UKRAINE SETTLEMENT OPTIONS: SECURITY GUARANTEES

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EXECUTIVE SUMMARY

In a settlement, a security guarantee for Ukraine would be contemplated to offset possible concessions made in relation to its potential NATO membership, the exclusion of the presence of foreign forces on its territory and perhaps certain limitations on its longer-range armaments.

A security guarantee for Ukraine is not to be confused with a broader guarantee intended to help enforce an overall settlement between Ukraine and the Russian Federation (an impositional guarantee). In particular, it would not be a measure aiming to ensure Ukraine's compliance with a permanently neutral status, disarmament obligations, etc. Instead, it would be strictly a protective guarantee.

A security guarantee should therefore likely be established outside of the settlement agreement between Ukraine and the Russian Federation. It would be uni-directional and uni-purpose. It would only apply in relation to Ukraine, and only for the purpose of securing it from armed attack or acts of aggression.

This means that the guarantor states would not likely include the Russian Federation or states close to it. While the guarantee may be referenced in any bilateral settlement agreement among Ukraine and the Russian Federation, it should focus on those states actually in a position to raise the price for, and the risk of, potential further aggression against Ukraine.

The Russian Federation might object to such an arrangement, as it appears to be directed specifically at the Russian Federation. However, the guarantee would be phrased to apply in relation to an armed attack or act of aggression committed by any state. There would be no specific reference to the Russian Federation.

The specific, narrow focus of the guarantee is legitimate because (a) the security guarantee is meant to balance sacrifices Ukraine is making in terms of its permanently neutral status and possibly other limitations, and (b) in view of the experience of the present armed invasion of its territory.

The trigger event for the security guarantee should be specific, employing terms that are well understood and defined in international law. This could be an 'armed attack' (Article 51 of the UN Charter) and an 'act of aggression' (GA Resolution 3314 (XXIX).

The mechanism to bring the guarantee into force would include, in the first instance, the occurrence of the trigger event plus a request from Ukraine. There should be no reference to confirmation of the occurrence of the armed attack or act of aggression by a third-party body (Security Council or, in the event of a veto, General Assembly).

However, if the circle of guarantors is limited to like-minded states, activating the guarantee could be subjected to some form of collective determination by the guarantors.

The determination by the guarantors of the activation of the guarantee could be by consensus in the first instance, to be followed by an alternate means to reaching a view if strict consensus is not possible. This would however not prejudice the right of individual guarantor states to take any unilateral action consistent with the UN Charter they deem necessary.

The security guarantee would commit the guarantor states to consult within a short period of time upon receiving a request from Ukraine. They could agree to consult and come to a common view within a matter of, say, 2-3 days.

If they confirm that an armed attack or act of aggression has occurred, the guarantor states would agree to respond through effective political, economic and potentially other measures, including military support or action.

Such a response would consist of immediate reference of the matter to the UN Security Council, and support for action under the *Uniting for Peace* procedure (GA Res 377 A (V)) should the Council be unable to act through the application of the veto.

The guarantors could pledge to undertake firm economic counter-measures. Indeed, they might commit to re-imposing the full set of sanctions as is applied at present (snap-back of unilateral, rather than UNSC sanctions). If the guarantor states are reluctant to promise the automatic re-imposition of the full set of sanctions that apply at present, they could agree on a minimum catalogue of measures that would apply immediately.

An alternative option, although one difficult to obtain, would be to insist on Russian Federation acceptance of an automatic snap-back of UN Security Council sanctions if a settlement with Ukraine is to be achieved. As no Chapter VII, universal sanctions are in place at present, there would need to be broad Chapter VII sanctions adopted by the Council. These would be suspended the very moment they are adopted. The resolution would establish that the sanctions could be brought into operation through a mere procedural vote in the Council in case of an armed attack or act of aggression, or through some other means to which the veto could not apply.

The security guarantee would also contemplate military responses. This could include a firm commitment to accelerated assistance in terms of military equipment for Ukraine in case of an armed attack or act of aggression.

Ukraine is seeking a commitment to additional military measures, including the imposition of a no-fly zone or other forms of direct military involvement to preserve its territorial integrity. Realistically, guarantor states, including NATO states, may not wish to commit themselves in advance to binding undertakings relating to the military defence of Ukraine. As now, they may consider that this risks an escalatory confrontation with the Russian Federation, should that state be involved in a further military operation in Ukraine.

Indeed, even Article 5 of the NATO Treaty does not commit NATO members to a definite and specific kind of military response in their mutual defence. Hence, the security guarantee might refer in general terms to ‘other measures deemed necessary by the guarantors states, acting in the exercise of the right of collective self-defence of Ukraine.’ Possibly the wording might refer to ‘additional steps, including potentially forcible action’. However, any such decision would likely need to remain within the discretion of the guarantor states. A commitment to automaticity in the application of forcible measures seems unlikely.

If the guarantee is concluded among the guarantor state alone (rather than a broader range of states that might not all be expected to assist in case of an armed attack or act of aggression), the question arises what form their undertaking might take. This could be a joint declaration adopted by them as a political commitment. It could be a legally binding commitment among themselves. On the other hand, Ukraine might well seek to be party to any such commitment, rather than merely being its object.

The security guarantee could be referenced in the primary agreement between Ukraine and the Russian Federation, and the states guarantor could formally witness signature of that principal agreement,

Presumably the settlement would be endorsed in a Chapter VII Security Council Resolution. That resolution might also make reference to the undertakings of the guarantor powers.

I. INTRODUCTION

A. Security Guarantees in the Negotiations between the Sides

The Ukrainian government has issued a ten-point proposal for a settlement in its negotiations with the Russian Federation. Among the core elements of that proposal is the suggestion that Ukraine might adopt a permanently neutral status. According to a press summary of the proposal, this is to be balanced by security guarantees:

1. Ukraine proclaims itself a neutral state, promising to remain nonaligned with any blocs and refrain from developing nuclear weapons — in exchange for international legal guarantees. Possible guarantor states include Russia, Great Britain, China, the United States, France, Turkey, Germany, Canada, Italy, Poland, and Israel, and other states would also be welcome to join the treaty.
2. These international security guarantees for Ukraine would not extend to Crimea, Sevastopol, or certain areas of the Donbas. The parties to the agreement would need to define the boundaries of these regions or agree that each party understands these boundaries differently.
3. Ukraine vows not to join any military coalitions or host any foreign military bases or troop contingents. Any international military exercises would be possible only with the consent of the guarantor-states. For their part, these guarantors confirm their intention to promote Ukraine's membership in the European Union.
4. Ukraine and the guarantor-states agree that (in the event of aggression, any armed attack against Ukraine, or any military operation against Ukraine) each of the guarantor-states, after urgent and immediate mutual consultations (which must be held within three days) on the exercise of the right to individual or collective self-defence (as recognized by Article 51 of the UN Charter) will provide (in response to and based on an official appeal by Ukraine) assistance to Ukraine, as a permanently neutral state under attack. This aid will be facilitated through the immediate implementation of such individual or joint actions as may be necessary, including the closure of Ukraine's airspace, the provision of necessary weapons, the use of armed force to restore and then maintain Ukraine's security as a permanently neutral state.
5. Any such armed attack (any military operation at all) and all measures taken as a result will be reported immediately to the UN Security Council. Such measures will cease when the UNSC takes the measures needed to restore and maintain international peace and security.
6. Implementing protection against possible provocations, the agreement will regulate the mechanism for fulfilling Ukraine's security guarantees based on the results of consultations between Ukraine and the guarantor-states.
7. The treaty provisionally applies from the date it is signed by Ukraine and all or most guarantor-states. The treaty enters force after (1) Ukraine's permanently neutral status is approved in a nationwide referendum, (2) the introduction of the appropriate amendments in Ukraine's Constitution, and (3) ratification in the parliaments of Ukraine and the guarantor-states.

… [https://meduza.io/en/slides/ukraine-s-10-point-plan]

Some of these proposals are likely to be contested. The Russian Federation may have some issues with parts of these proposals. Moreover, it is not yet clear whether the proposed guarantor states will be willing to undertake obligations of active, automatic military defence, in case of a further act of aggression against Ukraine.

B. Definition

Security guarantees are defined in international practice as undertakings to protect and preserve the status and territorial integrity of a nominated state or entity against security threats, foreign armed interventions or armed attacks. Such guarantees can be given by one or more states or by international organizations.

Security guarantees, have been applied since the inception of the modern state system and the Peace of Westphalia, or even before. [https://www.cfg.polis.cam.ac.uk/news/guaranteeing-the-peace2014international-actors-and-their-role-in-a-peace-settlement-for-the-middle-east.] However, their application has remained comparatively rare and modern practice in this area is fairly limited. [Varga, Witnesses and Guarantors, in Weller et al, International Law and Peace Settlements, Cambridge University Press, 2021, pp. 211-235.]

In modern peace-making practice, the term 'security guarantees' is mainly used in a different context to the present case. It is often employed when addressing internal conflicts, for instance where the safety of representatives of opposition movements at peace talks is concerned, or where groups of insurgents are to be demilitarized over time. These will then be covered by security guarantees extended by the territorial state they have been opposing. [Jill Freeman, Security Guarantees, https://www.beyondintractability.org/essay/security_guarantees; Wolff, From Paper to Peace: The Role of Guarantees in Peace Agreements, https://www.worldpoliticsreview.com/articles/13444/from-paper-to-peace-the-role-of-guarantees-in-peace-agreements]

In international law, a guarantee generally implies the obligation of the guarantor parties not to frustrate the agreement between the principal parties, and to ensure compliance by the principals with their own obligations. A guarantee in that sense can be impositional—it imposes a certain status and can restrict the freedom of action of the principals in an agreement to which the guarantee relates, as was the case of Cyprus under the 1960 Treaty of Guarantee.

A protective security guarantee, on the other hand, does not impose, but instead secures the sovereignty of the beneficiary state. It will preserve and protect the territorial integrity of that state from nominated challenges or infractions. There is no ambition to restrain the conduct of the state so protected.

Generally, the protection offered will relate to the prevention of armed attacks or acts of aggression. However, as will be noted below, a security guarantee can also be directed towards achieving other aims, such as the protection of a certain constitutional status of a territory, or its neutral character, etc.

The question of whether a guarantee is interpositional or protective will depend on the nature of the status settlement to which it relates. If a certain status has been imposed upon a state for the benefit of other states, or perhaps for the benefit of communities within the state concerned, the guarantee is more likely to be interpositional—it is a guarantee of enforcement of obligation incumbent upon the state to which the settlement relates. If, on the other hand, the status to which the guarantee relates has been freely agreed by the state concerned, without a sense that this status generates obligations vis-à-vis third states, the guarantee is likely to be protective.

Hence, consideration of a security guarantee in this instance depends in some measure on the framing of the permanently neutral status for Ukraine that is foreseen. If it is seen as an

undertaking made to satisfy Russian Federation security interests, then the Russian Federation may seek an impositional guarantee preserving that status. It may also seek to be among the guarantor powers.

If, on the other hand, the permanently neutral status is fashioned as a voluntary exercise of the foreign policy choices of Ukraine, the guarantee would be protective. Third states, most likely chosen in consultation with Ukraine, would be free to offer a security guarantee themselves, without involvement of, or reference to, the Russian Federation.

It is controversial whether a state can agree in advance of the use of force by other states in circumstances other than self-defence. This issue was raised when Turkey used force in relation to Cyprus, invoking its purported rights under the Treaty of Guarantee of 1960.

The dominant view is that a security guarantee cannot add to the authority of the guarantor states to use force beyond the authority available in international law to do so. This would ordinarily be the right to use force in the exercise of individual or collective self-defence according to Article 51 of the UN Charter. In any event, in this instance great care should be taken to avoid any implication that the security guarantee for Ukraine would create rights of intervention, or other action, other than in response to a request for collective self-defence from Ukraine, and in circumstances other than an armed attack or act of aggression against Ukraine.

C. Instances of Application

Security guarantees in the sense discussed here are generally applied in three sets of circumstances:

- Great powers wish to ensure that a territory is beyond use as a base for aggression or hostile military operations by another state directed against them. Hence, they press for neutrality of that entity and pledge to defend its neutrality;
- When a new security system is established after a destructive war, and a previous victim of aggression lacks faith in its application. For instance, in 1919 the UK and US felt constrained to propose a treaty of guarantee for France against renewed aggression by Germany, despite the establishment of the League of Nations. (The treaty, like the League Covenant as part of the Treaty of Versailles, remained unratified by the US);
- A state is left in a particular state of vulnerability, for instance by being deprived of the opportunity to reinforce its security through alliances. A security guarantee is meant to make up for this fact.

As was already noted above, in this instance there is a risk that different parties take a different view of the issue to be addressed by the guarantee (ensuring that Ukraine will not be a base for NATO vs ensuring the integrity of Ukraine against potential renewed aggression). Hence, it will be important to frame the issue of the security guarantee with some care, to avoid undesirable implications for Ukraine.

D. Progression of this Presentation

This presentation is arranged in three principal parts. First, the notion of a security guarantee is set into the context of related concepts. These are collective self-defence, collective security, and the broader notion of a guarantee in international law.

The next section considers more specifically the different types of security guarantee, according to their object and purpose, building on some of the considerations already raised in this introduction.

The third section raises some general issues relating to the operation of guarantees, including the trigger event for their application, any decision-making mechanism, the legal form of the guarantee, the choice of parties to it, and other issues.

Having noted these general issues, the presentation then considers three types of guarantees that might be contemplated for Ukraine. These are political, economic and finally military guarantees.

II. RELATED CONCEPTS

Security guarantees need to be distinguished from defensive treaties or alliances, from collective security, from non-aggression pacts and from other forms of guarantee.

A. Collective Self-Defence through Alliances

Security guarantees differ from collective defence treaties or alliances. In a collective defence arrangement, the allies promise to protect one another in case of an armed attack—an attack against one is an attack against all. Each participant agrees to defend every other participant in the arrangement. It is a reciprocal arrangement (You defend me if I am attacked, as I shall defend you should you be attacked.)

In a security guarantee, the pledge of protection goes only one way. The protected entity is not required to reciprocate in relation to the defensive guarantee; it does not have to offer to defend, in turn, the other states pledging to guarantee its security. (You promise to protect me if I am attacked, but I do not promise to protect you in return).

Of course, where a security guarantee is meant to preserve the neutral status of a state or entity in question, reciprocity would in any event be excluded by the neutral status itself. Neutrality does not permit participation in a defensive alliance and the acceptance of reciprocal obligations of common defence.

B. Collective Security Organizations or Arrangements

Security guarantees also differ from collective security arrangements. A collective defence arrangement operates against an armed attack by a state from outside of the alliance. In contrast, a collective security arrangement operates mainly among the members of the arrangement. In other words, if a member of the organization attacks another member, then all the other members of the organization will take collective measures to protect the state under attack.

There are, however, also some hybrid models, mixing collective security and collective self-defence, inasmuch as they apply to armed attacks from among the members, and from outside of the membership (e.g., the Interamerican Treaty of Reciprocal Assistance of 1947, [http://www.oas.org/juridico/english/treaties/b-29.html.])

In contrast to collective security, a security guarantee will normally be focused on safeguarding the security of just one state, rather than all of them. It is unidirectional. (We will defend you and only you.) Once more, the obligation to assure the security of the state is not reciprocal in case of a security guarantee. The protected states enjoy the benefit of protection, without having to pledge to contribute, in turn, to the safeguarding of the security of the other members, as would be the case in a system of collective security.

Like collective self-defence, a security guarantee will ordinarily apply to threats or attacks from outside the group of guarantors. There are however exceptions, where the guarantors themselves may be the most likely violators of the object of the guarantee. In that case, akin to collective security, the guarantee is in fact a pact among the guarantors to prevent a transgression by one of them through the threat of collective action against the transgressor.

C. Non-Aggression Pacts or Pledges

Starting with the inter-war years, the former Soviet Union was often seeking to establish specific obligations of non-aggression through non-aggression pacts with individual states, or through broader treaties of friendship and cooperation containing non-aggression clauses. The young Soviet Union saw itself as an endangered outlier in an overall hostile capitalist international system, and sought to obtain security assurances bilaterally where it could obtain them. This trend continued into the post-WWII era, where the Soviet Union was keen to obtain assurances relating to the territorial gains it had made in consequence of the war.

Non-aggression pacts or pledges will operate both ways (I will not attack you, and you will not attack me). Again, a security guarantee, only operates one way (You will not attack me, and you will take action if another state attacks me.)

At the point of the dissolution of the USSR, the Russian Federation and Ukraine signed such a treaty of friendship and cooperation. A second such undertaking was concluded on 31 May 1997, pledging the inviolability of the territorial integrity of the parties and confirming the renunciation of the use of force. (Articles 2, 3.) The treaty was later terminated by Ukraine, in view of the forcible actions of 2014.

Undertakings of this kind do not really add to the legal relations of the sides. The protection of the territorial integrity of states and the prohibition of the use of force are already binding on all states by virtue of general international law. Such treaties will however confirm a certain territorial status quo—as noted, in the past this was a strong interest of the Soviet Union, which sought to consolidate its post-World War II territorial gains. This interest may now be revived on the part of Russia, in view of the territorial changes that occurred de facto in 2014, and additional changes it may now seek.

Moreover, these treaties will tend to add dispute settlement mechanisms, such as the obligation to solve disputes through negotiation, conciliation or arbitration. This may reduce the risk of the resort to the use of force. However, there will generally be no enforcement mechanisms in the sense of a security guarantee.

D. Other Forms of Guarantee

The notion of a guarantee is also sometimes used in a non-technical sense, by non-experts. For instance, in 2020, the US concluded the *Agreement for Bringing Peace to Afghanistan* with the Taliban movement. The agreement repeatedly refers to ‘guarantees and mechanisms’ that are meant to ensure certain aims of the agreement, such as the prevention of terrorist acts against the US emanating from Afghan soil, or the withdrawal of foreign forces from Afghanistan according to a certain timeline. But, in fact, there is nothing in the agreement that resembles a guarantee in a legal sense. Like whistling in the wind, the use of the term ‘guarantee’ is meant to disguise the fact that at least one party to the agreement might not necessarily be much constrained by it, especially after the other has fulfilled its part of the bargain (the US withdrawal).

True guarantees in international law are generally seen to involve two types of obligation for a guarantor state. The first is that the guarantor is required to ensure compliance by one or more of the principal parties to the agreement. The second is that the guarantor state itself must not act in violation of the agreement between the principal sides.

An example is provided by the Declaration of Guarantees that is part of the 1988 Afghanistan peace agreements. In the principal agreement to which the guarantee is attached, Afghanistan and Pakistan pledge not to intervene in their respective internal affairs. In an associated Declaration of Guarantees, the then Soviet Union and the USA:

> Undertake to invariably refrain from any form of interference and intervention in the internal affairs of the Republic of Afghanistan and the Islamic Republic of Pakistan and to respect the commitments contained in the bilateral Agreement between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Principles of Mutual Relations, in particular on Non- Interference and Non-Intervention. [Declaration of Guarantees, USSR and USA, 14 April 1988, http://insidethecoldwar.org/sites/default/files/documents/The%20Geneva%20Accords%20on%20Afghanistan,%20April%2014,%201988.pdf.]

This undertaking consists of two parts, both in fact addressed at the guarantors. First, they will themselves invariably refrain from intervention against either of the two principals. Second, they will respect the commitments of the principals. This meant that they would not push either side into violation of its own commitment of non-intervention. This implied (or should have implied) that the US would no longer be able to supply the Mujahedin opposition forces in Afghanistan through Pakistan, as this would mean that Pakistan would then be in violation of its principal obligation of non-intervention against Afghanistan.

A third type of obligation of the guarantor may go beyond a commitment not to participate in violations of the commitments of the principal parties to the agreement to which the guarantee relates. The guarantors may also contract into an obligation actively to ensure compliance on the part of the principal parties.

For instance, in a Memorandum of Agreement between the USA and Israel, relating to the Peace Treaty between Israel and Palestine of 1979, the US announced that it will 'take appropriate measures to promote full observance of the Treaty of Peace.' [Article 1.] In case of violation or a threat of violation, the US would 'take such remedial measures as it deems appropriate, which may include diplomatic, economic and military measures.' [Article 2.]

In a further step, the US also promised support to the victim of a possible violation of the obligations accepted by the principal parties, in this case Israel:

> The United State will provide support it deems appropriate for proper action taken by Israel in response to such demonstrated violations of the Treaty of Peace.

Hence, the examples invoked so far show several modalities for a guarantee in general terms:

- The guarantor will not itself act inconsistently with the principal obligation at issue;
- The guarantor will not contribute to violations on the part of the principal parties;
- The guarantor will use its best endeavours to ensure compliance by the principal parties with their own obligations;
- The guarantor may even go as far as enforcing the obligation of an offending principal party—this may be a party with which it has special influence, or it may be the other side;
- The guarantor may offer to support the victim of a violation of the obligation to which the guarantee relates.

A general guarantee relating to a settlement for Ukraine might therefore relate to provisions designed to ensure compliance by the Russian Federation and Ukraine of their obligations, for instance relating to implementing the neutrality provisions, or conversely any withdrawal requirement that might be included.

However, such a broad guarantee of the overall settlement agreement is not likely contemplated in this present instance. Rather than seeking to ensure compliance of all parts of the agreement, the guarantee would (and should) only relate to the security dimension after a settlement. Moreover, it would only apply to one of the two likely parties to a settlement: to Ukraine.

This is of course why the present discussion focuses on the term ‘security guarantee’ instead of a broader guarantee of the settlement and this terminology should be retained. The aim of a security guarantee is very narrow. It supports the state accepting the principal obligations in the settlement by preserving it from future threats to its external security.

In this instance, the trade-off would be that, if Ukraine accepts the limitations inherent in the status of permanent neutrality and perhaps some other undertakings, others will balance the fact that Ukraine cannot assure its security through alliances. Instead, they offer to make up for this deficit by pledging to assist in maintaining the security of permanently neutral Ukraine.

III. GENERAL ISSUES ARISING FOR SECURITY GUARANTEES

Having clarified the concept of a guarantee more generally and of a security guarantee, it may be useful also to address some general issues that would apply to all or most of the options that will be discussed below. It will be convenient to start by considering the different types of security guarantee in existence.

A. Types of Security Guarantee

For present purposes, it is important to be clear about what type of security guarantee is envisaged. It is likely that Ukraine and the Russian Federation might approach the issue from a different perspective. Broadly, one may distinguish restrictive from protective security guarantees.

Impositional Security Guarantee: An impositional security guarantee would normally be associated with a broader status settlement, in which the entity under guarantee is the object of an arrangement imposed by third states. For instance, a larger peace settlement among major powers may provide for permanent neutrality of a certain territory of strategic value for them. This arrangement on permanent neutrality is made to place that territory beyond contention of the major powers.

The guarantee for the permanently neutral status of the territory in that instance is not so much directed at preserving the rights and interest of the territory. It is directed at reassuring the major parties that the territory will indeed remain neutral and that it will not play a part in a potential future confrontation between them. An example is the London Treaty of 1831 which divided Belgium from Holland, and declared the former to be permanently neutral, in the interest of the European balance of power. [Article 7, Martens, NRdT, Ser. 1, Vol 2, 177ff.]

Similarly, Luxemburg was placed under a regime of permanent neutrality by the London Treaty of 1867, requiring it to maintain that status in relation to all others. Article 2 placed this status under the guarantee of France, Italy, Netherlands, Austria, Prussia, Russia and Great Britain. [Delbrueck, *Friedensdokumente aus fuenf Jahrhunderten*, Vol 2, p. 1125.]

A more modern example of an impositional guarantee is provided by the Cyprus *Treaty of Guarantee* of 1960. Under that treaty, Cyprus was meant to be maintained as an independent and undivided state—it was precluded from joining with Greece to the detriment of its large Turkish speaking population segment. Greece, Turkey and the United Kingdom, as guarantors, agreed to 'recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution.'

Turkey invoked these provisions when it argued that Cyprus was moving towards a violation of the agreed status. Claiming that the consultations among the guarantors provided for in Article IV paragraph 1 had been unsuccessful, it took unilateral action by means of an armed invasion. This resulted in the deployment of Turkish forces in the northern part of the island of Cyprus which in turn facilitated the establishment of the Turkish Republic of Northern Cyprus as a purportedly independent state.

An impositional guarantee therefore is directed at, or against, the state, entity or territory to which the guarantee relates. This is in contrast to a protective guarantee.

Protective Guarantee: A protective guarantee is meant to preserve a beneficiary state against challenge by third states. Preserving the beneficiary state is the dominant interest, rather than the preservation of the interests of the guarantor states. For instance, the *Definite Peace*

between Britain, France, Spain and Batavia of 1802 recognized the independence of Malta, Gozo and Comino under the Order of St John, and confirmed that this independence would be assured by France, Britain, Austria, Spain, Russia and Prussia.

An arrangement of this kind might expressly include, or merely imply, an obligation of the guarantor states to preserve the territory or entity in question. For instance, Great Britain argued that it was acting in compliance with its guarantor obligations when it entered World War I after Germany had violated Belgian neutrality by marching into its territory. In fact, the relevant Treaty of London of 1839, which had provided for Belgian neutrality, did not actually include an express military guarantee on the part of Great Britain or any other state. [E.g., Preeta Nilesh, Belgian Neutrality and the First World War, Some Insights, https://www.jstor.org/stable/44158486.]

Mixed Purpose: A somewhat unusual instance is furnished by the arrangements concluded between Finland and the Soviet Union under their *Treaty on Friendship, Cooperation and Mutual Assistance* of 1948. [http://heninen.net/sopimus/1948_e.htm.] According to Article 1:

> In the eventuality of Finland, or the Soviet Union through Finnish territory, becoming the object of an armed attack by Germany or any state allied with the latter, Finland will, true to its obligations as an independent state, fight to repel the attack. Finland will in such cases use all its available forces for defending its territorial integrity by land, sea, and air, and will do so within the frontiers of Finland in accordance with obligations defined in the present agreement and, if necessary, with the assistance of or jointly with, the Soviet Union.

Hence, it would be the obligation of Finland, in the first instance, to defend and enforce its neutrality against other states (Germany and her allies in this instance). But the object of that defence of Finnish neutrality under this treaty was ultimately the defence of the Soviet Union. Hence, the Soviet Union claimed the right of assistance in case neutral Finland was in danger of being overrun. (This right of assistance was, however, qualified in a subsequent clause, making it dependent on Finnish consent.) As the purpose of the guarantee is both the protection of the entity, but also the safeguarding of the interest of a third party, one might consider this an example of a mixed purpose guarantee.

B. Participants in a Guarantee

Where a protective security guarantee is concerned, the choice of guarantor would depend on a series of factors. Where the object of the guarantee is to constrain the state concerned, for instance in case of an imposed neutrality, the principal external parties to the agreement might be the guarantors. They might reserve the right to enforce the obligations imposed upon the state concerned, including potentially the use of force against it. Again, the 1960 Cyprus Treaty of Guarantee arguably offers an example. Turkey invoked that Treaty in justification of its military invasion of Northern Cyprus, arguing that Cyprus was violating its principal obligations to which the guarantee relates.

In case of a protective guarantee, however, the composition of the guarantors is different. They are not states that wish to ensure compliance with the primary undertakings of one or both sides in their own interest, or in their collective interest. Rather, the relationship is one of protector and beneficiary. Those states offering the security guarantee agree to act entirely in the interest of the beneficiary state in ensuring its protection.

In this instance, Ukraine seems to have suggested that the list of potential guarantors might be potentially open-ended, offering states the opportunity to opt in (see the extract from its position paper at the outset of this Option paper). This would be quite unusual. A security guarantee does not become more effective the more states join in. Rather, in actual practice, the reverse could be true.

Perhaps one might distinguish in this context between states supportive of the settlement, or witnesses to it, from those involved in the actual security guarantee. The former may be a broader range of states who act as friends to the peace process or settlement. They may wish to encourage the sides and offer economic assistance or other helpful steps. But they would not necessarily be best placed to participate in a security guarantee. The two categories of states should not be treated as one and the same.

In this instance, the Ukrainian side has also suggested that it might consider including the Russian Federation among the guarantor states.

The Russian Federation may well wish to be party to the guarantor arrangement. This wish would however not necessarily be focused on seeking to assist in maintaining the defence of Ukraine. Rather, the Russian Federation might seek a right to participate in enforcing neutrality and possibly other, related obligations, such as disarmament and arms limitations. This could turn the intended protective security guarantee to the benefit of Ukraine, into an impositional guarantee directed against Ukraine. The Russian Federation might aim to constrain Ukraine's future conduct by giving other states, in particular itself, standing to enforce compliance with the obligation of neutrality.

Indeed, should the Russian Federation be listed as a guarantor state in general terms, there is the risk that this could lay the groundwork for a subsequent military intervention. Not unlike Turkey under the Treaty of Guarantee of 1960 invoked above, it might claim a mandate to enforce commitments made by Ukraine in relation to the two Oblasts concerning their autonomy or other matters.

C. Symmetry in Security Guarantees?

There is also another issue to consider. The Russian Federation might argue for a symmetrical security guarantee that it might offer to Luhansk and Donetsk, or possibly even other areas it might seek to occupy. This would supposedly mirror the security guarantee offered by other states for Ukraine as a whole.

Of course, the two circumstances are different. The security guarantee contemplated for Ukraine concerns a fully sovereign state—and a state at present subjected to an unlawful armed invasion. The position of Luhansk and Donetsk, as outcomes of the use of force by an external state, falls into a different category.

At present, the legality of the use of force by the Russian Federation in Donbas is based on two arguments. One is the protection of the Russian-speaking population from genocide—a view rejected already by the International Court of Justice. The other is the argument that Luhansk and Donetsk are independent states and can invite other states, including the Russian Federation, to exercise the right of collective self-defence on their behalf.

Again, as the status of the two Oblasts as independent states has been internationally rejected, this second argument, too, cannot succeed. Only states can invite other states to assist in their defence under Article 51 of the UN Charter.

However, if the Russian Federation were to obtain a treaty right of intervention from Ukraine, in the form of a security guarantee foreseen in a settlement, this situation might change. A

future intervention by the Russian Federation could be justified, however controversially, with reference to the settlement and the security guarantee offered to both entities.

Of course, this only applies to a symmetrical security guarantee extended by the Russian Federation to the entities if that guarantee is foreseen in any settlement. If it is a unilateral act adopted by the Russian Federation outside of the settlement, this would be legally irrelevant.

The recognition of both entities as states by the Russian Federation, and the conclusion of collective self-defence treaties with them, on 21 February 2022, is not valid at the level of international law. Both entities are positively non-states as they came about in consequence of the use of force, and in order to legitimize the use of force by the Russian Federation.

Any security guarantee unilaterally extended by the Russian Federation to the two unlawful entities would not add to the authority of the Russian Federation to use force on their behalf. However, if the Russian Federation was to be included among the guarantor states of the overall settlement, this could be used as an argument in favour of a claimed right to act in defence of the two Oblasts at some future point.

In summary, to make the Russian Federation a guarantor state might therefore lay the ground for subsequent arguments that it had the right to take certain action in order to fulfil its obligation of guaranteeing the permanently neutral status of Ukraine, or to preserve its claimed status of Luhansk and Donetsk. Such action might consist of the use of force in an extreme case. However, the guarantee might also be invoked to justify other steps, including potentially the recognition or annexation of certain territories in response to alleged violation by Ukraine of its permanently neutral status.

The exclusion of the Russian Federation from the range of guarantor states would not need to be seen as an act directed against it, or as a sign of particular distrust. Rather, this flows from the fact that the Russian Federation is the principal party of the agreement to which the guarantee relates. Where a protective guarantee is concerned, in the normal course of things a principal treaty party cannot, or should not, at the same time be a guarantor of the very obligations it has undertaken.

There is precedent for offering external security guarantees to just the one or other side in the context of a bilateral peace settlement. An example is provided by the security assurances given by the US to Israel when it concluded the peace agreement with Egypt. In the Memorandum of Agreement between the USA and Israel, in Article 3, the US notes:

> … if a violation of the Treaty of Peace is deemed to threaten the security of Israel, including, inter alia, a blockade of Israel's use of international waterways, a violation of the provisions of the Treaty of peace concerning limitation of forces or an armed attack against Israel, the United Sates will be prepared to consider, on an urgent basis, such measures as the strengthening of the United States presence in the area, the providing of emergency supplies to Israel, and the exercise of maritime rights in order to put an end to the violation.

Again, this assurance, or guarantee, exists entirely outside of the actual peace agreement with Egypt. It only addresses Israel as its object of protection. Also, the guarantee does not foresee that taking of action that is not justified by general international law.

D. The Specific Focus of a Guarantee—the Trigger Event

A guarantee can focus on ensuring performance of a broad range of obligations. The example from the 1988 Afghanistan agreements exhibits a guarantee focusing on maintaining the obligation of non-intervention between the parties and also of the guarantors. Another example is the Cyprus guarantee, which focused on maintaining the independence and agreed

constitutional order of Cyprus. Other guarantees can focus on retaining the status of a territory, or its continued territorial unity (Bosnia and Herzegovina).

In shaping any guarantee as may apply to Ukraine, it will be important to ensure that the focus lies on preserving and protecting that state from external aggression, rather than on preserving and protecting the status to which Ukraine may subject itself in a settlement (permanent neutrality, disarmament, etc). This is implied by the concept of protective security guarantee already invoked by Ukraine, rather than a restrictive guarantee of its status that others might contemplate.

The terms of the security guarantee will identify the action to be taken by the guarantors in case of an infraction. The security guarantee will need to identify clearly what that infraction would be. Where a protective security guarantee is concerned, a number of different terms could be suggested, each having a specific meaning in international law.

Territorial Integrity and Political Independence: The guarantee could be focused on preserving and protecting the territorial integrity or political independence of Ukraine. However, that concept is broad and could lead to differing interpretations that might undermine the effectiveness of the guarantee.

More specifically, and mirroring the prohibition of the use of force in Article 2 (4) of the UN Charter, the guarantee could be triggered by 'the use of force against the territorial integrity or political independence or in any other manner inconsistent with the purposes and principles of the United Nations.'

However, the reference to 'territorial integrity or political independence' has at times led to an argument that a use of force is not prohibited if it does not permanently interfere with the territorial integrity or political independence of the state concerned. Similarly, it is sometimes argued that certain uses of force, for instance in support of populations under threat of genocide, would not offend against the purposes and principles of the UN Charter. Hence, such action would be excluded from the prohibition of the use of force. Hence, it might be best to avoid this term where the trigger for the application of the guarantee is concerned.

Threat or Use of Force: Article 2 (4) of the UN Charter prohibits the mere threat of force, along with the actual use of force in violation of the territorial integrity or political independence of a state. Threats of the use of force are internationally just as unlawful as actual uses of force. If they are meant to be covered, it would be important to clarify what kind of actions amount to a threat of force to avoid an impossibly broad scope of application of the guarantee. A restrictive view of that concept would suggest that a threat of the use of force must consist of three elements:

- a demand directed at the state concerned to take certain action that lies within its own sovereign prerogative;
- the clear indication that military force will be used if that demand is not met;
- coupled with the military capability and readiness to make good on that threat.

Armed Attack: An alternative concept to the term 'use of force' is that of an 'armed attack.' An armed attack is a use of force sufficiently serious to trigger the right to self-defence under the UN Charter. Hence, an armed attack tends to be the trigger event for the application of defensive alliances. The meaning of that terms is clearly defined in international law and well understood.

Act of Aggression: A further possible trigger is that of 'an act of aggression' or 'aggression.' That term is defined in some detail in a UN General Assembly Resolution (Resolution 3314

(XXIX)). This definition is intended to guide the UN Security Council in the application of enforcement Chapter VII of the UN Charter.

A useful compromise might be a provision that lists as the trigger event for the security guarantee a combined formular, like 'if an armed attack or act of aggression occurs.'

E. Territorial Reach of the Guarantee

Ukraine is offering to exempt the Ukrainian territories over which it did not exercise control as of 23 February 2022 from the guarantee. Presumably this is to reassure the guarantors that they will not be dragged into a conflict over disputed territories that is likely to persist.

If, according to the initial view of Ukraine, the Russian Federation is included among the guarantors, this territorial restriction could also exclude a claim of the Russian Federation to extend a security guarantee to those areas.

Of course, the territorial definition resting on the positions held on 23 February 2022 would only apply if the settlement results in a full withdrawal of Russian Federation forces to those areas. On the other hand, the Russian Federation may have larger territorial ambitions. In addition to retaining Crimea, these could include all of Luhansk and Donetsk, rather than merely the parts of the Oblasts it held on 23 February 2022, or even additional territories to their South, potentially as far as Odessa. Whether it harbours these ambitions, and whether it will be in a position to occupy and hold the additional territories in question, is not yet clear.

It is in any event likely that the issue of a full and rapid withdrawal of Russian forces to the positions they held on 23 February 2022 will be contested in the negotiations. Russia will not wish to easily give up any advances it has made at considerable sacrifice, if it manages to consolidate these advances, while Ukraine will not accept the loss of further territory in the wake of a particularly brutal military aggression.

The definition of the protected territory may therefore in the end be the territory controlled by the government of Ukraine within the lines of separation that apply after the agreed disengagement of forces and the withdrawal of foreign forces as stipulated in the settlement. These lines may or may not be those held by the side on 23 February 2022, although it is unlikely that Ukraine would accept any agreement that would endorse any further territorial gains by the Russian Federation.

If a settlement is possible, then the question arises whether Ukraine is definitely and permanently willing to cease hostilities in relation to any or all territories that remain under Russian Federation control. As the resumption of hostilities between Armenia and Azerbaijan relative to Ngorno Karabakh of Autumn 2019 suggests, sometimes a state will decide to re-capture territory occupied for some considerable time by another state.

Could the exclusion of territories under Russian control from the guarantee suggest that such an operation might be mounted by Ukraine in the future? What would happen if Ukraine initiated such an armed campaign and then faced counterattacks, leading to armed intrusion into the territory covered by the guarantee. Would such a situation still be covered by the guarantee, even if the counter-offensive was provoked by Ukraine?

This possibility might be excluded by a provision that removes a situation that results from offensive action or provocation from the application of the guarantee. However, concepts and terms of this kind are broad, and might invite abuse and 'false flag' attacks or incidents by the other side as a way to avoid triggering the guarantee.

Somewhat more technical language, such as an exclusion of a situation that results from 'a first use of force by the Ukrainian governments in relation to territory beyond the agreed line of

control' from the guarantee might help overcome this problem. However, uncertainty and abuse might still occur and the only likely way to address this is through the freedom of appreciation of the situation by the guarantor states. They would exercise their judgement in assessing whether or not Ukraine was in fact the state that triggered further hostilities.

Another way of addressing this problem would be to require the sides to subject any alleged infractions of the cessation of violence to action by a Mixed Military Commission. Any side that refuses the application of this procedure, or disregards the findings and requests of the commission in case of a use of force, would be taken to be the aggressor state, or, in case of Ukraine, would lose its claim to invoke the security guarantee.

Another question is whether the guarantee will be focused only and exclusively on the territory of Ukraine. It is also possible that Ukrainian ships or aircraft, or its citizens abroad, might be subjected to an armed attack or act of aggression. Would the guarantee apply under such circumstances? If not, if Ukraine responds forcibly on its own and is then subjected to further attacks, would the guarantee apply, or could the guarantors argue that the armed attack against Ukraine was provoked by Ukraine?

F. Individual or Collective Decision

A further general question concerns the mechanism for triggering the application of the guarantee. The first condition for all of the options noted below would be the occurrence of the trigger event. Second, there would need to be a request from Ukraine to implement the guarantee. Again, Ukraine would want to ensure that it cannot be subjected to action by guarantor states which it does not itself support. Much like the invocation of collective self-defence, there would need to be a request for implementation action from the government of Ukraine.

There are then three principal options for action according to the guarantee.

Automatic Application: First, there might be a requirement for each guarantor individually to deliver on the guarantee. Each individual guarantor would determine that the trigger event has occurred. It would receive a request for action from the state under attack. It would then determine for itself what action it wishes to take in response, or what action it may have to take under the terms of the guarantee.

Activation Mechanism of the Guarantors: Second, if an armed attack or act of aggression may have occurred, or the beneficiary of the guarantee claims that it has, this could trigger the activation of a collective mechanism. The guarantors may then be required to consult with one another, and perhaps to come to an agreement to activate the guarantee. They might also coordinate their action or agree to take joint action.

An example is provided by the Declaration on the Neutrality of Laos of 23 June 1962. In it, the participants in the Conference on Laos request that all states should respect the neutrality declared by that state and refrain from the use of force or acts of intervention against that state. They add a formal obligation to consult with one another, in case of a risk of the violation of the integrity or neutrality of Laos, to consider necessary steps to vindicate these principles. [Section 4, Signed by the PRC, Burma (Myanmar), France, India, Cambodia, Canada, Poland, USSR Thailand, UK, USA, DR Vietnam, Republic of Vietnam.]

Of course, if there is a requirement for a collective decision, and that decision is to be reached by consensus among the guarantors, this would mean that no action might be taken unless there is unanimity of views. This could make the security guarantee less credible.

To avoid this problem, there could be an initial procedure for collective decision-making. If it turns out to be impossible to reach the required consensus within a short period of time, a less

involving, secondary procedure for decision-making might apply. This could be consensus minus one, or a simple or qualified majority decision among the guarantors.

If there is a majority decision, though, it would be unlikely that a state opposing the decision would be bound to implement it. Rather, the mechanisms would be that such a majority decision would allow those states wishing it to invoke the guarantee and take action.

Alternatively, if a required consensus cannot be obtained, individual guarantor states might become entitled to act alone. This is exemplified in the Cyprus Treaty of 1960, to which reference was already made above. [Article 2 of the Treaty of Guarantee.] Article IV provided:

> 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.
>
> In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty

External Mechanism: Third, activating the guarantee could depend on confirmation by a third body like the UN Security Council that the trigger event has occurred. Given the likely blockage of the Council due to a veto by an interested state, some alternative means might be devised. This might, for instance, be a finding by the UN General Assembly or some other authoritative third-party body that an armed attack or act of aggression against Ukraine has occurred.

The external confirmation of the occurrence of an armed attack or act of aggression would increase the legitimacy of whatever response the guarantors then take in response. On the other hand, interposing such a mechanism can cause delay or it might even frustrate the implementation of the guarantee.

The 1925 Treaty of Locarno offers a mixed mechanism, designed to overcome any deadlock or delay due to the invocation of a collective mechanism. The Treaty offered definite security guarantees for 'the maintenance of the territorial status quo resulting from the frontiers been German and Belgium and between Belgium and France and the inviolability of the said frontiers.' [Article 1, https://treaties.un.org/doc/Publication/UNTS/Volume%2054/volume-I-1292-English.pdf.]

In case of an allegation of a breach of this undertaking, or a failure of a party to the treaty to address such an allegation through peaceful means, the issue would be referred to the Council of the League of Nations. If the Council, as a collective and objective agency confirmed the breach, then the guarantor states would 'each of them come immediately to the assistance of the Power against whom the act complained of is directed.' [Article 4 (2).]

However, in case of a 'flagrant violation,' i.e., and obvious armed attack, there was no need for reference to a collective body:

> Each of the other Contracting parties hereby undertakes immediately to come to the help of the party against whom such a violation or breach has been directed as soon as the said Power has been able to satisfy itself that this violation constitutes an unprovoked act of aggression and that by reason either of the crossing of the frontier or of the outbreak of hostilities or of the assembly or armed forces in the demilitarized zone immediate action is necessary. [Article 3.]

G. Duration of the Obligation to Assist

If states are required to assist according to the guarantee, the question arises as to how long that right or obligation to act would remain in place. In international law, the right to take action under the security guarantee cannot go beyond the extent of force available to the victim of the armed attack under the law on individual and collective self-defence (Article 51 of the Charter).

According to Article 51, the right to individual or collective self-defence extends up to such time as the UN Security Council has taken the measures necessary for the maintenance or restoration of international peace and security. Hence, the Security Council, if it takes effective action to safeguard the state under armed attack, can suspend the right and obligation to act in its defence and accordingly also to act in implementing the guarantee.

States acting in self-defence are obliged to report this fact to the UN Security Council. This then allows the Council to act, possibly suspending the right to self-defence.

It is contested who determines whether the Council has taken the measures necessary for the restoration or maintenance of international peace and security. Some assert that any action of the Council, at least when acting under Chapter VII of the Charter, would suffice. Others assert that only enforcement action capable of ending the armed attack could suspend self-defence. Others, still, assert that only the victim state of an armed attack can determine whether, in its view, sufficient collective action has been taken to render self-defence inapplicable.

If the Council fails to act, for instance, due to the application of a veto, the right to individual and collective self-defence extends to the point when the armed attack that triggered the application of self-defence, and the guarantee, has been entirely reversed. This would also terminate the right or obligation to render military assistance if this is encompassed by the security guarantee.

Hence, a settlement agreement or a separate declaration on security guarantees might note that the undertaking to assist Ukraine extends until such time as the right to collective self-defence terminates.

H. Legal Establishment of the Guarantee

An initial question is whether the guarantor states are willing to engage in a legally binding commitment. If so, this could take the form or a Joint Declaration or Memorandum of Understanding that would in fact be a treaty amongst them. If not, they would merely issue a political declaration that is not subject to international law. Evidently, Ukraine would likely press for a binding legal commitment.

The next question is whether Ukraine would be a party to any agreement, if a legally binding agreement is sought. It will presumably prefer to be a subject, rather than an object of such a relationship. If that seems less desirable from the perspective of the guarantors, Ukraine could at least be associated with the instrument in some softer say, such as witnessing signature.

As was noted earlier, in some instances of settlement, the guarantors will themselves be parties to the settlement. This tends to be the case when a settlement is the outcome of a larger, multi-party conference process and where it is of an impositional character. This does not seem to be the trajectory in this instance. Rather, one might expect a bilateral Ukraine-Russia agreement.

However, there would likely be other elements to an overall peace settlement, concluded with a variable constellation of parties, going beyond Ukraine and the Russian Federation.

In addition to the principal settlement between Ukraine and the Russian Federation, there would likely need to be some form of undertaking on the part of key states and institutions concerning gradual sanctions relief, presumably to be administered in stages as implementation

of the settlement progresses. This might take the form of a political undertaking by the states concerned, to which reference might be made either in the bilateral agreement, or perhaps in a Security Council resolution endorsing the bilateral agreement.

There may be additional, external commitments that need to be tied into the settlement. These might concern, for instance, support by international financial institutions and others for reconstruction, or an agreement on the deployment of an international presence in certain areas, or the role of international agencies in supporting implementation on the ground.

Overall, therefore, it seems unlikely that a settlement agreement would stand alone. The question is therefore how a security guarantee might be tied into the settlement, if it is to be tied into it.

As was noted already, a preferred option would be to offer a security guarantee that is specific, focused on Ukraine alone, and on a possible future armed attack or acts of aggression.

Yet, if the principal agreement confirms that Ukraine will be a permanently neutral state, it may be necessary at least to note in that agreement that a security guarantee will be obtained and is not incompatible with the obligation of permanent neutrality.

Although the principal agreement will likely be bilateral, guarantor states could agree to witness the agreement. This would serve to tie the security guarantee somewhat more into the principal agreement, without disturbing its principally bilateral nature.

In the case of the Afghanistan Peace Accords of 1988, a complicated way was chosen to tie the guarantee into the agreement. The two guarantors, the USSR and USA concluded a Declaration of guarantees. This was in fact a treaty, although, as will noted below, it was a disguised one.

In addition, there was a separate Agreement on Interrelationships, tying all the respective obligations of the two principal parties and the guarantors together. That Agreement was signed by the two principal parties and witnessed by the guarantors. However, in witnessing, the guarantors actually expressed consent, and thus became disguised parties to the agreement on Interrelationships and the whole set of agreements.

These manoeuvres were necessary given the difficulties of the USA relating to advice and consent of the Senate—an issue to which it will be necessary to return in a moment. For the present discussion, the key question is whether the guarantors will accept obligations under international law, and if so, to what extent the role of the guarantors needs to be bound into the obligations of the principal parties in their bilateral agreement.

In any event, it is likely that the full set of instruments constituting the overall settlement, including the relationship with the guarantor states, will be reflected in a Chapter VII resolution of the UN Security Council endorsing the settlement. As the Russian Federation will be a principal party to the settlement, there should be no risk of a Russian Federation veto in relation to the attendant security guarantee of which it will have been aware throughout.

In classical practice, it was sometimes thought that permanently neutral status would require acceptance by other states, unless it had been adopted by a larger, epoch-making conference of the major powers. If so, a guarantee attached to neutrality might also require such acceptance. This was, for instance, the case in Estonian and Lithuanian treaties of peace with the USSR of 1920. Delbrueck, ed., *Friedensdokumente aus fuenf Jahrhunderten*, Engel, 1984, Vol. 2, p 1126.] Under those treaties, in case of broad acceptance of their permanent neutrality, the USSR too would be obliged to recognize their neutrality and would be required to join in offering security guarantees attached to such neutrality.

Similarly, even in 1962, the Declaration on Laos to which reference was made above, requested express recognition by other states of the decision of Laos to opt for permanent neutrality, and appealed to all of them to respect the independence, integrity and neutrality of the Kingdom. [Section 3.]

However, this view can no longer be maintained. If a state declares itself permanently neutral, all other states can rely on the legal effect of that declaration. In turn, the declaration of neutrality is opposable to them in the sense that they must respect the principles of neutrality vis-à-vis the state concerned. This effect obtains even if they have not communicated their acceptance of such neutrality. The same applies to any guarantee that may attach to such a declaration of permanent neutrality.

I. Entry into Force

If a legally binding security guarantee is sought, then the question of bringing the settlement and the guarantees into force needs to be considered carefully.

Legal obligations can be brought into force through signature, through ratification or through unilateral declarations of states. The legal quality of the resulting rights and obligations is not enhanced or diminished according to which of these methods has been employed. An obligation undertaken through a formal unilateral declaration made by a Head of State or government or a foreign minister is just as binding as a treaty ratified by a national parliament.

At present, Ukraine is proposing that its own adherence to the bilateral settlement with the Russian Federation will be dependent on a referendum and ratification by its own parliament, following a referendum. Given the likely controversy attaching to some of the provisions of the likely settlement, this may be a necessary requirement. If the principal settlement requires Ukrainian ratification, the Russian Federation will also be required to ratify the agreement.

It is perhaps not likely that the guarantors will be part of the principal settlement. If they are, the requirement of ratification would also apply to them.

This would not necessarily be the case if the security guarantee is to be contained in a separate legal instrument, if a legally binding guarantee is indeed foreseen. It would be up to the guarantor states to determine whether the obligations contained in the security guarantee would enter into force upon signature or ratification.

The Ukrainian side has however proposed that the commitments of guarantor states should indeed be subjected to ratification. The settlement would only enter into force once all guarantor states have so ratified. Presumably this is meant to add a sense of serious, binding legal commitment to the obligations of the guarantors

This provision might make sense if indeed Ukraine achieves a military security guarantee akin to Article 5 of the NATO Treaty, as is its present, announced intention. National parliaments of guarantor states might insist on a ratification requirement if such a potentially risky undertaking is to be contemplated.

If that is the case, however, entry into force of the agreement may be delayed by many months or potentially for a longer period, depending on the national ratification processes in a variety of states. Moreover, the entire settlement would collapse if ratification fails in one single parliament.

However, it may be that Ukraine will not achieve a firm, military security guarantee akin to Article 5 of the NATO Treaty. It seems more likely that a softer form of guarantee might be the best Ukraine might achieve. If so, it may be preferable to see if the guarantor states might be able to bring that undertaking into force by signature alone, rather than requiring ratification.

Indeed, even such a procedure might rule out US participation. The US has in the past been unable to become party to treaties on a whole range of obligations, given the reluctance of the US Senate to offer advice and consent.

Instead, some undertakings have had to be presented as simple executive agreements that do not require ratification. In other instances, the legal nature of an undertaking, clearly drafted in the manner of a treaty, had to be denied altogether, relying on the idea of 'soft law' instead. Hence, the JCPOA addressing Iran's nuclear weapons programme was presented as a non-binding text, although it has been operating as if it was a formal agreement in law. The evidence of the latter is supplied by the fact that the sides have been applying concepts from the law of treaties in relation to it, such as the doctrine of material breach.

As was already noted, a cunning way around this problem was found in relation to the guarantee issued by the USA and the Soviet Union in relation to the 1988 Afghanistan agreements already noted above. The document is designated a Declaration and provides in its concluding provisions:

> 8. The present instrument will be registered with the Secretary-General of the United Nations. It has been examined by the representatives of the Parties to the bilateral agreements and of the States-Guarantors, who have signified their consent with its provisions. … In witness thereof, the representatives of the States-Guarantors affixed their signatures hereunder:

Under the law of treaties, it is clear that the designation of a document is irrelevant when considering whether or not it is an agreement concluded under international law. Hence, the term 'Declaration' might suggest something other than a treaty, but it can still be a treaty if the parties meant to conclude an agreement under international law.

The USA and USSR, as guarantors, appeared to have signed the Declaration on Guarantees, but specifically acting 'in witness thereof.' This suggests that they acted as mere witnesses, and not as parties to the declaration. However, the text notes that they 'signified their consent,' which means that they accepted the provisions of the Declaration as legal obligations binding upon them. Having witnessed the document, they cannot claim to have been unaware of this binding effect.

It is not clear what the needs of the USA would be in this instance. In particular, the position of the US Senate may perhaps be different on this occasion, given the broad support for the cause of Ukraine. If not, this would pose a real problem, provided Ukraine insists on a legally binding undertaking, as it well might.

It is clear that US participation in the instrument of guarantee would be key and cannot be dispensed with. One alternative would be to offer the security guarantee in the shape of (binding) unilateral declarations of the guarantor states, which would not be constrained by ratification concerns in the US.

Alternatively, the US might claim that a memorandum of understanding on security guarantees is merely an executive arrangement without the need of Senate scrutiny. Another option would be to offer a solution akin to the Afghanistan Agreements of 1988, allowing for the fullest application of the craft of legal drafting to disguise the legal nature of the undertaking. But while technically possible in terms of law, in terms of politics, such an involving process would clearly undermine the clarity and strength of the assurances sought by Ukraine.

In addition to stipulating the mechanism for entry into force, the instrument containing the guarantee would be registered with the UN Secretariat, along with the principal settlement agreement between the parties, if it is a binding international agreement.

J. Duration of the Security Guarantee

A security guarantee can be of limited or unlimited duration. In this instance, the duration of the guarantee could be linked to certain expected developments. For instance, should Ukraine become a member of the EU, the guarantee might automatically lapse (see below, Option 4).

IV. MAIN OPTIONS FOR SECURITY GUARANTEES

There are three possible approaches to security guarantees, depending on the consequences that would flow from triggering the application of the guarantee. These are political, economic and military security guarantees, respectively.

OPTION 1: CONSULTATIVE GUARANTEE

The softest, but most often-used option for security guarantees is that of a political, or consultative guarantee. The application of the guarantee may well lead to the application of economic sanctions or even military measures against an aggressor state. However, no specific outcome is promised in advance, other than consultation amongst guarantors or reference to a collective security body that may consider further steps.

An example was already furnished above, when referring to the Declaration on the Neutrality of Laos of 1962. In case of an infraction of the permanent neutrality of the Kingdom, the guarantors would consult with the Laotian government and with one another, and then consider what steps might be necessary. [Section 4.] Also, the US assurances given in connection with the Israel-Egypt peace agreement only foresaw that 'the United Sates will be prepared to consider, on an urgent basis, such measures as …' would seem necessary to the US government. Even in relation to such a close ally as Israel, the US merely promised consideration of steps, rather than any specific and definite action in case of an armed attack.

This was also the avenue pursued in the Budapest Memorandum on Ukraine. The Memorandum was signed in 1994 by Russia, the UK, the US and Ukraine, when Ukraine gave up the nuclear weapons inherited from the former Soviet Union. Contrary to myth, the document is in fact a binding treaty, duly registered with the United Nations. However, its obligations are limited.

In line with the UN Charter, the Memorandum confirms the obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine. The US, UK and Russia added a solemn pledge that 'none of their weapons will ever be used against Ukraine except in self-defence.' As opposed to other guarantees for non-nuclear states mentioned below, it should be noted that this wording is not restricted to the use of nuclear weapons against Ukraine. It excludes the use of any weapons for any reason other than self-defence.

The parties also promised to refrain from economic coercion 'designed to subordinate to their own interests the exercise by Ukraine of the rights inherent in its sovereignty.' This would include its choice of alliance or regional integration.

But what happens if force is used? In contrast to NATO's Article 5, there is no promise of collective defence. Instead, even if an aggression involving nuclear weapons takes place against Ukraine, the other three parties merely pledge to refer the matter to the UN Security Council. This now sounds rather hollow. In the present episode, the Russian Federation was able to frustrate action in the Council concerning its own aggression through its veto.

A second example of a security guarantee is provided by the pledges accompanying the adoption of the Nuclear Non-Proliferation Treaty. To reassure the states agreeing to give up the right to possess nuclear weapons, the UN Security Council adopted Resolution 255 (1968). The resolution confirms the right to individual or collective self-defence of all states. Going beyond that, it recognizes that:

> … aggression with nuclear weapons or the threat of such aggression against a non-nuclear weapon state would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter;

First, it is noteworthy that this wording implies a dual track. On the one hand, action is expected from the Security Council as the principal organ of the United Nations addressing international peace and security. But there is also an expectation of action by individual states, including in particular the nuclear-weapon State permanent members.

The term 'would have to act' sounds relatively strong, but is in fact rather unspecific, as no particular action is foreseen. Moreover, the term is qualified by the reference to 'in accordance with their obligations of the UN Charter.' Under the Charter, member states of the Security Council contribute to decisions on collective security according to their political judgment and discretion.

Hence, this provision does not really establish an automatic reaction to the threat or use of force involving nuclear weapons against a non-nuclear weapons state. Instead, the decision to act, and what action to take, would remain a political one. Each member, and permanent member, remains free to determine what action the UN Charter might require.

The second paragraph of the resolution appears to recognize this discretionary element. Rather than necessarily relying on collective security administered by the Council, it seems to point to individual action of certain states:

> 2. Welcomes the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any nonnuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used;

This paragraph is to be seen in connection with the third paragraph of the Memorandum which references Article 51 of the Charter on self-defence. The decision to act in response to an aggression involving nuclear weapons remains, in accordance with their previously announced intention, with the states concerned. This may be non-military support or assistance as determined by the state concerned, or action under Article 51 of the Charter on self-defence.

In 1995, the Security Council adopted a further resolution on security guarantees for non-nuclear weapons state-parties to the Non-proliferation Treaty. The resolution noted the statements made by each of the (declared) nuclear weapons states, giving assurances that they would not use nuclear weapons against non-nuclear state parties to the treaty (negative security guarantee).

The resolution also notes the legitimate interests of non-nuclear weapons states to receive positive assurances that the Security Council, and above all, its nuclear-weapons state permanent members, will act immediately in the event that such states are the victim of an act or threat of nuclear aggression.

However, in terms of substance, the resolution does not clarify what that action would consist of. Once more, it merely restates the right of the victim states to bring such a matter to the attention of the Council in order to seek assistance. Third states are invited to offer technical, medical, scientific or humanitarian support to the victim. Beyond that, the Council merely welcomes once more the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, without specifying what that support of assistance might consist of.

Again, the Council merely notes the 'intention' of the relevant states to provide support. There is no automaticity in the response of the Council itself, nor is there a binding and clear commitment of the member states to oppose the aggression militarily.

It is likely, or at least possible, that a settlement between Ukraine and the Russian Federation would be noted and endorsed by the UN Security Council. That endorsement might take the form of a soft security guarantee in the mould of the two resolutions noted above.

For instance, while not formally offering a guarantee, the UN Security Council, in endorsing the Dayton agreement on Bosnia and Herzegovina, has internationally entrenched the obligations contained in that document. This includes, in particular, the protection of the territorial integrity of Bosnia and Herzegovina, and the obligation of Republika Skpska within it, not to secede or join Serbia.

The Council could emphasize the availability of the collective security mechanism in case of an armed attack or act of aggression against Ukraine, and, failing its application, note the right to individual and collective self-defence of Ukraine. In that context, it could note the intention of certain guarantor states to support Ukraine in case of an armed attack or act of aggression, consistent with the provisions of the UN Charter.

OPTION 2: GUARANTEE OF AUTOMATIC ECONOMIC ENFORCEMENT MEASURES

A second option would remove the discretion of guarantor states in shaping their response to an infraction by providing for an automatic response, at least where economic counter-measures are concerned. This option is not unknown in practice. Already the League of Nations Covenant foresaw the automatic imposition of broad economic sanctions against states using force in violation of the Covenant.

> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

The guarantor states could adopt a similar approach, simply declaring that in case of an armed attack or act of aggression directed against Ukraine, they will adopt a strong and effective set of comprehensive economic sanctions against the aggressor state. The nature and extent of these sanctions might be stipulated in advance, either in a separate document adopted only by the guarantors, or in the annex on the provisions on the lifting of sanctions that will likely accompany any settlement agreement.

Of course, the number of guarantors is likely to be relatively small. Sanctions adopted by them alone might not be particularly effective. Hence the guarantors may add that they will undertake their best endeavours to have those sanctions applied also by any collective arrangements they may be part of (G-7, EU, NATO, etc), or by their members.

Another way of achieving this would be to indicate in the instrument of guarantee that, in case of an armed attack or act of aggression directed against Ukraine, the full set of sanctions that were in place, say on 1 April 2022, shall be immediately imposed again. Once more, this would apply to the guarantor states, and potentially to organizations they are part of and their members.

To add to the credibility of the automatic imposition, or re-imposition, of sanctions, beyond the guarantor states themselves, the relevant collective organizations of which they are members (EU, NATO, G-7, etc) could adopt decisions upon signature of the settlement by two sides, confirming that they will follow the decisions of the guarantors in imposing or re-imposing sanctions if required.

Of course, the sanctions that exist at present are not universal. Given the veto in the UN Security Council, no sanctions resolution that is binding on all states could be achieved at the time. The situation would presumably be the same should there be a further armed attack or act of aggression in violation of the settlement.

It may be possible to circumvent this problem, building on the example of the Iranian nuclear deal (JCPOA) sanctions snap-back precedent. In that instance, the existing Security Council sanctions against Iran were suspended. They could be brought back into action (snapback) upon the finding by a party to the JCPOA that Iran had committed significant violation.

In this instance, the starting point is different, as no Chapter VII Security Council sanctions are in place that could be suspended and then subjected to a snap-back. Hence, as part of a settlement, the permanent members of the UN Security Council would first need to agree to ensure adoption of a sanctions resolution. That resolution would then be suspended. It could be brought back into operation through a number of mechanisms.

The first might be a request of Ukraine, supported by a specified number of guarantor states, in case of an armed attack or act of aggression against Ukraine. The suspension would be removed automatically, according to the pre-existing sanctions resolution, once the President of the UN Security Council confirms receipt of the requisite number of requests.

Alternatively, the sanctions resolution could specify that the suspension of the sanctions will be removed through a procedural vote in the Security Council—a vote to which the veto does not apply.

In a further alternative, the resolution might provide for a voting mechanism on activating the sanctions that merely requires the affirmative votes of, say, three of the permanent members of the Council, rather than all five.

A yet further option would be for the resolution to activate by an affirmative vote of a substantive, 2/3rds majority in the UN General Assembly. This would apply if the Council is unable to discharge its primary responsibility for international peace and security due to the veto and the Assembly is meeting under the Uniting for Peace procedure (Resolution 377A (V)). That resolution permits the General Assembly to step in and adopt recommendations (and only recommendations) in place of the blocked Council.

The Assembly would not go beyond the provisions of the Charter as it would merely exercise the procedural role of activating the sanctions already imposed by the Council under Chapter VII.

In fact, none of these solutions would involve a change to, or a violation of, the UN Charter. The power to impose the sanction would remain with the Council acting in the traditional way. This includes the power to assign the authority to render the resolution operational to another mechanism.

The precedent (although not an altogether happy one) would be Resolution 1441 (2002) concerning Iraq. That resolution found that Iraq was in material breach of its cease-fire obligations under Resolution 687 (1991), but it then suspended the consequences of that finding. Similarly, in Resolution 678 (1990), the Council even authorized forcible measures,

but then suspended their application for a period, pending final attempts to reach a settlement. The resolution's authorization became operational automatically upon the expiry of that period.

The disadvantage of this option is that the Russian Federation might be unlikely to vote for a sanctions resolution that might, in the future, be directed against itself. On the other hand, the sanctions mechanism in the proposed resolution would not be directed in any formal way at the Russian Federation. Instead, the mechanism would apply to any state launching an armed attack or act of aggression against Ukraine. This fact might ease the acceptability of a mechanism of this kind ever so slightly.

OPTION 3: MILITARY SECURITY GUARANTEE

Permanent neutrality rules out Ukrainian membership in a military alliance, i.e., a promise in advance by other states to defend Ukraine in return for a promise of Ukraine to contribute to the defence of the other allies if needed. However, as already noted, a permanently neutral state does not lose its right to individual or collective self-defence. If a permanently neutral states is subjected to an armed attack, other states may come to its aid should the victim request assistance. Article 51 of the United Nations Charter on individual and collective self-defence applies.

In contrast to an alliance, the neutral state can request assistance in the exercise of its right to self-defence, but it is not assured in advance that any state will respond positively to that request. A military security guarantee could add more certainty to this prospect.

Depending on how it is framed, a military security guarantee would provide for the possibility, the likelihood, or the certainty of a collective military response to an armed attack or act of aggression directed against Ukraine.

At its weakest, a military security guarantee for Ukraine could consist of a requirement of the guarantor states to consult in case of an armed attack or act of aggression directed at Ukraine. Again, this would in essence be a consultative guarantee, although one focused on potential military action.

If requested, the guarantors would, either individually or acting together, take such action as they determine necessary in response to the stipulated trigger event. This may or may not include forcible action in the exercise of the right to collective self-defence. The US assurances to Israel in the 1979 Memorandum quoted above offer an example.

While a provision of this kind does not ensure an automatic military response, it does raise the risk for a potential aggressor that a collective response might ensue. If the relationship between beneficiary and guarantor is an established and a close one, as is the case in relations between the US and Israel, a guarantee of this kind may in fact be more credible than its fairly open terms might suggest.

Moreover, a military security guarantee that lacks automaticity in triggering military action may nevertheless do just that—trigger a strong military response. The UK was under no formal obligation to enforce the guarantee of Belgian neutrality against Germany in World War I. Nevertheless, it invoked the breach of the guarantee as the reason for entering the war against Germany.

On the other hand, Ukraine's proposal suggests a guarantee offering an assured response. It has at times pointed to Article 5 of the NATO Treaty and indicated that it is arguing for a similar guarantee for its defence. That article provides:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they

> agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

This provision leaves it to each NATO member itself to determine what action 'it deems necessary,' although it could be argued that such action should include a military dimension.

In short, even the NATO treaty does not include a formal requirement determining a specific kind of response that must be taken automatically by all NATO members if one of them suffers an armed attack, such as the automatic imposition, for instance, of a no-fly zone. There is no commitment to any particular type of forcible response, or its scale or level of intensity. Every state determines individually what response 'it deems necessary.'

In reality, NATO members would be highly likely to decide on a collective armed response and to coordinate very closely on the elements they would contribute, according to long laid plans and procedures. And, such contributions of each individual state would be very significant indeed. However, this is the outcome of many years of joint exercises and shared expectations and experiences during the Cold War and the resulting, strong political commitment.

In short, it may not always be the actual, formal terms of a military guarantee that renders it effective, but a calculation of its credibility in political terms, backed by the military capacity of the guarantor states.

The Ukrainian proposal that was noted at the head of this paper suggests that guarantors:

> will provide (in response to and based on an official appeal by Ukraine) assistance to Ukraine, as a permanently neutral state under attack. This aid will be facilitated through the immediate implementation of such individual or joint actions as may be necessary, including the closure of Ukraine's airspace, the provision of necessary weapons, the use of armed force to restore and then maintain Ukraine's security as a permanently neutral state.

The language concerning individual or joint action 'as may be necessary' suggests a fair measure of discretion as to how the Ukrainian request is to be met. On the other hand, it is not clear whether the phrase 'including the close of Ukraine's airspace … ' is meant as a mandatory contribution that must be rendered when Ukraine so requests. The requirement of the 'use of armed force to restore and then maintain Ukraine's security' would sound like an open-ended commitment to the defence of Ukraine.

Potentially, this requirement goes beyond what Article 5 of the NATO Treaty offers to NATO members. On the other hand, if these are exemplary references to actions NATO and its members might take if they deem it appropriate, the proposal would be in line with the formal obligations of Article 5.

As was noted, Ukraine has suggested that the US, UK, France, Italy, Germany, Poland, Turkey and potentially Israel might become the bearer of its military security guarantee. In fact, the proposal also mentions China and the Russian Federation as possible candidates and seems to be open-ended, offering the possibility to others to join in.

With the exception of the latter two and Israel, these proposed guarantor states are all members of NATO. Already during the present conflict, these member states of NATO have firmly excluded direct military involvement in a military conflict pitting them against the forces of

the Russian Federation in combat. They argue that this would risk escalation towards a third World War. It is not clear that such NATO members would accept just that obligation through a guarantee for a settlement.

The Russian Federation might also be weary of bringing NATO states, and hence possibly NATO, into the picture. After all, it argued at the outset of the present conflict that, since the collapse of the Soviet Union, it has been encircled by NATO expansion.

If NATO states offer a firm military security guarantee, and if they use force against the Russian Federation in Ukraine, there might not be much of a difference to actual involvement by NATO in the conflict when seen from Moscow. Indeed, escalation might work the other way, leading from the involvement of individual NATO members as guarantor states to the eventual involvement of NATO as an organization and its full membership.

To address this issue, NATO might confirm that any military security guarantee arrangement would lie outside of the area of operation of its own territorial guarantee to member states. Hence, involvement by NATO members in the defence of Ukraine would not trigger Article 5 and would not necessarily involve all of NATO.

The Ukrainian proposal also refers to steps that could be taken to avoid provocations. Presumably, the harder the military security guarantee is meant to be, the higher the threshold for action would need to be (for instance, a sizeable, armed invasion unprovoked by prior action on the part of Ukraine). Conversely, the more leeway the guarantor states have in evaluating the situation and shaping their response, the lower the threshold for action would be (an armed attack against Ukraine).

Again, the question of a broader military campaign developing from localized fighting on the line of control in eastern Ukraine would need to be considered in this context. Would such a rolling campaign qualify as an armed attack of act of aggression, and might it be excluded from the guarantee if there is no clear 'first use' of significant force that can be attributed to the Russian Federation?

OPTION 4: THE EUROPEAN UNION

At present, the Russian Federation is not only opposing Ukraine's membership in NATO, but also its participation in the European Union. On the other hand, under the impression of the present conflict, the European Parliament has pressed for highly accelerated membership for Ukraine. Moving beyond the existing stabilization and association arrangement, Ukraine has now applied for immediate candidate status and membership. The President of the European Commission, Ursula von der Leyen, when visiting Ukraine in early April 2022, also raised the prospect of a condensed route though the accessions process.

Ordinarily, the membership process is highly technical and complex. However, in the medium-term, EU membership may offer a way out of the security dilemma experienced by Ukraine.

The Russian Federation sees NATO membership as part of the US-led plot to encircle and diminish it. It is true that the EU is seeking to enhance its foreign policy and security dimension, but it should be more difficult to see it as an agent of US imperialist domination and aggression.

Opposition to EU membership might be rooted more in the sense that this step would remove Ukraine yet further from the orbit of influence with which the Russian Federation might wish to surround itself. Then, again, having failed to achieve regime change in Ukraine, it is unlikely that Ukraine will ever opt for closer relations with the Russian Federation, instead of the West, in the wake of the present 'Special Military Operation.'

In fact, Ukrainian EU membership would not only envelop that state in an international institutional setting dedicated to peaceful economic integration and development. It might also address the issue of security guarantees in due time.

While the EU started out as an economic integration organization, there is a common security dimension. Article 42 (7) provides that:

> 7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Ukraine would be able to shape the arrangements under this article so as not to 'prejudice the specific character' of its security and defence policy in the shape of permanent neutrality, as is the case with several other neutral EU members states like Ireland, Finland, Sweden and Austria.

In short, once Ukraine obtains EU membership, it would be protected by an effective and credible security guarantee. That guarantee is entirely defensive and non-threatening in relation to the Russian Federation. Hence, any security guarantee that may need to be included in a Ukrainian-Russian settlement could be a temporary measure, pending EU membership.

V. CONCLUSION

Any settlement agreement between Ukraine and the Russian Federation will most likely take the form of a bilateral agreement. The provision on security guarantees need not be included in the actual bilateral agreement. Instead, it could take the form of a joint undertaking by the guarantors, perhaps with the participation of Ukraine.

The Russian Federation and China should not be amongst the guarantors. Rather, the guarantors should be selected according to the credibility of their involvement in the defence of Ukraine in case of a further armed attack or act of aggression.

While the settlement agreement should rule out 'the threat or use of force' between the sides in its general parts, the actual guarantee should relate to an 'armed attack or acts of aggression.' These terms trigger, respectively, individual and collective self-defence and UN collective security and would similarly trigger the application of the security guarantee.

The guarantee should provide a mechanism for the automatic re-imposition of the fullest set of sanctions, within a few days of the occurrence of an armed attack or act of aggression. Ideally, these would be universal, UN sanctions, under a snap-back arrangement discussed in this paper.

If no universal sanctions arrangement is possible, then the guarantors would pledge to re-impose the full set of sanctions in place at present. They would also undertake to ensure that key international institutions of which they are a part (G-7, NATO, EU) will do the same.

Ukraine may need to adjust is expectations relating to a military security guarantee. Insofar as NATO states are not at present willing to intervene in the conflict militarily, for fear of risking a direct confrontation with the Russian Federation, they will likely resist a firm obligation to do just this on a future occasion.

Similarly, having a firm military security guarantee on the part of key NATO states that mirrors Article 5 of the NATO Treaty will likely conflict with a red line on the part of the Russian Federation. After all, much of this conflict is about pushing back NATO.

Instead, it is likely that a compromise form of words needs to be found that raises the risk for any future aggressor against Ukraine, without necessarily committing the guarantors in a way that is neither acceptable to them nor to the Russian Federation.

For the medium-term, EU membership would resolve the security dilemma for Ukraine without conflicting with its anticipated status of permanent neutrality.

Joint Declaration on a Security Guarantee for Ukraine

In the event of an armed attack or act of aggression against the territory of Ukraine [other than those not under the control of Ukraine as of 23 February 2022] [other than those not under the control of the government of Ukraine as provided in the *Settlement Agreement between Ukraine and the Russian Federation* to which this document relates], the states guarantor will immediately, within no more than two days, consult one another.

Such consultations can be triggered by a notification by the government of Ukraine, or any of the guarantor states, that such an armed attack of act of aggression has occurred.

If the states guarantor confirm by consensus that such an armed attack or act of aggression has occurred, and that one or more transgressor states bear principal responsibility for it, they will immediately refer the matter to the United Nations Security Council.

If the Security Council is unable to take effective action due to the application of the veto, they will support reference of the matter to the UN General Assembly in accordance with the Uniting for Peace Resolution 377 A (V) of the UN General Assembly.

In addition, the states guarantor will impose comprehensive sanctions against the transgressor state, at a comparative level as applied in relation to events in Ukraine as of 1 May 2022. The states guarantor will use their best endeavours to ensure adoption of similar measures by appropriate organizations or arrangements of which they are a party, and their members.

The states guarantor declare their intention to use additional means at their disposal to preserve and protect the territorial integrity and political independence of Ukraine in case of an armed attack or act of aggression. In this connection they confirm the availability of Article 51 of the UN Charter on individual and collective self-defence. Consistent with the UN Charter, they will provide a full range of responses, including military support or action, in support of the government of Ukraine in the exercise of that right upon its request as they may deem necessary.

Any action involving the use of force in individual and collective self-defence shall be immediately reported to the UN Security Council. Such action will terminate once the Security Council has taken the measures necessary for the restoration or maintenance of international peace and security as provided in Article 51 of the UN Charter.

The above provisions are without prejudice to the right of the individual states guarantors to take such additional measures as they may deem necessary, consistent with the provisions of the UN Charter.

These undertakings shall remain in place until Ukraine enters the European Union as a member.

This Joint Declaration shall enter into force on the day of signature and shall be registered with the Secretary-General of the United Nations.