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Until We Achieve Universal Peace: Implications of the International Law Commission's Draft Articles on the "Effects of Armed Conflict on Treaties"

Lauren Dudley*

I. INTRODUCTION

Armed conflict is raging all around the world right now – the United States Military is engaging in offensive activities in Iraq and Afghanistan and recently deployed troops to Syria; the Boko Haram insurgency continues in Nigeria and other African States; civil war is consuming Yemen; armed conflict is engulfing South Sudan; civilians continue to be at risk in the Great Lakes region of Africa; unrest persists in eastern Europe; and millions are fleeing Syria and seeking refuge in Europe and other continents to offer a few examples. In the face of these examples of armed conflict is an international system of treaties and conventions that have been developed over the last century with the main goal of preventing and managing armed conflict, as well as with the goals of facilitating trade, encouraging economic development, and improving access to medicine and food.

A number of scenarios can complicate legal obligations when an armed conflict erupts between state parties to a treaty. For example, imagine you are the leader of a State that has just declared war on another State. After fighting commences, you come to the realization that your country previously entered into a number of treaties with the same State with which you are now at war. Are those treaties still in effect? What would happen if neither State formally declared war? Imagine yet another scenario where there is no international conflict, but violent clashes have erupted between the State's military and armed groups within the territory. Is the State still bound to fulfill all of its treaty obligations with other states? What if the State's military is not involved in the clashes, but instead the violence is carried out by at least two groups of non-state actors? The international community has sought the answers to these questions.

In July 2011, the International Law Commission ("ILC") concluded its work on the topic of the effect of armed conflict on treaties by adopting a set of draft articles on the topic and recommending them to the United Nations ("U.N.") General Assembly. Later that year, the General Assembly considered chapter VI of the "Report of the International Law Commission on the work of its sixty-third session" and took note of the draft articles and commended them to U.N. Member States.¹ In 2014, the U.N. Sixth Committee considered the "Effect of Armed Conflict on Treaties"

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and adopted a draft resolution once again commending the articles to Member States.² The U.N. Sixth Committee requested comments of the Member States with the plan to include the topic on the agenda for the seventy-second U.N. General Assembly Session scheduled to commence in 2017.³ Since the beginning of this process ten years ago, the facilitation of discussions between States on this significant yet continually changing area of international law has been the most recent step in adopting a resolution that details treaty protocol.

This Article looks at the role of the ILC in evaluating the draft resolution of the “Effects of Armed Conflict on Treaties” and evaluates the sources relied upon by the ILC and some implications the draft articles present. Unlike many of the international conventions that are already generally accepted and frequently relied upon such as the “U.N. Convention Against Torture,”⁴ the draft articles on the “Effects of Armed Conflict on Treaties” find many sources from the judicial opinions crafted by international courts. In addition, there are many implications of the definition of “armed conflict” used by the ILC and in the field of international humanitarian law. This Article compares and analyzes some aspects of the draft articles with the United States treaty ratification process. This Article concludes with predictions as to what will encompass the draft articles.

II. BACKGROUND

A. The Structure of the United Nations and the Role of the International Law Commission

The U.N. is made up of six principal organs: the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice (“ICJ”), and Secretariat. The International Law Commission (“ILC”) is a permanent and part-time subsidiary organ of the U.N. General Assembly. The ILC was established by the U.N. General Assembly under General Assembly Resolution 174(II).⁵ The governments participating in the drafting of the Charter of the United Nations (“U.N. Charter”) “were overwhelmingly opposed to conferring on the United Nations legislative power to enact binding rules of international law.”⁶ As a compromise, Article 13(1) of the U.N. Charter was adopted conferring on the General Assembly the powers of

¹ G.A. Res. 66/99, U.N. Doc. A/RES/66/99 (Dec. 9, 2011) (citing to Rep. of the Int’l Law Comm’n, 63d Sess., April 26–June 3, July 4–August 12, 2011, U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10 (2011) to encourage Member States to discuss the report while determining to include a discussion item on the agenda for the sixty-ninth session entitled “Effects of armed conflicts on treaties”).

² *Id.* at ¶¶ 2, 3.

³ See G.A. Draft Res. C.6/69/L.9 Legal-Sixth Committee, 69th Sess., *Effects of armed conflicts on treaties*, U.N. Doc. A/C.6/69/L.9 (Oct. 31, 2014).

⁴ See Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. Res. 39/46, UN. Doc. A/RES/39/46 (Dec. 10, 1984).

⁵ See Statute of the International Law Commission, art. 1(1), Nov. 21, 1947, G.A. Res. 174(II), U.N. Doc. A/CN.4/4, http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_4.pdf&lang=EF [hereinafter ILC Statute].

⁶ *Drafting and Implementation of Article 13, paragraph 1, of the Charter of the United Nations*, INTERNATIONAL LAW COMMISSION (July 15, 2015), <http://legal.un.org/ilc/drafting.shtml> (noting the participating governments also rejected proposals to confer on the General Assembly power to impose certain general conventions on States by a majority vote).

study and recommendation.⁷ The U.N. thereafter established two principal bodies for performing such studies: the ILC and the U.N. Commission on International Trade Law (“UNCITRAL”).⁸ For its mission, “[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.”⁹ The ILC meets in annual sessions and its members come from a variety of backgrounds not limited to academia, diplomatic corps, international organizations, and government ministries.¹⁰ There are currently thirty-four members who serve five-year terms.¹¹ Potential members are recommended by a U.N. Member State and are elected by secret ballot voted upon by the ILC.¹² These members do not represent the Member State or geographic location they reside in; rather, the elected members serve in their individual capacities.¹³

While a number of topics have been considered by the ILC, some of the most notable codifications that have received almost universal acceptance include the Vienna Convention on the Law of Treaties,¹⁴ the Vienna Convention on Diplomatic Relations,¹⁵ and the Vienna Convention on Consular Relations.¹⁶ Current topics before the ILC include: the expulsion of aliens, the obligation to extradite or prosecute, the protection of persons in the event of disasters, the immunity of state officials from foreign criminal jurisdiction, treaties over time, and the most-favoured-nation clause.¹⁷ The discussion of the topic the “Effects of Armed Conflict on Treaties” was concluded in 2011, but has not yet been adopted by the U.N.

⁷ U.N. Charter art. 13, para. 1 (“(1) The General Assembly shall initiate studies and make recommendations for the purpose of: (a) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification; (b) promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”).

⁸ Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 *Wis. INT’L L.J.* 61, 61–62 n.1 (2005) (noting a large part of the General Assembly’s requirement of “codification and development” occur in Special Committees, diplomatic conferences, and ad hoc bodies).

⁹ See ILC Statute, *supra* note 5, art. 1(1); see also *About the Commission*, INTERNATIONAL LAW COMMISSION (July 15, 2015), <http://legal.un.org/ilc/ilcintro.shtml> (stemming from the belief that written international law through codification could help fill in the existing gaps of customary international law and develop general abstract principles with precision).

¹⁰ See *Membership*, INTERNATIONAL LAW COMMISSION (July 20, 2015), <http://legal.un.org/ilc/ilcmembe.shtml>.

¹¹ *Id.*

¹² *Id.* (clarifying that U.N. Member States may nominate a maximum of two nationals and two non-nationals, but for fairness, no two members of the Commission may be nationals of the same State).

¹³ *Id.*

¹⁴ See Vienna Convention on the Law of Treaties, art. 84(1), May 23, 1969, 1155 U.N.T.S. 331.

¹⁵ See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

¹⁶ See Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261; see also Ian Sinclair, *THE INTERNATIONAL LAW COMMISSION 39* (Grotius Publ’ns Ltd. 1987) [hereinafter Sinclair, ILC] (presenting criticisms that charge the ILC with pursuing a rigid practice).

¹⁷ See generally INTERNATIONAL LAW COMMISSION (2015), <http://legal.un.org/ilc/> (listing topics considered by the ILC during 2015).

B. The Codification of International Law

Central to the mission of the ILC is the codification of international law.¹⁸ In this context, codification has been defined as “the more precise formulation and systemization of rules of international law in fields where there already has been extensive State practice, precedent, and doctrine.”¹⁹ The ILC has been criticized over the years for the perception that the final product of any study will always be a codification convention.²⁰ But while codification is often the goal, it is possible that upon further study, an issue may not become codified.

Once a topic has been added to the agenda of the ILC, it goes through a three-stage process of consideration.²¹ During the first stage, the ILC appoints a Special Rapporteur, who formulates a plan of work, and sometimes in conjunction with the U.N. General Assembly, requests data and information on the topic from governments and international organizations.²² During the second stage of the process, the ILC considers the reports and any draft articles of the Special Rapporteur.²³ At this time, elaborations to the draft articles are made and commentaries are added. There is then an approval of a set of provisional draft articles. During the third stage of the process, the ILC studies the replies of the Governments, and then revises articles as necessary.²⁴ This is followed by the consideration and approval of any revised drafts. The last step in this stage is the adoption by a plenary of the ILC of a final draft of the articles with commentary.²⁵ The ILC may then recommend these draft articles for consideration by the U.N. General Assembly.

C. Timeline of Study by the International Law Commission

In 2000, the ILC identified the topic of effects of armed conflict on treaties to be an area of study and interest for the Commission.²⁶ Prior to this time, this same topic was considered by the Institute of International Law (also known as the Institut de Droit International). The Institute of International Law was founded in 1873 and created as an independent institution for the development of international law.²⁷ The Institute meets every two years and drafts resolutions

¹⁸ See ILC Statute, *supra* note 5.

¹⁹ See ILC Statute, *supra* note 5, art. 15.

²⁰ See Sinclair, ILC, *supra* note 16, at 37 (explaining that the rigidity of the practice deprives the Commission the potential to influence the development of subjects of law which have not yet reached this stage).

²¹ See ILC Statute, *supra* note 5, art. 16.

²² See ILC Statute, *supra* note 5, art. 16(a)–(e) (allowing the Commission to consult with scientific institutions and experts in the field to better prepare drafts).

²³ See ILC Statute, *supra* note 5, art. 16(f)–(h).

²⁴ See ILC Statute, *supra* note 5, art. 16(i).

²⁵ See ILC Statute, *supra* note 5, art. 16(j).

²⁶ See Rep. of the Int'l Law Comm'n, 52d Sess., May 1–June 9, July 10–Aug. 18, 2000, U.N. Doc. A/55/10; GAOR, 55th Sess., Supp. No. 10 (2000), reprinted in 2 Y.B. Int'l Law Comm'n 140–41 [hereinafter Introduction of Topic].

²⁷ See *History*, INSTITUTE OF INTERNATIONAL LAW (Feb. 2, 2006), <http://justitiaetpace.org/historique.php?lang=eng> [hereinafter IIL History] (explaining the purpose of the Institute of International Law was to develop international law outside of governmental influence).

that are brought to the attention of government authorities.²⁸ In 1912, this organization adopted a resolution on the effects of armed conflict on treaties.²⁹ In 1985, the Institute adopted a new resolution titled “The Effects of Armed Conflicts on Treaties.”³⁰ This resolution consisted of eleven articles. Since the adoption of each of these resolutions, the concept of armed conflicts has changed over time making the resolutions obsolete. For example, the 1985 resolution defined armed conflict as “a state of war or an international conflict . . . regardless of a formal declaration of war”³¹ This is different from the definition in the current draft articles promulgated by the ILC, which applies a broader definition of international conflict.³²

In the process of identifying the topic for study in 2000, scholar Ian Brownlie identified the source of the topic as the Savings Clause of the Vienna Convention.³³ He also noted that the topic had previously been considered by the Institute of International Law, and that the resolutions on the topic that were adopted were not comprehensive. Thus, the law in the area remained unsettled. Brownlie noted that one of the key areas of distinction was the transformation of activities that could constitute “armed conflict.” Further study was needed because States were beginning to confront the issues of “different forms of military occupation of territory and new types of international conflict.”³⁴ Additionally, Brownlie introduced a nine-part schema for the study of the topic, which included the following issues: the definition of armed conflict, the definition of treaty, factors to consider in determining whether a treaty would be suspended or terminated, and consequences of suspension or termination of a treaty.³⁵

By 2005, the first report by Special Rapporteur Ian Brownlie was released.³⁶ In this report, Brownlie provided a conceptual background of the topic as well as a set of draft articles with commentaries. In the report, Brownlie noted that there is no general consensus as to the legal doctrine associated with the “Effect of Armed Conflict on Treaties.” Specifically, there was a divergence of opinions with regard to rationales that have been accepted by individual writers as well as a divide as to whether to treat the topic as a question of the law of treaties or as a question of the law of armed conflict. As to the former, Brownlie identified the following rationales for its acceptance: (1) because war is the opposite of peace and creates anarchy, as a result, all treaties are

²⁸ *Id.* (noting in between sessions, the Plenary Assembly assigns the scientific commissions themes to study, and once the studies are completed, the Plenary Assembly analyzes the results and decides whether to adopt Resolutions reflecting the results).

²⁹ Rapporteur, *Règlement concernant les effets de la guerre sur les traités*, INSTITUT DE DROIT INTERNATIONAL (Christiania, 1912) (by Nicolas Politis), http://www.idi-iil.org/idiF/resolutionsF/1912_christ_02_fr.pdf [hereinafter IIL 1912 Resolution].

³⁰ Rapporteur, *The Effects of Armed Conflict on Treaties*, INSTITUTE OF INTERNATIONAL LAW (Helsinki, 1985) (by Bengt Broms), http://www.idi-iil.org/idiE/resolutionsE/1985_hel_03_en.PDF [hereinafter IIL 1985 Resolution].

³¹ See IIL 1985 Resolution, *supra* note 30, art. 1.

³² These definitions will be discussed below. See *infra* III.B.1.

³³ See generally Introduction of Topic, *supra* note 26, at 140.

³⁴ *Id.* (identifying that legal uncertainties in this area are magnified when unprecedented issues arise).

³⁵ *Id.*

³⁶ Special Rapporteur, *First Rep. on the Effects of Armed Conflicts on Treaties*, Int'l Law Comm'n, U.N. Doc. A/CN.4/552 (Apr. 21, 2005) (by Ian Brownlie), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/250/71/PDF/N0525071.pdf?OpenElement> [hereinafter Brownlie First Report].

annulled; (2) treaties remain in force as long as they are compatible with the purposes of war; (3) the intention of the parties should be evaluated; and (4) the use of force should not be recognized as a way to suspend or terminate treaties because states are limited in the situations in which they can resort to force.³⁷ Brownlie also made the determination that it made more sense to treat the topic of the effects of armed conflict on treaties as an issue of the law of treaties.³⁸

In addition, the U.N. Secretariat released its study of the topic in 2005. In the memorandum released by the Secretariat, the “Effect of Armed Conflict on Treaties”³⁹ was distinguished based on the subject matter of the treaty. In other words the Secretariat made an initial finding as to which types of treaties would have a high or low likelihood of applicability during times of conflict based on the subject matter of the treaty. It concluded that treaties falling into the following areas could have a high likelihood of applicability during times of armed conflict: “humanitarian law treaties, treaties with express provisions on wartime applicability, treaties regulating a permanent regime or status, treaties or treaty provisions that codify *jus cogens* rules, human rights treaties, treaties governing intergovernmental debt, and diplomatic conventions.”⁴⁰ Along the same line, the Secretariat identified the following types of treaties as being those not with a high likelihood of applicability, but with a moderately high likelihood of applicability: “reciprocal inheritance treaties and multilateral ‘law-making’ conventions.”⁴¹ Treaties identified as exhibiting either a varied or an emerging likelihood of applicability were “international transport agreements; environmental treaties; extradition treaties; border-crossing treaties; treaties of friendship, commerce and navigation; intellectual property treaties, and penal transfer treaties.”⁴² At that time the Secretariat identified two types of treaties with a low likelihood of applicability: treaties inapplicable through express provisions and “treaties incompatible in practice.”⁴³ The 2005 memorandum by the Secretariat also included examples of modern state practices from selected countries and selected armed conflicts.⁴⁴

In 2007, Special Rapporteur Ian Brownlie released his fourth report on the “Effects of Armed Conflict on Treaties.”⁴⁵ The focus of this report was on the relevant provisions of the Vienna Convention of the Law of Treaties, particularly Article 65. While offering an explanation of the relevant treaty provisions, Brownlie also noted that the provisions of the Vienna Convention were

³⁷ *Id.* at ¶ 4–6.

³⁸ *Id.* at ¶ 7–10 (comparing to whether the topic of the effects of armed conflicts on treaties should be analyzed under the law relating to armed conflict).

³⁹ Memorandum by the Secretariat on the effect of armed conflict on treaties: an examination of practice and doctrine, A/CN.4/550 (Feb. 1, 2005), http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/550 [hereinafter 2005 Secretariat Report].

⁴⁰ *Id.* (addressing the type of treaty as well as the magnitude of the conflict is important when determining the applicability of a treaty during armed conflict).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See 2005 Secretariat Report, *supra* note 39.

⁴⁵ Special Rapporteur, *Fourth Rep. on the Effects of Armed Conflicts on Treaties: Procedure for Suspension and Termination*, Int’l Law Comm’n, U.N. Doc. A/CN.4/589, at ¶ 1–2 (Nov. 14, 2007) (by Ian Brownlie) [hereinafter Brownlie Fourth Report].

of “limited relevance.”⁴⁶ In 2008, the European Commission and the International Maritime Organization provided comments to the ILC with regard to the topic.⁴⁷ Similarly, in 2010 state governments submitted comments and information to the ILC with regard to the topic and the draft articles that had already been released.⁴⁸ State governments providing comments and information included Burundi, China, Colombia, Cuba, Ghana, Lebanon, Poland, Portugal, Slovakia, Switzerland, and the United States.⁴⁹

After drafts of the articles went through a comment period and several revisions, the draft articles were adopted by the ILC in 2011. The ILC recommended that the General Assembly take note of the articles and its annex, and that it “consider . . . the elaboration of a convention on the basis of the draft articles.”⁵⁰ Since then, countries have voiced their opinion as to what actions should be taken next and the U.N. has placed the draft articles on a provisional agenda for the seventy-second session of the General Assembly.⁵¹

D. Introduction to the Study by the ILC of the “Effects of Armed Conflict on Treaties”

The issue of the effects of armed conflict on treaties finds its origins in discussions of international law that date back to the beginning of treaties and the presence of war. However, without international tribunals to make decisions as to the applicability of treaties during times of war, many of the decisions have been left to domestic tribunals. This meant that, for example, the United States Supreme Court would make the determination as to whether a particular treaty between the United States and Great Britain was in effect during the War of 1812.⁵² Additionally, at least in the United States, most cases were not brought by the parties to the treaty, but instead by private U.S. companies or citizens.⁵³

The current debate over the “Effect of Armed Conflict on Treaties” finds its origins in the Savings Clause of the Vienna Convention, which states that “the provisions of the present

⁴⁶ *Id.* at ¶ 3 (noting Part V of the Vienna Convention addresses procedure for invalidity, termination, and suspension of treaties, but consequently does not apply to the issue of whether a treaty is still valid when there is an outbreak of hostilities between States).

⁴⁷ *Effects of Armed Conflicts on Treaties: Comments and Observations Received From International Organizations*, Int’l Law Comm’n, U.N. Doc. A/CN.4/592 (Feb. 27, 2008) (raising the question, among others, of whether the Convention for the Safety of Life at Sea would still apply to commercial vessels during periods of armed conflict while noting it contains no provisions relating to its application to warships or to the effects of armed conflicts).

⁴⁸ *Effects of Armed Conflicts on Treaties: Comments and Information Received From Governments*, Int’l Law Comm’n, U.N. Doc. A/CN.4/622, at ¶ 2 (Mar. 15, 2010) [hereinafter 2010 Government Comments].

⁴⁹ *Id.*

⁵⁰ Rep. of the Int’l Law Comm’n, 63d Sess., Apr. 26–June 3, July 3–Aug. 12, 2011, U.N. Doc. A/66/10, at ¶ 97; GAOR, 66th Sess., Supp. No. 10 (2011) [hereinafter ILC 2011 Report].

⁵¹ See Press Release, General Assembly, Law Comm’n’s Work on ‘Prot. of Disaster Victims’ is Called Key Dev. in Codification of Int’l Law, U.N. Press Release GA/L/3423 (Oct. 27, 2011) [hereinafter 2011 ILC Press Release]; see also U.N. Doc. A/C.6/69/L.9, *supra* note 3.

⁵² See *Karnuth v. United States*, 279 U.S. 231, 239–41 (1929) (Sutherland, J.) (reasoning that the trade provision in the 1794 Jay Treaty was founded on peaceful relations, it was brought to an end by the War of 1812).

⁵³ *Id.* at 241 (holding an individual who raised a claim regarding trade or commerce after the War of 1812 could not rely on the rights expressed secured in the 1794 Jay Treaty).

Convention shall not prejudice any questions that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.”⁵⁴ In its initial study of the topic, the ILC was confronted with a number of difficulties in evaluating the topic, namely (1) the diverse set of circumstances that can constitute “armed conflict,” (2) the decrease in formalization of armed conflict, and (3) the difficulty in obtaining a current assessment of the effect of armed conflict on treaties.⁵⁵ At this time, there were three possible conclusions that could be drawn.⁵⁶ Under the traditional view, treaties do not survive armed conflict. Under a twentieth century view, war does not affect treaties. However, there were some recognized exceptions. Under a modern view, “armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to a conflict.”⁵⁷

E. The Vienna Convention on the Law of Treaties

While Special Rapporteur Ian Brownlie argued that the Vienna Convention on the Law of Treaties was of “limited relevance,” there are provisions of the Vienna Convention that should be recognized when considering the topic of the “Effects of Armed Conflict on Treaties.”⁵⁸ One of the key documents in this field is the Vienna Convention on the Law of Treaties.⁵⁹ Treaties, and the rules regarding their interpretation, are especially important because they are considered the primary source of international law.⁶⁰ The Savings Clause of the Vienna Convention specifically addresses the question that the study of the “Effects of Armed Conflict on Treaties” has tried to answer.⁶¹ Other provisions of importance include Articles 62 and 65. Article 62 provides a definition for a fundamental change of circumstances and provides that a treaty may be suspended, terminated, or withdrawn in the event of a fundamental change of circumstances.⁶² Article 65 takes into account the “[p]rocedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty.”⁶³ Of particular importance is paragraph 3 of this article, which reads, “[i]f, 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 U.N.”⁶⁴ This could mean that parties would be forced to bring their case before the International Court of Justice to reach a final result.

⁵⁴ See generally 2010 Government Comments, *supra* note 48; see Vienna Convention on the Law of Treaties, art. 73, May 23, 1969, 1155 U.N.T.S. 331. [hereinafter Vienna Convention].

⁵⁵ See 2005 Secretariat Report, *supra* note 39, at ¶ 3–6.

⁵⁶ See 2005 Secretariat Report, *supra* note 39, at ¶ 14–16.

⁵⁷ See 2005 Secretariat Report, *supra* note 39, at ¶ 16.

⁵⁸ See Brownlie Fourth Report, *supra* note 45, at ¶ 3.

⁵⁹ See Vienna Convention, *supra* note 54, art. 84(1).

⁶⁰ Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute] (explaining that the mission of the International Court of Justice is to settle international law disputes as well as apply and interpret treaties).

⁶¹ See Vienna Convention, *supra* note 54, art. 73 (questioning whether treaties between States may be abrogated during an outbreak of hostilities between those States).

⁶² See Vienna Convention, *supra* note 54, art. 62.

⁶³ Vienna Convention, *supra* note 54, art. 65.

⁶⁴ Vienna Convention, *supra* note 54, art. 65.

F. The International Court of Justice and other International Tribunals

The International Court of Justice (“ICJ”) is a principle organ of the U.N. It has jurisdiction over legal disputes submitted to it by State members to the U.N and can also give advisory opinions on legal questions referred to it by authorized U.N. organs.⁶⁵ One notable feature of the ICJ is its identification of the sources of international law. Article 38 of the Statute of the International Court of Justice provides the following:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of law.⁶⁶

This means that the ILC can serve at least two functions. First, through the process of the codification of international law, the ILC plays a role in the creation of treaties that are then considered by the ICJ as the primary source of international law.⁶⁷ Second, the work and consideration of a topic by the ILC can be cited in ICJ decisions and advisory opinions.⁶⁸ Completed by leading scholars in the field of international law, the work and consideration of the ILC fits into the fourth category of international law. Likewise, the ICJ can play a role in the codification of international law. While this may not have been true during the early years of the ILC when there were no ICJ decisions to draw from, the current draft articles on the “Effects of Armed Conflict on Treaties” incorporate previous ICJ decisions both in the formulation of the draft articles and in the development of the comments to each Draft Article.

The same is true of other international tribunals. One of the starkest examples is the body of law relied on by the ILC in drafting the articles on the “Effects of Armed Conflict on Treaties.”⁶⁹ One major area of contention, as cited in the 2000 overview of the topic, has been the definition of armed conflict. Much of this stems from the changing means by which “conflict” occurs and the changing actors that are now involved in conflict. In formulating the definition of armed conflict to be used in the draft articles, the ILC adopted much of its definition from the International Criminal Tribunal for the Former Yugoslavia *Tadic* case,

⁶⁵ See generally Int’l Ct. of Justice, *The Court*, <http://www.icj-cij.org/court/index.php?p1=1> (explaining the role of the International Court of Justice as it relates to the United Nations).

⁶⁶ ICJ Statute, *supra* note 60, art. 38.

⁶⁷ See ICJ Statute, *supra* note 60, art. 38(1)(a).

⁶⁸ See Sinclair, ILC, *supra* note 16, at 127–38.

⁶⁹ See generally 2010 Government Comments, *supra* note 48.

defining “armed conflict” as existing “whenever there is a resort to armed force between the States or protracted armed violence between governmental authorities and organized groups.”⁷⁰

III. ANALYSIS OF THE DRAFT ARTICLES

A. General Rule/Test

Over the years, two schools of thought on the effect of armed conflict on treaties have developed. One school of thought adopts a subjective test and the other school of thought adopts an objective test.⁷¹ The modern approach that has been adopted tends to be a combination of both of these schools of thought.⁷²

The first school of thought, the intention school, was proposed by Sir Cecil Harst and followed by a number of commentators.⁷³ This school of thought, adopting a subjective test, asks, “did the signatories of the treaty intend that it should remain binding on the outbreak of war?”⁷⁴ This intent can be express or implied.⁷⁵

The second school of thought, referred to as the compatibility doctrine, developed out of a dissatisfaction with the intention school.⁷⁶ This school of thought, adopting an objective test, asks, “is the execution of the treaty incompatible with the conduct of war?”⁷⁷ According to the ILC, it “focuses on the compatibility of the treaty with national policy during armed conflict.”⁷⁸ This frame of thought has been discussed and adopted in U.S. Supreme Court cases and has been discussed in the Permanent Court of International Justice case of *S.S. Wimbledon*.⁷⁹

As a result, “Effect of Armed Conflict on Treaties” reaches three potential conclusions.⁸⁰ The traditional view, held primarily during the nineteenth century, was that treaties do not survive armed conflict.⁸¹ A second view emerged during the early twentieth century in which it was argued that

⁷⁰ ILC 2011 Report, *supra* note 50, at 181–82 (explaining that the ILC excluded the concluding words “or between such groups within a State” because the current draft articles apply only to situations involving at least one State Party to the treaty).

⁷¹ See 2005 Secretariat Report, *supra* note 39, at ¶ 9.

⁷² See 2005 Secretariat Report, *supra* note 39, at ¶ 13.

⁷³ See 2005 Secretariat Report, *supra* note 39, at ¶ 10 (recognizing that the intention test has been espoused by other commentaries, including McNair, Borchard, Garner, Rank, Lenoir and Hyde).

⁷⁴ See 2005 Secretariat Report, *supra* note 39, at ¶ 9.

⁷⁵ See 2005 Secretariat Report, *supra* note 39, at ¶ 10 (discussed in Cecil J. B. Hurst, *The Effect of War on Treaties*, 2 BRITISH YEARBOOK OF INTERNATIONAL LAW 37, 40).

⁷⁶ See 2005 Secretariat Report, *supra* note 39, at ¶ 11 (explaining that this dissatisfaction arose in light of the lack of express provisions on the intention, combined with the difficulties inherent in inferring the intention of the parties).

⁷⁷ 2005 Secretariat Report, *supra* note 39, at ¶ 9.

⁷⁸ 2005 Secretariat Report, *supra* note 39, at ¶ 11.

⁷⁹ 2005 Secretariat Report, *supra* note 39, at ¶ 11; see, e.g., *Clark v. Allen*, 331 U.S. 503 (1947).

⁸⁰ See 2005 Secretariat Report, *supra* note 39, at ¶ 14 (commenting that the traditional view was held by historical figures, such as Charles II, King of England and Scotland and Sir J. D. Harding, the Queens Advocate in 1854 Britain).

⁸¹ See 2005 Secretariat Report, *supra* note 39, at ¶ 14.

war does not affect treaties.⁸² However, there were some recognized exceptions. This second view was adopted in numerous reports on the law of treaties. The modern view is broad and has been presented is that “armed conflict does not ipso facto terminate or suspend the operation of treaties in force between the parties to a conflict.”⁸³ The view adopted by the ILC in its draft articles is similar to this modern view. Additionally, it recognizes treaties of certain subject matter that remain in effect during armed conflict.

B. A Look at the Draft Articles and Their Implications

The ILC drafted eighteen articles for inclusion in the draft articles on the “Effects of Armed Conflict on Treaties” agreed upon during the summer of 2011.⁸⁴ The draft articles are divided into three parts: (1) scope and definitions, (2) principles, and (3) miscellaneous. Attached is an annex for use when interpreting draft article 7.⁸⁵ Each of these parts carries with it illustrative facts relating to the topic, but also a variety of potential implications. These implications could affect the future of the draft articles themselves.⁸⁶

To begin, draft article 1 states that the application of the draft articles deals with the “relation between States under a Treaty.”⁸⁷ This means that the draft articles are not applicable to international organizations, while international organizations may still be parties to any treaties in question. According to the ILC, this first draft article resembles the Article 1 of the Vienna Convention on the Law of Treaties and carries with it three scenarios:

- (a) the situation concerning the treaty relations between two States engaged in an armed conflict, including States engaged on the same side, (b) the situation of the treaty relations between a States engages in an armed conflict with another State and a third State not Party to that conflict, and (c) the situation of the effect of a non-international armed conflict on the treaty relations of the State in question with third States.⁸⁸

While some countries argued that draft article 1 was possibly too narrow by not including international organizations as possessing the ability to invoke the articles,⁸⁹ other countries felt that this draft article, as originally drafted, was overly broad and should explicitly state that it was limited

⁸² See 2005 Secretariat Report, *supra* note 39, at ¶ 15.

⁸³ See 2005 Secretariat Report, *supra* note 39, at ¶ 16.

⁸⁴ See ILC 2011 Report, *supra* note 50, at 179–98.

⁸⁵ See ILC 2011 Report, *supra* note 50, at 198.

⁸⁶ See ILC 2011 Report, *supra* note 50, at 179–98 (noting that article 7 creates a rebuttable presumption that the subject matter of the treaty implies that the treaty survives an armed conflict).

⁸⁷ ILC 2011 Report, *supra* note 50, at 179.

⁸⁸ ILC 2011 Report, *supra* note 50, at 179.

⁸⁹ See 2010 Government Comments, *supra* note 48, at 4-5 (China and Ghana).

to international armed conflicts.⁹⁰ However, the definition encompassed in the above three scenarios is sufficient to handle any scenarios that may arise, which makes the provision appropriate with regards to the stated purpose of the ILC.

It should also be reiterated that the draft articles were created under the framework of the law of treaties, as opposed to the law of armed conflict. As such, the provisions fall within the same line of draft articles and conventions as the Vienna Convention on the Law of Treaties.⁹¹ However, because so much of the focus of the draft articles is inherently on armed conflict, it seems that it would have been more fitting if the draft articles were instead formulated under the laws of war or some type of hybrid between the law of treaties and the laws of war. This is because of the use of the key term “armed conflict,” which is best described by the laws of war.

1. Application of the Draft Articles to “Treaties” and “Armed Conflicts”

Draft Article 2 provides definitions for the two key terms in the agreement: “treaty” and “armed conflict.” With regard to the term “treaty,” like in draft article 2(a), the definition adopted for the draft articles is similar in wording to the definition provided by Article 2(1)(a) of the Vienna Convention on the Law of Treaties.⁹² As a comparison, draft article 2(a) defines “treaty” as “an international agreement concluded between States in written form and governed by international law . . . and includes treaties between the States to which international organizations are also parties.”⁹³ Article 2(1)(a) of the Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law.”⁹⁴ By including the role of international organizations in the definition appearing in the draft articles, the draft articles create a more inclusive and broader definition of treaty. This definition also emphasizes the increased role and presence of international organizations. This is particularly relevant when considering that there are a multitude of international organizations to which States are parties. Additionally, some of these international organizations are beginning to establish modes of adjudication under which States could take any legal disagreements to an international forum. These new modes of adjudication could invoke these very draft articles if the draft articles were to become binding law. For example, the African Union has developed its own judicial system. Also, frequently claims are brought at the World Trade Organization by or against the European Union as a customs union rather than against an individual country.

The key qualifier for the application of the draft articles is the presence of “armed conflict” as evidenced by its primary position in the title of the topic, the “Effect of Armed Conflict on Treaties.” Draft article 2(b) has adopted the following definition of “armed conflict.” As opposed to the definition of a treaty, the events that constitute “armed conflict” have transitioned over the years to become more inclusive of a variety of actions by a variety of actors. This change is exemplified in the different definitions included in the 1912 Institute of International Law Resolution, 1985

⁹⁰ See 2010 Government Comments, *supra* note 48, at 5 (Poland and Portugal).

⁹¹ See generally Vienna Convention, *supra* note 54.

⁹² See ILC 2011 Report, *supra* note 50, at 181; see Vienna Convention, *supra* note 54, art. (2)(1)(a).

⁹³ ILC 2011 Report, *supra* note 50, at 181.

⁹⁴ Vienna Convention, *supra* note 54, art. 2(1)(a).

Institute of International Law Resolution, the Geneva Conventions, and various definitions adopted by international tribunals. This means that the following timeline of definitions is relevant.

To begin with, the 1912 Resolution adopted by the Institute of International Law did not provide a definition of armed conflict, but did use the word “war” throughout the Resolution. The Geneva Conventions provide two articles that pertain to armed conflict, one of an international character and one of a non-international character. Convention IV provides that it shall apply to the following situations of international armed conflict:

All cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance. . . .⁹⁵

The Geneva Conventions also include Common Article 3, which provides minimum safeguards that must be applied by parties to a conflict that is non-international.⁹⁶ The 1985 Resolution adopted by the Institute of International Law adopted a definition of armed conflict that was less inclusive than that of the Geneva Conventions by defining “armed conflict” as

[A] state of war or an international 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 States 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.⁹⁷

Another highly regarded definition of armed conflict is that adopted by the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in 1995, which defined armed conflict as existing “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁹⁸ This definition of armed conflict was broadened by the International Criminal Tribunal for Rwanda (“ICTR”) in 2000. In noting that Common Article 3 of the Geneva Conventions did not provide a specific definition of non-international armed conflict, the ICTR sought to provide such a definition. This same definition has been referenced by the International Criminal Court in some of its proceedings. The ICTR provided the following components of a non-international conflict:

⁹⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), arts. 2, 3, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

⁹⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention].

⁹⁷ See IIL 1985 Resolution, *supra* note 30, art. 1.

⁹⁸ Prosecutor v. Tadic, Case No. IT-94-1-A72, Decision in Prosecutor v. Tadic, ¶ 70 (Oct. 2, 1995).

The expression “armed conflicts” introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single state.⁹⁹

In recent years, the definition of armed conflict has been further complicated with the acts of terrorism against the United States that prompted the United States to occupy territory and engage in armed conflict with both non-state and State actors abroad. Recognizing these changes, the ILC chose the following definition for armed conflict: “a situation in which there is a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.”¹⁰⁰ In its commentary on the draft article, the ILC explains that this draft article must be read in conjunction with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, so that the following situations would also be covered by the draft articles: war or armed conflict between two contracting States even if the war is not recognized by one of the States; and “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”¹⁰¹

Representatives of Governments had the opportunity to comment on the draft articles that were adopted by the ILC.¹⁰² Among the most commented aspects was the definition of armed conflict. This was not surprising considering that the definition of armed conflict is important any time the discussion surrounds legal standards that apply during armed conflict whether regarding the laws of war, international humanitarian law, international human rights law, or “Effects of Armed Conflict on Treaties,” or many other related topics. Among the countries that had specific comments with regards to the definition of “armed conflict” were Finland, the Philippines, the United States, Poland, and Italy.¹⁰³ These comments may be a signal to the international community as to the success of the draft articles if they were to be voted upon by the U.N. General Assembly as a convention.

Specifically, Miriam Defensor Santiago of the Philippines expressed that the term “armed conflict” should be further clarified because it covers non-international conflicts without expressly stating so.¹⁰⁴ Similarly, Ryszard Sarkowicz of Poland suggested that the Vienna Convention had

⁹⁹ Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 247–48 (Jan. 27, 2000), <http://www/ictrcaselaw.org/docs/doc15264.pdf>.

¹⁰⁰ See ILC 2011 Report, *supra* note 50, at 181.

¹⁰¹ See Geneva Convention, *supra* note 95, at art. 2.

¹⁰² See 2011 ILC Press Release, *supra* note 51.

¹⁰³ See 2011 ILC Press Release, *supra* note 51.

¹⁰⁴ See 2011 ILC Press Release, *supra* note 51 (pointing out that the draft articles open themselves up to the inclusion of the effect of treaties they may not have necessarily envisioned).

within its scope internal armed conflicts.¹⁰⁵ Because of this, Poland suggested that further research was needed with regard to the current practice of states on the effects of internal armed conflicts on treaties.¹⁰⁶ If the goal of the preparation of the draft articles is their codification, then more research should be completed on the issue of internal armed conflict even though the ILC engaged in research over the course of ten years. This is especially important when considering “internal” armed conflict has become more prevalent over recent years, as shown by the number of cases involving internal armed conflict that have led to the prosecution of individuals by the international criminal tribunals. The growth in internal armed conflict is evidenced by the recent uprisings in the Middle East. These uprisings may qualify as “armed conflict” under the draft articles, but not necessarily under the definition adopted by the Geneva Conventions. Under the draft articles, internal armed conflict qualifies as “armed conflict” if State forces are involved and the conflict is protracted. In many of the countries classified as part of the “Arab Spring,” military forces have clashed with organized groups or the public over many months. This would imply that there is in fact “armed conflict” under the draft articles, since State forces have been involved and the conflict was “protracted.”

Harold Hongju Koh of the United States has suggested that rather than create its own definition of “armed conflict,” the ILC should define armed conflict in the same manner as Geneva Convention Articles 2 and 3.¹⁰⁷ These two articles are universally accepted among the states; using the definition posited by the Geneva Conventions seems most practical. There is a sufficient amount of international jurisprudence on the topic, lending further weight to the benefit of using the definition in the Geneva Conventions. This is true especially in the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.¹⁰⁸ Each of these international courts prosecutes individuals for their involvement in committing offenses under the Geneva Conventions. The Geneva Conventions are also invoked by domestic courts including the United States. In the United States, the Supreme Court has relied on the Geneva Conventions in cases of international conflict as well as in purely domestic cases, such as the death penalty.¹⁰⁹ If the draft articles were either adopted as an international convention or, instead, as an addition to particular treaties, it is possible that cases involving either the Convention or such treaties would go before international and domestic adjudicatory bodies. Many of these judicial bodies have experience with the Geneva Conventions and know how to apply them. In the case that these adjudicatory bodies have not had the opportunity to apply the Geneva Conventions, the opinions of other tribunals that have applied the Geneva Conventions in determining whether there is armed conflict are available.

¹⁰⁵ See 2011 ILC Press Release, *supra* note 51 (asking that the Vienna Convention be interpreted literally and with the utmost caution).

¹⁰⁶ See 2011 ILC Press Release, *supra* note 51 (considering whether the draft articles should more be extended to risk reduction, prevention, preparedness, and mitigation).

¹⁰⁷ See 2011 ILC Press Release, *supra* note 51; see also Geneva Convention *supra* note 95, art. 2–3.

¹⁰⁸ See generally International Committee of the Red Cross, *The Application of the Geneva Conventions by the International Criminal Tribunal for the Former Yugoslavia* (1999), <https://www.icrc.org/eng/resources/documents/misc/57jptx.htm>.

¹⁰⁹ See generally David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1386–87 (2011); see also *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988).

Additionally, like with the “effects of armed conflict on treaties,” armed conflict is a requisite requirement for the application of the Geneva Conventions. With regard to international humanitarian law and the Geneva Conventions, non-international (or internal) conflict requires a “minimum level of intensity.”¹¹⁰ Common Article 3 of the Geneva Conventions does not apply to isolated or sporadic events of violence, such as riots.¹¹¹ This would mean that, when answering the question posed earlier in this Paper as to whether the uprisings in the Middle East would be considered an armed conflict under the Geneva Conventions, it is possible to only consider long durations of violence as “armed conflict” under the Geneva Conventions.

One further wrinkle exists beyond the text of the Geneva Conventions. Many of the provisions of the Geneva Conventions have been accepted as customary international law and the application of the Geneva Conventions to many violations of international humanitarian law is achieved through custom.¹¹² When looked at more generally, it is possible that there is a definition of “armed conflict” based on custom different from the one adopted in the ILC’s draft articles, which could create implications when parties seek application of the draft articles.¹¹³ In fact, it is possible that courts could be willing to apply the definitions of “armed conflict” adopted in fields of international humanitarian law and the laws of war.

2. Principles and the Operations of Treaties during Armed Conflicts

The second part of the draft articles is devoted to governing principles.¹¹⁴ The ILC has listed these principles in order of priority and in doing so has created a framework for analysis whereby one can go sequentially through each principle to reach a determination. The first of these principles is contained in Draft Article 3, which adopts the modern view of the “Effects of Armed Conflict on Treaties” by providing “The existence of an armed conflict [does] not ipso facto terminate or suspend the operation of treaties.”¹¹⁵ This serves as the overarching principle. This is limited to treaties (1) between states that are parties to the conflict and (2) between a state that is a party to the conflict and a third state.¹¹⁶ While international organizations may be parties to a treaty, the draft articles do not apply to them.¹¹⁷ Draft Article 4 provides that if a treaty contains provisions with regards to its “operation in situations of armed conflict” then these provisions of the treaty will continue to apply.¹¹⁸ While not specifically mentioned in the ILC’s commentary to the Draft Article, it would ap-

¹¹⁰ See International Committee of the Red Cross, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf [hereinafter ICRC].

¹¹¹ See Geneva Convention, *supra* note 95, art. 3; see also ICRC, *supra* note 110.

¹¹² See generally International Committee of the Red Cross, *Customary International Humanitarian Law: Volume I: Rules* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

¹¹³ *Id.* (explaining how the positive obligations imposed by a duty may vary based on interpretation).

¹¹⁴ ILC 2011 Report, *supra* note 50, at 181 (noting that Article 2 provides definitions for key terms used in the draft articles).

¹¹⁵ See 2011 ILC Press Release, *supra* note 51.

¹¹⁶ See ILC 2011 Report, *supra* note 50, at 182.

¹¹⁷ See ILC 2011 Report, *supra* note 50, at 181 (reminding that, according to article 1, the treaty relations of international organizations are excluded from the scope of the draft articles).

¹¹⁸ See ILC 2011 Report, *supra* note 50, at 185.

pear that treaties on the laws of war and international humanitarian law would ordinarily fall within this category of treaties as such treaties go into effect during armed conflict.

Draft Article 5 provides that the “rules of international law on treaty interpretation” will still be applied in the event of an armed conflict.¹¹⁹ This provision thus relies on and in effect incorporates the Vienna Convention on the Law of Treaties, implying that armed conflicts do not affect the interpretation of the provisions or lead to the suspension, termination, or withdrawal of a treaty.¹²⁰

Draft articles 6 and 7 provide factors that can be taken into account when determining whether a treaty is subject to suspension, termination, or withdrawal on the one hand, or continuation on the other hand.¹²¹ Draft Article 6 focuses on the former and lists characteristics of both the treaty and the armed conflict that can be taken into account when ascertaining whether a treaty is susceptible to termination, withdrawal, or suspension.¹²² Relevant factors implicating the treaty itself include the subject matter of the treaty, the object and purpose of the treaty, the content of the treaty, and the parties to the treaty.¹²³ Factors pertaining to the armed conflict include the territorial extent of the armed conflict, the scale and intensity of the armed conflict, and the duration of the armed conflict.¹²⁴ The degree of outside involvement in non-international conflict is also relevant; this makes sense when read in conjunction with other provisions, such as the requirement that a non-international conflict be “protracted.” Draft Article 7 refers the reader to the annex to the draft articles which provides an exemplary list of treaties that, by virtue of their subject matter, remain continuous during armed conflict.¹²⁵ The list provided in the Annex will look strikingly familiar to the list provided earlier in this Paper as applicable during armed conflict.¹²⁶ The following treaties are listed in the Annex:

- (a) Treaties on the law of armed conflict, including treaties on international humanitarian law;
- (b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;
- (c) Multilateral law-making treaties;
- (d) Treaties on international criminal justice;
- (e) Treaties of friendship, commerce and navigation and agreements concerning private rights;
- (f) Treaties for the international protection of human rights;
- (g) Treaties relating to international protection of the environment;
- (h) Treaties relating to international watercourses and related installa-

¹¹⁹ See ILC 2011 Report, *supra* note 50, at 186.

¹²⁰ See ILC 2011 Report, *supra* note 50, at 186 (stating that the Commission had in mind articles 31 and 32 of the Vienna Convention when establishing this requirement).

¹²¹ See ILC 2011 Report, *supra* note 50, at 187–89.

¹²² See ILC 2011 Report, *supra* note 50, at 187.

¹²³ See ILC 2011 Report, *supra* note 50, at 187 (adding that these factors, when taken in combination with other factors, may open up a new perspective).

¹²⁴ See ILC 2011 Report, *supra* note 50, at 187 (noting that these elements are intended to limit the possibility for States to assert the termination or suspension of the operation of a treaty, or right of withdrawal).

¹²⁵ See ILC 2011 Report, *supra* note 50, at 188.

¹²⁶ See *supra* II.c.

tions and facilities; (i) Treaties relating to aquifers and related installations and facilities; (j) Treaties which are constituent instruments of international organizations; (k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement; (l) Treaties relating to diplomatic and consular relations.¹²⁷

Some of the treaties that have been listed in Draft Article 7, such as those relating to international humanitarian law and the international protection of human rights, were listed by the U.N. Secretariat in its 2005 memorandum as having a high likelihood of applicability during time of armed conflict.¹²⁸ Other subject areas that have made the list include areas for which the ILC drafted articles which turned into Conventions, namely the three Vienna Conventions and the Convention on the Law of the Sea.¹²⁹

In critiquing the draft articles, the representatives of some countries opined that the list of treaties from the Annex should be placed in the text of Article 7.¹³⁰ This list appears comprehensive and easy to apply. However, because the range of topics is so extensive, it may have made more sense for the ILC to also provide a list of treaties that would cease to be operable during times of armed conflict.

The conclusion, suspension, and termination of treaties during armed conflicts are primarily procedural issues and are set out in draft articles 8 through 14.¹³¹ The last few draft articles, 17 and 18, address broader issues. Draft article 17 takes into account the law of neutrality, stating that such laws do not prejudice the draft articles.¹³² Draft article 18 preserves other methods for terminating, suspending, or withdrawing a treaty.¹³³ These other methods include those provided for in the Vienna Convention on the Law of Treaties, covering a material breach, fundamental change of circumstances, and supervening impossibility of performance.¹³⁴

3. The Security Council and the Use of Force

Draft articles 14, 15, and 16 take into account the role and actions of the Security Council and the general rules regarding the use of force.¹³⁵ Draft Article 14 allows for States to engage in self-defense.¹³⁶ One limitation with this Draft Article is that it does not include non-international

¹²⁷ See ILC 2011 Report, *supra* note 50, at 198.

¹²⁸ See 2005 Secretariat Report, *supra* note 39, at 16 (explaining that, under traditional international law, the agreements governing the conduct of hostilities survived the outbreak of war, since they were designed for application during war).

¹²⁹ See 2005 Secretariat Report, *supra* note 39, at 35.

¹³⁰ See, e.g. 2011 ILC Press Release, *supra* note 51 (statement of Paivi Kaukoranta of Finland).

¹³¹ See ILC 2011 Report, *supra* note 50, at 188–95.

¹³² See ILC 2011 Report, *supra* note 50, at 197.

¹³³ See ILC 2011 Report, *supra* note 50, at 197.

¹³⁴ See Vienna Convention, *supra* note 54, art. 61.

¹³⁵ See ILC 2011 Report, *supra* note 30, at 194–97 (covering the effect of the exercise of the right to self-defense, the prohibition of benefit to an aggressor state and the decisions of the Security Council, respectively).

¹³⁶ See ILC 2011 Report, *supra* note 50, at 194.

conflicts. Under Draft Article 15, a treaty cannot be suspended if a State is an aggressor within the meaning of the U.N. Charter and U.N. General Assembly Resolution 3314.¹³⁷ Under Draft Article 16, there is no prejudice for Security Council Resolutions.¹³⁸ This Draft Article appears to be unnecessary, but it does serve to explicitly reiterate that any State obligations under the U.N. Charter prevail over those of the draft articles if the draft articles were to become law.

While in theory these provisions may not cause problems, in practice it is possible that States could run into issues with these draft articles, especially when considering the United Nations was created to promote peace and security. However, to some degree the draft articles allow for violence. If these draft articles were to be elaborated into a Convention it would be a recognition that armed conflict can happen in the future and it would be an admission that the U.N. has failed to achieve its goal. At a more practical level, there are some who perceive the Security Council as a group with a “political” agenda and it is possible that a State could be labeled an aggressor in contradiction to how that State feels its actions should be interpreted.¹³⁹ As such, if these few draft articles were included in a convention, it is possible that there would be much discussion surrounding them.

a. Treaties to Which the United States is a Party

Each State has its own unique way of ratifying a treaty or convention. In the United States, the treaty ratification process is defined in Articles I and II of the Constitution. Under the Constitution, the President has the power to enter into treaties with the advice and consent of the U.S. Senate, provided two-thirds of the Senators present concur.¹⁴⁰ Through the use of Trade Promotion Authority, Congress can give the Executive branch parameters for negotiation and establish rules for Congressional consultation and notification; frequently, after voting on the treaty, the Senate cannot amend the treaty. The discussion can also be placed in the context of the power of the U.S. President to engage in diplomatic affairs and serve as the commander in chief of the armed forces and the power of the U.S. Congress to regulate commerce with foreign countries and declare war.¹⁴¹

There are a number of potential roadblocks that a convention elaborating the draft articles would confront. One key potential roadblock surrounds the definition of armed conflict¹⁴² and the United States Senate’s interpretation of the provisions in the draft articles. The United States will seek to protect its perceived interests. Because state sovereignty is important for the United States, it is possible that the United States could operate as an “aggressor” and fail to receive Security Council

¹³⁷ See ILC 2011 Report, *supra* note 50, at 195; see also Definition of Aggression, art. 1, Dec. 14, 1974, G.A. Res. 3314(XXIX) U.N. Doc. A/Res/29/3314, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>.

¹³⁸ See ILC 2011 Report, *supra* note 50, at 196.

¹³⁹ See generally ILC 2011 Report, *supra* note 50, at 197 (incorporating articles 16 and 17 as “without prejudice” clauses to preserve neutrality and independence).

¹⁴⁰ U.S. CONST. art. II, § 2.

¹⁴¹ U.S. CONST. art. I, II.

¹⁴² See 2011 ILC Press Release, *supra* note 50.

approval before entering into an armed conflict. If this were to happen, there would be a potential conflict with draft articles 14 and 15.¹⁴³

III. NEXT STEPS AND RECOMMENDATIONS

It is important to consider what may happen after states have had the opportunity to voice their final concerns with the draft articles. Throughout the process, States were welcomed and encouraged to submit their comments and any information that would be helpful to the development of the topic. While the ILC has transmitted the draft articles to the U.N. General Assembly with the recommendation that it consider “the elaboration of a convention,” many officials speaking on behalf of their governments voiced different goals for the use of the draft articles.¹⁴⁴ While all of the governments commended the ILC on its work on the “effects of armed conflict in treaties,” some of the officials had particular suggestions with regards to both the content of the articles and next steps. To these ends, there are some additional recommendations that should be considered.

A. The Draft Articles Should Be Reformulated as a Convention and Brought Before the U.N. General Assembly

While overall the reaction to the adoption of the ILC’s draft articles on the “effects of armed conflict on treaties” has been positive, the spokespersons for a number of countries have admitted that there appears to be no need for a reformulation of the draft articles as a Convention brought before the members of the United Nations.¹⁴⁵ The United States has proposed that, instead of the draft articles becoming a Convention, the draft articles could serve as a model for provisions added to individual treaties entered into between states.¹⁴⁶ While countries such as Singapore may be looking to the end product of the draft articles, it is important to consider the benefits that would result from the process of the draft articles becoming a convention.¹⁴⁷

The idea of a Convention based on the text of the draft articles would lead to a renewed discussion on both the role of the International Law Commission, treaty law, and the law of armed conflict. With many international organizations and U.N. organizations playing a role in the drafting of Conventions and treaties, the actions undertaken by the ILC can sometimes be overshadowed. Discussions of the draft articles would necessarily lead to discussions of the functions and actions of the ILC. It has been suggested that the relevant organizations performing daily work within a particular subject area should remain responsible for the treaties and the public international law that emerges in those subject areas.¹⁴⁸ Through an international discussion, it is possible that the

¹⁴³ See *supra* note 135 and accompanying text.

¹⁴⁴ See 2011 ILC Press Release, *supra* note 51.

¹⁴⁵ See 2011 ILC Press Release, *supra* note 51 (including statements from delegates that the Commission’s draft articles were among the Commission’s most practical and efficient areas of work).

¹⁴⁶ See 2011 ILC Press Release, *supra* note 51.

¹⁴⁷ See 2011 ILC Press Release, *supra* note 51 (highlighting the sentiment of Singapore that there is no need for the draft articles to be elaborated into a convention).

¹⁴⁸ See Koskenniemi, *supra* note 8, at 61 (sharing an experience with experts in the field who insinuated organizations

original role of the ILC could be reinvigorated or transformed to reflect the societal changes that have occurred since the ILC was established in 1947. These changes include the increased role of international courts, the role of international organizations, and the participation of smaller states in international affairs. There also exists the idea of an international public sphere. While there may be “a working public sphere of political articulation, contestation and decision” at the domestic level, it is hard to find anything comparable at the international level.¹⁴⁹ The proposal of a Convention or a decision handed down by an international court provides rare opportunities for international conversation on a legal topic.

There are a few aspects of the draft articles that would welcome an international conversation. One of these is the definition of “armed conflict” and the role it should and does end up playing in international law. The United Nations was founded as an organization with the purpose of promoting peace and security, which means that it discourages armed conflict. Many years have passed since the founding of the United Nations and yet armed conflict is still widespread. Perhaps now is the time for a general reevaluation of the successes and failures with regards to the issue, and maybe a discussion of the draft articles on the “effects of armed conflict on treaties” can spur such a discussion.

It is important to note that even if the draft articles are not elaborated and adopted into a Convention, the draft articles and studies performed by the ILC and the Secretariat are available within the international legal field. For its Special Rapporteurs on the topic, the ILC enlisted the expertise of scholars in the field of public international law. As such, their work on the ILC can be relied upon by the International Court of Justice in future decisions as a fourth source of law. Even if they are not used in any final decisions, the materials relied upon by the ILC can be cited by individual judges in their concurring or dissenting opinions.

B. The United Nations Should Submit the “Effects of Armed Conflict on Treaties” as a Legal Question to the International Court of Justice.

In the event that the draft articles on the “Effects of Armed Conflict on Treaties” are not elaborated by the U.N. General Assembly into some type of Convention, the United Nations has the option of instead seeking an advisory opinion from the International Court of Justice (“ICJ”). The ICJ has the power to give advisory opinions on any legal questions submitted to it by parties authorized by the U.N. Charter to do so.¹⁵⁰ According to the U.N. Charter, the U.N. General Assembly, the U.N. Security Council, or any U.N. organ authorized by the U.N. General Assembly can seek an advisory opinion.¹⁵¹ The ILC has filed its draft articles with the U.N. General Assembly, which places this body in the best position to seek the answer to the issue.

committed to the cause of human rights are in the best position to understand what is possible and desirable to attaining standards in this area).

¹⁴⁹ See Koskeniemi, *supra* note 8, at 90–91 (adding that models for an international public sphere respectful of domestic notions of democracy and representation is an important aspect of international transformation).

¹⁵⁰ See ICJ Statute, *supra* note 60, art. 65(1) (meaning an advisory opinion is likely to have very little impact on any domestic U.S. cases that present questions regarding treaties when there is the presence of armed conflict).

¹⁵¹ U.N. Charter art. 95.

While the draft articles are new, the issues that were considered in creating the draft articles have arisen at various times over the years. Additionally, the void that the draft articles have sought to fill finds its origins in a treaty that has been considered by the International Court of Justice: the Vienna Convention on the Law of Treaties. If a question were submitted by the U.N. General Assembly on the topic of the “Effect of the Armed Conflict on Treaties” that question could cite directly to Article 73 of the Vienna Convention.¹⁵² As part of its submission to the ICJ, the U.N. General Assembly could include the draft articles on the “Effects of Armed Conflict on Treaties” as well as the materials considered by and created by the ILC.¹⁵³ If the ICJ were to accept the question and provide an answer in favor of the draft articles, it would provide additional validity to the draft articles and could lead to their eventual acceptance, whether as an international convention or as part of individual treaties.

There are a few drawbacks to pursuing these actions. First, it is possible that the ICJ would not accept the legal question if it was drafted too broadly. It may become necessary to ask that the ICJ apply the Savings Clause of the Vienna Conventions to a specific treaty and specific armed conflict.¹⁵⁴ This would be a reasonable request on the part of the ICJ considering that there are a range of available definitions for “armed conflict” and the modern view on the “effects of armed conflict on treaties” finds that armed conflict does not ipso facto suspend or terminate a treaty. The General Assembly would need to be careful in choosing what treaty and conflict to consider because of the magnitude of potential results that could occur. For example, if the question concerns a particular ongoing armed conflict that the ICJ finds would not actually terminate or suspend a treaty and at least one of the parties to that conflict seeks suspension of a treaty, then that state may feel inclined to escalate the violence associated with the armed conflict to reach the result it desires. Additionally, there could be too many scenarios that would need to be contemplated by the ICJ in order for any comprehensive set of rules to develop.

Second, there is the issue of how much impact an ICJ advisory opinion would have on other courts. For example, while the United States falls under the jurisdiction of the ICJ because it is a member of the U.N. and must adhere to the ICJ’s decisions,¹⁵⁵ the U.S. Supreme Court is not bound by the opinions of the ICJ.¹⁵⁶

Even with these drawbacks, it would still be beneficial for the U.N. General Assembly to pose the question to the ICJ. The ICJ could actually give some type of answer and opinion. Even if the ICJ finds that the question is inappropriate for its consideration, that determination could serve as evidence as to which questions can or should be submitted by the U.N. General Assembly to the ICJ for its consideration.

¹⁵² See Vienna Convention, *supra* note 54, art. 73 (governing cases of State succession, State responsibility, and outbreak of hostilities).

¹⁵³ See ICJ Statute, *supra* note 60, art. 65(2) (providing that submissions may be accompanied by any information that would be helpful to the ICJ in formulating its opinion).

¹⁵⁴ See *supra* note 51 and accompanying text.

¹⁵⁵ U.N. Charter art. 93, para. 1 (stating that all Members of the United Nations are parties to the Statute of the International Court of Justice).

¹⁵⁶ Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 373–84 (2008).

C. The United States Congress, and other National Legislatures, Should Hold Hearings on the Topic

With the current political divide in the U.S. Congress, now is the perfect time for members of Congress, international law experts, U.S. diplomats, and the public to engage in a conversation about the “Effects of Armed Conflict on Treaties” and the roles of the International Law Commission, the U.N. General Assembly, and the International Court of Justice. While it is likely that there would be no concrete legislative outcome, a variety of viewpoints would have the opportunity to enter the discussion. The U.S. Senate Committee on Foreign Relations considers a number of treaties and conventions to which the United States seeks to become a party. This means that if, for example, the draft articles on the “Effects of Armed Conflict on Treaties” were elaborated into a convention, it is likely that if the U.S. President were to sign onto the Convention, it would take a vote by the U.S. Senate to complete the United States ratification process.

Rather than waiting for a convention, the U.S. Senate Committee on Foreign Relations and the U.S. House Committee on Foreign Affairs could hold hearings on the issue now. The Senate committee could hold a hearing on the draft articles or a more general hearing on the role of the ILC and the U.N. General Assembly. The hearing could be used to accomplish a number of purposes. First, the evaluation done by the Committee could be used to send a message to the President and Executive Branch that similar language to the draft articles should be included in future treaties between the United States and other countries, if the draft articles were found to be satisfactory. Second, the content of the draft articles could be used to evaluate the content of future treaties that come before the Committee and the Committee could contemplate the possible effects that armed conflict could have on the applicability of the treaties. This is especially important in cases where the United States is not a party to the conflict, but the conflict is prevalent in an area where the United States has treaty obligations.

A similar dialogue may be welcome in other countries, and such discussions could set the stage for future developments. There are some governments that view the methods used by the ILC as traditional and possibly part of a problem with its usefulness.¹⁵⁷ Under such a method, there is a presumption that the ILC represents a single “people.” However, there have been a number of developments in the international law arena that have had an impact on its codification including an “increase in soft law” and the “transnational pooling of functional and technical interests in informal networks beyond public law regulation” that have made the ILC almost appear useless.¹⁵⁸ With such opinions abound, maybe it is time for a reevaluation of the role of the ILC. It is possible that maybe the work of the ILC is welcome in certain niches such the progressive development and codification of the laws of treaties.

Any of these recommendations would spur a dialogue that would encompass both the content of the draft articles and the general role of the ILC in codifying international law.

¹⁵⁷ See Koskenniemi, *supra* note 8, at 64.

¹⁵⁸ See Koskenniemi, *supra* note 8, at 64.

IV. CONCLUSION

The ILC's treatment of the topic of the "Effect of Armed Conflict on Treaties" has made a substantial contribution to the field of international law in this area. Some of the benefits that have come from the process of drafting the articles include an initial working definition of armed conflict can be solidified in an international treaty. The draft articles also bring some certainty. Many of the draft articles are clear, and yet there are still some ambiguous terms that are still present which would give State parties some flexibility in the articles' applicability. While there are still issues that remain with the content of the draft articles, the presence of the draft articles have the potential of spurring an international dialogue centered on the content of the draft articles role of the International Law Commission.

We are less than two years from the start of the seventy-second session of the U.N. General Assembly, and it is unlikely that the number of armed conflicts raging in our world will decrease before then. With climate change and scarcity of resources on the rise, we may even see an increase in armed conflict. Maybe with the adoption of the International Law Commissions draft articles, the international community would have a more definite idea of the "Effects of Armed Conflict on Treaties."