

Neutral in the face of coercion and force?

Challenges under international treaty law for a peaceful solution to the conflict in Ukraine

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Abstract

A negotiated solution to the Ukraine conflict suggests the conclusion of a treaty under international law (a “peace treaty”), which raises several questions from the perspective of the prohibition of the use of force and annexation under international law, as well as a possible violation of *ius cogens*. Various doctrinal solutions, as they have appeared in the literature, are discussed and evaluated as to their feasibility. Finally, this contribution offers an alternative approach through ‘law and economics’, whereby apparent contradictions between the law of treaties and the law of neutrality might be reconciled.

I. Introduction

Discussion of the Russia-Ukraine conflict is polarised, not only from the perspective of the politics or law of neutrality discussed in this volume: from the questionably motivated call for Ukraine to abandon its self-defence, coming from (often no longer quite) fringe parties on both sides of the spectrum, Donald Trump’s and J.D. Vance’s public dressing down of Ukrainian President Volodymyr Zelenskyy on live television, to the appeasement of Vladimir Putin, dangling the carrot of a peace process in front of the international community.

Any future peace treaty will be primarily shaped by the geopolitical interests of the various actors and thus be water on the mills of the school of classical realism in international relations.¹ Yet, its conclusion

1 See generally Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 7th ed. (2005).

– as Stefan Oeter equally demonstrates in his contribution in this volume – nonetheless calls into question a number of premises of international law proclaimed in the classroom, textbooks, and commentaries: the prohibition of the use of force, the prohibition of annexation, and *ius cogens* – all of which overlap with or even make obsolete the classical laws of neutrality.² One is still left wondering to what extent third states must remain neutral towards a treaty in light of coercion and force, accepting the weaker party's surrender and bowing to the interests of the strongman.

This contribution begins with a brief shift of scenery, transporting the reader to Northern Italy almost half a millennium prior to any discussion of a peace agreement between Russia and Ukraine, in order to illustrate that the scenario discussed here – of annulment of an international treaty due to coercion and force – is not necessarily purely hypothetical, at least historically (II.). This is followed by an overview of the provisions of the Vienna Convention on the Law of Treaties (VCLT)³ relevant to a peace treaty in the Russia-Ukraine conflict (III.), before a number of solutions to the resulting dilemma are presented – some of them realistic, others more far-fetched (IV.). Finally, a 'law and economics' approach⁴ is offered as an alternative solution (V.) before the contribution concludes (VI.).

II. The Peace of Madrid of 1526

On 24 February 1525, the King of France, Francis I of the House of Valois-Angoulême, was taken prisoner by his arch-rival, Charles V of the House of Habsburg, at the Battle of Pavia. In exchange for his release, Charles V demanded not only the renunciation of Flanders and Artois, but also the surrender of the Duchy of Burgundy, to which Francis I finally agreed in the Peace of Madrid on 14 January 1526. He was released, but had to leave two of his sons as hostages in Castile as a guarantee.

This did not prevent him from immediately declaring the Peace of Madrid null and void upon his release, citing coercion as the grounds. In addition, Francis I presented a notarised letter of protest, in which he had already declared all concessions made under duress to be invalid, as a precautionary measure prior to accepting the Peace of Madrid. Francis

2 See the contributions by Hilpold and Janik in this volume.

3 Vienna Convention on the Law of Treaties, 23.5.1969, 1155 UNTS 331.

4 See generally Richard A. Posner, *Economic Analysis of Law*, 9th ed. (2014).

I also found an ally for this legal opinion in Medici Pope Clement VII, with whose support he, together with Francesco Sforza – who had claims to Milan – as well as the cities of Venice and Florence, opposed Charles V's monopoly of power with the League of Cognac.

The Italian Wars thus continued until the so-called Ladies' Peace of Cambray of 1529, concluded between Margaret of Austria and Louise of Savoy, which largely confirmed the Treaty of Madrid, albeit with the significant change that the Duchy of Burgundy was now awarded to Francis I.

Could this episode in the relations between the Houses of Habsburg and Valois⁵ be repeated in the 21st century? What if a successor to Zelenskyy in the office of Ukrainian president decides to invoke Article 51 or 52 of the VCLT as a ground for invalidating a possible peace treaty? Could this ultimately avert an initial loss of territory?

III. The Vienna Convention on the Law of Treaties as a limit to peace treaties

Both Russia and Ukraine are parties to the VCLT, which regulates the application of international treaties, from their acceptance to their dissolution due to defects in their conclusion, or termination due to disturbances in their performance.

Articles 51 and 52 VCLT concern situations in which consent to an international treaty is obtained by coercion against a state representative – with the classic example of the euphemistic ‘offer he can’t refuse’ featuring in the movie *The Godfather* – or by the use or threat of force against a state. Such consent shall have no legal effect; the treaty is void *ab initio* and is dissolved *ex tunc*.⁶ These provisions are a logical consequence of the general legal principle of law *ex iniuria ius non oritur*: law cannot arise from injustice.⁷

5 For the events and their assessment in historiography, see Arno Strohmeyer, *Peace Treaties in Historical Perspective: The Perception of the Peace of Madrid (1526) in German Historiography*, in Heinz Duchhardt & Martin Peters (eds.), *Calculation – Transfer – Symbol: European Peace Treaties of the Pre-Modern Era*, Publications of the Institute of European History Mainz, Supplement Online 1 (2006), p.132.

6 Cf. Oliver Dörr, *Use of Force, Prohibition of*, in *Max Planck Encyclopedia of International Law* (June 2013), para. 32.

7 See Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*,

Regardless of this, another provision of the VCLT could still stand in the way of a peace treaty between Russia and Ukraine: the existence of a peremptory norm of international law, a so-called *ius cogens* norm. According to Article 53 of the VCLT, '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.

The customary international law of state responsibility also gives rise to an obligation on the part of the entire international community not to recognise, or further contribute to a situation that is contrary to a peremptory norm of international law.⁸ This precludes any neutral stance – legal or political – in the face of coercion and force.

Even aside from these rules of treaty law, the same result could in fact be derived from the primacy of Article 103 of the UN Charter,⁹ namely that a subsequent treaty between individual Member States of the United Nations must not lead to a departure from the prescriptive norm of Article 2(4) of the UN Charter.

A. Prohibition of force

Article 2(4) of the UN Charter codifies the prohibition of the use of force under international law, in the words of the International Court of Justice (ICJ) in the *Armed Activities* case, as a 'cornerstone'¹⁰ of international law: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'¹¹ Despite questioning voices in the literature,¹² the prohibition of force is generally accorded the status *ius cogens*.¹³

2011, p. 320; Gregory Fox, A Legal Framework for a Russia-Ukraine Peace Agreement, EJIL:Talk!, 19 December 2024, available at: <https://www.ejiltalk.org/a-legal-framework-for-a-russia-ukraine-peace-agreement/>.

⁸ See Art. 41 ASR.

⁹ Cf. n. 28.

¹⁰ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 168, p. 223, para. 148.

¹¹ German language version according to BGBl. Nr. 120/1956.

¹² See James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 *Michigan Journal of International Law* (2011), pp. 215–257.

¹³ See *Yearbook of the International Law Commission*, 1966, Vol. II, UN Doc. A/CN.4/SER.A/1966/Add.1, p. 247.

Attempts at interpreting the wording of Article 2(4) of the UN Charter restrictively, in order to exclude individual circumstances or generate exceptions outside the UN Charter, have proven unsuccessful¹⁴. To the contrary, NYU Professor Thomas M. Franck even described the prohibition as an 'idiot rule': 'It says, in substance, that states may not initiate the use of armed force against another state.'¹⁵ States must therefore refrain from using military force against other states.¹⁶

There is therefore no further need for interpretation regarding the prohibition of force – unlike, for example, the question of an armed attack as a prerequisite for legitimate self-defence.¹⁷ Wherever military force or actions tantamount to it have been exercised against another state or on its territory, Article 2(4) of the United Nations has been violated.

The principle that forcible annexations of territory are withheld recognition was already formulated in 1932 by then US Secretary of State, Henry L. Stimson, in the doctrine that came to bear his name with regard to Japan's annexation of Manchurian China.¹⁸ Following the Briand-Kellogg Pact of 1928,¹⁹ this paved the way for the development of law towards the prohibition of force, as found today in the UN Charter, and therefore makes the annexation of foreign territory a prime example – or, as the ICJ stated in its advisory opinion on the construction of the wall in the

14 See Simon Chesterman, *The Scourge of War: Humanitarian Intervention and the Prohibition of the Use of Force in the UN Charter*, in id. (ed.), *Just War or Just Peace? Humanitarian Intervention and International Law* (2002), p. 50 with further references.

15 Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990), p. 75.

16 Although the concept of the use of force in international law primarily refers to military action, it also encompasses other measures of comparable outcome, provided that they are equivalent in scale and effects to the use of military force, such as deliberately causing an environmental disaster in another State or a cyber operation with physical consequences.

17 See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits), I.C.J. Reports 1986, 14, pp. 103–104, para. 195.

18 See Quincy Wright, *The Stimson Note of January 7, 1932*, 26(2) *American Journal of International Law* (1932), 342.

19 Treaty between the United States and other Powers providing for the Renunciation of War as an Instrument of National Policy, 27.8.1928.

Palestinian territories, ‘a corollary’ – of the prohibition of the use of force.²⁰ Of course, this also has an impact on the exercise of neutrality.²¹

In addition to the use of force, Article 2(4) of the UN Charter also prohibits the threat of force. This threat may be either explicit or implicit, arising from circumstances such as the mobilisation of troops or military manoeuvres on the border of another state.²² Clearly, this also includes the prospect of sustained combat operations in the event of failure to meet certain demands.²³

B. Legal consequences for peace negotiations

At first glance, subsequently terminating a peace treaty that was concluded in full awareness of the limitations set by coercion and the use of force would appear to contradict the principle of *pacta sunt servanda*, which stands at the heart of the VCLT: agreements must be abided by. After all, according to the wording of Article 26 of the VCLT, this principle also includes the principle of good faith, meaning that concluding a treaty with the intention of later declaring it null and void would violate the general legal principle of law of *venire contra factum proprium*.

However, the possibility of raising the defence of forfeiture in Article 45 of the VCLT clearly excludes Articles 51 and 52 of the VCLT,²⁴ as the United Nations International Law Commission (ILC) has clearly stated in its explanations of the draft text: ‘[T]he Commission did not think that the principle [that a party is not permitted to benefit from its own inconsistencies] should be applicable at all in cases of coercion of a representative under Article [51] or coercion of the State itself under Article [52].’²⁵ Incon-

20 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, 171, para. 87.

21 See the contributions by Hilpold and Janik in this volume.

22 See Christian Tams, *Article 2(4)*, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, 4th ed. (2024), pp. 346–347, para. 110.

23 See *ibid.*, p. 345, para. 108.

24 See Marcelo Kohen & Sarah Heathcote, *Article 45*, in Olivier Corten & Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), 1074, para. 29.

25 Yearbook of the International Law Commission, 1966, Vol. II, p. 239. See With regard to state practice, apparently a different opinion: Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, 2011, p. 329. However, this overlooks

sistency or bad faith therefore, cannot be invoked in relation to the treaty in the case of coercion against state representatives or the use of force against the state itself.

Conversely, due to the logical reversal of this idea in Article 69(3) of the VCLT, as the aggressor, Russia could never invoke the invalidity of a treaty that it itself had procured through coercion.²⁶ Concerns regarding the stability of international relations or existing peace treaties were not taken into account when discussing the exceptions in Articles 51 and 52 of the VCLT, during the negotiation of the VCLT.²⁷

On the question of whether at least individual passages of the treaty could be exempted from invalidity and separated from the treaty – as Article 44 of the VCLT allows in principle – the ILC agreed that in the case of coercion against a representative of a state or use of force against the state itself, there are compelling reasons to consider the treaty null and void in its entirety:

“The Commission considered that where a treaty has been procured by the coercion either of the State or of its representative, there were imperative reasons for regarding it as absolutely void in all its parts. Only thus, in the opinion of the Commission, would it be possible to ensure that the coerced State, when deciding upon its future treaty relations with the State which had coerced it, would be able to do so in a position of full freedom from the coercion.”²⁸

In the opinion of the ILC, this was the only way to ensure that a State could freely shape its future treaty relations.

As regards the cessation of hostilities on the part of Russia which will be regulated in any peace treaty, this could only be considered declaratory un-

the ‘self-contained regime’ created by Article 42 of the VCLT concerning the invalidity and termination of treaties.

26 Cf. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 646, para. 14.

27 See Kohen & Heathcote (note 23), 1074, para. 30; Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), p. 321.

28 Yearbook of the International Law Commission, 1966, Vol. II, pp. 238-239. With regard to those standards that are already established under customary international law, there is apparently a difference of opinion: Kirsten Schmalenbach and Alexander Prantl, *How to End an Illegal War?*, *Völkerrechtsblog*, 21.4.2022, available at: <https://voelkerrechtsblog.org/how-to-end-an-illegal-war/>.

der the customary international law of state responsibility, which includes the obligation to cease acts in violation of international law.²⁹

Even after the violation has ceased, the ILC agreed in their explanations that a treaty once tainted by the use of force could not be remedied:

“Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio*.”³⁰

A legal malaise due to coercion or use of force remains attributed.

C. Assessment

Consequently, any peace agreement resulting from the use of force and coercion, or that entails the recognition of an annexation – i.e., without the full restoration of Ukraine's pre-2014 borders – is null and void.³¹ The fact that Russia, as the aggressor state, has indisputably violated Article 2(4) of the UN Charter was already established by an overwhelming majority of the UN General Assembly at its emergency meeting on 2 March 2022.³²

29 See Art. 30 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), *Yearbook of the International Law Commission* (2001-II), 20 (hereinafter: ASR). Cf. Schmalenbach & Prantl (n. 27).

30 *Yearbook of the International Law Commission*, 1966, Vol. II, p. 247.

31 Cf. United Nations General Assembly Resolution ES-11/4, *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*, 13 October 2022, UN Doc. A/RES/ES-11/4.

See also Florian Kriener & Anne Peters, *Legal Limits for UNSC Action on Peace in Ukraine*, EJIL:Talk!, 8 April 2025, available at: <https://www.ejiltalk.org/legal-limits-for-unscc-action-on-peace-in-ukraine/>; Vishchyk & Pizzi (note 30); Different view: Felix Herbert, *Territorial Concessions to the Aggressor: (In-)Validity of a Prospective Peace Treaty Between Russia and Ukraine?*, Verfassungsblog, 6 January 2025, available at: <https://verfassungsblog.de/territorial-concessions-to-the-aggressor/>. Herbert refers to the Lusaka Ceasefire Agreement (1999) and the Minsk II Agreement as counter-examples (similarly Schmalenbach & Prantl, n. 27). Ceasefire agreements are, strictly speaking, not treaties under international law (see Section IV.C.), and the Minsk II Agreement constitutes a political commitment. Moreover, the argument that nullity would allow the aggressor to remove territorial settlements from treaty regulation appears unconvincing.

32 See United Nations General Assembly Resolution ES-11/1, *Aggression against Ukraine*, 18 March 2022, UN Doc. A/RES/ES-11/1.

For third countries, the *ius cogens* status of the prohibition of force would also mean that even annexations incorporated in a possible peace treaty may not be recognised, nor may any form of support be provided to maintain the illegal situation.³³ In any case, no rights or obligations may be established in relation to this territory.³⁴ Thus, there is also no ‘neutrality under international treaty law’ regarding the subject matter of the treaty.

IV. Ways out of the dilemma

Why even hold peace talks if it is impossible to conclude a treaty during ongoing hostilities and occupation, or following the annexation of territory? A whole series of scenarios have been discussed in the literature, ranging from somewhat realistic to hypothetical and far-fetched.

A. Ending the use of force and returning annexed territories

Russia could, for a legal second, cease all hostilities and withdraw from all occupied and annexed territories (and subsequently have Ukraine ‘voluntarily’ cede territories³⁵). Given Russia’s territorial claims, however, this would hardly be conceivable as anything more than a circumvention of the rules. In practice, a withdrawal of Russian troops seems unlikely.

B. Application of the Vienna Convention on the Law of Treaties

Insofar as the scope of application of the VCLT only refers to written agreements concluded between States, an oral treaty or the transfer of the territories claimed by Russia to an international organisation for administration, subsequently ceded to Russia or Ukraine, could be considered. Similarly, both states could agree to terminate the VCLT before concluding

33 Cf. Maksym Vishchuk & Jeremy Pizzi, *Compromises on Territory, Legal Order, and World Peace: The Fate of International Law Lies on Ukraine’s Borders*, Just Security, 6 October 2023, available at: <https://www.justsecurity.org/89216/compromises-on-territory-legal-order-and-world-peace-the-fate-of-international-law-lies-on-ukraines-borders/>

34 Cf. Vishchuk & Pizzi (n. 30).

35 Cf. Herbert (n. 32).

a peace treaty. The treaty does not contain a ‘sunset clause’³⁶ providing for continued validity beyond termination.

Apart from the problem already discussed of recognising a situation contrary to *ius cogens*, these are merely further ways of circumventing Articles 51 and 52 of the VCLT, violating the object and purpose of the VCLT. The legal consequences of violating a *ius cogens* norm would equally apply outside of the law of treaties.³⁷ Certainly, it would not serve the interests of an international rule of law.³⁸

C. Ceasefires

The common view has it that Article 52 of the VCLT contains a ‘proviso’ whereby treaties relating to ceasefires, the provision of humanitarian services, or an exchange of prisoners are not covered and would therefore be permissible.³⁹ The reasoning behind this is that these situations necessitate an armed conflict and are therefore not brought about by the use of force itself.⁴⁰

Furthermore, some would find a ceasefire agreement to fall outside the law of treaties *stricto sensu*, rather categorising them as a *lex specialis* of international humanitarian law.⁴¹

The result would likely be a frozen conflict, as in the case of North and South Korea or Cyprus and Turkey; or as has been the case in Crimea since 2014. The weapons are silent, but the violation of law persists. In any case, should these views prove correct, the result would not be a peace treaty.

D. Security Council

Similarly, a Security Council resolution on a peace settlement could, as a non-contractual decision, make the terms of a peace treaty binding on

36 Such a clause provides for the continued application of a treaty or of specific provisions thereof beyond the moment of termination.

37 Cf. Arts. 40 et seq. ASR.

38 In addition, it would continue to apply in relation to third countries that are parties to the VCLT.

39 See Schmalenbach & Prantl (n. 27).

40 See *ibid.*

41 See *ibid.* By way of example, reference is made to the Lusaka Ceasefire Agreement of 1999; cf. also n. 32.

Russia and Ukraine (as well as all other members of the United Nations)⁴² or even replace it altogether.

Although the common view in the literature is that the United Nations Security Council is also bound by *ius cogens*⁴³, there is no authority to review the decision; in view of the *Lockerbie* ruling by the ICJ, the question remains purely academic.⁴⁴

Furthermore, it could be held that the primacy of such a decision pursuant to Article 103 of the UN Charter would take precedence over the provisions of the VCLT, in any case: '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, the former shall prevail.' After all, decisions by the Security Council are also derivative treaty law.⁴⁵

In any case, it seems problematic that Russia, as a permanent member of the Security Council, could block any further decision on the peace created by such means—such as a determination of its violation or an adjustment to changed circumstances.

E. Absence of a conflict of norms

One view put forward in the literature, is that there is no conflict of norms at all where the treaty does not refer to the use of force itself (i.e. directly refers to the legality of Russian aggression or annexation).⁴⁶ The same author concludes: 'International law's overarching object and purpose of

42 Cf. Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties Purchased*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 327–328; Fox (n. 7); *ibid.*, *A Ukrainian Peace Agreement Without Ukraine?*, EJIL:Talk!, 8 April 2025, available at: <https://www.ejiltalk.org/a-ukrainian-peace-agreement-without-ukraine/>; Herbert (n. 32); Kriener & Peters (n. 31); Schmalenbach & Prantl (note 27).

43 See *ibid.*

44 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Request for the Indication of Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, 3, pp. 15–16, paras. 39–42; cf. Fox (n. 7).

45 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Request for the Indication of Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, 3, pp. 15–16, paras. 39–42.

46 See Herbert (n. 32).

maintaining international peace requires that a peace settlement will always be feasible.⁴⁷ International law seeks the peaceful resolution of disputes, so it must be possible to have a peace treaty, regardless of the provisions of the VCLT.

Whilst this is surely a noble idea and such a narrow, formalistic interpretation of conflicts of norms seems feasible in legal theory, it certainly misses the mark in terms of the object and purpose of the VCLT,⁴⁸ as evidenced by the above-cited *travaux préparatoires*, the explanations of the ILC. Furthermore, legal analysis cannot satisfy itself with objectives alone.

V. Termination of a treaty as ‘law and economics’

The ‘project of international law’ as an ever-advancing, rules-based order reflects Friedrich Schiller’s idea that all previous ages have striven towards a more human century, as laid out in his inaugural lecture at the University of Jena.⁴⁹ Correspondingly, a peace treaty contrary to normative progress already achieved in the 1960s, with the consent of the Soviet Union, can only be seen as an erosion of the international rule of law, despite all the objections of legal pedantry. The NATO mission in Kosovo in 1999 and the Iraq War in 2003, with Russia now appropriating the underlying justifications, have made very clear what such an approach has meant for the prohibition of the use of force.⁵⁰ Although classical realism carries within an appealing pragmatism, concerning itself with national interests, not legal norms, the defeatism currently dominating the scholarship of international

47 Felix Herbert, *(Ir-)Relevance of Ius Cogens? Legal Consequences of Ius Cogens in Russia’s War of Aggression Against Ukraine*, ZaöRV 83 (2023).

48 The formalistic counter-arguments advanced by Herbert (n. 32) fail to convince: first, conflicts between substantive norms differ fundamentally from the approach adopted by the ICJ in the *Jurisdictional Immunities* case, which concerned the distinction between procedural and substantive rules; second, the prohibition of the use of force constitutes an “idiot rule” (see Section III.A.), the object and purpose of which is beyond doubt; third, there is no reason why a treaty could not be invalid both because of the circumstances of its conclusion and because of its content (Art. 52 VCLT also applies to treaties the content of which does not necessarily violate *ius cogens*).

49 Friedrich Schiller, *What Is, and to What End Do We Study Universal History? An Inaugural Academic Lecture Delivered upon the Commencement of His Lectures*, 1789, p. 31.

50 See Markus Beham, *Russia’s War Against International Law, Climate Transition, and Europe*, *Nova et Varia* 3 (2022), p. 94.

law and the reduction of the subject to mere political rhetoric cannot satisfy anyone interested in normative doctrine or a positivist legal order. It is not enough to mourn the demise of the international legal order; viable solutions must be found to ensure its effectiveness.

As the above elaborations have shown, every peace treaty is subject to avoidance. Further consideration, however, suggests that Ukraine would first have to invoke the defence of nullity in accordance with Article 65 of the VCLT.⁵¹ This would be followed by a formalised process in which Ukraine would first have to notify Russia in writing of its claim for termination of the treaty. In doing so, Ukraine would also have to state its reasons, which should not pose too great a hurdle in view of the aforementioned General Assembly resolution of 18 March 2022:⁵² Russia has violated Article 2(4) of the UN Charter, thereby opening up the scope of application of Article 52 and, if necessary, Articles 51 and 53 of the VCLT.⁵³

Upon receiving such notification, Russia would, in turn, have three months to lodge an objection, failing which the treaty would be terminated by the transmission of an instrument signed by an authorised organ of Ukraine. In the event of an objection, the VCLT refers the parties to the peaceful means of dispute resolution set out in Article 33 of the UN Charter. These range from negotiation, possibly with the assistance of another state or an international organisation, to mediation and submission to an international court or arbitral tribunal. The parties would be back at the negotiating table for a more lasting peace.

Hence, there is no reason not to apply this provisionally invalid treaty on both sides, while at the same time placing the coerced party in the more favourable position of being able to invoke the invalidity of the treaty at any time. In the case of Articles 51 and 52 of the VCLT, only the party to the treaty that was subject to coercion may invoke the defence of invalidity. If a violation of *ius cogens* is assumed, it could now be argued that, according to the customary international law of state responsibility, the entire international community has a duty not to recognise the situation or to assist in maintaining it. Nevertheless, this coincides with the preservation of Ukraine's claims to the territories that were once annexed by force. It would be possible for third countries to take a neutral stance in this regard.

51 Cf. Fox (n. 7).

52 See n. 32 above.

53 See Section III.C.

Following the termination of the treaty, all actions taken by Ukraine on its basis remain legally valid. Russia, on the other hand, as the party exercising coercion or force, would have no claim to this under Article 69(3) of the VCLT. This would only be slightly modified if a violation of *ius cogens* were assumed, in which case, according to Article 71 of the VCLT, both parties would have to eliminate as far as possible, the consequences of actions taken based on a provision that is contrary to a peremptory norm of general international law. Here, too, the wording ‘as far as possible’ would leave sufficient room for interpretation in favour of Ukraine.

Therefore, when interpreted according to the general principle of law *ut res magis valeat quam pereat* – that a provision must be interpreted in a way that it has effect rather than not – a ‘law and economics’ consideration of Articles 51 and 52 of the VCLT, and, if necessary, Article 53 of the VCLT lets these appear as compensation for the originally limited negotiating position, a natural law element securing the contractual equilibrium and fairness between the parties.

There would also be nothing wrong with a dispute resolution mechanism that focuses exclusively on the interpretation of the treaty, excluding the question of whether the treaty is null and void, as would be the case in a submission to the ICJ. That the Secretary-General of the United Nations would have any right whatsoever to examine the content of a treaty upon the mandatory registration – analogous to the domestic debate on the right of executive organs to examine laws when countersigning them⁵⁴ – appears doubtful.⁵⁵

VI. Conclusion

From a ‘law and economics’ perspective, a peace treaty can be brought into line with the norms of the VCLT: although they cannot elevate an otherwise one-sided treaty to one that the weaker party would have concluded of its own free will, they do enable the latter to break away at any given moment. Raising the objection of the law of treaties comes not from the

54 See Markus Beham, *Must the Austrian Federal President Ratify CETA?*, Verfassungsblog, 16 July 2018, available at: <https://verfassungsblog.de/muss-der-oesterreichische-bundespraesident-ceta-ratifizieren/>

55 Cf. United Nations General Assembly Resolution 97(1), *Registration and Publication of Treaties and International Agreements*, 14 December 1946, UN Doc. A/RES/97(1).

ivory tower, but rather opens up a room for manoeuvre for Ukraine in the event of a regime change in Russia.⁵⁶ However, this does not imply 'neutrality under the law of treaties' with regard to coercion and force; rather, each state continues to have a duty not to take any further measures to preserve the elements of the treaty that violate international law or to recognise such a situation in the first place. Only with regard to the existence of the treaty and its contestation could third states remain agnostic.

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56 Cf. Fox (n. 7).

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