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Chapter VI
Effects of armed conflicts on treaties

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Commentary

(1) The present annex contains an indicative list of categories of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict. It is linked to draft article 7 and was included, as has been explained in the commentary to that provision, to further elaborate on the element of "subject matter" of treaties contained among the factors, listed in subparagraph (a) of draft article 6, to be taken into account when ascertaining the susceptibility of a treaty to termination, withdrawal or suspension in the event of an armed conflict.

(2) The effect of such an indicative list is to create a set of weak and rebuttable presumptions based on the subject matter of those treaties: the subject matter of the treaty carries the implication that the treaty survives an armed conflict. Although the emphasis is on *categories* of treaties, it may well be that only the subject matter of particular provisions of the treaty carries the implication of continuance.

(3) The list is purely indicative, as confirmed by the use of that adjective in draft article 7, and no priority is in any way implied by the order in which the categories are presented. Moreover, it is recognized that in certain instances the categories are overlapping. The Commission decided not to include within the list an item referring to *jus cogens*. This

category is not qualitatively similar to the other categories which have been included in the list. The latter are subject-matter based, whereas *jus cogens* cuts across several subjects. It is understood that the provisions of draft articles 3 to 7 are without prejudice to the effect of principles or rules included in treaties and having the character of *jus cogens*.

(4) The list reflects available State practice, particularly United States practice, and is based on the views of several generations of writers. It must be admitted, however, that the likelihood of a substantial flow of information from States, indicating evidence of State practice, is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult. Apparent examples of State practice often concern legal principles which bear no relation to the specific issue of the effect of armed conflict on treaties. Thus some of the modern State practice refers, for the most part, to the effect of a fundamental change of circumstances, or to the supervening impossibility of performance, and is accordingly irrelevant. In some areas, such as that of treaties creating permanent regimes, State practice offers a firm basis. In other areas there may be a firm basis in the case law of municipal courts and in some executive advice given to courts.

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

(5) It seems evident that, being intended for governing the conduct and the consequences of armed conflicts, treaties relating thereto, including those bearing on international humanitarian law, apply in the event of such conflicts. As pointed out by A.D. McNair,

> "[t]here is abundant evidence that treaties which in express terms purport to regulate the relations of the contracting parties during a war, including the actual conduct of warfare, remain in force during war and do not require revival after its termination.[1]

(6) This principle is accepted generally both by writers and in the practice of States. In 1963 the General Counsel of the United States Department of Defense, referring to the application of the Nuclear Test Ban Treaty in time of war, stated the following: "It is my opinion, shared by the Legal Adviser of the Department of State, that the treaty cannot properly be so construed." He then noted that:

> "... [i]t should be noted that it is standard practice in treaties outlawing the use of specified weapons or actions in time of war for the treaties to state expressly that

[1] A. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, p. 704.

"There were in existence at the outbreak of the First World War a number of treaties (to which one or more neutral States were parties) the object of which was to regulate the conduct of hostilities, e.g., the Declaration of Paris of 1856, and certain of the Hague Conventions of 1899 and 1907. It was assumed that those were unaffected by the war and remained in force, and many decisions rendered by British and other prize courts turned upon them. Moreover, they were not specifically revived by or under the treaties of peace. Whether this legal result is attributable to the fact that the contracting parties comprised certain neutral States or to the character of the treaties as the source of general rules of law intended to operate during war is not clear, but it is believed that the latter was regarded as the correct view. If evidence is required that the Hague Conventions were considered by the United Kingdom Government to be in operation after the conclusion of peace, it is supplied by numerous references to them in the annual British lists of 'Accessions, Withdrawals, Etc.', published in the British Treaty Series during recent years, and by the British denunciation in 1925 of Hague Convention VI of 1907. Similarly in 1923 the United Kingdom Government, on being asked by a foreign Government whether it regarded the Geneva Red Cross Convention of 6 July 1906 as being still in force between the ex-Allied Powers and the ex-enemy Powers, replied that in the view of His Majesty's Government this convention, being of a class the object of which is to regulate the conduct of belligerents during war, was not affected by the outbreak of war." *Ibid.*

> they apply in time of war, in order to prevent possible application of the rule that war may suspend or annul the operation of treaties between the warring parties. (Cf. *Karnuth v. United States*, 279 U.S. 231, 236–239; *Oppenheim's 'International Law'*, vol. II, 7th ed., pp. 302–306) ...
>
> In the present case, language specifically prohibiting the use of nuclear weapons in wartime does not appear; it must, therefore, be presumed that no such prohibition would apply."[2]

(7) The present category is not limited to treaties expressly applicable during armed conflict. It covers, broadly, agreements relating to the law of armed conflict, including treaties relating to international humanitarian law. As early as 1785, Article 24 of the Treaty of Friendship and Commerce between Prussia and the United States of America expressly stated that armed conflict had no effect on its humanitarian law provisions.[3] Moreover, the *Third Restatement of the Law*, while re-stating the traditional position that the outbreak of war between States terminated or suspended agreements between them, acknowledges that "agreements governing the conduct of hostilities survived, since they were designed for application during war …".[4] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice found that

> "as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used".[5]

(8) The implication of continuity does not affect the operation of the law of armed conflict as *lex specialis* applicable to armed conflict. The mention of this category of treaties does not address numerous questions that may arise in relation to the application of that law. Nor is it intended to prevail regarding the conclusions to be drawn on the applicability of the principles and rules of humanitarian law in particular contexts.

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

(9) It is generally recognized that treaties declaring, creating, or regulating a permanent regime or status, or related permanent rights, are not suspended or terminated in case of an armed conflict. The types of agreements involved include cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, and the creation of exceptional rights of use of or access to the territory of a State.

(10) There is a certain amount of case law supporting the position that such agreements are unaffected by the incidence of armed conflict. Thus, in the *North Atlantic Coast Fisheries* arbitration the British Government contended that the fisheries rights of the

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[2] M. Whiteman, *Digest of International Law*, vol. XIV, pp. 509 and 510.

[3] Treaty of Friendship and Commerce concluded between Prussia and the United States on 10 September 1785, Article 24, cited in H.W. Verzijl, *International Law in Historical Perspective*, Leyden, Sijthoff, 1973, p. 371.

[4] American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, § 336 (e) (1987).

[5] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 226, at para. 89.

United States, recognized by the Treaty of 1783, had been abrogated as a consequence of the war of 1812. The Court did not share this view and stated that: "International law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended by it."[6]

(11) Similarly, in the case of *Meyer's Estate* (1951), an appellate court in the United States of America, addressing the permanence of treaties dealing with territory, held that

> "[t]he authorities appear to be in accord that there is nothing incompatible with the policy of the Government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war …".[7]

In *State ex rel. Miner v. Reardon* (1926), a California Court ruled that some treaties survive a state of war, such as boundary treaties.[8] This finding is, of course, connected with the prohibition to annex occupied territory.

(12) The resort to this category does, however, generate certain problems. One of them is the fact that treaties of cession and other treaties affecting permanent territorial dispositions create permanent rights. And it is these rights which are permanent, not the treaties themselves. Consequently, if such treaties are executed, they cannot be affected by a subsequent armed conflict.

(13) A further source of difficulty derives from the fact that the limits of the category commented here remain to some extent uncertain. For example, in the case of treaties of guarantee, it is clear that the effect of an armed conflict will depend upon the precise object and purpose of the treaty of guarantee. Treaties intended to guarantee a lasting state of affairs, such as the permanent neutralization of a territory, will not be terminated by an armed conflict. Thus, as McNair notes,

> "the treaties creating and guaranteeing the permanent neutralization of Switzerland or Belgium or Luxembourg are certainly political but they were not abrogated by the outbreak of war because it is clear that their object was to create a permanent system or status".[9]

(14) A number of writers would include agreements relating to the grant of reciprocal rights to nationals and to acquisition of nationality within the category of treaties creating permanent rights or a permanent status. However, the considerations applying to the treatment of such agreements as not susceptible to termination are to be differentiated to a certain extent from those concerning treaties of cession of territory and boundaries. Accordingly, such agreements will be more appropriately associated with the wider class of friendship, commerce and navigation treaties and other agreements concerning private rights. This class of treaties shall therefore be examined below.

(15) In their regulation of the law of treaties, the Commission and States have also accorded a certain recognition to the special status of boundary treaties.[10] Article 62(2)(a) of the 1969 Vienna Convention provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty

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[6] *North Atlantic Coast Fisheries* case (Great Britain, United States), award of 7 September 1910, United Nations, *Reports of International Arbitral Awards* (*UNRIAA*), vol. XI, p. 167, at p. 181. See also C. Parry, *British Digest of International Law*, vol. 2B, 1967, pp. 585–605.

[7] *AILC* 1783–1968, vol. 19, p. 133.

[8] *Ibid*., p. 117, at p. 119; see also *AD* 1919–1942, No. 132, p. 238.

[9] McNair, p. 703.

[10] On this issue, see also the case *In re Meyer's Estate* mentioned in paragraph (11) above.

establishes a boundary. Such treaties were recognized as an exception to the general rule of Article 62 because otherwise that rule, instead of serving the cause of peaceful change, might become a source of dangerous frictions.[11] The Vienna Convention on Succession of States in Respect of Treaties reaches a similar conclusion about the resilience of boundary treaties, providing in its Article 11, 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".[12] Although these examples are not directly relevant to the question of the effects of armed conflict on treaties, they nevertheless attest to the special status attached to these types of regimes.

(c) *Multilateral law-making treaties*

(16) Law-making treaties may be defined as follows:

"(i) *Multi-partite law-making treaties*

By these are meant treaties which create rules of international law for regulating the future conduct of the parties without creating an international regime, status, or system. It is believed that these treaties survive a war, whether all the contracting parties or only some of them are belligerent. The intention to create permanent law can usually be inferred in the case of these treaties. Instances are not numerous. The Declaration of Paris of 1856 is one; its content makes it clear that the parties intended it to regulate their conduct during a war, but it is submitted that the reason why it continues in existence after a war is that the parties intended by it to create permanent rules of law. Hague Convention II of 1907 for the Limitation of the Employment of Force for the Recovery of Contract Debts and the Peace Pact of Paris of 1928 are also instances of this type. Conventions creating rules as to nationality, marriage, divorce, reciprocal enforcement of judgments, etc., would probably belong to the same category."[13]

(17) The term "law-making" is somewhat problematic[14] and may not lend itself to a clear contour. There is, however, a certain amount of State practice relating to multilateral treaties of a technical character arising from the post-war arrangements consecutive to the Second World War. It has been asserted that "Multilateral Conventions of the 'law making' type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended, and revived on the termination of hostilities, or receive even in wartime a partial application."[15]

(18) The position of the United States is described in a letter of 29 January 1948 by the Legal Adviser of the State Department, Ernest A. Gross:

"With respect to multilateral treaties of the type referred to in your letter, however, this Government considers that, in general, non-political multilateral treaties to which the United States was a party when the United States became a belligerent in

[11] Paragraph (11) of the Commission's commentary to draft article 59, now article 62, of the Vienna Convention (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, p. 79). The exception of treaties establishing a boundary from the fundamental change of circumstances rule, though opposed by a few States, was endorsed by a very large majority at the United Nations Conference on the Law of Treaties.

[12] Vienna Convention on Succession of States in Respect of Treaties, United Nations, *Treaty Series*, vol. 1946, p. 3.

[13] McNair, p. 723.

[14] See Secretariat Memorandum (A/CN.4/550 and Corr.1), paras. 49–50.

[15] I.A. Shearer, *Starke's International Law*, 11th ed., London, Butterworths, 1994, p. 493.

the war, and which this Government has not since denounced in accordance with the terms thereof, are still in force in respect of the United States and that the existence of a state of war between some of the parties to such treaties did not *ipso facto* abrogate them, although it is realised that, as a practical matter, certain of the provisions might have been inoperative. The view of this Government is that the effect of the war on such treaties was only to terminate or suspend their execution as between opposing belligerents, and that, in the absence of special reasons for a contrary view, they remained in force between co-belligerents, between belligerents and neutral parties, and between neutral parties.

"It is considered by this Government that, with the coming into force on 15 September 1947 of the treaty of peace with Italy, the non-political multilateral treaties which were in force between the United States and Italy at the time a state of war commenced between the two countries, and which neither government has since denounced in accordance with the terms thereof, are now in force and again in operation as between the United States and Italy. A similar position has been adopted by the United States Government regarding Bulgaria, Hungary, and Rumania ..."[16]

(19) The British position, as stated in a letter from the Foreign Office of 7 January 1948, was the following:

"I am replying ... to your letter ... in which you enquired about the legal status of multilateral treaties of a technical or non-political nature, and whether these are regarded by His Majesty's Government in the United Kingdom as having been terminated by war, or merely suspended.

You will observe that, in the peace treaties with Italy, Finland, Romania, Bulgaria and Hungary, no mention is made of such treaties, the view being taken at the Peace Conference that no provision regarding them was necessary, inasmuch as, according to international law, such treaties were in principle simply suspended as between the belligerents for the duration of the war, and revived automatically with the peace. It is not the view of His Majesty's Government that multilateral conventions *ipso facto* should lapse with the outbreak of war, and this is particularly true in the case of conventions to which neutral Powers are parties. Obvious examples of such conventions are the International Air Navigation Convention of 1919 and various postal and telegraphic conventions. Indeed, the true legal doctrine would appear to be that it is only the suspension of normal peaceful relations between belligerents which renders impossible the fulfilment of multilateral conventions insofar as concerns them, and operates as a temporary suspension as between the belligerents of such conventions. In some cases, however, such as the Red Cross Convention, the multilateral convention is especially designed to deal with the relations of Powers at war, and clearly such a convention would continue in force and not be suspended.

As regards multilateral conventions to which only the belligerents are parties, if these are of a non-political and technical nature, the view upon which His Majesty's Government would probably act is that they would be suspended during the war, but would thereafter revive automatically unless specifically terminated. This case, however, has not yet arisen in practice."[17]

[16] See R. Rank, "Modern War and the Validity of Treaties: A Comparative Study", *Cornell Law Quarterly*, vol. 38, 1952–1953, p. 321, at pp. 343–344.

[17] *Ibid*., p. 346. See also G.G. Fitzmaurice, "The Juridical Clauses of the Peace Treaties", *Recueil des cours* ..., vol. 73, 1948-II, pp. 308–309, and L. Oppenheim, *International Law*, vol. II, London,

(20) The position of the German,[18] Italian,[19] and Swiss[20] Governments appears to be essentially similar with regard to the present subject matter. However, the State practice is not entirely consistent and further evidence of practice and, especially more current practice, is needed.

(21) In this particular context the decisions of municipal courts must be regarded as a problematical source. In the first place, such courts may depend upon the guidance of the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the case law of domestic courts is not inimical to the principle of survival. In this connection, in the decision of the Scottish Court of Session in *Masinimport v. Scottish Mechanical Light Industries Ltd.* (1976)[21] may be cited.

(22) Although the sources are not all congruent, the category of law-making treaties can be recommended for recognition as a class of treaties having the status of survival. As a matter of principle they should qualify and there is a not an inconsiderable quantity of State practice favourable to the principle of survival.

(d) *Treaties on international criminal justice*

(23) By including "treaties on international criminal justice", the Commission chiefly intended to ensure the survival and continued operation of treaties such as the Rome Statute on the International Criminal Court of 17 July 1998.[22] The category in question may also encompass other general, regional and even bilateral agreements establishing international

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Longmans, Green, 1948, pp. 304–306. Fitzmaurice discusses the way in which the revival or otherwise of bilateral treaties was dealt with, which involved a method of notification, and notes:

"The merit of a provision of this kind is that it settles beyond possibility of doubt the position in regard to each bilateral treaty which was in force at the outbreak of war between the former enemy States and any of the Allied or Associated Powers, which would certainly not be the case in the absence of such a provision, having regard to the considerable difficulty and confusion which surrounds the subject of the effect of war on treaties, particularly bilateral treaties.

This difficulty also exists in regard to multilateral treaties and conventions, but it is much less serious, as it is usually fairly obvious on the face of the multilateral treaty or convention concerned what the effect of the outbreak of war will have been on it. In consequence, and having regard to the great number of multilateral conventions to which the former enemies and the Allied and Associated Powers were parties (together with a number of other States, some of them neutral or otherwise not participating in the peace settlement) and of the difficulty that there would have been in framing detailed provisions about all these conventions, it was decided to say nothing about them in the peace treaties and to leave the matter to rest on the basic rules of international law governing it. It is, however, of interest to note that when the subject was under discussion in the Juridical Commission of the Peace Conference, the view of the Commission was formally placed on record and inscribed in the minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents, or even in certain cases as between belligerents and neutrals who may be cut off from each other by the line of war; but that such conventions are at the most suspended in their operation and automatically revive upon the restoration of peace without the necessity of any special provision to that effect. The matter is actually not quite so simple as that, even in relation to multilateral conventions, but at any rate that was broadly the basis upon which it was decided not to make any express provision about the matter in the peace treaties."

[18] *Ibid*., pp. 349–354.

[19] *Ibid*., pp. 347 and 348.

[20] See *Répertoire suisse de droit international public*, pp. 186–191.

[21] *ILR*, vol. 74, p. 559, at p. 564.

[22] United Nations, *Treaty Series*, vol. 2187, p. 3.

mechanisms for trying persons suspected of having perpetrated international crimes (crimes against humanity, genocide, war crimes, crime of aggression). The category covered here only extends to treaties establishing international mechanisms for the prosecution of persons suspected of such crimes, to the exclusion of those set up by other types of acts such as the Security Council resolutions relating to the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.[23] It also excludes mechanisms resulting from agreements between a State and an international organisation, because the present draft articles do not cover treaty relations involving international organizations.[24] Finally, the category described here only encompasses treaties setting up procedures for prosecution and trial in an international context, and does not comprise agreements on issues of international criminal law generally.

(24) The prosecution of international crimes and the trial of those suspected of having committed them concerns the international community as a whole. This is in itself a reason for advocating the survival of the treaties belonging to this category. To this it will be added that the inclusion of war crimes renders essential the survival of the treaties considered here: war crimes can only occur in time of armed conflict, and aggression is an act resulting in international armed conflict. The two other main categories of international crimes, crimes against humanity and genocide, too, are often committed in the context of armed conflict.

(25) It may be, however, that certain provisions of an instrument belonging to the category of treaties commented here cease to be operational as a result of armed conflict, for example those relating to the transfer of suspects to an international authority or obligations assumed by a State regarding the execution of sentences on their territory. The separability of such provisions and obligations from the rest of treaty pursuant to draft article 11 of the present draft articles would seem unproblematic.

(26) There remains the question of whether the insertion of this type of treaties is a matter of *lex ferenda* or *lex lata*. At first sight, the former would seem to hold true because the kind of conventions under consideration are of relatively recent origin, and very little practice — if any — can be produced, except of course for the fact that a treaty such as the Rome Statute was plainly intended to continue to operate in situations of international or non-international conflict. It should also be recalled that part of the treaty provisions under consideration are of a *jus cogens* character and, as such, *must* be regarded as surviving armed conflicts.

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

(27) Before analysing this type of treaties and their fate in some detail, a few preliminary observations are in order. First, it must be made clear that this category is not necessarily confined to classical "treaties of friendship, commerce and navigation (FCN)", but may

[23] International Tribunal for the Former Yugoslavia, established by SC Res. 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993; and International Tribunal for Rwanda, established by SC Res. 955 (1994) of 8 November 1994.

[24] See Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, of 6 June 2003; United Nations, *Treaty Series*, vol. 2329, p. 117; Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, of 22 January and 6 February 2007, United Nations, *Treaty Series*, vol. 2461, p. 257, and SC Res. 1757 (2007) of 30 May 2007; and Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, of 16 January 2002, United Nations, *Treaty Series*, vol. 2178, p. 137.

include treaties of friendship, commerce and consular relations,[25] or treaties of establishment. Second, as a rule, only part of these instruments survive. It is evident, in particular, that provisions relating to "friendship" are unlikely to survive to an armed conflict opposing the Contracting States; but that does not mean that provisions relating to the status of foreign individuals do not continue to apply, that is, provisions regarding their "private rights".[26] Third, while treaties of commerce tend to lapse as a result of armed conflicts between States,[27] such treaties may contain provisions securing the private rights of foreign individuals which may survive as a result of the separability of treaty provision under draft article 11 of the present draft articles. Fourth, the term "private rights" requires explanations: Is it limited to individuals' substantive rights or does it also encompass procedural ones?

(28) Regarding treaties of FCN, reference has to be made, in the first place, to the Jay Treaty, or Peace Treaty, or Treaty of FCN, concluded on 19 November 1794 between the United States of America and Great Britain, which put an end to the War of Independence. Some provisions of this Treaty have remained applicable to this day, surviving, in particular, the War of 1812 between the two countries.

(29) In what is perhaps the leading case in the matter — *Karnuth v. United States* (1929) — the provision in issue was Article III of the Jay Treaty, which gives the subjects of one Contracting Party free access to the territory of the other. While it held that the Article in question had been abrogated by the 1812 War, the Supreme Court re-iterated what it had said in the earlier case of *Society for the Propagation of the Gospel v. Town of New Haven* (1823):

> "[t]reaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.[28]

(30) Article III of the Treaty also exempts from customs duties the members of the Five Indian Nations established on the one or the other side of the border. In two cases, United States courts ruled that provisions of the Treaty bearing on the rights or obligations, not of the Contracting Parties as such, but of "third parties", *i.e.* individuals, had survived armed conflicts.[29]

(31) Article IX of the Jay Treaty provided that subjects of either country may continue to hold landed property on the territory of the other. In *Sutton v. Sutton*, a very early case brought before the British Court of Chancery, the Master of the Rolls held that since the relevant treaty provision stated that subjects of one Party were entitled to keep property on the territory of the other, as were their heirs and assignees, it was reasonable to infer that the Parties intended the operation of the treaty to be permanent, and not to depend upon the

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[25] *Brownell v. City and County of San Francisco*, California Court of Appeal, 1st District, 21 June 1954, *ILR* 1954, p. 438.

[26] In this sense, individuals are considered to be "third parties", see below, para. 30.

[27] See two cases reported in *Fontes juris gentium*, Series A, Sec. 2, t. 1, p. 163, No. 342, and t. 6, p. 371, No. 78; the *Russian German Commercial Treaty* case, German *Reichsgericht*, 23 May 1925, *AD* 1925–1926, No. 331.

[28] *AILC 1783–1968*, vol. 19, p. 49, at p. 54.

[29] *United States ex rel. Goodwin v. Karnuth*, District Court for the Western District of New York, 28 November 1947, *AD* 1947, No. 11; *McCandless v. United States*, Circuit Court of Appeals, 3rd Circuit, 9 March 1928, *AD* 1927–1928, No. 363.

continuance of a state of peace. This was borne out, the Master of the Rolls added, by the "true construction" to be given to the act of implementation on the domestic level.[30]

(32) It is now convenient to turn to a number of precedents dealing with treaties which do not bear the "FCN" label. The object of the case *Ex parte Zenzo Arakawa* (1947) was Article I of the Treaty of Commerce and Navigation concluded between the United States and Japan on 21 February 1912, which provided for the constant protection and security of the citizens of each Party on the territory of the other. According to the judge, "[s]ome [treaties] are unaffected by war, some are merely suspended, while others are totally abrogated". Treaties of commerce and navigation fall into the second or third category, "because the carrying out of their terms would be incompatible with the existence of a state of war". The *Arakawa* case may be a special one, however, conditioned as it was by the peculiarities of the armed conflict between the two countries and perhaps also by the dimension of the protection granted by the relevant treaty provision.[31]

(33) *Techt v. Hughes* was another landmark in the progression of the case law. The issue considered was the survival of the Treaty of Commerce and Navigation between the United States and Hungary of 27 August 1829, more precisely its provision on the tenure of land. Judge Cardozo pointed out that it was difficult to see why, while in *Society for the Propagation of the Gospel v. Town of New Haven*[32] a provision on the *acquisition* of real property was found to have survived the War of 1812, this should be disallowed when it came to the *enjoyment* of such property.[33]

(34) *State ex rel. Miner v. Reardon* pertained to Article 14 of the 1828 Treaty between the United States and Prussia. A provision of that Treaty dealt with the protection of the property of individuals, in particular the right to inherit property. The lower court opted for the survival of this provision,[34] as did the Supreme Court of Nebraska in a decision of 10 January 1929,[35] and the United States Supreme Court in its decision in *Clark v. Allen* (1947), where Article 4 of the Treaty of Friendship, Commerce and Consular Rights between Germany and the United States, of 8 December 1923, was under scrutiny. That provision allowed nationals of either State to succeed to nationals of the other. Following established precedent, the Court stated that "the outbreak of war does not necessarily suspend or abrogate treaty provisions" — note the reference to "treaty *provisions*" rather than to "treaties" — though such a provision may of course be incompatible with the existence of a state of war (*Karnuth* case, paragraph 29), or the President or the Congress may have formulated a policy inconsistent with the enforcement of all or part of the treaty (*Techt* case, paragraph 29). The Court then followed the decision in *Techt* (paragraph 33), where a similar treaty provision was held to have survived. Indeed, the question to be answered was whether the provision in issue was "incompatible with national policy in time of war". The Court found that it was not.[36]

(35) Another group of cases begins with two French decisions. *Bussi v. Menetti* was about a proprietor in Avignon who, for health reasons, wished to live in a house owned by him and gave notice to his Italian tenant. The Tribunal of first instance accepted his plea, considering that the outbreak of the war between France and Italy in 1940 had ended the

[30] Court of Chancery, 29 July 1830, *BILC*, vol. 4, p. 362, at pp. 367–368.
[31] District Court, Eastern District of Pennsylvania, *AILC 1783–1968*, vol. 19, p. 84.
[32] United States Supreme Court, 1823, *AILC 1783–1968*, vol. 19, p. 41, especially at p. 48.
[33] *AILC 1783–1968*, vol. 19, p. 95.
[34] *Ibid.*, p. 117, at p. 122.
[35] *Goos v. Brocks*, Supreme Court of Nebraska, 10 January 1929, *AD* 1929–1930, No. 279.
[36] *AILC 1783–1968*, vol. 19, p. 70, at pp. 73, 74 *et seq.*, 78-79. See also *Blank v. Clark*, District Court, Eastern District of Pennsylvania, 12 August 1948, *AD* 1948, No. 143.

Treaty of Establishment concluded between the two countries on 3 June 1930, according to which French and Italian nationals enjoyed equal rights in tenancy matters. The *Cour de cassation* (*Chambre civile*) ruled that treaties were not necessarily suspended by the existence of a war. In particular, the Court said,

> "treaties of a purely private law nature, which do not involve any intercourse between the enemy Parties and which have no connection with the conduct of hostilities — such as conventions relating to leases — are not suspended merely by the outbreak of war".[37]

(36) The case of *Rosso v. Marro* was a similar one, except that the claim was one of damages for the refusal to renew a lease, allegedly in violation of a 1932 convention. On this issue, the *Tribunal civil* of Grasse explained the following:

> "Treaties concluded between States who subsequently become belligerents are not necessarily suspended by war. In particular, the conduct of the war [must allow for] the economic life and commercial activities to continue in the common interest. [Hence] the Court of Cassation, reverting … to the doctrine which it has laid down during the past century (…), now holds that treaties of a purely private law nature, not involving any intercourse between the belligerent Powers, and having no connection with the conduct of hostilities, are not suspended in their operation, merely by the existence of a state of war."[38]

(37) The above case law is, however, contradicted by *Lovera v. Rinaldi*. In this case, the Plenary Assembly of the *Cour de cassation*, again interrogated about the status of the Treaty of Establishment of 3 June 1930, which prescribed national or at least most-favoured-nation treatment, found that the Convention had lapsed at the onset of war, because the maintenance of its obligations was judged incompatible with the state of war.[39] In *Artel v. Seymand*, the *Cour de cassation* (*Chambre civile*) also concluded that that same Convention had lapsed so far as leases were concerned.[40]

(38) In relation to the Convention of 3 June 1930 between France and Italy, the *Cour de cassation* held, in 1953, that the national treatment to be granted to Italians under the Convention regarding the tenure of agricultural land was incompatible with a state of war.[41]

(39) This series will be closed by a somewhat peculiar case which concerns individuals but makes a foray into the field of public law. Article 13 of a Convention concluded between France and Italy on 28 September 1896 and providing that persons residing in Tunis and having retained Italian citizenship would continue to be considered Italians, was considered operative in 1950 despite World War II.[42]

(40) There are a large number of cases which concern procedural rights secured by multilateral treaties. Many of them relate to security for costs (*cautio judicatum solvi*). This was true for the case of *CAMAT v. Scagni*, the object of which was Article 17 of the 1905 Hague Convention on Civil Procedure. According to the French court involved,[43] private-law treaties should, in principle, survive but cannot be invoked by aliens whose hostile attitude may have affected the evolution of the war, especially, as was the case here, by

[37] 5 November 1943, *AD* 1943–1945, No. 103, at pp. 304–305.
[38] 18 January 1945, *AD* 1943–1945, No. 104, at p. 307.
[39] Decision of 22 June 1949, *AD* 1949, No. 130.
[40] Decision of 10 February 1948, *AD* 1948, No. 133.
[41] *Gambino v. Consorts Arcens*, Cour de cassation, 11 March 1953, *ILR* 1953, p. 599.
[42] *In re Barrabini*, Court of Appeal of Paris, 28 July 1950, *ILR* 1951, No. 156.
[43] Court of Appeal of Ager (France).

persons who had been expelled from France on account of their attitude.[44] In another case settled by a Dutch court after World War II, it was held that the relevant provision of the 1905 Hague Convention had not lapsed as a result of the War. By contrast, another Dutch court reached the conclusion that the 1905 Convention had been suspended at the outbreak of the War and had re-entered into force on the basis of the 1947 Treaty of Peace with Italy.[45] The same conclusion was reached by the *Landgericht* of Mannheim (Germany) and by a Dutch court.[46] In one case the question of the survival of the 1905 Convention was left open.[47]

(41) Certain cases relate to the survival of other multilateral treaties, such as the Hague Convention on Divorce and Judicial Separation of 1902, which was held to have been suspended during World War II and re-activated at the end of that conflict.[48]

(42) Mention has to be made as well of the 1905 Hague Convention on the Conflict of Laws in Matters of Marriage, Article 4 of which prescribed a certificate of capacity to marry. This requirement was objected to by a husband-to-be who contended that, as a result of the War, the Convention had lapsed. The Netherlands Court of Cassation disagreed, explaining that "[t]here could only be a question of suspension in so far and for so long as the provisions of the Convention should have become untenable", which was not the case here and which suggests that the issue was considered to be one of temporary impossibility of performance rather than one of the effects of armed conflict of treaties.[49]

(43) One also notes with interest a decision in which the Court of Appeal of Aix (France) upheld the continued validity of the ILO Convention of 10 June 1925 providing for equal treatment of nationals of one Contracting Party by the other Party in matters of workmens' compensation. The Court found that the Convention had not lapsed *ipso facto*, without denunciation, upon the outbreak of a war and that, at the most, the exercise of rights deriving from the Convention was suspended[50] – an unsatisfactory conclusion because it appears to say, on the one hand, that the Convention remained applicable while, on the other, it speaks of suspension, which suggests exactly the contrary.

(44) Mention must equally be made of a series of Italian cases dealing with multilateral and bilateral conventions on the execution of judgments. In some of these cases, survival was assumed,[51] in others not.[52]

(45) As a matter of principle and sound policy, the principle of survival would seem to extend to obligations arising under multilateral conventions concerning arbitration and the enforcement of awards. In *Masinimport v. Scottish Mechanical Light Industries Ltd*., the Scottish Court of Session held that such treaties had survived World War II and were not covered by the 1947 Peace Treaty with Romania. The agreements concerned were the

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[44] 19 November 1946, *AD* 1946, No. 99.

[45] *Gevato v. Deutsche Bank*, District Court of Rotterdam, 18 January 1952, *ILR* 1952, No. 13.

[46] *Security Cost* case, 26 July 1950, *AD* 1949, No. 133; *Herzum v. van den Borst*, District Court of Roermond, 17 February 1955, *ILR* 1955, p. 900.

[47] *Legal Aid* case, 24 September 1949, Celle Court of Appeal, *AD* 1949, No. 132.

[48] *Silverio v. Delli Zotti*, Luxembourg, High Court of Justice, 30 January 1952, *ILR* 1952, No. 118.

[49] *In re Utermöhlen*, 2 April 1948, *AD* 1949, No. 129, at p. 381.

[50] *Ets Cornet v. Vve Gaido*, 7 May 1951, *ILR* 1951, No. 155.

[51] *P.M. v. Miclich*, Court of cassation, 3 September 1965, Diritto internazionale, vol. XXI-II, 1967, p. 122.

[52] *LSZ v. MC*, Rome Court of Appeal, 22 April 1963, Diritto internazionale, vol. XIX-II, 1965, p. 57. In some cases, the decision was made dependent on whether the relevant treaties had been put back in operation: Court of Cassation, 9 May 1962, *Rigano v. Socìetà Johann Meyer*, *ibid*., vol. XVIII-II, 1964, p. 181; Milan, Court of Appeal, 19 May 1964, *Shapiro v. Flli Viscardi*, Rivista di diritto internazionale, vol. XLIII, 1965, p. 286.

Protocol on Arbitration Clauses of 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. The Court characterized the instruments as "multipartite law-making treaties".[53] In 1971 the Italian Court of Cassation (Joint Session) held that the 1923 Protocol on Arbitration Clauses had not been terminated despite the Italian declaration of war on France, its operation having only been suspended pending cessation of the state of war. This is, again, an unsatisfactory conclusion, for the reasons indicated in paragraph (43) (*Cornet* case).

(46) The recognition of this group of treaties would seem to be justified, and there are also links with other classes of agreements, including multilateral law-making treaties.

(47) The preceding description and analysis lead to the conclusion that, even though the case law examined may not be entirely coherent, there is a clear trend toward holding that "private rights" protected by treaties subsist, even where procedural rights of individuals are concerned.

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

(48) Writers make very few references to the status, for present purposes, of treaties on the international protection of human rights. This state of affairs is easily explained. Much of the relevant writings on the effect of armed conflicts on treaties preceded the emergence of international human rights rules. Furthermore, the specialist literature on human rights has a tendency to neglect technical problems. Article 4 of the 1985 resolution of the Institute of International Law provides, however:

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

Article 4 was adopted by 36 votes to none, with 2 abstentions.[54]

(49) The use of the category of human rights protection may be viewed as a natural extension of the status accorded to treaties of FCN and analogous agreements concerning private rights, including bilateral investment treaties. There is also a close relation to the treaties creating a territorial regime and, in so doing, setting up standards governing the human rights of the population as a whole, or a regime for minorities, or a regime for local autonomy.

(50) The application of international human rights treaties in time of armed conflict is described as follows:

> "Although the debate continues whether human rights treaties apply to armed conflict, it is well established that non-derogable provisions of human rights treaties apply during armed conflict. First, the International Court of Justice stated in its *Nuclear Weapons* Advisory Opinion that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. The *Nuclear Weapons* opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts that although the inherent right to self-defence may justify non-

[53] 30 January 1976, *ILR*, vol. 74, p. 559.

[54] *Annuaire de l'Institut de droit international*, vol. 61-II, pp. 219–221.

> performance of certain treaties, 'as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct'. Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict. Because non-derogable human rights provisions codify *jus cogens* norms, the application of non-derogable human rights provisions during armed conflict can be considered a corollary of the rule expressed in the previous section that treaty provisions representing *jus cogens* norms must be honoured notwithstanding the outbreak of armed conflict."[55]

(51) This description illustrates the problems relating to the applicability of human rights standards in the event of armed conflict.[56] The task of the Commission has not been to deal with such matters of substance but to direct attention to the effects of armed conflict upon the operation or validity of particular treaties. In this connection, the test of derogability is not appropriate because derogability concerns the operation of the provisions and is not related to the issue of continuation or termination. However, the competence to derogate "in time of war or other public emergency threatening the life of the nation" certainly provides evidence that an armed conflict as such may not result in suspension or termination. At the end of the day the appropriate criteria are those laid down in draft article 4. The exercise of a competence to derogate by one Party to the treaty would not prevent another Party from asserting that a suspension or termination was justified on other grounds.

(52) It will finally be remembered that, under draft article 11 of the present draft articles, certain provisions of international treaties for the protection of human rights may not be terminated or suspended. This does not mean that the same is true for the other provisions if the requirements of draft article 11 are met. Conversely, there may be human rights provisions in treaties belonging to other categories of treaties which may continue in operation even if those treaties do not, or only do partly, survive, always supposing that the separability tests of draft article 11 are fulfilled.

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

(53) Most environmental treaties do not contain express provisions on their applicability in case of armed conflict. The subject matter and modalities of treaties for the international protection of the environment are extremely varied.[57]

(54) The pleadings relating to the Advisory Opinion of the International Court of Justice on nuclear weapons indicate, quite clearly, that there is no general agreement on the proposition that all environmental treaties apply both in peace and in time of armed conflict, subject to express provisions indicating the contrary.[58]

(55) In the *Nuclear Weapons* Advisory Opinion the International Court formulated the general legal position in these terms:

> "29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the

[55] Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 32 (footnotes omitted).

[56] See, further, Rene Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002, pp. 247–276.

[57] Philippe Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge: Cambridge University Press, 2003, pp. 307–316; Patricia Birnie and Alan Boyle, *International Law and the Environment*, 2nd ed., Oxford, Oxford University Press, 2002, pp. 148–151; K. Mollard-Bannelier, *La protection de l'environnement en temps de conflit armé*, Paris, Pedone, 2001.

[58] See the Secretariat Memorandum (A/CN.4/550 and Corr.1), paras. 58–63.

living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

> 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'

31. The Court notes furthermore that articles 35, paragraph 3, and 55 of Additional Protocol I [to the Geneva Conventions of 1949] provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions."[59]

(56) These observations are, of course, significant. They provide general and indirect support for the use of a presumption that environmental treaties apply in case of armed conflict, despite the fact that, as indicated in the written submissions relating to the Advisory Opinion proceedings, there was no general agreement on the specific legal question.[60]

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

(57) Treaties relating to watercourses or rights of navigation are essentially a sub-set of the category of treaties creating or regulating permanent rights or a permanent regime or status. It is, nonetheless, convenient to examine them separately.

[59] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 226, at paras. 29–31.

[60] See D. Akande, "Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court", *BYBIL*, vol. 68, 1997, pp. 183 and 184.

(58) The picture is, however, far from simple. The practice of States has been described as follows by Fitzmaurice:

> "Where all the parties to a convention, whatever its nature, are belligerents, the matter falls to be decided in much the same way as if the convention were a bilateral one. For instance, the class of law-making treaties, or of conventions intended to create permanent settlements, such as conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives on the restoration of peace."[61]

(59) The application of treaties concerning the status of certain waterways may be subject to the exercise of the inherent right of self-defence recognized in Article 51 of the Charter of the United Nations.[62]

(60) In any event, the regime of individual straits and canals is usually dealt with by specific treaty provisions. Examples of such treaties include the Convention Instituting the Statute of Navigation of the Elbe (1922),[63] the Treaty of Versailles Relating to the Kiel Canal (1919),[64] the Convention Regarding the Regime of the Straits (Montreux) (1936),[65] the Panama Canal Treaty (1977)[66] and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (1977).[67]

(61) Certain multilateral agreements provide expressly for a right of suspension in time of war. Thus Article 15 of the Statute on the Regime of Navigable Waterways of International Concern (1922)[68] provides that:

> "This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit."

(62) The Convention on the Law of the Non-navigational Uses of International Watercourses (1997)[69] prescribes in its Article 29:

> "*International watercourses and installations in time of armed conflict*
>
> "International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules."

(63) There is accordingly a case for including the present category in the indicative list.

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

(64) Similar considerations would seem to apply with respect to treaties relating to aquifers and related installations and facilities. Groundwater constitutes about 97 per cent

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[61] Fitzmaurice, *Recueil des cours*, p. 316.
[62] See R.R. Baxter, *The Law of International Waterways, with Particular Regard to Interoceanic Canals*, Cambridge, Mass., Harvard University Press, 1964, p. 205.
[63] League of Nations, *Treaty Series*, vol. 26, pp. 221, 241.
[64] *British and Foreign State Papers*, vol. 112 (1919).
[65] League of Nations *Treaty Series*, vol. 173, p. 213.
[66] *ILM*, vol. 36, 1977, p. 1022.
[67] *Ibid*., p. 1040.
[68] League of Nations *Treaty Series*, vol. 7, p. 37, at p. 61.
[69] G.A. Res. 51/229 of 21 May 1997, annex.

of the world's fresh water resources. Some of it forms part of surface water systems governed by the Convention of 1997 on the Law of the Non-navigational Uses of International Watercourses mentioned in paragraph (62) and, accordingly, will fall under that instrument. On the groundwaters not subject to that Convention, there is very little State practice. In its work on the law of transboundary aquifers, the Commission has demonstrated what is achievable in this area.[70] In addition, the existing body of bilateral, regional and international agreements and arrangements on groundwaters is becoming noticeable.[71]

(65) Based on the fact that the Commission's draft articles on aquifers largely follow provisions of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, and also on the underlying protection provided for by the law of armed conflict, the basic assumption is that transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.[72]

(66) Although the law of armed conflict itself provides protection, it may not be so clear that there is a necessary implication from the subject matter of treaties relating to aquifers and related installations and facilities that no effect ensues from an armed conflict. But the vulnerability of aquifers and the need to protect the waters contained therein make a compelling case for drawing the necessary implication of continuance.

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

(67) Most international organizations have been established by treaty,[73] commonly referred to as the "constituent instrument" of the organization. As a general rule, international organizations established by treaties enjoy, under international law, a legal personality separate from that of its members.[74] The legal position, therefore, is analogous to that of the establishment of a permanent regime by means of a treaty. The considerations applicable to permanent regimes, discussed in paragraphs (9) to (15), accordingly also apply generally to constituent instruments of international organizations. As a general proposition, such instruments are not affected by the existence of an armed conflict in the three scenarios envisaged in draft article 3.[75] In the modern era, there is scant evidence of practice to the contrary. This is particularly the case with international organizations of a universal or regional character whose mandates include the peaceful resolution of disputes.

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[70] Draft articles on the law of transboundary aquifers, Report of the International Law Commission, Sixtieth Session, Supplement No. 10 (A/63/10), para. 53. See G.A. Res. 63/124 of 11 December 2008, annex.

[71] See generally S. Burchi/K. Mechlem, *Groundwater in International Law. Compilation of Treaties and Other Legal Instruments*, (FAO/UNESCO), 2005.

[72] See draft article 18 of the draft articles on the law of transboundary aquifers.

[73] See para. (4) of the commentary to Article 2 of the draft articles on the responsibility of international organizations, *supra*.

[74] *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 185*; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 73, para. 37 ("International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties)"; and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996*, p. 66, para. 25.

[75] See the 1985 resolution of the Institute of International Law, Article 6 ("A treaty establishing an international organization is not affected by the existence of an armed conflict between any of its parties"), *Annuaire de l'Institut de droit international*, vol. 61-II, pp. 199–255.

(68) This general proposition is without prejudice to the applicability of the rules of an international organization, which include its constituent instrument,[76] to ancillary questions such as the continued participation of its members in the activities of the international organization, the suspension of such activities in light of the existence of an armed conflict and even the question of the dissolution of the organization.

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

(69) This category is not prominent in the literature and there is to some extent an overlap with the category of multilateral treaties constituting an international regime. Certain writers, however, give explicit recognition to the continuing operation of treaties establishing mechanisms for the peaceful settlement of international disputes.[77] In accordance with this principle, special agreements concluded before World War I were acted upon to effect the arbitrations concerned after the War.

(70) The treaties falling into this category relate to conventional instruments on international settlement procedures, that is, on procedures between subjects of international law. That category does not extend, *per se*, to mechanisms for the protection of human rights, which are, however, covered by sub-paragraph (f) (treaties for the international protection of human rights). Similarly, it does not include treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad which may, however, come under the label of group (e) as "agreements concerning private rights".

(71) The survival of this type of agreements is also favoured by draft article 9 of the draft articles (notification of intention to terminate, or to withdraw from, a treaty, or to suspend its operation), which envisages the preservation of the rights or obligations of States regarding dispute settlement (see paragraph (7) of the commentary to draft article 9).

(l) *Treaties relating to diplomatic and consular relations*

(72) Also included in the indicative list are treaties relating to diplomatic relations. While the experience is not well documented, it is not unusual for embassies to remain open in time of armed conflict. In any event the provisions of the Vienna Convention on Diplomatic Relations suggest its application in time of armed conflict. Indeed, Article 24 of that Convention provides that the archives and documents of the mission shall be inviolable "at any time"; this phrase was added during the Vienna Conference in order to make clear that inviolability continued in the event of armed conflict.[78] Other provisions, for example Article 44 on facilities for departure, include the words "even in case of armed conflict". Article 45 is of particular interest as it provides:

> "If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
>
> "(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

[76] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975, Article 1(34).

[77] See S.H. McIntyre, *Legal Effect of World War II on Treaties of the United States*, The Hague, Martinus Nijhoff, 1958, pp. 74–86; and McNair, (footnote 27 above), p. 720. See also M.O. Hudson, *The Permanent Court of International Justice, 1920–1942*, New York, Macmillan, 1943.

[78] See Eileen Denza, *Diplomatic Law, A Commentary on the Vienna Convention on Diplomatic Relations*, 2nd ed., Oxford, Clarendon Press, 1998, p. 160.

"(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

"(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State."

(73) The principle of survival is recognized by some commentators.[79] The specific character of the regime reflected in the Vienna Convention on Diplomatic Relations was described in emphatic terms by the International Court of Justice in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. In the words of the Court:

> "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of articles 44 and 45 of the Convention of 1961. (Cf. also articles 26 and 27 of the Convention of 1963.) Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State."[80]

(74) The Vienna Convention on Diplomatic Relations of 1961 was in force for both Iran and the United States. In any event the Court made it reasonably clear that the applicable law included "the applicable rules of general international law" and that the Convention was a codification of the law.[81]

(75) As in the case of treaties relating to diplomatic relations, so also in the case of treaties relating to consular relations, there is a strong case for placing such treaties within the class of agreements which are not necessarily terminated or suspended in case of an armed conflict. It is well recognized that consular relations may continue even in the event of severance of diplomatic relations or of armed conflict.[82] The provisions of the 1963 Vienna Convention on Consular Relations indicate its application in time of armed conflict. Thus, Article 26 provides that the facilities to be granted by the receiving State to members of the consular post, and others, for their departure, shall be granted "even in case of armed conflict". Article 27 provides that the receiving State shall, "even in case of armed

[79] See for example C.C. Chinkin, , "Crisis and the Performance of International Agreements: The Outbreak of War in Perspective", *Yale Journal of World Public Order*, vol. 7, 1981–1982, p. 177, at pp. 194–195; and Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 36.

[80] *I.C.J. Reports 1980*, p. 3, para. 86.

[81] *Ibid.*, para. 45, para. 90 and (in the *Dispositif*) para. 95.

[82] Luke T. Lee, *Consular Law*, 2nd ed., Oxford, Clarendon Press, 1991, p. 111.

conflict", respect and protect the consular premises. The principle of survival is recognized by Chinkin.[83]

(76) The International Court of Justice, in its judgment in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, emphasized the special character of the two Vienna Conventions of 1961 and 1963.

(77) The Vienna Convention on Consular Relations was in force for both Iran and the United States. Moreover, the Court recognized that the Convention constituted a codification of the law and made it reasonably clear that the applicable law included "the applicable rules of general international law".[84]

(78) Regarding national practice, a decision of the California Court of Appeal (1st District) may be of interest. The Treaty of Friendship, Commerce and Consular Rights between the United States and Germany of 8 December 1923 exempted from taxation land and buildings used by each State on the territory of the other. Taxes were levied, however, when Switzerland, as a caretaker, and, later on, the federal Government took over the premises of the German Consulate General in San Francisco. The defendants contended that the 1923 Treaty had lapsed or been suspended as a result of the outbreak of World War II. But the Court of Appeal found that the Treaty and the exemption provided by it were not abrogated "since the immunity from taxation therein provided was not incompatible with the existence of a state of war". While this case may be viewed as an affirmation of the continued applicability of a treaty of friendship and commerce, the 1923 Treaty also concerned consular relations and hence may serve as evidence of the survival of agreements on consular relations.[85]

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[83] C. Chinkin, (footnote 104 above), pp. 194 and 195. See also the Secretariat Memorandum (A/CN.4/550 and Corr.1), para. 36.

[84] *I.C.J. Reports 1980*, p. 3, para. 45; para. 90, and (in the *Dispositif*), para. 95.

[85] *Brownell v. City and County of San Francisco*, 21 June 1954, *ILR* 1954, p. 432, especially p. 433.