

AGORA: THE END OF TREATIES?

THE FALL AND RISE OF PEACE TREATIES

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When the United States terminated its seven-year occupation of Japan in 1954, it did so having signed a peace treaty.¹ By contrast, the United States tried, unsuccessfully, to persuade Hamid Karzai to sign a Bilateral Security Agreement² to accompany the drawdown of U.S. forces in Afghanistan. Even if Karzai had agreed to sign, the draft agreement bears much stronger resemblance to an alliance than to a peace treaty; it does not reference hostilities between the United States and Afghanistan, nor does it include any version of the term “peace treaty.”

The absence of peace treaties to conclude the wars in Afghanistan and Iraq is emblematic of a larger trend. In a recent article³ in *International Organization*, I show that the use of peace treaties to conclude interstate war has seen a dramatic decline since 1950. Approximately three-quarters of nineteenth century interstate wars were accompanied by peace treaties. This number drops to approximately forty percent for the twentieth century as a whole, and to a mere fifteen percent for interstate wars after 1950. Like declarations of war⁴ that used to accompany the start of conflict, peace treaties may be falling into desuetude.

Peace treaties serve important roles in international law and politics. Previous research⁵ has shown that wars that end in peace agreements are significantly more likely to see durable peace than wars ending without such agreements. Peace treaties eliminate ambiguity as to whether two countries remain at war. Peace treaties also allow for the normalization of relations. For example, Russia and Japan have certainly been hindered by the absence of a post-World War II peace treaty that would have normalized their relations.⁶

Peace Treaties in Historical Context

The first known peace treaty is the Treaty of Qadesh, concluded between Ramses II and the Hittite Emperor Hattusilis, in 1269 B.C.E. Ruins of pillars that still stand today marked the conclusion of peace treaties in Ancient Greece and Rome. Peace treaties have historically been surrounded by ritual, from the *osculum pacis* (“kiss of peace”) given in the Middle Ages to the ceremonial handshake observed today.

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¹ Treaty of Peace with Japan, Sept. 8, 1951, 1832 UNTS 42.

² Pre-decisional Document on Security and Defense Cooperation Agreement, U.S.-Afg., July 25, 2013.

³ Tanisha M. Fazal, *The Demise of Peace Treaties in Interstate War*, 67 INT’L ORG. 695 (2013).

⁴ Tanisha M. Fazal, *Why States No Longer Declare War*, 21 SECURITY STUD. 557 (2012).

⁵ VIRGINIA PAGE FORTNA, PEACE TIME: CEASE-FIRE AGREEMENTS AND THE DURABILITY OF PEACE (2004).

⁶ Period After Negotiations of the Normalization of Japanese-Soviet Relations, Joint Compendium of Documents on the History of Territorial Issue between Japan and Russia, MINISTRY OF FOREIGN AFFAIRS OF JAPAN.

While kisses and pillars were especially important in eras of limited literacy, modern peace treaties are written documents that describe a contract between belligerents to cease hostilities and resolve issues under dispute. Peace treaties differ from cease-fires, armistices, and truces in that they are meant to punctuate a war fully rather than to mark a temporary halt in fighting. Peace treaties also differ from UN Security Council (UNSC) resolutions meant to terminate wars, such as those issued after the Iran-Iraq and 1990 Persian Gulf Wars. Peace treaties are mutually agreed to by belligerents, while UNSC resolutions are handed down from an international body.

Why Are Peace Treaties in Decline?

There are several possible explanations for the decline of peace treaties, from the rise of the United Nations to the purported end of war itself. In the remainder of this essay, I discuss the logic behind and provide an empirical assessment of each.

The Rise of the United Nations

A focus on the United Nations provides two possible explanations for the decline of peace treaties. First, UNSC resolutions may substitute for peace treaties. Second, UN member states may be averse to concluding peace treaties in wars not deemed legal under the UN system.

While the correlation between the UN era and the demise of peace treaties in interstate war is undeniable, further investigation does not support claims that the United Nations itself, or membership more generally, account for this trend. In a regression analysis of twentieth-century wars that controls for the regime type of states, territorial exchange, and major power conflict, among other variables, UN membership is not a significant predictor of concluding a peace treaty (indeed, if anything, the results suggest that UN members may be more and not less likely to conclude peace treaties than non-UN members). Coding pertinent UNSC resolutions as peace treaties in this same analysis also does not change the results; it does not appear that these resolutions systematically substitute for peace treaties.

Changing Trends in War Outcomes

Wars today may be increasingly likely to end in foreign-imposed⁷ regime change⁸ and draws,⁹ and may be decreasingly likely to conclude with the conquest of an entire state. Any of these changes could translate into a corresponding shift in the incidence of peace treaties. Wars ending in regime change may not require a peace treaty but, instead, may be more likely to see a new alliance. Perhaps peace treaties tend to be preferred—and written—by victors, in which case an increase in draws could lead to a decrease in peace treaties. And certainly, wars that end in state death¹⁰ would see little need for a peace treaty.

As it turns out, neither foreign-imposed regime change nor the achievement of a decisive victory by one side in a conflict is related to the conclusion of a peace treaty. Less surprisingly, wars that end in the elimination of one party to the conflict are 50 percent less likely to be accompanied by a peace treaty than are wars

⁷ JOHN M. OWEN, THE CLASH OF IDEAS IN WORLD POLITICS: TRANSNATIONAL NETWORKS, STATES, AND REGIME CHANGE, 1510-2010 (2010).

⁸ Alexander B. Downes & Jonathan Monten, *Forced to be Free?: Why Foreign-Imposed Regime Change Rarely Leads to Democratization*, 37 INT'L SECURITY 90 (2013).

⁹ Virginia Page Fortna, *Where Have All the Victories Gone? Peacekeeping and War Outcomes*, Paper prepared for Presentation at the Annual Meetings of the American Political Science Association (Aug. 2009).

¹⁰ TANISHA M. FAZAL, STATE DEATH: THE POLITICS AND GEOGRAPHY OF CONQUEST, OCCUPATION, AND ANNEXATION (2007).

that do not end in a state death. But with the decline of state death since 1945, this finding cannot explain the demise of peace treaties.

Territoriality and War

One of the many purposes a peace treaty may serve is as a deed for territory exchanged in war. Thus, wars in which territory changes hands may be especially likely to be accompanied by peace treaties. Many scholars have argued¹¹ that there has been an emerging norm against territorial conquest.¹² A decline in wartime forcible territorial exchanges could therefore translate into a decline in peace treaties. Indeed, wars in which territory is exchanged are approximately 40 percent more likely to be concluded with peace treaties compared to wars in which territory does not change hands. If territory has become a less acceptable commodity in war, peace treaties may not be as useful as they were previously.

Democracy and the Decline of (Short) Wars?

The rise of democracy could also explain the decline of peace treaties. Democratic peace theory¹³ tells us that democracies are unlikely to fight each other, even though democracies may not be any less warlike than non-democracies, on average. Peace treaties resonate with basic democratic values such as contractual agreement and transparency. If democracies are less likely to participate in modern wars, perhaps this is why we see fewer peace treaties.

Or perhaps it is not democracy, but power, that explains the demise of peace treaties. While the claim that all war is on the decline¹⁴ has taken criticism¹⁵ recently,¹⁶ the finding that major powers have not gone to war with each other since World War II¹⁷ is indisputable. Insofar as major powers are reluctant to conclude peace treaties with considerably weaker states, the absence of major power war could explain (at least in part) the decline of peace treaties.

Another alternative explanation for the demise of peace treaties emerges from the bargaining theory of war.¹⁸ Longer wars are likely to be characterized by particularly thorny issues and, thus, may be very unlikely to be accompanied by peace treaties. If wars have become longer, perhaps peace treaty use has declined as a result.

Empirical analysis does not support claims regarding a relationship between democracy and war duration on the one hand, and the use of peace treaties on the other. These results are not surprising in that there are few democracy-on-democracy wars, which would be the most likely to result in peace treaties; moreover, the democratic peace is not claimed to be limited to a particular time period, while peace treaties have clearly been on the decline. Additionally, there are many examples of protracted conflicts that have been accompanied by peace treaties. The border war that began between Eritrea and Ethiopia in 1998, for example, lasted nearly 1,000 days—well more than double the average duration of interstate wars—and ended with a peace treaty in the 2000 Algiers Agreement.

¹¹ BOAZ ATZILI, *GOOD FENCES, BAD NEIGHBORS: BORDER FIXITY AND INTERNATIONAL CONFLICT* (2012).

¹² Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215 (2003).

¹³ Michael W. Doyle, *Liberal Internationalism: Peace, War and Democracy*, NOBELPRIZE.ORG (June 22, 2004).

¹⁴ STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (Reprint ed. 2012).

¹⁵ Anita Gohdes & Megan Price, *First Things First: Assessing Data Quality before Model Quality*, 57 J. OF CONFLICT RESOL. 1090 (2013).

¹⁶ DOUGLAS P. FRY, *WAR, PEACE, AND HUMAN NATURE: THE CONVERGENCE OF EVOLUTIONARY AND CULTURAL VIEWS* (2013).

¹⁷ JOHN MUELLER, *RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR* (2010).

¹⁸ James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379 (1995).

It does appear, however, that major powers are significantly more likely to conclude peace treaties with each other than with weaker states. With the decline in major power war, we have thus found an additional piece of the puzzle of why peace treaty use has been declining.

The Unintended Consequences of Codification

Of all the factors discussed above, only two—territorial exchanges during war and major power conflict—seem to bear a relationship to peace treaty use. These two factors, though, offer only a very limited explanation for why peace treaties have been on the decline. A fuller explanation must invoke the history and architecture of the law of armed conflict itself.

One of the great accomplishments of the international community in the past century has been the development of a robust, but still growing, body of codified international humanitarian law¹⁹ (IHL). The first codified laws of war, such as the 1856 Declaration of Paris Respecting Maritime Law,²⁰ were designed to make it easier for belligerents to prosecute war by, for example, having very generous standards for which goods could be considered contraband in war. By the turn of the twentieth century, however, the tenor of IHL had changed dramatically. Since then, and through today, the major focus of IHL has been on protecting victims of war, particularly civilians.²¹

As IHL has developed over time, the standards for compliance have risen. And although many, if not most, militaries make good faith efforts to comply with these standards, doing so has become increasingly challenging. This is true even for the best-resourced militaries in the world, such as the United States and its NATO allies. For example, the standard set by the ICTY's judgment in *Gotovina*,²² which rules that a five percent error rate in artillery targeting is sufficient to make an attack illegal, is an historically very high one. Given the increased difficulty of complying with international humanitarian law, states may have opted out of the formalities of war—such as peace treaties—as a strategy to create some ambiguity as to the applicability of IHL.

From a legal perspective, the scope and applicability of IHL are clear. According to Common Article 2 of the 1949 Geneva Conventions, applicability extends to “all cases of declared war or of any other armed conflict.” With one exception, however: these terms are intentionally vague.²³ Declarations of war seem to have gone out of style in the same way that peace treaties have. War itself is a notoriously difficult concept to define, as is “armed conflict.”²⁴ In concluding a formal peace treaty, states would eliminate any ambiguity as to the nature of their previous activities and the application of IHL to them. By instead labeling their behavior “police actions,” “counterterrorism,” or “humanitarian intervention,” states can at least argue the applicability of IHL.

Two examples help illustrate this point. In 1900, several Western states plus Japan engaged in a “Relief Expedition” as a response to the Boxer Rebellion. Chinese paramilitaries, Boxers, had attacked Western and Japanese legations and were besieging their personnel. Every single member of the Relief Expedition had just signed the Third 1899 Hague Convention with Respect to Laws and Customs of War on Land. And every

¹⁹ *Treaties, States Parties and Commentaries: By Topic*, INT'L COMM. OF THE RED CROSS.

²⁰ *Declaration Respecting Maritime Law*, Mar. 30, 1856, INT'L COMM. OF THE RED CROSS.

²¹ *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, INT'L COMM. OF THE RED CROSS.

²² *Prosecutor v. Ante Gotovina & Mladen Markac*, Case No. IT-06-90-A, Judgement, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

²³ *REPORT ON THE SEVENTEENTH INTERNATIONAL RED CROSS CONFERENCE*, Stockholm, Sweden (Aug. 1948).

²⁴ *FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW*, INT'L LAW ASS'N, THE HAGUE CONFERENCE, USE OF FORCE (2010).

single member of the Relief Expedition (with the exception of the Japanese) committed gross violations of the 1899 Hague Conventions. The Relief Expedition left a trail of rape, pillage, and plunder en route to Beijing. At the conclusion of the conflict, which the Relief Expedition won handily, there was discussion of how to settle terms with the Chinese. While there was some negotiation involved, what was clear was that the settlement would not be codified in a peace treaty. Instead, the Relief Expedition settled on a “Final Protocol,” which was explicitly not meant to be a peace treaty but instead “served the purpose of denying the legal existence of war.”²⁵

More recently, an Indian misstep in the 1971 Bangladesh War illustrates off-the-equilibrium path behavior that refraining from signing a peace treaty typically allows states to avoid today. India and Pakistan signed a peace treaty, the Simla Agreement, in 1972. According to the Third 1949 Geneva Convention (ratified by both India and Pakistan), prisoners of war (POWs) had to be repatriated directly following the cessation of hostilities (Article 118). India, however, continued to detain over 90,000 Pakistani prisoners, arguing that the Bangladeshis had the right to try these prisoners for war crimes. After a year of fruitless talks led to a breakdown in negotiations, Pakistan brought the case before the International Court of Justice (ICJ). Within three months, India invited Pakistan to resume talks, and they quickly resolved all but a few hundred of the most egregious of the POW cases.

India’s quick concession in the face of a trial at the ICJ was exactly the outcome the Pakistanis hoped to achieve. The fact that the 1971 war had begun formally (with mutual declarations of war) and ended formally (with a peace treaty) left the Indians without a legal leg to stand on. India could in no way argue that the Geneva Conventions did not apply, precisely because it had already admitted to being in a state of war with Pakistan.

Systematic analysis of the relationship between the proliferation of codified IHL and the propensity of states to sign peace treaties (or not) lends significant support to this line of argument. An analysis of all pairs of belligerents in all interstate wars from 1816–2007 shows that wars such as the Korean War, which ended just after the creation of the 1949 Geneva Conventions, were 50 percent less likely to be accompanied by peace treaties compared to wars like the Crimean War, which ended just as the first laws of war were being codified. A finer-grained look at the data show that belligerents in the 75th percentile for IHL treaty ratification are 60 percent less likely to conclude peace treaties when compared to belligerents in the 25th percentile. Moreover, states that violate IHL during the course of a conflict—and, in particular, those laws that contain within them provisions for punishment and restitution, such as the 1954 Hague Protocol for the Protection of Cultural Property²⁶—are significantly less likely to conclude peace treaties compared with their more compliant counterparts.

The Irony of IHL?

This analysis suggests a puzzling tension between state commitment and behavior. It is states, after all, that design IHL treaties. Their representatives draft and negotiate the language, and then decide whether and when to sign, ratify, and implement the treaties into national law. Why would states sign treaties to which they do not intend to adhere?

There is a large and growing literature in political science on the varieties of compliance with international law.²⁷ Rather than focusing on issues of selection²⁸ or signaling,²⁹ however, I suggest a different mechanism at

²⁵ FRITZ GROB, *THE RELATIVITY OF WAR AND PEACE: A STUDY IN LAW, HISTORY, AND POLITICS* (1949).

²⁶ *Protocol for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, May 14, 1954, INT’L COMM. OF THE RED CROSS.

²⁷ BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

work in this case. A cursory examination of the composition of delegations to the earliest IHL conferences reveals a very different demographic compared to those present at such conventions today. In particular, military personnel were often central to the drafting of early IHL treaties, but do not appear to play this same role today. Thus, modern IHL may have undermined its own cause by focusing on law-makers at the expense of law-takers.

The possibility that the development of modern IHL has hindered its application by disincentivizing states from signing peace treaties is a troubling one. But just as states may have stopped signing peace treaties in order to create plausible deniability about their culpability for war crimes in interstate war, the use of peace treaties in civil war may be on the rise. Even controlling for the increasing number of civil wars, data from one study³⁰ show that peace treaty use in civil wars has seen a fifteen-fold increase since 1950 (civil war onset itself has tripled over the same period). Another³¹ study seeks to explain why peace treaty use in civil wars has more than doubled over the past two centuries.

Why would the use of peace treaties decline in interstate war but increase in civil war? It may well be that the proliferation of codified IHL has very different effects depending on the type and nature of conflict. States may seek to avoid the obligations of IHL. But rebel groups in civil wars—particularly those seeking international legitimacy,³² such as secessionist groups—may view the proliferation of codified IHL as an opportunity to engage with the international community. By publicizing their compliance with IHL, these groups seek to signal their intent and capability to be good citizens of the international community, should they be admitted to the club.³³ Thus, we see groups such as the Zapatistas³⁴ inviting the International Committee of the Red Cross to monitor their behavior during the conflict, and the success of NGOs like Geneva Call³⁵ in persuading non-state actors to sign deeds of commitment to stop using land mines and child soldiers.

These opposite trends in peace treaty usage in interstate and civil wars generate important conclusions for the drafters of international humanitarian law. First, belligerents engage very strategically with IHL. Even if they mean to comply, they prefer vagueness as to their obligation. Thus, loopholes in existing and new laws must be considered carefully. Second, IHL has multiple audiences. Even though states have drafted and ratified IHL, non-state actors seeking legitimacy have increasingly sought to engage with IHL. The international community is thus presented with an important opportunity in its dealings with these non-state actors. At a time when the international community has the most leverage over legitimacy-seeking non-state actors, it may be best poised to engage with these groups to mitigate the human costs of war.

²⁸ Jana von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, AM. POL. SCIENCE REV. 611 (2005).

²⁹ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 1935 (2002).

³⁰ MICHAEL W. DOYLE & NICHOLAS SAMBANIS, *MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS* (2006).

³¹ Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AJIL 373 (2006).

³² Hyeran Jo & Catarina P. Thomson, *Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts, 1991-2006*, 44 BRIT. J. OF POL. SCIENCE 323 (2014).

³³ Tanisha M. Fazal & Ryan D. Griffiths, *Membership Has its Privileges: The Changing Benefits of Statehood*, 16 INT'L STUD. REV. 79 (2014).

³⁴ General Command of the EZLN, *Today we say 'enough is enough!' (Ya Basta!)*, First Declaration from the Lacandon Jungle, EZLN's Declaration of War (1993).

³⁵ *Id.*