The Effect of Armed Conflict on Treaties: A Stocktaking

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1 Introduction

The issue of the survival, termination or suspension of international treaties in the event of armed conflict, or withdrawal from them, must be almost as old as the conclusion of treaties itself. It mainly arises because the bulk of international agreements are concluded in times of peace and contain no provisions on what will be their fate if one or several States Parties participate in armed conflicts. This is the case, for example, for the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)[1] or for the agreements on the peaceful settlement of disputes, both of which Tullio Treves knows so well.

Discussions on the problem, and on possible solutions, reach back to the early nineteenth century,[2] and three main *theories* have emerged:

(i) Armed conflict is an extralegal phenomenon which terminates the operation of treaties. According to this natural-law theory, war was the expression of a breaking away from the existing social compact (*contrat social*) on the international level.

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[1] Entered into force on 16 November 1994.

[2] For an abundant bibliography on the subject, see The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine. Memorandum by the Secretariat, UN Doc. A/CN.4/550 (1 February 2005), pp. 88–95.

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(ii) According to a second conception, armed conflict is a factual as well as a legal phenomenon. Rights and duties established by treaty will survive, such as those relating to boundaries and territorial regimes, or rights of third parties, i.e. individuals, as long as their continuation is compatible with the policies pursued by the belligerent. The basic idea is that of survival rather than of termination or suspension.

(iii) As is often the case in international law, there is an intermediary view according to which there *is* no clear rule and there is no likelihood of there being one on account of the diverging interests of States.[3]

Regarding the existing *practice*, two tendencies may be noted. The first is that followed by the continental State, according to which treaties *lapse* if there is an armed conflict between States Parties to them. According to the second tendency, mainly represented by Anglo-American case law, at least some categories of treaties or treaty provisions will survive.

Among the cases following the second tendency, there are a number of decisions by the United States Supreme Court and other tribunals.[4] These decisions pertain to the 1794 Jay Treaty,[5] to other treaties of friendship, commerce and navigation (FCN), and to treaties establishing boundaries and territorial regimes. Regarding the former, one will note, however, that they will not necessarily continue to operate in full, for some of their provisions can be separated from the rest of the treaties without affecting the continued validity of the remaining provisions. Among the treaties which do not survive, one finds the "political" treaties, that is, those whose operation depends "on the existence of normal political and social relations between States",[6] such as peace treaties, treaties of friendship and alliance,[7] non-aggression pacts and status-of-force agreements (SOFA).

European practice and case law gradually began to follow the same tendency and have not since World War II.

2 Some Particular Issues

As pointed out already, the existence of an armed conflict does not always entail the outright and complete termination of treaties. First, *some rules* of an extinct treaty may survive. Second, the agreement, or a part thereof, may only be *suspended*. Such is the case for a number of multilateral treaties, the obligations of

[3] Delbrück 2000, p. 1369.

[4] See infra, para 4.3. lett. e).

[5] Treaty of Amity, Commerce and Navigation (London, 19 November 1794), entered into force on 19 February 1856.

[6] Delbrück 2000, p. 1371.

[7] Except those containing provisions on individuals' private rights which are separable from the rest of the treaty. See infra, para 4.3. lett. e).

which belligerent States may be temporarily unable to meet; the issue, here, is closely related to that of the impossibility of performance (Article 61 of the Convention on the Law of Treaties (Vienna, 23 May 1969; hereinafter VCLT).[8] Another problem arising in this connection is that of the *effect* of suspension: Do suspended agreements, or provisions thereof, automatically bounce back into operation at the end of the armed conflict, or is an agreement between the Parties or a decision of an independent third person required?

A further issue is that of the defining "armed conflict". As is well known, riots and similar forms of violence are not armed conflicts,[9] nor are forms of a limited use of force such as "limited actions of self-defence", "humanitarian interventions" and "limited use of force on the high seas". For treaties to be terminated or suspended, the situation must qualify as an "armed conflict". It may well be, however, that events, even though they have not reached the threshold of armed conflict, make the performance of the treaty or of some of its provisions temporarily or permanently impossible, or bring about a fundamental change of circumstances (Articles 61 and 62 of the VCLT).

A connected issue is the characterisation of sanctions taken pursuant to Chapter VII of the United Nations Charter. Lawful recourse to such measures is not regarded as amounting to "armed conflict" but as a lawful move, within the framework of collective security, to restore the lawful order. In such situations there will be no extinction or suspension of treaties, nor withdrawal from them, except if an impossibility of performance or a fundamental change of circumstances materialises or if termination, suspension or withdrawal forms part of the sanctions taken under Chapter VII.

The next question to be examined under the present heading is whether the rules determining the fate of treaties should only apply to *international* armed conflicts or also cover non-international conflicts. There is little State practice—if any—regarding the latter, although at present non-international conflicts outnumber international conflicts. This suggests that the exclusion of internal conflicts—or at least of those which have been instigated or fomented by external elements—would considerably diminish the relevance of any codification or progressive development of the rules governing the effects of armed conflict on treaties. Conversely, one may well ask whether the issues relating to non-international

[8] Entered into force on 27 January 1980.

[9] See: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), entered into force on 21 October 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) (Geneva, 8 June 1977), entered into force on 7 December 1978.

conflict could and should not be disposed of by the rules of Articles 61 (impossibility of performance) and 62 (fundamental change of circumstances).

Which are the hypotheses in which the fate of treaties in the event of armed conflict has to be determined? The classical situation is, of course, that of a treaty between two or more States participating in an international armed conflict. A second relevant situation is that of a belligerent State Party to a treaty vis-à-vis a third, non-belligerent State. The third hypothesis would be that of States involved in non-international conflicts.[10]

A question which must be addressed as well is that of how to deal with conventions to which international organisations are Parties concurrently with some of their member States. There seems to be little known practice on this point if one disregards that provided by the representatives of Iraq and Iran sitting peacefully next to each other in plenary organs of the United Nations during the war opposing the two countries. Rules will eventually have to be devised to take care of such situations.

3 The Question of the Effect of Armed Conflict Before the International Law Commission

Much of what has been said on the effects of armed conflict on treaties is contradictory or uncertain, as is shown by part of the diplomatic and judicial practice. So much so, as is shown by Article 73 of the VCLT,[11] that in the late 1960s the International Law Commission (ILC) and the community of States shied away from tackling the issue. At the same time the state of flux of the relevant law made a codification desirable—even if it was to include a part of *lex ferenda*—as it would inject some stability and order into a somewhat uncertain part of international law.

Despite the reminder inserted in Article 73 of the VCLT, it was not the ILC that started the codification process, however, but the Institute of International Law which, in 1985, adopted a resolution on "The Effect of War on Treaties" (Rapporteur: Mr. B. Broms).[12] While this text is of excellent quality, it is characterised by the fact that it only covers *international* armed conflict—a limitation due to the fact that, at the time, the tendency to engage in non-international conflicts was less pointed than today.

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[10] Report of the International Law Commission, 63rd Session, UN Doc. A/63/10 (2011), p. 173, at p. 179, commentary (2) on Article 1.

[11] The Article prescribes: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the responsibility of a State or from the outbreak of hostilities between States."

[12] Resolution of 28 August 1985. 1986 Yearbook of the Institute of International Law 61-II, p. 278.

The topic appeared on the ILC's agenda in 2004, and Mr. I. Brownlie was appointed Special Rapporteur. Between 2005 and 2008, Mr. Brownlie presented four reports,[13] while the Secretariat submitted a memorandum entitled: "The Effects of Armed Conflicts on Treaties: An Examination of Practice and Doctrine".[14] In the course of its debates on the subject, the Commission established a working group to assist it in its consideration of the draft articles prepared by the Special Rapporteur. That Group put forward a number of proposals on controversial issues. The suggestions made by it were subsequently accepted by the Commission and transmitted to its Drafting Committee. The efficiency displayed by the Special Rapporteur and the organs of the Commission made it possible for the latter to examine 18 draft articles completed by an annex, and the commentaries thereon, in 2008, only four years after the start of the ILC's work on the topic. At that time, Mr. Brownlie resigned from the Commission. The Draft Articles approved by the ILC in a first reading were then submitted to member States for comments.

In 2009, the Commission appointed a new Special Rapporteur in the person of the present author who, in 2010, prepared a first (and only) report in which he analysed Member States' reactions to the Draft and proposed some changes in it.[15]

After a discussion of that Report by the full Commission, the new version of the Draft Articles presented by the Special Rapporteur was transmitted to the ILC's Drafting Committee and then subjected to a second reading by the Commission. That exercise led to the definitive adoption of the Draft Articles and the accompanying commentaries on 17 May and 5 August 2011, respectively.[16] The ILC also recommended to the United Nations General Assembly: (a) to take note of the Draft Articles and to annex them to its resolution; and (b) to consider, at a later stage, the elaboration of a convention on the basis of these Articles.[17] The Commission's somewhat reserved appraisal of its own work was probably due to the difficulty of

[13] First Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN Doc. A/CN.4/552 (21 April 2005); Second Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN Docs A/CN.4/570 (16 June 2006) and A/CN.4/570/Corr.1 (12 July 2006); Third Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN Docs A/CN.4/578 (1 March 2007) and A/CN.4/578/Corr.1 (24 July 2007); and Fourth Report on the Effects of Armed Conflicts on Treaties by Mr. Ian Brownlie, Special Rapporteur, UN docs A/CN.4/589 (14 November 2007) and A/CN.4/589/Corr.1 (16 April 2008).

[14] UN Docs A/CN.4/550 (1 February 2005) and A/CN.4/550/Corr.1 (3 June 2005).

[15] Effects of Armed Conflicts on Treaties: Comments and Information Received from Governments, UN Docs A/CN.4/622 (15 March 2010) and A/CN.4/622/Add.1 (12 May 2010).

[16] First Report on Effects of Armed Conflicts on Treaties, by Mr. Lucius Caflisch, Special Rapporteur, UN Doc. A/CN.4/627 (22 March 2010) and A/CN.4/627/Add.1 (21 April 2010).

[17] Effects of armed conflicts on treaties: Note on the recommendation to be made to the General Assembly about the draft articles on the Effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur, UN Doc. A/CN.4/644 (18 May 2011).

identifying the precise state of the law in the matter, to the fear of the possible consequences of a failed codification conference or of insufficient ratification of its result, and to the probable unwillingness of States to adopt a set of firm rules in this vital and delicate matter, despite the fact that the presence of such rules would be a welcome contribution to the stability of the international order.

4 The Content of the Draft Articles

4.1 Scope and Definitions (Articles 1 and 2)[18]

Article 1 makes it clear that the Draft Articles only cover treaty relations between States, to the exclusion of those between one or several States and another subject of international law, such as an international organisation, for example in the framework of the United Nations Convention on the Law of the Sea of 10 December 1982. The ILC thought that the fate of treaties involving international organisations as Parties should not be dealt with in the present Articles because this would mean a foray into hitherto uncharted territory; but it also thought that treaties such as the Law of the Sea Convention should be covered insofar as the relations between *States* regarding that Convention were concerned. The formula "relations between *States* under a treaty" elegantly reflects this idea.

The armed conflict does not have to involve *all* States Parties to a treaty; the Draft Articles will also apply when only one State Party to a treaty participates in the conflict. Accordingly, they cover two possible objects: (i) treaty relations between States Parties to the conflict; and (ii) treaty relations between a State Party to the conflict and a State which is not.

Article 2 defines "treaties" in the same manner as Article 2.1.a of the VCLT.[19] Accordingly, the scope of the Draft Articles is limited to written agreements and, as pointed out already, to treaty relations between States.

Far more delicate was the question of how to define "armed conflict". Originally that notion had been given a definition *sui generis*, i.e. one limited in its effect to the

[18] Article 1: "*Scope*. The present draft articles apply to the effects of armed conflict on the relations of States under a treaty". 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 organisations 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 organised armed groups."

[19] According to this provision, "'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".

Draft Articles and, perhaps most importantly, to conflicts between *States*.[20] Therefore, a new definition had to be elaborated. This could have been done by drawing from the definitions in the Geneva Conventions on the Protection of War Victims and the Additional Protocols, but such an operation would have resulted in a complex solution. A simpler approach was that offered by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Tadić*:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[21]

This formula calls for two comments. First, the *Tadić* definition was a broad one as, owing to the nature of the specific situation to which it was to apply, it also covered conflicts opposing organised armed groups within a State. Second, it only applied to *protracted* violence within the framework of non-international conflicts. In the end, the ILC adopted the *Tadić* definition but amputated it of its last element—violence between organised armed groups—maintained the word "protracted" in order not unduly to extend the concept of non-international armed conflict, and explained, in the commentary, that the formula included belligerent occupation as an integral part of armed conflict.[22] This was how the final version of Article 2.1.b came about.[23]

4.2 Core Provisions (Articles 3–7)[24]

Article 3, which is patterned on Article 2 of the 1985 Resolution of the Institute of International Law, proclaims the basic principle governing the matter: the

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[20] "'Armed conflict' means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the application of treaties between States parties to the armed conflict or between a State party to the armed conflict and a third State, regardless of a formal declaration of war or any declaration by any or all of the parties to the armed conflict" (Report of the International Law Commission, 60th Session, UN Doc. A/63/10 (2008), p. 83). The above definition, which was limited to international armed conflicts, corresponded to Article 1 of the 1985 Resolution of the Institute of International Law.

[21] ICTY, Prosecutor v. Dusko Tadić, IT-94-1-A, Appeals Chamber, Decision (2 October 1995), para 70.

[22] For another limitation, see infra, p. 39.

[23] This provision now reads as follows: "'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 organised armed groups."

[24] These provisions prescribe: 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." 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." Article 5: "Application of rules on treaty interpretation. The rules of international law on treaty interpretation shall be applied

existence of an armed conflict, as defined above, does not *ipso facto* terminate or suspend a treaty. Nor is there a presumption of continued operation. All that Article 3 says is that extinction or suspension is not to be presumed. Despite some views to the contrary—favouring a presumption of continued operation—, the Commission's majority decided not to alter the text proposed by the first Special Rapporteur, undoubtedly because it considered that a more far-reaching rule, creating a general presumption of continuity, would not be justified by international practice.

However, the Article 3 rule certainly sounds the death knell for the old theory of a conventional *tabula rasa* in the event of armed conflict. The evolution of the judicial practice toward the idea that treaties do not necessarily cease to operate as a consequence of armed conflict is described at some length in commentary (2) on Article 3. Perhaps the most authoritative statement on the contemporary practice can be found in the judgment of the Supreme Court of the United States in *Karnuth* v. *United States* (1929), where the Court had this to say:

> [t]he 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 subject 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

(Footnote 24 continued)
to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict." 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." 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." 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 organisations. (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."

> relations of harmony between nation and nation', are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war.[25]

The above extract suggests that treaties of cession, on boundaries and the like, as well as agreements attributing rights to individuals (who could be considered "third parties" in respect of the armed conflict) shall continue in operation, while so-called political treaties (treaties of friendship, of alliance and of military cooperation) would lapse. This viewpoint may, today, be considered as being universally accepted. The days of "war ends everything" are over and have been replaced by "armed conflict does not end everything". This finding prompts the question of how to determine what survives and what does not. Articles 4–6 provide three successive means for solving the issue.

A first means are the provisions of the treaty itself, says *Article 4*. Indeed, some treaties do contain provisions on this point.

A second means, according to *Article 5*, are the rules on treaty interpretation. Indeed, the provisions of the treaty at issue may reveal whether the treaty was intended to continue or not. While the Article takes no position on the content of the existing rules on treaty interpretation, the ILC clearly had Articles 31 and 32 of the VCLT in mind. The Commission did not, however, expressly refer to these provisions, first on account of its policy not to make cross-references to other legal instruments and, second, because not all States are Parties to the VCLT.[26]

In many cases, neither Article 4 nor Article 5 will lead to results, which is where *Article 6* comes into play: Whenever the application of Articles 4 and 5 is inconclusive, the factors listed in that provision may be resorted to. Some of these factors relate to the *nature of the treaty* and include the treaty's subject-matter, its object and purpose, its content, and the number of Parties to it. Others concern the *nature of the armed conflict*: its territorial extent, its scale and intensity, its duration, and, in the event of a non-international armed conflict, "the degree of outside involvement". As explained in the commentary, this last 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.[27]

In other words, the definition of the second leg of the *Tadić* formula found in Article 2 is being limited and refined here: the Draft Articles cover non-international conflicts only if there is a "degree of outside involvement". But the Commission does not specify the necessary degree of such involvement.

The subject-matter is an essential element when it comes to determining the fate of a treaty, as is pointed out in *Article 7* of the Draft Articles: the continued

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[25] American International Law Cases (AILC), 1783–1968, Vol. 19, p. 49, at pp. 52–53.

[26] Report cited in note 10, p. 186, commentary (2) on Article 5.

[27] Ibidem, pp. 187–188, commentary (4) on Article 6.

operation of a treaty or parts of it may be implied by its subject-matter. To show what kinds of agreements may carry such an implication, the ILC has established a list which is attached to the Draft Articles but must be considered as *purely indicative*. On the one hand, this means that there may be other categories of treaties carrying the same implication of continuity; it also means, on the other hand, that the implication may be offset, e.g., by one or several of the factors mentioned by Article 6, for instance the absence of a significant degree of outside involvement in a non-international conflict. Inclusion in the list does carry a presumption, but a rebuttable one.

4.3 The Annex

Despite its inclusion at the end of the Draft Articles, it is most convenient to examine the *Annex* here.[28] At the time of the first reading of the Draft, the Annex as it then was had been criticised as being insufficiently rooted in practice, especially case law. While the content of the list did not change dramatically later on, an effort was made to complete the examination of the practice through additional research, especially into the decisions of national tribunals, and to enlarge the commentary on the Annex. Presently that commentary is almost as long as that on the Draft Articles themselves. There are now twelve categories of treaties on the indicative list:

(a) Treaties on the Law of Armed Conflict Including Treaties on International Humanitarian Law

These are agreements that are meant to apply, not in times of peace, but in situations of armed conflict. It stands to reason that agreements such as the Hague and Geneva Conventions on the laws of war and on international humanitarian law must continue in operation, as otherwise they would remain useless.

(b) Treaties Creating Permanent Regimes, Including Treaties Establishing Land and Maritime Boundaries

The grandfather of territorial treaties having survived armed conflict is, of course, the Definitive Treaty of Peace and Friendship concluded between the United States and Great Britain (Paris, 3 September 1783),[29] for which the latter contended, and the former contested, that the fisheries rights stipulated in it in favour of the United States had been abrogated by the War of 1812. The Court of Arbitration found, in its award of 1910, that "international law in its modern

[28] Indeed, the Special Rapporteur would have preferred its insertion after Article 7 rather than at the end of the Draft.

[29] Entered into force on 12 May 1784.

development recognises that a great number of treaty obligations are not annulled by war, but at most suspended by it."[30]

There are a number of treaties of the same type which have been considered as having withstood the vicissitudes of war. In the case of *Meyer's Estate*, an appellate court of the United States, referring to the issue of the permanence of territory-related conventions or "dispositive treaties or dispositive parts of treaties", found that such provisions were "compatible with, and not abrogated by, a state of war".[31] The same rule applies to treaties establishing or guaranteeing territorial regimes or rights. Similarly, the situations created by the implementation of treaties of cession or by boundary agreements are not affected by armed conflict. And indeed, the survival of boundary treaties is equally ensured by other rules, such as Article 62.2.a of the VCLT according to which the termination or suspension of treaties on account of a fundamental change of circumstances is not possible for treaties drawing a boundary; or by the 1978 Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), Article 11 of which prescribes that a succession of States does not as such affect boundaries established by a treaty, or rights and duties stipulated in a treaty and relating to the regime of a boundary.[32]

The basic reasons for the resilience of agreements related to territory seem to be that they go with the territory, just as charges on land go with ownership, and the proposition that merely occupied territory continues to belong to its sovereign and cannot be annexed by an occupant as long as there has been no permanent change of sovereign.

(c) Multilateral Law-Making Treaties

Multilateral treaties generally do not collapse *in toto* just because one or several of their States Parties happen to participate in an armed conflict. This is particularly true for conventions establishing relatively general and abstract rules in a given field (health, drugs, protection of industrial and intellectual property, railway traffic, civil procedure, and so forth), and even more so for codifications in the field of international law. This principle has been accepted by a number of governments, as well as by national tribunals, witness the case of *Masinimport* v. *Scottish Mechanical Light Industries, Inc*. (1976), in which a Scottish court concluded that the Protocol on Arbitration Clauses (Geneva, 24 September 1923)[33] and the Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927)[34] qualified as "multipartite law-making treaties" and had survived World War II, even though they may have been suspended. It is of course possible that a

[30] Arbitral Tribunal: The North Atlantic Coast Fisheries Case (Great Britain/United States), Award (7 September 1910).

[31] AILC 1783–1968, Vol. 19, p. 133, at p. 138.

[32] Entered into force on 6 November 1996.

[33] Entered into force on 28 July 1924.

[34] Entered into force on 25 July 1929.

State Party to such a convention is, on account of the armed conflict, not in a position to meet its treaty obligations owing to an impossibility of performance under Article 61 of the VCLT.

(d) Treaties on International Criminal Justice

One feature characterising contemporary international law is the establishment of international judicial organs to prosecute and try individuals accused of having committed international crimes. Some of these organs have been created by treaty, in particular the International Criminal Court (ICC) set up by the Rome Statute of 17 July 1998,[35] while others are the products of Security Council resolutions. It is the former that must be considered here.

Obviously treaties instituting the organs in question must survive armed conflicts since part of their objective is the repression of war crimes under international law; it will also be noted that part of the treaties falling into this category contain rules of *jus cogens* which are bound to survive. Although the kind of agreements considered here are relatively recent and have generated little practice, they must be put on the list, if only on a *lex ferenda* basis. It will be noted that the inclusion of these originated from a Swiss proposal which, however, had suggested the incorporation of the whole body of international criminal law,[36] whereas the present text is confined to treaties establishing international mechanisms to apply that law.

(e) Treaties of Friendship, Commerce and Navigation (FCN), and Treaties Concerning Private Rights

This is, quantitatively speaking, the largest category of agreements to be considered. These agreements may be subdivided into FCN treaties and treaties protecting the rights of individuals.

FCN treaties have been analysed in some detail by the Commission.[37] The bulk of cases—or at least of those bearing on individuals' rights—were decided by United States and British courts and related to the Jay Treaty of 1794. In addition to *Karnuth*, mentioned earlier, one should cite a *dictum* of the United States Supreme Court in the early case of *Society for the Propagation of the Gospel* v. *Town of New Haven* (1823), where the Court pointed out that

> [t]reaties 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.[38]

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[35] Rome Statute of the International Criminal Court (Rome, 17 July 1998), entered into force on 1st July 2002.

[36] See Report cited in note 10, p. 205, commentaries (23) and (24).

[37] Ibidem, paras 27–38, pp. 206–208.

[38] AILC 1783–1968, Vol. 19, p. 49, at p. 54.

There are also numerous cases about treaties which protected individuals' rights but did not wear the FCN label. One may mention as examples *State ex rel. Miner* v. *Reardon* (1929) and *Goos* v. *Brocks*,[39] which pertained to Article XIV of the Treaty of Commerce and Navigation between the United States and Prussia (Washington, 1 May 1828).[40] That provision protected the right of the nationals of one Party to inherit property on the territory of the other. The courts involved upheld the continued validity of that Article despite World War I.

A similar trend is observable on the European continent, as is shown by a decision of the Civil Tribunal of Grasse (France), which states the following:

> Treaties concluded between States who subsequently become belligerents are not necessarily suspended by war. In particular, the conduct of the war [must allow for] 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 connection with the conduct of hostilities, are not suspended in their operation merely by the existence of a state of war.[41]

Regarding other *agreements concerning the private rights* of individuals, one can mention the numerous bilateral investment treaties (BITs) protecting investments made by the nationals of one Party on the territory of the other. These private rights, in principle, survive armed conflicts, together with the attendant procedural right of the individual to act against the State on the international level. The rule of survival would seem to extend even to agreements dealing with *procedural rights in general*, as is shown by the *Masinimport* case cited earlier.

In conclusion, the survival rate of the provisions granting and protecting private rights and the attendant procedural rights seems to be high, regardless of the label carried by the treaty in question: FCN, commerce, establishment, investment protection or other; what matters is whether the agreement confers rights on "third" (private) parties and whether the relevant provisions are separable from the rest of the agreement.

(f) Treaties for the International Protection of Human Rights

The principle governing this category of treaties is expressed in Article 4 of the 1985 Resolution of the Institute of International Law:

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

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[39] Ibidem, p. 117, at p. 122; *Goos v. Brocks*, Supreme Court of Nebraska, 10 January 1929, ibidem, p. 124.

[40] Entered into force on 14 March 1829.

[41] Decision of 22 June 1949, Annual Digest of Public International Law Cases 1949, No. 130.

The latter is the case of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)[42] Article 15 of which allows States Parties, in time of war or other public emergency, to take measures derogating from the Convention except from its core provisions (Articles 2, 3, 4, para 1, and 7),[43] provided that certain conditions are met. In addition, the well-foundedness of such derogations may be scrutinised, in specific cases, by the European Court of Human Rights. This does not mean that provisions other than core articles may be derogated from; all it says is that there may be no derogations from core provisions. The issue considered here must be distinguished from the question of the applicability of international human rights law in situations where the international law on armed conflict serves as *lex specialis*.[44]

(g) Treaties Relating to the International Protection of the Environment

As in categories (d) and (f), the international legislator, here, moves into largely uncharted territory, characterised by some degree of controversy. One cannot but recall, in this connection, that in its advisory opinion on the *Legality of the Threat or the Use of Nuclear Weapons*,[45] the International Court of Justice (ICJ), while denying that treaties relating to the protection of the environment could be intended to deprive a State of its right of self-defence, held that respect for the environment was one of the elements serving to assess whether a given action conformed to the principles of necessity and proportionality. The advisory opinion also drew attention to Articles 35.3 and 55 of Additional Protocol I to the Geneva Convention of 1949 on the Protection of War Victims, which relate to the environment.[46] The ILC notes, in its commentary, that the Court's observations "are, of course, significant" and that they provide "general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict".[47] It cannot be denied, however, that the presumption in favour of the survival of such treaties belongs, at least partly, to the realm of *lex ferenda*.

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[42] Entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998, and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[43] These provisions deal, respectively, with the right to life, the prohibition of torture and of inhuman or degrading treatment, and the principle "No punishment without law".

[44] On this issue, cf. for example Pastor Ridruejo 2007, pp. 399–407.

[45] ICJ: Legality of the Threat or Use of Nuclear Weapons, Advisory Op. (8 July 1996).

[46] Article 35.3 of the Protocol prohibits the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. According to Article 55, care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage; this protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

[47] Report cited in note 10, p. 212, commentary (56).

(h) Treaties on International Watercourses and Related Installations and Facilities

Here the presumption of continued applicability rests mainly on the fact that rules contained in multilateral treaties, such as the Treaty Respecting the Free Navigation of the Suez Canal (Constantinople, 29 October 1888)[48] (Article I), the Convention and Statute on the Regime of Navigable Waterways of International Concern (Barcelona, 20 April 1922)[49] (Article 15), and the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997; hereinafter 1997 Convention on Watercourses)[50] (Article 29) provide for such a presumption in more or less veiled terms. A similar situation prevails in the category of

(i) Treaties on Aquifers and Related Installations and Facilities

The rules of the ILC's Draft Articles on the Law of Transboundary Aquifers[51] are similar to those of the 1997 Convention on Watercourses. The latter being presumed to continue in time of armed conflict, and the law of armed conflict providing for the protection of international watercourses, the Commission's commentary concludes that

> transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.[52]

In essence this means that, despite the absence of much practice, aquifer treaties, on account of their similitude with watercourse agreements, will be treated in the same way.

(j) Treaties Establishing International Organisations

In general the constituent instruments of international organisations are not, as practice shows, affected by the existence of armed conflicts involving Contracting Parties. This is the essence of what Article 6 of the 1985 Resolution of the Institute of International Law asserts, and the ILC agrees by establishing a presumption in that sense, adding that "there is scant practice to the contrary".[53]

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[48] Entered into force on 22 December 1888.

[49] Entered into force on 31 October 1922.

[50] Not yet in force.

[51] Report of the International Law Commission, 60th Session, UN Doc. A/63/10, para 53; and UN General Assembly Resolution 63/124 of 11 December 2008, UN Doc. A/RES/63/124 (15 January 2009), Annex.

[52] Report cited in note 10, p. 216, commentary (72). See also Article 18 of the Draft Articles on the Law of Transboundary Aquifers, supra n. 51, p. 27.

[53] Report cited in note 10, p. 214, commentary (67).

(k) Treaties Relating to the International Settlement of Disputes by Peaceful Means, Including Resort to Conciliation, Mediation, Arbitration and Judicial Settlement

This category of agreements may overlap, to some extent, with that of multilateral treaties establishing an international regime (category (b)). There is evidence of the survival of such agreements, and it will be seen later on, when dealing with Article 9.5 of the Draft Articles,[54] that a presumption of survival is desirable. It will also be noted, however, that the Commission's commentary defines this category of treaties fairly narrowly by limiting it to agreements on dispute settlement between *full subjects* of international law, thus excluding international mechanisms for the protection of human rights and the international protection of private investments; but instruments of that kind may be covered by categories (f) (treaties for the international protection of human rights) or (e) (agreements concerning private rights).

(l) Treaties Relating to Diplomatic and Consular Relations

The Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)[55] contains a series of provisions—Articles 24, 44 and 45—suggesting that treaties on this matter should survive armed conflicts. In its commentary,[56] the Commission quotes a long passage from the case concerning *United States Diplomatic and Consular Staff in Tehran* which suggests that treaty provisions protecting diplomatic representatives survive.[57]

The same can be said of treaty rules protecting consular agents and personnel, such as Articles 26 and 27 of the Vienna Convention on Consular Relations (Vienna, 24 April 1963),[58] and of what the ICJ declared in the *Diplomatic and Consular Staff* case. On the level of national practice, attention is being drawn by the ILC[59] to the decision of a California court in *Brownell* v. *City and County of San Francisco*.[60] Under the Treaty of Friendship, Commerce and Consular Rights (Washington, 8 December 1923) concluded between Germany and the United States,[61] land and buildings used by one Contracting State on the territory of the other were exempted from taxation. Taxes were claimed, however, when Switzerland, as a caretaker, and later on the United States Government, took over the premises of the German Consulate General in San Francisco. The local authorities,

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[54] See infra, p. 49.

[55] Entered into force on 24 April 1964.

[56] Report cited in note 10, p. 216, commentary (72).

[57] ICJ: United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment (24 May 1980), para 86.

[58] Entered into force on 19 March 1967.

[59] Report cited in note 10, p. 217, commentary (77).

[60] California Court of Appeal (21 June 1954), International Law Reports 1954, p. 432, especially at p. 433.

[61] Entered into force on 14 October 1925.

which claimed the taxes, argued that the 1923 Treaty had lapsed as a result of the Second World War; the United States Government contended that it had not. The Court of Appeal espoused the latter view, arguing that the exemption stipulated by the Treaty was not abrogated "since the immunity from taxation therein provided was not incompatible with the existence of a state of war". While this case primarily supports the continued operation of treaties of FCN, as is noted in the ILC's commentary, the 1923 Treaty dealt with consular issues as well; hence the case may also serve as evidence for the survival of agreements on consular matters.

(m) Conclusion

The above description suggests that the "survival" rate in the above categories of agreements is fairly high, the essential reason being the distinction drawn between "political" treaties, on the one hand, and, on the other, treaties establishing boundaries and territorial regimes, or agreements securing the "personal" rights of individuals, i.e. "third parties" not concerned by the armed conflict—unless, of course, their specific behaviour suggests otherwise. The idea was and is that, at least in this particular area, continuity should prevail as much as possible.

It must be kept in mind that the notion of FCN treaties is not a rigid and finite category. Individual rights may or may not be secured by treaties bearing that label. They may equally be found in other categories of agreements, "treaties of commerce" or "treaties of establishment" for instance.

Finally, treaties may contain a mix of provisions only few of which establish or guarantee personal rights. In such cases, the question of the separability of treaties arises—an issue which is addressed in the next subdivision of this paper.

4.4 Other Provisions Relevant to the Operation of Treaties (Articles 8–12)[62]

Article 8 allows States involved in an armed conflict to conclude treaties. A.D. McNair points out that there is no inherent impossibility for belligerent States to

[62] 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." 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. 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 para 3,

enter into treaties.[63] As examples G.G. Fitzmaurice mentions armistice agreements and agreements on the exchange of personnel and of safe conduct through enemy territory.[64] According to the ILC's commentary,[65] enemy States can also agree on the amendment or modification (cf. Part IV of the VLCT) of treaties.[66] The upshot is that States, though involved in armed conflict, retain their treaty-making power.

An important provision of the Draft Articles is *Article 9* on the notification of the intention to terminate or suspend treaties, or to withdraw from them. The question of how a State is to act, on the procedural level, when it holds that a given agreement has lapsed or should be suspended, has always been shrouded in mystery. Generally, the issue was settled at the end of the conflict.

Borrowing from Article 65 of the VCLT, *Article 9* of the Draft Articles establishes a notification procedure. A State intending to terminate or suspend a treaty, or to withdraw from it, on account of an armed conflict may notify the other

(Footnote 62 continued)
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." 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 draft article 6."

[63] McNair 1961, p. 696.

[64] Fitzmaurice 1948, p. 309.

[65] Report cited in note 10, p. 189, commentary (6) on Article 8.

[66] Article 43 VCLT provides: "The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

State Party or States Parties, or the depositary, of its intention (para 1). The notification takes effect upon its receipt by the other State Party or States Parties (para 2). If the latter omit to react, the notifying State is entitled to go ahead. If they object—within a reasonable time-span (para 3)—, all the States concerned shall seek a solution to their disagreement through the means indicated by Article 33.1 of the United Nations Charter (para 4). Nothing of what precedes affects the recourse to means of peaceful settlement that have remained applicable between the Parties (para 5).

The essential feature of Article 9 is that a procedure is provided which should bring some order into the chaos caused by armed conflict, that that procedure must be followed by the State wishing to end or suspend a treaty, or to withdraw from it, and that the procedure is not set in motion automatically. Another important feature is that the procedure may end either during the conflict or even thereafter. Finally, in connection with Article 9.5, the obligations of States in matters of dispute settlement would seem to survive in principle owing to their inclusion in the indicative list of the Annex to the Draft Articles (letter (k)).

Even where treaty rights have disappeared as a consequence of armed conflicts, this will not impair the duty of contracting States to meet obligations embodied in the treaty which they are subject to also independently of the treaty. This provision—*Article 10*—is modelled on Article 43 of the VCLT.[67]

The next provision, which has been alluded to already, is *Article 11*. It is based on Article 44 of the VCLT (and prefigured in Article 7 of the Draft Articles, which refers to the continuation of operation "in whole or in part"). It creates a presumption of non-separability which can be rebutted by showing: (i) that the treaty contains clauses that are separable from the remainder of its provisions with regard to their application; (ii) that the acceptance of those clauses was not an essential basis of the consent given by the other Party or Parties to be bound by the treaty as a whole; and (iii) that the "continued performance of the remainder would not be unjust". As pointed out in the commentary,[68] this passage is taken *verbatim* from Article 44.3.c of the VCLT, which originated from a proposal made at the Vienna Conference by the United States. What it means is that the separation of treaty provisions should not create a significant imbalance to the detriment of the other Party or Parties.

Article 12 is a near-perfect replica of Article 45 of the VCLT. It deals with the loss of the right, in the event of an armed conflict, to terminate or suspend a treaty, or to withdraw from it: a State may forego its right to terminate, to suspend or to withdraw—if there is such a right—if it has indicated, expressly or by its conduct, that it wishes the treaty to continue. The commentary notes that, when an armed

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[67] "The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

[68] Report cited in note 10, pp. 192–193, commentary (3) on Article 11.

conflict arises, the States concerned may not always be aware of the dimension that conflict may attain subsequently; their behaviour must therefore be appreciated at the moment when the conflict has attained its peak.[69] This is why the words "after becoming aware of the facts" have been inserted in the chapeau of Article 12.

Article 13, finally, deals with the post-war revival and resumption of treaty relations. The term "revival" applies to treaties that have lapsed or been suspended as a consequence of armed conflict. According to Article 13.1, positive action is required to bring them back to life, and such action will result in a *novation*. This was the device used by the Allies under Article 44 of the Peace Treaty with Italy (Paris, 10 February 1947).[70] The word "resumption" used in Article 13.2 can only apply to treaties *suspended* in the course of armed conflict, for what has lapsed cannot be "resumed". "Resumption" is not the result of a common decision by the Contracting Parties but of objective elements, i.e. those referred to in Article 6 of the Draft.

4.5 "No-prejudice" Clauses (Articles 14–18)[71]

The remainder of the rules examined here—Articles 14–18—are intended to show that the Draft Articles do not prejudice the application of other rules of international law. The first three provisions relate to the system of collective security established by the United Nations Charter.

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[69] Ibidem, p. 193, commentary (3) on Article 12.

[70] Entered into force on 15 September 1947. Article 44 of the Peace Treaty runs as follows: "1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or to revive. Any provision not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties. 2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations. 3. All such treaties not so notified shall be regarded as abrogated."

[71] 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."

Under *Article 14* a State wishing to exercise its natural right of self-defence in accordance with the United Nations Charter will not be prevented from doing so and, to this end, may suspend—only suspend—the treaty that would impede its exercise. In doing so, the State in question will, in particular, prevent the imbalance that would ensue if the aggressor State could require its victim to meet all the treaty obligations it owes to its aggressor. In addition, the provisions of Articles 6 and 7 on the continued operation of certain treaties remain applicable: "a consequence that would not be tolerated in the context of armed conflict", says the Commission, "can equally not be accepted in the context of self-defence". Thus "the right provided for will not prevail over treaty provisions that are designed to apply in armed conflict", including the provisions of the international humanitarian law treaties of 1949.[72] A similar provision can be found in Article 7 of the Resolution of the Institute of International Law.[73]

Article 15 bears a mysterious title: "Prohibition of benefit to an aggressor State". Its origins can be traced back to the aforesaid Resolution as well.[74] It prescribes that an aggressor State within the meaning of the United Nations Charter and of Resolution 3314 (XXIX) of the General Assembly[75] cannot terminate or suspend a treaty, or withdraw from it, as a consequence of an armed conflict provoked by itself. If the Security Council does find that a State wishing to do so *is* an aggressor, that State cannot cancel or suspend a treaty, or withdraw from it, except if it derives no benefit from that action[76], the latter issue being determined either by the Council itself or by a judge or arbitrator. If the Council has made no determination, the State concerned may cancel or suspend a treaty or withdraw from it. It may no longer do so, however, from the moment at which it is stigmatised as an aggressor by the Security Council. The issue therefore remains suspended as long as there is no determination. The characterisation by the Council will condition what is to follow. If the State initially believed to be an aggressor turns out not to be one, or if termination, suspension or withdrawal is determined not to be beneficial to the aggressor State, the notification that may have been made under Article 9 will be appreciated from the angle of the ordinary

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[72] Report cited in note 10, p. 195, commentary (2) on Article 14.

[73] Article 7 of the Institute's Resolution reads as follows: "A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor."

[74] Article 9, which provides: "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."

[75] U.N. Doc. A/RES/*29*/3314 (14 December 1974), Annex.

[76] The text of Article 15 sparked animated discussions on whether that provision should apply across the board, to all aggressor States, regardless of whether they would benefit from the aggression or not, or only to those aggressor States which would draw a benefit from the termination, suspension or withdrawal. The latter view, finally, prevailed.

rules contained in the Draft Articles. By contrast, if the State concerned is confirmed to be an aggressor, or to be benefiting from the termination, suspension or withdrawal, the ordinary rules no longer apply and the notification under Article 9 will have no effect.[77]

The words "as a consequence of an armed conflict that results from the act of aggression" serve to ensure that the characterisation of a State as an aggressor only relates to the specific conflict under consideration. The words in question were added to prevent an interpretation under which a State would retain a characterisation as an aggressor made in the context of entirely different conflicts with the same or even with another opposing State.[78]

Finally, despite contrary views, the Commission refused to go beyond a formula referring to the use of force in violation of Article 2.4 of the United Nations Charter.[79]

Article 16, the last of the clauses safeguarding the Organisation's system of collective security, gives priority to relevant decisions taken by the Security Council. This clause may partly overlap with Articles 14 and 15 described previously. The main decisions to be respected are, of course, those taken in the framework of Chapter VII of the Charter, but other decisions—such as those adopted pursuant to Article 94 of the Charter—may also be relevant.

The priority attributed to Security Council decisions is based on Article 103 of the Charter.[80] Article 8 of the Resolution of the Institute of International Law served as a model.[81]

Article 17 is another "no-prejudice" clause, but not one specifically connected with the United Nations system. The clause, for which no model exists in the Resolution of the Institute of International Law, has been inserted at the request of Commission members from neutral countries.

As a status derived from treaty, neutrality comes alive at the outbreak of armed conflicts between third States; therefore, the treaty status of neutrality must survive during such conflicts; if it did not, the treaty would be useless. A status of neutrality can also result from rules of general international law, in which case the problem is not that of the survival of a treaty, but that of the scope of a customary rule. At any rate, under Article 17 the rules on neutrality will apply in time of armed conflict regardless of the present Draft Articles.

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[77] Report cited in note 10, p. 196, commentary (2) on Article 15.

[78] Ibidem, commentary (4) on Article 15.

[79] Ibidem, commentary (5) on Article 15.

[80] Article 103 provides: "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[81] According to Article 8 of that Resolution, "[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."

Article 18, the final provision of the Draft to be examined here, declares that the Draft Articles are without prejudice to the other rules of international law on the termination or suspension of treaties, or on the withdrawal therefrom, in particular to Articles 55–62 of the VCLT. Article 18 is intended to prevent the assumption that the Draft Articles have the character of a *lex specialis* which would, in time of armed conflict, prevail over the "normal" causes of termination, suspension or withdrawal.

5 Conclusions

The preceding examination of the Draft Articles on the Effect of Armed Conflict on Treaties adopted by the ILC yields the following conclusions:

(i) The ILC's Draft unquestionably closes a gap in the existing rules on the Law of Treaties and answers a question discussed for decades by practice and by writers.

(ii) While some of the Draft's provisions reflect existing law, other rules have the character of *lex ferenda*. The latter is true, in particular, of some categories of agreements included in the indicative list of the Annex to the Draft Articles: treaties for the protection of human rights and of the environment, conventions relating to international criminal justice, treaties on aquifers, and constituent instruments of international organisations. All these new categories result from contemporary developments of international law.

(iii) The most important innovation brought by the Draft Articles is the extension of their scope to non-international armed conflicts, currently the dominant form of armed strife. That extension is, however, relativised by Article 6.b which limits its effect to conflicts with a certain degree of outside involvement.

(iv) One may wonder whether the extension of the scope of the Draft Articles was really necessary, and whether this issue could not have been solved by making use of the existing law of treaties, i.e. by assuming that non-international armed conflicts always represent a devastating blow for the States concerned and, therefore, are likely to bring about a fundamental change of circumstances (Article 62 of the VCLT), often resulting in a temporary or definitive impossibility of performance (Article 61 of the VCLT). While this may well be true, it will be recalled that, under Article 6.b, the scope of the ILC's Draft is in fact limited to non-international armed conflicts with at least some degree of outside involvement. If the problem had been addressed along the lines suggested above, this nuance would have been lost.

(v) The authors of the Draft Articles have attempted to strike a reasonable balance between often contradictory views. In this the members of the Commission have received guidance from the 1985 Resolution of the Institute of International Law whose scope was, however, confined to armed conflicts of an international character.

(vi) In some areas, the ILC had to tread on treacherous ground. The case law of national courts, which is of central importance, did not always provide the clear and reliable guidance one could have wished: some domestic courts found it difficult fully to grasp the issues; and sometimes their decisions remained unclear. What can be concluded, e.g., from decisions asserting that treaties are not terminated but suspended? And what is meant by "suspension": do "suspended" treaties automatically bounce back into operation at the end of the armed struggle, or must there be an agreement to that effect?

(vii) In the field covered by the Commission's Draft Articles, it is usual to speak of the survival or otherwise of *treaties as such*. Such language disregards the fact that treaties often do not survive or lapse *en bloc*. The issue of the separability of treaty provisions thus assumes critical importance. Treaties of commerce, for example, may not survive *in toto*, but some of their provisions—those securing private rights—may continue in operation. This is why the title given to the Draft may appear misleading; "The Effects of Armed Conflicts on Treaty *Provisions*" might have been more accurate.[82]

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[82] In its Resolution 66/99 of 9 December 2011, the United Nations General Assembly welcomed the conclusion of the ILC'S work on The Effects of Armed Conflicts on Treaties, expressed its appreciation to the Commission, took note of the Articles elaborated on the subject and commended them to the attention of governments, without prejudging the question of their future adoption or other appropriate action. It also decided to include the topic "The Effects of Armed Conflicts on Treaties" in the agenda of its 69th session so as to examine, in particular, the form to be given to the Articles. The highly contentious nature of the topic makes it unlikely that the Articles will receive much further official consecration, e.g., by the convocation of a codification conference. This is not to say, however, that the work of the Commission has been in vain. The Articles will be considered by international agencies and governments as being the state-of-the art expression of the principles governing the effects of armed conflicts, international or internal, on international agreements.