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The Ukraine War and the Prohibition of the Use of Force in International Law

Claus Kreß



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2022

**Torkel Opsahl Academic EPublisher
Brussels**

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Front cover: *The upper section uses an image of doves of peace in flight. It has been there since the start of TOAEP's Occasional Paper Series. From No. 11 onwards in the Series, the lower section of the page shows the ancient wrought ironwork above the entrance of the CILRAP Bottega in Florence, which also serves as the office of TOAEP.*

Back cover: *The image on the back shows a segment of the age-old terracotta floor of the CILRAP Bottega in Florence. The Bottega premises have been used for various purposes over the centuries, including as a leather bottega for decades.*



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ISBN: 978-82-8348-211-9.

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Claus Kreß

1. Introduction

Russia's war of aggression against Ukraine has given rise to a host of questions of international law. An analysis from the perspective of either the law of international armed conflict or international criminal law, to name just two specific sub-fields, would make for lectures of their own. In the following, I have chosen the prohibition of the use of force under international law as my central point of reference. My considerations will chiefly be of a doctrinal character, but I shall make an attempt to also shed some light on the historical dimension of the topic as well as on some aspects of legal principle. At times, it will be apparent that this text has originated from a lecture given to a German audience.

2. "Cornerstone of the United Nations Charter": The Prohibition of the Use of Force in International Law

The International Court of Justice ('ICJ') has called the prohibition against the use of force "a cornerstone of the United Nations Charter".¹ This is a very accurate characterization: Hans Kelsen rightly made the point that it would be difficult to speak of an international *legal* order at all if the "rights" protected by this order were subject to a "sovereign right" to resort to war.² And yet, as late as in 1919, the view was widely held among international lawyers that the international legal order was of such a precarious nature:³

¹ ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, 19 December 2005, I.C.J. Reports 2005, pp. 168, 223 (para. 148) (<https://www.legal-tools.org/doc/8f7fa3/>).

² Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg, Harvard University Press, 1945 pp. 331 ff., particularly p. 340.

³ The existence of a sovereign *ius ad bellum* at the time has, however, remained a matter of controversy; see the overview in Claus Kreß, "Shakespeares 'Heinrich V' und das Recht des Krieges", in *Juristen Zeitung*, 2014, vol. 69, no. 23, pp. 1137–1146. The debate has been re-animated by Agatha Verdebout, "The Contemporary Discourse on the Use of Force in the

when the peace treaties after World War I were being discussed in Paris, the British Prime Minister Lloyd George and the French Prime Minister Clemenceau, in particular, pressed for international criminal proceedings against the former German Emperor Wilhelm II for unleashing a war of aggression.⁴ However, the international lawyers of the victorious powers advised their political leaders that “The premeditation of a war of aggression [...] is conduct which the public opinion reproves and which history will condemn, but [...] a war of aggression may not be considered as an act directly contrary to positive law [...]”.⁵ Even the League of Nations did not completely overcome the idea of a *ius ad bellum* in international law.⁶ The decisive step toward a *ius contra bellum* was made only in 1928 with the Briand-Kellogg Pact, named after the foreign ministers of France and the United States at that time.⁷ This treaty-based prohibition of war quickly grew into customary international law because of its almost immediate acceptance more or less worldwide.⁸ After World War II, the prohibition of war was further developed into a prohibition of the use of force in Article 2(4) of the

Nineteenth Century: A Diachronic and Critical Analysis”, in *Journal on the Use of Force and International Law*, 2014, vol. 1, no. 2, pp. 223–246; see also Tom Ruys, “From *passé simple* to *futur imparfait*? A response to Verdebout”, in *Journal on the Use of Force and International Law*, 2015, vol. 2, no. 1, pp. 3 ff.; Jochen von Bernstorff, “The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State”, in *European Journal of International Law*, 2018, vol. 29, no. 1, pp. 233 ff.; and now in particular Agatha Verdebout, *Rewriting Histories of the Use of Force: The Narrative of ‘Indifference’*, Cambridge University Press, 2021.

⁴ For more details, see William A. Schabas, *The Trial of the Kaiser*, Oxford University Press, 2018; for a more condensed account, see Claus Kreß, “The Peacemaking Process After the Great War and the Origins of International Criminal Law *Stricto Sensu*”, in *German Yearbook of International Law*, 2019, vol. 62, pp. 175–176, 180–186.

⁵ Commission on the Responsibility of the Authors of War and Enforcement of Penalties, “Report Presented to the Preliminary Peace Conference”, 29 March 1919, in *American Journal of International Law*, 1920, vol. 14, p. 118.

⁶ On the procedural containment of war in the League of Nations Act, Randall Lesaffer, “Too Much History: From War as Sanction to the Sanctioning of War”, in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, 2015, pp. 50–52.

⁷ For a gripping account of the history preceding the Anti-War-Pact, see Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, Simon and Schuster, 2017, pp. 101–130.

⁸ Hathaway and Shapiro, 2017, pp. 129 ff., see *supra* note 7; International Military Tribunal (Nuremberg), Judgment and Sentences of 1 October 1946, in *American Journal of International Law*, 1947, vol. 41, pp. 172, 217–221 (<https://www.legal-tools.org/doc/f21343/>).

United Nations ('UN') Charter. In its jurisprudence,⁹ the ICJ speaks of the "principle of non-use of force in international relations"¹⁰ in order to underline the fundamental importance of the prohibition of the use of force and to highlight that this prohibition, in addition to its prominent place in the UN Charter, is anchored in customary international law.

3. The Russian Federation's Continued Violation of the Prohibition of the Use of Force under International Law

The violation of the prohibition of the use of force in Ukraine by the Russian Federation began many years prior to 24 February 2022.

3.1. Russia's Violations of the Prohibition of the Use of Force in 2014

Until 1991, Ukraine had a peculiar legal status: it was a Federated Soviet Republic of the Union of Soviet Socialist Republics and yet an original Member State of the United Nations.¹¹ Since 1991, and as a result of the dissolution of the Soviet Union,¹² Ukraine has been presenting all the attributes of statehood under international law. The territory of Ukraine includes Crimea as well as the territories of the so-called Donetsk and Luhansk People's Republics. Russia has been recognising this from the outset. The Budapest Memorandum of 1994, co-signed by Russia, states:

The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation

⁹ For this jurisprudence, see, Claus Kieß, "The International Court of Justice and the 'Principle of Non-Use of Force'", in Weller, 2015, pp. 561 ff., see *supra* note 6.

¹⁰ See Kieß, 2015, see *supra* note 9, p. 595 (with notes 15–17).

¹¹ On the history of the negotiations on granting Ukraine charter status of a founding member of the United Nations, see, Ruth Russell, *A History of the United Nations Charter: The Role of the United States Charter 1940-1945*, Brookings Institution Press, 1958, pp. 433–437, 533–539, 584, 597–599, 636; on the constitutional position of Ukraine within the Soviet Union, see Angelika Nußberger, "Russia", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. VIII, Oxford University Press, 2012, p. 1047 (paras. 81 ff.).

¹² On the controversy over the correct legal classification of the dissolution of the Soviet Union under international law, see Nußberger, 2012, pp. 1050–1052 (paras. 93–108), see *supra* note 11.

in Europe, to respect the independence and sovereignty and the existing borders of Ukraine.¹³

Already in spring 2014, Russia used force in Crimea in violation of international law. Since then, Crimea has been under Russian military occupation.¹⁴ In August 2014, Russia intervened in the fighting between Ukraine's armed forces and separatists in the east of the country with regular troop units and heavy weapons, once more in violation of the prohibition of the use of force. The so-called Donetsk and Lugansk People's Republics owe their existence to this Russian violation of the prohibition of the use of force, and without Russia's continued military intervention in violation of international law, these entities would not have become and remained viable; they are puppet regimes.¹⁵

3.2. Russia's Use of Force since 24 February 2022

On 24 February 2022, Russia invaded Ukraine, and since that date Russia has been engaging in a comprehensive use of force against Ukraine. The fact that, as in the case of the instances of the use of force in 2014, this latest escalation of Russia's use of force cannot be justified under international law has been demonstrated many times, and perhaps in greatest detail by James A. Green, Christian Henderson and Tom Ruys.¹⁶ I would therefore like to

¹³ Article 1 of the Joint Declaration issued on 5 December 1994 at Budapest by the leaders of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America, UN Doc. A/49/765, 5 December 1994 (<https://www.legal-tools.org/doc/qoa5zb/>); in the same sense see Article 3 of the Treaty of Friendship, Cooperation and Partnership concluded between Ukraine and the Russian Federation, 31 May 1997 (<https://www.legal-tools.org/doc/b7nedx/>).

¹⁴ Claus Kreß and Christian Tams, "Dichtung und Wahrheit: Was ist dran an Moskaus Argumentationsversuchen im Ukraine-Konflikt", in *Internationale Politik*, May/June 2014, pp. 16 ff.

¹⁵ Otto Luchterhandt, "Die Vereinbarungen von Minsk über den Konflikt in der Ostukraine (Donbass) aus völkerrechtlicher Sicht", in *Archiv des Völkerrechts*, 2019, vol. 57, pp. 429–432.

¹⁶ The most detailed account to date is that of James Green, Christian Henderson and Tom Ruys, "Russia's attack on Ukraine and the *jus ad bellum*", in *Journal on the Use of Force and International Law*, 2022, vol. 9, no. 1, pp. 4 ff.; for three further analyses, see Oona Hathaway, "International Law Goes to War in Ukraine: The Legal Pushback to Russia's Invasion", in *Foreign Affairs*, 15 March 2022; Angelika Nußberger, "Tabubruch mit Ansage: Putins Krieg und das Recht", in *Osteuropa*, 2022, vol. 72, pp. 51 ff.; and Christian Tomuschat, "Russlands Überfall auf die Ukraine: Der Krieg und die Grundfragen des Rechts", in *Osteuropa*, 2022, vol. 72, pp. 33 ff.

keep this point brief, to then devote myself more intensively to the follow-up questions.

For a better understanding of what follows, a little more about the somewhat convoluted international peace and security law nomenclature should be said at the outset. Firstly, as was already mentioned, the term 'force' is central to the principle of prohibition of the use of force under international law.¹⁷ Secondly, the term 'armed attack' describes the central condition of the right of self-defence, recognized in Article 51 of the UN Charter.¹⁸ Thirdly, the international legal concept of aggression is a multifaceted one.¹⁹ Article 39 of the UN Charter makes reference to an "act of aggression". If the Security Council determines the existence of an act of aggression, it can activate the system of collective security under Chapter VII of the UN Charter,²⁰ up to the authorization of military enforcement measures.²¹ In customary international law, the term aggression denotes a serious violation of the prohibition of the use of force. The prohibition of aggression is part of *ius cogens*, peremptory international law,²² and its violation triggers certain

¹⁷ Oliver Dörr, "Use of Force, Prohibition of", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, vol. VIII, 2012, pp. 609–611 (margin. 11–20).

¹⁸ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press, 2010.

¹⁹ Claus Kreß, "Aggression", in Robin Geiß and Nils Melzer (eds.), *The Oxford Handbook of the International Law of Global Security*, Oxford University Press, 2021, pp. 232 ff.

²⁰ Nico Krisch, "Introduction to Chapter VII: The General Framework", in Bruno Simma, Daniel Erasmus-Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., vol. II, Oxford University Press, 2012, pp. 1237–1271.

²¹ The determination of an "act of aggression" is not constitutive for the activation of the collective security system of the UN Charter; alternatively, the determination of a "breach of peace" or that of a "threat to the peace" are possible; Kreß, 2021, pp. 234 ff., see *supra* note 19.

²² Contrary to a widely held view, it is not beyond doubt whether the prohibition of the use of force under international law, in all its components, constitutes peremptory international law; on the one hand, see André de Hoogh, "*Jus Cogens* and the Use of Armed Force", in Weller, 2015, pp. 1161 ff., see *supra* note 6; important reasons for the opposing position are in James Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force", in *Michigan Journal of International Law*, 2011, vol. 32, pp. 215 ff.; the ICJ, in any case, has not yet made a corresponding finding; Kreß, 2015, p. 571, see *supra* note 9 (with references in notes 52 ff.); accordingly, in the – admittedly not exhaustive – list of *ius cogens* norms in the appendix to the draft conclusions on peremptory norms of general international law drawn up by the International Law Commission ('ILC'), only the prohibition of aggression and not that of the prohibition of use of force is listed; Peremptory norms of general international law (*ius cogens*): Text of the draft conclusions and Annex adopted by the Drafting Committee on second

special legal consequences in terms of State responsibility.²³ Finally, there is the concept of war of aggression which is essentially a concept of international criminal law. It formed the core State conduct element of ‘crimes against peace’ the adjudication of which was at the heart of the Nuremberg and Tokyo trials after World War II.²⁴ In the meantime, the term ‘crime of aggression’ has come to replace that of ‘crimes against peace’. After a long journey, a definition of the crime of aggression has been included in Article 8 *bis* of the Statute of the International Criminal Court (‘ICC’).²⁵ The State conduct element of the crime is an “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”²⁶ This formulation, which was agreed upon after long and difficult negotiations, is best to be interpreted in conformity with customary international law with respect to which, as was noted, the concept of a war of aggression is central.²⁷

Having thus clarified the conceptual landscape, let us now look more closely at Russia’s use of force against Ukraine as from 24 February 2022. As a legal justification, Russia has invoked the right of self-defence. Complying somewhat unorthodoxly with the reporting requirement enshrined in

reading, UN Doc. A/CN.4/L.967, 11 May 2022, p. 6 (‘ILC, Draft conclusion and Annex, 11 May 2022’) (<https://www.legal-tools.org/doc/rumns/>).

²³ ILC, Draft conclusion and Annex, 2022, p. 5, see *supra* note 22; Kreß, 2021, pp. 244–246, see *supra* note 19.

²⁴ “To initiate a war of aggression [...] is not only an international crime; it is the supreme international crime [...]”; International Military Tribunal (Nuremberg), Judgment and Sentences of 1 October 1946, see *supra* note 8; on Nuremberg and Tokyo and crimes against peace, see Kirsten Sellars, *Crimes against Peace and International Law*, Cambridge University Press, 2013, pp. 84–259. It may be mentioned in passing that the term ‘crimes against peace’ was coined by the Soviet international law expert Aaron Trainin who was one of Stalin’s advisors at the time; Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II*, Oxford University Press, 2020, pp. 7 ff., 20 ff., 35–43; it is also worth noting how significantly Russia shaped the laws of war in the late nineteenth and early twentieth centuries in sharp contrast to Russia’s negative posture in recent times; see Michael Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia’s historical role and its current practice*, Nomos Verlagsgesellschaft, 2022.

²⁵ For a detailed account, see Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 2nd ed., Cambridge University Press, 2021.

²⁶ For a detailed analysis, see Claus Kreß, “The State Conduct Element”, in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, vol. 1, 2017, pp. 412 ff.

²⁷ *Ibid.*, pp. 507–537.

the second sentence of Article 51 of the UN Charter, Russia invoked its right of self-defence by annexing a speech delivered by President Putin on 24 February to a short cover letter sent to the Security Council.²⁸ This speech is quite long,²⁹ but so lacking in substance in terms of international law that it is not even possible to say with reasonable certainty whether Russia invoked the individual or collective right of self-defence or both. Be that as it may, the requirements of neither individual nor collective self-defence were present on 24 February 2022 or any time later.

In his speech, Russia's President spent a lot of time articulating a Russian sentiment of threat allegedly posed by Ukraine.³⁰ However, Putin did not come in any way close to making an arguable case for at the least an imminent armed attack by Ukraine on Russia. It is therefore not necessary to enter into the complex legal debate about the status of preventive self-defence in current international law³¹ in order to conclude that Russia was not in a position to invoke a right of individual self-defence in order to justify its use of force against Ukraine.

Russia also did not have a collective right of self-defence. The most obvious reason among many others is that only States can request the exercise of the right of collective self-defence and neither Donetsk nor Lugansk qualify as such. The fact that President Putin recognized the two so-called People's Republics as "States" on 21 February,³² did not lead to the creation of new States in the sense of international law. Rather, by claiming statehood

²⁸ Letter dated 24 February from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, UN Doc. S/2022/154, 24 February 2022 (<https://www.legal-tools.org/doc/lpvt92/>).

²⁹ For an illuminating analysis, Nußberger, 2022, pp. 52–58, see *supra* note 16.

³⁰ *Ibid.*, pp. 61 ff.

³¹ For detailed analyses, see Johanna Friman, *Revisiting the Concept of Defence in the Jus ad Bellum: The Dual Face of Defence*, Hart Publishing, 2017; Björn Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht: Eine systematische Ermittlung des gegenwärtigen friedenssicherungsrechtlichen Besitzstandes aus völkerrechtsdogmatisch und praxisanalytischer Sicht*, Duncker and Humblot, 2012; for a brief summary of the debate, see Claus Kreß, "On the Principle of Non-Use of Force in Current International Law", in *Just Security*, 30 September 2019.

³² Putin's speech on 21 February 2022 is reproduced in *Osteuropa*, 2022, vol. 72, pp. 119 ff.

for its two puppet regimes, Russia disregarded Ukraine's territorial integrity.³³

In contrast, there would only have been a basis for serious discussion if a part of the civilian population living in eastern Ukraine had previously become subject to systematic violations of the most basic human rights. Then, but only then, would the questions have become relevant whether current international law, in such an extreme case, knows of a right of forcible remedial secession and of a right to seek external military assistance in the exercise of this right. These questions, which have arisen in the case of Kosovo, remain highly controversial.³⁴ In his speech of 24 February 2022, President Putin tried to evoke a parallel with the Kosovo case by accusing Ukraine of committing genocide in eastern Ukraine.³⁵ But Russia, despite the possibility having been open to it before 24 February 2022,³⁶ did not make any serious attempt to substantiate this allegation. In fact, all available reports of international observers of the events in eastern Ukraine reveal that no such substantiation would have been possible. As is well known, Ukraine reacted by introducing proceedings before the ICJ in pursuit of a negative declaratory judgment as regards to Russia's unfounded allegation of genocide. By way of provisional measures, the Court decided that Russia must suspend its use of force in Ukraine altogether for the time being.³⁷

Russia did not even invoke a right of so-called forcible unilateral humanitarian intervention. According to the prevailing view in international legal doctrine, such a right does not exist even in case of an impending

³³ "Statement by Members of the International Law Association Committee on the Use of Force", in *Just Security*, 4 March 2022.

³⁴ The ICJ has alluded to, but left open the question of "remedial secession" in ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, 22 July 2010, I.C.J. Reports 2010, pp. 403, 438 (paras. 82–83) (<https://www.legal-tools.org/doc/5ac90f/>); on that question, see Nußberger, 2022, p. 59, see *supra* note 16.

³⁵ On Russia's use of the Kosovo precedent before 2022, see Nußberger, 2022, pp. 57–59, see *supra* note 16; for a more detailed account, see Anna Melikov, *Die Interpretation des völkerrechtlichen Gewaltverbots und möglicher Ausnahmen - Russische Doktrin und Praxis*, Duncker and Humblot, 2021, pp. 226–228.

³⁶ For a presentation of the various avenues open to Russia in that respect, see Tomuschat, pp. 38–39, see *supra* note 16.

³⁷ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022 (<https://www.legal-tools.org/doc/pw9myi/>).

humanitarian catastrophe and as a last resort after a veto in the Security Council.³⁸ Whether there is reason to nuance this view, need not detain us in the case of Russia's use of force against Ukraine because there was nothing close to an impending humanitarian catastrophe in Eastern Ukraine at the relevant time.³⁹

4. The Wider Significance of Russia's Continued Negation of the Prohibition of Use of Force

Since 24 February 2022, Russia's violation of the prohibition of the use of force in Ukraine, which began in 2014, has dramatically grown in intensity and comprehensiveness. The images of the terrible consequences of this violation of international law for the people of Ukraine reach us on a daily basis through the media. In addition to the consequences for the attacked State and its population, Russia's course of action also risks to affect the stability of the offended norm. This is so because in this case, the prohibition of the use of force is fundamentally called into question by the conduct of a permanent member of the UN Security Council which, according to Article 24 of the UN Charter, has the primary responsibility for the maintenance of international peace and security. In such circumstances, there is a particular danger that the prohibition of the use of force might erode.

This brings to mind the interwar period for a second time: after 1928, as already mentioned, the new prohibition of war immediately gained wide acceptance. But after the first major crisis resulting from Japan's invasion of Chinese Manchuria in 1931,⁴⁰ the young prohibition came under massive pressure with Italy's war of aggression against Abyssinia in 1935.⁴¹ According to Herfried Münkler, a renowned political scientist, a firm international reaction would have been necessary after Italy's invasion in order to save the

³⁸ For the predominant view, see Nigel Rodley, "Humanitarian Intervention", in Weller, 2015, p. 794, see *supra* note 6.

³⁹ Tomuschat, 2022, p. 39, see *supra* note 16.

⁴⁰ On this case, including the problem with the concept of 'war' to which it gave rise, see Hersch Lauterpacht, "'Resort to War' and the Interpretation of the Covenant During the Manchurian Dispute", in *American Journal of International Law*, 1934, vol. 28, pp. 34 ff.

⁴¹ Hathaway and Shapiro, 2017, pp. 172–174, see *supra* note 7; Quincy Wright, "The Test of Aggression in the Italo-Ethiopian War", in *American Journal of International Law*, 1936, vol. 30, pp. 45 ff.

still young prohibition of war from a loss of authority.⁴² This was also the opinion of the German defence in the Nuremberg trial against the major German war criminals: Hermann Jahrreiß, an international law professor from Cologne, pleaded on behalf of the entire defence – and possibly inspired by Carl Schmitt – that, by 1939, the prohibition of war had lost its binding force due to the lack of determination by States to sanction the violations of that prohibition that had occurred in the years before Germany’s wars of aggression began.⁴³

Münkler is of the view that the current prohibition of the use of force under international law was already showing signs of erosion before 24 February 2022. Since those who were able to do so – such as the United States and China – lacked the will, and those who wanted to do so – such as the European States in particular – lacked the ability to actively protect the prohibition of the use of force under international law, a shift toward a ‘*Großraumordnung*’, that is, an international legal order marked by several spheres of influence under the domination of a superior power – according to Münkler – had become apparent. In such a comparatively ‘thin’ international legal order, the prohibition of use of force would apply only *between* and not *within* the spheres of influence.⁴⁴ It is not far-fetched to see the Russian President’s strategic thinking through the lens of a doctrine of ‘*Großraum*’⁴⁵ in a manner reminiscent of Schmitt’s vision.⁴⁶ After 24

⁴² Herfried Münkler, “Das Scheitern der Pariser Friedensordnung. Ein Lehrstück zur Verrechtlichung der internationalen Politik”, in Claus Kreß (ed.), *Paris 1919-1920: Frieden durch Recht?*, Nomos Verlagsgesellschaft, 2021, p. 85.

⁴³ *Trial of the Major German War Criminals before International Military Tribunal, Nuremberg, 14 November, 1945-October 1, 1946*, published in Nuremberg, 1948, Official Text in German, vol. 17, p. 517; for more details, see, Hathaway and Shapiro, 2017, pp. 285–290, see *supra* note 7; Claus Kreß, “Hans Kelsen, Hermann Jahrreis, Carl Schmitt and the question of war and peace in international law”, in Hanns Prütting (ed.), *Festschrift 100 Jahre Rechtswissenschaftliche Fakultät Universität Köln 1919–2019*, Otto Schmidt, 2020, pp. 94 ff.

⁴⁴ Münkler, 2021, pp. 91 ff., see *supra* note 42; on earlier allusions to “spheres of influence” in the practice of State on the prohibition of the use of force, see Christian Marxsen, *Völkerrechtsordnung und Völkerrechtsbruch*, Mohr Siebeck, 2021, pp. 283–317.

⁴⁵ For a broader historical perspective, see, Gerd Koenen, “Russland gründlich entzaubert vom Ende eines deutschen Komplexes”, in *Osteuropa*, 2022, vol. 72, p. 24.

⁴⁶ Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht*, 4th ed., Dunckler and Humblot, 1941; see also Kreß, 2020, pp. 87–89, see *supra* note 43; Marxsen, 2021, p. 315, see *supra* note 44.

February, Münkler pushed his previous analysis to the point of stating: “There will no longer be talk of a global validity of universal values”.⁴⁷

5. Legal Consequences of the Russian Violation of the Prohibition of the Use of Force and the Reactions So Far

Münkler underestimates the resilience of the prohibition of the use of force under international law.⁴⁸ He rightly implies, however, that not only the future of Ukraine,⁴⁹ but also the authority of the international law prohibition of the use of force are currently at stake. Regrettably, prior violations of the prohibition of the use of force by ‘Western’ States, including, most importantly, and this despite of its different overall character, the unlawful use of force of the two permanent UN Security Council members United States and Great Britain against Iraq in 2003, have contributed to the seriousness of the present challenge.⁵⁰

5.1. United Nations Security Council and General Assembly

It was therefore of vital importance to send out as quickly as possible from within the UN a clear and a strong signal against Russia’s violation of the prohibition of the use of force. The way to achieve this had to go through the Security Council. As early as 25 February, a draft resolution condemning Russia’s actions was placed before the Security Council for a vote.⁵¹ A clear majority of 11 members in the Council backed this draft.⁵² Mexico stated its position with particular clarity: “[W]e are confronted with the invasion of

⁴⁷ Translation by the author. The original is as follows: “Von einer globalen Geltung universeller Werte wird nicht mehr die Rede sein”; Herfried Münkler, “Mit politischer Romantik ist niemandem geholfen Postheroische Gesellschaften müssen im Krieg vor allem die Nerven bewahren”, *Frankfurter Allgemeine Zeitung*, 16 March 2022, p. 9.

⁴⁸ For a first response to Münkler, see Claus Kreß, “Wird das Gewaltverbot gestärkt?”, *Frankfurter Allgemeine Zeitung*, 24 March 2022, p. 7; see also Marxsen, see *supra* note 44, pp. 316 ff.

⁴⁹ On the utility for international legal analysis of insights provided by political science scholarship more generally, see Marxsen, 2021, pp. 192–194, see *supra* note 44.

⁵⁰ On the more recent challenges before 24 February 2022, see generally Kreß, 2019, see *supra* note 31.

⁵¹ Draft resolution on aggression by the Russian Federation against Ukraine in violation of the Charter of the United Nations, UN Doc. S/2022/155, 25 February 2022 (<https://www.legal-tools.org/doc/rpf39b/>).

⁵² Provisional Verbatim Record of the 8979th Meeting, UN Doc. S/PV.8979, 25 February 2022, p. 6 (<https://www.legal-tools.org/doc/s3ykgp/>).

one sovereign country by another, which constitutes a flagrant violation of Article 2, paragraph 4, of the Charter of the United Nations and also constitutes an act of aggression [...].”⁵³ China, India, and the United Arab Emirates abstained, and the adoption of the resolution failed, as expected, because of a Russian veto.⁵⁴ Norway was particularly outspoken in its criticism of this self-serving veto in the Council:

A veto cast by the aggressor undermines the purpose of the Charter. It is a violation of the very foundation of the Charter of the United Nations. Furthermore, in the spirit of the Charter of the United Nations, as a party to the dispute, Russia should have abstained from voting on the draft resolution.⁵⁵

But no one in the Security Council has explicitly taken up the point,⁵⁶ recently voiced in academic writing, that a veto could be *legally* void because of its abusive use.⁵⁷ Instead, the Council has followed its practice going back to the Korean War,⁵⁸ and, for the eleventh time, it convened an emergency special session of the UN General Assembly.⁵⁹ Such a procedural decision cannot be vetoed.⁶⁰ The General Assembly adopted its Uniting for Peace

⁵³ *Ibid.*, p. 5.

⁵⁴ *Ibid.*, p. 6.

⁵⁵ *Ibid.*, pp. 7 ff.

⁵⁶ See in particular, Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Cambridge University Press, 2022; specifically on the Russian veto on the Ukraine war, see *id.*, “Aggression and the Veto”, in *Opinio Juris*, 28 February 2022.

⁵⁷ On the history of the negotiations on Article 27(3) of the UN Charter, see Russell, 1958, pp. 531–533, see *supra* note 11, and, in summary, *id.*, pp. 944–966; more recently, see Nico Krisch, “The Security Council and the Great Powers”, in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, 2008, pp. 135–137. It is noteworthy that, shortly after the Russian veto, the UN General Assembly adopted a resolution obliging the Assembly to hold a debate on the relevant issue after the veto in the Security Council. The member of the Council who vetoed should be the first to speak in this debate; see Resolution of the General Assembly, Standing Mandate for a General Assembly debate when a veto is cast in the Security Council, UN Doc. A/RES/76/262, 28 April 2022, see in particular operative paras. 1 and 2 (<https://www.legal-tools.org/doc/kcunyr/>).

⁵⁸ William Stueck, “The United Nations, the Security Council, and the Korean War”, in Lowe *et al.*, 2008, pp. 265 ff, see *supra* note 57.

⁵⁹ Convening an emergency special session of the General Assembly on Ukraine, UN Doc. S/RES/2623 (2022), 27 February 2022 (<https://www.legal-tools.org/doc/1aphqh/>).

⁶⁰ See Charter of the United Nations, 26 June 1945, Article 27(2) (<http://www.legal-tools.org/doc/6b3cd5/>).

resolution⁶¹ on 1 March 2022 by a clear two-thirds majority of 141 votes to 5, with 35 abstentions.⁶² In this resolution, the Russian use of force is characterized as aggression, in accordance with the draft submitted in the Security Council.⁶³ While the resolution is not legally binding, through it the international community has sent – and this is so even with 35 abstentions⁶⁴ – a strong signal against Russia’s egregious violation of the prohibition of the use of force.⁶⁵

5.2. Military Support for Ukraine by Third States

It was a strong signal – but one that by itself is purely verbal in nature. In contrast, the Russian negation of the norm manifests itself anew daily with force. It is therefore important that the significance of the General Assembly resolution has not remained a powerful text message. Rather, the resolution has clarified, with the special authority of this august body, the international legal ground on which the subsequent reactions by third States rest. In view of the foregoing considerations, those reactions are of considerable importance not only for the future of Ukraine, but also for the respect by other governments for the prohibition of the use of force in the coming years. The reactions in question include the entire spectrum of non-military sanctions. I shall not elaborate upon these sanctions in this study,⁶⁶ but place all the emphasis on the legal issues surrounding the military assistance which is being rendered to Ukraine by a significant number of third States. For the purposes of this study, I shall direct my immediate attention to the case of Germany (as the paper is based on an address to a German legal audience), but, of course, the underlying legal principles apply to other third States as well.

I wish to begin with a preliminary observation: Germany is entitled to come to Ukraine’s aid through the use of its own armed forces in exercise of the right of collective self-defence, and indeed – within the limits of necessity and proportionality – such a lawful use of force could even extend to

⁶¹ For more details on this point in the light of previous practice, see Dominik Zaum, “The Uniting for Peace Resolution”, in Lowe *et al.*, 2008, pp. 154 ff., see *supra* note 57.

⁶² Draft Resolution on Aggression against Ukraine, UN Doc. A/ES-1L, 1 March 2022 (<https://www.legal-tools.org/doc/x65cmr/>).

⁶³ See the second operative paragraph of draft resolution UN Doc. A/ES-1L, *ibid.*

⁶⁴ 12 States chose not to vote.

⁶⁵ Christian Walter, “Der Ukraine-Krieg und das wertebasierte Völkerrecht”, in *JuristenZeitung*, 2022, vol. 77, no. 10, pp. 475 ff.

⁶⁶ See instead, for example, *ibid.*, pp. 478 ff.

territory of the Russian Federation. If Russia reacted to a lawful exercise of the right of collective self-defence by Germany with a use of force against German targets, this would constitute a further Russian violation of the prohibition of the use of force. While this legal point should actually be self-evident, I emphasise it in the form of this hypothetical, because many German politicians had appeared to increasingly lose sight of it. Instead, the relevant debate in Germany focused on the need to avoid ‘entering into the war’, that is, in legal terms, becoming a party to the international armed conflict between the Russian Federation and Ukraine.⁶⁷ In that connection, the German public could easily be misled to believe that Germany would act contrary to international law if it became party to an international armed conflict with the Russian Federation and that this State would therefore be entitled to use force against Germany in response (leaving aside for a moment the disturbing reality that the Russian government has already shown that it is prepared to use armed force even when not entitled to do so). The German political debate suffered from a lack of rigorous distinction between the international law on the use of force and the law of international armed conflict: obviously, the law of international armed conflict would apply equally to Germany and Russia if Germany became party to the international armed conflict between the Russian Federation and Ukraine or if an international armed conflict otherwise arose between Germany and the Russian Federation. This would entail, for example, that a Russian soldier taking part in the hostilities would enjoy the combatant privilege and hence not commit a war crime if he attacked a German military target without foreseeing clearly excessive civilian damage as a result thereof. However, the principle of equal application of the law of international armed conflict⁶⁸ would leave completely unaffected Russia’s obligation to abide with the prohibition of the use of force. The reasons for Germany’s refusal to directly use force in defence of Ukraine are therefore not of an international *legal*, but of a *political* nature, and both intellectual and political honesty requires to say so unambiguously, while recognizing the fundamental seriousness of the situation at hand.

⁶⁷ For a lucid analysis of the political debate in Germany, see Helene Bubrowski, “Wo liegt die Grenze zum Kriegseintritt Deutschlands?”, *Frankfurter Allgemeine Zeitung*, 16 May 2022.

⁶⁸ On that principle, see Mary O’Connell, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, 2021, p. 20.

Having made this point, I wish now to turn to the more complicated legal issue, how the lawfulness under international law of Germany's military assistance to Ukraine through logistical support and the supply of weapons is to be accurately explained. In this respect, it is of note that Germany has decided not to report its assistance to the UN Security Council in a letter invoking the right of self-defence,⁶⁹ while the second sentence of Article 51 of the UN Charter states, that "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council" and while this reporting requirement also applies in the case of collective self-defence.⁷⁰ In that regard, the German government has expressed the view that its supply of arms to Ukraine does not involve an exercise of Germany's right of collective self-defence.⁷¹

This leads to the question as to the point at which support for the use of force by another State amounts to a use of force by the supporting State. For as soon as a State uses force, it must be able to rely on an exception to the prohibition of the use of force. If, however, a State merely assists another State in that latter's use of force, this assistance is lawful without a need to rely on an exception, provided that the supported use of force itself is lawful. The delineation in question is not crystal clear. In its first landmark judgment on the prohibition of force in the 'Nicaragua case', the ICJ characterized the United States' arms supplies to the Contra rebels in the non-international armed conflict in Nicaragua as a use of force by the United States itself.⁷² In

⁶⁹ In contrast, see, Germany's notification of collective self-defense in favor of the States attacked by the so-called 'Islamic State' in Letter dated 10 December 2015 from the Chargé d'affaires of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/946, 10 December 2015 (<https://www.legal-tools.org/doc/jqe6iz/>).

⁷⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, 27 June 1986, I.C.J. Reports 1986, pp. 14, 105 (para. 200) ('ICJ, *Nicaragua v. United States of America*') (<https://www.legal-tools.org/doc/046698/>).

⁷¹ According to the State Secretary in the Federal Foreign Office, Susanne Baumann on 18 May 2022 in response to a written parliamentary question (*Bundestags-Drucksache* 20/1918, p. 39), the legal situation is as follows:

The Federal Government and its partners are supporting Ukraine by supplying weapons in exercising its right of individual self-defence against Russia's illegal war of aggression. This lawful assistance does not pass the threshold of an exercise of the right of collective self-defence.

⁷² ICJ, *Nicaragua v. United States of America*, 1986, pp. 14, 119 (para. 228), see *supra* note 70 Kreß, 2015, p. 574, see *supra* note 9.

such cases, reference is often made to an *indirect* use of force. The ‘Nicaragua case’, however, was that of a delivery of weapons by a State to violent *non-State* actors. State practice on *inter-State* military support has been notably more restrained in assuming an indirect use of force by the supporting State, as the Ukraine war reaffirms.⁷³ It is therefore indeed legally accurate to characterize Germany’s current military assistance to Ukraine as lawful aid of and assistance to Ukraine’s exercise of its right of individual self-defence.

This, however, does not exhaust the question of Germany’s adherence to the reporting requirement under Article 51 of the UN Charter. This is so because it must also be asked whether Germany’s military aid of and military assistance to Ukraine are compatible with the law of neutrality.⁷⁴ This question arises precisely because of the fact that Germany has *not* become, as a result of its military assistance to Ukraine, a party to the international armed conflict between that latter State and the Russian Federation.⁷⁵ For this could mean that Germany is bound by the law of neutrality *not* to supply arms to any party to the conflict.⁷⁶

If this was the case, Germany would need a special exception from its neutrality duties to rely upon. The most straightforward exception in point would seem to be the collective right of self-defence: if the collective right of self-defence, as was just set out, would justify even the use of German

⁷³ This is reflected with particular clarity from the resolution of the General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625 (XXV), 24 October 1970 (<https://www.legal-tools.org/doc/5039aa/>), in which paragraphs 8 and 9 on the principle of non-use of force, which concern the “indirect use of force” in the form of support for non-State violent actors, have remained without counterpart in cases of inter-State military assistance.

⁷⁴ On the law of neutrality, see generally Michael Bothe, “The Law of Neutrality”, in Fleck, 2021, pp. 602 ff., see *supra* note 68.

⁷⁵ This point does not seem to be a seriously controversial one. In that vein, see Wissenschaftliche Dienste Deutscher Bundestag, “Rechtsfragen der militärischen Unterstützung der Ukraine durch NATO-Staaten zwischen Neutralität und Konfliktteilnahme, WD 2 - 3000 - 019/22, p. 4. See also the lucid commentary by Alexander Wentker, “At War: When do States Supporting Ukraine become Parties to the Conflict and What Would that Mean?”, in *EJIL: Talk!*, 14 March 2022. A comprehensive discussion of the conditions under which a State initiates an international armed conflict or enters into an already existing international armed conflict is beyond the scope of this study.

⁷⁶ For a detailed overview of the relevant legal issues, see Wolf Heintschel von Heinegg, “Neutrality in the War against Ukraine, Articles of War”, in *Articles of War*, 1 March 2022.

armed forces in defence of Ukraine (seen from the narrow perspective of Article 51), then, *a fortiori*, the same right of collective self-defence should provide Germany with an exception to its *prima facie* duty under the law of neutrality to provide Ukraine with weapons for its defence. However, such an argument derived from the right of self-defence would, at least, sit uneasily with Germany's decision not to report an exercise of the right of collective self-defence pursuant to Article 51 of the UN Charter⁷⁷ – which closes the little circle around the reporting requirement.

In the alternative, consideration might be given to characterizing Germany's arms deliveries as a collective countermeasure (or: reprisal) in order to overcome the *prima facie* legal hurdle resulting from the law of neutrality. The existence of a general right to adopt collective countermeasures in case of a violation of an obligation *erga omnes* is highly controversial.⁷⁸ But it could be argued that there should be such a right at least in case of the prohibition of the use of force where a violation even gives rise to the right to use force collectively. This argument would thus not include a direct reference to the right of collective self-defence, but would attribute a 'radiating effect' to this right on the related right to adopt collective countermeasures. This is no doubt an argument worthy of close consideration.

Ultimately, however, there is no need to place reliance on the right of either exercising collective self-defence or adopting collective countermeasures. In fact, there is a more straightforward way of showing why Germany's arms deliveries to Ukraine do not violate neutrality law.⁷⁹ In a nutshell, in

⁷⁷ One might consider a line of reasoning to the effect that the Security Council need not be notified of *every* exercise of the right of collective self-defence, but only of such exercises involving a use of force by the reporting State. But it would be hard to square such an argument with the letter of Article 51 of the UN Charter.

⁷⁸ In the context of its work on state responsibility for internationally wrongful conduct, the ILC has left open the question of whether third States not directly affected by the breach of the relevant obligation *erga omnes* have a right to adopt collective countermeasures; Article 54 of the relevant ILC Articles is drafted in the style of a dilatory compromise and this has been accompanied by the statement in the relevant commentary that the state of customary international law is "uncertain"; see, Draft Articles on State Responsibility for Internationally Wrongful Acts with Commentaries, in *Yearbook of the International Law Commission*, 2001, vol. II, part two, pp. 137 (text) and 139 (nos. 6 ff.) (commentary) (<https://www.legal-tools.org/doc/10e324/>).

⁷⁹ The following is in line with Stefan Talmon, "The Provision of Arms to the Victim of Armed Aggression: the case of Ukraine", in *Bonn Research Papers on Public International Law*, Paper No. 20/2022, 6 April 2022, pp. 8–20; see also Oona Hathaway, "Supplying Arms to Ukraine is not an Act of War", in *Lawfare*, 12 March 2022; Ryan Goodman and Oona

contemporary international law, the traditional requirement under neutrality law to refrain from rendering military assistance does not apply to the victim of aggression that has chosen to exercise its right of individual self-defence. The reason for this is as follows: the strictly symmetrical prohibition of military support of belligerents under the classic law of neutrality came into existence before the 1928 prohibition of war, that is at a time when international law did not contain a comprehensive prohibition of force and instead had the much more modest ambition to limit the suffering in war through the laws of war, the *ius in bello*. Within this legal universe, the law of neutrality was situated at the interface between the law of war and the law of peace. Its function was to provide a normative incentive against a widening of the theatre of war. Whether the law of neutrality continues to serve a useful purpose alongside the existing *ius contra bellum* is quite uncertain.⁸⁰ However, this question does not detain us further for present purposes. For it cannot be reasonably doubted that the old objective of the law of neutrality, namely the territorial confinement of hostilities, can no longer claim an overriding priority since international law has evolved so as to include a *ius contra bellum*. The fundamental normative change was clearly appreciated already in 1932 by the then United States Secretary of State Henry Stimson. Referring to States violating the new law against war, he said: “We no longer draw a circle around them and treat them with the punctilio of the duelist’s code. Instead, we denounce them as lawbreakers.”⁸¹ The primary goal of the contemporary law of international peace and security is to prevent the outbreak of war and, in the event of an unlawful armed attack, to protect the victim of such an attack. Within the logic of such an international legal order, there must be a keen interest in ensuring that its cornerstone, the prohibition of the use of force, is not subjected to erosion. All those considerations argue in favour of lifting the traditional neutrality obligation on third States not to deliver arms to the benefit of a State exercising its right of individual self-defence. This

Hathaway, “Why China Giving Military Aid to Russia Would Violate International Law”, in *Just Security*, 17 March 2022.

⁸⁰ According to the predominant view, this is the case; see, for example, Wolff Heintschel von Heinegg, “Wider die Mär vom Tod des Neutralitätsrechts”, in Horst Fischer, Ulrike Froissart, Wolf Heintschel von Heinegg and Christian Rapp (eds.), *Krisensicherung und Humanitärer Schutz – Festschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag, 2004, pp. 221 ff.; on the current debate, see for example, Raul ‘Pete’ Pedrozo, “Ukraine Symposium - Is the Law of Neutrality Dead?”, in *Articles of War*, 31 May 2022.

⁸¹ Henry L. Stimson, “The Pact of Paris: Three Years of Development”, in *Foreign Affairs*, 1932, vol. 11, no. 1, p. iv.

normatively coherent legal situation is to be achieved through a systemic integration of the prohibition of the use of force into the previously established law of neutrality in the form of at least partially superseding the latter.

Regarding Germany's stance on the Ukraine war, there is widespread talk of 'non-belligerency' instead of neutrality.⁸² The term 'non-belligerency' goes back to the position that the United States took (for a while) during World War II before entering the war.⁸³ During this period of time, Great Britain received massive support, but just below the threshold of entering the war. Here, too, the question of compatibility with the law of neutrality arose. The then Attorney General of the United States, Robert Jackson, who had sought the advice of Hersch Lauterpacht, justified the lawfulness of the United States' course of conduct in essence in the same way as the lawfulness of Germany's military assistance to Ukraine has just been explained in this study. It bears emphasizing, however, that the relevant legal considerations do not *follow* from the term 'non-belligerency'. One may, of course, use that term, but in such case, this concept does no more than to articulate the *result* of a legal argument rather than to shape it. To end this part of the analysis, may it be mentioned in passing that the law that the United States passed in support of Great Britain during World War II was called the 'Lend-Lease Act'. The United States law of 9 May 2022 on military assistance to Ukraine is called 'Ukraine Democracy Defense Lend-Lease Act'.⁸⁴ History has a long breath.

5.3. Questions of Responsibility under International Law

Regarding the legal consequences discussed under this heading, it is uncertain at present whether they can take practical effect in the future. The two main legal issues are the state responsibility of the Russian Federation for aggression and the individual criminal responsibility of the relevant part of the Russian leadership for the crime of aggression.

5.3.1. State Responsibility of the Russian Federation

Only the Paris Peace Treaties after World War I mark the transition from a practice of a war tribute to be paid by the defeated State to an international

⁸² See, for example, Walter, 2022, p. 478, see *supra* note 65.

⁸³ See, for example, Hathaway and Shapiro, 2017, pp. 168–179, see *supra* note 7.

⁸⁴ United States, Ukraine Democracy Defense Lend Lease Act of 2022, Public Law 117–118, 136 STAT 1184, 9 May 2022 (<https://www.legal-tools.org/doc/ua4n3a/>).

legal obligation of reparation on the aggressor State – and at Paris, this transition began partly *avant la lettre*.⁸⁵ After that and until today, the practice of States directly in point has remained limited to the cases of the German wars of aggression in World War II, Iraq's invasion of Kuwait in 1990 and the wars between Eritrea and Ethiopia on the one hand, and Uganda and the Democratic Republic of the Congo on the other, both dating from the end of the last century.⁸⁶ Though this practice is not very dense, it sufficiently confirms the existence under customary international law of the obligation of reparation of a State that violates the prohibition of the use of force.⁸⁷

The more complex legal issue is to determine the precise scope of the duty in question. It should not be a matter of serious doubt that Ukraine is entitled to also claim the costs incurred as a result of its exercise of the right of individual self-defence, insofar as this State has conducted the hostilities in accordance with the law of international armed conflict.⁸⁸ It is less clear whether third States can also claim their costs incurred as a result of the military assistance rendered to Ukraine. The commission set up by the UN Security Council to settle claims following Iraq's aggression against Kuwait rejected the eligibility of war costs incurred by the Allies in the course of their military operation to repel the Iraqi aggression, but without giving any legal reasons for this.⁸⁹ Another challenging legal question is whether third countries that have accepted refugees from Ukraine can claim compensation for the public funds used for the purposes of the accommodation of those persons.⁹⁰ It bears noting that in the practice following Iraq's unlawful invasion of Kuwait, indications that point in the direction of such a possibility can be identified.⁹¹ But it should also be considered that other primary

⁸⁵ Elisabeth Günnewig, *Schadenersatz wegen der Verletzung des Gewaltverbotes als Element eines ius post bellum*, Nomos Verlagsgesellschaft, 2019, pp. 75–134.

⁸⁶ This practice is described by Günnewig, *ibid.* This author could not take into account the recent judgment of the ICJ in the case of the Democratic Republic of the Congo against Uganda; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 9 February 2022, 9 February 2022 (<https://www.legal-tools.org/doc/e5y6on/>).

⁸⁷ Günnewig, 2019, p. 415, see *supra* note 86.

⁸⁸ *Ibid.*, pp. 386 ff.

⁸⁹ *Ibid.*, pp. 264 ff., 389.

⁹⁰ Tomuschat, 2022, p. 41, see *supra* note 16.

⁹¹ United Nations Compensation Commission, Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Claims by Governments

international legal rules of conduct than the prohibition of the use of force might provide third States with a legal basis for the compensation in question.⁹²

Just before work on this study was completed, the Council of Europe's Committee of Ministers "noted with interest" a proposal submitted by Ukraine to establish a "comprehensive international compensation mechanism".⁹³

5.3.2. Individual Criminal Responsibility

Whereas the obligation to make reparations focuses on the interests of the injured State, individual criminal responsibility is primarily concerned with stabilizing the violated primary international rule of conduct: Robert Jackson, whom we have already met a little earlier, emphatically expressed this policy as United States chief prosecutor in the historic Nuremberg trial against Germany's major war criminals. While Hermann Jahrreiß, as seen above, invoked the complete collapse of the prohibition of war in the wake of the Abyssinia War for the defence, Jackson attested to the resilience of the prohibition of war, but at the same time to the urgent need for its reaffirmation after its fundamental challenge. In his opening speech, Jackson exclaimed:

The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this

and International Organizations, (Category F Claims), UN Doc. S/AC.26/1997/6, 18 December 1997, p. 23 (No. 86) (<https://www.legal-tools.org/doc/oh4vey/>).

⁹² See, for example, Christian Tomuschat, "State Responsibility and the Country of Origin", in Vera Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Legal Issues*, Martinus Nijhoff Publishers, The Hague, 1996, p. 71; Hannah R. Garry, "The Right to Compensation and Refugee Flows: A Preventative Mechanism in International Law?", in *International Journal of Refugee Law*, 1998, vol. 10, pp. 103–106; Władysław Czapliński and Pavel Šturma, "La responsabilité des Etats pour les flux de réfugiés provoqués par eux", in *Annuaire français de droit international*, 1994, vol. 40, pp. 160–162; Payam Akhavan and Morten Bergsmo, "The Application of the Doctrine of State Responsibility to Refugee Creating States", in *Nordic Journal of International Law*, 1989, vol. 3, pp. 243 ff. (<https://www.legal-tools.org/doc/58d2d6/>); Luke T. Lee, "The Right to Compensation: Refugees and Countries of Asylum", in *American Journal of International Law*, 1986, vol. 80, pp. 553–560.

⁹³ Ministers' Deputies, "Consequences of the aggression of the Russian Federation against Ukraine", Decision taken at the 1442nd meeting, CM/Del/Dec(2022)/1442/2.3, 15 September 2022, op. para. 3.

is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.⁹⁴

“Including those which sit here now in judgment” – the end of this powerful message resonates particularly strongly in view of the ongoing Russian war of aggression against Ukraine. It forms part of the trials and tribulations of the historical development of international criminal law that by no means only Russia, but also, and not least, the United States have contributed to the fact that the fulfilment of their Nuremberg promise in the case of the Ukraine war presents not only factual, but also major legal difficulties.

From the perspective of substantive international criminal law, the matter is free from doubt: President Putin is under suspicion of having committed a crime of aggression.⁹⁵ This is because Russia’s use of force against Ukraine constitutes an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the UN Charter within the meaning of Article 8 *bis*(1) of the Statute of the ICC. For the time being, however, the ICC is prevented from exercising its jurisdiction over the crime of aggression, which was only activated on 17 July 2018.⁹⁶ This is because the Russian Federation has not yet acceded to the ICC Statute, and in the event of an act of aggression by a State not party to that Statute, the Court can only act if the situation in question is referred to it by the UN Security Council.⁹⁷ During the negotiations, the United States were among those insisting on a jurisdictional regime for the crime of aggression which is more restrictive than that

⁹⁴ For example, in *Trial of Major German War Criminals by the International Military Tribunal sitting at Nuremberg Germany*, Buffalo in William S. Hein & Co., 2001, p. 45.

⁹⁵ For two model indictments, see Ryan Goodman and Rebecca Hamilton, “Model Indictment for Crime of Aggression against Ukraine: Prosecutor v. Vladimir Putin”, in *Just Security*, 14 March 2022; Open Society Justice Initiative, “Model Indictment for the Crime of Aggression Committed against Ukraine”, in *Just Security*, 9 May 2022.

⁹⁶ The last step required for this to happen was the adoption of the activation resolution (Resolution ICC-ASP/16/Res.5 (<https://www.legal-tools.org/doc/6206b2/>)) by the Assembly of States Parties to the International Criminal Court on 14 December 2017; Claus Kreß, “On the Activation of ICC’s Jurisdiction over the Crime of Aggression”, in *Journal of International Criminal Justice*, 2018, vol. 16, pp. 1 ff.

⁹⁷ See Article 15 *bis* paras. 4 and 5 of the ICC Statute; for the relevant statement by the Prosecutor of the ICC, see “Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine”, 25 February 2022 (<https://www.legal-tools.org/doc/zf00m4/>).

for the other crimes under international law within the ICC's jurisdiction.⁹⁸ It is another regrettable irony of the history of international criminal law that France and Great Britain, who were the first to powerfully request the international criminalization of the waging of a war of aggression after World War I, are the two most important sceptics among the ICC States Parties today.⁹⁹ Yet, the history of international criminal law is not in want of surprising turns and significant advances have most often crystallized at historical junctures. It is therefore hardly surprising that we are currently witnessing an intensifying international discussion about the establishment of a Special Tribunal for the crime of aggression, an establishment that was powerfully demanded by the President of Ukraine in his statement dated 22 September 2022 at the General Debate of the seventy-seventh Session of the UN General Assembly,¹⁰⁰ to bridge the jurisdictional gap in the case of Russia's current aggression and that this happens in parallel with calls for an improvement of the ICC Statute in order to bring the conditions for this Court's

⁹⁸ Claus Kreß and Leonie von Holzendorff, "The Kampala Compromise on the Crime of Aggression", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1194–1199, 1201–1204, 1207–1210, 1215 ff.

⁹⁹ Kreß, 2021, pp. 276–285, see *supra* note 19.

¹⁰⁰ "Speech by the President of Ukraine at the General Debate of the 77th session of the UN General Assembly", 22 September 2022 (<https://www.legal-tools.org/doc/wh08nu/>). Just before that, the Committee of Ministers of the Council of Europe had "noted with interest" the proposal submitted by Ukraine "to establish a special ad hoc tribunal for the crime of aggression against Ukraine", see "Consequences of the aggression of the Russian Federation against Ukraine", 2022, op. para. 3, see *supra* note 93; for previous expressions of support by parliamentary assemblies, see, for example, Parliamentary Assembly of the Council of Europe, "Consequences of the Russian Federation's continued aggression against Ukraine: role and response of the Council of Europe", Resolution 2433 (2022) (<https://www.legal-tools.org/doc/goqt8o/>); European Parliament, "The fight against impunity for war crimes in Ukraine", Resolution of 19 May 2022, P9_TA(2022)0218 (<https://www.legal-tools.org/doc/dw93uy/>); Organization for Security and Co-operation in Europe, Parliamentary Assembly, "Resolution on the Russian Federation's War of Aggression Against Ukraine and its People, and its Threat to Security across the Region", Twenty-Ninth Annual Session, Birmingham, 2–6 July 2022 (<https://www.legal-tools.org/doc/uc3vy6/>); for scholarly analyses, see for example, Tom Dannenbaum, "Mechanisms for Criminal Prosecution of Russia's Aggression against Ukraine", in *Just Security*, 10 March 2022; Oona Hathaway, "A Crime in Search of a Court. How to Hold Russia Accountable", in *Foreign Affairs*, 19 May 2022; Ukraine Task Force of the Global Accountability Network, "Proposal for a Resolution by the United Nations General Assembly and Accompanying Proposal for a Statute of a Special Tribunal for Ukraine on the Crime of Aggression", 7 September 2022; Oona Hathaway, "The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine. An agreement between the United Nations and Ukraine can pave the way", in *Just Security*, 20 September 2022.

exercise of jurisdiction over the crime of aggression more in line with its universal orientation.¹⁰¹ We shall see.

5.4. Peace Treaty or Ceasefire

It is also uncertain, at the time of writing, whether the war will be ended by a negotiated peace. This legal analysis is intended to leave open the question of whether the conclusion of a peace treaty with the Russian government is still a politically viable goal, or whether no more than a ceasefire should be pursued as long as President Putin is in power.¹⁰² Instead, the focus here is on the hurdles under international law that would arise with regard to the conclusion of a peace treaty, hurdles that exist in intimate connection with the prohibition of the use of force.

According to Article 52 of the Vienna Convention on the Law of Treaties, which in the relevant point reflects customary international law,¹⁰³ a treaty the conclusion of which has been procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter is void.¹⁰⁴ Accordingly, Russian territorial gains in Ukraine cannot be validated on the basis of a peace treaty as long as the Russian armed forces militarily occupy the territories in question, or if the resumption of hostilities hangs over Ukraine like the sword of Damocles. The only possibility which could be considered to overcome the limitation posed by Article 52 of the Vienna Convention would be a resolution adopted by the UN Security Council under Chapter VII of the UN Charter endorsing a peace treaty. In view of the paramount importance of the prohibition of the use of force, the adoption of such a resolution would be a highly precarious step in terms of international policy. Nevertheless, an argument can be made that such a course of action would be within the scope of the UN Security Council's powers. For Article 52 of the Vienna Convention would not appear to be part of peremptory international law which is binding also on the Security Council acting under Chapter VII of the UN Charter. Accordingly, the Security Council

¹⁰¹ Parliamentarians for Global Action, "Proposal to Amend Article 15 *bis* of the Rome Statute on the Crime of Aggression", 13–22 July 2022.

¹⁰² In the latter direction, see Peter Graf Kielmansegg, "Putins Krieg", *Frankfurter Allgemeine Zeitung*, 19 April 2022, p. 7.

¹⁰³ Kirsten Schmalenbach, "Article 53: Treaties conflicting with a peremptory norm of general international law ('jus cogens')", in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed., Springer, 2018, p. 959, para. 53.

¹⁰⁴ For an extended commentary, see Schmalenbach, *ibid.*

would arguably be in a position, within the framework of its broad discretionary powers, to adhere to a possible request made by Ukraine in order to avoid further victims to conclude a peace treaty with Russia that includes territorial concessions to the aggressor.

The preceding tentative conclusion was arrived at with the crucial caveat that the UN Security Council would “adhere to a possible request made by Ukraine”. Could the Council go one step further and order an end to the hostilities at some point, even against the wishes of Ukraine, perhaps out of fear of an uncontrollable territorial escalation of the war? In any case, the Council would be barred from handing over a part of Ukrainian national territory to the Russian aggressor, on the facts as they stand at the time of writing. This is already evident from the Security Council’s core ‘police’ function, which is aimed at averting danger and does not include the permanent solution of territorial status issues. Moreover, according to customary international law, every State is under the duty not to recognize acquisitions of territory by force. Here, the legacy of Henry Stimson resonates again. For the aforementioned duty emerged from the so-called Stimson Doctrine, which the then United States Secretary of State announced after the first serious challenge to the new prohibition of war, that is Japan’s invasion of Chinese Manchuria in 1931.¹⁰⁵ There is much to be said for assigning this non-recognition obligation to peremptory international law insofar as the territorial acquisition in question resulted from aggression.¹⁰⁶ If this is the case, the duty not to recognise acquisitions of territory made as a result of aggression could not be disposed of by the UN Security Council either.

This leaves the question of whether it would be within the powers of the Council to call on the Russian Federation and Ukraine to sign a binding ceasefire, with a temporary freeze on actual Russian territorial gains, but with all territorial status issues remaining open. Such an order by the Security Council would severely curtail Ukraine’s right of individual self-defence. This is all the more so because, under current international law, a ceasefire line may arguably itself become protected by the prohibition of the use of force after a certain period of time.¹⁰⁷ Could the Security Council

¹⁰⁵ Hathaway and Shapiro, 2017, pp. 166–168, see *supra* note 7.

¹⁰⁶ Paragraph 2 of Conclusion 19 on peremptory norms of general international law of the International Law Commission (ILC, Draft conclusion and Annex, 11 May 2022, p. 5, see *supra* note 22) would appear to leave that question open.

¹⁰⁷ This point became relevant in the 2020 war between Azerbaijan and Armenia over Nagorno-Karabakh; see Tom Ruys and Felipe Rodriguez Silvestre, “Military Action to Recover

restrict Ukraine's right to self-defence in this way, even though this right is described in the UN Charter as an "inherent" right of every State? The first sentence of Article 51 of the UN Charter states the following on the relationship between the right to self-defence and the power of the Council to take collective security measures:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence, if an armed attack occurs against a Member of the United Nations, *until the Security Council has taken measures necessary to maintain international peace and security* (emphasis added).

Is the concept of "international peace and security" to be understood in such a way that the measures taken in order to serve this goal might conflict with the continued exercise of the right of self-defence? The most thorough discussion of this question that I am aware of has been presented by Nico Krisch. He argues that the UN Charter has not decided this question. From this, he concludes that the Security Council is not categorically prevented from subordinating the State interest in effective self-defence to the world community interest in avoiding an escalation of armed conflict.¹⁰⁸ Krisch's analysis is very circumspect,¹⁰⁹ but his final conclusion remains open to doubt. It is possible that this literally existential question comes close to a point where Kelsen would say that the spade is bent in jurisprudential terms.¹¹⁰ On one thing, however, one can but emphatically agree with Krisch: assuming that the Security Council has the power under consideration, it should not even consider using it, except *in extremis*. Because any other approach could – in the apt words of Krisch – make a policy of appeasement

Occupied Land: Lawful Self-Defense or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited", in *International Law Studies*, 2021, vol. 97, pp. 682 ff.

¹⁰⁸ Nico Krisch, *Selbstverteidigung und kollektive Sicherheit*, Springer, 2001, p. 395–397; for a very illuminating analysis, see also Sebastian Graf Kielmansegg, "An der Nahtstelle der Friedensordnung – Bedeutung und Grenzen des Selbstverteidigungsrechts im System der kollektiven Sicherheit", in *Archiv des Völkerrechts*, 2012, vol. 50, pp. 298 ff., who attributes greater weight than Krisch to the right of self-defence.

¹⁰⁹ Krisch, 2001, pp. 243–272, see *supra* note 108.

¹¹⁰ One is tempted to draw a comparison with the question of precedence with regard to a state of international legal order; see Hans Kelsen, *Allgemeine Staatslehre. Studienausgabe der Originalausgabe 1925*, edited by Mathias Jestaedt, 2019, p. 312.

the standard, encourage aggressors and considerably weaken the international prohibition of the use of force.¹¹¹

6. Concluding Remarks

Hersch Lauterpacht once remarked, with regard to the often particularly tense and unmediated encounter between norm and power, that international law is at the vanishing point of law.¹¹² In this sense, the prohibition of the use of force, the right of self-defence, and the UN Charter's collective security system all lie at the vanishing point of international law.¹¹³ The Ukraine war, in which a veto-holder and nuclear power unleashed a war of aggression, makes the point as plain as it can be. At the same time, however, the prohibition of the use of force, to recall Kelsen's insight, is constitutive for a universal legal order that protects every State regardless of its strength. That is why, in the present precarious moment, it is necessary to stabilize the politically sensitive legal boundary that the prohibition of the use of force demarcates for the exercise of State power in international relations. Otherwise, there would be a real risk – and to that extent Münkler's overly far-reaching prediction should indeed be taken as a serious warning – that the international legal order might undergo a move toward a *Großraumordnung* somehow reminiscent of Schmitt's thinking. In a *legal* study, nothing more is possible than a walk to the border, in which – after ascertaining the border line – the instruments available for fortifying that border are determined. The use of these instruments, however, is left to the decisions by politicians. May this legal scholar be permitted only a brief final observation in terms of international legal *policy*.

¹¹¹ Krisch, 2001, p. 397, see *supra* note 108.

¹¹² Hersch Lauterpacht, "The Problem of Revision of the Law of War", in *British Yearbook of International Law*, 1952, vol. 29, p. 382.

¹¹³ Lauterpacht himself had only drawn this conclusion for *jus in bello*. His famous words are: "[I]f international law is at the vanishing point of law, the laws of war are at the vanishing point of international law". But one only has to recall the well-known sentence of the former United States Secretary of State Dean Acheson, looking back on the Cuban Missile Crisis, to recognize that the prohibition of the use of force under international law, together with the international law on armed conflict, is at vanishing point of international law in the sense addressed in the text. Acheson stated: "The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power – power that comes close to the sources of sovereignty", *Proceedings of the American Society of International Law*, 1963, p. 14.

Ukraine has made its decision to defend its statehood, its territorial integrity and its way of life. Of course, if it had made a different decision, international law would have provided international policy actors with instruments to assert the validity of the prohibition of the use of force against its violation. But it remains true that Ukraine, by courageously defending itself, also bravely renders the world a service in that it contributes to the resilience of the prohibition of the use of force at a very critical moment. The situation remains dramatic – both for Ukraine and for the future of the prohibition of the use of force: Russia is continuing its war of aggression with brutal force. China and India continue to adopt a wait-and-see attitude instead of taking a firm stand on Ukraine’s side and in defence of the existing international law. On the other hand, while the international community has certainly not lived up to all of Ukraine’s legitimate hopes for support of its admirable struggle, the assistance provided to Ukraine – especially in view of the formidable threats built up by the aggressor – has, on the whole, gone significantly beyond the purely symbolic level. Perhaps, it can be said, with all caution, that the support provided by the liberal States – albeit, as this author regrets to say as a German citizen, clearly after too long a hesitation on the part of Germany – has eventually come close to that “prudent bravery” that has been identified as the most appropriate posture under the circumstances.¹¹⁴ This, together with the exceptional bravery displayed by the Ukrainians, is reason enough not to let confidence fade and instead to act with enduring steadfastness. With regard to my government, this includes the hope that it will soon dispel any doubt that it will follow up its own words on military assistance for Ukraine with corresponding deeds. The death knell¹¹⁵ should not be rung either for Ukraine and its internationally recognized borders or for the universal prohibition of the use of force.

¹¹⁴ The term was coined by Kielmansegg, 2022, see *supra* note 102.

¹¹⁵ The death knell for the prohibition of the use of force under international law was rung on previous occasions, beginning, at least, with the well-known essay by Thomas Franck, “Who killed Article 2(4)? Or: Changing Rules Governing the Use of Force by States”, in *American Journal of International Law*, 1970, vol. 64, no. 5, pp. 809 ff. The fact that the supposed patient, Article 2(4), has always survived so far should serve as a source of encouragement today.

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Claus Kreß

As from 24 February 2022, Russia has been escalating its unlawful use of force against Ukraine, which had begun as early as in 2014, to a comprehensive war of aggression. As the world has been witnessing since the beginning of this escalation, Russia's course of action constitutes an existential threat to Ukraine and its people. In addition to that, it implies the serious risk that the authority of the prohibition of the use of force may erode. This study, which has grown out of a speech delivered in Karlsruhe, where Germany's Federal Constitutional Court and Federal Court of Justice are seated, sets out the international legal framework for current and possible future reactions by Ukraine, third States and the international community as a whole in response to Russia's fundamental challenge to what the International Court of Justice has called a "cornerstone of the United Nations Charter".

In large parts, the study is of a doctrinal nature. But it also attempts to shed light on the historic dimension of the topic as well as on some aspects of legal principle. In conclusion, the study recalls previous calls for ringing the death knell for the prohibition of the use of force and the encouraging fact that the supposed patient has always survived. In that vein, this paper argues that if the support of Ukraine from within the international community will be sufficiently determined and steadfast, there is no reason to ring the death knell for Ukraine in its internationally recognized borders and for the universal prohibition of the use of force.

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