

The ILC Draft Articles on the Effects of Armed Conflicts on Treaties: Room for Termination or Suspension of Bilateral Investment Treaties?

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INTRODUCTION

The international law on foreign investment has continued to develop significantly over the last decades. An increase in international investment activities has correlated with an increase in their legal protection through international instruments.¹ Speaking of *the* law on foreign investment is thereby somewhat misleading, as there is no universal treaty framework for the protection of foreign investments. Instead, a net of thousands of individual international investment agreements is stretched over the globe.² Almost every State in the world, to diverging degrees, has concluded bilateral investment treaties (BITs) that grant protection, on a reciprocal basis, *vis-à-vis* investors coming from one State party (the home State) to the other (the host State). Crucially, BITs provide investors the possibility to directly enforce these guarantees against the host State through investor-State arbitration.

The proliferation of transnational investments has naturally increased the chance that investments are made in regions that might be affected by conflict. Recent examples include the cases of Libya, Syria, or Ukraine, all of which are part of the BIT universe.³ Under the extreme conditions of armed conflict, the investor's need for protection is especially pressing, whereas the State will want to ensure its leeway to take appropriate (military) action within the limits of the law of armed conflict. Although a BIT may cover these situations, its applicability in the face of armed conflicts remains a delicate legal question.

While the Ciceronian dictum of "*inter arma enim silent leges*"⁴ may have never been valid, the question still arises whether BITs continue to operate during armed conflicts or whether a State party may suspend or even terminate them under such extraordinary circumstances. The relationship between two belligerent States in an international armed conflict is thereby the most prominent constellation. BITs concluded with third, uninvolved States could, however, also be potentially affected by an international or even non-international armed conflict.

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¹ See, generally, KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* (2013). For the latest developments, see UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges* (2016), available at http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf [last accessed 28 November 2016].

² See UNCTAD, *Investment Policy HUB: International Investment Agreements Navigator*, <http://investmentpolicyhub.unctad.org/IIA> [last accessed 28 November 2016] (listing 2959 bilateral investment treaties (BITs), 2321 of which are currently in force, and 364 other treaties with investment provisions, 294 of which are currently in force).

³ According to UNCTAD, Libya is a party to 23 BITs that have entered into force before the civil war in 2011, Syria is a party to 27 BITs currently in force, and Ukraine is a party to 57 BITs currently in force, including a BIT with Russia. *Id.* On the question whether Russian BITs may be applicable with regard to the annexed Crimean Peninsula, see, e.g., Richard Happ & Sebastian Wuschka, *Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories* 33 J. INT'L ARB. 245 (2016).

⁴ MARCUS TULLIUS CICERO, *PRO T. ANNIO MILONE ORATIO IV.11.* (52 BCE), available at www.thelatinlibrary.com/cicero/milo.shtml [last accessed 29 November 2016] (originally "[s]ilent enim leges inter arma" ["for among arms, the laws fall silent", or, loosely translated, "in times of war, the law falls silent"]).

Traditionally, the answer to the question of how armed conflict affected treaties between belligerents was plain and simple: With the outbreak of war, all treaties were considered abrogated.⁵ This rule is no longer valid, but has been replaced by more nuanced approaches. Yet, today's customary rules remain elusive due to inconsistent State practice and divided scholarship. As more recent State practice has been largely in-existent, the work of the United Nations (UN) International Law Commission (ILC) was set to shed light on the issue. Indeed, the most recent and arguably most authoritative instrument on the topic are the Draft Articles on the Effect of Armed Conflict on Treaties (Draft Articles), elaborated by the ILC and adopted in 2011 by the UN General Assembly.⁶ The Draft Articles seek to offer guidance as to what treaties or treaty provision might be susceptible to suspension or termination. It establishes certain indications and presumptions and, when applied to the case of BITs, it seems to offer a rather straight-forward answer. Details, however, remain in need of further scrutiny and critical examination.

The present piece on the Draft Articles and the question whether BITs may be suspended or terminated reflects part of a broader research project on the interface between armed conflict and the international legal protection of property and investments, in particular. This working paper, reflecting the author's work-in-progress, first portrays the historical development from the traditionally simple answer to today's uncertainties regarding the question of whether and how armed conflict affect treaties. In a second step, the paper introduces the ILC Draft Articles and examines the proposed process of determining a treaty's susceptibility to suspension or termination. This process is subsequently applied to the case of BITs, finding that the nature of BITs justifies a general presumption in favor of their continuity. The paper concludes with some general remarks on the debated effects of armed conflict on treaties. In particular, it argues that focus should be laid on questions of interpretation and application rather than applicability.

I. HISTORICAL PERSPECTIVE

Well into the late 19th century, the prevailing perception was that the outbreak of war automatically terminated all treaties between belligerents.⁷ Once war had ceased, the (victorious) party or parties were left with the discretion to revive certain agreements or to let them be abrogated.⁸ This rule of customary international law was reflected in the practice of States and the writings of scholars at the time.⁹

It was, however, never a truly absolute rule.¹⁰ Treaties concluded for the very purpose of—also or exclusively—applying in times of war naturally continued to operate. This was not only true for treaties codifying rules of war,¹¹ but also for others expressly stipulating their applicability during hostilities.¹²

⁵ See Silja Vöneky, *Armed Conflict, Effect on Treaties* ¶ 1, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ONLINE EDITION (Rüdiger Wolfrum ed., last updated March 2011), <http://opil.ouplaw.com/home/epil>.

⁶ UNGA, *Effects of armed conflicts on treaties* (9 December 2011), UN Doc. A/RES/66/99 [*hereinafter* UNGA, *Effects of armed conflicts on treaties*].

⁷ See ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 698 (note 2) (1961) (tracing that rule back to the “ancient practice of *diffidatio*, whereby upon the outbreak of war it was customary for each belligerent to proclaim solemnly that all treaties existing between them had thereby ceased.”).

⁸ See Arnold Pronto, *The Effect of War on Law—What happens to their treaties when states go to war?* 2 CAMBRIDGE J. INT'L & COMP. L. 227, 230 (2013).

⁹ See, e.g., British High Court of Admiralty, *Le Louis*, 15 December 1817, 165 English Reports 1464, 1480; EMER DE Vattel, *THE LAW OF NATIONS, BOOK III: OF WAR* § 175 (2008, first published 1760), available at <http://oll.libertyfund.org/titles/2246> [last accessed 29 November 2016]. For more examples, see ILC, *The effect of armed conflict on treaties: an examination of practice and doctrine, Memorandum by the Secretariat* ¶ 14 (1 February 2005), UN Doc. A/CN.4/550 [*hereinafter* ILC, *Secretariat Memorandum*]; Harvard Research in International Law, *Draft Convention on the Law of Treaties* 29 AJIL SUPPL. 663, 1184–85 (1935).

¹⁰ Already *Hugo Grotius* wrote in 1625, in reference to Cicero: “If ‘laws are silent among arms,’ this is true only of civil laws and laws relating to the judiciary and the practices of peacetime, and not of the other laws which are perpetual and appropriate to all circumstances.” HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE, BOOK III*

Further limitations of the rule of total abrogation gained acceptance only in the 19th century, in particular through decisions of national courts. The first of such cases was the *Society for Propagation of the Gospel v. Town of New Haven* case of 1823, in which the US Supreme Court held that treaties “stipulating for a permanent arrangement of territorial and other national rights are, at most, suspended during the war.”¹³ Other court decisions followed and soon scholars started to acknowledge an increasing list of exceptions.¹⁴

By the turn of the century, the theory of total annulment was no more.¹⁵ It was replaced by conceptions that considered some treaties terminated, others merely suspended, and allowed again others to continue in operation.¹⁶ Thus, Oppenheim noted in 1906 that the “vast majority” of international legal scholars abandoned the previous theory of total abrogation and that “the opinion is pretty general that war by no means annuls every treaty”.¹⁷

However, it remained uncertain which treaties exactly were abrogated or suspended and which treaties continued to apply.¹⁸ In an attempt to crystalize commonalities, scholars began to categorize treaties.¹⁹ Oppenheim, for example, distinguished between political and non-political treaties on the one, and treaties establishing “a permanent condition of things” and other treaties on the other hand.²⁰

In their attempts to determine the fate of treaties, one group of commentators and judges was guided by the (presumed) intention of the parties at the time of the conclusion of the treaty.²¹ Another group favored an objective theory, based on either the nature of the treaty, distinguishing in particular between “private” and “political” treaties and the rights they enshrine, or the consistency of the treaty (provisions) with situations arising in a state of war, i.e. with national policy during wartime, or a combination of these two.²² Those who adhered to the intention-based approach, however, also relied on these objective criteria to infer the presumed intention.²³

1752 (2005, first published 1625), available at http://lf-oll.s3.amazonaws.com/titles/1427/1032-03_LFeBk.pdf [last accessed 24 November 2016].

¹¹ The US *Lieber Code* of 1863, the first written codex for the conduct of war, contained a rule stating that “the law of war [disclaims] [...] the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.” US War Department, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES, IN THE FIELD (PREPARED BY FRANCIS LIEBER) art. 11 (1863).

¹² MCNAIR, *supra* note 7, at 696–97.

¹³ US Supreme Court, *Society for Propagation of the Gospel v. Town of New Haven*, 12 March 1823, 21 U.S. (8 Wheat.) 464. See also Court of Chancery, *Sutton v. Sutton*, 29 July 1830, 39 English Reports 255 [hereinafter *Sutton v. Sutton*] (holding that it was the intention of the treaty in question that the operation of those provisions stipulating private property rights “should be permanent, and not depend upon the continuance of a state of peace”).

¹⁴ E.g. JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIERTEN STAATEN ALS RECHTSBUCH DARGESTELLT 461 (1868).

¹⁵ E.g. Harvard Research in International Law, *supra* note 9, at 1185 (“Nearly all writers on international law today hold that *ipso facto* termination is the exception rather than the rule.”).

¹⁶ E.g. Edwin M. Borchard, *The Effect of War on the Treaty of 1828 with Prussia* 26 AJIL 582, 584–85 (1932); SHERSTON BAKER, HALLECK’S INTERNATIONAL LAW, VOL. I 294 (3rd ed. 1893).

¹⁷ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. II: WAR AND NEUTRALITY § 99 (1st ed. 1906). See also Permanent Court of Arbitration, *North Atlantic Coast Fisheries (Great Britain v. United States)*, 7 September 1910, XI Reports of International Arbitral Awards 167, 181.

¹⁸ OPPENHEIM, *supra* note 16, § 99.

¹⁹ See Editorial Comment, *Effects of War Upon Treaties and International Conventions, A Project Adopted by the Institute of International Law at Its Session in Christiania, in August, 1912* 7 AJIL 149, 149–50 (1913).

²⁰ OPPENHEIM, *supra* note 16, § 99.

²¹ E.g. MCNAIR, *supra* note 7, at 711; James J. Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* 34 GEORGETOWN L. J. 129 (1946); Cecil J. B. Hurst, *The Effect of War on Treaties* 2 BYIL 37, 39–40 (1921–1922).

²² E.g. Albert de La Pradelle, *The Effect of War on Private Law Treaties* 2 INT’L L. QUARTERLY 555 (1948–1949); BLUNTSCHLI, *supra* note 13, 538.

²³ See, e.g., Hurst, *supra* note 20, at 40 (who favored the intention-based approach, but stated that the intention “must be presumed from the nature of the treaty or from the concomitant circumstances”). See, similarly,

Despite the commonalities of both theories,²⁴ a lack of uniformity in scholarship and an inconsistent and uncertain body of State practice continued to prevail. The formulation of general rules that could claim to reflect customary international law was impossible.²⁵ In order to mitigate uncertainties, the *Institut de Droit International* (IDI) suggested, in a 1912 resolution, some general principles on the issue.²⁶ Thereby, it went one step further than most commentators and reversed the common approach by establishing a presumption in favor of continuity, subject to certain exceptions for, among others, treaties of a public nature.²⁷ The IDI thus proclaimed the exact opposite of the earlier rule, clearly reflecting the significant development the perception of the effects of armed conflicts on treaties had gone through.

However, after World War I, peace treaties introduced a new approach to pre-war agreements by vesting the victorious States with the power to notify the former belligerent of those bilateral treaties, which they wanted to revive.²⁸ Accordingly, peace agreements distinguished between bilateral and multilateral treaties and seemed to suggest that the former had been terminated, while the latter had been suspended at most.²⁹ Nevertheless, US courts kept to their previously taken position and considered certain bilateral treaties with Germany, despite a lack of official notification, as having survived the war.³⁰

Similar provisions appeared in post-World War II peace treaties,³¹ but State practice remained mixed.³² The US and Great Britain took a generally very liberal position with regard to their treaties. McIntyre observed, for example:

There is no instance in which the evidence is conclusive that the United States regarded any treaty as terminated by World War II. [...] The vast majority of treaties were at most suspended, and even then only to the extent required by the exigencies of the war [...].³³

French courts considered at least some of France's bilateral treaties, especially commercial treaties, as terminated, but jurisprudence on private law treaties was inconsistent.³⁴ China expressly considered all bilateral treaties with Japan as terminated.³⁵ Germany, finally, took a nuanced approach, basing the fate of treaties on their respective nature.³⁶

US Supreme Court, *Clark v. Allen*, 9 June 1947, 331 U.S. 503, 509–10; Court of Appeals of New York, *Techt v. Hughes*, 8 June 1920, 229 N.Y. 222.

²⁴ ILC, *Secretariat Memorandum*, *supra* note 9, at ¶ 13; ILC, *First report on the effects of armed conflicts on treaties*, by Mr. Ian Brownlie, *Special Rapporteur* ¶ 29 (21 April 2005), UN Doc. A/CN.4/552 [*hereinafter* ILC, *First Brownlie Report*].

²⁵ See, e.g., US Supreme Court, *Karnuth, US Director of Immigration et al. v. US, on Petition of Albro, for Cook et al.*, 8 April 1929, 279 U.S. 231, 236 (stating that, while the traditional doctrine of total annulment “is repudiated by the great weight of modern authority [...] [there is a lack of accord] as to precisely what treaties fall and what survive [...]. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution”).

²⁶ IDI, *Règlement concernant les effets de la guerre sur les traités* (Rapporteur: M. Nicolas Politis, Session de Christiania, Resolution 6, 31 August 1912), available at http://www.justitiaetpace.org/idiF/resolutionsF/1912_christ_02_fr.pdf [last accessed 27 October 2016]. An English translation, with editorial comments, can be found in Editorial Comment, *supra* note 18.

²⁷ IDI, *supra* note 25, art. 1.

²⁸ Treaty of Peace with Germany art. 289 (Versailles, 28 June 1919), 225 CTS 188; Treaty of Peace between the Allied and Associated Powers and Hungary art. 224 (Trianon, 4 June 1920), 6 LNTS 187.

²⁹ See Anikó Szalai, *Hungarian Experiences Regarding the Effect of World Wars on International Treaties* 3 ACTA SOCIETATIS MARTENSIS 215 (2007-2008).

³⁰ Supreme Court of Kansas, *State of Kansas v. Reardon*, 10 April 1926, 120 Kan. 614 [*hereinafter* *State of Kansas v. Reardon*]. See also La Pradelle, *supra* note 21, at 565–66 (with references to domestic court decisions).

³¹ Richard Rank, *Modern War and the Validity of Treaties (Part 2)* 38 CORNELL L. R. 511, 539 (1953).

³² Richard Rank, *Modern War and the Validity of Treaties (Part 1)* 38 CORNELL L. R. 321, 343–55 (1953).

³³ STUART HULL MCINTYRE, LEGAL EFFECT OF WORLD WAR II ON TREATIES OF THE UNITED STATES 340–41 (1958).

³⁴ Rank, *supra* note 30, at 521–28.

³⁵ JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 1282 (1974) cited after ILC, *Secretariat Memorandum*, *supra* note 9, at ¶ 80(n).

³⁶ Rank, *supra* note 31, at 349–355.

In the 1950s and 1960s, when the ILC elaborated its Draft Articles on the Law of Treaties, it expressly excluded the effects of war from its work. The ILC justified this step by the consideration that “it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties.”³⁷ It further stated

that in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States.³⁸

This decision was unfortunate.³⁹ Armed conflicts have remained a sad constant in the relations of States and their effects on treaties thus remain in the uncertain realm of customary international law. The Vienna Convention on the Law of Treaties (VCLT),⁴⁰ which resulted from the ILC’s work, was not to include rules on the effects of armed conflicts on treaties.⁴¹ Instead, Article 73 VCLT merely clarifies that the Convention “shall not prejudice any question that may arise in regard to a treaty [...] from the outbreak of hostilities between States.”⁴²

In 1985, over seventy years after first dealing with the matter, the IDI adopted a new resolution on the effects of armed conflict on treaties.⁴³ It considered existing State practice as still not uniform and saw the need to “affirm certain principles of international law”.⁴⁴ The resolution establishes as the general rule that “[t]he outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict”⁴⁵ as well as treaties between a party to the conflict and a third State.⁴⁶

This basic principle—that treaties are not necessarily terminated or suspended by the outbreak of hostilities—reflects today’s customary international law. The development of the perception of effects of war on treaty relations has thus undergone a remarkable development. Although the perception that war destroys every legal bond between hostile States may have never been absolute, the general assumption, until the middle of the 19th century, was that treaties between belligerents were terminated automatically. This rule has been watered down successively and ultimately reversed into a presumption in favor of continuity. The evolution of the international legal order after World War II has perpetuated these developments by finally outlawing the use of force, by blurring the lines between the law of peace and the

³⁷ ILC, *Report on its fifteenth session (6 May–12 July 1963)* ILC YB. 1963, VOL. II 187, 189 (¶ 14) (1963).

³⁸ ILC, *Report on its eighteenth session (4 May–19 July 1966)* ILC YB. 1966, VOL. II 172, 267 (1966).

³⁹ Cf. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 271 (3rd ed. 2013) (noting that the ILC dodged the issue by taking an “ostrich-like position”).

⁴⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 UNTS 331 [*hereinafter* VCLT].

⁴¹ This stands in contrast to the earlier work of the Harvard Research in International Law. The Harvard Draft Convention on the Law of Treaties of 1928 included an article stating that, *de lege ferenda* “[a] treaty which expressly provides that the obligations stipulated are to be performed in time of war [...] or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war [...] is not terminated or suspended by the beginning of a war between two or more of the parties.” If such a provision or “manifest intention” is not available, the treaty is generally suspended and will “come into operation when the state of war is ended.” See Harvard Research in International Law, *supra* note 9, at 664 (art. 35).

⁴² However, this does not mean that the effects of armed conflicts on treaties lie outside the law of treaties. ILC, *First Brownlie Report*, *supra* note 23, at ¶ 8.

⁴³ IDI, *The Effects of Armed Conflicts on Treaties* (Rapporteur: Bengt Broms, Session of Helsinki, Resolution 13, 28 August 1985), available at http://www.justitiaetpace.org/idiE/resolutionsE/1985_hel_03_en.PDF [last accessed 28 October 2016].

⁴⁴ *Id.*, preamble, at ¶ 3.

⁴⁵ *Id.*, art. 2.

⁴⁶ *Id.*, art. 5. In contrast to the work of 1912, the new resolution does not list exceptions for treaties that may be terminated or suspended, but names a few types of treaties that remain unaffected by war. These are, according to the resolution, treaties which provide that they are operative during armed conflict, treaties which by their nature or purpose are to be regarded as operative, treaty provisions relating to the protection of the human person (unless otherwise provided by the treaty), and treaties establishing an international organization. *id.*, arts 3, 4, 6.

law of war, and by expanding the interconnectedness of States through highly increasing treaty relations.⁴⁷ On the other hand, already existing uncertainties have been amplified by the proliferation of non-traditional warfare, begging the question whether non-international armed conflicts could also have an impact on international agreements.⁴⁸

While the theory of total annulment had the advantage of giving a very simple answer to a difficult question, it has no ground in the contemporary practice of States and the understanding of armed conflict and international law more generally. The open question thus is how to determine which treaties or treaty provisions remain applicable, which may be suspended, and which may be terminated.

II. THE DRAFT ARTICLES OF THE INTERNATIONAL LAW COMMISSION

After the IDI resolution of 1985, the effects of armed conflicts on treaties were hardly addressed at all in legal scholarship. It was not until the year 2000 that the topic resurfaced, when the ILC included it in its long-term program of work.⁴⁹ *Ian Brownlie*, in a first syllabus on the topic, observed that the IDI resolution was not comprehensive, the literature “less than satisfactory”, State practice, although considerable, uncertain, and that thus the law was “to a considerable degree unsettled” and in “a continuing need for [...] clarification”.⁵⁰ After an endorsement of the topic by the UN General Assembly,⁵¹ the ILC began to study the topic extensively and, finally, adopted a set of Draft Articles in 2011.⁵²

1. The International Law Commission’s Work on the Effects of Armed Conflicts on Treaties

The ILC’s general mandate comprises both the codification of existing international law and its progressive development.⁵³ When working on a set of draft articles with the aim of preparing a later convention, the work of the Commission accordingly may vary between collecting and assessing existing practice and *opinio juris* of States and making progressive suggestions on how to regulate certain aspects. Whether the outcome, especially a set of draft articles, reflects existing customary international law thus has to be determined for each individual provision.

In 2004, the ILC appointed *Brownlie* as Special Rapporteur on the effects of armed conflicts on treaties.⁵⁴ In the course of the following years, the Rapporteur submitted a total of four reports, presenting his research and proposing draft regulations.⁵⁵ In addition, the ILC Secretariat prepared a comprehensive memorandum in 2005, collecting both State practice and scholarly commentary on the matter.⁵⁶ A first set

⁴⁷ Pronto, *supra* note 8, at 233.

⁴⁸ *See id.*, at 230–33.

⁴⁹ ILC, *Report on its fifty-second session (1 May–9 June and 10 July–18 August 2000)* ¶ 729 (2000), UN Doc. A/55/10.

⁵⁰ *Id.*, annex, at 140.

⁵¹ UNGA, *Report of the International Law Commission on the work of its fifty-sixth session* ¶ 5 (2 December 2004), UN Doc. A/RES/59/41.

⁵² ILC, *Draft articles on the effects of armed conflicts on treaties, with commentaries*, in Report on its sixty-third session (26 April–3 June and 4 July–12 August 2011) 173 (2011), GAOR Sixty-sixth Session, Suppl. No. 10 (A/66/10) [*hereinafter* ILC, *Draft articles, with commentaries*].

⁵³ Charter of the United Nations art. 13 (San Francisco, 24 October 1945), 1 UNTS XVI [*hereinafter* UN Charter]; UNGA, *Statute of the International Law Commission* art. 2(1) (21 November 1947), UN Doc. A/RES/174(II).

⁵⁴ ILC, *Report on its fifty-sixth session (3 May–4 June and 5 July–6 August 2004)* ¶ 364 (2004), GAOR Fifty-ninth session, Suppl. No. 10, A/59/10. The UN General Assembly endorsed the ILC’s decision, *see* UNGA, *Report of the ILC on the work of its fifty-sixth session* ¶ 5 (2 December 2004), UN Doc. A/RES/59/41.

⁵⁵ ILC, *First Brownlie Report*, *supra* note 23; ILC, *Second report on the effect of armed conflicts on treaties*, by Mr. Ian Brownlie, *Special Rapporteur* (16 June 2006), UN Doc. A/CN.4/570 [*hereinafter* ILC, *Second Brownlie Report*]; ILC, *Third report on the effects of armed conflicts on treaties*, by Mr. Ian Brownlie, *Special Rapporteur* (1 March 2007), UN Doc. A/CN.4/578; ILC, *Fourth report on the effects of armed conflicts on treaties: procedure for suspension and termination*, by Mr. Ian Brownlie, *Special Rapporteur* (14 November 2007), UN Doc. A/CN.4/589.

⁵⁶ ILC, *Secretariat Memorandum*, *supra* note 9.

of draft articles with commentaries was adopted on first reading and transmitted to governments for comments in 2008.⁵⁷ In 2009, *Lucius Caflisch* was appointed new Special Rapporteur for the topic.⁵⁸ He mainly assessed comments by States and suggested certain reformulations of the draft articles.⁵⁹ In 2011, the ILC completed the second reading and adopted a final set of 18 Draft Articles, together with commentaries.⁶⁰ It recommended the Draft to the UN General Assembly,⁶¹ which officially took note of the Draft Articles, annexed them to the resolution, and commended them to the attention of governments.⁶²

When the ILC and the Special Rapporteur, in particular, had begun to consider the topic, they faced a number of obstacles that added to already existing uncertainties.⁶³ Earlier State practice, dealing exclusively with classical inter-State conflicts, is inconsistent and possibly outdated. Moreover, practice as well as scholarly analyses in the context of the two World Wars must be assessed with caution due to the wars' exceptional magnitude.⁶⁴ In contrast, modern practice is hardly present, as States do usually not comment on the effect of a conflict on certain treaties.⁶⁵ Finally, the ILC faced the practical problem that governments did not reply to inquiries about their (contemporary) practice, making "the identification of relevant State practice [...] unusually difficult."⁶⁶

2. The Draft Articles on the Effects of Armed Conflicts on Treaties

Despite practical and doctrinal difficulties, the ILC adopted the Draft Articles seven years after the appointment of *Brownlie* as first Special Rapporteur. The Draft's first of three parts clarifies that the "draft articles apply to the effects of armed conflicts on the relations of States under a treaty" (Draft Article 1) and defines the terms "treaty" and "armed conflict" (Draft Article 2). Importantly, the latter definition covers not only international, but also non-international armed conflicts. The ILC further clarified that the Draft also applies to occupation of territory, even if met with no armed resistance.⁶⁷ Furthermore, the Articles do not only apply to the relationship of belligerent States but to that between a State involved in (national or international) conflict and a third State. State practice on the latter issue is particularly rare and doctrine does not offer a concise answer.⁶⁸ Additionally, some States have rejected the idea of non-international armed conflicts influencing treaties beyond the scope of the VCLT,⁶⁹ i.e. beyond the application of the doctrines of supervening impossibility of performance and fundamental change of circumstance⁷⁰.

⁵⁷ ILC, *Report on its sixtieth session (5 May–6 June and 7 July–8 August 2008)* ¶¶ 63–64 (2008), GAOR Sixty-third session, Suppl. No. 10 (A/63/10) [hereinafter ILC, 2008 Report].

⁵⁸ ILC, *Report on its sixty-first session (4 May–5 June and 6 July–7 August 2009)* ¶ 229 (2009), GAOR Sixty-fourth session, Suppl. No. 10 (A/64/10).

⁵⁹ ILC, *First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur* (22 March 2010), UN Doc. A/CN.4/627 [hereinafter ILC, *Caflisch Report*]; ILC, *First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur, Addendum* (21 April 2010), UN Doc. A/CN.4/627/Add.1.

⁶⁰ ILC, *Draft articles, with commentaries, supra* note 52.

⁶¹ *Id.*, at ¶ 97.

⁶² UNGA, *Effects of armed conflicts on treaties, supra* note 6.

⁶³ See ILC, *Secretariat Memorandum, supra* note 9, at ¶¶ 3–6; ILC, *supra* note 49, annex, at 140. See also Lauren Dudley, *Until We Achieve Universal Peace: Implications of the International Law Commission's Draft Articles on the "Effects of Armed Conflict on Treaties"* 6 NAT. SEC. L. BRIEF 13, 19 (2016).

⁶⁴ ILC, *Secretariat Memorandum, supra* note 9, at ¶ 79.

⁶⁵ See *id.*, at ¶ 161.

⁶⁶ ILC, *Report on its fifty-ninth session (7 May–5 June and 9 July–10 August 2007)* ¶ 275 (2007), GAOR Sixty-second session, Suppl. No. 10 (A/62/10) [hereinafter ILC, 2007 Report].

⁶⁷ ILC, *Draft articles, with commentaries, supra* note 52, commentaries to art. 2, at ¶ 6.

⁶⁸ See ILC, 2007 Report, *supra* note 66, at ¶ 287.

⁶⁹ E.g. UNGA, *Sixth Committee: Summary record of the 18th meeting* ¶ 16 (23 October 2014), UN Doc. A/C.6/69/SR.18 [hereinafter UNGA, *Sixth Committee Meeting*].

⁷⁰ VCLT, *supra* note 39, arts 61 and 62. The question under which circumstances an armed conflict may trigger these rules lies beyond the scope of this paper. On this issue, see Benny Tan Zhi Peng, *The International Law*

The ILC, nevertheless, chose to include non-international armed conflicts in the Draft and opted for the view that the conflict's characteristics may be taken into account during the operation of the Draft. Although the ILC argued that "[n]on-international armed conflicts could affect the operation of treaties as much as international ones",⁷¹ it noted that "[t]he typical non-international armed conflict should not, in principle, call into question the treaty relations between States."⁷² Non-international armed conflicts are thus less likely to affect treaties than international armed conflicts; in particular, outside involvement might add an inter-State dimension to non-international armed conflicts, which might exceptionally justify effects on treaty relations.

The second part of the Draft is subdivided into two chapters, establishing the rules governing the operation of treaties in the event of armed conflicts and other relevant provisions.

Draft Article 3 contains the fundamental rule on the effects of armed conflicts on treaties. It states:

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties: (a) as between States parties to the conflict; [and] (b) as between a State party to the conflict and a State that is not.

The provision reproduces the second IDI resolution verbatim. It is safe to say that this article reflects customary international law. The rule that armed conflicts do not *ipso facto* terminate or suspend all treaties has been accepted since the beginning of the 20th century. Furthermore, the ILC reported that no State has objected to this basic idea⁷³ and a number of States expressly affirmed its customary status.⁷⁴

While Draft Article 3 offers no help *vis-à-vis* the determination of a treaty's fate, the subsequent provisions are designed to guide the interpreter with the following three steps: First, unsurprisingly, priority is given to (express) treaty provisions on the treaty's operation in armed conflict (Draft Article 4). If such a provision does not exist, following Draft Article 5, the treaty is to be interpreted to determine its susceptibility to termination (or withdrawal) or suspension.

Where interpretation alone does not lead to a conclusive result,⁷⁵ Draft Article 6 points the interpreter to "all relevant factors", including the nature of the treaty and the characteristics of the armed conflict. The latter refers to treaty-external circumstances and comprises the respective conflict's territorial extent, scale, intensity, and duration, as well as, in case of a non-international armed conflict, the "degree of outside involvement" (Draft Article 6 *lit.* b), implying that "the greater the involvement of third States in a non-international armed conflict, the greater the possibility that treaties will be affected, and vice versa."⁷⁶

The nature of the treaty includes in particular its subject matter, object and purpose, content, and number of parties (Draft Article 6 *lit.* a). In order to provide guidance for this step of the analysis, Draft Article 7 refers the interpreter to the annex, which contains "[a]n indicative list of treaties, the subject-matter of which involves an implication that they continue in operation, in whole or in part." Belonging to a certain type of treaty does thereby not conclusively determine the fate of this treaty. As explained by the ILC, "treaties do not continue in operation simply because they fall into one of the listed categories."⁷⁷ Instead, the category only creates "weak rebuttable presumptions" that are not necessarily bedded in customary international law.⁷⁸ The list was, in fact, disputed among States and members of the ILC. At

Commission's Draft Articles on the Effects of Armed Conflicts on Treaties: Evaluating the Applicability of Impossibility of Performance and Fundamental Change 3 ASIAN J. INT'L L. 51 (2013).

⁷¹ ILC, *Draft articles, with commentaries*, *supra* note 52, commentaries to draft art. 2, at ¶ 8.

⁷² *Id.*, commentaries to draft art. 1, at ¶ 2.

⁷³ ILC, *Caflich Report*, *supra* note 59, at ¶ 33.

⁷⁴ UNGA, *Sixth Committee Meeting*, *supra* note 69, at ¶ 10 (South Africa on behalf of the African Group); *id.*, at ¶ 13 (Belarus).

⁷⁵ See ILC, *Draft articles, with commentaries*, *supra* note 52, commentaries to draft art. 6, at ¶ 1.

⁷⁶ *Id.*, commentaries to draft art. 6, at ¶ 4.

⁷⁷ ILC, *Caflich Report*, *supra* note 59, at ¶ 53.

⁷⁸ ILC, *Draft articles, with commentaries*, *supra* note 52, commentaries to the annex, at ¶ 2; ILC, *Second Brownlie Report*, *supra* note 55, at ¶ 42. Some of the categories, however, reflect customary international law, e.g.

first proposed as an actual article, the list was demoted to an annex, but its helpfulness remained disputed, in particular, because treaties may often not fit into one single category.⁷⁹ The list was justified in acknowledgment of these circumstances by its merely indicative nature and the possible separability of treaty provisions that allow for flexible approaches to each treaty or treaty provision.⁸⁰

If a State intends to suspend or terminate a treaty, according to Draft Article 9, it shall notify the other party or parties or the treaty's depositary, if applicable. The notification will take effect once it has been received by the other party or parties, if it does not provide for a subsequent date. Where the treaty in question or general international law provides for a right to object,⁸¹ the recipient party may exercise that right within reasonable time, triggering a duty to seek peaceful solution of the dispute under Article 33 UN Charter. As the Draft is modeled on Article 65 VCLT, *Arnold Pronto* sees such a notification requirement somewhat skeptical, as it may be difficult to comply with "in the fog of war".⁸² He concludes that the notification procedure should be understood as being recommendatory only.⁸³ Indeed, it would seem counterintuitive to deny a suspension or termination of a treaty, only because procedural rules were not complied with during the extraordinary circumstances of an armed conflict. Either way, Draft Article 9 does certainly not reflect existing customary law, but must be qualified as a progressive suggestion by the ILC.

Draft Article 11, based on Article 44 VCLT, clarifies that termination or suspension of a treaty may affect only part of a treaty. Termination or suspension as a whole remains, however, the general rule. Separability is affirmed under three cumulative conditions: First, the clauses in question must be separable from the remainder of the treaty; second, it must appear that acceptance of these clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and, finally, the continued performance of the remainder of the treaty must not be unjust.

The right to terminate or suspend a treaty is lost, according to Draft Article 12, when the State expressly agrees to or acquiesces in the treaty remaining in force or continuing to operate. If, on the other hand, a treaty is terminated or suspended, the parties may agree on its revival or resumption after the conflict has ended, as established by Draft Article 13.

The Draft's last part frames "miscellaneous" issues with regard to the use of force, the UN Charter, the VCLT, and the law of neutrality. Draft Article 14 establishes that a State may suspend, in whole or in part, the operation of a treaty insofar as it is incompatible with the legitimate exercise of the State's inherent right of self-defense under Article 51 UN Charter. Opposite to such legal use of force, Draft Article 15 addresses the illegal use: If an international armed conflict is caused by the aggression of one State, that State may not terminate or suspend a treaty if the effect would be to its benefit. Finally, Draft Articles 16 to 18 clarify that the Draft is without prejudice to the decisions of the UN Security Council, to the laws of neutrality, and other grounds for termination or suspension. In particular, the Draft does not exclude the application of the VCLT's grounds for suspension or termination to cases of international or non-international armed conflicts. The Draft Articles are designed as being compatible with the VCLT,⁸⁴ they form a part of the law on treaties, and add a ground for suspension or termination to the general rules under the VCLT.

treaties creating an international regime or status, human rights treaties, or treaties for the protection of the environment. See Vöneky, *supra* note 5, at ¶ 5.

⁷⁹ ILC, *Report on its fifty-seventh session (2 May–3 June and 11 July–5 August 2005)* ¶ 170 (2005), GAOR Sixtieth session, Suppl. No. 10 (A/60/10) [hereinafter ILC, 2005 Report].

⁸⁰ See ILC, *Report on its sixty-second session (3 May–4 June and 5 July–6 August 2010)* ¶ 232 (2010), GAOR Sixty-fifth session, Suppl. No. 10 (A/65/10).

⁸¹ ILC, *Draft articles, with commentaries, supra* note 52, commentaries to draft art. 9, at ¶ 4.

⁸² Pronto, *supra* note 8, at 240.

⁸³ *Id.*, at 240.

⁸⁴ See ILC, 2005 Report, *supra* note 79, at ¶ 115.

3. Conclusion on the ILC Draft Articles

Although the ILC spent some time developing its Draft, the outcome does not appear to be particularly groundbreaking. The Draft Articles spell out many rather obvious rules or lose themselves in somewhat vague postulations. Given the remaining uncertainties in State practice, the ILC might have been best advised to take a more progressive route. The present form of the Draft Articles may thus be seen as rough guidelines rather than comprehensive regulations. It seems improbable that these guidelines will ensure legal certainty and prevent disagreement *vis-à-vis* the fate of a treaty. The added value of hypothetically adopting them as a convention is thus questionable. The UN General Assembly, in late 2014, repeated its commandment of the Draft Articles to the attention of States, requested the Secretary-General to invite governments to submit comments on future action regarding the Articles, and decided to include the item “effects of armed conflicts on treaties” in the provisional agenda of Assembly’s 72nd session, to be commenced in 2017.⁸⁵ Some States have expressed skepticism of the Draft Articles’ practical operability⁸⁶ and many governments do not support the adoption of a convention.⁸⁷

The ILC has remained cautious and adopted a set of draft norms that is based on the presumption of continuity of treaties. The norms certain points of orientation for the determination of the fate of certain treaties,⁸⁸ but do not seem to present a final and comprehensive answer. The ILC’s work and the continuing debate among States should, however, be interpreted as cementing the reversal of the previous law on the matter and as shifting the burden on States⁸⁹ to justify the suspension or termination of a treaty during armed conflict.

III. THE CASE OF BILATERAL INVESTMENT TREATIES

The practical value of the Draft Articles can be tested by their application to the case of BITs. *Christoph Schreuer*, in a brief analysis of the topic, opined that

as a rule, treaties dealing with the protection of foreign investments, such as BITs, continue to apply after the outbreak of armed hostilities. This is particularly so where these treaties address the consequences of armed conflicts.⁹⁰

Yet, given the uncertainties surrounding the Draft Articles and the lack of clear precedents for the case of BITs, the issue may not be as clear-cut as it may seem at first sight.

According to the steps proposed in the Draft Articles, one first has to assess whether the treaty in question itself contains a provision on its continuity or discontinuity during armed conflict. Draft Article 4 is limited to few examples in treaty practice and BITs are generally not part of them. However, a number of BITs do contain clauses that reference situations of armed conflict in one way or another. These clauses may be determinative to the overall applicability of the treaty, as suggested by Draft Article 5.

BITs that do not contain such clauses have to be assessed in light of Draft Articles 6 and 7 and the Draft Articles’ annex. If BITs fell within the scope of the annexed list, there may be a presumption of their continuity. Exceptionally, however, specific parts of BITs could be subjected to suspension under the conditions of separability.

⁸⁵ UNGA, *Effects of armed conflicts on treaties* (10 December 2014), UN Doc. A/RES/69/125.

⁸⁶ UNGA, *Sixth Committee Meeting*, *supra* note 69, at ¶ 32 (Argentina); *id.*, at ¶ 43 (Israel).

⁸⁷ *Id.*, at ¶ 9 (South Africa on behalf of the African Group); *id.*, at ¶ 20 (Russian Federation); *id.*, at ¶ 46 (US).

⁸⁸ See Pronto, *supra* note 8, at 241; Heike Krieger, *Article 73*, in *VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 1239, ¶ 68 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

⁸⁹ See Vöneky, *supra* note 5, at ¶ 18 (“Looking from a broader perspective, the development of the last decades seems to indicate that there may be a paradigm shift in the future: then it will be necessary that each State must give convincing reasons why a certain peacetime obligation cannot be fulfilled because of an armed conflict.”).

⁹⁰ Christoph Schreuer, *The protection of investments in armed conflicts*, in *INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES* 3, 5 (Freya Baetens ed., 2013).

1. BITs Referencing Situations of Armed Conflict

Although direct stipulations by BITs on their applicability during armed conflicts do generally not exist, some treaties mention the conflict scenario. Three types of clauses may be distinguished: conflict-specific non-discrimination clauses, clauses providing for compensation in the specific context of armed conflict, and exception clauses for measures taken in the pursuit of the State's security interest.

Non-discrimination clauses that address cases of armed conflict are relatively common. For example, Article 12(1) of the 2004 Canadian Model BIT reads:

Each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or a natural disaster.⁹¹

Such a provision ensures national or most favored nation treatment of investors with regard to compensation provided by States in cases of armed conflict, revolution, etc. It is triggered when the host State takes compensatory measures, even though it is not obligated to do so under the BIT or customary international law.⁹² The clause does not give rights to compensation as such; it merely ensures non-discrimination, i.e. equal compensation, if the State chooses to compensate its own or third-country investors.⁹³ It, further, does not, as *lex specialis*, override other treaty standards, especially full protection and security guarantees, but adds to them.⁹⁴

The second type of clause, mostly found in combination with the first type, goes beyond mere guarantees of non-discrimination. Art. 5(5) of the US Model BIT, for example, reads:

[...] if an investor of a Party, in the situations [of armed conflict, among others], suffers a loss in the territory of the other Party resulting from:
 (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities;
 or
 (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation
 the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. [...] ⁹⁵

Such a clause gives an absolute claim for losses suffered due to an armed conflict.⁹⁶ The relationship to other provisions of the BIT is less clear than in the case of a mere non-discrimination clause. In particular, one could read *lit. b* of the provision as regulating a special case of the full protection and security provision.

The last case of clauses dealing with armed conflicts are security exceptions. In contrast to the other two instances, security exceptions do not create obligations for the host State, but allow it to take certain measures in its security interests by exempting it from liability. Article 15 of the Finland-Tanzania BIT reads, for example:

⁹¹ Canadian Model Agreement for the Promotion and Protection of Investments art. 12(1) (2004), *available at* www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf [last accessed 19 November 2016].

⁹² Rudolf Dolzer & Yun-I Kim, *Germany*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 289, 311 (Chester Brown ed., 2013).

⁹³ Céline Lévesque & Andrew Newcombe, *Canada*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES, *supra* note 92, at 53, 92.

⁹⁴ ICSID Arbitral Tribunal, *Barnardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, 22 April 2009, ICSID Case No. ARB/05/6, ¶ 104, *available at* www.italaw.com/cases/467 [last accessed 21 November 2016]; Nicao Schrijver & Vid Prisljan, *The Netherlands*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES, *supra* note 92, at 535, 578.

⁹⁵ U.S. Model Bilateral Investment Treaty art. 5(5) (2012), *available at* www.state.gov/documents/organization/188371.pdf [last accessed 17 November 2016] [*hereinafter* US Model BIT].

⁹⁶ August Reinisch, *Austria*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES, *supra* note 92, at 15, 33.

Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.⁹⁷

There is no doubt that all of these provisions are meant to apply during armed conflicts, both international or non-international ones. Already the basic interpretative principle of effectiveness⁹⁸ dictates this understanding of the terms. It thus must be presumed that the parties intended a BIT containing such a clause to continue to apply during armed conflicts. Such treaties thus must be presumed to be not susceptible to suspension or termination as a whole due to the outbreak of an armed conflict.

The remaining and more difficult question is how to deal with BITs that do not contain such a clause.

2. BITs Not Referencing Situations of Armed Conflicts

Draft Articles 6 and 7 intend to offer the solution for treaties not referencing the situation of armed conflict. The nature, in particular the subject matter and object and purpose, are crucial to determine whether a treaty is susceptible to termination or suspension in the event of an armed conflict (Draft Article 6 *lit. a*). Among the treaties, which Draft Article 7 presumes continue in operation, in whole or in part, are those of friendship, commerce and navigation (FCN treaties) and agreements concerning private rights (annex, *lit. e*).

The ILC considered these treaties the precursors of modern BITs⁹⁹ and, accordingly, qualified the latter as falling within this category.¹⁰⁰ During the final stage of the drafting process, the Drafting Committee had more precisely held that investment protection treaties form part of this category “to the extent that they dealt with private rights.”¹⁰¹

However, this categorization must be followed with caution. *Josef Ostránský*, in perhaps the only detailed analysis of the fate of BITs in armed conflicts, pointed out that the categorization of BITs as “agreements concerning private rights” by the ILC is linked to the question of the nature of the investors’ rights under BITs.¹⁰² It has become a highly disputed issue whether investment treaties grant substantial and procedural rights to investors directly, whether they grant only the procedural right to assert rights of the State, or whether investors carry no rights at all, but only enforce the rights of their home State as its agents.¹⁰³ Only if one considers investors as carrying (substantial and/or procedural) rights, BITs could be seen as agreements concerning private *rights*.

In any event, the ILC’s analogy to exiting precedence on FCN treaties and agreements concerning private rights is questionable for another reason. “Private rights” were, in judicial decisions and writings of scholars, limited to rights of a “purely private law nature,”¹⁰⁴ that is to say: to *private law* rights, concerning

⁹⁷ Agreement between the Government of the Republic of Finland and the Government of the United Republic of Tanzania on the promotion and protection of investments art. 15 (Helsinki, 19 June 2001), 2201 UNTS 61.

⁹⁸ RICHARD GARDINER, *TREATY INTERPRETATION* 179 (2nd ed. 2015).

⁹⁹ ILC, *2008 Report*, *supra* note 57, commentaries to draft art. 5, at ¶ 21.

¹⁰⁰ ILC, *Draft articles, with commentaries*, *supra* note 52, commentaries to the annex, at ¶ 48. *See also id.*, commentaries to the annex, at ¶ 69 (“treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad [...] may [...] come within group (e) as ‘agreements concerning private rights’”); ILC, *2008 Report*, *supra* note 57, commentaries to draft art. 5, at ¶ 29.

¹⁰¹ ILC, *Provisional summary record of the 3089th meeting* 32 (17 May 2011), UN Doc. A/CN.4/SR.3089.

¹⁰² Josef Ostránský, *The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict* 6 J. INT’L DISP. SETT. 136, 148 (2015).

¹⁰³ *See, e.g.*, Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights* 56 HARVARD INT’L L. J. 353 (2015); Susan D. Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?* 12 U.C. DAVIS J. INT’L L. & POL’Y 47-99 (2005); Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration* 74 BYIL 151 (2003).

¹⁰⁴ *Chambre sociale, Busi v. Menetti*, 5 November 1943, 12 International Law Reports 304, 304-5. It should be noted that French courts changed its jurisprudence in favor of the abrogation of such treaties, based on the peace treaties after World War II. *See* ILC, *Secretariat Memorandum*, *supra* note 9, at ¶ 46.

primarily the legal relationship between individuals.¹⁰⁵ Such rights, e.g. the right to acquire land or to inherit property, were regularly held to remain in force during hostilities.¹⁰⁶ FCN treaties,¹⁰⁷ similarly, contained private law rights, which were mostly held to continue in operation, while other rights, such as the freedom of movement or the freedom from confiscation without compensation, were suspended during World War II.¹⁰⁸ More recent practice on modern FCN treaties, which have laid a focus on the protection of investments, might indicate that they remained unaffected by armed conflict,¹⁰⁹ but this practice is not particularly clear and did not arise in the context of investment protection.¹¹⁰

Even if BITs are seen to convey certain rights upon private investors, these rights are by no means (purely) private. BITs, to a large extent, contain international legal guarantees concerning the protection of already existing (private) rights, such as property rights, from improper interference by the host State.¹¹¹ Disputes arising out of a BIT thus concern the relationship between an investor and a State.¹¹² In contrast, inheritance treaties, as examples of agreements concerning private rights, grant the right to inherit property. Disputes arising out of such a treaty—e.g. on ownership situations—accordingly concern the relationship between two private individuals. The equation of BITs with agreements concerning *private* rights, at least understood in the traditional sense, is thus not convincing.¹¹³ Existing precedence can only be invoked for the case of BITs with due caution.

Even though the categorization of BITs as agreements concerning private rights does not accurately reflect the nature of BITs, the ILC's line of reasoning is still insightful. The Commission based its categorization on the idea that armed conflicts should generally not affect the status of individuals.¹¹⁴ *Brownlie*, for example, argued that private rights agreements

continue to apply because of legal security for the nationals and other private interests involved, coupled with the condition of reciprocity. In other words, there is no compelling reason why the incidence of an armed conflict should dislodge the mutually beneficial *status quo*.¹¹⁵

The consideration that “the purpose of such agreements is the mutual protection of nationals of the parties”¹¹⁶ was thus seen as the crucial factor. This equally applies to BITs. Rather than speaking of “private rights” that were traditionally understood as private law rights, one should focus on the

¹⁰⁵ See also La Pradelle, *supra* note 21; Lenoir, *supra* note 20, at 173.

¹⁰⁶ That is, at least as long as their execution was consistent with the state of war. See, e.g., *State of Kansas v. Reardon*, *supra* note 29; *Sutton v. Sutton*, *supra* note 12. See also ILC, *Draft articles, with commentaries*, *supra* note 52, commentaries to the annex, at ¶ 46.

¹⁰⁷ See, generally, MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 180 (3rd ed. 2010).

¹⁰⁸ ILC, *Secretariat Memorandum*, *supra* note 9, at ¶ 80(b).

¹⁰⁹ See *id.*, at ¶¶ 68–74.

¹¹⁰ The ILC invokes the International Court of Justice's (ICJ) judgements in the *Nicaragua* and the *Oil Platforms* cases, where the Court based its jurisdiction (also) on FCN treaties between the parties of the disputes. ICJ, *Case Concerning Oil Platforms (Iran v. US)*, 6 November 2003, ICJ Rep. 2003, 161, ¶ 125(1); ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US): Jurisdiction of the Court and Admissibility of the Application*, 26 November 1984, ICJ Rep. 1984, 392, ¶ 113(1)(b).

¹¹¹ Ostránský, *supra* note 102, at 153–54.

¹¹² BITs generally also provide for dispute settlement between the two State parties, but this procedure is scarcely used in practice. See Nathalie Bernasconi-Osterwalder, *State–State Dispute Settlement in Investment Treaties* (International Institute for Sustainable Development, Best Practices Series, October 2014), available at www.iisd.org/library/best-practices-series-state-state-dispute-settlement-clause-investment-treaties [last accessed 29 November 2016].

¹¹³ See also Ostránský, *supra* note 102, at 153.

¹¹⁴ For example, the ILC itself clarified that, “as a rule, only part of these instruments survive. It is evident, in particular, that provisions relating to ‘friendship’ are unlikely to survive to an armed conflict opposing the Contracting States; but that does not mean that provisions relating to the status of foreign individuals do not continue to apply, that is, provisions regarding their ‘private rights’.” ILC, *Draft articles, with commentaries*, *supra* note 52, commentaries to the annex, at ¶ 26.

¹¹⁵ ILC, *First Brownlie Report*, *supra* note 23, at ¶ 77.

¹¹⁶ ILC, *2008 Report*, *supra* note 57, commentaries to draft art. 5, at ¶ 29.

protection of *private interests* as such,¹¹⁷ thereby simultaneously avoiding the debate on conceptualizing investor rights.

The focus on the protection of private interests as well as the reciprocal basis of BITs speak strongly in favor of their continuance during an armed conflict. Whether treaties confer private (law) rights on individuals, or (merely) entail guarantees for existing rights does not change the fact that, although States may be at war with each other, individuals are not.¹¹⁸ The protection of their interests should generally not be affected by the outbreak of armed conflicts. As emphasized by *Tony Cole*, the

ultimate goal of an investment treaty, after all, is to motivate private action, not to secure particular treatment from one State to another, and they are entered into with the explicit goal of inducing non-State entities to rely upon the promises they contain.¹¹⁹

BITs are thus treaties that have left the exclusively inter-State level and primarily concern the relationship between States and private investors. Irrespective of the question, whether they grant rights to investors or not, the protection of private interests and the enforcement of the protective guarantees lie at the heart of BITs. Their nature thus clearly speaks against their suspension or termination during armed conflicts.¹²⁰ The characteristics of the armed conflict in question, under Draft Article 6 *lit.* b, are unlikely to refute this presumption. The nature of BITs will generally outweigh external factors.¹²¹ States may opt for other solutions in the individual case, but as a general presumption, BITs continue to operate.

Whether certain guarantees of BITs may be suspended separately is, however, a different question.

3. The Separability of Bilateral Investment Treaties

The Draft Articles adopt the general rule on separability and its requirements set out by Article 44(3) VCLT. Article 11 EACT reads:

Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the Parties otherwise agree, take effect with respect to the whole treaty except where:

- (a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and
- (c) continued performance of the remainder of the treaty would not be unjust.

The threshold for separability is rather high. As indicated by the negative formulation of the provision, termination or suspension of the treaty as a whole remains the general rule.

Assertions on the separability of a BIT must be made with caution, as every BIT stands for itself and must be interpreted individually. Keeping this reservation in mind, some general considerations can still be made, as the structure, language, and interpretation of BITs are, more or less, similar and certain common features exist in virtually every BIT.¹²² Although most provisions of a BIT may be “separable from the remainder of the treaty”, the question which clause is “an essential basis of the consent” to the treaty, is more difficult to assess. This is particularly so because of a general lack of available *travaux préparatoires* on investment treaties. Nevertheless, it is reasonable to assume that neither key substantial guarantees nor investment arbitration provisions can be suspended or terminated, as these core features of every BIT must be presumed to lay at the essential basis of consent.

¹¹⁷ Cf. also Bernhard Hofstötter, *Cyprus under British Rule: An International Law Analysis of Certain Land Surveys and Land Assignments Between 1878 and 1955* 7 CHINESE J. INT'L L. 159, 184–85 (note 118) (2008).

¹¹⁸ See Lenoir, *supra* note 20, at 170 (citing a Belgian court decision of 1840).

¹¹⁹ TONY COLE, THE STRUCTURE OF INVESTMENT ARBITRATION 78 (2013).

¹²⁰ *Id.*, at 77–78; Krieger, *supra* note 88, at ¶ 54.

¹²¹ Odysseas G. Repousis & James Fry, *Armed Conflict and State Succession in Investor-State Arbitration* 22 COLUMBIA J. EUR. L. 421, 432 (2016).

¹²² Roberts, *supra* note 103, at 359. See, generally, STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009).

It seems plausible to ascertain that most of the substantial or procedural provisions are not inseparable from the BIT as such. This may not be true for clauses defining, for example, the notion of investments, but one can hardly imagine an interest in their suspension or termination. If one of the substantial protection standards or the arbitration mechanism were suspended, the BIT could still operate, albeit with a lower standard of protection or a lack of enforcement mechanism.

However, the second requirement concerning the consent of the other party to the BIT is much more difficult to fulfill in the case of BITs. Rules on investment arbitration could theoretically be detached from the rest of the treaty.¹²³ However, the enforcement of investment claims is an integral part, if not the core, of modern BITs. Although details naturally depend on the specific treaty at hand, enabling investment arbitration, and thereby depoliticizing investment disputes is one of the key purposes of a BIT.¹²⁴ It must therefore be presumed that provisions offering consent to arbitration¹²⁵ are at the essential basis of the consent of both parties to the treaty. Accordingly, as a rule, provisions enabling the investor to bring claims against the host State cannot be suspended or terminated, unless the treaty specifies otherwise, the circumstances indicate that the consent of the other party was not essentially based on the availability of arbitration, or if the treaty is suspended or terminated as a whole.

One must further assume that certain substantial provisions, which exist in virtually every BIT, lie at its very heart and thus form an indispensable part of the treaty. This may be true for the duty to provide compensation when expropriating the investor, non-discrimination provisions providing for national and most-favored nation treatment, as well as fair and equitable treatment, and protection and security standards.¹²⁶

However, certain other provisions might be susceptible to suspension or termination. For example, a BIT might include a (limited) obligation to allow the entry of persons into the territory of the host State.¹²⁷ It stands to reason that there might be apt justification for a State involved in an armed conflict to significantly restrict border-crossing. Existing practice on border-crossing treaties suggests the susceptibility of such provisions to be terminated or suspended.¹²⁸ It can further be assumed that investment establishment provisions may not be at the basis of the other (home) State's consent. The same might hold true for the, practically important, guarantee of free transfer of funds.¹²⁹ However, much depends on the specific treaty and the circumstances of its conclusion. Nevertheless, there thus may be some, albeit little, theoretical room for the suspension of clauses that are not at the very heart of the BIT.

¹²³ Cf. ILC, *Summary record of the 2927th meeting* ¶ 60 (30 May 2007), UN Doc. A/CN.4/2927 (arguing for a distinction between specific provisions of a treaty, in particular dispute settlement provisions in investment treaties).

¹²⁴ See Marc Jacob, *Investments, Bilateral Treaties* ¶ 78, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ONLINE EDITION (Rüdiger Wolfrum ed., last updated June 2014), <http://opil.ouplaw.com/home/epil>.

¹²⁵ See Christoph Schreuer, *Investment Disputes* ¶ 22, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ONLINE EDITION (Rüdiger Wolfrum ed., last updated May 2013), <http://opil.ouplaw.com/home/epil> (“Most BITs [...] contain offers of consent to arbitration by the States Parties to the treaties to the nationals of the other States Parties to the treaties. The treaty is not the arbitration agreement but merely offers arbitration to eligible nationals. The consent agreement is perfected through the acceptance of the offer by the investor.”)

¹²⁶ Jacob, *supra* note 124, at ¶ 26 (calling these features of BITs their “core repertoire”).

¹²⁷ E.g. Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment art. II(3) (Washington, D.C., 14 November 1991), *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127> [last accessed 17 November 2016]. States have, however, been reluctant to liberalize the free movement of persons, see ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 142–44 (2009).

¹²⁸ See ILC, *Secretariat Memorandum*, *supra* note 9, at ¶ 67.

¹²⁹ E.g. US Model BIT, *supra* note 95, art. 7.

IV. CONCLUSION

The effects of armed conflicts on treaties remain a difficult subject in international law. The traditional, simple rule of total abrogation has been abandoned and replaced by approaches that rely on nuanced characterizations of different treaties and treaty provisions.¹³⁰ This development has left the international legal community in a state of uncertainty. The ILC's work has helped to identify certain indicators and strengthened the revocation of any assumption of discontinuity. The continuity and stability of treaty relations were indeed the leading considerations behind the Draft Articles.¹³¹ However, where the Draft Articles aim at crystallizing existing custom, the lack of uniform practice has rendered a concise codification impossible¹³²; where they aim at progressively developing the law, they lose themselves in uncertainty. In the end, the Draft thus appears rather underwhelming when it comes to its practical application.

The ILC's work can be seen as being flawed from the very beginning: State practice and scholarly commentary is, by now, at least over half a century old. Today's conflicts are not comparable to traditional warfare and even less comparable to the two World Wars. What is more, today's conceptualization of international law and the legal dimensions of armed conflicts have fundamentally changed since the end of World War II and the creation of the UN. The ILC has, unfortunately, not challenged the starting point of their analysis. The idea that an armed conflict, in itself, justifies the suspension or termination of treaties—not only *vis-à-vis* a State's belligerent, but also *vis-à-vis* third States—seems to be largely out of place in today's world order.

The ILC tried to “update a doctrine that has been written largely for another age”.¹³³ It would have been perhaps more fruitful to radically reconsider the issue and realign the effects of armed conflicts on treaties with the general law on treaties, as codified in the VCLT.¹³⁴ Given the existing possibilities for suspending or terminating a treaty, in whole or in part, there may be little room left and little need remaining for suspension or termination based on the mere fact of the outbreak of an armed conflict.¹³⁵ Modern State practice, indeed, points in this direction.¹³⁶

Even if one were to adhere to the traditional approach of the ILC, BITs must, despite the remaining uncertainties and tenuous historical precedence, be presumed to remain operable during armed conflict. The ILC should clarify their standpoint on BITs by expressly including them in the catalogue of treaties annexed to the Draft. Suspension, rather than termination, of individual clauses may be a possible option for States to temporarily shift off certain obligations.¹³⁷ These obligations must, however, not be part of the essential basis of the consent of the other party to the BIT, which is most likely the case for key provisions of the treaty. The nature of BITs, i.e. the reciprocal protection of private interests, emits, in any event, a strong presumption in favor of continuity. This is even more the case for BITs between a State that is affected by an (international or non-international) armed conflict and a third State, as BITs contain the promise to offer protection precisely in times of crisis and uncertainty.

¹³⁰ MCNAIR, *supra* note 7, at 695.

¹³¹ ILC, *Draft articles, with commentaries*, *supra* note 52, commentaries to draft art. 3, at ¶ 1.

¹³² See Krieger, *supra* note 88, at ¶ 41; Vöneky, *supra* note 5, at ¶ 18.

¹³³ ILC, *Secretariat Memorandum*, *supra* note 9, at ¶ 164.

¹³⁴ Cf. René Provost, *Convention of 1969: Article 73*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, VOL. II 1645, ¶ 29 (Olivier Corten & Pierre Klein eds., 2011) (“Any attempt to develop a coherent and principled approach to this issue must [...] rely upon, to the greatest possible extent, the general principles on the law of treaties expounded in the Vienna Convention.”).

¹³⁵ See also Krieger, *supra* note 88, at ¶ 68.

¹³⁶ The ILC Secretariat itself reported that Italian courts, the Netherlands, and members of the European Community have relied on the doctrines of supervening impossibility or fundamental change of circumstances to suspend or terminate treaties due to the outbreak of armed conflicts. See ILC, *Secretariat Memorandum*, *supra* note 9, at ¶¶ 82–119. Unfortunately, the ILC has labelled such practice “irrelevant” for the study of the topic, see ILC, *2008 Report*, *supra* note 57, commentaries to draft art. 4, at ¶ 8.

¹³⁷ Notably, parallel obligations under customary international law remain unaffected by the suspension or termination of a treaty-based counterpart (Draft Article 10).

Modern international law is based on the peaceful and stable relations between States. Armed conflict is thus “a disruption, for a limited period of time, of the normal situation, which is peace.”¹³⁸ This disruption must not be perpetuated by affecting the relations between States to a greater degree than absolutely necessary, in particular in cases where interests of the individual are involved. This does, however, not mean that the operation of a BIT in times of armed conflict necessarily continues in the same way as it would in times of peace. Even where an armed conflict in itself does not justify the suspension of certain obligations, other mechanisms of general international law, such as the grounds for suspension under the VCLT or justifications found in the law of State responsibility, may apply.¹³⁹ Further, the ILC discussed to include in their Draft a provision on the law applicable in armed conflict. It ultimately decided against the article, but it remains worth citing it:

The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.¹⁴⁰

Similarly, BIT obligations may be in need of reinterpretation in light of the law of armed conflict. In some instances, the BIT itself implicitly invokes the law of armed conflict; in other instances, standards of protection may be redefined, based on the values and decisions inherent in the law of armed conflict.

It corresponds best to the legal environment of today to grasp the prime effects of armed conflicts on treaties not as a question of whether a treaty may be suspended or terminated, but as an *interpretive* issue. Rather than denying the applicability of a treaty, its application might be adapted to properly take into account the factual extremes of the armed conflict and the specialized body of law applicable to armed conflicts.¹⁴¹ This would help to strengthen the view of armed conflict not as a lawless room where only a few basic rules of the law of armed conflict apply, but as a room that can and must be regulated by law as to minimize its damaging effects to States and individuals.

¹³⁸ ILC, *Secretariat Memorandum*, *supra* note 9, at ¶ 163.

¹³⁹ Vöneky, *supra* note 5, at ¶¶ 12–17.

¹⁴⁰ ILC, *supra* note 55, draft art. 6 *bis*.

¹⁴¹ See, e.g., COLE, *supra* note 119, at 62–80; Gleider I. Hernández, *The interaction between investment law and the law of armed conflict in the interpretation of full protection and security clauses*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES, *supra* note 90, at 21; Ofilio Mayorga, *Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations* (Harvard Program on Humanitarian Policy and Conflict Research, Policy Brief, August 2013), available at www.hpcrresearch.org/publications/applied-research/hpcr-policy-briefs [last accessed 29 November 2016].