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Peace is Made in War

Some Thoughts on Trump's Peace Plan for Ukraine

After the peace negotiations in Alaska, a position has been taken in the debate among international lawyers and politicians which —unintentionally— plays into Russia's strategy of endurance. The debate revolves around whether and when Ukraine exercises sufficient free consent to conclude a peace treaty with Russia.
It is well known that Russian imperial ambitions are measured not in years, but in decades. Putin has made clear on several occasions (e.g. here and here) that the war in Ukraine – in his view – does not need to end quickly and that he is willing to sacrifice much more combatants and civilians if his demands are not met. Trump's latest 28-point Ukraine-Russia peace plan (accessible here) recognizes Putin's determination and makes a very advantageous offer to Russia.

"Europe is Playing Poker, Russia is Playing Chess"

According to some scholars (e.g. here, here and here) and policymakers (e.g. here, here and here), no realistic peace treaty, such as the 28-point-plan, can be validly concluded while hostilities continue, as Ukraine remains under coercion and thus lacks sufficient free consent to make concessions. If Putin refuses to order a halt to the attacks, then, under this view, no peace agreement entailing Ukrainian concessions can be concluded. The practical effect of this position is also clear: it prolongs the conflict, playing directly into Putin's doctrine of "long breath" (Thumann, p. 109).
This blog post argues that making Ukraine's free consent dependent on Russia's willingness to freeze the conflict undermines international law's capacity to end armed conflicts and should therefore be legally revised in the light of the principle of peace.

Protecting State Will or Achieving Peace?

From a legal perspective, there is little necessity to interpret the rules of international law in this restrictive way. Article 52 of the Vienna Convention on the Law of Treaties (VCLT) provides:

> "*A treaty is void if its conclusion has been procured by the threat or use of force* [...]."

Some scholars argue that this provision significantly complicates (e.g. here, from minute 11:30), if not prevents (e.g. here), the conclusion of a peace treaty if Russian troops remain on Ukrainian territory as any Ukrainian concession could be seen as causally procured by coercion. This view treats Article 52 VCLT as requiring a ceasefire before peace negotiations can even begin.
At the same time, it is widely accepted that Article 52 is inapplicable to *pure* peace treaties—those that contain nothing beyond provisions ending hostilities. Since their sole purpose is to *terminate* the use of force, they logically cannot be said to have been *procured* by the use of force (Schmalenbach, VCLT Commentary, Art. 52 para. 24). This reveals that the requirement of a ceasefire is by no means absolute. When it comes to mixed peace agreements, Article 44(5) VCLT stipulates that treaties violating Article 52 VCLT cannot be divided into valid and invalid parts; they must be void in their entirety (Brosche, p. 85). Since any realistic peace treaty between Russia and Ukraine could involve territorial or political concessions the crucial question is: can Ukraine legally agree to such terms without its decision being considered coerced?

The Problem of Proving Causality

Determining whether a certain concession has been causally procured by the threat or use of force, i.e. if Ukraine's "free will" has been violated is rather difficult as states do not have a will in the same sense individuals do. Thus, the scholarly debate sidesteps the issue by asking whether specific provisions of a treaty reflect the aggressor's war aims.

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If the use of force served to achieve those very provisions, then the treaty would constitute a so-called *coercive intent case*—rendering the entire treaty void under Articles 52 and 44(5) VCLT (Schmalenbach, para. 23). This interpretation is compelling in principle, since gunboat diplomacy is over (Hathaway/Shapiro, p. 134ff., 301ff.), and an aggressor should not benefit from its aggression. Yet, it shifts the focus from the victim state's free consent to the aggressor's intentions and determines the treaty's validity based on its content.

The more unfavourable the treaty is for the victim state, i.e. the more it advances the aggressor's objectives, the more likely it is to be considered void. In effect, 'bad' peace treaties—those involving major concessions—could automatically be excluded (cf. Thielbörger).

This view raises dogmatic, theoretical, and practical questions.

Dogmatic: Article 52 VCLT Protects Consent, not Content

At first glance, this interpretation seems to have an implicit moral integrity since it wants to protect Ukraine from concluding disadvantageous treaties and excludes certain provisions *a priori*. However, a closer look reveals that the situation is more complex. Under the guise of protecting the principle of free consent, international legal scholars restrict Ukraine's free consent to their own understanding of a 'good' peace treaty. Limiting the possible content of a peace treaty restricts this consent rather than protecting it.

This becomes striking when the affected population expresses its consent itself. Under Article 73 of the Constitution of Ukraine territorial concessions can only be made after a referendum. That could lead to a contradictory situation where Ukrainians themselves declare their willingness to trade peace against territory with international law scholars denying this opportunity by referencing Article 52 VCLT. This interpretation of Article 52 VCLT is thus difficult to reconcile with the principle of self-determination. After this possibility had long been purely theoretical, the issue could now become relevant in practice, as Zelensky has come out in favour of holding a referendum.

Speaking of a possible conflict with *ius cogens* norms, there is already a rule that voids treaties because of their content: Article 53 VCLT. In the words of Schmalenbach, *"whereas Art 53 stipulates that a treaty is void because of its proscribed subject matter, Art 52 stipulates that—irrespective of the subject matter—a treaty is void because of the proscribed methods that procured its conclusion."* (Schmalenbach, para. 4, emphasis added). Determining the validity of a peace treaty under Article 52 VCLT because of its subject matter therefore blurs the differences between and contradicts the systematics of these two Articles.

Theoretical: The Value of Peace in an International Peace Order

Assessing whether a treaty implements the aggressor's war aims requires balancing the content of the treaty provisions. First, the motives for starting an armed conflict usually cannot be assessed exactly, which hinders a precise analysis of those motives within the peace treaty. Moreover, treaties are inherently based on *quid pro quo*, mixing obligations in ways that make it impossible to evaluate individual provisions in isolation.

For instance, anchoring in Ukraine's constitution a commitment not to join NATO —as per point 7 of Trump's peace plan — would certainly fulfil a Russian war objective and constitute a bad peace treaty. But can other provisions – such as the recognition of Ukraine's sovereignty (point 1) or the Russian withdrawal from some territories (point 21 c.) outweigh this impression? And, most importantly, can anything outweigh the value of ending the war at all?

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The theoretical difficulty of this content-balancing approach is inherent in the nature of peace treaties and leads back to the origins of international law. If modern international law is correctly understood as a regulatory mechanism whose ultimate goal is global peace (Shaw, p. 6, O'Connel, p. 273 and Heintze, p. 760), the expression 'bad peace treaty' can only be an oxymoron. In a positivist manner, the UN Charter already indicates the existential importance of global peace for the international legal order, Article 1(1) UN Charter. As the primary goal of the UN, world peace, also represents the legal-theoretical *raison d'être* of modern international law after the devastating experiences of World War II, the UN was founded as the central international legal organisation *in order to* secure global peace (Heintze, p. 611).
Therefore, Article 52 must not be interpreted as suspending the ability of international law to establish peace, even if it is ostensibly done to protect the victim. Under the principle of peace and as part of their right to self-determination, Ukrainians cannot be denied the decision to make concessions in order not to be exposed longer to an acute threat of annihilation. Just as the exhaustion of the Ukrainian people must not lead to Putin achieving his war aims, international law cannot dictate how much territory is worth to them to live in peace. The prevailing view which seeks to determine Ukraine's free consent on the basis of the content of the treaty amounts to this kind of paternalism.
Balancing peace against other treaty provisions misunderstands the purpose of international law and—unintentionally—provides reasons to continue the war as it implicitly admits that there are interests that outweigh peace. A highly problematic message for a peace order.

Practical: No Peace Under Concessions Possible

Finally, there are also practical reasons against this content-balancing approach. If the causality of the use of force is determined—as shown above—on the basis of the content of the treaty the attacked state cannot—even if it actually does so of its own free consent—make any legally secure concessions in the interest of peace, since objectively this could always constitute a coercive intent case and a separation of the parts of the treaty is inadmissible under Article 44(5) VCLT (Falkowska/Bedjaoui/Leidgens, VCLT Commentary, Art. 44 para. 33). Any assurances by leading Ukrainian politicians that NATO membership was painfully abandoned in view of the agreed peace and the return of Crimea based on their own cost-benefit analysis, would be as insignificant for determining free consent as the conclusion of the treaty itself.
This leaves no room for compromise—the very essence of conflict resolution.
The problem persists even under a ceasefire and demonstrates the inconsistency of the opinion discussed here. Since ceasefires are temporary and carry an implicit threat of renewed conflict if negotiations fail (cf. Würkert, p. 289), any agreement could still be viewed as concluded not under the use but under the threat of force, thus invalid under Article 52 VCLT. This would prevent the defeated state from making any disadvantageous concessions in peace treaties even concluded during a ceasefire due to the latent threat of violence despite the differences in bargaining capacities and power imbalances compared to an ongoing aggression. In this way, we observe an insufficient logical structure of the content-based-approach produced by a target-orientated interpretation which hinders a nuanced assessment of the actual situation "on the ground".
Effectively, the dominant view that leaves no room for concessions compels Ukrainians to keep fighting until they have gained enough bargaining power to conclude a peace treaty without making concession; regardless of how long that may take.

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Conclusion

War is a dirty business. But even to achieve peace you must get your hands dirty and resist the temptation to impose excessive moral conditions.

International law cannot dictate how many square kilometres of territory are "too many" to trade for peace without undermining its own highest principle: the maintenance of peace. While Ukraine must not be forced into a one-sided peace that enshrines Russian war aims, the law should not patronize Ukraine by pre-determining what sacrifices are permissible.

Article 52 VCLT is not intended to leave the timing of peace entirely to the aggressor's willingness to enter into a ceasefire. Rather, it seeks to render the use of force legally ineffective without making the end of hostilities legally impossible.

It is not only the structural advantages of authoritarian regimes in terms of endurance that should motivate the West to pursue peace. Most importantly, the devastating consequences of armed conflicts compel international law and scholarship to avoid interpretations that, however well-intentioned, delay the legal possibility of peace.

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