



International Law Commission
Sixty-third session

Geneva, 26 April–3 June and 4 July–12 August 2011

**Draft report of the International Law Commission on the
work of its sixty-third session**
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**Chapter VI
Effects of armed conflicts on treaties**

Contents

	<i>Paragraphs</i>	<i>Page</i>
A. Introduction.....	1–5	
B. Consideration of the topic at present session	6–8	
C. Recommendation of the Commission	9	
D. Tribute to the Special Rapporteur	10–11	
E. Text of the draft articles on the effects of armed conflicts on treaties	12	
1. Text of the draft articles.....	12	

A. Introduction

1. During its fifty-sixth session (2004), the Commission decided¹ to include the topic “Effects of armed conflicts on treaties” in its programme of work, and to appoint Sir Ian Brownlie as Special Rapporteur for the topic.

2. At its fifty-seventh (2005) to sixtieth (2008) sessions, the Commission had before it the first to fourth reports of the Special Rapporteur (A/CN.4/552, A/CN.4/570 and Corr.1, A/CN.4/578 and Corr.1 and A/CN.4/589 and Corr.1, respectively), as well as a memorandum prepared by the Secretariat entitled “The effects of armed conflict on treaties: an examination of practice and doctrine” (A/CN.4/550 and Corr.1). The Commission further proceeded on the basis of the recommendations of a Working Group,² chaired by Mr. Lucius Caflisch, which was established in 2007 and 2008 to provide further guidance regarding several issues which had been identified in the Commission’s consideration of the Special Rapporteur’s third report.

3. At its sixtieth session (2008), the Commission adopted on first reading a set of 18 draft articles, and an annex, on the effects of armed conflicts on treaties, together with commentaries. At the same meeting, the Commission decided, in accordance with draft articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

4. At its sixty-first session (2009), the Commission appointed Mr. Lucius Caflisch as Special Rapporteur for the topic, following the resignation of Sir Ian Brownlie.³

5. At its sixty-second session (2010), the Commission had before it the first report of the Special Rapporteur (A/CN.4/627 and Add.1), containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments (A/CN.4/622 and Add.1). The Commission considered the Special Rapporteur’s first report and subsequently instructed the Drafting Committee to commence the second reading of the draft articles on the basis of the proposals of the Special Rapporteur for draft articles 1 to 17, taking into account the comments of Governments and the debate in the Plenary on the Special Rapporteur’s report.

B. Consideration of the topic at the present session

6. At the present session, the Commission considered the report of the Drafting Committee (A/CN.4/L.777 and Corr. 1 (French only))⁴ at its 3089th meeting, held on 17

¹ At its 2830th meeting, on 6 August 2004, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, para. 364. The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda. The Commission had, at its fifty-second session (2000), identified the topic “Effects of armed conflicts on treaties” for inclusion in its long-term programme of work. *Ibid.*, *Fifty-fifth Session, Supplement No. 10 (A/55/10)*, para. 729. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year’s report of the Commission. *Ibid.*, annex. In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic’s inclusion.

² *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 324, and *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10)*, paras. 58–60.

³ *Ibid.*, *Sixty-fourth Session, Supplement No. 10 (A/64/10)*, para. 229.

May 2011, and adopted the entire set of draft articles on the effects of armed conflicts on treaties, on second reading, at the same meeting.

7. At its ... to ... meetings, held on ... 2011, the Commission adopted the commentaries to the aforementioned draft articles.

8. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

9. At its ... meeting, held on ... 2011,⁵ the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly

D. Tribute to the Special Rapporteur

10. At its ... meeting, held on ... 2011, the Commission, after adopting the draft articles on the effects of armed conflicts on treaties, adopted the following resolution by acclamation:

“The International Law Commission,

Having adopted the draft articles on the effects of armed conflicts on treaties,

Expresses to the Special Rapporteur, Mr. Lucius Caflisch, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the effects of armed conflicts on treaties.”

11. The Commission also expressed its deep appreciation to the previous Special Rapporteur, Sir Ian Brownlie, for his valuable contribution to the work on the topic.

E. Text of the draft articles on the effects of armed conflicts on treaties

1. Text of the draft articles

12. The text of the draft articles adopted by the Commission at its sixty-third session is reproduced below.

Effects of armed conflicts on treaties

Part One

Scope and definitions

⁴ At its 3089th meeting, held on 17 May 2011, the Commission decided to request that the Secretariat issue, as part of the Official Records of the Commission, a Note prepared by the Special Rapporteur for consideration by the Drafting Committee in connection with the annex to the draft articles on the effects of armed conflicts. See A/CN.4/645.

⁵ The Commission had before it a Note by the Special Rapporteur on the recommendation to be made to the General Assembly about the draft articles on the effects of armed conflicts on treaties, A/CN.4/664.

Article 1
Scope

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

Article 2
Definitions

For the purposes of the present draft articles:

(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organizations are also parties;

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

Part Two
Principles

Chapter I
Operation of treaties in the event of armed conflicts

Article 3
General principle

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

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

Article 4
Provisions on the operation of treaties

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

Article 5
Application of rules on treaty interpretation

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

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

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

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

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

Article 7

Continued operation of treaties resulting from their subject-matter

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

Chapter II

Other provisions relevant to the operation of treaties

Article 8

Conclusion of treaties during armed conflict

1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.
2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.

Article 9

Notification of intention to terminate or withdraw from a treaty or to suspend its operation

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

Article 10

Obligations imposed by international law independently of a treaty

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

Article 11
Separability of treaty provisions

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

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

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

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

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

Article 13
Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in draft article 6.

Part Three
Miscellaneous

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

A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right.

Article 15
Prohibition of benefit to an aggressor State

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

Article 16
Decisions of the Security Council

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

Article 17
Rights and duties arising from the laws of neutrality

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

Article 18
Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

Annex**Indicative list of treaties referred to in draft article 7**

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

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

(c) Multilateral law-making treaties.

(d) Treaties on international criminal justice.

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

(f) Treaties for the international protection of human rights.

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

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

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

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

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

(l) Treaties relating to diplomatic and consular relations.
