IMPOSED TREATIES AND INTERNATIONAL LAW

STUART S. MALAWER

Table of Contents

INTRODUCTION ........................................................................................................ 5
I. CLASSICAL AND TRADITIONAL WRITERS ......................................................... 11
   A. Seventeenth and Eighteenth Century Writers .................................................. 11
      Hugo Grotius ...................................................................................................... 12
      Samuel Pufendorf ............................................................................................... 12
      Emmerich de Vattel ............................................................................................ 13
      P.P. Shafirov ...................................................................................................... 15
   B. Nineteenth Century Writers ............................................................................. 16
      Wharton ............................................................................................................... 16
      Oppenheim ......................................................................................................... 17
   C. Summary of Classical and Traditional Writers ............................................... 18
II. WORLD WAR I AND THE INTER-WAR PERIOD: THE TRADITIONAL RULE SURVIVES DEMANDS FOR CHANGE ...................................................... 19
   A. Doctrine ............................................................................................................. 19
      1. Adherents to the Traditional Rule ................................................................. 19
         Julius Hatschek ............................................................................................... 19
         Alex Möller ..................................................................................................... 20
         Charles Butler ................................................................................................. 20
         Edgar Turlington ............................................................................................ 21
         Charles Hyde .................................................................................................. 22
      2. Proponents of a New Rule ............................................................................ 23
         Alfred von Verdross ....................................................................................... 23
         Hersch Lauterpacht ......................................................................................... 24
   B. State Practice .................................................................................................. 25
      1. United States Response to Japan’s 21 Demands (1915) ............................... 25
      2. The Soviet Attitude Toward the Brest-Litovsk Treaty (1918) and the Versailles Peace Treaty (1919) ................................................................. 27
      3. The Versailles Treaty: German Reaction (1919) and Its Repudiation (1936) ........................................................................................................ 29
      4. Early Soviet Treaty Practice ........................................................................ 31
      5. United States Reaction to Japanese Occupation of Manchuria (1932) ............ 33
      6. Chinese Practice (Republic of China and the Nationalists) ......................... 35
         a. Writers ......................................................................................................... 35
         b. Treaty Practice of the Republic of China ................................................... 36
      7. Munich Four-Power Agreement (1938) ......................................................... 38
         a. Writers ......................................................................................................... 38
         b. Practice ....................................................................................................... 40
   C. International Legislation and Codification ....................................................... 41
      1. Article I of the Hague Conventions of 1899 and 1907 ............................... 41
      2. Article 19 (Revision of Treaties) of the League Covenant ........................... 42
         a. Drafting Article 19 ..................................................................................... 42
         b. Writers on Article 19 .................................................................................. 44
         c. Subsequent Practice under Article 19 ....................................................... 48
III. POST-WORLD WAR: A NEW RULE IS RECOGNIZED AND CODIFIED

A. Doctrine ............................................ 74

1. Recent Doctoral Theses ............................... 77
   F. Nozari ........................................... 77
   K. Hossain .......................................... 78
   Rosenstein-Rozakis ................................ 79

2. Western Writers .................................... 79
   Ross .................................................. 79
   Keeton .............................................. 80
   Fitzmaurice ........................................ 80
   Fenwick ............................................. 81
   Lauterpacht ........................................ 81
   Schwarzenberger .................................. 82
   de Visscher ........................................ 82
   McNair .............................................. 83
   Jennings ............................................ 83
   O'Connell ......................................... 83
   Brownlie .......................................... 84
   Sztucki ............................................. 84

3. Non-Western Writers .............................. 85
   a. Communist Writers (Eastern European) ........ 85
      Herczeg .......................................... 85
      Dabrowa ......................................... 85
      Bierzanek ....................................... 86
   b. Non-Western Writers (Lesser Developed Countries) .......... 86
      Salonga ......................................... 86
      Varghese ........................................ 86
      Mookerjea ....................................... 86
4. Note on Recent Views on the Legality of Economic and Political Coercion in International Relations and the 1973-1975 Arab Oil Embargo ......................................................... 88

B. State Practice ............................................. 89

1. General Communist Chinese Theory of Imposed Treaties and Practice of the People's Republic of China ................................................................. 89
   a. Recent Views on the Attitude of the People's Republic of China Regarding the Concept of Imposed Treaties ......................................................... 89
      Cohen and Chiu ........................................ 90
      Hungdah Chiu ........................................ 91
   b. Communist Chinese Theorists and Communist Chinese State Practice ......................................................... 92

2. General Soviet Theory of Imposed Treaties and Recent State Practice ......................................................... 93
   a. Western Writers on Soviet Theory ........................................ 93
   b. Soviet Writers and State Practice ........................................ 94
      G.I. Tunkin ............................................ 95
      Vassilenko ............................................. 96
      Talalayev .............................................. 97
      Adjarov ................................................. 97
      Lukashuk ............................................... 97
      Academy of Sciences ..................................... 98
      The 1968 Soviet-Czechoslovakian Treaty ................. 99
      Sino-Soviet Border Dispute ................................ 100

3. The 1973 German (Federal Republic)-Czechoslovakian Treaty ......................................................... 100
4. 1975 Iranian-Iraq Treaty ........................................ 102
5. German Border Treaties of the 1970's ........................................ 104
6. Current United States-Panama Negotiations ......................................................... 105

C. International Legislation ........................................ 106

1. Drafting the United Nations Charter ........................................ 107
   a. The Drafting of Articles 11 and 14 ........................................ 107
   b. Drafting Chapter VI and Chapter VII ........................................ 111
      The Security Council and the Pacific Settlement of Disputes ............ 111
      Security Council and the Enforcement Powers ................................ 114

2. United Nations Practice ........................................ 115
   a. Article 102 ........................................... 116
   b. Article 103 and Article 107 ........................................ 116
   c. General Assembly Resolution of December 14, 1946 ...................... 117
   e. 1961 General Assembly "France-Bizerta Base" Resolution (Tunisia v. France) ......................................................... 120

   a. The 1970 Declaration ........................................ 121
   b. Drafting the 1970 Declaration ........................................ 123

   a. Article 52 and its Drafting ........................................ 129
Articles 26, 52, 75, the Declaration on Economic Coercion and the Dissemination Resolution ........................................ 129
b. Recent Writings ................................................................. 134
c. Article 75 (The Aggressor State Exception) .................................. 136
d. The 1974 General Assembly Declaration on Defining Aggression: Articles 1, 2 and 5(1)—“Armed Force” and Its “Threat” ........ 138
5. A Note on the Recent Activities of Some Regional Organizations .... 140
D. Jurisprudence ........................................................................ 142
1. International Jurisprudence .................................................... 142
   Fisheries Jurisdiction Case .................................................. 142
   Barcelona Traction Case ....................................................... 146
   Interpretation of Peace Treaties with Bulgaria, Hungary and Romania ................................................................. 148
   German External Debts Arbitration ........................................... 149
   Drouitzky Claim ................................................................. 150
   De Pascale Case ................................................................. 150
   Mergé Claim ................................................................. 151
   Cases of Dual Nationality ..................................................... 151
   Re Rizzo .................................................................................. 151
2. National Jurisprudence ............................................................ 152
   V. CONCLUSION AND SUMMARY ........................................ 154
A. What the Rule Is and What It Is Not ....................................... 155
B. Related Propositions ............................................................. 156
C. Existing Problems With the Rule Against Imposed Treaties .......... 158
   1. “Reference to” .................................................................... 158
   2. “Void” Treaties and Subsequent Acts .................................... 159
   3. The Role of the Security Council ......................................... 161
   4. Compulsory and Binding Third-Party Determinations .......... 161
D. Additional Suggestions: Further Clarifying and Developing the Rule .... 162
E. Concluding Remarks ............................................................... 166
BIBLIOGRAPHY ........................................................................ 167
IMPOSED TREATIES AND INTERNATIONAL LAW

STUART S. MALAWER*

This study discusses and analyzes the rule against imposed treaties. The rule declares invalid any treaty which is imposed by the threat or use of aggressive military force against a contracting state.¹ As such, the rule functions as an exception to *pacta sunt servanda*.

The rule against imposed treaties is based upon the principle of sovereign equality, its derivative rule of state consent, and the prohibition against the use of force in international relations. It is a rule of customary international law based upon the Charter of the United Nations, and having antecedents in the early twentieth century. The rule exists exclusive of any particular international instrument and, moreover, it is not stated clearly in any such instrument. Generally, the rule against imposed treaties requires actual state consent, and refuses to recognize legal fiction as a basis of contracting sufficient to result in valid treaty obligations. The impetus for the development of this rule has come from several sources, including the public pronouncements of the communist and third world states which have favored an even broader rule, and from United States foreign policy in the early twentieth century.²

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1. This article does not discuss the rule of treaty law which denies validity to treaties concluded as a result of the threat or use of force against the individual negotiator. This principle has long been recognized in international law. 2 H. Grotius, De Jure Belli Ac Pacis Libri Tres 804-05 (1st ed. 1625, F. Kelsey transl. 1646) in Classics Int'l L. (J. Scott ed. 1925) [hereinafter cited as Grotius].


In the contemporary literature of international law, the concept of unequal treaties is seldom discussed by Western scholars and is primarily emphasized as an important principle of international law by communist scholars.

*Id.* The Indian scholar Anand has stated recently:

5.
Research on the law relating to imposed treaties has been occasional and too casual. While jurists and scholars have analyzed widely the law of war as it relates to the validity of resort to force, these same jurists and scholars have avoided any detailed analysis of the effect of the use of force in the conclusion of treaties. Some writers have discussed the general topic of invalidity of treaties, others have analyzed the formal rules governing the expression of state consent, and several have studied unequal treaties in the context of the 1969 Vienna Convention on the Law of Treaties. A few have discussed, in passing, the threat or use of military force as a specific ground for invalidating a treaty, but none has extensively analyzed imposed treaties and the rule against them. Moreover, the lack of a detailed

The reasons for the present resentment against traditional international law spring from their past history and subjugation... The new states are determined to annul the former law of domination as expressed in the colonial system and unequal treaties.

Anand, Role of International Adjudication, in The Future of the International Court of Justice 1, 7 (L. Gross ed. 1976) [hereinafter cited as Anand]. See also Resolution on Unequal Treaties, Conférence des Juristes Afro-Asiatiques 233 (1957).


This occasional and causal treatment of the subject... is due... and maybe most important, to the fact that application of force until recently has been a legitimate means in international relations.

Id. at 15. Another legal scholar has written recently: "International lawyers since then [1928] have wrestled with the problem of whether treaties imposed by countries who have used force in breach of their treaty engagements are valid." J. Grenville, The Major International Treaties 1914-1973, 14 (1974).


7. Varma, Unequal Treaties in Modern International Law, 7 Eastern J. Int'l L. 43 (1975), this study treats both the concept of unequal treaties and the rule prohibiting imposed treaties; F. Nozari, Unequal Treaties in International Law (1971); Marković, Les Traites Inegaux en Droit International, 17 Jugoslovenska Revija Za Međunarodno Pravo 264 (1970). As to unequal treaties Marković stated:

[I]l est peut-être un des plus controversés, mais il est d'autant plus important que la communauté internationale et les relations internationales contemporaines exigent de façon de plus en plus pressante qu'on y apporte une solution.

Id.


The question of coercion is much more complex in the case of duress applied not to an individual negotiator but to a state as a whole. In classical
juridical examination of the general subject of duress in concluding treaties has been decried in recent years.9

Recent developments in international treaty relations, international jurisprudence and international legislation, as well as the continuing threat of new warfare, have made research into the topic more relevant and necessary. For example, the 1973 German-Czechoslovakian Treaty,10 the 1973 International Court of Justice Fisheries Jurisdiction Case11 and the 1974 General Assembly Resolution on Defining Aggression12 have provided new and significant data for meaningful analysis of the rule against imposed treaties.

This study traces and analyzes the juridical development of the rule from the early twentieth century when the rule did not exist, to the present when very few deny its existence in some form. The research here presented discloses a tension in the development of the rule, a tension that favors a broader formulation of the rule in order to outlaw the use of economic force. This tension is still present today.

On the juridical level, the acceptance of the newer rule has brought treaty law into harmony with the law of war. Until recently, an anomaly existed within certain rules of international law formulated during the twentieth century. In general, a state is allowed to use military force only in self-defense. This principle was codified in 1945, in article 51 of the Charter of the United Nations. However, there was no explicit formulation of a corresponding rule of treaty law which declared treaties void should they be concluded under military duress, that is, should a state become the victim of aggressive military action. An express statement of such a rule was proffered to the international community only in the 1969 Vienna Convention on the Law of Treaties.

The older rule of treaty law, as it existed in the nineteenth century,

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declared as lawful those treaties concluded as the result of the threat or use of any military force against contracting states. This rule was supported by writers, jurisprudence and state practice of that era. A few authors during the inter-war era of the twentieth century indicated a desire to change the traditional rule of treaty law, and international jurisprudence showed some discontent with the existing rule; the treaty practice of several states, as well as international legislation, revealed even greater discontent with the existing rule. However, it was not until the drafting of the United Nations Charter that a new rule came into existence. Although established in the Charter, the new rule was not free of controversy or confusion.

The older rule contained an inherent paradox by rendering unlawful any attempt to violate a prior peace treaty, yet recognizing a treaty as legally valid if such a treaty should be violated successfully. An imposed treaty was viewed also as a political justification for entering into “just wars.” Although the rationale of the traditional rule was that it provided a means of concluding hostilities, the older rule of law contributed to the periodic renewal of warfare whenever the military balance of power shifted, and a state sought to overthrow a prior unfavorable imposed treaty.

The emphasis of policy in the nineteenth century was on fostering the conclusion of hostilities. The emphasis today stresses the need for actual state consent, and for preventing the outbreak of renewed hostilities by making known beforehand that imposed treaties are not legally valid.

During the drafting of the Charter there was no specific discussion of the use of imposed treaties as a means of preventing the outbreak of hostilities, of ending hostilities, or of managing interstate conflict. However, when the newer rule is construed, as it must be, in light of the United Nations Charter, it allows the international organization great freedom of action when the United Nations acts to counter threats to or breaches of the peace. This freedom is as great as that of states in the nineteenth century which relied upon the rules of law authorizing the use of any force and recognizing the legality of all treaties. Thus, the Security Council under some circumstances, such as when less powerful states do not have the political protection of one of the leading powers, is legally authorized, even if only implicitly, to impose treaties on the less powerful states.

In deciding which international actors may lawfully impose a treaty and under what conditions, it is useful to employ the following categories: 1) the Security Council of the United Nations; 2) an
aggressor state; 3) the "victorious victim" of aggression; and 4) third-states (including regional organizations), that is, ones not engaged in the military conflict. It will be seen that both the Security Council and the "victorious victim" may impose a treaty, with the right of the Security Council being broader than that of the victim state. The aggressor state, or states not engaged in the military conflict, however, are not lawfully permitted to impose a treaty.

It should be noted that this study is not an analysis of the broad concept of "unequal" treaties. Although the concept of unequal treaties is not new to international law,\textsuperscript{13} the term "unequal" has not been clearly defined. It is often understood to denote treaties falling into at least one of the following categories: 1) treaties containing formally equal treaty provisions, but in practice, unequal obligations which may occur as a result of unforeseen developments; 2) treaties containing formally unequal obligations, regardless of the actual effect of the treaty; 3) and 4) are identical to 1) and 2), except with either economic or military force threatened or used in order to conclude such agreements; 5) treaties not otherwise unequal, concluded through the use of economic force alone; 6) treaties not otherwise unequal, concluded through military force alone.

In practice, treaties in categories 1) and 2), unequal treaties concluded without the threat or use of some form of force, have not existed often. The minimum element in categories 3) through 6) is the threat or use of force. It is the last and most basic of these categories that this study investigates: the threat or use of military force in concluding treaties. Accordingly, the term "imposed treaties" is defined herein as treaties concluded by the threat or use of illegal, that is, aggressive, military force against states. The term "unequal treaties" is defined as those treaties enumerated in the preceding paragraph, other than those defined as "imposed treaties." The distinction between these two types of treaties is significant, for this investigation concludes that economic force alone is not a factor which is juridically recognized as sufficient to vitiate a state's consent in treaty relations. One may conclude by implication that other forms of unequal treaties also are not illegal under the currently existing rules of international law.

An imposed treaty is defined herein not only as a treaty ending hostilities as described above, but also as any international agreement concluded as the result of the aggressive use of military force.\textsuperscript{14} For

\textsuperscript{13} Varma, Unequal Treaties in Modern International Law, 7 Eastern J. Int'l L. 56 (1975).

\textsuperscript{14} Schwarzenberger, Peace Treaties Before International Courts and Tribunals, 8 Indian J. Int'l L. 1 (1968). "In law, no difference exists between peace treaties and any other type of consensual engagement. The same rules govern them all." Id. at 1.
example, if State A threatens to use military force against State B in order to coerce State B's consent to a tariff, trade, commodity or concession agreement favorable to State A, this is an imposed treaty. In most historical instances, however, imposed treaties have taken the form of peace treaties.

The determination of the existence and the extent of the rule against imposed treaties is vital to any national decision-maker concerned with determining the legal nature of international agreements and the role they may play in managing interstate conflict. Once the rule is accurately delineated, guidelines may be deduced for concluding valid treaties. Such guidelines could assist a national decision-maker in selecting acceptable and effective techniques in concluding treaties. Also of a practical significance, this study provides both domestic and international courts and tribunals with a detailed analysis of the existence and extent of an essential rule of law that ought to be applied in determining the validity of treaties under international law and, thus, in assessing their applicability as either international or domestic treaty obligations.

The approach of this analysis is to examine authors, state practice, international legislation, and codification efforts in the twentieth century in order to determine, in the context of managing interstate conflict, the content of the rule against imposed treaties. Emphasis is given to actual state practice, especially treaty practice, and to the attempts of the international community to codify such a rule in multilateral declarations and agreements. This is essentially a positivistic approach which expands the sources of international law as they are enumerated in article 38(1) of the Statute of the International Court of Justice.

The general purpose of this work is to analyze and to evaluate the

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15. 1 J. Verzijl, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 400 (1968).

This deep chasm, which undeniably exists between the positive law of nations of former centuries and the theories of writers on that law necessitates special caution in the selection, the use and the weighing of sources consulted.

Id. at 406.

Verzijl pleaded for more independent and systematic research on topics in the history of international law, by relying on sources other than writings of other publicists. As stated by Verzijl:

A general objection against the comprehensive works already existing is this—and how could it be otherwise?—that they lean too much on the writings or elaboration of sources by others and that they seldom show signs of an independent and systematic research in the available immediate sources.

Id. at 407.

16. This study does not discuss common law or civil law rules of duress in contract law. The differences in structure of the domestic and international law system are so significant, that such an examination would not be particularly relevant to the topic under examination. For a recent article on duress in the private law of one municipal law system see Beatson, Duress as a Vitiating Factor in Contract, 33 CAMB. L.J. 97 (1974).
development in the twentieth century of the rule against imposed treaties. Based upon the sources examined, the specific aims are to determine the definition of the term "force", to examine the attempts of states to equate economic and political force to military force as a factor vitiating state consent, and to determine the probable efficacy of the newer rule in terms of one of its purposes, that is, precluding the outbreak of renewed hostilities. While this research may be viewed as a case study of dissatisfied states in international law, or as an historical study in the development of a rule of treaty law, the author's primary intent is to present an analysis of the development of a new rule of customary international law relating to treaty-making in the context of existing international society. 17

This study concludes with a suggestion that existing international instruments be amended in order to reflect the rule more accurately. The conclusion also offers a suggestion which would develop the rule further to increase its effectiveness as a means of managing interstate conflict.

I.  CLASSICAL AND TRADITIONAL WRITERS

Because there are not many directly relevant and significant writings from the years preceding the twentieth century on the topic of international law and imposed treaties, only a short discussion of these writings and a summary is presented at this point.

Although several writers of the seventeenth and eighteenth centuries discussed the juridical nature of imposed treaties, only a few nineteenth century writers did so. The treatment of the topic of imposed treaties by these earlier writers was also more extensive than that of the nineteenth century writers.

A. Seventeenth and Eighteenth Century Writers

The writers of the seventeenth and eighteenth centuries discussed

17. Some newer works have rejected the usefulness of the "old-new state" distinction for the study of international law. Syatauw, Old and New States—A Misleading Distinction for Future International Law and International Relations, LE DROIT INTERNATIONAL 67 (1974); Kim, The Asian State Practice and International Legal Order, 13 KOREAN J. INT'L L. 29 (1968) (in Korean with English summary). See also Keith, Asian Attitudes to International Law, 3 AUSTRALIAN J. INT'L L. 1 (1967). New nations have "demanded that international law be adapted to meet the new needs of international society." AFRICAN INTERNATIONAL LEGAL HISTORY i (A. Mensah-Brown ed. 1975). Anand has written:

[Traditional international law] sanctified colonialism and accepted the unequal treaties forced upon weaker states as valid and legal. It is this law and these rights, acquired during the colonial and imperialist age, which are being questioned today.

Anand, supra note 2, at 7.
both the development of a rule of the law of war regulating the resort to force, and a rule of the law of treaties regulating the use of force in concluding treaties. They discussed imposed treaties, without using this term, as a specific form of unequal treaties, as well as the interpretation of those peace treaties which may be classified as imposed treaties.

Hugo Grotius. Hugo Grotius, the Dutch humanist, in 1625, discussed unequal treaties in De Jure Belli Ac Pacis Libri Tres.\(^\text{18}\) Although Grotius contended that unjust wars are unlawful, he nevertheless argued that treaties resulting from all wars are valid.\(^\text{19}\)

Grotius stated that the injustice of waging war should not be a factor in determining the validity of a peace treaty. Rather, it should be a factor only in interpreting such a treaty.\(^\text{20}\) He argued that, generally, the more favorable a treaty condition is, the more broadly it should be construed. Grotius never questioned the validity of imposed peace treaties whether or not they resulted from an unjust war.\(^\text{21}\)

Samuel Pufendorf. In the Law of Nature and Nations,\(^\text{22}\) Pufendorf, the German legal scholar, assessed the view in 1672, that all compacts made with an enemy are required to be observed.\(^\text{23}\) However, while he stated that all imposed peace treaties are to be observed, he also asserted that treaties between states that continued a state of war are not to be observed.\(^\text{24}\)

Pufendorf adhered to the view that pacts which actually ended hostilities should not be subject to a plea of duress which would deny the

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18. Grotius, supra note 1, at 804-05.
19. Id. at 809. J. Tooke, The Just War in Aquinas and Grotius (1965) stated Grotius' views as follows:

Moreover at the end of a war the rights of the parties depend on military victory, not in the least upon whose cause had been just.

Id. at 231. Y. Melzer, Concepts of Just War 17 n.7 (1975) argues that the existence of the shift from distinguishing wars as "just and unjust" to "legal and illegal" was not evident prior to the sixteenth century. Even as late as the first half of the twentieth century the existence of the shift was not clear.

20. Id.
21. I C. Phillipson, The International Law and Custom of Ancient Greece and Rome (1911) stated the following:

[With] the rapid extension of [the Roman] empire and absorption of foreign countries, the basis of equality gave way very often to the relationship of sovereign and dependent, strict reciprocity of treaty stipulations being replaced by a dictatorial insistence of stated conditions; so that in the end ... the formal expression of the bilateral character of treaties came to be eliminated.

Id. at 411.
23. Id. at 849.
24. Id. Barbeyrac's editorial note to Pufendorf's text rejected this view.

I am of [the] opinion that these sorts of compacts ought to be as religiously observed as any other. His reasons prove nothing because they prove too much.

Id. at n.2 (author's updating of the language).
validity of such pacts. He argued that such treaties are lawful since both parties are put on a plane of equality as regards the justice of the war. In addition, he thought that the excuse of the unjust creation of fear ought not to be recognized. Otherwise, there could be no end to wars, which were assuredly frequent enough.

*Emmerich de Vattel.* More than most writers of the seventeenth and eighteenth centuries, the Swiss jurist, Vattel, discussed the topics of imposed treaties, treaties of peace and the interpretation of such treaties.

Although Vattel did not use the words "imposed" or "forced" treaties, his writings clearly lend themselves to the use of such terms. For example, he stated the following: "When a Nation is *forced* to submit to another it may lawfully renounce its former treaties, if that is demanded of it by the power which had compelled it to make the unequal alliance."*

Vattel recognized that some treaties imposed by force may not be contrary to the laws of nature. For example, imposing unequal terms on a weaker state for the stronger state's own safety is not contrary to the natural law of nations. Vattel also contended that a treaty may be imposed upon a state as a penalty to punish it for being an unjust aggressor or to render it incapable of easily doing harm in the future. This is more than merely imposing a treaty in order to recreate the *status quo*.

It is stated in later portions of this article that the modern rule against imposed treaties does not allow the imposition of a treaty on an aggressor as a penalty. However, the rule permits a treaty to be imposed in reference to a state's aggression. Whether the imposition of a
treaty is permissible in order to render the aggressor incapable of easily doing harm in the future is still an open question.

Vattel discussed treaties of peace as a particular type of treaty.33 Like other writers, Vattel believed that the right to make peace went with the power to make war; individual states were the final arbiters in the exercise of such rights. He indicated that the urgent need for the termination of unfortunate wars provided the justification of the rule of law recognizing the validity of a peace treaty.34 Moreover, Vattel specifically recognized the legal rights of an "unjust conqueror."35 The unjust conqueror becomes possessed of all the powers of government, including the power to negotiate peace treaties with other nations.36

Like the other writers of this period of classical international law scholarship, Vattel saw the overriding reason for recognizing imposed peace treaties as the necessity to end existing hostilities. In a broad sense, although Vattel did not explicitly view it as such, the need to end hostilities and to preclude further killing and horror is a paramount principle of justice.

Because of the necessity of maintaining the existence of a defeated state, Vattel justified the principle of treaty law which allowed imposed treaties. Yet, he also justified it from an international community perspective. He declared that if the rule were otherwise, it would undermine the general principle of treaty observance.

To authorize [a rule invalidating imposed treaties] would amount to an attack upon the common safety and welfare of Nations; the principle would be condemned as abhorrent by the same reasons which made the faithful observance of treaties a universally sacred duty. . . . Besides the plea would be almost always disgraceful and absurd.37

Vattel did not regard the consent of the defeated state either as a juridical fiction or as real but vitiated by the duress that had been brought to bear against the state. He believed it to be real and actual consent even though it was brought about by duress.

Since the nation has consented to [treaties of peace] it must look upon them as an advantage, considering the circumstances under which they were made; and it should respect its word.38

33. See generally VATTEL, supra note 28, at 346.
34. Id. at 347.
35. Id. at 349.
36. Id. "[N]either of the parties is condemned as unjust, a proceeding which scarcely any sovereign would submit to." Id. at 350.
37. Id. at 356.
38. Id. at 357.
Vattel also treated the problem of interpreting an imposed peace treaty. He contended that when the meaning of a clause is in doubt, it is to be interpreted against the party prescribing the terms of the treaty. "For as it was he who in a measure dictated the treaty, the fault is his if it was not worded more clearly. . . ." He thought that by interpreting an ambiguous clause against the imposing state, a measure of fairness would be provided to the weaker party.

In summary, Vattel contended that imposed treaties are lawful, including all peace treaties. The need to save a state from further destruction and to uphold the general sanctity of treaties were his essential policy considerations. This need was recognized as providing a reason for a rule of treaty law allowing the use of force in concluding treaties. This rule was incongruous to the existing law of war, which was that there should be no unjust resort to wars. He believed that the consent of the defeated state was not vitiated by the duress. However, he argued that ambiguous terms of a peace treaty are to be interpreted against the dictating state.

P.P. Shafirov. It is of interest to indicate the views of Shafirov, as Vice-Chancellor of the Russian Empire, in his 1717 discourse concerning the just causes of the war between Sweden and Russia in the early eighteenth century. This has been rediscovered and republished only recently.

Shafirov argued that the Russo-Swedish Treaty of 1616 was "a prejudicial and forced peace" that was signed in order to save Russia from "impending utter ruin." Shafirov contended that the Tsar had observed a peace treaty which had been extorted from his predecessors.

Shafirov attempted to rely upon the "just war doctrine" in order to

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39. Id. at 354. Bynkershoek contended that it was unjust for the leading powers to impose a treaty on a smaller state with the overt intention of precluding a conflict between that smaller and innocent state and its larger and aggressive neighbor.

As it is unjust to compel a sovereign to make war against his will, so it is unjust to force peace upon him.

The pretext to such acts of injustice is usually a desire to conserve the peace, as it has been the pretext for even greater wrongs which have been fashionable for some years past, seeing that sovereigns have banded together to dispose of the dominions and powers of other sovereigns at pleasure, and as freely as if these were their own.

2 C. Bynkershoek, Quaestionum Juris Publici Libri Duo (1st ed. T. Frank transl. 1737) in Classics in Int'l L. 142 (J. Scott ed. 1930).


41. Id. at 268.

42. Id.

43. Id. at 273.
justify Russia’s first use of force in the Swedish-Russian War of 1700-1721. He believed that the prior imposed peace treaty was cause in and of itself to justify politically the use of force against Sweden. Thus the Treaty of 1616, even though it was declared to be both observed and valid, was proposed as a factor in determining the justness of a subsequent war.

This reasoning highlights an anomaly of the eighteenth century theorists. Imposed treaties were viewed as legally valid, but they were also thought of as grounds to be relied upon to justify renewed warfare. One may conclude that Shafirov’s reasoning is that a legally valid treaty may serve as political justification for renewed hostilities—the paradoxical absurdity of the classical view of “imposed treaties” and “just wars.”

B. Nineteenth Century Writers

By and large, nineteenth and early twentieth century writers rarely discussed imposed treaties. When they did, they viewed them as being legal. These writers did not make the theoretical distinction between an unjust treaty of peace, defined here as a treaty resulting from the military success of an aggressor, and a just peace treaty imposed by the victorious victim of aggression. Neither did they discuss the justness of the provisions within the peace treaties. These omissions are indicative of their less rigorous analysis of the topic of imposed treaties. A discussion of two leading nineteenth century treatises is presented in order to indicate the prevalent views of this time period.

Wharton. Francis Wharton, in his Digest of International Law of the United States in 1887, quoted Woolsey and Bernard as having accepted the validity of all coerced treaties. Woolsey stated that coercion, while invalidating a private agreement produced by it, did not

44. Id.
45. Butler in his introduction stated that Shafirov argued that treaties obtained by coercing a state during a period of domestic stress were void. Id. at 1, 9. This is a broad reading of Shafirov’s work. The “domestic distress” approach by itself is not a statement of the law as existing in the twentieth century, let alone in the eighteenth century.
46. Perhaps this was because the Western states were the imposers of many treaties during the nineteenth and twentieth centuries.
47. 2 A Digest of the International Law of the United States 5 (F. Wharton ed. 1887) [hereinafter cited as Wharton]. See also 5 A Digest of International Law 183-84 (J. Moore ed. 1906) [hereinafter cited as Moore].
48. T. Woolsey, Introduction to the Study of International Law 100 (4th ed. 1875) [hereinafter cited as Woolsey].
49. M. Bernard, Four Lectures on Subjects Connected with Diplomacy 184-85 (1868) [hereinafter cited as Bernard].
invalidate a treaty so produced.\textsuperscript{50} Thus, Wharton declared that there could be no question of the binding force of the treaty between France and Germany that led to the dethroning of Napoleon III, though its terms were concluded through coercion.\textsuperscript{51} He also argued that the same may be said of the consent of France to a treaty after the defeat of its armies at Waterloo, and of the treaty by which Mexico ceded California and other territory to the United States.\textsuperscript{52}

Bernard declared that neither the plea of "duress" nor that of \textit{laesio enarnes} (severe hardships) could be recognized as justifying the non-fulfillment of a treaty.\textsuperscript{53} He contended, for example, that the hardship inflicted by France on Russia after the Battle of Jena did not invalidate the Peace of Tilsit.\textsuperscript{54}

However, both Woolsey and Bernard, as did all nineteenth century writers, recognized that personal duress upon the negotiator vitiates the underlying consent of the international agreement.\textsuperscript{55} The views illustrated subsequently by Moore in his digest\textsuperscript{56} were essentially similar to those of Woolsey and Bernard.

\textit{Oppenheim.} In his treatise on international law, Oppenheim clearly assented to the existing rule by stating that the repudiation of any treaty, whether or not the treaty was brought about by the threat or use of military force, was to be viewed as an unlawful repudiation under international treaty law.\textsuperscript{57} He stated that, generally, a treaty without real consent lacked binding force, but that circumstances of urgent distress, such as defeat in war or the menace of a strong state to a weak state, would not invalidate the consent of a state to the terms of a treaty.\textsuperscript{58}

His conclusions were essentially similar to those of the writers of the seventeenth and eighteenth centuries. However, his writings did not indicate that he had ever assessed the views of the classical writers, especially those of the naturalist school of international law; nor did he discuss policy reasons for not invalidating imposed treaties, or the relation of a treaty of peace to just and unjust wars.

\begin{itemize}
\item[\textsuperscript{50}] \textsc{Woolsey}, supra note 48, at 175.
\item[\textsuperscript{51}] \textsc{Wharton}, supra note 47, at 5.
\item[\textsuperscript{52}] Id.
\item[\textsuperscript{53}] \textsc{Bernard}, supra note 49, at 184.
\item[\textsuperscript{54}] Id. at 185.
\item[\textsuperscript{55}] \textsc{Woolsey}, supra note 48, at 172; \textsc{Bernard}, supra note 49, at 184.
\item[\textsuperscript{56}] \textsc{Moore}, supra note 47.
\item[\textsuperscript{57}] 1 \textit{L. Oppenheim, International Law} 525 (1905); 1 \textit{L. Oppenheim, International Law} 547 (1912).
\item[\textsuperscript{58}] Id.
\end{itemize}
C. Summary of Classical and Traditional Writers

The writers of the seventeenth, eighteenth and nineteenth centuries never used the term "imposed treaties", but only the term "unequal treaties". It is interesting to compare the discussions of seventeenth and eighteenth century writers to writers of the nineteenth century who viewed all imposed treaties as valid and did not discuss this topic further. The earlier classical writers reached much the same conclusions; however, unlike the nineteenth century writers, they struggled with various subtle propositions. The refusal of nineteenth century writers to discuss more fully the problem of imposed treaties may be explained in part by the movement away from the older naturalist legal philosophy to a stronger positivistic approach.

The writers of the seventeenth and eighteenth centuries were confronted with the problem of upholding the validity of imposed or forced treaties, especially in light of these writers' view of the law of war under which unjust wars were illegal. They contended that this anomaly was unfortunate but unavoidable because of existing state practice. Forced treaties or imposed treaties were discussed most often by classical and traditional writers in the context of peace treaties. The writers rarely indicated what forms "forced treaties" could have if they were not in the form of peace treaties. Also, the writers rarely discussed the law of imposed treaties in the context of restricting the possibility of renewed warfare; they discussed the law only in terms of ending the immediate conflict. Treaties were always to be observed under pacta sunt servanda. The consent of the defeated or coerced state was viewed as real, and not a legal fiction. In cases of ambiguity, these treaties were to be construed against the imposer.

For the early writers, the policy considerations for validating imposed treaties were two-fold. First, the essential consideration was

59. The older naturalist school of international law approved of various rules as positive law which were at variance with jus naturale. One such rule seems to have been the rule precluding the invalidity of treaties because of military duress against the state. See generally the Swedish treatise T. GIHL, INTERNATIONAL LEGISLATION 46 (S. Charleston transl. 1937).

Two major private codes of international law in the nineteenth century, Field's International Code and Bluntschli's International Law Code, which purported to reflect existing law, did not proscribe the use of military force in treaty-making. D. FIELD, OUTLINES OF AN INTERNATIONAL CODE art. 190 (2d ed. 1876); M. BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIE art. 402 et seq. (1870). However, the Fiore Code, a nineteenth century code which posited an ideal set of rules, proscribed such use of force in treaty relations. P. FIORE, IL DIRITTO INTERNAZIONALE CODIFICATO E LA SUA SANZIONE GIURIDICA arts. 757-58 (1915) (1st ed. 1890). The international law community waited almost eighty years to have an analogous rule codified into a draft international convention. For a convenient collection of these codes see 29 AM. J. INT'L. L. Supp. 1207 et seq. (1935).
the need for a state to be able to ensure its survival by consenting to an agreement to prevent that state and its people from further destruction. Second, there was the need to ensure the observation of treaties by all states in the international community. The early writers did not believe that states should be permitted to use a plea of duress in order to vitiate their contractual agreements.

II. WORLD WAR I AND THE INTER-WAR PERIOD: THE TRADITIONAL RULE SURVIVES DEMANDS FOR CHANGE

The inter-war period saw continuing approval of the traditional rule. An evaluation of that period discloses the emergence of a demand for change and of a developing state of tension between contemporary views and the continued acceptance of the more classical position.

A. Doctrine

The great majority of scholars writing during the inter-war period did not believe that the rule upholding the validity of imposed treaties had in any way been changed. Only a few writers argued that the developing new rule, which rejected the validity of imposed treaties, had crystallized sufficiently to be classifiable as a rule of international treaty law.

1. Adherents to the Traditional Rule. The adherents to the traditional rule in the inter-war period generally agreed with many of the observations made by earlier writers, although they emphasized more the lack of third-party adjudication and the concern for the larger international community, rather than just the interests of the directly affected states.

Julius Hatschek. The Danish professor of international law at the University of Guttinger, Dr. Julius Hatschek, in 1930, fully accepted the prevailing view that duress on a state did not vitiate the validity of a treaty. Hatschek contended that equality was an essential condition for the valid consummation of a treaty. Nevertheless, he argued that constraint alone could not constitute a basis in international law upon which a state might contest the validity of a treaty. Hatschek discussed

60. J. Hatschek, An Outline of International Law 170 (C. Manning transl. 1930) [hereinafter cited as Hatschek]. See also the views of the Dutch Councillor of State, D. Jitta, The Renovation of International Law (1919). An earlier writer declared imposed treaties to be valid, no matter how unequal they were, and proffered the phrase "unilateral imposition of demands" to be used in lieu of imposed or unequal treaties. C. Phillipson, Termination of War and Treaties of Peace 165 (1916).
61. Hatschek, supra note 60, at 170.
62. Id.
neither the details of his position nor the policy consideration of the stated rule; he merely cited Grotius.63

Axel Möller. This Danish professor, in 1931, treated the question of duress against a state in one sentence: "[W]ar or threat of war, does not, according to positive international law, generally render the treaty invalid."64 Möller accepted the existing rule with no trace of dissent.

Charles Butler. At the annual meeting of the American Society of International Law in 1932, there was a round table discussion of treaty interpretation which centered on the topic of treaties made under duress. This was one of the earlier scholarly discussions at an organized international law conference which treated the question of the juridical impact of duress on states in their treaty relations and, especially, treaty-making. The views of Charles Butler and Edgar Turlington are notably instructive in light of their clear statements on this topic.

At the 1932 meeting, Butler specifically commented on whether the obligor party can be released from a treaty obligation by reason of duress exercised over him in the making of the treaty.65 In a passing reference to the 1932 confrontation between China and Japan over the latter's invasion of Manchuria, Butler contended that any treaty arising from that conflict would be binding, even if it were forced upon China.66

Butler rejected the notion that there existed a single standard of morality for both individuals and nations.67 The answer to the question of whether obligations assumed under duress could be avoided under any recognized principles of international law was for Butler, "I do not think so."68

In Butler's view, the basis of the existing rule was two-fold: 1) even if there existed an authoritative body competent to determine the validity of a plea of duress, no recognition of such a plea should be given, because to do so would undermine the rights of people and nations;69 2) adherence to the traditional rule would assure the interna-

63. Id.
64. A. MÖLLER, INTERNATIONAL LAW IN PEACE AND WAR 228 (H. Pratt transl. 1931).

At the 1927 meeting of the American Society of International Law, there was a discussion of imposed treaties within the context of termination of unequal treaties. Putney, The Termination of Unequal Treaties, 21 PROCED. AM. SOC'Y INT'L L. 87, 88-89 (1927); Buell, The Termination of Unequal Treaties, id. at 90, 90-91. Putney stated: "[W]hatever kind of unequal treaty we refer to, I do not think that there is any principle of international law . . . [which gives] a right to abrogate it." Id. at 89.
66. Id. at 45-46.
67. Id. at 46.
68. Id.
69. Id. at 46, 48.
tional community of a rule tending to end military hostilities.\textsuperscript{70}

\textit{Edgar Turlington.} Turlington readily agreed with the observations of Butler, and in surprisingly blunt language, declared that a treaty of peace was a kind of judgment following a trial by battle.\textsuperscript{71} Given the decentralized nature of the international community, a treaty of peace is valid regardless of the duress directed against a state.\textsuperscript{72} He cited contemporary state practice of the United States in Latin America (Haiti, 1915 and Santo Domingo, 1916),\textsuperscript{73} as well as the partitioning of Poland in the nineteenth century by other European states, as examples supporting the traditional rule.\textsuperscript{74}

Turlington believed it dangerous to accept the "implied analogy between treaties and private contracts."\textsuperscript{75} Moreover, he considered it especially dangerous to transfer the rules of morality binding in a domestic legal order to the international legal order.\textsuperscript{76}

Turlington argued that the policy basis of the traditional rule to be of at least a dual nature. First, he believed a defeated state to have a role, however slight, in drafting a peace treaty.\textsuperscript{77} Thus, he contended that imposed treaties are based on actual consent. Second, he argued that the "welfare of society demands [the] observance [of imposed treaties]."\textsuperscript{78} He emphasized the need of protecting the larger society from a rule allowing a subjective and unilateral denunciation of a treaty in a manner not subject to review by an authoritative third party.

The above arguments were standard reasons for recognizing imposed treaties given by the older classical writers, the nineteenth century writers and the inter-war writers. Turlington restated them in a direct and uncritical manner.

Two additional observations of Turlington are of importance: 1) after identifying the work of a scholar, Dr. Verdross, as adhering to a position that the old rule has been changed, Turlington explicitly rejected this view as being "a little ahead of the procession;"\textsuperscript{79} 2) he raised the problem of treaty revision as it relates to imposed treaties.\textsuperscript{80}

\textsuperscript{70} *Id.* at 46.
\textsuperscript{71} *Id.* at 50.
\textsuperscript{72} *Id.*
\textsuperscript{73} *Id.* at 49, 50.
\textsuperscript{74} *Id.* at 52.
\textsuperscript{75} *Id.* at 49.
\textsuperscript{76} *Id.*
\textsuperscript{77} *Id.*
\textsuperscript{78} *Id.* at 50. Turlington contended that, "[T]he welfare of society may be deemed at some time in the future not to demand the observance of [imposed] treaties." *Id.*
\textsuperscript{79} *Id.*
\textsuperscript{80} *Id.* at 52.
The second proposition is significant in the sense that these two concepts, treaty revision and imposed treaties, were rarely discussed as related concepts by scholars of the inter-war period. This was the case even though these concepts were linked by several states in their practice during that period. Turlington believed that although there may be many reasons for treaty revision, a paramount reason, if not the main reason in practice, is the existence of imposed treaties.\(^{81}\) Turlington also implicitly distinguished the differing effects of these two doctrines.\(^{82}\) Treaty revision requires the consent of the disputing parties, while the abrogation of imposed treaties, if the new rule put forward by some writers was to be accepted, would allow a unilateral denunciation of obligations.

**Charles Hyde.** Hyde accepted the traditional rule and argued that force directed against a state is generally irrelevant.\(^{83}\) His analysis, more than that of some of the other scholars of the inter-war period, raised questions of particular interest to writers of the present decade. His critique of the rule was basically similar to that of other writers of the inter-war period. Yet, he accepted the use of force against a state in treaty-making as an unfortunate characteristic of the existing international legal system.\(^{84}\)

Hyde did not believe that the municipal law analogy which held that duress vitiated a contract, was applicable to the existing international law of treaties.\(^{85}\) For Hyde, the basis of the existing rule was that the consent did not need to be real, a legal fiction being sufficient. He argued that the consensual nature of the agreement was not significant. What was important was the objective sought to be effected. He insisted that the chief concern of international society was recognition of all treaties whether or not concluded under duress, in light of the practical problems which subsequent denouncement might create.\(^{86}\)

Hyde's position described above does not distinguish his writing from writings of other publicists of that period. However, he went on to

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81. *Id.*
82. *Id.*
83. 2 C. HYDE, INTERNATIONAL LAW—CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1380 (2d ed. 1945) [hereinafter cited as HYDE].
84. *Id.* at 1381.
85. *Id.* at 1379. "There is deemed to be slight opportunity for the application of this principle at least in some stages of the process of concluding formal agreements between States." *Id.*
86. *Id.* at 1381.

The practical problem of the present time concerns, therefore, the legal effect of compulsion upon achievements attributable to it, rather than the legal quality of agreements, that are utilized in order to make compulsion effective. *Id.*
make several trenchant remarks. First, Hyde stated that the belligerent’s right to impose a treaty might be limited.\textsuperscript{87} He raised the possibility of the invalidity of the transfer of the territory of the defeated state,\textsuperscript{88} a legal proposition that has not yet been settled definitely. Second, Hyde asserted that the then accepted rule may be counter-productive in the sense that it weakens respect for the sanctity of treaties.\textsuperscript{89} It is also interesting to note that Hyde believed the Brest-Litovsk Treaty\textsuperscript{90} to be invalid not because it violated any rule against the use of force; rather, it subsequently became invalid by what might best be termed the fortunes of war.\textsuperscript{91} Hyde accepted the traditional rule, but did so with the clear knowledge that it was the lesser of two evils.\textsuperscript{92} Either the international community would recognize such treaties, or wars would be prolonged.

Hyde, like other writers of this period, emphasized peace in the international community more than any other factor. He gave greater emphasis to this proposition than to the need to spare the defeated state from further suffering, the view expressed more by the classical writers than by the writers in the twentieth century. This was a subtle but interesting development.

2. \textit{Proponents of a New Rule}. The Western proponents of a new rule of international treaty law during the inter-war period numbered only a few writers. They often demonstrated an acceptance, if only limited, of a new rule which was at times viewed to be a new \textit{jus cogens}.\textsuperscript{93}

\textit{Alfred von Verdross}. Professor Verdross of the University of Vienna discussed the validity of immoral treaties under the concept of \textit{jus cogens}.\textsuperscript{94} Although other authors of this period viewed imposed treaties as invalid, Verdross’ discussion of immoral treaties and \textit{jus cogens} added another dimension.

\textsuperscript{87} \textit{Id.} at 1380 n.5. An earlier writer suggested this proposition as a maxim to guide the forthcoming 1919 Versailles Peace Conference. \textsc{W. Phillimore, Three Centuries of Treaties of Peace} 4 (1917).

\textsuperscript{88} \textit{Hyde, supra} note 83, at 1380 n.5.

\textsuperscript{89} \textit{Id.} at 1381.

\textsuperscript{90} \textit{Armistice Concluded at Brest-Litovsk, done Dec. 15, 1917, 2 Documents in Preparation for Paris Peace Conference} 1 (U.S. Dep’t of State ed. 1918).

\textsuperscript{91} \textit{Hyde, supra} note 83, at 1380.

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} Writers during this period often rejected the doctrine of legal equality of states. Baker argued that such a doctrine is a fiction which is based upon older naturalist writings of the seventeenth century, but the doctrine is rejected by the positivist writers of the nineteenth century. Baker, \textit{The Doctrine of Legal Equality of States}, 4 \textsc{Brit. Y.B. Int’L L.} 1, 7 (1924). \textsc{See also} \textsc{McNair, Equality in International Law}, 26 \textsc{Mich. L. Rev.} 131 (1927).

\textsuperscript{94} Verdross, \textit{Règles Générales du Droit International de la Paix}, 30 \textsc{Recueil Des Cours} 271, 496-500 (1929) [hereinafter cited as 1929 Verdross]; Verdross, \textit{Forbidden Treaties in International Law}, 31 \textsc{Am. J. Int’L L.} 571 (1937) [hereinafter cited as 1937 Verdross].
Verdross thought that the comments of Judge Schücking in his dissenting opinion in the Chinn Case\(^{95}\) evidenced the principle that international law declared immoral treaties to be void.\(^{96}\) He quoted Judge Schücking's comment that the Permanent Court would never recognize an international treaty in contradiction to bonos mores.\(^{97}\) Judge Schücking's full comments indicated that treaties are immoral if they had a "flaw in their origin."\(^{98}\) This could be construed to include the unlawful use of force against a state in concluding a treaty, as the use of force often had been thought of as at least a violation of good morals.

Verdross argued that the League Covenant kept intact the distinction between just and unjust wars,\(^{99}\) merely adding another category, that of wars of self-defense.\(^{100}\) Thus, some wars initiated by a state may be just, even if they were not in self-defense. He contended that in addition to the Covenant, the Lucarno Pact and the Kellogg-Briand Pact also had an impact on changing the law of war and, implicitly, the law of treaties.\(^{101}\)

Verdross concluded that immoral treaties are void, and that no valid obligation could come into existence concerning the immoral contents of a treaty. He believed that international tribunals are under a duty to take judicial notice that such treaties are void, even if there be no demand by a party to this effect.\(^{102}\) "In consequence, a formal voidance of immoral contents of treaties is not necessary. The burdened state has the right simply to refuse the fulfillment of such an obligation."\(^{103}\) For Verdross, the rule against immoral treaties was a jus cogens, and no obligation whatsoever could flow from such treaties.\(^{104}\)

One ambiguity arises in the context of Verdross' view of void treaties. He argued that a burdened state has a right simply to refuse the fulfillment of an immoral obligation. One might ask whether this means that the burdened state also enjoys the alternative right to require the fulfillment of such an obligation. Verdross would seem to say no, but he did not treat this problem fully.

**Hersch Lauterpacht.** Lauterpacht, in the edited work of

96. 1937 Verdross, supra note 94, at 576.
97. Id. at n.16.
99. 1929 Verdross, supra note 94, at 498.
100. Id.
101. Id. at 499.
102. 1937 Verdross, supra note 94, at 576-77. Such juridical notice should also be taken by national courts.
103. Id. at 577.
104. Id. at 571, 576.
OPPENHEIM, INTERNATIONAL LAW, stated that a change in treaty law probably occurred during the inter-war period.105 His statement was not as clear and unequivocal as it was in later editions of OPPENHEIM appearing after the Second World War.

Lauterpacht argued that in light of the Covenant of the League and the General Treaty for the Renunciation of War, international law had rejected the previously existing rule.106 He made it clear that there was no change in general international law as the result of these two instruments. The change was limited to the views of the parties adhering to these agreements which were not universal.107

He did not present a discussion of the policy considerations behind these rules. He merely stated that the prior law was obnoxious to some general principle of law, presumably one requiring the consent of states, but was nevertheless the existing law.108 He did believe, however, that an invalidly imposed treaty could be given some effect if other states subsequently recognized the situation created by the imposed treaty.109

One may conclude that while Lauterpacht espoused the existence of a new rule of treaty law in the inter-war period, his views were not a radical departure from those generally accepted by other Western writers of that era.

B. State Practice

An analysis of the practice of a number of states during the inter-war period evidences an early development of the rule against imposed treaties. Yet, state practice as a whole was neither persistent nor consistent. The evidence analyzed does not support the proposition that state practice during the inter-war period crystallized a new rule of treaty law on imposed treaties.

The practice of states over a period of time, accepted by most of them as legitimate, is the process that creates customary international law. This study cites examples of treaty practice as evidence bearing on the existence or non-existence of that customary rule of international law which governs the conclusion of treaties.

1. United States Response to Japan's 21 Demands (1915). The

105. 1 L. OPPENHEIM, INTERNATIONAL LAW 703 (H. Lauterpacht 5th ed. 1937).
106. Id.
107. Id. at 702.
108. Id.
109. Id. at 703 & n.1. This proposition is discussed below in the text accompanying note 1015 infra. It will be shown that the 1969 Vienna Convention, to the contrary, explicitly postulated that imposed treaties could not have even a limited effect.
response of the United States government\textsuperscript{110} to the "Twenty-One
Demands" made on China by Japan in 1915,\textsuperscript{111} is one of the earliest
examples of state practice in the twentieth century challenging the
existence of the generally accepted rule of treaty law at that time.

As a result of the Japanese threat of military force against China in
1915, China acquiesced in the signing of several treaties with Japan.
Among those treaties were the Treaty Respecting the Province of
Shantung\textsuperscript{112} and the Treaty Respecting South Manchuria and Eastern
Inner Mongolia.\textsuperscript{113} Both were concluded on May 25, 1915.

On May 11, 1915, exactly two weeks before the conclusion of
these treaties, United States Secretary of State Bryan had asked the
United States ambassador to Japan to convey a note to the Japanese
government stating that the United States could not recognize any
agreement arising from the prevailing circumstances.\textsuperscript{114} Those cir-
cumstances included the threat of military force as contained in the
Japanese ultimatum.\textsuperscript{115} The Bryan Note stated the following:

\textit{In view of the circumstances of the negotiations which}
\textit{have taken place and which are pending between the Govern-
ment of Japan and the Government of China, and the agree-
ments which have been reached as a result thereof, the
Government of the United States has the honor to notify the
Imperial Japanese Government that it cannot recognize any
agreement or undertaking which has been entered into or
which may be entered into between the Governments of Japan
and China impairing the treaty rights of the United States and
its citizens in China, the \textit{political or territorial integrity} of the
Republic of China, or the international policy relative to
China commonly known as the \textit{open door policy}.}\textsuperscript{116}

This early twentieth century treaty practice of the United States
exhibited a newly developing approach to the validity of treaties, an
approach denying recognition to treaties imposed by the threat of
military force. This position was reasserted by the United States during

\begin{footnotesize}
\begin{enumerate}
\item Letter from Secretary of State to Ambassador Guthrie, May 11, 1915, reproduced in \textit{For. Rel.} U.S. 146 (1924) [hereinafter cited as Bryan Letter].
\item Id. at 145. \textit{See also} 2 \textbf{Treaties and Agreements with and Concerning China} 1231 (J. MacMurray ed. 1921).
\item Treaty Respecting South Manchuria and Eastern Inner Mongolia, \textit{done} May 25, 1915, \textit{id.} at 796.
\item Bryan Letter, \textit{supra} note 110, at 146.
\item Bryan Letter, \textit{supra} note 110, at 146 (emphasis added).
\end{enumerate}
\end{footnotesize}
the 1932 Sino-Japanese conflict in the form of the Stimson Note.117

2. *The Soviet Attitude Toward the Brest-Litovsk Treaty (1918) and the Versailles Peace Treaty (1919).* The Soviet attitude toward the Brest-Litovsk Treaty of 1918 was the Soviet Union's earliest practice regarding imposed treaties. It was one basis for the soon to be developed Soviet doctrine espousing a new rule of international law on the nature of treaties. The new Soviet government signed the Treaty, but believed it to be an imposed agreement and questioned its legitimacy.

The Armistice between Russia and Germany was signed December 15, 1917, at Brest-Litovsk.118 Article 9 required that the parties "enter into peace negotiations immediately after the signature of the present Armistice Treaty."119 The history of Russia's conduct during this period and immediately after the signing of the peace treaty evidences that Russia believed itself forced to sign an imposed and unjust peace treaty.

On February 10, 1918, two months after the signing of the Armistice, Russia issued a declaration signed by Trotsky and others stating that she was putting "an end to the state of war with Germany."120 Russia was renouncing "any intention of signing an annexationist peace," and was ordering complete demobilization of all troops.121 This was a most unusual declaration and certainly one with little historical precedent.

In response to the Russian announcement, Germany declared that the Armistice on the Russian front was terminated122 and immediately renewed military operations. Germany argued that Russia's refusal to sign a peace treaty rendered the establishment of peace impossible and amounted to the denunciation of the Armistice.123 This argument had some legal validity in that article 9 of the Armistice required that the sides enter immediately into peace negotiations.

In another declaration, both Lenin and Trotsky announced that Russia was "forced to formally declare its willingness to sign a peace upon the conditions which have been dictated."124 Negotiations were resumed, but the German military operations continued. By the terms of the German ultimatum, such military operations were to continue until

118. Armistice Concluded at Brest-Litovsk, *done Dec. 15, 1917, 2 Documents in Preparation for Paris Peace Conference 1 (U.S. Dep't of State ed. 1918).*
119. *Id.* at 7.
120. Russia's Declaration to the Powers, Feb. 10, 1918, *id.* at 173.
121. *Id.*
123. *Id.* at 174.
124. Surrender of Russia, Feb. 19, 1918, *id.* at 175.
the signing of the peace treaty. The Germans allowed only three days for negotiations.\textsuperscript{125} The Peace of Brest-Litovsk was signed March 3, 1918.\textsuperscript{126}

Russia subsequently protested its signing of the Peace Treaty.\textsuperscript{127} In a lengthy declaration, the Russian peace delegation stated that the Treaty had been forced upon them by violence, and that the agreement was definitely an "annexationist and imperialistic peace."\textsuperscript{128} The Peace of Brest-Litovsk was not a peace based on a free agreement of the peoples of Russia . . . but a peace dictated by the force of arms. This is the peace which Russia, grinding its teeth, is compelled to accept.\textsuperscript{129}

The Russian delegation went on to state: "[N]o honest man can believe that the war against Russia can now be term[ed] a defensive war."\textsuperscript{130} They declared further:

\begin{quote}
[We] are forced to accept the peace dictated by those who . . . are the more powerful . . . we refuse to enter into any discussion of these terms.\textsuperscript{131}
\end{quote}

Russia believed that the Brest-Litovsk Treaty was imposed by force, contained unequal provisions and was a result of a non-defensive war. By its pronouncements the Soviet government questioned the legitimacy of the agreement which was imposed by the actual use of military force.

Although one writer, T.A. Taracouzio, argued in 1938, that the Brest-Litovsk Treaty was "insignificant,"\textsuperscript{132} Russia's attitude toward the treaty was an important development in support of its subsequent doctrinal position on imposed treaties.

In language similar to the earlier Russian pronouncements, the Versailles Treaty proclaimed the invalidity of treaties imposed by Germany. By article 292, Germany recognized that its treaties with Russia were abrogated, and by article 293, all treaties concluded with Allied states by reason of military force were \textit{ipso facto} annulled.\textsuperscript{133} By

\begin{flushleft}
\textsuperscript{125} Resumption of Negotiations, Feb. 28, 1918, \textit{id.} at 180. \\
\textsuperscript{126} The Treaty of Brest-Litovsk, \textit{id.} at 13. \\
\textsuperscript{127} Russian Delegates Protest Against German Terms, \textit{id.} at 185. \\
\textsuperscript{128} \textit{Id.} \\
\textsuperscript{129} \textit{Id.} \\
\textsuperscript{130} \textit{Id.} at 186. \\
\textsuperscript{131} \textit{Id.} at 187. \\
\textsuperscript{132} T. TARACOUZIO, THE SOVIET UNION AND INTERNATIONAL LAW 251 (1935). \\
\end{flushleft}
article 231, Germany recognized that the war had been imposed by her own aggression.\textsuperscript{134} Thus, the Versailles Treaty linked the notion of aggression with illegally imposed treaties. This was in furtherance of the position put forward by Russia regarding its objections to the Brest-Litovsk Treaty. The Versailles Treaty not only questioned the legitimacy of a treaty imposed by aggression, but went further and annulled a specific example of one.

3. \textit{The Versailles Treaty: German Reaction (1919) and Its Repudiation (1936).} The German reaction in 1919, to the Versailles Peace Treaty, as revealed by the official comments of the German delegation to the draft treaty in 1919,\textsuperscript{135} and by the Allied Reply to those comments,\textsuperscript{136} indicates that Germany believed the Treaty violated that state’s basis of entry into negotiations. Germany did not claim at that time that the treaty was invalid because it was imposed by Allied aggression.\textsuperscript{137} It was not until 1936, that Germany renounced the Versailles Treaty as being an imposed treaty.

\textit{Comments by the German Delegation on the Conditions of Peace}\textsuperscript{138} discusses the following: the legal basis of the negotiations; the contradiction between the draft of the Versailles Treaty and the negotiations’ legal basis which had been previously agreed upon; the contradiction between the draft of the Versailles Treaty and the previous assurances given; and general ideas of international law.

The German delegation’s position was that they had entered into the Armistice of 1918 and subsequent peace negotiations in reliance on President Wilson’s Fourteen Points as contained in his Congressional message of January 8, 1918, and in subsequent proclamations. The delegation argued that Germany had a right to discuss the terms of

\begin{itemize}
\item Germany recognizes that all treaties, conventions or arrangements which she concluded with Russia . . . are and remain abrogated.
\item \textit{Id.} at 296. Article 293 states in part:
\begin{quote}
Should an Allied or Associated Power . . . have been forced . . . by reason of military occupation or by any other means or for any other cause, to grant . . . favors of any kind . . . are \textit{ipsa facto} annulled by the present Treaty.
\end{quote}
\item \textit{Id.} at 296. Article 231 in part provides:
\begin{quote}
. . . Germany accepts the responsibility . . . [for] the war imposed upon [the Allies] by the aggression of Germany and her allies.
\end{quote}
\item \textit{Id.} 251-52.
\item 134. Versailles Treaty, \textit{supra} note 133, at 251-52.
\item 138. 143 \textit{INT’L CONCIL.} 1203 (1919).
\end{itemize}
peace, and that the discussion should extend only to the Fourteen Points. The delegation stated: "If a peace of a different nature were forced upon Germany it would constitute a breach of a solemn pledge." 139 The delegation went on to conclude: "[T]he draft of a peace treaty as submitted to the German Government stands in full and irreconcilable conflict with the basis agreed upon for a just and durable peace." 140

Germany's position was that the imposition of the treaty would be a breach of a solemn pledge, not a violation of general international law. However, it did believe that a pactum de contrahendo existed, and that it would be violated by the conclusion of a treaty along the lines of the draft submitted by the Allies. 141 The point to be noted is that Germany did not contend the existence of a customary rule of international law limiting the use of an imposed and one-sided peace agreement. At most, Germany argued that a particular conventional obligation would be violated.

The Reply of the Allies to the observations of the German delegation rejected the general position of Germany regarding the variance of terms. 142 The Reply threatened the renewed outbreak of military hostilities. 143 It stated: "[T]his letter and the memorandum attached constitute [the Allied and Associated Powers'] last word." 144 The Reply added that if the treaty were not to be signed, "[t]he said armistice will thus terminate and the Allied and Associated powers will take such steps as they think needful to enforce their Terms." 145 The Reply also contended that a basis for the negotiation had been contained in the prior correspondence and pronouncements, and concluded that the Allies had adhered to previous commitments.

Hitler's speech to the German Reichstag on March 7, 1936, repudiated the Versailles Treaty. Hitler enlarged the legal grounds of the German objection to the Versailles Treaty to include the element of imposed provisions. 146 In other documents, he also stated that the Peace Treaty was both imposed and dictated. 147

140. Comments of the German Delegation on the Conditions of Peace, 143 Int'l Concil. 1203, 1220 (1919).
141. Id. at 1205.
143. Id. at 1349.
144. Id. at 1351.
145. Id. at 1352.
147. Id.
4. *Early Soviet Treaty Practice.* While early Soviet treaty practice was not entirely consistent, it did, for the first time in the history of international treaty law, explicitly abrogate treaties that were imposed. Soviet practice was not unilateral, but was based upon mutual state consent.

Soviet policy was based somewhat on the treaty practice of the former Czarist government. The Czarist government in 1870, demanded the revision of the earlier multilateral treaty of 1856, which had neutralized the Black Sea. The resulting Treaty of 1870 among Russia, Great Britain, Austria, France, Germany, Italy and Turkey, revised the earlier treaty\(^1\) by denouncing the 1856 Neutralization of the Black Sea. The 1870 Protocol was not a unilateral abrogation, but revised the 1856 Treaty in a "spirit of conciliation and equitable appreciation."\(^2\) Thus, the 1870 Protocol was explicitly based upon unanimity, which was specifically reaffirmed in the treaty as "un principe essentiel du droit des gens."\(^3\)

Czarist Russia often viewed itself as a victim of imposed treaties. However, like Japan in the nineteenth century, Russia had a two-sided experience with imposed treaties. It was also an imposer. This is proven by Russia's treaty policy with China in the nineteenth century concerning their borders.

The Soviet policy in the 1920's and the 1930's had a similar two-sided nature. The Soviets strengthened their opposition to imposed treaties by actually abrogating some treaties which they believed were imposed. However, they did not abrogate other treaties, in some of which they were the stronger party, and in others the weaker.

The Russian-Persian Treaty of Friendship of 1921 is an example of the Soviet government's extension of the Czarist government's juridical position which required unanimity for treaty revision.\(^4\) In this treaty, the Soviet Union renounced the tyrannical policy of Czarist Russia and held that the body of treaties concluded with Persia were null and void.\(^5\) The various articles of the treaty proclaimed that the securing of treaties with the absence of the consent of Persia amounted to a criminal policy on behalf of the Czarist government,\(^6\) and that such treaties were repugnant to the Soviet Union.\(^7\)

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2. Id. at 1195 (transl. by the author).
3. Id.
5. Id.
6. Id. art. 2.
7. Id. art. 3.
This treaty showed that the Soviet Union believed certain treaties imposed by the Czarist government to be unlawful. However, the treaty abrogating the earlier treaty was consented to by both states in a subsequent bilateral treaty. Thus, the actual bilateral abrogation of the former treaty was a new policy, but not as extreme as it would have been if the Soviet Union had abrogated the treaty unilaterally. It is juridically significant that in a provision of the later treaty, the Soviet Union contended that imposed treaties are both unlawful and criminal.

The Soviet Union in the 1921 Treaty with Turkey abolished its existing capitulation rights in Turkey.\textsuperscript{155} In article 1, Russia explicitly stated its view on imposed treaties.\textsuperscript{156}

Article 1—Each of the contracting parties agrees not to recognize any peace treaty or other international agreements imposed upon the other against its will . . . .

This treaty further illustrates the position of the Soviet Union toward imposed treaties which was then developing to the effect that no treaty was to be recognized if it were imposed on either state against its will. This referred to any treaty, not only to those in which these states were the contracting parties.

Some treaties concluded by Russia in the 1920's did not abrogate prior imposed treaties. The 1925 Soviet-Japanese Treaty of Friendship perpetuated the earlier treaty which had been imposed on Russia in 1905.\textsuperscript{157} Article 1(2) specifically recognized the continued existence of the Treaty of Portsmouth of 1905 that had been imposed upon Czarist Russia by Japan at the conclusion of the 1904-1905 Russo-Japanese War.

The Soviet-Chinese Treaty of 1924 clearly reveals inconsistent state practice, and a contradiction between practice and the developing Soviet doctrine of imposed treaties.\textsuperscript{158} The parties declared that new treaties were to be enacted on the basis of equality and reciprocity.\textsuperscript{159} The Soviet Union reaffirmed, on the basis of its earlier policy pronouncements of 1919-1920, that all former treaties between China and Czarist Russia were null and void.\textsuperscript{160} However, in the supplementary

\textsuperscript{155} Treaty of Friendship Between the U.S.S.R. and Turkey, art. 7, Mar. 16, 1921, 118 BRIT. & FOR. ST. PAPERS 990, 992 (1923). See also, 17 AM. J. INT'L L. 228 (1923).

\textsuperscript{156} Id. at 990.


\textsuperscript{158} Agreement on General Principles for the Settlement of the Questions Between the Republic of China and the U.S.S.R., art. 9, done May 31, 1924, 37 L.N.T.S. 176 [hereinafter cited as Settlement of Questions].

\textsuperscript{159} Id. art. 3.

\textsuperscript{160} Id. art. 4.
agreements and declaration relating to Outer Mongolia and the Chinese Eastern Railway, the Soviet Union kept many of its rights which had been secured by actions of the Czarist government.

Another illustration of contradictory Soviet state practice was the 1937 Soviet-Chinese Treaty. Article 3 of that treaty explicitly provided that the present treaty, implementing the Kellog-Briand Pact of 1928, should not be interpreted as affecting obligations arising out of prior bilateral or multilateral treaties.

The Soviet Union in the 1920’s and 1930’s concluded a treaty reaffirming a previous treaty imposed upon it, the 1925 Soviet-Japanese Treaty, and concluded agreements with China which may be termed imposed. Yet Soviet treaty practice nevertheless revealed an attitude novel for the international community at that time, that imposed treaties were unlawful. While this juridical development was to some extent an outgrowth of Czarist Russian policy, it was new in the sense that it was explicitly based upon a concept of imposed treaties. This was a milestone in the history of international treaty law.

5. United States Reaction to Japanese Occupation of Manchuria (1932). The Stimson Doctrine issued in the midst of the Japanese-Chinese conflict over Manchuria in the early 1930’s, was a reaffirmation by the United States of its 1915 position established during the period of Japan’s Twenty-one Demands on China. The Stimson Doctrine declared that no agreement brought about by the threat or use of military force against a state would be recognized by the United States. This represented a major policy position of the United States in the early 1930’s.

Quincy Wright, writing in 1932, stated his belief that the Stimson letter of January 7, 1932, was a significant instrument setting forth a new rule of international law. He stated the new rule thus: “Treaties
in the making of which non-pacific means have been employed are void.\textsuperscript{168}

The Stimson Note of January 7, 1932, was sent to both Japan and China. It states the following:

With the \textit{recent military operations} about Chinchow . . . the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation \textit{de facto} nor does it \textit{intend to recognize any treaty or agreement} entered into between those governments . . . including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China . . . and it does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States are parties.\textsuperscript{169}

Stimson recorded in a memorandum that he had reminded the Japanese Ambassador in Washington of a similar note sent in 1915, at the time of the Twenty-One Demands.\textsuperscript{170} The Japanese Ambassador replied that he remembered the earlier note.\textsuperscript{171} Stimson previously had authorized a verbal message, different in language, but similar in tone to the earlier note, regarding the Soviet military actions concerning the Chinese Eastern Railway in Manchuria in 1929,\textsuperscript{172} to be conveyed to over thirty foreign ministries.

The Stimson Note of 1932 evidences, at the least, that the United States as a matter of national policy would not recognize any international agreement brought about by means contrary to the terms of the 1928 Pact of Paris which had renounced the use of force as an instrument of foreign policy.

In the Note, Stimson specifically refers to the Japanese military operations taking place in China. In the last sentence, the Note indicates that the United States, Japan and China were parties to the 1928 Pact of

\textsuperscript{168} Wright, \textit{The Stimson Note of January 7, 1932}, 26 \textit{Am. J. Int'l L.} 342, 344 (1932).

\textsuperscript{169} Letter from The Secretary of State to the Consul General at Nanking, Jan. 7, 1932, 3 \textit{For. Rel. U.S.} 7-8 (1948) (emphasis added).

\textsuperscript{170} Memorandum by the Secretary of State, Jan. 5, 1932, \textit{id.} at 5-6.


\textsuperscript{172} The Secretary of State to Certain Diplomatic Representatives, 2 \textit{For. Rel. U.S.} 371-73 (1943). Previous statements had been communicated to both China and Russia. \textit{Id.} at 372-73.
Paris. One construction of the Note concludes that the United States favored what was only a conventional rule, not an obligation of customary international law.\textsuperscript{173} However, even this construction seems too broad. Nowhere in the 1928 Pact of Paris is it explicitly declared that treaties brought about by the use of force are invalid. Nowhere in the Note does the United States indicate that a treaty brought about by force is unlawful; the Note states only that the United States would not recognize such a treaty.

It may be concluded that the Stimson Note was a clear indication, no matter how limited, that at least one major power in the 1930’s was not going to recognize an imposed treaty, for whatever reasons, political or otherwise. However, this did not amount to a clear acceptance or even a statement of a juridical rule against imposed treaties.

6. \textit{Chinese Practice (Republic of China and the Nationalists).} The Chinese government’s practice in response to existing treaties and newly imposed treaties during the inter-war period was one of limited success. Although some treaties were renegotiated, China continued to suffer from newer imposed treaties. The Chinese government did not deny the validity of imposed treaties. Rather, it viewed them as being subject to renegotiation only.

\textit{a. Writers.} A number of Chinese writers of the inter-war period and contemporary writers have discussed this period of Chinese international treaty relations.

Loo Ching Yen in 1927, discussed international treaty law but did not criticize existing rules of treaty law.\textsuperscript{174} In 1931, Yu-Hao criticized the practice of concluding imposed treaties.\textsuperscript{175} He did not maintain that imposed treaties were illegal,\textsuperscript{176} but stated merely that they were a decaying institution and contrary to morality.\textsuperscript{177} His position is similar to the position developed by the Nationalist government of the Republic of China in the inter-war period. Yu-Hao noted that the topic of imposed

\begin{itemize}
  \item \textsuperscript{173} \textit{Id.} at 371-73.
  \item \textsuperscript{174} \textit{L. Ch'ing Yen}, \textit{International Law} 20 (1927). For an even earlier study see M. Tyau, \textit{The Legal Obligations Arising out of Treaty Relations and Other States} (1917). Tyau stated: "[T]he obligations she has to discharge were not contracted voluntarily, but imposed upon her by superior force." \textit{Id.} at 212. For a research guide to both original Chinese sources and secondary works on China's general response to the West in the nineteenth and early twentieth centuries and its attempt at a positive foreign policy, see \textit{Ssu-yu Teng \\& J. Fairbank, Research Guide for China's Response to the West—A Documentary Survey}, 1839-923, at 1, 15 (1954).
  \item \textsuperscript{175} \textit{T. Yu-Hao}, \textit{The Termination of Unequal Treaties in International Law} (1931). "[T]he extraordinary political and economic privileges and immunities therein conferred upon the foreigners seems to be hardly warranted by circumstances." \textit{Id.} at 31.
  \item \textsuperscript{176} \textit{Id.} at 63.
  \item \textsuperscript{177} \textit{Id.} at 17, 21.
\end{itemize}
treaties had received very little attention from publicists. He discussed Porter's Congressional Resolution of 1927 which requested that the President enter into new treaties with China based on an equitable and reciprocal basis.

A modern-day writer, Hungdau Chiu, has written on the inter-war treaty practice of the Republic of China. Chiu argues that it was the policy of the Republican (Peking) government and subsequently of the Nationalist government to revise existing treaties. This policy had its roots in Imperial Chinese treaty relations. As early as 1902, the Ch'ing government exhibited a similar attitude in the negotiations leading to the conclusion of the Sino-British Treaty Concerning Commercial Relations. Chiu points out that in the 1919 Versailles Peace Conference, the Republican government of China submitted a memorandum concerning the abolition of spheres of influence, consular jurisdiction and tariff preferences. However, the Conference took no action on that memorandum.

Chiu states that in 1931, the Nationalist government issued a regulation requesting the revision of treaties on the basis of rebus sic stantibus under article 19 of the Covenant of the League of Nations. However, a year later, after Japan's occupation of Mukeden, the implementation of the regulation was postponed indefinitely. Chiu further points out that in 1943, after a period of negotiations, the Nationalist Government was successful in concluding new treaties with the United Kingdom and the United States abolishing extra-territoriality and other rights.

b. Treaty Practice of the Republic of China. At the Washington Conference in 1922, China questioned the justice of the previously imposed Twenty-One Demands on China, but agreed to their technical

178. Id. at 7.
179. Id. at 13. See Revision of Treaties with China, H.R. Rep. No. 1891, 69th Cong., 1st Sess. 1 (1927) which emphasizes "mutual fairness and equity."
181. Id. at 245.
182. Id. at 246, 254. "[T]hey did not argue that such treaties are void or can be abrogated at will." Id. at 254.
183. Id. at 243.
184. Id. at 244.
185. Id. at 245 n.29.
186. Id. at 256.
187. Id.
188. Id. at 256.
189. Id.
Malower: Imposed Treaties and International Law

1977

IMPOSED TREATIES 37

validity. 190 China believed that the circumstances surrounding the negotiation of the 1915 treaties created an "essential injustice." 191 China questioned the validity of the 1915 treaties from the point of view of equality and justice, 192 not law. 193 The purpose of the Conference was to arrange a political conciliation between China and the foreign powers. 194 China’s policy at the Conference was to adhere to the juristic validity of the 1915 treaties, which China believed were imposed. At the same time, China asked the Conference to arrive at a more equitable and just solution acceptable to all states concerned.

China was successful in having the Soviet Union relinquish extraterritorial and consular jurisdiction in article 21 of the Sino-Soviet Treaty of May 31, 1924. 195 It was not until 1943, that China was able to obtain similar treatment from the Western powers. However, the Chinese Manifesto of 1929, 196 resulting from China’s dispute with the Soviet Union over the Chinese Eastern Railway in Manchuria, indicated that China was still suffering under existing imposed treaties. China could not do very much about it, and the Manifesto did not declare invalid the Soviet treaties on which the Soviet Union’s right to operate the railway were based. 197

The Chinese government’s note to Japan in 1932, protesting the recognition of Manchoukuo, was a clear example of China’s continued plight under foreign military forces and treaties, and its inability to change the situation. 198 China relied upon the League of Nations

191. Id.
192. Id.
193. Id, at 170-71. Baron Shidehara of Japan emphasized the traditional rule. He stated the following during the Washington Conference of 1922:

The insistence by China on the cancellation of those instruments would in itself indicate that she shares the view that the compacts actually remain in force and will continue to be effective, unless and until they are cancelled.

... If it should once be recognized that rights solemnly granted by treaty may be revoked at any time on the ground that they were conceded against the spontaneous will of the grantor, an exceeding dangerous precedent will be established, with far-reaching consequences upon the stability of the existing international relations in Asia, in Europe and everywhere.

Id, at 171.
194. Id, at 172.
195. See generally Q. Wright, THE EXISTING LEGAL SITUATION AS IT RELATES TO THE CONFLICT IN THE FAR EAST 110 n.89 (1939).
197. China proclaimed her right of self-defense, but did not declare a unilateral termination of any treaties. Id, at 231. See also Chinese Eastern Railway, supra note 161, at 197.
Resolution of March 11, 1932, but was not able to enforce it.\textsuperscript{199} This resolution\textsuperscript{200} declares that agreements resulting from the use of force contrary to the Covenant or the Pact of Paris are not to be recognized by members of the League.

The aforementioned events support the conclusion that China’s view of imposed treaties was not that they were legally invalid, but that they ought to be subject to revision based upon the consent of the states concerned.\textsuperscript{201} As a view of international law, this Chinese position certainly was not excessive.

7. Munich Four-Power Agreement (1938). The four-power Munich Agreement of 1938, to which Czechoslovakia subsequently adhered, was signed by the representatives of the English, French, Italian and German governments.\textsuperscript{202} Neither the United States nor the Soviet Union participated in the Munich Conference. The Agreement was treated by the major powers, including the United States, as a legally valid agreement, despite the threat of military force by Germany against Czechoslovakia and, implicitly, against the other major powers. Only after the outbreak of World War II did the Allies declare it to be invalid.

a. Writers. Two American international law writers discussed the Munich Agreement of 1938 prior to the outbreak of World War II. Both Fenwick\textsuperscript{203} and Wright\textsuperscript{204} dealt with the Agreement’s juridical significance in the development of international law, and concluded that the Agreement was invalid.\textsuperscript{205}

Fenwick argued that the Munich Agreement was a “severe setback” for the development of international law.\textsuperscript{206} He stated that the international community had developed a new rule of law, created by the series of multilateral treaties concluded during the inter-war

\textsuperscript{199} Id. at 263-64. Stimson during these debates argued that the Covenant was not applicable to the United States, and implicitly argued that its rules were essentially only conventional and not customary international law obligations. Id. at 348.

\textsuperscript{200} See also text accompanying notes 325-32 infra, for a discussion of League of Nations Resolution of March 11, 1932.

\textsuperscript{201} Chang has supported this view at the 1967 meeting of the American Society of International Law, 61 PROCED. AM. SOC’Y INT’L L. 137 (1967).

\textsuperscript{202} Agreement for the Cession by Czechoslovakia, Sept. 29, 1938, 142 BRIT. FOR. ST. PAPERS 438 (1938). See 2 DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, 1014 (Ser. D 1949) [hereinafter cited as GERMAN DOCUMENTS].

\textsuperscript{203} Fenwick, The Outlook for International Law, 33 AM. J. INT’L L. 105 (1939) [hereinafter cited as FENWICK].

\textsuperscript{204} Wright, The Munich Settlement and International Law, 33 AM. J. INT’L L. 12 (1939) [hereinafter cited as WRIGHT].

\textsuperscript{205} Fenwick, supra note 203, at 105; Wright, supra note 204, at 29.

\textsuperscript{206} Fenwick, supra note 203, at 105.
In the period,\(^{207}\) which outlawed the use of force against a state in concluding agreements,\(^{208}\) Fenwick noted that the Munich Agreement was not even in the form of a negotiated peace.\(^{209}\) He emphasized that although the transfer of territory under the Agreement might be lawful, the "procedural" means employed rendered the transfer invalid.\(^{210}\)

Quincy Wright analyzed the history of the Sudeten problem\(^{211}\) and the legality of the methods used in concluding the 1938 Munich Agreement.\(^{212}\) He conceived the history of the settlement and of Nazi foreign policy in general as being one of constant threat of force.\(^{213}\) Thus, he believed that the agreement reached at Munich was illegal, and that it was caused by panic on the part of the Western powers.\(^{214}\) Wright laid the blame in part on the failure of the League to implement article 19 of the Covenant\(^ {215}\) which allowed the revision of treaties, especially in relation to demands for territorial changes. Wright also analyzed the symbiotic nature of the 1919 Versailles Treaty and the 1938 Munich Agreement. Dictatorial procedures were used in concluding both agreements, and to an extent, the former made the occurrence of the latter inevitable as soon as the military balance changed.

The Versailles settlement may not have been seriously unjust in substance, but it eventually succumbed because it had been achieved by procedures of dictation which did not provide assurances that it was just. Germany's resentment at the treaty was mobilized less against the terms of the treaty than against its dictated origin.

Until the people of the world are similarly determined to place procedures ahead of substance, we may expect the

\(^{207}\) Id.

\(^{208}\) Id. "International Law has in recent years established procedures which definitely exclude the use of force to accomplish legal ends." Id.

\(^{209}\) Id. at 106.

\(^{210}\) Id. at 105-06.

\(^{211}\) Wright supra note 204, at 20.

\(^{212}\) Id. at 28. Wright considered the methods used by Germany in concluding the treaty as the factor making the Agreement invalid.

It may be that settlement of Munich was in substance just. Of that no one can ever be certain because it was not arrived at by a procedure which general human experience has approved as likely to yield justice.

\(^{213}\) Id. at 31.

\(^{214}\) Id. at 19, 31.

\(^{215}\) Id. at 29.

Through successive stages in dealing with the Sudeten problem the Powers had proceeded from acts which were merely impolitic, to acts which were positively illegal and finally to acts which suggested panic—facilis descensus Averno.

\(^{215}\) Id. at 30.
world to alternate between dictates of Versailles and dictates of Munich, with little respite from wars and rumors of wars.  

b. Practice. The form of the Munich Agreement represents a dictation of terms. Even the language of the particular articles betrays this factor. For example, certain articles state that "evacuation will begin," and "the remaining territory [will] be occupied by German troops."

Chamberlain noted that it was the failure to apply article 19 that was a cause of the Sudeten situation.

I cannot help reflecting that if Article XIX of the Covenant providing for the revision of the Treaties by agreement had been put into operation, as was contemplated by the framers of the Covenant, instead of waiting until passion became so exasperated that revision by agreement became impossible, we might have avoided the crisis.

It is clear that the parties concerned with the Munich Agreement recognized that military force was being threatened. They nevertheless acted as though the agreement were negotiated and lawful. This included Roosevelt, even though he was not directly involved in the negotiations. Czechoslovakian Minister Hurban stated that the Czechoslovakian people were making a "sacrifice which never before in history was required under such concentrated pressure of an undefeated State without war." A secret German memo clearly indicated that Hitler had threatened the British and French foreign ministers that

216. Id. at 31-32 (emphasis added). Hitler stated: "The peace conditions imposed on the conquered nations in the Paris suburbs treaties have fulfilled nothing of the promises given." Telegram from German Chancellor (Hitler) to President Roosevelt, Sept. 27, 1938. 1 FOR. REL. U.S. 669, 670 (1955). See also Führer to the President of the United States, GERMAN DOCUMENTS, supra note 202, at 969.

217. See generally The Czechoslovak Crisis and Munich Agreement—Documents and Speeches, 15 BULL. INT’L NEWS (1938); The German-Czechoslovak Crisis, 1 FOR. REL. U.S. 483-739 (1955).

218. 1938 Munich Agreement, art. 1.

219. Id. art. 4.


222. Telegram from President Roosevelt to German Chancellor Hitler, Sept. 26, 1938, 1 FOR. REL. U.S. 657-58 (1955) wherein Roosevelt stated, "I most earnestly appeal to you not to break off negotiations looking to a peaceful, fair, and constructive settlement." Id. at 658.

223. Letter from Czechoslovak Minister (Hurban) to the Secretary of State, Sept. 29, 1938, id. at 701.
military force would be used against Czechoslovakia if the Agreement were not concluded.\textsuperscript{224}

In determining whether or not international law in the inter-war period supported the existence of a new rule of treaty law denying the validity of imposed treaties, one must look at actual state practice. State practice in this period is overshadowed in importance by the negotiation and the conclusion of the 1938 Munich Agreement. The four great powers who signed it, as well as others, viewed it as a legally valid treaty despite the fact that military force was threatened against Czechoslovakia. The overriding policy consideration of the Western powers was to maintain world peace by imposing a treaty on a small state, a state that was clearly not the aggressor, but the victim of aggression.

C. International Legislation and Codification

Multilateral treaties and resolutions of the League of Nations during the inter-war period, as well as public and private codification efforts, supported the early development of a new rule of treaty law, but not its crystallization. These instruments evidenced the formation of a new rule of law which limited in general the use of military force in international relations. However, no rule developed in the context of a rule of treaty law precluding the validity of a treaty brought about by the threat or actual use of military force against a contracting state.

1. Article I of the Hague Conventions of 1899 and 1907. Article I of the Hague Conventions of 1899 and 1907 states the following:

With a view to obviating, as far as possible, recourse to force in the relations between states, the Signatory [Contracting]\textsuperscript{225} powers agree to use their best efforts to insure the pacific settlement of international differences.\textsuperscript{226}

Article I requires only the best efforts of states “as far as possible” to avoid recourse to force. Article I did not in any other manner change the existing rule of the law of war relating to the use of military force, let alone the rule of treaty law recognizing as valid those treaties emerging

\textsuperscript{224} Memorandum of the First Meeting Between the British and French Prime Ministers, the Duce, and the Führer, Sept. 29, 1938, GERMAN DOCUMENTS, supra note 202, at 1003. “[Hitler] has now declared in his speech in the Sportpalast that he would in any case march in on October 1.” Id. at 1004. See also id. at 1008.

\textsuperscript{225} The 1899 Convention used the term “signatory,” while the 1907 Convention used the term “contracting.”

from the threat or use of force. 227

2. Article 19 (Revision of Treaties) of the League Covenant. Article 19 of the Covenant was the first major provision adopted by the international community which aided in the development of a new rule of treaty law. 228

Although article 19 did not specifically refer to imposed treaties, an analysis of its language, its drafting history and the subsequent practice of the League and its member states indicates that the article was construed to refer specifically to imposed treaties. However, article 19 did not declare imposed treaties or any other treaties to be invalid. It allowed only an advisory opinion by the League Assembly to the member states concerned. The opinion could request only the reconsideration of the treaty by those states and could not even suggest specific terms of revision.

Article 19 adds significantly to the development of a rule against imposed treaties in two respects. First, article 19 had particular application to the revision of imposed treaties. Second, it extended to an international organization the right to suggest treaty revision, an expansion of the right traditionally exercised by contracting states only.

a. Drafting Article 19. The drafters of article 19 discussed the revision of treaties in relation to imposed treaties and the territorial guarantees of the Covenant under article 10. 229 The drafters of the treaty did not intend to declare imposed treaties as void, but as treaties that would fall generally within the operation of treaty revision under article 19.

227. Both Conventions established an International Commission of Inquiry and a Permanent Court of Arbitration. Neither of the tribunals had compulsory or binding authority. Hague Convention of 1899, supra note 226, arts. 14, 18; Hague Convention of 1907, supra note 226, arts. 35, 37-40. The Hague Convention Respecting the Limitation of the Employment of Force, art. 1, done Oct. 18, 1907, 36 Stat. 2241, T.S. No. 537, prohibited the use of force in the recovery of contract debts. This was a codification of the 1903 Drago Doctrine. It also represents an early development in the law of war prohibiting the use of force in one specific type of interstate dispute.


The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

Id. (emphasis added).

229. League of Nations Covenant art. 10. See generally D. Miller, The Drafting of the Covenant (1928) [hereinafter cited as Miller].

"Disputes...will no longer be settled by a unilateral pronouncement of the most powerful party by means of pressure or violence, but in accordance with the Charter of the League." F. Van Asbeck, The Relationship between International and Colonial Law, in International Society in Search of a Transnational Legal Order 48, 65 (H. Van Panhuys & M. Boomkamp eds. 1976) (essay published 1931).
Early in the drafting of article 19, Cecil of the United Kingdom argued that the Covenant's guarantee against external aggression and protecting territorial integrity, as it appeared in article 10, would be directly linked to the provision for treaty revision. However, as they appeared in the final text, there was no direct connection between the two provisions.

Early in the drafting process, the Italian delegation proposed that "every coercive act" be abstained from, and that "all treaties entered into . . . contrary to the principles laid down . . . shall be considered null and void." This proposal was not incorporated into the final text.

Subsequent proposals linked the revision of treaties to the recently made peace treaties of that period. This was the case in the Wilson-British draft and its subsequent version revising the Cecil-Miller drafts. Those proposals also were not specifically included in the final text.

The Wilson-British draft would have allowed the League to recommend "any modification which it may think necessary." If such a modification were not accepted in cases of territorial questions, members would cease to be under an obligation to protect a state from forcible aggression.

An earlier draft of Cecil's considered the revision of treaties as a means of dealing with terms of treaties which had become obsolete. An Italian proposal suggested that the Assembly ought to have the

230. 1 MILLER, supra note 229, at 169-70.

231. Draft Scheme for the Constitution of the Society of Nations, art. 1, para. c, 2 MILLER, supra note 229, at 246, 248.

232. Id. art. 2. One of the basic principles of the Covenant was to create the obligation to protect member states against external aggression. LEAGUE OF NATIONS COVENANT art. 10.


235. 2 MILLER, supra note 229, at 118.

If at any time it should appear that any feature of the settlement guaranteed by this Covenant and by the present treaties of peace no longer conforms to the requirements of the situation, the League shall . . . recommend . . . any modification which it may think necessary. If such recommendation is rejected by the parties affected, the States . . . in the case of territorial questions, cease to be under the obligation to protect the territory in question from forcible aggression by other States, imposed on them by subsection (ii) of the Preamble.

Id. at 118-19 (emphasis added).

236. Id.

237. 1 MILLER, supra note 229, at 170. The proposal read:

Subject, however, to provision being made by the Body of Delegates for the periodic revision of treaties which have become obsolete and of International conditions, the continuance of which may endanger the Peace of the World.

Id. (emphasis added).
power to declare treaties void. These proposals, likewise, were never accepted.

The drafting history of article 19 indicates that certain delegations wanted to create a provision broader than the one actually accepted. In short, these delegations sought to give the Assembly the power to declare treaties void, especially those brought about by coercive acts. They wanted to link this provision directly to the territorial guarantees of the Covenant and the guarantee against external aggression. These delegates did not prevail, however.

An analysis of the language of the text clearly indicates the rule which was adopted. The Assembly “may from time to time advise” the member states. This clearly means that the Assembly had only an advisory right. As explained by Cecil, this right could be exercised only by the unanimity of the Assembly. The Assembly could not declare treaties inapplicable, let alone void. The Assembly could advise only the “reconsideration” of treaties which became “inapplicable.” This criterion of “inapplicable” was not certain, and could have included political, social and legal considerations. “Inapplicable” presumed that the treaty was valid at one point and was still valid. It was left to the member states concerned whether or not to revise a treaty. In such a case, the consent of the states involved was required.

b. Writers on Article 19. At the 1936 annual meetings of the American Society of International Law, a paper was presented by Quincy Wright on article 19. The paper and the discussion of it are especially significant in that they came towards the end of the inter-war period when the practice under the Covenant was completed. Quincy Wright concluded that the doctrine of rebus sic stantibus “does not limit the action of the Assembly and its interpretation is unimportant in the function of Article 19.” Wright argued that article 19 was more than a mere codification of an existing juridical rule; it was a development in international law which intended to adjust the legal situation to political realities, especially territorial demands. Article 19 was to provide a

238. Draft Scheme For the Constitution of the Society of Nations, art. 2, 2 MILLER, supra note 229, at 246, 248.


241. Id. at 68. “It is difficult to interpret Article 19 juristically because it has had so little application in practice.” Id. at 66.

242. Id. at 68. Wright emphasized that the application of article 19 was to include political considerations. Id. This may well have been the situation, but it was also discussed by some of its drafters and subsequently by the Assembly in the context of imposed treaties.
procedure for effectuating peaceful change. It was to close the gap between necessity and the law.

Professor James Garner, in commenting upon Wright's presentation, stated that the group of treaties which created a substantial problem were imposed treaties, particularly treaties of peace.\(^{243}\) He cited also the Soviet Union’s success in abrogating and re-examining such treaties based upon mutual state consent of the Soviet Union and its treaty partners.\(^{244}\)

Article 19 did not enumerate any particular grounds that would allow treaty revision. It was believed by both publicists and various governments that an imposed treaty was a qualifying basis for revision.\(^{245}\) These proponents thought that an imposed treaty would become inapplicable almost as soon as any condition existing at the time of the making of the agreement had changed, such as the social needs of the international community or a change in international morality. In fact, some argued that no additional changes needed to be indicated after a treaty was shown to be imposed.\(^{246}\)

Pitman Potter and several other writers discussed article 19 during the inter-war era. Pitman Potter of the Graduate Institute of International Studies in Geneva presented not one, but two significant studies of article 19. The first study was made in 1932\(^{247}\) during the height of the League’s activities, and the second, a larger study was completed in 1941, after the demise of the League.\(^{248}\)

In 1932, Potter stated that the study of revision of treaties is one of the most important questions a student of international affairs in Geneva could study.\(^{249}\) He believed that the recent demand for treaty revision was in large part because of the "alleged inequities of treaties imposed by force."\(^{250}\)

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243. \textit{Id.} at 78. "But there is a class of treaties which makes the trouble. Those are treaties which have been imposed upon the parties on one side, and particular treaties of peace." \textit{Id.}
244. \textit{Id.} at 80.
246. \textit{Id.} at 10. Potter quoted the report of the 1920 Committee of Jurists appointed by the Assembly in the Bolivia-Chile dispute.

[When the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes . . . . (t)he Assembly would have to ascertain . . . whether one of these conditions did in point of fact exist.]

League of Nations, Records, Plenary Meetings, Second Assembly 466 (1921).
247. 1932 POTTER, \textit{supra} note 245.
248. Potter, \textit{Article XIX of the Covenant of the League of Nations, 12 Geneva Studies} 9 (1941) [hereinafter cited as 1941 POTTER].
249. 1932 POTTER, \textit{supra} note 245, at 3.
250. \textit{Id.} at 8.
Potter did not think that a rule of treaty law existed which invalidated imposed treaties, although such treaties had been particularly susceptible to a plea of revision under article 19.251 He did not believe that article 19 was intended to refer only to a change of military strength.252 He believed it should also apply if there was a change in the social needs of the international community, or when a treaty was "in the strict sense of the term, unjust."253 Potter believed that a treaty could be viewed as either imposed or unequal. In his view, such concepts were severable, and the unequalness of a treaty, even if the inequality existed from the outset, would subject the treaty to a plea under article 19 as much as if the treaty had been imposed.254

In 1941, with the help of hindsight, Potter analyzed in depth the drafting of article 19 and the history of the state practice under it. Potter concluded that article 19 "constituted an integral and a potentially important element in the political and juridical system set up under the name of the League."255

Potter thought that an important reason for the League's collapse was its failure to utilize article 19.256 It was Potter's belief that the powerful members of the League were the beneficiaries of treaties to which other members objected.257 The objecting states were generally the weaker ones or the ones thought of as the weaker. The powerful states feared that any use of article 19 would upset the system and the

251. But the demand for revision in recent times has arisen to take care of cases where the fault existed from the beginning and was . . . inescapable because the treaty was forced upon the now complaining signatory—not a situation covered by any such rule. It is very largely to deal with alleged inequities imposed by force that the demand for revision of treaties has arisen and been developed in recent years.

Id. at 9.

252. Id. at 9.

253. Id. at 10.

254. Potter viewed the 1871 London Conference of the powers as making an earlier declaration concerning the right of treaty revision, based upon mutual state consent. However, he believed that the statement was primarily political, rather than juridical. Id. at 7.

255. 1941 POTTER, supra note 248, at 9. As to rebus sic stantibus he stated:

[Article 19] does not constitute an application of the rule rebus (non) sic stantibus nor even justify its invocation by . . . the Assembly (or any other League organ) itself.

Id. at 67. For a recent study of rebus sic stantibus see Ridruejo, La Doctrine "Rebus Sic Stantibus" à la Conférence de Vienne de 1968 sur le Droit des Traités, 25 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 81 (1968).

256. 1941 POTTER, supra note 248, at 66, 75.

And among those functions the one which historically, logically, and technically was the most advanced in character, and furthest from actual performance in the League system, is or has been precisely that of community revision or legislation.

Id. at 75.

257. Id. at 69.
advantages gained by four years of war. Many of the demanding states simply gave up attempting to secure revision by pacific means. Of course, "the crux of the matter on the technical side" was that only the states themselves could revise such treaties.

The views of other writers on article 19 are essentially consistent with each other and are supported by the practice of that period.

Professor Brierly, writing in 1927, evaluated article 19 and concluded that it would not be advisable to attempt a formal amendment of it. Brierly believed the real problem for international law to be the demand for unilateral release from treaties known and intended to be oppressive at the time they were entered into. He believed that international law in 1926, did not vitiate such agreements. Brierly's advice was that time was to allow "the moral sanction behind" article 19 to grow. He summarized the current status of international law and article 19 as they related to imposed treaties in the following:

Let us recognize candidly the existence of a blot upon the system, and admit that here not as a matter of morality, but for practical utilitarian reasons, la force prime la droit.

Two other authors, Paul de Auer and F. Llewellyn-Jones, also analyzed the revision of treaties in light of the League's practice.

De Auer contended that article 19 did not provide a means of fulfilling its purpose, which he believed was to bring about freely negotiated treaties. De Auer recommended the adoption of a legal rule being essentially a rule against imposed treaties. The rule he envisioned would provide that treaties were to be effective only if states had joint debates and exhaustive conferences.

Llewellyn-Jones also analyzed article 19 and state practice under it. He was particularly interested in the subsequent revision of the

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258. *Id.* at 56, 73.
259. *Id.* at 72.
260. *Id.* at 74.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 19.
266. DeAuer, *Revision of Treaties*, *18 Transactions Grotius Soc'y* 155 (1932) [hereinafter cited as DeAuer].
269. *Id.* at 158.
270. *Id.*
1919-1920 peace treaties that had taken place outside the context of the article 19 procedure. He agreed with the suggestion that further revision of these peace treaties under article 19 might succeed in keeping the peace in Europe. He concluded by quoting: "It is not to be expected that the vanquished will settle down tranquilly under a dispensation ordained by the victors." 

(c). Subsequent Practice Under Article 19. There were only two cases of state practice under article 19: Bolivia and Peru v. Chile in 1920, 1921; and China's requests of 1925 and 1929. Both evidenced that the complaining states believed article 19 to be applicable especially to imposed treaties.

In the matter of Bolivia and Peru v. Chile (1920, 1921), both Bolivia and Peru in the very first Assembly meeting of the League of Nations, attempted to invoke article 19 in connection with treaties that were previously imposed upon them by Chile. Bolivia argued that the Bolivian-Chile Treaty of 1904 was imposed on her by force. Peru contended that the Peru-Chile Treaty of 1883 was forced upon her. Both Bolivia and Peru asked the Secretary-General to have the respective matters put on the agenda. Peru later withdrew its request and Bolivia asked that its request be considered in the Second Assembly in 1921. The Committee of Three Jurists in 1921 was appointed to assess Bolivia's case.

The report of that committee pointed out that Bolivia's request was not in the correct form, since it could not request the Assembly to revise a treaty, but could only request it to advise the contracting states to reconsider the treaty. The report went on to state that a treaty may be

271. Llewellyn, supra note 267, at 23.
272. Id. at 29-30.
273. Id. at 29, quoting, FORTNIGHTLY REV. (no additional citation was given). See also M. Radoïkovitch, LE RÉVISION DES TRAITÉS ET LE PACTE DE LA SOCIÉTÉ DES NATIONS (1930).
277. LEAGUE OF NATIONS, 1ST ASS., at 595-97 (1920).
278. Id. at 581.
279. Id. at 580.
280. LEAGUE OF NATIONS, 2D ASS., at 261 (1921).
281. Id. at 466.
inapplicable if "either materially or morally radical changes" have taken place. 282

The position of Bolivia was that an imposed treaty allowed a state to request that the League of Nations advise that the treaty be reconsidered. No additional showing, such as a change of morality, need be proven. 283 Bolivia did not resubmit its application, 284 which makes it difficult to conclude very much; however, one may conclude that the practice discussed above discloses an early development in the growth of the rule against imposed treaties, and that the League of Nations had a right under the proper circumstances to advise the reconsideration of an imposed treaty.

In both 1925, 285 at the Sixth Assembly, and in 1929, 286 during the Tenth Assembly, China requested that resolutions be passed relating to the problem of imposed treaties.

In 1925, and 1929, China was in the process of attempting by diplomatic means to revise several treaties. In both the Sixth and Tenth Assemblies, the resolutions passed did not accurately reflect China's desire that imposed treaties be criticized as they applied to China. In fact, the 1925 resolution did not even mention China. 287

It was in the Assembly on the tenth anniversary of the League of Nations that the most significant Chinese attempts were made to have the League influence the revision of China's treaties. China had proposed a draft resolution in the First Committee (Constitutional and Legal Question) suggesting that a committee be appointed to study article 19. 288 Belgium suggested an amendment, 289 but neither the draft nor the amendment passed. The First Committee accepted a resolution of its sub-committee which included in its appendix the earlier Chinese draft resolution. 290 This was subsequently adopted by the plenary meeting of the Tenth Assembly. 291

The Chinese draft resolution in 1929, had not specifically referred to imposed or unequal treaties, although the comments of the Chinese
delegates in the First Committee had referred to them. M. Chao Chu Wu had stated:

The Chinese declaration envisaged particularly those ‘unequal’ treaties and conventions, with whose general outline the Committee was doubtless familiar, under which China laboured. If it could be said of any treaties that had become inapplicable, it could be said of those.292

The draft resolution submitted by the sub-committee and adopted by both the First Committee and the Assembly specifically referred to the treaties between China and other states:

[Treaties] between China and other States, being inconsistent with present conditions in China, have become inapplicable within the meaning of Article 19 of the Covenant.293

Statements made by members of other delegations also indicate that they were referring to imposed treaties. Yoshida of Japan said that the statements contained in the resolution related not only to China, but were of general application.294 Dr. Kock-Weser believed that the recent developments of the international community in forbidding war mandated that progress be made to achieve active pacifism.295 He believed that new treaties ought to be concluded.296 Unfortunately, China, as Bolivia before her, failed to invoke article 19 formally in accordance with the proper procedures. While Bolivia had made an application which turned out to be in improper form, China never actually applied, even after passage of a ‘‘morale boosting’’ resolution of a general nature on imposed treaties.

3. The Failure of the 1921 Proposed Brazilian Amendment to the Covenant. In 1921, Brazil proposed an amendment to the Covenant, which was not adopted. The amendment would have declared void any international treaties concluded contrary to the Covenant clauses prohibiting aggression.297 The Permanent Court was to have jurisdiction to determine which state was the aggressor.

The proposed amendment read as follows:

All the Members of the League of Nations consider null and void pleno jure, the provisions of any international treaty concluded in the future which grant to a State which has made war contrary to Articles 12, 13 and 15 of the Covenant the following . . . (reparations, economic benefits, annexation of territory) . . . .

293. Id. at 100.
294. Id. at 54.
295. Id. at 44.
296. Id. at 45.
297. LEAGUE OF NATIONS, 2D ASS., Committee Meeting, at 396, 400 (1921).
All the Members of the League recognize the competence of the Court of International Justice, in case of doubt, to determine de plano . . . which has been the aggressor State.298

Braga of Brazil believed that the amendment embodied objective international law which would lead to a protection more effective than any military blockade.299 Braga asserted that this amendment would help to establish "an international legal system in accordance with which no aggressor State could continue, even after the war, to enjoy a tranquil and prosperous existence."300 Unfortunately, such a new legal system was not to be developed at that time.

4. *The League of Nations Commission of Experts (1925-1928) and the Hague Codification Conference (1930).* The Hague Codification Conference of 1930 was a general codification conference convened during the inter-war period to codify rules of customary international law.301 If it had succeeded in producing even a draft rule on imposed treaties, this would have been strong evidence of the existence of such a rule. Not only did the Conference not produce such a draft, it hardly attempted to discuss this or related rules. The Commission of Experts through one of its sub-committees only touched upon the problem of imposed treaties.

The Assembly in 1924, created by resolution the Committee of Experts to report to the Council "on the questions which are sufficiently ripe [for a conference]."302 A sub-committee was eventually created to examine the possibility of formulating rules of procedure for international conferences, and for the conclusion and drafting of treaties.303 The rules on concluding and drafting treaties referred to those treaties drafted by a codification conference. Even the suggestion for a convention did not consider that the proposed rules would be binding.304 Rather, they were to serve only as guidelines for states.

The report of the sub-committee by Mastny suggested that one area that might be investigated was the general theory of the validity of

298. *Id.* at 400-01.
299. *Id.* at 398-99.
300. *Id.* at 399.
302. *League of Nations, 5th Ass.*, at 125 (1924); See also 1 *Rosenne*, *supra* note 301, at vii.
303. 1 *Rosenne*, *supra* note 301, at 36.
304. *Id.* at 236.
treaties. The Committee of Experts sent out questionnaires to a number of states. Only one response, made by Denmark, raised the possibility of discussing the right of unilateral denunciation. Neither Japan nor Germany believed the question of international conferences and multilateral treaty-making to be a question sufficiently ripe for a codification conference.

Verzijl, the Dutch jurist, commenting in 1968, on the 1930 Conference stated, "'[It] did not correspond to the expectations it aroused;';" in fact, "'[It] fell far short of expectations.'" Rosenne, the former Israeli member of the International Law Commission, concluded that while the Conference was not a success, it was not a waste of effort. Hearne, in a lecture delivered in 1931, at the Geneva Institute of International Relations, stated that the 1930 Conference directed attention to the science of codification and the nature of the legal relationship between history and jurisprudence. Alvarez in 1931, also believed that the experience was valuable. Nevertheless, the Conference failed to produce any significant resolutions or treaties.

A basic failure of the Conference has been ascribed to the procedures it followed. As Rosenne argued, it was the sub-committee system and poor instructions to the rapporteurs, as well as the lack of political will of the states, which caused the failure. Thus, it would not be entirely correct to believe that the failure of the Conference evidences, on the part of the participants, a lack of consensus on any particular rule of international law. However, it would be proper to conclude that the failure even to draft a rule on imposed treaties renders doubtful the existence of any consensus in favor of that rule.

5. 1928 Pact of Paris and the 1934 Budapest Articles of Interpre-

305. 2 Rosenne, supra note 301, at 132.
306. Id. at 264.
307. Id. at 298-99.
308. Id. at 299.
309. Id.
310. Part IV of the conference's final recommendation stated: "'[There is] the necessity of preparing the work of the next conference for the codification of international law a sufficient time in advance.'" 5 ACTES DE LA CONFERENCE POUR LA CODIFICATION DU DROIT INTERNATIONAL 171 (1930).
311. 1 J. Verzil, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 13 (1968) [hereinafter cited as Verzil].
312. Id. at 29.
313. 1 Rosenne, supra note 301, at xcix. "'[I]t has come to be seen that despite its limited and timid approach, the Committee of Experts performed useful services in starting to clear the ground.'" Id.
314. Hearne, The Codification of International Law, 6 PROBLEMS OF PEACE 89 (1931).
316. 1 Rosenne, supra note 301, at ci.
tation, and the Committee to Amend the Covenant. Under article 1 of the 1928 General Pact for the Renunciation of War, popularly known as the Kellogg-Briand Pact, the Kellogg Pact, and the Pact of Paris, the contracting states: "‘condemn recourse to war . . . and renounce it as an instrument of national policy. . . .’"317 This provision of the multilateral treaty proclaimed a rule of international law restricting the use of force except for the implicit right of self-defense. This was an extension of the law of war which had been enunciated by the League Covenant. However, the treaty did not develop further the analogous rule of treaty law.

The International Law Association meeting in Budapest in 1934, agreed upon a number of articles to be used as a guide to interpreting the 1928 Kellogg-Briand Pact. Article 5 of the Budapest Articles states the following:

The signatory states are not entitled to recognize as acquired de jure any territorial or other advantages acquired de facto by means of a violation of the Pact.318

Article 5 of the Budapest Articles, if read in conjunction with article 1 of the Kellogg-Briand Pact which renounced the use of war, meant that any territorial or "other advantage" gained by a state using illegal force was not to be recognized. Article 5 did not further define the term "other advantages." An interpretation relying on the ordinary meaning of that term might include an imposed treaty.

To fully understand the impact of the Budapest Articles, one should recall that the International Law Association is a private group independent of the League of Nations, and cannot be viewed as a source of international law. Its private international codifications are at most merely a subsidiary means of evidencing the then existing international law. The acceptance of the Budapest Articles as anything more than the view of one group of legal scholars would be erroneous. One may generalize that the rule of treaty law as to imposed treaties underwent some development, but in light of the fact that the International Law Association was a private group and the Budapest Rules of Interpreta-


Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers—violators of the general treaty. We no longer draw a circle about them and treat them with the punctilios of the duelist’s code.

Id. at iv.
tion did not explicitly refer to imposed treaties, its development certainly did not amount to a crystallization of a rule of treaty law.

Quincy Wright in 1933, argued that the Pact of Paris had "a positive legal character," even though the hope of the Pact had not been realized.\textsuperscript{319} Lauterpacht in 1935, took issue with the position Wright postulated, and said that the "shortcomings of international law cannot be removed by juristic effort, however well meaning."\textsuperscript{320}

It was to a large measure United States influence that led to the conclusion of the 1928 Pact of Paris. Colombos, in his 1928 article reviewing the drafting history of the Pact, noted that the Pact of Paris "comes from one of the greatest and richest states [the United States] in the world, which for more than eight years has consistently kept aloof from any active cooperation with the rest of the world."\textsuperscript{321}

The League of Nations, itself, recognized the juridical significance of the Pact of Paris. It appointed the Committee to Amend the Covenant\textsuperscript{322} and gave it a mandate to bring the Covenant into conformity with the new development in the law of war, a demand that the Dutch international lawyer, Verzijl, made in 1931.\textsuperscript{323} During the Committee sessions, the British delegation suggested in 1929, that article 12(1) of the Covenant be amended in order to reflect the new law, and that in no instance was resort to force to be sanctioned.\textsuperscript{324}

Although the Covenant was not so amended, the fact that such a committee was appointed and such proposals made indicates the belief by the League and its member states that a new rule of international law relating to war had emerged. However, in only a very minimal sense did the 1928 Pact of Paris explicitly aid in the development of an analogous rule of treaty law.


\textsuperscript{320} Lauterpacht, supra note 318, at 190. He also was critical of the apparent encroachment that was made as to the rights of neutral states. Id. at 178-79. See also Whitton, What Follows the Pact of Paris, 276 Int’l Concil. 9 (1932).
\textsuperscript{321} Colombos, The Paris Pact, Otherwise Called the Kellogg Pact, 14 TRANSACTIONS GROTIUS SOC’Y 87 (1929).
\textsuperscript{322} LEAGUE OF NATIONS OFF. J., Spec. Supp. 75, 510 (1929).
\textsuperscript{323} VERZIJL, supra note 311, at 503. Verzijl also stated: "[T]he Kellogg Pact is well in advance of the Covenant." Id. at 501.
\textsuperscript{324} LEAGUE OF NATIONS OFF. J., Spec. Supp. 75, 510 (1929).

Proposed Article 12(1): The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree that they will in no case resort to war.

Id.
11, 1932, adopted a resolution which is a significant milestone in the early development by the international community of a new rule of treaty law.\textsuperscript{325}

The relevant sections of the 1932 League Resolution on Forced Treaties are as follows:

Part I. Considering that the provisions of the Covenant are entirely applicable to the present dispute, more particularly as regards: (1) principle of a scrupulous respect for treaties . . . [which] proclaims the binding nature of the principle and provisions referred to above and declares that it is incumbent upon the Members of the League of Nations \textit{not to recognize} any situation, \textit{treaty or agreement}, which may be brought about \textit{by means contrary to the Covenant of the League of Nations} . . . [or \textit{contrary to the Pact of Paris}.]

. . . .

Part II. Affirming that it is contrary to the spirit of the Covenant that the \textit{settlement of the Sino-Japanese dispute should be sought under the stress of military pressure} on the part of either party . . . \textsuperscript{326}

The Resolution declares that treaties brought about by means contrary to the Covenant or the Pact of Paris are not to be recognized. The League resolution was worded in terms of non-recognition, not illegality. Non-recognition is most often a political judgment, not a juridical determination. Non-recognition can be based on many factors, political, economic and military. It is not normally based upon solely legal considerations.\textsuperscript{327}

Some of the statements made during the debate of this resolution by the various delegates to the Assembly are of some interest. Sir John Simon of the United Kingdom sought to add a reference to the signatories of the Pact of Paris.\textsuperscript{328} The amendment was adopted.\textsuperscript{329} Count Apponyi of Hungary stated that he approved of the Assembly restating the general principles of the Covenant.\textsuperscript{330} Mr. Costa du Rels of Bolivia, obviously mindful of his own country’s experience, unfortunately overstated the situation by declaring, “‘To-day [sic], no nation can impose its will by force; the international community would acknowledge no advantage obtained in that way.’”\textsuperscript{331}

\textsuperscript{326} \textit{Id.} at 81-82 (emphasis added). \textit{See also id.} at 87.
\textsuperscript{327} \textit{See B. Bot, Non-recognition and Treaty Relations} 254-55 (1968).
\textsuperscript{329} \textit{Id.} at 83.
\textsuperscript{330} \textit{Id.} at 71.
\textsuperscript{331} \textit{Id.} at 77.
A review of the diplomatic correspondence between the United States Ambassador Wilson in Switzerland and the Secretary of State discloses that the amendment suggested by Sir John and adopted by the Assembly, was formulated by United States diplomats in Switzerland in response to British inquiries. This explains the similarity between the resolution and the Stimson Note. It was the intention of the United States officials, in the terms of the subsequent correspondence, "not to fail to call attention to the reasons for cooperation between the members of the League and the United States as well as providing in the future a common ground on which we might act." 332

While this disclosure is quite interesting from a foreign policy perspective, the amendment is not of great juridical significance. The significance of the Resolution is that the League of Nations restated the view earlier posited by the United States in the Stimson Note.

7. The Montevideo Convention on Rights and Duties of States (1933) and the 1928 Havana Convention on the Law of Treaties. Article 11 of the 1933 Montevideo Convention on Rights and Duties of States 333 is significant in that it used the same general phrase as the aforementioned 1932 League Resolution. It denied recognition to "advantages which have been obtained by force." 334 Article 11 did not state which advantages were unlawful, nor did it state explicitly that imposed treaties were among the advantages specifically contemplated as not to be recognized.

The 1933 Montevideo Convention was based upon the 1927 draft of the International Commission of American Jurists, which was drafted at the Commission's Rio de Janeiro meeting. 335 Ratifications to the Montevideo Convention were deposited in 1934, at the Pan American Union by a number of states including the United States.

Article 11 states the following:

The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representation, or in any other effec-

332. Telegram from The Minister in Switzerland to the Secretary of State, March 11, 1932, 3 FOR. REL. U.S. 563 (1948). "[The British representative] did this effectively and that the words 'or contrary to the Pact of Paris' were inserted at the end of the final paragraph of Part I." Id. at 564. See also Second Telegram from The Minister in Switzerland to the Secretary of State, March 11, 1932, Id. at 568. This contained a note from Drummond (the League Secretary-General).


334. Id.

335. 6 INT'L LEG. 620 (M. Hudson ed. 1937).
tive coercive measure. The territory of a state is inviolable and may not be the objective of military occupation nor of other measures by force imposed by another state directly or indirectly or for any motive whatever even temporarily.\textsuperscript{336}

Without going into the drafting history of this provision, it is clear from the language that no special advantages were to be recognized if they were created by military force. However, the convention did not explicitly identify imposed treaties as "special advantages."

The Montevideo Convention was a regional convention only. It had less juridical significance in formulating a general rule of customary international law than would a universal multilateral treaty. Perhaps, it has even less significance than a multilateral treaty that has not even entered into force, such as the 1969 Vienna Convention on the Law of Treaties.

The International Conference of American States in 1928, had adopted a treaty on the law of treaties, the 1928 Havana Convention on Treaties.\textsuperscript{337} The Havana Treaty did not mention in any of its provisions the problem of imposed treaties, let alone declare such treaties to be invalid.\textsuperscript{338} Article 10 specifically provided that no state could relieve itself of treaty obligations except by peaceful means.\textsuperscript{339} Article 14(f) required agreement of both states in cases of renunciation.\textsuperscript{340}

Assessing both the 1933 Montevideo Convention and the 1928 Havana Convention on Treaties, one may conclude that discontent with the existing rule was demonstrated in the more recent convention. However, the earlier treaty on treaty law, by not even discussing the problem, raises the question as to whether the delegates really intended to change treaty law.

8. \textit{The Draft Mexican Peace Code (1933).} A draft regional treaty never signed, ratified or entered into force, is not of much weight as a source of general international law. However, it is worthwhile to indicate one such instrument, the Draft Mexican Peace Code of 1933.\textsuperscript{341}

The Mexican delegation presented a draft peace code to the Seventh International Conference of American States, held in Montevideo, Convention, supra note 333, art. 11 (emphasis added).


Havanna Convention, supra note 337, art. 10.

\textit{Id.} art. 14(f).

1 \textit{Pan-Am. Union, Improvement and Coordination of Inter-American Peace Instruments} 75, 79 (1942).
tevideo in 1933, the same conference which produced the Convention on the Rights and Duties of States.\textsuperscript{342} The purpose of the draft code was to coordinate in a single instrument the various American instruments for the maintenance of peace.\textsuperscript{343}

Article 4 of the draft Mexican Peace Code contained similar language to that of article 11 of the Convention on Rights and Duties of States (1933).\textsuperscript{344} It used the formulation of "non-acceptance," rather than "non-recognition." While such a formulation may have intended to signify a different juridical proposition, such an intentment was not clear. The Code adhered to the principle of non-acceptance of force, whether military or of any other sort, to acquire territory or "any special advantage."\textsuperscript{345}

Resolution XV, approved by the Eighth International Conference of American States at Lima in 1938,\textsuperscript{346} requested the Pan American Union to transmit the Draft Mexican Peace Code to the various American Governments for their opinions; it was intended that the opinions should serve as a basis for subsequent adoption.\textsuperscript{347} No further significant action was taken on the draft code.

The draft Mexican Peace Code is of little help in determining whether a new rule of treaty law had crystallized. Its significance is less than that of the 1933 Montevideo Convention which was adopted and ratified. However, the history of the Mexican Peace Code indicates the inability of the interested states, especially the victims of imposed treaties, to act successfully even at this relatively minor level.\textsuperscript{348}

9. \textit{Harvard International Law Draft on the Law of Treaties (1935) and Harvard Draft Convention on Rights and Duties of States in Case of Aggression (1939)}. An analysis of article 32 (Duress) of the Harvard International Law Draft on the Law of Treaties (1935)\textsuperscript{349} and article 4(3) (Aggressor's Treaties) of the Harvard Draft Convention on Rights and Duties of States in Case of Aggression (1939)\textsuperscript{350} is of particular significance. The articles indicate that a group of the most

\begin{itemize}
\item[342.] See Montevideo Convention, supra note 333.
\item[343.] \textit{1 PAN-AM. UNION, IMPROVEMENT AND COORDINATION OF INTER-AMERICAN PEACE INSTRUMENTS} 75.
\item[344.] \textit{Id.} art. IV.
\item[345.] \textit{Id.}
\item[346.] \textit{[1944] PAN-AM. UNION, GEN. REP.} 33.
\item[347.] \textit{Id.} at 34.
\item[348.] "Minor" is used here in the sense of states not taking action to question the validity of imposed treaties, action which might have brought victim states into a confrontation with a stronger power at the international conference.
\item[349.] 29 \textit{AM. J. INT'L L. Supp.} 1148 (1935) [hereinafter cited as 1935 \textit{HARVARD DRAFT}].
\item[350.] 33 \textit{AM. J. INT'L L. Supp.} 827, 828 (1939) [hereinafter cited at 1939 \textit{HARVARD DRAFT}].
\end{itemize}
eminent international legal scholars in the United States in the middle
and late 1930's, after all the advances toward the new rule occurred,
rejected the rule's existence.

Article 32 of the Harvard International Law Draft on the Law of
Treaties (1935) states the following:

(a) As the term is used in this Convention, duress involves the
employment of coercion directed against the persons signing a
treaty on behalf of a state . . . . 351

The Comment to the 1935 Draft clearly indicates that the Draft
Convention's term "duress" did not include the employment of force or
coercion by one state against another.352 It clearly rejects the position
that a new rule of law had emerged,353 and recognizes merely that the
law was in a state of transition.354 The Comment states the following:

The term "duress" as used in this Convention does not
include the employment of force or coercion by one State
against another State for the purpose of compelling the
acceptance of a treaty . . . . Such indirect compulsion is not
. . . "duress" as the term is used in this Convention.355

The Comment further states:

[I]n recent years there has been an increasing disposition
among writers on international law to challenge the traditional
view as to the right of one State to use force against another
State and to impose upon the latter a treaty embodying such
terms as the former State may see fit to demand.356

. . . . The views just quoted and pronouncements referred
to undoubtedly present a new attitude in regard to the validity
of treaties imposed by force, and perhaps it can only be said
that the law on this point is in a state of transition. It cannot be
said, however, that the conception of duress has been
extended to embrace the use of force against a State as such,
even though the force is unjustifiably used by the State
resorting to it and in violation of its treaty engagements.357

An investigation into the preparatory work discloses that earlier
drafts of article 32 held peace treaties invalid if their imposition involved
the violation of the rules governing the making of war. These drafts were

351. 1935 HArvARD DRAFT, supra note 349, at 1148.
352. Id. at 1151. "It is this narrow or restricted sense that the term 'duress' is used in
this section." Id.
353. Id. at 1153.
354. Id.
355. Id. at 1152.
356. Id.
357. Id. at 1153.
rejected, indicating that in 1935, the drafters had hoped to find such a rule existing, but were not able to do so.

In 1935, the group of eminent scholars of international law rejected the existence of a new rule of treaty law. This group included, among others: Hackworth, Hyde, Jessup, Whitton, Woolsey and Wright. They did not cite fully the existing state practice of the twentieth century, but they did assess major instances of state practice, such as the Twenty-One Demands of Japan of 1915, the Brest-Litovsk Treaty of 1918, and Bolivia/Peru-Chile dispute of 1921, as well as the Covenant (1919) and the Pact of Paris (1928).

Article 4(3) of the 1939 Draft Convention on the Rights and Duties of States in Cases of Aggression provides that an aggressor’s imposed treaty is voidable. The Commentary indicates that some states may be satisfied with a treaty imposed upon them.

Article 4(3) is a clear statement of a rule, and approaches the idea codified in articles 52 and 75 of the 1969 Vienna Convention on the Law of Treaties. However, an analysis of the documents relating to the drafting of article 4(3) discloses no consensus for the statement of that rule. The drafters themselves state that the Draft Convention as a whole was subject to “fundamental differences of opinion,” and did not enjoy even the “consensus of the members of the Advisory Committee.” The Draft Convention was presented only in order to facilitate “debates upon the problem... among scholars throughout the world with a view to the further clarification of the subject.”

The Draft Convention’s article 4(3) can be viewed as a rule that the Advisory Committee at most hoped would be substantiated after greater analysis and debate. Even this interpretation of its significance may be too generous. The most significant development at the time that this article was drafted was the Munich Agreement of 1938. That agreement

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359. 1935 HARVARD DRAFT, supra note 349, at 1159.

360. Article 4(3) states: “A treaty brought about by an aggressor’s use of armed force is voidable.” 1939 HARVARD DRAFT, supra note 350, at 828.

361. Id. at 895-96.

362. Id. at 827.

363. Id.

364. Id.
certainly would not support a belief that a new rule of law had crystallized since 1935, when the Harvard research group had last examined the problem.

By reading both the 1935 Draft Convention on the Law of Treaties and the 1939 Draft Convention on the Rights and Duties of States in Case of Aggression, one may conclude that the drafters of these documents hoped for a new rule, but did not find its crystallization.

D. Jurisprudence

To a limited extent, international jurisprudence of the Permanent Court of International Justice, international arbitration, and national jurisprudence dealt with the problem of imposed treaties during the inter-war period. Such jurisprudence involved the related issues of restrictive treaty interpretation of imposed treaties, treaty revision, state equality and state consent. An analysis of the jurisprudence of this period discloses that not one case, international or national, held a treaty unlawful because of its being imposed. On the contrary, jurisprudence consistently upheld the validity of imposed treaties.

1. International Jurisprudence. Writers have stated that the jurisprudence of the Permanent Court of International Justice never discussed imposed treaties or inequality in treaty relations. Such a view is not a completely accurate assessment. While no cases explicitly decided these issues, a number of cases, including oral arguments and dissenting opinions, discussed these and related propositions. The Court, in fact, established some case law in this area, albeit only slight.

The case of The S.S. "Wimbledon", the first contentious case the Permanent Court was called on to decide, involved an action in 1923, by some of the former Allies of World War I (United Kingdom, France, Italy, Japan and Poland) against Germany. It was brought for the latter's refusal to allow passage through the Kiel Canal of a munitions ship (English registered and chartered by a French company) traveling to the Polish Naval Base at Danzig. The voyage was in support of the forces opposing the Communist Russian armies in the Russo-Polish War. The Court awarded judgment to the applicants.

The case treated the validity of the imposed Versailles Peace Treaty and the construction of article 380. The joint dissenting opinion of

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366. Id. at 16.
367. Id. at 19.
368. Id. at 33-34.
369. Id. at 22.
Anzilotti and Huber,370 the oral argument of Schiffer,371 and the dissenting opinion of Schücking372 regarding the restrictive interpretation of imposed treaties are of particular interest. Schiffer was the German counsel, Schücking the German national judge.

The Court concluded that article 380 obligated Germany to allow the passage of the Wimbledon,373 and this duty was not vitiated by Germany’s obligations as a neutral, which in any case did not obligate Germany to forbid the passage.374 Both France and Poland were at peace with Germany; thus, they were entitled to exercise their right of passage.375

The Court declined to see in the conclusion of any treaty, an abandonment of sovereignty,376 regardless of whatever restrictions were assumed. The Court declared that the right of entering into any international engagement is an attribute of state sovereignty.377

Anzilotti and Huber in their dissenting opinion, specifically argued that article 380, the central issue in the case, was an “obligation, imposed upon a State.”378 Neither Anzilotti nor Huber ever questioned the validity of imposing obligations. They merely concluded that an imposed obligation, if it is clear, is to be given a literal meaning.379 However, this meaning was not to extend beyond the intention of the parties.380

Schiffer agreed that the Versailles Treaty was an imposed agreement.381 He argued that the general rule which requires an ambiguous treaty provision to be interpreted against the state drafting a treaty, should be applied also against the imposers of a treaty.382 Schiffer relied upon the arguments of Professor Zitelmann as contained in the German rejoinder.383

370. Id. at 35-42.
373. Id. at 30.
374. “Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the ‘Wimbledon’ through the Kiel Canal, but, on the contrary, was entitled to permit it.” Id.
375. Id.
376. Id. at 25.
377. Id.
378. Id. at 39.
379. Id. at 36.
380. Id.
382. Id.
383. Id. Schiffer stated, “It was for those who imposed the Treaty of Versailles on Germany, and who are now the Applicants, to have said in the Treaty exactly what they wanted.” Id.
The Court adhered to, but did not find it necessary to apply the restrictive interpretation of imposed treaties rule. It followed the French counsel Bosdevant’s arguments\(^\text{384}\) that article 380 was not an ambiguous provision nor a provision drafted in favor of the Allies. It also held that the article should not be interpreted restrictively against any of the parties, because it was clear and it favored all states, establishing a general freedom of transit.

Schücking believed the problem of servitudes to be a subject of controversy among writers on international law,\(^\text{385}\) but that such writers generally required all treaties concerning servitudes to be interpreted restrictively so as to minimize any limitation of the sovereignty of states suffering under servitudes. Schücking concluded that article 380 should not be subjected to a purely literal construction, but should be construed in a way which would allow Germany to exercise its rights as a neutral.\(^\text{386}\)

The existence or non-existence of the restrictive rule of interpretation in the Court’s decision is not essential to the significance of the case in this analysis.\(^\text{387}\) The significance of the case lies in the conclusion that the Permanent Court of International Justice did not declare the Versailles Treaty or any provision in it to be void because of its being imposed. No dissenting opinion or oral argument ever asserted this proposition. The dissenting opinions and oral arguments merely disclosed the belief that a restrictive rule of treaty interpretation existed, especially in relation to imposed treaties. Such treaties, if ambiguous, were to be interpreted against the imposer in order to allow the state suffering under the imposed treaty to relinquish as little of its sovereign rights as was consistent with the terms of the treaty.

In S.S. Wimbledon, the restrictive interpretation of an imposed treaty was discussed only by losing counsel and a dissenting opinion. However, in German Settlers in Poland,\(^\text{388}\) these same arguments were made by winning counsel and were clearly accepted by the Court’s decision. Although S.S. Wimbledon was a contentious case and Ger-

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384. Id. at 212. Basdevant stated:
Restrictive interpretation logically stands against extensive interpretation.
But we do not claim the latter in our favour, we only take Article 380 in the strict and natural meaning of its terms, which terms are quite sufficient for establishing freedom of transit.

Id.


386. Id.

387. However, the Court stated, "This [restriction of sovereignty] constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation." Id. at 24. But the Court does not apply the above rule when it would be contrary to the plain terms of a treaty provision. Id. at 24-25.

man Settlers in Poland was an advisory opinion, the significance of the latter is not substantially diminished.

German Settlers in Poland concerned the legality of Poland's seizure of property of Germans and former German nationals living in Poland after World War I. The Court upheld the rights of the Germans and former German nationals, holding that the Polish action was contrary to its international treaty obligations.

The Court was faced with the central problem of construing article 93 and especially article 256 of the Versailles Treaty. It also had to construe article 21 of the Minorities Treaty, concluded the same day as the Versailles Treaty, and articles 1 and 5 of the Polish legislation of July 14, 1920. Article 93 of the Versailles Treaty required Poland to conclude the Minorities Treaty, and article 256 of Versailles required Polish compensation for all property formerly owned by the German state and royal family. Poland argued that article 256 of the Versailles Treaty was also applicable to properties held by private German individuals, not just to property held by the German government.

The Court held that it was contrary to the principle of equality for Poland to subject the German settlers' private rights to expropriation. The Court went on to discuss its interpretation of article 256 of the Versailles Treaty. It asserted that the preservation of such rights was to be implied.

The Court, as has already been seen, is of the opinion that no treaty provision is required for the preservation of the rights and obligations now in question. In the opinion of the Court, therefore, no conclusion can be drawn from the silence of the Treaty of Peace contrary to that resulting from the preceding statements. On the other hand, however, the position of the Court as regards the protection of the private rights now in question appears to be supported by the provisions of that Treaty.

It is true that the Treaty of Peace does not in terms formally announce the principle that, in case of a change of sovereignty, private rights are to be respected; but the principle is clearly recognized by the Treaty.

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389. Id. at 6.
390. Id. at 43.
391. Id.
392. Id. at 13-14.
393. Id. at 14.
394. Id. at 43.
395. Id. at 25.
396. Id. at 38.
397. Id.
While the Court did not indicate explicitly that it was restrictively construing an imposed treaty in order to uphold the rights of Germany, the Court, in fact, interpreted the Treaty as it did in order to protect the rights of Germany and to restrict the degree of "sovereignty" which Germany was considered to have contracted away, that is, the right of a state not to have its citizens' property discriminatorily taken by a foreign country when the property is located in that foreign country.

Schiffer, the German counsel and a former German Minister of Justice, argued, as he had in *S.S. Wimbledon*, that changes created by the Versailles Treaty should be restrictively interpreted against the states upon which they were imposed. He specifically discussed the transfer of territory and population.

The guiding principle is at all times that the injury and damage caused by any change of territory to the population of such territory must be reduced to a minimum.

The arguments by Schiffer were found by the Court to be controlling. Schiffer wanted the Versailles Treaty to be interpreted in such a way as to limit the obligations of Germany to a minimum. The Court favored such an interpretation.

The case of the *Denunciation of the Treaty of November 2, 1865 Between China and Belgium* (1927) had the potential of being one of the most significant to be decided by the Permanent Court in making new law in the area of imposed treaties.

In 1928, China, by a Presidential decree, terminated the Sino-Belgian Commercial Treaty of 1865. China believed the 1865 Treaty to be a unilateral treaty providing for unequal treatment and wanted a new treaty to be negotiated "on the basis of equality and mutual respect for territorial sovereignty." Documents filed with the Registrar of the Court indicated that China believed the continuation of the 1865 Treaty

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399. *Id.*
400. *Id.* Schiffer further stated:
[[1]](footnote) feel bound to abide by the arguments which I have here developed; these arguments are not, I consider, in any way shaken by the contentions of the previous speakers.
401. *Id.* at 748.
402. *Id.* at 5. *See generally Revision of Expiring Treaties, 3 China L. Rev. 45 (1927); Sino-Belgian Treaty, 3 China L. Rev. 89 (1927).
404. *Id.* at 74.
would have been one-sided and at the expense of China. It is reasonable to expect that China also would have raised in the Court questions concerning the conclusion of the 1865 Treaty.

Belgium declared that under article 46 of the 1865 Treaty, it alone had the right of renouncing the Treaty. Article 46 gave Belgium the right to terminate the Treaty by giving notice at least six months before the end of each ten year period. China had no such right.

By the application of November 25th, 1926, Belgium invoked the Court’s jurisdiction and requested the application of provisional measures. The Court granted them on January 8th, 1927, until they were revoked by the Court order of February 15th, 1927, after the Chinese government consented to a provisional regime regulating the treatment of Belgians in China. Eventually, Belgium withdrew the application to the Court.

In ascertaining the significance of the Denunciation of the 1865 Sino-Belgium Treaty, it is difficult to draw any broad juridical conclusions in the context of the law relating to imposed treaties. In the context of the imposed treaty problem, the awarding of provisional measures is not significant, although for a research study of provisional measures they may well be. The case certainly represents a missed opportunity for the Court to fully analyze the issue under discussion, since the issue most likely would have been presented to the Court. It was not the fault of the Court that it was not able to adjudicate the question. The events of the day precluded the case from being heard.

Although Free Zones of Upper Savoy and the District of Gex (1929) is one of the more widely known cases to have been decided by the Permanent Court, only the portion of Judge Negulesco’s individual opinion discussing article 19 (treaty revision) of the Versailles Treaty is discussed here. The significance of this opinion is mainly the full treatment of all matters in the case relating to article 19, including an express reference to the article. Negulesco’s opinion dissented from the legal arguments of the Court, but adhered to them in allowing the parties additional time to negotiate.

405. Letter from the United Chambers of Commerce of China To the Permanent Court of International Justice, Nov. 20, 1926, id. at 283.
407. Id. at 4-5.
408. Id. at 6.
409. Id. at 9.
411. Id. at 28.
Switzerland, by an act of the federal Diet, had acceded to the earlier 1815 Declaration of the Powers Assembled at the Congress of Vienna in Regard to Switzerland.412 This declaration was received in final form in article 1 of the Treaty of Peace of 1815, which emerged from the Congress of Vienna.413 Switzerland agreed to the withdrawal of French customs barriers from the political frontier around Geneva.

Article 435(2) of the 1919 Treaty of Versailles, which Switzerland did not sign but had partially acceded to by diplomatic notes, declared that the 1815 arrangements were, "no longer consistent with present conditions . . . and that it is for France and Switzerland to come to an agreement."414 France believed that the 1815 arrangement had been abrogated. Switzerland opposed that interpretation. The Court accorded the parties a period of time to negotiate a new agreement.415

Judge Negulesco of Rumania made two arguments concerning article 19: first, he argued that article 19 empowered the Assembly to apply the doctrine of *rebus sic stantibus*;416 second, article 435 of the Treaty of Versailles was a particular application of article 19.417

To clearly present Negulesco's arguments it is best to quote them directly:

"Article 19 of the Treaty of Versailles permits changes in or the abrogation of a treaty which has become inapplicable owing to a new situation having arisen; but only as a result of a unanimous vote of the Assembly of the League of Nations and not by means of a unilateral declaration. Article 19 of the Treaty of Versailles therefore confirms the validity of the clause *rebus sic stantibus* and at the same time rejects any claim to apply it unilaterally.

Article 435 of the Treaty of Versailles is simply the application of this principle."418

Negulesco's conclusion that article 19 was intended to be an adoption of the principle *rebus sic stantibus*, and that only the Assembly could apply it was incorrect. As indicated previously, article 19 called for, at the most, only the eventual revision of a treaty. Moreover, the Assembly had power only to recommend the reconsideration of a treaty. Article 19 did not give the Assembly a right to revise, let alone to terminate, a treaty.

412. *Id.* at 19.
413. *Id.*
414. *Id.* at 17.
415. *Id.* at 21.
416. *Id.* at 30.
417. *Id.*
418. *Id.* (emphasis added).
As to Negulesco's conclusion that article 435 of Versailles was a particular application of article 19, the Court explicitly rejected that argument. The Court declared that, according to the facts, mutual state consent was required in order to terminate the 1815 Treaty. The Court held that the construction of article 435 and the subsequent Swiss action did not create a Swiss acceptance of the termination. Both France and Switzerland had undertaken merely to enter into new negotiations.

The question of treaty revision came up in the context of the 1815 Treaty which was imposed upon France as a consequence of her military defeat. Neither the Court nor Negulesco's opinion indicated that France or Switzerland questioned the validity of that treaty or the Peace Treaty of 1919.

Oscar Chinn is a significant case because of the language Judge Schücking used in his individual opinion concerning the absolute nullity of a treaty having a flaw in its origin, as determined by international public policy and public morality. This case indicates that at least one judge of the Permanent Court believed that treaties may be void because of various problems related to their origin, even though such problems were not enumerated.

Oscar Chinn involved an action by the United Kingdom, on behalf of one of its citizens, against Belgium. The United Kingdom alleged that Belgium had taken unfavorable action in the Congo through changes in shipping rates which resulted in damage to British owned shipping interests in the Congo. The Court was presented with the problem of the validity of a subsequent multilateral treaty abrogating provisions of a prior multilateral treaty that had required unanimity of consent for any subsequent changes, when not all of the contracting states of the first treaty consented. However, the Court did not decide directly the question of imposed treaties.

Judge Schücking's arguments in Oscar Chinn in 1934, were consistent with his earlier arguments in the 1923 S.S. Wimbledon case. In S.S. Wimbledon, he had argued that imposed treaties should be construed restrictively against the imposer. In this case, Schücking contended that even if states did not question the invalidity of a subsequent multilateral treaty, the treaty still could be void. It would be void if it lacked the consent of all the signatories of the prior treaty, which by its terms was not to be deviated from subsequently without unanimity of consent. Schücking thought that the case under discus-

420. Id. at 150.
421. Id. at 66.
422. Id. at 70.
423. Id. at 148.
sion was similar to the regime established by article 20 of the Covenant which obligated states not to enter into subsequent agreements inconsis-
tent with the Covenant.\textsuperscript{424}

Schücking stated that article 38(1)(a) of the Statute of the Court did not require the Court to apply conventions "which it knows to be invalid."\textsuperscript{425} Schücking further stated that in general, the Court would never apply a treaty which was contrary to international law. He pointed out that the Court would find itself in the same position if a treaty had "a flaw in its origin," which would make it null and void\textsuperscript{426} as a matter of "international public policy."\textsuperscript{427} This was the situation even if a treaty was made applicable by a special agreement authorizing the Court to exercise its jurisdiction. Although Schücking in \textit{Oscar Chinn} did not specifically refer to imposed treaties, his language certainly could have encompassed that concept, especially in light of the Covenant's intention to regulate the use of military force by states.

Schücking's full statement, for purposes of completeness and clarity, is given below:

The Court would never, for instance apply a convention the terms of which were contrary to public morality. But, in my view, a tribunal finds itself in the same position if a convention advanced by the parties is in reality null and void, owing to a flaw in its origin. The attitude of the tribunal should, in my opinion, be governed in such a case by consider-
ations of international public policy, even when jurisdiction is conferred on the Court by virtue of a Special Agreement.\textsuperscript{428}

The significance of the 1937 River Meuse case\textsuperscript{429} is noteworthy in that the Permanent Court of International Justice discussed as a principle of interpretation the equality of treaty obligations. The Court held that it would interpret a treaty, if at all possible, as creating equal obligations. Moreover, it would interpret an obligation in terms of the actual effect of the treaty provisions. \textit{River Meuse} indicated that unequal treaty provi-
sions are valid.

In \textit{River Meuse}, the Netherlands as the applicant brought the action against Belgium.\textsuperscript{430} In the memorial, counter-memorial, rejoinder and reply, both countries argued that the 1863 Belgium-Netherlands Treaty had been violated.\textsuperscript{431}

\textsuperscript{424} \textit{Id.} at 149.
\textsuperscript{425} \textit{Id.} at 150.
\textsuperscript{426} \textit{Id.}
\textsuperscript{427} \textit{Id.}
\textsuperscript{428} \textit{Id.} (emphasis added).
\textsuperscript{430} \textit{Id.} at 6.
\textsuperscript{431} \textit{Id.} at 6-9.
The 1863 Treaty created obligations on both parties to limit their taking of water from the River Meuse for purposes of feeding the Dutch and Belgian canal systems. Even though the Netherlands, the applicant, argued that Belgium had a more extensive obligation, the Netherlands contended that the Treaty was valid. The Court, having actually visited several cities involved in the case, concluded that both parties had similar obligations\textsuperscript{432} and that the claims of both parties were ill-founded.

The individual opinion of Judge Altamira argued that the obligations contained in the 1863 Treaty were both equal as stated and equal in their operation.\textsuperscript{433} He concluded:

In this interpretation of the 1863 Treaty, I have been at pains to state by an analysis of its articles the express or implied obligations contained in each of them. The Treaty does not seem to me to impose any other obligation upon either Party.\textsuperscript{434}

The individual opinion of Judge Hudson concluded that the operation by Belgium and the Netherlands of the locks on the Meuse, "in law as well as in fact," was not in violation of the 1863 Treaty.\textsuperscript{435} Hudson further concluded that both parties had assumed identical treaty obligations.\textsuperscript{436} He argued that, as a principle of equity, even if there were a violation of a treaty by one party, the other party should not be permitted to take advantage of it.\textsuperscript{437}

Both Altamira and Hudson contended that the actual treaty obligations involved in the case were equal. Hudson went further and discussed the possible non-performance of such obligations. The significance of these two views and the decision of the Court lies in the fact that none of them dealt with the consequences of unequal obligations, let alone obligations imposed by military force, even though the Netherlands had actually pleaded the existence of unequal obligation as a valid basis for Court enforcement of the treaty.\textsuperscript{438}

In addition to the holdings of the Permanent Court, international jurisprudence on the rule of imposed treaties includes a case of interna-

\textsuperscript{432} Id. at 32.
\textsuperscript{433} Id. at 39-40.
\textsuperscript{434} Id. at 43.
\textsuperscript{435} Id. at 75.
\textsuperscript{436} Id. at 77.
\textsuperscript{437} Id. Hudson quoted the following Anglo-American maxim, "'Equality is equity.'" Id. He also stated that "'[A] tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.'" Id.
\textsuperscript{438} The Treaty was not viewed by any party as imposed.
tional arbitration. The 1931 *Salem Case*\(^4\)\(^3\)\(^9\) was an international arbitration involving the United States and Egypt during the inter-war period. It explicitly denied the existence of a rule of treaty law which declared unequal treaties to be unlawful.\(^4\)\(^4\)\(^0\) The Tribunal was presented with the application of a capitulation treaty, but neither the parties nor the Tribunal discussed the treaty as being imposed.

*Salem* involved George Salem, a naturalized American citizen\(^4\)\(^4\)\(^1\) who had been born in Egypt.\(^4\)\(^4\)\(^2\) He was criminally prosecuted in a local Egyptian court and found not guilty.\(^4\)\(^4\)\(^3\) He then brought an action for damages in a mixed court and lost.\(^4\)\(^4\)\(^4\) The United States brought this action against Egypt for a denial of justice.\(^4\)\(^4\)\(^5\)

The United States argued that the bringing of the criminal action, excessive delay and the holding of certain legal papers, such as a property deed, constituted a denial of the international standard of justice.\(^4\)\(^4\)\(^6\) The United States also argued that there was a violation of the United States-Turkey Treaty of 1830, to which Egypt had acceded as an independent state.\(^4\)\(^4\)\(^7\)

By the Special Agreement of January 20, 1931, an arbitral tribunal was authorized, and, under the Agreement, Walter Simons of Germany, Fred K. Nielsen of the United States and Abdel Pasha of Egypt were appointed.\(^4\)\(^4\)\(^8\)

In defense against the United States' allegations, Egypt argued that international law did not recognize a "one-sided agreement," referring to the 1830 Treaty.\(^4\)\(^4\)\(^9\) The Egyptian government argued the following:

> In as much [sic] as the pecuniary claim of the American Government is based on an alleged violation of the Treaty of 1830 between the United States and Turkey, such a claim is not well founded in international law.

> This treaty confers a unilateral right on the United States. Now, according to established principles of international law, no pecuniary claim for damages can be based on such a one-sided agreement.\(^4\)\(^5\)\(^0\)

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439. *Salem Case* (United States v. Egypt), 2 R. Int'l Arb. Awards 1163 (1932); 5 Ann. Dig. 188.
440. *Id.* at 1194.
441. *Id.* at 1164.
442. *Id.* at 1165.
443. *Id.* at 1169.
444. *Id.* at 1177.
445. *Id.* at 1163.
446. *Id.* at 1174.
447. *Id.* at 1175.
448. *Id.* at 1163, 1165.
449. *Id.* at 1179.
450. *Id.*
The Tribunal rejected this defense by Egypt.\textsuperscript{451} It stated that the body of rules constituting international law did not contain a rule declaring unequal or unilateral treaties to be unlawful.\textsuperscript{452} In rejection of this Egyptian defense, the Tribunal stated:

The Egyptian Government considers the pecuniary claim to be inadmissible because the treaty on which the alleged violation capitation rights of the United States are based, namely, the Treaty of 1830 with Turkey, granted the United States unilateral rights and because, according to international law, no claim for money in respect of violation of such a one-sided agreement could be entertained. The \textit{Arbitral Tribunal cannot acknowledge the existence of such an international rule}; it will always depend upon the circumstances whether compensation in money can be claimed in respect of the violation of a valid treaty, \textit{even if it be unilateral}.\textsuperscript{453}

The Tribunal stated that the 1830 Treaty was not "a purely unilateral agreement."\textsuperscript{454} The treaty provided that the consular jurisdiction granted to the United States would oblige the consular courts to conform to the same standard of efficiency as the local jurisdiction.\textsuperscript{455}

The Tribunal concluded that the treaty was lawful, holding unequal treaties to be lawful agreements. It did not believe that a "less than purely" unequal treaty was invalid. The Tribunal found no denial of justice and then held on Egypt's behalf.\textsuperscript{456}

While \textit{Salem} did not mention imposed treaties, it is important for an analysis of the case to mention them. The 1830 Treaty, like many capitation treaties of the nineteenth century in the Near East and North Africa, has been viewed often as being imposed. Yet, invalidity based upon a rule of treaty law proscribing imposed treaties was not alleged by Egypt. Egypt did not argue that the 1830 Treaty was invalid because of the illegal use of force. Egypt argued that the treaty was invalid only because of the unequal obligations contained in the Treaty. One may conclude that from the failure even to invoke such a rule, Egypt did not believe such a rule existed.

2. \textit{National Jurisprudence}. National jurisprudence generally accepted the traditional rule. The national jurisprudence of the inter-war era held that imposed treaties were to be restrictively interpreted in favor of the vanquished state.

\begin{itemize}
\item \textsuperscript{451} \textit{Id.} at 1194.
\item \textsuperscript{452} \textit{Id.}
\item \textsuperscript{453} \textit{Id.} (emphasis added).
\item \textsuperscript{454} \textit{Id.}
\item \textsuperscript{455} \textit{Id.}
\item \textsuperscript{456} \textit{Id.} at 1203.
\end{itemize}
In Austrian jurisprudence, *Yugoslav Liquidations* was a 1934 municipal case decided by the Austrian Supreme Court which held that an imposed treaty was subject to a restrictive rule of treaty interpretation. The Court also held that such a treaty was a valid agreement.

The case involved an action by an Austrian national also having Yugoslav nationality, against a Yugoslav bank in Austria. He alleged a wrongful liquidation by the bank of his property in Yugoslavia. The liquidation was based upon article 249(b) of the Treaty of St. Germain which authorized the liquidation by Allied countries of the property of former enemy nationals. The plaintiff alleged that his dual nationality precluded the operation of article 249(b), because the article did not apply to dual nationals. The lower court and the Supreme Court held against the plaintiff.

The Supreme Court agreed with the plaintiff that the treaty was to be interpreted strictly. However, it held that the lower court was not guilty of "a too wide interpretation." The Supreme Court went on to say that although the treaty was dictated, it must be viewed as an agreement. It also stated that it is the intent of both the victors and of Austria at the time the treaty was made which must be determined. The Supreme Court stated the following:

Since [the Treaty of St. Germain], although for the most part representing the *dictates* of the Allied and Associated Powers, is *nevertheless* to be regarded as being in essence an agreement, we must look not only to the will of the victor States but also to the discoverable intention of Austria . . .

The Supreme Court concluded that article 249(b) was clear, it did not exclude dual nationals, and Austria was obligated to enforce it.

*Yugoslav Liquidations* technically serves only as evidence of the then existing rule of treaty law, rather than as a source of it. By the terms of the Statute of the Permanent Court of International Justice and of the existing International Court, national jurisprudence is only a subsidiary means of determining international law. Even with this limitation,

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457. Treaty of St. Germain (Yugoslav Liquidations) Case, 7 Ann. Dig. 296 (Supreme Court of Austria 1934).
458. Id. at 297.
459. Id. at 296.
460. Id.
461. Id.
462. Id. at 297. "This Court agrees with the contention of the appellant that the Treaty of St. Germain is 'to be interpreted strictly.'" Id.
463. Id.
464. Id. at 297-98 (emphasis added).
465. Id. at 298.
Yugoslav Liquidations is significant in that it is consistent with the international jurisprudence of that period.

Without giving too much value to wartime German jurisprudence, R & G v. Hochbahn A. G. & FR.466 (1941) implicitly upheld the validity of the 1938 union of Austria with Germany, but held that the German Civil Code was not intended to be introduced into Austria.467 The German Supreme Court did not blindly apply the relevant legal instruments in a broad manner. It looked at the situation and decided that the German Civil Code was not intended to replace the Austrian Civil Code even though other German legislation had been made applicable in Austria.

E. Summary of the Inter-War Era

An analysis of doctrine, state practice, international legislation, and international and national jurisprudence during the inter-war period indicates the continued existence of the rule of treaty law recognizing the validity of treaties imposed upon states without their consent. Some discontent appeared during this period, but it certainly did not crystallize into a new rule of treaty law which proclaimed the vitiating effect in treaty-making of the threat or use of military force against a state.

Doctrine for the most part favored the traditional rule, but some writers proclaimed a new standard. Treaty practice, while inconsistent, showed the beginnings of the development of a new rule of law. International legislation, while limiting the recourse to war, did not formulate an explicit rule of treaty law which would have acted as a corollary of that prohibition. Neither international nor national jurisprudence rejected the traditional rule even though a number of decisions concerned some propositions closely related to the traditional rule.

III. POST-WORLD WAR II: A NEW RULE IS RECOGNIZED AND CODIFIED

Events from 1945 to 1975 have contributed to the further development and crystallization of a rule against imposed treaties, based upon the principle of sovereign equality, its derivative rule of state consent, and the general prohibition against the use of force in international relations.

A. Doctrine

Western writers in the post-war era have discussed the concept of imposed treaties only in passing, and treatment of the subject by

466. Judgment of April 4, 1941, 167 RGZ 1; 14 Ann. Dig. 104 (Supreme Court of Austria 1941).
467. Id. at 106.
Communist writers has been restricted to a very general level. It is only more recently that greater consideration has been given to this topic, primarily as a result of the adoption of article 52 of the 1969 Vienna Convention on the Law of Treaties.

A most interesting characteristic of the writings of the post-World War II era is that while many writers agree that a new rule exists prohibiting the use of military force in the conclusion of treaties, several others deny this. Moreover, among those writers who do accept the new rule, there is a lack of consensus on virtually all of its aspects.

The points of dispute among the writers are reflected in their answers to the following questions: Does a rule against imposed treaties exist? What type of force is unlawful—economic or military? Does the existing rule also outlaw all "unequal" treaties? What is the theoretical basis of the rule?

The following brief discussion of three recent commentators clearly demonstrates the diversity of issues included in this subject area.

In a recent study, Arie David makes several general observations on unilateral treaty termination.468 David notes that the general problem of unilateral treaty termination is "monstrously complex,"469 and contends that the problem is not susceptible to simple yes-or-no answers.470 He decries the fact that many writers have crossed off the problem as having no solution, and have studied other subjects.471

In a recent article, Professor Briggs also discusses unilateral treaty termination.472 He does so in the context of three cases decided by the

469. DAVID, supra note 468, at xi.
470. Id.
471. Id.
International Court of Justice in the 1970's.\textsuperscript{473} He concludes that recent jurisprudence has been helpful in consolidating, for the first time, some law on unilateral treaty termination.\textsuperscript{474} Unfortunately, he refers only in passing to the element of duress.\textsuperscript{475}

A recently published work on the general problem of imposed treaties discusses state succession in the context of state practice relating to unequal treaties.\textsuperscript{476} Lung-Fong Chen analyzes state practice and devolution agreements and concludes that no separate rule exists as to state succession and unequal treaties.\textsuperscript{477}

Chen defines unequal treaties in categories similar to those contained in this article.\textsuperscript{478} He also reaches a conclusion similar to that of this work, regarding the nature of the existing rule against imposed treaties. He defines a treaty as unequal if either military or economic coercion is used as a strategy in concluding it.\textsuperscript{479} However, he concludes that a rule of treaty law exists only against the use of military coercion.\textsuperscript{480} While he does not use the term "imposed treaties," Chen argues that only such treaties are prohibited, rather than all unequal


\textsuperscript{474} Briggs, supra note 472, at 68.

\textsuperscript{475} Briggs argued that even though ICAO Council and Fisheries Jurisdiction involved jurisdictional clauses, the larger implications should not be overlooked. \textit{Id.} at 67.


\textsuperscript{477} \textit{Id.} at 235.

Since the special characteristics of unequal treaties in cases of state succession have not been generally recognized and treated distinctly, the practice regarding state succession to unequal treaties and the rules adopted by the states in this area are inconsistent and confusing.

\textit{Id.}

\textit{[R]egarding state succession to unequal treaties . . . . there is no universally accepted legal rule.}

\textit{Id.} at 239.

\textsuperscript{478} \textit{Id.} at 37-38, 49.

\textsuperscript{479} \textit{Id.} at 47.

\textsuperscript{480} \textit{Id.} at 40. Chen summarizes the arguments for and against excluding the concepts of economic and political force from being included in a definition of the term "force." The arguments for the restrictive view are: 1) the drafting of article 2(4) precluded it; 2) economic and political coercion is too vague; 3) it is too difficult to apply the concepts of economic and political coercion; 4) the application of this position would undermine \textit{pacta sunt servanda}. The arguments for the broad view are: 1) there is no need to rely upon the legislative history of article 2(4); 2) the vagueness of the concepts of political and economic force is no excuse; 3) there is no need to rely upon an obsolete concept of force; 4) there is a need to uphold the sovereign equality of states; 5) there is a need for the beneficial effects of applying this view; 6) the necessary procedural safeguards exist. \textit{Id.} at 42-46.

\textit{[I]t is controversial whether political and economic strategies can serve as criteria for characterizing a treaty unequal.}

\textit{Id.} at 40 (footnotes omitted).
treaties. However, unlike the present writer, Chen argues that the rule against militarily imposed treaties already existed in 1919, at the time of the Covenant.\textsuperscript{481} Chen suggests that a broader competence ought to be given to the International Court of Justice in the 1970’s.\textsuperscript{482} This contention is a conventional response of writers in many fields of international law.\textsuperscript{483}

1. \textit{Recent Doctoral Theses.} Three recent doctoral theses are of particular interest. A recent Swedish LL.D. thesis deals specifically with the problem of imposed treaties. An Oxford D.Phil. thesis discusses state sovereignty\textsuperscript{484} and state consent, and an American J.S.D. thesis discusses \textit{jus cogens}.\textsuperscript{485} The first thesis is the most significant. The other two make relevant observations, while analyzing propositions closely related to the rule against imposed treaties.

\textbf{F. Nozari.} This LL.D thesis, \textit{UNEQUAL TREATIES IN INTERNATIONAL LAW},\textsuperscript{486} was completed in 1971 at the Institute of International Law at the University of Stockholm. In the text, Nozari defined “unequal” to mean “imposed”, and to include both military and economic force.

Nozari spends much of his effort distinguishing his definition of imposed treaties from \textit{clausula rebus sic stantibus},\textsuperscript{487} and discussing \textit{pacta sunt servanda} and a host of other basic aspects of treaty law. Only at the end of his thesis does he address the question of treaties made in connection with war.\textsuperscript{488}

Nozari concludes that an unequal treaty is:

[A] treaty which, through the application of direct or indirect pressure, is \textit{imposed}, wholly or partly, by a powerful State on a weaker State—a situation which is the consequence of a

\begin{itemize}
\item \textsuperscript{481} \textit{Id.} at 41.
\item \textsuperscript{482} \textit{Id.} at 241.
\item \textsuperscript{483} \textit{See generally} Higgins, \textit{The Desirability of Third-Party Adjudication: Conventional Wisdom or Continuing Truth?}, in \textit{INTERNATIONAL ORGANIZATION-LAW IN MOVEMENT} 37 (J. Fawcett & R. Higgins eds. 1974).
\item \textsuperscript{484} K. Hossain, State Sovereignty and the U.N. Charter, (1964) (unpublished D. Phil. thesis at Oxford University).
\item \textsuperscript{486} F. Nozari, \textit{UNEQUAL TREATIES IN INTERNATIONAL LAW} (1971) [hereinafter cited as \textit{Nozari}].
\item \textsuperscript{487} \textit{Nozari}, supra note 486, at 134.
\item \textsuperscript{488} \textit{Id.} at 274.
\end{itemize}
State [sic] of inequality. . . . Inequality can be either political or legal, or both legal and political at the same time. The pressure applied by the powerful State can be physical, social, economic or political, all depending on circumstances in every specific case. 499

In Nozari's view, it is the unlawful force, economic or military, which makes a treaty unequal. "The object or the substance of a treaty cannot alone establish criterion for inequality." 490 It is this element of force, rather than the unequal provisions in a treaty, which makes a treaty invalid.

Concerning the terms "unjust", "unequitable", and "leonine" treaties, it is suggested that these terms define, in principle, the object and the substance of unequal treaties. Such terms cannot thus be used interchangeably with the term "unequal treaty". 491

A significant aspect of Nozari's effort is his inclusion of relevant state practice as an important factor in analyzing the prevailing international rule. He discusses a number of events, as does this writer, but omits many important examples, including the 1938 and 1968 Czechoslovakian Agreements.

K. Hossain. This Oxford University D.Phil. thesis, State Sovereignty and the U.N. Charter, does not discuss imposed treaties, but does discuss certain directly related propositions, 492 including both the "consent rule" 493 and the "rule of restrictive interpretation of treaties" as pertinent to all treaties. 494 Hossain believes that the former exists while the latter does not. 495 He argues that these rules are

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499. Id. at 119 (emphasis added). It is submitted that by the term "unequal treaty" is meant a treaty which, through the application of direct or indirect pressure, is imposed wholly or partly, by a powerful State upon a weaker State. Id. at 169.

490. Id. at 120.

491. Id. at 121.

The inclusion of Articles 52 [prohibition of the threat or use of force] and 53 [rules of jus cogens] in the Convention on the Law of Treaties, can be considered a great advancement in the progressive codification of international law in general, and in the recognition of the norm "unequal treaty" in particular. Id. at 243. However, unequal treaties might not be invalid. Id. at 298. "It should be mentioned that the term "unequal treaty" has never been subject of a discussion in any international tribunal." Id. at 114.

492. See note 484, supra.


494. Id. at 244-308.

495. Id. at 149-50. "This view [restrictive treaty interpretation], however, is not borne out by practice." He argued that the competing principle of effectiveness has been applied in preference to the principle of restrictive treaty interpretation. Id. at 150.
subsumed under the general principle of sovereign equality as enunciated in article 2(1) of the Charter, and he concludes that a restrictive rule of interpretation has not in fact been sustained by the practice of the United Nations.

Rosenstein-Rozakis. This 1973 thesis, The Peremptory Norms of General International Law (Jus Cogens) Under the Vienna Convention of the Law of Treaties, does not directly discuss imposed treaties, but does make an observation significant to their analysis. The author suggests that certain provisions of the 1969 Vienna Convention on the Law of Treaties have "faded" some of the differences between international law and domestic law. In particular, he argues that the jus cogens rule is such a provision. Traditionally, states were allowed to create any substantive inter-se rule, but now this right has been limited.

This writer believes that article 52 brings international and domestic law closer together by prohibiting force as a permissible means of bringing about agreements between subjects of the international legal order. In domestic law, proof of direct threat of physical harm will vitiate the consent of a party to a contract. The same principle now exists in international law.

2. Western Writers. Western writers continued to reject the existence of a new rule, and even today, they are very cautious. The views presented here are in chronological order as they appeared from the immediate beginning of the post-war era to thirty years later in 1975. With a few exceptions, the writings of authors on article 52 of the 1969 Vienna Convention on the Law of Treaties and on the work of the International Law Commission are presented later in this work.

Ross (Danish). In 1947, Professor Alf Ross of the University of Copenhagen, Denmark, in A TEXT BOOK OF INTERNATIONAL LAW, accepted the traditional view. Surprisingly, he did not even mention the then recently concluded United Nations Charter. He accepted the view that all imposed treaties are valid.

It is generally recognized that compulsion exercised against a state (war) does not render a treaty invalid. On the

496. Id. at 149-50.
497. See note 485, supra.
498. Id. at 1.
499. Id. at 9.
500. Id. at 1.
501. Id. at 9.
contrary view no peace treaty would be valid under International Law. 503

Keeton (British). G.W. Keeton, the Dean of the Faculty of Law at University College, London, in his 1948 lecture at the Hague Academy of International Law, discussed the problem of extraterritoriality. 504 He treated imposed treaties as an aspect of that problem, but remarkably, still argued that use of force against a state was irrelevant. 505

Keeton discussed the 1842 Treaty of Nanking and the 1858 Treaties of Tientsin which concluded respectively the first and second Anglo-Chinese Wars. 506 He also discussed the first capitulation treaties with Turkey, which were agreed upon at the height of Turkish power.

Even if [imposed treaties] were not [freely concluded], it is unquestioned international law that a treaty obtained by the exercise of pressure by one state upon another, even at the end of a war, is nonetheless binding. 507

Fitzmaurice (British). Also lecturing in 1948, to the Hague Academy of International Law, Fitzmaurice, then Deputy-Legal Advisor to the British Foreign Office, contended that a new rule had emerged. 508

In the ordinary way, the mere fact that a State is under a political or military necessity to sign a given treaty . . . does not affect the validity of the treaty . . . [A]n aggressive war must now be regarded as an international wrong, and logically therefore the rule . . . should perhaps be regarded as modified, so as to except the case of a peace treaty imposed by a victorious aggressor. 509

Fitzmaurice suggested that if the war were "wrong" under international law, no consequences ought to flow to the wrongdoer. 510 An aggressor would be such a wrongdoer. However, a peace treaty would be imposable by the victim of the aggression on the aggressor. 511 Fitzmaurice did not offer any supporting evidence for these views, and he recognized that his views were not thoroughly thought out.

503. Id.
505. Id.
506. Id.
507. Id. See also Keeton, The Revision Clauses in Certain Chinese Treaties, 10 Brit. Y.B. Int'l. L. 111, 119-21 (1929).
509. Id. (emphasis added).
510. Id.
511. Id. at 356.
This is a subject the full implications of which will have to be worked out, and the writer is only concerned to draw attention to it and makes no claim that the view suggested is necessarily correct in all aspects.  

_Fenwick (American)._ Charles Fenwick, in his 1951 lecture to the Hague Academy of International Law, discussed the progress of international law. He accepted the view that where military force against a state is used or threatened, a resulting treaty is invalid.  

Fenwick focused on the situation in which no military force was used, but in which the bargaining positions of the states involved were so widely separated and the result so unfair as to shock world public opinion. He contended that these circumstances should be taken into consideration only when interpreting a treaty.  

_Lauterpacht (British)._ Professor H. Lauterpacht in 1954, in the BRITISH YEARBOOK OF INTERNATIONAL LAW, discussed the law of war and reinforced the view he had expressed in the 1930's, that a new rule of treaty law probably had emerged. While his earlier view seems to have been premature, his writings in the 1950's corresponded more closely with the prevailing system. In 1954, Lauterpacht, like Fitzmaurice, argued that "a peace treaty imposed by the victorious aggressor has no legal validity." However, both Lauterpacht, and Fitzmaurice, failed to explain whether a validly imposed peace treaty was subject to limitations, which obligations might be imposed, or the exact nature of the invalidity of an unlawfully imposed peace treaty.  

Professor Lauterpacht in editing OPPENHEIM, INTERNATIONAL LAW (1955), indicated that although his views as expressed in the 1930's were not then widely accepted, a new rule had "probably" developed since the Charter. He indicated that this was only a rule of conventional law and not customary international law, and that if the aggressor

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512. _Id._  
513. Fenwick, _The Progress of International Law During the Past Forty Years_, 79 RECUEIL DES COURS 1 (1951).  
514. _Id._ at 50.  
515. _Id._ at 51.  
517. _Supra_ note 508.  
518. See Lauterpacht, _supra_ note 516, at 233.  
520. _Id._ at 892.
were not a party to the Charter, then only the traditional rule might be applicable.521

Schwarzenberger (British). In 1955, Georg Schwarzenberger, while delivering the basic course in international law at the Hague Academy of International Law, provided a theoretical basis for the rule against imposed treaties, and contended that the rule was derived from the principle of state consent.522

Schwarzenberger argued that the Kellogg Pact and the U.N. Charter had "radically" changed the traditional rule,523 and that the principle of state consent was an important principle of international law.524

de Visscher (Belgian). Professor de Visscher in the 1957 English edition of his treatise, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW, rejected the view that treaties imposed by an unjust aggression are invalid.525

De Visscher contended that although some treaties, particularly peace treaties, are concluded under pressure,526 "[p]ositive international law nevertheless holds them valid."527 He believed that this validity could not be explained by moral principles528 and that this situation emphasizes the unfortunate but primitive nature of international law. International law has to reckon with force and the phenomenon that only states utilizing force are capable of establishing order, even if this works to the detriment of other legitimate interests.529

De Visscher concluded that despite recent efforts in defining

521. Id.

In so far as the victorious State was not bound by either of these instruments, or if resort to war on its part was not in violation of them, there is room for the continuance of the traditional rule disregarding the vitiating effect of physical coercion exercised against a State.

Id.

522. Schwarzenberger, The Fundamental Principles of International Law, 87 RECUEIL DES COURS 193, 265-67 (1955). He also analyzed the problem of imposed treaties by emphasizing the historical tendency to employ them as a pretext for new hostilities.

Medieval international law abounds with picturesque incidents culminating in treaties which were concluded under duress and disregarded if possible at the earliest opportunity on the excuse of duress. At the same time, early practice was fully conscious of the possibly vitiating effect of duress and compulsion of treaties.

Id. at 265.

523. Id. at 266.

524. Id. at 289. He further contends that imposed treaties are void. Id. at 266, 270.

525. C. de Visscher, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 247 (P. Corbett transl. 1957).

526. Id.

527. Id. at 246.

528. Id.

529. Id. at 247.
aggression, no consensus as to its essential nature had been achieved, and the prevailing nebulous concept of aggression "could not constitute a cause of nullity in law." It was this point which was essential to de Visscher. If a well established definition existed, then the nullity of an agreement resulting from aggression should be recognized.

McNair (British). Lord McNair in The Law of Treaties, published in 1961, was one of the first writers of the early 1960's to suggest that treaties imposed by military force are illegal. He did not contend, however, that unequal bargaining position was alone sufficient to render a treaty illegal. Lord McNair argued that it should be "the duty of an international tribunal to scrutinize closely the circumstances in which a treaty . . . was concluded . . . [where a] party's consent [was secured] by means of the illegal use or threat of force."

On the general problem of coercion of states and treaties, Lord McNair accurately and succinctly described the state of the law of the early 1960’s: "[T]here exists abundant literary authority, a little diplomatic authority, and almost no judicial authority" in support of the rule against imposed treaties. He also pointed out,

[T]hat in no case did any of the defeated Powers [of World War II] allege that an armistice agreement or a treaty was not binding upon it because its consent had been obtained by force or the threat of force . . .

Jennings (British). Jennings, in 1967, in the general course on principles of international law at the Hague Academy of International Law, made an observation very relevant to this study. In discussing an early draft of article 52 prepared by the International Law Commission, Jennings stated in reference to the definition of "force" and its application in a particular situation, that in "the end the field is likely to be open to subjective assertion and counter-assertion."

His lecture discloses his concern with the inability of the international community to formulate a practical rule, free of ambiguity.

O'Connell (New Zealand). D.P. O'Connell, the Chichele Profes-

530. Id.
531. Even though article 14 of the Charter does not explicity refer to treaty revision, de Visscher argued that it is essentially similar to article 19 of the Covenant. Id. at 323. This view is similar to the one this writer develops.
533. Id.
534. Id. The same may be said of domestic tribunals.
535. Id. at 207.
536. Id. at 209.
537. Jennings, General Course on Principles of International Law, 121 RECUEIL DES COURS 563 (1967).
538. Id.
Sor of Law at All Soul's College, Oxford University, wrote in 1970, in INTERNATIONAL LAW that "it is more difficult to agree that a treaty is vitiating if one of the contracting States signs it under pressure." He believed the Munich Agreement of 1938 to be invalid, and stated that the subsequent Czech-German Treaty of March 1939 was "probably" invalid because of the then physical occupation of Czechoslovakia. O'Connell pointed out that certain countries, including the United Kingdom and Switzerland, had initially recognized the validity of their existing treaties with Nazi Germany, and the extension of those treaties, in 1938, to apply to annexed Austria and, in 1939, to certain provinces of Czechoslovakia. He characterized article 52 of the 1969 Vienna Convention as "a blank cheque to States seeking escape from inconvenient treaty commitments." Brownlie (British). Ian Brownlie, in 1968, merely identified the problem of imposed treaties in INTERNATIONAL LAW AND THE USE OF FORCE BY STATES. His treatise did not discuss the effect of the case of military force in concluding treaties, but simply presented the basic anomaly in the area of imposed treaties: the law of war in the twentieth century has developed so as to limit the use of force, while the law of treaties has lagged behind. He implicitly requested further study by observing that jurists "have avoided any detailed examination of the problems involved." Sztucki (Swedish). Jerzy Sztucki in his treatise on jus cogens and the 1969 Vienna Convention, made several valuable observations on the general problem of the validity of treaties. Sztucki contended that the invalidity of a treaty is in essence a "question of a legal construction in a legal system..." it is also the question of possible appropriate legal action bringing about specific legal results on specific established grounds." He also urged the determination of the actual juridical significance of a void treaty. He contended that the pronouncement of a treaty as void did not preclude legal effects, but mandated an investiga-

540. Id. at 240.
541. Switzerland's extension was in 1942 during the early part of World War II. Id. at 380.
542. Id. at 240. See also 2 D. O'Connell, State Succession in Municipal Law and International Law 24 (1967). Here O'Connell argued: "It is evident that the hypothesis that generally treaties lapse on independence or union must be rejected."
544. Id. at 405. See also I. Brownlie, Principles of Public International Law 594 (2d ed. 1973).
546. Id. at 190.
tion into what the effects may be.\textsuperscript{547}

He believed that "a margin of freedom" ought to be left to the states in ascertaining legal effect in an otherwise invalid treaty. He also noted that there unfortunately was only "extremely scarce international practice" with regard to the problem.\textsuperscript{548} Sztucki concluded his analysis in 1974, with an invitation to scholars to undertake additional relevant research.

3. Non-Western Writers. Non-Western writers have generally accepted the principle that imposed treaties are void, although some have not. Only a few such writers have contended that the use of economic force alone will also invalidate international agreements. Communist writers go beyond the above views and declare that treaties are invalid, even though they do not involve the unlawful use of either military or economic force, when they contain provisions which are unilateral on their face or in their operation.

These writers are divided into two groups: those from Communist states (Eastern European) and those from non-Communist, less developed states. The views of Soviet and Chinese writers are presented separately in later discussion.

a. Communist Writers (Eastern European).

Herczech (Hungarian). In 1969, the Hungarian jurist, Geza Herczech, in \textit{General Principles of Law and the International Legal Order}, discussed unequal treaties only in a brief footnote.\textsuperscript{549} Herczech believed the principle of not recognizing unequal treaties to be a \textit{jus cogens}, and unequal treaties to be invalid because they conflict with the principles of sovereign equality of states and the right of self-determination. Moreover, unequal treaties are not to be held valid under \textit{pacta sunt servanda}.

Herczech's dual view, that the principle of unequal treaties is a limitation on \textit{pacta sunt servanda}, and that it is based upon the more general principle of sovereign equality of states, is a theme running through the writings of many authors from Communist and lesser developed states.

Dabrowa (Polish). In 1969, the Polish writer, Slawomir Dabrowa,
analyzed Polish treaty practice and Poland's pre-war treaties in the context of the recently concluded 1969 Vienna Convention on the Law of Treaties. Dabrowa argued that the problem of state succession of Communist regimes to prior treaties has not been colored by the doctrine of unequal treaties.

**Bierzanek (Polish).** Bierzanek, another Polish writer, criticized American international law writers, especially political scientists, as deprecating the function of international law and rejecting the need for fundamental change. He argued that there is a need for the codification of the legal principle of peaceful coexistence, presumably including a rule against unequal treaties. He did not attempt to define the concept "unequal treaty," nor did he comment on its extent, nature, effect, or theoretical basis.

**b. Non-Western Writers (Lesser Developed Countries).**

**Salonga (Philippines).** Salonga, Professor of International Law at the Far Eastern University in the Philippines, in 1966, rejected the existence of a new rule and also the views of writers which supported such a new rule.

However, where the duress is not against the person of the negotiator but against the State itself, the treaty is not thereby rendered invalid. Thus, a dictated treaty, such as a peace treaty imposed by the victor upon the vanquished State, has been regarded as valid legally as one entered into freely on both sides.

**Varghese (Pakistan).** In 1952, the Pakistani legal writer, Payappilly Itty Varghese, accepted the view that imposed treaties are not valid. In his opinion, a manifestation of consent should be required, which "must be a free expressed consent of the contracting parties." Varghese stated the following:

In all wars of conquest the treaties are imposed ones and cannot be said to be valid.

**Mookerjea (Indian).** In 1968, an Indian legal scholar, Sobhanlal

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551. Id. at 61.
553. See also M. JIRÁSEK, PRINCIPLES OF THE OLD AND NEW ORGANIZATION OF THE WORLD (1945); notes 7-8 supra.
555. Id.
557. Id.
558. Id.
Mookerjea, accepted the newer rule. Mookerjea stated that if force is used against a state, the resulting treaty is void. He illustrated his proposition by pointing out that the Dolai Lama had declared the Sino-Tibetan Treaty invalid, as being concluded under duress.

**Mahajan (Indian).** In 1973, another Indian legal scholar, Vidya Dhar Mahajan, in PUBLIC INTERNATIONAL LAW, contended that not all peace treaties were valid. Those treaties concluded in violation of the United Nations Charter lack the necessary mutual consent of the states. Mahajan emphasized the need for mutual consent. Although he did not discuss the specific provisions of the Charter upon which his conclusions were based, he cited article 2(3), which requires states to settle disputes peacefully.

**Elias (Nigerian).** In 1971, at the Hague Academy of International Law, T.O. Elias, the well-known Nigerian jurist, argued that a new rule precluding the validity of imposed treaties had begun to develop in the 1920's and the 1930's. Elias concluded that this rule was now extant and that the United Nations Charter article 2(4) was its source.


**Varma (Indian).** In a 1975 article, Prem Varma defined, in part, the concept of unequal treaties as those brought about by the threat or use of force, as well as those brought about by economic and political pressure. However, he concluded that only those treaties brought about by the illegal use of military force are invalid.

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560. Id.
561. Id.
563. Id.
565. Id.
567. Id. at 175.
568. Id. at 176.
569. Id. at 170.

But the unequal treaties extorted by force or threat of force against a state are illegal and void.

Id.
Such treaties have, in fact, been in existence from earliest times. It is only the State's right to abrogate such treaties that is of recent origin.\textsuperscript{571}

4. \textit{Note on Recent Views on the Legality of Economic and Political Coercion in International Relations and the 1973-1975 Arab Oil Embargo.} The 1973-1975 Arab Oil Embargo has been the topic of a number of recent articles discussing the legality in international relations of economic and political coercion under article 2(4) of the Charter of the United Nations.\textsuperscript{572} These articles have discussed the validity of treaties resulting from the use of economic and political coercion, but not in the context of treaty law.

While it may be premature to assess this growing body of dialogue, a general observation may be made. If there is no consensus as to whether political and economic coercion is unlawful, as a general rule of international conduct, it is difficult to understand how that "rule" can be utilized in assessing the juridical validity of a treaty.\textsuperscript{573}

The German lawyer, Hartmut Brosche, in his 1974 analysis of the Arab oil embargo, presented a fair evaluation of the current state of the law.\textsuperscript{574} He also presented his hope, the crystallization of a new rule of international law.

\textsuperscript{571} \textit{Id.} at 73. Varma argued that unequal treaties ought to be illegal.

Therefore, there seems to be no valid reason why the treaties concluded as a result of economic and political pressures should not be treated as illegal and void.

\textit{Id.} at 65. \textit{See also} notes 7-8 \textit{supra}.


\textsuperscript{573} Many writers believe that the rejection at San Francisco in 1945, of a Brazilian proposal to extend article 2(4) to cover "economic measures" was a rejection of a general prohibition against economic force in international relations. \textit{See} Doc. 784, 1/1/27, at 4-5, 6 U.N.C.I.O. Doc. 336, 339 (1945). However, some argue that such a prohibition may be found in the non-intervention principle. Lillich, \textit{Economic Coercion and the "New International Economic Order": A Second Look at Some First Impressions}, 16 \textit{Va. J. INT'L L.} 233 (1976). \textit{See also} Bowett, \textit{International Law and Economic Coercion}, 16 \textit{Va. J. INT'L L.} 245 (1976).

\textsuperscript{574} Brosche, \textit{supra} note 572, at 30. Brosche argues that the trend is towards the broader definition. Thus both the Arab action and the prior action are inconsistent with the Charter. \textit{Id.} at 34.
Thus we have seen that the world is split on the question of whether the general prohibition of the threat or use of force as formulated in Article 2(4) of the Charter embraces pressures of an economic or political nature. . . Their strong movement to outlaw economic and political pressure will bring about new norms governing the limits of permissible economic coercion; new rules of customary international law will emerge.575

B. State Practice

State practice discloses a general acceptance of a rule against imposed treaties, some inconsistent practice, and an uncertain position concerning the effect of imposed treaties.

1. General Communist Chinese Theory of Imposed Treaties and Practice of the People's Republic of China. Several recent works have appeared in which writers for the first time discuss the Communist Chinese attitude toward international law in general, and their concept of imposed treaties in particular. This section examines the views of non-Communist Chinese authors on the attitude of the People's Republic of China toward imposed treaties, and it examines the historical events relied upon by both Communist Chinese and other writers.

a. Recent Views on the Attitude of the People's Republic of China Regarding the Concept of Imposed Treaties. The most recent and authoritative works to examine the attitude of the People's Republic of China toward the concept of imposed treaties are by Professors J. Cohen,576 H. Chiu577 and J. Hsiung.578

575. Id. at 30.

"The quality of research on international law in the PRC, even according to eminent
Cohen and Chiu (1974). Professors Cohen and Chiu have collaborated in producing a documentary study of the Communist Chinese views on international law, including the concept of imposed treaties. Professor Cohen, as the Director of the East Asian Legal Center at the Harvard Law School, and Professor Chiu of the University of Maryland School of Law, a Research Associate at the East Asian Legal Center in 1974, presented their views in the various edited portions of the book which explain the translated documents.

Professors Cohen and Chiu, in reviewing the history of the term "unequal treaty," note that: "[It] appears to have been coined by the Chinese Nationalists in 1923," and conclude that one of China's reasons for entering World War I was to eliminate unequal treaties. They also state that despite the doctrinal support within Communist China for the legal invalidity of imposed treaties, the government of the People's Republic "has not acted upon that assumption with respect to boundary treaties," and that in contrast to the Nationalist definition and use of the concept of unequal treaties in a "relatively precise fashion," the People's Republic of China and Communist writers have used it in a "flexible and broad manner."

Cohen and Chiu recite several examples of post-World War II state practice of the People's Republic of China. The Communist Chinese declared the 1956 United States-Swiss Treaty Concerning Civil Uses of Atomic Energy as unequal, since it gave a right to the United States to acquire or use Swiss inventions based on nuclear information supplied by the United States. The Communist Chinese also declared unequal the existing 1956 British-Jordanian Treaty providing for the stationing of British forces on Jordanian territory. They further pronounced as unequal the 1946 Republic of China-United States Treaty of Friendship, Commerce and Navigation, not because the terms were unequal, but because the operation of those terms was unequal in light of political and economic considerations. The Communist Chinese also contended

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Chinese Communist legal scholars themselves, has been poor and rudimentary." Ogden-China, supra, at 30.

579. 2 PEOPLE'S CHINA & INT'L LAW (J. Cohen & H. Chiu eds. 1974) [hereinafter cited as 2 PEOPLE'S CHINA].
580. Id. at 1116.
581. Id. at 1115.
582. Id. at 1128.
583. Id. at 1145.
584. Id.
585. Id. at 1249.
586. Id. at 1250.
587. 1 PEOPLE'S CHINA, supra note 576, at 131.
588. Id.
that the 1960 Japan-United States Security Treaty was unequal since it was imposed on Japan.589 However, the People's Republic has not declared unequal the veto system of the United Nations.590

Hungdah Chiu (1972). In 1972, Hungdah Chiu published several works discussing Communist China and imposed treaties.591 Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties observed that Communist China has never publicly denounced as unequal the 1945 Nationalist Chinese-Soviet Treaty Concerning Manchuria.592 It was only in the 1960's, in the context of the seemingly interminable Sino-Soviet border dispute, that the 1858 Sino-Russian Aigun Treaty and the 1860 Sino-Russian Peking Treaty were criticized, but were not abrogated.593

In 1972, in his more general work, The People's Republic of China and the Law of Treaties, Chiu offered more information on this subject.594 Chiu indicated that Communist Chinese scholars contend that "just" and "equal" treaties are primary sources of international law,595 and regard the coercion of a state and the unequal nature of treaty provisions as independent grounds for judging a treaty invalid.596

In addition to coercion, Communist Chinese writers consider the "unequal" or "aggressive and enslaving" nature of a treaty a vitiating condition.597

Chiu emphasized that the concept of unequal treaties is "flexible." For example, Communist China has not abrogated as illegal all imposed or unequal treaties to which it is a party, especially certain treaties with the Soviet Union which are still in force.598 Chiu concluded that although unequal boundary treaties are being observed, there is no requirement that they be observed forever.599

589. 2 People's China, supra note 579, at 1250.
590. Id. at 1254, 1314.
592. Id. at 264.
593. Id. at 265. Chiu argued that the Nationalists believed that imposed treaties were at most subject to rebus sic stantibus, not to a rule against imposed or unequal treaties.
595. Id. at 5.
596. Id. at 30.
597. Id.
598. Id. at 97. For example, boundary treaties with Hong Kong and Macao are currently in force. Chiu further stated that "Application of the concept of 'unequal treaties' by Communist China is flexible and seems largely determined by political considerations." Id. at 68.
599. Id. at 96.
The views of commentators other than the above are essentially complementary to the views just described.

Shao-chuan Leng analyzed the recent Chanpao Island dispute (Damansky Island) and concluded that, in theory, the Communist Chinese regard treaties previously imposed on her as unequal and illegal.\textsuperscript{600} Yet, in practice, Communist Chinese have been rather "selective and prudent" in applying their concept of unequal and imposed treaties.\textsuperscript{601}

In 1972, James Hsuing, then of New York University, contrasted the Communist Chinese position with that of the 1969 Vienna Convention.\textsuperscript{602} He concluded that the Communist Chinese position has gone further than the formulation of article 52 of the Vienna Convention on the Law of Treaties.\textsuperscript{603}

The [Chinese People's Republic] position agrees with this principle but goes beyond it. The concept of exploitation in interstate relations sealed by treaties has much broader application than coercion in the conclusion of treaties. Furthermore, mere nominal or verbal reciprocity, in [Chinese People's Republic] views, does not make a treaty truly equal.\textsuperscript{604}

\textit{b. Communist Chinese Theorists and Communist Chinese State Practice}. Chou Keng-sheng in 1955, adhered to the position that article 2(1) of the Charter proclaimed the principle of equality of states, which was a fundamental principle of international law.\textsuperscript{605} He then argued that unilateral treaties, including both unequal treaties and those which are imposed, violate article 2(1).\textsuperscript{606} In 1950, Wang I-wang stated that certain commercial treaties had been concluded under military threat and were unequal.\textsuperscript{607} As an example of this, he mentioned treaties concluded during the Manchu dynasty which provided for consular jurisdiction, leased territories and concessions such as tariff restrictions,

\begin{footnote}
\textsuperscript{600} \textit{Law in Chinese Foreign Policy: Communist China and Selected Problems of International Law} 244 (S. Leng & H. Chiu eds. 1972).
\textsuperscript{601} [S]he nevertheless reserves the right to differentiate between "equal" and "unequal" treaties and to proclaim their validity and legality according to her interests.
\textsuperscript{602} Id. at 271.
\textsuperscript{603} Id. at 271.
\textsuperscript{604} Id. at 271.
\textsuperscript{605} Id. at 271.
\textsuperscript{606} Id. at 271.
\textsuperscript{607} Id. at 271.
\end{footnote}

1 \textit{People's China}, supra note 576, at 126, 131.
\textsuperscript{606} \textit{Id. at} 131.
\textsuperscript{607} \textit{Id. at} 1168.
navigation in internal rivers and construction of railways.\footnote{608} 

The state practice of the People's Republic of China regarding imposed treaties is illustrated by its legal position in the Sino-Soviet border dispute and the Sino-Indian border dispute.

As mentioned, China denounced both the 1858 Sino-Russian Aigun Treaty and the 1860 Sino-Russian Peking Treaty. However, it did not abrogate them. In 1963, Surya Sharma, an Indian international lawyer, analyzed the Chinese recourse to military force against India in a case study on peaceful coexistence.\footnote{609} Sharma concluded that the Stimson Doctrine of non-recognition ought to have been applicable.\footnote{610}

It appears that China's use of force to change its Indian borders on the basis of alleged imposed treaties is not consistent with its position on imposed treaties. In the Sino-Soviet border dispute, China does not argue that imposed treaties constitute a continuing aggression, which confers on a state the unilateral right to use military force in order to alter its borders. The Sino-Indian border confrontation has highlighted the central weakness of the concept of imposed treaties—the concept of imposition is dependent upon the concept of aggression, and who defines it.

2. **General Soviet Theory of Imposed Treaties and Recent State Practice.** A review of Soviet theory of imposed treaties indicates that the rule against imposed treaties, although quite often used, has not been the subject of extensive analysis by either Soviet writers or Western writers on Soviet international legal doctrine.

a. **Western Writers on Soviet Theory.** Western writers have discussed the Soviet attitude toward international law, peaceful coexistence and treaty law. They have rarely discussed the Soviet view of imposed treaties, and almost never have actual Soviet state practice, or, in particular, Soviet treaty practice been dealt with in this light.

Before presenting a discussion of imposed treaties and the Soviet Union's practice and doctrine, it will be helpful to consider the view of Butler on the current rudimentary state of Western scholarship concerning Soviet international law doctrine and practice.\footnote{611}

Butler argued that current scholarly efforts by Western writers are amateurish but necessary attempts at history.\footnote{612} He contended that it is

\footnotesize{
\begin{itemize}
\item 608. Id.
\item 610. Id. at 152.
\item 612. Id.
\end{itemize}
}
essential to reconsider the existing periodization schemes for describing the patterns of Soviet international law behavior and doctrine. For Butler it is necessary to develop such schemes according to issue areas, especially in order to evaluate "the platitudes concerning the determinants of Soviet international legal doctrine and practice." However, he never discussed imposed treaties.

In 1972 and 1975, Richard Erickson investigated the Soviet view of imposed treaties. He stated that Soviet doctrine precludes both imposed and unequal treaties from the protection of the principle of pacta sunt servanda, treating such treaties as void ab initio. Erickson stressed that it is duress, economic, military or political, that vitiates a treaty. He then presented the following typology of unequal treaties, a classification which includes treaties other than imposed treaties: 1) treaties of economic assistance, for example, the Marshall Plan; 2) treaties of military assistance; and 3) treaties forced upon newly independent states, for example, the 1936 Anglo-Egyptian Treaty.

b. Soviet Writers and State Practice. This section analyzes the more recent writings of Soviet writers as they have appeared in the SOVIET YEARBOOK ON INTERNATIONAL LAW and other Soviet sources. Also discussed are Soviet state practice and treaty relations, especially

613. Id. at 224. The author supports his position by reference to his prior research on the Soviet approaches to the law of the sea.

My own studies of Soviet approaches to the law of the sea also have demonstrated a close interrelationship between doctrine and practice which standard periodizations would savagely distort.

Id.

614. R. Erickson, INTERNATIONAL LAW AND THE REVOLUTIONARY STATE 77-80 (1972) [hereinafter cited as Erickson]. See also Erickson, Soviet Theory of the Legal Nature of Customary International Law, 7 CASE WEST. RES. J. INT'L L. 148 (1975); Rao, Soviet Approach to the Law of Treaties, 14 INDIAN J. INT'L L. 433 (1974). In this article the author espoused the view that "the treaties that derogate from the principle of sovereign equality of States as also those forced upon States are unequal treaties." Id. at 436 (footnotes omitted).

615. Erickson, supra note 614, at 77. But see Triska, Treaties, in 2 ENCYCLOPEDIA OF SOVIET LAW 689, 690 (F. Feldbrugge ed. 1973): After World War II, however, coercion and force have been viewed as legal and have not been considered an invalidating factor in treaty obligations.

616. Erickson, supra note 614, at 77.

617. Id. at 78.

618. Id. at 78-79. Also in 1972, Grzybowski traced the development of the Soviet doctrine of unequal treaties in treaty practice; however, he never defined the term. Grzybowski, Soviet Theory of Treaties, in ESSAYS ON THE LAW OF TREATIES 209-16 (S. Agrawala ed. 1972). See also Ramundo, Peaceful Coexistence—INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM (1969); J. Triska & R. Slusser, THE THEORY, LAW AND POLICY OF SOVIET TREATIES 42, 135 (1962); Shapiro, The Post-War Treaties of the Soviet Union, 4 Y.B. WORLD AFF. 130 (1950); 3 SOV. STAT. & DEC. (No. 4 1967). This Soviet publication on public international law contains various recent Soviet statutes and judicial decisions relating to public international law.
the continuing Sino-Soviet border dispute and the 1968 Soviet-Czechoslovakian Treaty.

**G.I. Tunkin.** It is most significant to emphasize at the outset the writings of Tunkin, since he is thought by many to be the most significant Soviet international law writer. Hazard, in 1975, viewed him as "a major force" in implementing into law the Soviet’s policy of peaceful coexistence.619

In 1974, G.I. Tunkin, in THEORY OF INTERNATIONAL LAW,620 declared the following principles, which had been advanced initially by the October Revolution, as having enormous potential force: the principles of equality, self-determination and sovereignty of nations.621 Tunkin contended that the new Soviet state, at its birth, had broken immediately with the colonial policy of Tsarism by repudiating treaties having a colonial and an unequal character.622 He argued that the dual principles of equality and self-determination mandated such an approach.623

The idea of the invalidity of unequal treaties set forth in the Decree on Peace, the abrogation by the Soviet state of all unequal treaties . . . were an inspiring example for the dependent countries. It has become much more difficult for imperialist states to impose unequal treaties, although, taking advantage of the weakness of some states, especially the new ones, they also frequently compel them to sign such treaties at the present time.624

Two earlier articles by Professor Tunkin in 1968 and 1962, further reveal this leading Soviet legal theorician’s views.

In 1968, in the REVUE EGYPTIENNE DE DROIT INTERNATIONAL,625 Tunkin stated that in the half century since the October Revolution, "some old principles of international law have disappeared; new progressive principles have emerged and a whole body of international

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620. G. Tunkin, THEORY OF INTERNATIONAL LAW (W. Butler transl. 1974) [hereinafter cited as Tunkin].
621. Id. at 7.
622. Id. at 11. See also Tunkin, The Problem of Sovereignty and Organization of European Security, 10 REVUE BELGE DE DROIT INTERNATIONAL 1 (1974).
623. The principle of the prohibition of the threat or use of force, especially its detailed applicability to the situation in Europe, will help to provide additional legal guarantees against violations of the sovereignty of European states, connected with the use or the threat of force.
624. Tunkin, supra note 620, at 14.
law has undergone an essential transformation." He argued that the most important innovation had been the emergence of the principle of prohibition against wars of aggression, and that the principles of peaceful co-existence and equality had been accepted as a result of the activities of the Soviet state.

In 1962, Tunkin emphasized the essential role of state consent in the formulation of new rules and principles of international law. He held that although modern Western views of international law often varied as to the role of state consent, nonetheless consent was the sole means of establishing rules of international law.

Tunkin argued that in both customary and conventional international law, the agreement or consent of the states was essential. Moreover, such agreement could not result from powers employing "dictatorial methods in the process of creation of norms of international law."

Several Soviet lawyers have discussed imposed treaties in more detail than Tunkin. These views are presented here along with the doctrine of imposed treaties expressed in the Soviet law school textbook, International Law.

Vassilenko. In 1971, V.A. Vassilenko, in State Sovereignty and International Treaty, set out to determine the circumstances under which an international agreement would operate to restrict the sovereignty of the contracting states. He concluded that unequal

626. Id. at 2.
628. Id.
630. The 22nd Congress, supra note 629, at 22.
631. Tunkin stated:
Recognition of agreements as the sole means of establishing norms in international law derives from the concept of peaceful coexistence. The Soviet concept of agreement stands opposed to the major tendencies of the modern bourgeois science of international law. [T]hey [the bourgeois concepts] objectively create the possibility of justification of the policy of "positions of strength", which is invariably interwoven with efforts on the part of the imperialist powers to employ dictatorial methods in the process of creation of norms of international law.

632. Id.
treaties would result in such restriction on sovereignty. 635

Vassilenko concisely defined an unequal treaty as one containing both coercion and disproportionate rights and obligations:

A forcible creation of a disproportion of rights and duties turns a treaty into a negative factor evidencing itself in a violation of the voluntariness principle and in an uneven correlation of rights and duties to the detriment of one of the parties. Such a treaty is deemed to be an unequal treaty and, naturally, in this case the sovereignty of the state subjected to violence and waiving some of its major prerogatives would undoubtedly be violated or restricted. 636

Talalayev. In 1970, A.N. Talalayev discussed, in the context of the 1969 Vienna Convention, the relation of *pacta sunt servanda* to the validity and separability of treaties. 637 He found these issues to be among the "complicated theoretical problems of international law" discussed at the Vienna Conference. 638

In the more serious instances of invalidity, absolute invalidity above all, where the treaty as a whole is void *ab initio* as contrary to the rules of *jus cogens* . . . the separability principle cannot be applied. 639

Adjarov. In 1969, K.A. Adjarov described the early Soviet treaty practice of abrogating treaties with countries of the East. 640 He believed this practice to have been based upon Lenin's "attention to the relations with the peoples fighting for the liberation from colonial domination." 641

Lukashuk. In 1949, I.I. Lukashuk indicated that the doctrine concerning unequal treaties is based on the necessity of actual state consent. 642

635.  *Id.* at 79.

636.  *Id.*


638.  *Id.*

639.  *Id.* at 127.


From the postulate that obligations cannot be placed upon a state contrary to its will there of necessity flows the demand that treaties should express the real will of their signatories.643

Lukashuk argued that traditional international law had previously required only formal expression of consent, but that the Soviet Union had played a decisive role in the recognition of the illegality and invalidity of many treaties.644 "From the point of view of the science of law, unequal treaties are worthless. . . ."645 He supported the view of the inter-relationship of coercion and inequality by repeating the often heard phrase, "unequal treaty imposed by force."646 He believed this to be the correct interpretation of article 2(4) and article 103 of the United Nations Charter.647

Academy of Sciences. INTERNATIONAL LAW does not clearly distinguish between imposed and unequal treaties.648 It continues to use the phrase "imposed by force, and which are unequal,"649 when it is apparent that a treaty need not be both imposed and unequal in order to be illegal under accepted Soviet doctrine. It emphasizes that the doctrine of unequal treaties is based upon the principle of sovereign equality of states.650

The voluntary expression of the will of the parties and equality and mutual advantage must be the basic legal principles underlying international treaties. . . .651

The principle that international treaties must be observed does not extend to treaties which are imposed by force, and which are unequal in character. . . .652

Equal treaties are treaties concluded on the basis of the equality of the parties; unequal treaties are those which do not fulfill this elementary requirement. Unequal treaties are not legally binding; equal treaties must be strictly observed.

Treaties must be based on the sovereign equality of the contracting parties.653

643. Id. at 45 (emphasis added).
644. Id.
645. Id. at 46.
646. Id.
647. Id. See also Talalayev, The Termination of International Treaties in the History and Practice of the Soviet State, 1959 Sov. Y.B. Int'l L. 155.
649. Id. at 248.
650. Id.
651. Id. at 247.
652. Id. at 248.
653. Id. (emphasis added).
Two of the most important events in Soviet post-war state practice provide significant examples of state practice that does not support the doctrine espoused by Soviet writers.

The 1968 Soviet-Czechoslovakian Treaty. In 1938, Czechoslovakia signed the infamous Munich Pact, under the threat of Nazi military force. Thirty years later, Czechoslovakia was forced by actual Soviet military action into signing the Soviet-Czechoslovakian Treaty of 1968. Unlike the Munich Agreement of 1938, the 1968 Agreement was viewed by most states as being illegal because military force was used against the contracting state in order to bring about the conclusion of the treaty.

Article 1 of the 1968 Soviet-Czechoslovak Treaty on Stationing of Soviet Troops states that the Treaty was brought about by the "consent" of the Czechoslovak Socialist Republic. That the consent resulted from the military occupation of Czechoslovakia by Soviet and Warsaw Pact forces, provoked the statement made by the United States Representative to the September 12th meeting of the United States Special Committee on Principles of International Law and prior statements of the United States Representative to the Security Council, explicitly condemning the events in Czechoslovakia as an illegal act of aggression.

These statements were similar to the views of other countries condemning the Soviet action. The Czechoslovakian National Assembly Proclamation of August 28, 1968, had previously condemned the Czechoslovakian occupation. It declared the occupation "as illegal and contrary to international treaties."

The Soviet Union justified its intervention in Czechoslovakia as being authorized by "socialist international law." This was not assented to by either Western states or the People's Republic of China.

Soviet state practice is in sharp conflict with the Soviet Union's claim of being the champion of the rule against imposed treaties. However, by 1968, it was too late for Soviet state practice to prevent the

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654. For a collection of documents on this subject see 7 INT'L LEGAL MATERIALS 1265-339 (1968) [hereinafter cited as 7 INT'L LEGAL MATERIALS].
655. Id. at 1334.
656. Id. at 1317.
658. 7 INT'L LEGAL MATERIALS, supra note 654, at 1313.
659. Id. at 1323.
660. Id. at 1326.
development of a new rule of treaty law. It was simply a violation of such a rule.

*Sino-Soviet Border Dispute.* The Soviet Union claims that the Sino-Russian Treaty of Aigan of 1858 and the Sino-Russian Treaty of Peking of 1860, as well as the 1945 Sino-Soviet Treaty, are equal and valid. The government of the People’s Republic of China, as indicated previously, contends that these treaties are imposed and unequal.

Soviet author V.S. Miasnikov argued, in a 1974 article, that the 19th century treaties in fact corrected an earlier invalid treaty. He stated that the 1689 Treaty of Nerchinsk had been imposed by the Ch’ing Government on the Tsarist Government and that it was Chinese coercion against both Russia and the Russian delegation which had brought about the conclusion of the 1689 Treaty.

[T]he “Ch’ing government entered into struggle with Russia for the Amur when this territory was a part of Russia, and hence the military seizure of the Amur by the Ch’ing government was aggression vis-à-vis Russia.”

The Treaty of Nerchinsk, and in particular its territorial articles, was signed in an abnormal circumstance—under the threat of the physical extermination of the Russian delegation and the detachment escorting it by the enormously superior forces of the Manchus. In view of this the treaty should be considered coercive, i.e., concluded under the threat of the application of force.

3. The 1973 German (Federal Republic)-Czechoslovakian Treaty. The 1973 German (Federal Republic)-Czechoslovakian Treaty declared the 1938 Munich Agreement void on the grounds that had been imposed by force, however, it retained as valid certain consequences of the 1938 Munich Agreement, thus giving it limited effect. The Preamble and article 1 respectively state:

RECOGNIZING that the Munich Agreement of 29 September 1938 was imposed on the Czechoslovak Republic by the National Socialist regime under the threat of force.


662. *Id.*

663. *Id.*

664. *Id.* at 88.

665. *Id.* This was Miasnikov’s quote of a previous study by Iakovleva.

666. *Id.* at 89.


668. *Id.*
The Federal Republic of Germany and the Czechoslovak Socialist Republic, under the present Treaty, deemed the Munich Agreement of 29 September 1938 void with regard to their mutual relations.669

At the drafting of the 1973 Agreement, the Czechoslovakian government urged that the Munich Agreement be declared void as of its inception, but the German government refused to concede this point,670 being concerned about legal complications which might arise regarding the Sudeten Germans. Many had gained German citizenship, either during World War II, or when they were expelled by the post-war Czechoslovakian government. Germany wanted to avoid problems of inheritance, land ownership, status of marriages and divorces, and other civil acts contracted under German law.671 This was the main issue throughout the drafting of the Agreement, although a problem as to the right of the Federal Republic to act on behalf of interests located in West Berlin developed in the later stages of the negotiations, which right the Federal Republic conceded.672

Article 2 expressly preserved legal rights and nationalities established under the Munich Agreement, and protected the Federal Republic from any claims that might otherwise be based upon this new 1973 Agreement:

1) The present treaty shall not affect the legal effects on natural or legal persons of the law as applied in the period between 30 September 1938 and 9 May 1945.

   This provision shall exclude the effects of measures which both Contracting Parties deem to be void owing to their incompatibility with the fundamental principles of justice.

2) The present treaty shall not affect the nationality of living or deceased persons ensuing from the legal system of either of the two Contracting Parties.

3) The present treaty, together with its declarations on the Munich Agreement, shall not constitute any legal basis for

669. Id. (emphasis added).
material claims by the Czechoslovak Socialist Republic and its natural and legal persons.\footnote{673}{German-Czechoslovak Treaty, \textit{supra} note 667, at 19 (emphasis added).}

Walter Schell, as the German Minister of Foreign Affairs, after initialing the Treaty in Bonn on June 23, 1973, declared that the Treaty was a clear rejection of past policies that were based upon coercion.\footnote{674}{Statement by Walter Schell, June 20, 1973, in \textit{Treaty on Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic of 11 December 1973}, 27-28 (Press and Info. Office, Federal Republic of Germany 1974).} Bohuslav Chňoupek, the Czechoslovakian Foreign Minister, declared the 1973 Treaty “a victory for the reason and realism both contracting parties have shown.”\footnote{675}{Speech by Bohuslav Chňoupek, on file at the International Legal Studies Library, Harvard Law School, July 15, 1974.} In an address to a combined session of the Czechoslovakian legislative body on July 15, 1974,\footnote{676}{Id. at 28, 29.} Chňoupek contended that the 1973 Agreement confirmed the nullity of the Munich Agreement which had been concluded against Czechoslovakia’s will and had caused the country “immense moral and material harm.”\footnote{677}{Id. at 8. The Czechoslovakian statute of limitations still remains in effect to preclude criminal prosecutions.}

Chňoupek stated “that both sides were able in an acceptable way to embody as law in the Treaty the nullity of the so-called Munich Agreement.”\footnote{678}{Id. at 5.} He did state that for “humane reasons,” under article II of the 1973 Agreement, some acts were declared valid which stemmed from the use of German law in Czechoslovakia, from 1938 to 1945.\footnote{679}{Id. at 7.} One may conclude that the 1973 Agreement continued to recognize previously created rights, rather than instituting new rights retroactively.


\begin{center}
\footnotesize
673. German-Czechoslovak Treaty, \textit{supra} note 667, at 19 (emphasis added).
677. \textit{Id.} at 5.
678. \textit{Id.} at 7.
679. \textit{Id.} at 8. The Czechoslovakian statute of limitations still remains in effect to preclude criminal prosecutions.
\end{center}
unequal and imposed by force.682 The 1937 London Treaty established the Iraqi border as including the east bank of Shatt al-Arab River.683 The 1975 Algiers Agreement declares that the river frontier was to run down the middle of the navigational channel.684 It is significant that this major Middle-Eastern dispute centered on an imposed treaty, and was resolved by that treaty’s revision.685

In 1969, Amir Khosrow Afshar, Deputy Foreign Minister of Iran, in a speech to the Senate of Iran, declared the 1937 Treaty to be both imposed and unequal. He argued that the 1937 Treaty was forced upon Iran,686 and that the agreement violated the international legal principle of equality because of its one-sided terms.687

As to the use of force, Afshar stated:

Considering the principle which has been mentioned, it must be noted that the Frontier Treaty of 1316 (1937 A.D.) between Iran and Iraq was concluded in a time when the British colonial system was at its height of power, and was keeping Iraq under its protecting wings, using force and bringing pressure upon Iran to sign that treaty which ceded all Shatt-ul-Arab, except two sections of it to Iraq.688

As to the unequal nature of the treaty, Afshar stated:

Furthermore, in accordance with the established canons of International Law, one of the important principles in concluding any agreement, is the equality of rights of the two contracting parties. The question is whether the principle of equality of rights has been observed in the case of Shatt-ul-Arab.689

Afshar concluded that the 1937 Iran-Iraq Treaty was abrogated.

"[A]s far as the Imperial Government is concerned, it is valueless and

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682. N.Y. Times, March 7, 1975, at 1, col. 5; id. March 8, 1975, at 3, col. 5; id. March 11, 1975, at 1, col. 7; id. March 12, 1975, at 34, col. 1; id. at 35, col. 1.
685. The political significance is that Iraq changed its position. N.Y. Times, March 11, 1975, at 8, col. 4. As a result, there was increased cooperation between these two oil-producing states, both members of OPEC. N.Y. Times, March 12, 1975, at 35, col. 1. This strengthened the Arab-Persian cooperation and weakened the Iranian-Israeli tie. Id. For a general study of the Persian Gulf states see H. AL-BAHARNA, THE ARABIAN GULF STATES (1975). See also Cases, Conflicting Attitudes on Shatt El-Arab, 2 ISRAEL L. REV. 431 (1967).
687. Id. at 484.
688. Id. at 483-84 (emphasis added).
689. Id. at 484 (emphasis added). See also Pace, Iran Assuming Britain’s Former Role as Guardian of Persian Gulf States, N.Y. Times, May 7, 1975, at 2, col. 3.
null and void.\textsuperscript{690} Iraq contested the abrogation in a letter to the Security Council,\textsuperscript{691} claiming that boundary treaties could never be unilaterally abrogated.\textsuperscript{692}

Over the years Iran had developed valuable oil facilities near the waterway. By supporting the rebellious Kurdish forces within Iraq, Iran had pressured the Iraqi Government for a change.\textsuperscript{693} Even though the 1975 Algiers Agreement came about as a compromise in this larger political context, the juridical significance of the 1969 abrogation and the 1975 Algiers Agreement still remains.

5. \textbf{German Border Treaties of the 1970's.} In 1970, Federal Republic of Germany concluded two treaties recognizing Polish sovereignty over former German territory. Article 3(3) of the 1970 German-Soviet Non-Aggression Treaty\textsuperscript{694} and article 1 of the 1970 German-Polish Treaty Concerning Basis for Normalizing Relations\textsuperscript{695} recognized the Oder-Neisse line as forming the western frontier of Poland. The Preamble of the 1970 German-Polish Treaty recognized that Poland was the "first victim" of the Second World War.\textsuperscript{696} Article 3(2) of the 1972 Treaty between the Federal Republic of Germany and the German Democratic Republic recognized also the Oder-Neisse border.\textsuperscript{697}

\begin{itemize}
  \item \textsuperscript{690} \textit{Id.} at 485.
  \item \textsuperscript{692} \textit{Id.}
  \item \textsuperscript{693} See note 682 \textit{supra.}
  \item \textsuperscript{695} Article 3. [T]hey regard today and shall in future regard the frontiers of all States in Europe as inviolable . . . including the Oder-Neisse line which forms the western frontier of the People's Republic of Poland . . . .
  \item \textsuperscript{696} \textit{Id.} See generally Steinberger, \textit{International Law Aspects of the German-Soviet Treaty of August 12, 1970}, 31 \textsc{Zeitschrift für ausländisches öffentliches Recht und Völkerrecht} 147 (1971). Steinberger argued that the treaty does not create a territorial guarantee, but only a pledge not to use force.
  \item \textsuperscript{697} German-Polish Treaty Concerning Basis for Normalizing Relations, Nov. 18, 1970, 10 \textsc{Int'l Legal Materials} 127 (1971).
  \item \textsuperscript{698} Article I. [Germany and Poland are] in mutual agreement that the existing boundary line . . . the Oder River . . . Neisse . . . shall constitute the western State frontier of the People's Republic of Poland.
  \item \textsuperscript{699} \textit{Id.}
  \item \textsuperscript{700} \textit{Id.}
  \item \textsuperscript{701} Federal Republic of Germany—German Democratic Republic Treaty, Dec. 21, 1972, 12 \textsc{Int'l Legal Materials} 16 (1973).
  \item \textsuperscript{702} Article 3. They reaffirm the inviolability now and in the future of the border existing between them and undertake fully to respect each other's territorial integrity.
  \item \textit{Id.} See generally Skubiszewski, \textit{The Western Frontier of Poland and the Treaties with Federal Germany}, 3 \textsc{Polish Y.B. Int'l L.} 53 (1970). See also Note, \textit{Recognition of the DDR: Some Legal Aspects of West German's Foreign Policy and the Quest for German Reunification}, 7 \textsc{Case W. Res. Int'l L.} 94, 119 (1974).
\end{itemize}
These treaties are significant because they recognize that an agreement acknowledging a transfer of territory might resolve problems resulting from past aggression. However, it should be noted that these treaties have not been declared by any state as having been invalidly imposed on an aggressor state.

The treaties served as a model for the more general Helsinki Declarations, concluded in 1975, by the European Security Conference. That treaty confirmed the legitimacy of post-World War II borders in eastern and central Europe.698

6. Current United States-Panama Negotiations. The mid-1970's have seen the continuation of negotiations, concerning control of the Canal Zone, between the United States and Panama, which have centered around the 1903 Treaty.699 Panama's position, expressed as early as 1962, in the United Nations, is that the 1903 Panama-United States Treaty is unequal.700 Solis of Panama stated:

Because of the form and the circumstances in which this Treaty of 1903 was signed, and because of the humiliating, injurious, unjust and inequitable terms for Panama which were included in it . . . [Panama has] the specific object of preserving the necessary moral authority which would enable it to seek a better understanding.701

Panama itself has not declared the 1903 Treaty as void. Panama asserts that the circumstances related to the conclusion of the Treaty, as well as the unequal nature of its provisions, have given Panama the moral authority to renegotiate the treaty, but not the legal right of unilateral abrogation.

Article 1 of the 1974 joint United States-Panama statement indicates that the 1903 Treaty is to be replaced only by mutual consent in the form of a new interoceanic canal treaty.702

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698. Conference on Security and Co-operation in Europe: Final Act, 14 Int'l Legal Materials 1292 (1975). Article II of Part A prohibits the use of force in settling disputes, and article III declares that the frontiers are not to be assaulted. Id. at 1297.


701. Id. at 113 (emphasis added).

702. Text of Joint Statement, 70 Dep't State Bull. 184 (1974). "The treaty of 1903 and its amendments will be abrogated by the conclusion of an entirely new interoceanic canal treaty." Id. For additional recent articles see Breden, The Reopening of the Panama Canal (Controversy), 18 SAIS Rev. 20 (1974); Kissinger, U.S. and Panama Agree on
C. International Legislation

An analysis of international legislation from 1945 to 1975, indicates that the rule against imposed treaties has been accepted. This acceptance was implicit by the Charter in 1945, and explicit by article 52 of the Vienna Convention on the Law of Treaties in 1969. The rule was supported by the 1970 Declaration of Friendly Relations, and further clarified by the 1974 Declaration on Defining Aggression. These documents, a draft treaty and two General Assembly resolutions, were intended to interpret and develop the rules of law as contained in the 1945 Charter. 703


The organs of the United Nations can by their interpretation of the Charter broaden the scope of the United Nations, especially when there is unanimous agreement on the subject, or at least no open disagreement.

Nevertheless, there is a wide consensus that these declarations actually established new rules of international law binding upon all States. This is not treaty-making but a new method of creating customary international law.

Thus the United Nations has made possible the creation of "instant international law."

Id. at 50, 52, 53 (footnote omitted).


[W]here codiﬁcation conventions are concerned, these rules [in the conventions] may gain ascendancy after all by establishing themselves in the codiﬁcation process and thus becoming binding on States.

C. EUSTATHIADIS, UNRATIFIED CODIFICATION CONVENTIONS 1 (1973). Professor Paolillo has stated:

[I]nternational law beneﬁts from the conclusion of multilateral codiﬁcation treaties, whether they have been accepted or not, by eliminating inconsistencies and ambiguities that normally characterize international custom.


The fact that relative success was eventually achieved should not blind one to the dangers inherent in the process—in particular, the danger that the more permanent needs of the international community might be sacriﬁced to short-term political objections or considerations.

Sinclair, Principles of International Law Concerning Friendly Relations and Co-operation among States, in ESSAYS ON INTERNATIONAL LAW IN HONOUR OF KRISHNA RAO 107, 138 (M. Nawaz ed. 1976) [hereinafter cited as Sinclair].
1. *Drafting the United Nations Charter.* During the drafting of the United Nations Charter, mention of imposed treaties occurred as part of the discussion on treaty revision. Numerous amendments were suggested which would have included a provision for treaty revision, especially in the context of articles 11 and 14. None of them were adopted.

Express rejection of the world body’s power to revise treaties would have been a significant retreat from the Covenant of the League of Nations. However, an analysis discloses conflicting evidence. The ordinary meaning of the terms used\(^{704}\) and subsequent United Nations practice suggest that a power of treaty revision was conferred on the General Assembly. An analysis of the Security Council’s authority under Chapter VI, providing for the pacific settlement of disputes, and Chapter VII, governing enforcement measures, indicates that the Council was given powers sufficiently broad to recommend specific revisions as well as to impose such revisions.

a. *The Drafting of Articles 11 and 14.* At the outset of the United Nations Conference on International Organization, held in 1945, at San Francisco, Bodawi Pasha of the Egyptian delegation declared that it was "a duty of the Conference to prescribe principles for the revision of treaties which have become inconsistent with the new concept of world conditions and collective security."\(^{705}\) This comment reflected the sentiment behind several provisions for treaty revision suggested as amendments to the original Dumbarton Oaks Proposals.

Mexico, Brazil and Egypt, among other states, suggested amendments that would have included a specific reference to treaty revision; none were adopted.

In paragraph 36 of a lengthy memo concerning the Dumbarton Oaks Proposals, Mexico urged that the Assembly should have the power to recommend the revision of treaties which could not be fulfilled or which would endanger the international order.\(^{706}\) This proposal would govern a broad class of international agreements, including imposed or unequal treaties.

\(^{704}\) Article 31(1), 1969 Vienna Convention on the Law of Treaties, provides, A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose. (emphasis added).


\(^{706}\) Doc. 2, G/7(c), at 42, 3 U.N.C.I.O. Doc. 2, at 94 (1945). Paragraph 36 states: The Assembly shall recommend to the members the revision of those international treaties or agreements which it may not be possible to fulfill, or which may endanger international order . . . .
Mexico also suggested in another proposal, that the General Assembly be empowered to discuss and make recommendations concerning "treaties proving inapplicable . . . having become unjust."707 This proposal would have altered article V-B-1,708 which emerged as article 11(1), providing for Principles of Co-operation and Disarmament.709

The Brazilian delegate believed that the power of treaty revision was desirable,710 and closely related to rebus sic stantibus. He warned that rebus sic stantibus was dangerous, but the absence of revision could lead to unjust or disastrous consequences.711 The Brazilian suggestion applied only to a continuing injustice arising from executory treaties, not to treaties which had been totally executed.712 Brazil had suggested that the General Assembly by a two-thirds vote be allowed to recommend to the States concerned that they come to an agreement.713 The Brazilian proposal in part stated:

At the request of any of the contracting parties to an executory treaty claiming the total or partial termination of such treaty, or an injustice in its continuation, the Assembly by a majority of two-thirds, may invite either of the contracting parties to come to an agreement with the former for the revision or termination of such treaty.714

Prior to the San Francisco Conference, Brazil had made a similar proposal at the 1945 Inter-American Conference on Problems of War and Peace, held in Mexico.715

Egypt suggested that the General Assembly be given the power to recommend "the reconsideration of treaties which have become inapplicable."716 This proposal relied upon language essentially similar to that contained in article 19 of the League Covenant. The Egyptian

709. U.N. Charter art. 11, para. 1. The amendment would have inserted after the word "disarmament" the following: "[t]he treaties proving inapplicable and any international situations having become unjust." Doc. 2 G/7(c), at 42, 3 U.N.C.I.O. Doc. 2, at 94 (1945).
710. 3 U.N.C.I.O. Doc. 254, at 238 (1945).
711. Id.
712. Id. (emphasis added).
713. Id. (emphasis added).
714. INTER-AMERICAN CONFERENCE ON PROBLEMS OF WAR AND PEACE, RESOLUTION XXX ON THE ESTABLISHMENT OF A GENERAL INTERNATIONAL ORGANIZATION 50 (1945).
715. Id. 3 U.N.C.I.O. Doc. 735, at 580 (1945).
delegate emphasized that his proposal concerned international agreements which "create unjust situations or maintain a state of affairs which is onerous to one of the parties." 717

Venezuela supported the inclusion of treaty revision, but urged that it be limited to a change of circumstances, as determined by an international court. 718 The Philippines, during the drafting of article 102, governing Treaty Registration, argued that no state should conclude a treaty which would violate the "spirit" and principles of the Charter. 719 This was similar to a suggestion made in 1930, by Peru concerning the League Covenant. 720

The Ethiopian delegation during debate on the text of article 103, which expresses the supremacy of the Charter, suggested that the Charter should abrogate all obligations which were found by either the Security Council or the General Assembly to be inconsistent with the Charter. 721 It also suggested that states should agree not to enter into any such agreements.

The Venezuelan proposal was relatively restrictive, but the Philippine and Ethiopian proposals were very broad. The Philippine proposal, by relying on the "spirit" of the Charter as a basis of invalidating agreements, presumably would have extended article 2(4) to treaty relations. The Ethiopian proposal would have given the United Nations the authority to declare a treaty invalid, without requiring that it specify particular grounds.

Several delegates at the San Francisco Conference commented upon the status of treaty revision and the language of the various proposals. The most instructive were those comments made by the delegates from Bolivia, France, Belgium, Columbia, Egypt and Chile.

Andrade, of Bolivia, discussing the provision that was to become article 14, contended that the language, "peaceful adjustment of any situation, regardless of origin," included the revision of treaties. 722 He quoted the views of Senator Vandenberg who also believed that the phrase did not preclude the Assembly’s right to recommend treaty revision. 723 Andrade further stated:

717. Id.
720. See note 1017 infra.
723. Id.

[The phrase "the peaceful adjustment of any situation regardless of origin" should not be interpreted to mean that the subject of the revision of treaties would be foreclosed to the Assembly.

Id.

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Bolivia has always respected the treaties and pledges to which she has subscribed. If we favor their revision, it is because some countries had no alternative than to accept them, and because their enforcement would endanger peace. We believe that in drawing up the Charter we should make it possible to review any case of injustice whether deriving from a treaty or not.\textsuperscript{724}

Aglion, of France, argued that article 14 did not include the power to recommend treaty revision,\textsuperscript{725} citing the Second Commission's positive action of rejecting all amendments containing such authority.\textsuperscript{726} He stated:

On the other hand, all the amendments concerning revision of treaties have been brushed aside by the Committee, after discussions which took place during three meetings, and the answers given to questions asked. . . . Therefore, we have definitely discarded all possibilities for the revision of treaties in the Assembly.\textsuperscript{727}

Aglion believed the power of the Assembly to recommend treaty revision to be non-existent, even though its general power of discussion was very broad.\textsuperscript{728} He based his position upon his belief that Hitler had used article 19 of the Covenant as a basis for his territorial demands. "[I]f the Assembly were competent to revise treaties at any time, you might have agitation for revision of this or that treaty, and there would never be any stability in the treaties."\textsuperscript{729}

The Belgian delegate, Rölin, disagreed with both the French rationale and interpretation.\textsuperscript{730} Rölin thought it historically inaccurate to assert that article 19 of the Covenant played any part in Germany's aggression.\textsuperscript{731} Rölin was critical of France's political position, and concluded that Belgium "hopes that no such restrictive interpretation will be adopted."\textsuperscript{732}

\textsuperscript{724} Id. He also stated the following:

Weak countries feel equally or more acutely than strong countries the negative significance of insecurity and of unjust situations which, sooner or later, demand solution. . . . Hence the principle, exhaustively discussed and approved here, opens broad possibilities of fruitful development for the future.

\textsuperscript{725} Id. at 12-14, 13 U.N.C.I.O. Doc. 1072, at 201-03 (1945).

\textsuperscript{726} Id. at 13, 13 U.N.C.I.O. Doc. 1072, at 202 (1945).

\textsuperscript{727} Id. (emphasis added).

\textsuperscript{728} Id. "Its powers of discussion are limited only by the limits of the very vast sphere of subject matters enumerated in the Charter." Id.

\textsuperscript{729} Id.

\textsuperscript{730} Id. at 17-18, 13 U.N.C.I.O. Doc. 1072, at 206-07 (1945).

\textsuperscript{731} Id. at 18, 13 U.N.C.I.O. Doc. 1072, at 207 (1945).

\textsuperscript{732} Id.
Zuleta, of Columbia, contended that the draft of article 14 "rejects . . . revision of treaties." Andraous, of Egypt, rejected Columbia's position, stating that "the revision of treaties . . . would advance international law." Maza, of Chile, upon reviewing these positions stated that Chile's understanding was "that the General Assembly will not directly or indirectly have the power of recommending the revision of existing treaties."

Even though the General Assembly was not specifically granted the authority to recommend the revision of treaties, the ordinary meaning of the terms used in articles 11 and 14 leads one to conclude that the General Assembly was given the implicit authority to recommend the revision of treaties. Article 11(2) specifically authorizes the discussion of "any question," and article 14 permits recommendations concerning the "peaceful adjustment of any situation, regardless of origin." In 1965, the General Assembly adopted Resolution 2021(XX), which drew the attention of the member states "to the desirability of adapting" a number of specified multilateral agreements concluded under the auspices of the League of Nations "to contemporary conditions." Thus, the General Assembly, by its own interpretation of the Charter, has determined that it has authority to recommend to member states the need to examine treaties with the purpose of determining any necessity of their revision.

b. Drafting Chapter VI and Chapter VII.

The Security Council and the Pacific Settlement of Disputes. Bolivia suggested that, in accordance with the Security Council's authority to implement the Pacific settlement of disputes if there were no agreement among the states concerned, then the Security Council should be obligated to recommend the revision of treaties. However, the consent of the states would be required to impose any Security Council recommendation under Chapter VI.

The Security Council shall recommend the revision of all

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733. Id. at 21, 13 U.N.C.I.O. Doc. 1072, at 210 (1945).
734. Id.
735. Id. at 22, 13 U.N.C.I.O. Doc. 1072, at 211 (1945).
736. Id.
international treaties or agreements whose continued existence would endanger a good understanding between states . . . . Where the agreement of the parties cannot be obtained, the Security Council shall decide on the experience of the said revision . . . . 739

The Bolivian proposal was not adopted. However, the revision of treaties was not expressly forbidden by the text of the Charter, as proposals directly aimed at precluding treaty revision were rejected.

The French government suggested that the provision which was to become article 34, governing the Security Council's Investigation of Disputes, 740 should be guided by the principle of pacta sunt servanda. 741 France proposed, as a preamble to the text of that article: "[t]he Security Council, while bearing in mind that treaties must be respected . . . . " 742 This attempt by the French to assure the observance of treaties and to preclude treaty revision was rejected.

The ordinary meaning of the text of article 37(2), "such terms of settlement as it may consider appropriate," permits the conclusion that in the right circumstance, a treaty revision might be deemed the most appropriate term of settlement. Such a recommendation by the Security Council could concern an existing imposed treaty and include specific proposals for revision. This is unlike article 19 of the Covenant which only allowed recommendations to states that they revise their treaties.

The Sponsoring Governments, the United States, the Soviet Union and China, had sought the amendment of that article of the Dumbarton Oaks Proposal 743 which was eventually to become article 37 of the Charter. 744 The original proposal empowered the Security Council to

739. Id. (emphasis added).
740. U.N. CHARTER, art. 34.

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Id.

741. Doc. 2, G/7(o), at 3, 3 U.N.C.I.O. Doc. 97, at 385 (1945). The amended article would have read as follows:

The Security Council, while bearing in mind that treaties must be respected, should be empowered to investigate any dispute or any situation . . . .

Id.

742. Id.
744. U.N. CHARTER, art. 37, para. 2 states:

If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

(emphasis added).
recommend only "appropriate procedures or methods of adjustment." The amendment would broaden this to include: "recommendations as to the actual terms on which the dispute should be settled." The Sponsoring Governments gave assurances that such a recommendation of the Security Council would not be binding on the parties. The amendment prevailed, and this view was reflected in the final text of article 37.

Bolivia had requested that the provision which emerged as article 35, allowing the notification by any member of the United Nations of "any dispute, or any situation," should include the term "agreement." This suggestion was not accepted. Bolivia was apparently once again mindful of the problem of the treaty with Chile, which Bolivia believed and still believes to be imposed. An earlier attempt to deal with this problem under the League Covenant had also met with failure.

Belgium had suggested that the Security Council, under the pacific settlement provisions, be authorized "to impose on the Parties, in case of need, such temporary methods (procedures) as it may deem necessary," and "to take whatever equitable decision [which] could settle the difference peacefully." These suggestions were not adopted.

Early in the proceedings Brazil had proposed a treaty revision measure. However, the primary incentive for this had been the desire

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   The Security Council would thus not only recommend procedures; it might make recommendations as to the actual terms on which the dispute should be settled.

   As the result of this amendment, the Security Council may, in the cases envisaged, "recommend" terms of settlement as well as procedures and methods of adjustment. In the course of discussion on an amendment offered by the Delegation of Belgium, the Delegates of the United Kingdom and the United States gave assurances that such a recommendation of the Security Council possess no obligatory effect for the parties.

Id. 748. U.N. CHARTER, art. 35, para. 1 reads:
   Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

749. Doc. 207, III/2/A/3, at 5, 12 U.N.C.I.O Doc. 1030, at 183 (1945). Article 35(1) would have read, "Any Member of the United Nations may bring any such dispute, situation, or agreement."

750. Id. at 6, 12 U.N.C.I.O. Doc. 1030, at 184 (1945).
751. Id. at 8, 12 U.N.C.I.O. Doc. 1030, at 186.
to stay anticipated radical proposals aimed at solving the same problem.\textsuperscript{753}

The delegate of the United States stated that the broader language adopted by the conference was intended to incorporate treaty revision\textsuperscript{754} and was certainly not intended to foreclose the authority of the Assembly.\textsuperscript{755}

\[\text{Although he had originally contemplated a specific allusion in the Charter to the question of revision of treaties, he had foregone this in favor of the broad version . . . put forward by the four sponsoring governments and France. . . . He recognized the objections to identifying treaties as such . . . and held the concern of the Assembly was not with treaties \textit{per se}, but with adjusting conditions. . . . The phrase "the peaceful adjustment of any situations, regardless of origin," in his view, \textit{should not be interpreted to mean that the subject of treaty revision was foreclosed to the Assembly.}^756\]

The delegate from Belgium had hoped that the United Nations would have explicit authority to impose necessary treaty revisions, but settled for the adopted formulation.\textsuperscript{757}

\textit{Security Council and the Enforcement Powers}. During the San Francisco Conference, Australia suggested that the Security Council be given, under the provision which was to emerge as article 39, the authority to "lay down just terms for the settlement of the dispute."\textsuperscript{758} This suggestion was withdrawn because its particular wording was thought to place it within the pacific settlement section of the Charter.\textsuperscript{759}

Under article 39, the Security Council has authority to "decide what measures shall be taken . . . to maintain or restore international peace and security." Article 42 provides that in order to give effect to the Security Council’s decisions, "it may take such action by air, sea, or land forces as may be necessary. . . ." Article 39 does not specify

\textsuperscript{753} Id.
\textsuperscript{754} Id.
\textsuperscript{755} Id.
\textsuperscript{757} Doc. 748, II/2/39 at 3, 9 U.N.C.I.O. Doc. 3128, at 128 (1945).
\textsuperscript{758} Doc. 199, II/3/7, at 2, 12 U.N.C.I.O. Doc. 1010, at 289 (1945). The proposed amendment read as follows:

\[\begin{align*}
\text{[I]} & \textit{shall, in accordance with the purposes and principles of the United Nations, lay down just terms for the settlement of the dispute, and take any measures necessary for carrying out that settlement and for maintaining international peace and security.}
\end{align*}\]

\textit{Id. See also} Doc. 289, II/3/11 at 2, 12 U.N.C.I.O. Doc. 1285, at 610 (1945).
\textsuperscript{759} Id. This suggestion was also introduced at that point, but was not accepted. Doc. 2, G/14 at 9, U.N.C.I.O. Doc. 474, at 551 (1945).
whether or not a treaty may be imposed, nor does it specify the measures which might be taken. There is no indication in the language of article 39 that the imposition of a treaty might not be an appropriate "measure," since the measures authorized under article 39 are left to the discretion of the Security Council.

The Security Council is authorized to take enforcement measures under article 39 when the Council determines "the existence of any threat to the peace, breach of the peace, or act of aggression." This empowers the Security Council to impose treaties not only when there is an act of aggression, or when states are permitted to exercise their right of self-defense, but also within the larger class of hostilities, including threats and breaches of the peace.

Consider the following illustrations:
Illustration 1:
State A attacks State B. State B is successful in defeating State A. State B is authorized to impose an agreement on State A.
Illustration 2:
State A and State B are on the verge of military conflict. The Security Council may impose an agreement between both states (with or without the United Nations as a party), and without one or both of the states' consent.

In the first illustration, a treaty is being imposed only as a result of an actual armed attack. In the second illustration, the United Nations imposes a treaty on the basis that the existing military confrontation under article 39 is a "threat" or a "breach of the peace." This authorization would allow the Security Council, if it had the necessary support of the super-powers, to impose its will on the less powerful states, regardless of whether or not it had the consent of those states.

It is interesting to note that the apparent power of the Security Council under article 39 to impose treaties, is possibly as extensive as the same power held by individual states in the nineteenth century. This makes possible a circumstance in which a treaty may be imposed, yet valid, despite development of the rule generally invalidating imposed treaties.

2. United Nations Practice. This section discusses certain articles of the Charter and General Assembly resolutions which relate to the rule against imposed treaties.

a. **Article 102.** Article 102 of the United Nations Charter provides for the requirement of treaty registration.\(^ {761} \) Article 102 states:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall *as soon as possible be registered with the Secretariat* and published by it.

2. *No party* to any treaty or international agreement *which has not been registered* in accordance with the provisions of paragraph 1 of this Article *may invoke that treaty or agreement before any organ* of the United Nations.\(^ {762} \)

Early in the history of the United Nations, General Assembly resolutions implemented article 102 by adopting Regulations Governing Treaty Registration.\(^ {763} \) Article 2 of the Regulations requires a "certified statement regarding any subsequent action."\(^ {764} \)

1. When a treaty or international agreement has been registered with the Secretariat, *a certified statement* regarding any *subsequent action* which effects a change in the parties thereto, or the terms scope of application thereof, shall also be registered with the Secretariat.\(^ {765} \)

Although the types of "subsequent actions" which are to be registered are not specified, it is arguable that actions included are only those consented to by all parties concerned. However, in 1947, the Director of the Division of Registration of Treaties provided, on behalf of the Secretary-General, an interpretation, approved by the Sixth Committee, which rendered article 2 applicable to the traditionally unilateral acts of denunciation and abrogation.\(^ {766} \) Beckett of the United Kingdom thought that article 102 "imposed a continuous obligation on all Member States."\(^ {767} \) A treaty denounced on the grounds of its imposed origin, therefore, would be subject to the requirements of article 102.

b. **Article 103 and Article 107.** Article 103 provides that the Charter takes precedence over inconsistent treaties of member states and, presumably, both prior and subsequent treaties.\(^ {768} \)

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\(^ {761} \) U.N. *Charter* art. 102.


\(^ {766} \) 2 U.N. GAOR, Sixth Comm. 112-15 (1947).

\(^ {767} \) *Id.*

\(^ {768} \) U.N. *Charter* art. 103.
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.\textsuperscript{769}

Article 103 simply affirms the supremacy of the Charter, and provides for its application when a conflict is found to exist. It is not a source of the rule against imposed treaties, or of any other substantive rule.

Article 107 states:

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.\textsuperscript{770}

The prevailing view is that article 107 was intended to ensure the validity of the then still to be concluded peace treaties. It was not intended to provide the ex-enemy states with a legal basis for claiming that such treaties could not be concluded.\textsuperscript{771}

Article 107 also provided some precedent for article 75 of the 1969 Vienna Convention which allows treaties to be imposed on an aggressor. While article 107 requires the "action" to be "as a result of that war," article 75 of the 1969 Convention requires treaties to be "with reference" to the aggression.\textsuperscript{772}

\textbf{c. General Assembly Resolution of December 14, 1946}. During the first session of the General Assembly on December 14, 1946, a resolution was passed which called for the mutual balanced reduction of armed force and the withdrawal of armed forces stationed in member states without the freely given consent from those states.\textsuperscript{773}

The Military Occupation Paragraph of the 1946 Disarmament Resolution states:

[The General Assembly recommends] the withdrawal

\textsuperscript{769} Id. art. 103 (emphasis added). 4 Repertory of Practice of United Nations Organs, Supp. 3, 212 (1959-1966).

\textsuperscript{770} U.N. CHARTER art. 107 (emphasis added).


\textsuperscript{772} Article 75 of the 1969 Convention requires the reference to be to the state's aggression. Article 107 uses the broader formulation: "result of that war."

without delay of [Member States'] armed forces stationed in the territories of Members without their consent freely and publicly expressed in treaties or agreements consistent with the Charter and not contradicting international agreements . . . . 774

During debate on the resolution, El-Sanhoury of Egypt contended that article 2 of the Charter, which proclaims the principle of sovereign equality, was the juridical basis of the Military Occupation Paragraph.775

It was with this principle in view that paragraph 7 of the resolution under discussion recommends the immediate withdrawal of foreign troops stationed on the territory of Member States.776

The Egyptian delegate argued that an exception to the prohibition against foreign bases, as indicated in the resolution, was state consent freely and publicly expressed.777 El-Sanhoury contended that this consent needed to be embodied in an international agreement,778 and could not be the result of violence or pressure against the consenting state. He argued that consent would not be valid if extracted by intimidation, constraint or the use of armed force.779 A state can only by "a freely negotiated treaty renounce an essential attribute of sovereignty."780

Bevin of the United Kingdom stated:

We had a ten-year treaty between Egypt and ourselves. . . . But when we were approached to revise it we readily agreed, and negotiations are going on for the same results.

. . . .

I apologize to nobody for our conduct. . . . [B]ut I have been as I said, both in the Committee and elsewhere, cautious. . . . 781

Bevin argued that the 1936 Egyptian-British Treaty782 was not invalid for lack of state consent or for the unlawful use of British influence in fostering the conclusion of the agreement or for any other reason. Since the treaty was sound, its revision was possible only with the consent of both states.

774. Id. (emphasis added).
775. Id. at 1299.
776. Id.
777. Id.
778. "According to this principle . . . the said Member State cannot, but by a freely negotiated treaty, renounce an essential attribute of its sovereignty." Id.
779. Id.
780. Id.
781. Id. at 1304 (emphasis added).
While Bevin did not expressly accept the resolution as a statement of accepted customary international law, he did not reject it.⁷⁸³ Nor did he provide any guidance on the sort of action which would vitiate state consent, whether it might be military or non-military force, or the type of military action which constitutes an unauthorized action.⁷⁸⁴
d. 1947 Security Council Debate on the 1936 Egyptian-British Treaty. Nibrashy Pasha, the Egyptian delegate, argued that the 1936 Egyptian-British Treaty was imposed.⁷⁸⁵ Pasha understood himself to be challenging the basic assumptions of nineteenth century imperialism,⁷⁸⁶ which included the nineteenth century Western view of international law.⁷⁸⁷ He asserted that the 1936 Treaty allowed a military occupation of Egypt during peace-time, without Egypt’s consent,⁷⁸⁸ and that continued existence of the treaty represented a violation of the Charter.

Relying upon the Military Occupation Paragraph of the 1946 Disarmament Resolution,⁷⁸⁹ Pasha stated, “Egypt has not given such consent to the occupation by the United Kingdom forces,”⁷⁹⁰ and cited an alleged verbal intimidation of “serious consequences” by the British High Commissioner to the King, and Prime Minister of Egypt. Pasha further argued that, in addition to being imposed,⁷⁹¹ the 1936 Treaty was also unequal. Pasha stated: “As a free nation, Egypt cannot tolerate such an unequal relationship.”⁷⁹² He concluded that since the 1936 Treaty was invalid under the Charter,⁷⁹³ its abrogation was authorized by article 103.

Sir Alexander Cardogan of the United Kingdom objected to Pasha’s analysis,⁷⁹⁴ stating: “If this Treaty is valid, as I shall hope to

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⁷⁸³. Some might conclude that he did reject such a principle.
⁷⁸⁴. Even today British writers take a very cautious view of the existence of a new rule of law against imposed treaties.
⁷⁸⁶. Id. at 1749. “In all frankness, we are here to challenge the basic assumptions of nineteenth century imperialism.” Id.
⁷⁸⁷. Id. at 1755.
⁷⁸⁸. Id. at 1756.
⁷⁹¹. Id. at 1756.
Nor is the Treaty of 1936 consistent with the Charter. I have already explained that the military occupation for which the Treaty provides is in itself a contradiction of the Charter.

Id.

⁷⁹⁰. Id. at 1754-755.
⁷⁹². Id. at 1756.
⁷⁹³. Id. at 1757.
⁷⁹⁴. Pasha contended that the Security Council was not the appropriate forum to argue fully the juridical merits of its case. “In this high forum, I shall not argue the juridical position of the 1936 Treaty, but my country has no hesitation in placing its reliance on the Charter.” Id. at 1753.
show it is, Egypt has no case at all to bring before the Council.1795 Sir Alex agreed that article 103 brings into effect the 1946 Resolution, but rejected the Egyptian position that Egypt’s consent was not freely and publicly given.1796

It is clear from this debate that the principle that state consent must be freely given in order to have a valid agreement was accepted by both Egypt and the United Kingdom. The parties disagreed, however, over what type of force might vitiate state consent. Egypt alleged that mere intimidation would be sufficient, and that an unequal treaty would be invalid. The United Kingdom rejected the first argument and did not even mention the unequal argument, presumably believing it to be legally insignificant.

e. 1961 General Assembly “France-Bizerta Base” Resolution (Tunisia v. France). The General Assembly resolution passed in response to the French attack on Bizerta in July, 1961, emphasizes the proposition that military forces can be stationed on foreign territory only with the consent of the host state, and such consent cannot be coerced by military force.1797

The French forces had been stationed at a military base at Bizerta in Tunisia.1798 Tunisia had requested their withdrawal, but the French used military force in a surprise attack engineered to maintain their military position and provide sufficient leverage to coerce renewed Tunisian consent. The General Assembly resolution reaffirmed the requirement of state consent, and precluded the use of military force in coercing it. The resolution states in part:

[The General Assembly] Recognizes the sovereign right of Tunisia to call for the withdrawal of all French armed forces present on its territory without its consent.1799

3. International Codification: The 1970 General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Co-operation. General Assembly Resolution 2625 was adopted at the General Assembly’s 25th Anniversary Session, in

795. Id. at 1771.
796. Id. at 1779. Sir Alex also rejected the Egyptian reliance on rebus sic stantibus. Id. at 1776.

[It must be stated that the extent to which treaties can be held to be invalid on rebus sic stantibus grounds . . . is certainly very limited as well as being controversial. There is no decision of an international tribunal where this . . . has been applied in any remotely similar case . . . .

Id. at 1778-779.


799. See note 797 supra.
1970. The drafting of this resolution and the attached declaration involved an extensive discussion of imposed treaties. The major provisions had been adopted in 1967, but formal adoption occurred in 1970.

The 1970 Declaration on Friendly Relations emerged after almost a decade of preparatory work by a specially constituted General Assembly committee, the Special Committee on Friendly Relations and the permanent Legal Committee (the Sixth Committee). However, a number of delegates believed that the International Law Commission in its drafting of the Convention on the Law of Treaties should have primary responsibility in drafting a rule regarding imposed treaties.


The 1970 Declaration accepted "good faith in international obligations" as one of the seven principles. A subsidiary rule under this general principle was that only "valid" treaty obligations were to be honored in good faith. It was essentially under this rule that the major discussion of imposed treaties took place.

The seven principles of international law enumerated by the Declaration are: a) the prohibition against the threat or use of force in international relations; b) the settlement of international disputes by peaceful means; c) non-intervention in domestic matters; d) the duty of cooperation; e) the principle of equal rights and self-determination of peoples; f) the principle of sovereign equality of states; and g) the principle that states shall fulfill in good faith their obligations in general. Under each principle a number of more specific rules were enumerated. The Declaration reads as follows:


801. See generally Malawer, International Law Studies and the Social Sciences: Foreign Policy Analysis and International Law, 2 DENVER J. INT'L L. & POL. 23, 29 (1972), wherein the author states that "[T]he multilateral treaty process is the primary means of generating new law which allows a diversified world to manage common global problems." Id.

802. See note 850 infra.


It [the Declaration Concerning Friendly Relations] represents on many points as the negotiating history amply demonstrates...pressures for recognition of an emerging lex-ferenda and, above all, between the antimonies of stability and change.

Sinclair, supra note 703, at 137.

804. Id.
PREAMBLE

The General Assembly

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State.

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality.

1. Solemnly proclaims the following principles:

   (B) The Principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

   International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means [settlement procedures].

   (F) The Principle of sovereign equality of states.

   (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

   (G) The Principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

   (c) Every State has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

GENERAL PART

2. Declares that:

   In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

   Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter...
taking into account the elaboration of these rights in this Declaration.

3. Declares further that:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law... 805

The Preamble states that it is a duty of states to refrain from the use of either military or economic coercion in international relations, and the Declaration itself proclaims three principles of international law particularly significant to the present discussion.

First, states shall settle their disputes by pacific means. This incorporates a subsidiary rule which provides that states may freely choose among various settlement procedures. Second, the Declaration proclaims the principle of sovereign equality. This incorporates a subsidiary rule which provides that states have a right to choose and develop their various societal systems freely. Third, states shall in good faith observe all international obligations. This includes, as a subsidiary rule, the obligation of good faith enforcement of international agreements if they are valid under generally recognized principles and rules of international law.

b. Drafting the 1970 Declaration. The 1970 Declaration enumerates principles of international law not fully elaborated in the Charter, and based to a large extent upon the prohibition in article 2(4) of the Charter, against the threat or use of force in international relations.

As early as 1965, members of the drafting committee urged that the good faith obligation should relate specifically to treaty obligations, 806 and, moreover, that pacta sunt servanda should relate only to treaties freely entered into, 807 and not to obligations sanctioning aggression, colonial domination, or to unequal treaties or treaties imposed by force. 808

In the 1966 meetings of the Special Committee, Czechoslovakia proposed an amendment to the principle declaring sovereign equality, which would give states the right to dispose freely of their national wealth and natural resources. 809 The Cameroon proposed a more

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807. Id.
808. Id.

Each State has the right freely to choose and develop its political, social, economic and cultural systems and to dispose freely of its national wealth and natural resources.

Id. See also Czechoslovak Amendment, U.N. Doc. A/AC. 125/L.8 (1966).
detailed sub-amendment,810 and Kenya suggested an amendment adding that any such agreements entered into would need to have been valid pursuant to rules of international law.811 These natural resources amendments were never adopted, and the sovereign equality principle and its subsidiary rule of free choice of societal systems were limited in the Declaration to a general statement.812

In the 1966 meetings of the Special Committee, Egypt proposed an amendment which would incorporate under the principle of sovereign equality an entirely new rule.813 This amendment, although not adopted, would have given any state the right to remove any foreign military base from its territory at any time, on the grounds that military base location agreements are inherently unequal. Unlike the natural resources amendment, this amendment cannot be said to be incorporated implicitly in any of the subsidiary principles.814

As to the principle of good faith, an amendment was proposed which would have introduced equality as a criterion in determining the


Each State has the right to freely choose and develop its political, social, economic and cultural systems, and to enter into treaty or convention with any State or States of its choice for the disposal of its national wealth and natural resources within the territorial limits of the contracting States.


Each State has the right to freely dispose of its national wealth and natural resources. In the exercise of this right, due regard shall be paid to the applicable rules of International Law and to the terms of agreements validly entered into.

Id. See also Cameroon Amendment, U.N. Doc. A/AC. 125/L.10 (1966).


Id.

In 1972, the International Law Association, at its New York conference, drafted the General Treaty for the Peaceful Settlement of International Disputes. Article 2, para. 3, states:

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. . . .


813. See note 809 supra. Egypt's proposal read: "Each State has the right to remove any foreign military base from its territory." Id.

814. Statement by the Chairman of the Drafting Committee, U.N. Doc. A/AC. 125/L.33, at 3 (1966): "On the topic of foreign military bases, the progress made can only politely be described as negligible." Id.
validity of a treaty. The amendment stated:

1. Every State shall fulfill, in good faith, its obligations ensuing from international treaties, concluded freely and on the basis of equality.  

This "Nine-State Amendment" did not make clear the meaning of equality. Both it and a similar amendment, using the terms "freely" and "basis of equality," and proposed by Czechoslovakia were rejected. An alternative amendment was proposed by the United States and the United Kingdom, and the final version substantially reflected that amendment. It did not refer to equality.

In his capacity as the Yugoslav representative to the Special Committee, Šahović contended that the good faith principle is based upon and expands Charter articles 2(2) and 103.

Movohan of the Soviet Union mentioned, in regard to the good faith principle, that leonine agreements were of particular concern to the Soviet Union.

[All too often [imperialist countries] attempted to impose the implementation of spoliatory measures set forth in agreements they had concluded with the Czarist regime. The Committee must therefore help to ensure compliance with treaty obligations and at the same time assist developing countries which sought to reject inequitable agreements that had been imposed on them.

Narbrit, the United States delegate, denied that the United States amendment was intended to preclude a rule against imposed treaties. On the contrary, the United States sought a more general formulation of that rule. Narbrit believed that neither the Czechoslovakian proposal nor

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822. Id. at 6-7.

823. Id. at 8. Mr. Reis, of the United States, in 1967, stated that "unequal" treaties prior to 1945, must remain in effect. This, he contended, was based upon sound policy. U.N. Doc. A/AC. 125/SR. 61, at 15 (1967).
the Nine-State Amendment showed any large area of disagreement. The use of the phrases "freely concluded," and "on the basis of equality," as he understood them, were not objectionable, but too limited, in that they might inadvertently omit other rules of invalidity. "[A]ny such reference should logically be a complete incorporation of all the rules of treaty law."826

Darwin of the United Kingdom commented on the general principle of good faith, the subsidiary rule of treaty validity, and imposed treaties. He agreed with the United States that there was no reason to mention one asserted ground rather than another, but added that this "controversial point" should await the conclusions of the International Law Commission. He also suggested that the discussion of imposed treaties be taken up again when the Declaration was reviewed as a whole.830

The above statements of the United States and the United Kingdom delegations is strong evidence that their amendment as adopted did not preclude establishment of a rule against imposed treaties.

The views of other delegates at the 1967 meetings of the Special Committee are also significant. Sinclair of the United Kingdom viewed imposed treaties as a "technical rule" of international law, which should not be discussed then. The Czechoslovakian delegate argued that a rule against unequal treaties would not weaken pacta sunt servanda, but would make its limits more precise. The Syrian and Kenyan delegates spoke in favor of a rule against all imposed treaties.

825. Id.
826. Id. "The references . . . did not appear to meet that standard and would therefore require some revision." Id.
827. Darwin stated that the principle of good faith was based upon Charter article 2(2). Id. at 10.
828. Id. at 12.
829. Id.
832. Id. at 6-7. Myslil of Czechoslovakia stated:
   The principle pacta sunt servanda was naturally only applicable to treaties and other obligations accepted freely . . . Unequal treaties, in particular treaties which were the product of colonialism, and treaties which had not been concluded in accordance with international law . . . were examples of treaties to which the principle could hardly be applied.
   Id.
834. Id. at 5-8.

[A] provision should be included to recognize the possibility of abrogating
as did the Polish delegate\textsuperscript{835} who declared that although the subject of unequal treaties was controversial, that was no reason to avoid it.\textsuperscript{836}

The Canadian delegate, Miller, stated that the United Kingdom delegate in 1966, had acted wisely in omitting from the Declaration the controversial points\textsuperscript{837} as there was agreement that only treaties which were coerced by military force should be invalidated.\textsuperscript{838} The Swedish delegate, Blix, a well-known international law expert on treaty termination, pointed out that the failure to enumerate imposed treaties did not suggest the juridical intent that they be excluded by the Declaration.\textsuperscript{839} It merely avoids the possibility of a legal argument a contrario which might inadvertently require the good faith observance of all non-imposed treaties, even if they should be void pursuant to other substantive rules governing treaty termination.\textsuperscript{840} The general formulation was merely a cautious one.\textsuperscript{841}

The Czechoslovakian delegate accepted the concept of treaty "validity" based upon "generally recognized principles and rules of international law" since this embodied the idea that international treaties must be concluded freely and on the basis of equality.\textsuperscript{842} The United Kingdom then narrowed its objection to the excluded language and argued that such language might be understood to apply to certain controversial questions relating to treaty succession.\textsuperscript{843}

\textsuperscript{835} treaties which had been concluded in bad faith, which could be deemed to include such elements as force, duress, coercion and fraud.

\textit{Id.} at 7.

835. \textit{Id.} at 3-5.

836. \textit{Id.} at 5.


838. He contended that the International Law Commission had taken no decision on the question of whether a new state could avoid a prior, unjust or inequitable treaty. \textit{Id.} at 7.

839. \textit{Id.} at 13.

840. "[T]here was no need for the statement concerning 'unequal treaties' in the elaboration of the principle under discussion whereas there might be some danger in including it." \textit{Id.}

841. "That formulation was thus more comprehensive and at the same time more cautious than the other." \textit{Id.}

842. U.N. Doc. A/AC. 125/SR. 79, at 9 (1967): "His delegation would accept the text on the understanding that the reference in paragraph 3 . . . must be concluded freely and on the basis of equality in order to be valid."

843. \textit{Id.} at 10.

His delegation had regarded the proposal to add the words "freely concluded on a basis of equality" to paragraph 3 as open to objection on the grounds that it might be taken to apply to certain controversial questions relating to treaty succession. \textit{Id.} See also Draft Report of the 1967 Special Committee (Milan Šahović, Rapporteur), U.N. Doc. A/AC. 125/L.53/Add.4 (1967); Report of the Special Committee, 22 U.N. GAOR, Annexes, Agenda Item No. 87, U.N. Doc. A/6799 (1967).
In a lengthy working paper presented to the 1970 meeting of the Special Committee, Italy contended that the principle of sovereign equality, as expressed, was "too vague" and "tautological."844 Italy had wanted the search for agreement to continue, especially in regard to the transfer of national wealth in accordance with treaties validly entered into,845 as Kenya had previously suggested.846 However, Italy did not mention, either in its working paper or in statements during the 1970 meetings, imposed treaties. The delegates did not attempt to further revise their 1967 formulation of the validity principle, even in light of the conclusion of the 1969 Vienna Convention.

In summary, there was agreement that the use of military force would invalidate a treaty,847 but there was no agreement on whether economic force should have a similar effect.848 This problem was left to the International Law Commission. Only a few Western states were hesitant to incorporate the broader rule favored by the Communist and non-aligned states. There was substantial support for the belief that invalidity might be extended in the future to unequal treaties.

The impact of the 1970 Declaration on the rule against imposed

845. Id.
846. Id.
847. The Venezuela representative stated:

The body of rules the Committee had formulated could legitimately be regarded as the most up-to-date expression of the scope and interpretation of the Charter of the United Nations ... and as a most effective contribution to the future codification of principles which were authoritatively regarded as authentic examples of jus cogens ... .

Id. at 77. The Japanese delegate argued that the Declaration was "a most significant elaboration." Id. at 115. The delegate of the U.A.R. viewed the Declaration as a great moment in the history of the whole process of codification of the principles of peaceful coexistence. Id. at 116. Röling stated that the 1970 Declaration represented a merging of various interests.

The different roots of peaceful coexistence merged in the United Nations debates which led to the adoption of the Declaration on Principles of International Law Concerning Friendly Relations and operation among States in Accordance with the Charter of the United Nations ... .


848. The Dutch representative argued that the Declaration ought not to be viewed as if it is a carefully drafted legal document, thus argumentation a contrario is not to be determinative. Id. at 95. This view is contrary to the view that precision in rules of law represents a guarantee for all countries, particularly small and developing countries. [1968] U.N. JURIDICAL Y.B. 117 (1970).

treaties was discussed in two 1972 studies by Milan Šahović. Šahović, the representative from Yugoslavia, stated that a number of delegates contended that the International Law Commission should clarify certain aspects of the legal principle governing unequal treaties, a principle believed by many to be the most important restriction on the principle of *pacta sunt servanda*.

4. **International Codification: The 1969 Vienna Convention on the Law of Treaties.** The 1969 Vienna Convention adopted a vague rule regulating the use of force in treaty relations. Ambiguities were intentionally included as a compromise, with the expectation that future practice would resolve them. The Convention, even though not yet in force, is significant as being the first multilateral agreement to contain a rule addressed to the use of force against a state in the treaty-making process.

   a. **Article 52 and its Drafting.**

   Articles 26, 52, 75, the Declaration on Economic Coercion and the Dissemination Resolution. Article 52 of the 1969 Vienna Convention states the general rule that treaties coerced by the threat or use of force are void. The phrase, "the threat or use of force" is directly from article 2(4) of the Charter. Neither that phrase, nor the term "void" are defined in the text of the Convention. Article 52 states:

   A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

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Article 75 addresses treaties concluded with an aggressor state. Article 75 states:

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

A treaty imposed on an aggressor state need only be in conformity with the Charter. This requirement allows a state, presumably the aggrieved state, in lieu of the United Nations, to conclude such a treaty. There is no definition of the requirement of "reference to that State's aggression" or of an "aggressor."

Article 26 states the general principle of pacta sunt servanda:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Included in the "Final Act" of the Conference, which was a resolution accompanying but not a part of the text of the convention, was the Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty, and the Dissemination Resolution which required widespread dissemination of that declaration.

The Declaration emphasizes the freedom of state consent:

The United Nations Conference on the Law of Treaties . . . condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent . . .

Certain other articles of the Vienna Convention are of importance to the present discussion. Article 4 of the Convention provides that the Convention is not to be retroactive, although article 52 is certainly regarded as retroactive to at least 1945. Article 42 provides that the

854. Id.
855. The resolution in part stated, "Member States [are] to give the Declaration the widest possible publicity and dissemination." Id.
856. Id. (emphasis added).
857. The prohibition contained in article 52 is independent of article 4. Article 52 is a "codification" rather than an actual example of "progressive development" of the law.

Article 4 states:

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.
validity of a treaty might "be impeached only through the application of the present Convention." 858 Articles 69859 and 71860 state the general consequences of a treaty being held void. Especially, article 69 provides that a treaty voided under article 52 may not have even a limited effect. 861

Drafting Articles 26, 52, and 75. The Vienna Convention was drafted under the auspices of the International Law Commission. Although the initial efforts of the Special Rapporteurs had begun in the early 1950's, the emphasis of this analysis is on the suggestions made by the state representatives during the 1968-1969 Conference and, where relevant, on the views expressed by members of the International Law Commission and the Special Rapporteurs.

The convention did not provide exact definitions of "force" and "aggressor." Ambiguities were created by the drafters intentionally, since they were the essence of a compromise which made agreement on the text of these articles possible. It was intended that future practice of the United Nations would clarify these terms.

Article 26 of the Convention was subject to several proposed amendments. One of the most important was the Five-State Amendment proposed by Bolivia, Czechoslovakia, Ecuador, Spain and Tanzania, 862 which would have replaced the phrase, "Every treaty in force," with the phrase, "Every valid treaty." The Congo proposed using the

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858. Article 42 states:
1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.  
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to the suspension of the operation of a treaty.

 Convention, supra note 852, at 236. However, some "codification" may not be a "progressive development" of international law.

859. See note 896 infra.

860. Article 71 states:
1. In the case of a treaty which is void under article 53 the parties shall:  
   (a) eliminate as far as possible the consequences of any act performed. . . .
   . . .  
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
   . . . (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination . . . if their maintenance is not in itself in conflict with the new peremptory norm of general international law.

 Convention, supra note 852, at 259-60.

861. It is arguable that if article 52 is a jus cogens, and even if an agreement is void under article 52, then states may keep in force consequences of that agreement under article 71(a), as long as it is not possible to do otherwise.

phrase: "treaties which have been regularly concluded." 863 Neither amendment was accepted, but the debates clearly indicate that the delegates believed only valid treaties to be within pacta sunt servanda.

It was decided for drafting reasons only that the word "valid" should be left out of article 52. The debates make it clear that the validity of treaties was generally understood to be a qualification of pacta sunt servanda. Moreover, the prime concern was with invalidity stemming from unequal and imposed treaties.

Talalayev of the Soviet Union specifically criticized treaties procured by force, such as colonial treaties. 864 Mercado of Bolivia criticized both imposed and unjust treaties. 865 Mercado stated:

The expression "treaty in force" would then serve the purposes of States which were more concerned to defend rights arising from unjust treaties than to make concessions in the interests of justice. 866

Harry of Australia 867 and De Bresson of France 868 warned against burdening the text with unnecessary language. Rosenne of Israel found the amendments unnecessary, 869 and the Cuban delegation understood the words "treaty in force," as meaning "valid treaty," 870 a view shared by other delegates, including those from Czechoslovakia, Spain, Nepal, and Rumania. 874

865. Id. at 154.
866. Id. He also stated:

A treaty which had been imposed by force, or a treaty which sanctioned a de facto situation, was contrary to the principles of the United Nations Charter and could not be binding upon the parties.

Id.

867. His delegation could support the International Law Commission's text, and believed that attempts to burden the convention with unnecessary qualifications should be avoided.

Id. at 156.
868. Id. at 156-57.
869. Id. at 157.
870. Id. at 150-51. Tabio of Cuba stated:

The pacta sunt servanda rule was intended to ensure the stability of law; not stability at any price, but stability based on justice. A treaty cloaked in false legality to conceal an unlawful aim was a kind of offence and could not be covered by the pacta sunt servanda rule any more than a treaty to which a State's consent had been obtained unjustly or by coercion.


871. Id. at 46.
872. Id. at 47.
873. Id. at 48.
874. Id. at 49.
Virtually all states believed that *pacta sunt servanda* referred only to valid treaties, and many declared that treaties which were imposed by force, or were unequal, should be regarded as invalid.

Article 52 of the Convention, sparked considerable debate concerning whether it invalidated only imposed treaties, or unequal treaties as well. The debates did not resolve this issue. The term "force", in the context of the Declaration on the Prohibition on Using Economic and Political Force, permits the conclusion that article 52 is a rule against unequal treaties. However, the Declaration was not made a part of the text of article 52 or of the Convention. Most of the developed states contended that if one were to rely on the text only, economic force would not be included.

In 1969, this author, in the *Vanderbilt Journal of Transnational Law*, analyzed the drafting of article 52, and noted that an amendment was proposed by the Afro-Asian, Latin American and Communist states. The amendment proposed that article 52 explicitly mention economic and political pressure as grounds for treaty invalidation. This amendment failed, but as a compromise, the Declaration on Economic and Political Force, a simple Conference resolution, was adopted and bolstered by passage of the Dissemination Resolution, a compromise which called for the widespread dissemination of the Declaration.

The Commentary to the draft text by the International Law Commission stated that the Commission deliberately left the phrase "threat or use of force" undefined in the anticipation that the acts covered by this term should be determined by subsequent United Nations' interpretations of the relevant provisions of the Charter.

A study of the views of the Special Rapporteurs, Sir Humphrey Waldock, Sir Gerald Fitzmaurice, and Sir Hersch Lauterpacht, indi-

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877. Malawer, supra note 875, at 18.

*Solemnly condemns* the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.

*Id.*

880. *Id.* at 64.
icates that they believed that article 52 only codified an existing rule of law. Sir Humphrey Waldock argued in 1963, that article 52 did not involve undue legal risks unless the concept of "force" was extended to include economic and political force. The Special Rapporteurs argued against giving article 52 a broad definition which might encourage unfounded treaty denunciation. One may conclude minimally that a rule against imposed treaties was adopted in 1969. This writer concluded in 1970, that:

An analysis of the work of the Commission-Conference codification process that treated the question of defining force in the context of coerced treaties highlights the conflict between the developed states and underdeveloped states. Clearly, the underdeveloped states supported a broad definition of "force," while the more industrialized states favored a restrictive definition proffered by the three Special Rapporteurs.

b. Recent Writings. Since the late 1960's, a number of writers have discussed the general problems of imposed treaties in the context of article 52.

In 1971, Shabtai Rosenne presented a thorough study of the procedural provisions of the Vienna Convention, including those provisions which apply to the rules governing the invalidity, termination and suspension of the operation of treaties. He noted that these procedural rules "had become from the political point of view the most sensitive issue which the diplomatic conference would have to face."

882. Malawer, supra note 875 at 22-23.
883. Id. at 24.
886. Id. at 7.
These rules, especially articles 42, 65, 69 and the Annex (and this writer would add article 71), reflect delicate political compromises on cardinal issues.\textsuperscript{887} Rosenne concluded that the procedures established by the treaty apply to all grounds of invalidity, including coercion of a state.\textsuperscript{888}

The 1969 Vienna Convention established procedures to be followed when terminating an agreement in reliance on specified grounds. It incorporated in article 65\textsuperscript{889} the pacific settlement provisions of the Charter, and in article 66, the requirement of non-compulsory judicial settlement by the International Court of Justice and compulsory jurisdiction when relying upon a \textit{jus cogens}.\textsuperscript{890} It also established an optional Conciliation Commission under the authority of the Secretary-General.\textsuperscript{891} If a state relies upon the rule against imposed treaties, it will not be faced with compulsory judicial settlement, unless that rule is determined to be an existing or a new \textit{jus cogens} under either article 53 or 64.

In 1967, Michael Bothe discussed the earlier but essentially identical version of the prohibition against coercion, which appears in articles 52 and 75.\textsuperscript{892}

Bothe presented a discussion of the dichotomy between the law of war and the impact of the threat or use of force on the law of treaties. He stated that, "this new concept of the prohibition of force cannot be considered as generally accepted between the wars,"\textsuperscript{893} but went on to argue that today, despite existing objections, there is a rule against the

\textsuperscript{887} Id. at 8.
\textsuperscript{888} Id. at 59. Rosenne stated:

The outcome would seem to be that the differences between the jurisprudential characteristics of the various grounds for the invalidity or the termination of a treaty are not in themselves sufficiently serious to affect the operation of the procedure laid down in the Vienna Convention, as far as concerns the life of the treaty itself.

\textit{Id.}

\textsuperscript{889} Convention, supra note 852, art. 65, para. 3 states:

If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

\textsuperscript{890} Convention, supra note 852, art. 66, para. (a) states:

Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

Convention, supra note 852, at 257. If the abrogation involves a \textit{jus cogens}, compulsory jurisdiction is provided. This jurisdiction may be avoided if the parties agree to submit their dispute to arbitration.

\textsuperscript{891} Annex to the Convention, paras. 1-7.


\textsuperscript{893} Id. at 508.
use of force in treaty law. "[I]t must be concluded from doctrine and practice that positive international law does not take into account these objections." However, Bothe emphasized the necessity of showing a causal relationship between the illegal use of military force and the conclusion of a treaty, in order to invalidate that treaty. He was critical of the repetitive nature of article 75, the "Aggressor State Exception", and concluded that this exception was clear in the United Nations Charter, especially in article 103.

In 1970, Frankowska, a Polish international lawyer, contended that article 52 of the Vienna Convention was so basic as to need no commentary. Lachs on the other hand, another Polish international lawyer and former member of the International Court of Justice, argued in 1968, that the draft article did deserve special attention.

c. Article 75 (The Aggressor State Exception). Article 75 of the Vienna Convention on the Law of Treaties states a general exception to the law governing the validity of treaties. A review of the debates makes it clear that the drafters viewed article 75 essentially as a restriction on the rule stated in article 52. A treaty is void under article 52 if it is coerced by the "threat or use of force." An exception is permitted by article 75 if such coercion is directed against an aggressor state by either a member state or the United Nations in conformity with the Charter. Such measures must be in "reference" to the aggressor state's aggression, and would presumably be implemented when the aggressor were defeated. The text of article 75 defines neither "aggression" nor the class of measures which might be characterized as being in "reference" to a state's aggression.

Amendments were unsuccessfully proposed by both Japan and

894. Id. at 509-10.
895. Id. at 513.
896. Id. at 517. See also Convention, supra note 852, art. 69, para. 3, which states, "In cases falling under articles 49, 50, 51 or 52, para. 2 ["good faith reliance"] does not apply with respect to the party to which . . . the coercion is imputable."
Japan sought to omit any reference to "aggression" and to allow only the Security Council to take measures otherwise invalid under the terms of the Convention. This would have prohibited states from acting individually and would have authorized collective action only by the Security Council, presumably under its enforcement powers.

Thailand’s amendment was more limited than Japan’s amendment. It sought only to omit any reference to an “aggressor” state. This would have retained the right of states to act individually. Thailand desired to broaden the exception to cases not involving aggression.

The debates relating to the Japanese and Thai amendments indicate that the delegates intended article 75 to be, essentially, a limitation on the rule against imposed treaties. The term “aggression” was not defined, and there was no discussion concerning the ambiguity of the “reference back” requirement. For example, should transfer of territory be regarded as a reference to the original aggression?

Fujisaki of Japan argued that the existing draft was both too narrow, because it dealt with cases of aggression, and too broad, because “measures taken in conformity with the Charter” might be interpreted as including measures taken unilaterally by a state. He contended that the article should not be limited only to cases of aggression. Suphamongkhon of Thailand argued that reference to “aggression” should be eliminated because of the League’s and the United Nation’s failure in defining that term. This is an example of the familiar position that only when there is an accepted definition of “aggression” should the term be incorporated into a rule of treaty law.

Sir Francis Vallat of the United Kingdom believed article 75 unnecessary in light of its implicit inclusion in article 103 of the Charter. Bindschedler of Switzerland stated that as drafted, article 75 simply referred to measures which might be taken by the Security Council under Chapter VII, and by member states as measures of self-defense, under article 51 of the Charter.

Talalayev of the Soviet Union claimed that his delegation “had a

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902. See note 900, supra.
903. See note 901, supra.
904. Id.
906. Id. at 453-54. See also statement by the West German delegate, id. at 454.
907. Id. at 454. Accordingly, he was to abstain in voting on the amendments.
908. Id. at 454-55. He was in favor of the Japanese amendment.
very special moral right to speak with wrath of aggression."

He opposed both the Japanese and Thai amendments on the grounds that they equated a peace treaty imposed by an aggressor with one imposed on an aggressor. He stated that:

[The amendments were] placing on the same footing a peace treaty imposed by an aggressor on the victim of the aggression, and a treaty imposed on the aggressor after its defeat.

War of aggression was the most serious international crime. They were not dealing with any rights or benefits which an aggressor might claim, but only with the aggressor's obligations.

Kearney of the United States was in favor of the Japanese amendment on the grounds that article 75 was too limited. He desired to provide a clear statement of the rule intended by the Charter, especially as to the Security Council's authority.

The Japanese delegation abstained from voting on article 75 when it became clear that its amendment would not be adopted.

d. The 1974 General Assembly Declaration on Defining Aggression: Articles 1, 2 and 5(1)—"Armed Force" and Its "Threat." The 1974 Declaration on Defining Aggression further clarified the ambiguity which had existed since 1969, by providing a definition which covers both "force" in article 52, and "aggression" in article 75. The definition apparently resolved this ambiguity in favor of a rule against imposed treaties.

The 1974 Declaration on Defining Aggression, in article 1, defines aggression as the use of "armed force."

Article 1. Aggression is the use of armed force by a state

909. Id. at 455.

As a consequence of the aggression which it had been the victim during the Second World War, the Soviet Union had suffered human and material losses which no State and no people had experienced throughout the history of mankind.

Id.

910. Id.

911. Id.

912. Id. at 456. Kearney may not have taken this position if he were more fully aware of the significance of its adoption in broadening the prohibition as contained in article 52.


Article 2 defines the "first use of armed force" as "prima facie" but rebuttable evidence of aggression.

Article 2. The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression had been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.916

Article 5(1) of the Declaration states:

Article 5(1). No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.917

Since "use" in article 2 is broader than "actual attack", it seems reasonable to conclude that the threat or use of military or armed attack is "aggression." One concludes that this view governs the determination of an "aggressor" under article 75 of the Vienna Convention, and also identifies certain treaties as imposed by "force" and hence, invalid under article 52 of the Convention.918

In 1974, Andrew Bennett of the United States stated that the Declaration "is one of the positive achievements of this 29th General Assembly."919 However, Robert Rosenstock, also of the United States, viewed the Declaration as a compromise intended simply to provide

916. Id. However, article 1 does not use the term "threat or use of force," but only the term "use of force."

917. Id. at 3.

Article 5(3) states: "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful." Id. But see articles 10 and 32 of the 1974 General Assembly Resolution ("The Charter of Economic Rights and Duties of States") which declares all states "juridically equal" and that "[n]o State may use . . . economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights." G.A. Res. 3281, 29 U.N. GAOR Supp. 31, at 50, U.N. Doc. A/9631 (1974).

918. The definition forms part of a consistent effort of the United Nations to develop a code of basic rules of international law, implementing the cryptic provisions of the Charter of the United Nations. Adopted unanimously or by consensus, these rules are binding on the world community as authoritative interpretations of the Charter.

The end of one story is, of course, only the beginning of another, and we have to wait many years before we will know what impact this document has had on the development of international relations.

Sohn, Introduction, in 1 DEFINING INTERNATIONAL AGGRESSION—THE SEARCH FOR WORLD PEACE 1, 2 (B. Ferencz ed. 1975).

guidance to the Security Council in defining the term "aggression" as used in article 39 of the Charter.920

The interest of the Soviet Union in defining "aggression" was more limited than that of other states. During the debates of the Special Committee, Kolesnik of the Soviet Union, by emphasizing the right of self-defense conferred under article 51 of the Charter, made it clear that for a definition to be favored by the Soviet Union, it would have to identify the degree of force which would justify a state's exercising its right to defend itself.921

5. **A Note on the Recent Activities of Some Regional Organizations.** Regional organizations have only barely begun to consider the problem of imposed treaties.

The Organization of African Unity has denounced only in general terms the threat or use of economic and political pressure in international relations insofar as it hampers their political and economic development.922 In 1972, the O.A.U. declared that a proposed agreement between the United Kingdom and Rhodesia would be invalid because it would lack valid state consent on behalf of Rhodesia, since Rhodesia

920. *Id.*

[T]he views expressed by the Soviet representative seemed to indicate some confusion over the Special Committee's task. According to the Soviet representative, the concept of aggression as set forth in Article 39 of the Charter was not the same as the concept of aggression in Article 51 and a distinction had to be drawn between aggression which conferred the right of self-defense and that which did not. But the task was to define aggression, not the right of self-defense.


[The Council of Ministers] Denounces the economic and political pressures which certain developed countries are attempting to bring to bear on African countries with a view to threatening their development efforts and hampering them in the exercise of their sovereignty over their natural resources . . . .

*Id.*
was not being governed by the consent of the majority of its population.\textsuperscript{923}

In 1966, a sub-committee of the Asian-African Legal Consultative Committee declared in Bangkok, that although the general principle of peaceful coexistence requires the observance of all international law obligations, this requirement does not include "unjust" treaties.\textsuperscript{924} In 1969, in Karachi, the Consultative Committee did not agree on any of the major aspects of article 52.\textsuperscript{925} A difference of opinion existed regarding whether article 52 was \textit{lex lata},\textsuperscript{926} whether it encompassed economic and political pressure,\textsuperscript{927} and regarding the merits of ambiguously drafting article 52, thus leaving it to be interpreted by subsequent practice.\textsuperscript{928}

In 1971, the Inter-American Juridical Committee of the Organization of American States, while discussing treaties conflicting with the United Nations Charter,\textsuperscript{929} never mentioned article 52. In 1970, the committee also discussed the revision of treaties, as requested by the General Assembly of the United Nations, and again never raised the problem of illegal military duress against a state.\textsuperscript{930}

\textsuperscript{923} Id. \textit{Resolution on Zimbabwe, CM/Res. 267 (XIX)}, at 176, para. 3.

[The Council of Ministers] \textit{Calls Upon} the Government of the United Kingdom not to transfer or accord . . . and urges it to promote the country's attainment of independence by a democratic system of Government in accordance with the aspirations of the majority of the population . . . .

\textit{Id.}

\textsuperscript{924} \textbf{ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, REPORT OF THE EIGHTH SESSION (BANGKOK) 78 (1966).}

3) Where the performance of an existing treaty obligation has become unduly burdensome or unjust, such obligation shall no longer be binding.

\textit{Id.}

\textsuperscript{925} \textbf{ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, REPORT OF THE TENTH SESSION (KARACHI) 237-40 (1969).}

\textsuperscript{926} \textit{Id.} at 237 (delegate of Iraq); \textit{id.} at 238 (Member of the I.L.C.).

\textsuperscript{927} \textit{Id.} at 238-39 (delegate of Pakistan); \textit{id.} at 240 (delegates of Japan and Indonesia). The delegate of Pakistan argued that an anomaly would exist if one accepts the rule that economic coercion of a representative would invalidate a treaty, but economic coercion of a state would not. \textit{Id.} at 238-39.

\textsuperscript{928} \textit{Id.} at 238 (delegate of Japan); \textit{id.} at 238-39 (delegate of Pakistan). The delegate of Pakistan stated that "the I.L.C. instead of making the matter specifically clear, decided to leave it to be worked out by interpretation, which was hardly satisfactory." \textit{Id.} at 238.

\textsuperscript{929} \textbf{ORGANIZATION OF AMERICAN STATES: WORK ACCOMPLISHED BY THE INTER-AMERICAN JURIDICAL COMMITTEE 39 (1972); OEA/Ser. Q/IV.3, CJI-6 (1972).}

\textsuperscript{930} \textit{Opinion on the Revision, Updating and Evaluation of Various International Conventions, id.} at 3. For a general study of international law and the inter-American system see J. CASTILLA, \textit{EL DERECHO INTERNATIONAL EN EL SISTEMA INTERAMERICANO} (1970).

Even more than the United Nations Charter, the OAS Charter, April 30, 1948, art. 5, para. e. & art. 16, [1951] 2 U.S.T. 2394, T.I.A.S. No. 2361, at the minimum, represents an implicit acceptance of the rule against imposed treaties. Article 5(e) declares that a victory
D. Jurisprudence

National jurisprudence first dealt with imposed treaties in the post-war era. The International Court of Justice has discussed this topic to its greatest extent most recently in the 1970's.931

1. International Jurisprudence. In the Fisheries Jurisdiction Case932 before the International Court of Justice, the United Kingdom in a war of aggression "does not give rights." Article 16 declares that the use of coercive measures of an economic or political character cannot result in "advantages of any kind." In 1975, an amendment to article 1 of the OAS Charter was drafted which declared a prohibition of the threat or use of force, in any manner inconsistent with the provisions of the U.N. Charter or the Rio treaty. Protocol of Amendment of the Rio Treaty, 14 INT'L LEGAL MATERIALS 1121, 1123 (1975).

Neither the International Law Association nor the Institute of International Law (two private groups), have analyzed the question of imposed treaties. However, the Institute of International Law has discussed the modification and termination of multilateral treaties, e.g. Modification et Terminaison des Traités Collectifs, 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 5 (1961).


Most recently the issue of imposed treaties was raised, seemingly, by counsel in the Western Sahara Case, but it was not reached by the International Court. Advisory Opinion on the Western Sahara, 14 INT'L LEGAL MATERIALS 1355 (1975); Judicial Decisions, 10 INT'L LAWYER 199 (1976). Morocco proposed "to carry out an examination [of] both of these treaties and of the motives which led to their conclusion, and the circumstances in which they were concluded." CR 75/10, July 1, 1975, I.C.J. 4 (emphasis added). Morocco claimed that Spain's "intention [was] to impose a protectorate on the region." Id. at 8. The treaties were concluded "in peculiar circumstances." Id. at 2. Morocco concluded that the protectorate of 1884 was not in conformity with international law. Id. at 13. Mauritania and Morocco signed an agreement on April 14, 1976, dividing the Western Sahara between them and providing for joint exploitation of the territory's phosphate deposits. Financial Times, Apr. 15, 1976 at 5. See generally Comment, The March on the Spanish Sahara: A Test of International Law, 6 DENVER J. INT'L L. & POL. 95, 111 (1976).

Hamed Sultan has recently analyzed the principle of restrictive treaty interpretation and concluded that it is complementary to the principle of effectiveness, since both attempt to effectuate the intent of the parties. Sultan, The Special Function of the Principle of Restrictive Interpretation, in MÉLANGES OFFERTS À JURAJ ANDRASSY 294 (V. Ibler ed. 1965). After an analysis of the jurisprudence of the International Court of Justice, Sultan concluded:

[C]ontradictions in the agreement should be confined to what is necessary to achieving the essential purposes of the Parties and should not be extended to imposing new purposes and unnecessary detailed obligations upon the Parties. Id.

Carbone argued that a unilateral act such as a promise in international law is to be restrictively interpreted and that the Court supports this proposition. Carbone, Promise in International Law: A Confirmation of Its Binding Force, 1 ITALIAN Y.B. OF INT'L L. 166, 171 (1975).

and the Federal Republic of Germany contested Iceland’s extension of its exclusive fisheries jurisdiction, implemented in the 1960’s and the 1970’s. The dispute was submitted to the Court, and afforded it an opportunity to address the issue of the validity of a treaty alleged by one state as being imposed. The case involved an international agreement binding the parties to accept the compulsory jurisdiction of the International Court of Justice, and which was declared to have been concluded as a consequence of unlawful military duress. Since the inception of the Permanent Court of International Justice in 1920, this was the first time the international tribunal had been confronted with and decided such an issue.

Iceland, in 1958, proclaimed a 12-mile fisheries zone. A number of incidents occurred between Iceland, and the United Kingdom and Germany, leading to a series of negotiations and, finally, an exchange of notes. The Anglo-Icelandic Exchange of Notes took place on March 11, 1961, and the German-Icelandic Exchange of Notes took place on July 19, 1961. These diplomatic exchanges were registered with the Secretary-General under United Nations Charter article 102.

The Exchange of Notes specified that the United Kingdom and Germany would no longer object to a 12-mile fisheries zone, and provided for six-months notice of any further extension. By the terms of the Exchange of Notes, the parties accepted the compulsory jurisdiction of the International Court in case of a dispute with regard to any such future extension. In 1971, Iceland announced the termination of the 1961 Agreements and, in 1972, extended to 50 miles the limit of its exclusive fisheries jurisdiction. The United Kingdom and Germany complained to the Court of the unilateral denunciation and extension. In 1972, the Court granted interim measures. In February 1973, the

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Court rendered its decision on its jurisdiction.936

In late 1973, there was another exchange of notes providing for a temporary two year arrangement pending a settlement of the dispute. In 1974, the Court rendered its decision on the merits,937 which declared that Iceland’s claims were “not opposable” to the United Kingdom or Germany.938 It did not declare Iceland’s extension to be generally invalid, but held that Iceland’s preferential rights in the contested areas had to be balanced by the historic rights of the United Kingdom and Germany.

A central issue of the 1973 decision on the Court’s jurisdiction was whether the 1961 Agreements were void because of the threat or use of military force directed at Iceland by the Royal Navy.939 The Court in 1973, decided that the 1961 Agreements were not void940 and were not imposed in violation of article 52 of the 1969 Vienna Convention.941 The Court went on to state that the doctrine rebus sic stantibus had not terminated the 1961 Agreements.942 This view was reaffirmed by the Court in 1974.943 Though Iceland never appeared before the Court in any of the proceedings, it did submit letters and documents as to its position, especially concerning the lack of validity of the 1961 Agreements.

The cases brought by the United Kingdom and Germany were not joined because of some differences as to their respective positions. Although the issues were essentially the same, separate decisions were rendered in the 1973 case.

The Icelandic letter of June 27, 1972, declared that the 1961


937. Id.


940. Id. at 59.

941. Id.

942. Id. at 16. “While changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty, the Icelandic contention is not relevant to the present case.” Id.

Agreements "took place under extremely difficult circumstances."\footnote{944} Germany, in its memorial, interpreted this statement as questioning the initial validity of the 1961 Agreements. Germany believed that Iceland's position was that Iceland was "under some kind of pressure and [concluded the agreements] not by its own free will."\footnote{945}

The Court's discussion on this vital question was limited to only a few sentences:

There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void. It is equally clear that a court cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support. The history of the negotiations which led up to the 1961 Exchange of Notes reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides. No fact has been brought to the attention of the Court from any quarter suggesting the slightest doubt on this matter.\footnote{946}

The Court concluded as a matter of law that "an agreement concluded under the threat or use of force is void," and found this principle to be implied in the Charter of the United Nations.\footnote{947} This statement itself is very significant in that it shows that the Court accepted as of 1945, if not earlier, that a rule against imposed treaties existed and was "recognized" by article 52 of the 1969 Vienna Convention on the Law of Treaties.

After stating that it could not consider such a serious charge if it were "unfortified by evidence," the Court analyzed the history of the negotiations which led to the 1961 Exchange of Notes, and concluded that the negotiations revealed that the Agreements were freely negotiated on the basis of perfect equality. No facts were found even to suggest the slightest degree of coercion.\footnote{948} In light of the actual facts of the case, as indicated in the separate and dissenting opinions of the

\footnote{944}{Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1973] I.C.J. 49, 58-59 (jurisdiction).}
\footnote{945}{Id. at 59.}
\footnote{946}{Id. (emphasis added).}
\footnote{947}{Id. Briggs, Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice, 68 Am. J. Int'l L. 51, 62 (1974), stated: What is significant . . . is the Court's unhesitating acceptance as a principle of contemporary international law of the rule "recognized" in Article 52 of the Vienna Convention . . . .}
\footnote{948}{Id.}
Court, it is clear that the mere presence of military force in the contested area was not sufficient to constitute "force" under the Court's formulation of the rule.

The dissenting opinion of Padilla Nervo in the British case asserted that the British Royal Navy had been using illegal force to oppose the new fishery limit.\footnote{Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1973] I.C.J. 4, 46 (jurisdiction, dissenting opinion of Judge Nervo).}

The Court should not overlook the fact, and does not need to request documentary evidence as to the kind, shape and manner of force which was used (Article 52, Vienna Convention on the Law of Treaties).

A big power can use force and pressure against a small nation in many ways . . . . The Royal Navy did not need to use armed force, its \textit{mere presence} on the seas inside the fishery limits of the coastal state could be enough pressure.

. . . There are \textit{moral} and \textit{political pressures} which cannot be proved by the so-called documentary evidence. . . .\footnote{Id. at 46-47 (emphasis added). If the Royal Navy was within a 3 mile zone, the Court's response may have been different.}

Sir Gerald Fitzmaurice, in his separate opinion, contended that the 1961 Agreement was based upon a \textit{quid pro quo.}\footnote{Separate Opinion of Sir Gerald Fitzmaurice, Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1973] I.C.J. 49, 73 (jurisdiction).}

The United Kingdom and Germany immediately recognized Iceland's exclusive 12-mile fishery zone, and Iceland agreed to compulsory jurisdiction of the International Court if the United Kingdom or Germany contested any future extension by Iceland of its fisheries limit.\footnote{Id. \"The \textit{quid pro quo} was Iceland's acceptance of recourse to the Court if at anytime she claimed further to extend her fishery limits.\" Id. at 73-74.}

As to the question of equality, Sir Gerald argued that the agreement was reciprocal. Iceland was given the right to have recourse in the future if it objected to naval protection used to contest any new Icelandic extension.\footnote{[F]or if one of the other Parties should react to Iceland's purported extension of her fishery limits, not by recourse to the Court but by measures of naval protection, it would then have been open to Iceland to invoke the adjudication clause, which was in consequence a safeguard for her, as well as for the other two Parties. Where then was the element of \textquoteleft\textquoteleft duress\textquoteright\textquoteright? Id. at 34.}

In the \textit{Barcelona Traction Case},\footnote{Belgium-Spain Barcelona Traction Case, [1970] I.C.J. 3 (merits).} there was a discussion of the significance of a validly imposed treaty and the development of a new rule of customary international law. The conclusion reached was that such a treaty cannot be used as evidence to support the development of a
new rule of customary international law. This conclusion was not a holding of the Court, but merely the conclusion of one judge in his separate opinion.\footnote{955} The issue in the \textit{Barcelona Traction Case} was whether the International Court of Justice would pierce the corporate veil of a Canadian incorporated enterprise, and allow Belgium, the state of its majority shareholders, standing to bring a question before the Court. The question concerned the takeover by the Spanish government of the corporation’s foreign subsidiaries’ property in Spain.\footnote{956} The Court held that there was no rule of customary international law which required it to interfere in order to allow the shareholders such standing.\footnote{957}

The Court examined the provisions of the peace treaties of World War I and World War II. It concluded that “lifting the corporate veil” was provided for, but it did not support the finding of a generally recognized rule in that or other situations.\footnote{958} The Court declared that the drafters of those treaties intended only to provide for the seizing and pooling of enemy property in order to cover reparation payments. The question before the Court in 1970, was that of the complaining party’s standing to sue in an action requesting compensation for a taking of property. These two situations were considerably different.

Judge Ammoun in a separate opinion argued that, generally, validly imposed peace treaties would not be viewed as supportive of “nascent international custom,” because the treaties were imposed upon defeated states.\footnote{959} They did not evidence any real state consent by the defeated. However, Ammoun believed that these treaties, under the 1969 Treaty on the Law of Treaties, “must be respected by virtue of the rule \textit{pacta sunt servanda}. “\footnote{960}

So far as the Peace Treaties more particularly are concerned, whether these be bilateral or multilateral, they are not such to amount \textit{ipso facto} to an element of custom. The clauses of these treaties, imposed upon the defeated states, must be respected by virtue of the rule \textit{pacta sunt servanda}. But can the reasoning be pressed so far as to say that their provisions reflect the consent of, or the genuine and effective acceptance by, the defeated State, which acceptance or con-

\footnotetext{955}{Id. at 305 (separate opinion of Judge Ammoun).}
\footnotetext{956}{Id. at 7-11. This was by the use of bankruptcy procedures. \textit{Id.} at 9.}
\footnotetext{957}{Id. at 38, 48-49, 51. The Court refused to find such a right when one was not explicitly denied. The Court refused to extend the right of diplomatic protection in order to guard against confusion.}
\footnotetext{958}{Id. at 40-41. It also looked at enemy-property legislation. \textit{Id.}}
\footnotetext{959}{Id. at 305 (separate opinion of Judge Ammoun).}
\footnotetext{960}{Id.}
sent would, on this hypothesis, give rise to the *opinio juris*?961

The 1950 *Interpretation of Peace Treaties* was an advisory opinion which decided that Bulgaria, Hungary and Rumania were required to name representatives to commissions established under the World War II peace treaties.962

Fitzmaurice, Counsel for the United Kingdom, argued that underlying the case was the opinion of the ex-enemy states that the peace treaties were not valid because of the non-reciprocity or inequality of obligations.963 Fitzmaurice rejected the validity of such an argument as "nonsense."964

I am of course aware, and my Government is aware, that underlying the ex-enemy attitude there is probably a feeling, hinted at if not overtly expressed, that because the human rights clauses of the Peace Treaties are not reciprocal in character, this justifies the ex-enemy Governments (if not in actually studying to evade them) at any rate in representing the efforts of my Government . . . as an attempt to interfere in the internal affairs of these countries and to keep them in some form of permanent subjection. Now, in fact, that would be nonsense, but nevertheless there may be something here that needs comment . . . .965

Fitzmaurice contended that if a plea of non-reciprocity were able to invalidate a peace treaty, it would be impossible ever to conclude a war by the use of a treaty. He stated that peace treaties by their nature usually contain a number of unilateral and unequal provisions.966

[If this argument [plea of non-reciprocity] were to be admitted as valid the result would be destructive of the whole force and obligatory character of treaties of peace, and it would become useless to try and put any formal end to a state of war by means of such treaties . . . since no finality would in fact have been reached, and everything could be reopened at any time of the plea of non-reciprocity . . . . By their very nature and the circumstances in which they are made, treaties of peace usually contain a number of clauses of a unilateral or

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961. *Id.* He also went on to state the following:

It will be observed first of all that the clauses concerning war reparations only apply against one party, for the benefit of the party which imposed them. Of course it would not be otherwise in a treaty marking the end of a victorious war even one which was waged for just cause.

*Id.*


964. *Id.*

965. *Id.* (emphasis added).

966. *Id.*
non-reciprocal character. But such treaties and clauses are
not thereby juridically invalidated.967

Post-war international jurisprudence on the rule against imposed
treaties also includes international arbitration cases. The German External
Debts Arbitration,968 decided in 1972, involved a dispute between
Greece and Germany. The origin of the dispute was Germany’s failure
to pay compensation for violations of Greek neutrality prior to Greece’s
entry into World War I.969 The case concerned Germany’s obligations
under both the Versailles Treaty and the 1924 London Debt Agree-
ment.970 The Tribunal held that debts arising from World War I were to
be included in the current German-Greek negotiations.971

Germany agreed that a rule of restrictive treaty interpretation
existed, although it was not applicable in this case. Germany conceded
that an ambiguous treaty provision ought to be interpreted against its
drafters, but argued that Greek representatives, nevertheless, were
present during the drafting of the 1924 London Debt Agreement.972

It is difficult to reach any firm conclusions on the significance of
this case for the topic under discussion, except insofar as it indicates the
persistent view of states that a treaty is to be interpreted as imposing
the least burden—even if the treaty is imposed.973

The following five cases decided by the Allied-Italian Conciliation
Commissions between 1952 and 1965, indicate acceptance of a restric-
tive rule of treaty interpretation of peace treaties. These cases collec-
tively agreed that the principle of legal equality was not violated, and

967 Id. (emphasis added). India-Pakistan Appeal Relating to the Jurisdiction of the
ICAO Council, [1972] I.C.J. 46, while not dealing with an imposed treaty, further indicates
the continuing dispute between states as to the existence of a restrictive rule of treaty
interpretation. See Argument by Polkhivola (India), India-Pakistan Appeal Relating to the
Jurisdiction of the ICAO Council, [1972] I.C.J. Pleadings 506. See also Memorial by India,
id. at 49; Reply of India, id. at 427. It is important to mention that the International Court in
Barcelona stated that general arbitral jurisprudence "cannot therefore give rise to
generalization going beyond the special circumstances of each case." Interpretations of


969. Id.

970. German Reparations, Aug. 16, 1924, 41 L.N.T.S. 429.

971. Greece v. Germany, 47 Int’l L. Rep. 418, 421 (1974). The negotiations were to
be under the Agreement on German External Debts, done Feb. 27, 1953, 333 U.N.T.S. 3.


[It] was permissible to interpret international treaties to the prejudice of those
who formulated them only when every other rule of interpretation had been
tried without success. The guiding principle was that a provision must be so
interpreted as to inflict the least burden . . . .

Id.

973. Id. Recent state practice supports a restrictive rule of treaty interpretation.
Malawer, The Withdrawal of UNEF—A New Notion of Consent, 4 Cornell Int’l L.J. 25
that the lack of free consent by Italy did not vitiate the validity of the Peace Treaty. Most of these cases treated the problem of whether an individual was entitled to reparations under the terms of the Peace Treaty, and several involved problems of dual nationality.

The 1965 Drouitzkoy Claim\(^\text{974}\) involved a claim by a United Nations’ national for tax exemption under the 1947 Peace Treaty. The Commission, in upholding the claim, held that a restrictive rule of treaty interpretation existed, but would be applicable only if a treaty provision were ambiguous. In the words of the Commission:

The Commission feels obliged to stop at the point where a so-called restrictive interpretation would be contrary to the plain terms of this Treaty . . . \(^\text{975}\)

The Commission suggested that it is not always best to rely upon interpretation as a method of alleviating unduly heavy burdens in imposed treaties.\(^\text{976}\)

Undoubtedly, when one is concerned with a treaty of peace which was imposed—rather than discussed and negotiated—by a group of victorious Powers, the principle of safeguarding the greatest possible freedom of the contracting States as regards the alleviation of too heavy burdens, can best be invoked by means of new negotiations . . . rather than by leaving to the constituted judicial body the task of making a revision of its own through the channels of interpretation.\(^\text{977}\)

The United States-Italian Conciliation Commission in the 1961 De Pascale Case, discussed the restrictive rule of interpretation in relation to the mutual consent of the contracting parties.\(^\text{978}\) The Commission ruled that a restrictive interpretation was permitted since it reflected the mutual consent of all the contracting parties,\(^\text{979}\) and it awarded reparations.\(^\text{980}\)

This—restrictive—interpretation to Article 78, paragraph 4(c) of the Treaty of Peace is not, in any event, in conflict with the preparatory work of the Peace Conference, which should, however, be given consideration in the interpretation of an international treaty only insofar as it

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975. Id. at 439.
976. Id.
977. Id.
979. Id. at 234.
980. Id. at 235.
reflects a mutual consent of all the contracting parties to a
given text. . . .

The United States-Italian Conciliation Commission in the 1955
Mergré Claim decided that the 1945 Peace Treaty was not invalid for
lacking consent or for violating the principle of equality. However,
the Commission did not award any reparations, even though it held
the 1947 Peace Treaty valid.

The Anglo-Italian Commission decided in the 1954 Cases of Dual
Nationality (Case No. 22), against a dual national. The Commission
held that the 1947 Peace Treaty was to be interpreted pursuant to the
general rules of treaty interpretation.

Notwithstanding the unilateral genesis of Peace Treaties,
imposed on the vanquished by the victors, they are really
bilateral conventions and their interpretation is regulated by the
general rules of interpretation of treaties.

The Franco-Italian Conciliation Commission in the 1952 Re Rizzo
case, discussed the need to determine the intent of the contracting parties
and the need to restrict the obligations of the vanquished. The
Commission held that the Italian plaintiff's property in Tunis was exempt from liquidation. As in the other cases, there was no discus-
sion of the circumstances under which a peace treaty may be regarded as
invalid. However, this arbitration more than any other, did discuss
imposed treaties, consent and restrictive interpretation.

But even in the case of a treaty of peace imposed on a
defeated state . . . the ascertaining of the intention of the parties, and not of one party only, remains the principal aim of interpretation. Although the defeated State gave its consent under constraint, it nevertheless gave it, and the agreement arises from that consent. It is true that the defeated State submitted itself to the will of the victorious States, but only to

981. Id. at 234.
983. Id. at 456.
984. Id. at 448. "The defeated State can, in the peace treaty itself, accept limitations, more or less temporary, on the exercise of its sovereignty." Id.
985. Cases of Dual Nationality (Anglo-Italian Conciliation Commission), 14 R. Int'l
986. Id. at 33.
987. International Jurisprudence normally interprets the provisions of interna-
tional treaties in a restrictive manner, as it considers them as limitations of the sovereignty of the State. . . .
989. Id. at 479.
that will as it was manifested in the Treaty of Peace submitted for its signature. The victorious States cannot, therefore, require that the Treaty of Peace, although it was *not negotiated*, shall be interpreted according to their undisclosed wishes; it must be interpreted according to the will of the victorious States as they have expressed it... and reduced it to writing... and as it appears objectively in the Treaty.

[O]bligations contained in conventions must be interpret- ed in such a way as to *impose the minimum burden on the debtor party*. ... 990

The Commission contended that since the vanquished state’s consent was not given through a process of negotiation, the Commission had to interpret the terms of the peace treaty in favor of the defeated state and not expand upon those terms in any manner, so as to impose the minimum burden on the defeated state.

2. National Jurisprudence. Three Dutch cases and one German case discussed the validity of the 1938 Munich Agreement under international law. Two Dutch cases held that the Munich Agreement was void because of the threat of military force against Czechoslovakia during its negotiation; one Dutch and one German case raised the question but left it unresolved.

The Dutch case, *Nederlands Beheers-Instituut v. Nimwegen and Männer*, 991 was decided by the District Court of Arnhem in January, 1952, 992 and in November, 1952, by the Court of Appeals of Arnhem. 993 The Nederlands Beheers-Instituut was the Dutch agency which adminis- tered enemy property. 994 It claimed a right to have the defendant treated as a German national.

The defendant (Männer) was a Czech national at the time of the Munich Agreement, but was subsequently given German nationality as a consequence of the German-Czechoslovakian Treaty of November 20, 1938 (the "Berlin Treaty"). The District Court refused to recognize the imposed German nationality on the basis that the 1938 Munich Pact and the subsequent 1938 Berlin Treaty were void because of the threat of aggression. 995

990. *Id.* at 481-82 (emphasis added).
992. *Id.* at 250.
993. *Id.* at 251.
994. *Id.* at 249.
995. *Id.* at 250. "The subsequent acceptance of this arrangement by Czechoslovakia made no difference... because it had been forced upon that State under the threat of aggression." *Id.*
The Court of Appeals reversed by stating that the Czechoslovak Republic in 1945, had recognized the effect of the aforementioned treaties upon former Czechoslovak citizens of German and Hungarian origin.\textsuperscript{996} Later in 1945, this position had been confirmed by a decree of the Czechoslovakian President.\textsuperscript{997}

Another Dutch case, \textit{Ratz-Lienert and Klein v. Nederlands Beheers-Instituut},\textsuperscript{998} was decided in 1956, by a Special Chamber of Revision of the Judicial Division of the Council for the Restoration of Legal Rights. It was called on to decide whether the Netherland’s legislation on enemy property applied to certain individuals, Sudeten Germans upon whom the 1938 Treaty of Berlin imposed German nationality. The Court decided that the German threat of force invalidated both the Munich and Berlin treaties,\textsuperscript{999} rendering the imposition of German nationality invalid. This was held to be the case in spite of the 1945 Czechoslovakian Presidential Decree.\textsuperscript{1000}

The validity of the Treaty [of Berlin] as a whole cannot be accepted; it was concluded by Czechoslovakia under clear, inescapable and unlawful duress. Czechoslovakia adhered to the Treaty only after she had under protest consented to the transfer of the Sudetenland to Germany, who was threatening war if she did not. . . .\textsuperscript{1001}

The last Dutch case to be discussed, \textit{Amato Narodni Podnik v. Julius Keilwerth Musikinstrumentenfabrik},\textsuperscript{1002} was decided by the District Court of the Hague in 1956. It involved a question of ownership of various trademarks. The Court held that the trademarks did not pass under the Dutch enemy property legislation because the defendant did not possess German nationality.\textsuperscript{1003}

\textsuperscript{996} Id. at 251.
\textsuperscript{997} Id.
\textsuperscript{998} Id. at 251.
\textsuperscript{999} Id. at 253.
\textsuperscript{1000} Id. at 539.
\textsuperscript{1001} Id. at 540.
\textsuperscript{1002} Id. at 538. The Court stated that this invalidity was evidenced by the repeated declarations of nullity by the Allies after the outbreak of World War II. Of course, no such declarations were made during the time of the negotiation of the Munich Agreement. At that time, the lack of such declarations evidenced an acceptance of the Agreement.
\textsuperscript{1003} Id. at 435 (1961).
\textsuperscript{1004} Id. at 436.
This was a question similar to the one presented in the above two cases, and here the Court held that the 1938 Treaty of Berlin and the prior Munich Agreement were void.\textsuperscript{1004} Thus, they could not have granted valid German nationality to a Czech national.\textsuperscript{1005} 

The Court agrees with the argument of the defendant. The German-Czechoslovak Nationality Treaty was invalid because it was concluded under clear and unlawful duress. . . .\textsuperscript{1006} 

\textit{Land Registry of Waldsassen v. The Town of Eger (Cheb) and Waldsassen} was decided in 1965, by the Supreme Court of Bavaria, in the Federal Republic of Germany.\textsuperscript{1007} The two lower courts held that Czechoslovakia had illegally expropriated German real property and that the property could not be sold in Germany. The Supreme Court of Bavaria reversed,\textsuperscript{1008} after discussing the question of the validity of the 1938 Munich Agreement from two points of view. Either the Agreement was void \textit{ab initio} because of illegal duress, or it was valid but destroyed by the forcible incorporation of Czechoslovakia into Germany in 1939. The Court decided that "these questions do not require final decision here,"\textsuperscript{1009} since in any case, the Munich Agreement was invalid.\textsuperscript{1010} 

\textbf{IV. CONCLUSION AND SUMMARY} 

In order to determine, analyze and assess the current state of the international law rules relating to imposed treaties, this study has analyzed case law of international and national tribunals, treaty practice and international legislation in the context of managing interstate conflict.

The following is a summary of the salient conclusions of this study. Several suggestions are put forward with the intention of assisting the international community in better managing the problem of interstate conflict and increasing the political viability of treaties, that is, enabling treaties to be used as a means of limiting the outbreak of new hostilities. This outlook is apposed to those which emphasize logical consistency,
neo-naturalist law precepts or a merely mechanical approach to terminating hostilities.

The evidence in the preceding discussions gives rise to three categories of conclusion: 1) what the rule against imposed treaties is, and what it is not; 2) propositions related to the rule; and 3) existing problems with the rule.

A. What the Rule Is and What It Is Not

The evidence assessed in this research indicates that the rule accepted by the international community prohibits the threat or use of aggressive military force against a state in order to bring about a treaty. The rule is a restriction on the general principle of *pacta sunt servanda*.

The new rule allows a treaty to be imposed only upon an aggressor state by the aggrieved state or by collective action, which may include action by the Security Council. At present, the Security Council is permitted to take action in more cases than is a state acting individually. While the limits of the authority of the Security Council in imposing a treaty on a state as an enforcement measure are not clear, there is no doubt that the Security Council does have such authority. However, this is not because the Charter or the drafters provided explicitly for such authority, for they did not. The authority exists because the language of certain provisions of Chapter Seven of the Charter is so broad as to require that such authority be inferred from the ordinary meaning of the terms used.

The evidence cited does not support the contention of many writers and commentators that there is a rule precluding the validity of unequal treaties. A number of representatives from various states argue that the phrase "the threat or use of force" in article 52 of the Vienna Convention should be broadly construed as a prohibition against the use of economic force in treaty relations. They point out subsequent acts of the Conference and the broad language of article 2(4) of the Charter. However, they do not consider article 75 of the Convention, nor do they consider the compromise of the 1968-1969 Conference which excluded from the treaty text the precise language which those representatives now rely upon as a rule of law. The *raison d'etre* of the compromise was to preclude exactly the claims currently being put forward in regard to economic force.

The articles of the Convention must be interpreted, by the terms of the Convention, in a manner consistent with the Charter. The drafters of
the Convention intended that the prohibition against coerced treaties would develop as the law of the Charter was clarified. Indeed, this intent has been fulfilled. Now, in light of the passage of the 1974 General Assembly Declaration on Aggression, the broad claim that the rule prohibiting the use of force in treaty negotiations includes economic force is even less persuasive in that the Aggression Declaration precludes economic justification for an act of self-defense. The better interpretation is that the current rule views the general prohibition of articles 52 and 75 in the context of, and limited by the 1974 Declaration.

B. Related Propositions

The rule against imposed treaties, as indicated in the Fisheries Jurisdiction Case (1973), was implicitly accepted in 1945, by the Charter of the United Nations. It was not explicitly accepted until the adoption in 1969, of article 52 of the Vienna Convention on the Law of Treaties, and it was not substantially clarified until the 1974 Declaration on Defining Aggression.

In terms of legal concepts, most observers agree that the rule against imposed treaties is based upon the principles of sovereign equality, its derivative concept of state consent, and the prohibition against the use of force in international relations. The development of the rule against imposed treaties by the international community has required that various interests be balanced. In formulating the rule, the following objectives have been emphasized: making the law of treaties logically consistent with the law of war; providing a practical means of terminating hostilities; precluding the use of peace treaties as a pretext for renewed hostilities; and precluding fictitious state consent from serving as a basis of international treaty obligations.

The overriding objective has been to develop a new rule of law based on actual state consent, and to discourage the renewal of hostilities by making it known beforehand that treaties imposed by unlawful force are not to be observed. This latter policy is viewed by the supporters of the new rule as a causal consequence of the former; that is, when states agree freely to their treaty obligations, those commitments are less likely later to become a source of friction between them, thus reducing the chances of new military hostilities. This policy attempts to create a new rule of law to supplant an older one which all too often had served as an incentive to enter into new military hostilities. The new rule can be viewed as particularly implementing "the foremost legal obliga-

1011. For a recent article on the nature of the principle of sovereign equality, see Anand, Sovereign Equality of States in the United Nations, 7 Indian J. Int’l L. 185 (1967).
tion of states" not to resort to war. 1012

The replacement of the old rule by the new reflects a difference in the policies which lie behind those rules. The older policy emphasized the expedient conclusion of hostilities, even if it involved the recognition of a treaty imposed upon a state as a result of an aggressive war. Although the newer policy also favors the earliest possible termination of conflict, it attempts to regulate the conclusion of hostilities by establishing general guidelines governing the conclusion of treaties ending hostilities. The guidelines state that a peace treaty should be drafted in reference to the aggressive acts, if the treaty is one validly imposed upon an aggressor.

A paradox lies in the newer rule in that the rule, when interpreted in light of the Charter, gives the Security Council authority which, in effect, is almost as extensive as the rights of states in the nineteenth century. These rights allowed the stronger powers to impose, in the form of treaties, their will upon the weaker states. This imposition of treaties followed the practice of the Congress of Vienna which allowed the imposition of treaties without the actual consent of states.

The tension that has accompanied the newer rule's development is still apparent. Many dissatisfied states wish to expand the rule further at the cost of restricting even more the principle of pacta sunt servanda 1013 by invalidating treaties which are imposed by non-military force.


[1]International law has fully endorsed the universal moral condemnation of war and has translated the latter into the foremost legal obligation of states . . . . International law has created a vast network of treaties and arrangements, as well as an elaborate institutional framework designed to prevent war.

Id.

It is also of importance that such democratic principles of classic international law which have been inherited by contemporary international law (respect of State sovereignty, equality of states . . . ) have considerably developed in line with the progressive development of international law as a whole.

Substantial changes have taken place in all parts of international law: law of treaties . . . .

. . . . Classic international law was in many parts a law imposed . . . . The legal foundation of contemporary international law is the agreement of States resulting from the harmonization of their wills.


1013. Pollack in 1884, warned against the acceptance of rules which, in fact, have not been recognized by the international community.

But this . . . leaves it an open question whether ius gentium really coincides with ius naturale. There may possibly be rules that deserve to be recognized by all mankind, but in fact are not. . . .

Statesmen have analyzed the existing rule against imposed treaties, but have not fully recognized the role of the rule in managing interstate conflict. They have insisted that the rule be broadened without realizing its potential as a disruptive force, especially in light of the absence of compulsory third party review, judicial or otherwise.

The evidence also indicates that a validly imposed treaty, such as a peace treaty imposed on an aggressor state at the end of a war, should be interpreted restrictively in order to minimize any imposed obligation on the vanquished state. This interpretation is favored because the consent of the vanquished aggressor state is not freely given. This view accepts the proposition that freely given state consent should be the basis of treaty obligations, but that when it is not, any construction extending such obligations is to be restricted. This proposition is a narrow exception to the general principle that treaties should be interpreted in a broad and liberal manner.

C. Existing Problems With the Rule Against Imposed Treaties

Several problems exist regarding the current state of the rule against imposed treaties. Three significant problems that need to be resolved in order for the rule to be developed further are: 1) defining exactly what is entailed by the requirement that the initial aggression be referred to in determining which terms may be validly included in a treaty lawfully imposed on a state by a state acting in self-defense; 2) clarifying the effect of rendering void an invalidly imposed treaty, and specifically determining whether there should exist a right to a subsequent agreement protecting the rights of the aggrieved state and individuals under such treaties; 3) determining the most effective role of the Security Council in imposing agreements on states. The problem of determining the precise category of acts that would fall within the phrase "threat or use of military force" is significant. However, it goes beyond the area covered by this study. It would be a proper subject for a more detailed study of the 1974 General Assembly Declaration on Aggression which attempts to treat this problem and enumerate such acts.

Possible solutions to the three problem areas are essentially political decisions of the international community. As such, they represent the "further development" of international law, rather than a juridical determination of their merits.

1. "Reference to." Article 75 of the 1969 Vienna Convention on the Law of Treaties provides that a treaty may be imposed on an aggressor with reference to that state's aggression, and that a state may impose such a treaty with or without the participation of the United
Nations. Does reference to a state’s aggression here mean reference to the actual military positions, to other aspects of the aggression, or to the underlying causes?

It is important to establish what an imposed treaty under article 75 may provide. An imposed treaty might attempt to provide for several significant or strategic matters such as the transfer of territory, demilitarization of such territory, reparations or transit rights. The evidence presented within this study does not establish specifically the range of terms which a validly imposed treaty may contain. One view is that the provisions of the treaty ought to refer only to actual military aspects of the initial aggression, or perhaps only to the consequences of that aggression, such as, to the location of the aggressor’s troops within the attacked state, for example. Another view is that such a treaty ought to take into account all of the actual and immediate causes of aggression, for example, the existence of an unmarked border. It seems reasonable to favor the first view, that is, to limit a validly imposed treaty to dealing with the immediate consequences of the aggression in order to establish the ante quo. If the other solution is chosen, a state may be given too much discretion which may result in the imposition of an undesirably burdensome treaty. This, in effect, would have very little reference to the immediate causes of aggression and would lead to a new set of grievances on behalf of the aggressor state. Such a situation existed under the older rule and was a consideration in the development of the newer one.

2. "Void" Treaties and Subsequent Acts. Article 52 of the 1969 Vienna Convention characterizes all treaties falling within its terms as void. There is a need to define the exact consequences of such treaties. For example, the People’s Republic of China in its border dispute with the Soviet Union involving certain boundary treaties, and the Federal Republic of Germany and Czechoslovakia in their 1973 treaty, do not view the abrogated treaties as absolutely without effect. The People’s Republic of China appears to view the existing borders as lawful; both West Germany and Czechoslovakia have declared various rights of individuals, established under the “void” treaty, as remaining in effect. Both of these are examples of subsequent acts undertaken consistent with a “void” treaty, but voluntarily given present effect by the state against whom that treaty was imposed. There is an important difference between the two examples, however, giving rise to two categories of

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1014. It is suggested that states ought to continue to have the right to conclude these agreements outside of the United Nations structure, given the current state of the development, or lack of development, of the United Nations’ authority and responsibility in the interstate use of force.
subsequent acts. In the first category the acts recognized, such as the Chinese acceptance of the existing border, are characterized as "public". In the second category, the acts, such as the West German-Czechoslovakian declarations on individuals' rights, are best described as "private."

The difference between "public" and "private" acts often serves as the basis in civil law countries for recognizing the effects of an illegal act. Although this difference is not discussed here, it is suggested that a new formulation of the rule perhaps ought to allow an aggrieved state the right to declare at least some parts of an invalidly imposed treaty to be valid and binding. Evidence does not support the rule as formulated in article 52 which declares all coerced treaties to be void. Even if a treaty is invalid from its inception, the effects of some of its terms ought to be subject to continuing recognition from the date of the imposition. This continuing recognition would not establish new rights prospectively, but simply would observe rights contained or created under the original imposed treaty.

This suggested rule is not just a codification of existing practices for codification's sake. It is based upon the policy consideration of not imposing additional hardships on individuals or nations. For example, if Mr. X in State B is granted a divorce under the terms of a statute passed or adopted under the authority of a treaty imposed upon State B by State A, he ought not to find himself in the position of a bigamist when State B renounces the treaty and acts done under it, because of the unlawful use of military force in bringing about the agreement. An aggrieved state may believe that part, if not all of a settlement imposed upon it, nevertheless, may meet its standard of fairness in the context of both law and politics. Once a state is in a position to exercise its consent freely, it ought to be allowed to give continued recognition to as much of the existing situation as it finds suitable. Once the defective consent of a state is rectified, the underlying policy behind article 52 is satisfied since that policy seeks only to make actual state consent the basis of treaty obligations.1015

One argument against the above view is that it would be too difficult to specify as a general rule of international law which acts

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1015. Rozakis, The Law on Invalidity of Treaties, 16 ARCHIV DES VÖLKERRECHTS 151, 156 (1974). Rozakis argued that article 52 is subject only to "relative nullity" rather than "absolute nullity," since the interest protected is that of the coerced state and not a more general public interest. Id. at 170 n.38.

Dhokalia contended that international law is mature enough to avoid the acceptance of only a doctrine of absolute nullity. Dhokalia, Nullity or Invalidity of Treaties, 9 INDIAN J. INT'L L. 177, 192 (1969). "[E]very system of law has to some extent met the tension between nullity and the legal effects of unlawful acts." Id.
should be observed and which should not. Taking this problem into account, an alternative is a rule that would allow a state, when it is able to exercise free consent, to declare its intention to recognize certain acts that confer rights and benefits to it and to the former aggressor state. These might be categories of acts or specific acts such as those relating to marriage, divorce, inheritance or other acts which the state might determine to be consistent with its own view of fairness and national security. This recognition ought not to require a new agreement, but should be achievable through unilateral action. Thus, the acts in question would be recognized as lawful from the date of the invalidly imposed treaty. It would be the recognition of the subsequent consent of the aggrieved state that would give the necessary validity to acts already performed.

Even if the aggrieved state expresses no interest in preserving any of the effects of an imposed treaty, it may be best to uphold certain private acts undertaken in accordance with that treaty on the basis that not to do so would be inconsistent with minimum "due process", or recognized international human rights. However, there is a convincing objection to this position. There is little possibility of general international agreement on which rights and interests ought to be selected for special protection. In the area of international human rights, there is no current consensus as to which classes of rights should be regarded as fundamental.

3. The Role of the Security Council. This research has analyzed the rule against imposed treaties from a juridical and developmental perspective, rather than from the perspective of the United Nations' authority to utilize imposed treaties under its enforcement powers.

While the term self-defense might be broadly interpreted, in light of the 1975 Declaration on Aggression, as including anticipatory self-defense, article 52 nevertheless requires there be a prior threat or use of military force. Article 52 does not allow a state to impose a solution because it believes itself confronted with a mere threat to the peace. On the other hand, the Security Council does have such authority under article 39. The authority of the Security Council to impose agreements in cases of aggression and threats to the peace needs substantial study and clarification to determine its extent and to determine the necessity of relying upon the actual consent of states, a desirable element in normal bilateral treaty relations, but not necessarily as desirable for the development of a vertically organized international society.

4. Compulsory and Binding Third-Party Determinations. The
procedures for treating a claim of invalidity established by the 1969 Vienna Convention provide for compulsory jurisdiction of the International Court only if an issue is one of *jus cogens*. Thus it becomes important to determine whether the rule against imposed treaties under article 52 is most correctly construed as a *jus cogens* under article 53. Being such an important instance of the general prohibition against the use of force in international relations, a cardinal principle of the United Nations Charter, the rule itself becomes a cardinal mandate of treaty law. To the extent that states cannot act contrary to the rule in the exercise of their consent, the rule seems, on first impression, to meet the definition of a *jus cogens*. However, there is little consensus as to the criteria of *jus cogens*; drafters of the 1969 Vienna Convention were unable to enumerate them, and some denied that the rule contained in article 52 is a *jus cogens*. While this article does not answer the question of whether the new rule is a *jus cogens*, it is clear that the new rule defines the nature of the consent required to vary rules which are not *jus cogens*.

The need for binding and compulsory determination is often cited by writers analyzing a broad range of international law topics. An analysis of the procedures appropriate to the rule of imposed treaties is not provided in this research, but one observation may be offered: when such an analysis is made, all of international law and society will have moved toward a more permanent international peace.

D. Additional Suggestions: Further Clarifying and Developing the Rule

Additional suggestions may be made in two broad categories: first, further clarifying the existing documents in order to state more precisely the currently accepted rule; and second, further developing and refining certain aspects of the rule in order to increase its efficacy in controlling interstate conflict.

In clarifying the existing rule, there is a need to define "force" in article 52 of the Vienna Convention as "military force." The prohibition on states, in articles 52 and 75, as interpreted in light of the 1974 Declaration on Defining Aggression, is apparently coextensive with the article 51 right of self-defense as stated in the United Nations Charter. The Charter employs the term "armed attack." Interpreting the prohibition in article 52 as a prohibition against aggressive military force would

1016. See generally Rao, *Jus Cogens and the Vienna Convention on the Law of Treaties*, 14 INDIAN J. INT'L L. 362 (1974). Rao stated that the prohibition of use of force was suggested as a *jus cogens*, but it was opposed by two-thirds of the members of the International Law Commission. Id. at 375 & n.85.
help to avoid exaggerated definitions of the rule against imposed treaties by states relying on claims of illegal economic force. However, it would not necessarily preclude a treaty imposed after the preemptive use of force by a state which had been threatened with attack.

Ought the principle of state consent be expanded in order to make the rule against imposed treaties coextensive with the concept of unequal treaties, as that concept is expressed by some of its supporters? Such an interpretation would subject many treaties to a possible claim of invalidation since treaties are often concluded by parties of unequal strength. Most treaties contain technically unequal or non-identical rights and obligations. Quite often, these are merely the terms of an arms-length bargain. Even if they were not, such inequality is a fact of present international life; there is no practical way of avoiding it. Even municipal law systems recognize many analogous private contractual relationships. There is no value in creating a logical and internally consistent legal system which is precluded from ever applying its rules of conduct because of the disparity between the given nature of its subject matter and the rigidity of its demands.

Such an expansion of the rule could subject any treaty to a charge of being unequal, that is, an allegation that a treaty is invalid merely because the parties include a stronger state and a less powerful state, even when the strength of the more powerful state is not a causal factor in concluding the agreement. Moreover, such an expansion of the rule would also place the international community in the untenable position of having to decide a question of defining and applying the ambivalent and relational concept of force on an issue-by-issue basis. For example, the international community would have to decide the validity of economic force used in treaty practice by less-developed countries against militarily stronger parties. If such use of economic force were determined to be as unlawful as aggressive military force, presumably the right of self-defense would allow the developed states military recourse against lesser-developed states. If the right to use military force were denied, then the international community might witness a new gap between the law of war and the law of treaties. The law of treaties would prohibit both economic and military measures, while the law of war would not prohibit economic force.

Clarification of the existing rule could be implemented by having the International Law Commission suggest an appropriate amendment which would include a specific reference to the prohibition against treaties concluded under the threat or use of aggressive military force. Alternatively, the rule might be expressed in a resolution of the General
Assembly or Security Council. Such an amendment or instrument might read as follows:

(A) No international agreement shall be valid if a state is coerced to consent to that agreement by the threat or use of aggressive military force against that state.1017

(B) If such an international agreement is concluded, the aggrieved state may subsequently freely announce that it: 1) recognizes some or all of the rights held by individuals during the treaty’s imposition; or 2) recognizes the continued existence of other effects of the imposed agreement.

Both sections of the above proposed rule codify and crystallize the existing rule of international law. Section A treats the nature of the prohibited force, and Section B treats the existing law as to the effect of the proscribed agreement.

From a problem-solving perspective of controlling interstate conflict, it is useful to summarize the functioning of the traditional pre-Charter rule, the newer post-Charter rule, and the proposed rule. This can be done by emphasizing two distinct but interrelated aspects or stages of treaty practice: the conclusion of a treaty, and its subsequent denunciation.

The traditional rule did not invalidate a treaty because of the use of any force against a state in the treaty’s conclusion. International law did not permit a denunciation of a treaty for the reason that it was imposed. The actual consent of states was not required in the creation of binding international agreements.

The traditional rule did not tend to restrict the use of imposed treaties as a pretext for renewed hostilities. Rather, the traditional rule

1017. Whether or not the Secretary-General has or should have the authority to deny registration of an imposed treaty is not decided here. No such authority existed under the Covenant. 11 LEAGUE OF NATIONS OFF. J. 78 (1930). See generally Middlebush, Non-Recognition as a Sanction of International Law, 27 PROCED. AM. SOC’Y INT’L L. 40, 48 n.36 (1933). In 1930, Peru proposed that article 18 of the Covenant be amended so that the League Secretariat would not be permitted to register “any treaty of peace imposed by force as a consequence of a war.” The proposed amendment was not adopted. It read as follows:

tended to be used as a legal justification for sacrificing smaller and less powerful states in the name of world peace and *pacta sunt servanda*.

The existing rule invalidates a treaty because of the threat or use of military force against a state during the conclusion of the treaty. However, the effect of an invalidly imposed treaty is not clear. There is also confusion as to whether the existing rule includes treaties brought about by economic force, as well as other forms of unequal treaties. Further, the Security Council appears to have authority to impose a treaty in situations not strictly limited to acts of aggression. Finally, states are required to register all denunciations, including those based upon the new rule.

The newer rule, in conjunction with the present lack of third-party procedures, likewise does not discourage the use of imposed treaties as a pretext for renewed hostilities. Treaties imposed by military force are illegal. However, there is a great probability that some states may claim a broader rule to exist, thus putting additional stress on the existing fabric of international law and relations.

The proposed rule clarifies the existing substantive rule. It provides that the threat or use of military force, but *not* economic or political pressure, in the conclusion of treaties, vitiates such treaties. It excludes as a rule of law the broader doctrine of unequal treaties. Thus the proposed rule attempts to avoid the tension with which the existing rule needlessly strains the international legal system. Moreover, the proposed rule provides a legal guarantee.

The aforementioned suggestions are intended to provide additional legal guarantees in order to protect all states, but especially smaller and less powerful states, by establishing beyond question that the Munich Treaty of 1938 is not a juridically acceptable model for states acting individually or collectively to control interstate conflict. An exaggerated view of *pacta sunt servanda*, which postulates blind adherence for the sake of some higher good, is not acceptable. Treaties need to become more viable politically in order to serve as an instrument ending hostilities and precluding the treaties’ use as a basis for a new military conflict. If the rules relating to imposed treaties were made clearer, there might be less likelihood of such treaties being enacted. Clearly formulated rules would foster a treaty-making process with a far better probability of maintaining peaceful relations.

Moreover, in establishing a clarified rule on imposed treaties, only

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a relatively minor political decision would be required to create a substantially more viable regime. Such a system would not guarantee a peace, but it would certainly further it.

E. Concluding Remarks

An effort has been made in this study to analyze as much evidence as possible regarding imposed treaties, but it would be an exaggeration to claim that all the evidence has been evaluated. However, the most significant data have been identified and analyzed. It is clear that the rules regulating imposed treaties are open to controversy and confusion. This research has attempted to analyze the evidence and to make it more understandable.

In light of the above comments and of the preceding analysis of doctrine, state practice, international legislation and jurisprudence, this study has ventured to offer several conclusions and suggestions. It has concluded that there exists a rule of treaty law best termed the rule against imposed treaties. This rule exists, but it is not free of controversy. Political decisions are needed to clarify the legal status of the rule and to develop it further. Such development would increase its usefulness in peacefully controlling interstate conflict. It respectfully is suggested here that the authors of this future development should assess proposals such as those outlined here, in order to improve the existing rule and to foster peaceful relations among states.
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