not take those measures or, in any case, may do so only insofar as it does not benefit from them; this latter point may be assessed either by the Security Council or by a judge or arbitrator. In the absence of such a determination, the State may act under article 4 and the following articles.

(3) From the moment of the commission of the aggression, the State characterized as an aggressor by the attacked State may no longer, under article 9, claim the right to terminate a treaty, to withdraw from it or to suspend its operation, unless it derives no benefit from doing so. It may claim the right anyway, arguing that no aggression has been committed or that its adversary is the aggressor. The situation will therefore remain in limbo until the second stage, which is the determination by the Security Council. That action determines what follows: If the State initially considered to be the aggressor turns out not to be, or if it does not benefit from the aggression, the notification that it may have made under article 9 will be assessed in accordance with the ordinary criteria established in the draft articles. If, on the other hand, the State is confirmed as the aggressor and has benefited from setting aside its treaty obligations, such criteria are no longer applicable when it comes to determining the legitimacy of termination, withdrawal or suspension. In other words, when a State gives notification of termination of or withdrawal from the treaty, or of suspension of its operation, and is then determined to be an aggressor, it will be necessary to establish whether it benefits from the termination, withdrawal or suspension. If it does, the notification has no effect unless the treaty in question sets out particular rules in that regard.

(4) The words “as a consequence of an armed conflict that results from the act of aggression” serve to limit the characterization as an aggressor State to the conflict in question, thus avoiding an interpretation that that State will retain such designation even in the context of entirely different conflicts with the same opposing State or even with a third State.

(5) The Commission decided not to go beyond a formula referring to the resort to armed force in violation of the Charter of the United Nations.

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

#### ***Article 16. Decisions of the Security Council***

**The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.**

#### *Commentary*

(1) Article 16 seeks to preserve the legal effects of decisions of the Security Council taken under the Charter of the United Nations. While the Council’s actions under Chapter VII of the Charter of the United Nations are

<sup>419</sup> Article 9 of the resolution of the Institute of International Law reads as follows:

“A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State” (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 248).

arguably the most relevant in the context of the present draft articles, the Commission recognized that the actions of the Council taken under other provisions of the Charter of the United Nations, such as Article 94 on the enforcement of judgments of the International Court of Justice, may be equally relevant. Article 16 has the same function as article 8 of the 1985 resolution of the Institute of International Law.<sup>420</sup> The Commission decided to present the provision in the form of a “without prejudice” clause instead of the formulation adopted by the Institute which was cast in more affirmative terms.

(2) Article 103 of the Charter of the United Nations provides that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter of the United Nations and their obligations under any other international agreement, their obligations under the Charter of the United Nations shall prevail. In addition to the rights and obligations contained in the Charter of the United Nations itself, Article 103 applies to obligations flowing from binding decisions taken by United Nations bodies. In particular, the primacy of Security Council decisions under Article 103 has been widely accepted in practice as well as in writings on international law.<sup>421</sup>

(3) Article 16 leaves open the variety of questions that may arise as a consequence of Article 103.

**Article 17. Rights and duties arising from the laws of neutrality**

**The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.**

*Commentary*

(1) Article 17 is another “without prejudice” clause, which seeks to preserve the rights and duties of States arising from the laws of neutrality. This wording has been preferred to a more specific reference to the “status of third States as neutrals”. It was felt that the reference to “neutrals” was, as a matter of drafting, imprecise, as it was not clear whether it referred to formal neutrality or mere non-belligerency. The present provision is accordingly more of a saving clause.

(2) As a status derived from a treaty, neutrality becomes fully operational only at the outbreak of an armed conflict between third States; it is therefore clear that it survives the conflict since it is precisely in periods of conflict that it is intended to apply. Moreover, the status of neutrality is not always derived from a treaty. The question of the

applicability of the laws of neutrality does not generally arise in terms of the survival of the status of neutrality but in relation to the specific rights and duties of a State that is neutral and remains neutral; pursuant to article 17, these rights and duties prevail over the rights and duties arising from the present draft articles.

**Article 18. 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) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.**

*Commentary*

(1) Article 18 preserves the possibility of termination or withdrawal of a treaty, or of suspension thereof, arising from the application of other rules of international law, in the case of the examples drawn from the 1969 Vienna Convention, in particular articles 55 to 62. The reference to “Other” in the title is intended to indicate that these grounds are additional to those in the present draft articles. The words “*inter alia*” seek to clarify that the grounds listed in article 18 are non-exhaustive.

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

ANNEX

**INDICATIVE LIST OF TREATIES  
REFERRED TO IN ARTICLE 7**

**(a) Treaties on the law of armed conflict, including treaties on 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) multilateral law-making treaties;**

**(d) treaties on international criminal justice;**

**(e) treaties of friendship, commerce and navigation and agreements concerning private rights;**

**(f) treaties for the international protection of human rights;**

**(g) treaties relating to the international protection of the environment;**

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

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

<sup>420</sup> Article 8 of the resolution of the Institute of International Law reads as follows:

“A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution” (Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), p. 248).

<sup>421</sup> See, in particular, the report of the Study Group of the Commission on fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1) (mimeographed; available from the Commission’s website, documents of the fifty-eighth session; the final text is published as an annex to *Yearbook ... 2006*, vol. II (Part One), paras. 328–340).

(j) treaties which are constituent instruments of international organizations;

(k) treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;

(l) treaties relating to diplomatic and consular relations.

#### Commentary

(1) The present annex contains an indicative list of categories of treaties the subject matter of which carries an implication that they continue in operation, in whole or in part, during armed conflict. It is linked to article 7 and was included, as has been explained in the commentary to that provision, to further elaborate on the element of “subject matter” of treaties contained among the factors, listed in subparagraph (a) of article 6, to be taken into account when ascertaining the susceptibility of a treaty to termination, withdrawal or suspension in the event of an armed conflict.

(2) The effect of such an indicative list is to create a set of rebuttable presumptions based on the subject matter of those treaties: the subject matter of the treaty implies that the treaty survives an armed conflict. Although the emphasis is on *categories* of treaties, it may well be that only the subject matter of particular provisions of the treaty carries the implication of continuance.

(3) The list is purely indicative, as confirmed by the use of that adjective in article 7, and no priority is in any way implied by the order in which the categories are presented. Moreover, it is recognized that in certain instances the categories are overlapping. The Commission decided not to include within the list an item referring to *jus cogens*. This category is not qualitatively similar to the other categories which have been included in the list. The latter are subject-matter based, whereas *jus cogens* cuts across several subjects. It is understood that the provisions of articles 3 to 7 are without prejudice to the effect of principles or rules included in treaties and having the character of *jus cogens*.

(4) The list reflects available State practice, particularly United States practice, and is based on the views of several generations of writers. It must be admitted, however, that the likelihood of a substantial flow of information from States, indicating evidence of State practice, is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult. Apparent examples of State practice often concern legal principles that bear no relation to the specific issue of the effect of armed conflict on treaties. Thus some of the modern State practice refers, for the most part, to the effect of a fundamental change of circumstances, or to the supervening impossibility of performance, and is accordingly irrelevant. In some areas, such as that of treaties creating permanent regimes, State practice offers a firm basis. In other areas, there may be a firm basis in the case law of municipal courts and in some executive advice given to courts.

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

(5) It seems evident that, being intended to govern the conduct and the consequences of armed conflicts, treaties relating thereto, including those bearing on international humanitarian law, apply in the event of such conflicts. As pointed out by McNair,

There is abundant evidence that treaties which in express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination.<sup>422</sup>

(6) The present category is not limited to treaties expressly applicable during armed conflict. It covers, broadly, agreements relating to the law of armed conflict, including treaties relating to international humanitarian law. As early as 1785, article 24 of the Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America expressly stated that armed conflict had no effect on its humanitarian law provisions.<sup>423</sup> Moreover, the *Restatement of the Law Third*, while restating the traditional position that the outbreak of war between States terminated or suspended agreements between them, acknowledges that “agreements governing the conduct of hostilities survived, since they were designed for application during war”.<sup>424</sup> In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice found that

as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality,

<sup>422</sup> McNair, *The Law of Treaties* (footnote 406 above), p. 704:

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

<sup>423</sup> Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America, signed at The Hague on 10 September 1785, *Treaties and Other International Agreements of the United States of America, 1776–1949*, vol. 8, Department of State, 1971, p. 78 (cited in J. H. W. Verzijl (ed.), *International Law in Historical Perspective*, Leiden, Sijthoff, 1973, at p. 371).

<sup>424</sup> *Restatement of the Law Third: the Foreign Relations Law of the United States*, vol. 1, St. Paul, Minnesota, American Law Institute Publishers, 1987, para. 336 (e).

whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the [Charter of the United Nations]) to all international armed conflict, whatever type of weapons might be used.<sup>425</sup>

(7) The implication of continuity does not affect the operation of the law of armed conflict as *lex specialis* applicable to armed conflict. The mention of this category of treaties does not address numerous questions that may arise in relation to the application of that law, nor is it intended to prevail regarding the conclusions to be drawn on the applicability of the principles and rules of humanitarian law in particular contexts.

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

(8) It is generally recognized that treaties declaring, creating or regulating a permanent regime or status, or related permanent rights, are not suspended or terminated in case of an armed conflict. The types of agreements involved include agreements on cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, and treaties creating exceptional rights of use of or access to the territory of a State.

(9) There is a certain amount of case law supporting the position that such agreements are unaffected by the incidence of armed conflict. Thus, in *The North Atlantic Coast Fisheries Case*, the Government of the United Kingdom contended that the fisheries rights of the United States, recognized by the Treaty of 1783,<sup>426</sup> had been abrogated as a consequence of the war of 1812. The Permanent Court of Arbitration did not share this view and stated that “[i]nternational law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but at most suspended by it”.<sup>427</sup>

(10) Similarly, in the *In re Meyer's Estate* case (1951), an appellate court in the United States of America, addressing the permanence of treaties dealing with territory, held that

[t]he authorities appear to be in accord that there is nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war.<sup>428</sup>

In *State ex rel. Miner v. Reardon* (1926), the court ruled that some treaties survive a state of war, such as boundary

treaties.<sup>429</sup> This finding is, of course, connected with the prohibition against the annexation of occupied territory.

(11) The resort to this category does, however, generate certain problems. One of them is the fact that treaties of cession and other treaties affecting permanent territorial dispositions create permanent rights, and it is these rights which are permanent, not the treaties themselves. Consequently, if such treaties are executed, they cannot be affected by a subsequent armed conflict.

(12) A further source of difficulty derives from the fact that the limits of this category remain to some extent uncertain. For example, in the case of treaties of guarantee, it is clear that the effect of an armed conflict will depend upon the precise object and purpose of the treaty of guarantee. Treaties intended to guarantee a lasting state of affairs, such as the permanent neutralization of a territory, will not be terminated by an armed conflict. Thus, as McNair notes,

the treaties creating and guaranteeing the permanent neutralization of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status.<sup>430</sup>

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

(14) In their regulation of the law of treaties, the Commission and States have also accorded a certain recognition to the special status of boundary treaties.<sup>431</sup> Article 62, paragraph (2) (a) of the 1969 Vienna Convention provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary. Such treaties were recognized as an exception to the general rule of article 62 because otherwise that rule, instead of serving the cause of peaceful change, might become a source of dangerous frictions.<sup>432</sup> The 1978 Vienna Convention reached a similar conclusion about the resilience of boundary treaties, providing in its article 11 that “[a] succession of States does not as such affect: (a) a boundary established by a

<sup>425</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 261, para. 89.

<sup>426</sup> Definitive Treaty of Peace, signed at Paris on 3 September 1783, H. Miller (ed.), *Treaties and Other International Acts of the United States of America* (see footnote 410 above), document Nos. 1–40 (1776–1818), p. 151.

<sup>427</sup> *The North Atlantic Coast Fisheries Case*, Award of 7 September 1910, UNRIAA, vol. XI (Sales No. 61.V.4), p. 167, at p. 181. See also C. Parry (ed.), *A British Digest of International Law: Phase I: 1860–1914*, vol. 2B, London, Stevens and Sons, 1967, pp. 585–605.

<sup>428</sup> *In re Meyer's Estate*, 107 Cal. App. 2d 799, 805 (1981), AILC 1783–1968, vol. 19, p. 133, at p. 138.

<sup>429</sup> United States, Supreme Court of Kansas, *ibid.*, p. 117, at p. 119; see also ADPILC 1919–1942, Case No. 132, at p. 238.

<sup>430</sup> McNair, *The Law of Treaties* (footnote 406 above), p. 703.

<sup>431</sup> On this issue, see equally the *In re Meyer's Estate* case mentioned in paragraph (10) above.

<sup>432</sup> See paragraph (11) of the Commission's commentary to draft article 59 [now article 62 of the 1969 Vienna Convention], *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 283; or *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 417 above), p. 79. The exception of treaties establishing a boundary from the fundamental change of circumstances rule, though opposed by a few States, was endorsed by a very large majority of States at the United Nations Conference on the Law of Treaties.

treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary". Although these examples are not directly relevant to the question of the effects of armed conflicts on treaties, they nevertheless attest to the special status attached to these types of regimes.

(c) *Multilateral law-making treaties*

(15) Law-making treaties have been defined as follows:

(i) *Multi-partite law-making treaties*

By these are meant treaties which create rules of international law for regulating the future conduct of the parties without creating an international régime, status, or system. It is believed that these treaties survive a war, whether all the contracting parties or only some of them are belligerents. The intention to create permanent law can usually be inferred in the case of these treaties. Instances are not numerous. The Declaration of Paris of 1856 [Declaration Respecting Maritime Law] is one; its content makes it clear that the parties intended it to regulate their conduct during a war, but it is submitted that the reason why it continues in existence after a war is that the parties intended by it to create permanent rules of law. Hague Convention II of 1907 [respecting the limitation of the employment of force for the recovery of contract debts] and the Peace Pact of Paris of 1928 [General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact)] are also instances of this type. Conventions creating rules as to nationality, marriage, divorce, reciprocal enforcement of judgments, &c., would probably belong to the same category.<sup>433</sup>

(16) The term "law-making" is somewhat problematic<sup>434</sup> and may not lend itself to a clear definition. There is, however, a certain amount of State practice relating to multilateral treaties of a technical character arising from the post-war arrangements following the Second World War. It has been asserted that "Multilateral Conventions of the 'law-making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended and revived on the termination of hostilities, or receive even in wartime a partial application".<sup>435</sup>

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

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

It is considered by this Government that, with the coming into force on September 15, 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in

accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania ...<sup>436</sup>

(18) The position of the United Kingdom, as stated in a letter from the Foreign Office of 7 January 1948, was the following:

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

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

As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice.<sup>437</sup>

<sup>436</sup> R. Rank, "Modern war and the validity of treaties: a comparative study", *Cornell Law Quarterly*, vol. 38 (1952-1953), pp. 343-344.

<sup>437</sup> *Ibid.*, p. 346. See also Oppenheim (footnote 405 above), pp. 304-306. Fitzmaurice discusses the way in which the revival or otherwise of bilateral treaties was dealt with, which involved a method of notification, and notes thus:

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

"This difficulty also exists in regard to multilateral treaties and conventions, but it is much less serious, as it is usually fairly obvious on the face of the multilateral treaty or convention concerned what the effect of the outbreak of war will have been on it. In consequence, and having regard to the great number of multilateral conventions to which the former enemies and the Allied and Associated Powers were parties (together with a number of other States, some of them neutral or otherwise not participating in the peace settlement) and of the difficulty that there would have been in framing detailed provisions about all these conventions, it was decided to say nothing about them in the Peace Treaties and to leave the matter to rest on the basic rules of international law governing it. It is, however, of interest to note that when the subject was under discussion in the Juridical Commission of the Peace Conference, the view of the Commission was formally placed on record and inscribed in the minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace

<sup>433</sup> McNair, *The Law of Treaties* (footnote 406 above), p. 723.

<sup>434</sup> See "The effects of armed conflict on treaties: an examination of practice and doctrine", memorandum by the Secretariat (footnote 389 above), paras. 49-50.

<sup>435</sup> I. A. Shearer (ed.), *Starke's International Law*, 11th ed., London, Butterworths, 1994, p. 493.



(19) The position of the Governments of Germany,<sup>438</sup> Italy<sup>439</sup> and Switzerland<sup>440</sup> appears to be essentially similar with regard to the present subject matter. However, the State practice is not entirely consistent and further evidence of practice, and especially more current practice, is needed.

(20) In this particular context, the decisions of municipal courts must be regarded as a problematical source. In the first place, such courts may depend upon the guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the case law of domestic courts is not inimical to the principle of survival. In this connection, the decision of the Scottish Court of Session in *Masiniimport v. Scottish Mechanical Light Industries Ltd.* (1976)<sup>441</sup> may be cited.

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

(d) *Treaties on international criminal justice*

(22) By including “treaties on international criminal justice”, the Commission chiefly intended to ensure the survival and continued operation of treaties such as the Rome Statute of the International Criminal Court of 17 July 1998. The category in question may also encompass other general, regional and even bilateral agreements establishing international mechanisms for trying persons suspected of having perpetrated international crimes (crimes against humanity, genocide, war crimes, crime of aggression). The category covered here only extends to treaties establishing international mechanisms for the prosecution of persons suspected of such crimes, to the exclusion of those set up by other types of acts such as the Security Council resolutions relating to the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.<sup>442</sup> It also excludes mechanisms resulting from agreements between a State and an international organization, because the present draft articles do not cover treaty relations involving international organizations.<sup>443</sup> Finally, the category described

here only encompasses treaties setting up procedures for prosecution and trial in an international context and does not comprise agreements on issues of international criminal law generally.

(23) The prosecution of international crimes and the trial of those suspected of having committed them concern the international community as a whole. This is in itself a reason for advocating the survival of the treaties belonging to this category. In addition to this, the inclusion of war crimes renders essential the survival of the treaties considered here: war crimes can only occur in time of armed conflict, and aggression is an act resulting in international armed conflict. The two other main categories of international crimes, crimes against humanity and genocide, too, are often committed in the context of armed conflict.

(24) It may be, however, that certain provisions of an instrument belonging to this category of treaties cease to be operational as a result of armed conflict, for example those relating to the transfer of suspects to an international authority or obligations assumed by a State regarding the execution of sentences on their territory. The separability of such provisions and obligations from the rest of the treaty pursuant to draft article 11 of the present draft articles would seem unproblematic.

(25) There remains the question of whether the insertion of this type of treaties is a matter of *lex ferenda* or *lex lata*. At first sight, the former would seem to hold true because the kinds of conventions under consideration are of relatively recent origin, and very little practice—if any—can be produced, except of course for the fact that a treaty such as the Rome Statute of the International Criminal Court was plainly intended to continue to operate in situations of international or non-international conflict. It should also be recalled that part of the treaty provisions under consideration are of a *jus cogens* character.

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

(26) Before analysing this type of treaties and their fate in some detail, a few preliminary observations are in order. First, it must be made clear that this category is not necessarily confined to classical treaties of friendship, commerce and navigation, but may include treaties of friendship, commerce and consular relations<sup>444</sup> or treaties of establishment. Second, as a rule, only a part of these instruments survives. It is evident, in particular, that provisions relating to “friendship” are unlikely to survive to an armed conflict opposing the contracting States, but

without the necessity of any special provision to that effect. The matter is actually not quite so simple as that, even in relation to multilateral conventions, but at any rate that was broadly the basis upon which it was decided not to make any express provision about the matter in the Peace Treaties” (Fitzmaurice (footnote 415 above), pp. 308–309).

<sup>438</sup> Rank (footnote 436 above), pp. 349–354.

<sup>439</sup> *Ibid.*, pp. 347–348.

<sup>440</sup> P. Guggenheim (ed.), *Répertoire suisse de droit international public: documentation concernant la pratique de la Confédération en matière de droit international public, 1914–1939*, vol. I, Basel, Helbing and Lichtenhahn, 1975, pp. 186–191.

<sup>441</sup> *Masiniimport v. Scottish Mechanical Light Industries Ltd.*, ILR, vol. 74 (1987), p. 559, at p. 564.

<sup>442</sup> International Tribunal for the Former Yugoslavia, established by Security Council resolution 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993; and International Tribunal for Rwanda, established by Security Council resolution 955 (1994) of 8 November 1994.

<sup>443</sup> See the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian

law of crimes committed during the period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117; the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Beirut, 22 January 2007, and New York, 6 February 2007), *ibid.*, vol. 2461, No. 44232, p. 257, and Security Council resolution 1757 (2007) of 30 May 2007; and the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), *ibid.*, vol. 2178, No. 38342, p. 137.

<sup>444</sup> See *Brownell v. City and County of San Francisco*, California Court of Appeal, First District, 21 June 1954, ILR, vol. 21 (1954), p. 432 *et seq.*, at p. 438.

that does not mean that provisions relating to the status of foreign individuals do not continue to apply, that is, provisions regarding their “private rights”.<sup>445</sup> Third, while treaties of commerce tend to lapse as a result of armed conflicts between States,<sup>446</sup> such treaties may contain provisions securing the private rights of foreign individuals which may survive as a result of the separability of treaty provisions under article 11 of the present draft articles. Fourth, the term “private rights” requires explanations: Is it limited to individuals’ substantive rights or does it also encompass procedural ones?

(27) Regarding treaties of friendship, commerce and navigation, reference has to be made, in the first place, to the Jay Treaty, or the Treaty of Amity, Commerce, and Navigation between His Britannick Majesty and the United States of America concluded on 19 November 1794 between the United States of America and Great Britain. Some provisions of this Treaty have remained applicable to this day, surviving, in particular, the War of 1812 between the two countries.

(28) In what is perhaps the leading case in the matter—*Karnuth v. United States* (1929)—the provision in issue was article 3 of the Jay Treaty, which gives the subjects of one contracting party free access to the territory of the other. While it held that the article in question had been abrogated by the War of 1812, the Supreme Court reiterated what it had said in the earlier case of *Society for the Propagation of the Gospel v. Town of New Haven*:

Treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.<sup>447</sup>

(29) Article 3 of the Jay Treaty also exempts from customs duties the members of the Five Indian Nations established on the one or the other side of the border. In two cases, United States courts ruled that provisions of the Treaty bearing on the rights or obligations, not of the contracting parties as such, but of “third parties” (individuals), had survived armed conflicts.<sup>448</sup>

(30) Article 9 of the Jay Treaty provided that subjects of either country may continue to hold land on the territory of the other. In *Sutton v. Sutton*, a very early case brought before the British Court of Chancery, the Master of the Rolls held that since the relevant treaty provision stated that subjects of one party were entitled to keep property on the territory of the other, as were their heirs and assignees, it was reasonable to infer that the parties intended the operation of the Treaty to be permanent, and

not to depend upon the continuance of a state of peace. This was borne out, the Master of the Rolls added, by the “true construction” to be given to the act of implementation on the domestic level.<sup>449</sup>

(31) It is now convenient to turn to a number of precedents dealing with treaties which do not bear the “friendship, commerce and navigation” label. The object of the case *Ex parte Zenzo Arakawa* (1947) was article I of the Treaty of Commerce and Navigation between the United States and Japan concluded in 1911, which provided for the constant protection and security of the citizens of each party on the territory of the other.<sup>450</sup> According to the judge, “[s]ome [treaties] are unaffected by war, some are merely suspended, while others are totally abrogated”. Treaties of commerce and navigation fall into the second or third category, “because the carrying out of their terms would be incompatible with the existence of a state of war”. The *Ex parte Zenzo Arakawa* case may be a special one, however, conditioned as it was by the peculiarities of the armed conflict between the two countries and perhaps also by the dimension of the protection granted by the relevant treaty provision.<sup>451</sup>

(32) *Techt v. Hughes* was another landmark in the progression of the case law. The issue considered was the survival of the Treaty of Commerce and Navigation between the United States and Austria–Hungary of 1829, more precisely its provision on the tenure of land.<sup>452</sup> Judge Cardozo pointed out that it was difficult to see why, while in *Society for the Propagation of the Gospel v. Town of New Haven*<sup>453</sup> a provision on the acquisition of real property was found to have survived the War of 1812, this should be disallowed when it came to the enjoyment of such property.<sup>454</sup>

(33) *State ex rel. Miner v. Reardon* pertained to article 14 of the 1828 Treaty of Commerce and Navigation between the United States and Prussia. A provision of that Treaty dealt with the protection of the property of individuals, in particular the right to inherit property.<sup>455</sup> The

<sup>449</sup> Court of Chancery, 29 July 1830, *British International Law Cases*, vol. 4, p. 362, at pp. 367–368.

<sup>450</sup> Treaty of Commerce and Navigation between the United States and Japan, signed at Washington, D.C. on 21 February 1911, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1910–1923*, vol. III, Washington, D.C., United States Government Printing Office, 1923, p. 2712.

<sup>451</sup> District Court for the Eastern District of Pennsylvania, AILC 1783–1968, vol. 19, p. 84.

<sup>452</sup> Treaty of Commerce and Navigation between the United States and Austria–Hungary, signed at Washington, D.C. on 27 August 1829, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1776–1909*, vol. I, Washington, D.C., United States Government Printing Office, 1910, pp. 29 *et seq.* See also the Treaty of Commerce and Navigation between the United States and Austria, signed at Washington, D.C. on 8 May 1848, *The Statutes at Large and Treaties of the United States*, vol. 9, Boston, Little and Brown, 1851, pp. 944 *et seq.*

<sup>453</sup> *Society for the Propagation of the Gospel v. Town of New Haven* (see footnote 409 above), p. 41, especially at p. 48.

<sup>454</sup> *Techt v. Hughes* (see footnote 412 above).

<sup>455</sup> Treaty of Commerce and Navigation between the United States and Prussia, signed at Washington, D.C. on 1 May 1828, *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1776–1909* (footnote 452 above), vol. II, pp. 1496 *et seq.*, at p. 1500.

<sup>445</sup> In this sense, individuals are considered to be “third parties”; see below, paragraph (29) of the commentary to this article.

<sup>446</sup> See two cases reported in *Fontes juris gentium, Series A, Sectio 2, Tomus 1* (1879–1929), p. 163, No. 342, and *Tomus 6* (1966–1970), p. 371, No. 78; and the *Russian–German Commercial Treaty* case (footnote 413 above).

<sup>447</sup> *Karnuth v. United States* (see footnote 411 above), p. 54. See also footnotes 409 and 410 above.

<sup>448</sup> *United States ex rel. Goodwin v. Karnuth*, 28 November 1947, District Court for the Western District of New York, ADPILC 1947, Case No. 1; and *McCandless v. United States*, Court of Appeals, Third Circuit, 9 March 1928, ADPILC 1927–1928, Case No. 363.

lower court opted for the survival of this provision,<sup>456</sup> as did the Supreme Court of Nebraska in a decision of 10 January 1929,<sup>457</sup> and the United States Supreme Court in its decision in *Clark v. Allen* (1947), where article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights between Germany and the United States of America<sup>458</sup> was under scrutiny. That provision allowed nationals of either State to succeed to nationals of the other. Following established precedent, the Court stated that “the outbreak of war does not necessarily suspend or abrogate treaty provisions”—note the reference to “treaty provisions” rather than to “treaties”—though such a provision may of course be incompatible with the existence of a state of war (*Karnuth v. United States*, para. (28) above), or the President or the Congress may have formulated a policy inconsistent with the enforcement of all or part of the treaty (*Techt v. Hughes*, para. (32) above). The Court then followed the decision in *Techt v. Hughes*, where a similar treaty provision was held to have survived. Indeed, the question to be answered was whether the provision in issue was “incompatible with national policy in time of war”. The Court found that it was not.<sup>459</sup>

(34) Another group of cases begins with two French decisions. *Bussi v. Menetti* was about a proprietor in Avignon who, for health reasons, wished to live in a house owned by him and gave notice to his Italian tenant. The tribunal of first instance accepted his plea, considering that the outbreak of the war between France and Italy in 1940 had ended the Treaty of Establishment concluded between the two countries on 3 June 1930, according to which French and Italian nationals enjoyed equal rights in tenancy matters.<sup>460</sup> The *Cour de cassation* (*Chambre civile*) ruled that treaties were not necessarily suspended by the existence of a war. In particular, the Court said that

treaties of a purely private law nature, which do not involve any intercourse between the enemy Powers and which have no connexion with the conduct of hostilities—such as Conventions relating to leases—are not suspended merely by the outbreak of war.<sup>461</sup>

(35) The case of *Rosso v. Marro* was a similar one, except that the claim was one of damages for the refusal to renew a lease, allegedly in violation of a 1932 convention. On this issue, the *Tribunal civil de Grasse* explained the following:

Treaties concluded between States who subsequently become belligerents are not necessarily suspended by war. In particular, the conduct of the war [must permit] the economic life and commercial activities to continue in the common interest. [Hence] the Court of Cassation, reverting ... to the doctrine which it has laid down during the past century ..., now holds that treaties of a purely private law nature, not involving any intercourse between the belligerent Powers, and

having no connexion with the conduct of hostilities, are not suspended in their operation, merely by the existence of a state of war.<sup>462</sup>

(36) The above case law is, however, contradicted by *Lovera v. Rinaldi*. In that case, the Plenary Assembly of the *Cour de cassation*, again having to deal with the status of the 1930 Treaty of Establishment between France and Italy, which prescribed national or at least most-favoured-nation treatment, found that the Treaty had lapsed at the onset of war, because the maintenance of its obligations was judged incompatible with the state of war.<sup>463</sup> In *Artel v. Seymand*, the *Cour de cassation* (*Chambre civile*) also concluded that the same Treaty had lapsed so far as leases were concerned.<sup>464</sup>

(37) In relation to the 1930 Treaty of Establishment between France and Italy, the *Cour de cassation* held, in 1953, that the national treatment to be granted to Italians under the Treaty regarding the tenure of agricultural land was incompatible with a state of war.<sup>465</sup>

(38) This series will be closed by a somewhat peculiar case which concerns individuals but makes a foray into the field of public law. Article 13 of a Convention concluded between France and Italy in 1896, providing that persons residing in Tunis and having retained Italian citizenship would continue to be considered Italians,<sup>466</sup> was considered operative in 1950 despite World War II.<sup>467</sup>

(39) There are a large number of cases which concern procedural rights secured by multilateral treaties. Many of them relate to security for costs (*cautio judicatum solvi*). This was true for the case of *C.A.M.A.T. v. Scagni*, the object of which was article 17 of the Convention relating to civil procedure of 1905. According to the French court involved,<sup>468</sup> private-law treaties should, in principle, survive but cannot be invoked by aliens whose hostile attitude may have affected the evolution of the war, especially, as was the case here, by persons who had been expelled from France on account of their attitude.<sup>469</sup> In another case dealt with by a Dutch court after World War II, it was held that the relevant provision of the Convention had not lapsed as a result of the War. By contrast, another Dutch court reached the conclusion that the Convention had been suspended at the outbreak of the War and had re-entered into force on the basis of the 1947 Treaty of Peace with Italy.<sup>470</sup> The same conclusion was reached by

<sup>462</sup> *Rosso v. Marro* (see footnote 413 above), p. 307.

<sup>463</sup> *Lovera v. Rinaldi*, decision of 22 June 1949, ADPILC 1949, Case No. 130.

<sup>464</sup> *Artel v. Seymand*, decision of 10 February 1948, ADPILC 1948, Case No. 133.

<sup>465</sup> *Gambino v. Consorts Arcens*, 11 March 1953, *Cour de cassation*, ILR 1953, p. 599.

<sup>466</sup> Consular and Establishment Convention, signed at Paris on 28 September 1896, F. Stoerk, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international. Continuation du grand recueil de G. F. de Martens*, 2nd series, vol. XXIII, Leipzig, Librairie Theodor Weicher, 1898, pp. 363 *et seq.*, at pp. 366–367.

<sup>467</sup> *In re Barrabini*, 28 July 1950, Court of Appeal of Paris, ILR 1951, Case No. 156, pp. 507–508.

<sup>468</sup> Court of Appeal of Agen, France.

<sup>469</sup> *C.A.M.A.T. v. Scagni*, 19 November 1946, Court of Appeal of Agen, *Revue critique de droit international privé*, vol. 36, No. 1 (January–June 1947), p. 294; see also ADPILC 1946, Case No. 99.

<sup>470</sup> *Gevato v. Deutsche Bank*, 18 January 1952, District Court of Rotterdam, ILR 1952, Case No. 13, p. 29.

<sup>456</sup> *State ex rel. Miner v. Reardon* (see footnote 429 above), p. 122.

<sup>457</sup> *Goos v. Brocks et al.*, 10 January 1929, Supreme Court of Nebraska, ADPILC 1929–1930, Case No. 279.

<sup>458</sup> Treaty of Friendship, Commerce and Consular Relations between Germany and the United States of America, signed at Washington, D.C. on 8 December 1923, Leagues of Nations, *Treaty Series*, vol. LII, No. 1254, pp. 133 *et seq.*, at pp. 158–159.

<sup>459</sup> *Clark v. Allen* (see footnote 412 above), at pp. 73–74 *et seq.*, and pp. 78–79. See also *Blank v. Clark*, 12 August 1948, District Court for the Eastern District of Pennsylvania, ADPILC 1948, Case No. 143.

<sup>460</sup> Treaty of Establishment between France and Italy, signed at Rome on 3 June 1930, *Journal officiel de la République française*, 20 January 1935, p. 643.

<sup>461</sup> *Bussi v. Menetti* (see footnote 413 above), pp. 304–305.

the *Landgericht* of Mannheim (Germany) and by another Dutch court.<sup>471</sup> In one case, the question of the survival of the Convention relating to civil procedure of 1905 was left open.<sup>472</sup>

(40) Certain cases relate to the survival of other multilateral treaties, such as the 1902 Convention relating to the Settlement of the Conflict of Laws and Jurisdictions as regards Divorce and Separation, which was held to have been suspended during World War II and reactivated at the end of that conflict.<sup>473</sup>

(41) Mention has to be made as well of the 1902 Convention for the Regulation of Conflicts of Laws in relation to Marriage, article 4 of which prescribed a certificate of capacity to marry. This requirement was objected to by a husband-to-be who contended that, as a result of the war, the Convention had lapsed. The Court of Cassation of the Netherlands disagreed, explaining that “[t]here could only be a question of suspension in so far and for so long as the provisions of the Convention should have become untenable”, which was not the case here and which suggests that the issue was considered to be one of temporary impossibility of performance rather than one of the effects of armed conflicts on treaties.<sup>474</sup>

(42) One also notes with interest a decision in which the Court of Appeal of Aix (France) upheld the continued validity of the ILO 1925 Convention concerning workmen’s compensation for accidents. The Court found that the Convention had not lapsed *ipso facto*, without denunciation, upon the outbreak of a war and that, at the most, the exercise of rights deriving from the Convention was suspended<sup>475</sup>—an unsatisfactory conclusion because it appears to say, on the one hand, that the Convention remained applicable while, on the other, it speaks of suspension, which suggests exactly the contrary.

(43) Mention must equally be made of a series of Italian cases dealing with multilateral and bilateral conventions on the execution of judgments. In some of these cases, survival was assumed,<sup>476</sup> in others, it was not.<sup>477</sup>

(44) As a matter of principle and sound policy, the principle of survival would seem to extend to obligations arising under multilateral conventions concerning arbitration and the enforcement of awards. In *Masinimport*

*v. Scottish Mechanical Light Industries Ltd.*, the Scottish Court of Session held that such treaties had survived World War II and were not covered by the 1947 Treaty of peace with Roumania. The agreements concerned were the Protocol on Arbitration Clauses of 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. The Court characterized the instruments as “multipartite law-making treaties”.<sup>478</sup> In 1971, the Italian Court of Cassation (Joint Session) held that the Protocol on Arbitration Clauses had not been terminated despite the declaration by Italy of war against France, its operation having only been suspended pending cessation of the state of war.<sup>479</sup> This is, again, an unsatisfactory conclusion, for the reasons indicated in paragraph (42) above (*Cornet* case).

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

(46) The preceding description and analysis lead to the conclusion that, even though the case law examined may not be entirely coherent, there is a clear trend towards holding that “private rights” protected by treaties subsist, even where procedural rights of individuals are concerned.

#### (f) *Treaties for the international protection of human rights*

(47) Writers make very few references to the status, for present purposes, of treaties on the international protection of human rights. This state of affairs is easily explained. Much of the relevant writings on the effect of armed conflicts on treaties preceded the conclusion of international human rights treaties. Furthermore, the specialist literature on human rights has a tendency to neglect technical problems. Article 4 of the 1985 resolution of the Institute of International Law provides, however, that

[t]he existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides.

Article 4 was adopted by 36 votes to none, with 2 abstentions.<sup>480</sup>

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

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

<sup>471</sup> *Security for Costs* case, 26 July 1950, ADPILC 1949, Case No. 133; *Herzum v. van den Borst*, 17 February 1955, District Court of Roermond, ILR 1955, p. 900.

<sup>472</sup> *Legal Aid* case, 24 September 1949, Court of Appeal of Celle, Germany, ADPILC 1949, Case No. 132.

<sup>473</sup> *Silverio v. Delli Zotti*, 30 January 1952, Luxembourg High Court of Justice, ILR 1952, Case No. 118, p. 558.

<sup>474</sup> *In re Utermöhlen*, 2 April 1948, Court of Cassation of the Netherlands, ADPILC 1949, Case No. 129, at p. 381.

<sup>475</sup> *Établissements Cornet v. Vve Gaido*, 7 May 1951, Court of Appeal of Aix, ILR 1951, Case No. 155.

<sup>476</sup> *P. M. v. Miclich e Presi*, 3 September 1965, Court of Cassation, *Diritto internazionale*, vol. 21-II (1967), p. 122.

<sup>477</sup> *L. S. Z. v. M. C.*, 22 April 1963, Court of Appeal of Rome, *ibid.*, vol. 19-II (1965), p. 37. In some cases, the decision was made dependent on whether the relevant treaties had been put back in operation: *Rigano v. Società Johann Meyer*, Court of Cassation, 9 May 1962, *ibid.*, vol. 18-II (1964), p. 181; and *Shapiro v. Società Fratelli Viscardi*, 19 May 1964, Court of Appeal of Milan, *Rivista di diritto internazionale*, vol. 48 (1965), p. 286.

<sup>478</sup> *Masinimport v. Scottish Mechanical Light Industries Ltd.* (see footnote 441 above), p. 560, at p. 564.

<sup>479</sup> *Lanificio Branditex v. Società Azais e Vidal*, ILR, vol. 71 (1986), p. 595.

<sup>480</sup> Institute of International Law, *Yearbook*, vol. 61, Part II (see footnote 401 above), pp. 200 and 221.

Although the debate continues whether human rights treaties apply to armed conflict, it is well established that non-derogable provisions of human rights treaties apply *during* armed conflict. First, the International Court of Justice stated in its advisory opinion on nuclear weapons [*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226] that “the protection of the International Covenant [on] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency” [p. 240, para. 25]. The *nuclear weapons* opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its Commentary on the articles on the responsibility of States for internationally wrongful acts that although the inherent right to self-defence may justify non-performance of certain treaties, “[a]s to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct”. Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict.<sup>481</sup>

(50) This description illustrates the problems relating to the applicability of human rights standards in the event of armed conflict.<sup>482</sup> The task of the Commission has not been to deal with such matters of substance but to direct attention to the effects of armed conflict upon the operation or validity of particular treaties. In this connection, the test of derogability is not appropriate because derogability concerns the operation of the treaty provisions and is not related to the issue of continuation or termination. However, the competence to derogate “in time of war or other public emergency threatening the life of the nation” certainly provides evidence that an armed conflict as such may not result in suspension or termination. At the end of the day, the appropriate criteria are those laid down in draft article 4. The exercise of a competence to derogate by one party to the treaty would not prevent another party from asserting that a suspension or termination was justified on other grounds.

(51) Finally, it will be remembered that, under article 11 of the present draft articles, certain provisions of international treaties for the protection of human rights may not be terminated or suspended. This does not mean that the same is true for the other provisions if the requirements of article 11 are met. Conversely, there may be human rights provisions in treaties belonging to other categories of treaties which may continue in operation even if those treaties do not, or only do partly, survive, always supposing that the separability tests of article 11 are fulfilled.

(g) *Treaties relating to the international protection of the environment*

(52) Most environmental treaties do not contain express provisions on their applicability in case of armed conflict. The subject matter and modalities of treaties for the international protection of the environment are extremely varied.<sup>483</sup>

<sup>481</sup> “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), para. 32 (footnotes omitted).

<sup>482</sup> See also R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002, pp. 247–276.

<sup>483</sup> See P. Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, 2003, pp. 307–316; P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd ed., Oxford University Press, 2009, pp. 205–208; and K. Mollard Bannelier, *La protection de l'environnement en temps de conflit armé*, Paris, Pedone, 2001.

(53) The pleadings relating to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* indicate, quite clearly, that there is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflict, subject to express provisions indicating the contrary.<sup>484</sup>

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

The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”

The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I [to the Geneva Conventions for the protection of war victims] provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.<sup>485</sup>

(55) These observations are, of course, significant. They provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict, despite the fact that, as indicated in the written submissions relating to the advisory opinion proceedings, there was no general agreement on the specific legal question.<sup>486</sup>

<sup>484</sup> See “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), paras. 58–63.

<sup>485</sup> *Legality of the Threat or Use of Nuclear Weapons* (see footnote 425 above), pp. 241–242, paras. 29–31. With regard to the Rio Declaration on Environment and Development (Rio Declaration), see *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

<sup>486</sup> See D. Akande, “Nuclear weapons, unclear law? Deciphering the *Nuclear Weapons* advisory opinion of the International Court”, *BYBIL* 1997, vol. 68 (1998), pp. 183–184.

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

(56) Treaties relating to watercourses or rights of navigation are essentially a subset of the category of treaties creating or regulating permanent rights or a permanent regime or status. It is, nonetheless, convenient to examine them separately.

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

Where all the parties to a convention, whatever its nature, are belligerents, the matter falls to be decided in much the same way as if the convention were a bilateral one. For instance, the class of law-making treaties, or of conventions intended to create permanent settlements, such as conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives [on] the restoration of peace.<sup>487</sup>

(58) The application of treaties concerning the status of certain waterways may be subject to the exercise of the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations.<sup>488</sup>

(59) In any event, the regime of individual straits and canals is usually dealt with by specific treaty provisions. Examples of such treaties include the 1888 Convention between Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain and Turkey respecting the free navigation of the Suez Canal (Constantinople Convention); the 1922 Convention instituting the Statute of Navigation of the Elbe (art. 49); the 1919 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) as it relates to the Kiel Canal (arts. 380–386); the 1936 Convention regarding the Régime of the Straits; the 1977 Panama Canal Treaty;<sup>489</sup> and the 1977 Treaty concerning the Permanent Neutrality and Operation of the Panama Canal.<sup>490</sup>

(60) Certain multilateral agreements provide expressly for a right of suspension in time of war. Thus article 15 of the 1921 Convention and Statute on the Regime of Navigable Waterways of International Concern provides that

[t]his Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit.

(61) The 1997 Convention on the Law of the Non-navigational Uses of International Watercourses prescribes the following in its article 29:

*International watercourses and installations in time of armed conflict*

<sup>487</sup> Fitzmaurice (footnote 415 above), p. 316.

<sup>488</sup> See R. R. Baxter, *The Law of International Waterways, with Particular Regard to Interoceanic Canals*, Cambridge (Massachusetts), Harvard University Press, 1964, p. 205.

<sup>489</sup> Signed at Washington, D.C. on 7 September 1977, United Nations, *Treaty Series*, vol. 1280, No. 21086, p. 3. See also ILM, vol. 16 (1977), p. 1022.

<sup>490</sup> Signed at Washington, D.C. on 7 September 1977, ILM, vol. 16 (1977), p. 1040.

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

(62) There is accordingly a case for including the present category in the indicative list.

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

(63) Similar considerations would seem to apply with respect to treaties relating to aquifers and related installations and facilities. Groundwater constitutes about 97 per cent of the world's fresh water resources. Some of it forms part of surface water systems governed by the Convention on the Law of the Non-navigational Uses of International Watercourses mentioned in paragraph (61) above and, accordingly, will fall under that instrument. On the groundwaters not subject to that Convention, there is very little State practice. In its work on the law of transboundary aquifers, the Commission has demonstrated what is achievable in this area.<sup>491</sup> In addition, the existing body of bilateral, regional and international agreements and arrangements on groundwaters is becoming noteworthy.<sup>492</sup>

(64) Based on the fact that the Commission's draft articles on the law of transboundary aquifers largely follow provisions of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, and also on the underlying protection provided for by the law of armed conflict, the basic assumption is that transboundary aquifers or aquifer systems and related installations, facilities and other works enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and are not to be used in violation of those principles and rules.<sup>493</sup>

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

(j) *Treaties which are constituent instruments of international organizations*

(66) Most international organizations have been established by treaty,<sup>494</sup> commonly referred to as the

<sup>491</sup> General Assembly resolution 63/124 of 11 December 2008, annex. The text of the draft articles on the law of transboundary aquifers with commentaries thereto is reproduced in *Yearbook ... 2008*, vol. II (Part Two), para. 53.

<sup>492</sup> See generally S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments*, Rome, FAO/UNESCO, 2005, p. 102. See also ILM, vol. 40, No. 2 (March 2001), p. 321.

<sup>493</sup> See article 18 of the draft articles on the law of transboundary aquifers adopted by the Commission at its sixtieth session, *Yearbook ... 2008*, vol. II (Part Two), pp. 42–43.

<sup>494</sup> See paragraph (4) of the commentary to article 2 of the draft articles on the responsibility of international organizations adopted by the Commission at its current session, chapter V, section E2, above.

“constituent instrument” of the organization. As a general rule, international organizations established by treaties enjoy, under international law, a legal personality separate from that of their members.<sup>495</sup> The legal position, therefore, is analogous to that of the establishment of a permanent regime by means of a treaty. The considerations applicable to permanent regimes, discussed in paragraphs (8) to (14), accordingly also apply generally to constituent instruments of international organizations. As a general proposition, such instruments are not affected by the existence of an armed conflict in the three scenarios envisaged in article 3.<sup>496</sup> In the modern era, there is scant evidence of practice to the contrary. This is particularly the case with international organizations of a universal or regional character whose mandates include the peaceful settlement of disputes.

(67) This general proposition is without prejudice to the applicability of the rules of an international organization, which include its constituent instrument,<sup>497</sup> to ancillary questions such as the continued participation of its members in the activities of the international organization, the suspension of such activities in the light of the existence of an armed conflict and even the question of the dissolution of the organization.

(k) *Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement*

(68) This category is not prominent in the literature, and there is to some extent an overlap with the category of multilateral treaties constituting an international regime. Certain writers, however, give explicit recognition to the continuing operation of treaties establishing mechanisms for the peaceful settlement of international disputes.<sup>498</sup> In accordance with this principle, special agreements concluded before World War I were applied to the arbitrations concerned after the War.

(69) The treaties falling into this category relate to conventional instruments on international settlement procedures, that is, on procedures between subjects of international law. That category does not extend, *per se*, to

mechanisms for the protection of human rights, which are, however, covered by subparagraph (f) (Treaties for the international protection of human rights). Similarly, it does not include treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad which may, however, come within group (e) as “agreements concerning private rights”.

(70) The survival of this type of agreement is also favoured by article 9 of the present draft articles (Notification of intention to terminate or withdraw from a treaty or to suspend its operation), which envisages the preservation of the rights or obligations of States regarding dispute settlement (see paragraph (7) of the commentary to article 9).

(l) *Treaties relating to diplomatic and consular relations*

(71) Also included in the indicative list are treaties relating to diplomatic relations. While the experience is not well documented, it is not unusual for embassies to remain open in time of armed conflict. In any event, the provisions of the Vienna Convention on Diplomatic Relations suggest its application in time of armed conflict. Indeed, article 24 of that Convention provides that the archives and documents of the mission shall be inviolable “at any time”; this phrase was added during the United Nations Conference on the Law of Treaties in order to make it clear that inviolability continued in the event of armed conflict.<sup>499</sup> Other provisions, for example article 44 on facilities for departure, include the words “even in case of armed conflict”. Article 45 is of particular interest as it provides as follows:

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

(72) The principle of survival is recognized by some commentators.<sup>500</sup> The specific character of the regime reflected in the Vienna Convention on Diplomatic Relations was described in emphatic terms by the International Court of Justice in the case concerning *United States Diplomatic and Consular Staff in Tehran*. In the words of the Court:

The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded

<sup>495</sup> *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 185; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (see footnote 67 above), para. 37 (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”); and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 68 above), p. 78, para. 25.

<sup>496</sup> See the 1985 resolution of the Institute of International Law, article 6: “A treaty establishing an international organization is not affected by the existence of an armed conflict between any of its parties” (Institute of International Law, *Yearbook*, vol. 61, Part II (footnote 401 above), p. 201).

<sup>497</sup> Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975), art. 1, para. 1 (34).

<sup>498</sup> See S. H. McIntyre, *Legal Effect of World War II on Treaties of the United States*, The Hague, Martinus Nijhoff, 1958, pp. 74–86; and McNair, *The Law of Treaties* (footnote 406 above), p. 720. See also M. O. Hudson, *The Permanent Court of International Justice 1920–1942*, New York, Macmillan, 1943.

<sup>499</sup> See E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed., Oxford University Press, 2008, p. 189.

<sup>500</sup> See for example C. M. Chinkin, “Crisis and the performance of international agreements: the outbreak of war in perspective”, *The Yale Journal of World Public Order*, vol. 7 (1980–1981), pp. 177 *et seq.*, at pp. 194–195. See also “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), para. 36.



to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the [Vienna Convention on Diplomatic Relations] of 1961 (cf. also Articles 26 and 27 of the [Vienna Convention on Consular Relations] of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State.<sup>501</sup>

(73) The Vienna Convention on Diplomatic Relations of 1961 was in force for both Iran and the United States. In any event, the Court made it reasonably clear that the applicable law included “the applicable rules of general international law” and that the Convention was a codification of the law.<sup>502</sup>

(74) As in the case of treaties relating to diplomatic relations, so also in the case of treaties relating to consular relations, there is a strong case for placing such treaties within the class of agreements which are not necessarily terminated or suspended in case of an armed conflict. It is well recognized that consular relations may continue even in the event of severance of diplomatic relations or of armed conflict.<sup>503</sup> The provisions of the 1963 Vienna Convention on Consular Relations indicate its application in time of armed conflict. Thus, article 26 provides that the facilities to be granted by the receiving State to members of the consular post, and others, for their departure, shall be granted “even in case of armed conflict”. Article 27 provides that the receiving State shall,

“even in case of armed conflict”, respect and protect the consular premises. The principle of survival is recognized by Chinkin.<sup>504</sup>

(75) The International Court of Justice, in its judgment in *United States Diplomatic and Consular Staff in Tehran*, emphasized the special character of the two Vienna Conventions of 1961 and 1963 (see para. (72) above).

(76) The Vienna Convention on Consular Relations was in force for both Iran and the United States. Moreover, the Court recognized that the Convention constituted a codification of the law and made it reasonably clear that the applicable law included “the applicable rules of general international law”.<sup>505</sup>

(77) Regarding national practice, a decision of the California Court of Appeal (First District) may be of interest. The Treaty of Friendship, Commerce and Consular Rights between Germany and the United States of America of 1923<sup>506</sup> exempted from taxation land and buildings used by each State on the territory of the other. Taxes were levied, however, when Switzerland, as a caretaker, and, later on, the Federal Government, took over the premises of the Consulate General of Germany in San Francisco. The City and County of San Francisco contended that the 1923 Treaty had lapsed or been suspended as a result of the outbreak of World War II. However, the Court of Appeal found that the Treaty and the exemption provided by it were not abrogated “since the immunity from taxation therein provided was not incompatible with the existence of a state of war”. While this case may be viewed as an affirmation of the continued applicability of a treaty of friendship and commerce, the 1923 Treaty also concerned consular relations and hence may serve as evidence of the survival of agreements on consular relations.<sup>507</sup>

<sup>504</sup> Chinkin (footnote 500 above), pp. 194–195. See also “The effects of armed conflict on treaties: an examination of practice and doctrine”, memorandum by the Secretariat (footnote 389 above), para. 36.

<sup>505</sup> *United States Diplomatic and Consular Staff in Tehran* (see footnote 501 above), p. 24, para. 45; p. 41, para. 90; and (in the *dispositif*) p. 44, para. 95.

<sup>506</sup> See footnote 458 above.

<sup>507</sup> *Brownell v. City and County of San Francisco* (see footnote 444 above), p. 433.

<sup>501</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 40, para. 86.

<sup>502</sup> *Ibid.*, p. 24, para. 45; p. 41, para. 90; and (in the *dispositif*) p. 44, para. 95.

<sup>503</sup> L. T. Lee, *Consular Law and Practice*, 2nd ed., Oxford, Clarendon Press, 1991, p. 111.