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First report on the effects of armed conflicts on treaties

By Mr. Lucius Caflisch, Special Rapporteur

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A. Introduction

1. The draft articles on effects of armed conflicts on treaties will be given a second reading at the Commission's session in 2010. The Special Rapporteur wishes at the outset to pay tribute to the memory of his predecessor, Mr. Ian Brownlie, and to thank him for his four reports and, in general, for the remarkable work which he carried out on the topic.

2. The draft articles adopted on first reading in 2008 and subsequently sent to the General Assembly were commented on by 34 States during the Sixth Committee's discussions in the same year. In addition, 11 Member States have submitted written comments on them.[1] The present report considers these comments and proposes a number of changes to the initial set of draft articles.

3. While many questions were raised and suggestions made, the discussion seems to have focused on four themes: (i) the scope of the draft articles, in particular the question of including situations in which only one State party to a treaty is involved in an armed conflict; non-international armed conflicts; and agreements to which international organizations are parties (draft articles 1 and 2); (ii) the "indicia" for identifying treaties that continue in operation (draft article 4); (iii) the types of treaties whose subject matter implies their survival in whole or in part (draft article 5 and annex); and (iv) the (different?) effects of international or civil war conditions involving a single State party or several States parties to treaties.

4. When considering States' comments, the Special Rapporteur will take a pragmatic approach: he will not make drastic changes to the draft, since it is due for its second reading; he will not focus excessively on doctrinal considerations, so as to ensure that the draft retains practical value; and, within this framework, he will attempt to take into account the comments made by Member States. These comments will be considered article by article.

B. Scope (draft article 1)

5. As one State has commented,[2] the issue of scope should be studied further. Despite, or perhaps because of, its conciseness, draft article 1 has triggered an avalanche of comments, from the suggestion that the scope of the draft articles should be very broad to the suggestion that it should be very limited, with supporting arguments.

6. A first group of Member States would like to restrict the scope of the draft articles to treaties between two or more States of which more than one is a party to the armed conflict. The reasoning behind this view is that situations involving only one State — mainly but not exclusively non-international conflicts — are already covered by articles 61 (Supervening impossibility of performance) and 62 (Fundamental change of circumstances) of the 1969 Vienna Convention on the Law of Treaties.[3] This is not really accurate: the approach thus advocated would mean that, in cases of conflicts between two or more States, a number of provisions relating to the effects of inter-State armed conflicts would be applicable in addition

[1] See A/CN.4/622 and Add.1.
[2] Slovenia (A/C.6/63/SR.18, para. 26).
[3] Burundi and Portugal (A/CN.4/622).

to articles 61 and 62, while, in situations involving only one State, only those articles would be applicable, to the exclusion, therefore, of the present draft articles. The response will be that the effects of armed conflicts in the two situations are so different that they cannot be governed by the same provisions. The Special Rapporteur remains sceptical of this argument, considering that, since the trigger in both cases is an armed conflict, the solution should be sought in the factors mentioned in draft articles 4 and 5. Another argument refers to article 73 of the 1969 Vienna Convention, which states that the provisions of the Convention shall not prejudge the question of the effects of war now under discussion and which forms the framework for the present draft articles. Article 73 refers to "the outbreak of hostilities between States", which would exclude situations in which the question of the effects of armed conflicts on treaties involves only one State.[4] The Special Rapporteur considers that the Commission's mandate should be interpreted flexibly and that it is sufficiently broad to encompass the effects of armed conflicts involving only one State.

7. In the view of another Member State,[5] the question of the effects of international armed conflicts involving only one State party to the treaty in question should be excluded from the scope of the draft articles, as should the question of the effects of non-international armed conflicts involving only one State party to the treaty. If these views were accepted, the draft articles would serve to determine the fate of treaties between States which are parties to them and of which more than one is also participating in an international armed conflict. Such a restriction would reduce the scope and usefulness of the draft articles too much. It would also mean that there were armed conflicts and armed conflicts: the effects of some would be determined by the draft articles, while the effects of others would not. This does not seem to be a desirable approach.

8. One question that remains open[6] is whether the draft articles should cover the effects of armed conflicts on treaties to which international organizations are parties. Some States have said that they are in favour,[7] but the majority seem to be opposed.[8] Mainly for practical reasons, the Special Rapporteur is inclined to follow the latter view. Reviewing the draft articles in their entirety from that perspective would greatly delay the successful completion of the Commission's work. In addition — although this is not a crucial factor — the matter relates not to article 73 of the 1969 Vienna Convention but to article 74, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[9] Moreover, as the wording of the provision indicates, international organizations as such do not wage war; there will probably be few cases in which the obligations of States members of an organization have to be considered in the light of an armed conflict between them, and such cases could,

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[4] Czech Republic (A/C.6/63/SR.16, para. 82).

[5] Portugal (A/CN.4/622 and A/C.6/63/SR.19, para. 26); see also Poland (A/CN.4/622).

[6] Para. (4) of the commentary to draft art. 1, *Official Records of the General Assembly, Sixty-third session, Supplement No. 10* (A/63/10), p. 89.

[7] China and Ghana (A/CN.4/622).

[8] Czech Republic (A/C.6/63/SR.16, para. 80); Poland (A/CN.4/622); and Portugal (A/CN.4/622 and A/C.6/63/SR.19, para. 26).

[9] Art. 74, para. 1, provides that the provisions of the Convention "shall not prejudge any question that may arise in regard to a treaty between one or more States and one or more international organizations ... from the outbreak of hostilities between States".

where necessary, be resolved by adopting a new series of rules which would be based on article 74, paragraph 1, of the 1986 Vienna Convention.

9. Two Member States[10] have expressed the view that article 25 of the 1969 Vienna Convention should be mentioned in draft article 1; to be more precise, treaties that are applied provisionally on the basis of article 25 of the 1969 Vienna Convention should continue to be applied provisionally to the same extent as treaties that were in force at the time of the outbreak of the armed conflict. This comment is perfectly justified: treaties applied provisionally pursuant to article 25 should continue to be applied provisionally as long as their provisional application is not terminated and they have not disappeared or been suspended pursuant to the provisions of the draft articles applicable to treaties in general. The Commission makes this point in paragraph (3) of the commentary to draft article 1, and it is not essential to refer to article 25 in draft article 1.

10. We will turn now to some other issues raised in Member States' comments. One comment consisted of a suggestion to replace the words "apply to" with the words "deal with".[11] This drafting change seems acceptable.

11. Another comment[12] was that it should be made clear that the draft articles cover both bilateral and multilateral treaties. This seems to be self-evident: draft article 1 refers to "treaties", as does article 1 of the 1969 Vienna Convention; this means both categories. This point is also made in paragraph (2) of the commentary to draft article 2.

12. The phrase "where at least one of the States is a party to the armed conflict" may seem unclear. In the Special Rapporteur's view, it means that at least one State party to the treaty must also be a party to the armed conflict; this idea would be expressed more clearly as follows: "where at least one of these States is a party to the armed conflict".

13. Thus, draft article 1 could read as follows:

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

C. Use of terms (draft article 2)

14. Draft article 2, subparagraph (a), defines the term "treaty" in accordance with article 2, paragraph 1, of the 1969 Vienna Convention. Here, the main question that arises is whether the scope of the draft articles should include treaties concluded between States and international organizations. This question has already been mentioned in paragraph 8 of this report. The Special Rapporteur considers that it would be preferable not to extend the draft articles to the effects of armed conflicts on treaties to which international organizations are parties. The present draft articles

[10] Burundi (A/CN.4/622); and Romania (A/C.6/63/SR.21, para. 51).
[11] United Kingdom (statement dated 27 October 2008, available from the Codification Division).
[12] Burundi (A/CN.4/622).

are intended to complement the 1969 Vienna Convention. The Commission is still at liberty to supplement the 1986 Vienna Convention with another draft text.

15. Having thus attempted to resolve the question of whether or not to include treaties to which one or more international organizations are parties, we must now consider the question of whether or not to include situations of non-international conflict. There can be no doubt that the current draft article 2, subparagraph (b), does not provide for any exclusions in this regard and, therefore, should apply to all armed conflicts, even though the draft article itself and the commentary are silent on this point. Although this approach has been criticized by some,[13] it is supported by a majority of States.[14] It may therefore be retained.

16. The concept of armed conflict still needs to be defined. As stated in paragraph (3) of the commentary to draft article 2, its subparagraph (b) contains a definition adapted to the specific needs of the draft articles and is limited to armed conflicts which "by their nature or extent are likely to affect the application of treaties". Under the current draft articles, the definition of "armed conflict" may thus vary depending on the field to which it is intended to apply. Some[15] are in favour of this approach but others[16] are not. The Special Rapporteur considers that it would be detrimental to the unity of the law of nations to apply a given definition in the field of international humanitarian law and a completely different definition in the field of treaty law.

17. The Special Rapporteur takes note of the doubts expressed by one State[17] regarding the appropriateness of defining "armed conflict". Even if these doubts are shared by others, it must be acknowledged that a set of draft articles such as that proposed by the Commission is not viable without a minimum of definitions, particularly of concepts that determine the subject matter of the draft articles.

18. Which definition should be used? Insofar as the draft articles are to cover internal as well as international conflicts, article 1 of the resolution adopted in 1985 by the Institute of International Law[18] is not appropriate because, despite the title of the resolution, it covers only international conflicts. Moreover, the definition in that article is an ad hoc definition adopted for a specific purpose; this type of approach has already been dismissed, in principle, in paragraph 16 of this report.

19. Another approach would consist in using the definitions contained in the Geneva Conventions of 1949 and the Additional Protocols of 1977. Common article 2 of the four Geneva Conventions provides:

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[13] Indonesia (A/C.6/63/SR.18, para. 49); Iran (Islamic Republic of) (A/C.6/63/SR.18, para. 54); and Poland (A/C.6/63/SR.17, para. 49, and A/CN.4/622).

[14] Burundi (A/CN.4/622); Ghana (A/CN.4/622 and A/C.6/63/SR.18, para. 2); Greece (A/C.6/63/SR.18, para. 41); Hungary (A/C.6/63/SR.17, para. 32); New Zealand (A/C.6/63/SR.18, para. 18); Nordic countries (A/C.6/63/SR.16, para. 31); and Switzerland (A/C.6/63/SR.16, para. 66, and A/CN.4/622).

[15] Burundi (A/CN.4/622).

[16] Ghana (A/CN.4/622); Japan (A/C.6/63/SR.18, para. 38); Slovenia (A/C.6/63/SR.18, para. 26); and Switzerland (A/CN.4/622).

[17] United States (A/CN.4/622).

[18] Resolution entitled "The Effects of Armed Conflicts on Treaties", adopted in Helsinki on 28 August 1985.

> The ... Convention shall apply to all cases 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 of them.

Article 1, paragraph 1, of Additional Protocol II defines non-international armed conflicts as

> armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II].

20. The two articles could probably be combined with a view to defining the concept of armed conflict. This approach would have the advantage of specificity and of combining the concepts of "armed conflict" in the fields of international humanitarian law and treaty law. However, it would be cumbersome and the definition would be, to some extent, circular. Moreover, the former article has been somewhat overtaken by modern developments: it refers to "war", "declared war" and "state of war". Nonetheless, if there were a desire to take this approach without lengthening the draft article too much, that could be done simply by adding to draft article 2, subparagraph (b), a reference to common article 2 of the 1949 Conventions and article 1, paragraph 1, of Additional Protocol II. In the Special Rapporteur's view, this approach would not be ideal: references to other texts make the draft articles abstract and difficult to digest.

21. Another possibility is to opt for a more modern, simple and comprehensive wording, namely that used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the Tadić case:

> 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.[19]

This wording, which could be considered for inclusion in draft article 2, subparagraph (b), appears to be sufficiently specific and comprehensive, particularly as it refers to "organized armed groups" without mentioning all the characteristics of such groups listed in article 1, paragraph 1, of Additional Protocol II of 1977 (responsible command; exercise of control over a part of State territory; capacity to carry out sustained and concerted military operations; capacity to implement Protocol II). If this wording is to be used, however, the last part ("or between such groups within a State") should be deleted because, under draft article 3, subparagraphs (a) and (b), the draft articles apply only to situations involving at least one State party to the treaty that is a party to the armed conflict. That condition is not fulfilled when organized armed groups are fighting each other within a State. With that reservation, the Commission could accept a solution based on the Tadić wording.

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[19] International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

22. One Member State[20] believes, however, that the draft articles should go further and deal with the legal effects of non-international conflicts and situations involving militias, armed factions, civilians who have become actors in a conflict, ad hoc soldiers or mercenaries recruited for a specific situation. The presence of such actors could certainly be included in the circumstances to be taken into account when deciding whether or not the treaty continues in operation (in the context of draft article 4, subparagraph (b)?).

23. If the draft articles are to cover both international and internal conflicts, an idea which was accepted in the draft articles as adopted on first reading, it will be necessary to consider whether the two categories of conflict have the same effects on treaties.[21]

24. Let us now consider a number of issues related to those just addressed. Two Member States[22] would like it to be made clear that the draft articles are without prejudice to international humanitarian law, which constitutes the *lex specialis* governing armed conflict. This could be stated in the commentary to draft article 2. It could also be stated in the draft articles themselves by adding a new provision to the "without prejudice" provisions (draft articles 14, 16, 17 and 18).

25. One Member State[23] has quite rightly drawn attention to an inconsistency between the draft articles and the wording of article 73 of the 1969 Vienna Convention, which is the basis for the Commission's work on this issue. The article in question specifies that the provisions of the Vienna Convention "shall not prejudge any question that may arise in regard to a treaty from ... the outbreak of hostilities between States". This article is mentioned in support of the view that non-international armed conflicts should be excluded from the scope of the draft articles, as the Commission's mandate, on the basis of article 73, is limited to conflicts between States. However, article 73 cannot be seen as a categorical prohibition on examining issues which have not yet been considered. The same State admits that fact when arguing for the inclusion of international organizations on the basis of article 74, paragraph 1, of the 1986 Vienna Convention.

26. Another State[24] has requested that the definition of armed conflict should include the concept of "embargo". It is difficult to agree to that suggestion because an embargo is a coercive measure that may be used, under certain conditions, in situations of peace as well as in situations of armed conflict. If such a measure is taken in time of peace, it has nothing to do with the topic currently under discussion. If it is adopted during an armed conflict, it is the conflict that has effects on treaties, not the embargo, which is merely an incidental element of the conflict.

27. One Member State[25] has suggested replacing the term "state of war", used in draft article 2, subparagraph (b), with the expression "state of belligerency" on the grounds that article 73 of the 1969 Vienna Convention refers to the "outbreak of hostilities". It is unclear how this change would improve the provision in question:

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[20] Burundi (A/CN.4/622).

[21] China (A/C.6/63/SR.17, para. 53); Romania (A/C.6/63/SR.21, para. 52); and Switzerland (A/CN.4/622 and A/C.6/63/SR.16, para. 66).

[22] United Kingdom (statement dated 27 October 2008, available from the Codification Division); and United States (A/C.6/63/SR.18, para. 21).

[23] China (A/C.6/63/SR.17, para. 53).

[24] Cuba (A/CN.4/622).

[25] Hungary (A/C.6/63/SR.17, para. 32).

the concepts "state of belligerency" and "outbreak of hostilities" are not identical to each other, nor are they identical to the concept of armed conflict. In any case, this issue would no longer arise if the suggestion made in paragraph 21 of using the Tadić wording were accepted.

28. This also applies to the suggestion made by one Member State[26] that the word "operations", which appears in draft article 2, subparagraph (b), and is generally reserved for the context of inter-State armed conflict, should be avoided. This issue would also not arise if the Tadić wording were used. However, the word "operations" is in any case used even for the activities of organized armed groups, as shown by article 1, paragraph 1, of Additional Protocol II of 1977 (see above, para. 19), which defines these groups in accordance with the criterion of their exercise of such control over a part of State territory "as to enable them to carry out sustained and concerted *military operations*" (emphasis added).

29. Lastly, there is the issue of occupation. When occupation occurs in the context of an armed conflict, is it part of the conflict to the extent that there is no need for specific mention of it? The Member State which raised the issue[27] believes that the two terms have distinct meanings. The Special Rapporteur does not consider this to be the case: occupation is an event that occurs during armed conflicts, as reflected in common article 2 of the 1949 Geneva Conventions, which states that the Conventions apply to cases of occupation. However, in order to maintain the greatest possible clarity, it is recommended that paragraph (6) of the commentary to draft article 2 be retained, as it states expressly that the draft articles apply to occupation even in the absence of armed actions between the parties.

30. Draft article 2 could therefore read as follows:

"**Use of terms**

For the purposes of the present draft articles:

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

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

D. Absence of a rule under which, in the event of an armed conflict, treaties are ipso facto terminated or suspended (draft article 3)

31. Draft article 3 provides that the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as between the States parties to the conflict or between a State party to the conflict and a third State. This provision, entitled "Non-automatic termination or suspension", is derived directly

[26] Switzerland (A/CN.4/622).

[27] United States (A/CN.4/622 and A/C.6/63/SR.18, para. 21).

from article 2 of the resolution of the Institute of International Law mentioned in paragraph 18 above, which 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.

32. However, there are two differences between these two provisions: (i) whereas the Institute's resolution is concerned only with the fate of treaties in force between the parties to the armed conflict, the Commission's draft is intended to cover the effect of armed conflicts either between parties to the treaty that are also parties to the armed conflict, or between a single State party to the conflict and a "third" State, that is, a State party to the treaty which is not a party to the conflict; (ii) the Institute's text uses the term "ipso facto", whereas, in the Commission's draft article 3, that term was replaced by "automatically" and, later, "necessarily".

33. In general, draft article 3 has been well received. No State has objected to the basic idea that the outbreak of an armed conflict involving one or more States parties to a treaty does not, in itself, entail termination or suspension. In other words, there are agreements whose subject matter (draft article 5) or attendant circumstances (draft article 4) suggest or imply their continuity. This means that there are agreements which survive by reason of their subject matter or certain indicia. It may be, as noted by some States in their comments, that the words "necessarily" and "automatically" are ambiguous.[28] The expression "ipso facto", on the other hand, seems to reflect quite accurately what both the Institute and the Commission wanted to say. The Special Rapporteur, following the view of the majority of States which have commented,[29] suggests that the Commission return to the expression "ipso facto", despite the preference expressed by one State for the word "necessarily".[30]

34. One Member State[31] would like to go further, and, without offering specific wording for draft article 3, has suggested that a positive formulation is needed. If the Special Rapporteur has understood correctly, the draft article should affirm that in principle treaties continue to operate in the event of armed conflict. It would be difficult to go so far, given the present state of international law, and also in view of the comments made on draft article 3. Moreover, a "positive" formulation of this provision might entail a complete rethinking of the draft articles.

35. The same State has requested that reference be made in draft article 3 to treaties establishing or modifying land and maritime boundaries.[32] Admittedly that category of agreements is of great importance, as attested to by the fact that boundaries remain in place until the end of an armed conflict (occupation may

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[28] Iran (Islamic Republic of) (A/C.6/63/SR.18, para. 55); and Poland (A/CN.4/622). This could mean, for example, that there may be other criteria that justify the survival of the treaty in question, in addition to the indicia set out in draft article 4 and the indicative information relating to the subject matter of the treaty referred to in draft article 5 and in the annex to the draft articles.

[29] Ghana (A/CN.4/622); Greece (A/C.6/63/SR.18, para. 42); Poland (A/CN.4/622); and Switzerland (A/CN.4/622).

[30] Malaysia (A/C.6/63/SR.17, para. 10).

[31] Iran (Islamic Republic of) (A/C.6/63/SR.18, para. 55).

[32] Ibid., para. 53.

occur, but not annexation)[33] and also by the fact that that type of agreement is given second place in the list contained in the annex to the draft articles, immediately following the category of treaties relating to the law of armed conflict, which become operative in the event of armed conflict. All of the foregoing serves to indicate that the stability of land or river boundaries, including maritime delimitation and territorial regimes, is a fundamental principle.[34] Removing this category from the list contained in the annex to the draft articles and incorporating it into draft article 3 would distort the essential elements of the draft articles, which state, firstly, that existing treaties do not cease, ipso facto, to have effects and, secondly, that, under draft article 5, the subject matter of certain treaties — including those on boundaries, delimitation and territorial regimes — is the reason for their continued operation. On this specific point, therefore, it should be maintained that, in accordance with generally accepted practice, this category of treaty is one of those whose continued operation is the best assured. There is no reason to modify draft article 3 in the manner requested. However, there is every reason to refer to this category of treaties in draft article 5; on this point, see paragraph 61 below.

36. According to another State which has commented,[35] draft article 3 concerns the operation of treaties: (a) between States parties to a treaty that are also parties to an armed conflict; and (b) between a State that is a party to the treaty and a party to the armed conflict, on the one hand, and a third State, on the other: that is, a State party to the treaty that is not a party to the conflict. The effects of the outbreak of a conflict could be different in the two cases, and that difference should be reflected in the draft.

37. Lastly, there is a terminology issue to resolve.[36] Under the current draft article 3, the "actors" in the situations in question are: (i) States parties to a treaty; (ii) a State party or States parties to an armed conflict; and (iii) "third States". It is important to specify, where there may be doubt, whether a State is a party to a treaty, an armed conflict, or both. As for "third States", that term could refer to countries not parties to the armed conflict, countries not parties to the treaty, or countries not parties to either. An attempt could be made to clarify these issues in draft article 3; see paragraph 40 below.

38. Another criticism[37] is that the title of draft article 3 (Non-automatic termination or suspension) is unclear; a suggestion has been made to replace it with "Presumption of continuity". The Special Rapporteur agrees with the diagnosis but not with the proposed treatment. Draft article 3 does not deal with a presumption that remains until it is contradicted; as indicated in draft articles 4 and 5, the fate of treaties involving one or more States that are parties to a conflict — whether or not it is an international conflict — will be determined by a number of factors: the indicia referred to in draft article 4 and the treaty's subject matter, as referred to in draft article 5. An expression that is both neutral and clear should therefore be

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[33] Michael Bothe, "Occupation, Belligerent", in *Encyclopedia of Public International Law*, vol. 3 (J-P), Rudolf Bernhardt, ed. (Amsterdam, North-Holland, 1997), pp. 763-766 (764).

[34] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, decision of 31 July 1989, United Nations, *Reports of International Arbitral Awards*, vol. XX, p. 121.

[35] Italy (A/C.6/63/SR.16, para. 72).

[36] Poland (A/CN.4/622).

[37] Switzerland (A/CN.4/622).

found. At present, the only wording that comes to mind is "Absence of ipso facto termination or suspension". This formulation lacks elegance but reflects the content of the draft article.

39. The last issue to be considered in relation to this draft article is whether the Commission should also consider cases in which two States parties to a treaty are on the same side in an armed conflict.[38] The answer seems to be yes; at least the current content of draft article 3 does not exclude such cases, which does not mean that the Commission could not exclude them if it so desired.

40. Taking account of the above considerations, draft article 3 could read as follows:

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

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

(a) Between States parties to the treaty that are also parties to the conflict;

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

E. Indicia of susceptibility to termination, withdrawal or suspension of treaties (draft article 4)

41. Draft article 4 provides that, in order to ascertain whether a treaty is terminated or suspended in the event of an armed conflict, resort shall be had to: (a) articles 31 and 32 of the 1969 Vienna Convention, which relate to the interpretation of treaties; and (b) the nature and extent of the armed conflict and its effect on the treaty, the subject matter of the treaty and the number of parties to the treaty.

42. Before dealing with the substance of this provision and the controversy it has generated within the Commission and among Member States, the preliminary questions posed by one Member State[39] should be answered, namely: what is the purpose of the provision and for whom is it intended? Does it seek to guide States in their conduct in such a situation, or does it seek to guide international courts in assessing whether, in acting on the basis of draft article 8 (Notification of termination, withdrawal or suspension), a State has followed the applicable rules of international law? The Special Rapporteur's response will be brief: the provision serves both purposes. Draft article 4 highlights the criteria used to ascertain, in a specific case, whether a treaty is susceptible to termination, withdrawal or suspension. If, during an armed conflict, a State concerned makes the notification provided for in draft article 8 without complying with the conditions set out in the draft article — should the interpretation of the treaty pursuant to articles 31 and 32 of the 1969 Vienna Convention show that the parties to the treaty had not expressed a common desire to allow for termination, withdrawal or suspension, and that there

[38] Italy (A/C.6/63/SR.16, para. 72).

[39] Poland (A/CN.4/622).

is no valid ground for such a request arising from the nature and extent of the conflict, the likely effect of the conflict on the treaty, the subject matter of the treaty or the number of parties to the treaty — the State that has so acted would, at the end of the armed conflict, be considered accountable for such non-compliance.

43. The criteria to be included in draft article 4 were contested in the Commission and are still being contested by States that are critical of the Commission's draft. One criticism is that criteria such as the "nature and extent of the armed conflict" and "the effect of the armed conflict on the treaty" amount to a "circular definition".[40] It is not clear to the Special Rapporteur what constitutes an obstacle here. It is possible, for example, that a large-scale armed conflict concerning a territory over which, pursuant to the agreement at issue, a cooperation regime has been established might terminate that agreement on account of either the extent or the duration of the conflict. Obviously, these criteria, the second of which can be established only with the passage of time, may create conditions that make performance of the treaty impossible and that undermine the trust of the parties to the conflict.

44. Some States which have commented on draft article 4[41] seem to think that the Commission has abandoned the criterion of the intention of the States at the time of conclusion of a treaty, while another State[42] seems to feel that this criterion will be of little practical use. Other States[43] and the Special Rapporteur think that the intention expressed by the States parties at the time of conclusion of a treaty or during a subsequent period — insofar as it reveals anything about the point under discussion here — is an important criterion derived from the application of articles 31 and 32 of the 1969 Vienna Convention. Therefore, there is no need to add a reference to the intention of the States parties, as one Member State appears to wish.[44] Nonetheless, if there were a desire for even more explicit wording, draft article 4, subparagraph (a), could be reformulated as follows: "the intention of the parties as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties". In any event, draft article 4, subparagraph (a), should be retained.

45. Another comment[45] was that the reference to "the nature and extent of the armed conflict" in draft article 4, subparagraph (b), should be deleted, either because it could contradict draft article 2, subparagraph (b),[46] or because it should be connected to the traditional grounds for terminating and suspending treaties in order to maintain the stability of treaty relations between States. The same should apply to criteria such as the nature and intensity of the armed conflict, the effects of the conflict on the treaty, the subject matter of the treaty, and the number of parties, all of which were said to be "abstract" concepts.[47] On the other hand, other Member

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[40] Austria (A/C.6/63/SR.16, para. 36).

[41] Burundi (A/CN.4/622); Czech Republic (A/C.6/63/SR.16, para. 83); and New Zealand (A/C.6/63/SR.18, para. 18).

[42] Belarus (A/C.6/63/SR.16, para. 40).

[43] China (A/C.6/63/SR.17, para. 54).

[44] United Kingdom (statement dated 27 October 2008, available from the Codification Division).

[45] Austria (A/C.6/63/SR.16, para. 36); Belarus (A/C.6/63/SR.16, para. 40); and Iran (Islamic Republic of) (A/C.6/63/SR.18, para. 56).

[46] Iran (Islamic Republic of) (A/C.6/63/SR.18, para. 56).

[47] Belarus (A/C.6/63/SR.16, para. 40).

States[48] and the Special Rapporteur would like to maintain these criteria. First, it is not clear that there is a contradiction between the current draft article 2, subparagraph (b) — which requires some level of intensity for a conflict to qualify as an "armed conflict" — and the idea of increased intensity, which would be one of the indicia for ascertaining susceptibility to termination or suspension pursuant to draft article 4, subparagraph (b). Second, if the new text of draft article 4, subparagraph (b), proposed in paragraph 51 were accepted, the alleged contradiction would, in any event, disappear. With regard to other considerations put forward by one of the States that has expressed opposition to the inclusion of the criterion "nature and extent of the armed conflict", it should be noted that the same State has requested that additional criteria such as the intensity and duration of the conflict should be taken into account.[49]

46. Several ideas for additions to draft article 4 have been put forward. One suggestion was to add new "indicia" such as change of circumstances, impossibility of performance[50] and material breach of the treaty.[51] These additions are already covered by articles 60 to 62 of the 1969 Vienna Convention and draft article 17, and hence seem unnecessary.

47. According to another commenting State,[52] draft article 4 should include other important factors, such as the possible results of terminating, withdrawing from or suspending a treaty. This suggestion is covered in the proposed text of draft article 4 contained in paragraph 51 of the present report.

48. The subject matter of the treaty is the key element in draft article 5. It is also mentioned, as one Member State has pointed out,[53] in draft article 4, subparagraph (b). Nonetheless, and in order to avoid any confusion, it would be appropriate to delete the reference to the subject matter of the treaty in draft article 4, subparagraph (b).

49. Some Member States[54] would like draft article 4, subparagraph (b), to indicate that the list of indicia contained therein is not exhaustive, but this information is already contained in paragraph 4 of the commentary to the current draft article 4. It is true that it could be moved to the draft article itself, but such a change would weaken the normative value of the text.

50. Lastly, it has been observed[55] that it is inappropriate to refer to "withdrawal" in draft article 4, since it would contradict draft article 3. The Special Rapporteur fails to see what would constitute the contradiction and hence proposes that the existing text be retained.

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[48] China (A/CN.4/622).
[49] Belarus (A/C.6/63/SR.16, para. 40).
[50] Ibid.
[51] Cyprus (A/C.6/63/SR.19, para. 8).
[52] China (A/CN.4/622).
[53] United Kingdom (statement dated 27 October 2008, available from the Codification Division).
[54] China (A/C.6/63/SR.17, para. 54); El Salvador (A/C.6/63/SR.17, para. 12); and Israel (A/C.6/63/SR.18, para. 33).
[55] Iran (Islamic Republic of) (A/C.6/63/SR.18, para. 56).

51. In the light of the foregoing considerations, draft article 4 could read as follows:

> "**Indicia of susceptibility to termination, withdrawal or suspension of treaties**
>
> In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:
>
> (a) The intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and
>
> (b) The nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty."

F. Operation of treaties on the basis of implication from their subject matter (draft article 5 and annex)

52. The subject matter of a treaty may involve the implication that it continues in operation, in whole or in part, during armed conflict. Draft article 5 states that, in such cases, the incidence of an armed conflict will not as such affect the operation of the treaty. The draft articles are accompanied by an annex entitled: "Indicative list of categories of treaties referred to in draft article 5". The list contains the following categories: (a) treaties governing armed conflicts; (b) treaties establishing a boundary, delimitation or permanent regime; (c) treaties of friendship, commerce and navigation and analogous agreements concerning private rights; (d) treaties for the international protection of human rights; (e) treaties relating to the protection of the environment; (f) treaties relating to watercourses; (g) treaties relating to aquifers; (h) multilateral law-making treaties; (i) treaties relating to the peaceful settlement of disputes between States; (j) treaties relating to commercial arbitration; (k) treaties relating to diplomatic relations; and (l) treaties relating to consular relations. These are all categories of agreements whose survival, in the opinion of the States concerned, is necessary — so necessary that the States in question have continued to apply them, in whole or in part, despite having experienced the catastrophic consequences of the incidence of an armed conflict.[56]

53. Before examining the reactions to draft article 5 and the list contained in the annex, four preliminary comments may be made. First, in the types of situations envisaged, the incidence of an armed conflict will not as such affect the continued operation of the treaty, although such continued operation may be jeopardized by factors other than the incidence of the conflict. Second, continuity may apply to the treaty as a whole or to only a part thereof; in the Special Rapporteur's view, the question should be resolved by referring to the indicia set out in draft article 4. Third, the list contained in the annex to the draft articles is described as "indicative" in paragraph 7 of the commentary to draft article 5. This seems to mean: (i) that

[56] Detailed commentary on the categories listed here can be found in the report of the International Law Commission on its sixtieth session, *Official Records of the General Assembly, Sixty-third session, Supplement No. 10* (A/63/10), pp. 96-124.

other factors may be taken into consideration; and (ii) that treaties do not continue in operation simply because they fall into one of the listed categories. In addition, treaties may fall into one category or another, or they may not fall into any of the categories yet contain provisions that do. Nonetheless, and considering the other variables included in the draft articles, the text offers approximations rather than hard and fast rules, which is hardly surprising given the nature of the issue under discussion. Fourth, the list contained in the annex, the content of which has been questioned by a number of States that wish, for axample, to supplement or update the list, to make it more abstract, or to spell out the criteria for the survival of treaties,[57] is, as another State has pointed out,[58] indicative and does not suggest that the kinds of treaties mentioned would never be affected by the outbreak of an armed conflict.

54. The Special Rapporteur's task now is to consider some specific comments made in relation to draft article 5. One comment[59] was that the wording of the draft article should be made clearer. The Special Rapporteur is willing, but cannot propose changes without more specific comments. One group of States[60] seems to take the view that, in the context of draft article 5, the treaty or clauses that survive do not necessarily have to be applied as they are, but that some basic treaty principles need to be taken into account during armed conflict. If this comment means that draft article 5 should be applied with some flexibility, it could well be endorsed, as flexibility is built into the current wording of the provision. Another Member State[61] has expressed concern about the survival, in whole or in part, of treaties whose subject matter seems to imply a degree of continuity. It may be assumed that, if the answer cannot be deduced from the subject matter of the treaty alone, the indicia contained in draft article 4 will come into play.

55. It has also been pointed out[62] that certain treaties are concluded with the specific purpose of being applied in times of armed conflict, particularly treaties on international humanitarian law, but also those relating to human rights, territorial boundaries, limits or regimes, and the establishment of intergovernmental organizations. It seems obvious that international humanitarian law should survive, since it applies largely to times of armed conflict,[63] whereas treaties constituting international organizations, for example, may remain partially suspended in time of conflict. The Special Rapporteur believes that it would be preferable, for reasons of clarity, to have an article containing a statement of principle followed by a separate list. For the same reasons — and in order to achieve some flexibility — it would be better, contrary to the suggestion made by one Member State,[64] not to incorporate the list into draft article 5.

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[57] Chile (A/C.6/63/SR.22, para. 12); Greece (A/C.6/63/SR.18, para. 44); Israel (A/C.6/63/SR.18, para. 33); Italy (A/C.6/63/SR.16, para. 73); Japan (A/C.6/63/SR.18, para. 38); Malaysia (A/C.6/63/SR.17, para. 10); and Poland (A/C.6/63/SR.17, para. 49).

[58] China (A/C.6/63/SR.17, para. 54).

[59] Republic of Korea (A/C.6/63/SR.16, para. 53).

[60] Nordic countries (A/C.6/63/SR.16, para. 32).

[61] Italy (A/C.6/63/SR.16, para. 73).

[62] Belarus (A/C.6/63/SR.16, para. 41).

[63] On this point, see draft article 7, which concerns treaties that contain express provisions on their operation in times of armed conflict.

[64] Hungary (A/C.6/63/SR.17, para. 33).

56. One Member State[65] has expressed the wish to know the factors that make it possible to determine whether a treaty or some of its provisions should continue in operation (or be suspended or terminated) in the event of armed conflict. It seems to the Special Rapporteur that these factors can be determined by first consulting draft article 5, which relates to the subject matter of the treaty, then the indicative list in the annex to the draft articles and lastly, if necessary, the indicia contained in draft article 4 (see in this connection the position taken by China[66]). Another State[67] has proposed that "relevant factors or general criteria" should be identified. In fact, the factors in question are a combination of general and specific criteria — the indicia mentioned in draft article 4 and the subject matter of the treaty mentioned in draft article 5. The latter criterion is based on international practice, which is the only factor of relatively reliable value in a field full of uncertainties. If its value were disregarded, the decisions to be taken in this regard would be even more arbitrary.

57. With regard to the survival, in whole or in part, of certain treaties referred to in draft article 5, one Member State[68] feels rightly that partial survival is possible only if the treaty provisions are separable. According to that State, a reference to draft article 10 (Separability of treaty provisions) should therefore be considered. Likewise, draft article 5 should contain an explicit reference to the list contained in the annex to the draft articles. Lastly, it has been suggested that other treaties should be considered for inclusion in the scope of draft article 5 on a case-by-case basis. The Special Rapporteur thinks that a reference to draft article 10 (also advocated by Switzerland) is neither necessary nor useful. All the draft provisions that allow for termination or partial suspension are subject to the conditions set out in draft article 10, and it would suffice to confirm this in the commentary to draft article 5. It is also superfluous to refer to the list in draft article 5 itself, since the list contains a reference to that draft article. In general, cross references within the draft articles should be limited, so as to prevent the absence of a reference in one case from being used in another case as evidence of a lack of connection between one article and another. As for the third comment — that other types of agreement should be considered for inclusion in the scope of draft article 5 on a case-by-case basis — this possibility already exists, since the list contained in the annex to the draft articles is indicative rather than exhaustive (see para. 53 above).

58. Contrary to the opinion expressed by one Member State,[69] the Special Rapporteur is not of the view that draft article 5 is superfluous, given that termination and suspension are non-automatic. Since this principle is embodied in a general rule — draft article 3 — the State in question argues, there is no need to enumerate the specific categories of agreements whose subject matter involves the implication that they continue in operation. The Special Rapporteur does not share this view. Draft article 3 does not in any way imply the automatic operation, in whole or in part, of a treaty in the event of armed conflict. It is clear from this and subsequent provisions that the question must be examined in the light of the criteria set forth in draft articles 4 and 5 and the list annexed to the draft articles in connection with draft article 5. Draft article 5 is thus a key provision.

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[65] India (A/C.6/63/SR.17, para. 47).
[66] A/C.6/63/SR.17, para. 54.
[67] Israel (A/C.6/63/SR.18, para. 33).
[68] Greece (A/C.6/63/SR.18, para. 43).
[69] Poland (A/CN.4/622).

59. As a further consideration,[70] the Commission has been invited to examine the relationship between draft article 5 and draft article 10 (Separability of treaty provisions). As explained earlier (para. 57), the Special Rapporteur takes the view that there is a link between these two provisions, as well as between draft articles 4 and 10. As stated, draft articles 4 and 5 establish the indicia, criteria and elements giving substance to draft article 3; their application leads to a determination of the survival in whole or in part of a treaty, or, on the contrary, to its disappearance. This conclusion must then be considered in the light of draft article 10, and also draft article 11. Where reference to draft articles 4 and 5 suggests survival of a treaty in part, reference to draft article 10 will indicate: (a) whether the provisions in question are separable from the rest of the treaty; (b) whether or not acceptance of the provisions in question constituted, for the other party or parties, an essential element in their consent to be bound by the treaty as a whole; and (c) whether or not implementation of that part of the treaty that survives is unfair. That is to say, the conditions laid down in draft article 10 are in addition to those provided for in draft articles 4 and 5. Similar reasoning may, moreover, be applied to draft article 11 (Loss of the right to terminate, withdraw from or suspend the operation of a treaty) in that, even where a right to call for suspension or termination, in whole or in part, existed, that right may no longer be invoked once renounced by the State in question.

60. One Member State[71] has complained of the lack of clarity of draft article 5 and has encouraged the Commission to give examples of treaties or treaty provisions that might continue in operation. The Special Rapporteur acknowledges that the latter is an elusive goal but would point out that a degree of clarity is provided by the list contained in the annex to the draft articles, while the commentary, in fact, gives such examples.

61. Another State[72] has proposed the addition of a second paragraph to draft article 5, to read:

> "2. Treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict."

This proposal is attractive. If a clear majority of the Commission is in favour, the Special Rapporteur would not be opposed, notwithstanding his view that the proposed amendments may well complicate rather than simplify matters. In particular the question arises, given the contentious issue of determining to what extent human rights treaties continue to operate in time of armed conflict and to what extent international humanitarian law supplants them,[73] of whether it is possible to assume the continuity of treaties for the international protection of human rights. Consideration must also be given to the precise meaning of the term "international criminal law", and to whether it might not be preferable to refer to treaties on international criminal justice. A third issue is whether it is useful and

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[70] Nordic countries (A/C.6/63/SR.16, para. 32).

[71] Colombia (A/CN.4/622).

[72] Switzerland (A/CN.4/622).

[73] On this issue, see, for example, Sylvain Beauchamp, *Explosive Remnants of War and the Protection of Human Beings under Public International Law*, thesis (Geneva, Graduate Institute of International and Development Studies, 2008), pp. 114-157.

necessary to refer to the Charter of the United Nations. Be that as it may, such a change, which might well also encompass treaties on boundaries and limits (in this regard, see para. 35 above), would undoubtedly lead to the disappearance of several categories in the list contained in the annex to the draft articles.

62. If the idea of such an amendment were accepted, it would need to be drafted as precisely as possible. The following text might serve as a basis:

> "Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties creating or regulating a regime, including those establishing or modifying land or maritime boundaries, remain in or enter into operation in the event of armed conflict."

63. We will now consider the list annexed to the draft articles, examining in turn the idea of having such a list, its nature and content, and its relationship to draft article 5.

64. Certain States[74] take the view that it is not desirable to have such a list; or it could be incorporated into the commentary to draft article 5, with determinations as to the survival of treaties being made case by case.[75] Other States would incorporate the list into draft article 5.[76] Still others endorse the Commission's solution, namely a list annexed to the draft articles.[77] There is cause for hesitation, at least between annexing a list in connection with draft article 5 and incorporating it into the commentary (there being no prospect that a solution involving insertion of a list into the text of draft article 5 would find acceptance). The Special Rapporteur favours retention of the current text since it offers a greater degree of normativity than if the list were consigned to the commentary.

65. Following these preliminary observations, some general remarks are in order. The indicative nature of the list cannot be overemphasized.[78] The title of the list reaffirms this element. Consequently, the subject matter of the treaty determines its inclusion in the "categories" of agreements that, in practice, survive in whole or in part. However, being indicative, the list cannot be considered complete; moreover, the indicia in draft article 4 may enter into consideration. All this is relevant to the question[79] of what will become of the categories of treaties not in the list: since the list is merely indicative, they may still fall within the scope of draft article 5.

66. Another general remark was that the question has been inadequately examined and that further study of practice is required by seeking the views of Member States through questionnaires. In addition, it has been said that the practice referred to in the commentary is too focused on practice and doctrine in common law countries.[80] In response it may be stated: (i) that the commentary is certainly not confined to the

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[74] Nordic countries (A/C.6/63/SR.16, para. 32).

[75] In this vein see China (A/C.6/63/SR.17, para. 54).

[76] Hungary (A/C.6/63/SR.17, para. 33).

[77] Cyprus (A/C.6/63/SR.19, para. 9); Indonesia (A/C.6/63/SR.18, para. 49); and Republic of Korea (A/C.6/63/SR.16, para. 53).

[78] China (A/C.6/63/SR.17, para. 54); Cyprus (A/C.6/63/SR.19, para. 9); Japan (A/C.6/63/SR.18, para. 38); Malaysia (A/C.6/63/SR.17, para. 10); Poland (A/C.6/63/SR.17, para. 49); and United States (A/CN.4/622).

[79] Chile (A/C.6/63/SR.22, para. 12).

[80] Greece (A/C.6/63/SR.18, paras. 43 and 44).

practice of common law authorities but that it must be based on existing, accessible practice (and practice is perhaps more accessible in common law countries than in others); (ii) that while it may be that some precedents are not referred to, notwithstanding the meticulous research undertaken by the current Special Rapporteur's late predecessor, that research was thoroughly conducted and there should be no major omissions; and (iii) that any further research based on questionnaires addressed to States would delay the conclusion of work on this topic indefinitely.

67. With regard to the content of the list, some would prefer more categories, others fewer. Certain States have argued for a more comprehensive list;[81] others have suggested the inclusion of additional categories: treaties embodying rules of *jus cogens*[82] and treaties relating to international criminal justice.[83] With regard to treaties embodying rules of *jus cogens*, such rules will survive in time of armed conflict, as will rules of *jus cogens* that are not embodied in treaty provisions; otherwise they would not be rules of *jus cogens*. Thus the inclusion of this category of treaties does not seem essential. It is certainly the case, on the other hand, that the relatively recent rules of international criminal justice should form a new category and be included in the list, despite the absence or near absence of relevant practice; it may, moreover, be maintained that the aim of at least some of these rules is precisely to protect individuals in the event of armed conflict.

68. One State commenting on the list would like to go further.[84] To the types of agreement that it wishes to see included in the body of draft article 5 (treaties on international humanitarian law, human rights and international criminal law, Charter of the United Nations (see para. 61)), it has added a new category — treaties establishing an international organization. But it has also proposed the deletion of five categories: treaties of friendship, commerce and navigation and analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to international watercourses and related installations and facilities; treaties relating to aquifers and related installations and facilities; and treaties relating to commercial arbitration.

69. While the Special Rapporteur is agreeable to the inclusion of treaties establishing international organizations in the list, he sees no need to delete the five categories mentioned in the preceding paragraph. Their inclusion reflects practice, and the list is indicative in nature. In addition, it is evident from draft article 5 that it is the treaty either in whole or in part that continues in operation, which means that the survival of a treaty belonging to a category included in the list may be limited to only some of its provisions.

70. For the reasons elaborated on at length above, the text of draft article 5 and the attendant list might read:

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[81] Japan (A/C.6/63/SR.18, para. 38); Malaysia (A/C.6/63/SR.17, para. 10); and Poland (A/C.6/63/SR.17, para. 49).

[82] Hungary (A/C.6/63/SR.17, para. 33); and Portugal (A/CN.4/622).

[83] Switzerland (A/CN.4/622).

[84] Ibid.

“**The operation of treaties on the basis of implication from their subject matter**

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

[2. Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land boundaries or maritime boundaries and limits, remain in or enter into operation in the event of armed conflict.]”[85]

“**Annex**

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

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

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

[(c) Treaties relating to international criminal justice;]

(d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

[(e) Treaties for the protection of human rights;]

(f) Treaties relating to the protection of the environment;

(g) Treaties relating to international watercourses and related installations and facilities;

(h) Treaties relating to aquifers and related installations and facilities;

(i) Multilateral law-making treaties;

(j) Treaties establishing an international organization;

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

(l) Treaties relating to commercial arbitration;

(m) Treaties relating to diplomatic and consular relations.”[86]

[85] Text between square brackets reflects the discussion in paras. 62-64 of the present report.

[86] The categories between square brackets are those that could be incorporated into a new draft art. 5, para. 2.

G. Conclusion of treaties during armed conflict (draft article 6)

71. Draft article 6 enunciates two rules: (1) a State party to an armed conflict retains the capacity to conclude treaties; and (2) in time of armed conflict, States may conclude lawful agreements providing for the termination or suspension of treaties that would otherwise remain in operation.

72. One Member State[87] takes the view that this provision should be deleted since the Commission, in including it, has broached a non-existent problem. Capacity to conclude treaties derives from the independence of the State and its international personality. No peace treaty or armistice would ever have seen the light of day had the States parties to an armed conflict not retained this capacity. An express statement that the capacity to conclude treaties subsists sows doubt and confusion.

73. These criticisms concern paragraph 1 of draft article 6, which, as stated in paragraph (2) of the commentary to the draft article, enunciates the "basic proposition" that an armed conflict does not affect the capacity of States parties to the conflict to enter into treaties. This statement does not require any justification.[88] That said, the proposal to delete draft article 6 takes no account of the fact that paragraph 1 serves as an introduction to paragraph 2; the latter must in no event disappear since it allows the States concerned to suspend or terminate treaties or parts of treaties which would otherwise remain in operation in time of armed conflict. This latter assertion appears less obvious than the rule in paragraph 1 of draft article 6.

74. Another Member State[89] seeks clarification — if only in the commentary — that draft article 6, paragraph 2, is without prejudice to the rule embodied in draft article 9, which provides that the termination or suspension, in whole or in part, of a treaty as a consequence of an armed conflict does not exonerate the States concerned from the duty to comply with the rules of international law other than those in the treaty which is terminated or suspended. Thus two belligerent States could not agree, with a stroke of the pen, to terminate, in relations between themselves, application of the Geneva Conventions of 1949 or of the Additional Protocols of 1977. The Special Rapporteur considers it justifiable to retain draft article 6 and to specify, in the commentary, that the article is without prejudice to draft article 9.

75. The reference in draft article 6, paragraph 2, to "lawful agreements" has the same purpose: to prevent an agreement between certain States parties inter se (see 1969 Vienna Convention, art. 41, para. 1 (b)) from undermining the object and purpose of treaty or customary provisions such as those of the 1949 Conventions and 1977 Protocols. For this reason the Special Rapporteur is reluctant to delete the adjective "lawful", contrary to the suggestion made by certain States.[90] But there should, perhaps, be an explanation in the commentary of the importance of this adjective.

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[87] Poland (A/CN.4/622).

[88] However, as noted in para. (4) of the commentary to draft art. 6, eminent experts such as A. D. McNair and G. Fitzmaurice have deemed it appropriate to comment on the question.

[89] Switzerland (A/CN.4/622).

[90] Colombia (A/CN.4/622); and United Kingdom (statement dated 27 October 2008, available from the Codification Division).

76. In view of the foregoing, draft article 6 could read:

"**Conclusion of treaties during armed conflict**

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

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

H. Express provisions on the operation of treaties (draft article 7)

77. Draft article 7 provides that "where a treaty expressly so provides, it shall continue to operate in situations of armed conflict". To cover all eventualities, it would probably have been preferable to say "if or insofar as", in order to take into account the possibility of partial operation. However, if the new language proposed in paragraph 81 of the present report is approved, this change would no longer be necessary.

78. Two Member States[91] have proposed that this draft article should be deleted or modified.[92] The Special Rapporteur, like Colombia,[93] does not agree with the proposal to delete it, but considers that it is not in the right place and could be better drafted.

79. With regard to the proper place for this provision, one State[94] has suggested moving it close to draft article 5. Another State[95] thinks that draft article 7 should follow draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties), since it is simply a case of the application of draft article 4. The Special Rapporteur shares the view that draft article 7 is not in the proper place. However, he would not place it after draft article 5 or 4, but rather after draft article 3. This solution would impart a logical order to the entire set of provisions applicable to the issues to be resolved: (i) general principle of the absence of a rule entailing ipso facto termination or suspension (draft art. 3); (ii) first possible solution: the provisions of the treaty itself provide the answer (draft art. 7, which would become draft art. 3 bis); (iii) second option: review of a series of indicia in order to ascertain whether the treaty continues in operation, is suspended, in whole or in part, or is terminated (draft art. 4); (iv) third option (which may be combined with the second): on account of its subject matter, the treaty is one which, on the outbreak of armed conflict, continues in operation, in whole or in part, or, on the other hand, one which ceases to operate on the outbreak of armed conflict (draft art. 5); and, lastly, (v) fourth option: the States in question have concluded, during the armed conflict, agreements involving termination or suspension of the treaty which would otherwise continue in operation (draft art. 6, para. 2). In other words, once the rule (or rather the absence of a rule) applicable to the central issue addressed in the draft articles

[91] Chile (A/C.6/63/SR.22, para. 13); and Poland (A/CN.4/622).
[92] Chile (A/C.6/63/SR.22, para. 13).
[93] A/CN.4/622.
[94] Romania (A/C.6/63/SR.21, para. 53).
[95] Switzerland (A/CN.4/622).

has been stated in draft article 3, the possible solutions are presented in a logical order.

80. One Member State has requested that the Commission should indicate the factors for identifying treaties which, on account of their nature, are not affected by armed conflicts under any circumstances. It is difficult to give a definitive response to this request, but the Special Rapporteur believes that no treaty is untouchable. Obviously, the treaties referred to in draft article 7 continue to operate because they provide for their own survival, not because they are untouchable on account of their nature. The treaties referred to in draft article 5 and in the list annexed to the draft articles may also continue to operate because of their subject matter, but such continued operation does not necessarily apply to the treaty as a whole and, moreover, it may be subject to the application of the criteria set forth in draft article 4.

81. In the light of the foregoing remarks, draft article 7 should be retained, but it should follow draft article 3 and should be redrafted to read as follows:

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

I. Notification of termination, withdrawal or suspension (draft article 8)

82. This provision has generated heated debate. Under the current text, the notifications referred to in draft article 8, paragraph 1, are unilateral acts through which a State, on the outbreak of armed conflict, informs the other contracting State or States or the depositary, if there is one, of its intention to terminate, withdraw from or suspend the operation of the treaty. Performance of this unilateral act is not required when the State in question does not wish to terminate, withdraw from or suspend the operation of the treaty. This is a consequence of the general rule set out in draft article 3, which provides that the outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties.

83. Draft article 8, paragraph 2, specifies that the notification takes effect upon receipt by the State or States in question. The same should apply when the notification is addressed to the depositary: the notification takes effect when the State for which it is intended receives it from the depositary.

84. In accordance with draft article 8, paragraph 3, nothing in paragraphs 1 and 2 shall affect the right of the notified party to object, in accordance with the terms of the treaty or other rules of international law, to termination, withdrawal from or suspension of the operation of the treaty.

85. Draft article 8, paragraph 3, therefore allows the notified State to object to the content of the notification if it considers it to be contrary to draft articles 3 to 7. This provision is aligned with article 65, paragraphs 3 to 5, of the 1969 Vienna Convention. However, the Commission decided not to include a draft provision corresponding to article 65, paragraph 4, of the Vienna Convention, which provides that nothing in the foregoing paragraphs shall affect the rights or obligations of the parties with regard to the peaceful settlement of disputes. In other words, following the notification and any objection to its content, the dispute settlement process

would remain suspended until the end of the armed conflict. Consequently, in practice, the treaty will remain paralysed until the peaceful settlement of the dispute concerning the content of the notification. The Commission opted for this approach because it considered that

> it was unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict.[96]

In other words, a period during which one or more States are involved in an armed conflict would not be, in the Commission's opinion, the ideal time for setting in motion the existing dispute settlement mechanisms: the State or States in question will consider that they have more urgent things to do and will have no inclination to address that issue at that particular time. While such an attitude may seem understandable, it does not help advance the cause of the peaceful settlement of disputes.

86. The Commission's approach has been endorsed by some States[97] and criticized by another State,[98] which considers that there is no reason to put on hold a State's obligations with regard to the peaceful settlement of disputes in the context of the effects of armed conflicts on treaties.

87. The Special Rapporteur would not see any insurmountable difficulty in providing that settlement procedures shall remain accessible in times of armed conflict, or at least not precluding that possibility. It should also be noted that treaty obligations in this area are among those that may continue to operate pursuant to draft article 5 and item (i) of the corresponding list contained in the annex. Draft article 8 could therefore be supplemented with wording drawn from article 65, paragraph 4, of the 1969 Vienna Convention, as follows:

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

This text would become paragraph 5 of draft article 8.

88. Another State[99] would like to know the effects of notification on the rights and duties of States parties to the treaty. The response depends on the content of the notification: in the immediate term, the notification would lead to the total or partial paralysis of the treaty. If it is followed by an acknowledgement of receipt, a right to object to the content of the notification is triggered; otherwise, the State making the notification may carry out the measure which it has proposed.

89. Two Member States[100] have expressed the view that it may not always be practical to fulfil the notification requirement, a remark which also applies to acknowledgement of receipt, particularly if the other State or States or the depositary State are parties to the conflict. This difficulty cannot be denied.

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[96] Para. (1) of the commentary to draft art. 8, *Official Records of the General Assembly, Sixty-third session, Supplement No. 10* (A/63/10), p. 126.

[97] Hungary (A/C.6/63/SR.17, para. 33); and Malaysia (A/C.6/63/SR.17, para. 10).

[98] Switzerland (A/CN.4/622).

[99] Belarus (A/C.6/63/SR.16, para. 42).

[100] Greece (A/C.6/63/SR.18, para. 45); and United Kingdom (A/C.6/63/SR.16, para. 59).

However, what would be the substitute for notification and acknowledgement of receipt? Without the duty to notify, the rules set out in the draft articles would become largely theoretical. The Special Rapporteur is of the view that, where difficulties emerge, the States concerned should be pragmatic in fulfilling their duties of notification and acknowledgement of receipt; what is certain is that these acts must be performed, to the extent possible, in a manner similar to that provided in article 65 of the 1969 Vienna Convention, and that an announcement "to the general public", *urbi et orbi*, would probably not be sufficient.

90. One Member State[101] has questioned the substance of draft article 8, paragraph 3, which states that nothing shall prevent a State party from objecting, in accordance with the terms of the treaty or (other) rules of international law, to the termination, withdrawal or suspension of the operation of the treaty. This State has also requested information on the relationship between draft article 8, paragraph 3, and article 73 of the Vienna Convention. First, the Special Rapporteur believes that draft article 8, paragraph 3, is indispensable; if it disappeared, the issue of the effects of armed conflicts would be dominated by the State making the notification. As for the relationship between draft article 8, paragraph 3, and article 73 of the Vienna Convention, it should simply be noted that the latter article states that the Convention does not prejudge the question of the effects of the "outbreak of hostilities between States" on treaties, while the draft articles are designed to address that question, following the path set out in the Vienna Convention as far as possible.

91. Another issue is that no time limit has been set for objecting to a notification, contrary to article 65, paragraph 2, of the 1969 Vienna Convention, which sets a time limit of three months. The Commission took the view that it was difficult to provide for time limits in the context of armed conflicts. However, it may have to make such provision if the text proposed in paragraph 87 of the present report is accepted. Nonetheless, given that the context is one of armed conflict, the time limit should probably be longer than three months.

92. One interesting suggestion[102] was that the scope of draft article 8 should be extended to States that are not parties to the conflict but are parties to the treaty. Technically, this would be an easy matter: it would suffice to replace the current text of draft article 8, paragraph 1, with the following: "A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, whether or not it is a party to the conflict, shall notify … of that intention". Since the State that made this suggestion has said that the Commission "should … consider" this possibility, the Special Rapporteur is submitting the observation in question to the members of the Commission for their consideration.

93. Another comment[103] was that the title of draft article 8 is imprecise: the notification that is the subject of the draft article is not of termination, withdrawal or suspension, but of the intention to terminate, withdraw from or suspend the operation of a treaty. According to the State that made this comment, it is clear that notification in itself cannot terminate or suspend the treaty obligations in question. It is the absence of objections within a given time limit (see para. 88 above) that will trigger this consequence. If an objection has been raised, the issue will remain

[101] Greece (A/C.6/63/SR.18, para. 45).
[102] China (A/C.6/63/SR.17, para. 55).
[103] Poland (A/CN.4/622).

frozen until a diplomatic or legal settlement is reached. In order to clarify the situation, a fourth paragraph could be inserted into draft article 8; it would be aligned with article 65, paragraph 3, of the 1969 Vienna Convention and would provide as follows:

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

This text would be preceded by the current paragraph 3 of draft article 8.

94. Draft article 8 has generated a great deal of interest and divided opinion among States, which have formulated other proposals in that regard. For example, one Member State[104] has requested that the right to make a notification within the meaning of draft article 8 should be limited to treaties other than those the subject matter of which, on the basis of draft article 5, involves the implication that they continue in operation. However, as has been noted during the consideration of draft article 5, neither it nor the corresponding list contained in the annex to the draft articles establishes the absolute certainty that would make draft article 8 as restrictive as desired.

95. In conclusion, it is worth noting the wish expressed by one Member State[105] to add, at the end of draft article 8, paragraph 2, wording along the lines of "unless the notice states otherwise" (unless it provides for a "subsequent" date).

96. The text of draft article 8 could therefore be improved and clarified to read as follows:

> "**Notification of intention to terminate, withdraw from or suspend the operation of a treaty**
>
> 1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.
>
> 2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.
>
> 3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty. Unless the treaty provides otherwise, the time limit for raising an objection shall be … after receipt of the notification.
>
> 4. If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
>
> 5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as, despite the

[104] Iran (Islamic Republic of) (A/C.6/63/SR.18, para. 57).
[105] United States (A/CN.4/622).

incidence of an armed conflict, they have remained applicable, pursuant to draft articles 4 to 7."

J. Obligations imposed by international law independently of a treaty (draft article 9)

97. Draft article 9, which has its roots in article 43 of the 1969 Vienna Convention, provides that 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. This text has not given rise to any comments. Paragraph (2) of the commentary to this draft article describes the principle set out in the draft article as "trite", which has led one Member State[106] to respond that, on the contrary, it is an important principle. The Special Rapporteur proposes to retain the draft article as it is and to replace the words "seems trite" in paragraph (2) of the commentary with the words "seems self-evident".

K. Separability of treaty provisions (draft article 10)

98. Draft article 10, as adopted by the Commission on first reading, provides as follows:

"**Separability of treaty provisions**

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

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

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

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

99. It is stated in the commentary that this draft article reproduces verbatim article 44 of the 1969 Vienna Convention, except for paragraphs 4 and 5 of that article, which are of no relevance to the draft articles. Draft article 10 is of some importance in the present context because the partial survival or suspension of a treaty cannot be envisaged in the absence of separability.[107] Since the draft article is clearly modelled on article 44 of the Vienna Convention, the Special Rapporteur sees no

[106] Switzerland (A/CN.4/622).

[107] Greece (A/C.6/63/SR.18, para. 43).

need to examine its structure further, contrary to the suggestion made by one group of States.[108]

100. One Member State[109] has queried the meaning of the word "unjust", used in draft article 10, subparagraph (c). An answer can be obtained by referring to the deliberations of the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969. It was not the Commission that originated article 44, paragraph 3 (c), of the Vienna Convention and hence draft article 10, subparagraph 3 (c). It was the United States of America that proposed this text at the Conference, fearing that a State might insist on the termination or invalidity of a treaty by giving an unduly narrow interpretation to the word "separable" in article 44, paragraph 3 (a), and the words "essential basis" in article 44, paragraph 3 (b). As Mr. Kearney, the United States representative, 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.[110]

101. This explanation highlights the purpose of the United States proposal, which was to limit the separability of treaty provisions in order to protect the other contracting party or parties. However, the proposal is silent on the meaning of the word "unjust". The Special Rapporteur believes, nonetheless, that article 44, paragraph 3 (c), of the Vienna Convention is a sort of 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 paragraphs 3 (a) (separability with regard to application) and 3 (b) (which provides that 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).

102. Under these circumstances, the Special Rapporteur sees no need to modify the text of draft article 10.

L. Loss of the right to terminate, withdraw from or suspend the operation of a treaty (draft article 11)

103. According to the Commission's commentary, draft article 11 is based on the equivalent provision in the Vienna Convention, namely article 45. It provides that a State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if it has "expressly agreed" that the treaty

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[108] Nordic countries (A/C.6/63/SR.16, para. 32).

[109] Colombia (A/CN.4/622).

[110] 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* (United Nations publication, Sales No. E.68.V.7), 41st meeting of the Committee of the Whole, 27 April 1968, para. 17. For the United States proposal, 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* (United Nations publication, Sales No. E.70.V.5), para. 369.

remains in force or continues in operation (subpara. (a)) or if it can "by reason of its conduct" be considered as having acquiesced in the maintenance in force of the treaty. The replication of this rule, which has been endorsed explicitly by some States,[111] means essentially that a minimum of good faith must remain in times of armed conflict.

104. One Member State[112] considers that this rule is "too rigid" and that a State cannot always anticipate the course of an armed conflict and its potential effects on the State's capacity to continue to fulfil its treaty obligations. In addition, the same State has stated its understanding that the circumstances resulting in a State's loss of the right to terminate, withdraw from or suspend the operation of a treaty arise after the armed conflict has produced its effect on the treaty.[113] The arguments thus summarized may seem contradictory. The first argument seems to be that the course of armed conflicts is unpredictable and that the States concerned should be able to reconsider their position during the conflict; if this argument were generally accepted, then draft article 11 would become redundant. The second argument, by contrast, seems to be that article 45 of the Vienna Convention, as replicated in the Commission's draft article 11, means that the situation can be assessed only after the armed conflict has "produced its effect on the treaty" and that draft article 11 may be retained if this point is clarified.

105. In the Special Rapporteur's opinion, the commentary to draft article 11 could specify that the draft article covers positions adopted "after the armed conflict has produced its effect on the treaty", although it would be preferable to replace the words "its effect" with the word "effects", so as not to dilute the normative content of the provision in question too much. A simpler solution would be to suggest, in the commentary, that States refrain from the actions referred to in the draft article until the effects of the conflict on the treaty have become partially clear. The Special Rapporteur prefers the latter solution.

106. According to the same State,[114] the Commission should examine the relationship between draft articles 11 and 17. Draft article 17 provides that the draft articles (and hence draft article 11) are without prejudice to termination, withdrawal or suspension on other grounds — agreement of the parties, material breach, impossibility of performance, or fundamental change of circumstances — although this list is not exhaustive. In the Special Rapporteur's opinion, this means that a State may very well decide to invoke — even if it has lost the right to termination, withdrawal or suspension under draft article 11 — other grounds set out in the 1969 Vienna Convention. This conclusion is bolstered by the title of draft article 17, which uses the words "other cases", and by the explanation contained in paragraph (1) of the commentary to that draft article ("the reference to 'Other' in the title is intended to indicate that these grounds are additional to those in the present draft articles"). The question, however, seems largely theoretical, particularly in the scenario envisaged in draft article 11, subparagraph (b): it seems unlikely that it can be deduced from the mere "conduct" of the State concerned that its acquiescence in the maintenance of the treaty was based on the incidence of an armed conflict rather than on one of the items listed in draft article 17.

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[111] Colombia (A/CN.4/622).
[112] China (A/C.6/63/SR.17, para. 56).
[113] China (A/CN.4/622).
[114] China (A/C.6/63/SR.17, para. 56).

107. Using rather strong language — referring for instance to sloppy drafting — another State[115] has claimed to have identified a fundamental contradiction: while the title of draft article 11 refers to the right to terminate, withdraw from or suspend the operation of a treaty, no such right is mentioned anywhere else. That, according to the State in question, is a fundamental flaw in the draft articles.

108. The Special Rapporteur believes that that is an overly formalistic point of view. The provisions preceding draft article 11 indicate what States have a right to do and under what conditions it is possible to maintain, terminate, withdraw from or suspend the operation of a treaty. Draft article 8 sets out what States must do and when they may do it. If these provisions do not amount to the definition of a right and the limits on that right, then the Special Rapporteur does not see how they can be characterized. However, if the Commission wished to take into account this criticism, it would suffice to replace, in the title of the draft article, the words "of the right" with "of the option".

109. Draft article 11, with a slight drafting change, would read as follows:

> "**Loss of the right [of the option] to terminate, withdraw from or suspend the operation of a treaty**
>
> A State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if:
>
> (a) It has expressly agreed that the treaty remains in force or continues in operation; or
>
> (b) It can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force."

M. Resumption of suspended treaties (draft article 12)

110. The resumption of the operation of a treaty suspended as a consequence of an armed conflict is determined in accordance with the indicia referred to in draft article 4: articles 31 and 32 of the 1969 Vienna Convention, the nature and extent of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty (see para. (1) of the commentary). The question of when a treaty is resumed should be resolved on a case-by-case basis (para. (2) of the commentary). Prima facie, this provision seems obscure and requires clarification.

111. One important question[116] is that of the relationship between draft articles 12 and 18. Draft article 18 provides that the draft articles are without prejudice to the right of States parties to a treaty and to an armed conflict to regulate, subsequent to the conflict, on the basis of a new agreement, the revival of treaties terminated or suspended as a result of the conflict. On this point, it should be noted that draft articles 12 and 18 are indeed closely linked and should be placed close to each other. For the sake of clarity, draft article 18 could first become draft article 12 because, in a sense, it contains the general rule: that, whether a treaty has been terminated or suspended in whole or in part, the States parties may, if they so agree, still conclude an agreement to revive or render operative even agreements or parts

[115] Poland (A/CN.4/622).

[116] Raised by Colombia, Poland and Switzerland (A/CN.4/622).

thereof that have ceased to exist. This is a consequence of the freedom to conclude treaties. It is also obvious that these are not unilateral decisions.

112. The scope of draft article 12 is narrower: it applies only to treaties that have been suspended in connection with the indicia referred to in draft article 4. Since the treaty in such a case has been suspended at the initiative of one State party — a party to the armed conflict — on the basis of the prescribed indicia, it would appear that, when the armed conflict is over, these indicia cease to apply. As a result, the treaty may or should become operative once again, unless other causes of termination, withdrawal or suspension have emerged in the meantime (see draft art. 17), or unless the parties have agreed otherwise. Resumption may be called for by one or more States parties, because it is no longer a matter of an agreement between States, but an initiative that may be taken unilaterally and whose result will depend on compliance with the conditions for resumption set forth in draft article 4 — an issue which will be resolved, if necessary, through the available dispute settlement procedures.

113. The foregoing is a brief analysis of the relationship between draft articles 12 and 18, the question of who may take the initiative to resume the operation of a treaty in accordance with draft article 12 and under what conditions,[117] and the question of how the scope of the two provisions should be defined.[118] The analysis suggests that draft article 18 should be incorporated into draft article 12[119] and that the latter should no longer take the form of a "without prejudice" clause.

114. The new draft article 12 (into which draft article 18 would be subsumed) could read as follows:

> "**Revival or resumption of treaty relations subsequent to an armed conflict**
>
> 1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a result of the armed conflict.
>
> 2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in draft article 4."

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[117] United Kingdom (statement dated 27 October 2008, available from the Codification Division).
[118] Colombia and Switzerland (A/CN.4/622).
[119] Colombia (A/CN.4/622).