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Effects of armed conflicts on treaties

Comments and information received from Governments

Addendum

I. Introduction

An additional two written replies, containing comments and observations on the draft articles on the effects of armed conflicts on treaties adopted on first reading by the International Law Commission at its sixtieth session (2008), were received from Austria (29 March 2010) and the Islamic Republic of Iran (2 March 2010).

II. Comments and information received from Governments

A. General comments

Austria

[Original: English]

The draft articles are based on the general view that treaties could be suspended or terminated only insofar as they are affected by the armed conflict. This position could create problems with regard to multilateral treaties, as the effect could be different depending on whether the multilateral treaty is of a synallagmatic nature or an integral treaty under which the obligations are owed *erga omnes partes*. It would be useful if the Commission could also address this question and its consequences for the topic under discussion.

Iran (Islamic Republic of)

[Original: English]

The stability, integrity and continuity of international treaties is a recognized principle in international law, and any act inconsistent with the purposes and



principles of the Charter of the United Nations should not affect the application or operation of such treaties. Iran reiterates its position that the mandate of the International Law Commission in considering the effects of armed conflicts on treaties is to supplement, and not to change, the existing international law of treaties, in particular the stipulations of the Vienna Convention on the Law of Treaties of 1969, which, to a large extent, reflects customary international law.

B. Specific comments on the draft articles

1. Draft article 1

Scope

Austria

[Original: English]

The question arises whether the equal application to treaty relations among the States parties engaged in the conflict and those between a State party engaged in the conflict and a State party not engaged in the conflict (third State) is justified. It can be asked why the third State should have to renounce certain rights only because the other State party is engaged in an armed conflict, in particular given the general conviction that, in principle, the law of peace continues to govern relations between States engaged in a conflict and third States. It is, for instance, conceivable that a State engaged in an armed conflict suspends bilateral investment treaties with third States to avoid having to pay compensation in the case of damages caused by military operations. In such a situation, it could be asked why a third State should no longer enjoy the protection of its investments only because of the outbreak of an armed conflict. If the State engaged in the conflict suspends the operation of such a treaty, the third State would also no longer be obliged to protect investments of the other State — this would establish a situation of equality. But it seems that a right to suspend such treaties would create significant possibilities for misuse. Another legal solution would be to solve problems of injuries to foreign property through either the investment treaty itself, provided it contains regulations concerning this situation, or the law of State responsibility. The whole idea of the legal regime established by these draft articles is to conceive of the situation addressed by it as an exceptional one in which treaty relations should be maintained to the utmost extent. Preserving treaty relations with the third State would be in line with this conception. Moreover, the commentary on draft article 4 confirms that the effect of an armed conflict on a treaty between States engaged in the conflict is not identical to that on a treaty between a State engaged in the conflict and a third State. Draft article 4, paragraph (b), attempts to cope with this problem by adopting a flexible approach, according to which the extent of affectedness determines the right of suspension or termination so that treaties with third States would to a large extent not be addressed. It is suggested that the Commission reconsider this problem, including the possibility of exempting the treaties between a State engaged in an armed conflict and a State not engaged in that conflict from the scope of applicability of these draft articles. However, should the view prevail that the draft articles should apply also to treaties between a State engaged in an armed conflict and a third State, it would be justified to also endow the third State with the right to suspend, for example, a treaty that is in conflict with its duties under the laws of neutrality.

2. Draft article 2

Use of terms

Austria

[Original: English]

1. The draft articles should relate only to international armed conflicts, despite the increased blurring of the distinction between international and non-international armed conflicts. Present international humanitarian law to a large extent is still based on such a distinction. The other State party to a treaty may possibly not be aware of the existence of a non-international armed conflict in a State, even if it amounts to a situation addressed by Protocol II to the Geneva Conventions of 1949. The inclusion of non-international armed conflicts would thus be detrimental to the stability and predictability of international relations, which are two main objectives of the international legal order. Since no other State is involved in a non-international armed conflict, it is unclear to which other States parties the effects of the draft articles would then apply. Rather, these situations should be governed by the provisions of the Vienna Convention on the Law of Treaties. Articles 61 and 62 of the Convention seem to offer a legal device sufficient to cope with such situations. Since article 73 of that Convention excludes only questions arising from the outbreak of hostilities between States from the scope of its applicability, non-international armed conflicts are within its purview. To establish a special regime for such situations could prompt conflict with the Convention, as it would add an additional ground for unilateral suspension to the grounds established under the regime of the Convention, notwithstanding the exhaustive nature of the grounds for such suspension or termination in the Convention.

2. Although the present definition of armed conflicts does not explicitly mention a situation of occupation, Austria is nevertheless of the view that this situation is included in this definition.

3. A definition of third State could be included, since this term has different meanings in international law. The meaning in this context obviously refers to a State that is not engaged in the relevant armed conflict.

3. Draft article 3

Non-automatic termination or suspension

Austria

[Original: English]

The formulation of draft article 3 depends on whether or not treaties concluded by a party to an armed conflict with a third State will be included.

Iran (Islamic Republic of)

[Original: English]

1. The Islamic Republic of Iran fully supports the presumption of legal stability and continuity of treaty relations and deems it to be central to the topic in question. The use of two different terms, “non-automatic” and “necessarily”, respectively, in the title and in the chapeau of draft article 3 could compromise the aforementioned

principle. To avoid any confusion as such, draft article 3 should be redrafted affirmatively.

2. Iran would have preferred that a specific reference had been made in draft article 3 to the category of treaties establishing a boundary or a territorial regime. Such reference would have made it clear that treaties establishing boundaries and territorial regimes are exceptions. By doing so, the Commission would avoid the risk of sending a wrong message to any State which, for one reason or another, has ambitions to effect changes in the demarcation of its international borders. It is imperative to note the critical function of treaties establishing boundaries in the maintenance of international peace and security (see also the discussion under draft article 5).

4. Draft article 4
Indicia of susceptibility to termination, withdrawal or suspension of treaties

Austria

[Original: English]

According to the structure of the draft articles, a State engaged in a conflict will unilaterally decide whether these conditions have been met. However, since the vagueness of the conditions gives that State a wide discretion, such conditions would have to be elaborated.

Iran (Islamic Republic of)

[Original: English]

The inclusion of the indicium “the nature and extent of the armed conflict” may give the wrong impression that the more intensive and expanded an armed conflict becomes, the more probable it would be that treaty relations between the belligerent States may be terminated or suspended. Nor could “the effect of the armed conflict on the treaty” be a viable determining factor. These indicia are eventually left undefined, and the use of similar terms and phrases in draft article 2 (b) without providing clear definitions has produced a circular ambiguity as to the exact meaning of the terms. Moreover, Iran does not deem it appropriate to allow for “withdrawal” in this draft article, since it contradicts the content of draft article 3.

5. Draft article 5 and annex
Operation of treaties on the basis of implication from their subject matter

Iran (Islamic Republic of)

[Original: English]

1. It would be very much desirable if the Commission would use this opportunity to highlight the extraordinary status of the category of treaties establishing a boundary or a territorial regime. It is true that “treaties establishing or modifying land and maritime boundaries” — to which should be added those treaties establishing or modifying river boundaries — figure prominently in the list of categories of treaties referred to in draft article 5. Nevertheless, a mere and simple reference to such treaties in the annex would hardly obligate the parties to an armed conflict, since it is an annexed indicative list whose legal status remains to be

determined. Iran would have preferred that a specific reference be made to this category of treaty in draft article 3.

2. A treaty which establishes an objective situation, such as a boundary or a territorial regime, belongs, by its nature, to the category of treaties creating permanent regime and status. Such treaties create *erga omnes* obligations to which not only the States parties to the treaty, but also the international community as a whole, including all States and even non-state actors, are bound. As such, even a fundamental change of circumstances, such as armed conflict, cannot be invoked as a ground for terminating or withdrawing from these treaties.

3. Special treatment for treaties establishing a boundary or a territorial regime has been expressly admitted in the Vienna Convention on the Law of Treaties, of 23 May 1969, and the Vienna Convention on Succession of States in respect of Treaties, of 23 August 1978, in which a clear distinction is made between treaties establishing boundaries and other treaties. For example, article 62 of the Vienna Convention on the Law of Treaties, relating to a fundamental change of circumstances, makes it clear that such a change would not affect this category of treaties and, thus, cannot be invoked as a ground for terminating such treaties. Similarly, article 11 of the Vienna Convention on Succession of States in respect of Treaties, entitled “Boundary regimes”, specifies that “[a] succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary”. In both instances, the permanence of boundaries and their inviolability constitute the main premise of those provisions.

4. Moreover, the principle of stability and permanence of territorial regimes established by treaty is critical for the provision of humanitarian assistance and protection of civilians during an armed conflict. Depending on the place of residence of the population, living in occupied territories or in a territory under the control of a party to the conflict other than occupied territory, international humanitarian law has created two distinct bodies of law in order to ensure the free passage of humanitarian consignments and supplies (see article 23 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and articles 69 and 70 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts). It is obvious that assuming any role for armed conflicts in modifying or suspending the operation of treaties establishing a border would seriously undermine the provision of humanitarian assistance and the protection of civilians.

5. International jurisprudence also firmly supports the principle of permanence of territorial rules and regimes established by treaty. For instance, the International Court of Justice recently admitted that “it is a principle of international law that a territorial regime established by treaty ‘achieves a permanence which the treaty itself does not necessarily enjoy’ and the continued existence of that regime is not dependent upon the continuing life of the treaty under which the regime is agreed” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections*, *I.C.J. Reports 2007*, p. 861, paragraph 89). This principled observation was reiterated by the International Court of Justice in one of its most recently issued judgments, in which it held that “[t]he territorial rules laid down in treaties of this type are, by nature, particularly marked in their permanence ...” (*Case Concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*,

Judgment of 13 July 2009, paragraph 68; see also *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, I.C.J. Reports 1994, p. 35, and p. 37, paragraph 73).

6. Draft article 6
Conclusion of treaties during armed conflict

Austria

[Original: English]

Austria concurs with the essence of this provision. Paragraph 1, however, raises the question of the purpose of the reference to the Vienna Convention on the Law of Treaties and whether a State that is not party to this convention would be covered by this provision. Similarly, the meaning of “lawful” in paragraph 2 could be queried. That term could be deleted, in particular in view of the possibility that such an agreement could be unlawful on grounds different from those stated here.

7. Draft article 8
Notification of termination, withdrawal or suspension

Austria

[Original: English]

1. Austria emphasizes the necessity of establishing a procedure that avoids the lengthiness of that under the Vienna Convention on the Law of Treaties. Although draft article 8 addresses this issue, it remains silent on the consequences of an objection under paragraph 3. Does that mean that, in the case of an objection, the procedure under the Vienna Convention should apply, or does it mean that the usual dispute settlement procedures become applicable? The commentary does not address this question.

2. As mentioned under draft article 1, the third State should also have the right to suspend or terminate a treaty that is in conflict with its obligations under the laws of neutrality.

Iran (Islamic Republic of)

[Original: English]

Draft article 8 should distinguish between different categories of treaties. This seems to apply, unless stated otherwise, to all treaties, including treaties establishing boundaries. It can be (mis)interpreted as a kind of invitation to “[a] State engaged in armed conflict intending to terminate or withdraw from a treaty” to declare its intention to open hostilities. There is an inconsistency between this provision and the annexed indicative list. It would be more appropriate and legally sound if the initial right of the party to an armed conflict, namely notification, were limited to treaties other than those the subject matter of which involves the implication that they continue in operation during an armed conflict.

**8. Draft article 10
Separability of treaty provisions**

Austria

[Original: English]

The present formulation does not clarify whether termination, withdrawal or suspension should have effect only with regard to the clauses in subparagraphs (a) to (c). Although the effect of this draft article is to distinguish it from that of the corresponding article 44 of the Vienna Convention, a clarification is nevertheless necessary in the text of the draft article itself.

**9. Draft article 12
Resumption of suspended treaties**

Austria

[Original: English]

Austria fully concurs with the idea underlying this draft provision. However, the text does not indicate whether the determination of resumption should be taken in agreement (as could be derived from paragraph 2 of the commentary) or could be determined unilaterally.

**10. Draft article 13
Effect of the exercise of the right to individual or collective self-defence
on a treaty**

Austria

[Original: English]

1. Although there are no doubts that the victim of an armed attack, in the sense of article 51 of the Charter of the United Nations, should be entitled to suspend a treaty incompatible with the exercise of the right of self-defence, draft article 13 raises certain questions. It could be interpreted so as to allow the right of suspension in relation to any treaty, regardless of the restrictions set out in draft article 4. Since this is not envisaged, a clear indication of the applicability of draft article 4 (for example, “subject to article 4 ...”) or of any other restriction would be helpful or even required.

2. Another question is whether the conditions concerning the separability of a treaty under draft article 10 are also applicable in the present context. It could also be asked why draft article 13 refers only to suspension and not to termination and withdrawal, as is foreseen in draft article 4. The commentary is silent in all these respects.

**11. Draft article 14
Decisions of the Security Council**

Iran (Islamic Republic of)

[Original: English]

1. The Islamic Republic of Iran believes that the “without prejudice” clause contained in draft article 14 is not only superfluous, considering articles 25 and 103

of the Charter of the United Nations, but also relates to subject matter that falls outside the mandate of the International Law Commission and, therefore, should be deleted. In its practice vis-à-vis international armed conflicts, the Security Council has always emphasized its respect for treaty obligations and the territorial integrity of States involved in armed conflicts. The practice of other organs of the United Nations, including the General Assembly, also indicates that the parties to an armed conflict are required to fully respect their treaty obligations, in particular those treaties determining internationally recognized borders.

2. Moreover, the Islamic Republic of Iran does not agree with the interpretation of article 103 of the United Nations Charter as rendered in paragraph 3 of the commentary to draft article 14. Generally speaking, this article is merely intended to resolve conflicts between the provisions of the Charter itself on the one hand, and obligations arising from other international treaties on the other. However, the authority of the Security Council is subject to certain limitations; as the International Tribunal for the Former Yugoslavia held in the *Tadić* case: “In any case, neither the text nor the spirit of the Charter conceives the Security Council as *legibus solutus*” (unbound by law). Member States have undertaken to comply with the decisions of the Security Council only if they are in accordance with the Charter of the United Nations. As the International Court of Justice held in its *1971 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, the Council is required to respect all international normative rules to which Member States are bound. The Security Council is entrusted with the primary responsibility for maintenance of international peace and security, but it cannot exceed its authority (*ultra vires*) or require breach of the principles and rules arising from treaty relations, in particular *pacta sunt servanda* and respect for international boundaries established and recognized by a treaty. The Security Council shall, therefore, act in accordance with the purposes and principles of the Charter of the United Nations, in particular respect for the obligations arising from treaties, while discharging its primary responsibility regarding the maintenance of international peace and security.

12. Draft article 15
Prohibition of benefit to an aggressor State
Iran (Islamic Republic of)

[Original: English]

The Islamic Republic of Iran favours the inclusion of draft article 15, and submits that a clear distinction should be made between situations of unlawful use of force by a State and those of self-defence, in accordance with the Charter of the United Nations. It has always been Iran’s principled position that the State resorting to unlawful use of force must not be allowed to benefit from such unlawful act in any manner. It is a general principle of international law that no State may benefit from its own wrongful act.