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Armed Conflicts and the Law of Treaties: Recent Developments and Reappraisal of the Doctrine in Light of the Wars in Syria and Ukraine

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1. Introduction

For a long time, the effect of armed conflicts on treaties has been one of the most controversial areas of international law.[1] While the first codifications on the law of armed conflict clarified that the rules governing conduct in war differ from those in peacetime, it remained contested what happens with treaties which did not purport to regulate armed conflict. The traditional view that they were automatically abrogated with the outbreak of war was famously challenged in the Lieber Code,[2] which marked a shift towards a position that most treaties survive armed conflicts. This presumption is also embedded in the Draft Articles on the Effects of Armed Conflicts on Treaties ("Draft Articles") adopted by the International Law Commission ("ILC") in 2011.[3]

The Draft Articles reflect the ILC's attempt to reconcile two opposing positions: on the one hand, the need for stability in treaty relations and legal certainty, and on the other hand, accommodation of realities of armed conflict which may necessitate termination or suspension of some treaties. While the ILC prioritized the former in the Draft Articles, it also left the door open for the latter. How wide this door for terminating or suspending treaties is open, however, is not clear. The ongoing armed conflicts, including in Syria and Ukraine, have presented an opportunity for states to test the principles and presumptions embedded in the Draft Articles.

This contribution is the first to examine the recent practice of actual and possible invocations of the doctrine on the effects of armed conflicts on treaties ("EACT") in the context of wars in Syria and Ukraine. While one of the objectives of the ILC Draft Articles was to bring more clarity to this difficult topic, it is questionable whether this has been achieved. The article argues that many provisions of the Draft Articles, reflecting the ILC's desire to progressively develop international law, are still heavily contested and ambiguous, and that this has started to reflect in the case law of international tribunals and state practice. Consequently, this may deter states from engaging with the EACT doctrine and the Draft Articles in the future.

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[1] Memorandum by the Secretariat, 'The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine' 57th Session of ILC (2005) UN Doc A/CN.4/550 ('Secretariat Memorandum') p. 4.

[2] General Orders No 100: Instructions for the Government of Armies of the United States in the Field (24 April 1863) Article 11.

[3] ILC, 'Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries' in Yearbook of the International Law Commission, 2011, Vol II, UN Doc A/CN.4/SER.A/2010/Add.1 (Part 2).

The article is structured as follows. Section Two clarifies the legal framework for terminating and suspending treaties in armed conflict, discussing both the traditional law of treaties as codified in the Vienna Convention on the Law of Treaties ("VCLT"),[4] and the more specific but non-binding ILC Draft Articles. Section Three analyses an investment arbitration award *Guris v Syria*,[5] in which for the first time an international tribunal applied and interpreted the ILC Draft Articles in ascertaining whether the war in Syria affected the operation of an investment treaty. The article criticizes the award, highlighting the flaws in the tribunal's understanding of the EACT doctrine. Section Four examines how the Russia-Ukraine war affected the operation of treaties between Russia and Ukraine as well as treaties between Russia and third states. It evaluates whether the announced or potential treaty suspensions or terminations could be justified under the EACT paradigm.

2. Law governing the operation of treaties in armed conflict

The primary instrument governing treaties is the Vienna Convention on the Law of Treaties which entered into force in 1980. Its underlying principle is that treaties are binding upon parties and must be complied with in good faith (*pacta sunt servanda*).[6] According to the VCLT, suspension or termination of a treaty is an exception, very narrowly defined and cumbersome to enforce. Already during the drafting of the VCLT, the ILC recognized that the conditions for invoking the exception may be different when the operation of treaties was impacted by an armed conflict. Many decades later it conducted comprehensive research on this topic, ultimately resulting in a non-binding instrument, which reflects the ILC's mission to clarify the position on this subject in international law as well as to contribute to codification and progressive development thereof.

This section outlines the potential grounds that could be invoked for termination or suspension of treaties due to an armed conflict. First, it summarises the traditional doctrines codified in the VCLT, and second, it reflects on a historically controversial doctrine on the effects of armed conflict on treaties and the ILC's attempt to capture its essence in a single document.

2.1 Suspension and termination under the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties prescribes the grounds and the procedure for termination and suspension of treaties in Part V, Section 3. Two doctrines, in particular, could become relevant in situations of armed conflict: supervening impossibility to perform, codified in Article 61 of the VCLT, and fundamental change of circumstances, codified in Article 62 of the VCLT. Both reflect customary international law and thus apply even if one of the parties to a treaty is not a party to the VCLT.[7]

[4] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[5] *Guris Construction and Engineering Inc v Syrian Arab Republic*, ICC Case No 21845/ZF/AYZ, Final Award (31 August 2020).
[6] VCLT, Article 26.
[7] *Case Converning the Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Merits) [1997] ICJ Rep, 1, 62, para. 99 (*Gabčíkovo*); *Fisheries Jurisdiction Case* (*Federal Republic of Germany v Ireland*) (Jurisdiction) [1973] ICJ Rep 1, 18, para. 36 (*Fisheries Jurisdiction*).

Article 61 of the VCLT may be invoked as a ground for termination if the impossibility of performing a treaty is a result of "the permanent disappearance or destruction of an object indispensable for the execution of the treaty".[8] If the impossibility to perform is temporary, the treaty can only be suspended. Although the threshold for successfully invoking this ground appears high, especially if one subscribes to the restrictive interpretation according to which Article 61 is limited to situations of the physical disappearance of an object of a treaty (*e.g.*, a river drying up),[9] there have been instances in practice when impossibility to perform was invoked due to circumstances created by an armed conflict. For example, McIntyre noted that during World War II, labor treaties and obligations to pay under treaties governing intergovernmental debt were impossible to perform.[10] The view that some treaties or provisions thereof may become inoperative and thus suspended as a practical matter was also endorsed in diplomatic statements and decisions of municipal courts.[11]

Even more rigorous are conditions for invoking fundamental change of circumstances. Article 62 of the VCLT stipulates that a treaty can be terminated only if the change in circumstances that existed at the time of the conclusion of a treaty was not foreseen by the parties and provided that "(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty".[12] While in practice, states have sometimes invoked fundamental change of circumstances to suspend treaties due to an armed conflict (*e.g.*, the US suspended the International Load Line Convention due to World War II;[13] the Netherlands suspended its bilateral treaties with Suriname due to civil strife in Suriname in 1982[14]), courts have been generally apprehensive about applying the doctrine.[15] A notable exception is the *Racke* case, in which the European Court of Justice ("ECJ") concluded that the European Economic Community's suspension of the Cooperation Agreement with Socialist Federal Republic of Yugoslavia ("SFRY") was justified because the war in 1991 resulted in the fundamental change of conditions under

[8] VCLT, Article 61.

[9] This view is not unanimously accepted, and some commentators argue that the Article 61 VCLT covers also 'juridical impossibility'. See J Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict* (OUP 2019) p. 75; P Bodeau-Livinec and J Morgan-Foster, 'Article 61' in O Corten and P Klein (eds), The Vienna Conventions on the Law of Treaties, The Commentary (OUP 2011) pp. 1389– 90; I Sinclair, *The Vienna Convention on the Laws of Treaties* (2nd edn, MUP 1984) pp. 191–92; T Giegerich, 'Article 61' in O Dörr and K Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary (Springer 2012) p. 1056.

[10] S McIntyre, Legal Effects of World War II on Treaties of the United States (Martinus Nijhoff 1958) p. 134.

[11] See *e.g.*, *Lanificio Branditex v Soceita Azais e Vidal* (1971) Court of Cassation, Joint Session, No 3147, reported in 1 Italian Ybk of Intl L (1975) pp. 232–33; *In re Utermöhlen* (1948) AD 1949, No 129, 381, cited in Commentary to Draft Articles, Annex, para. 41; R Rank, 'Modern War and the Validity of Treaties' (1952) 38(3) Corn L Q 321 noting how after the Second World War, the US position was that due to existence of armed conflict "… as a practical matter, certain of the [treaty] provisions might have been inoperative").

[12] VCLT, Article 62(1).

[13] Secretariat Memorandum, *supra* note 1, p. 69

[14] *Ibid*., p. 81.

[15] See *e.g.,* Free Zones of Upper Savoy and the District of Gex (France v Switzerland) (Order) [1929] PCIJ Rep Series C No 17/1, 283–84; *Fisheries Jurisdiction*, *supra* note 7, p. 20; *Gabčíkovo*, *supra* note 7, p. 65, para. 104; G Fitzmaurice, 'Second Report on the Law of Treaties' in Yearbook of the International Law Commission, 1957, Vol II, UN Doc A/CN.4/107, 56, para. 141.

which the treaty was entered into.[16] Arguably, it was not the war alone, but rather the accompanying dissolution of SFRY that was deemed to radically transform the extent of the obligations performed under the treaty.[17]

Despite the occasional invocations of these doctrines by states in the context of armed conflict, the VCLT expressly provides in Article 73 that the VCLT provisions "shall not prejudge any question that may arise in regard to a treaty […] from the outbreak of hostilities between States". The Commentary to this saving clause reveals the ILC's position that the VCLT was not meant to regulate the effect of an armed conflict on treaties since that was deemed a complex issue requiring separate analysis.[18] This does not mean that Article 73 of the VCLT precludes the application of the VCLT grounds in the context of armed conflict. While the existence of an armed conflict is not in itself sufficient for invocation of Articles 61 and 62, it can still create circumstances that meet the requirements under these provisions.[19]

Rather, Article 73 is an acknowledgment that the VCLT is not the only, and more importantly, not the most effective legal framework governing the operation of treaties in times of hostilities. It suggests that a different legal mechanism, which reflects the realities of this specific extraordinary situation better and which has less formalized procedural requirements, might be more appropriate for dealing with this issue. It took the ILC 20 years to finally identify the issue of the effects of armed conflicts on treaties as an area of the ILC's interest and embark on its analysis. The outcome of the ILC's work is described next.

2.2 The effects of armed conflicts on treaties: codifying the doctrine

The "effects of armed conflict on treaties" doctrine is based on the recognition that the rules governing the existence and operation of treaties are different in times of war than in times of peace. The ILC highlighted this in the commentary to Article 73 of the VCLT when it noted that "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."[20] Indeed, there is a significant state practice and scholarly commentary confirming that the existence of armed conflict may be sufficiently incompatible with the nature and purpose of some treaties so that they become either terminated or suspended for the duration of hostilities.[21] This state practice and academic commentary, however, have not been consistent, which left the parameters of the doctrine largely obscure, prompting the ILC's decision to analyze and clarify the doctrine.[22]

[16] Case 162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655 (*Racke*).
[17] *Racke*, Judgment, para. 57.
[18] ILC, 'Draft Articles on the Law of Treaties with Commentaries' in Yearbook of the International Law Commission, 1966, Vol II, UN Doc A/6309/Rev 1, Commentary to Article 69 (which became Article 73), 267–68.
[19] This is in line with Article 18 of the ILC Draft Articles. For the analysis, see Zrilič, *supra* note 9, p. 73.
[20] Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969 (United Nations publication, Sales No. E.70.V.5), vol. III, p. 87.
[21] Secretariat Memorandum, *supra* note 1.
[22] *Ibid*.

The evolution of the doctrine is marked by three distinct developments. On one end of the spectrum, the traditional view supported by state practice well into the 19th century was that all treaties between belligerent parties were abrogated upon the outbreak of war.[23] On the other end of the spectrum, the position that became popular in the early 20th century was that, save for some exceptions, wars do not affect the operation of treaties.[24] Under the third, moderate view, the presumption is that treaties continue to operate unless otherwise indicated by the express or implied intent of the parties ("intention" school),[25] or a treaty is incompatible with a state policy and the safety of a nation or conduct during war ("compatibility" school).[26] The latter test emerged in response to the perceived flaws of the "intention" school, notably the fact that most treaties do not include provisions on the continued applicability of treaties in wartime or parties' intention is difficult to discern. In the oft-cited *Techt v Hughes* case, Justice Cardozo argued that to determine the effect of war on treaty provisions, one must examine first whether "the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace."[27] The "compatibility" doctrine received support in decisions of municipal courts,[28] declarations of state departments and academic commentary.[29] It captures well the modern understanding of the nature of the EACT doctrine. In its attempt to bring clarity to the topic, the ILC combined the insights of both "intention" and "compatibility" schools.

While the ILC is not the first institution that embarked on the analysis of the doctrine (early attempts to clarify the principles were made by the Harvard Law School in 1935 and the Institute of International Law in 1912 and 1985)[30] its project was certainly the most ambitious. The work spanned over ten years, and involved two Special Rapporteurs (Ian Brownlie, who did most of the work, was replaced by Lucius Caflisch in 2009), several reports (four by Brownlie and one by Caflisch), the Secretariat Memorandum (one of the most important sources on state practice and literature on this subject), extensive discussions within the ILC and numerous comments by the governments before it resulted in the adoption of the Draft Articles on the Effects of Armed Conflicts on Treaties in 2011. While the ILC recommended

[23] *Ibid*., para. 14.
[24] *Ibid*., para. 15.
[25] Cecil J. B. Hurst, 'The Effect of War on Treaties' (1921) 2 British Yearbook of International Law 37, 40; J Delbrück, 'War, Effect on Treaties' in R Bernhardt (ed), Encyclopaedia of Public International Law: Vol IV (Amsterdam Elsevier 1982) p. 311; Rank, *supra* note 11, pp. 325-333. For the list of scholars who subscribed to the intention school, see Secretariat Memorandum, *supra* note 1, para. 10.
[26] Secretariat Memorandum, *supra* note 1, p. 10; Rank *supra* note 11.
[27] *Techt v. Hughes*, United States, Court of Appeals of New York, AILC 1783–1968, vol. 19, pp. 95.
[28] *Karnuth v. United States*, AILC 1783–1968, vol. 19, p. 49, at pp. 52–53; *Clark v. Allen*, United States, Supreme Court, AILC 1783–1968, vol. 19, pp. 78–79; *In re Meyer's Estate*, 107 Cal. App. 2d 799, 805 (1981), AILC 1783–1968, vol. 19, p. 133, at p. 138.
[29] For an overview, see Secretariat Memorandum, *supra* note 1, paras. 11-13.
[30] Harvard Research in International Law, Law of Treaties, 29 American Journal of International Law, Supp. 973, 1183-1204 (1935); Effects of War Upon Treaties and International Conventions, 7 American Journal of International Law 149 (1912); The Effects of Armed Conflicts on Treaties, resolution of the Institut de droit international (Helsinki, 1985).

the General Assembly to adopt the Draft Articles as a binding convention,[31] there seems to be little political will for that.[32] In 2017, the General Assembly adopted a resolution which emphasized the value of the Draft Articles in providing guidance to states and decided to revert to this topic in the future.[33] Thus currently, at the least, the ILC Draft Articles present a valuable guide on the subject matter, and at the most, some parts of it could be taken as a reflection of customary international law.

The scope of the Draft Articles is delimited in Article 1, which states that they "apply to the effects of armed conflicts on the relations of States under a treaty".[34] The Commentary explains that this entails the following three scenarios:

> (a) the situation concerning the treaty relations between two States engaged in an armed conflict, including States engaged on the same side; (b) the situation of the treaty relations between a State engaged in an armed conflict with another State and a third State not party to that conflict; and (c) the situation of the effect of a non-international armed conflict on the treaty relations of the State in question with third States.[35]

These hypotheses reflect the definition of "armed conflict" articulated in Article 2 of the Draft Articles as "a situation in which there is a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups".[36] The definition mimics the one coined by the International Criminal Tribunal for the Former Yugoslavia in *Tadić* decision, with the omission of violent situations between organized armed groups within a state.[37] The adopted definition of armed conflict raised concerns and sparked harsh criticism from the governments, some holding that non-international armed conflicts should be excluded from the scope of the Draft Articles,[38] or at least further research was needed on their effects on treaties,[39] while others advocating the definitions established in international humanitarian law sources, notably common Articles 2 and 3 of the 1949 Geneva Conventions.[40]

Articles 3–7 present the most important part of the Draft Articles. Article 3 codifies the underlying principle that armed conflict does not, *ipso facto*, terminate or suspend the operation of treaties. It favors legal stability and continuity, while still providing for a

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[31] Secretariat Memorandum, *supra* note 1, paras. 11–12; A Aust, Modern Treaty Law and Practice (2nd edn, CUP 2007) 309; M Prescott, 'How War Affects Treaties between Belligerents: A Case Study of the Gulf War' (1993) 7(1) Emory Intl L Rev 197.

[32] In the last meeting on this topic, government representatives agreed that the Draft Articles should not yet be elaborated into a binding convention. See General Assembly, Sixth Committee, Summary record of the 17th meeting Held at Headquarters, New York, on Friday, 20 October 2017. (A/C.6/72/SR.17).

[33] General Assembly Resolution 72/121 of 7 December 2017.

[34] ILC Draft Articles, Article 1.

[35] Commentary to Article 1, para. 2, p. 109

[36] ILC Draft Articles, Article 2.

[37] *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-T (2 October 1995) para. 70.

[38] General Assembly Sixth Committee Meeting 2017, supra note 32 (*e.g.,* comments from Russia, Sudan, Iran).

[39] *Ibid*. (*e.g.,* comments from Malaysia, South Africa).

[40] *Ibid*. (*e.g.,* comments from the US).

possibility for some treaties to be suspended or terminated. To determine whether a treaty survives armed conflict, one needs to consult Articles 4–7. The first step in the inquiry is determining the intent of the parties from the text of a treaty (Article 4) or, in the absence of an express treaty provision, determining the fate of a treaty by applying the rules of treaty interpretation (Article 5). If these steps, largely reflecting a subjective test, yield no conclusive answers, Article 6 provides further guidance by listing examples of relevant factors indicating whether a treaty is susceptible to survive or not in an armed conflict. They are split into two categories: the first group of factors pertain to the nature of a treaty (*e.g*., its subject matter, object and purpose, content), and the second to the characteristics of an armed conflict (*e.g*., territorial extent, scale and intensity, duration). Articles 6 reflects an objective test,[41] according to which a treaty or a treaty provision will be suspended or terminated if they are incompatible with a state of war. It further ties to Article 7, which refers to the indicative and non-exhaustive list of treaties (found in the Annex) the subject matter of which involves an indication that they continue in operation, in whole or in part, in time of armed conflict.[42] Many governments criticized the classification system based on Article 7 list as unnecessary, too broad, imprecise and inconsistent with state practice, and consequently, some states proposed its revision or even deletion from the Draft.[43]

Article 18 of the Draft Articles stipulates that the articles are "without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, inter alia… (b) supervening impossibility of performance; or (c) fundamental change of circumstances".[44] While this confirms that the grounds for termination or suspension of treaties under the VCLT doctrines can exist in parallel with the EACT doctrine, it also raises a question about the differences between these doctrines.[45] The overlap in the nature and rationale of the doctrines is in particular conspicuous with respect to a fundamental change of circumstance since at the root of a treaty termination or suspension is a distorted relationship and loss of mutual trust between states, which, in the case of the EACT, manifests in incompatibility with a state wartime policy.[46] In this sense, the EACT doctrine could be seen as a reflection of the fundamental change of circumstances, tailored to the extraordinary and specific circumstances of an armed conflict, which in turn also informs the differences between the doctrines.

Unlike the EACT, the VCLT doctrines are codified in a binding treaty that reflects customary international law. Since the question of armed conflict was deliberately left out of the VCLT codification process, the conditions for invoking these doctrines are rigorous, especially for the fundamental change of circumstances, which is defined by using negative and conditional

[41] See footnotes 27-28.
[42] ILC Draft Articles, Article 7.
[43] General Assembly Sixth Committee Meeting (2017), *supra* note 32 (*e.g.,* comments from Algeria, Sudan, Bangladesh, Iran).
[44] Draft Articles, Art 18.
[45] For an analysis, see Zrilič, *supra* note 9, p. 83.
[46] In case of supervening impossibility of performance, the difference with the EACT doctrine is easier to comprehend since the former concerns a state's practical inability to perform its obligations rather than policy considerations like the EACT.

wording, thereby indicating the drafters' preference for "the stability of treaty relations."[47] In contrast, conditions for invoking the EACT are more relaxed, only requiring meeting the "armed conflict" threshold and proving the intention of the parties or incompatibility of a treaty or a treaty provision with a state wartime policy. Moreover, while the VCLT doctrines fall within a clearly defined and extensive mandatory notification procedure,[48] the EACT could be potentially invoked without adhering to such strict notification requirements,[49] although to what extent the ILC has ensured that in the Draft Articles is debatable, and further discussed in the next section.[50]

The adoption of the ILC Draft Articles in 2011 has revived scholarly interest in the topic of effects of armed conflict on treaties,[51] however, invocations of the doctrine in practice since then have been rare or undocumented. This changed in 2020 when a tribunal in investment treaty arbitration *Guris v Syria* considered whether a war in Syria resulted in the suspension of a bilateral investment treaty between Turkey and Syria. The case is important because it is the first time that an international adjudicative body engaged with the ILC Draft Articles and, quite significantly, recognized them as an accurate reflection of customary international law.

Another security crisis that has possible implications for the EACT doctrine is the ongoing armed conflict between Russia and Ukraine. While there have been localized conflicts in this region since 2014 (notably in Crimea and Donbas), Russia's invasion of Ukraine in February 2022 has shocked the world due to its scale and intensity. In response, many countries have taken action affecting the operation of their treaties with Russia, although legal justifications for such actions remain largely unclear.

The next two sections will thus reflect on the recent developments in the field by first analyzing the arbitral award in *Guris v Syria* and the tribunal's treatment of the EACT doctrine; and second, by surveying the state practice following the war between Russia and Ukraine to determine if such practices reflect the EACT.

3. *Guris v Syria*: The effect of armed conflicts on investment treaties

Over the past ten years, international law has seen burgeoning literature analyzing the interplay of investment treaties and armed conflict.[52] This is not surprising as the conflicts in

[47] *Gabčíkovo, supra* note 7, para. 104.
[48] VCLT, Articles 65-67.
[49] The Secretariat Memorandum notes that "a strong argument can be made that the [EACT doctrine] is distinguishable on the basis that it occurs automatically, whereas doctrines such as *rebus sic stantibus* and impossibility must be invoked." Secretariat Memorandum, *supra* note 1, para. 162.
[50] See Section 3.1.
[51] See *e.g.,* Zrilič, *supra* note 9; Ostřanský, 'The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict' (2015) 6 JIDS 136; L Dudley, 'Until We Achieve Universal Peace: Implications of the International Law Commission's Draft Articles on the "Effects of Armed Conflict on Treaties"' (2016) 6(1) American University National Security Law Brief.
[52] See *e.g*., Zrilič, *supra* note 9; C Schreuer, 'The Protection of Investments in Armed Conflicts' in F Baetens (ed), Investment Law Within International Law: Integrationist Perspectives (CUP 2011) p. 3; G Hernández, 'The Interaction between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses' in F Baetens (ed), Investment Law Within International Law: Integrationist Perspectives (CUP 2013) p. 29; K. Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels' (2018) (31)(3) Leiden Journal of International Law 617.

the aftermath of Arab Spring in 2011 and Crimea in 2014 spawned a series of arbitration claims by foreign investors against host states for the alleged violation of investment treaties.[53]

Investment treaties are typically entered between two states each undertaking certain obligations of protection towards investors coming from the opposite state party (*e.g*., obligation of protection and security, obligation to not expropriate investment except under specific conditions and payment of compensation, obligation to not discriminate etc.). In addition, they often guarantee foreign investors a procedural right to bring an arbitration claim for damages against a host state without any requirement to exhaust local remedies first.

The starting point of analysis for many scholars who explored the application of investment treaties in armed conflict was the question of whether the treaties continue to operate upon the outbreak of armed conflict. While most have heeded closely the ILC work and answered in the affirmative,[54] it was not until 2020 that the question was also addressed by an arbitral tribunal in the *Guris v Syria* case.

In 2004, Turkish construction company Guris decided to invest in the Syrian cement sector by building two cement production factories. When in 2011 the political stability and security in Syria deteriorated, the investor ceased its commercial activities. As the armed conflict escalated, investor cement facilities were ravaged through theft, armed attacks and forcible seizures at the hands of Kurdish armed groups who took control over the area. The investor argued that the actions and omissions of armed groups were attributable to Syria and constituted the breach of the Turkey-Syria bilateral investment treaty ("BIT").

Syria rejected the investor's allegation, arguing, among others, that investor losses were caused by non-state armed groups whose actions were not attributable to the Government of Syria and in part of the territory outside of the Government's effective control. More importantly for the present discussion, the respondent argued that the tribunal lacked jurisdiction since the Turkey-Syria BIT was suspended without notice as a result of hostilities taking place in Syria as of April 2011.[55] The respondent argued that since BIT was suspended it could not give rise to obligations and treaty claims for the duration of armed conflict.

The tribunal was not persuaded by the respondent's argument. Relying on the ILC Draft Articles, it concluded that the armed conflict did not result in the suspension of the BIT. More specifically, it held that the BIT contains provisions that confirm parties' intention that the treaty "will continue to apply during times of armed conflict".[56] While the tribunal's

[53] See *e.g*., *Ampal v Arab Republic of Egypt*, ICSID Case no ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017); *Olin Holdings Limited v Libya*, ICC Case No 20355/MCP, Award (25 May 2018); *Strabag SE v Libya*, ICSID Case No ARB(AF)/15/1, Award (29 June 2020); *Cengiz Sanayi v Libya*, ICC Case No 21537/ZF/AYZ, Award (7 November 2018); *Oztas Construction v Libya*, ICC Case No 21603/ZF/AYZ, Award (14 June 2018); *Way2B ACE v Libya*, Award (24 May 2018) (not public); *Guris v Libya,* Partial Award (4 February 2020) (not public).
[54] See *e.g.,* Schreuer, *supra* note 52, p. 3; Hernández *supra* note 52, p. 29; T Cole, *The Structure of Investment Arbitration* (Routledge 2013) p. 79.
[55] *Guris*, *supra* note 5, para. 140.
[56] *Ibid*., para. 148.

consideration of the impact of armed conflict on treaties and engagement with the ILC Draft Articles is commendable, its analysis is not entirely satisfactory. In particular, four issues, discussed below, reflect the tribunal's lack of understanding of the current state of law or, at least, are open to criticism.

3.1 The requirement of the notification procedure

The tribunal started its analysis by relying on the general law of treaties as codified in the VCLT. While it acknowledged that one of the parties to a BIT, Turkey, is not a party to the VCLT, it established that relevant provisions of the VCLT reflect customary international law and are thus applicable in relations between Turkey and Syria.[57] The tribunal highlighted two such provisions, Article 65(1) and 67(1) of the VCLT, which spell out the notification procedure that must be followed for a treaty to be suspended. Since Syria did not notify Turkey in writing of its intention to suspend the treaty in line with these procedural provisions, the tribunal held the treaty could not be suspended.[58]

It is widely accepted that many provisions of the VCLT reflect customary international law, including substantive provisions potentially relevant for termination or suspension of treaties such as Article 61 and Article 62 of the VCLT.[59] It is less clear whether formal procedural requirements laid down in Article 65 of the VCLT form customary international law. According to the ECJ they do not. In the afore-mentioned *Racke* case, which concerned the European Economic Community's unilateral suspension of the Cooperation Agreement with the SFRY, the ECJ held that the war in 1991 constituted a fundamental change of circumstances as codified in Article 62 of the VCLT. The ECJ treated Article 62 as a reflection of customary international law but held that suspension of the Cooperation Agreement with no prior notification or waiting period, as required under Articles 65 and 67 of the VCLT, was permitted under customary international law.[60] Similarly, commentators argued that the obligation to notify of intention to suspend or terminate a treaty is not clearly established in customary international law, especially in times of armed conflict.[61]

The tribunal's reasoning is problematic also because it buttressed its conclusion with reference to the notification procedure in Article 9(1) of the ILC Draft Articles,[62] thus implying that a duty of notification reflects customary international law also with respect to suspension of treaties as an effect of armed conflicts specifically. This assumption is inaccurate as it is not supported by consistent state practice and *opinio juris*, as established in the comprehensive study conducted by the Secretariat.[63] In fact, in its Memorandum, the Secretariat concluded that the absence of an obligation to notify with respect to the EACT is potentially the most

[57] *Ibid*., para. 144.
[58] *Ibid*, para 143.
[59] See note 7.
[60] *Racke*, Judgment, *supra* note 16, para 58; *Racke*, AG Opinion, *supra* note 16, para. 98.
[61] Krieger, 'Article 73' in Dörr and Schmalenbach, *supra* note 9, p. 1359.
[62] *Guris*, *supra* note 5, footnote 102.
[63] Secretariat Memorandum, *supra* note 1, p. 77, para. 139.

important difference between the EACT and the VCLT grounds for suspending or terminating a treaty.[64]

The inclusion of the notification procedure in the ILC Draft Articles, modeled on Article 65 of the VCLT, must be thus seen as a reflection of the ILC's desire to progressively develop international law with a view to promote legal stability and continuity of treaty relations. In the process of drafting, such procedural requirement was seen by many as impractical and detached from the reality of armed conflict, and some state delegates proposed that the notification procedure be formulated in a sufficiently flexible manner and not be mandatory.[65] As the author argued elsewhere, these concerns were taken on board through flexible drafting of the Article 9(1) of the ILC Draft Articles, which, when compared to Article 65 of the VCLT, provides for a streamlined and simplified notification procedure that is instructive rather than mandatory.[66] In other words, states are strongly encouraged to notify of their intention to suspend or terminate a treaty, however, such effects can still take place when notification could not reasonably be made in light of armed conflict circumstances.

In sum, the absence of Syria's written notification to Turkey amidst armed conflict should not have automatically precluded invocation of grounds for suspending a treaty under customary international law or the ILC Draft Articles. Further inquiry would be necessary to establish whether a treaty was suspended.

3.2 Discerning the intent of the parties from a treaty

Although the tribunal held that the absence of notice was "dispositive of the Respondent's argument", it asserted that the same conclusion would have been reached even if the notification requirement had been met.[67] This conclusion was based on Article 3 of the ILC Draft Articles, which according to the tribunal reflected customary international law.[68] Article 3 lays down the general rule that "existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as between State Parties to the conflict". The tribunal correctly noted that the effect of Article 3 is that a further investigation is needed and that the first step in the inquiry, as per Article 4 or the ILC Draft Articles, should be to establish if "a treaty itself contains provisions on its operation in situations of armed conflict", in which case "those provisions shall apply".[69]

The tribunal found that several provisions of the BIT, in particular, the full protection and security standard in Article II(2) and an armed conflict clause in Article IV(3) indicated that the treaty was intended to continue to apply during armed conflict.[70]

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[64] *Ibid*., p. 71, para. 126.
[65] See the statements of the Netherlands in Official Records of the General Assembly, 'Summary Record of the 24th Meeting' 65th Session, 2010, UN Doc A/C.6/65/SR.23, para 43; Greece, *ibid*., UN Doc A/C.6/65/SR.24, para 40; Sri Lanka, *ibid*., UN Doc A/C.6/65/SR.26, para. 41.
[66] For more detailed analysis on the notification procedure, see Zrilič, *supra* note 9, pp. 85-86.
[67] *Guris*, *supra* note 5, para. 145.
[68] *Ibid*., para. 146.
[69] *Ibid*., para. 147.
[70] *Ibid*., para. 148.

The tribunal was somewhat hasty and imprecise in its analysis. To better understand parties' intention for investment treaties' operation in times of armed conflict, investment treaties can be divided into four categories:

The first category includes investment treaties which contain clauses that expressly prescribe their continued operation in times of armed conflict. For example, Article 11 of the Germany-Papua New Guinea BIT states that the treaty "shall remain in force also in the event of a conflict arising between the Contracting Party…".[71] Such clauses are very rare.

The second category includes investment treaties which contain so-called security exceptions, which permit states to take certain measures to protect their security interests, including in times of war and other conflict situations.[72] The effect of such exceptions is that the treaty provisions are suspended and thus give no rise to state responsibility for measures falling within the scope of an exception.[73]

The third category entails investment treaties that prescribe obligations specifically addressing measures taken in armed conflict. Thus, some investment treaties contain substantive provisions which prescribe obligations of protection that host states have in times of armed conflict. The most notable examples are so-called advanced armed conflict clauses (also known as "extended war clauses"), which can be found in around 30% of all investment treaties, and which stipulate a substantive obligation to pay compensation for investor losses caused through destruction or seizure by a state's armed forces during armed conflict.[74] In its basic, simple form, armed conflict clauses do not stipulate any substantive obligations but rather provide for a non-discriminatory treatment with respect to voluntary payments for losses related to armed conflict.[75] Some other substantive standards that do not refer to armed conflict expressly, such as full protection and security (FPS) provision, can be also presumed to apply in conflict situations, given their object, purpose and historical origin.[76]

The fourth category consists of treaties that do not contain any such provisions described above and from which no intention as to their application in armed conflict can be discerned. Such treaties are in minority.

Only investment treaties falling in the first two categories can be presumed to reflect the parties' intention as to the continued operation or suspension of an entire treaty in situations of armed conflict. The Syria-Turkey BIT does not contain any such general clause that would provide for continued operation or authorize its derogation in armed conflict, as recognized by the tribunal.[77] However, the Syria-Turkey BIT falls in the third category, based on the FPS standard and a basic armed conflict clause, highlighted by the tribunal. While these provisions are indeed intended to continue to apply in times of armed conflict, they are limited in scope and the type of measures to which they apply (*i.e.*, physical interference with investment,

[71] Germany-Papua New Guinea BIT (1980) Article 11.
[72] See *e.g.,* Energy Charter Treaty (1994) Article 24(3)(a)(ii).
[73] Zrilič, *supra* note 9, Chapter 5.
[74] *Ibid*., p. 64, p. 112.
[75] *Ibid*., Chapter 4, p. 109.
[76] *Ibid*., Chapter 4, p. 89.
[77] *Guris*, *supra* note 5, para. 148.

non-discrimination in payment of voluntary indemnities for war losses). It can thus not be inferred reasonably that the inclusion of such provisions in investment treaties implies that all other treaty provisions are also intended to apply in armed conflict. Indeed, the separation between provisions that are suspended and those that continue to apply is possible.

The ILC has recognized this by including in the ILC Draft Articles a principle of separability (Article 11), which permits termination or suspension of only some treaty provisions rather than a treaty in its entirety. Accordingly, an arbitral tribunal would need to assess "the nature and purpose of the specific articles involved" to ascertain whether invoked provisions continue to apply or not.[78] Since the principle of separability arguably reflects customary international law,[79] and has been endorsed in investment arbitration practice,[80] it is surprising that the *Guris* tribunal ignored it in its analysis of the ILC Draft Articles.

3.3 Factors indicating whether a treaty is susceptible to suspension

The tribunal further supported its conclusion by considering the factors relevant in ascertaining a treaty's susceptibility to apply in armed conflict, as enumerated in Article 6 of the Draft Articles. Rather than addressing all such factors, the tribunal cherry-picked one, namely, the subject matter of a treaty, and linked that to Article 7 and the related Annex to the Draft Articles which provides for an indicative list of treaties whose subject matter "involves an implication that they continue in operation, in whole or in part, during armed conflict".[81] The tribunal emphasized that this list includes "treaties of friendship, commerce and navigation [FCN treaties] and agreements concerning private rights" and that the ILC recognized that bilateral investment treaties fall within the scope of "agreements concerning private rights".

While it is true that investment treaties are covered by the Article 7 list, as the name suggests, the list is merely suggestive and does not reflect customary international law. The inclusion of "FCN treaties and analogous agreements concerning private rights" was subject to many objections by state delegates,[82] which is not surprising since the Secretariat in its Memorandum concluded that such treaties exhibited a varied and controversial likelihood of applying in times of conflict.[83] The ILC's inclusion of such treaties on the Article 7 list thus reflects the ILC's preference for promoting treaty stability. However, it comes with a caveat, underscored by both Special Rapporteurs, that treaties on the list may not survive in their

[78] *Techt v Hughes*, *supra* note 27, para. 244.
[79] *Ibid*.
[80] *Plama Consortium Ltd v Republic of Bulgaria,* ICSID Case no ARB/03/24, Decision on Jurisdiction (8 February 2005) para. 212.
[81] ILC Draft Articles, Article 7 and Annex.
[82] I Brownlie, 'Third Report on the Effects of Armed Conflicts on Treaties' ILC 59th Session, 2007, UN Doc A/CN.4/579/Corr.1, para. 34; L Caflisch, 'First Report on the Effects of Armed Conflicts on Treaties' in Yearbook of the International Law Commission, 2010, Vol II, UN Doc A/CN.4/SER.A/2010/Add.1 (Part 1), para. 231; General Assembly Sixth Committee Meeting, *supra* note 32, (comments from Malaysia) para. 40.
[83] Secretariat Memorandum, *supra* note 1, paras. 68-74.

entirety, and individual provisions may still be separated from the rest of a treaty and be suspended.[84]

Furthermore, the tribunal did not consider factors other than the subject matter that may indicate whether a treaty is susceptible to suspension. For example, Article 6 of the Draft Articles mentions the number of parties to a treaty as one such factor. Historically, armed conflicts have had a greater effect on bilateral treaties than multilateral treaties with parties that are not parties to a conflict.[85] More importantly, the tribunal completely ignored the factors pertaining to the characteristics of armed conflict "such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict also the degree of outside involvement".[86] The fact that the investment losses in *Guris* were incurred in the part of territory outside of Syria's control amidst prolonged and intense conflict, and Syria's argument that the conflict was internationalized through outside involvement of Turkey, suggest a greater possibility of the Syria-Turkey BIT being affected by the conflict.

3.4 The decision of the Eritrea-Ethiopia Claims Commission

Although there is no *stare decisis* rule in investment arbitration and tribunals do not have any obligation to follow decisions of other arbitral tribunals let alone adjudicative bodies outside international investment law, the *Guris* tribunal dedicated the entire section of the award to the decision of the Eritrea-Ethiopia Claims Commission ("EECC"). Arguably, this was because the EECC decision was relied upon by the respondent in support of its argument that the BIT was suspended. In the said decision, the EECC decided that a 1993 Protocol between Eritrea and Ethiopia under which Ethiopia was obliged to pay pensions to former Ethiopian state employees who had become Eritrean nationals and residents following Eritrea's independence, was suspended because of the armed conflict between Eritrea and Ethiopia.[87] The *Guris* tribunal dismissed the decision as irrelevant to the case due to differences in the facts and nature of the treaties in question.

The EECC based its conclusion on two considerations: first, the fact that "the intention to maintain a treaty in operation during hostilities [was] not plainly apparent from the text" of the 1993 Protocol;[88] and second, on belligerents' rights under customary international law prohibiting economic dealings and financial transactions with opposing powers. [89] In other words, the Commission held that it would be unreasonable to presume that Ethiopia would have "bound itself to make substantial cash payments to an opposing belligerent" or its nationals during the conflict. This rationale for suspending a treaty is in line with state practice and the doctrine according to which an armed conflict can affect the operation of a treaty if a treaty or its individual provisions are incompatible with a state's policy and security considerations during wartime.

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[84] ILC Draft Articles, Article 7 ILC Draft Articles; Brownlie, 'Third Report', *supra* note 82, para. 54; Caflisch, 'First Report', *supra* note 82, para. 232.
[85] ILC Draft Articles, Commentary to Article 6; Secretariat Memorandum, *supra* note 1, p. 82.
[86] Draft Articles, Article 6(b).
[87] *Guris*, *supra* note 5, para. 155; Pensions—Eritrea's Claims 15, 19 & 23, Final Award (2005) 26 RIAA 471.
[88] Eritrea's Claim, para. 29.
[89] *Ibid*., para. 23.

The *Guris* tribunal did not distill and consider this rationale in any way. This is surprising given Syria's assertion of Turkey's hostility, involvement in armed conflict and a deteriorated diplomatic relationship between the two countries. An analysis in line with the EACT doctrine as reflected in the EECC decision would require the tribunal to ascertain the nature of the relationship between the parties and consider if a BIT or its individual provisions (*e.g.*, provisions on payment of compensation and transfer of funds from Syria to Turkey) were compatible with Syria's policy during armed conflict.

In summary, the *Guris* decision demonstrates how the Draft Articles limit states' ability to suspend treaties as a consequence of an armed conflict. Although the Draft Articles provide for a possibility to suspend or terminate a treaty, the way in which they are drafted has created a field of uncertainty and ambiguity, enabling decision-makers to ignore or overlook this option in favor of treaty continuity. Before the adoption of the Articles, decision-makers engaging with the EACT doctrine, like the EECC and municipal courts, were not constrained by these prescriptions and had thus more leeway to accommodate realities of a conflict situation as reflected in state practice. *Guris* tribunal's restrictive application of the Draft Articles thus creates a dangerous *de facto* precedent, especially because it does not refer to the Articles merely as a guide but also as a reflection of customary international law.

4. The effect of the Russia-Ukraine war on treaties

The present section considers the effect of the war between Russia and Ukraine on treaties. Based on the intensity, scale and international character, the situation in Ukraine presents a type of armed conflict that in the past more likely affected the operation of treaties. While Russia invaded Ukrainian territory in Crimea already in 2014 and there has been an ongoing conflict between Ukrainian forces and Russia-backed separatists in the Donbas area since then, the conflict expanded significantly when Russia launched a full-scale invasion of Ukraine on 24 February 2022. While Russia referred to the invasion as a "special military operation"[90] this self-qualification has no legal consequences as there is no doubt that the situation on the ground meets the threshold of armed conflict under international law, as established in international humanitarian law sources as well as the definition espoused in the ILC Draft Articles.

There is also little doubt that the war has affected the operation and application of many treaties as this can be inferred from declarations to this end made by states. That in itself is not the only indicator of, nor a necessary requirement for the armed conflict to affect the operation of a treaty as often notifications of suspension or termination or not made immediately, as seen in the above-analyzed *Guris* case. The methodological challenges in studying the effect of armed conflict on treaties are further compounded by the fact many states often avoid explaining legal grounds for termination or suspension in their diplomatic correspondence or at least they do not expressly assert the EACT doctrine. Unless such actions and consequences thereof are challenged by the parties to a treaty or other affected actors in courts and tribunals, there are not many options to ascertain whether armed conflict has

[90] P Kirby, 'Why Has Russia Invaded Ukraine and What Does Putin Want?' BBC News (9 May 2022) <https://www.bbc.co.uk/news/world-europe-56720589> accessed 10 June 2022.

indeed resulted in suspension or termination of a treaty, and if so, what the legal basis for that was.

While the EACT doctrine has so far not been invoked by states in the context of the Russia-Ukraine war, this does not mean it will not be relied on in the future. Indeed, history has shown that significant time may pass (often several decades or in some cases more than a hundred years), before the issue reaches courts or states make official declarations.[91] It is thus important to take a closer look at some of the instances of treaty terminations and consider them through the lens of the EACT doctrine. This section presents examples of treaties that are most likely affected by the Russia-Ukraine war, based on the characteristic of treaties and declarations made by states available in the public domain. The examples are similar to analogous historical cases that have been mapped out in the reports of the ILC, Secretariat Memorandum and the early academic work on this topic. The structure of the section follows the ILC Draft Articles' recognition that armed conflict can affect both treaties between two states engaged in an armed conflict as well as treaties between a state engaged in an armed conflict and a third state that is not a party to that conflict.[92] Along these lines, the first part will examine treaties between Russia and Ukraine while the second part will focus on treaties between Russia and third countries.

4.1 The effect of the war on treaties between Russia and Ukraine

In situations when one state is a clear aggressor, violating Article 2(4) of the UN Charter, the ILC Draft Articles permit a state which is a victim of aggression and is exercising its right of self-defense to suspend in whole or in part a treaty incompatible with the exercise of that right.[93] Conversely, the ILC Draft Articles prohibit an aggressor state from benefiting from the possibility of terminating or suspending a treaty, as a consequence of the armed conflict that this state has provoked.[94] Accordingly, Ukraine would appear to have a wider leeway to suspend or terminate treaties than Russia.

In the absence of public reports about the performance of bilateral treaties between Russia and Ukraine, one can but speculate that at least those treaties which are inconsistent with the state of war could be suspended for the duration of hostilities unless treaties do not stipulate otherwise. For example, this would include extradition agreements since warring

[91] Secretariat Memorandum, *supra* note 1, para. 5. For example, it took the British Government almost 200 years to declare that the Nootka Sound Convention of 1790 had been terminated in 1795 as a result of war between Britain and Spain (reported in 54 British Yearbook of International Law (1983) 370). Another example concerns the British court's assessment of the effect of the World War II on the Convention on the Execution of Foreign Arbitral Awards of 1927 only when the issues was raised in 1977 in *Case No. I. Masinimport v. Scottish Mechanical Light Industries Ltd* (reported in 48 British Yearbook of International Law (1976-77) 333-35).

[92] ILC Draft Articles, Article 3.

[93] *Ibid*., Article 15.

[94] *Ibid*., Article 16.

parties tend to avoid unnecessary intercourse during conflict,[95] and border crossing treaties since their continued application could create a threat to security for the warring countries.[96]

Have any of the treaties been terminated as an effect of war? According to the Secretariat Memorandum, treaties that are inherently incompatible with armed conflict, such as treaties of alliance, exhibit a low likelihood of applicability in armed conflict.[97] Indeed, it is widely accepted in literature and municipal case law that so-called political treaties, a category that includes treaties of friendship and cooperation, neutrality, non-aggression and disarmament, are "generally considered to be terminated with commencement of war" since they "depend on the existence of normal political and social relations between States for their proper functioning".[98] The United States Supreme Court in *Karnuth vs United States* (1929) stated that "treaties of amity, of alliance, and the like, having a political character, the object of which 'is to promote relations of harmony between nation and nation', are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war".[99] This view is also accepted by the ILC as reflected in the Commentary to the Draft Articles.[100]

An example of such a treaty are the Minsk Agreements signed in 2014 and 2015 between Ukraine, Russia and the self-proclaimed republics of Donetsk and Lugansk represented by Russia-backed separatists.[101] Among others, these agreements included stipulations on a ceasefire, withdrawal of military troops, decentralization of Ukraine, acknowledgment of special status for the disputed territories by parliamentary resolution and organization of local elections, exchange of prisoners, and deliveries of humanitarian aid.[102] Implementing the agreements proved challenging from its start since both sides violated the ceasefire, and moreover, due to Russia insisting that it is not a party to the conflict and thus not bound by the terms of the agreement.[103] The final blow came a couple of days before the invasion, when Russia recognized the independence of Donetsk and Luhansk territories, with president Putin saying that the Minsk agreements did not exist anymore.[104] While Russia's withdrawal from the Minsk agreements preceded the outbreak of war, it could be argued that the agreements whose subject matter was non-aggression and disarmament would cease to exist

[95] Both Ukraine and Russia are parties to the European Convention on Extradition. It could be argued that the convention has been suspended between these countries upon the outbreak of war.
[96] In 2018, Ukraine prohibited the entry into the country for Russian men with an aim to prevent Russian land invasion by means of formation of "private armies" on Ukrainian soil. A Roth, 'Ukraine Bans Entry to Russian Men "To Prevent Armies Forming"' The Guardian (30 November 2018) <https://www.theguardian.com/world/2018/nov/30/ukraine-bans-russian-men-from-entering-the-country> accessed 10 June 2022. See also *Karnuth*, *supra* note 35.
[97] Secretariat Memorandum, *supra* note 1, p. 47.
[98] Delbrück, *supra* note 25, and other authorities cited in Secretariat Memorandum, *supra* note 1, ft 278.
[99] *Karnuth*, *supra* note 35, pp. 52−53.
[100] ILC Draft Articles with Commentary, p. 112.
[101] Minsk 1 agreement is signed by Ukraine and the separatist regions, while Minsk 2 agreements is signed by Ukraine, the separatist region, Russia and the Organisation for Security and Cooperation in Europe (OSCE).
[102] 'Key Things to Know about Minsk Agreements and Why Their Future Looks Bleak' TrtWorld (23 February 2022) <https://www.trtworld.com/europe/key-things-to-know-about-minsk-accords-and-why-their-future-looks-bleak-55028; https://www.rosalux.de/en/news/id/46007/the-minsk-agreement-is-history> accessed 10 June 2022.
[103] *Ibid*.
[104] *Ibid*.

or operate even in the absence of such a unilateral statement as an effect of armed conflict on 24 February 2022. Two issues remain open, however. The first concerns the question of whether the agreements have been terminated or merely suspended, with some diplomats (*e.g.*, the UN Secretary General) and heads of states seemingly advocating the latter.[105] The second issue concerns the principle embedded in the Draft Articles, according to which Russia, as an aggressor state, would not be able to terminate the agreements if the effect of such termination was to Russia's benefit.[106]

Another treaty of 'political' nature was a Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, which entered into force in 1999. The Treaty underscored the parties' obligation to respect each other's territorial integrity and inviolability of the borders between them.[107] Most of the treaty provisions were drafted in hortatory language and promoted cooperation in different fields, including military, economy and trade, transportation, and science and education, and provided for the protection of national minorities. Interestingly, Ukraine terminated the Treaty in 2018 on the basis of Article 40 of the treaty according to which ten years after entering into force, the Treaty could be renewed for a successive ten-year period unless neither party intended to terminate the treaty. Ukraine notified Russia about its intention not to renew the treaty and as a legal basis for termination cited Article 60 of the VCLT. Accordingly, Ukraine terminated the treaty because of Russia's military aggression which was against the object and purpose of the treaty and constituted a material breach.[108] For reasons explained above, Ukraine could have argued that the treaty was terminated already in 2014 as an effect of armed conflict in Crimea and Eastern Ukraine rather than waiting for almost five years to opt out of a treaty renewal.

A question more relevant in the context of the present conflict concerns the fate of the treaties entered into on the basis of the Treaty of Friendship, Cooperation and Partnership, in particular the Agreement on Cooperation in the Use of the Sea of Azov and the Kerch Strait ("Kerch Strait Treaty").[109] The Kerch Strait, which lies between the Crimean Peninsula and Taman Peninsula, connecting the Sea of Azov and the Black Sea. Since the annexation of Crimea in 2014, Russia has controlled both the eastern and western sides of the Kerch Strait and has repeatedly obstructed the free passage of commercial and non-commercial ships, including Ukrainian warships in 2018 which gave rise to a UNCLOS arbitration dispute.[110]

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[105] 'Minsk Agreements Have Been in Intensive Care' ReliefWeb (23 February 20222) <https://reliefweb.int/report/ukraine/minsk-accords-have-been-intensive-care-secretary-general-notes-general-assembly>; 'Ukraine Crisis: What Are the Minsk Agreements?' Independent (3 May 2022) <https://www.independent.co.uk/news/world/europe/ukraine-russia-minsk-agreement-putin-b2070394.html> both accessed 10 June 2022.

[106] ILC Draft Articles, Article 15.

[107] Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation (signed 31 May 1997, entered into force 1 April 1999) Article 2.

[108] Y Ioffe, 'Termination of the Treaty of Friendship between Russia and Ukraine – Too Little Too Late?' OpinioJuris Blog (1 May 2019) <http://opiniojuris.org/2019/05/01/termination-of-the-treaty-of-friendship-between-ukraine-and-russia-too-little-too-late-%EF%BB%BF/> accessed 10 June 2022.

[109] Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (adopted 24 December 2003, entered into force 5 May 2004).

[110] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Procedural Order No. 1, PCA Case No. 2019-28, Annex VII Arbitral Tribunal, of 22 November 2019.

The passage regime through Kerch Strait is regulated in the 2003 Kerch Treaty which stipulates that Ukrainian and Russian merchant ships and warships enjoy the freedom of navigation in the Kerch Strait and the Sea of Azov.[111] This freedom of navigation does not extend to warships and non-commercial ships of third countries which may pass through the Kerch Strait or enter the Sea of Azov only if they are visiting a port in Ukraine or Russia with the permission of both parties (Article 2(3) of Kerch Strait Treaty). For example, this means that NATO warships cannot enter the Sea of Azov unless Russia agrees to it. In the *Coastal State Rights Case*, Ukraine argued that the Kerch Strait is governed by the regime of transit passage under Article 37 of the United Nations Convention on the Law of the Sea (creating a liberal regime for passage of foreign military and merchant vessels) rather than a specialized and more restrictive permit-based passage regime which is based on the Kerch Strait Treaty stipulations that the Kerch Strait and the Sea of Azov are internal waters within Russia and Ukraine.[112] In light of Russia's control over the Kerch Strait territory, it appears it would be in Ukraine's interest if the Kerch Strait Treaty was annulled.[113]

While Ukraine did not terminate the Kerch Strait Treaty as an effect of the 2014 conflict (although there were discussions about this in the Ukrainian Parliament),[114] the question is if the ongoing armed conflict has affected its operation. First, the Treaty does not contain any provision on its application during the armed conflict from which the intent of the parties could be inferred.[115] Second, the ILC Draft Articles place treaties related to the international watercourse and navigational rights on the Article 7 indicative list of treaties that continue to apply in armed conflict. However, the commentary on the Draft Articles is more nuanced. It recognizes that a situation may be more complicated when parties to a treaty are belligerents and sometimes treaties may be suspended as reflected in state practice,[116] and summed up in the following quote by Fitzmaurice:

> … conventions providing for the free navigation of certain canals or waterways or for freedom and equality of commerce in colonial areas, will not be affected by the fact that a war has broken out involving all the parties. Their operation may be partially suspended but they continue in existence and their operation automatically revives [on] the restoration of peace.[117]

[111] Kerch Strait Treaty, Article 2(1).
[112] A Lott, 'The Passage Regime of the Kerch Strait: To Each Their Own?' (2021) Ocean Development & International Law, p. 52, 77.
[113] *Ibid*., p. 81.
[114] *Ibid*.
[115] For comparison, see Montreaux Convention (1936), governing the passage through Bosporus and Dardanelles Straits in Turkey, which contains such a provision. See 'The Montreux Convention and the Russia-Ukraine War' Politics Today (8 March 2022) <https://politicstoday.org/the-montreux-convention-and-the-russia-ukraine-war/> accessed 10 June 2022.
[116] See Secretariat Memorandum, *supra* note 1, p. 34; C Chinkin, 'Crisis and the Performance of International Agreements: The Outbreak of War in Perspective' (1981) 7 Yale J World Pub Ord 194, pp. 203-205.
[117] G G Fitzmaurice, 'The juridical clauses of the peace treaties' (1948) 73, Recueil des cours de l'Académie de droit international de La Haye, 316, cited in ILC Draft Articles with Commentary, p. 128.

This suggests that the Kerch Strait Treaty may not be terminated, however, to the extent it sets out internal waters regimes and regulates passage right in the Sea of Azov and the Kerch Strait it could be considered suspended for the duration of hostilities.

While it may be too early for Ukraine to announce the application of the EACT in the context of the ongoing war, one may but wonder why it did not invoke the doctrine in the aftermath of the Crimean war. One explanation can be found in political and strategic reasons, *i.e.*, Ukraine's intention to maintain relations with Russia and prevent further exacerbation of the conflict. Another explanation could be that Ukraine's officials were not aware of the possibility of invoking the EACT doctrine given the fledgling status of the ILC Draft Articles, or they were not persuaded by the viability of its successful invocation. The fact the EACT doctrine is not firmly established as a rule of positive law may have contributed to that.

4.2 The effect of the war on treaties between Russia and third countries

Many states have strongly condemned Russia's aggression against Ukraine and showed sympathy and support to Ukraine by supplying humanitarian aid and weapons, accepting refugees as well as passing sanctions against Russia and Russian individuals connected to the Russian government with an aim to compel Russia to withdraw its troops from Ukraine and stop the violations of international law. As part of this solidarity package, many states have suspended or terminated some of the treaties with Russia, including agreements on cultural, education and research exchange, agreements on the issuance of visas and agreements on the exchange of information.

Soon after Russian troops entered Ukraine's territory, many European countries decided to halt or ban cooperation agreements in the areas of research and education with Russia. Germany was the first EU country to announce such a blanket ban, followed by Denmark, Poland and the Netherlands.[118] For example, in response to the appeal of the Dutch Ministry of Education, Culture and Science, universities and other research institutions in the Netherlands suspended all partnerships with educational and knowledge institutions in Russia and its ally Belarus.[119] Following individual countries' responses, the same position was formalized at the European Union level. The European Commission decided to terminate the participation of Russia's public bodies in all ongoing grant agreements and suspend all related payments under research, science and education programs. Horizon 2020 (currently, 78 Russian organizations have active projects), Horizon Europe, Euratom and Erasmus+, as well pledged to not to enter in any new agreements with Russia's organizations.[120]

Furthermore, some countries have taken measures affecting other types of bilateral cooperation in culture and science. For example, Slovenia terminated the Agreement with

[118] 'EU Suspends Research Payments to Russian Partners' Science Business (2 March 2022) <https://sciencebusiness.net/news/eu-suspends-research-payments-russian-partners> accessed 10 June 2022.
[119] 'Russian and Belarusian Students and Staff at Erasmus University to Carry On Despite Blanket Ban on Cooperation' Science Business (8 March 2022) <https://sciencebusiness.net/network-updates/russian-and-belarusian-students-and-staff-erasmus-university-rotterdam-carry> accessed 10 June 2022.
[120] 'EU Stands with Ukraine' Erasmus+ (10 March 2022) <https://erasmus-plus.ec.europa.eu/news/eu-stands-with-ukraine> accessed 10 June 2022.

Russia on the Establishing and Operation of Centres for Science and Culture.[121] The Agreement provided a legal framework for the work of the Russian Centre for Science and Culture in Slovenia, the activities of which included organizing exhibitions, running Russian language courses and a library with Russian books. Another example is the partial suspension of bilateral agreements for cultural exchange between Japan's local governments and Russian cities (*e.g.,* Tokyo and Moscow, and Hiroshima and Volgograd).[122]

Agreements regulating crossing borders have also been subjected to partial suspension. For example, many European states, like Spain, Malta, Portugal, the United Kingdom (UK) and Greece, have decided to suspend golden visa programs (*i.e.*, program which offers residency to a visa holder in exchange for the investment made) for Russian citizens.[123] Moreover, the EU has partially suspended Visa Facilitation Agreement with Russia, depriving Russian officials and businessmen of privileged access to the EU.[124] Similar decisions were made by Denmark, Iceland, Liechtenstein, Norway and Switzerland in relation to their bilateral agreements with Russia. In response, Russia passed a decree on retaliatory visa measures, according to which some provisions of the visa facilitation agreements with the said countries were suspended, preventing certain categories of citizens of these countries from accessing a simplified procedure for obtaining visas and visa-free travel to Russia.[125] Moreover, in response to Japan's stance over the war in Ukraine, Russia also withdrew from negotiating a formal World War II Peace Treaty with Japan, which would settle the competing claims over territorial rights to four Kuril Islands, which have been under Russian administration since the end of World War II. Russia decided to end a visa-free regime for Japanese nationals to visit disputed Kuril Islands,[126] while Japan decided to suspend the exchange visa-free program for the fiscal year 2022.[127]

The UK has also suspended the exchange of tax information with Russia under the Convention on Mutual Administrative Assistance in Tax Measures and Belarus under bilateral Double Tax

[121] 'They Are Cancelling the Russian Centre, and Expelling the Director' (translated from Slovenian) N1 SLO (31 March 2022) <https://n1info.si/novice/slovenija/ukinjajo-ruski-dom-v-ljubljani-vodja-bo-moral-zapustiti-slovenijo/ accessed 10 June 2022.

[122] 'Tokyo, Hiroshima Suspend Russian Sister-City Exchanges Over Ukraine Invasion' Stars and Stripes (31 March 2022) <https://www.stripes.com/theaters/asia_pacific/2022-03-21/tokyo-hiroshima-japan-suspend-sister-city-exchanges-russia-ukraine-5420054.html> accessed 10 June 2022.

[123] 'Spain Suspends Golden Visa Program for Russian Citizens' Schengen Visa News (21 March 2022) <https://www.schengenvisainfo.com/news/spain-suspends-golden-visa-program-for-russian-citizens/> accessed 10 June 2022.

[124] Council Decision (EU) 2022/333 of 25 February 2022 on the partial suspension of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2022:054:FULL> accessed 10 June 2022.

[125] Decree on Retaliatory Visa Measures in Connection to Unfriendly Measures of Foreign States' (4 April 2022) <http://kremlin.ru/acts/news/68137> accessed 10 June 2022.

[126] 'Russia Breaks Off WWII Peace Talks Over Japan's Stance on Ukraine Invasion' Radio Free Europe (21 March 2022) <https://www.rferl.org/a/russia-japan-peace-treaty-ukraine-invasion/31763675.html> accessed 10 June 2022.

[127] 'Japan Suspends Visit to Russian-Held Isles' Japan News (27 April 2022) <https://www.nationthailand.com/international/40014959> accessed 10 June 2022.

Agreements.[128] While the exchange of tax information aims to address tax compliance risks, the suspension of the agreements aims to ensure that the UK is not supplying Russia with information that could increase tax benefits for Russia.[129] The rationale behind all these treaty suspensions and terminations is clear as they are often presented as part of sanctions ramping up economic pressure on Russia and crippling its ability to finance its invasion of Ukraine.[130] The question is whether these measures are justified under international law, and if so, on what legal basis. Some of the treaties already include provisions accommodating suspension or modification of performance in extraordinary circumstances. For example, the European Commission justified halting payments to Russia and other adjustments under Erasmus exchange agreements by referring to *force majeure* clauses included therein.

Given the internationally coordinated and collective nature of these measures, could they be justified under Chapter VII of the UN Charter? Had these measures been taken pursuant to the Security Council decision under Chapter VII, Article 103 of the UN Charter would ensure that in conflict between the obligations under the Charter and obligations under the international agreements, the former would prevail.[131] The ILC Draft Articles recognize this in Article 16 which preserves the legal effect of decisions of the Security Council under the UN Charter.[132] Sanctions against Russia, however, were not mandated by the Security Council, unsurprising given that Russia has a permanent seat in the Council.

Given their expressly stated rationale, the measures could be further justified as countermeasures in response to Russia's violation of international law. Countermeasures are one of the circumstances precluding wrongfulness codified in Chapter V of the Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA")[133] These circumstances present a general defense in the law of state responsibility and as such do not suspend or terminate a treaty or treaty obligation, but rather provide for justification or excuse for its non-performance.[134] It is unclear whether the successful invocation of the circumstances also precludes the obligation to pay compensation,[135] which renders this defense somewhat less appealing than defense mechanisms available in the law of treaties. This could perhaps explain why in the above-discussed *Guris* case, Syria initially tried to defend the suspension of the BIT as a countermeasure against Turkey's violation of international law, but then dropped this line of defense and replaced it with the law of treaties doctrine.[136] Furthermore, the question of whether non-injured states can take so-called solidarity countermeasures

[128] 'UK Suspends Tax Cooperation with Russia' UK Government (17 March 2022) <https://www.gov.uk/government/news/uk-suspends-tax-co-operation-with-russia> accessed 10 June 2022.
[129] *Ibid.*
[130] See *e.g.,* 'Ukraine: EU Agrees Fifth Package of Restrictive Measures Against Russia' European Commission Press Release (8 April 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2332> accessed 10 June 2022.
[131] Secretariat Memorandum, *supra* note 1, 79.
[132] ILC Draft Articles, Article 16, and Commentary, p. 118.
[133] ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' UN GAOR, 56th Sess, Supp 10, Ch. 4, (2001) UN Doc A/56/10.
[134] Secretariat Memorandum, *supra* note 1, footnote 452.
[135] ARSIWA, Article 27; *Gabčíkovo, supra* note 7, p. 39, para. 48.
[136] *Guris*, *supra* note 5, para. 160.

against a state whose violation of international norms does not directly affect them, is contested in international law.[137]

Finally, could the third states' measures affecting treaties with Russia be justified under the EACT doctrine? In practice, there have been many examples of states, not being a party to an armed conflict, suspending treaties with a belligerent force as a means of support for the victimized state or retaliation against states that are on the "wrong side" of a conflict.[138] Chinkin expressed her skepticism about the legality of such treaty suspensions in the following words: "[i]t is doubtful whether support for an external crisis can justify suspending treaty rights. Such action is not specific to the conduct of the conflict and therefore seems unnecessary".[139] This view echoes a restrictive approach followed by the Permanent Court of International Justice in the *S.S. Wimbledon Case*.[140] In that case, Germany, a neutral state, refused passage through the Kiel Canal to a ship supplying weapons to Poland during the Polish-Russian War of 1920, although the Treaty of Versailles guaranteed free passage for all vessels of all nations at peace with Germany.[141] The Court, however, suggested that Germany would be able to suspend the specific treaty provision, had the conflict threatened its own security. The sentiment was expressed in the dissenting opinion of Judges Anzilotti and Huber as follows:

> In this respect, it must be remembered that international conventions […] are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purpose of national defence, it is entitled to do so even if no express reservations are made in the convention […] The right of a State to adopt the course it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it ... [142]

The above-mentioned suspension of the Load Lime Convention in 1941 followed a similar constellation of actors but a much more severe and wide-scale armed conflict.[143] America suspended the Convention before it became a party in World War II in order to help Great Britain fight off Nazi Germany. However, the rationale behind the suspension was not only the support for Britain but, indirectly, also the protection of America's own safety which would have been threatened had Britain been defeated against a force that had already taken

[137] ILC Commentary to ARSIWA, p. 139.
[138] See Chinkin, *supra* note 116, p. 196.
[139] *Ibid*., 197.
[140] *The S.S. Wimbledon* [1923] P.C.I.J. ser. A, No. I.
[141] Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43, 225 Parry's T.S. 188, Articles 380-86 (Kiel Canal).
[142] S.S. Wimbledon, *supra* note 140, pp. 36-37.
[143] While in that case, the US justified suspension under the fundamental change of circumstances doctrine, that was heavily criticized in scholarship. See, e.g., H W Briggs, 'The Attorney General Invokes Rebus Sic Stantibus' (1942) 36 AJIL 89; Chinkin, *supra* note 116, p. 189. Judging against the subsequent codification of the law of treaties, it is unlikely that the strict conditions of Article 62 VCLT would have been met, and the EACT doctrine could have presented a more appropriate legal alternative.

control of most of Europe. In other words, the continued operation of the Convention was inconsistent with the US security policy with the war being a tangible threat that has not yet materialized for the US at the time of suspension.

In the examples listed in this section, third countries could similarly argue they suspended or terminated treaties with Russia because their continued application was inconsistent with their own national policy and the safety of their nations during an armed conflict between Ukraine and Russia.[144] More specifically, they could argue, and indeed they have,[145] that Russia's invasion of Ukraine does not only threaten the survival of Ukraine but presents a threat to the security of the whole of Europe and the international order. While this rationale could fall within the "compatibility" parameters of the EACT doctrine, whether suspension or termination of treaties was justified would depend on a contextual analysis informed by the ILC Draft Articles. A decision-maker would thus need to consider provisions and the nature of affected treaties and characteristics of the armed conflict, the number of states engaging in such measures affecting the operation of treaties with Russia, as well as evaluate whether individual treaties or treaty provisions that were suspended or terminated were indeed incompatible with the states' policy and safety during the war.[146]

5. Conclusion

This article has set out to re-evaluate the doctrine on the effects of armed conflicts on treaties as reflected in the ILC Draft Articles and their actual or potential application to wars in Syria and Ukraine. The ILC's attempt to balance legal certainty and the distorted trust between parties resulted in a framework that inherently prioritizes the former. While in the process of drafting the Articles, the Special Rapporteurs emphasized the importance of stability for treaty relations, they also reassured governments that the framework will be more flexible and accommodating than the VCLT. To what extent this has been achieved in the Draft Articles is debatable, though.

In particular, the problem arises when parts of the Draft Articles reflecting the progressive development of international law with a view to foster legal certainty (*e.g.,* the indicative list of treaties in the Annex, the notification procedure) overshadow and trump parts of the Draft Articles that accommodate nuance and are more reflective of state practice (*e.g.*, a contextual analysis and "incompatibility" test, the principle of separability). It has been shown how this approach was followed in the *Guris v Syria* case, in which the arbitral tribunal ignored the aspects of the Draft Articles that are accommodating of realities of armed conflict and have been endorsed in earlier international and municipal case law.

It has been argued that the corollary of such application and interpretation of the ILC Draft Articles which solely focuses on upholding stability in treaty relations is that the Articles will

[144]The fact that the countries suspending the treaties are not directly involved in armed conflict, could present a challenge in passing the "incompatibility" threshold.

[145] 'Barbaric War on Ukraine: EU's Van Der Leyen Denounces Russia' Al Jazeera (12 May 2022) https://www.aljazeera.com/news/2022/5/12/russia-most-direct-threat-to-world-order-eus-von-der-leyen accessed 10 June 2022.

[146] Chinkin speaks of proportionality and reasonableness of measures, however, it is unclear what is the exact nexus that would apply in the context of the EACT. Chinkin, *supra* note 116, p. 204.

become indistinguishable from the VCLT and thus made redundant. While this outcome is good for legal certainty, it also defeats the rationale behind regulating the EACT in a separate document, which was based on a premise that an armed conflict is a complex supervening situation warranting a more flexible treatment than that provided for in the VCLT.

In its last resolution on this subject, the General Assembly urged states to engage with Draft Articles whenever appropriate.[147] The war in Ukraine, in its intensity, magnitude and other characteristics, resembles the kind of conflicts in which the EACT doctrine was invoked in the past, and as argued here, some publicly documented treaty suspensions and terminations could be potentially justified under it. It remains to be seen, however, if references to the Draft Articles will become more common and what interpretive direction they will take in the future. Going forward, it would be advisable to set up a working group that would review modern state practice and revise the Draft Articles with an aim to resolve the contested issues, some of which have been discussed in this contribution.

[147] General Assembly Resolution 72/121 of 7 December 2017.