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The dichotomy of the laws of war and peace through the lens of the law of treaties

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Anikó Szalai[1]: The dichotomy of the laws of war and peace through the lens of the law of treaties[2]

Abstract

Relationship between the members of the international community and the law governing their affairs had been defined for centuries by whether they were in a state of war or in peace with each other. Differing and more abundant law pertained to the peaceful periods, which has been terminated or modified by the start of the state of war. Such sharp division between the state of peace and war is not apparent in the modern system of international law created in 1945. In practice we see that states do not always abide by international law and they can get "entangled" in many different kinds of armed conflict. In the time of armed conflict it is not only the law of armed conflicts that is applicable for them, but a wide array of treaty obligations. It is a clear aim by the beginning of the 21st century that armed conflicts shall have the least possible effect on the globalized relations of the international community. Nevertheless, when a state is involved in an armed conflict, the performance of certain international obligations would fully be incompatible with its national security- and war-interests. Furthermore, it can also be imagined that even if it would like to perform the formerly undertaken obligations, it cannot do so owing to the war situation. The sharp separation, dichotomy of the law of peace and war cannot be maintained in the 21st century.

Does the dichotomy of the law of war and peace still exist?[3]

Relationship between the members of the international community and the law governing their affairs had been defined for centuries by whether they were in a state of war or in peace with each other. Differing and more abundant law pertained to the peaceful periods, which has been terminated or modified by the start of the state of war. For a while the only consequence of the commencement of the state of war was that all international obligation had been terminated between the warring states. During the Middle Ages extensive customary international law developed for the regulation of war, Grotius has already claimed that war is not a state fully without or outside of the law.[4] His opinion was shaped by the Thirty Years War, ongoing in 1625 when writing his major work. He stated about the above-mentioned conflict that states do not respect any human or divine law.[5]

Thus the state of war resulted in clear international legal consequences, which had typically meant the following: 1) interruption of diplomatic and other relations, 2) termination,

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[3] This article is the translation of a chapter previously published in Hungarian: Hová lett a háború és béke jogának dichotómiája? In: Csapó, Zsuzsanna (szerk.) Emlékkötet Herczegh Géza születésének 85. évfordulójára: A ius in bello fejlődése és mai problémái; Pécs, Magyarország: Pécsi Tudományegyetem, Állam- és Jogtudományi Kar, (2013) pp. 253-268.

[4] Grotius, Hugo: *A háború és a béke jogáról*. (Szerk.: Hajdu Gyula) Akadémiai Kiadó, Budapest, 1960. Introduction, para. 25-28. [On the Law of War and Peace]

[5] Ibid. Introduction, para. 28.

denunciation or suspension of bilateral treaties, 3) application of the laws of war and international humanitarian law. Thus war is not a phenomenon outside law, because rules pertain to it, but these rules are different from the ones applicable during the time of peace. These norms can completely be differentiated from the ones relevant at peacetime.

According to the general notion with the beginning of the state of war international treaties became terminated between the belligerents. The explanation to this was that states undertook international obligations only in order to profit from them, and this can change in the meantime. Thus when a war breaks out, no state can respect others' interests because by this it would harm itself.[6] Natural law had brought some changes in this thinking, at least at a theoretical level.

Nevertheless the system of norms with respect to the two states was sharply distinguishable, and several hundreds of years of bloody wars were needed in order for the states to accept written international norms for the state of war. Following the social and economic development in the 1800s, states entered into increasing numbers of treaties, and some contained rules for their continuing force even in the event of hostilities. Typical examples of this are lending agreements. It was characteristic in this period that states only accepted to keep during (e.g.: law of war) or after the time of war (e.g.: payment of the money borrowed prior to the war) such obligations which had been undertaken *expressis verbis* in the time of peace.

Such sharp division between the state of peace and war is not apparent in the modern system of international law created in 1945. Theoretically in accordance with positive law armed conflict can only take place if authorized by the UN Security Council for the protection of peace, application of or threatening with armed force is prohibited in other cases. Naturally, states are entitled to self-defence, but only if they have been attacked - so an internationally wrongful act has happened.

In practice we see that states do not always abide by international law and they can get "entangled" in many different kinds of armed conflict. In the time of armed conflict it is not only the law of armed conflicts that is applicable for them, but a wide array of treaty obligations. Armed conflicts do not terminate obligations existing under the UN Charter and basic human rights conventions, and also membership in international organizations generally remains existing. Although several multilateral treaties contain "without-prejudice" clauses, namely such provision which expresses that the concerned convention is without prejudice to the law applicable in the case of aggression, hostilities or armed conflict, this does not mean that the necessary and compatible provisions of the concerned agreement could not be applied. For example, if the Security Council orders the interruption of the diplomatic relations with a government, this does not necessarily mean that the inviolability of the diplomatic buildings, which is guaranteed by the 1961 Vienna Convention and customary international law, wouldn't be applicable.

It is a clear aim by the beginning of the 21st century that armed conflicts shall have the least possible effect on the globalized relations of the international community. Nevertheless, when a state is involved in an armed conflict, the performance of certain international obligations would fully be incompatible with its national security- and war-interests. Furthermore, it can also be imagined that even if it would like to perform the formerly undertaken obligations, it cannot do so owing to the war situation. Thus when searching for the answer to what legal norms shall be observed by the state during an armed conflict, all the above-mentioned features shall be taken into account.

[6] Ibid. Introduction, para. 5.

1. The development of the law of war and peace in legal theory

For centuries the legal consequences of the start of a state of war had been so clear – for example that all bilateral treaties became terminated – that legal theory had not dealt with the issue above the level of declaration. This changed in the late Middle Ages, and by the 19th century a list of theories had been established. The exciting question is not whether diplomatic relations are terminated or not,[7] or whether the rules created specifically for the time of the armed conflict shall be applied or not (especially the *jus in bello*), but the fate of the rest of the treaties.

When examining the effect of armed conflicts on international treaties it has a determining significance what relation exists generally between law and war. With respect to the relationship between war and international legal order two, fully opposing approaches can be our starting point. On the one hand we can consider war as a fact, meaning the intentional use of force by states, which is outside of the sphere of law. On the other hand war can also be regarded as such a fact, which has a legal effect, which is a way of settlement of disputes and can be legally defined.[8]

1.1. Time of peace = law; war = lack of law

The first notion regarding war as a phenomenon or a fact outside of law became widespread in the legal thinking of natural law. Its representatives stated that war abrogated the operation of law (in an objective way). That is, it generally terminates all legal relationship between the concerned states, in Latin expression *inter arma silent leges*. The expression that law is silent among arms probably originates from Cicero, who used it in his speech titled Pro Milone.[9] Opposing to this generally accepted view, according to Hugo Grotius war does not end all legal bonds, thus it cannot be considered to be a phenomenon outside of law. In Grotius' opinion it used to be a widespread notion in the ancient times that disputes between the people or kings is decided by Mars. And it's not only the masses who thought that war had nothing to do with the law, but even wise men strengthened this idea. Nothing was more general, than the expression that law is not compatible with arms.[10] Subsequently Grotius discusses in detail his disagreement with this idea. He acknowledges that written law, i.e. the civil law of the concerned state is abrogated, but in his opinion principles and laws dictated by nature, as well as rules accepted by the international community remain valid.[11]

According to the opinion of those supporting the principle of termination the state of war between two countries is such a serious situation that respect for obligations arising from a treaty shall not be expected from any of them. This had been the leading principle of international relations from ancient times for centuries and it had an important part in the clear division between the time of peace and war. States accepted international agreements only

[7] This typically still occurs today, often prior to the start of the actual hostilities, though by the end of the 20th century we have seen examples of the opposite as well: Eritrea and Ethiopia expressly wished to maintain their diplomatic relations during the 1998-2000 armed conflict. See: *Diplomatic Claim, Eritrea's Claim 20* (Eritrea v. Ethiopia), Eritrea Ethiopia Claims Commission, Partial Award of 19 December 2005.; *Diplomatic Claim, Ethiopia's Claim 8* (Ethiopia v. Eritrea), Eritrea Ethiopia Claims Commission, Partial Award of 19 December 2005.

[8] Delbrück, Jost: *War, Effect on Treaties*. In: Bernhardt, Rudolf (ed.): Encyclopedia of Public International Law, vol. IV, North-Holland 2000. p. 1368.

[9] See: Wright, Quincy: *A Study of War*. Chicago, The University of Chicago Press 1942. p. 209.; Fitzmaurice, Gerald: *Inter Arma Silent Leges*. Sydney Law Review, No. 1. 1953–55. pp. 332–343.

[10] In order to prove this, Grotius cites Ennius, Horatio, Lucanus and Pompeius. See: Grotius, Hugo: op. cit. Introduction, para. 3-5.

[11] Grotius, Hugo: op. cit. Introduction, para. 25-28.

because it was in their interest, thus if an armed conflict occurs between them, this interest clearly has changed or evaporated. Thus rules established for the time of peace were terminated at the time of war. This phenomenon remained unchanged even by the existence of the difference between just and unjust war, which was in close connection with religion and the belief that war is governed by gods (e.g.: Jupiter or Mars) or God. Around this era in international relations war was a typical means of acquiring territory, subjugate and dominate peoples, thus maintaining former treaty relations among the parties to it was not a possibility.

The appearance of natural law in the Middle Ages represents the first cracks in this system, several jurists and philosophers declared that certain principles and rules shall be respected in all circumstances, because those are stemming from Nature and valid for all peoples in the same way.[12]

1.2. War is a phenomenon regulated by law

By the end of the late Middle Ages norms relating to warring had started to form in customary international law.[13] Thanks to the ideals of Enlightenment, technical development and the significant changes in warfare the need for codification and development of the laws of war has surfaced by the middle of the 1800s. The first result of this is the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, and the 1868 Saint Petersburg Declaration. The circle of written norms were enriched by further agreements around the turn of the 19-20th century: the 1899 and 1907 Hague Conventions and the 1906 Geneva Convention (which was the improved version of the one adopted in 1864). Thus the nature of the previously existing dichotomy had changed, clear international law was adopted for the time of the armed conflict (instead of the "lack of law"). But this had only pertained to the application of *jus in bello*,[14] and did not influence the scope of the rest of the treaties.

1.3. Treaties other than the *jus in bello* remain in effect

Compared to the above-mentioned opinion (in point 1.1.) that war generally terminates international treaties, an opposite notion had entered the scientific field between the two world wars. According to this theory *ipso facto* termination is an exception, and the general rule is that validity and force of the treaties is not influenced by an international armed conflict.[15] This theory was also represented by the draft convention of the law of treaties prepared in 1935 by Harvard University.[16] In this study the only exception was when the treaty was fully

[12] See e.g.: Grotius, Hugo: op. cit. Introduction, para. 26, 28.; Elbe, Joachim von: *The Evolution of the Concept of the Just War in International Law.* American Journal of International Law, 1939, vol. 33. No. 4. pp. 665–688.; Delbrück, Jost: op. cit. p. 1368.

[13] Naturally, traces and the foundation of this legal field can be found in Ancient law. See e.g.: Nagy, Károly: *A nemzetközi jog, valamint Magyarország külkapcsolatainak története*. Lakitelek, Antológia Kiadó 1995. [The history of international law and of the foreign relations of Hungary]; Ádány Tamás – Bartha Orsolya – Törő Csaba (szerk.): *A fegyveres összeütközések joga*. Budapest, Zrínyi Kiadó 2009. [The law of armed conflicts]

[14] As exceptional examples, some treaties, not from the field of the laws of war, already appear in this time period, which expressly deal with the event of war (regulate their application or the suspension of their application, clarifying that the treaty does not terminate owing to the state of war). E.g.: the Spanish government declared in 1898, that the state of war between Spain and the United States of America terminated all their bilateral treaties. This statement received many criticism, among others the United States sent a diplomatic note that it does not accept the full termination, since there is a treaty between the two states, concluded in 1834, which obliges Spain to annually pay a certain amount of money to the US. Not even the state of war can exempt Spain from the performance of this, so at the end of 1899 the Spanish government paid its arrears, regarding it as 'a case of Christian honour'. Moore, J. B.: *The Effect of War on Public Debts and on Treaties – the Case of the Spanish Indemnity*. Columbia Law Review, 1901, vol. 1/4.

[15] Delbrück, Jost: op. cit. p. 1369.

[16] *Harvard Research in International Law, Law of Treaties*. American Journal of International Law, 1935, vol. 29, Supplement Part III.

incompatible with the state of war between the parties, for example in the case of treaties of friendship or military alliance. Thus in such situation the aim of the treaty is expressly opposite to the state of war.[17] This view had been strengthened by the appearance of the restriction of the right to the use of force, the codification of which in the Covenant of the League of Nations[18] and in other international agreements[19] had resulted in the forming of the question, whether a lawfully created treaty can be terminated as a consequence of an unlawful event.[20]

Nevertheless in practice approximation of war and law commenced only at the middle of the 1800s, and the principle of total termination and the notion that war is a phenomenon outside of law had become outdated only after the changes in the 20th century. Factors leading to this:

a) Development of human rights and humanitarian law had reached a level, which required that their basic rules shall be respected at the time of war or state of emergency.

b) The prohibition of the use of force had been introduced to the international legal system, which allows the use of force only in exceptional cases. War aiming at acquiring territory is expressly forbidden, basis of the present international legal order is the preservation of *status quo*.

c) The UN Charter is applicable at all times, its provisions oblige states even during an armed conflict. Furthermore, legal application of the use of force can only be permitted by the United Nations, thus it is not a simple inter-state issue, but one which concerns the whole international community.

d) Globalized economic and trade relations developed with widespread multilateral treaty relations, and generally staying out of them is probably not in the interest of a state even at the time of armed conflict. Re-regulation of these relations after the conflict might be very time-consuming and complex.

e) The characteristics of armed conflicts have also changed, today non-international conflicts or non-international ones with an international character are typical, and not wars in the classical meaning.

2. 21st century - does the dichotomy still exist?

Owing to the significant changes in international relations and in the total international legal order it is highly questionable by now that the dual nature or separability of the law of peace and war still exists. In order to answer this question it is worth analyzing the effect of the factors mentioned in the previous point.

2.1. Development of international humanitarian law and human rights

The commencement of humanitarian law has already been described in Point 1.2., which has been followed by a wide array of legislation in the 20th century. Dynamic development of the field has been reached by the creation of the system of the further Geneva Conventions (1929, 1949, 1977), agreements prohibiting certain types of weapons and the establishment of international criminal responsibility.

Naturally, these all relate to the norms of armed conflict, thus their application cannot be questioned. Contrary to that, the scope of human rights is still not an unequivocally clarified issue. It is evident that certain rights, namely the non-derogable rights are obligatory for the

[17] Delbrück, Jost: op. cit. p. 1369.

[18] Art. 10. Hague I - Pacific Settlement of International Disputes, 18 October 1907.

[19] Drago–Porter Agreement, 1907, the Hague; Kellog–Briand Pact, 1928, Paris.

[20] Effects of Armed Conflicts on Treaties. *Report of the International Law Commission on the Work of its Fifty-seventh Session*, A/60/10 2005. Chapter V. para. 149.

state at all times, not only at the time of peace. While Article 4 of the International Covenant on Civil and Political Rights (ICCPR)[21] allows derogation from certain rights "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", the later created human rights conventions do not regulate such a possibility. No similar derogation clause can be found in the 1965 Convention on the Elimination of All Racial Discrimination, in the 1979 Convention on the Elimination of all Forms of Discrimination against Women or in the 1989 Convention on the Rights of the Child. Furthermore, the 1984 Convention Against Torture declares in Article 2 that, "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[22] Even in the case of an armed conflict derogation can be accepted only if the existence of the nation is in danger.[23]

For this reason, it is visible that legal interpretation progresses toward a wider, and not narrower interpretation, in order to secure the basic requirement of the protection of humanity at all times, regardless of peace, war or in a situation in between these two. This has been underlined by several international judgments. For example the International Court of Justice stated in the *Armed Activities on the Territory of the Congo* case, that the human rights conventions signed by both Rwanda and the Democratic Republic of Congo are in effect since they entered into force, thus it can be concluded that the armed activities and conflicts on the territory of these states have not influenced the effect of the treaties and the joining reservations. The Court declared this not only with respect to the most basic, non-derogable rules, but to the whole of the agreement.[24] Standards defined by international criminal law and the minimum level of protection provided by international humanitarian law represent barriers to the derogation. The International Court of Justice added in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that in the case of derogable human rights the possible extent of the derogation can be defined with the assistance of the applicable *lex specialis*, namely based on the law applicable in armed conflicts.[25]

2.2. The prohibition of the use of force

The use of armed force had been the sovereign right of every state until the beginning of the 20th century, thus the effect of the armed conflict was not linked to its legality. It was accepted that all bilateral relationship is terminated by the conflict, and the legislation subsequent to the armed conflict is typically not for the restoration of the previous relations but to create a new 'order', to sign new ones.

At the beginning of the 20th century *jus ad bellum* has profoundly changed. With the adoption of the UN Charter the prohibition of the use of force has been achieved, and in accordance with it international armed conflict should only occur based on the resolution of the Security Council. However, in reality what we see is that armed conflicts start without permission. If a state violates the prohibition of the use of force and international law would allow for it to terminate or suspend the application of existing treaties during or after the attack, the question arises whether an illegal act (i.e. the violation of the prohibition of the use of force) can result in a legal consequence (i.e. other international obligations are not needed to be

[21] Hague I - Pacific Settlement of International Disputes, 18 October 1907.

[22] Hague I - Pacific Settlement of International Disputes, 18 October 1907.

[23] Human Rights Committee: *General Comment No. 29: Derogations during states of emergency (Art. 4)*. 2001. Point 3.

[24] *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), ICJ, Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006.

[25] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ, Advisory Opinion of July 8, 1996, I.C.J. Reports 1996. para. 25. On the relationship of the two fields of law see e.g.: Kovács, Péter: *Emberi jogok és humanitárius nemzetközi jog: versengés vagy kiegészítés?* Föld-rész, III. évf. (2010) No. 1-2., pp. 57-65. [Human rights and international humanitarian law: competition or complementation?]

respected as well). Exclusion of this can be based on several arguments. Breach of the prohibition of the use of force means breach of a *jus cogens*, which results in invalidity. Thus the act of the violator is not suitable to induce any valid legal effect. A similar conclusion is reached also if the prohibition of the use of force is not considered to be *jus cogens*, but only an *erga omnes* norm, since the principle of *ex injuria jus non oritur* is well-known in international law as well. Thus as a result of the violation the violator shall not acquire rights from that legal relation or as a consequence of it.[26] The International Court of Justice expressed this in the advisory opinion given in the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa):* "One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship."[27]

Based on the legal principles, the state violating the prohibition of the use of force is not entitled to gain advance from that violation, namely to 'get rid' of its treaty-based obligations. But in the practice since 1945 it is often not easy to identify the aggressor state. With respect to certain armed conflicts the resolutions of the Security Council contain the applicable law, while it does not deal with other conflicts at all. This resulted in the blurred picture about the effect of armed conflicts on treaties. Practice and theory has rather focused on the issues of humanitarian law and that it shall be respected by all sides without importance being given to the identity of the aggressor, and thus the connection between *jus ad bellum* and *jus in bello* has been pushed to the background. Naturally, it is not questionable that humanitarian law shall be respected by all sides without taking into account the legality of the commencement of the armed conflict. Nevertheless, this does not entail that belligerents would automatically be exempted from other international obligations, or that the issue of legality cannot influence the application of other norms.

Termination of treaties cannot be accepted as a legal consequence irrespective of the violation of the *jus ad bellum*. Notwithstanding, their general application also cannot be expected during an armed conflict (except for the ones expressly applicable then), thus suspension – within narrow bounds and in accordance with certain procedural rules – can generally be accepted in the given situation. The draft of the International Law Commission contains a similar recommendation.[28]

2.3. The system of international relations and the UN

This factor is closely linked to the prohibition of the use of force, as mentioned above, since the most important regulations and framework of the use of force is provided by the UN Charter. The essential norms of the new world order established in 1945 has to be accepted by all states, whether member of the United Nations, or not, and whether it participated in its adoption or not.

At the outbreak of an armed conflict (let it be international or domestic) the question does not even surface whether a member state of the UN is obliged to respect *all* of the articles of the Charter or not. This is also supported by the fact that the states concerned participate at

[26] See e.g.: Lagerwall, Anne: *The Duty not to Recognise as Lawful a Situation Created by the Illegal Use of Force: From Kosovo to Abkhazia and South Ossetia.* In: Szabó, Marcel (ed.): State Responsibility and the Law of Treaties. The Hague, Eleven International Publishing 2010. pp. 77–100.; Lauterpacht, Hersch: *The Limits of the Operation of the Law of War*. British Yearbook of International Law, Vol. 30. 1953. pp. 206–243.

[27] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971. para. 91.

[28] *Draft articles on the effects of armed conflicts on treaties, with commentaries*. Yearbook of the International Law Commission, 2011, Vol. II. Part Two.

the meetings of the organs of the UN and for example the body decides whether the state can be relieved from paying the membership fee or not.

An armed conflict does not terminate the treaties establishing international organizations, but it can be imagined that the belligerents do not participate in the work of the organization, or in the event of a world war the organization might suspend its operation fully or partially. Nevertheless, these are based on the mutual consent of the members of the organization. None of the conflicts of the past one hundred year terminated, in legal meaning, any of the international organizations. When establishing a new international organization states create a new international subject, the termination of which is possible in three ways:

a) the organization terminates itself,

b) all the members withdraw from the organization, or

c) in any other way regulated in the charter document (e.g.: an event happens, or the number of the parties fall below a certain number).

Naturally behind these actions a reason can be the occurrence of an armed conflict, but it, by itself, does not bring about the legal effect of termination, further action of the members is required.

The settlement of disputes by peaceful means is one of the founding principles of today's international relations and law. It might seem to be a paradox, but this principle also obliges the belligerents, and not only the principle itself, but also the treaties containing it. Notwithstanding the conflict they shall respect the procedures of peaceful settlement of disputes set in agreements. In connection with the August 2008 war Georgia sued Russia also at the International Court of Justice, stating that it violated the 1965 UN Convention against racial discrimination.[29] Although the ICJ found itself in lack of jurisdiction, it was clearly stated that the effect of this convention was not influenced by the hostilities. Both of the states regarded the convention as being in effect, and the Court cited as a reason for its lack of jurisdiction that Georgia did not follow the dispute settlement mechanism prescribed by the convention.[30]

2.4. Universal norms and globalization

According to the United Nations Treaty Series there are approximately 500 multilateral treaties,[31] which together form the frame of the international legal system today. Most of the states are parties to these agreements, some of them have universal or near universal membership. They regulate such areas, which have significant basis and background in customary international law. These treaties form a network, in which one can find the rule for most of the legal problems occurring generally during international relations. Typically the content of these treaties is not politically-motivated, but covers the interests of a wide group or most of the states.

Experiences of legal history show that multilateral law-making treaties were not terminated during the world wars, furthermore they were suspended only on rare occasions. The peace treaties after World War I declared that these treaties were in effect also after the war, but the peace treaties subsequent to World War II did not mention them at all. States explained this with the notion that the multilateral treaties of non-political, technical character or establishing permanent regimes were not terminated by the war.[32]

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[29] Hague I - Pacific Settlement of International Disputes, 18 October 1907.

[30] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, ICJ, Preliminary Objections of the Russian Federation, 1 December 2009.

[31] United Nations Treaty Series Overview: <http://treaties.un.org/Pages/Overview.aspx?path=overview/overview/page1_en.xml>

[32] See e.g.: Fitzmaurice, Gerald: *The Juridical Clauses of the Peace Treaties*. Recueil des Cours, vol. 73. 1948. (II) pp. 308–309.

The circle of such treaties has significantly widened in the 20th century and several of them contain rules for the event of an armed conflict. As examples of such agreements, the following can be mentioned: the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention of Consular Relations, the 1969 Vienna Convention on the Law of Treaties, and the 1982 UN Convention on the Law of the Sea (UNCLOS) can also be grouped here. Furthermore, the human rights conventions, as well as the treaties establishing international organizations can also be listed here. Paying more concrete attention to, for example, the UNCLOS,[33] several of its articles pertain to the (peaceful) actions of war ships,[34] or regulate such conduct, which is prohibited both at the time of peace and war (e.g. piracy).[35]

All states are parties to a vast number of treaties, and their force and application does not depend on the armed conflict. It is evident that for example the 1969 Vienna Convention on the Law of Treaties is applicable to the conclusion, interpretation and invalidity of an armistice agreement or to the peace treaty. Similarly, even in the case of the interruption of diplomatic relations the 1961 Vienna Convention remains in effect and certain of its rules are still applicable even during the armed conflict, e.g. the inviolability of the buildings. When concluding such treaties, the basic aim was to establish universal and long-lasting regimes, which are not (significantly) influenced by an armed conflict – especially since the conflict is only between a few parties of the treaty and not all of them.

By the 21st century, economy has remarkably changed, interdependence among the states supersedes every previous level, it is fundamental interest of states to participate at the global commerce, even at the time of an armed conflict. It cannot be expected that states at war with each other do commercial business with each other, but this does not mean that they should terminate all their economic and commercial agreements. Numerous analyses conclude that general agreements of commerce, navigation, friendship and bilateral investment remain in force during the armed conflict, but their application might be suspended.[36]

It is visible that often a certain level of informal communication is maintained among the belligerent states, e.g. their diplomats talk with each other on the corridors of international organizations or in the frame of the so-called "track two diplomacy".[37] Furthermore, maybe even a higher level can be expected from them: For example in the case of *Armed Activities on the Territory of the Congo*, the Democratic Republic of the Congo invoked against Rwanda that, owing to the armed conflict between them, it was not able to abide by the procedural obligations set in Article 29 of the CEDAW. Rwanda contended that the DRC was capable of such an action during the hostilities. Rwanda based its argument on the fact, that the Congo dealt with such technical issues during this time as the issue of the telephone prefixes, about which one of the Congolese ministers continued a correspondence with the International Telecommunication Union (ITU). Thus Rwanda stated, that they could see no impediment hindering the DRC from commencing diplomatic negotiations in relation to the application of the concerned convention.[38] The ICJ agreed with Rwanda on this issue, it could also not find

[33] United Nations Convention on the Law of the Sea, Montego Bay, 1982, UNTS Reg. No. 31363.

[34] Chapter 3/C (Articles 29-32), Article 95.

[35] For example Article 102.

[36] See e.g.: Walker, Hermann Jr.: *Modern Treaties of Friendship, Commerce and Navigation.* Minnesota Law Review, 1957–1958, vol. 42.; Sornarajah, M.: *The International Law on Foreign Investment*. 3rd ed. Cambridge, Cambridge University Press 2010.

[37] See e.g.: Dalia Dassa Kaye: *Talking to the Enemy – Track Two Diplomacy in the Middle East and South Asia*. Santa Monica, CA: RAND Corporation, 2007. https://www.rand.org/pubs/monographs/MG592.html

[38] *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), ICJ, Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006. para. 81-83.

any circumstance (not even the 1998-2003 war between them), which would have rendered it acceptable that the DRC did not fulfil the procedural obligations of the CEDAW.[39]

Subsequent to an armed conflict, especially if it lasted long, it can take years to rearrange economic relations. The volume of international commerce was much smaller prior to World War II than today, and for the loser states it was very detrimental that it took years to establish international economic relations again. Furthermore, the state which is first willing to renew former treaties with the state concerned can gain significant influence in that state.[40] Often, owing to economic realities and other interests, former belligerents do business with each other right away after the termination of hostilities.[41] In the event of long-running, low intensity conflicts, notwithstanding the hostilities, commerce might even be maintained during it. This can be seen e.g. between India and Pakistan.[42]

During a 'traditional' armed conflict economic cooperation and commercial relations are suspended, while in the event of low-intensity conflicts generally they operate, even if not frequently and at a lower level. Nevertheless, the field which typically recovers quickest after an armed conflict is commerce and economy, often much earlier than signature of the peace treaty.

2.5. The changed nature of armed conflicts

Schwarzenberger, in an article published in 1943, expresses that several situations in international relations can be considered neither peaceful nor a state of war. In this event, which he calls a "*status mixtus*", that is a mixed state, the concerned states are involved in an armed conflict, nevertheless they wish to continue their peaceful relations with each other as well. Thus the frontier between peace and war is smeared.[43]

It's not only the above-mentioned case which shows the changed nature of armed conflicts, but also it can be seen that the number of non-international armed conflicts, civil wars has increased, while of the classic wars, international armed conflicts diminished. But hostilities within one state can spill over to neighbouring ones, other states can intervene in it, can lead to the dissolution of the state, and as a result of such events it becomes questionable whether the armed conflict is non-international or international in character.

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[39] Ibid. para. 92.

[40] E.g.: Prior to World War II, besides Germany, Hungary had the most extensive economic and commercial relations with the United Kingdom. After the end of the war, the government of the UK insisted that Hungary shall not conclude economic agreements with any state until the signature of the peace treaty. Notwithstanding, during the fall of 1945 Hungary entered into an agreement of economic cooperation with the Soviet Union. The signature of the peace treaty occurred one and a half year later, but life and economic life has not stopped until then. The country and the population needed income and products, not in 1947, but all along. See: Balogh, Sándor: *A népi demokratikus Magyarország külpolitikája 1945–1947*. Budapest, Kossuth Könyvkiadó 1982. [The foreign policy of the People's Democratic Republic of Hungary]; Szalai, Anikó: *Effect of the World Wars on International Treaties of Hungary,* Miskolc Journal of International Law, Vol. 5. (2008) No. 2. 98-108.

[41] During more peaceful times the United Kingdom even sold military products to Argentine. *Falkland Islands tensions: UK bans exports to Argentine military*, BBC News, April 26, 2012. http://www.bbc.co.uk/news/uk-17858361 ; The value of commerce between North and South Korea is approx. 1.5 bill USD/year: Susannah Cullinane: *How does North Korea make its money?* CNN.com, April 10, 2013. http://edition.cnn.com/2013/04/09/business/north-korea-economy-explainer

[42] The volume of commerce is constantly rising between India and Pakistan, and amounts to several billion USD/year. See e.g.: Michael Kugelman – Robert M. Hathaway (ed.): *Pakistan-India Trade: What Needs To Be Done? What Does It Matter?* Woodrow Wilson International Center for Scholars, 2013. https://www.wilsoncenter.org/publication/pakistan-india-trade-what-needs-to-be-done-what-does-it-matter

[43] Schwarzenberger, Georg: *Jus Pacis Ac Belli?* American Journal of International Law, 1943, vol. 37. pp. 460–479. Jessup uses similar argumentation: Jessup, Philip C.: *Editorial Comment – Should International Law Recognize an Intermediate Status between Peace and War?* American Journal of International Law, Vol. 48. No. 1. 1954. pp. 98–103.

The qualification of the conflict is significant when deciding about the applicable law. On the one hand, the applicable humanitarian law is not identical for the two different cases, on the other hand the start of a civil war does not invoke those legal consequences, which used to relate to the state of war, namely the termination or suspension of bilateral treaties. Article 73 of the Vienna Convention only pertains to the case of international hostilities, thus it can be concluded that the convention remains applicable in the event of non-international armed conflict. This means that with respect to a non-international armed conflict treaties can be terminated or suspended only in accordance with the general rules of treaty law.

3. The answer to the question posed at the beginning: "it depends on..."

The sharp separation, dichotomy of the law of peace and war cannot be maintained in the 21st century. The circle of applicable law is much wider than international humanitarian law. Those issues which are regulated both by humanitarian law and other international sources, shall be decided in accordance with the norms of humanitarian law, based on the principle of *lex specialis derogat legi generali*. However, there is a wide spectrum of life events for which humanitarian law does not contain regulation. In legal history these international norms were regarded by states as terminated and they acted with respect to only their own interests. The changes visible since the beginning of the 20th century, especially the prohibition of the use of force, the multiplication of multilateral agreements, globalized economic and commercial relations, as well as the changed nature of armed conflicts have resulted in the need for most of the norms both at the time of peace and at war. Nowadays the aim of an armed conflict is typically not to change the whole existing system, as it was previously. Thus it is not profitable for any state to demolish the existing network of relations, the building of which took long time and big efforts. Naturally, contrary to that, it can be imagined that the execution, performance of certain bilateral agreements is not compatible with the armed conflict. In such a case states can suspend the treaty, and continue its application when the hostilities are over. In international customary and treaty law there are no unequivocal rules on the suspension of treaties in the event of an armed conflict, thus further development of treaty law and codification is necessary.

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