XXXIV POLISH YEARBOOK OF INTERNATIONAL LAW
2014
DOI 10.7420/pyil2014e
PL ISSN 0554-498X

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THE BUDAPEST MEMORANDUM OF 5 DECEMBER 1994: POLITICAL ENGAGEMENT OR LEGAL OBLIGATION?

Abstract:
Ukraine, upon giving up the nuclear arsenal left on its territory by the USSR, entered in 1994 into a Memorandum on Security Assurances with the United Kingdom, United States and Russian Federation (Budapest Memorandum). Since the crisis began between the Russian Federation and Ukraine in February 2014, a number of States have invoked the Budapest Memorandum. Unclear, however, is whether this instrument constituted legal obligations among its Parties or, instead, is a political declaration having no legal effect. The distinction between political instruments and legal instruments is a recurring question in inter-State relations and claims practice. The present article considers the Budapest Memorandum in light of the question of general legal interest – namely, how do we distinguish between the legal and the political instrument?

Keywords: treaties, legal obligations, political commitments, use of force, international security, non-proliferation and disarmament, general rule of interpretation, supplementary means of interpretation, subsequent practice, treaty text, treaty context, object and purpose, Budapest Memorandum, Russian Federation, Ukraine, United States, United Kingdom

INTRODUCTION

The Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) was adopted on 5 December 1994 by the Russian Federation, Ukraine, United Kingdom, and United States.[1] "Noting the changes in the world-wide security situation",[2] the four Parties

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[1] Letter dated 7 December 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General: A/49/765 – S/1994/1399, annex I.

[2] Budapest Memorandum, preambular para. 3.

"reaffirm[ed] their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine."[3] The three nuclear weapons States also "reaffirm[ed] their commitment to Ukraine (…) to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine."[4]

France on the same day adopted a Statement on the Accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[5] France's Statement indicated, *inter alia,* that "France, as a permanent member of the Security Council, reaffirms its intention to obtain from the Council immediate steps to provide, in accordance with the Charter, the necessary assistance to Ukraine as a non-nuclear weapons State under the NPT, if it is the victim of an act of aggression or a threat is made against it with nuclear weapons" and "its commitment to respect the independence and sovereignty of Ukraine within its present borders."[6]

In view of the acts of armed aggression by the Russian Federation against Ukraine since February 2014, including the putative annexation of Ukraine's territory of Crimea on 21 March 2014,[7] the question arises whether the Budapest Memorandum created

[3] *Ibidem*, para. 1.

[4] *Ibidem*, para. 2.

[5] Treaty on the Non-Proliferation of Nuclear Weapons (adopted 12 June 1968, entered into force 5 March 1970), 729 UNTS 168.

[6] For the text of France's Statement, *see* http://www.exportlawblog.com/docs/security_assurances.pdf (accessed 30 March 2015). The statement reads as follows in the original:

La France, en tant que membre permanent du Conseil de Sécurité, affirme son intention d'obtenir que le Conseil prenne des mesures immédiates en vue de fournir, conformément à la Charte, l'assistance né[ce]ssaire à l'Ukraine en tant qu'Etat non possesseur d'armes nucléaires partie au TNP, au cas où celle-ci serait victime d'un acte d'agression ou ferait l'objet d'une menace d'agression avec emploi d'armes nucléaires.

La France réaffirme son engagement de respecter l'indépendance et la souveraineté d'Ukraine dans ses frontières actuelles, conformément aux principes de l'Acte final d'Helsinki et de la Charte de Paris pour une nouvelle Europe. Elle rappelle son attach[e]ment aux principes de la CSCE selon lesquels le frontières ne peuvent être modifiées que par des moyens pacifiques et par voie d'accord, et les Etats participants s'abstiennent de recourir à la menace ou l'emploi de la force soit contre l'intégrité territoriale ou l'indépendance politique d'un Etat, soit de toute autre manière incompatible avec les buts de Nations Unies.

[France, as a permanent member of the Security Council, affirms its intention to obtain from the Council immediate steps to provide, in accordance with the Charter, the necessary assistance to Ukraine as a non-nuclear weapons State under the NPT, if it is the victim of an act of aggression or a threat is made against it with nuclear weapons.

France reaffirms its commitment to respect the independence and sovereignty of Ukraine within its present borders, in accordance with the principles of the Helsinki Final Act and the Charter of Paris for New Europe. It recalls its attachment to CSCE principles according to which borders can be changed only by peaceful means and agreement, and the participating States shall refrain from the threat or use of force against the territorial integrity or political independence of a State, or in any other manner inconsistent with the purposes of the United Nations.]

[7] Federal Constitutional Law, *On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the*

legal obligations on the part of the States which adopted it and, to the extent that it did, what those obligations are.[8] The initial problem is to establish whether the guarantees set out in the Memorandum (and France's associated Statement) are legal obligations or, instead, political undertakings having no distinct legal effect.

1. THE LAW OF (NON)TREATIES: WHAT RULES APPLY?

Under what rules is it to be established what character – legal or political – an instrument possesses? It would be question-begging to say that the general rule of interpretation for treaties[9] necessarily applies to an instrument like the Budapest Memorandum: the very question to be answered is whether the instrument is a treaty creating legal obligations or not. Also, it is to be asked whether establishing the character (legal or political) of the instrument as a whole is really the question – or, instead, whether the real question is what character is possessed by each of its provisions. After all, an instrument of undoubted treaty character well may contain provisions that are purely hortatory as well as declarations of a purely political character. In that case, the question is to distinguish between the legal and the non-legal within a given instrument.

In practice, however, the question typically has been posed like this: what character is possessed by the instrument as a whole? And, in practice, the conceptual problem of applying the general rule of interpretation for treaties has not been an obstacle. The conceptual problem notwithstanding, courts and tribunals have been ready to consider whether an agreement creates legal rights or obligations, and they have done so by considering the instrument as a whole.

In both *Aegean Sea Continental Shelf* and *Qatar* v. *Bahrain,* the International Court of Justice ("ICJ" or "the Court") was called upon to consider an instrument upon which one party sought to base jurisdiction and which the other party asserted was a mere political undertaking (and thus not an effective basis for jurisdiction). The ICJ reasoned that it "must have regard above all to [the] actual terms and to the particular circumstances in which [the instrument] was drawn up."[10] The Court said that whether or not an instrument constitutes a legal agreement "essentially depends on the nature of the act or transaction to which the [instrument] gives expression."[11]

City of Federal Importance Sevastopol, 21 March 2014, available at: http://eng.kremlin.ru/events/president/news/20625 (accessed 30 March 2015). Further to the situation, *see* T. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law*, Palgrave Macmillan, New York: 2015.

[8] *See e.g.* Prof. Stephen MacFarlane, interview by France 24, 3 April 2014, available at: http://www.france24.com/en/20140303-ukraine-us-uk-diplomacy-russia-budapest-memorandum/ (accessed 30 March 2015).

[9] Art. 31 of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 (VCLT).

[10] ICJ, *Aegean Sea Continental Shelf,* Jurisdiction, 18 December 1978, ICJ Rep. 1978, p. 3, 39, para. 96. Quoted [in:] ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, 1 July 1994, ICJ Rep. 1994, p. 112, 121, para. 23.

[11] *Aegean Sea Continental Shelf,* Jurisdiction, p. 39, para. 96.

This would suggest a method of analysis akin to that indicated under the general rule of interpretation – i.e., the rule set out under Article 31.1 of the VCLT: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." To say that one "must have regard above all to [the] actual terms" is a directive similar to that which says "[a] treaty shall be interpreted (…) in accordance with the ordinary meaning to be given to the terms." The straightforward case, then, would be the instrument in which the parties have declared, by its "actual terms," their intention to create (or not to create) legal obligations. But not all instruments say "we, the parties, herein intend to create legal obligations [or not]." So the interpreter may have to look further.

To have regard to "the particular circumstances in which [the instrument] was drawn up" and to treat the character of the instrument as "essentially depend[ent]" upon "the nature of the act or transaction to which the [instrument] gives expression" are less tightly connected to the standard language by which the rule of interpretation is expressed. A link between these phrases and the standard language nevertheless may be discerned. The "nature of the act or transaction" arguably evokes the "object and purpose" of the treaty, albeit loosely. It could be, then, that what the Court had in mind was that the object and purpose of the instrument in question is to be considered in order to arrive at a conclusion whether the instrument creates legal obligations or not.

Applying the phrase "object and purpose" when interpreting an instrument, it has been remarked, gives rise to questions, not least of all concerning how the plain text of the instrument is to be related to teleological considerations.[12] There are good reasons to take care in applying teleological considerations, not least of all the violence that a free-wheeling interpretative approach can do to an intention set out in the plain terms of the text. However, where a real contest exists as to whether the text in question has any legal content at all, teleological considerations have a special salience. A text that says "the States Parties shall do X", where X is a clear course of action, gives rise to little or no need for a teleological approach – *if* it is accepted that the text is legally binding. If, by contrast, a question exists whether the text is legally binding, then the otherwise clear directive to "do X" no longer has an uncontested meaning. To identify its meaning, the interpreter must form a judgment as to whether the object and purpose of the parties was to create a legal obligation or, instead, merely to declare a political *desideratum*. The interpretive approach to be taken in respect of an undoubted obligation-creating instrument thus is not quite the same as that to be taken in respect of an instrument the legal character of which is contested. In respect of the latter, a certain shift of stress is entailed in the direction of teleological considerations.

When the legal or political character of the instrument is contested, a shift is also entailed toward what the standard rule of interpretation identifies as the supplementary

[12] *See e.g.* E. Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, Oxford: 2014, pp. 113-118; D. S. Jonas & T. N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 Vanderbilt Journal of Transnational Law 565 (2010), pp. 580-582.

means of interpretation. The Court suggested this in *Aegean Sea Continental Shelf*, when it said that regard should be given "to the particular circumstances in which [the instrument] was drawn up." This evokes the language of Art. 32 of the VCLT – "Supplementary Means of Interpretation." Supplementary means, however, are a sort of residual mechanism – to be reserved for: (1) confirming the meaning when this is already evident on the application of the general rule (text in its context and in light of the instrument's object and purpose); or (2) determining the meaning if the interpretation that would be arrived at by applying the general rule "*(a)* [would] leave (…) the meaning ambiguous or obscure;" or *(b)* "[would] lead (…) to a result which is manifestly absurd or unreasonable." When the legal or political character of the instrument is contested, confirming a meaning which is already evident on the application of the general rule (the first case under Art. 32) is not likely to serve much purpose. A provision of the instrument may have a clear meaning, to the extent that the legal character of the instrument is assumed; but here it is the legal character itself which is in question. And if the text on its own answers the question of legal character (the hypothetical clause that says "we, the parties, herein intend to create legal obligations [or not]"), then, there too, it does not seem that supplementary means of interpretation add much to the analysis.

The second branch of the second case under Art. 32 – determining the meaning if the meaning would otherwise be "manifestly absurd or unreasonable" – is not applicable here either: there is nothing "manifestly absurd" about a political undertaking which creates no legal obligation; and it is not "unreasonable" to conclude that some instruments are only that – political instruments, not legal agreements.

As for the first branch of the second case – where the interpretation arrived at by applying the general rule would leave the meaning "ambiguous or obscure" – this may be the more natural interpretative device to apply where the question of the legal character of the instrument arises. If from the text of the instrument taken in its context and in light of the instrument's object and purpose, one cannot be sure whether the instrument was intended to create legal obligations, then the meaning of the instrument is "ambiguous." Under the scheme of Arts. 31 and 32, this would open the door to the supplementary means of interpretation – e.g., to "the preparatory work of the treaty and the circumstances of its conclusion."

When the Court said that, to judge whether the instrument creates legal obligations or not, one is to consider "the particular circumstances in which [the instrument] was drawn up,"[13] it might appear that the Court was applying this scheme. Judge Oda evidently thought that this was the right approach (though he disagreed with the Court's conclusion). In his dissenting opinion in the jurisdiction phase of *Qatar* v. *Bahrain,* Judge Oda referred to Art. 32 and said that this directed the interpreter to consider "the

[13] *Aegean Sea Continental Shelf,* Jurisdiction, p. 3, 39, para. 96. Quoted in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, p. 112, 121, para. 23.

preparatory work of the treaty and the circumstances of its conclusion."[14] Judge Oda concluded that, when they accepted the 1990 Minutes (by which Qatar said jurisdiction was to be founded), the parties had adopted no legally binding commitment.[15] In Judge Oda's words, when "the three Foreign Ministers (…) did sign the Minutes of the meeting (…) they certainly did so without the slightest idea that they were signing a tripartite treaty or convention."[16] It might be asked whether the Court (and the dissenting Judge) were strictly applying the approach laid out in Art. 31 and 32. Would it not have been possible to reach the same conclusion(s) by reference to the object and purpose that the parties had evinced?

Courts and tribunals in practice have implicitly accepted the applicability of the general rule of interpretation and its supplementary part notwithstanding conceptual questions the approach may raise. As with the interpretation of undoubted treaty instruments, the task will be to determine the intention of the parties. As has recently been observed, "the very taproot of treaty interpretation is the objective establishment of the intentions of the parties."[17] It is natural to apply the same standard when asking whether there exists a legally binding treaty to interpret.

When applying the standard of "objective establishment of the intentions of the parties" to determining the legal or political character of the instrument, much the same questions arise as when determining the meaning of an undoubted legal text. In particular, it is to be asked, by what indications does one tell what the parties intended? The Court in *Qatar v. Bahrain* rejected the argument that statements or conduct after the adoption of the 1990 Minutes determined the parties' intentions. As to subsequent statements, the Court said as follows:

> The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a 'statement recording a political understanding,' and not to an international agreement.[18]

This in itself does not explain why the text in question is to be viewed as creating legal obligations. The Court rejected that the national constitutional procedures for the adoption of the Minutes or the lateness of their registration under Article 102 of the Charter determined that they lacked legal character[19] (the question of registration will be

[14] In particular to Art. 32 of the VCLT concerning supplementary means of interpretation: Dissenting Opinion of Judge Oda, ICJ Rep. 1994 at 138-39, para. 16.

[15] *Ibidem*, paras. 14-17.

[16] *Ibidem*, para. 16.

[17] E. Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, Oxford: 2014, p. 56.

[18] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, at pp. 122-23, para. 27.

[19] *Ibidem* at 122, para. 29.

considered further below). In any event, the Court concluded that "any such intention, even if shown to exist, [could not] prevail over the actual terms of the instrument in question."[20] So the terms as adopted are the starting point for analysis. If they evince the shared intention of the parties to create legal obligations, then the instrument is to be interpreted as doing so. This again is in accordance with the approach generally taken to questions of treaty interpretation.

While undoubtedly practical, the Court's approach to the prior question has been eased by the conclusion that the instruments in dispute were in truth legal instruments. A case in which that conclusion could not be supported would perhaps put a greater onus on a court or tribunal to say how exactly the rules of treaty interpretation apply – and why. It is not altogether clear that the drafting history of the Vienna Convention would furnish the answers; it tends rather to suggest that the adopted text resulted from a decision to elide the questions.

In both the International Law Commission (ILC) and the Diplomatic Conference, disagreement arose as to the scope of the term "treaty". One of the problems was that jurists and States did not agree how to ensure that the term extends to all agreements that create legal rights or obligations. A drafting approach which excluded political agreements met with objection, perhaps for that reason; the exact grounds for objection here were not perfectly clear. Mr. Talalaev, the Soviet representative, said that

> [b]y limiting the notion of a treaty to agreements which provided for rights and obligations, [a] Swiss amendment unduly restricted the scope of the draft articles by excluding from their sphere of application important international agreements, such as the Atlantic Charter, the Yalta and Potsdam Agreements and many political declarations which not only provided for 'rights and obligations' but also laid down very important rules of international law.[21]

The objection here seems to have been that some instruments are of mixed character – containing both legal and political terms – and that the provision on use of terms should not exclude an agreement simply because some of its terms are non-binding. This seems a valid concern, but other States had the opposite concern: that an expansive approach would sweep into the scope of the Convention instruments of purely political character.

Sepulveda Amor, as representative of Mexico in the Diplomatic Conference, agreed with the Swiss approach that would exclude political instruments from the term "treaty" expressly:

> The purpose of a treaty was to establish legal relations between the parties, which was not true of declarations of principle or political instruments such as the Atlantic Charter…

[20] *Ibidem*. The Court had reached a similar result, though with reference to rather elaborate private law analogies, in *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, 26 May 1961 ICJ Rep. 1961, p. 17, paras. 31-32.

[21] Committee of the Whole, 87th meeting, 14 April 1969, *Official Records, UN Conference on the Law of Treaties* (Second Sess.), p. 226 (para. 22).

> The Mexican delegation therefore considered that the existence of a legal relationship between States which concluded a treaty should be regarded as an essential element of the legal act.[22]

The United Kingdom's representative took a similar view, saying that the USSR had

> expressed too broad a view of the concept of a treaty within the framework of the draft convention. International practice had consistently upheld the distinction between international agreements properly so-called, where the parties intended to create rights and obligations, and declarations and other similar instruments simply setting out policy objectives or agreed views.[23]

So participants in the Diplomatic Conference and later parties to the Convention held the view that the law of treaties as set out therein is not to be interpreted as applying to political instruments. The differences on the point found expression through the work of the ILC and the subsequent Diplomatic Conference.

In fact, a compromise had been proposed in the ILC the year before adoption of the draft articles and three years before the opening of the Diplomatic Conference. Briggs, in the 1965 session of the ILC, suggested that, to address the concern of the States which objected to applying the draft articles to "agreed statements of policy" (i.e., political instruments not creating legal rights or obligations), a simple change in drafting would suffice. Draft article 1(b) in the set of draft articles reported by Waldock in 1962 read as follows:

> '*Treaty*' means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation).[24]

Briggs's suggestion was to replace the word "any" with the word "an".[25] Thus, instead of a treaty being used in the convention to mean "*any* international agreement," it would be used to mean "*an* international agreement." This wording entails the possibility of a more limited scope. True, under Brigg's wording, it *could* be that a treaty includes international agreements regardless of their content (political or legal); but the wording as adopted makes clear that it might not.

Moreover, the proposal to switch from "any" to the potentially more restrictive "an" was made in a particular context. This was amidst a disagreement over whether the text

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[22] Committee of the Whole, 4th meeting, 29 March 1968, *Official Records, UN Conference on the Law of Treaties* (First Sess.), p. 23 (para. 26).

[23] Mr. Sinclair (United Kingdom), *ibidem*, p. 228 (para. 35). To similar effect, *see* Mr. Rodriguez (Chile), *ibidem*, pp. 226-27 (para. 24); and in the ILC discussions in 1965 the observations by de Luna: ILC 777th meeting, 5 May 1965, ILC Yearbook (1965), vol. I, p. 10 (para. 20).

[24] Sir Humphrey Waldock, Special Rapporteur, First report, 26 March 1962: ILC Yearbook (1962), vol. II, p. 31.

[25] Briggs, ILC 777th meeting, 5 May 1965, ILC Yearbook (1965), vol. I, p. 10 (para. 10).

should expressly exclude political agreements. Objectors against an exclusion worried that it would exclude too much – i.e., instruments with mixed legal and political terms. Proponents of an exclusion worried that the scope of the text, without the exclusion, would be misinterpreted as extending to purely political instruments. The text as eventually adopted was as follows:

> *Article 2*
> *Use of terms*
> 1. For the purposes of the present Convention:
> *(a)* 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[26]

The Commentary to draft article 2 mentioned that the drafters decided to drop the proposal to expressly restrict the definition of treaties to instruments having the element of "intention to creation obligations under international law."[27] It attributed this to concerns that the phrase would lead to confusion as between instruments under international law and domestic law.[28] It did not mention Briggs's solution – the one in fact adopted – or the context in which that solution was adopted – namely, a disagreement over how to deal with political agreements.

Of course, we have no Convention on the Law of Non-Treaties; and the convention we do have sets out a rule of interpretation which, its controversies notwithstanding, serves its purpose. Future interpreters seem likely to apply its terms, *mutatis mutandis,* to the question of the legal or political character of an instrument.

Some writers have suggested that the interpreter might measure the parties' intention (legal or political) by starting outside the text.[29] The mainstream view affirms that the starting point is the text, as the text provides the objective evidence of intention.[30] The difference of views seems to be one of emphasis, not of substance. Nobody would say that the text of the instrument does not matter; and to speak about subjective measures of party intention would seem simply to be another way of speaking about the context, object and purposes – another way of distinguishing between text and the other branches of the general rule of interpretation. As suggested above, when the character of the instrument as legal or political is in doubt, the interpretative problem

[26] Adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, 333.

[27] For a still earlier version *see* H. Lauterpacht, Special Rapporteur, First Report, 24 March 1953, ILC Yearbook (1953), vol. II, p. 90: "Article 1. Essential Requirements of a Treaty. Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties."

[28] Draft Art. 2, Comment (6): ILC Yearbook (1966), vol. II, p. 189.

[29] D. B. Hollis & J. J. Newcomer, '*Political' Commitments and the Constitution*, (2009) 49 Virginia Journal of International Law 507 (2009), p. 523, n. 57.

[30] *See e.g.* Ch. Chinkin, *A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States*, 10 Leiden Journal of International Law 223 (1997), pp. 236-37. Cited by Hollis & Newcomer (*ibidem*).

is not precisely the same as entailed by contested provisions within an undoubted legal instrument. The interpretative tools that have been used, however, are derived from, if not identical to, those belonging to the law of treaties. Sir Hersch Lauterpacht, as special rapporteur on the topic of the law of treaties, said that the legal effectiveness of an instrument "must be evidenced by the terms of the treaty and any other available evidence."[31] This was a defensible approach at the time; it remains so today.

So the guarantees by the Russian Federation, United Kingdom, United States and France to Ukraine are to be considered, first, in view of the terms by which the Parties expressed those guarantees; and then in the context in which they were expressed and in the light of their object and purpose.

2. TEXT OF THE BUDAPEST MEMORANDUM

The Budapest Memorandum sets out a series of assurances to Ukraine. The assurances are contained in six operative paragraphs, each of which the three Permanent Members of the Security Council which are parties to the Memorandum "confirm." The operative paragraphs are as follows:

> 1. The Russian Federation, the United Kingdom (…) and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine;
> 2. [The three P5 Parties] reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations;
> 3. [The three P5 Parties] reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind;
> 4. [The three P5 Parties] reaffirm their commitment to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used;
> 5. [The three P5 Parties] reaffirm, in the case of Ukraine, their commitment not to use nuclear weapons against any non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a State in association or alliance with a nuclear-weapon State;

[31] Lauterpacht, Special Rapporteur, Second Report on the Law of Treaties, ILC Yearbook (1954), vol. II, p. 125, para. 11.

6. [All four Parties] will consult in the event a situation arises that raises a question concerning these commitments.[32]

A preliminary point is that these provisions, with the exception of the consultation provision in paragraph 6, are expressed as renewals or reaffirmations. The Parties evidently believed themselves already subject to the commitments or obligations which the Memorandum "reaffirm[ed]." Many a legal rule is expressed by more than one treaty and also by treaty and in general international law. So too, however, can a political commitment be expressed in more than one place.

Another point is that four of the five paragraphs refer to "commitment" and only one to "obligation." It is certainly an obligation (subject to the established exceptions) to refrain from threat or use of force against Ukraine's territorial integrity. That obligation existed before the conclusion of the Budapest Memorandum, which "reaffirm[ed]" the obligation in paragraph 2. Whether the variation in the Memorandum between "obligation" and "commitment" has legal consequences is doubtful. Paragraph 5 reaffirms the P5 Parties' "commitment" not to use nuclear weapons against Ukraine except in case Ukraine in alliance with a nuclear-weapon State attacked one of them (or their armed forces or allies). To posit that the P5 Parties, in the absence of the Memorandum, would have had a right to use nuclear weapons against Ukraine – in the absence of an attack by Ukraine – is untenable.[33] So the non-use of nuclear weapons, as indicated in paragraph 5, is non-use as a matter of legal obligation, but this is not to say that the legal obligation arises out of paragraph 5; it pre-exists that provision. The articulation of a commitment as a political matter does not change the legal character of an obligation which already exists in the same terms.

Respect for borders is an existing legal obligation as well. The Memorandum (under paragraph 1) refers to the Final Act of the CSCE in connection with that obligation. The Final Act is widely understood to be a political statement and not to constitute legal obligations.[34] The reference in the Memorandum to the Final Act is not a *renvoi*; it does not incorporate the Helsinki commitments by reference. Even if it had, it would not, without more, have changed the character of those commitments. Again, to refer to an existing commitment – such as the legal obligation to respect settled boundaries – does not in itself change the legal character of the commitment.

The Memorandum refers to the Final Act again (in para. 3) when reaffirming a commitment to "refrain from economic coercion designed to subordinate to their

[32] A/49/765 – S/1994/1399, pp. 2-3.

[33] Which follows from the general prohibition against threat or use of force other than in self-defence (Charter Art. 2(4)), and from the conclusions of the ICJ in *Legality of the Threat or Use of Nuclear Weapons* that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict" – except perhaps in "an extreme circumstance of self-defence, in which the very survival of a State would be at stake": Advisory Opinion, 8 July 1996, ICJ Rep. 1996, p. 226, 266 (para. 105 (E)).

[34] *See* with citations to literature J. J. Paust, *Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act*, 45 Law and Contemporary Problems 53 (1982), pp. 55-57.

own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind." This "commitment" is reminiscent of others which States have asserted to be purely political – like the commitment in the Algiers Declaration to non-interference, to be noted shortly again below. There is plausible ground for treating the content of such a commitment as political and not legal. Establishing that the commitment had been breached would entail a difficult and inevitably highly contentious exercise in appreciation: "economic coercion" is not a term of art; the Memorandum does not define it. Legal obligations certainly can entail difficult questions; but it would be surprising for three economically powerful States to accept an obligation to refrain from economic influence; where their influence becomes coercion might be determinable in some cases but a large area of uncertainty exists with such appreciations. Similarly, it would be surprising if they would have accepted, as a legal obligation, a prohibition against "secur[ing]" over Ukraine "advantages of any kind"; it would be hard to see how in practice they could assure that they did not.

Then there are paragraphs 4 and 6. These are the only provisions of the Memorandum requiring that the three P5 Parties take affirmative steps, rather than refrain from prohibited actions. Paragraph 4 seems to be restricted to acts of aggression or threats of aggression "in which nuclear weapons are used." It might be argued, with reference to the English language text, that the qualifying clause ("in which nuclear weapons are used") applies only to the threat of aggression and that, thus, any act of aggression (nuclear or other) triggers the commitment to seek Security Council action.[35] However, this is by no means an unimpeachable interpretation. The overall concern of the Memorandum with nuclear disarmament is relevant as context.

The conduct required under paragraph 4 is political conduct – "to seek immediate (…) action" by the Security Council "to provide assistance to Ukraine." This in itself is not determinative as to whether the commitment in paragraph 4 itself is legal or political. Many legal obligations are obligations to do things having a political character. A challenge, however, could be raised on other grounds whether a State may enter into a legally binding commitment to seek Security Council action. Libya and the United States both seemed to accept that a member of the Security Council could not be obliged to vote or refrain from voting on a particular Security Council action.[36] The

[35] The French language text of paragraph 4 also suggests that the concern is with threats or use of nuclear weapons, referring as it does to Security Council action "*en cas d'agression ou de menace d'agression avec recours à l'arme nucléaire dirigée contre l'Ukraine*." The words "*en cas*" refer to the whole clause that follows; and the words "*dirigée contre l'Ukraine*" refer to the whole clause that comes before; but the clause "*avec recours à l'arme nucléaire,"* while probably intended to modify both "*agression*" and "*menace*", could arguably be restricted to the latter.

[36] See *Lockerbie,* Request for the Indication of Provisional Measures, Eric Suy (for Libya), Public Sitting, Thursday 26 March 1992, translation, p. 72; Public Sitting (morning), Saturday 28 March 1992, translation, p 44. And Rashkow (for the United States), Public Sitting (morning), Friday, 27 March 1992, p. 31; Edwin Williamson (for the United States), Public Sitting (afternoon), Saturday, 28 March 1992, p. 31.

European Court of Human Rights has doubted whether international responsibility could attach to a State for the way it voted in the Security Council.[37] By contrast, when it came to a pledge to vote (or to refrain from exercising a veto) in a regional security organization, the ICJ apparently did not judge a State to be prevented from making that pledge as a legally binding commitment; the Court judged that Greece had "breached its obligation" when it objected to the admission of the former Yugoslav Republic of Macedonia to NATO;[38] and it said in its reasoning that the question of the accordance of Greece's conduct with the treaty provision requiring Greece not to object to Macedonia's NATO candidacy was a "legal question pertaining to the interpretation and implementation" of that treaty[39] – i.e., a "legal dispute".[40] It would seem to follow that it was open to the Russian Federation, United Kingdom and United States to make a legal commitment to Ukraine to take action in the Security Council.

Paragraph 6 provides that the three P5 Parties "will" activate a consultation mechanism if "a situation arises that raises a question concerning these commitments." They might have said "shall" but the chosen verb is not at all inconsistent with an intention to create a legal obligation. The Ukrainian party well may have asked whether, following an act of aggression by one of the guarantor Parties, an obligation to consult with that party would have had much substance. There was a multi-party consultation mechanism under Article IV of the Treaty of Guarantee of 1960 and that did little good at any phase of the long crisis in the Republic of Cyprus.[41] But this is not a question of the character (legal or political) of the consultation provision; it is a question instead of the efficaciousness of consultation as a dispute settlement mechanism in situations of armed conflict or aggression. States are free to accept legal commitments to do things that may have little or no useful policy effect. "The fact that the obligation provided for in the instrument can be fulfilled by a somewhat nominal act of the parties does not necessarily detract from its character as a treaty."[42]

States also well may adopt instruments in which they both create legal rights and obligations and address matters in purely political terms. Thus the United States under Point I, paragraph 1, of the General Declaration of 19 January 1981 (Algiers Declaration) "pledge[d] that it is and from now on will be the policy of the United States not

[37] *Behrami and Behrami* v. *France,* Application No. 71412/01*; Saramati* v. *France, Germany and Norway,* Application No. 78166/01, ECtHR (Grand Chamber), 2 May 2007, para. 149.

[38] ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece*), Judgment, 5 December 2011, ICJ Rep. 2011 p. 644, 693, para. 170, dispositive para. (2). The author acted as adviser to Greece in this matter.

[39] *Ibidem* at p. 664, para. 58.

[40] *Ibidem* at p. 665, para. 61. It nevertheless might be noted that the obligation breached, as indicated in the *dispositif*, was not described there as a "legal" obligation.

[41] Treaty of Guarantee, 16 August 1960 (Republic of Cyprus-Greece-Turkey-United Kingdom), Art. IV, para. 1: "In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions."

[42] Lauterpacht, *supra* note 27, p. 97.

to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs,"[43] a provision which the United States indicates is of political character only.[44] The Declaration sets out a range of further provisions, e.g., requiring the return of assets and the settlement of claims; requiring the discontinuation of ICJ proceedings; and creating the Iran-United States Claims Tribunal, participation in which is obligatory and the awards of which are binding. There is no doubt that those provisions are not mere political declarations. But the presence of a legal provision in an instrument is not conclusive as to the character of the other provisions, any more than the presence of one political clause renders the rest merely political.

The Memorandum contains a clause verifying the equal validity of its drafting languages; and a clause indicating that the Memorandum "will become applicable upon signature." Such apparatus is certainly expected in legally binding instruments, but its presence does not as such determine the character of an instrument. Political commitments can be dressed in legal forms.

In summary, the text of the Memorandum sets out a number of commitments which, whether legal or political, would not add much if anything to the existing legal obligations of the Parties. In particular, these are the provisions concerning respect for settled boundaries and non-use of nuclear weapons. The provisions articulate obligations which already possess legal character by virtue of other legal instruments or general international law.

The Memorandum also, however, sets out commitments to take particular steps in the event of particular situations arising. These are the commitments to seek Security Council action, to activate a consultation mechanism, and to furnish assistance to Ukraine. These commitments do not overlap with existing commitments found in other sources. They are specific to the Memorandum. If they are legally binding, then they add materially to the legal obligations of the Parties. Moreover, if they are legally binding, then they also affect the substance of the other provisions. The provision stipulating respect for settled boundaries, for example, if the Memorandum expresses this as a legal obligation, standing on its own would add little to the Parties' legal obligations. However, the provisions stipulating concrete steps by the parties, if legally binding, introduce obligations if the other obligations are breached. Thus even the provisions of the Memorandum which might at first appear at most to re-iterate existing legal obligations could be significant if the instrument taken as a whole is of legal character. The inclusion of the well-worn substantive obligation in an instrument containing a binding dispute settlement clause adds a significant dimension to the obligation. The Budapest Memorandum contains no binding dispute settlement clause; but it combines a restatement of pre-existing obligations with new procedural commitments.

[43] http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf (accessed 30 March 2015).

[44] *See* U.S. Statement of Defense, *Islamic Republic of Iran* v. *United States,* Claim A-30 (Iran-United States Claims Tribunal) 40-5. The example is Duncan Hollis: *see* D. B. Hollis, *Defining Treaties*, [in:] D. B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford: 2012, pp. 11, 34 and n. 150.

3. CIRCUMSTANCES OF THE ADOPTION OF THE BUDAPEST MEMORANDUM

As suggested above, the text of the Memorandum by no means excludes in terms (as some instruments do) that its Parties intended to create legal obligations. It falls, then, to consider "the particular circumstances in which [the Memorandum] was drawn up."

To start, the Budapest Memorandum was adopted as part of a particular security architecture. This constitutes a central aspect of the circumstances of the Memorandum's adoption. Salient aspects of that architecture are these. The three P5 Parties to the Memorandum had been on opposite sides of the Cold War divide. Two of them remained members – and central members – of NATO. The other had been the leader of the former Warsaw Pact. Ukraine is a country of over 40,000,000 people located in between the Parties. A legal commitment by any of the other Parties to a State in that position – the largest non-bloc State in Europe – would have been a commitment of considerable strategic significance. It is to be wondered whether the United States and the United Kingdom, without domestic ratification procedures, would have entered into a mutual defence pact creating a new security arrangement with Ukraine. A binding security commitment in that circumstance would have been a significant change in the security architecture of the Euro-Atlantic area. The accession of new members to NATO suggests the formal steps (legal and political) that such a change would be expected to involve.[45] It would be strange for the Parties to have finalized such a change in a short text and absent any further specification of modalities of commitment.

However, that is only one side of the story. It is also to be asked whether a nuclear weapons State would have given up its arsenal in exchange for a mere political commitment.[46] The same day that the Parties concluded the Memorandum, Ukraine deposited in London, Moscow, and Washington the instruments of accession[47] as a non-nuclear-weapon State to the NPT. The preamble to the Memorandum "[w]elcomed the accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear-weapon State." It also "[took] into account the commitment of Ukraine to eliminate all nuclear weapons from its territory within a specified period of time."[48] Ukraine on 21 September 1995 adopted an Agreement with the International Atomic Energy Agency for the application of safeguards in connection with the NPT.[49] The

[45] *See e.g.* P. E. Gallis, *NATO Enlargement: The Process and Allied Views*, Congressional Research Service, Washington, DC: 1997. *See also Case concerning the application of Article 11(1) of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, Counter-Memorial of Greece, 19 January 2010, pp. 69-88.

[46] *See* L. Gelb, *Firing back at my Ukraine critics*, Daily Beast 2 April 2014, available at: http://www.thedailybeast.com/articles/2014/04/02/les-gelb-puts-russia-in-its-place-and-critics-in-theirs.html (accessed 30 March 2015).

[47] http://disarmament.un.org/treaties/s/ukraine (accessed 30 March 2015).

[48] Budapest Memorandum, preamble, paras. 1, 2.

[49] Entered into force 22 January 1998 by notification: 2015 UNTS 691. For text, *see* IAEA, INFCIRC/550.

Safeguards Agreement provides for binding and compulsory dispute settlement in the event of a dispute which Ukraine and the Agency prove unable to settle by other means.[50] Ukraine and the Agency adopted an additional protocol to the Safeguards Agreement in 2000.[51] Prior to the adoption of the Budapest Memorandum, Ukraine had entered into engagements concerning the technical modalities for disarmament.[52]

Ukraine had not arrived immediately at the decision to relinquish nuclear weapons.[53] The national security guarantees in the Memorandum "were the principal factors and (…) had a key role in the Ukrainian Parliament's decision in favour" of disarmament.[54] That the nuclear disarmament of Ukraine was important to the other Parties can at least be surmised. Even as serious differences exist between them as to the forums and modalities for achieving non-proliferation,[55] these are all States to which the obligation of NPT Article I applies. Though it is not an obligation of the nuclear-weapons States under NPT Article I to achieve disarmament as such, it is an obligation under Article VI to "pursue negotiations in good faith on effective measures relating to (…) nuclear disarmament"; and, more generally, a *desideratum* to increase the number of non-nuclear weapons States well may be inferred from the other obligations in the Treaty. At least one State views the Article VI obligation as having enough substance to merit the institution of an inter-State claim.[56] It would be astonishing if the Russian

[50] Ukraine – IAEA Safeguards Agreement, Art. 22. Note the default appointment procedure in Art. 22, para. 1.

[51] Protocol additional to the Agreement between Ukraine and the International Atomic Energy Agency for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, 15 August 2000, entered into force 24 January 2006, 2402 UNTS 161.

[52] *See e.g.* Letter dated 1 October 1993 from the Representative of the Russian Federation addressed to the President of the Conference on Disarmament transmitting the texts of an agreement between the Government of the Russian Federation and the Government of Ukraine on the recycling of nuclear warheads as well as basic principles governing the recycling of nuclear warheads from strategic nuclear forces deployed in Ukraine, signed on 3 September 1993: CD/1225, 5 October 1993.

[53] *See* H. Hamant, *Démembrement de l'URSS et problèmes de succession d'Etats*, Editions Bruylant, Brussels: 2007, pp. 398-399.

[54] Mr. Zlenko (Ukraine), Security Council, 3514th meeting, 11 April 1995: S/PV.3514, pp. 2-3.

[55] *See e.g.* Letter dated 31 January 2014 from the Permanent Representative of the Russian Federation addressed to the Acting Secretary-General of the Conference, transmitting Joint Statement by interested States in support of the Conference on Disarmament in Geneva (Algeria, Argentina, Armenia, Belarus, Brazil, China, Egypt, India, Indonesia, Iraq, Kazakhstan, Pakistan, Russian Federation, Syrian Arab Republic, Tajikistan, Ukraine), CD/1971, 21 February 2014: "We believe that the Conference, as the single multilateral negotiating forum with its fundamental principle of consensus and its membership, cannot be substituted by any other forum in addressing the complex tasks that it already has on its agenda."

[56] It is by reference, *inter alia,* to Art. VI that the Republic of the Marshall Islands bases its claims against India, Pakistan, and the United Kingdom in *Obligations concerning Negotiations relation to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India; Marshall Islands* v. *Pakistan; Marshall Islands* v. *United Kingdom). See* Application Instituting Proceedings against the Republic of India by the Republic of the Marshall Islands, 24 April 2014, p. 6 (para. 10); against Pakistan, p. 6 (para. 10); against the United Kingdom, p. 7 (para. 12).

Federation saw the de-nuclearization of Ukraine as anything other than a step to be encouraged and, once achieved, a status to be maintained.

It is of interest that the Memorandum is "in Connection with" the accession of Ukraine to the Non-Proliferation Treaty. The Memorandum does not identify itself as a protocol to the Treaty. There is, however, no general rule excluding a side agreement by certain parties to a multilateral convention.[57] Moreover, the Non-Proliferation Treaty does not exclude "regional treaties in order to assure the total absence of nuclear weapons" in the territories affected.[58] In implementation of Article III of the Treaty, an extensive series of safeguard agreements exist between States Parties and the International Atomic Energy Agency.[59] Side agreements to achieve the object and purpose of the NPT are envisaged therein – and are part of the practice which has emerged since NPT's entry into force.

One more aspect of the circumstances of the adoption of the Memorandum is worth noting. This is the immediate setting in which the Parties adopted it. The Memorandum was adopted at a high-level meeting of the Parties at which they adopted a number of other statements and instruments. The Memorandum is specifically a follow-on document. A Joint Declaration issued the same day, noting, *inter alia,* "the historical changes in the world", is in the language of political expression, not legal obligation.[60] When the Permanent Representatives of the four parties requested that the Memorandum be circulated as a document of the General Assembly and of the Security Council, they attached the Memorandum as Annex I and the Joint Declaration as Annex II.[61] The two documents are concerned with the same parties and the same overall theme. There is no rule against adopting two political declarations on the same day, but it may be asked why a further statement of purely political purpose but dressed in legal forms would have been adopted in tandem with a political declaration. Again, like other considerations adduced above, this in itself does not conclusively establish whether or not the Memorandum possesses a legal character. It is one among the range of circumstances surrounding the adoption of the instrument.

[57] *Cf.* Art. 41 of the VCLT.

[58] Art. VII of the NPT.

[59] *See e.g.* Agreement between the Kingdom of Saudi Arabia and the International Atomic Energy Agency for the application of safeguards in connection with the Treaty of [sic] the Non-Proliferation of Nuclear Weapons, June 16, 2005, entered into force Jan. 13, 2009: 2587 UNTS 29; Agreement between the Socialist People's Libyan Arab Jamahiriya and the International Atomic Energy Agency on the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, adopted and entered into force 8 July 1980, 1227 UNTS 161 and Additional Protocol, 10 March 2004, entered into force 11 August 2006, 2432 UNTS 227. Further to the structure and content of safeguards agreements, *see* IAEA INFCIRC/153 (*corrig.*), June 1972.

[60] A/49/765 – S/1994/1399, annex II.

[61] Letter dated 7 December 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom and the United States addressed to the Secretary-General, A/49/765 – S/1994/1399, p. 1.

4. SUBSEQUENT PRACTICE OF THE MEMORANDUM PARTIES

The ICJ, as noted above, rejected that subsequent practice determined whether or not the adopted Minutes in *Qatar* v. *Bahrain* created legal obligations. This is not, however, to say that subsequent practice is irrelevant. The Court was considering an argument that one party's practice in itself determined whether the Minutes possessed a legal character; this is not how subsequent practice affects the meaning of a text under the general rule of interpretation.

Subsequent practice affects the meaning of a text, instead, in the manner set out under Art. 31.3 of the VCLT, which provides as follows:

> There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.

Again, as with the general rule of interpretation taken as a whole, a problem of question-begging arises if the treaty rules are applied mechanistically. Whether or not the instrument in question is a treaty is the very question that needs to be settled. To attempt to settle it by applying the rules of *treaty* interpretation assumes the answer that needs to be found.

What may be said about subsequent practice and an instrument of indeterminate character is this. Subsequent practice may be relevant in at least two distinct ways. First, the parties may adopt a new text (Art. 31.3(a) applied *mutatis mutandis*), or they may participate in subsequent practice which establishes a new agreement (para. 3(b)); and, through either of these modalities, they may shed light on the meaning of the original text. Second, practice in connection with an agreement (whether the agreement is political or legal) may form the basis for new customary law relations. In other words, the original text, whether or not it possessed a legal or a political character, may have become a reference point for further action, and the States performing that action may have done so in a manner giving rise to a new legal rule – i.e., they have generated a new rule of international law (applicable at least between themselves) that derives from and reflects a practice that they accept as law.[62]

The Parties to the Memorandum have referred to it in their later official statements. When referring to the Memorandum, they have drawn attention to its relevance to the NPT regime as a whole. For example, the United States and Russian Federation, on the occasion of the expiry of START in 2009, recalled the role of the Memorandum as part of the disarmament régime overall. The disarmament of Ukraine (and of Belarus

[62] *See* M. Wood, Special Rapporteur, *Second report on identification of customary international law*, 22 May 2014, Draft Conclusion 2, A/CN.4/672, p. 68, para. 20.

and Kazakhstan) "enhanced the NPT regime, had a beneficial impact on international security and strategic stability, and created favourable conditions for further steps to reduce nuclear arsenals."[63] Such language might be said to concern strategy and political relations only. An act or commitment which "enhanced the NPT regime" was not necessarily a legal act or commitment. Confidence-building measures, for example, typically do not entail legal obligations[64] but may be necessary to a disarmament regime.[65]

In the same Joint Statement, the United States and the Russian Federation said as follows:

> The fulfilment by these states [Ukraine, Belarus and Kazakhstan] of their obligations under the Protocol to the START Treaty of May 23, 1992, (Lisbon Protocol) and their accession to the NPT as non-nuclear-weapon states, strengthened their security, which was reflected, inter alia, in the Budapest Memoranda of December 5, 1994. In this connection, the United States of America and the Russian Federation confirm that the assurances recorded in the Budapest Memorandum will remain in effect after December 4, 2009.[66]

There would be a degree of asymmetry in saying that one political document "will remain in effect" after the expiry of another clearly legal instrument. The December 2009 Statement seems to place START and the Budapest Memorandum, instead, on the same footing. Whatever conclusion as to the character of the Memorandum that might be drawn from the Joint Statement, nothing in the Joint Statement indicated an intention to change the content or effects of the Memorandum. To say that it "will remain in effect" is to say that whatever effect it had before will continue unchanged. This was not a subsequent agreement, or subsequent practice establishing an agreement, to change the character of the Memorandum. It did however reiterate the close association between the Memorandum and certain legal obligations of the parties.

There appears to have been some doubt on the part of Ukraine whether the Memorandum in itself created a legal framework for Ukraine's security. Ukraine's parliament in July 2010 raised the possibility of a multi-party treaty to ensure the "development of the Budapest Memorandum."[67] The concerns of Ukrainian political leaders at the time of the expiry of START were registered widely as well. The government of the day was concerned that Ukraine's position was vulnerable because it did not belong to a defensive alliance. To say that the Memorandum needed further development was

[63] Joint Statement by the United States and Russian Federation regarding the expiration of the Treaty on the Reduction and Limitation of Strategic Offensive Arms (START), 4 December 2009, PRN: 2009/123, available at: http://www.state.gov/r/pa/prs/ps/2009/dec/133204.htm (accessed 30 March 2015).

[64] *See e.g.* reference to "*non-legally binding* transparency and confidence-building measures to strengthen stability in space" in U.S. Department of State Press Release No. 2013/0901, Statement on Consensus Achieved by the UN Group of Governmental Experts on Transparency and Confidence Building Measures for Outer Space Activities, 18 July 2013 (emphasis added).

[65] *See e.g. U.S. Approach to Preventing Biological Weapons Proliferation and Bioterrorism: Contemporary Practice of the United States Relating to International Law*, 104 American Journal of International Law 129 (2010), p. 131 ("We must also increase participation in the existing Confidence-Building Measures").

[66] United States – Russian Federation Joint Statement, 4 December 2009, final para.

[67] *Ukraine Seeks Additional Security Guarantees from Nuclear Powers*, ITAR-TASS, Tuesday, 6 July 2010.

to suggest that, in its present form, it did not create the binding commitments that would have assured Ukraine of its security. At the same time, it does not mean that an existing commitment is not of legal character that its beneficiary wishes to re-inforce it with further commitments. The adoption of bilateral military cooperation agreements among the members of NATO, for example, does not mean that the North Atlantic Treaty is not a legal instrument.

The United States, United Kingdom and France each mentioned the Budapest Memorandum in a meeting of the Conference on Disarmament on 3 March 2014 at which the "situation in Ukraine" was on the agenda. The United Kingdom said that it "was willing to engage on the matter on the basis of the Budapest Memorandum and was committed to a diplomatic response to the situation"[68] – a statement from which it is hard to draw any clear conclusion. The statement suggests that the Memorandum has diplomatic significance but not necessarily a binding character (otherwise, it would not have been a question of whether the United Kingdom, as a party to the Memorandum, "was willing" or not "to engage on the matter"; engagement would have been obligatory). The United States associated the Memorandum with the Helsinki Final Act, saying that "Russia's invasion and occupation of Ukrainian territory (…)" were "in full contravention (…) of Russia's obligations under [*inter alia*] the Helsinki Final Act (…) and the 1994 Budapest Memorandum."[69] The problem with this statement is that it does not expressly characterize the "obligations" one way or the other, political or legal. The United States position has been from the start (1975) that the Helsinki Final Act is a political instrument only.[70] To speak of the two instruments in the same breath without distinguishing their legal character tends to suggest that they are similar; but by no means is this a conclusive point. The United Kingdom and United States two days later in the Conference said that they fully supported convening a "high-level meeting of parties to the Budapest Memorandum."[71] Two of the Parties thus indicated their intention to carry out one of the provisions of the Memorandum (paragraph 6 on consultations); but they did not say whether they believed themselves obliged to do so. Again, this was not to express a position one way or the other as to the character of the Memorandum.

France at the Conference on Disarmament stood out among the three. France, in contrast to the United Kingdom and United States, "reminded everyone of the existing law including the 1994 Budapest Memorandum."[72] To "include" an instrument in the "existing law" is to include it as an instrument of legally binding character.

[68] Conference on Disarmament, 3 March 2014, available at: http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/C1188DA04742DD5DC1257C9000587A9A?OpenDocument (accessed 30 March 2015).

[69] *Ibidem*.

[70] *See* Paust, *supra* note 34.

[71] Conference on Disarmament, 5 March 2014, available at: http://www.unog.ch/unog/website/news_media.nsf/(httpPages)/EC4DFA46850AD4A6C1257C920042D57F?OpenDocument (accessed 30 March 2015).

[72] Conference on Disarmament, 3 March 2014.

There have been other indications as well that the Budapest Memorandum created obligations. The Russian Ministry of Foreign Affairs, through the Information and Press Department, on 19 March 2014, said as follows:

> In the context of the situation in Ukraine, some of our partners use the opportunity to point out the obligations of the Russian Federation under the Budapest Memorandum of 1994. In this regard, we would like to remind them what these obligations were and who is responsible for their observation.

Under the Budapest Memorandum Russia, the United States and the United Kingdom are obliged to be guarantors of the rights inherent in the sovereignty of Ukraine.[73]

Ukraine has stated more clearly that the instrument created legal obligations.[74] It is not unheard of for States to communicate legal positions through press offices and the like.[75] In claims practice, the legal effect of statements even by high-level officials is not infrequently contested.[76] It is much harder, however, to contest a statement with which one's own statements agree. Here, both States have said that the Memorandum entails obligations and responsibility. The Russian Federation might argue that its statement about the Memorandum concerned only "obligations", not necessarily "legal obligations." However, the Information and Press Department statement linked those "obligations" directly to Ukraine's "rights inherent in (…) sovereignty," that is to say legal rights. An obligation that is correlative to a legal right would seem itself to be legal in character. It is true that the statements of Russia and Ukraine expressly indicating the obligatory character of the Memorandum were adopted in the midst of an extreme political situation. Political circumstances, however, have no necessary bearing on the meaning of statements which are otherwise clear on their terms. The question here is what the statements, on their terms, have to say about the commitments between these States. Both States, notwithstanding sharp discord in other matters, expressed the view that the Memorandum had established obligations.

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[73] Comment by the Information and Press Department of the Russian Ministry of Foreign Affairs regarding the Budapest Memorandum of 1994, 19 March 2014, available at: http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/3461172e18a7ef3544257ca10032c515!OpenDocument (accessed 30 March 2015).

[74] Note verbale dated 13 March 2014 from the Permanent Mission of Ukraine addressed to the Acting Secretary-General of the Conference on Disarmament and Annex with Parliamentary statement to the guarantor States of the security of Ukraine, CD/1977. *See also* Ukraine's statement at the 3 March 2014 meeting of the Conference on Disarmament.

[75] *See e.g.* Spain's protests over the invasion of Kuwait communicated by the Office of Diplomatic Information, Unilateral acts of States, Victor Rodríguez Cedeño, Special Rapporteur, Seventh report, A/CN.4/542, p. 54, para. 116.

[76] The most famous instance being the Norwegian Foreign Minister's statement (the Ihlen Declaration): PCD, *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April 1933, PCIJ Ser. A/B No. 53, pp. 36-37. *See also e.g. Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Public sittings, Murphy (for FYROM) (relying on *Nicaragua* v. *United States*), CR 2011/11, 28 March 2011, pp. 24-25, paras. 15-16; Crawford (for Greece), CR 2011/12, 30 March 2011, pp. 33-34, para. 26.

Less conclusively, the European Union Committee of the United Kingdom House of Lords, in a Report dated 20 February 2015, said that, "[a]s one of the four signatories of the Budapest Memorandum (1994), which pledged to respect Ukraine's territorial integrity, the UK had a particular responsibility when the crisis erupted."[77] A "particular responsibility" is not necessarily a legal responsibility.

The various statements of the parties could be taken to constitute subsequent practice relevant to the interpretation of the Memorandum, as envisaged under VCLT Art. 31.3. The effect of subsequent agreement between two parties to a four-party treaty would be limited.[78] True, some number of the parties to a multilateral instrument short of all the parties may reach agreement amongst themselves. In the case of the Budapest Memorandum after February 2014, Russia and Ukraine were in disagreement in fundamental ways. They did nevertheless evince a shared understanding on one point: they both referred to the Memorandum as having created legal obligations and thus would appear both to have understood the Memorandum to be a legal instrument. Subsequent practice is relevant not only in establishing an agreement to identify the meaning of an instrument; it also may be relevant in confirming the meaning or resolving an ambiguity. As the ILC said in respect of the draft provision on subsequent practice, "[t]he importance of (…) subsequent practice in the application of the treaty, as an element of interpretation is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[79] The "understanding" that concerned the ILC here was an understanding reflected in how the parties to the instrument fulfilled their engagements, "the fulfilment of engagements between States (…) [being] the surest commentary on the effectiveness of those engagements." ["*l'exécution des engagements [étant], entre Etats… le plus sûr commentaire du sens de ces engagements.*"][80] It might equally be said that the public statements of the parties as to the character of those engagements, where the statements are in accord, is a commentary on the character of the instrument. The statements of the parties well may be counted as "action which has been taken under the Treaty,"[81] and, as the Permanent Court

[77] European Union Committee, House of Lords, *The EU and Russia: before and beyond the crisis in Ukraine*, 20 February 2015, para. 82.

[78] As to the difficulties arising when some but not all parties to a multilateral instrument adopt new obligations which are not in clear accord with the instrument, *see generally* S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, Cambridge University Press, Cambridge: 2014.

[79] ILC Yearbook 1966, vol. II, p. 221, Comment (15) (to draft art. 27), quoted in ICJ, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, ICJ Rep. 1999, pp. 1045, 1075-6 (para. 49).

[80] *Russian Indemnity case (Russia/Turkey)* (Lardy, de Taube, Mandelstam, Abro Bey, Réchid Bey), Award, 11 November 1912, XI *Reports of International Arbitral Awards* 421, 433.

[81] That statements may be relevant as State conduct for purposes of identifying customary international law is not controversial. *See e.g.* Wood, First Report, p. 20 (para. 48). While identifying subsequent practice for purposes of the interpretation of a treaty is not the same thing as identifying State practice as an element in identifying customary international law, there is no obvious reason to exclude statements as a form of State action as such for purposes of treaty interpretation. The subsequent practice, to be relevant to settling a question, of course must be practice concerning the substance of that question

said, such action, "[i]f there were any ambiguity," is relevant to "arriving at the true meaning."[82]

5. TREATY REGISTRATION

Finally, a word may be said about treaty registration. Belarus on the same day in Budapest as the Ukraine Budapest Memorandum entered into a Memorandum having, *mutatis mutandis,* the same title with the same three nuclear weapons States. In the Belarus Budapest Memorandum, too, the non-weapon State's boundaries and territorial integrity were assured.[83] The Memorandum also contained a consultation provision.[84] Belarus registered the Memorandum in accordance with Charter Article 102 on 3 September 2012.[85]

From the start, the registration requirement has been understood to concern instruments by which parties "intend to establish legal obligations"[86] rather than political statements, declarations and the like, which are "not (…) subject to the formality of registration."[87] Sometimes, parties say both that an instrument is not for registration and that it is a political instrument. The Parties said neither in respect of the Budapest Memoranda. They said both in the Code of Conduct on Politico-Military Aspects of Security, an instrument adopted at the same Budapest Summit.[88] It does not appear in fact that any of the Parties (as of 8 March 2015) had registered the Ukraine Budapest Memorandum.[89] "Non-registration or late registration, on the other hand, does not

and not another, however related, one: see *Maritime Dispute (Peru v. Chile)*, Judgment, 27 January 2014, para. 171.

[82] PCIJ, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, 12 August 1922, PCIJ Ser. B, No. 2, p. 39 (1922).

[83] Memorandum of Security Assurances in connection with the Accession of the Republic of Belarus to the Treaty on Non-Proliferation of Nuclear Weapons, paras. 1, 2, Budapest, 5 December, 1993, UNTS reg. no. 50069.

[84] *Ibidem*, para. 6.

[85] Certificate of registration, No. 62556. For the text (not yet assigned a UNTS volume number), see No. 50069.

[86] Memorandum of the Secretary-General, as approved by the Council of the League, 19 May 1920, para. 3: 1 LNOJ 154, 155 (1920), about which *see* M. O. Hudson, *The Registration and Publication of Treaties*, 19 American Journal of International Law 273 (1925), p. 277.

[87] Report of the Committee Appointed to Study the Scope of Article 18 of the Covenant from a Legal Point of View (Scialoja, President; Bourquin, Fernandes, Fromageot, Hurst, and Struycken, Members), 28 June 1921, C.256.1921.V, p. 3.

[88] Section X of the Code of Conduct provided as follows: "39. The provisions adopted in this Code of Conduct are politically binding. *Accordingly*, this Code is not eligible for registration under Article 102 (…)" (letter dated 21 December 1994 from the Permanent Representative of Hungary to the United Nations addressed to the Secretary-General, Annex: A/49/800—S/1994/1435, p. 31 (emphasis added)).

[89] There is also the Kazakhstan Budapest Memorandum, of the same date, parties, and form. This appears neither to have been registered nor circulated. For its text *see* http://www.exportlawblog.com/docs/security_assurances.pdf (accessed 30 March 2015).

have any consequence for the actual validity of [an] agreement, which remains no less binding upon the parties."[90]

CONCLUSION

Ukraine on 5 December 1994 entered into a four-party agreement confirming the removal of nuclear weapons from its territory. The Ukraine Budapest Memorandum, one of three such instruments adopted with the former nuclear weapons States which had recently emerged out of the disintegration of the USSR, also contained a series of security guarantees. The invasion of Ukraine by forces of the Russian Federation in February and March 2014 and the purported annexation of Ukrainian territory did not instigate a military response from the United Kingdom or the United States. To be sure, in accord with paragraph 6 of the Memorandum, there were consultations (though not jointly of all the Parties). And the Western Parties introduced a draft resolution at the Security Council, a step which was in accord with paragraph 4.[91] However, this was the extent of the response, at least in the initial months of the crisis.

Ukraine on 28 February 2014 referred to the "deterioration of the situation in the Autonomous Republic of the Crimea, Ukraine" and invoked Art. 34 and 35 of the Charter.[92] Ukraine on 13 March called upon the General Assembly to "examine the situation" in accordance with Art. 11.2, and invoked the right to individual and collective self-defence under Art. 51.[93] When Ukraine acceded to the NPT, it adopted a Declaration stating that "[t]he threat or use of force against the territorial integrity and inviolability of borders or political independence of Ukraine from a nuclear power (…) will be considered by Ukraine as exceptional circumstances which jeopardize its interests."[94] The precise meaning of the Declaration is unclear, but the "exceptional circumstances" to which it referred now have arisen; the Declaration suggests that these are circumstances which in other cases have served to preclude wrongfulness.[95] It does not appear that Ukraine (as of 8 March 2015) has invoked the Declaration.

The draft resolution introduced on 15 March 2014 in the Security Council would have affirmed that "no territorial acquisition resulting from the threat or use of force

[90] *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*, Jurisdiction and Admissibility, p. 112, 122, para. 29.

[91] 15 March 2014: S/2014/189.

[92] Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council, S/2014/136.

[93] Letter dated 13 March 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council, Annex: S/2014/186.

[94] http://disarmament.un.org/treaties/a/npt/ukraine/acc/moscow (accessed 30 March 2015).

[95] *See* Articles on State Responsibility, Art. 25 (Necessity), and ILC Commentary. Reprinted at J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002, pp. 178-86.

shall be recognized as legal."[96] The draft noted that "Ukraine has not authorized" the referendum in Crimea which would soon take place. The draft then

> [*d*]*eclare*[*d*] that this referendum can have no validity, and cannot form the basis for any alteration of the status of Crimea; and call[ed] upon all States, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[97]

The Russian Federation vetoed the draft. China abstained. The remaining thirteen Member States voted in favour. The draft had been put forward, *inter alia,* by France, the United Kingdom and the United States. The General Assembly, on 27 March 2014, adopted resolution 68/262 ("Territorial integrity of Ukraine").[98] It is not recorded that any of the guarantor States said that their support for action in the Security Council or General Assembly was in fulfilment of a legal commitment under paragraph 4 of the Budapest Memorandum.

The main consequence of the practice of the Parties to the Budapest Memorandum since February 2014 well may be in respect of the régime of non-proliferation and international efforts at disarmament. The Chairman of the Committee of Ministers of the Council of Europe expressed dismay about the failure to observe the Budapest Memorandum:

> On the Budapest Memorandum, I can but endorse the position that has been stated. It would be a major signal for worldwide disarmament if, 10 years on, the Budapest memorandum was seen as a meaningless piece of paper. We were talking about the preservation of the sovereignty and integrity of the territory on the proviso that nuclear weapons be relinquished. That was indeed done, but 10 years later one of the five countries that signed the memorandum has sent troops into Ukraine.[99]

The political lesson is unlikely to be lost on any State weighing the costs and benefits of nuclear armament. It did not go too far to say that "[t]he credibility of, and trust in, the multilateral disarmament machinery had been worn thin" by the breach by Russia of the provisions of the Memorandum.[100]

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[96] Draft resolution, preambular para. 3, S/2014/189, p. 1. The draft resolution was put forward by Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, the United Kingdom, and the United States.

[97] Draft resolution, para. 5, p. 2.

[98] The sponsors of the draft were Canada, Costa Rica, Germany, Lithuania, Poland and Ukraine, 24 March 2014, A/68/L.39.

[99] Sebastian Kurz (Austria, speaking in capacity of Chairman of the Committee of Ministers), Monday, 7 April 2014, eleventh sitting: AS (2014) CR 11 (provisional version).

[100] Mr. Balslev (Denmark), Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 16 May 2014, NPT/CONF.2015/PC.III/SR.2, p. 9, para. 51.

Then there is the initial question – the character of the Memorandum as a legal or a political instrument. Hersch Lauterpacht, in 1954 in the Second Report on the Law of Treaties referred to above, suggested that there is (or that there should be) a presumption against denying the law-creating effect of international agreements:

> Although the parties may have intended a treaty to mean little, no assumption is permissible that they intended it to mean nothing and that the instrument concluded in the form of a treaty – with the concomitant solemnity, formality, publicity and constitutional and other safeguards – is not a treaty. [101]

The Budapest Memorandum takes the form of an international agreement. That in itself is not inconsistent with the instrument having only political effects. Its Parties, however, clearly intended that it not be devoid of meaning altogether. The commitments which the Memorandum contains are serious commitments. The State whose security the Memorandum guaranteed was a new State at the time, and it recognized the precariousness of its situation. Whatever the character of the other Parties' commitments, legal or political, the guaranteed State acceded to nuclear disarmament as its side of the bargain. Whatever character the Budapest Memorandum may have possessed, at least some of its provisions have now been opposed between the Parties as legally binding, albeit at cross-purposes. In this light, it at least can be said that this agreement adopted at the time of Ukraine's voluntary disarmament has remained a touchstone for the Parties' relations. To the extent that it is accepted that the instrument stipulates legal obligations, their context is the law of non-proliferation. The object and purpose of the instrument are to be understood in relation to that context. Even to the extent that the commitments made in 1994 were intended to be political, their non-observance will be difficult to prevent from affecting the law which surrounds them.

[101] Lauterpacht, *supra* note 27, para. 11.