

Szalai Anikó¹: The Work of the International Law Commission in Relation to the Effect of Armed Conflict on Treaties

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In 2000 the International Law Commission (hereinafter: ILC or Commission) defined in its long term programme the topic of “the effect of armed conflict on treaties”² The reason for it was that “the literature on the subject is less than satisfactory. The subject is surely ideal for codification and/or progressive development. ... The law remains to a considerable degree unsettled. ... The practice of States as to the effects of armed conflicts on treaties varies.”³

These uncertainties in the legal sources and in the practice of States are compounded by the appearance of new phenomena including different forms of military occupation of territory and new types of international conflict. It is generally recognized that there is a continuing need for the clarification of the law in this area.⁴

It was high time for the Commission to start elaborating this topic, as the ILC already in 1966, while drafting the Vienna Convention on the Law of Treaties, have recognized that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. However, it concluded that “in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States.”⁵

Accordingly, the effect of armed conflicts on treaties remained wholly outside the scope of the Vienna Convention, thus rendering customary international law the sole applicable law. Prior to the prohibition of use of force customary law was well-founded and easy to reveal, but since 1945 it is an arduous task to explore state practice and to ascertain *opinio juris*.

In 2004 the ILC decided to include in its current programme of work this topic. The Commission appointed Mr. Ian Brownlie Special Rapporteur.⁶ He submitted his “First report on the effects of armed conflict on treaties” at the fifty-seventh session (2005)⁷ which was followed by two other reports in 2006 and 2007.⁸

The Secretariat concluded an examination of the doctrine and state practice related to this subject in a Memorandum⁹. It explains all the theoretical approaches to the topic, the possible categorizations of the effects, examines the state practice during and since World War II, and the relationship of the topic to other legal doctrines.

In his first report, the Special Rapporteur drew up draft articles along which it is easier to deal with this subject. These draft articles and the Memorandum of the Secretariat forms basis of the discussions at the ILC and the Sixth Committee of the General Assembly.

The present state of these draft articles shows that the scope of the articles shall be only in respect of treaties between States. Mr. Brownlie highlighted that “there is a vast variety of international organisations and their functions. It can be questioned whether the specificity of such organisations and their treaty arrangements could be dealt with in this study. Moreover, the issues concerning international organisations and armed conflict may be very different to those arising from States and armed conflict.”¹⁰

The Members of the ILC have agreed to use the “treaty” term of the Vienna Convention on the Law of Treaties¹¹, but significant disagreement occurred in relation to the definition of “armed conflict”. For the purpose of the present draft they are using the following term: “Armed conflict” means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.”¹²

This “idem per idem” definition arises some questions: If a conflict does not affect international treaties it is not a conflict? State of war is a clear legal term, but what is the definition of conflict? Are all conflicts armed conflicts, but not all armed conflicts are conflicts? Does the “other declaration” refer to a declaration being similar to the declaration of war, or shall the declaration be about the effect of the conflict? How can we express the effect of a phenomenon, when we cannot even determine the phenomenon itself?

The division of opinion whether non-international armed conflicts shall be included or not cannot be ignored: half of the participants opposes it and the other half supports it.¹³ The frame of the topic has to be specified exactly, and obviously only those questions shall be examined which are in close connection with the core. However, leaving non-international armed conflicts out of the work might render the results less valuable, as nowadays the number of these conflicts prevails.

After the scope and terms the draft states in Article 3 that “the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as (a) between the parties to the armed conflict; (b) between one or more parties to the armed conflict and a third State.”¹⁴ This is the most important provision incorporated here, meaning on the one hand that war is not an automatic, ipso facto case of termination of international treaties and on the other hand that war might not even be a case of termination. The theory behind this innovation is the state practice of the past 60 years and the idea of enhancing stability, continuity and legal security.

The main guiding principle which determines the susceptibility to termination or suspension is the intention of the parties at the time of the conclusion of the treaty. (Article 4)¹⁵ The opposition to the reliance upon intention is normally based upon the problems of ascertaining the intention of the parties. Article 31 and 32 of the Vienna Convention makes clear, the meaning of a treaty may be proved by a variety of means. The different methods of interpretation, the object and purpose of the treaties, the commentaries or the travaux préparatoires help to discover the intention of the parties. Nonetheless it is still a challenge to define what happens when the parties had no thought at all about an armed conflict at the time of the conclusion.

The draft declares that the mode of suspension or termination shall be the one codified in the Vienna Convention.¹⁶ It has been suggested at the ILC that the legal consequences of suspension or termination should be defined, but to do that would be to elaborate the provisions of the Vienna Convention, which is not an appropriate task.

According to the Rapporteur it is essential to state that “Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed

conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.”¹⁷

When declaring that “the outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties” it is intended to reflect the experience of belligerents concluding agreements between themselves during the conflict.¹⁸

“The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.”¹⁹ This draft provision originates in the idea of including a provision based upon the principle stated by the International Court of Justice in the Nuclear Weapons advisory opinion²⁰ relating to the relation between human rights and the applicable *lex specialis*, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.²¹ The role of the provision in the draft is to provide a useful clarification.

The ILC felt necessary to collect those types of treaties which - owing to their object and purpose - continue in operation during an armed conflict. The draft articles include the following treaties as such:

- (a) Treaties expressly applicable in case of an armed conflict;
- (b) Treaties declaring, creating or regulating permanent rights, a permanent regime or status;
- (c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
- (d) Treaties for the protection of human rights;
- (e) Treaties relating to the protection of the environment;
- (f) Treaties relating to international watercourses and related installations and facilities;
- (g) Multilateral law-making treaties;
- (h) Treaties relating to the settlement of disputes between States by peaceful means;
- (i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;
- (j) Treaties relating to diplomatic relations and consular relations.²²

The whole provision seems to be redundant, in view of the role already played by draft articles 3 and 4, but the Special Rapporteur emphasised that the list shall be included either as one of the articles or as an annex, though it was indicative and expository.²³ In support of the inclusion of such a list it can also be mentioned that without it the regulation would be too abstract.

The Special Rapporteur does not regard the inclusion of treaties or treaty provisions codifying *jus cogens* rules into this list as acceptable. Such possibility raises a major question of general international law, and one which is notoriously difficult. Moreover, this category is not qualitatively similar to the other categories which have been proposed.²⁴ Though the exact list and place of *jus cogens* among the legal sources of international law is not clear, it is hardly understandable how can armed conflicts affect peremptory norms when these norms shall be respected universally in all situations.

The draft makes it possible to resume the suspended treaties in accordance with the provisions of the Vienna Convention²⁵ and are without prejudice to the competence of parties to an

armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.²⁶

Concerns were expressed, both in the ILC and in the Sixth Committee, to the effect that the draft shall not leave open the possibility that there would be no difference in the legal effect concerning treaty relations between an aggressor State and a State acting in self-defence. An aggressor State should not benefit from its aggression, and “to allow a unilateral assertion of an illegal use of force as a basis for the termination or suspension of treaties is likely to be inimical to the stability of treaty relations.”²⁷ Another side of the question is that how can an illegal act (meaning use of force) result in the termination or suspension of a legal act (meaning a valid and legally binding treaty).

The articles shall be without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations, and also to the status of third States as neutrals in relation to an armed conflict.²⁸

The likelihood of a substantial flow of information from States is small and the identification of relevant State practice is, in this sphere, unusually difficult, because the modern State practice commonly refers to the effect of a fundamental change of circumstances or to the supervening impossibility of performance. Also according to some publicists it might be difficult to draw a line between the *rebus sic stantibus* principle and the effect of war, as major hostilities could be regarded as changed circumstances.²⁹ Furthermore, all three of them, the effect of war, impossibility and *rebus sic stantibus* can be mixed when stating that “it is not so much the fact that a war has broken out, but rather the impossibility to implement the treaty, owing to the change in the conditions which presided over its conclusion, which affects the treaty.”³⁰ (The ILC has not dealt with the question of distinction in the Reports, and it is a complex topic, thus not a subject of the present study.)

It took several decades for the ILC to venture to explore this question and it is most probable that almost the same duration of time will pass before the ILC reaches a common view. In the last 3 years, since it is on the agenda, the ILC was able to define the rough frame of the topic, the draft articles form an adequate basis for the elucidation of the problems, but yet no answers are given.

¹ Dr. Szalai, Anikó, University of Szeged Faculty of Law, Department of International and European Law, PhD Student, Year II, Tutor: Bodnár László, Professor of International Law, Head of Department (Dr. Szalai Anikó, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Nemzetközi Jogi és Európa-jogi Tanszék, II. éves nappali tagozatos PhD hallgató, témavezető: Prof. Dr. Bodnár László tanszékvezető, egyetemi tanár).

² A/55/10 Report of the International Law Commission, 2000, Ch. IX, paras. 726, 729.

³ A/55/10 Report of the International Law Commission, 2000, Annex, Syllabuses on topics, 140.

⁴ *Ibid.*

⁵ Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, 1966, vol. II., Commentary to draft article 69., 267.

⁶ A/59/10 Report of the International Law Commission, 2004, Ch. XI, para. 364.

⁷ A/CN.4/552, Geneva, 2 May-3 June and 4 July-5 August 2005

⁸ A/CN.4/570 Second report on the effects of armed conflict on treaties, June 2006; A/CN.4/578 Third report on the effects of armed conflict on treaties, March 2007

⁹ A/CN.4/550 and Corr.1, The effect of armed conflict on treaties: an examination of practice and doctrine

¹⁰ A/CN.4/578 Third report on the effects of armed conflict on treaties, March 2007, para. 9.

¹¹ Article 2, para. 1 (a) of the Vienna Convention, 1969, “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”

¹² A/CN.4/578 Third report on the effects of armed conflict on treaties, March 2007, Draft article 2 (b), paras. 12-15.

¹³ In the Sixth Committee: States opposed to inclusion are Algeria, Austria, China, Colombia, India, Indonesia, Islamic Republic of Iran, Portugal, United Kingdom; States in favour of inclusion are Greece, Japan, Malaysia, Morocco, Nigeria, the Netherlands, Poland, Romania, Sierra Leone, Slovakia.

¹⁴ A/CN.4/578 Third report on the effects of armed conflict on treaties, March 2007, Draft article 3, paras. 16-19.

¹⁵ Ibid. Draft article 4, paras. 20-25.

¹⁶ Ibid. Draft article 8.

¹⁷ Ibid. Draft article 5.

¹⁸ Ibid. Draft article 5 bis

¹⁹ Ibid. Draft article 6 bis

²⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996, para. 25.

²¹ A/CN.4/578 Third report on the effects of armed conflict on treaties, March 2007, paras. 30-31.

²² Ibid. Draft article 7

²³ Ibid. para. 34.

²⁴ Ibid. para. 35.

²⁵ Ibid. Draft article 9

²⁶ Ibid. Draft article 14

²⁷ Ibid. para. 61.

²⁸ Ibid. Draft articles 11-12.

²⁹ Benedetto Conforti, Stuart Hull McIntyre, Ian Brownlie in: A/CN.4/550 and Corr.1, The effect of armed conflict on treaties: an examination of practice and doctrine, 68-71.

³⁰ Ibid. 77.