

# The international legal framework for a peace agreement in Ukraine and the reactions of third parties: What does the principle of non-recognition of violent territorial acquisition mean for neutrality?

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## Abstract

The stance on the key points of a conceivable peace agreement for Ukraine reveals a fundamental disagreement among Western states on how to deal with Russia's war of aggression against Ukraine. President Trump appears to be unwaveringly following the guidelines of classic realpolitik and consistently ignoring the normative dimension of international politics. The European states, which have declared themselves defenders of the 'multi-lateral world order' and international law, insist on the fundamental normative codes of the international legal order as established by the UN Charter in 1945 and further developed over the last decades in an increasingly dense web of practice. The prohibition of the use of force in Article 2 (4) of the UN Charter is one of the fundamental pillars of this modern international legal order, declared by the overwhelming majority of international legal scholars to be one of the central rules of *jus cogens*, and prohibits any form of violent acquisition of territory. This article first reviews the fundamental role of the prohibition of force in the modern peace order enshrined in international law. These fundamental considerations make it clear why the prohibition of the acquisition of territory by force, which was established before the Second World War under the heading of the 'Stimson Doctrine', is of such fundamental importance for the architecture of the international legal order. Given the precarious nature of the fundamental norm of the prohibition of the use of force, the reaction of the international community to fundamental breaches of law – committed more or less openly – is of particular importance. Articles 52 and 53 of the Vienna Convention on the Law of Treaties are considered to be the central guiding norms of international law in this response, and their implications for the assessment of a possible peace treaty involving the cession of territory are analysed in detail.

This reveals a direct link to questions of neutrality. A classic position of neutrality, maintaining equal distance from both parties and refraining from taking a normative stance, threatens to undermine the necessary solidarity of third countries with regard to violations of *jus cogens* – and therefore requires certain revisions in the understanding of neutrality. The normative 'crucial question' in the background is: Is a 'rule-based' order, as enshrined in Articles 52 and 53 of the Vienna Convention on the Law of Treaties, illusory in view of the current realities of international politics? The renaissance of 'neo-realism' in political debate points precisely in this direction. This makes it all the more urgent for international law doctrine – if it is willing to persist on its normative claims – to address the question of how the legal situation can be adapted to the facts created on the battlefield if a simple transfer of territory through peace treaty cessions is no longer possible under the pressure of arms. This question vividly illustrates the challenges facing the defenders of the 'rules-based order'.

## I. Introduction

In the run-up to the meeting between US President Donald Trump and Russian President Vladimir Putin announced for Friday, 15 August 2025, at which possible peace options for Ukraine were to be discussed, the issue of possible territorial concessions by Ukraine had once again become the focus of media attention. The joint statement by EU heads of state and government on 12 August 2025 emphasised "that international borders must not be changed by force" and that a just and lasting peace that brings stability and security must respect international law.<sup>1</sup> US President Trump, on the other hand, insists that there will be "a land swap". These statements reveal a fundamental disagreement among Western states on how to deal with Russia's war of aggression against Ukraine. President Trump appears to be unwaveringly following the principles of classic *realpolitik* and, as is almost always the case, ignoring the normative dimension of international politics. Russia is clearly the stronger military power and, according to classic 'realist' logic, will demand a price for ending the war, even though it was Russia itself that started the war. The European states, which have declared

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1 European Council, Statement by the leaders of the European Union on Ukraine, 12 August 2025, <https://www.consilium.europa.eu/de/press/press-releases/2025/08/12/statement-by-european-union-leaders-on-ukraine/>.

themselves defenders of the 'multilateral world order' and international law, insist on the fundamental normative codifications of the international legal order as established by the UN Charter in 1945 and further developed over the last decades in an increasingly dense web of practice. The prohibition of violence in Article 2 (4) of the UN Charter is one of the fundamental pillars of this modern international legal order, declared by the overwhelming majority of international legal scholars to be one of the central rules of *jus cogens*, and prohibits (as one of its basic corollaries) any form of violent acquisition of territory.<sup>2</sup>

How can a system characterised by a strict prohibition on the violent acquisition of foreign territory<sup>3</sup> possibly adapt the legal situation to the facts created on the ground by military force? If a simple transfer of territory through peace treaty provisions – even if these are forced upon the weaker side by overwhelming force – is no longer possible *de jure*, the question may arise as to how the necessary political concessions can be made to persuade the stronger party to refrain from using force. Or has classical international law become a mere utopia, without any lasting steering power, since the unilateral use of force is once again becoming the norm of a 'law of the strongest' in international relations? This question vividly illustrates

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- 2 See the blog debate on these issues Kirsten Schmalenbach / Alexander Prantl, *How to End an Illegal War?*, *Völkerrechtsblog*, 21 April 2022, <https://voelkerrechtsblog.org/de/how-to-end-an-illegal-war/>; Michael N. Schmitt, *Ukraine Symposium – Territorial Acquisition and Armed Conflict, Articles of War*, 29 August 2023, <https://lieber.westpoint.edu/territorial-acquisition-armed-conflict/>; Maksym Vishchyk / 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, <https://www.justsecurity.org/89216/compromises-on-territory-legal-order-and-world-peace-the-fate-of-international-law-lies-on-ukraines-borders/>; Philipp Kehl, *Treaty or No Treaty? – International Law and the Purported Trump Peace Proposal for Ukraine*, *EJIL:Talk!*, 2 December 2024, <https://www.ejiltalk.org/treaty-or-no-treaty-international-law-and-the-purported-trump-peace-proposal-for-ukraine/>; Gregory Fox, *A Legal Framework for a Russia-Ukraine Peace Agreement*, *EJIL:Talk!*, 19 December 2024, <https://www.ejiltalk.org/a-legal-framework-for-a-russia-ukraine-peace-agreement/>; Felix Herbert, *Territorial Concessions to the Aggressor. (In-)Validity of a Prospective Peace Treaty Between Russia and Ukraine?*, *Verfassungsblog*, 6 January 2025, <https://verfassungsblog.de/territorial-concessions-to-the-aggressor/>; Florian Kriener / Anne Peters, *Legal Limits for UNSC Action on Peace in Ukraine*, *EJIL:Talk!*, 8 April 2025, <https://www.ejiltalk.org/legal-limits-for-unscc-action-on-peace-in-ukraine/>.
- 3 See Rainer Hofmann, *Annexation*, *MPEPIL*, Jan. 2020; Ingrid Brunk / Monica Hakimi, *The Prohibition of Annexations and the Foundations of Modern International Law*, *AJIL* 118 (2024), 418 et seq.

the predicament facing the defenders of the 'rules-based order'.<sup>4</sup> If they fail to defend the central pillars of the UN Charter's peace order, codified in international law, against the challenge posed by military powers such as the USA, Russia, but also Israel, Iran and others, the international community is in danger of falling back into the (primordial) state of an 'anarchical society of states'.

The following considerations therefore initially focus on the fundamental role that the prohibition of the use of force plays in the modern peace order constituted in the forms of international law. These fundamental considerations make it clear why the prohibition of the violent acquisition of territory, which was established before the Second World War under the heading of the 'Stimson Doctrine', is of fundamental importance for the architecture of the international legal order. If one accepts an erosion of this fundamental principle, one accepts that a central pillar of this order will be permanently damaged – which in the medium term could jeopardise the stability of this order and even bring the entire normative edifice crashing down. This explains the increasingly desperate defence of the fundamental prohibition of any form of violent acquisition of territory, which, in view of the ongoing peace negotiations on the war in Ukraine, repeatedly leads to persistent normative interventions, especially by European states.

Accordingly, a 'peace treaty' involving changes to the territorial status quo imposed by armed force is not necessarily the primary means of achieving a peaceful resolution to the conflict, intended to end the conflict (even if only meant as a temporary solution).<sup>5</sup> This purpose of a temporary solution is typically served by a ceasefire agreement, which initially accepts the facts created on the battlefield, in the form of a freezing of the front lines, within the framework of a 'de facto' arrangement, in order to create space for constructive negotiations on a balance of interests through the (provisional) construction of a silence of arms.<sup>6</sup> The genuine legal problems then arise

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4 See only Ingrid (Wuerth) Brunk / Monica Hakimi, Russia, Ukraine, and the Future World Order, *AJIL* 116 (2022), 687 et seq.; see also Monica Hakimi / Jacob Katz Cogan, The End of the U.S.- Backed International Order and the Future of International Law, *AJIL* 119 (2025), 279 et seq. and John Dugard, The Choice Before Us: International Law or a 'Rules-Based International Order'?, *Leiden J. Int'l. L.* 36 (2023), 223 et seq.

5 On the instrument of the peace treaty, see Jann H. Kleffner, *Peace Treaties*, MPEPIL, March 2011, and Nina Caspersen, *Peace Agreements: Finding Solutions to Intra-State Conflicts*, 2017.

6 On the instrument of ceasefire, see Christine Bell, *Ceasefire*, MPEPIL, Dec. 2009, and Yoram Dinstein, *Armistice*, MPEPIL, Sept. 2015.

in the following negotiations, which ideally should lead to a peace treaty that constitutively changes the legal situation in the sense of a settlement. In the context of such peace treaty negotiations, the question arises whether it is possible at all to agree on territorial changes – territorial changes that would constitute (as the 'fruit of the poisonous tree'<sup>7</sup>) evident effects of brute aggression and continuing military asymmetry? The question, if posed in this way, is not as easy to answer as it might seem at first glance.

With regard to possible 'victor's dictates', the question also arises as to the reaction of third countries confronted with the dictates of the aggressor. As a state committed to preserving the international legal order, can I remain indifferent at all to such (illegal) dictates, i.e. (in a broader sense) adopt a position of neutrality, if this indifference threatens to accept a fundamental breach of law and thus might become part of creating a new normality? The preservation of the fundamental principles of international law requires, it seems, dedicated normative reactions from the international community 'as a whole', if the normative indifference of the 'neutral' states (as laid down in the institution of neutrality) is not meant to lead to the erosion of the entire order in the sense of (widespread) free riding.<sup>8</sup> In view of this finding, some specific adjustments to the obligations under the laws of neutrality appear necessary.

But how can one imagine a (re)arrangement of attribution of territory in the long term? In view of geostrategic imperatives and the will of the populations concerned, such a reorganisation may even appear sensible under certain circumstances. In one way or another, at least in the context of a longer period of time, there must be options for adapting the legal situation to the real circumstances on the ground if international law is not to mutate into a purely fictitious 'cloud cuckoo land' that no longer has any guiding force with regard to the real actions of states. Can the Security Council play a constructive role in promoting and securing such adjustments to the realities of international politics? And what is the role of ceasefire agreements? As these introductory considerations show, there are many questions – but the answers are uncertain and leave us feeling rather unsatisfied.

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7 See also Fox, EJIL:Talk!, 19 December 2024 (note 2).

8 See Felix Herbert, (Ir-)Relevance of ius cogens? Legal Consequences of ius cogens in Russia's War of Aggression Against Ukraine, ZaöRV 83 (2023), 461, 472 et seq.

## II. Use of Force and Law: The Prohibition of the Use of Force as a Central Norm of the Modern Order of Maintenance of Peace

If one wishes to understand what is at stake in the question of a possible 'land swap' under pressure from Russian aggression, one should first consider the fundamental importance of the prohibition of the use of force under Article 2 (4) of the UN Charter (and under parallel customary law) for the preservation of peaceful relations and the banning of force under modern international law. According to the literature of international law, the central function of any legal system is to enable the peaceful coexistence of all those entities subject to the law. Developed legal systems therefore provide for the state's monopoly on the use of force.<sup>9</sup> "Modern international law also seeks to ensure peaceful coexistence between states and to restrict the use of force between states," as Michael Bothe puts it.<sup>10</sup> However, given the decentralised nature of the international order, international law cannot in fact do this in the same way as the national legal systems. "There is no monopoly on the use of force in the international community comparable to that of the state. The decentralized use of force and its justification therefore play a completely different and incomparably greater role in international relations than the individual right of self-defence in domestic law."<sup>11</sup> After the collective security system established by the League of Nations and the Briand-Kellogg Pact had failed in the interwar period, the founding of the UN after the Second World War was an attempt to make a new start and avoid the mistakes of the old system. The UN Charter is clearly characterised by the desire to prevent wars in order to, as the preamble to the Charter states, "save succeeding generations from the scourge of war". To this end, the UN Charter establishes a system of collective security, the material core component of which is a general prohibition of the use of force.<sup>12</sup> This general prohibition of the use of force is not only considered

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9 See, for example, Michael Bothe, *Friedenssicherung und Kriegsrecht* [Peacekeeping and Law of Wars], in Wolfgang Graf Vitzthum / Alexander Proelß (eds.), *Völkerrecht* [International Law], 8th ed. 2019, 755, 762.

10 Ibid.

11 Ibid.

12 Oliver Dörr, *Use of Force, Prohibition of*, MPEPIL, August 2019, para. 8; Bardo Fassbender, *Die Gegenwartskrise des völkerrechtlichen Gewaltverbots vor dem Hintergrund der geschichtlichen Entwicklung* [The current crisis of the prohibition of force under international law against the backdrop of historical developments], *EuGRZ* 31 (2004) 241, 246 et seq.

a norm of treaty law, but is also commonly regarded as part of customary international law.<sup>13</sup> This is remarkable insofar as there is no consistent and general practice of refraining from military force – military force has been used repeatedly in international relations over the past decades as a means of enforcing political interests. At the same time, however, it can be said, looking at the practice of states, that there is undoubtedly a general legal conviction in the sense of a comprehensive acceptance that there exists in principle a prohibition of force under international law.<sup>14</sup> No state that has used force in recent decades has questioned the validity of this prohibition *per se*. At most, attempts have regularly been made to justify the use of force by legal or factual arguments that presented the force actually used as a case of permissible exceptions to the unquestioned general rule of prohibition.<sup>15</sup> The dispute over the permissibility of force in international relations is therefore essentially a dispute over the scope of the prohibition of force under international law and, in particular, over possible grounds for (exceptionally) justifying force. In practice, states that use military force do not consistently claim that the prohibition of force does not apply, but rather invoke exceptions to the general prohibition of the use of force<sup>16</sup> – and this is completely logical bearing in mind the centrality of the exclusion of unilateral military force for the maintenance of the international legal order.

However, this central achievement of the modern law of peace and conflict remains precarious in practice. In a system of states in which the use of military force remains decentralised and a number of highly armed great powers (and also regional powers) repeatedly attempt to test the limits of the prohibition, if not to gradually extend it, in order to create scope for the use of military force against states in their neighbourhood, the unquestionable validity of the prohibition of force proves to be permanently contested beneath the surface. Russia's aggression against Ukraine<sup>17</sup> is just one partic-

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13 Stefan Kadelbach, *Zwingendes Völkerrecht* (Mandatory International Law), 1992, 228-29; Dörr (note 4) para 9-10.; Bothe (note 9), para. 8.

14 See only Bothe (note 9), para. 8.

15 Bothe (note 9), para. 8.

16 David Wippman, *The Nine Lives of Article 2(4)*, Minnesota JIL 16 (2007), 387 et seq.

17 See Claus Kieß, *Russia's War of Aggression Against Ukraine and the Crime of Aggression*, in Masahiko Asada / Dai Tamada (eds.), *The War in Ukraine and International Law*, 2025, 55 ff.; Ruprecht Polenz, *Russlands Angriffskrieg gegen die Ukraine – was steht auf dem Spiel??*, in Uwe Marquardt et al. (eds.), *Krieg in der Ukraine: Perspektiven*, 2024, 131 et seq.; Anne Peters, *The Russian Invasion in Ukraine - An Anti-Con-*

ularly vivid example of such a (no longer really covert) 'contestation'<sup>18</sup> of the prohibition of force, as Russia's justifications turned out to be extremely flimsy, bordering on the ridiculous – albeit parodying Western narratives that previously were used to justify problematic uses of force by the West, such as the 1999 intervention in Kosovo, the 2003 invasion of Iraq and the violent overthrow of the Gaddafi regime in Libya in 2011.<sup>19</sup> The usual death declarations repeatedly postulated in academic literature regarding Article 2 (4) and the prohibition of the use of force in general, however, have consistently proven to be premature<sup>20</sup> – although the prohibition of the use of force is not truly uncontested, as can be seen from the cynical disregard for the norm by the Putin regime, but also by US President Trump's disregard for the normative requirements of Article 2 (4) and the regular overreach of possible justifications in recent Israeli practice under the Netanyahu government. These examples demonstrate sufficiently that we are currently dealing with a number of important political actors who no longer care about the normative foundations of our present international legal order, as they, being normative nihilists, believe only in the 'law of the strongest'.

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stitutional Moment in International Law?, MPIL Research Paper Series 2024-11; Felix Lange, *Der russische Angriffskrieg gegen die Ukraine und das Völkerrecht*, Schriftenreihe der Juristischen Gesellschaft zu Berlin Vol. 200, 2023; Christina Binder, *Der russische Angriffskrieg gegen die Ukraine: Eine völker- und menschenrechtliche Einordnung*, in Stefan Hansen / Olha Husieva / Kira Frankenthal (eds.), *Russlands Angriffskrieg gegen die Ukraine: Zeitenwende für die deutsche Sicherheitspolitik*, 2023, 227 et seq.; James Green / Christian Henderson / Tom Ruys, *Russia's Attack on Ukraine and the Jus ad Bellum*, *Journal on the Use of Force and International Law* 9 (2022), 4 et seq.; Paulina Starski / Friedrich Arndt, *The Russian Aggression against Ukraine – Putin and his 'Legality Claims'*, *Max Planck Yearbook of United Nations Law* 25 (2021), 756 et seq.

- 18 For a fundamental discussion of the theory of contestation, see Antje Wiener, *Contestation and Constitution of Norms in Global International Relations*, 2018.
- 19 See Paulina Starski / Friedrich Arndt, *The Russian Aggression against Ukraine - Putin and his 'Legality Claims'*, *Max Planck Yearbook of United Nations Law* 25 (2021), 756 et seq.; René Värk, *Russia's Legal Arguments to Justify its Aggression against Ukraine*, ICDS Analysis, November 2022, <https://icds.ee/en/russias-legal-arguments-to-justify-its-aggression-and-conduct-in-ukraine/>; Anastasiya Kotova / Ntina Tzouvala, *In Defence of Comparisons: Russia and the Transmutations of Imperialism in International Law*, *AJIL* 116 (2022), 710 et seq.
- 20 Louis C. Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, *AJIL* 65 (1971), 544 et seq. Jost Delbrück, *Effektivität des Gewaltverbots*, *Friedens-Warte* 74 (1999), 139 et seq.; David Wippman, *The Nine Lives of Article 2(4)*, *Minnesota JIL* 16 (2007), 387 et seq.



### III. Realpolitik vs. jus cogens: The Debate on the Limits of Territorial Changes Imposed by the Use of Force

If we focus on the undoubtedly precarious nature of the fundamental norm of the prohibition of use of force, the reaction of the international community to the - more or less openly committed - violations of fundamental rules are of particular importance. The impending erosion of the essential norms of maintaining international peace and security can only be halted if the states, as far as oriented towards the central norm of the prohibition of use of force, react to every violation of the core rules with a decided expression of their normative disapproval, condemning the violation as an (unacceptable) denial of the normative binding force of the basic rules of international law, and try to prevent the aggressor from enjoying the fruits of its aggression, by consistently refusing to recognise the legitimacy of the (new) situation thus created. In fact, the 90 per cent or so of small and medium-sized states that are structurally incapable of militarily overwhelming their neighbours and, as a result, have more to fear from violations of the prohibition of force than they have to gain from a stretching of the limits of permissible military force, should have a fundamental interest in maintaining the unreserved validity (and observance) of the basic rules of maintaining peace and security – and, at its core, in the continued respect for the prohibition of use of force.

#### 1) Art. 53 VCLT: Prohibition of Use of Force as a Norm of 'jus cogens'

In international law, such a mechanism oriented towards preserving norms by not recognizing facts created as a result of fundamental breaches of law is nothing new. Famous in this context is the 'Stimson Doctrine', with which US Secretary of State Stimson responded in 1931 to Japan's invasion of China and the secession of Manchukuo as a Japanese puppet state, following on from the Briand-Kellogg Pact of 1928.<sup>21</sup> The underlying idea is very modern – the non-recognition of any change in circumstances brought about by a breach of fundamental legal rules: "[The US] does not intend to recognise any situation, treaty, or agreement which may be brought about

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21 See David Turns, *The Stimson Doctrine of Non-Recognition: its Historical Genesis and Influence on Contemporary International Law*, Chinese JIL 2 (2003), 105 et seq.; Thomas D. Grant, *Doctrines (Monroe, Hallstein, Brezhnev, Stimson)*, MPEPIL, March 2014, para. 8 et seq.

by means contrary to the covenants and obligations of the Pact of Paris of 27 August 1928, to which treaty both China and Japan, as well as the United States, are parties.”<sup>22</sup> In a sense, this doctrine, which gained strength in the aftermath of the Second World War, and in connection with Art. 2(4) UN Charter, and became an ironclad part of state practice over the decades (and thus part of customary international law), anticipates the modern idea of the nullity of violations of *jus cogens*, as reflected in Art. 53 of the Vienna Convention on the Law of Treaties.

The prerequisite for this rule is, first of all, the existence of a mandatory norm of international law, a so-called *ius cogens* norm.<sup>23</sup> According to Art. 53 VCLT, a treaty is void “if [the subject matter of the treaty] is contrary to a peremptory norm of general international law”<sup>24</sup> The customary international law rules of state responsibility also give rise to an obligation on the part of the entire international community not to recognise or further promote a situation that is contrary to a peremptory norm of international law (as set out in Art. 41 ASR).<sup>25</sup> The fact that the prohibition of use of force in Article 2 (4) belongs to this group of peremptory norms of international law is largely undisputed<sup>26</sup> in international legal doctrine; the few voices that rebel against this (almost universal) consensus<sup>27</sup> have remained virtually without support. As a consequence, it is generally recognised that any form of violent annexation of foreign territory constitutes a direct violation of the mandatory norm prohibiting aggression and must therefore

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22 Grant (fn. 21), para. 8.

23 On the category of ‘*jus cogens*’, see only Dire Tladi, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, 2021; Dinah Shelton, *Jus Cogens: Elements of International Law*, 2021; Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse*, 2020; Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law*, 2017; Robert Kolb, *Peremptory International Law - ‘jus cogens’: A General Inventory*, 2015; Thomas Weatherall, *Jus cogens: International Law and Social Contract*, 2015; Alexander Orakhelashvili, *Peremptory Norms in International Law*, 2006.

24 See on Art. 53 VCLT Kirsten Schmalenbach, Article 53, in Oliver Dörr / Kirsten Schmalenbach (eds.), *The Vienna Convention on the Law of Treaties. A Commentary*, 2nd ed. 2018, 965 et seq.

25 See also Kolb (note 23), 104 et seq., and Weatherall (note 23), 355 et seq.

26 See Yearbook of the International Law Commission, 1966, Vol. II, A/CN.4/SER.A/1966/Add.I, p. 247; see also Kolb (note 23), 73 f.; Weatherall (note 23), 223 et seq.; Schmalenbach (note 24), para. 82.

27 See, for example, James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, *Michigan Journal of International Law* 32 (2011), 215 et seq.

be treated as null and void as a result of its conflict with a norm of jus cogens, and consequently may not be recognised by third states.<sup>28</sup>

However, the application of this rule to peace treaties is by no means trivial. In contrast to the unilateral annexation of foreign territory, where the breach of a norm of jus cogens is directly translated into a (normatively undesirable) change of status, this is different in the case of peace treaty arrangements, where an agreement of will between the warring parties is added between the breach of law and the effected change of status. In a very narrow interpretation, one could deny the conflict of norms from the outset – after all, the state concerned has agreed to the change in status. However, such a restrictive interpretation would not be entirely satisfactory, because in the event of continuing military asymmetry, the victim of aggression remains under duress and may have no alternative but to agree to the change of status demanded by the aggressor.<sup>29</sup>

Ultimately, the question of whether the (continuing) coercive effect of the act of aggression will prevail over the content of the peace treaty depends largely on the scope for action remaining to the victim of the aggression. If the victim has succeeded in resisting the aggression and preventing the aggressor from achieving its goals, even the weaker negotiating partner may have good reasons, in the effort to achieve a viable balance of interests, to relinquish certain territorial claims and exchange (ultimately, in all probability, irretrievable) territory in exchange for concessions in other areas. The question of whether the overall power asymmetry between the negotiating partners in the struggle to reach a negotiated solution in the aftermath of a war of aggression will per se preclude territorial concessions by the victim of aggression cannot be answered unequivocally. Accordingly, this question is assessed quite differently in international legal literature.<sup>30</sup>

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28 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.

29 See, for example, Enzo Cannizzaro, A Higher Law for Treaties?, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, 2011, 425, 427 et seq. (esp. 434 et seq.), for such a rather broad interpretation of the conflict between treaty provisions and jus cogens.

30 See, for example, as statements on the case of Ukraine, Schmitt, Articles of War, 29 August 2023 (note 2); Vishchyk and Pizzi, Just Security, 6 October 2023 (note 2); Fox, EJIL:Talk!, 19 December 2024 (note 2); on the other hand, Herbert, Verfassungsblog, 5 January 2025 (note 2).

## 2) Art. 52 VCLT: Cession of Territory under the Pressure of Unlawful Force

A less expansive interpretation of the nullity rule in Article 53 of the Vienna Convention, which does not consider peace treaties involving territorial changes to be in conflict with the *jus cogens* rule prohibiting the use of force *per se*, has the advantage of establishing a meaningful concordance between the areas of application of Articles 53 and 52 of the Vienna Convention.<sup>31</sup> If the mandatory rule of the prohibition of violence (including the normative follow-up provisions to be derived from it) is interpreted too broadly, there is a risk that Article 53 VCLT will completely consume the specific provision of Article 52 VCLT, leaving it with no scope of application of its own. This was probably not the intention of the ILC, nor of the majority of states that confirmed the Articles of State Responsibility as applicable law in a resolution of the UN General Assembly.

Article 52 of the Vienna Convention on the Law of Treaties, which deals with the problem of treaties concluded under duress, declares treaties to be null and void if their conclusion "was brought about by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".<sup>32</sup> If one takes the underlying legal concept seriously, peace treaties are often in danger of being declared null and void under Art. 52 VCLT.<sup>33</sup> This applies in particular to peace agreements concluded in the context of an ongoing war of aggression by a highly armed major or regional power against a small or medium-sized state (with a significantly weaker military posture), especially if the peace negotiations take place under the pressure of continuing hostilities with their (characteristic) military asymmetry. Seen in the light of the facts

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31 See also Herbert (note 8), 468 et seq.

32 On Article 52 of the Vienna Convention, see Olivier Corten, 1969 Vienna Convention Article 52, in: Olivier Corten / Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties*, Volume II, 2011, 1201 et seq. (paras 24- 28); Kirsten Schmalenbach, Article 52, in: Oliver Dörr / Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary*, 2nd ed. 2018, 937 et seq. (paras 20-24); H. G. de Jong, *Coercion in the Conclusion of Treaties: A Consideration of Articles 51 and 52 of the Convention on the Law of Treaties*, *Netherlands Yb. Int'l. L.* 15 (1984), 209 et seq.

33 See also Christian Tomuschat, *Peace Treaties and Jus Cogens*, in Christian Calliess (ed.), *Herausforderungen an Staat und Verfassung. Völkerrecht - Europarecht - Menschenrechte: Liber Amicorum für Torsten Stein zum 70. Geburtstag*, 2015, 339, 348-49, as well as Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties*, in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, 2011, 320, 321 et seq.

of the case, nullity within the meaning of Article 52 VCLT depends on the criterion of "brought about by the use of force [...]". While the war of aggression continues, in which the victim state must negotiate under the coercive pressure of the aggressor's superior military power, this criterion of 'brought about' is almost always likely to be met.<sup>34</sup> This element can only be disregarded in a context of 'lateral causality' where, in the wake of the war of aggression, the attacked state catches up in military terms to such an extent that there is no longer any real asymmetry of power – consider the constellation of Saddam Hussein's war of aggression against Iran, when by the end of the 1980s the asymmetry of forces that existed at the outset had long given way to a military stalemate, despite all the support the West gave to Iraq under Saddam Hussein.<sup>35</sup> The other constellation in which the 'brought about' of Art. 52 VCLT might increasingly recede is the situation of an interim ceasefire, in which the originally asymmetrical predicament of ongoing aggression recedes into the background due to a consolidated truce – and the victim of the attack regains the political freedom to decide for itself on the sacrifices necessary for a lasting pacification of the conflict situation. The pressure of 'frozen' aggression may still be present here – through the occupation of not insignificant parts of the victim state's territory – but in this constellation of a consolidated ceasefire (without the looming threat of a resumption of hostilities), the victim state regains the political freedom to decide its own future.

In the case of Ukraine, at least under the prevailing circumstances – one must deny such a break in the causality of violent subjugation and (forced) territorial cession.<sup>36</sup> Ukraine remains under extreme pressure from the Russian military machine and, despite all its successes in repelling Russian aggression, is struggling to defend itself against the ongoing Russian offensive operations. Ultimately, there is an extreme imbalance in the economic and military resources of the two sides, despite the (albeit limited) support provided by Western states for Ukraine's self-defence; Russia's long-term

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34 See also in this regard Schmalenbach and Prantl, *Völkerrechtsblog*, 21 April 2022 (note 2); Schmitt, *Articles of War*, 29 August 2023 (note 2); Herbert, *Verfassungsblog*, 5 January 2025 (note 2).

35 See Stefan Oeter, *Neutralität und Waffenhandel (Neutrality and Arms Trade)*, 1992, 112 et seq.

36 See also Schmalenbach and Prantl, *Völkerrechtsblog*, 21 April 2022 (note 2); Schmitt, *Articles of War*, 29 August 2023 (note 2); Vishchyk and Pizzi, *Just Security*, 6 October 2023 (note 2); Kehl, *EJIL:Talk!*, 2 December 2024 (note 2); Fox, *EJIL:Talk!*, 19 December 2024 (note 2); Herbert, *Verfassungsblog*, 5 January 2025 (note 2); Kriener and Peters, *EJIL:Talk!*, 8 April 2025 (note 2).

military and armaments policy sustainability is significantly greater than that of Ukraine, which keeps Ukraine in a state of duress and under threat of overwhelming defeat in Russia's ongoing war of aggression. It would be difficult to speak of a free and self-determined decision by Ukraine, at least as long as the military operations of the war of aggression continue. As a result, any form of territorial cession conceded by Ukraine under the pressure of the military challenge would be brought about by "the use of force in violation of the principles of international law laid down in the Charter of the United Nations" – and would therefore be null and void under Article 52 of the Vienna Convention on the Law of Treaties.

In other words, the classic mode of a peace dictated by the victor, as was still customary practice after the First World War, can no longer be reconciled with the provisions of Article 52 of the Vienna Convention on the Law of Treaties, at least insofar as the victor is the aggressor responsible for the use of force – and this would undoubtedly be the case in the situation in Ukraine.

### 3) Article 53 VCLT: The Right to Self-Determination as 'jus cogens'

Another aspect makes the idea of a peace treaty ceding territories of Ukraine to Russia under the dictate of an ongoing war appear highly problematic – and this is an aspect that is hardly ever addressed in the ongoing debates over the issue. Not only the prohibition of violence, but also the right of peoples to self-determination is generally considered to be one of the core components of the rules of jus cogens.<sup>37</sup> The right to self-determination primarily protects the right of every (state) people to determine independently the political order and economic constitution of their community.<sup>38</sup> In the context of the right to self-determination, 'people' essentially refers to the citizens of a given state established and recognised

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37 See Yearbook of the International Law Commission, 1966, Vol. II, A/CN.4/SER.A/1966/Add.I, p. 247; see also Weatherall (fn. 23), 250 et seq.; Schmalenbach (fn. 24), para. 82, Dire Tladi, *Ius cogens*, MPEPIL, Feb. 2024, para. 63; the ICJ recently emphasised the jus cogens character of the right to self-determination in its OPT advisory opinion - ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, paras. 230 et seq.

38 For more details, see Stefan Oeter, *Self-Determination*, in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, Volume I, 4th edition, 2024, 457 ff., margin note 8 et seq., 33.

under international law – a condition that certainly applies to Ukraine and the Ukrainian people.<sup>39</sup> Putin's delusion of an imperial 'Russkiy Mir' based on the assumption that there is no Ukrainian people constituting an independent nation and that ultimately the population of Ukraine consists only of 'unredeemed' Russians with 'false consciousness'<sup>40</sup> can only be regarded as adventurous. As the people of a state recognized by the international community as a member state of the United Nations – including, *inter alia*, by Russia – it is solely up to the Ukrainian people to decide on their national affiliation and/or independence; insofar as Russia, in the wake of the historical narrative propagated by President Putin, presumes to decide from the outside on the 'right' national affiliation of the Ukrainian people, this is nothing more than an externally enforced 'foreign domination', essentially an act of colonial rape. From this perspective, the military takeover of the Ukrainian state and the installation of a Moscow-controlled puppet government (undoubtedly planned in 2022) would be nothing less than the suppression of the Ukrainian people's right to self-determination in the context of an act of imperial violence – in other words, a brute violation of the *jus cogens* rule of the right to self-determination.

There is little to suggest that this original blueprint of imperial fantasies of the Putin variety can still be implemented one-to-one in reality. The Ukrainian people's will to resist was too strong, and the military reorganisation of the Ukrainian state after the overhaul of military structures under the pressure from Russian aggression since 2014 (with some equipment aid from the West) was too thorough to allow the Russian army to march on Kyiv as it had dreamed of doing. From the perspective of Moscow's original war aims, the cession of large areas of Ukrainian territory in the east and south of the country would certainly be nothing more than a consolation prize – but it would still be highly problematic. In the case of forced cessions of large areas without the consent of the populations concerned, there would be a collision between the content of the treaty and the rules of the right of self-determination (which are to be regarded as *jus cogens*) under Art. 53 VCLT. According to a prominent doctrine,

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39 Oeter (note 38), para. 24 et seq.

40 See Susanne Spahn, *Russia's Narratives and Disinformation in the War on Ukraine*, in Stefan Hansen / Olha Husieva / Kira Frankenthal (eds.), *Russia's War of Aggression against Ukraine*, 2023, 45 et seq.; Arnd Bauerkämper, *Putins Gedächtnispolitik als Waffe*, in Wolfgang Benz (ed.), *Die Ukraine: Kampf um Unabhängigkeit*, 2023, 377 et seq.; Lutz Unterseher, *Krieg in der Ukraine: Hintergründe und Abgründe* (War in Ukraine: Background and Abysses), 2023, 15.

not only does the free choice of political and economic system, which also includes integration into another state, require the self-determination of the people concerned exercised through an act of collective decision-making; the cession of large parts of territory from one state to another is also a fundamental act of political status determination, which requires consent exercised by referendum. of the inhabitants of the affected territory – "free and fair territorial referendums are the proper procedure for exercising the right to self-determination".<sup>41</sup> The principle of 'territorial referendum' thus postulated has found increasing recognition in international legal doctrine and state practice and requires that, in the event of a transfer of territory from one state to another, the population concerned be consulted in a referendum – and should ultimately give its consent to the intended change of status.<sup>42</sup> The classic mode of shifting territories back and forth at a 'green table' in some capitals of imperial actors is no longer compatible with post-colonial international law oriented towards self-determination and would – if it were nevertheless agreed by treaty – be considered null and void due to a conflict with the *jus cogens* rules of the right to self-determination. Given President Putin's thoroughly imperialist ideology, which is deeply alien to the concept of self-determination, it would be more than surprising if Russia were to envisage the takeover of territories it currently claims only after a referendum on the territory that could objectively be described as 'free and fair'. On the contrary, Moscow knows that the inhabitants of the affected areas strongly reject a transfer to Russian rule and would – as in Crimea and in the already occupied territories of eastern and southern Ukraine – forcibly transform the affected populations into 'good Russians' through targeted deportations and forms of brutal re-education. However, such a scandalous practice, currently exercised in the occupied Ukrainian

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41 See Anne Peters, *The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, in Christian Calliess (ed.), *Herausforderungen an Staat und Verfassung. Völkerrecht – Europarecht – Menschenrechte: Liber Amicorum für Torsten Stein zum 70. Geburtstag*, 2015, 278, 286 et seq.; see also Urs Saxer, *Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung: Selbstbestimmung, Konfliktmanagement, Anerkennung und Staatennachfolge in der neueren Völkerrechtspraxis*, 2010, 777 et seq.

42 See Markku Suksi, *The Referendum as an Instrument for the Resolution of Territorial Disputes and for the Exercise of Self-Determination*, in Peter Hilpold (ed.), *Autonomy and Self-Determination in Europe and in International Comparison*, 2016, 84 et seq.



territories, violates not only the law of military occupation and human rights, but is also completely contrary to the right to self-determination.<sup>43</sup>

#### IV. Neutrality vs. Solidarity: The Duties of Third States in Dealing with Violent Territorial Changes

The scope of the rules that govern the handling of cases of forcibly imposed territorial changes is not limited to the direct relationship between the perpetrator and victim states, but also covers third states which, in a closely interlinked world, have diplomatic and international legal relations with the parties to the conflict and, to a certain extent, are also involved in political and economic transactions with the parties to the conflict. It is difficult to avoid the question of how to deal with the (internationally problematic) results of violent land grabbing in legal transactions, whether this has taken the form of direct, unilateral annexation or has been ratified bilaterally (through the use of coercion) by contractual agreements.

The real question in that regard is how much room the value-laden modern international law still leaves for attitudes of classical neutrality.<sup>44</sup> Classical forms of neutrality are always fed by a certain indifference to the normative questions that arise in the relationship between the warring parties. The aim is to stay out of the conflict so as not to incur the wrath of one or even both parties to the conflict; in some circumstances, the aim may also be to continue doing good business with both sides, with which one may have had close economic ties prior to the conflict. In itself, this classic logic of neutrality is not reprehensible – but does current international law

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43 On the flagrant violations of the law of military occupation, see David Wallace, *Ukraine Symposium – The Law of Belligerent Occupation*, Articles of War, 8 March 2023, <https://lieber.westpoint.edu/law-belligerent-occupation/>; see also Michael N. Schmitt, *Deportation of Ukrainian Civilians to Russia: The Legal Framework*, Articles of War, 24 March 2022, <https://lieber.westpoint.edu/deportation-ukrainian-civilians-russia-legal-framework/> and Katharine Fortin, *Abducting Dissent: Kidnapping Public Officials in Occupied Ukraine*, Articles of War, 22 March 2022, <https://lieber.westpoint.edu/kidnapping-public-officials-occupied-ukraine/>.

44 See, for example, Giulio Bartolini, *The Ukrainian-Russian Armed Conflict and the Law of Neutrality: Continuity, Discontinuity, or Irrelevance?*, *Netherlands Int'l. L. Rev.* 71 (2024), 281 et seq.; Natalino Ronzitti, *Neutrality, Non-Belligerency, and Permanent Neutrality According to Recent Practice and Doctrinal Views*, *Journal of Conflict & Security Law* 29 (2024), 55 et seq.; Dallas Bates, *Neutrality and Non-Belligerency: International Support of Ukraine against the Russian Invasion*, *Denv. J. Int'l L. & Pol'y* 51 (2022-2023), 109 et seq.

still leave enough manoeuvring space to seriously maintain such an attitude of normative indifference, including the resulting abstinence from any form of partisanship in favour of one of the parties?

A look at the empirical evidence of the positions actually taken and the practical handling of relations with the parties to the conflict in Russia's war of aggression against Ukraine is certainly instructive here. On closer inspection, the attitudes and practices of third countries prove to be deeply heterogeneous.<sup>45</sup> While NATO countries and EU member states have openly sided with Ukraine, avoiding direct participation in the fighting (and thus the status of a party to the conflict), there is a – albeit significantly smaller – group of client states closely allied with Russia that have openly sided with Russia by supplying it with weapons and military equipment (Iran), have made their own territory available to Russia for offensive operations (Belarus), and have even effectively entered the conflict as a party to the conflict by sending their own armed forces (North Korea).<sup>46</sup> The majority of the world's states fall somewhere between these two extremes, with quite different nuances. China, for example, does not openly side with Russia, but it does engage in intensive trade with the aggressor state by purchasing enormous quantities of oil and gas, which ultimately fills Russia's war chest, and it tolerates a considerable amount of commercial activity by its own companies that circumvents Western economic sanctions.<sup>47</sup> Other BRICS countries are striving for ostentatious equidistance from Russia and the West, while the majority of the smaller and medium-sized states of the 'Global South' are trying to muddle through somehow, while avoiding conflicts with the power blocs involved.<sup>48</sup> Although these states condemn

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45 For an informative overview of the positions of the various groups of states on Russia's war of aggression, see Cătălin Balog, *Hitting Moscow – Between Strategic Desperation and Balance by Force*, IFIMES, 13 August 2025, <https://www.ifimes.org/en/researches/hitting-moscow-between-strategic-desperation-and-balance-by-force/5579?>.

46 See Herbert (note 8), 476.

47 Lili Bayer, 'Very big mistake': NATO chief cautions China over supplying weapons to Russia, *Politico*, 24 February 2023, <https://www.politico.eu/article/very-big-mistake-nato-chief-jens-stoltenberg-cautions-china-over-russia-weapons-supply-ukraine-war/>; see also Gyula Krajczár, *The Russia- Ukraine War and China: Neutrality with Imperial Characteristics*, in Bálint Madlovics / Bálint Magyar (eds.), *Russia's Imperial Endeavour and Its Geopolitical Consequences*, 2023, 311 et seq.

48 For an example of the case of African states, see Olayinka Ajala, *The Case for Neutrality: Understanding African Stances on the Russia-Ukraine Conflict*, *Journal of Military and Strategic Studies* 22 (2022), 129 et seq.

Russian aggression per se, as evidenced by the clear majorities in the relevant resolutions of the UN General Assembly that condemn Russia's war of aggression, most states in the 'Global South' also distrust the West, accusing it of double standards in its handling of the basic rules of international law and of a certain 'hypocrisy' in its attitude.<sup>49</sup> In the eyes of these states, the West is not really a credible defender of the 'rules-based world order', and this is reflected in their noticeable distance from the calls for solidarity from Western states. The attitude of this large majority of states in the 'Global South' can probably best be understood in terms of classic neutrality.

From the outset, the 'West', i.e. the NATO states and the member states of the EU, have departed from a position of traditional neutrality – in the sense of normative indifference and practical equidistance. Their open partisanship is characterised by a spirit of solidarity in a sense of collective self-defence. The massive military and arms industry support for Ukraine essentially functions as a kind of 'little sister' to collective self-defence.<sup>50</sup> Direct confrontation in the sense of entering the war as a party to the conflict is being avoided for geostrategic reasons, as most strategists believe that the dangers of uncontrollable escalation (up to and including the use of nuclear weapons) would be almost impossible to contain in a direct conflict between NATO and Russia. This stance can best be understood in terms of 'qualified neutrality' or 'non-belligerence', as practised by the Roosevelt administration in its policy of military support for Great Britain against Nazi Germany in 1939 – before the United States directly entered the war – as a stance of strategic ambiguity.<sup>51</sup> Such an attitude decisively departs from the classic patterns of traditional neutrality, as it openly opts to take sides with one party to the conflict, namely the party normatively justified in its use of force under the rules of self-defence.<sup>52</sup> Such an attitude could well be argued in view of the intense discussion after 1919 about the relationship between collective security and neutrality.<sup>53</sup> Is there still any room for attitudes of neutrality – the question underlying the

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49 Balog (note 45), section VII.

50 See Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerence, and the Use of Force*, *Articles of War*, 7 March 2022, <https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/>.

51 See Oeter (note 35), 65 et seq.

52 See also Niccolò Zugliani, *The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of the Conflict in Ukraine*, *EJIL* 35 (2024), 389 et seq.; cf. also Bartolini (note 44), 287 et seq. and Ronzitti (note 44), 57 et seq.

53 On these debates, see Oeter (note 35), 50 ff., 57 et seq.

debate – if the normative distinction between aggressor state and victim of aggression, in the sense of a requirement of solidarity (supporting collective security) with the victim of the attack, actually compels support for the victim state? The question was not answered conclusively between 1919 and 1939, nor after 1945 – but there was a clear tendency to regard solidarity with the victims of aggression as the ethically and politically 'moral high ground', as the preferable stance in light of the spirit of modern rules of collective security.<sup>54</sup> This clearly left room for a stance such as (partial) 'non-belligerency'. In a historical 'longue durée', it is astonishing how these debates (and the attitudes shaped by them) have experienced an astonishing revival in the West's position on Russia's war of aggression against Ukraine. Under international law, in view of the *jus cogens* norm of Art. 2 (4) and the condemnation of aggression as a 'crime of crimes' under international criminal law, it is perfectly justifiable to take a conscious stance of partisanship in response to Russia's brazen aggression, departing from traditional patterns of neutrality.

With regard to the position of the states supporting Russia, the question of normative justifiability can be answered with exactly the opposite result. Precisely because of the manifest nature of Russia's war as an act of open aggression, in blatant violation of the UN Charter and other fundamental norms of *jus cogens*, direct support for the aggression (which has been perfunctorily renamed a 'special military operation' by the Kremlin) is not justifiable under international law.<sup>55</sup> The complicity of Belarus in allowing its own territory to be used as a staging area and operational ground for the Russian attacking force, the massive supply of combat drones and missiles to Russia by the Iranian regime, and certainly the deployment of North Korea's own armed forces to fight side by side with Russian troops on the front line in eastern Ukraine, clearly constitute acts of aiding and abetting aggression that are manifestly contrary to international law and must be assessed as independent offences under international law (in the case of North Korea, probably even as direct (co-)perpetration of a prohibited war of aggression).<sup>56</sup> There is basically no need to discuss the normative assessment of this support for Russia any further.

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54 See Oeter (note 35), 57 et seq.

55 See also Herbert (note 8), 476 et seq.

56 See Marko Milanovic, *Ukraine Symposium – The Complicity of Iran in Russia's Aggression and War Crimes in Ukraine*, Articles of War, 19 October 2022, <https://lieber.westpoint.edu/complicity-iran-russia-aggression-war-crimes-ukraine/>,

Much more difficult to assess is the ostentatious equidistance maintained by most states in the 'Global South' towards the parties to the conflict, which ultimately amounts to a structural convergence towards a classic position of neutrality. As already mentioned, this position is not consistently characterised by a form of blind normative indifference – many of these states have joined in the condemnation of Russia's open aggression under international law (and thus taken a normative position in principle).<sup>57</sup> A clear lesson from the discussions of the interwar period and the years after 1945 on the relationship between neutrality and collective security is also that even with a clear normative assessment – an evident breach of international law on the one hand, the fundamental demand for solidarity with the victim of aggression on the other – there is no hard obligation to assist the victim state.<sup>58</sup> The often precarious military-strategic situation of smaller states may make it pragmatically advisable not to take sides openly and ultimately to adopt a neutral stance.

However, this does not apply without restrictions. First of all, following the basic concept of the 'Stimson Doctrine', which has long since become customary international law, there is an obligation not to recognise any form of violent acquisition of territory, such as also the practical consequences of such territorial acquisition.<sup>59</sup> All states are therefore obliged not only to treat the territorial acquisition as such as null and void, i.e. to refuse to accept the 'robber's' claim to the territory that has been forcibly incorporated, usually in the form of annexation;<sup>60</sup> but also, in principle, to refuse to recognise any form of exercise of sovereignty over the (illegally annexed) territory, with the exception of the so-called 'Namibia exception'<sup>61</sup> with regard to personal status acts. Such non-recognition forces a certain degree of partisanship upon states – but a partisanship that is hardly avoidable under the concept of *jus cogens*.

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and Steve Szymanski /Joshua C.T. Keruski, Ukraine Symposium - North Korea's Entry into International Armed Conflict, Articles of War, 10 December 2024, <https://lieber.westpoint.edu/north-koreas-entry-international-armed-conflict/>.

57 See Herbert (note 8), 480-81.

58 See Oeter (fn. 35), 71 et seq. and Michael Bothe, *Neutrality, Concept and General Rules*, MPEPIL, October 2015, para. 13.

59 See Grant (note 21), para. 13 et seq., also Hofmann (note 3), para. 26 et seq., 31 et seq. and Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law*, 2015, 63 et seq.

60 See Jochen A. Frowein, *Non-Recognition*, MPEPIL, December 2011, para. 3 et seq.

61 *Ibid.*, para. 5 et seq.

The obligations for third countries go far beyond this specific question of non-recognition of acquisition of territory by force. A number of authors dealing with the normative relevance of the category of *jus cogens*, have argued, informed by considerations of the law of state responsibility, that on the one hand, the general obligations not to promote forms of serious breach of *jus cogens* norms through acts of support result in far-reaching obligations of omission, i.e. obligations prohibiting any participation in the commission of serious violations.<sup>62</sup> From this perspective, the cases described above of direct support for Russia's war of aggression must be classified as clear violations of the duty of 'non-assistance', maintaining the situation created by a 'serious *jus cogens* breach'.<sup>63</sup> Under certain circumstances, this requires neutral states to make adjustments to the classic regime of obligations of neutrality. The long-standing idea that a neutral state may continue to supply weapons and armaments to belligerents to the extent of its established pre-war deliveries, as long as it does not excessively favour one side,<sup>64</sup> must certainly be modified today in view of the obligation of 'non-assistance' in maintaining serious *jus cogens* violations. No substantial support should be given to the aggressor that might help him in continuing its violations of *jus cogens* – even if this means severing historically established trade or supply relationships on which the aggressor may be dependent to a certain extent in terms of military technology or even (in a more general sense) economic policy in order to keep its 'war economy' running.

Potentially even more far-reaching is the 'obligation to cooperate to end serious *jus cogens* breaches', which is also derived from general categories of state responsibility.<sup>65</sup> As a derivation from basic categories of state responsibility, this general obligation to cooperate has a certain logic. However, it remains questionable to what extent such an obligation has actually become an obligation that in terms of state practice can be claimed to have the status of customary international law.<sup>66</sup> The scope of relevant state

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62 See, for example, Herbert (note 8), 476 et seq.

63 Ibid.

64 See Oeter (note 35), 217 et seq.

65 ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)', (2022) A/77/10, Annex, lit. a, conclusion 19.

66 See Herbert (note 8), 477 f., also Nina Jørgensen, The Obligation of Cooperation in: James Crawford / Alain Pellet / Simon Olleson (eds.), *The Law of International Responsibility*, 2010, 695, 699-700.

practice is rather limited; the classification given by the ILC in the 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)' of 2022, namely that this rule is 'now recognized under international law'<sup>67</sup>, remains without sufficient evidence. However, the vast majority of states have explicitly or implicitly welcomed the postulation of such a norm in the ILC's 'draft conclusion 19'<sup>68</sup> – and in their practice in response to Russian aggression (and the subsequent serious violation of a number of other '*jus cogens*' norms), the majority of UN member states have effectively confirmed the existence of such a norm.<sup>69</sup> But even if one affirms such a general duty to cooperate, it remains largely unclear in detail what concrete conclusions will arise from it.<sup>70</sup> There is still much room for further legal developments here – but the direction in which these developments are heading is clear.

Further legal developments are increasingly undermining traditional notions of neutrality and calling for corresponding modifications to the regime of obligations of neutrality. From the standard position of the (uninvolved) third party, which was rigidly codified in the traditional law of neutrality of the 19th and early 20th centuries with a focus on equal treatment of the parties to the conflict, neutrality in modern *jus contra bellum* has changed to become an exception requiring justification. In many conflict scenarios, a position of neutrality can still be argued on normative grounds. In the case of open wars of aggression, however, the regime of neutrality tends to be superseded by the obligation of abstention and norm preservation that is imposed by a value-based international legal order, which only allows for indifferent standing aside to a limited extent and, in fact, increasingly makes it appear to be a (disreputable) case of 'free riding'.<sup>71</sup>

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67 ILC, Draft conclusions *jus cogens*, with commentaries (fn. 64), conclusion 19, commentary para. 2.

68 Herbert (note 8), 481.

69 "Therefore, international practice in response to Russia's war, and *opinio iuris*, corroborate the customary status of the obligation to cooperate within international organisations through lawful means to end serious *jus cogens* breaches" – according to Herbert (fn. 8), 482.

70 See also Herbert (note 8), 482 et seq.

71 See also Bothe, Neutrality, MPEPIL (fn. 58), para. 10, and Rebecca Ingber, The Abuse of Neutrality, *Virginia J. Int'l L.* 65 (2025), 437, 450 et seq., 490 et seq.

## V. Is there Still Room for Realpolitik? Options for Legally Effective Territorial Transfers through Peace Treaties

For apologists of traditional power politics, oriented towards a balancing of interests conceived in terms of realpolitik, the above overview of established categories and debates in international law may seem somewhat frustrating. Must the states concerned wage endless war, they might ask, since there is no longer any possibility of a realistic balance of interests that could offer the stronger side something that might induce it to end the use of force? If this were the case, the legal perseverance of the principled theorists of 'pure law' would be in danger of achieving a Pyrrhic victory in terms of peace policy. The noble principles of upholding the rules of *jus cogens* would be taken into account as a fundamental value, but realpolitik solutions to the impasse of open wars of aggression or conquest would be blocked.

Such a simple opposition between the (normative) world of law and the (empirical) world of realpolitik would be too simplistic, however. There are ways to achieve realpolitik goals while upholding the fundamental principles of international law. However, these must not result in a simple dominance of power relations in terms of realpolitik and thus in an unbridled 'law of the strongest' – a non-sensical formula because in a normative perspective the dictates of the powerful have nothing in common with law. Subsequently, it is necessary to explore the possible mechanisms that still open up space for realpolitik action.

### 1) Possible 'ex post' Validation of Invalid Peace Treaties by the UN Security Council

One idea considered in the literature in this context amounts to overriding the consequences of the invalidity of treaties concluded under duress by means of subsequent resolutions of the UN Security Council. Basis of this idea is the assumption that the Security Council, in the interest of its primary task of peacekeeping, should be able to set aside the interests of victim states of aggression, in order to be able to steer situations of escalating violence back into orderly channels. The basic idea underlying such an argumentation is that peacekeeping within the meaning of Chapters VI and VII cannot ignore the real balance of power and power imbalances, as the Security Council does not have at its disposal an arsenal of overwhelming means of power with which even important major and regional powers



could be disciplined. Ultimately, the system is designed to accommodate the fundamental interests of these powers – and this cannot always be achieved while scrupulously adhering to legal requirements.

Some of the authors in international legal literature object to this approach. They persistently stress that a Chapter VII resolution of the Security Council is clearly not capable of easily remedying the legal defects of a peace treaty that has been concluded in violation of *jus cogens* norms.<sup>72</sup> The binding nature of *jus cogens* ultimately prevails, thus goes their argument, even over the powers of the Security Council. In principle, this idea of normative hierarchy is certainly correct. The ILC has discussed at length the issue of a possible conflict between Security Council resolutions and the requirements of *jus cogens* – and has ultimately included a rule in its 2022 draft conclusions that assumes the primacy of *jus cogens* even over Security Council resolutions in such cases.<sup>73</sup> However, this primacy rule is conditional on the content of the Security Council resolution actually conflicting with *jus cogens*. The counterargument insists that a resolution validating a transfer of territory under a peace treaty does not directly conflict with the provisions of *jus cogens*.<sup>74</sup> What is confirmed here is not a unilateral annexation in violation of *jus cogens*, but a contractual disposition that is legally dubious in the process of concluding the treaty (due to the continuing coercive effect of the aggression) – but its validation by the Security Council does not directly constitute a conflict with the provisions of *jus cogens*.<sup>75</sup> In a purely technical sense, this is probably correct, but the argument ultimately smacks of sophistry. As an organ of an international organisation, the Security Council is fundamentally bound by international law and therefore does not act in a legal vacuum in any of its options for action.<sup>76</sup> On the contrary, Art. 24 (2) of the UN Charter expressly binds the Security Council to the objectives and principles of the Charter.<sup>77</sup> This also includes the obligation to sanction violations of *jus cogens* and not to contribute in any way to the maintenance or even consolidation of such

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72 See, for example, Fox (note 2); cf. also Forlati (note 33), Kriener / Peters (note 2) and Enrico Milano, *Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status*, EJIL 14 (2003), 999, 1015 et seq.

73 ILC, *Draft conclusions jus cogens, with commentaries* (note 65), conclusion 16.

74 According to Herbert (note 2).

75 Ibid.; see also Forlati (note 33), 329.

76 Kriener / Peters (note 2), section II.

77 See Anne Peters, *Article 24*, in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, Volume I, 4th ed. 2024, 1029 ff., para. 60.

serious violations. The ICJ recently emphasised this once again in its 2024 Advisory Opinion on the occupied Palestinian territories with regard to the right to self-determination as a peremptory norm of international law.<sup>78</sup> The obligations not to recognise serious violations and not to accept any consequences of a serious violation must be interpreted broadly and require that any form of de facto consolidation of the previous violation be refrained from. This obligation applies to all changes: "Member States are under an obligation not to recognise any changes in the physical character or demographic composition, institutional structure or status of the territory occupied by Israel on 5 June 1967, including East Jerusalem".<sup>79</sup> This finding resulted in specific obligations to refrain from any contractual relations and to abstain from economic or commercial transactions or agreements "which validate or entrench its proposed occupation of the Palestinian Territory" as a result of Israel's violations of jus cogens.<sup>80</sup> In other words, it is more a matter of the spirit and purpose of preventing violations of jus cogens than of overly narrow, sophisticated constructions of the rules on the consequences of serious violations of jus cogens norms.

Similar features of a sophisticated relativisation of the obligations of 'non-assistance' are found in the argument that confirmation of the territorial disposition in the peace treaty does not violate the principle of non-recognition of the acquisition of territory by force.<sup>81</sup> This principle, which has developed over decades starting from the fundamental basis of the Stimson Doctrine, may now be considered part of customary international law – but nothing more, it is claimed; it is undoubtedly not part of jus cogens, the argument goes.<sup>82</sup> Thus, contractual recognition of a transfer of territory effected by force would not conflict with the provisions of jus cogens, but only with simple rules of customary international law – which the Security Council may disregard in an emergency, invoking the primacy rule of Article 103 of the UN Charter.<sup>83</sup>

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78 ICJ, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, available at: <https://icj-cij.org/sites/default/files/case-related/186/186-20240719-sum-01-00-en.pdf>.

79 ICJ, OPT Advisory Opinion (note 78), para. 278; see also paras. 280 et seq.

80 ICJ, OPT Advisory Opinion (note 78), paras. 278-79.

81 Herbert (note 2).

82 See Herbert (note 2); see also Forlati (note 33), 331-32.

83 On the primacy of Article 103 of the UN Charter over customary international law, see Andreas Paulus / Johann Ruben Leiss, Article 103, in Bruno Simma et al. (eds),

Prominent scholars, however, rightly point out that the Security Council, in exercising its primary responsibility for international security and peace, is entitled to take decisive measures which, in the coercive situation of immediate action required to avert threats or breaches of peace, also dispense with certain basic rules, such as the prohibition of force and intervention.<sup>84</sup> However, the forced implementation of a peace treaty which in itself has to be considered as null and void would not constitute an emergency measure under urgency, but would amount to legislative action by the Security Council.<sup>85</sup> Such legislative action is not prohibited per se to the Security Council – but in the case of (permanent) status-changing legislative acts to the detriment of the legal position of individual states, it is subject to very high requirements<sup>86</sup> What the Security Council is clearly not allowed to do in this context is to undermine the basic rules of international law to which it is bound in principle; it certainly must not deliberately undermine the fundamental rules of the international order, in particular not rules of *jus cogens*, which it is called upon to protect, by giving its seal of approval to flagrant violations of peremptory norms of international law.

Furthermore, it is highly doubtful whether the Security Council has any mandate at all to impose a permanent status settlement for disputed territories against the will of the states concerned. At the end, it has primarily the power to temporarily regulate situations involving the use of force in order to preserve peace or restore international order.<sup>87</sup> Changes to the fundamental status of territories that would deeply interfere with the territorial sovereignty of the states concerned (in the absence of their consent) are by no means covered by the powers of Chapter VII, if the Charter is read correctly.<sup>88</sup> They always require – and this is where contemporary international law reveals itself to be an order still deeply rooted in the categories of state sovereignty – the consensus of the states concerned, however difficult this may be to achieve in lengthy negotiations, in the absence of violent

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The Charter of the United Nations: A Commentary, Volume II, 4th ed. 2024, 2743 et seq., para. 73 et seq.

84 See, for example, Kriener / Peters (note 2), Section II.

85 Ibid.

86 For details, see Peters, Article 24 (note 77), para. 70 et seq.

87 See also Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action*, *EJIL* 26 (2015), 671 et seq.

88 See also the sceptical views expressed by Milano (note 72), 1015 ff. and by Björn Elberling, *The "Ultra Vires" Character of Legislative Action by the Security Council*, *International Organizations Law Review* 2 (2005), 337, 348 ff.

coercion. A different interpretation of the Charter would turn it into a hegemonic order under the direction of a small group of major powers – an understanding that may not look far-fetched for some of the P5, but which would certainly not meet with the approval of the remaining 98% of the international community.

## 2) Ceasefire Agreement as a Necessary Prelude to any Territorial Disposition

According to established practice, the Security Council may (without any problems) impose a ceasefire, i.e. a provisional arrangement which for some time silences the weapons. There exist different modalities of such a provisional silencing of arms.<sup>89</sup> What all these arrangements, be it forms of a 'truce' or a 'ceasefire', have in common is their character of a provisional solution. They constitute essentially measures of a temporary nature that lead to a (provisional) cessation of hostilities, typically with the front line being frozen.<sup>90</sup> De jure, they have no effect on the status of the territories concerned under international law, which is why they fall unproblematically under the mandate of the Security Council – after all, no rights of the states concerned are curtailed.

They are not entirely without binding force – but the arrangements typically agreed in ceasefire agreements are limited, apart from the fundamental silence of the guns, to technical details such as the geographical and temporal scope of the ceasefire, possible measures for the separation of troops, minor corrections to the front lines where necessary, its monitoring (possibly also by international observers) and the parties' options for responding to alleged violations.<sup>91</sup> The agreement of a ceasefire is also not entirely unproblematic in view of Article 52 VCLT – the frozen front line continues to manifest the injustice of the act of aggression, in the wake of which the aggressor has typically occupied parts of the territory of the victim state of the attack by means of military force – and the ceasefire (temporarily) confirms this occupation as a provisional solution. In a certain sense, therefore, a ceasefire agreement is thus a prolongation of the initial act of aggression, since it provisionally forces the victim state to

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89 See Kriener / Peters (note 2), section IV.

90 See Valentina Azarova / Ido Blum, *Suspension of Hostilities*, MPEPIL, Sept. 2015, para. 2 et seq.

91 See Christine Bell, *Ceasefire*, MPEPIL, Dec. 2009, para. 16 et seq.

accept the 'fait accompli' arising out of the aggression as a serious violation of peremptory norms of international law. This 'fait accompli' is 'brought about' by the aggression, because without the use of force by the aggressor, the affected state would never have agreed to the (even if only temporary) loss of its territorial sovereignty. However, the ceasefire agreement is typically advantageous for the militarily inferior victim state, as it grants it a respite in the military conflict and thus relieves it of military pressure.<sup>92</sup> It is precisely for this reason that in the war against Ukraine, Russia is rejecting any prospect of declaring a ceasefire, while Ukraine would be willing to accept a provisional silencing of arms without further ado.

At the same time, agreeing to a ceasefire is a fundamental prerequisite for establishing a process of sustainable peace negotiations. As long as hostilities continue, any form of substantial agreement between the aggressor and the victim state would fail to meet the requirements of Article 52 of the Vienna Convention on the Law of War, as the conclusion of such an agreement would always be contaminated by the ongoing aggression – brought about by coercion against the state attacked. Only the 'cooling-off' period of the ceasefire gives the weaker state, i.e. the victim of the attack, the political leeway necessary for a free political decision how to cope with the territorial 'fait accompli' brought about by the aggression. The aggression remains present as a latent form of coercion in the occupation of the territories behind the front line and clearly limits the victim state's options for action in terms of realpolitik. In the context of a ceasefire that has been consolidated over a longer period of time, with a correspondingly pacified situation on the ground, the question of the future territorial shape of the state has a real chance to become the subject of public discourse – an open debate can take place on whether it would be preferable to relinquish certain parts of the territory in order to achieve long-term peace.

Such a renunciation of territorial sovereignty claims, at the end codified as a transfer of territory in a peace treaty, may well make sense in terms of realpolitik. This is evident not least from the situation in Ukraine. Large parts of Donbass, especially the Donetsk and Luhansk oblasts, have not been under the control of the Ukrainian government for more than ten years now, but have been for a long time under Russian occupation, now having been effectively incorporated into Russia. It is not entirely clear whether the population of these two oblasts with a Russian-speaking

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92 Ibid., para. 20 et seq.

population of ambivalent national allegiance would actually have opted for Russia in a free vote in 2014. The flight or expulsion of the decidedly Ukrainian sections of the population and the harsh policy of 'Russification' of the remaining population has now led to a national homogenisation that leaves little doubt about the loyalty of the local population to Russia. If the territories were to be returned, the Ukrainian administration would be faced with a population that is largely hostile towards it.<sup>93</sup> In addition, large parts of the territory are war-torn and economically bled dry.<sup>94</sup> Ukraine would have to expend considerable resources to keep these areas alive, not to mention the immense task of reconstruction. In a sober political calculation, it would therefore make perfect sense to relinquish these territories – and if Ukrainian politicians (and the Ukrainian public) were to come to this conclusion in a free and open internal debate, it would be absurd to speak of the 'bringing about' of the cession of territory through the use of force by Russia and to invoke the nullity clause of Article 52 of the Vienna Convention on the Law of Treaties. From a historical causality perspective, Russia naturally remains responsible for the loss of territory due to its violation of *jus cogens* through its aggression, but ultimately this is likely to be a matter of adequate causality rather than any historical contribution to causality.

With regard to Crimea, the question is likely to be quite different. Although the population of Crimea, which throughout the 20<sup>th</sup> century was dominated by ethnic Russians, may not necessarily be in favour of the region's reintegration into the Ukrainian state, Ukraine has a duty to protect with regard to the Crimean Tatars, the indigenous population of the Crimean peninsula. The Russian majority only has emerged as a result of immigration during the 20th century. After the deportation of the entire Crimean Tatar people to Central Asia on Stalin's orders in 1944<sup>95</sup>, a large proportion of the Crimean Tatars managed to return to the peninsula in the late Soviet era and then during the 1990s, amid growing conflict

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93 See also Nataliia Kasianenko, Internal Legitimacy and Governance in the Absence of Recognition: The Cases of the Donetsk and Luhansk "People's Republics", in Mikhail Minakov / Gwendolyn Sasse / Daria Isachenko (eds.), Special Issue 'Secessionisms in Europe: Societies, Political Systems and International Order under Stress', *Ideology and Politics* 12 (2019), 135, 144-45.

94 *Ibid.*, 142 et seq.

95 See Viktoria Savchuk, Die Deportation der Krimtataren, in Wolfgang Benz (ed.), *Die Ukraine: Kampf um Unabhängigkeit*, 2023, 167 et seq.

with the Russian majority in the region.<sup>96</sup> This conflict situation led the Crimean Tatars to lean heavily on the Ukrainian state as their 'protector', which, in the wake of the Russian occupation and annexation, led to the Crimean Tatars being accused of being pro-Ukrainian, ending up in a wave of systematic persecution and 'ethnic cleansing' by the Russian occupiers after the Russian occupation and annexation of the region in 2014.<sup>97</sup> The remaining groups of Crimean Tatars who stayed in the region are under massive pressure from the Russian administration and suffer from a high degree of repression against any insistence on their traditional cultural identity and cultural practices.<sup>98</sup> From this perspective, Ukraine could not accept a simple transfer of title concerning Crimea to Russia, as becoming a permanent part of the Russian Federation. Some form of credible protection mechanisms would be required to enable the Crimean Tatars to live a self-determined life (including forms of collective organization) while preserving their cultural traditions, religion and language – a prospect that will not exist under Russian administration in the existing regime structure. This would require a special arrangement, either in the form of condominium administration or through a mechanism of international monitoring and protection enforcing legal safeguards for the Crimean Tatars<sup>99</sup> – an arrangement that is unlikely to be acceptable to the Putin regime in the foreseeable future. As long as this unfortunate situation persists, it would not make sense to give up Ukraine's territorial claim – ultimately, it is the bargaining chip that will be needed in the medium term in the context of serious peace negotiations if Ukraine wants to eventually reach a meaningful arrangement in favour of the Crimean Tatars.

Concerning the oblasts of Zaporizhzhia and Kherson, an arrangement relinquishing territorial sovereignty over these areas is completely unthinkable from Ukraine's point of view. These are predominantly Ukrainian areas in terms of the cultural characteristics of the population, and more-

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96 See Markéta Žídková / Hynek Melichar, *Crimean Tatars Before and After the Annexation of Crimea: Identity, Societal Security, and the Prospects of Violence*, ALPPI Annual of Language & Politics and Politics of Identity 9 (2015), 87, 97 et seq.

97 Žídková / Melichar (fn. 96), 99 et seq.

98 See Mariia Shynkarenko, *Compliant Subjects?: How the Crimean Tatars Resist Russian Occupation in Crimea*, Communist and Post-Communist Studies 55 (2022), 76 et seq.

99 See also my reflections in: Stefan Oeter, *Der Ukraine-Konflikt und das Völkerrecht: Wie gelingt die Rückkehr zu einem völkerrechtskonformen Zustand*, in Heinz-Gerhard Justenhoven (ed.) *Kampf um die Ukraine: Ringen um Selbstbestimmung und geopolitische Interessen*, 2018, 191, 216 et seq.

over, they are core areas of great significance for Ukrainian national history, one might remember the story of the Zaporizhzhia Cossacks. The duty to protect the human rights of its population would make it practically impossible for Ukrainian politicians to cede these territories to Russia – and to expose the local population to brutal Russian repression as usual in occupied 'enemy territories', not to speak of the patterns of forced policy of 'de-Ukrainisation', using extremely brutal methods to eradicate any form of Ukrainian identity among the inhabitants, with the aim of forcibly transforming them into Russians.

## VI. Concluding Thoughts

The above considerations should have demonstrated with utmost clarity that a 'quick and dirty' peace agreement between Ukraine and Russia, as it was envisaged in Washington and Moscow, involving the cession of large areas of Ukrainian territory to Russia, would not constitute a sustainable solution under international law. Such a 'dictated peace' could be accused of being a glaring injustice, not only from the perspective of peace ethics, but also in political terms; such a 'peace' would also fail to provide a stable solution from a strictly legal perspective of international law, since a peace treaty that forces the attacked state to cede important parts of its territory under the pressure of ongoing (illegal) use of force would be null and void under the basic rules of treaty law set out in Articles 52 and 53 of the Vienna Convention on the Law of Treaties, and therefore cannot legally lead to a sustainable restructuring of inter-state relations. Article 52 of the Vienna Convention prohibits contractual dispositions that have been 'brought about' under duress – and this would undoubtedly be the case in Ukraine if Russia's war of aggression were to continue. Article 53 of the Vienna Convention declares treaties that conflict with mandatory rules of *jus cogens* to be null and void – and at least with regard to the right to self-determination as a mandatory rule of international law, this must also be assumed in the case of Ukraine, because the (forced) cession of territories against the will of the populations concerned is incompatible with the basic rules of the right to self-determination as understood today.

Without an interim ceasefire that leads to a medium-term consolidation of a 'normal situation' characterised by the absence of an ongoing use of force, enabling the victim of the attack to reach an internal political consensus on the price to be accepted for long-term pacification, the causal nexus



between any kind of contractual concession (e.g. in the form of territorial cessions) and the continuing violence cannot be broken; the 'peace treaty' surrender of territorial sovereignty would remain under the coercive effect of violence contrary to international law, and thus without legal validity. From this perspective, the 'conventional wisdom' that an armed conflict must first be temporarily pacified by a ceasefire before serious peace negotiations can be considered is fully plausible.

The fact that these fundamental structures of modern international law are currently being completely ignored in Moscow and Washington shows, first of all, only the decline in legal awareness among the traditional great powers, which obviously believe that their special status as 'permanent members' of the Security Council elevates them above the 'lowlands' of the classical disciplines of international law. Insisting on the basic principles of the Vienna Convention on the Law of Treaties, in combination with the derivations developed by the ILC from the modern concept of 'jus cogens', is not, however, a matter of nitpicking over principles, but is unavoidable if one wishes to defend the legal character of international law under the UN Charter system. Without the validity of the prohibition of the use of force according to Article 2 (4) of the UN Charter, and the demand for respect for this fundamental norm of the 'rules-based world order', even as far as the major powers are concerned, the international community would fall back into a violent anarchy characterised by the 'law of the strongest' – and the 'law of the strongest' is the opposite of law, essentially negating the idea of any legal commitment. If we were to abandon the norm of the prohibition of violence that characterises the modern international legal system and accept that highly armed military powers use ruthless force to take what they believe they are entitled to, the world would be plunged into chaos and would mutate into an assemblage of hegemonic spaces (the famous Schmittian 'Großraumordnungen') in which smaller states would only have room as vassals of the ruling powers. It is no secret that Moscow envisages a new type of such a 'multipolar world order'. But there are good reasons for the states of Europe, and ultimately also for most of the states of the Global South, not to embrace this vision of a 'new world order'. If we want to prevent the erosion of the existing international legal order, there is no alternative but to insist on the traditional fundamental principles of international law – and these undoubtedly include the basic rules of jus cogens and the rules codified for their protection in Articles 52 and 53 of the Vienna Convention on the Law of Treaties. If we are not willing to insist on these rules and would allow Russia to use (coerced) 'peace treaties' in

order to securing its spoils of aggression, Putin's Russia would be rewarded for its brazen disregard for the fundamental rules of international law, and incentives would be created for further acts of violence. This would not only be dangerous with regard to Moscow, but would also provide a blueprint for other states that have the military potential to seize foreign territory through the use of force. The future pattern of action for militarily well-equipped states would be set under the guiding star of Russia's approach: Conquer smaller states by force, secure the spoils by committing horrific crimes against international humanitarian law and human rights in order to deter the reluctant population of the affected areas from any form of resistance, and then wait until international support for the victim of the war of aggression wanes to the point where the adherents of 'realpolitik' develop the necessary willingness to accept the 'new realities' and come to terms with the results of the aggression. If we formulate the situation with which the international community in the case of Ukraine is faced in this way, there are good reasons to condemn the willingness to accept open aggression (and its consequences) as what it essentially is – a fatal sinfall that threatens to accept without any resistance the wanton destruction of the international legal order established after the Second World War. Every state (and every society) that has an interest in preserving a world as free as possible from the 'scourge of war' (preamble to the UN Charter) is therefore called upon to insist on the established rules of *jus cogens* – and to refuse to recognise the consequences of heinous acts of violence. This is the core of the rules of Articles 52 and 53 of the WVK discussed here, but also of the argument, with regard to the institution of neutrality, that the classic obligations of equal treatment are superseded by an obligation to take a firm stand against any form of open aggression. Even states of the 'Global South' – despite all their justified mistrust of the normative seriousness of the states of the 'West' – should consider whether it is not also in their own best interests to defend the existing international legal order against heinous acts of violence – they could easily be the next victims.

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