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上智大学法学会

研究ノート

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# The Function of Peace Treaties under Contemporary International Law\*

Masayuki Hiromi\*\*

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## I. Introduction

Although a large number of international armed conflicts have occurred even after the establishment of the principle of non-use of force enshrined in the Charter of the United Nations, peace treaties have become interestingly rare.<sup>1</sup> Instead of peace treaties,

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1 According to the statistic by Professor Wright, one-third of wars in the 16-17th centuries, half of wars in the 18th century, two-third of wars in the 19th century and six-sevenths of wars in the first two decades of the 20th century were ended by peace treaties. Q. Wright, 'How Hostilities Have Ended: Peace Treaties and Alternatives' (1970) 392 *The Annals of the American Academy of*

armistice agreements have been concluded in most cases of international armed conflicts. The current practice shows that ‘an armistice chiefly denotes a *termination* of hostilities, completely divesting the parties of the right to renew military operations under any circumstances whatever’,<sup>2</sup> as if recent armistice agreements are substituted for traditional peace treaties. It seems that one of the reasons for the current decline of peace treaties originates in Article 52 of the Vienna Convention on the Law of Treaties on the invalidity of treaties procured by the threat or use of force.<sup>3</sup> However, there were indeed some cases in which a peace treaty was concluded in practice.<sup>4</sup> The scholarship on this subject does not deal with the question of whether peace treaties are valid and, if so, how they function under contemporary international law.

In this context, the present article closely examines peace treaties’ legality and unique function under contemporary international law. By doing so, it will clarify that peace treaties are indeed in conformity with contemporary international law and that

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- Political and Social Science* 53. In contrast, to the best of my knowledge, after the Second World War, at most seven peace treaties were concluded in international armed conflict. See, *infra* note 4.
- 2 Y. Dinstein, *War, Aggression and Self-Defence*, 4th edn. (Cambridge University Press, 2005), p. 42 [emphasis added]. See also, M. Hiromi, ‘Changing Function in Armistice Agreement under the Charter of the United Nations: Focusing on the Subsequent Incident over Korean Armistice Agreement’ (2014) 57(4) *Sophia Law Review* 293-321 [in Japanese]; *idem.*, ‘Measures against ‘Material Breach’ of Armistice Agreement under General International Law’ (2012) 56(1) *Sophia Law Review* 65-93 [in Japanese] (incorporated into Hiromi, *Termination of International Armed Conflict under Contemporary International Law*, Parts 3 and 4).
  - 3 C. Tomuschat, ‘The 1871 Peace Treaty between France and Germany and the 1919 Peace Treaty of Versailles’ in R. Lesaffer (ed.), *Peace Treaties and International Law in European History: From the Late Middle to World War One* (Cambridge University Press, 2004), p. 385.
  - 4 Tashkent Declaration (between India and Pakistan), 10 January 1966, (1966) 560 UNTS 40-44; Simla Agreement on Bilateral Relations and Statement on its Implementation (between India and Pakistan), 3 July 1972, (1973) 858 UNTS 71; Treaty of Peace between the Arab Republic of Egypt and the State of Israel, 26 March 1979, (1979) 1138 UNTS 71; Agreement on Withdrawal of Troops from Lebanon (between Israel and Lebanon), 17 May 1983, (1983) 22 ILM 708-735; Treaty of Peace between Jordan and the State of Israel, 26 October 1994, (1998) 2042 UNTS 392; Agreement between the Government of the State of Eritrea and the Government of the Federal Republic of Ethiopia, 13 December 2000, (2001) 2138 UNTS 93; Pact on Security, Stability and Development in the Great Lakes Region (among *inter alia* DRC, Rwanda and Uganda), 15 December 2006, (2007) 46 ILM 175-184. See also, M. Wählisch, ‘Peace Settlements and the Prohibition of the Use of Force’, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), pp. 969, 972.

they can help settle disputes relating to an armed conflict. It will, firstly, examine the contents and functions of classical peace treaties as a comparison to those of contemporary peace treaties (Section II). Secondly, it will analyse the rules on the invalidity of treaties procured by the threat or use of force (Articles 52 and 75 of the aforementioned Convention) — which seem to be the principal basis for States' choosing armistice agreements over peace treaties (Section III). This analysis is particularly important, considering that 'relatively few scholarly works have been devoted to coercion in the law of treaties' in this context.<sup>5</sup> Thirdly, peace treaties' validity also needs to be examined in light of Article 53 of the aforementioned Convention on the invalidity of treaties against the peremptory norms under general international law (Section IV). Finally, by analysing major peace treaties concluded after the adoption of the Charter of the United Nations, this article will elucidate the function of peace treaties under contemporary international law (Section V).

Following the insights derived from these analyses, the article will clarify that (i) peace treaties can be in conformity with contemporary international law and States are not to be discouraged from concluding one (Sections III and IV); (ii) contemporary peace treaties' function is different from that of classical exemplars: contemporary peace treaties can function as a legal basis for negotiations to settle disputes relating to an armed conflict or can serve as a *compromis* to submit such disputes to an international court or arbitration (Sections II and V). The article focuses on peace treaties concluded in international armed conflict and does not handle questions concerning peace agreements concluded in non-international armed conflict.<sup>6</sup>

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5 J. Klabbers, 'The Validity and Invalidity of Treaties', in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press, 2012), p. 569. The ILC has recently revisited some rules of the Vienna Convention on the Law of Treaties such as reservations (Articles 19-23), subsequent agreement and practice (Article 31, paragraph 3 (a) and (b)), provisional application (Article 25) and preemprory norms of general international law (Articles 53 and 64). Similarly, the rules on invalidity of treaties procured by the threat or use of force also need to be reexamined. See, E. Cannizzaro, *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011), pp. v-vii.

6 As for the peace agreements concluded in non-international armed conflict, see, C. Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 AJIL 373-412.

## II. The Contents and Functions of Peace Treaties under Traditional International Law

In order to analyse the role of peace treaties under contemporary international law, it is necessary in the first instance to inquire into the function of classical peace treaties as a comparison. The conclusion of peace treaties — whose legal effect was the termination of war — was traditionally based upon the (sovereign) right of the victorious State to impose on the defeated State such conditions of peace as is pleased by the former. As a corollary of the sovereign right to wage war being permissible under traditional international law, the right to harvest fruits resulting from the victory of war was also permitted for the victorious State. One of the main functions of classical peace treaties was to give *de jure* recognition of this right, which is invalid under contemporary peace treaties.

Classical peace treaties concluded before the First World War generally consisted of at least four common substantive clauses, although the precise contents varied depending on the particularities of respective wars.<sup>7</sup> In general, classical peace treaties started with an opening operative clause, in which the parties to war agree that the state of war between them is thereby terminated (peace clause). The subsequent provisions routinely addressed indemnity (economic and financial clauses), cession (territorial clauses) and repatriation of prisoners of war<sup>8</sup> (military clauses).<sup>9</sup> The peace clause carried legal *effect* whereas the subsequent operative clauses stipulated *requirements* or *conditions* for peace. *In theory*, the clauses on the conditions of peace can be

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7 W. G. Grewe, 'Peace Treaties' (1997) 3 EPIL 942-944; J. K. Kleffner, 'Peace Treaties' (2012) 8 EPIL, 2nd edn., 107-108, paras. 14-17; G. G. Fitzmaurice, 'The Juridical Clauses of the Peace Treaties' (1948) 73 RdC 279, 321, 324-325.

8 Article 20 of the Hague Regulations of 1907 stipulated that '[a]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.' After the Geneva Convention relative to the Treatment of Prisoners of War of 1929 entered into force, their repatriation must generally be carried out with the conclusion of armistice agreement (Article 75).

9 With regard to the surrender and punishment of war criminals, prior to the First World War, it had been customary that 'if a war criminal has not been brought to trial during hostilities or the ensuing armistice period, the right to try him ceases with the peace treaty unless reserved in the treaty.' In many cases, peace treaties prior to the First World War contained the amnesty clause. Fitzmaurice, 'The Juridical Clauses of the Peace Treaties' (n 7) 306; H-H Jescheck, 'War Crimes' (2000) 4 EPIL 1350.

categorised into two: one relating to the settlement of matters which were at the roots of the preceding war and the other pertaining to matters arising out of the war. The former includes the territorial clauses especially when the war concerned territorial claims, while the latter relates to the military clauses.

*In practice*, however, the dividing line between them was blurred: this was because traditional international law ‘sets no limit to conditions of peace which the victor may exact from the defeated enemy’<sup>10</sup> — which was considered as the necessary corollary of the sovereign right of States to go to war. Thus, classical peace treaties were wholly irrelevant in the context of ‘reparation’ for the injury caused by an illegal war within the meaning of Article 34 of the Articles on Responsibility of States for Internationally Wrongful Act.<sup>11</sup> This is illustrated in particular in the concept of ‘indemnity’ provided in economic clauses, in contrast to that of ‘compensation’ stipulated in Article 36 of the aforementioned Articles. As Professor McNair pointed out:

Treaties of Peace often provide for the payment by the vanquished Power to the victor of a sum of money. The causes of such stipulations are various, and *from the legal point of view immaterial*. It may be a desire to enrich the victor, or to punish the vanquished, or to achieve both these ends; or it may merely the recoupment of the victor for the expenses of the war. Such payments have usually in the past been described as ‘indemnities,’ and history affords many instances of them.<sup>12</sup>

It has been customary, however, ‘not to compel [the defeated State] to pay compensation for damage done in the course of operations arising out of the lawful conduct of war’<sup>13</sup> under *jus in bello*. In spite of such custom, the victorious State was able to impose on the defeated State to pay ‘punitive’ compensation in the form of an indemnity, the amount of which was substantially more than what was strictly

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10 L. Oppenheim (H. Lauterpacht, ed.), *International Law: A Treatise*, 7th ed., Vol. 2 (Longman, 1952), p. 220, §61.

11 Y. Nishimura, ‘The Birth of the Law of State Responsibility’ in Sophia Law Society (ed.), *Legal and Theoretical Reflections on a Changing Society* (Yuhikaku, 2008), pp. 256-257 [in Japanese].

12 L. Oppenheim (L. McNair, ed.), *International Law: A Treatise*, 4th ed., Vol. 2 (Longman, 1924), p. 433, §269a [emphasis added].

13 Oppenheim (Lauterpacht, ed.), *International Law: A Treatise*, 7th ed., Vol. 2 (1952) (n 10), p. 220, §61.

associated with material damage.<sup>14</sup> In the words of Professor Oppenheim, ‘war once broken out, a belligerent is not obliged to lay down arms if and when the other belligerent is ready to comply with the request made before the war. As war is the *ultima ratio* between States, the victorious belligerent is not legally prevented from imposing upon the defeated any conditions he likes.’<sup>15</sup>

From the whole structure of classical peace treaties, it can be found that classical peace treaties had no legal *effect* (*i.e.* termination of the state of war) unless peace *conditions* (such as payment of indemnity and cession of certain territory) as is pleased by the victorious State were accepted by the defeated State. In other words, one party to war could maintain the state of war and continue or resume hostilities as long as the other party refused the peace conditions the former had induced.<sup>16</sup> In this sense, classical peace treaties inevitably involved an element of coercion.<sup>17</sup> Accordingly, traditional international law provided the exception of peace treaties compelled by the duress against a State’s representative (as well as a State itself) to the general rule of invalidity of a treaty.<sup>18</sup> According to the commentary of the Harvard Draft Convention on the Law of Treaties in 1935:

The term “duress” as used in this Convention does not include the employment of force or coercion by one State against another State for the purpose of compelling the acceptance of a treaty. The treaty-making representatives of the latter State may as a result of its defeat in war or the use of force against it ... find themselves under the necessity of giving their consent to a treaty when they would not otherwise do so. Such indirect compulsion is not, however, “duress” as the term is

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14 A. A. Steinkamm, ‘War Damages’ (2000) 4 EPIL 1357-1358.

15 L. Oppenheim, *International Law: A Treatise*, 1st edn., Vol. 2 (Longman, 1906), p. 30, §27.

16 For example, in the Paris Peace Conference, when the German Delegation protested certain conditions of peace induced by the victorious powers, the President of the Conference, Clemenceau replied to the Chairman of the German Delegation that ‘until coming into force of the treaty of peace, the denunciation of armistice would give the Allied armies every latitude as regards the military measures that they may consider necessary’ and required him to unconditionally accept those conditions. Foreign Office, ‘Relations between the Allies & Germany’, National Archives (of the United Kingdom), FO 608/ 147, 8 December 1919.

17 Fitzmaurice, ‘The Juridical Clauses of the Peace Treaties’ (n 7) 260, 355-356.

18 Harvard Draft Convention on the Law of Treaties, Article 32, (1935) 29 AJIL Supplement 1151-1152.

used in this Convention.<sup>19</sup>

In another part, the commentary further explained the reason for the exception that international law at that time disregarded the vitiating effect of imposed peace treaty:

Treaties of peace imposed upon defeated belligerents at the close of war are often regarded as an exception to the general rule which makes freedom of consent a condition of the validity of a treaty. Strictly speaking it cannot be said that coercion in such cases is employed for the purpose of compelling a negotiator to sign the treaty or the head of a State to ratify it or a legislative assembly to approve it. The usual procedure is for the victorious belligerent to state the terms on which it is willing to conclude peace with the enemy or to present the latter's plenipotentiaries at the peace conference with the draft of a treaty embodying the terms which it insists upon. The plenipotentiaries of the defeated State are told that the acceptance of the terms is a condition of the cessation of the war. They are given to understand also that if the terms are not accepted hostilities will be renewed or continued... In that case there is no employment of force or threatened use of force, physical or mental, against the persons of the plenipotentiaries to compel them to sign the treaty. They are free to choose between acceptance of the treaty or the renewal of continuance of the war... There is no duress in the legal sense of the term as it is used here, since the negotiator is free to refuse to sign the treaty and accept instead the other alternative.<sup>20</sup>

Since international law at that time set no limit to the conditions of peace, in many cases a peace treaty imposed by an ambitious victorious power did not create perpetual peace in many cases. For example, the Basle Peace Treaty between France and Prussia of 1795<sup>21</sup> led Immanuel Kant to conclude that 'no treaty of peace shall be held valid if it tacitly reserved matter for a future war.'<sup>22</sup> Given that classical peace treaties were intended to change the rights and obligations between the victorious and defeated States

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19 *Ibid.*, 1152.

20 *Ibid.*, 1154.

21 Treaty of Peace between France and Prussia, 5 April 1795, (1793-95) 52 CTS 333-339.

22 I. Kant, *Toward Perpetual Peace* (1795) [translated by author]. See also, M. J. Gregor and A. Wood (trans.), *Immanuel Kant Practical Philosophy* (Cambridge University Press, 1996), p. 317.

based on international law existing prior to a war and to establish new hegemonic order for the victorious State, ironically classical peace treaties played a role as the symbol of the anarchy of international society.<sup>23</sup> In this sense, it was a ‘Carthaginian Peace’ founded on the hegemony of the victorious State over the defeated State, like the *pax romana*. The classical peace treaties had, on the one hand, the function of a *contract* in the form of obligations imposed on the defeated State for the benefit of the victorious State.

However, one cannot overlook the fact that classical peace treaties also had, on the other hand, the function of law-making to create a new legal order of the international society.<sup>24</sup> Indeed, major classical peace treaties concluded after respective wars that involved most great powers — such as the Westphalia Peace Treaty of 1648, the Final Act of Vienna of 1815 and the Versailles Peace Treaty of 1919 — created new systems of the international society. Such respective order of Westphalian, Vienna or Versailles are referred as ‘system’ by historians. When such systems were accepted by (almost) all major powers including the defeated State as a fair and equitable adjustment, and when they succeeded in stabilizing international society, fundamental principles of international law emerged. Such principles included those relating to international peace and security, in particular.<sup>25</sup> This development is illustrated by the historical facts that the principle of non-intervention was introduced by the Westphalia Peace Treaties<sup>26</sup>; the congress system based on the principle of the balance of power was devised by the Final Act of Vienna<sup>27</sup>; and the system of collective security was established by Part I of the Versailles Peace Treaty (the Covenant of the League of Nations).

These functions of classical peace treaties intimately related to the functions of the

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23 A. Toynbee, ‘Anarchy by Treaty, 1948-1967’ in F. L. Israel (ed.), *Major Peace Treaties of Modern History 1948-1967*, Vol. 1 (Chelsea House Publishers, 2002), pp. xxv-xxl.

24 Fitzmaurice, ‘The Juridical Clauses of the Peace Treaties’ (n 7) 260.

25 Grewe, ‘Peace Treaties’ (n 7) 939.

26 R. Grote, ‘Westphalian System’ (2012) 10 EPIL, 2nd edn., 871, para. 6.

27 F. Münch, ‘Vienna Congress (1815)’ (2000) 4 EPIL 1287; T. Fitschen, ‘Vienna Congress (1815)’ (2012) 10 EPIL, 2nd ed., 678, para. 1. Strictly speaking, the peace between France and its adversaries was concluded by the (First) Paris Peace Treaty of 1814. But the Vienna Congress was convened in accordance with Article 32 of the Paris Peace Treaty ‘for the purpose of regulating ... the arrangements which are to complete the provisions of the present Treaty.’ (1813-1815) 63 CTS 190-191.

institution of war. Professor Sir Hersch Lauterpacht once pointed out that ‘as a means of changing the law, it [war] constituted a radical break in the continuity of the system of International Law and was analogous to the authorisation of a revolution in the very constitution of a State’.<sup>28</sup> In that, the relationship between war and peace treaties in international relations was analogous to that between revolution and a new constitution in the domestic sphere. In this sense, ‘peace’ was a value-neutral fact, recognised, but not regulated, by traditional international law.<sup>29</sup> One of the main functions of classical peace treaties was to give *de jure* recognition of rights and title, which were *de facto* acquired by a victorious State as a result of victory of war. The principle of *uti possidetis* or *status quo post bellum* (in contrast to *status quo ante bellum*) was, therefore, the underlying principle of traditional international law.<sup>30</sup> As Professor Fitzmaurice, the Third Special Rapporteur of the ILC Draft Articles on the Law of Treaties, pointed out, it is plausible in one sense that ‘if peace is a paramount consideration, it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice’.<sup>31</sup> In the words of Professor Tomuschat, ‘[t]hrough the principle of effectiveness, ... [classical international law] gave a place of pride to facts created by sheer might.’<sup>32</sup>

### III. The Validity of Peace Treaties under Articles 52 and 75 of the Vienna Convention on the Law of Treaties

In contrast to the traditional rule on the invalidity of treaties, the renunciation of war and the prohibition of the threat or use of force — the underlying foundation of contemporary international law — divest the victorious aggressor of the right to harvest fruits resulting from the victory of war.<sup>33</sup> In the words of Professor Sir Hersch

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28 Oppenheim (Lauterpacht, ed.), *International Law: A Treatise*, 7th ed., Vol. 2 (1952) (n 10), p. 179, §52*fe*.

29 As Professor Oppenheim described ‘war’ as ‘a fact recognized ... but not established, by International Law’, the same applies to ‘peace’. See, Oppenheim, *International Law: A Treatise*, 1st edn., Vol. 2 (1906) (n 15), p. 56, §54.

30 *Ibid.*, p. 287, §273. See also, R. Lesaffer, ‘Peace Treaties and the Formation of International Law’ in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 77.

31 G. G. Fitzmaurice, Third Report on the Law of Treaties (1958) 2 YBILC 38, para. 62.

32 C. Tomuschat, ‘International Law’ in *idem* (ed.), *The United Nations at Age Fifty: A Legal Perspective* (Kluwer Law International, 1995), p. 281.

Lauterpacht, who subsequently became the Second Special Rapporteur of the ILC Draft Articles on the Law of Treaties, ‘a peace treaty imposed by the victorious aggressor has no legal validity.’<sup>34</sup> The Latin maxim *ex iniuria ius non oritur* (‘A right does not arise from wrongdoing’<sup>35</sup>) is the corollary of the outlawry of war under the Covenant of the League of Nations and the Pact of Paris, and the principle of non-use of force enshrined in the Charter of the United Nations. In pursuant to these principles, parties to armed conflict are not categorised into victorious State or defeated State. Rather, the principle do discriminate between the wrongdoer State, who is responsible for its aggression (hereinafter the term ‘aggressor State’ is used in the sense of the Vienna Convention on the Law of Treaties), and the injured State in the sense of the law of State responsibility. This is reflected in Articles 52 and 75 of the Vienna Convention on the Law of Treaties.

Peace treaties, which are concluded between the parties to armed conflict, can be in theory categorised into four possible types. Among them, however, two are unfeasible in practice: (i) a peace treaty that the defeated aggressor imposes on the victorious victim and (ii) one that the defeated victim compels against the victorious aggressor. The other two kinds of peace treaties need to be examined in the context of the rules on the invalidity of treaties concluded as a result of coercion by the threat or use of force: (iii) the victorious aggressor imposes on the defeated victim and (iv) the victorious victim compels against the defeated aggressor. The peace treaties concluded in these two cases were both valid under traditional international law. However, based on the principle of non-use of force, the Vienna Convention on the Law of Treaties discriminates between the parties to armed conflict and invalidates the peace treaty imposed by the victorious aggressor<sup>36</sup>; it then provides that the one imposed by the

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33 Oppenheim (Lauterpacht, ed.), *International Law: A Treatise*, 7th ed., Vol. 2 (1952) (n 10), pp. 217-219, §61; Oppenheim (Lauterpacht, ed.), *International Law: A Treatise*, 8th ed., Vol. 1 (1955), p. 892, §499; I. Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), pp. 404-405.

34 Oppenheim (Lauterpacht, ed.), *ibid.*, Vol. 2, p. 219, §61.

35 A. X. Fellmeth and M. Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2009), p. 94.

36 The invalidity of this type of peace treaties was introduced by Professor Sir Hersch Lauterpacht for the first time. See, H. Lauterpacht, Report of the Law of Treaties (1953) 2 YBILC 148, 150, paras. 3, 9.

victorious victim is valid<sup>37</sup> (see Table 1). As noted above, concluding a peace treaty inevitably involves an element of coercion — because one party's denial to do so necessarily implies the continuation or resumption of hostilities by the other party. Therefore, the legal validity of a peace treaty imposed by the threat or use of force has to depend on the legality of such force.<sup>38</sup> Articles 52 and 75 of the aforementioned Convention stipulate that:

Article 52 (Coercion of a State by the Threat or Use of Force) A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 75 (Case of an Aggressor State) The provisions of the present Convention

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37 Professors Tomuschat and Krieger claim that the phrase 'measures taken in conformity with the Charter of the United Nations' in Article 75 of the Vienna Convention on the Law of Treaties does not cover measures of self-defence. See, C. Tomuschat, 'Article 75 (1969)' in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol. 2 (Oxford University Press, 2011), p. 1594, para. 19; H. Krieger, 'Article 75' in O. Dörr and K. Schmalenback (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 1291, para. 27. However, the members of the ILC had assumed that what was to become Article 75 would cover peace treaties imposed by the injured States on the aggressors. The debates in the Commission reveal that some members, in drafting the article, took into consideration the Versailles Peace Treaty and the peace treaties arising out of the Second World War. (1966) 1 (2) YBILC 180, para. 15 (Aréchaga), 180, para. 19 (Rosenne), 182, para. 34 (Ago), 182, para. 40 (Waldock). In addition, during the Vienna Conference, the Swiss delegation pointed out that 'the wording of the article was ambiguous, because "measures taken in conformity with the Charter" could mean the binding decisions taken by the Security Council under Chapter VII of the Charter, but also individual or collective measures of self-defence taken under Article 51 of the Charter.' *Official Records of the United Nations Conference on the Law of Treaties, First session (Summary Records of the Plenary Meetings and of the Meetings of the Committee of a Whole)*, U. N. Doc. A/CONF. 39/C.1/SR.76, p. 454, para. 49. Furthermore, there have been many cases, in fact, where the Security Council was unable or unwilling to authorise necessary measures while it had already identified the aggressor State, and the injured State used force in self-defence. In such cases, the question arises whether the injured State exercising the right of self-defence can impose a peace treaty on the aggressor State in order to terminate the armed conflict between them. Accordingly, it is unlikely that Article 75 does not cover measures of self-defence exercised by the injured State. As for the issue whether a peace treaty can be imposed on the aggressor State within the material scope of self-defence, see *infra* Part IV.

38 R. Hofmann, 'Annexation', (2012) 1 EPIL, 2nd edn., 413, para. 25.

are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

As any other 'international agreement[s] in written form concluded between States and governed by international law', peace treaties are subject to the rules under general international law of treaties<sup>39</sup> As indicated in the commentary of the Harvard Draft Convention on the Law of Treaties, what was to become Article 52 of the Vienna Convention on the Law of Treaties — relating to coercion of a State itself by the threat or use of force — had not been firmly established under traditional international law. This was indeed regarded as a progressive development during the drafting of the Convention.<sup>40</sup> In contrast, what was to become Article 51 of the Convention on the coercion of a representative of a State was the codification of then existing customary international law. However, after the adoption of the Vienna Convention, the ICJ held in the *Fisheries Jurisdiction* cases that '[t]here can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void,<sup>41</sup> and thus Article 52 is considered to have

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39 G. Schwarzenberger, 'Peace Treaties before International Courts and Tribunals' (1967) 8 *Indian Journal of International Law* 1.

40 I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, (Manchester University Press, 1984), pp. 176-177. For that reason, Sir Gerald Fitzmaurice, the Third Special Rapporteur, advocated the deletion of the draft article. See, Fitzmaurice, Third Report on the Law of Treaties (1958) 2YBILC 38, para. 62. In his report, he explained that 'by the time ... that circumstances permit of its repudiation, it will have been carried out, and many steps taken under it will be irreversible or reversible, if at all, only by further acts of violence. It is this type of consideration ... which had led almost ever authority thus far to take the view that it is not practicable to postulate the invalidity of this type of treaty.' See also, Fitzmaurice, 'The Juridical Clauses of the Peace Treaties' (n 7) 355-356. A similar position was taken in J. Stone, 'De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace' (1967-8) 8 VJIL 357-359.

41 ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1973, p. 14, para. 24; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1973, p. 59, para. 24. It is interesting, in this respect, that Judge Fitzmaurice did not deny but rather affirmed the rule on the invalidity of treaties imposed by threat or use of force itself in this case, whereas he had previously denied and proposed to delete it in 1958 as the Third Special Rapporteur of the ILC draft on the law of treaties. See,

become established rule of customary international law at the latest at the time of the adoption of the Charter.<sup>42</sup> Accordingly, in this section, it will analyse the validity of peace treaties under Article 52 and its complement Article 75 of the aforementioned Convention.

According to Article 52, a peace treaty imposed by the victorious aggressor is null and void *ab initio*. The ILC considered that, under Article 52, an unlawful threat or use of force *necessarily* entails coercion, and thus both are two sides of the same coin.<sup>43</sup> In accordance with the ILC commentary, '[e]ven if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio*.'<sup>44</sup> The result is that every aggressor State is automatically deprived of the capacity to conclude a treaty.

In contrast, according to Article 75, a peace treaty imposed by a victorious victim or the Security Council is regarded as valid. However, in this case, a peace treaty is concluded as a result that the injured State or the Security Council becomes *victorious* and thereby is in a position to impose it on the defeated aggressor. This is inconsistent with the premise that the validity of treaties is based upon the freedom of consent. Professor Sir Hersch Lauterpacht, as the Second Special Rapporteur, recognised this inconsistency but took the position that such peace treaty should be valid, stating that '[a]lthough in such cases the element of consent on the part of the State concerned is lacking, the impersonal authority of the law ... is properly deemed to supply, or to remedy, the absent element of consent'.<sup>45</sup> The ILC seems to consider that, under Article 75, coercion is irrelevant for the validity of the (peace) treaty imposed on an aggressor State if an injured State employs or the Security Council authorises the lawful use of

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Separate Opinion of Judge Fitzmaurice, *I.C.J. Reports 1973*, pp. 33-34, paras. 19-20 (United Kingdom v. Iceland), pp. 78-79, paras. 19-20 (Federal Republic of Germany v. Iceland).

42 (1966) 2 YBILC 246-247, para. (8). The ILC decided that Article 52 does not have retroactive effect. As a result, as the ILC observed in its commentary, '[t]he rule codified in the present article cannot ... be properly understood as depriving of validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force.'

43 (1966) 2 YBILC 246, para. (3).

44 *Ibid.*, 247, para. (6).

45 Lauterpacht, Report of the Law of Treaties (1953) 2 YBILC 150, para. 9.

Table 1: ILC	Consent	Coercion
Aggression	—	void (Article 52)
Lawful Use of Force	valid (Article 75)	valid (Article 75)

force. As Sir Humphrey Waldock, the Fourth Special Rapporteur of the same ILC Draft Articles, pointed out, ‘there is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor.’<sup>46</sup> That suggests, however, Article 75 of the Vienna Convention is ‘to some extent an art, not an exact science’.<sup>47</sup>

In drafting those provisions, the ILC seems to have taken two unreconcilable approaches. Firstly, its interpretation depends upon the preliminary question regarding the wrongfulness of the initial threat or use of force, while coercion was not borne in mind as a separate criterion.<sup>48</sup> Secondly, notwithstanding that, the ILC had not at all dealt with the matter of *jus ad bellum*.<sup>49</sup> As implied in its commentary, ‘[t]he Commission decided to define coercion in terms of a “threat or use of force in violation of the principles of the Charter”, and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.’<sup>50</sup> As a result, the ILC interpreted that the dichotomy between the aggressor State and injured State *at the moment of occurrence* of an armed conflict *ipso facto* stretched to the distinction between Articles 52 and 75 of the Vienna Convention on the validity of a treaty concluded *at the time of termination*

46 H. Waldock, Second Report on the Law of Treaties (1963) 2 YBILC 52, para. 7.

47 The ILC used this expression in its commentary on the rules of interpretation. (1966) 2 YBILC 218, para. 4.

48 M. Bothe, ‘Consequences of the Prohibition of the Use of Force: Comments on Arts. 49 and 70 of the ILC’s 1966 Draft Articles on the Law of Treaties’ (1967) 27 (3) ZaöRV 513; S. Forlati, ‘Coercion as a Ground Affecting the Validity of Peace Treaties’ in Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (n 5), p. 322.

49 Bothe, *ibid.*, 510-512. It is plausible, however, that the ILC did not to deal with any matters on the use of force, because they were thought unsuitable for codification, owing to the political sensitivity of the issue. See, S. Murase, Shared Natural Resources: Feasibility of Future Work on Oil and Gas, U. N. Doc. A/CN.4/621, para. 9. See also, P. Palchetti, ‘The ILC and Customary Rules on the Use of Force’ in P. Palchetti and E. Cannizzaro (eds.), *Customary International Law on the Use of Force: A Methodological Approach* (Brill Academic Pub, 2005), p. 237.

50 (1966) 2 YBILC 246, para. (3).

of the conflict. This interpretation seems to be influenced by Professor Sir Hersch Lauterpacht's opinion. In his (seventh) edition of *Oppenheim's International Law*, he stated that:

In so far as war has ceased to be a right... an illegal war, *i.e.* a war resorted to contrary to the fundamental obligations accepted by a State and prescribing the institution of war as such, can no longer confer upon the guilty belligerent all the rights which traditional International Law ... conferred upon the belligerent. *Ex injuria jus non oritur* is an inescapable principle of law. At the same time, in view of the humanitarian character of a substantial part of the rules of war it is imperative that *during the war* these rules should be mutually observed regardless of the legality of the war... However, ... these considerations apply only for the duration of the war. After the end of the hostilities there is full room for the application of the principle that no rights and benefits can accrue to the aggressor from his unlawful act.<sup>51</sup>

However, this interpretation can only be understood as unreasonable, entailing two undesirable logical consequences. Firstly, as confirmed by the ILC itself, in accordance with Article 75 of the Vienna Convention on the Law of Treaties, a peace treaty imposed by the injured State or the Security Council is considered to be valid, even when the treaty is in fact illegitimate. Professor Waldock conceded that 'for otherwise the security of armistice agreements and peace settlements, whether legitimate or *illegitimate*, would be endangered and the difficulty of terminating hostilities increased.'<sup>52</sup> He continued that:

As one writer has pointed out, the validity of the peace settlements of the First World War was never questioned in the numerous cases in which they came under discussion before the Permanent Court or in the innumerable proceedings arising out of them before arbitral tribunals. Again, while the treaty of 1939 between Nazi Germany and Czechoslovakia is generally regarded as invalid by reason of the

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51 Oppenheim (Lauterpacht, ed.), *International Law: A Treatise*, 7th edn., Vol. 2 (1952) (n 10), pp. 217-219, §61 [emphasis original].

52 Waldock, Second Report on the Law of Treaties (1963) 2 YBILC 52, para. 7 [emphasis added].

coercion both of the delegates and the State, the validity of the Italian Peace Treaty, a treaty certainly not negotiated but imposed, has not been regarded as open to challenge.<sup>53</sup>

In opposing this proposition, Professor de Luna, a fellow member of the ILC, aptly opined that ‘[e]ven in that case [of a peace treaty imposed on an aggressor], ... some limits should be set. The victim of an aggression was admittedly entitled to fair and equitable reparation, but he could not claim more. To permit the total annexation of the aggressor’s territory or the loss of its political independence would be going too far.’<sup>54</sup> Another member, Professor Paredes, also pointed out during the drafting process that, even in the case of a peace treaty dictated by the victim of aggression, ‘the reparations demanded should be reasonable’.<sup>55</sup> The Second Special Rapporteur seems to have anticipated these concerns and insisted that ‘compulsion is not a vitiating element in relation to validity of treaties in cases in which what is exacted from the coerced State does *not go beyond the limits of international law*’. This invoked Hall’s remarks that ‘so long as nothing more is exacted than it may be supposed that a State would consent to give, if it were willing to afford compensation for the past wrongs and security against the future commission of wrongful acts...’<sup>56</sup> It remains, however, unclear in the minutes if the ILC truly gave due regard to those concerns in finally adopting what was to become Article 75.

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53 *Ibid.* In the footnote, he quoted Professor McNair’s *Law of Treaties*. See, L. McNair, *The Law of Treaties* (Oxford University Press, 1961), p. 209. Although Professor Waldock did not quote the exact passage of Professor McNair, he seemed to be referring to the following passage: ‘[n]umerous decisions were given by the Permanent Court of International Justice upon the Treaty of Versailles of 1919 and other Peace Treaties entered into at the end of the First World War, and it is believed that in no case did any of the defeated Powers allege that an armistice agreement or a treaty was not binding upon it because its consent had been obtained by force or the threat of force, namely the continuance or the renewal of the war.’

54 (1963) 1 YBILC 52, para. 77.

55 *Ibid.*, 61, para. 9.

56 Lauterpacht, Report of the Law of Treaties (1953) 2 YBILC 150, para. 9 (at footnote 114) [emphasis added]. W. E. Hall, *A Treatise on International Law*, 3rd edn. (Clarendon Press, 1890), pp. 325-326 [Professor Lauterpacht misprinted the page number as 235]. See also, Stone, ‘*De Victoribus Victis*: The International Law Commission and Imposed Treaties of Peace’ (n 40) 362-363.

The second undesirable consequence of the interpretation was rightly pointed out by Ambassador Tsuruoka, another member of the ILC at that time: 'it was not always necessary or useful to invalidate treaties concluded by an aggressor State. Treaties on such matters as medical services or the exchange of prisoners, for example, should be recognized as valid, especially as the consent of the injured State was real.'<sup>57</sup> Accordingly, the Harvard Draft Convention on Rights and Duties of States in Case of Aggression of 1939 provided in Article 2, paragraph (3), that '[a] treaty brought about by an aggressor's use of armed force is *voidable*'; but not categorically void.<sup>58</sup> As its commentary states, '[i]t is conceivable that an aggressor might, after defeating the armed forces of the victim of aggression, conclude with the victim of aggression a treaty which *intrinsically offered a fair and equitable adjustment* of the controversy which had led to the armed conflict.'<sup>59</sup>

In contrast, Article 52 of the Vienna Convention on the Law of Treaties of 1969 stipulates the absolute void (not voidable). As introduced by the Second Special Rapporteur,<sup>60</sup> a peace treaty induced by the aggressor State is automatically void *ab initio*, even if the treaty intrinsically offers a fair and equitable adjustment — e.g., provisions that oblige the aggressor State to pay just reparation for the damage resulting from the aggression and that prohibit future aggression.<sup>61</sup> In addition, as pointed out by Professor Dinstein, 'Article 44 (5) of the Vienna Convention does not permit any separation of the provisions of a treaty falling under Article 52. This means that a treaty

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57 (1963) 1 YBILC 61, para. 11.

58 Harvard Draft Convention on Rights and Duties of States in Case of Aggression, (1939) 33 AJIL Supplement 895 [emphasis added].

59 *Ibid.* [emphasis added.]

60 Lauterpacht, Report of the Law of Treaties (1953) 2 YBILC 151, para. 2. In contrast, the Fourth Special Rapporteur originally proposed in his draft article 12 that such treaty is voidable to the effect that '[i]f a State is coerced into entering into a treaty through an act of force, or threat of force, employed against it in violation of the principles of the Charter of the United Nations, the State in question shall be entitled (a) to declare that the coercion nullifies its consent to be bound by the treaty *ab initio*; or (c) to affirm the treaty... provided always that no such affirmation shall be considered binding unless made after the coercion has ceased.' See, Waldock, Second Report on the Law of Treaties (1963) 2 YBILC 51.

61 Lauterpacht, *ibid.*, 150, para. 9, implied that 'provision[s] against future aggression and just reparation for damage resulting from aggression may *legitimately* form an element of the [peace] treaty' [emphasis added].

procured by coercion is void in its entirety.<sup>62</sup> The categorical invalidity of peace treaties of this kind inevitably connotes the resumption of hostilities even when a victim State does not wish such result.

This undesirable consequence of the interpretation led Professor Dinstein to advocate that ‘the invalidity of a treaty does not impair duties embodied therein, if these are independently binding on the parties by virtue of general international law.’<sup>63</sup> According to him, the resumption of hostilities is still prohibited by the principle of non-use of force under general international law, even when a peace treaty is nullified as a whole. However, his conclusion seems to have somewhat confused the cause and effect. The obligation of non-use of force can only resume to be applicable when an armed conflict is terminated. As long as an armed conflict continues, parties to the armed conflict can employ armed force continuously, unless the use of force is prohibited both by *jus ad bellum* and by *jus in bello*. Therefore, as long as a peace treaty containing the peace clause on the termination of (a state of) war is void in its entirety, the obligation of non-use of force does not resume to be applicable. This unfortunate result of the ILC’s interpretation is ironically overlaps with the Fourth Special Rapporteur’s anticipation regarding a peace treaty imposed by the injured State or the Security Council: ‘the security of armistice agreements and peace settlements ... would be endangered and the difficulty of terminating hostilities increased.’<sup>64</sup>

As opposed to the ILC, the ICJ, in applying the principle embodied in Article 52 of the Vienna Convention on the Law of Treaties, seems to have drawn a distinction between an unlawful threat or use of force and coercion. It observed in the *Fisheries Jurisdiction* cases that:

[A] court cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support. The history of the negotiations which led up to the 1961 Exchange of Notes reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides.<sup>65</sup>

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62 Dinstein, *War, Aggression and Self-defence*, 4th edn (n 2), p. 41.

63 *Ibid.*

64 Waldock, Second Report on the Law of Treaties (1963) 2 YBILC 52, para. 7.

65 ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1973, p. 14, para. 24; *Fisheries Jurisdiction (Federal Republic of Germany v.*

Table 2: ICJ	Consent	Coercion
Aggression	valid	
Lawful Use of Force		

It can be deduced from this judgment that where a treaty induced by an aggressor State is concluded with true consent of an injured State, the treaty is considered as valid under Article 52 of the Vienna Convention on the Law of Treaties — even if the aggressor State previously employed an unlawful threat or use of force. The ICJ thus limited the temporal scope of coercion by a threat or use of force to that happening at the time of concluding a peace treaty: an unlawful force or a threat of force need to have been taking place *during the process of concluding a treaty*, in order for it to be considered invalidated. Moreover, fulfilling this condition is *irrelevant* of the wrongfulness of a threat or use of force *at the time of opening hostilities* (see Table 2).

This interpretation of Article 52 of the Vienna Convention on the Law of Treaties can also be deduced from its title of ‘*coercion of a State by the threat or use of force*’. As explained in a commentary, the text of Article 52 indicates ‘the need for the existence of a causal link between, on the one hand, the illegal coercion and, on the other hand, the conclusion of the treaty... it is not sufficient to show that a State which concluded a treaty had previously been the victim of an illegal recourse to force to consider the treaty to be void.’<sup>66</sup> Consequently, even if a treaty — such as a convention on the exchange of prisoners, an armistice agreement or a peace treaty — is induced by an aggressor State, it is to be considered as valid, were it not for illegal coercion against an injured State at the time the treaty was concluded.

It can be concluded that, in interpreting Article 52, the wrongfulness of the threat or use of force *at the moment of occurrence* of an armed conflict does not directly correspond to the invalidity of a treaty concluded *at the time of termination* of the conflict. Such distinction between the unlawful threat or use of force and the element of coercion, in turn, raises another question: Is a peace treaty void under Article 75, if the treaty has been imposed by an injured State or the Security Council on an aggressor State in the negotiation and conclusion of the treaty — when the injured State had

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*Iceland*), *Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 59, para. 24.

66 O. Corten, ‘Article 52 (1969)’ in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (n 37), p. 1211, para. 24.

employed or the Security Council had authorised a lawful use of force at the time of opening hostilities? As implied in the ILC commentary, ‘it would be essential to avoid giving the impression that an aggressor State is to be considered as completely *exlex* with respect to the law of treaties.’<sup>67</sup> Professor Tomschat, a former member of the ILC, also pointed out that ‘this normative complement to Article 52 [*i.e.*, Article 75] is drafted in such an infelicitous manner, and is consequently so hard to understand, that it can hardly fulfil the function which it is expected to fulfil.’<sup>68</sup>

#### IV. The Validity of Peace Treaties under Article 53 of the Vienna Convention on the Law of Treaties

The question whether a peace treaty is valid needs to be examined not only in light of Article 52 or 75, but also Article 53 of the Vienna Convention on the Law of Treaties. As far as the interpretation of the ICJ is concerned, Article 52 of the aforementioned Convention centres on the defect in the consent of a State to be bound. This is analogous to other grounds for invalidating a treaty, such as fraud and corruption. Accordingly, Article 52 does not address any issues concerning the *substance* of a (peace) treaty. Instead, it mainly concerns the coercion in the form of an unlawful threat or use of force imposed in signing, ratifying or acceding a treaty — *i.e.*, the *procedures* by which the treaty is brought into force (as stipulated in Article 11 of the same Convention)<sup>69</sup>. In this respect, it must be borne in mind that, historically, the great majority of peace treaties, whether imposed by an aggressor State or an injured State, were based upon mutual consent in form; this consent was regarded as voluntary even if it was made under military ‘pressure’ (not identical with ‘duress’ in the strict legal sense). In contrast, substantive provisions were not based upon reciprocity.<sup>70</sup>

Furthermore, in drafting Article 75, the ILC did not even consider the procedural aspect of coercion, as if it agreed with the comment on the German signature of the Versailles Peace Treaty made by the Solicitor for the Department of State of the United

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67 (1966) 2 YBILC 268.

68 Tomuschat, ‘The 1871 Peace Treaty between France and Germany and the 1919 Peace Treaty of Versailles’ (n 3), p. 385.

69 Klabbbers, ‘The Validity and Invalidity of Treaties’ (n 5), p.561; H. G. de Jong, ‘Coercion in the Conclusion of Treaties: A Consideration of Articles 51 and 52 of the Convention on the Law of Treaties’ (1984) 15 *Netherlands International Law Review* 233–242, 247.

70 Fitzmaurice, ‘The Juridical Clauses of the Peace Treaties’ (n 7) 260.

States: ‘[e]ven though a vanquished nation is in effect compelled to sign a treaty, I think that in contemplation of law its signature is regarded as voluntary.’<sup>71</sup> However, the ILC’s approach seems to be untenable, when one takes into account the destiny of the Versailles Peace Treaty — whose substantive terms of peace were compelled by the injured States against Germany.<sup>72</sup> As the Versailles Peace Treaty’s case has shown, such ‘Carthaginian Peace is not practically right or possible.’<sup>73</sup> The Versailles Peace Treaty stipulated the clauses on the guarantees for the execution of the treaty, under which the German territory west of the Rhine was subject to occupation so long as ‘Germany refuses to observe the whole or part of her obligations under the present Treaty with regard to reparation’ (Article 430).<sup>74</sup> As pointed out by Professor Keynes, ‘[s]ince it will be impossible for Germany to fulfil the whole of her Reparation obligations, the effect of the above provision[s] will be in practice that the Allies will occupy the left bank of the Rhine just so long as they choose.’<sup>75</sup> An illegitimate peace treaty, even when imposed by the injured State, thus never establishes perpetual peace because it tacitly reserves material for a future war.<sup>76</sup>

Considering that a defeated State which was subject to coercion is often not in a position to declare the peace treaty void, it should not be overlooked that the procedural aspect of coercion is intricately interwoven with the substantive aspect of a peace treaty.<sup>77</sup> While the substantive aspect may not be covered by Articles 52 and 75, it may fall under Article 53 on peremptory norms of general international law.<sup>78</sup> This

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71 G. H. Hackworth, *Digest of International Law*, Vol. 5 (United States Government Printing Office, 1943), p. 158.

72 J. M. Keynes, *The Economic Consequences of the Peace* (Macmillan, 1920), p. 33.

73 *Ibid.*

74 Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany, 28 June 1919, (1919) 225 CTS 387. *See also*, G. Zieger, ‘Rhineland Occupation after World War I’ (2000) 4 EPIL 244-246; F. L. Jones, ‘Military Occupation of Alien Territory in time of Peace’ (1923) 9 *Transactions of the Grotius Society* 151-156. This kind of occupation is sometimes referred as ‘guarantee occupation’.

75 Keynes, *The Economic Consequences of the Peace* (n 72) p. 96.

76 Kant, *Toward Perpetual Peace* (n 22). *See also*, Gregor and Wood (trans.), *Immanuel Kant Practical Philosophy* (n 22), p. 317.

77 De Jong, ‘Coercion in the Conclusion of Treaties’ (n 69), 234.

possibility was implied by some of the ILC members in drafting what finally would become Article 52. For example, Professor Ago stated that ‘Article 12 [the eventual Article 52] ... applied to cases in which the treaty was considered void not because of some defect in consent, but because the use of force was inadmissible as a means of changing an international situation. Article 12 was therefore more closely linked to article 13 [the eventual Article 53], which also related to cases in which the treaty was void...’<sup>79</sup> Professor Rosenne also pointed out that

[T]he kind of considerations which had prompted the Special Rapporteur to provide in article 13 that a treaty was void if its object or execution involved “the infringement of a general rule or principle of international law having the character of *jus cogens*”, and in particular if it involved “the use or threat of force in contravention of the principles of the Charter”, must lead to similar conclusions regarding treaties procured by those means.<sup>80</sup>

The Second Special Rapporteur of the ILC Draft Articles on the Law of Treaties cited the practice of non-recognition as the evidence of the customary principle of the invalidity of treaties imposed by an unlawful threat or use of force.<sup>81</sup> In contrast, the ILC, in drafting the law of State responsibility, adopted the principle of non-recognition as a legal consequence of a serious breach of an obligation under peremptory norms of general international law (Article 41, paragraph 2).<sup>82</sup> Accordingly, even when a peace treaty is valid under Article 52 or 75 of the Vienna Convention on the Law of Treaties, if the treaty is inconsistent with peremptory norms of general international law, it is void under the law of treaties. The ILC itself recognised, in its commentary on the draft articles on the law of treaties, that ‘the law of

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78 W. Czapliński, ‘Jus Cogens and the Law of Treaties’ in C. Tomuschat and J-M Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligation Erga Omnes* (Martinus Nijhoff, 2005), p. 90.

79 (1963) 1 YBILC 55, para. 22.

80 *Ibid.*, 56, para. 38.

81 Lauterpacht, Report of the Law of Treaties (1953) 2 YBILC 148-149, para. 4.

82 A. Gianelli, ‘Absolute Invalidity of Treaties and Their Non-Recognition by Third States’ in Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (n 5), p. 334; G. Gaja, ‘Jus Cogens beyond the Vienna Convention’ (1981) 172 RdC 288.

the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.<sup>83</sup> Therefore, the question whether a peace treaty is valid needs to be answered not only in light of Article 52 or 75, but also Article 53.

According to Article 41, paragraph 2, of the Articles on Responsibility of States for Internationally Wrongful Act, no third States shall recognise as lawful a *situation* created by a serious breach of the prohibition of aggression,<sup>84</sup> as a legal consequence of a breach of such a primary peremptory norm. The General Assembly Resolution 3314 (XXIX) on the definition of aggression stipulates, in Article 5, paragraph 3, that ‘[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful’. The ‘situation’ which is subject to non-recognition is thus not limited to ‘territorial acquisition’, but includes ‘special advantage.’<sup>85</sup> These situations are brought about by a serious breach of the prohibition of aggression. Therefore, if a party to an armed conflict gains ‘special advantages’ by imposing on the other party a peace treaty, the former is in violation of the prohibition of aggression — regardless of whether it was the injured State or the aggressor State at the moment of occurrence of the conflict. The Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in 1933 indicates in Article 11 that ‘[t]he contracting States definitely establish ... the precise obligation not to recognize territorial acquisitions or special advantages *which have been obtained by force*’,<sup>86</sup> under which no distinction is made between the aggressor State and the injured State at the moment of occurrence of an armed conflict.

As expressed in the Pact of Paris, the institution of war prior to the Pact fulfilled two

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83 (1966) 2 YBILC 247, para. (1).

84 In its commentary on the Articles on Responsibility of States for Internationally Wrongful Act, the ILC likewise observed that ‘it is generally agreed that the prohibition of aggression is to be regarded as peremptory.’ (2001) II (2) YBILC 112, para. (4) (republished in J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), p. 246, para. (4)).

85 S. Talmon, ‘The Duty Not to ‘Recognize as Lawful’ a Situation created by the Illegal Use of Force or Other Serious Breaches on a *Jus Cogens* Obligation: An Obligation without Real Substance?’ in Tomuschat and Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (n 78), pp. 114-118.

86 Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1933, (1934) 165 LNTS 27 [emphasis added].

contradictory functions: to restore and remedy infringed rights by an injured State (an instrument for the solution of international controversies) and to challenge and change disadvantageous rights and titles based on existing international law (as an instrument of national policy).<sup>87</sup> The latter was subsequently prohibited by the principle of non-use of force enshrined in Article 2, paragraph 4, of the Charter of the United Nations. Furthermore, the situations resulting from the latter is subject to non-recognition. In contrast, the former — to restore and remedy infringed rights by an injured State — has been transformed into the right of self-defence stipulated in Article 51 of the Charter. The watershed between them can be drawn by the principle of proportionality in *jus ad bellum*. The principle of proportionality requires a balance between the use of force in self-defence and its objective of halting and repelling the attack. The use of force deployed to acquire territories beyond an existing boundary or to gain special advantage, therefore, is not justified as a lawful measure of self-defence.<sup>88</sup> Accordingly, even if a State was considered to be the injured State at the time of the occurrence of an armed conflict, its subsequent use of force in this manner is in violation of the principle of non-use of force.

Consequently, a peace treaty imposed by the previous injured State may be void in pursuance of Article 53 of the Vienna Convention, if it purports to obtain territorial acquisition or special advantage by imposing the peace treaty on the previous aggressor State. Therefore, the position that ‘a State acting in legitimate self-defence should be entitled to annex territory of the aggressor State in order to protect itself against future aggressions’ is not inconformity with present international law.<sup>89</sup> Nor does it allow

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87 S. Yamamoto, *International Law*, New edn. (Yuhikaku, 1994), p. 704 [in Japanese]; L. Oppenheim (H. Lauterpacht, ed.), *International Law: A Treatise*, 5th edn., Vol. 2 (Longman, 1935), pp. 147-148, 153, §52g, 52j.

88 Tomuschat, ‘Article 75 (1969)’ (n 37), p. 1594, para. 19.

89 Hofmann, ‘Annexation’ (n 38), 412, para. 23; B. Graefrath, ‘Iraqi Reparations and the Security Council’ (1995) 55 *ZaöRV* 22-23. Professor Graefrath criticised that the Security Council Resolution 687 ‘gives the impression that even the “authorization” to use force is sustained until the conditions imposed by res. 687 (1991) have been fulfilled by Iraq,’ which ‘comes frighteningly close to the military occupation of the “Ruhr” territory in 1923’. However, the term ‘all necessary measures’, which implies military measures, is inserted only in paragraph 4 relating to the inviolability of the international boundary between Iraq and Kuwait. Thus, the coalition forces cannot take military measures as further steps as may be required for the Iraqi implementation of the conditions of armistice without Iraqi violation of the international boundary — which is equivalent

occupying the aggressor State's territory in order to ensure its compliance with the reparation claims. Moreover, this is also the case for the Security Council: Article 42 of the Charter of the United Nations stipulates that the measures authorised by the Security Council under Chapter VII of the Charter must be proportionate with the aims 'to ... restore international peace and security'.<sup>90</sup>

In contrast to classical peace treaties, under contemporary international law — the principle of non-use of force in particular — a clear distinction should be drawn between the clauses relating to the settlement of matters which were at the roots of the preceding armed conflict, and the clauses concerning matters arising out of the war on the other. The former on the one hand, challenge and change rights and obligations that existed before the armed conflict: this confers 'special advantage' to the State imposing a peace treaty. Therefore, a peace treaty which contains such special advantage is invalidated, in accordance with Article 53 of the Vienna Convention on the Law of Treaties. The latter, on the other hand, regulate the obligation under the secondary norm to make reparation — a logical consequence of a breach of an obligation of the primary norms. In addition, the latter is strictly limited to the obligation of reparation for injury, as stipulated in Article 34 of the Articles of Responsibility of States for Internationally Wrongful Act, even in the case of a serious breach of a peremptory norm.<sup>91</sup> Accordingly, punitive compensation in the form of an indemnity beyond the limit of compensation provided in Article 36 of the aforementioned Articles is regarded as a 'special advantage'. Therefore, a peace treaty which contains such punitive compensation is null and void in its entirety, in accordance with Article 53 of the aforementioned Convention.<sup>92</sup>

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with a new armed attack. See, C. Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force' (1994) 65 BYBIL 155.

90 B. Graefrath and M. Mohr, 'Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait' (1992) 43 *Austrian Journal of Public and International Law* 133.

91 D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press, 2017), p. 191. Considering the intimate relationship between indemnity and territorial acquisition (or guarantee occupation), indemnity beyond the limits of compensation is also subject to non-recognition.

92 During the inter-war period, the Brazilian Delegation had already made a proposal, in the Assembly of the League, for the amendment of the Covenant of the League of Nations: '[a]ll the Members of the League of Nations consider null and void, *pleno jure*, the provisions of any

Bearing in mind the combined effect of Articles 52 and 75 on the one hand and Article 53 on the other, one can reach the following conclusions: even if a State was the aggressor State *at the moment of occurrence* of an armed conflict, a peace treaty concluded *at the time of termination* of the conflict is not invalidated if the treaty induced by the aggressor State does not include special advantages in favour of him obtained by an unlawful force. Conversely, a peace treaty that a previous injured State imposed on the initial aggressor State is void if it contains special advantages in favour of the former. Furthermore, as opposed to Articles 52 and 75, no distinction is made in Article 53 between the aggressor State and the injured State. Therefore, the victorious State, *regardless of whether the aggressor or the injured*, cannot impose on the defeated State the terms of peace beyond the situations that existed between them before the armed conflict occurred ('special advantages').<sup>93</sup> In other words, under contemporary international law, the principle of non-use of force requires *status quo ante bellum*,<sup>94</sup> namely, the re-establishment of the situation which would have existed if an armed conflict had not been occurred. As Professor Tomuschat pointed out, '[modern international law] should rest on foundations of legitimacy and not only on factual patterns shaped by power and might, in particular military force.'<sup>95</sup>

## V. The Function of Peace Treaties under Contemporary International Law

Considering that Article 53 of the Vienna Convention on the Law of Treaties invalidates a peace treaty which contains territorial acquisition, special advantage and punitive compensation, a question arises regarding what is the possible remnants of contemporary peace treaties' contents. Furthermore, is there any difference between the functions of classical peace treaties and contemporary ones? If so, what is this

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international treaty concluded in the future which grant to a State which has made war contrary to Articles 12, 13 and 15 of the Covenant, the following: (a) *Indemnity...*; (b) Clauses relating to the economic pressure against the conquered country; (c) The annexation of territory.' The League of Nations, Records of the Second Assembly: Meetings of the Committees (1921), Third Committee, Minutes, pp. 320, 396 [emphasis added]. See also, Brownlie, *International Law and the Use of Force* (n 33), p. 411.

93 Czaplinski, 'Jus Cogens and the Law of Treaties' (n 78), p. 96.

94 S. Wasum-Rainer, 'Status Quo' (2012) 9 EPIL, 2nd edn., 600, para. 13.

95 Tomuschat, 'International Law' (n 32), 282.

difference? In this section, by analysing major peace treaties concluded after the adoption of the Charter of the United Nations, the function of peace treaties under contemporary international law will be elucidated.

First of all, as a corollary of the renunciation of war and the prohibition of use of force, both the aggressor State and his responsibility for the unlawful use of force *can* be identified in contemporary peace treaties. Thus, the Treaty of Peace with Italy in 1947, for example, stipulated in its first preamble that 'Italy under the Fascist regime became a party to the Tripartite Pact with Germany and Japan, undertook a war of aggression and thereby provoked a state of war with all the Allied and Associated Powers and with other United Nations, and bears her share of responsibility for the war'.<sup>96</sup>

In contrast, the Treaty of Peace with Japan in 1951 did not explicitly mention the fact that Japan, one of the same Axis powers, waged a war of aggression.<sup>97</sup> Similarly, peace treaties concluded after the Second World War generally avoided the identification of the aggressor State, despite the logical consequence of the principle of non-use of force.<sup>98</sup> In this respect, the Algiers Peace Agreement between Eritrea and Ethiopia established, in Article 5, the Eritrea-Ethiopia Claims Commission<sup>99</sup>; the Commission subsequently determined the violation by, and the consequent responsibility of, Eritrea, in accordance with Article 2, paragraph 4, of the Charter of the United Nations.<sup>100</sup> This practice shows that the parties to a peace treaty cannot pre-determine the aggressor State even by mutual consent, if it were not any for neutral third-party

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96 Treaty of Peace with Italy, 10 February 1950, (1950) 49 UNTS 127.

97 Treaty of Peace with Japan, 8 September 1951, (1952) 136 UNTS 46-76. Instead, twenty-three out of twenty-eight war criminals accused of Count 1 of the Indictment (overall conspiracy of war of aggression), were convicted of the crime against peace stipulated in Article 5, paragraph (a) of the Charter of the International Military Tribunal for the Far East. Two out of five not convicted of the crime against peace, Matsuoka and Nagano, had died during the trial; and the prosecution of Okawa was dismissed after he was found insane and unfit for trial.

98 For example, Treaty of Peace between the Arab Republic of Egypt and the State of Israel, 26 March 1979, (1979) 1138 UNTS 71; Treaty of Peace between Jordan and the State of Israel, 26 October 1994, (1998) 2042 UNTS 392; Simla Agreement on Bilateral Relations and Statement on its Implementation (between India and Pakistan), 3 July 1972, 858 UNTS 71.

99 (2003) 2138 UNTS 97.

100 Eritrea-Ethiopia Claims Commission, *Partial Award, Jus Ad Bellum, Ethiopia's Claim 1-8*, para. 16 and Award B.1.

having decided that there was aggression.

Furthermore, there are some peace treaties that intentionally avoid any reference to an aggressor State, even though a neutral third-party has determined that one of the parties to the armed conflict had violated the principle of non-use of force. For example, during the Korean War, the Security Council had recognised in its Resolution 83 the breach of peace conducted by the Democratic People's Republic of Korea. Nevertheless, the Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation between the South (the Republic of Korea) and the North (the Democratic People's Republic of Korea) did not refer to the breach of peace.<sup>101</sup> Likewise, the Pact on Security, Stability and Development in the Great Lakes Region did not mention the violation by the Republic of Uganda of the principle of non-use of force,<sup>102</sup> even though although the ICJ had acknowledged the violation in the *Armed Activities* case (DRC v. Uganda).<sup>103</sup>

This practice, however, does not preclude the obligation of war reparations<sup>104</sup> by the State responsible for the unlawful use of force. The Treaty of Peace between Israel and Egypt, for example, required Israel (in Article 1, paragraph 1) to withdraw all her armed forces and civilians from the Sinai where Israel then unlawfully occupied. However, the treaty did not explicitly acknowledge which States had undertaken the war of aggression. Another example is the Tashkent Declaration between India and Pakistan, which was concluded after the Second India-Pakistan War. The treaty provided that 'all armed personnel of the two countries shall be withdrawn ... to the positions they held prior to 5 August 1965'<sup>105</sup> — the point in time when the armed conflict was commenced<sup>106</sup> — without any reference to an aggressor State. The

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101 Agreement on Reconciliation, Non-Aggression and Exchanges and Cooperation between the South and the North, U. N. Doc. CD/1147.

102 (2007) 46 ILM 175-184.

103 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 280, para. 345 (1).

104 The term 'reparation' is used in different ways. The peace treaties after the First and Second World Wars used the term in the meaning of 'compensation.' In this article, the term is used in the sense of Article 34 of the Article of Responsibility of States for Internationally Wrongful Act, under which it comprises 'restitution', 'compensation' and 'satisfaction.'

105 (1966) 560 UNTS 40 [emphasis added].

106 According to the report of the Secretary-General, grave breach of the cease-fire agreement and the cease-fire line began on 5 August 1965 when armed men crossed the ceasefire line from the Pakistan

obligation to withdraw under a peace treaty corresponds to the obligation of restitution under the law of State responsibility — *i.e.*, to re-establish the situation that would be existing if the armed conflict had not occurred. This principle is illustrated in the critical date fixed in the Tashkent Declaration. In addition, in case of the Tashkent Declaration, the obligation to withdraw was imposed on *both* States, since the respective armed forces had remained in the disputed area even after the conclusion of an armistice agreement. This obligation implied that such peace settlements were concluded on an equal footing.

When an armed conflict concerns a territorial claim on a certain disputed area, however, its settlement requires a delimitation. In pursuant to the prohibition of aggression (a primary norm) and the obligation of non-recognition (a secondary norm), parties to an armed conflict have no competence unilaterally to decide on a delimitation of boundaies.<sup>107</sup> Accordingly, contemporary peace treaties do not provide the *delimitation* of a disputed area but only reaffirm a *demarcation* of an existing boundary.<sup>108</sup> In order to ensure respect for the existing boundary firmly demarcated, contemporary peace treaties incline to reaffirm the obligation to refrain from the threat or use of force against the territorial integrity or political independence, as enshrined in Article 2, paragraph 4, of the Charter of the United Nations. In contrast, when the delimitation is required, parties to a peace treaty generally agree on a delimitation of a certain disputed area by peaceful means through bilateral negotiations or by other

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side to the Indian side for the purpose of armed action, although he did not determine whether the act of the armed men was attributable to Pakistan. *See*, Report by the Secretary-General on the Current Situation in Kashmir with Particular Reference to the Cease-Fire Agreement, the Cease-Fire Line and the Functioning of UNMOGIP, U. N. Doc. S/6651, pp. 3-4, paras. 5-6. The Security Council, replying the Report of the Secretary-General, adopted Resolution 210 which fixed the critical date on 5 August 1965 and ‘calls upon the parties ... promptly withdraw all armed personnel back to the positions held by them before 5 August 1965’.

107 B. Graefrath, ‘International Crimes and Collective Security’ in K. Wellens (ed.), *International Law: Theory and Practice —Essays in Honour of Eric Suy* (Martinus Nijhoff, 1998), p. 244.

108 Article 3 of the Treaty of Peace between Jordan and Israel, for example, stipulates in paragraph 1 that ‘[t]he international boundary between Israel and Jordan is delimited with reference to the boundary definition under the Mandate as is shown in Annex I (a)’ and in paragraph 2 that ‘[t]he boundary, as set out in Annex I (a), is the permanent, secure and recognised international boundary’ between them. Similarly, the Treaty of Peace between Israel and Egypt provides in Article 2 that ‘[t]he permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine...’

peaceful means mutually agreed in the treaty. Thus, the Algiers Peace Agreement between Eritrea and Ethiopia, for example, stipulated in Article 4 the establishment of the Eritrea-Ethiopia Boundary Commission, whose determinations shall be final and binding (paragraph 15).<sup>109</sup>

The obligation to pay compensation for injury caused by unlawful war or use of force is also stipulated in some contemporary peace treaties. For instance, Article 231 of the Versailles Peace Treaty — subsequently called the ‘War Guilt Clause’ — provided that:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.<sup>110</sup>

As Professor McNair pointed out, the Versailles Peace Treaty replaced the classical concept of ‘indemnity’ by the notion of ‘reparation’.<sup>111</sup> Traditionally, an indemnity encompassed war expenses used by the victorious State, a *lucrum cessans* and compound interest. As opposed to an indemnity, compensation is confined to damages caused by unlawful acts and does not extend to punitive compensation aimed at punishing the defeated population. In this respect, under contemporary international law, the State responsibility to pay compensation for the consequences of an unlawful invasion is not limited to damages caused by unlawful acts under *jus in bello*<sup>112</sup> but also extends to injuries caused by the illegal use of force under *jus ad bellum*.<sup>113</sup> This does

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109 Eritrea-Ethiopia Boundary Commission, *Decision regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002.

110 (1919) 225 CTS 286.

111 Oppenheim (McNair, ed.), *International Law: A Treatise*, 4th ed., Vol. 2 (1924) (n 12), p. 433, §269a.

112 Article 3 of the Hague Convention concerning the Laws and Customs of War in 1907 and Article 91 of the Additional Protocol I in 1977 stipulate the obligation to pay compensation in case of breach.

113 P. Sullo and J. Wyatt, ‘War Reparations’ EPIL Online (2014), <http://opil.ouplaw.com/home/EPIL>, para. 3.

not mean, however, compensation covers ‘moral damages’, *i. e.*, damages caused by an unlawful use of force that did not cause any actual damage to property or persons but constitutes an affront to an injured State.<sup>114</sup> This kind of damage is a matter of satisfaction — along with disciplinary or penal actions against high officials who are individually responsible for a crime of aggression, within the meaning of Article 37 of the Articles on Responsibility of States for Internationally Wrongful Act.<sup>115</sup>

Being a legal consequence of general international law of State responsibility, the obligation to pay compensation is independent of peace treaties. Accordingly, an obligation to pay compensation stipulated in contemporary peace treaties (the economic clauses) is only declaratory.<sup>116</sup> Furthermore the amount of money is no longer subject to the arbitrary discretion of the victorious State — which has to be objectively calculated. Thus, Article 5 of the Algiers Peace Agreement, for example, conferred upon the Eritrea-Ethiopia Compensation Commission the competence to decide ‘all claims for loss, damage or injury by one Government against the other, and by nationals ... of one party against the Government of the other party ... (a) related to the conflict [between them], and (b) result[ing] from violations of international humanitarian law ... or other violations of international law’.

This obligation of compensation, however, has the potential to cripple the economy of a wrongdoer State by imposing overwhelming burden which often results in strangling nationals’ lives, whose effects is similar to these of State-oriented economic sanctions. This will, in turn, escalate the people’s resentments against the ex-belligerent State and may result in the resurgence of a new armed conflict. In this context, in an attempt to avoid collective punishment of the population, the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) devised the method to hold high officials responsible for aggression. In this sense, the punishment of war criminals plays a similar role to that of smart sanctions. The history of the IMT and the IMTFE thus reveals that the economic consequences of peace was already a concern for a peaceful settlement of the Second World War.<sup>117</sup>

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114 (2001) II (2) YBILC 98-99, para. (1) (republished in Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (n 84), p. 218, para. (1)).

115 *Ibid.*, 106, para. (5) (republished in Crawford, *ibid.*, p. 232, para. (5)).

116 Graefrath, ‘International Crimes and Collective Security’ (n 107), p. 244.

In the last stage of the Second World War, Morgenthau, the Secretary of the Treasury of the United States, proposed to President Roosevelt the post-surrender program for Germany. The program became a provisional memorandum between President Roosevelt and Prime Minister Churchill to the effect that ‘[t]his programme for eliminating the war-making industries in the Ruhr and in the Saar is looking forward to converting Germany into a country primarily agricultural and pastoral in its character.’<sup>118</sup> The Secretary of War of the United States, Stimson, strongly opposed the Morgenthau’s Plan, suggesting to the President that:

Such a program would, I believe, create tensions and resentments far outweighing any immediate advantage of security and would tend to obscure the guilt of the Nazis and the viciousness of their doctrines and their acts.

By such economic mistakes I cannot but feel that you would also be poisoning the springs out of which we hope that the future peace of the world can be maintained. It is primarily by the thorough apprehension, investigation, and trial of all the Nazi leaders ... with punishment delivered as promptly, swiftly, and severely as possible, that we can demonstrate the abhorrence which the world has for such a system and bring home to the German people our determination to extirpate it and all its fruits forever.

My basic objection to the proposed methods of treating Germany ... was that in addition to a system of preventive and educative punishment they would add the dangerous weapon of complete economic oppression. Such methods, in my opinion, do not prevent war; they tend to breed war.<sup>119</sup>

Such a consideration of the economic consequences of peace was also reflected in the Treaty of Peace with Japan. Article 14 of the Treaty stipulated that ‘the resources of

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117 Y. Higurashi, *International Relations of the Tokyo Trial: Powers and Norms in International Politics* (Bokutakusha, 2002), pp. 84-117[in Japanese].

118 Memorandum Initialed by President Roosevelt and Prime Minister Churchill, *Foreign Relations of the United States, The Conference at Quebec 1944*, p. 467. See also, H. Morgenthau, Suggested Post-Surrender Program for Germany, *ibid.*, pp. 101-108. Morgenthau also suggested that the arch-criminals of the war shall be subject to summary execution as soon as the person is identified as the arch-criminal.

119 H. L. Stimson, The Secretary of War (Stimson) to the President, *ibid.*, p. 100.

Japan are not presently sufficient ... to make complete reparation for all such damage and suffering', while it was recognised that 'Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war'. Therefore, it was provided that '[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals'. Instead, Japan was obliged to carry out the sentences imposed by the IMTFE and other Allied War Crimes Courts upon Japanese nationals imprisoned in Japan (Article 11). This peace settlement led the Prime Minister Yoshida to state at the San Francisco Peace Conference that:

The peace treaty before the Conference contains no punitive or retaliatory clauses; nor does it impose upon Japan any permanent restrictions or disabilities. It will restore the Japanese people to full sovereignty, equality, and freedom, and reinstate us as a free and equal member in the community of nations. It is not a treaty of vengeance, but an instrument of reconciliation. The Japanese Delegation gladly accepts this fair and generous treaty...<sup>120</sup>

From the foregoing analysis, it can be concluded that a peace treaty is nullified *ab initio* under Article 53 of the Vienna Convention on the Law of Treaties, if classical terms of peace are imposed by the victorious State, regardless of whether it was the aggressor State or the injured State. As discussed above, classical conditions of peace, *i. e.*, indemnity and cession, are in conflict with the peremptory norm of general international law — from which peace treaties cannot derogate. The logical conclusion of this is that obligations contained in contemporary peace treaties can only be limited to the secondary obligations under the law of State responsibility. For instance, obligations such as restitution (withdrawal to an international boundary), compensation and satisfaction (punishment of war criminals) are legal consequences of the general international law of State responsibility. Therefore, these obligations contained in peace treaties are only declaratory.

Under classical peace treaties, terms of peace were a condition *sine qua non* for the

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120 Ministry of Foreign Affairs of Japan, *Documents on Japanese Foreign Policy, Records related to the Conclusion of Treaty of Peace with Japan*, Vol. 4 (Ministry of Foreign Affairs of Japan, 2002), p. 325, <https://www.mofa.go.jp/mofaj/annai/honsho/shiryo/archives/sk-4.html>.

termination of (a state of) war to be legally effective. Considering that the classical conditions of peace are invalidated, the possible remnants of contemporary peace treaties' contents seems to be the termination of (a state of) war. However, most armed conflicts occurred after 1945 have not been regarded as war in the formal sense. This is because States incline to evade a declaration of war or ultimatum, for these are presumed to be an unlawful threat of force and they could be held liable for the crime of aggression.<sup>121</sup> Instead, States defend their use of force by claiming self-defence or other legal justifications. Accordingly, a state of war does not exist in most of the recent armed conflicts. It is illogical to contend that a *de facto war* can be terminated by a peace treaty that provides the termination of *a state of war*.<sup>122</sup> As a result, major peace treaties concluded after 1945 do not explicitly deal with a state of war.<sup>123</sup>

Indeed, some contemporary peace treaties explicitly dealt with the end of a state of war. However, as opposed to classical peace treaties, they did 'not function to end a state of war as this has been done already.'<sup>124</sup> The Treaty of Peace between Jordan and Israel, for example, stipulated in its preamble that '[b]earing in mind that in their Washington Declaration of 25th July, 1994, they declared the termination of the state of belligerency between them'.<sup>125</sup> Since the state of belligerency between them had already terminated, Article 1 of the Treaty provided that '[p]eace is hereby established...'. Another example is the Agreement on Withdrawal of Troops from Lebanon, which more directly stipulated in Article 1, paragraph 2, that 'the state of war between Israel and Lebanon has been terminated and no longer existed.'<sup>126</sup>

As these peace treaties suggest, contemporary peace treaties have no constitutive effect to terminate an international armed conflict but only have a declaratory effect to confirm that the armed conflict had already terminated. Furthermore, in most cases, a

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121 Dinstein, *War, Aggression and Self-Defence*, 4th edn. (n 2), p. 32.

122 S. Sugiyama, 'Jurisprudence on the Use of Force and Peace Settlements: A Study of the Treaty of Peace between Egypt and Israel' in Y. Shimada, S. Sugiyama and M. Hayashi (eds.), *Diversification of International Disputes and their Legal Settlement* (Shinzansha, 2006), pp. 268-269 [in Japanese].

123 C. Greenwood, 'Scope of Application of Humanitarian Law' in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edn. (Oxford University Press, 2008), p. 71, para. 249.

124 Brownlie, *International Law and the Use of Force* (n 33), pp. 396-397 (at footnote. 6).

125 The Washington Declaration, 25 July 1994, (1994-1995) 8 *Palestine Yearbook of International Law* 277-279.

126 (1983) 22 ILM 709.

contemporary peace treaty has been preceded by an armistice agreement<sup>127</sup> — almost all preceding armistice agreements had already reaffirmed the obligation to refrain from a threat or use of force enshrined in Article 2, paragraph 4, of the Charter of the United Nations. Thus, a state of war is *legally irrelevant* in justify use of force.<sup>128</sup> Even if a state of war remains operative after the conclusion of an armistice agreement, the resumption of hostilities is prohibited under the principle of non-use of force, unless an armed attack occurs or the Security Council authorises military measures under Chapter VII of the Charter. This does not mean, however, that the concept of a state of war has completely been *abandoned* under the principle of non-use of force.<sup>129</sup> The notion of a state of war is still in use as a political term — the clauses on the termination of a state of war contained in some peace treaties are regarded as a political pledge for peace, although legally irrelevant.

The contemporary peace treaty's function that is legally relevant, in contrast, seems to be the function to agree to the peaceful settlement of disputes. In concluding a peace treaty, parties to the treaty give consent to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed in the treaty. In general, however, State parties decline to agree in a peace treaty on any substantive matters such as the total amount of compensation or which State holds the territorial title over a disputed area. Instead, they tend to agree to a peaceful settlement of disputes by conciliation or to submit the disputes to arbitration. In order to ensure respect for the determination by conciliation or arbitration, some peace treaties cautiously express that '[p]ending the final settlement of any of the problems between

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127 For example, the Treaty of Peace between Israel and Egypt of 1979 was preceded by the Egyptian-Israeli Agreement on Disengagement of Forces in pursuance of the Geneva Peace Conference of 1974. U. N. Doc. S/11198. Similarly, the Agreement for a Ceasefire in the Democratic Republic of the Congo (the Lusaka Ceasefire Agreement) was concluded in 1999 before the conclusion of the Pact on Security, Stability and Development in the Great Lakes Region in 2006. (2007) 2312 UNTS 256-262. This was also the case for the armed conflict between Eritrea and Ethiopia, in which the Agreement on Cessation of Hostilities was concluded on 18 June 2000 before the Peace Agreement between them on 13 December 2000. (2001) 2138 UNTS 86-92.

128 E. Lauterpacht, 'The Legal Irrelevance of the "State of War"' (1968) 62 ASIL Proceedings 64-65; C. Greenwood, 'Historical Development and Legal Basis' in Fleck (ed.), *The Handbook of International Humanitarian Law* (n 123), p. 36, para. 3.

129 M. Mancini, 'The Effects of a State of War or Armed Conflict' in Weller (ed.), *The Oxford Handbook of The Use of Force in International Law* (n 4), p. 996.

the two countries, neither side shall unilaterally alter the situation'<sup>130</sup> and '[t]he parties agree that the ... determinations of the [arbitration] shall be final and binding'.<sup>131</sup> In this sense, contemporary peace treaties in effect function as a *compromis*. Peace treaties of this kind can transform 'negative peace' — the absence of use of force established by an armistice agreement — to 'positive peace', which would establish a friendly relationship between parties to the treaty.<sup>132</sup>

## Epilogue

The contents and function of contemporary peace treaties which are consistent with Articles 52 or 75, and 53 of the Vienna Convention on the Law of Treaties indicate that such peace settlement is concluded on equal footing and ensures enduring peace. It coincides with the concept of 'peace without victory' advocated by President Wilson:

Victory would mean peace forced upon the loser, a victor's terms imposed upon the vanquished. It would be accepted in humiliation, under duress, at an intolerable sacrifice, and would leave a sting, a resentment, a bitter memory upon which terms of peace would rest, not permanently, but only as upon quicksand. Only a peace between equals can last. Only a peace the very principle of which is equality and a common participation in a common benefit. The right state of mind, the right feeling between nations, is as necessary for a lasting peace as is the just settlement of vexed questions of territory or of racial and national allegiance.<sup>133</sup>

The problem of peace in international law always pertains to 'the paradox of objective[s]' according to the formulations of Professor Koskenniemi. On the one hand, the objective of 'peace' in international law, as well as that of 'security', 'justice',

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130 Article 1, paragraph (i), of the Simla Agreement, (1973) 858 UNTS 72.

131 Article 4, paragraph 15, of the Algiers Peace Treaty, (2001) 2138 UNTS 96.

132 Dinstein, *War, Aggression and Self-Defence*, 4th edn. (n. 2), p. 46.

133 W. Wilson, Address on the Essentials of Permanent Peace, Delivered to the Senate of the United States, January 22, 1917, in J. B. Scott (ed.), *President Wilson's Foreign Policy: Messages, Addresses, Papers* (Oxford University Press, 1918), pp. 249-250. A year later, however, he formulated the Fourteen Points, in which he no longer argued in favour of a 'peace without victory'. See, J. Schwitzke, 'Fourteen Points of Wilson (1918)' (2012) 4 EPIL, 2nd edn., 203, para. 2.

'clean environment' or 'efficient economies', is irrefutable because of its high level of abstraction and indeterminacy. On the other hand, as soon as such objective is defined more closely, disagreements and conflicts emerge. As a result, as Professor Koskenniemi has pointed out, the real problem pertains not to whether international law should aim for 'peace' or 'security'. Rather, the dilemma resides in how to resolve controversies or conflicts in interpreting these notions — which often becomes an issue when defending or attacking particular policies.<sup>134</sup> Under contemporary international law, the victorious State, regardless of whether the aggressor State or the injured State, cannot unilaterally impose in a peace treaty the objective of peace as it pleases. Instead, contemporary peace treaties reaffirm legal consequences under the law of State responsibility arising out of an armed conflict. In addition so, contemporary peace treaties function as a legal basis for negotiations to settle disputes which were at the root of the armed conflict or can serve as a *compromis* to submit such disputes to an international court or arbitration. In this way, contemporary peace treaties will help resolve disputes by peaceful means and lay the groundwork for the former parties to international armed conflict establish a friendly relationship.

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134 M. Koskenniemi, 'What is International Law For?' in M. Evans (ed.), *International Law*, 2nd ed. (Oxford University Press, 2006), pp. 57-58.