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Fourth report on the effects of armed conflicts on treaties
by Mr. Ian Brownlie, Special Rapporteur

Procedure for suspension and termination

Contents

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I. Introduction

1. In the third report on the effects of armed conflicts on treaties (A/CN.4/578 and Corr.1), the mode of suspension or termination was treated in draft article 8 by analogy with articles 42 to 45 of the Vienna Convention on the Law of Treaties.[1] Both in the debate in plenary and in the Working Group, it was pointed out that this question requires further examination.

2. During the proceedings in the Working Group, it was agreed that the Special Rapporteur should be requested to carry out a more developed examination of the question of procedure, with particular reference to article 65 of the Vienna Convention. In order to expedite this examination, the Secretariat has prepared an informal memorandum on the legislative history of article 65 of the Vienna Convention on the Law of Treaties, excerpts of which are included in the present report.

II. The provisions of the Vienna Convention

3. By way of preface it is necessary to indicate the limited relevance of the provisions of the Vienna Convention on the Law of Treaties.

4. Part V of the Vienna Convention deals with "Invalidity, termination and suspension of the operations of treaties" and consists of five sections as follows:

Section 1: General provisions (articles 42 to 45)

Section 2: Invalidity of treaties (articles 46 to 53)

Section 3: Termination and suspension of the operation of treaties (articles 54 to 64)

Section 4: Procedure (articles 65 to 68)

Section 5: Consequences of the invalidity, termination or suspension of the operation of a treaty (articles 69 to 72).

5. In the result the provisions which directly concern the issue of procedure are as follows:

"**Section 4. Procedure**

"*Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*

"1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons thereof.

"2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party

[1] United Nations, *Treaty Series*, vol. 1155, p. 331.

has raised any objection, the party making the notification may carry out in the manner provided in Article 67 the measure which it has proposed.

"3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

"4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

"5. Without prejudice to article 45, the fact that a State has not previously made the notifications prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

"*Article 66. Procedures for judicial settlement, arbitration and conciliation*

"If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

"*Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty*

"1. The notification provided for under article 65, paragraph 1, must be made in writing.

"2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

"*Article 68. Revocation of notification and instruments provided for in article 65 and 67*

"A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect."

6. The difficulty which has to be faced is that *these provisions on procedure in cases of termination or suspension do not apply to any question "that may arise in regard to a treaty … from the outbreak of hostilities between States"*. This is

stipulated in article 73, which applies to the provisions of the Vienna Convention as a whole.

III. The legislative history of article 65 of the Vienna Convention

7. The presence of article 73 has the consequence that the Commission will be at liberty, and have the necessity, to design a solution for the particular case of the effect of armed conflict on treaties.

A. Relevance of the legislative history

8. The irrelevance of article 65 as a matter of formal application of the provisions does not have the implication that the legislative history is redundant. The relevance of the policy considerations taken into account in formulating article 65 to the procedure applicable in the case of the effects of armed conflicts cannot be ruled out ab initio. At the same time there remains the possibility, to be examined in due course, that the case of armed conflict is qualitatively different from the cases of termination or suspension presently encompassed by the Vienna Convention, and that in consequence the policy considerations are also different.

B. The legislative history of article 65 summarized (as in the Commission)

9. The original of article 65 was draft article 62 of the draft articles on the law of treaties considered by the Commission in 1966. The sources are analysed in some detail in the memorandum of the Secretariat on the legislative history of article 65. The key stages in the process were as follows:

First reading — draft article 51 (1963-1964)

10. The Secretariat analysis is as follows:

> "1963 In his second report (A/CN.4/156 and Add.1-3), Special Rapporteur Waldock included a section IV containing four draft articles (23-26) on the 'Procedure for annulling, denouncing, terminating, withdrawing from or suspending a treaty and the severance of treaty provision'.
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> - The Commission's discussion of the Special Rapporteur's proposals for the procedure for annulment, denunciation, termination, etc. were held at the 698th to 700th and 705th to 707th (art. 26 — severance) meetings.
>
> - The Drafting Committee subsequently proposed a revised drafting for draft article 25, which was discussed at the 714th meeting.
>
> "1963 That year the Commission adopted a further set of draft articles, including former draft articles 24 and 25, which have been renumbered as draft articles 50 (Procedure under a right provided for in the treaty) and 51 (Procedure in other cases), with commentaries. Draft article 51 was the first time the formulation,

later adopted by the Commission as draft article 62, appeared in the proposals for draft articles.

"1964 The first reading of the entire set of draft articles (including draft article 51) was subsequently concluded in 1964, following which the Commission transmitted the draft articles to Governments for comments.

• Draft article 51 was only raised twice in the debate in 1964 (by Mr. Rosenne at the 743rd meeting and Mr. Briggs at the 754th meeting).

"The text of draft article 51, as adopted on first reading, was as follows:

'*Article 51. Procedure in other cases*

'1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must:

(a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

'2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

'3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

'4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

'5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.'"

Second reading — draft article 62 (1965-1966)

11. The Secretariat analysis is as follows:

"1965 Several Governments submitted comments on, inter alia, draft article 51 as adopted by the Commission on first reading (A/CN.4/182 and Corr.1 and 2 and Add.1, Add.2/Rev.1 and Add.3).

"1965 The Commission did not consider draft article 51, as it was only able to consider the first 29 draft articles. The only reference in the

debate that year to draft article 51 was in a statement by Mr. Rosenne at the 797th meeting.

"1966 In his fifth report (A/CN.4/183 and Add.1-4), Special Rapporteur Waldock included a section on article 51 reviewing the comments made by Governments and making suggestions.

"1966 While the Commission was unable to discuss article 51 at its Monaco session early in 1966, several passing references to it were made in the debate.

"1966 The Special Rapporteur's proposals for article 51 were considered by the Commission at its 845th meeting, following which the draft article was referred to the Drafting Committee. Passing reference to the provision was subsequently made at the 849th, 861st and 863rd meetings. The report of the Drafting Committee on draft article 51 was presented to the plenary and considered at the 864th meeting, and was referred back to the Drafting Committee. The Commission considered a revised proposal for draft article 51, presented by the Drafting Committee, at its 865th meeting, following which draft article 51 was adopted, on second reading, by a vote. Reference to draft article 51, as adopted, was subsequently made at the 868th, 876th and 887th meetings.

"1966 Draft article 51 was subsequently renumbered as draft article 62 and adopted on second reading together with a commentary.

"The text of draft article 62, as adopted on second reading, was as follows:

'*Article 62. Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty*

'1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

'2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

'3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

'4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

'5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not

prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.'"

12. For present purposes the results of this analysis are inevitably limited, but the legislative history provides some useful indications of certain basic policy questions.

C. The policy considerations emerging from the work of the Commission

13. The work of the Commission in the period from 1963 to 1966 reveals the policy considerations lying behind draft article 51 (and, subsequently, draft article 62), as presented in the report of the Commission to the General Assembly in 1966.[2]

14. At the outset it should be emphasized that the question of procedure which is formally the subject of draft article 62 was closely related to the issues of substance. Indeed, the "procedural" elements provided the safeguards against the arbitrary assertion of grounds upon which treaties may be determined to be invalid, or terminated, or suspended. This consideration of legal security was indicated in a series of studies by different Special Rapporteurs.[3]

15. The policy elements were summarized in the commentary of the Commission attached to the draft article 62 in the report of the Commission to the General Assembly in 1966, as follows:

> "(1) Many members of the Commission regarded the present article as a key article for the application of the provisions of the present part dealing with the invalidity, termination or suspension of the operation of treaties. They thought that some of the grounds upon which treaties may be considered invalid or terminated or suspended under those sections, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real dangers for the security of treaties. These dangers, were, they felt, particularly serious in regard to claims to denounce or withdraw from a treaty by reason of an alleged breach by the other party or by reason of a fundamental change of circumstances. In order to minimize these dangers the Commission has sought to define as precisely and as objectively as possible the conditions under which the various grounds may be invoked. But whenever a party to a treaty invokes one of these grounds, the question whether or not its claim is justified will nearly always turn upon facts the determination or appreciation of which may be controversial. Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation."[4]

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[2] *Yearbook of the International Law Commission 1966*, vol. II, doc. A/6309/Rev.1.

[3] In this respect the following materials are of particular relevance: Fitzmaurice, second report, *Yearbook ... 1957*, vol. II, pp. 20-70; Waldock, second report, *Yearbook ... 1963*, vol. II, pp. 35-93; and Waldock, fifth report, *Yearbook ... 1966*, vol. II, pp. 46-50.

[4] *Yearbook ... 1966*, vol. II, p. 262.

16. In case of objections to a claim to terminate or suspend treaty provisions, some members of the Commission insisted that the resulting disputes should be subject to the compulsory jurisdiction of the International Court of Justice. The majority in the Commission were unable to accept such a procedural check, and were satisfied with the seeking of a solution through the means indicated in Article 33 of the Charter of the United Nations. This solution was justified in the Commentary in the following passages:

> "(5) *Paragraph 1* provides that a party claiming the nullity of the treaty or alleging a ground for terminating it or withdrawing from it or suspending its operation shall put in motion a regular procedure under which it must first notify the other parties of its claim. In doing so it must indicate the measure which it proposes to take with respect to the treaty, i.e. denunciation, termination, suspension, etc. and its grounds for taking that measure. Then by *paragraph 2* it must give the other parties a reasonable period within which to reply. Except in cases of special urgency, the period must not be less than three months. The second stage of the procedure depends on whether or not objection is raised by any party. If there is none or there is no reply before the expiry of the period, the party may take the measure proposed in the manner provided in article 63, i.e. by an instrument duly executed and communicated to other parties. If, on the other hand, objection is raised, the parties are required by *paragraph 3*, to seek a solution to the question through the means indicated in Article 33 of the Charter. The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations.
>
> "(6) Even if, for the reasons previously mentioned in this commentary, the Commission felt obliged not to go beyond Article 33 of the Charter in providing for procedural checks upon arbitrary action, it considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties would be a valuable step forward. The express subordination of the substantive rights arising under the provisions of the various articles to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty."[5]

17. The limitations upon the procedural checks were explained by Waldock during the 864th meeting of the Commission in 1966:

> "13. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 51 and 50 must be viewed in the light of the earlier articles, particularly article 30.

[5] Ibid.

The order of the two articles had been deliberately reversed by the Drafting Committee, so as to make it clear that article 50, which dealt with the final act was performed in the circumstances in which termination was legitimate.

"14. The difficulty in article 51 was that despite its safeguards, its provisions on negotiations and its reference to Article 33 of the Charter, it did not deal with a possibility of a deadlock. Clearly, under article 51, the parties would be left to act on their own responsibility. That looseness was inherent in the rules of contemporary international law on the adjudication of disputes.

"15. He sympathized with Mr. Jiménez de Aréchaga's wish to see the provisions of article 51 made as clear as possible *but it should be remembered that the Commission has not covered all the factual causes of termination in its draft articles; obsolescence, for example, had not been dealt with specifically. As far as State responsibility and State succession were concerned, however, he himself believed that they were governed with different principles*."[6] (Emphasis added)

18. These observations involve a frank estimation of the limitations presented by the provisions of draft article 51, which was the predecessor of article 65 of the Vienna Convention. Two elements are especially significant. In the first place, Waldock emphasizes the looseness "inherent in the rules of contemporary international law on the adjudication of disputes". And it must be clear that the picture has not changed very much since 1966. Secondly, the references by Waldock to other factual causes of termination, such as State succession, is of interest. In the context of the work of the Commission, it is clear that the outbreak of an armed conflict was such another factual cause. And it is equally clear that the Commission also regarded the incidence of armed conflict to be "governed by different principles".

D. The legislative history of article 65 summarized (Vienna Conference on the Law of Treaties)

19. The Secretariat analysis is as follows:

"**Introduction**

"8. The following changes were made during the Vienna Conference to draft article 62 as adopted by the Commission in 1966, resulting in the text of what is now article 65 of the Vienna Convention:

'*Article 65*

'*Procedure to be followed <u>with respect to</u> invalidity, termination, withdrawal from or suspension of the operation of a treaty*

'1. A party which, <u>under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation</u>, must notify other parties of its claim. The

[6] *Yearbook ... 1966*, vol. I, Part Two, p. 149.

notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons thereof.

'2. If, after the expiry of a period which, in cases of special urgency, shall not be less than three months after receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

'3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

'4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

'5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.'

"9. As can be seen from comparison, other than changes in cross-references, the only substantive changes made to the article, during the Vienna Conference, were to the title and to paragraph 1. Paragraphs 2 to 5 were adopted with the formulation proposed in the Commission's draft.

"10. What follows is a synopsis of the consideration of the provision at the Vienna Conference, resulting in the adoption of article 65 with the above amendments.

"**Summary of the consideration of article 65 [62] at the Vienna Conference**

"11. Draft article 62, as proposed by the International Law Commission, was considered by the Committee of the Whole of the Vienna Conference at its 1968 session, and a revised text as proposed by the Drafting Committee (containing only an amendment proposed by France) was adopted by the Committee of the Whole that year. The draft article was subsequently adopted by the plenary of the Conference in 1969.

"**Detailed chronology of consideration of article 65 [62] at the Vienna Conference**

"12. Two sessions of the Vienna Conference were held, in 1968 and 1969, respectively. The following is a description of the consideration of draft article 65 [62] during those sessions.

"*a. Discussion and action in the Committee of the Whole at the 1968 session*

"13. Draft article 62, as proposed by the International Law Commission, was considered by the Committee of the Whole at the 1968 session. Although several Governments submitted drafting proposals, only a proposal by France amending paragraph 1 was adopted. The draft article was then transmitted to the Drafting Committee, which simply incorporated the French amendment into paragraph 1. The Committee of the Whole considered and adopted the text

for draft article 62, as proposed by the Drafting Committee, at the 83rd meeting (paras. 14-16).

"1968 • Report of the Committee of the Whole (see paras. 573-581)

• Summary records of the 68th to 74th and 80th meetings of the Committee of the Whole containing discussion of draft article 62, as proposed by the International Law Commission

• Summary record of the 83rd meeting of the Committee of the Whole

"*b. Discussion and action in the plenary of the Conference at the 1969 session*

"14. Draft article 62, as approved by the Committee of the Whole, was adopted by the plenary of the Conference at its 25th meeting, held on 15 May 1969. The article was subsequently renumbered as article 65 of the Vienna Convention on the Law of Treaties. Note that some delegations conditioned their support for the provision on the inclusion of draft article 62 *bis*, which became article 66 of the Vienna Convention."

20. The French amendment, adopted by the Committee of the Whole at the 83rd meeting, is of particular significance. The purpose of the amendment was explained at the sixty-eighth meeting by Mr. de Bresson:

"9. Mr. DE BRESSON (France), introducing his delegation's amendment to paragraph 1 (A/CONF.39/C.1/L.342), said that a study of Part V showed that the International Law Commission had drawn a distinction between cases where the validity of a treaty might be contested in accordance with the provisions of articles 43 to 47, and those, covered by articles 48 to 50 and 61, where a treaty was void *ab initio*. Although that difference was not expressly stated anywhere in the draft convention, the difference of terminology used in the two groups of articles was evident, and the Committee must consider whether that difference affected the obligation to notify other parties of a claim of invalidity or an allegation of a ground for termination, withdrawal or suspension. In its comments on article 39, the French delegation had pointed out that the actual text of article 62 gave no clear answer to that important question.

"10. A *prima facie* examination of article 39, paragraph 1, gave the impression that the second sentence was complementary to the first, and that the paragraph as a whole established no distinction between 'relative' invalidity and invalidity *ab initio*; that interpretation also led to the assumption that article 62, paragraph 1, covered cases under articles 43 to 50 and article 61. A closer study of Part V showed, however, that that interpretation was unduly simple and that article 39, paragraph 1, might be held to refer to two distinct but parallel means of contesting validity.

"11. In that event, it could be argued that article 62, paragraph 1, only covered claims of invalidity on the grounds referred to in articles 43 to 47. But the second sentence of article 39, paragraph 1, provided for no recourse to article 62 in the cases of invalidity *ab initio* covered by articles 48 to 50 and article 61, and the grounds of invalidity in such cases could be invoked without reference to article 62, paragraph 1, and even without the intervention of the parties. That interpretation was further corroborated by the difference in

the terms used in paragraphs 4 and 5 of article 41 for States invoking 'relative' invalidity and those claiming invalidity *ab initio*, and also by the absence of any reference to the provisions in question in article 42.

"12. The possible consequences of that anomaly would be to enable any party to a treaty unilaterally to claim invalidity on the very grounds which were most difficult to establish, and to open the way to States other than the parties to benefit by the invalidity provided for by those articles.

"13. It had been claimed that the International Law Commission had meant article 62 to apply to all the provisions of Part V, but the French delegation considered that no ambiguity should be allowed to remain on such a fundamental point, and it had introduced its amendment with the sole purpose of clarifying the text in accordance with the generally recognized meaning."[7]

21. This amendment, which was adopted by the Committee of the Whole, provides reinforcement to the view that the issues of substance (invalidity), and the question of the procedure to be followed, were seen to be closely related.

22. Article 62 (as it then was) was adopted by the Plenary by 106 votes to none with two abstentions.[8]

E. The legislative history of article 65 (the phrase "except in cases of special urgency")

23. This phrase forms part of the text of article 65 as finally adopted at the Vienna Conference. The formulation first appears in draft article 51 (the predecessor of article 65) on the first reading in 1964 (see para. 10 above). The records contain no precise explanation of its provenance and it failed to provoke discussion in the plenary. It did, however, lead to discussion in the Drafting Committee, and this is referred to by Waldock in his fifth report. There, in examining the proposals of Governments, Waldock observed:

"7. The Finnish Government also suggests that in paragraph 1(b) a time-limit should be fixed within which the other party's reply would have to be given in cases of 'special urgency'; and it suggests a limit of two weeks or one month. This question, if the Special Rapporteur's memory is correct, was considered in the Drafting Committee which, however, thought it difficult to fix in advance a rigid time-limit to apply to all cases of 'special urgency'. In practice, cases of special urgency are likely to be cases arising from a sudden and serious violation of the treaty by the other party; and it seems possible to conceive of cases where even a time-limit of two weeks might be too long in the particular circumstances of the violation."[9]

24. In evaluating this element in the records it must be borne in mind that the reference to "cases of special urgency" can have no necessary relation to cases of

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[7] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole*, 68th meeting of the Committee of the Whole, 14 May 1968, paras. 9-13.

[8] *Second Session, Vienna, 9 April-22 May 1969, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole*, 25th plenary meeting, 15 May 1969, para. 43.

[9] *Yearbook ... 1966*, vol. II, pp. 49 and 50.

armed conflict, given the explicit provisions of article 73 of the Vienna Convention. At the same time, it is helpful to have the indication that the concept of "special urgency" was regarded as fact-based and related to "the particular circumstances of the violation".

IV. The special character of the "effects of armed conflicts on treaties" as a basis of termination or suspension

25. The Commission, during its work on the law of treaties in the years 1963 to 1966, held the opinion that it was not convenient to include "the case of an outbreak of hostilities between parties to a treaty". This response has been examined in the first report (A/CN.4/552, paras. 7-9). Thus, in the commentary to draft article 69 of the 1966 report to the General Assembly (article 73 of the Vienna Convention), the Commission observed (in relation to the cases of State succession and State responsibility):

> "(1) … Both these matters may have an impact on the operation of certain parts of the law of treaties in conditions of entirely normal international relations, and the Commission felt that considerations of logic and of the completeness of the draft articles indicated the desirability of inserting a general reservation covering cases of succession and cases of State responsibility."
>
> "(2) Different considerations appeared to the Commission to apply to the case of an outbreak of hostilities between parties to a treaty. It recognized that the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing. It also recognized that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. But it considered 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. Thus, the Geneva conventions codifying the law of the sea contain no reservation in regard to the case of an outbreak of hostilities notwithstanding the obvious impact which such an event may have on the application of many provisions of those Conventions; nor do they purport in any way to regulate the consequences of such an event. It is true that one article in the Vienna Convention on Diplomatic Relations (art. 44) and a similar article in the Convention on Consular Relations (art. 26) contain a reference to cases of 'armed conflict'. Very special considerations, however, dictated the mention of cases of armed conflict in those articles and then only to underline that the rules laid down in the articles hold good even in such cases. The Vienna Conventions do not otherwise purport to regulate the consequences of an outbreak of hostilities; nor do they contain any general reservation with regard to the effect of that event on the application of their provisions. Accordingly, the Commission concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no

account should be taken of that case or any mention made of it in the draft articles."[10]

26. In the event, the case of the outbreak of hostilities between States was included in article 73 of the Vienna Convention. As will be recalled, article 73 provides simply that "the provisions of the present Convention *shall not prejudge* any question that may arise in regard to a treaty … from the outbreak of hostilities between States". (emphasis added)

27. With due respect, the policy considerations invoked by the Commission in 1966 (see para. 25 above) have a generality which limits their reference. It is necessary to produce a more realistic analysis and one which is related directly to the modalities of termination and suspension.

28. The analysis now presented rests upon the general assumption that article 65 of the Convention does not provide helpful analogies for present purposes and that the case of armed conflict (or the outbreak of hostilities) is essentially different from what may be called the standard cases of invalidity, termination or suspension represented in part V of the Vienna Convention, and to which article 65 refers. The French amendment to article 62 (as it then was) at the Vienna Conference was intended to clarify that the procedure of notification applied to the provisions of part V *as a whole*.

V. The special character of the "effects of armed conflicts on treaties": distinguishing elements

29. The distinguishing elements are presented in order of significance:

(a) In the standard cases of termination or suspension the precipitating factor is the breach of the treaty or the revelation of invalidity as such. In the case of an armed conflict or military occupation, the precipitating factor is normally independent of the breach of treaty or the element of invalidity concerned. In other words, the dominant element (in the sense of causation) is extraneous to the breach of the treaty provisions;

(b) A further and equally significant factor is that the *cause* of the termination or suspension is not the breach of the treaty concerned but the considerations of security and necessity dictated by the circumstances of the armed conflict. It is in this respect particularly clear that the case of armed conflict is not a paradigm of the other cases of termination or suspension recognized in the Vienna Convention. It is also reasonably clear that the policy choice between termination and suspension is driven by elements of security and proportionate response. In other words, the policy elements include elements of necessity;

(c) The special character of the case of armed conflict can be illustrated by reference to the polarity between the Commission debates leading to article 65 and the practical consequences of an armed conflict. The focus of attention in the Commission was the appearance of the elements of a legal dispute, and the consequential need for provision for peaceful settlement and, in particular, the

[10] *Yearbook ... 1966*, vol. II, pp. 267 and 268.

creation of an obligation concerning dispute settlement. The provisions of article 65 directly reflect those concerns;

(d) In the circumstances of an armed conflict, the significance of peaceful settlement as a procedural safeguard is reduced if not eliminated. Indeed, the peaceful settlement scenario will be transformed by the incidence of an armed conflict. Moreover, identification of the legal dispute or disputes will be complex. The factors involved would result in a sequence of related disputes, as follows:

(i) The original act of termination of a treaty and the resulting notification, coupled with an objection;

(ii) A dispute as to the implementation of the provisions of article 67 of the Vienna Convention;

(iii) The legality of the armed conflict, both as to the progenitor, and the responsive measures of the target State, as additional sources of dispute;

(iv) The issues concerning the legality of countermeasures taken by the State Party which objects in face of a notification of termination or suspension;

(v) Also to be taken into account would be special legal factors conditioning the application of the provisions concerning notification and objection, stemming from the legal duty not to terminate or suspend the operation of a treaty if the effect would be to benefit an aggressor State.

VI. The modalities of notification in cases of armed conflict

30. In the light of the considerations set forth above, it may be asked whether the duty of notification can realistically feature in a set of provisions relating to the incidence of an armed conflict. After careful consideration, the Special Rapporteur has concluded that the role of notification cannot be ruled out ab initio.

31. The reasons for this conclusion are as follows. In the first place, notification, even in cases of armed conflict, constitutes a part of the procedural safeguards militating against unilateral action, and creating inducements to resort to a process of dispute settlement.

32. In addition, notification will remain feasible in the situations in which normal relations are maintained to a certain extent, in spite of the existence of an armed conflict. It is clear that the circumstances of armed conflict are very varied.

33. A further, and very significant, legal factor is the effect of draft article 3 in the third report (A/CN.4/578 and Corr.1), according to which the outbreak of an armed conflict “does not necessarily terminate or suspend the operation of treaties”. The process of notification is congruent with this regime of stability.

34. In the light of these considerations there is a certain case for maintaining a set of provisions concerning the modalities of termination and suspension. An efficient version of such provisions is to be found in draft article 26 as proposed by Fitzmaurice in his second report[11] as follows:

[11] *Yearbook ...1957,* vol. II, document A/CN.4/107.

"*The process of termination or withdrawal by notice (modalities)*

"1. In order to be valid and effective, notice of termination or withdrawal must, whether given under a treaty or other special agreement of the parties, or in consequence of a ground arising by operation of law, comply with the conditions specified in paragraphs 2 to 9 below, it being understood that any reference to a treaty includes any separate agreement of the parties providing for termination in relation to the treaty.

"2. Any notice given under a treaty must comply with the conditions specified in the treaty, and must be given in the circumstances and manner therein indicated. Where the notice is not given under the treaty but in the exercise of a faculty conferred by operation of law, it must state the date on which it purports to take effect, and the period of notice specified must be a reasonable one having regard to the character of the treaty and the surrounding circumstances. Except as provided in the remaining paragraphs of the present article, any failure or irregularity in the foregoing respects will render the notice inoperative, unless, either expressly or tacitly (by conduct or non-objection), all the other parties accept it as good.

"3. All notices must be formally communicated to the appropriate quarter in accordance with paragraph 2 of article 25 above. It is not sufficient to announce termination or withdrawal or give notice of it publicly, or publish it [in] the press. In the case of bilateral treaties, notice is given to the other party. In the case of plurilateral or multilateral treaties it must be given to each of the other parties individually, unless the treaty enables notice to be given to a 'headquarters' government, international organization or other specified authority.

"4. Notices take effect on the date of their deposit with the appropriate authority, and any period to which the notice is subject runs from then. In the case of notices given to several governments in respect of the same treaty, a uniform date must be indicated in the notices, and the moment of their communication must, so far as possible, be synchronized.

"5. Where the treaty requires a specified period of notice, or only permits of notice to take effect at the end of certain periods, and a notice is given purporting to take effect immediately, or after a shorter period than the one specified, the notice will not be void, but (if it is a notice given under the treaty) will take effect only on the expiry of the correct period as indicated in the treaty. If, however, and whether or not the treaty allows notice to be given under certain conditions, the notice in question does not purport to be given under the treaty, but in the exercise of a faculty conferred by law, the question of the period of notice will be governed by the relevant provisions of paragraph 2 above, and the notice will not take effect before the expiry of a reasonable period.

"6. Unless the treaty expressly so permits, notices of termination or withdrawal must be unconditional. Except as so provided, an intimation, public declaration or announcement that a party will terminate or withdraw from a treaty in certain events, or unless certain conditions are fulfilled, does not constitute an actual notice of termination or withdrawal, and will require to be completed by an unconditional notice in due course.

"7. Except where the treaty expressly provides for the separate termination or denunciation of, or withdrawal from, some particular part of, or certain individual clauses of the treaty, any notice of termination or withdrawal must relate to the treaty as a whole. In the absence of such express provision, a partial notice is invalid and inoperative.

"8. Equally, unless the contrary is both stated in the notice, and permitted by the treaty, a notice of termination or withdrawal applies automatically to all annexes, protocols, notes, letters and declarations attached to the treaty and forming an integral part of it, in the sense that they are without significant meaning or effect apart from, or in the absence of, the treaty.

"9. Unless the treaty otherwise provides, any notice of termination or withdrawal may be cancelled or revoked at any time before it takes effect or before the expiry of the period of notice to which it is subject; provided that such cancellation or revocation receives the assent of any other party which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position."

35. This set of provisions is to be preferred to the content of article 65 of the Vienna Convention for the following reasons. In the first place, the drafts presented by the subsequent Special Rapporteur, Sir Humphrey Waldock, were not successors to the Fitzmaurice draft (as in para. 34 above), but were antecedents of what became article 65 of the Vienna Convention.[12] The advantage of the Fitzmaurice draft is that it provides detailed provisions directly related to the procedure of termination and suspension. The disadvantage of the Waldock draft (and its successors) is the inclusion of machinery for the compulsory settlement of disputes.

36. It is reasonably clear that the prominence of the question of dispute settlement in the Waldock draft is hardly suited to the context of an armed conflict.

VII. The absence of notice of termination or suspension in relation to an armed conflict

37. The provisions of article 65 of the Vienna Convention do not relate to the case of an armed conflict as dictated by article 73, and this appears to be true. The key question is what the result is in the following situations:

- First: The existence of armed conflict impedes the giving of notice of termination or suspension within a reasonable period
- Second: The existence of an armed conflict is the *legal cause* of the termination or suspension, but no notice is given at any stage.

38. At this stage in the analysis it must be assumed that, in certain conditions, the incidence of armed conflict may justify termination or suspension between the parties and third States. The conditions of susceptibility are set forth in the 2007 revised formulation of the Working Group on the Effects of Armed Conflicts on Treaties for draft article 4, as follows (A/CN.4/L.718, para. 4):

[12] See Waldock, second report, *Yearbook ... 1963*, vol. II, pp. 86-90, draft article 25 and commentary.

"In order to ascertain whether a treaty is susceptible to termination or suspension in the event of armed conflict, resort shall be had to:

(a) Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject matter of the treaty and the number of parties to the treaty."

39. Two questions can now be confronted. The first is whether the regime of notice as presented by various Special Rapporteurs, and in the provisions of article 65 of the Vienna Convention, is feasible at all in relation to cases of armed conflict. The second question is this: if the regime of notice is regarded as inapplicable, what legal regime remains in place?

40. It is helpful to deal with these two questions together. There are two possible answers to the first question:

(a) That the regime of notice is simply not feasible;

(b) The application of a doctrine of waiver of the requirement of notice if the following conditions are present:

(i) Conduct of the other party constituting waiver of the requirement of notice;

(ii) Conduct of the other party indicating knowledge of the termination or suspension;

(iii) Express agreement to have recourse to recognized procedures of peaceful settlement, after the end of the armed conflict.

41. In case the principle of notice were to be ruled out as a matter of principle, as being infeasible, what legal regime would remain in place? The answer would appear to be: a legal regime broadly similar to the regime established by the provisions of the Vienna Convention. This was recognized by the Special Rapporteur, Sir Humphrey Waldock, in 1966. In his words:

"14. The difficulty in article 51 was that despite its safeguards, its provisions on negotiations and its reference to Article 33 of the Charter, it did not deal with the possibility of a deadlock. Clearly, under article 50, if no settlement was reached after exhausting the procedures specified in article 51, the parties would be left to act on their own responsibility. That looseness was inherent in the rules of contemporary international law on the adjudication of disputes."[13]

42. At the end of the day, the procedure of notification in article 65 of the Vienna Convention, aside from its function as a safeguard of the stability of treaties, has the role of providing evidence of the existence of a dispute. However, in most circumstances it will be possible to prove the existence of a dispute by other means. It is also to be recalled that no duty of notification exists in general international law.

[13] *Yearbook ... 1966*, vol. I, part two, p. 149.

VIII. Some conclusions

43. It is not intended to summarize the views advanced above. The purpose of this report has been to promote the formation of collective opinion within the Commission. There are certain choices to be made.

Option 1

44. The first possibility is to decide that there is no sufficient justification for a regime of notification similar to the content of article 65 of the Vienna Convention.

Option 2

45. The second option is to maintain a regime of notification which would reflect the considerations set forth in paragraphs 30 to 34 above. Such a regime could be based upon the drafts produced by Fitzmaurice in his second report.[11] The relevant drafts are as follows:

Draft article 8 bis
The act of termination or withdrawal

1. The act and process of terminating or withdrawing from a treaty by any party is an executive one, and, on the international plane, the function of the executive authority of the State. This applies whether the act consists of (i) a notice given under the treaty itself, or under a separate agreement of the parties, or in consequence of a ground of termination or suspension arising by operation of law; (ii) entering into a direct terminating agreement, or a replacing, revising or modifying treaty; or (iii) an acceptance of an invalid or irregular notice of termination, or of a repudiation. Consequently, the provisions of article 9 (The exercise of the treaty-making power) in the introduction to the present Code (A/CN.4/101) apply *mutatis mutandis* to the process of termination and withdrawal in the same way as they do to that of the making and conclusion of treaties.

2. A notice of termination or withdrawal consists, on the international plane, of a formal instrument or notification emanating from the competent executive authority of the State, and communicated through the diplomatic or other accredited channel to the other party or parties to the treaty, or to such "headquarters" government or authority as the treaty may specify, signifying the intention of the party concerned to terminate the treaty, or withdraw from participation in it, on the expiry of the required or appropriate period of notice.[14]

Draft article 8 ter
The process of termination or withdrawal by notice[15]

46. For the reasons given in paragraphs 35 and 36 above, this set of provisions is to be preferred to the content of article 65 of the Vienna Convention.

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[14] *Yearbook ... 1957*, vol. II, document A/CN.4/107, draft article 25.

[15] The text of this draft article (draft article 26 in the Fitzmaurice report) is set forth in paragraph 34 above.

Option 3

47. There is some justification for a principle of waiver of the requirement of notice as follows:

> *Draft article 9*
> *Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*
>
> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> (a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> (b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

This text replicates the provisions of article 45 of the Vienna Convention.

48. The question of the separability of treaty provisions has been left aside and is the subject of a separate study.