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EFFECTS OF ARMED CONFLICTS ON TREATIES

Report of the Working Group

1. Introduction

1. The International Law Commission, at its 2964th meeting on 16 May 2008, re-established a Working Group, chaired by Mr. Lucius Caflisch,¹ to provide guidance regarding several remaining issues which had been identified in the Commission's consideration of the Special Rapporteur's third report during the fifty-ninth session of the Commission in 2007.²
2. The Working Group held two meetings on 22 and 26 May 2008, respectively.

¹ The composition of the Working Group was announced at the 2965th meeting, on 21 May 2008, as being as follows: L. Caflisch (Chairman), I. Brownlie (Special Rapporteur), P. Comissário Afonso, C.J.R. Dugard, S. Fomba, M.G. Jacobsson, D.M. McRae, B.H. Niehaus, B. Ojo, A.R. Perera, E. Petric, G. Saboia, S. Vasciannie, M. Vázquez-Bermúdez, N. Wisnumurti, H. Xue and P. Escameia (ex officio).

² For the report of the Working Group adopted at the fifty-ninth session of the Commission, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, paras. 323-324.

3. The Working Group considered the following four issues: (1) the question of the applicability, in relation to draft article 8, of the procedure in article 65 of the Vienna Convention on the Law of Treaties for the termination or suspension of treaties; (2) the question of the applicability, also in relation to draft article 8, of articles 42 to 45 of the Vienna Convention on the Law of Treaties, and, in particular, article 44 on the separability of treaty provisions; (3) draft article 9, on the resumption of suspended treaties, as proposed by the Special Rapporteur in his third report;³ and (4) draft articles 12, 13 and 14, as proposed by the Special Rapporteur in his third report,⁴ relating to third States as neutrals, the termination or suspension of treaties by operation of the Vienna Convention, and the competence of parties to negotiate a specific agreement regulating the maintenance in force or revival of treaties, respectively. The Working Group had before it the Fourth Report of the Special Rapporteur on the Procedure for suspension and termination,⁵ as well as a Note prepared by the Chairperson of the Working Group on the question of the applicability of articles 42 to 45 of the Vienna Convention on the Law of Treaties.⁶

4. The Working Group concluded its consideration of all four remaining issues, and decided to formulate, for the consideration of the plenary, specific recommendations on each issue, together with some general recommendations.

2. Recommendations of the Working Group

5. The Working Group recommends that:

(1) The following draft articles be referred to the Drafting Committee in lieu of draft article 8, as proposed by the Special Rapporteur:

³ A/CN.4/578.

⁴ Ibid.

⁵ A/CN.4/589 and Corr.1.

⁶ A/CN.4/L.721.

“Article 8

Notification of termination, withdrawal or suspension

1. A State engaged in armed conflict wishing 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.
2. The notification takes effect upon receipt by the other State party or State parties.
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 such termination, withdrawal or suspension of the operation of the treaty.”

“Article 8 *bis*

**Obligations imposed by international law independently
of a treaty**

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a result of the application of the present draft articles or of the provisions of the treaty, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.”

“Article 8 *ter*

Separability of treaty provisions

The right of a party, provided for in a treaty, to terminate, withdraw from or suspend the operation of the treaty shall, unless the treaty otherwise provides or the parties otherwise agree, be exercised only with respect to the whole treaty except where:

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

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

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

“Article 8 *quater*

**Loss of the right 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 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.”

(2) The following reformulation for draft article 9 be referred to the Drafting Committee:

“Article 9

The resumption of suspended treaties

The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the criteria established in draft article 4.”

(3) Draft articles 12 to 13, as proposed by the Special Rapporteur, should be referred to the Drafting Committee with the following guidance:

(a) The title of draft article 13 should read “Other cases of termination or suspension”;

(b) The words “inter alia” should be inserted in the chapeau of draft article 13 after “consequence of”;

- (4) The following formulation for draft article 14 be referred to the Drafting Committee:

“Article 14

**The revival of treaty relations subsequent
to an armed conflict**

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate, subsequent to the conflict, the revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.”

- (5) Its recommendation, made at the fifty-ninth session of the Commission,⁷ that “[i]n principle, the consideration of treaties involving international intergovernmental organizations should be left in abeyance until a later stage of the Commission’s work on the overall topic, at which point issues of the definition of international organizations and which types of treaties (namely whether treaties between States and international organizations or also those between international organizations inter se) would be considered”, continued to apply in light of comments and observations subsequently received from international organizations.⁸

- (6) The Drafting Committee should consider the inclusion of reference to withdrawal from certain treaties as one of the possible options available to parties to an armed conflict, where applicable.

⁷ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 324, section (1) (a) (ii).

⁸ A/CN.4/592 and Add.1.