Even the Eagle does not Fly Higher than the Sun

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An old Russian expression goes “#### #### ## ###### #### ######” (“Even the eagle does not fly higher than the sun”). This piece of wisdom should be kept in mind during the current negotiations of Russia with the NATO member states (‘NATO MS’): as much as the sun is the mystical limit for the eagle’s cruising altitude, the Vienna Convention on the Law of Treaties (‘VCLT’) is the legal limit for the proposed Russia-NATO MS Agreement. That said, both limits, mystical and legal, are rather admonitions detached from the real world.

Contextual Background

Since the end of 2021, the situation at Ukraine’s border has been aggravating exponentially. In this context, Russia submitted its draft agreement, containing a demand of “security guarantees” from NATO MS, since the Russian Federation allegedly feels endangered by the NATO eastward enlargement. An additional draft agreement was submitted to the U.S. The two agreements mainly demand a cessation of NATO enlargement, cooperation with NATO partners, military deployments and exercises. Both the U.S. and NATO on behalf of its MS have rebuffed the drafts. The written rejections remain confidential, but some hints can be derived from statements by NATO Secretary-General Jens Stoltenberg and the Biden administration. Especially Russia’s demand to end NATO’s (eastward) expansion has been met with great opposition, based on the principle of sovereignty and each State’s right to choose its own security arrangements. Those principles were repeatedly emphasised and are claimed to be reflected in NATO’s ‘open door policy’ (disputably enshrined in Art. 10 NATO Treaty) and arguably acknowledged by Russia and the NATO MS (e.g. in the 1975 Helsinki Final Act, the 1990 Charter of Paris and the 1997 Russia NATO Founding Act).

The Proposed Agreement and *Pacta Tertiis*

The compatibility of the proposed agreement with the VCLT raises concerns under the *pacta tertiis* principle [Art. 34 VCLT] as the recent events convey the impression that Russia is trying to decide upon the fate of Ukraine’s NATO accession over Ukraine’s head. US President Biden’s statement “nothing about you without you” responds to this sentiment and, indeed, Russia’s security proposal reminds of the PCIJ Judgement *Free Zones of Upper Savoy and the District of Gex*. In line with the latter, Russia and NATO MS could have agreed decades ago in favour of European third states, including Ukraine, on the latter’s unconditional right to NATO accession [Art. 36 VCLT]. Assuming Russia and NATO MS would agree on the proposed agreement, this treaty would then revoke this unconditional right to accession to the detriment and against the wishes of Ukraine [Art. 37(2) VCLT].

Already the Helsinki Final Act recognizes that every State has the right to belong to international organizations, to be party to bilateral or multilateral treaties including the right to be party to treaties of alliance. The Soviet Union, as well as the U.S. and all the then-existing European States except Albania, signed the – admittedly merely politically binding – Act. The equally non-legally binding Charter of Paris reaffirms the principles put forward in the Act. Ultimately, within the Russia-NATO Founding Act, the parties signed a legally binding document stating that both parties equally acknowledged "respect for […] all states' […] inherent right to choose the means to ensure their own security." Given the historical context, it can be argued that, by signing the Founding Act, the parties agreed to award every European State the right to join NATO if it so wished, which confirms NATO MS' evolutionary interpretation of Art. 10 NATO Treaty. The proposed agreement would then revise the agreed upon 'open door policy'. Since Ukraine has repeatedly expressed its desire to become part of NATO, thereby implicitly accepting the 'right' it was awarded by the Russia-NATO Founding Act in conjunction with Art. 10 NATO Treaty, depriving Ukraine of that right via the proposed agreement would accordingly require Ukraine's consent, Art. 37(2) VCLT.

As tempting as these treaty-law considerations might be, NATO practice paints another picture: Despite the often stressed 'open door policy', NATO MS never considered Art. 10 NATO Treaty or any other agreement the legal basis for a third State's 'right' to NATO accession without formal invitation and thus unanimous approval. Practice since 1990 shows that States expressing an interest in joining NATO are merely invited to engage in dialogue with NATO, entailing several other procedural steps. The latest States that engaged and succeeded in this progress were Albania and Croatia (2009), Montenegro (2017) and the Republic of North Macedonia (2020). The latter already intended to join NATO in 2008, prevented by Greece's objection. The objection's legality was of main concern in the ICJ Case *Application of the Interim Accord of 13 September 1995* but exclusively discussed in the realm of a violation of the bilateral accord between the two parties. While Georgia and Ukraine repeatedly expressed their interest to join NATO, an invitation is outstanding. Thus, it is not in Ukraine's disposition to join NATO; rather, a non-accession agreement between NATO MS and Russia would oblige NATO MS to not invite Ukraine for the foreseeable future without diminishing Ukraine's legal position. Irrespective of the political implication of such an agreement with Russia, the language of Art. 10 NATO Treaty does not prevent NATO MS from entering into a binding commitment regarding NATO accession practice outside of the NATO Treaty procedure.

The Proposed Agreement and Art. 52 VCLT

Considering the situation at the Ukrainian border further, the conclusion of the proposed agreement could have been invalid under the terms set out in Art. 52 VCLT, protecting a State's free will. Accordingly, a treaty is void *ab initio* [Art. 44(5) VCLT] if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter. In this regard, Section 4 VCLT sets out procedural requirements that have never been used in practice.

The crucial element of Art. 52 VCLT is that the conclusion of the treaty has been procured by a threat or use of force in violation of the UN Charter. The term 'procured' requests (a) a causal link between force and the conclusion of a treaty and (b) a certain degree of force.

It is generally acknowledged that the threat or use of force refers to the prohibition to use force in international relations, Art. 2(4) UN Charter. The principle is further defined in the Definition of Aggression and the pertinent ICJ jurisprudence (*Military and Paramilitary Activities in and against Nicaragua*, para. 189 f.; Oil Platforms, para. 43; *Armed Activities on the Territory of the Congo*, para. 148). As the ICJ famously stated in its *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, a threat of use of force suffices in the context of Art. 2(4) UN Charter and is *per se* unlawful if the applied force would be unlawful. A 'threat' in this situation is an explicit or implicit communication of a State directed towards another State, indicating that, in case of non-compliance with a demand, armed force will be used (cf. *Schmalenbach*, in Dörr/Schmalenbach VCLT-Commentary, 2nd ed, Art. 52 para. 33). As a recent blog post elaborated, the actual use of force by Russia would be unlawful, rendering the threat unlawful, too. However, the causal element 'procured' under Art. 52 VCLT is especially difficult to prove. In this scenario, what is decisive is how explicitly the coercing State threatens to use force in case of the agreement's non-conclusion. Examples may be the contemplation of manpower and weapons stockpiles or the military and geopolitical capacity of the coercing State to translate the threat into action. A coercive intent must be retrievable from the coercing State's explicit or implicit actions.

Russia has deployed more than 100,000 troops along the Ukrainian border, including operational-tactical missiles. 30.000 additional troops are stationed in Belarus, awaiting a military exercise at the end of February. Satellite photos revealed Russian military hardware – including self-propelled guns, battle tanks and armoured vehicles for carrying infantry close to the Ukrainian border. Russia's Defence Ministry says that Russia is conducting 'regular' winter military drills in its southern region and also announced a large-scale naval manoeuvre in the Atlantic, Arctic, Mediterranean, Black Sea and Pacific. The exercises involve a total of 10,000 military personnel, more than 140 ships and over 60 aircrafts.

Bearing these factors in mind it could be rightly argued that a causal link existed between Russia's action and the Ukraine's duress if the latter would be coerced to enter into an agreement. However, in this particular instance the situation is a triangular one (Russia – NATO MS – Ukraine), as it is the threat of the use of force by Russia against the Ukraine that is supposed to procure an agreement with NATO MS. The language of Art. 52 VCLT does not *per se* exclude triangular constellations from its scope and it is not far-fetched to argue that among members of a defence alliance, the threat of armed force against one member is a threat against all members due to their mutual military assistance obligations (arg. Art. 5 NATO Treaty). However, it is difficult to extend this reasoning to an attacked State outside of the alliance, such as Ukraine, which gives NATO MS the right but not the duty under international law to assist the attacked State (arg. Art. 51 UN Charter; cf. *Goodrich*, in Hambro/Edvard Charter of the United Nations: Commentary

and Documents, Art. 51 p. 178 f.). Even though the Ukraine-NATO relationship intensified on various levels since the annexation of Crimea in 2014, this co-operation primarily embodies supportive measures such as the launching of trust funds, support in the reform of Ukraine's defence etc. Clearly, this special relation falls short on a bilaterally agreed unconditional support in case of an armed attack. Even if NATO MS feel coerced by the Russian military build-up at the Ukrainian borders due to the endangered European peace and a potential nuclear escalation, this sense of threat is not relevant under Art. 52 VCLT. A treaty's voidness due to coercion establishes an exception to the general *pacta sunt servanda* principle and, thus, needs to be interpreted and applied restrictively (cf. *Schmalenbach*, in Dörr/ Schmalenbach VCLT-Commentary, 2nd ed, Art. 52 para. 10 f.).

Conclusion

Having considered *pacta tertiis* and Art. 52 VCLT, the law of treaties does not limit Russia's cruising altitude with regard to the proposed agreement. From the perspective of the prohibition of the (threat of) use of force under Art. 2(4) UN Charter, however, the Russian eagle has burned its wings.
