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Justifying the Unjustifiable: Russia's Aggression against Ukraine, International Law, and Carl Schmitt's "Theory of the Greater Space" ("*Großraumtheorie*")

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Abstract

Russia's aggression against Ukraine has been accompanied by attempts to justify this blatant violation of international law with reference to the accepted exceptions to the prohibition of the use of force. These attempts had to fail from the outset as the necessary preconditions were not given. More pernicious is, however, the endeavor to find a justification in an "alternative" system of international law. The respective arguments echo considerations popular in the first half of the 20th century, such as Carl Schmitt's "theory of the greater space" and the "theory of encirclement". To accept a revival of such arguments, even only in part, risks undermining the very basics of modern international law. Ultimately, to allow this "obsession with territory" (Georges Scelle) to unfold would not even be in Russia's interest as it would deflect from this country's real economic and societal problems that need urgent action.

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I. A two pronged approach: Justifying Russia's attack against Ukraine with arguments from inside and outside the United Nations Charter

1. At first glance it seems contradictory to note that in the United Nations (UN) era which definitely outlawed the use of force in international relations—as is well known, an important step in this direction was already taken by the Kellogg-Briand Pact (or Pact of Paris) of 1928 which outlawed war[1]—arguments for leading a "just war" would have become so important. At a closer look, however, this conundrum is easily solved: Exactly because the time of "just wars" is over, it has become so pivotal to find exceptions in the UN systems that would justify legally what in principle can no longer be advocated and is usually associated with blame and sanction. Arguments for going to war, in the past politically so easily at hand, have now to be examined exclusively from a legal perspective which leaves little leeway for deviating from the prohibition of the use of force. This prohibition, which essence permeates the international legal order established in 1945 so pervasively, is so fundamental for UN law that any attempt to justify the threat or the actual use of force must appear as a subversive attack on the foundations of the modern peace order when it is outside a clear authorization by the UN Security Council (SC) according to Chapter VII of the UN Charter, or is not an act of self-defense on the basis of Article 51 of the Charter. It is for the proponent of this exception to prove its legal foundations and this endeavor comes near to a *probatio diabolica.* As will be seen, the Russian President offered (and continues to do so) an array of justifications somewhat alluding to legal exceptions but without providing real substantiation, leaving it to the listener or reader to choose from among them, individually or in combination, and to connect the dots randomly placed to somewhat resemble a legal figure. This attempt is eventually destined to fail since rarely before there has been such a broad consensus among international lawyers in not providing such arguments any basis in international law. Surreptitiously, however, a further approach emerges among these unsustainable attempts of (legal) defense, according to which a traditional legal dispute is in any case beyond the point in this context, as more fundamental aspects are here at issue. It is the Western countries themselves, so this line of reasoning goes, that are at least co-responsible for this catastrophe as they have wantonly antagonized and provoked Russia. They

1 General Treaty for Renunciation of War as an Instrument of National Policy, 46 Stat. 2343, T.S. NO. 796, 94 L.N.T.S. 57, art. 1.

have ruthlessly played their card of material and technological (although not cultural or moral) superiority, driving Russia, being in the midst of a difficult period of transition, into the corner.[2] The NATO area has been continuously extended and thus imperils the survival of Russia, the argument continues. In the neighboring territories an "anti-Russia" alliance hostile to Russia is created.[3] As Putin stated in his televised speech of 24 February 2022, the day he launched the aggression on Ukraine, in an address to the Russian people: "You and I simply have not been left with any other opportunity to protect Russia, our people, except for the one that we will be forced to use today."[4] While at first sight one might feel that this statement is reminiscent of a self-defense argument, it becomes evident at the same time, that this argument has nothing to do with the traditional discussion about self-defense in international law on the basis of Article 51 of the Charter.

2. We are rather confronted here with an extra- or meta legal reasoning with considerations of self-defense that are not only not covered by the UN Charter but also thoroughly contrarian to this system. They fundamentally contradict the very essence of the modern international legal order. In this, however, they get a legal essence again, as they stand for an alternative order with enormously far-reaching implications.

3. Although such a language might have been used plainly only by Putin and his staunchest allies, respectable and renowned political scientists beyond any suspect of political closeness to Mr Putin have also used arguments at least partially going in a similar direction when they expressed (some) understanding for the Russian President's posture. It seems that advocates of such ideas are mostly not aware of the extent to which the arguments they thereby contribute to has put the basic tenets of UN law into doubt.

4. For this reason, a two-step approach for tackling the proposed justifications (in a larger and narrower sense) seems appropriated:

- In a first moment it will try to distill from Putin's argumentation what could be seen as an offer to engage in a traditional international law discussion, relying as far as possible on mainstream concepts and argumentation tools. Already at this point it can be

2 See Address by the President of the Russian Federation, Office of the President of the Russian Federation (the Kremlin), 24 February 2022 (http://en.kremlin.ru/events/president/news/67843); Full text: Putin's declaration of war on Ukraine, The Spectator, 24 February 2022 (https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/).

3 Ibid., para. 26.

4 Ibid., para.35.

anticipated that any such attempt is bound to fail. Putin's argumentation is unconvincing from the outset: It is presented in a half-hearted way, mixing and confusing various concepts of international law and setting several of them upside down. Sticking to such an argumentation would make international law discussion futile and impossible.

- Eventually it becomes clear that the "position by default", the creation of an alternative international legal setting, is President Putin's real thrust. The elements of "mainstream international law language" in Putin's speech are only the "first thin layer" the Russian President used to create something like the semblances of a rule-and-consensus-based exchange of ideas. In reality, however, Putin attempts to overcome this system and to replace it with a different one which begs the questions, however, of whether such a set of rules could still be qualified as international law. And behind post-modern formulas introduced in this context, elements of an old thinking pertaining to a long-gone era reappear.

II. Justifying Russia's aggression against Ukraine with traditional international law arguments—an impossible challenge

II.A. The primary point of reference: President Putin's address of 24 February 2022

5. Any discussion about possible justification for Russia's aggression has to take as a primary point of reference President Putin's address on 24 February 2022.[5] While in Russia this act of aggression has to be referred to as a "military operation", outside of Russia no doubt has been left that the address of 24 February in substance is a "declaration of war".[6]

6. Right from the moment when these utterances by President Putin went public, international law academia tried to engage, as far as possible, in a discussion of these statements according to accepted tenets of international law in their prevailing interpretation.[7] The outcome of these inquiries is largely

5 See Address by the President of the Russian Federation, Office of the President of the Russian Federation (the Kremlin), above n.2. This is the official English translation of the speech by the Kremlin. A slightly different translation was provided by the "Spectator" immediately after the televised speech by the Russian President. See Full text: Putin's declaration of war on Ukraine, above n.2. In the following quotations are taken from the text published on the "Spectator" as this text contains page numbers, thereby facilitating referencing.

6 See The Spectator, above n.2.

7 See for example Elizabeth Wilmshurst, Ukraine: Debunking Russia's Legal Justifications, Chatham House, 24 February 2022 (https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications); Ralph Janik, Putin's War

uniform in the sense that it found little legal justification to Putin's claims, but at the same time it has to be remarked, as will be shown, that these "arguments of defense" are only part of Putin's line of reasoning. The real challenge coming from Moscow lies in the little disguised attempt to propose an alternative model of international law referring back to pre-UN ideologies in many senses, strong in the interwar period of the last century.

7. In the following, both strands of argument shall be considered. Particular attention will be paid to the arguments which might be called the "philosophic-ideological" ones, as they create the risk of undermining the existing international legal order as a whole. While the arguments, which can be epitomized as the "traditional" or "classic" ones, have already found considerable attention in literature, they cannot be treated merely in just a cursory way or be totally disregarded, as both strands of argument are interconnected[8]

against Ukraine: Mocking International Law, EJIL: Talk!, 28 February 2022 (https://www.ejiltalk.org/putins-war-against-ukraine-mocking-international-law/); Terry D. Gill, The *Jus ad Bellum* and Russia's "Special Military Operation" in Ukraine, 25 Journal of International Peacekeeping (2022), 121; Marko Milanovic, What is Russia's Legal Justification for Using Force against Ukraine?, EJIL: Talk!, 24 February 2022, (https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/); Danja Blöcher and Tim R. Salomon, In Zeiten der Zeitenwende: Der russische Angriffskrieg gegen die Ukraine, 1 Zeitschrift für das Gesamte Sicherheitsrechts, Sonderausgabe (2022), 1; Matthias Herdegen, Der Überfall auf die Ukraine: Völkerrechtliche Optionen des Westens, 1 Zeitschrift für das Gesamte Sicherheitsrechts, Sonderausgabe (2022), 7; James A. Green et al., Russia's Attack on Ukraine and the Jus ad Bellum, 9 Journal on the Use of Force and International Law (2022), 4 (https://www.tandfonline.com/doi/full/10.1080/20531702.2022.2056803); Angelika Nussberger, Zeitenwende in der internationalen Politik—Über den Missbrauch des Völkerrechts durch Wladimir Putin, 4 Forschung und Lehre (2022), 268; Stefanie Schmahl, Völker- und europarechtliche Implikationen des Angriffskriegs auf die Ukraine, 75 Neue Juristische Wochenschrift (2022), 969; Claus Kreß, The Ukraine War and the Prohibition of the Use of Force in International Law, Torkel Opsahl Academic EPublisher, Occasional Paper Series No.13 (2022) (https://www.toaep.org/ops-pdf/13-kress/); Adil Ahmad Haque, An Unlawful War, Symposium on Ukraine and the International Legal Order, AJIL Unbound, 23 May 2022, https://www.cambridge.org/core/journals/american-journal-of-international-law/article/an-unlawful-war/D425FCF59C8F04B8291796853DAE5C3B; Thibaut Fleury Graff, La Russie contre l'Ukraine: Espaces Géopolitiques et Frontiéres du Droit International, 127 Revue generale de droit international public (RGDIP) (2023) , 5; and Yves Sandoz, Le Droit International a la Lumiere et a l'Epreuve du Conflit Armé en Ukraine, 127 RGDIP (2023), 11.

8 It has been said that even those arguments which supposedly rely on "traditional" law arguments are based on "untenable legal standpoints", "do not have any merits and can thus only be called cynical". See Max Lesch and Christian Marxsen, Norm

and need therefore at least some consideration. No attempt to enter the "classic" or "traditional" discussion about justifications for the use of force will be exhaustive but only more or less extensive. Nonetheless, it is hoped to provide some additional insights. As mentioned, the central attempt will be to demonstrate that there is no reason to fear that the Russian aggression against Ukraine has fundamentally changed the international legal system. To the contrary, it may even have reinforced its main tenets.

II.B. Using the agreed language of international law

8. Those parts of Putin's speech where he uses the commonly agreed language of international law or where he at least uses single terms of this language—albeit in peculiar, unorthodox constructions—can be seen as a nod to the "culture of civility" brought about by international law.[9] It is with the intent to create sort of a common ground in the necessary interaction with those counterparts and interlocutors—first of all representatives of States, international organizations, civil society, media and the ever-growing number of officials administrating international law—towards whom acts of international legal institutions have to be justified. The challenge was extremely high as starting an outright war, all the more so by a permanent member of the Security Council, the UN organ bearing the "primary responsibility for the maintenance of international peace and security" (Article 24 of the UN Charter), runs squarely against the most basic principles of the UN Charter.[10] To justify such an act is practically impossible as the prohibition of aggression (and in substance the violation of the use of force) has a *jus cogens* character and permits therefore no derogation.[11] On the contrary, Article 41 of the

Contestation in the Law Against War: Towards an Interdisciplinary Analytical Framework, in: 83 ZaöRV (2023), 11, 35. It can therefore be argued that these "classical" arguments are also influenced by an ideology opposing core principles of international law altogether.

9 See Martti Koskenniemi, What is International Law for?, in: Malcolm D. Evans (ed.), International Law (2018), 28-50, 32.

10 According to the International Court of Justice (ICJ) the prohibition of the use of force is a "cornerstone" of the UN Charter. See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of Merits, ICJ Reports 2005, 168, para. 148.

11 The Commentary to ILC Draft Articles on Responsibility of States explicitly refers to aggression (but also, at least indirectly, to the prohibition of the use of force) in its non-exhaustive list of examples of peremptory norms. ICJ Judgments in the Nicaragua case also explicitly mentions the prohibition of the use of force as a *jus*

International Law Commission (ILC) Draft Articles on Responsibility of States even imposes an obligation of cooperation through lawful means to bring to an end to such a violation, a prohibition of recognition of the situation created and an obligation not to render aid or assistance in maintaining that situation. How the concept of aggression exactly relates to that of a "breach of peace" is not entirely clear,[12] but it seems safe to argue that "aggression" is a particularly severe breach of the peace.[13]

9. As has been aptly said,[14] the Russian aggression against Ukraine on 24 February 2022 practically corresponds to each example for "acts of aggression" mentioned in the non-exhaustive list of the UN General Assembly's Definition of Aggression.[15] In this perspective, President Putin's attempt to requalify the attack as a "special military operation" might appear understandable in view of the severe consequences associated with such violation, but this maneuver is not only cynical and outrageous but also futile and easily perceptible in its intent. "Substance over form" must radically apply in this area designed to protect the core of international peace law.

10. While it is manifestly not possible to deny that a severe breach of the peace has occurred, if at all, an attempt could be made to find a cause of justification avoiding thereby State responsibility. In this context, self-defense is the recourse being taken most often and this has been the case here as well.

II.C. Is the Russian aggression an act of self-defense?

11. Absent a Security Council authorization according to Chapter VII of the UN Charter (interpreted in an evolutive way), self-defense according to Article 51 of the Charter (or on the basis of customary international law, a normative setting providing perhaps somewhat more leeway) is the "natural"

cogens norm. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14, para. 190.

12 This is even more true since there seems to be a discrepancy between the English version of Article 51 of the Charter and the (similarly authentic) French version ("armed attack" vs. "aggression armée").

13 It has been argued that the order of the three terms in Art. 39 ("threat to the peace, breach of the peace, or act of aggression") is progressive, and thus aggression would be the most severe and egregious act. See Yoram Dinstein, Aggression, in: MPEPIL online ed. (2015), para. 8; (https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e236?prd=EPIL&q=aggression).

14 See James A. Green et al., above n.7, 6.

15 Definition of Aggression, UNGA Res 3314 (XXIX), UN Doc A/RES/3314 (1974).

justification for States using force. Thereby, regularly the fact is omitted that the requisites for this justification to apply are extremely demanding, which defend the effectivity of the prohibition of the use of force to the utmost extent.

12. Modern surveillance technology and intelligence gathering provide uncontestable information about the factual military developments on the ground prior to 24 February 2022, with large-scale Russian troop amassments directly at the Russian border towards Ukraine and an all-out attack on Ukrainian defense lines,[16] civilian goals and an ultimately failed attempt to encircle and capture the Ukrainian capital Kiev. According to Article 2 of UNGA Res 3314 (XXIX), "[t]he First use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression [. . .]".[17]

13. Already on this basis it appears to be next to impossible to further uphold the self-defense tale.[18] It is true that there are tendencies to interpret the right to self-defense extensively in the sense that it still remains effective in the perspective of an attack that would leave no possibility for later reaction or perhaps even in anticipation of a planned attack. This approach is not without problems as it bears the potential to undermine outright the prohibition of the use of force. A widely contradictory State practice with considerable discrepancies between official proclamation and actual behavior reflects this situation. Not even terminology is coherent[19]: Textbook distinctions between

16 On the detail information about the impending Russian attack available before 24 February 2022, see for example Ofek Riemer, Intelligence and the War in Ukraine: The Limited Power of Public Disclosure, The Institute for National Security Studies , 27 March 2022 (https://www.inss.org.il/publication/ukraine-russia-intelligence/).

17 Article 2 continues with stating that "[. . .] the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity". No such statement had been and could be issued (both for procedural as for factual reasons). See Definition of Aggression, above n.15, Article 2.

18 See also Markus P. Beham, Die russische ,,Spezialoperation" in der Ukraine, in: Thorsten Benkel (ed.), 10 Minuten Soziologie: Gewalt (2023), 127-157.

19 See Peter Hilpold, Die Vereinten Nationen und das Gewaltverbot, 3 Vereinte Nationen (2005),81, 83(https://zeitschrift-vereinte-nationen.de/publications/PDFs/Zeitschrift_VN/VN_2005/Heft_3_2005/Beitrag_Hilpold_VN_3_05.pdf). For Olivier Corten, all these terms are oxymorons. See Olivier Corten, The Prohibition of the Use of Force, in: Jorge E. Viñuales (ed.), The UN Friendly Relations Declaration at 50 (2020), 51-71, 63.

measures against an imminent threat (retained to be permissible by many writers) and anticipatory, preemptive or preventive acts against dangers which seem to be in the offing but have not yet materialized on the ground (retained to be illegal) are not devoid of practical plausibility, but are hardly reflected in official State practice which appears to be disparate.[20]

14. While for decades after the entry into force of the Charter it was mainly States like the US and Israel that endorsed a right to preemptive self-defense (although often in an ambiguous way), the attack on the Twin Towers of 11 September 2001 seemed to lay the ground for a complete reassessment of the legal framework. With President Bush's National Strategy of 2002, a bold step was set in this direction.[21] According to this approach, the concept of an "imminent attack" should be interpreted broadly, thereby again demonstrating that the concept of "imminence" is open to the most variegated constructions.[22]

15. Also at the UN level, it seems to be prepared to accept self-defense against an imminent threat, as suggested by the Report of the High-Level Panel on Threats Challenges and Change[23] (HLP) set up by the UN Secretary-General presented in December 2004.[24] This approach made it even in the 2005 Report by the Secretary General,[25] which was somewhat

20 For an overview of recent State practice in this field, see for example Christian Henderson, The Use of Force and International Law (2018), 281ss.

21 See President Bush Delivers Graduation Speech at West Point, United States Military Academy,1 June 2002, (https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html).

22 See extensively Yoram Dinstein, War, Aggression and Self-Defence (6th ed. 2017), 233. There might be some consensus about the assessment of extreme situations within the whole spectrum of possibilities. See, for example, Dinstein, at 234: "The central point is that self-defense cannot be exercised merely on the ground of speculation, assumptions, expectations or fear of what is sometimes called a 'latent' threat. The 'early hatching of an aggressive plan' is decidedly not enough". See also Henderson, above n.20, 234 (rejecting a notion of self-defense against a temporarily remote threat of an attack where there is little knowledge as to if, when, how and against whom the attack may be launched. The real problems arise, however, in the many grey areas where no such clear categorization is possible).

23 See A more secure world-Our shared responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004).

24 Ibid., para. 188.

25 See In Larger Freedom: Towards Development, Security and Human Rights for All (Annan Report), UN Doc. A/59/2005/Add.3 (2005).

more cautious, but not in the "Outcome Document" of 2005 which brought this discussion at the UN level to an end.[26]

16. As is well-known, the "Outcome Document" has ushered in a limited UN reform, in particular with regard to human rights protection, and in the aftermath it was no longer possible to achieve a similar momentum for UN reform. The respective discussion thus continued at a more academic level, though within fora which allowed for some broader (albeit mainly academic) consensus building. Also, it has to be remarked that there was a specific focus on threats stemming from non-State actors who pose threats not devoid of sovereignty challenges, but these challenges appear to be quite different than those which arise in inter-State conflicts.

17. In this context, essentially three contributions stood out[27]:

- the Chatham House Principles of International Law on the Use of Force by States in Self-Defense of 2005, sorted out by Elizabeth Wilmshurst after an intense dialogue between several British academics and practitioners;
- the Leiden Policy Recommendations on Counter-Terrorism and International Law of 2010, again resulting from an intense dialogue between academics and practitioners at Leiden University; and
- the Principles on "Self-Defense against an Imminent or Actual Armed Attack by Non-State Actors" presented by Daniel Bethlehem in 2012.[28] These principles are

26 On this whole discussion see Peter Hilpold, Reforming the United Nations: New Proposals in a Longlasting Endeavour, 3 Netherlands International Law Review (2005), 389, 393. Interestingly, while the "Outcome Document" is the most restrictive document of this series mirroring a true State consensus that reflects in particular the position of the more sovereignty-wary States (in particular those of the Non-Alignment Movement), at the same time, to the surprise of many, the concept of the "Responsibility to Protect" that is suited to challenge the concept of sovereignty under several aspects was accepted. See Peter Hilpold, The Duty to Protect and the Reform of the United Nations—A New Step in the Development of International Law?, in A. von Bogdandy and R. Wolfrum (eds.), Max Planck Yearbook of UN Law, Volume 10 (2006), 35, 36. As Christine Gray writes, the position taken by the High-Level Panel and the UN Secretary-General in the two Reports mentioned was "surprising". Further, for her, the claim in the High Level Panel Report that self-defense against an imminent threat is "long-established customary international law" was an "extremely controversial assertion". See Christine Gray, International Law and the Use of Force (OUP 4th ed. 2018), 174.

27 See Peter Hilpold, The Applicability of Article 51 UN Charter to Asymmetric Wars, in: Hans-. Joachim Heintze and Pierre Thielbörger (eds.), From Cold War to Cyber War (2016), 127-135, 133.

28 See Daniel Bethlehem, Principles Relevant to the Scope of a State's Right of Self-Defense against an Imminent or Actual Armed Attack by Non-State Actors, 106 AJIL (2012), 770.

also the result of a preceding dialogue but perhaps are evidence more clearly by the signature of one single author.

18. Letting aside the many terminological problems they create or are at least not able to solve, these documents confirm, to a greater or lesser extent, the existence of a right to self-defense against an imminent threat, but they deny the permissibility of preventive measures. The threat against which self-defense can be exercised may not only be a future and hypothetical one, but it must be real and substantial. It can be argued that due to the specific (although not exclusive) focus on non-State actors there might also have been a greater preparedness to take a broader perspective on "imminence" as these threats are often more difficult to locate. Caution is therefore required not to over-generalize the findings of these inquiries, in particular in view of both their specific focus (on non-State actors) and their primary provenance from academia (where often less importance is attributed to strict sovereignty protection while States regularly insist on this element).

19. In conclusion it can be stated that self-defense against an imminent threat is the farthest outpost academia and the prevailing State practice are prepared to go. While it is true that "imminence" is not defined and the temporal factor is not the only one to be considered in any attempt to sort out its material content, even such a fundamental existential threat as that resulting from the building up of a military nuclear capacity by a declared enemy has not been retained to fulfil the criteria of an "imminent threat".[29] There can be no doubt that any "imminent threat" has to be proved convincingly and in detail.

20. Returning to Russia's assault on Ukraine, President Putin did not manage to provide the slightest element of a justification that could qualify for a

29 The clearest example in kind is the 1981 Israeli strike on the Osiraq Nuclear Reactor in Iraq which met with strongest protest by the State community. Interestingly, as Christian Henderson remarks, most States argued that "Israel did not satisfactorily discharge the argumentative or the evidential burden of proving imminence in the invocation of this right". See Christian Henderson, above n.20, 284, with reference to Dino Kritsiotis, A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defense under International Law, in: Nigel D. White and Christian Henderson (eds.), Research Handbook on International Conflict and Security Law: *Jus ad Bellum*, *Jus in Bello* and *Jus post Bellum* (2013), 170, 188. This is a further confirmation of the fact that any attempt to give a broader meaning to the right to self-defense must refer to arguments premised on the concept of imminence. Even the High-Level Panel Report saw in this case no imminence, see above n.23, paras 189-192.

reaction to an imminent threat. Putin's address contained rather vague hints on a rebalancing of power at the international scene with the building-up of new forces at Russian borders. The threat for Russia's security is not asserted by reference to a specific military menace but rather via more generic assertions concerning the mendacity, meanness and infamy of the West. This set against the traditional Russian peace-love mixes up to a dangerous scenario where history could repeat itself like in 1940 and 1941. Not even remotely are these very subjective considerations related to sound legal considerations as to the applicability of Article 51 of the UN Charter in the present case.

21. As far as can be seen, since 1945, the building-up of a potential (conventional) military threat has never been used as a justification for a purported act of self-defense. Such a justification, reminiscent of that used by Rome in its Third Punic War against Carthage (149-146 BC), is radically incompatible with UN law.[30]

II.D. Other (theoretically possible) justifications based on international law

22. Self-defense is not the only (albeit fully unconvincing) line of argument the Russian side uses to justify the attack on Ukraine. Putin's address in February 2022 contains rather a further *mixtum compositum* of arguments that somehow refer to international law. There are text passages that allude to humanitarian interventions (when it is claimed that genocide has been perpetrated by Kiev on the people of Lugansk and Donezk in Eastern Ukraine), to interventions by invitation and collective self-defense (when it is sustained that the people of Lugansk and Donezk asked Russia for help, after the newly created Republics in these areas had concluded treaties of friendship and mutual assistance on February 22, 2022) and to the protection of nationals abroad (with reference to the people of Crimea and Sevastopol).

23. None of these arguments withstand any closer scrutiny. As to "humanitarian intervention"—the forcible intervention to protect people in other countries who are faced with grave human rights abuses or outright existential threats—there are strong doubts whether such measures find any legal

30 It remembers Cato throwing ripe figs on the Senate's floor to evidence Carthage's persisting strength and menace to Rome. It might be interesting to note that Japan also used this argument for her attack on Pearl Harbor in 1941. This circumstance afterwards was of decisive relevance for a rather restrictive formula to be adopted in the drafting process of Article 51 of the Charter. See Olivier Corten, above n.19, 63.

basis in international law.[31] Interventions of this kind, which occurred first in 1840 and 1850 in their present-day meaning, were often carried out with spurious intent and egoistic imperial motivation, although the atrocities they were intended to stop were regularly real and extreme.[32] From a legal vantage point for a long time these interventions did not create greater problems, but the situations changed in the 20th century and in particular after the coming into being of the United Nations which attributed the monopoly of the use of force to the UN Security Council (SC). Whether the SC could authorize the use of force for the protection of human rights in situations having otherwise no evident international connotation remained unclear for a long period. On the other hand, the HLP Report of 2004 and the Annan Report of 2005 also seemed to allow unilateral humanitarian interventions in cases of grave human rights violations. The "Outcome Document" of 2005 struck a balance between these opposing positions more in line with traditional international law: On the basis of paragraphs 138 and 139 of this Document, which officially recognized the concept of the "Responsibility to Protect", the SC was attributed the competence to authorize interventions also in cases of mere internal conflict. At the same time, however, it has also become clear that interventions by a single State or groups of States without Security Council's authorization do not fall under this permissive rule. Without authorization by the SC, which was here clearly not given, Russia could therefore not intervene in Ukraine. Therefore, no further investigation as to the validity of the allegations concerning grave human rights abuses by Ukrainian authorities (for which in any case no proof confirmed by independent authorities was provided[33]) was necessary.

31 See Peter Hilpold, R2P and Humanitarian Intervention in a Historical Perspective, in: Peter Hilpold (ed.), The Responsibility to Protect (R2P) (2014), 60-122.

32 For a good historical account see Brendan Simms and D.J.B. Trim, Humanitarian Intervention: A History (2011), ibid.

33 As Christian Tomuschat writes, should these allegations have been true, international institutions would have taken notice. Furthermore, Russia, as a permanent member of the SC would have had a privileged position to denounce such events—but this did not happen. See Christian Tomuschat, Russlands Überfall auf die Ukraine, 72 Osteuropa (2022), 33, 38. It is rather the case that the UN Independent International Commission of Inquiry on Ukraine to the Human Rights Council found in its Report of 16 March 2023 that Russia has committed war crimes in Ukraine. It stopped short, however, of classifying these actions as "genocide". See Murder, Torture and Rape but no Genocide-the UN's Latest Report on Ukraine, Euronews, https://www.euronews.com/2023/03/16/murder-torture-and-rape-but-no-genocide-the-uns-latest-report-on-ukraine.

24. Also, the reference to an "intervention by invitation" and to "collective self-defense" (expressed by or exercised in favor of what Putin called the "people's republics of Donbass") were fallacious and misleading.[34] Both territories making part of Ukraine were recognized by Russia as independent States only three days before the invasion. Requisites for recognition were manifestly not given and this was also the reason why other States apart from Russia, North Korea and Syria refrained from recognizing the annexation of these territories by Russia on 30 September, 2022.[35] Both an intervention by invitation and collective self-defense require as a legal minimum to be expressed by a State according to international law as otherwise both concepts would become an easy available pretext for interventions in civil wars or would be in favor of previously installed puppet regimes.[36] Furthermore, the requesting State has to exercise sovereignty over the respective territory and any intervention has to be limited to this territory, and the Russian intervention clearly reaches beyond.[37] To discuss the Russian aggression against Ukraine in the context of the concepts mentioned is therefore not possible, not even if these concepts' constitutive elements are defined extensively. We are rather fully outside the boundaries of these exceptions on the prohibition of the use of force.[38]

25. Finally, there is also a remark in Putin's address that could be interpreted as a justification based on an intervention intended to protect foreigners abroad.[39]

34 See The Spectator, above n.2.

35 See A/Res/ES-11/4 (2022), by which the GA condemned Russia's "illegal so-called referendums" and asked States not to recognize the "attempted illegal annexation". Ibid., para. 2.

36 For a recent comprehensive treatise on the issue of intervention by invitation see Erika de Wet, Military Assistance on Request and the Use of Force (OUP: Oxford 2020).

37 See Danja Blöcher and Tim R. Salomon, above n.7, 5; referring to Military and Paramilitary Activities in and against Nicaragua, above n.11, para. 246.

38 Thus, as to the concept of the "consent to intervention" no valid consent is given. The ILC stated, with regard to Article. 20 of the 2001 Draft Articles on State Responsibility that "the consent of the State must be valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers." See Responsibility of States for Internationally Wrongful Acts (2001), A/REA/56/83(2001), Yearbook of the International Law Commission, 2001, vol. II (Part Two).

39 On this issue, see generally Natalino Ronzitti, Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity (1985).

26. Again this is a highly controversial issue. It concerns military operations abroad intended to save nationals, typically those who are high-profile or at least persons identified individually, from an immediate threat to their life and safety. Even in such cases it is not sure whether international law really permits such interventions. In the present case, however, reference is made to an unknown number of Russians citizens who have purportedly been the subjects of discrimination in unspecified manner at not specifically identified locations. Thereby, borders between the concepts of "rescuing foreigners abroad" and "humanitarian intervention" blur. It is obvious that the allegations cited cannot even remotely fulfil the requisites for a justification for such an intervention, no matter what the specific qualification is. And in any case, as said, the legal justification of such measures is of unclear credentials and in the present case clearly in contrast to the principle of proportionality.[40]

II.E. First conclusion: The language of law is not able to provide acceptable justifications for the Russian aggression

27. At this stage it can be concluded that traditional international law does not offer any basis that could serve as a justification for Russia's aggression against Ukraine. UN law states quite the contrary. To rely on accepted international law rules that specifically prohibit the use of force and leave open only very small exceptions (primarily for the exercise of the right to self-determination) and to present them in a radically contorted manner is not only an open and outrageous maneuver to circumvent and manipulate generally accepted legal standards, but also an attempt to introduce Orwellian "Newspeak" on the international scene—it reflects a stratagem intended to use words and concepts of international peace law to justify war.

28. As shown, none of the arguments presented withstands closer scrutiny. This must also have been known to President Putin and his legal advisers and may have been the reason why Putin's address in February 2022 also contains other explanations for Russia's attack. They are based not on generally accepted rules of international law but on sort of an alternative international legal order, which may amount to a new rule in international law. Already in view of the dimension of the challenge posed by Russia's aggression against Ukraine, these arguments have to be taken even more seriously than those

40 The previous "passportization" process where Russian authorities provided passports to individuals in the Donbass region further underscore the abusive background of this attempt to justify the intervention. See James A. Green et al., above n.7, 15.

poorly presented in traditional international law language. Although these arguments may be new and unfamiliar from the viewpoint of the present-day international law discourse, at the same time they do recollect to a past and almost forgotten reality of the 1930s, when the State community's destiny was at an important crossroads. The decisions then taken are now in for a re-assessment.

III. A "Schmittian" versus a Kelsenian view of international law: Are we faced with a change of paradigm?

29. Alongside the various references to possible justifications for the intervention, which are half-heartedly presented and fully unconvincing in language and content, some other passages of Putin's address stand out that might, at first sight, sound like a decrying of Russia's loss of international clout due to the encirclement by Western States and alliances:

> Those who claim world domination, publicly, with impunity and, I emphasize, without any reason, declare us, Russia, their enemy. Indeed, today they have great financial, scientific, technological and military capabilities. We are aware of this and objectively assess the threats constantly being addressed to us in the economic sphere, as well as our ability to resist this impudent and permanent blackmail. I repeat, we evaluate them without illusions, extremely realistically.[41] [. . .] Even now, as Nato expands to the east, the situation for our country is getting worse and more dangerous every year.[42] [. . .] Further expansion of the infrastructure of the North Atlantic Alliance, the military development of the territories of Ukraine that has begun is unacceptable for us.[43] [. . .] For the United States and its allies, this is the so-called policy of containment of Russia, obvious geopolitical dividends. And for our country, this is ultimately a matter of life and death, a matter of our historical future as a people. And this is not an exaggeration: it is true. This is a real threat not just to our interests, but to the very existence of our state, its sovereignty. This is the very red line that has been talked about many times. They passed here.[44]

41 See The Spectator, above n.2, para.22.

42 Ibid., para.25.

43 Ibid., para.24.

44 Ibid., para.27.

30. These statements call to mind utterances of German politicians and academics of the 20th century: First the German Kaiser's phobia of "encirclement", then by Great Britain and the Entente and later Carl Schmitt's "*Großraumtheorie*"[45] (theory of greater space).[46] Both concepts are based on visions very distant from, if not totally contrarian to, today's UN order premised on the principle of "sovereign equality" (Article 2(1) of the Charter).

31. As has been recently stated, encirclement has been a key trigger of major wars in the past, in particular of WWI.[47] However, in these cases, the subjective sense of being encircled and the ensuing intent to overcome this perceived threat by force and not by negotiations and mutual concessions are of decisive importance.[48] While the theory of encirclement and the strategy to break out of it by force have some logic in a system of international relations where the *jus ad bellum* applies,[49] in the age of UN law, characterized by the prohibition of the use of force, such a reasoning contradicts the very essence of this order and risks putting it at peril altogether. There is a clear danger associated with such an approach that thereby an "alternative" international law system is vied for. The question arises as to what elements of the UN peace order can be preserved on this basis or which elements of "traditional" international law can be upheld within such a new approach. This question is not new but has been topical for the Soviet Union immediately after the Communist revolution and in the following interwar period. It calls to mind the Soviet theory of the international law in the transitional period as it was developed in the early years of

45 See Carl Schmitt, Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht (1941).

46 Detlev Vagts developed the concept of "Hegemonic International Law" designing a situation where one power can exert decisive influence on international law. See Detlev Vagts, Hegemonic International Law, 95 AJIL (2001), 843.

47 See Andrea Bartoletti, Escaping the Deadly Embrace (2022).

48 This is especially true for the situation of Germany before WWI. Also after the war nationalist circles continued to present this theory as the major reason for Germany going to war as sort of an inevitable reaction to the purported hostile attitude by the members of the *"Entente cordiale"* seemingly intended to suffocate Germany. Already in the interwar period, however, it was revealed how false and misleading this line of argumentation was. See Eduard Bernstein, Die Wahrheit über die Einkreisung Deutschlands (1920), (https://www.marxists.org/deutsch/referenz/bernstein/1920/wahrheit/index.htm).

49 Again Germany Chancellor Bismarck has shown that encirclement was not inevitable and even if it should materialize, war was not the only possible reaction to overcome it, but diplomacy should remain the first option.

the Soviet Union in particular by Professor Yevgeny Korovin: While Russia could engage in some international co-operation with capitalistic countries, first of all the vital interests of Russia have to be defended in view of the encirclement this country was faced by countries far superior in power and strength.[50] Seen from the perspective of the 1920s, two profoundly contrarian societal models competed against each other. When it was still fully unclear which one would finally have the upper hand, such a stance taken by the representatives of one ideology who were fully convinced of the superiority of it was that the creation of a class-free Marxist (and State-free) society would only have been a matter of time.[51] Alongside basic ideological contrasts with the "capitalist" world, this attitude by the Soviet Union also bore out, however, a vision connoted by a strong territorial perspective. In fact, it was the Soviet bloc which had to be defended against more or less the rest of the world. By the Molotov-Ribbentrop Pact of 1939 between Nazi Germany and the Soviet Union which sealed the partition of Eastern Europe and in particular that of Poland, this thinking achieved its utmost escalation.[52]

32. On the academic level the idea of the "*Großraumordnung*" was developed and propounded mainly by Carl Schmitt.[53] According to this theory the dominant power of each region or "greater space" should awarded superior rights towards neighboring countries where it could intervene to secure its prerogatives while being legitimized to impede interventions by exterior powers.[54]

33. The question was to what extent international law could survive in such an order. International law would surely not fade away as it was forecasted for a world order based on socialism,[55] and relations between the dominant

50 See Earl A. Snyder and Hans Werner Bracht, Coexistence and International Law, 7 ICLQ (1958), 54. See also Yevgeny Korovin, The International Law of the Transition Period (1924) (in Russian; German translation "Das Völkerrecht der Übergangszeit, 1971) as well as Theodor Schweisfurth, Sozialistisches Völkerrecht? (1979), 184.

51 Cf. Ludwig von Mises, Die Gemeinwirtschaft—Untersuchungen über den Sozialismus (1922), in which the author already demonstrated the superiority of a price-steered economy at that time and is credited for having foreseen the eventual break-down of the Eastern European economies.

52 See Roger Moorhouse, The Devils' Alliance: Hitler's Pact with Stalin, 1939–1941 (2014).

53 Carl Schmitt, above n.45.

54 See also Claus Kreß, above n.7, 10.

55 Eric F. Green, Socialist Internationalism: *Theoria and Praxis* in Soviet International Law, 13 Yale JIL (1988) 306, 309.

powers would still have to be regulated somewhat by international norms. For the rest, however, it would apply with "thinner" and "weaker" assurances and guarantees for the States in the orbit of a superior power,[56] in particular with regard to States within the "greater legal spaces" (somewhat like a system of "graduated rights"),

34. While the demise of the Eastern Communist regimes seemed to render this whole debate obsolete as ideological divergences were no longer given, it was surprising for most observers to see that the underlying conflict reappeared, albeit with changed terminologies and transpiring a substantive conflict between "East" and "West" couched in historic arguments pre-dating the conflict between "capitalism" and "socialism" by far.

35. In his quest for the restoration of the "Russian Empire", Vladimir Putin seemed to test various options, all with strong territorial connotations: the "Eurasia" model whereby on large parts of the territory of the Soviet Union a new, Russian dominated economic actor would have been created; "big Russia", bonding together Russia, Belarus and Ukraine, again with a predominant role of Russia and, eventually, as all these attempts fails, by the creation of "Greater Russia" whereby Russia would annex Crimea and some other parts of Eastern Ukraine.[57] In these attempts, political and economic instruments would interact and come to bear in conjunction. A decisive moment for Putin was surely when he had to come to understand that the efforts to bring Ukraine within Russia's economic sphere of influence were bound to fail. This happened, as it was stated, in 2014 when the Ukraine government opted for an association agreement with the European Union and therefore Putin's hopes of restoring Russia's ancient strength by re-establishing economic hegemony were definitely destroyed,[58] which he openly displayed since his return to power in 2012. From then on, according to Putin's changed plans, the "great area" should regain shape primarily by military means.

56 In this sense, also the "Brezhnev Doctrine" of 1968, justifying military intervention in Eastern European countries under Russia's sphere of influence in case of a thread for the socialist rule could be seen as an expression of this approach. Although formally directed at the defense of an ideology, the Brezhnev Doctrine eventually aimed, at least to a considerable extent, at preserving prerogatives of the Soviet Union. See Theodor Schweisfurth, above n.50, 150.

57 See Serhii Plokhy, The Russo-Ukrainian War (2023), 91, 103, 111. (Book review in "The Economist" of 11 May 2023, https://www.economist.com/culture/2023/05/11/serhii-plokhys-new-book-traces-vladimir-putins-road-to-war); see also Owen Matthews, Overreach: The Inside Story of Putin's War Against Ukraine (2022).

58 Ibid.

36. How much of understanding should be offered to Putin's policy? Does it suffice to denounce the flagrant breaches of UN law and international humanitarian law, perhaps accompanied by some softening of the criticism with the expression of doubts about the factual developments on the ground, while at the same time pronouncing (some) understanding for Russia's general predicament as it has come to unfold in the last decades?

37. Blaming Western countries for recent international law violations is not helpful in this context. Such violations have surely occurred[59] when decision-makers from Western countries involved, but even assuming the situations were comparable with that in Ukraine (they hardly were and in particular this holds true for the preconditions leading to the escalation in the various cases) the *"tu quoque"* argument would be valid here only if thereby the abrogation of the respective underlying norms could be sustained, which is surely not the case. The underlying norms include prohibition of the use of force, protection of fundamental human rights and international humanitarian laws.

38. This is not to deny for a ruler like Vladimir Putin the legitimacy of expressing fundamental fears about a seemingly relentless decline of his country ("they have great financial, scientific, technological and military capabilities").[60] Contrary to the legal elements (or what was intended to go for it) in his address on 24 February 2022, it can be reasonably assumed that these elements were sincerely felt and they undoubtedly have substance. The problems arising in this context, however, are twofold:

- What are the conclusions, a government should draw on the practical level from these findings?
- What are the legal instruments at hand for a government confronted with such a development?

39. In his address on 24 February 2022, Vladimir Putin was not able to offer any remedy against the phenomenon of his country's technological and

59 In this context, the usually mentioned events are the 1999 intervention in Kosovo, the intervention in Iraq by a US-led coalition in 2003 following false allegation about Saddam Hussein purportedly possessing weapons of mass-destruction, the change of regime in Libya in 2011 which is not covered by the relevant UN SC Resolution, as well as the illegal detention and treatment of prisoners in Guantanamo. See John Dugard, The choice before us: International law or a "rules-based international order"?, 36 Leiden JIL (2023), 223, 226. Putin also refers to these events in his address.

60 See The Spectator, above n.2, 6.

economic decline but concentrated on the attempt to counter the supposed military threat and at the same time providing them with priority.[61] It is true, that all these phenomena are somewhat interrelated. The loss of political clout in the neighboring countries (going hand in hand with a rebalancing of the military power relations) has hampered also Putin's ambitions to reshuffle the economic imbalance between East and West. What is more, to use the military card is not only an illegal, but also a highly dangerous gamble, even for a nuclear power, as also the course of the war has shown so far. As to the legal issues, the question of reparation has not yet been addressed in detail, even though both on the political level as in academia considerations going in this direction are under way.[62] No doubt, the way to obtain full reparation will be burdensome and most probably also very long, but this is a procedure the parties involved, assisted by the whole community of States,[63] and also have to undergo in order to guarantee the preservation of the existing international law order. Even less attention than to the question of reparation has been paid, up to this moment, to the issue how to tackle a situation where Ukraine

61 In a certain sense, this development could be seen as an extended case of application of the so-called "Thucydides trap". When Graham Allison saw, referring to the Greek historian Thucydides, an inclination by great powers to go to war if they feel threatened by an emerging power (see for example, Graham Allison, The Thucydides Trap, Foreign Policy, 9 June 2017, https://foreignpolicy.com/2017/06/09/the-thucydides-trap/), it could be argued that if the alteration of power relations is not due to the arise of one type of power, but due to the decline of other power, then the same peril arises.

62 On 14 November 2022 the UN GA adopted a resolution calling for Russia to pay war reparation to Ukraine, with 94 countries voted in favour of the resolution, 14 countries against, and 73 countries abstained. In May 2023 a vast majority of the members of the European Council decided to set up a register to tally the damage caused by Russia in view of future reparations. See Europe Approves Plan to Tally cost of Moscow's War in Ukraine with Eye toward Future Reparations, Radio Free Europe, 18 May 2023, https://www.rferl.org/a/ukraine-council-europe-reykjavik-reparations-register-damages/32416742.html. Frozen Russian assets could provide at least partly the necessary means. In principle, Russia is obliged to pay full reparation for the damage caused in violation of international law. See Responsibility of States for Internationally Wrongful Acts (2001), above n.38, Article 1 and 31; A/Res/2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Principle 1, para. 2.

63 In fact, the violations of international law also constitute breaches of *erga omnes* norms. On the basis of Article 48 of the ILC Draft Articles any State may invoke state responsibility in case of a violation of *erga omnes* norms and claim both cessation of the violation and reparation in the interest of the injured State.

should not be able to repel Russian forces from all occupied territories. According to Article 41(2) of the ILC Draft Articles on State Responsibility, States are prohibited from recognizing such a situation, a provision that echoes the Stimson doctrine of 1932. Whether a peace treaty, which regularly is the expression of some sort of a compromise for the sake of ending the war, could overcome this prohibition and validly allow the cession of Ukraine territories to Russia is still very much to be doubted.

IV. Conclusions

40. The Russian aggression against Ukraine has become a catastrophe not only for the immediate victim but for the international legal order as a whole. Notwithstanding many setbacks on a whole the international legal order has strengthened considerably since 1945 and has become an order of sophisticated values and principles. Many of them have been put in question by Putin's war. As it seems, one of the main victims of this war may become Russia herself.

41. The Eastern "greater area" under Russian influence that Putin longed for did not materialize. Russia emerges from this weakened on all accounts: politically, militarily, and economically. The toll in terms of lost human lives is already enormous now. The hope to counter Russia's eminent problem of a rapidly shrinking population by territorial conquest has become a failure.[64] At the end, the question has to be posed as to what the merits of the "territorial obsession" are. It is so aptly described by George Scelle that there is a constant in the interrelations between States,[65] if there have ever been some. This obsession has surely been characteristic for States since their very first creation and it has been a decisive motivating factor in all the great wars of conquest, be they of a colonial nature, of imperial characteristics (like the WWI) or associated with the intent to impose dictatorship based on race or ideology (like WWII). In hindsight, however, this philosophy had catastrophic consequences. It is for this motive that, starting with the "Stimson doctrine", such

64 See The Economist, Russia's Population Nightmare is Going to Get even Worse, 4 March 2023 (https://www.economist.com/europe/2023/03/04/russias-population-nightmare-is-going-to-get-even-worse).

65 Georges Scelle, Obsession du territoire. Essai d'étude réaliste de droit international, in Symbolae J. H. W. Verzijl (1958), 347. See also Robert Y. Jennings, The Acquisition of Territory in International Law (1963), 1.

intense international efforts had been undertaken to interrupt this devastating circle of violence by impeding the thought that aggression should pay off in the form of territorial gains. International law as it stands today offers no space for compromise on this issue. To show comprehension for Putin's justifications based on fully unacceptable distortions of international legal rules and for the rest on the supposed need to protect "territorial spheres of interest" would throw the international community back to the early 1920s.[66] The described process, unfolding since then, has not been without backlashes but nonetheless has been a steady one on a whole.[67] Putin's formal nod to the "culture of civility" as mentioned in the introductory part of this text results to be hollow and manipulative. Seemingly engaging in a discourse based on international concepts and lines of reasoning, in reality no real will can be

66 Here, reminiscences of Korovin's "International Law of the Transitional Era" of 1923 based on a segmented international law system (the law between the socialist and the capitalist bloc, the law between socialist countries and the law between capitalist countries) reappear. Within the socialist bloc (now the Russia dominated area or the area on which Russia claims to have historic rights) basic principles of traditional international law would no longer apply. On the still persisting influence of features of Marxist-Leninist ideology in post-communist Russia see Anna Isaeva, Contradictions and Incompleteness in Russian Legal Discourses, in: P. Sean Morris (ed.), Russian Discourses on International Law: Sociological and Philosophical Phenomenon (2019), 27-45, 44. In the same vein, see W.E. Butler, Foreign Policy Discourses as Part of Understanding Russia and International Law (1st ed. 2018), 177-198, at 195. The creation of "spheres of interest" of the superpowers, where they would be exempted from the prohibition of the use of force was criticized also by Thomas Frank, "Who killed Art. 2(4)? Or Changing Norms Governing the Use of Force by State", 64 AJIL (1970), 809, 835, as undermining the very essence of this fundamental principle of international law.

67 See the account by Steven R. Ratner, Land Feuds and Their Solutions: Finding International Law beyond the Tribunal Chamber, 100 AJIL (2006), 808, 812. Ratner, who wrote in 2006, cited Robert Jennings book "Acquisition of Territory" of 1963 in which the ban on acquisition of territory by force was presented as a principle not always respected. See Jennings, above n. 66, 67. It may be argued that in the meantime this ban gained further in strength. While the reaction by the State community against Russia's annexation of Crimea may have lacked in resolve (see UNGA Resolution A/RES/68/262 of 27 March 2014 with only 100 States condemning this annexation) the aggression started on 24 February 2022 was condemned on 2 March 2022 by 141 UN Member States voting in favor of UNGA Res. ES-11/1. See also Oona Hathaway and Scott Shapiro, The Internationalists and their Plan to Outlaw War (2017), who provide ample empirical proof for the continuously growing respect for the territorial integrity and sovereignty of States after WWII.

discerned in the Russian president to use these concepts and ideas according to their agreed meaning. This discussion in "traditional" terms hides the more fundamental attempt to do away with the existing international legal order altogether. The real essence of his message aims at the destruction of the discursive basis of international law formation on which modern understand of these legal orders basically rests.[68] Within the "greater legal space" the dominant power should be the beneficiary of legal privileges trumping even such basic rights as the prohibition of the use of force. Replacing "Kelsenian" international law by "Schmittian" international law[69] would not be in Russia's interest: it would not only set a dangerous precedent as to similar claims by other countries against Putin's empire, but also further delay deeply needed reforms in Russia's economy and society to counter a decay of a country, which is still the largest State in size on earth and whose decline is most probably not based on a dearth of territory.[70]

42. *"Zeitenwende"* ("a turning in time") was the term German Chancellor Olaf Scholz used for the overall qualification of these and other developments occurring in parallel. It has soon been taken up on an international scale.[71] Due to its vagueness the most diverse meanings can be attributed to this concept. It can well be stated that the Russian aggression against Ukraine and the ensuing consequences have radically changed the political and the economic landscape in Europe and much beyond. As to the rules on the prohibition of the use of force, no "turning in time" has occurred, quite to the contrary. The reactions to this aggression by broad parts of the State community have, once again, revealed the fallacies of Carl Schmitt's *"Großraumtheorie"* and

68 See Koskenniemi, above n. 9, 218.

69 See the fitting picture by Thibaut Fleury Graff, above n.7, 7 and Idem., La fin du moment kelsénien? Quelques réflexions sur les relations internationales contemporaines à l'aune de Kelsen, Annuaire Français de Relations Internationales (2019), vol.XX, 623.

70 This consideration can also be generalized: Even if the "hegemon" (in Detlev Vagts terms) is able to impose his will, this situation might eventually not turn to his favor as the hegemon himself needs the international legal order based on the principle of equality between States. See Vagts, above n. 46, 843. See on this discussion also Emmanuel Roucounas, A Landscape of Contemporary Theories of International Law (2019), 343.

71 See The Economist, A Year on, Olaf Scholz's Promise of Transformation is Only Partly Kept, 23 February 2023, https://www.economist.com/europe/2023/02/23/a-year-on-olaf-scholzs-promise-of-transformation-is-only-partly-kept.

confirmed the value of the UN peace order which rests on a sincere commitment to the prohibition of the use of force. If there is a "turning in time" in this field, then it is only in the sense that the obligations ensuing from Article 2(4) of the UN Charter have to be taken even more seriously than the case in the past.