# The Bear Unchained Goes West

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## I. PROVOCATIVE COMPARISONS RIGHT AT THE BEGINNING

It was 24 February 2022, a Thursday. It could have been, as it was centuries before, the Thursday on which carnival is ushered in in western countries, especially those with a Catholic tradition: Altweiber-Fastnacht (Old Crones' Carnival) is the name given in Germany to the day when for the sake of carnival, foolish women take over in the cities until Ash Wednesday. In 2022, everything was different. Russia attacked Ukraine. It is sure that in the history of the last two thousand years there has not been a similar frightening and horrifying Old Crones' Thursday. Only time will tell whether this day will mark a turning point. There are clear and unmistakable indicators of such epochal turning point.[2]

### 1.1. Feeding the Insatiable[3]

We shall look back a little in time. 24 February 2022 and its immediate preceding period represent a repetition of events that might be connected with the beginning of Second World War on 1 September 1939. Adolf Hitler had already set out in the 1920s, particularly in the 2nd volume of his book "Mein Kampf", and in the programme of the NSDAP, what the expansionist goals of a fascist foreign policy under his leadership would be (going East!), and which he never gave up. The Reich Government was quite successful in accomplishing those goals even without or with only little military force. It all started on 14 October 1933 when Germany quitted its membership in the League of Nations.[4] There was then the return of the territory of the Saar Basin, which the Versailles Peace Accord had put under the regime of the League of Nations, to the German Reich in 1935[5], there was the militarisation of the (de-militarized) German Rhine and Ruhr area in March 1936, there was the annexation of Austria to the German Reich on 12 March 1938[6] and there was on 30 September 1938 the Munich Agreement with the annexation of the German-populated territories (Sudetenland) of the Czechoslovak Republic to Germany and then on 15 March 1939 the invasion of what was left of the Czechoslovak Republic.[7] In the same month on 23 March 1939 Germany invaded the Memel district,[8] which was under Lithuanian administration on behalf of the League of Nations. The leading Western nations observed and accompanied this development with concern, but also with political appeasement, as the British Prime Minister of the time, Neville Chamberlain, used to describe it. Autocratic systems tend to understand such appeasing attitudes - as they had done at the time - in

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*2 Cf. the interview with former German judge at the European Court of Human Rights Angelika **Nußberger**: "A clear turn away from everything Europe stands for", Süddeutsche Zeitung No. 50 of 2 March 2022, p. 6*

*3 See: Tim **Bouverie**, Appeasing Hitler: Chamberlain, Churchill and the Road to War, London 2019; Adrian **Phillips**, Fighting Churchill, Appeasing Hitler. How A Civil Servant Helped Cause World War, Hull 2019; Jeffrey **Record**, The Spekter of Munich: Reconsidering the Lessons of Appeasing Hitler, Washington 2008*

*4 Klaus **Hildebrand**, Das Dritte Reich, München 1991, S. 17; Richard J. **Evans**, Das Dritte Reich, vol. 2/II: Diktatur, München 2006, S. 748 f.*

*5 Fritz **Jakoby**, Die nationalsozialistische Machtübernahme an der Saar. Die innenpolitischen Probleme der Rückgewinnung des Saargebiets bis 1935, Saarbrücken 1973*

*6 Erwin A. **Schmidt**, Der „Anschluss" Österreichs. Der deutsche Einmarsch im März 1938, 3rd ed., Bonn 1994; Bruce F. **Pauley**, Der Weg in den Nationalsozialismus. Ursprünge und Entwicklungen in Österreich, Wien 1988*

*7 A selection of literature: Boris **Čelovsky**, Das Münchener Abkommen 1938, Stuttgart 1958; Richard J. **Evans**, Das Dritte Reich. Vol. 2: Diktatur, Frankfurt am Main 2007, p. 805 seqq.; Ralf **Gebel**, „Heim ins Reich!" Konrad Henlein und der Reichsgau Sudetenland (1938 – 1945), Veröffentlichungen des Collegium Carolinum Vol. 83, 2nd München 2000; Jürgen **Zarusky**/Martin **Zückert** (ed.), Das Münchener Abkommen von 1938 in europäischer Perspektive. Eine Gemeinschaftspublikation des Instituts für Zeitgeschichte München-Berlin und des Collegium Carolinum, München 2013*

*8 Kurt **Diekert**/Horst **Grossmann**, Der Kampf um Ostpreußen, München 1960, p. 46 et seqq.*



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their own terms. The French say "L'appétit vient manger": Hunger comes with eating. That is how it was understood in 1939. Hitler's criminal invasion of Poland was propagandistically orchestrated. Polish armed troops had been blamed to have attacked areas in Upper Silesia prior to the German invasion. In reality, however, the actors of this attack were Wehrmacht troops from Hitler's sphere of power, which the Nazi apparatus used for its propaganda in order to strike at a militarily inferior Poland from the outset with tremendous military force at 5:45 a.m. on 1 September 1939.[9] And the Western powers acted surprised and unprepared.

All this may seem superficial and not well-grounded. But nevertheless, it is fair to ask whether there are parallels.

### 1.2. A Bear is Always Hungry

The Kremlin leader is attached to the defunct Soviet Union in which he grew up and in whose secret service he served years ago. He regrets the loss of power and prestige associated with the collapse of the Soviet Empire that he had described as a major catastrophe of the 20th century. Vladimir Putin has made no secret of this attitude in recent years.[10] In a way, he denies Ukraine the right to exist (independently of Russia). Also in disregard of historical facts, he reclaims that Ukraine had "always belonged to Russia".[11] The West on the other hand has always accompanied Russia's (expansive) foreign policy in this millennium and in the preceding century with indignation and also with some sanctions, which did not harm Russia so much. There was Russia's interference in Georgian affairs in August 2008 when Georgia (also not very luckily) tried to bring its breakaway provinces South Ossetia and Abkhazia back under Tbilisi's control[12]. The ceasefire of 13 August 2008 was followed by Russia's

[9] *A selection of literature on NS foreign policy: Léon* ***Noël****, Der deutsche Angriff auf Polen, Berlin 1948; Hans-Adolf* ***Jacobsen****, Nationalsozialistische Außenpolitik 1933 – 1938, Frankfurt 1968; Rainer F.* ***Schmidt****, Die Außenpolitik des Dritten Reiches 1933 – 1939, Stuttgart 2002; Marie-Luise* ***Recker****, Die Außenpolitik des Dritten Reichs, München 1990; Gerhard L.* ***Weinberg****, Hitler's Foreign Policy. The Road to World War II, New York 2005; Bernd-Jürgen* ***Wendt****, Großdeutschland. Außenpolitik und Kriegsvorbereitung des Hitler-Regimes, München 1987; Manfred* ***Messerschmidt****, Außenpolitik und Kriegsvorbereitung, in: Wilhelm Deist/Manfred Messerschmidt/Hans-Erich Volkmann/Wolfram Weite: Das Deutsche Reich und der Zweite Weltkrieg, Vol. 1: Ursachen und Voraussetzungen der deutschen Kriegspolitik, ed. by Militärgeschichtliches Forschungsamt, Stuttgart 1979; Horst* ***Rohde****, Hitlers erster „Blitzkrieg" und seine Auswirkungen auf Nordosteuropa, in: Klaus A. Maier/Horst Rohde/Bernd Stegemann/Hans Umbreit, Das Deutsche Reich und der Zweite Weltkrieg, Vol. 2: Die Errichtung der Hegemonie auf dem europäischen Kontinent, ed. by Militärgeschichtliches Forschungsamt, Stuttgart 1979; Herbert* ***Schindler****, Mosty und Dirschau 1939 – Zwei Handstreiche der Wehrmacht vor Beginn des Polenfeldzugs, Freiburg 1971; Günter* ***Wollstein****, Die Politik des nationalsozialistischen Deutschland gegenüber Polen 1933 – 1939/45, in: M. Funke (ed.), Hitler, Deutschland und die Mächte – Material zur Außenpolitik des Deutschen Reiches, Düsseldorf 1976; Janusz* ***Piekalkiewicz****, Polenfeldzug. Hitler und Stalin zerschlagen die Polnische Republik, Augsburg 1998; Jochen* ***Böhler****, Der Überfall. Deutschlands Krieg gegen Polen, Frankfurt am Main 2009.*

[10] *See Andreas* ***Hamburg****, Homo sovieticus, in: Gilbert H. Gornig/Alfred Eisfeld (ed.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 159 et seqq.; Claudia* ***Weber****, Der Pakt. Stalin, Hitler und die Geschichte einer mörderischen Allianz, München 2019, p. 64 et seqq.*

[11] *Nataliya* ***Poporvytsch****/Juriy* ***Kopinets'****, Die Geschichte der Ukraine von der Antike bis zur Neuzeit, in: Gilbert H. Gornig/Alfred Eisfeld (eds.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 21 et seqq.; Carolin* ***Gornig****, Die Geschichte der Ukraine vom Beginn der Neuzeit bis zum Ende des Ersten Weltkriegs, in: Gilbert H. Gornig/Alfred Eisfeld (eds.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 39 et seqq.; Andrij* ***Kudrjatschenko****, Die Entwicklung der Ukraine von 1917 bis 1991, in: Gilbert H. Gornig/Alfred Eisfeld (eds.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 61 et seqq.*

[12] *A selection of literature on the August War: Ronald D.* ***Asmus****, A Little War that Shook the World. Georgia, Russia, and the Future of the West, New York 2010; Erich* ***Reiter*** *(ed.), Die Sezessionskonflikte in Georgien. Schriftenreihe zur internationalen Politik Band 1, Wien/Köln/Weimar 2009; Svante E.* ***Cornell****/Frederick* ***Starr*** *(ed.), The Guns of August 2008 – Russia's War in Georgia, London 2009; Marie-Carin* ***von Gumppenberg****/Udo* ***Steinbach*** *(ed.), Der Kaukasus. Geschichte – Kultur – Politik, 3rd ed., München 2018, p. 121 et seqq. On 10 March 2022, the prosecutor applied to the ICC for arrest warrants for General Mikhail Mindzaev, former Minister of the Interior in the breakaway Georgian*

diplomatic recognition of the affected provinces as independent States on 26 August 2008. In the case of Ukraine, it was the other way around and now has the two non-viable Georgian provinces hanging from its peristaltic drip on one side, but two feet in the Caucasus on the other. Since Moldova declared its independence from the Soviet Union on 27 July 1991 the military presence of Russian troops in Transnistria, the eastern part of Moldova, kept alive a pro-Russian puppet regime there that is not recognised by anyone in the world. This is annoying for the West, and an obstacle for Moldova on its way into the European Union[13]. The Russian 14th Guards Regiment supports this puppet regime despite the fact that the Russian Federation was called upon to withdraw its troops from Transnistria by a NATO resolution of 18 November 2008 and subsequently by the UN General Assembly on 22 June 2018. Nothing happened in Transnistria, the perpetual talks go on under OSCE auspices, as they did since the 90ies of the last century - still well safeguarded by Russian military. The hardly verifiable recent Russian reports of attacks on Transnistria from Ukrainian territory and the indignation about this in Moscow are worrying and raise the question of whether such incidents are in turn to be used by Moscow to extend the Russian-Ukrainian conflict beyond the borders of Ukraine into the territory of Moldova. It is now that the West is remembering that another conflict is still open and unresolved in south-eastern Europe.

In the context of the Maidan events in 2014 and the subsequent flight of the then Ukrainian President Viktor Yanukovych[14] first to the rebellious provinces in the East of Ukraine and then to the Russian Federation, the annexation of Crimea and the city of Sevastopol took place after President Putin announced that preparations had to be made to "take Crimea back to Russia in order to give the inhabitants the opportunity to decide their own fate"[15]. On 6 March 2014, the parliament of the disputed Autonomous Republic of Crimea voted in favour of joining the Russian State. After a hastily organized referendum on 16 March 2014 (the constitutionality and legality of this sham democratic plebiscite is more than doubtful), Crimea and the city of Sevastopol were incorporated into the Russian Federation on 18 March 2014 on the basis of a treaty concluded with these territorial entities, which Russia ratified on 21 March 2014. The West cried out, the General Assembly of UN on 27. March 2014 declared the "incorporation" being a violation of international law, and the West imposed rather innocuous sanctions[16] and: voila![17] Where are we now? In the seceding eastern provinces of Ukraine,

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*provinces, Gamlet Guchmanov, head of the prisons there, and David Sanakoev, former Minister of Foreign Affairs, for crimes against humanity (Süddeutsche Zeitung No 59, 12/13 March 2022, p. 7).*

*[13] Cf. Dov **Lynch**, Separatist States and post-Soviet Conflicts, in: International Affairs Vol. 78 issue 4 p. 831 – 848; Tatiana **Stukaneva**, Der Transnistrien-Konflikt unter besonderer Berücksichtigung des internationalen Konflikt-Managements, Master-Arbeit an der Universität Wien, Wien 2013 – In a referendum of 18 November 2006 97 % of the Transnistrian population voted for seceding from Moldova and for joining the Russian Federation to a later time.*

*[14] The constitutionality of the overthrow of former President Viktor Yanukovych under the Ukrainian constitution was disputed at the time. Moscow has in the past repeatedly invoked these doubts in its disputes with successor governments in Kiev to question their legitimacy. However, this overlooks the fact that several elections have taken place in Ukraine in the meantime which, in the OSCE's assessment, certainly met democratic standards. In any case, the current presidency emerged from such an election, so that the events of 2014 can no longer be held against it. Nevertheless, President Putin pursues to "denazify" the regime in Kiev through his current "special operation".*

*[15] For the effects of secessionist activities on the civil population in general terms: Tanisha M. **Fazal**, (Kein) Recht im Krieg. Nicht intendierte Folgen der völkerrechtlichen Regelung bewaffneter Konflikte, Hamburg 2019, p. 285 et seqq.*

*[16] Gilbert H. **Gornig**, Wirtschaftssanktionen im Rahmen des Ukraine-Konflikts, in: Gilbert H. Gornig/Alfred Eisfeld (ed.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 221 et seqq.*

*[17] Some examples from literature: Manuel **Brunner**, Vom Umgang mit dem Bären und seiner Beute – Zum internationalen Status der Krim nach Völkerrecht, ZRP 2014, p. 250-251; Otto **Luchterhand**, Die Krim-Krise von 2014. Staats- und völkerrechtliche Aspekte, in: Osteuropa 5-6/2014, p. 61-86; Christian **Marxsen**/Anne **Peters**/Matthias **Hartwig** (ed.), The Incorporation of Crimea by the Russian Federation in the Light of International Law, Tagungsband zum Symposium am 2. und 3. September 2014 in Heidelberg, Zeitschrift für ausländisches öffentliches Recht*


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the "People's Republics of Luhansk and Donbas", now diplomatically recognised by Moscow only[18], Russian military has been present for years.[19] This interference, too, has only softly outraged the West. As the French say: L'appétit vient manger![20]

However, the situation under international law in 1939 differs in several respects from the situation under international law in 2022. It is striking that both in 1939 and in 2022 reasons were sought and put forward to put the mistreatment of another State and its population in a better, perhaps less illegal light. At least: the first legal steps have been taken. Based on the Genocide Convention[21], Ukraine filed a lawsuit against the Russian Federation at the International Court of Justice in The Hague and requested that in an emergency procedure the International Court of Justice finds that Russia has no legal basis to take action in and against Ukraine[22]. Meanwhile, one should not hope for immediate results. Wars in progression and genocides are complex events whose processing in formal legal proceedings can go to the limits of what is legally feasible. Incidentally, Angelika Nußberger, a former German judge at the European Court of Human Rights, also said this when she commented in her interview[23] on Georgia's complaints to the European Court of Human Rights. She said that this court was overstrained to judge war events that were in flux. Why should that be different as far as the International Court of Justice in The Hague is concerned?

Additionally to the proceedings before the International Court of Justice, the Office of the Prosecutor at the International Criminal Court (OPICC) has announced its intention to start investigations into the events in Ukraine. There are sufficient grounds for suspicion that both war crimes and crimes against humanity have been committed (or may still be committed)[24]. What is said on the pending procedure before the International Court of Justice is either to be said on those investigations of the

*und Völkerrecht (ZaöRV) 75/1 2015, S. 1 -231; Holger **Kremser**, Die Annexion der Krim durch Russland. Eine völkerrechtliche Würdigung, in: Gilbert H. Gornig/Alfred Eisfeld (ed.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 203 et seqq.*

*[18] See: Tanisha M. **Fazal**, (Kein) Recht im Krieg. Nicht intendierte Folgen der völkerrechtlichen Regelung bewaffneter Konflikte, Hamburg 2019, p. 61 et seqq. and p. 239 et seqq.*

*[19].Some examples from literature: Andreas **Kappeler**, Kleine Geschichte der Ukraine, 4th ed., München 2014; Matthias **Dembinski**/Hans-Joachim **Schmidt**/Hans-Joachim **Spanger** (eds.), Einhegung: Die Ukraine, Russland und die europäische Sicherheitsordnung, Leibniz-Institut – Hessische Stiftung Friedens- und Konfliktforschung, Frankfurt am Main 2014; Andreas **Heidemann-Grüder**/Manfred **Sapper**/Volker **Weichsel** (eds.), Schlachtfeld Ukraine. Studien zur Soziologie des Krieges, Themenheft der Zeitschrift Osteuropa, Berlin 2019; Sabine **Fischer**, Der Donbas-Konflikt. Widerstreitende Narrative und Interessen, schwieriger Friedensprozess, Studie der Stiftung Wissenschaft und Politik (SWP), Berlin 2019; Richard **Sakwa**, Frontline Ukraine. Crisis in the Borderlands, London/New York 2015; Andreas **von Arnauld**/Tobias **Debiel** (ed.), Die Ukraine-Krise (= Die Friedenswarte Vol. 89), Berlin 2014; Carolin **Gornig**, Völkerrechtliche Würdigung der Einmischung Russlands in die Ostukraine, in: Gilbert H. Gornig/Alfred Eisfeld (eds.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 221 et seqq.; Victor **Kostiv**, Maidan, Krim und „Neurussland", in: Gilbert H. Gornig/Alfred Eisfeld (eds.), Die Ukraine zwischen Russland und der Europäischen Union, Abhandlungen des Göttinger Arbeitskreises Vol. 15, Berlin 2021, p. 81 et seqq.*

*[20] We did not quote the very complicate Caucasus situation in particular in Chechenia with the two wars and the widely alleged crimes of genocide (Marie-Carin **von Gumppenberg**/Udo **Steinbach** [eds.], Der Kaukasus. Geschichte – Kultur – Politik, 3rd ed., München 2018, p. 152 et seq.)*

*[21] Convention on the Prevention and Punishment of Genocide of 9 December 1948 (UNTS Vol. 78, p. 277)*

*[22] Süddeutsche Zeitung of 1 March 2022 No. 49, p. 6. The hearing before the International Court of Justice on Monday, 7 March 2022, was sobering. The Russian Federation as the defendant in the proceeding was not represented in the hearing. Neither the Statute of the International Court of Justice of 26 June 1945 nor its Rules of Procedure of 14 April 1978, last amended on 21 October 2019, does not provide for any obligation of the parties to appear in proceedings by representatives (see Süddeutsche Zeitung No 55 of 8 March 2022, p. 6). As the representative of Ukraine turned it: "They are not here (means: in the courtroom), they are on the battlefield." For the non-representation before the International Court of Justice see: Hermann **Mosler**, Nichtteilnahme einer Partei am Verfahren vor dem Internationalen Gerichtshof, in: Ingo von Münch (ed.), Staatsrecht – Völkerrecht – Europarecht. Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. Mai 1981, Berlin – New York 1981, p. 439 et seqq.*

*[23] See: footnote 1*

*[24] Süddeutsche Zeitung of 1 March 2022 No. 49, p. 7*

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OPICC. It is a call for support when the International Prosecutor requested the population of affected areas in Ukraine to observe what is happening there und to submit respective reports to his office.

### 1.3. Aggression in International Legal History

In historical Europe (and elsewhere), war was an event that hit every generation at least once, almost like a natural occurrence nowadays. If one takes an account of the continent over the centuries, periods of peace lasting more than 70 years, as we know them in Europe after 1945, were rather the exception. Russian Federation brought this long period to a definite end. A new era is to commence, and nobody of us can predict how this era will look like.

In the old days before 1939, there was always shooting going on somewhere in Europe (and elsewhere on this globe). The international law of the time hardly questioned war at all.[25] Wars were fought for example because others invaded ancestral territories and drove out the tribes living there, for example because climatic conditions in the tribal areas no longer allowed the people living there to be fed, or for example because megalomaniac leaders wanted to create a place for themselves in the other posterity or in the history of their tribe. The causes of wars were manifold, but often devastating for all those who were affected, often including the own tribesmen of aggressors. Apart from the pursuit of territorial gains or the acquisition of better economic resources, wars in the modern era were always fought by States for power-political prestige. Since the early modern era was characterised by monarchies (with a few exceptions, such as the USA or the aristocratic Republic of Venice) until after the French Revolution, the prestige of the monarch and the honour of the nation in the concert of European powers were at stake when wars were started and waged. The last war that was fought for the honour of a nation was the Franco-German War of 1870/1871. Actually, the Empire of France and the Kingdom of Prussia were arguing on the candidacy of the (Catholic) prince Leopold of Hohenzollern-Sigmaringen to succeed to the Spanish throne[26], which had become vacant. With the resignation of the German candidate, the matter could actually have come to an end. But a telegram arbitrarily edited by Bismarck about a conversation between the French ambassador and the Prussian King Wilhelm in Bad Ems, which Bismarck leaked to the German press (the so-called Emser Depesche), struck at the French national honour and led to the French declaration of war on

[25] *Cf. Franz **von Liszt**, Das Völkerrecht systematisch dargestellt, 5th ed., Berlin 1907, p. 314-363*
[26] *Gordon A. **Craig**, Deutsche Geschichte 1866-1945. Vom Norddeutschen Bund bis zum Ende des Dritten Reiches, 3rd ed., München 1981, p. 31; Michael **Stürmer**, Die Deutschen und ihre Nation, Vol. III: Das ruhelose Reich. Deutschland 1866-1918, München 1985, p. 162 et seqq.; Klaus **Stern**, Das Staatsrecht der Bundesrepublik Deutschland, Vol. V: Die geschichtlichen Grundlagen des deutschen Staatsrechts, München 2000, p. 319 et seq.*


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Prussia.[27] The rest is history. War was, so to speak, the last resort of foreign policy.[28] In the end, war was the "cleansing agent" for settling disputes. A ban on aggression, as the UN Charter presupposes today would have simply made lawyers, philosophers[29], theologists[30] and politicians of past centuries shake their heads. It took the 20th century to shed more light on **the right to war**.

When there was war in the old days, it did not plunge entire countries into misery - with a few exceptions, such as the 30 Years' War in Germany. In warring countries, it could happen that entire regions did not notice that cannons were being fired and armies marched against each other in other regions of the same country. Mostly, wars were events that were localised - like floods in our days. One region was under water, so to speak, while neighbouring regions were spared. In addition, in the cabinet wars that became known at latest in the 18th century[31], the warring sovereigns led armies against each other, mostly consisting of mercenaries or professional soldiers. By the standards of the time, such armies were extremely expensive, so it is not surprising that the belligerents did not want

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*[27] Selection of modern literature: David **Wenzel**, Duell der Giganten. Bismarck, Napoleon III. und die Ursachen des Deutsch-Französischen Krieges von 1870/71, Berlin 2001; Tobias **Arand** (ed.), Der großartigste Krieg, der je geführt wurde. Beiträge zur Geschichtskultur des Deutsch-Französischen Kriegs 1870/71, Münster 2008; Josef **Becker** (ed.), Bismarcks spanische „Diversion" 1870 und der preußisch-deutsche Reichsgründungskrieg. Quellen zur Vor- und Nachgeschichte der Hohenzollernkandidatur für den Thron in Madrid 1866 – 1932, 3 volumes, Paderborn 2003-2007; Josef **Becker**, Von Bismarcks „Spanischer Diversion" zur „Emser Legende" des Reichsgründers, in Josef Becker/Johannes Burkhardt/Stig Förster/Günther Kronenbitter (ed.), Lange und kurze Wege in den Ersten Weltkrieg, München 1993, p. 87 et seqq.; Hans **Feske**, 1870/71 – ein provozierter Defensivkrieg mit Frankreich?, in Wolfgang Neubauer/Frank-Lothar Kroll (ed.), Forschungen zur Brandenburgischen und Preußischen Geschichte 13 (2003) Heft 1, p. 109 et seqq.; Eberhard **Kolb** (ed.), Europa vor dem Krieg von 1870. Machtkonstellationen – Konfliktfelder – Kriegsausbruch (= Schriften des Historischen Kollegs. Kolloquien 10), München 1987; Javier **Rubio**, Die Hohenzollern-Kandidatur von 1870 in der Diskussion, in: Forschungen zur Brandenburgischen und Preußischen Geschichte, Vol. 23 (2013) Heft 1, p. 61 et seqq.*

*[28] Cardinal Richelieu (1585-1642), the head of government of France under Louis XIII (cf. Uwe **Schultz**, Richelieu. Der Kardinal des Königs. Eine Biographie, München 2009; Daniell Patrick **O'Connell**, Richelieu. Kardinal-Staatsmann-Revolutionär, München 1978) is said to have had the gun barrels of the French cannons cast with the formula "ultima ratio regum" (the king's "last resort") during the 30 Years War against Germany. This then was copied 100 years later by the Prussian King Frederick the Great in 1742 when he became belligerent (Heribert **Prantl**, Krieg als letztes Mittel, in Kai Ambos/Jörg Arnold [eds.], Der Irak-Krieg und das Völkerrecht, Berlin 2003, p. 31 et seqq.); cf. further Matija **Gašparević**, Die Lehre vom gerechten Krieg und die Risiken des 21. Jahrhunderts – der Präemptivkrieg und die militärische humanitäre Intervention, Dissertation Ludwigs-Maximilians-Universität München 2010; Lothar **Rühl**, Interventions- und Eskalationsproblematik bei der militärischen Konfliktbewältigung – Die Ultima Ratio des bewaffneten Eingriffs als Mittel der Sicherheitspolitik, in Aus Politik und Zeitgeschichte Vol. 24 Bonn 2002 (= Beilage zur Zeitschrift Das Parlament); a selection from literature: Hermann **Stegemann**, Geschichte des Krieges, 4 volumes, Stuttgart/Berlin 1911; Bernd **Hüppauf**, Was ist Krieg? – Zur Grundlegung einer Kulturgeschichte des Kriegs, Bielefeld, 2013; Saul **David** (ed.), Die Geschichte des Krieges: Vom Altertum bis heute, München 2010*

*[29] In particular Immanuel **Kant**, Zum ewigen Frieden. Ein philosophischer Entwurf, Königsberg 1795 – ed. by Theodor Valentiner, Stuttgart 1986; Peter **Dörsam**, Zum ewigen Frieden 1795-1995: 200 Jahre nach Kants „Zum ewigen Frieden". Was nun?, Heidenau 1995; Sabine **Jaberg**, Kants Friedensschrift und die Idee der kollektiven Sicherheit. Eine Rechtfertigungsgrundlage für den Kosovo-Krieg der NATO?, Hamburger Beiträge zur Friedensforschung und Sicherheitspolitik, ed. by Institut für Friedensforschung und Sicherheitspolitik an der Universität Hamburg, item 129, Hamburg 2002; Wolfgang **Schluchter**, Zweihundert Jahre Immanuel Kants Schrift zum Ewigen Frieden, Heidelberger Jahrbücher Vol. 40, Heidelberg 1996, p. 193-203; Otfried **Höffe**, Völkerbund oder Weltrepublik? In: Otfried Höffe (ed.), Immanuel Kant Zum Ewigen Frieden, Heidelberg/New York 1995, p. 109-132; Uli **Jähner**, Versäumte Aktualität – Immanuel Kants „Zum ewigen Frieden", PROKLA Zeitschrift für kritische Sozialwissenschaft 1997, p. 143-172; Henning **Ottmann**, Der „ewige Frieden" und der ewige Krieg, in Henning Ottmann (ed.), Kants Lehre von Staat und Frieden, Baden-Baden 2009, p. 98 et seqq.*

*[30] **Augustine of Hippo** (354-430) (cf. Garry **Wills**, Augustinus, Berlin 2004) incorporated older (pagan) theories of just war into his major work De Civitate Dei (420), so laying the foundation for what was first a Catholic theorem on just war. See for the older tradition: Terry **Nardin**, The Ethics of War and Peace. Religious and Secular Perspectives, Princeton 1996; John **Kelsay**/James Turner **Johnson** (ed.), Just War and Jihad. Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions, New York 1991; for current views see: Georg **Kreis**, Der "gerechte Krieg": Zur Geschichte einer aktuellen Denkfigur, Basel 2006; R. A. **McCornick**/D. **Christiansen**: War, Morality of, in: Thomas Carson (ed.), New Catholic Encyclopedia, 2nd ed., Detroit 2003, vol. 14, p. 635-644; Gerhard **Beestermöller**, Thomas von Aquin und der gerechte Krieg. Friedensethik im theologischen Kontext der Summa Theologiae, Köln 1990; Richard J. **Regan**, Just War. Principles and Cases. Catholic University of America Press, Washington DC 1996, Eugen **Drewermann**, Der Krieg und das Christentum, 2nd ed. Regensburg 1984; Andreas **Holzem**, Krieg und Christentum. Religiöse Gewalttheorien in der Kriegserfahrung des Westens, Paderborn 2009*

*[31] Cf. Michael **Salewski**, Vom Kabinettskrieg zum totalen Krieg, in: Joachim Scholtysek/Ulrich Lappenküper/Christoph Studt (eds.), Masse und Macht im 19. und 20. Jahrhundert. Studien zu den Schlüsselbegriffen unserer Zeit, Berlin 2014, p. 57 et seqq.; Siegfried **Fiedler**, Kriegswesen und Kriegsführung im Zeitalter der Kabinettskriege, Koblenz 1986; Georg **Ortenburg**, Waffe und Waffengebrauch im Zeitalter der Kabinettskriege, Vol. 1 and 2, Berlin 1986; Sven **Externbrink**, Internationale Politik in der Frühen Neuzeit: Stand und Perspektiven der Forschung zu Diplomatie und Staatensystem, in: Hans-Christof Kraus/Thomas Nicklas (eds.), Geschichte der Politik. Alte und Neue Wege, München 2007, p. 15 et seqq.*

to "waste" them in battles. War at that time was often designed for sheer exhaustion of the opposing parties. When this occurred, the warring sovereigns settled their differences in truces and peace agreements. Their armies left the battlefields almost unharmed and were available to the sovereigns for the next conflict as a tried and tested means of threat.

The French Revolution brought the first change with the "levée en masse" ordered on 23 August 1793 by the Convent National in Paris, when the revolutionary French government knew no other way to help itself against the invading monarchical armies than to call the able-bodied men to arms[32], and by doing so increased the number of armed men from about 400.000, the size of the kingly army, up to one million "armed citizens".[33] With more than 20 million of inhabitants at the time, France thus had a completely different human potential at its disposal, while the monarchies fighting the revolution were still dependent on mercenaries, who were ultimately indifferent to the purposes for which their backers used them.[34] The wars of the kings slowly became the wars of everyone against everyone.[35] When Napoleon then did everything in his power to force the whole of Europe under his thumb, the defeated monarchies had no choice but to follow the French example and introduce general conscriptions in their States and other military reforms. Though, they got capable to defeat Napoleon first in the so-called Peoples' Battle near Leipzig and then finally in Waterloo. The consequence of compulsory military service, however, was that every family of the warring nations could now be affected in the person of the sons, if the sons no longer returned from the battles or only returned crippled. Over time, the general population became more interested in what was going on in a war. The war developed into warring masses.

When it came to battle, these were always quite unsavoury events. It is simple folklore that medieval battles, for example, were pure evidence of chivalry. Nothing of the sort is true. When for example the Frankish or Merovingian kings Theoderic and Chlovis I.[36] destroyed the kingdom of the Thuringians in the 6th century at the battle on the banks of the river Unstruth in 531, they wiped out

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*[32] Bruno **Cabanes**, Eine Geschichte des Krieges, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 16; Eckardt **Opitz**, Allgemeine Wehrpflicht. Geschichte, Probleme, Perspektiven, Bremen 1994; Philippe **Rogger**/Regula **Schmid Keeling**, Miliz oder Söldner und Solddienst in Stadt, Republik und Fürstenstaat 13.-18. Jahrhundert, Paderborn 2019; Dorothea **Schmidt**, Die preußische Landwehr. Ein Beitrag zur Geschichte der Allgemeinen Wehrpflicht in Preußen zwischen 1813 und 1830, Berlin 1987; Horst **Fischer**, Judentum, Staat und Heer in Preußen im frühen 19. Jahrhundert. Schriftenreihe Wissenschaftlicher Abhandlungen des Leo Baeck Instituts, Tübingen 1968; Werner **Benecke**, Militär, Reform und Gesellschaft im Zarenreich: die Wehrpflicht in Russland 1874-1914, Paderborn 2006; Roland G. **Foerster**, Die Wehrpflicht. Entstehung, Erscheinungsformen und politisch-militärische Wirkung, München 1994; Ricardo **Westphal**, Zur Geschichte der Wehrpflicht mit besonderem Fokus auf Deutschland und zur Diskussion um das Für und Wider ihrer Beibehaltung, Oldenburg 2005*

*[33] Cf. Gerd **Krumeich**: Zur Entwicklung der „nation armée" in Frankreich bis zum Ersten Weltkrieg, in: Roland G. Foerster (ed.), Die Wehrpflicht. Entstehung, Erscheinungsformen und politisch-militärische Wirkung (= Beiträge zur Militärgeschichte Vol. 43), München 1994, p. 133-145; Hans **Delbrück**, Geschichte der Kriegskunst im Rahmen der politischen Geschichte, Part 4: Die Neuzeit, Berlin 2004, p. 505 et seqq.; Scot **Lytle**, Robespierre, Danton and the Levée en masse, Journal of Modern History vol.30 (1958), p. 325-337; Rüdiger **Schmidt**, „Levée en masse, in: Enzyklopädie der Neuzeit online – http://dx.doi.org./10.1163/2352-0248_ed_COM_30950*

*[34] Hans **Delbrück**, Geschichte der Kriegskunst im Rahmen der politischen Geschichte, Part 4: Die Neuzeit, Berlin 2004, p.285 et seqq.*

*[35] Carl **von Clausewitz**, Bekenntnisschrift, in: the same, Ausgewählte militärische Schriften, hrsg. v. Gerhard Förster und Dorothea Schmidt, Berlin 1983, S. 213, 215*

*[36] Chlotar took the royal princess Radegunde (518 - 13.8.587) with him to Francia and gave her an excellent education. In 540 he married her and made her a Merovingian queen. After the Franks had murdered her brother Herminafried, the last Thuringian king, the marriage failed and Radegunde retired as a simple nun to the monastery of Ste. Croix in Poitiers, which she had founded and where she died on 13 August 587. She is venerated as a Catholic saint there, in the city of Poitiers, in France and in some other countries (Venantius **Fortunatus**, Vita sanctae Radigundis. Das Leben der Heiligen Radegunde, Stuttgart 2008; Bruno W. **Häuptli**, Radigundis, in: Biographisch-Bibliographisches Kirchenlexikon (BBKL), Vol. 22, Nordhausen 2003, Sp. 1131 – 1135).*


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the entire Thuringian elite[37], and the fairy tale goes that the corpses of dead Thuringians filled the river Unstruth so that the Franks could walk dry feet over them. Charlemagne did nothing else with the Saxons when he massacred their elite in 782 on the banks of the river Aller (Verden Blood Court)[38]. Such events characterise the European Middle Ages and recurred throughout its course. English battlefield archaeology of recent decades has again brought to light the unimaginable brutality with which individual battles were fought. The 30 Years' War in Germany, which saw entire regions of Germany fall desolate and deserted, is in its entirety the most devastating event in modern times. Napoleon's wars are at the end of this development[39]. The "Grande Armée", the largest of its time, failed because of the vastness of Russia, the winter there and, incidentally, the imperfect logistical planning of the Napoleonic regime. The end result was the Battle of Leipzig and Waterloo. But no one over the centuries thought of humanising the **law in war** if there was an international law in war at all. This changed when, in the middle of the 19th century, not only did the industrial revolution break out in the national economies, but warfare was almost simultaneously industrialised thanks to the weapons industry and developments in armouries.

Factories in all parts of Europe were able in the mid-19th century to mass-produce weapons of every kind on a scale that Napoleon and other belligerent leaders of history could not have dreamed of in their wildest dreams. This capability affected all types of weapons, from hand guns to assault rifles, from the smallest field howitzer to cannons that had ranges of kilometres.[40] The explosive power of the explosive devices used increased regularly. The invention of dynamite happened in the second part of the 19th century and made its manufacturer Alfred Nobel immensely rich. This is not the place to retrace the weapons developments[41] since the mid-19th century[42]. It is their consequences that must interest us.

Battles were no longer fought man against man, but at a distance and with the help of increasingly powerful artillery. Decisive battles, as the world knew them in the era of absolutist cabinet wars up to the warfare under Napoleon, no longer took and take place today. Instead, material and especially people are burned up in modern wars, as the "special operation" of the Russian Federation is currently proving in the best possible way.[43] In this way, soldiers could be killed, but also injured, in an almost industrial way. The medical misery of the wounded and the dying was palpable. Where crowds of people came together, without proper precautions, the hygienic and sanitary conditions into which

[37] *Steffen **Roßloff**, Katastrophe an der Unstrut. Untergang des Thüringer Königreichs 531, in: Thüringen. 55 Highlights aus der Geschichte, Erfurt 2018, S. 16 f.*
[38] *For the question whether international law was in existence under the Carolingians see: Heinhard **Steiger**, Die Ordnung der Welt. Eine Völkerrechtsgeschichte des karolingischen Zeitalters (741 – 840), Köln 2009*
[39] *Bruno **Cabanes**, Eine Geschichte des Krieges, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, S. 17*
[40] *Michael **Neiberg**, Technologie ist nichts ohne Strategie, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 132 et seqq.*
[41] *We are also not considering the financing of wars (see: Jennifer **Siegel**, Der Preis des Krieges, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 166 et seqq.; also see: Richard **Overty**, Der Aufstieg des Kriegsstaates, ibid, p. 150 et seqq.)*
[42] *Bruno **Cabanes**, Eine Geschichte des Krieges, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 24; Kerstin **von Lingen**, „Crimes against Humanity". Eine Ideengeschichte der Zivililsierung von Kriegsgewalt 1864-1945, Paderborn, München 2018*
[43] *Sir Hew **Strachan**, Der Zweck der Schlachten: Strategen und Strategien, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 59 et seqq.*

the soldiers were forced became precarious. In the 19th century, armies facing each other in the battleground and prisoner-of-war camps were veritable breeding grounds for epidemics that could hardly be controlled by pandemic medicine with the means available at the time. It should be remembered that antibiotics had not yet been invented at the time. This affected not only the individual soldier in the field, but also the individual prisoner of war in the camps set up for this purpose. Campaigns in the 19th century also hit the civilian population hard for the first time, because the increasingly powerful artillery could fire on them over a wide range without the individual civilian having seen a single soldier. Entire regions could be destroyed in this way, and in this destruction the civilian population sat helplessly and had to endure that over the time of the respective shelling their homes sank into rubble.[44] The climax was reached on 6th and 9th August 1945 when the atomic bombs hit Hiroshima and Nagasaki.[45] We cannot go into the details here, but a few defining war events of the 19th century should be mentioned at this point. There was the Crimean War of 1853 - 1856[46], which France and the United Kingdom fought primarily against the Russian Tsarist Empire supporting the cause of the Ottoman Empire. On the other side of the Atlantic, there was the American Civil War[47], and then were the Austro-Italian conflicts in Northern Italy in course of the Italian unification under the rule of the royal house of Piemonte and Sardinia. In the 20th century, the development of war progressed towards its climax, the totalisation of war.[48] Already the wars of the 19th century made it clear that the law of war needed binding rules under international law to protect soldiers, the wounded, prisoners of war and the civilian population. This is where the roots of what we now call **international humanitarian law** lie, which goes far beyond the **law in war**.

With the advent of the nation States at the turn of the middle ages to the renaissance, modern international law gradually emerged[49]. What this is supposed to say: Until 1914, no one in the

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[44] *Bruno **Cabanes**, Eine Geschichte des Krieges, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, S. 24 ff.*

[45] *Bruno **Cabanes**, Eine Geschichte des Krieges, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 26*

[46] *Kerstin S. **Jobst**, Geschichte der Krim, München 2020, p. 205 et seqq.; German **Werth**, Der Krimkrieg: Geburtsstunde der Weltmacht Russland, Erlangen 1989; Heinrich **Friedjung**, Der Krimkrieg und die österreichische Politik, Stuttgart und Berlin 1989. It was the first war, which mass media accompanied closely – see: Georg **Maag**/Wolfram **Pyta**/Martin **Windisch** (eds.), Der Krimkrieg als erster europäischer Medienkrieg, Berlin 2010*

[47] *Cf. Brian **Jordan**, Wer hat den Amerikanischen Bürgerkrieg wirklich gewonnen?, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 786 et seqq.*

[48] *Bruno **Cabanes**, Eine Geschichte des Krieges, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, S. 22*

[49] *See: Karl-Heinz **Ziegler**, Völkerrechtsgeschichte. Ein Studienbuch, 2nd ed., München 2007, p. 117 et seqq.; Bernhard **Kempen**/Christian **Hillgruber**, Völkerrecht, 2nd ed., München 2018, § 2; Andreas **von Arnould**, Völkerrechtsgeschichte(n). Historische Narrative und Konzepte im Wandel. Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel Vol. 196, Berlin 2017; Markus **Krajewski**, Völkerrecht, Baden-Baden 2017, p. 31 et seqq.; Wilhelm G. **Grewe**, Epochen der Völkerrechtsgeschichte, 2nd ed., Baden-Baden 1988; Hans **Kelsen**, Das Problem der Souveränität und die Theorie des Völkerrechts, 2nd ed., Tübingen 1928; Harald **Kleinschmidt**, Geschichte des Völkerrechts in Krieg und Frieden, Tübingen 2013; Heinhard **Steiger**, Universalität und Partikularität des Völkerrechts in geschichtlicher Perspektive. Aufsätze zur Völkerrechtsgeschichte. Studien zur Geschichte des Völkerrechts Vol. 333, Baden-Baden 2015; Wolfgang **Preiser**, Macht und Norm in der Völkerrechtsgeschichte. Kleine Schriften zur Entwicklung der internationalen Rechtsordnung und ihrer Grundlegung, Baden-Baden 1978; Oliver **Diggelmann**, Völkerrecht. Geschichte und Grundlagen. Mit Seitenblicken auf die Schweiz, Baden-Baden 1978; Michael **Becker**, Kriegsrecht und frühzeitlicher Protestantismus. Eine Untersuchung zum Beitrag lutherischer und reformierter Theologen, Juristen und anderer Gelehrter zur Kriegsrechtsliteratur im 16. und 17. Jahrhundert, 2017; Marcus M. **Payk**, Institutionalisierung und Verrechtlichung im späten 19. und frühen 20. Jahrhundert, Archiv für Sozialgeschichte Vol. 52 (2012), p. 861 et seqq.; Arthur **Nußbaum**, A Concise History of Nations, New York 1947; Arthur **Nußbaum**, Geschichte des Völkerrechts in gedrängter Darstellung, München – Berlin 1960; Georg **Stadtmüller**, Geschichte des Völkerrechts, Teil I: Bis zum Wiener Kongreß (1815), Hannover 1961; Ernst **Reibstein**, Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis, 1st volume: Vom Ausgang der Antike bis zur Aufklärung, Freiburg 1958, 2nd volume: Die letzten 200 Jahre, München 1963.*


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international law community had any doubt that States were allowed to make use of the last resort and wage war in their disputes with other States. When the civilised States of Europe set about humanising the **law in war**[50] at the end of the 19th and the beginning of the 20th century[51], none of the prominent European States gave a thought to curtailing the right to go to war. The Hague Conventions for the Peaceful Settlement of International Disputes of 1899[52] and of 1907[53] obliged the parties to the dispute to settle their disputes as peacefully as possible, and provided for a mediation procedure. The wars on the Balkan at the commencing 20th century are best evidence for that. More importantly, all conventions did not achieve a breakthrough in the prohibition of the use of violence.

Then, in the summer of 1914, the First World War broke out. Other nations still call it the "Great War" today because the war events had been without any precedence in human memory at the time. Although it was foreseeable that the warfare would be different from all previous wars, if only because of the industrialisation of the armaments industry[54], the world was nevertheless surprised by the attrition battles in northern France and Belgium, the submarine warfare instigated by Germany and the destruction of the Tsarist armies. The course of the war was marked by violations of international humanitarian law on all sides. However, the Germans (and their allies) stood out in particular, so that after the armistice in November 1918, not only the question of war guilt arose, but also the question of individual liability for war crimes. The abdicated German Emperor Wilhelm II (and other high-ranking politicians and military officers) was to be tried internationally. So, the allies thought. We will come to this in connection with the criminal liability of the individual. It should be noted, however, that the victorious powers could not agree to hold Wilhelm II responsible for a criminal war of aggression[55], because the prohibition of war of aggression did not exist under international law before 1914.

Those who worked on the Versailles Peace Treaty on the side of the victorious powers agreed that if this prohibition under international law did not yet exist, it would have to be worked on at the international level after the Versailles Peace Treaty was concluded.

Part of the overall work of Versailles was also the creation of the League of Nations, which provided an ideal forum to address the prohibition of aggression. The League of Nations Charter itself did not outlaw aggression, but offered a system of peaceful settlement of disputes either by arbitration or by the Council of the League of Nations. A Geneva Protocol of 2 October 1924 outlawing aggressive war failed to achieve the number of ratifications required. It was not until the Kellogg-Briand Pact of 27

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*[50] Just to recall Cicero's words "Inter arma enim silent leges!" (= "under the use of arms, law has become silent") quoted after Samuel **Moyn**, Krieg und Recht, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 103; Tanisha M. **Fazal**, (Kein) Recht im Krieg. Nicht intendierte Folgen der völkerrechtlichen Regelung bewaffneter Konflikte, Hamburg 2019, p. 21 et seqq.*

*[51] Samuel **Moyn**, Krieg und Recht, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2018, p. 103 et seqq.*

*[52] RGBl. 1901, p. 393*

*[53] RGBl. 1910, p. 4*

*[54] For the impact of armory industry and warfare on the environment see: John R. **McNeill**, Umweltzerstörung, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 117 et seqq.*

*[55] See already the excellent and unique presentation of William A. **Schabas**, The Trial of the Kaiser, Oxford 2018*

August 1928[56] that war of aggression was outlawed. One of this Pact's weaknesses, although it achieved near-universal validity and remains in force until today, was that it did not define the right of self-defence claimed by States.

Nevertheless, as we all know, the Kellogg-Briand Pact did not prevent the Second World War triggered by Hitler.

When the United Nations Charter (in the following: Charter) came into force on 26 June 1945, the Second World War with all its terrible, unprecedented manifestations of attrocities had just ended 90 days before when Germany's Wehrmacht surrendered unconditionally on 8 May 1945 (while the allied fight against Japan was still going on). The horror produced by Nazi Germany and her allies was best memorized by the founding members of UN who had already worked on the Charter during the war when those terrifying manifestations just happened.[57] When we start to interpret the Charter today, the determining aspect of this interpretation must still be that in June 1945 the States vowed to each other: "Never again!"[58]. This sentence has not lost an ounce of its weight in 2022.

## II. THE UN'S NON-USE OF MILITARY FORCE IN INTERNATIONAL RELATIONS

Against this background, the Charter formulates in Art. 1 No. 1 as the first of its objectives to maintain international peace and security and, to this end, to take effective collective measures to prevent and eliminate threats to international peace, to suppress acts of aggression and other breaches of the peace, and to settle international disputes or situations, which might lead to a breach of international peace by peaceful means, in accordance with the principles of justice and international law. It is true that the Charter only uses the term of "international peace" in Art. 1 (and in Art. 2) as well as in its preamble. This should not be misunderstood and misinterpreted to mean that only multinational use of force between several States is focused. The Charter is well aware that local conflicts between "only" two States also have the potential to spread like wildfire to other members of the United Nations. The political dimensions of the Russian-Ukrainian conflict show that they can affect the entire community of States' in particular when Russian militaries bombed Ukraine's biggest nuclear power plant in the morning of 3 March 2022. Moreover, the vote in the United Nations General Assembly on 2 March 2022 is the best proof of how concerned the world is with regards to the situation in Ukraine. Nothing more needs to be said about this.

In order to achieve the objective set out in Art. 1 No. 1 of the Charter (and other objectives envisaged in Art. 1), the members of the UN agree that the obligations under the Charter are binding on all member States (Art. 2 No. 2)[59], that all members shall settle their international disputes by peaceful

[56] *See: Kerstin* ***Wolny****, Ist das Aggressionsverbrechen nach heutigem Völkerrecht strafbar? Eine Bestandsaufnahme im Lichte aktueller Kriegsdrohungen gegen den Irak, https://www.kj.nomos.de/fileadmin/kj/doc/2003/20031Wolny_S_48.pdff, p. 52 et seq.*

[57] *Some selections with view on UNO's genesis: Maurice* ***Bertrand****, UNO. Geschichte und Bilanz, Frankfurt am Main 1995; Peter J.* ***Opitz****, Die Vereinten Nationen. Geschichte – Struktur – Perspektiven, München 2002; Helmut* ***Vogler****, Geschichte der Vereinten Nationen, 2nd ed., München 2008*

[58] *Carl* ***Bouchard****, Nie wieder Krieg!, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 203 et seqq.*

[59] *Stefanie* ***Schmahl****, Völker- und europarechtliche Implikationen des Angriffskriegs auf die Ukraine, NJW 2022, p. 969: ius cogens*


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means in such a way that international peace, security and justice are not endangered (Art. 2 No. 3). To this end and in general, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or otherwise inconsistent with the purposes of the United Nations (Art. 2 No. 4)[60]. Under international law, the concept of force is similar to the concept of force in national legal systems. It is any physical force, i.e. military or pseudo-military force between States, but also psychological force, the aim of which is, among other things, to break the opposing will of the other State and in this way to enforce the own political ambitions, whatever these may be. Since the Russian Federation has been bombarding Ukrainian infrastructure facilities and the Ukrainian military on Ukrainian territory incessantly since the invasion of its armed forces on 24 February 2022, the use of force should be beyond question. Whether the Russian troops massed on Ukraine's eastern border and their "manoeuvres" there previously already fulfilled the characteristic of the threat of force can therefore be left open after the force has already been used. The fact that the Russian troops were assembled in order to be ready for the invasion on 24 February 2022 (which was obviously planned and prepared for a long time) has, however, the threatening quality that Art. 2 No. 4 of the Charter has in mind. The propagandistic background music, still ringing in the ears of all observers, reinforces the impression of a threat, even though the Russian government, in negotiations with Western countries prior to the outbreak of violence, always spoke only of military manoeuvres in order to weaken the inherent threat and in order to camouflage its true intentions. Anyway, the legal term of aggression not defined by the Charter itself is having its grey and shadow areas[61] in particular when the aggressor invokes the right to preventive use of military violence, as Russia did[62]. This is where the Definition of Aggression adopted by the General Assembly on 14 December 1974[63] comes into play after the United Nations General Assembly Declaration of 24 October 1970 on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (the so-called "Friendly Relations Declaration") had still refrained from defining the concept of aggression in international relations in more detail.[64] It is true that the General Assembly cannot authentically and bindingly define provisions of the Charter. The authority to interpret and thus to define lies rather with the International Court of Justice in The Hague, whose decisions, however, initially only have an "inter partes" effect and can only become "customary international judicial law" over time, with increasing recognition by the member States. Nonetheless, the definition of

[60] *Gerhard **Leibholz**, „Aggression" im Völkerrecht und im Bereich ideologischer Auseinandersetzung, Vierteljahreshefte für Zeitgeschichte 1958, p. 165 et seqq.*
[61] *Klaus **Weber**, Angriffskrieg, in: Klaus Weber (ed.) Rechtswörterbuch, 24th ed., München 2022, p. 70 et seq.;*
[62] *Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margin. 574; Ruth **Wedgewood**, The Fall of Saddam Hussein, Security Council Mandates and Pre-emptive Self-Defense, American Journal of International Law (AJIL) Vol. 97 (2003), p. 582 et seqq.; Abraham D. **Sofaer**, On the Necessity of Preemption, European Journal of International Law Vol. 14 (2003), p. 209 et seqq.; John **Yoo**, International Law and the War in Iraq, American Journal of International Law (AJIL) Vol. 97 (2003), p. 572 et seqq.; Alfred **Verdross**/Bruno **Simma**, Völkerrecht, 3rd ed., München 1984, p. 470 et seqq.; Georg **Dahm**, Völkerrecht, Vol. 2, München 1961, p. 415 et seqq. – In this context for the question of severe sanctions of the Western States see: Brun-Otto **Bryde**, Die Intervention mit wirtschaftlichen Mitteln, in: Ingo von Münch (ed.), Staatsrecht – Völkerrecht – Europarecht, Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. Mai 1981, Berlin – New York 1981, p. 227 et seqq.; Albert **Bleckmann**, Gedanken zur Repressalie. Ein Versuch der Anwendung der Interessenjurisprudenz auf das Völkergewohnheitsrecht, in: Ingo von Münch (ed.), Staatsrecht – Völkerrecht – Europarecht, Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. Mai 1981, Berlin – New York 1981, p. 193 et seqq.*
[63] *Resolution No 3314*
[64] *Annex to Resolution Nr. 2625. For both resolutions see: Christian **Tomuschat**, International Law: Ensuring the Survival of Mankind on the Edge of the New Century, Hague Academy of International Law 2001, p. 207 et seqq.*

aggression approved by the General Assembly[65] provides the direction to guide us. Thus, aggression is the use of armed force by a State[66] against the sovereignty, territorial integrity or political independence of another State or otherwise incompatible with the Charter of the United Nations, as set out in our own definition (Art. 1 para. 1 of the Annex on Aggression). The term State is used in the definition independently of the question of recognition and regardless of whether a State is a member of the United Nations. Moreover, "State" can also mean a group of States. This definition largely coincides with the one we found, which we took from national law. More importantly, however, Art. 2 of the definition contains a prima facie rule. According to this rule, if a State is the first to use armed force in violation of the Charter, this constitutes prima facie evidence of an act of aggression, although the Security Council may conclude that a finding that an act of aggression has been committed would not be justified in light of other significant circumstances, such as, inter alia, where the acts in question and their consequences are not sufficiently serious. In any case, Art. 2 of the definition has the effect of placing the aggressor under considerable pressure to explain at the international level. This is because he must reverse the prima facie evidence rule. This explains that aggressors, such as Russia in the present case, often set off a propaganda barrage in advance, but then accompanying the aggression, in order to prevent every player on the international legal stage from pointing the finger in their face. In Art. 3 of the definition, the General Assembly sets out what it considers to be an act of aggression. However, the document also makes it clear that the following list is not meant to be exhaustive (see Art. 4 of the definition). First, Art. 3 makes clear that Art. 2 of the definition applies independently of a formal declaration of war.[67] Declarations of war, formerly formal acts that almost solemnly marked an end to diplomatic efforts, are completely out of practice in our modern days. The last time they were used was at the beginning of the First World War. In most of the 20th's century war cases, the ensuing armed conflicts began without the aggressor formally declaring to the aggressed that both States were now in a State of war. Nevertheless, even today an aggressor is reluctant to say that he has just invaded another State with war. States are sometimes very inventive when it comes to naming their acts of aggression that start a war, but not the Russian Federation, which had its president speak "only" of a "special operation" by the Russian armed forces – not much sophisticated when we look at the dimensions of such "special operation". Art. 3 of the definition lists and names the most common forms of interState use of force:

(a) the invasion or attack by the armed forces of one State upon the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any forcible annexation of the territory of another State or any part thereof;

(b) the shelling and bombardment of the territory of one State by the armed forces of another State or the use of weapons of any kind by one State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

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[65] *Thomas **Bruha**, Die Definition der Aggression. Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 – 1974. Zugleich ein Beitrag zur Strukturanalyse des Völkerrechts, Schriften zum Völkerrecht Vol. 66, Berlin 1980*

[66] *For violence used by non-State organizations see cf. Markus **Krajewski**, Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen – Der 11. September 2001 und seine Folgen, Archiv des Völkerrechts (AVR) Vol. 40 (2002), p. 103 et seqq.; Hans Georg **Dederer**, Krieg gegen den Terror, JZ 2004, p. 421 et seqq.; John **Lynn**, Zeitalter des Terrorismus, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 265 et seqq.*

[67] *Tanisha M. **Fazal**, (Kein) Recht im Krieg. Nicht intendierte Folgen der völkerrechtlichen Regelung bewaffneter Konflikte, Hamburg 2019, p. 109 et seqq.*



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(d) an attack by the armed forces of one State on the land, sea or air forces or on the naval and land fleet of another State;
(e) the deployment of the armed forces of another State, with the consent of that State, on its territory, in violation of the conditions provided for in the relevant agreement, or any extension of their presence in that territory beyond the expiry of the agreement;
(f) the fact that a State which has placed its territory at the disposal of another State allows that territory to be used by the other State to commit an act of aggression against a third State (this is where the conduct of Belarus comes into play in the case of Ukraine);
g) the deployment by or on behalf of a State of armed bands, groups, irregulars or mercenaries, when they carry out, or substantially participate in, by force of arms, acts against another State which, by reason of their gravity, are equivalent to the acts listed above (it should be recalled here that in the so-called "Luhansk and Donbas People's Republics", since 2014, the Russian Federation has acted not only with regular armed forces but also with the now famous "little green men", presumably mercenary forces[68]).

Looking at the examples listed by the General Assembly, we may note that the Russian Federation has not missed any of the examples given. In this respect, when it comes to the preventive aggression (also) invoked by the Russian Federation[69], this is not a question of the definition of aggression, but systematically a question of the aggression possibly being justified. We will soon deal with that when we come to Art. 51 of the Charter.

The characteristic of international dispute in Art. 2 No. 4 of the Charter has a delimitation function that must be seen in the context of the political independence of States. By speaking of international disputes, Art. 2 No. 4 of the Charter aims to prevent another State from using internal disputes of any kind as an occasion and pretext to interfere in the internal affairs of another State. We will come back to this point in connection with the diplomatic recognition of the so-called Donbas and Luhansk People's Republics and their request to the Russian government for military support in their dispute with the national government of Ukraine. However, since the Russian Federation has adopted the secession efforts of these "people's republics" as its own, this has become an "international dispute" even if it has intentionally been provoked as such in violation of international law.

If we can State as an interim result that the Russian-Ukrainian conflict is a violation of Art. 2 No. 3 and No. 4 of the Charter on the part of Russia, we should nevertheless bear in mind the patterns of thinking that the Kremlin leadership obviously cultivates in its relationship with Ukraine. It does not help much to tread on the slippery slope of the Russian president's historical views, which include that Ukraine has "always been part of Russia". As eventful and sad as Ukraine's history has been in the past, it was not always part of Russia, indeed not for most of the time, and if it was, then not in its current

[68] *Christopher **Kinsey**, Die Söldner*innen, outgesourcte Soldat*innen, in: Bruno Cabanes (ed.), Eine Geschichte des Krieges vom 19. Jahrhundert bis in die Gegenwart, Hamburger Edition 2020, p. 95 et seqq.*
[69] *See: Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margin. 574*

territorial form. As interesting as Kiev's history has been since the 10th century at the latest[70], a discussion about it "à la Moscow" does not lead anywhere. However, Russia's view of Art. 2 No. 3 and No. 4 of the UN Charter is illuminating and deeply backward-looking.

## III. RECLAIMED SELF-DEFENSE (ART. 51 OF THE CHARTER) DID UKRAINE ATTACK THE RUSSIAN FEDERATION?

The only exception to the prohibition of force between States in their international relations under statute law (and customary international law) is the "natural" or "inherent" right to individual or collective self-defence under Art. 51 of the Charter. The Charter itself does not define the right in detail, but rather refers to customary international law with the characteristic of naturalness and inheritress. Like self-defence in national law, which all legal systems know both in criminal law and in civil law, it is presupposed that there is an attack on the person defending himself. In the case of Ukraine, we can already State at this point that until 24 February 2022, Ukraine had not attacked Russia militarily. Neither have Ukrainian military or quasi-military troops crossed the border to the Russian Federation, nor has Ukraine, through its military or in any other way, used physical or psychological force on the Russian Federation's freedom of decision, i.e. its political independence and the independent political decision-making that is inseparable from it have been impaired by Ukrainian force. Art. 51 sentence 1 of the Charter speaks of an "armed attack" triggering the right to self-defence. However, since the Charter speaks of an "inherent right", which is located in customary international law, it may be questioned whether other unlawful conduct by a State below the threshold of an "armed attack" can also trigger and justify defence measures by a State[71]. We will touch on some aspects of this spectrum, which the Russian Federation uses in its propaganda war with Ukraine. The concept of a broad concept of aggression is also argued for by the law of reprisal, which is also located in customary international law and which basically cannot function without the consideration that a State confronted with injustice by another State must be entitled to respond adequately: **Ex iniuria ius non oritur**. We will see, however, that even a broad concept of aggression is not able to put Russia's invasion of Ukraine in any light of lawfulness. As far as the media independent of Ukraine and Russia can be followed, in the dispute over the Luhansk and Donbas regions, Ukraine has always insisted on negotiations in relation to Russia, whether under the Minsk Agreement of 12 February 2014 or in the Normandy format[72]. The fact that the internal disputes with the irregular troops of the "People's Republics" continued does not change anything in the relationship between Ukraine and Russia. After the annexation of Crimea, Ukraine protested, but did not try to push back the Russian troops that had invaded there with military force. By the way: It is also crucial that the published Statements from Moscow did not claim that Ukraine had attacked the Russian Federation. In the end, it's all "quarrelling over the emperor's beard". For, no matter how one views the concept of attack in self-defence - broadly or narrowly, it is the proportionality of any

[70] *Andreas **Kappeler**, Kleine Geschichte der Ukraine, 5th ed., München 2019; Kerstin S. **Jobst**, Geschichte der Ukraine, 2nd ed., Stuttgart 2015; Frank **Golcznoski** (ed.), Geschichte der Ukraine, Göttingen 1993; Paul **Kubicek**, The History of Ukraine, Westport/Conn. 2008; Paul Robert **Magorsi**, A History of Ukraine. Land and Its People, 2nd ed., Toronto 2010*

[71] *Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margins 757 et seqq.*

[72] *The Normandy format refers to government-level meetings between Germany, France, Russia and Ukraine, which first took place in this form at the Normandy commemorations on 6 June 2014.*


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countermeasure that is decisive, and what Russia is doing violates the prohibition of excess in an almost frightening manner.

### 3.1. Ukraine Endangers Russian Security Interests?

Russia did, however, claim that the situation in or through Ukraine had become dangerous for Russian security. It is already questionable whether a political insecurity of a State entitles it to attack another State with military force. The attack on the security of a State must be at hand or at least imminent. Russia by invoking its endangered security invokes talks between Ukraine and the Western Alliance NATO, which have been started years ago and which have not yet produced any concrete result at present and were not to produce any results in the imminent future. Whatever was and is being, in the past, Russia, with view to its own security situation, has always insisted that Ukraine should not become a member of NATO regardless how this membership was supposed to look like. At the time of the Russian attack in February 2022, Ukraine's NATO membership might have represented a way of thinking in the relationship between the Western defence alliance and Ukraine. It may be that there were negotiations between NATO and Ukraine on its accession or a sort of association. However, nothing is known about these having reached a concrete stage of outcome. Moreover, it should be remembered in this context that it is part of Ukraine's political independence in foreign policies (cf. Art. 2 para. 4 of the Charter) to decide whether and with whom the country concludes treaties or enters into alliances. If Russia sees itself threatened by NATO on its immediate borders, this is a point of contention that the Russian Federation must clarify with NATO with regard to security guarantees, as needed or desired by Russia. However, in view of the possibility of collective security according to Art. 1 No. 1 of the NATO Charter, Russia cannot prohibit NATO from holding talks with States that are being considered as members of the defence alliance even if they are neighbouring Russia. We may note that Russia's threat situation with regard to Ukraine's potential membership in NATO was not in actual question when Russia attacked. The same considerations apply to Ukraine's relationship with the European Union. Here, too, on the day of the invasion of Russian troops into Ukraine, Ukraine had not even been considered as a formal candidate for membership more immediately in terms of time. The fact that this has now changed after the invasion and the vote within European Parliament cannot retro-actively justify Russia's attack.

### 3.2. Collective Self-Defence and Emergency Aid for Luhansk and Donbas

Self-defence according to Art. 51 sentence 1 of the Charter can also take the form of collective self-defence. According to customary international law, it is also conceivable and permissible in the form of emergency aid.[73] In this respect and again, the situation under international law does not differ significantly from the legal situation which the member States of the United Nations have in their national legal systems. If a third State is unlawfully attacked by another State, a State may rush to the

[73] *Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margins 765 et seqq.*

aid of the attacked State and assist it in the necessary defence against the attacker, if the attacked State requests such assistance, in whatever form. It may be questionable whether the helper State may also intervene uninvited in a bilateral conflict (imposed emergency aid). We do not need to examine this in more detail here, as we will see in a moment, but we can say that imposed emergency aid to third parties does not pose a problem under international law if the aid also constitutes its own self-defence of the helper-State at the same time. This is where the "People's Republics of Luhansk and Donbas" come into play. Under international law, however, some not insignificant peculiarities apply, which result from Art. 2 No. 4 of the Charter. Undeniably, the territories of Luhansk and Donbas belonged (and still belong) to the territory of Ukraine. It is also indisputable that the de facto regimes there have been trying for years to break away from Ukraine's central government in Kiev, and have met with fierce resistance from that central government. For years, regular Ukrainian troops have been fighting armed troops of these de-facto regimes - despite the already mentioned Minsk Agreement, which was not implemented in this respect. According to serious and therefore credible reports, the Russian Federation supports the de facto regimes in both areas militarily, and possibly in other ways. Russian troops are said to be stationed there. The clashes have fluctuated in ferocity over the years, coming to some kind of standstill at best, only to flare up again. In any case, the central government in Kiev has only limited ability to enforce Ukrainian State power in the disputed areas. Nevertheless, if Luhansk and Donbas are going after their independence under international law, at the moment it can be said from an international law standpoint that this secessionist territories have not yet reached their goals.[74] It might be discussed whether the secession proceeding is only accomplished if the central government in Kiev releases these territories into independence under constitutional and international law, either on the basis of an agreement or by a unilateral act of the central government. This has not yet happened. However, as long as the de facto regimes in Luhansk and Donbas are still engaged in military struggle with the central government, the secession process is still open. By the way, it is unknown whether the population of those territories agree to such secessions. Democratically organised plebiscites have not yet taken place in the territories concerned. And again, the unilateral (diplomatic) recognition of both territories in recent days by the Russian government does not change anything under international law but was nothing less than the well-orchestrated attempt to create a pseudo-legal ground for both puppet regimes in Donbas and Luhansk to beg the Russian Federation for emergency help in their fight against the Ukrainian government.[75]

### 3.3. Nationalisation of Foreign Nationals

The finding that the East-Ukrainian territories of Luhansk and Donbas are still in an uncompleted session proceeding and have not become independent from Ukraine, is not changed by the fact that the Russian Federation offered the inhabitants of Luhansk and Donbas to grant them citizenship of the Russian Federation and that part of the population, if they still had Russian citizenship anyway,

[74] *Stefanie **Schmahl**, Völker- und europarechtliche Implikationen des Angriffskriegs auf die Ukraine, NJW 2022, p. 969 et seq.*
[75] *Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004 margins 155 and 156; Stefanie **Schmahl**, Völker- und europarechtliche Implikationen des Angriffskriegs auf die Ukraine, NJW 2022, p.969 in particular p. 970*


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accepted this offer. The offer itself can be questioned as interference in Ukraine's internal affairs and political independence and is being considered as an internationally rather unfriendly act. "Stealing" someone's citizens is, under international law, not acceptable.[76] In any case, the collective naturalisation of entire populations of a foreign State, even if they had given up their Ukrainian citizenship (which is not known), is a highly remarkable and questionable process under international law. The same applies to the population of the annexed Crimea. In no case, however, does this create a reason under international law to use force against the State to which these people formerly belonged (and perhaps still do). For apart from the deplorable fact that the people still living in Luhansk or Donbas are affected by the ongoing fighting between the central government of Ukraine and the local de facto regimes, according to the known State of affairs, the central government in Kiev has not turned against these population groups, nor has it attacked them in the sense of Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948[77].

### 3.4. Recognition of the "People's Republics" by the Russian Federation

The support given to the de facto regimes in Luhansk and Donbas to date already constitutes interference by the Russian Federation in Ukraine's internal affairs. Shortly before the attack on Ukraine, Moscow has now "recognised these regimes under international law", but no one else has either. Under international law, this process can be seen as an increase in interference in Ukraine's internal affairs. Irrespective of this, this recognition had only one purpose, namely to create the conditions for the Russian Federation to invoke Art. 51 of the Charter for the attack on Ukraine, which had not yet been carried out at the time but was already planned. This is because the recognition of the de facto regime was obviously linked to Russia's pledges of support to them, which the Russian side would like to have qualified as collective self-defence within the meaning of Art. 51, Sentence 1 of the Charter or as a request by two States for emergency assistance against attacks by Ukraine. However, this "trick" does not work. A unilateral recognition of a State does not create a new independent and sovereign State. The formation of a new State is a complex process under international law that can accompany or conclude a recognition. However, recognition is not an act of creation. Should the seceding de facto regimes in Luhansk and Donbas have asked the Russian Federation for alliance assistance in the sense of collective self-defence according to Art. 51, Sentence 1 of the Charter or for emergency assistance in their secessionist struggle, this request would be ineffective under customary international law. If the alliance assistance or emergency assistance is provided, as happened with the Russian Federation's attack on Ukraine, this type of assistance would remain interference in Ukraine's internal affairs and thus contrary to international law.[78]

[76] Karl **Doehring**, *Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margin 72*
[77] *UNTS Vol. 78 p. 277*
[78] *See Friedrich* **Berber**, *Lehrbuch des Völkerrechts, I st Vol.: Allgemeines Friedensrecht, 2nd ed., München 1975, p. 237 et seqq.; Karl* **Doehring**, *Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margins 153 et seqq.; Rudolf* **Bindschedler**, *Annexation, in: Rudolf Bernhardt/Peter Macalister-Smith (ed.), Encyclopedia of Public International Law, Vol. I, Oxford 1992, p. 1717*

## IV. PROPORTIONALITY

As in national law, so under Art. 51 of the Charter, all self-defence and emergency assistance is bound by the principle of proportionality. This principle is not only integral part of the right to self-defence under the Charter but rather a legal element, which, according to customary international law, cannot be thought away without international law losing its ground of validity. The State making use of Art. 51 of the Charter may only take those measures which are necessary to restore the disturbed State of peace. Art. 51 of the Statute is not a "carte blanche" for total war. It is precisely the experience gained with the "total war" of the fascist German Reich in many parts of Europe, including the Russian Federation and Ukraine, which constitutes the first sentence of Art. 51 of the Charter, that compels the parties to the dispute to be moderate in their use of force. The dispute between Ukraine and the Russian Federation relates to geographically manageable areas of Ukraine in its southern east. The Russian Federation, however, has attacked the south (Mariupol) as well as Kharkov, which is located rather to the northeast of Ukraine. Russian troops had moved towards Kiev. Already geographically, Russia's "special operation" is coming apart at the seams. To the north of Ukraine lies Belarus, which by all accounts has no quarrel with Ukraine, but as a result of its own domestic instability is becoming increasingly dependent on Moscow. According to available information, Minsk is making Belarussian territory available to Russian troops, so that Russian troops can also attack northern Ukraine from there. Indeed, attacking a country from three sides with a superior military force of all kinds leaves little thought of proportionality. However, there is something more: Since the Russian president has publicly Stated that the aim of the "Russian special operation" is the denazification of the leadership in Kiev (and probably in other parts of Ukraine as well), the prohibition of excess according to Art. 51, Sentence 1 of the Charter has been completely lost from Russian view. The Russian Federation wants to completely defeat the Republic of Ukraine in order to install (at best) a "de-nazified" leadership there. This is excessive in terms of international law and has only one precedent in the recent history of international law, namely the assumption of supreme governmental power in Germany after its defeat on 8 May 1945. The Allies had every reason to do this at the time. It was not only the unimaginable dimensions of the crime organised by the Nazis throughout Europe, but also the justified assumption that the German State apparatus was so contaminated by the NSDAP that a completely new beginning in Germany was imperative. It is the unmasking Russian propaganda to put a democratically elected State leadership in Ukraine on the same level as the German regime under Adolf Hitler. One may question the constitutionality of the removal of former President Victor Yanukovych, who was ultimately chased away to Russia. However, this is first and foremost an internal Ukrainian matter, the solution to which must be accepted by the neighbouring State of Russia, whatever the outcome is. However, after several elections have taken place in Ukraine since 2014, which were, as far as we know, democratic according to the OSCE standards, it represents simply a pretext for interference if Russia abuses the Maidan events of 2014 to put itself in the position of a far less democratic censor.


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## V. HUMANITARIAN INTERVENTION?

The same considerations apply if one tries to interpret the explanations of the Russian leadership as meaning that it is intervening in Ukraine for humanitarian reasons in order to prevent further genocide in Luhansk and Donbas. Whether so-called humanitarian intervention provides a suitable and viable justification for a violent attack on another State is disputed under international law[79]. States invoke Humanitarian Intervention, especially when the United Nations Security Council fails to act and it involves the most serious human rights violations, especially when it involves the prevention of genocide. This is what President Putin was referring to. The Russian Federation showed what to make of this reference when it came to the hearing before the International Court of Justice in The Hague, to which Ukraine had referred the matter precisely under the Genocide Convention. Had the prevention of further genocide (against whom?) been the Russian reason for the attack, the oral proceedings before the International Court of Justice would have provided the best opportunity and no better forum to hold this mirror up to the plaintiff Ukraine. Russia did not appear and it is therefore in the eye of impartial observers to assess this absence in the light of the allegations made that Ukraine's armed forces committed genocide in the eastern territories of Ukraine. But even if humanitarian intervention is permissible under international law, it would be bound by the prohibition of excess and be only suitable for solving the humanitarian problem. Territorially, it would thus be limited to the areas of Luhansk and Donbas. However, by attacking the entire rest of Ukraine, of which the Russian Federation is well aware that it is completely inferior militarily, the humanitarian intervention also becomes excessive and, at least from this point of view, illegal under international law.

In addition, it should be noted that the right of self-defence under Art. 51 of the Charter is a limited one in that it may only be exercised until the Security Council, for its part, has taken the necessary measures. Therefore, the member of the United Nations exercising the right of self-defence must immediately inform the Security Council (Art. 51, second sentence of the Charter). Even after days of

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[79] *Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., München 2004, margins 1008 et seqq., in particular margins 1013 et seqq.; see further a selection of literature: Heike **Krieger**, Das Konzept der Internationalen Schutzverantwortung, in: Internationale Sicherheitspolitik (= Informationen zur politischen Bildung), 2015, p. 70 – 73; Nasim **Aghayeo**, Humanitäre Intervention und Völkerrecht – Der Einsatz der NATO im Kosovo, Berlin 2007; Gisela **Edelbauer**, Rechtsgrundlagen der humanitären Intervention unter besonderer Berücksichtigung des Kosovo-Konflikts, Neubiberg 2005; Jeff L. **Holzgrefe**/Robert O. **Keohane** (ed.), Humanitarian Intervention. Ethical, Legal, and Political Dilemmas, Cambridge and others 2003; **International Commission on Intervention and State Sovereignty** (ed.), The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty. International Research Center, Ottawa 2001; Julian **Katz**, Kriegslegitimation in der Frühen Neuzeit. Intervention und Sicherheit während des anglo-spanischen Krieges (1585-1604), Veröffentlichungen des Deutschen Historischen Instituts London 86, Berlin 2021; Fabian **Klose**, „In the Cause of Humanity". Eine Geschichte der humanitären Intervention im langen 19. Jahrhundert, Göttingen 2019; Rajan **Menon**, The Concept of Humanitarian Intervention, New York 2016; Reinhard **Merkel** (ed.), Der Kosovo-Krieg und das Völkerrecht, Frankfurt am Main 2000; Klaus **Peters**, Widerstandsrecht und humanitäre Intervention. Osnabrücker rechtswissenschaftliche Abhandlungen Vol. 61, Köln and others 2005; Christian **Stetter**, Gewaltanwendung unter und neben der UN-Charta, Berlin 2007; David **Trim**, Humanitarian Intervention, in: Hew Strachan/Sibylle Scheipers (ed.), The Changing Character of War, Cambridge 2011, p. 151-166; Peter **Valek**, Is Humanitarian Intervention Compatible with U.N. Charter?, Michigan Journal of International Law Vol. 26 (2004/2005), p. 1223-1255; Thomas G. **Weiss**, Humanitarian Intervention. Ideas in Action, Cambridge and others 2007; Helfried **Münkler**/Karsten **Malowitz** (ed.), Humanitäre Intervention. Ein Instrument außenpolitischer Konfliktbearbeitung. Grundlagen und Diskussion, Heidelberg 2009; Matthias **Pape**, Humanitäre Intervention. Zur Bedeutung der Menschenrechte in den Vereinten Nationen, Baden-Baden 1997; Jürgen **Bartl**, Die humanitäre Intervention durch den Sicherheitsrat der Vereinten Nationen im „Failed State". Das Beispiel Somalia, Schriften zum Staats- und Völkerrecht Vol. 82, Frankfurt am Main 1999; Véronique **Zanetti**, Krieg, humanitäre Intervention und Pazifismus, in: Ralf Stoecker (ed.), Handbuch Angewandte Ethik, Stuttgart/Weimar 2011, p. 373-381; Dieter **Witschen**, Humanitäre Intervention – eine supererogatorische Praxis?, Zeitschrift für praktische Philosophie Vol. 4 (2017), p. 169 - 190*

aggression, this has not happened in case of Ukraine. That the attacked Ukraine has referred the conflict situation to the Security Council does not change anything about the Russian Federation's obligation to report. This is because the point is that the Security Council learns the view from the perspective of the State that decided to intervene. According to all published media reports, it is unlikely that the Russian Federation has indicated to the Security Council that it is invading Ukraine to prevent further genocide in the Donbas and Luhansk.

Finally, there is one circumstance that should not be ignored when assessing Russia's behaviour. After the collapse of the Soviet Union, Ukraine, among others, was a nuclear weapons State, because the Soviet Red Army had left nuclear weapons on the territory of Ukraine. At times, Ukraine possessed the third largest nuclear arsenal in the world. In the so-called Budapest Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons of 5 December 1994, Ukraine handed over its nuclear weapons to Russia. In return, Russia, the USA and the United Kingdom, among others, also committed to Ukraine to respect the sovereignty and existing borders of the countries (including Belarus and Kazakhstan) in return for renouncing nuclear weapons. The memorandum refers to the Helsinki Final Act where the contracting parties including the then Soviet Union agreed on peaceful relations, their mutual respect for the sovereignty and political independence of the contracting parties and on guaranteed borders. Although the legal nature of the memorandum and its binding character are disputed it should be said nevertheless that the Russian Federation has violated its own guarantees several times in the past, this time in 2022 most blatantly.

Before turning to possible individual liability, we can State that the Russian Federation's attack on Ukraine constitutes a blatant breach of international law.

## VI. INDIVIDUAL LIABILITY AND ICC JURISDICTION

It needs no explanation why we are dealing with the question of individual criminal responsibility in the situation that has dominated Ukraine since Thursday, 24 February 2022. We primarily talk about the crime of aggression, as for all other crimes possibly or even probably committed since the Russian Federation invaded the territory of Ukraine we actually miss detailed information (see the Addendum at the end).

### 6.1. The Jurisdiction of the International Criminal Court

The question arises at the outset whether the International Criminal Court in The Hague[80] has jurisdiction to prosecute those who have been and are being liable to all crimes that have been

[80] *For its history see: Gerhard* ***Werle****/Florian* ***Jeßberger****, Völkerstrafrecht, 5th ed., Tübingen 2020, p. 22 et seqq.; Hans-Peter* ***Kaul****, Durchbruch in Rom: Der Vertrag über den Internationalen Strafgerichtshof: Vereinte Nationen Vol. 46 (1998), p. 125-130; Kai* ***Ambos****, Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht – Rechtshilfe, 5th ed. München 2018, p. 126 et seq. – critical views at the beginning see: Antje* ***Papenfuss****, Herrschaft des Rechts oder Recht des Stärkeren? Kontroversen um den Internationalen Strafgerichtshof, Internationale Politik Vol. 8 (2002), p. 33-38; Nicole* ***Deitelhoff****, Gerechtigkeit und Frieden durch den Internationalen*


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committed and are going to be committed on Ukrainian soil. The preamble and Art. 1 of the Statute are based on the expectation of the contracting parties that, after the most serious international crimes have been codified, States will see it as their very own task to set up their national legal systems in such a way that they are able to prosecute these very crimes as sustainably and efficient as possible through their own criminal law institutions. This applies in particular to the Member States of the Rome Statute, which have ratified the Rome Statute in accordance with Art. 125 paragraph 2 of the Statute and on which Art. 86 et seq. of the Statute have imposed special obligations to cooperate with the ICC. As a result, Germany created its own Criminal Code on International Crimes Code[81] of 26 February 2002[82], which entered into force on 30 June 2002, and was last amended by Art. 1 of the Act of 22 December 2016.[83]

Having this expectation and this attitude of the Rome Statute in mind, the first sentence of Art. 1 of the Rome Statute of 17 July 1998 and the 10th paragraph of the preamble thereto describe the jurisdiction of the ICC as being complementary to the national criminal jurisdiction of its member States (and non-member States[84]). The ICC may take action only if States are either incapable or unwilling to prosecute Rome Statute-offenders by their own criminal institutions. We should note that the principle of complementarity is seriously debated among scholars as a new methodology of defining the borders between national criminal jurisdiction and international criminal jurisdiction[85] but also agree that further elaboration on the discussion does not lead us to better findings. It is

*Strafgerichtshof, in: Josef Braml/Thomas Risse/Eberhard Sandschneider (eds.), Einsatz für den Frieden, Sicherheit und Entwicklung in Räumen begrenzter Staatlichkeit, München 2010, p. 287 et seqq.; Frank **Hoffmeister**/Sebastian **Knoke**, Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof – Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerrecht, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 1999, p. 785 et seqq.*

*[81] Völkerstrafgesetzbuch. See: Kai **Ambos**, Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht – Rechtshilfe, 5th ed. München 2018, p. 142; Albin **Eser**, Das Rom-Statut des Internationalen Strafgerichtshofs als Herausforderung für die nationale Strafrechtspflege, in: Christian Grafi (ed.), Festschrift für Manfred Burgstaller zum 65. Geburtstag, Wien 2004, p. 355-373, in particular p. 360-363;*

*[82] BGBl. 2002 I, p. 2254*

*[83] BGBl. 2016 I, p. 3150*

*[84] Theresa **Steinberg-Fraunhofer**, Internationaler Strafgerichtshof und Drittstaaten. Eine Untersuchung unter besonderer Berücksichtigung der Position der USA. Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel Vol. 168, Berlin 2008*

*[85] Cf. Britta Lisa **Krings**, The Principles of "Complementarity" and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?, Göttingen Journal of International Law Vol. 4 (2012), p. 737 – 763; Oscar **Solera**, Complementary Jurisdiction and International Criminal Justice, IRRC Vol. 84 (2002), p. 145 – 171; and most prominently William A. **Schabas**, "Complementarity" in Practice. Some Uncomplimentary Thoughts, Criminal Law Forum Vol. 19, p. 5-33; Victor **Tsilonis**, in: C. D. Spinellis/Nikolaos Theodorakis/Emmanouil Billis/George Papadimitrakapoulos (eds.), Europe in Crisis, Criminal Justice and the Way Forward. Essays in Honour of Nestor Courakis, Vol. II, Athens 2017 p. 1257-1303; Laurent **Lafleur**, Der Grundsatz der Komplementarität. Der Internationale Strafgerichtshof im Spannungsfeld zwischen Effektivität und Staatensouveränität, Studien zum Strafrecht vol 44, Baden-Baden 2011; Helmut **Satzger**, International and European Criminal Law, 2nd ed., München 2018, p. 245-252; Gerhard **Werle**/Florian **Jeßberger**, Völkerstrafrecht, 5th ed., Tübingen 2020, p. 141-143; Noemi **Gal-Or**, Der Internationale Gerichtshof und der Grundsatz der Komplementarität. Eine Herausforderung für die globale Zusammenarbeit, UNIKATE Vol. 47 (2015), p. 46-53; Steve **Tharakan**, Konkretisierung des Komplementaritätsprinzips des Internationalen Strafgerichtshofs, St. Galler Studien zum Internationalen Recht Vol. 39, Zürich/St. Gallen 2009; Markus **Benzig**/Morten **Bergsmo**, Some Tentative Remarks on the Relationship Between International Criminal Jurisdictions and the International Criminal Court, in: Cesare Romano/Andre Nollkaempfer/Jann A. Kleffer (eds.), International Criminal Courts and Tribunals, Oxford 2004, p. 407-416. The crisis between the ICC and African States must not be concealed in this context. The ICC's initial focus on African suspects led to considerable unrest among these member States. The crisis culminated in the prosecution of Kenyan President Uhuru Kenyatta and his Vice President William Ruto. The African Union Summit on 13 October 2015, with threats of withdrawal already in the air, called for "that sitting heads of State should not be put on trial and that the Kenyan cases should be deferred." Calm was restored in November 2015 when the ICC Assembly of States (Art. 112 of the Rome Statute) commented on the call for sitting heads of State to be exempted from jurisdiction, stating that "Kenya's calls for an exemption for sitting heads of State shall be considered by amendments to the Rome Statute" (cf. Denis **Tull**/Annette **Weber**, Afrika und der Internationale Strafgerichtshof. Vom Konflikt zur politischen Selbstbehauptung. SWP-Studie. Stiftung Wissenschaft und Politik. Deutsches Institut für Internationale Politik und Sicherheit, Berlin 2016; Romana **Schweiger**, Der Beitrag des Internationalen Strafgerichtshofs zur Stärkung nationaler Institutionen – Überlegungen anhand der ersten Ermittlungen in Afrika, Wiener Zeitschrift für kritische Afrikastudien Vol. 5 (2005), p. 67-88).*

enough to refer to Art. 17 of the Statute, which obliges the Court to examine its jurisdiction under these aspects and, if the conditions apply, also to deny its own jurisdiction. With regards to the conflict situation in Ukraine, Germany for example already went public with a press statement of the Federal Prosecutor General that his office has yet initiated investigations into Ukrainian matters. The POICC (Prosecutor's Office to the International Criminal Court) can defer its investigations in view of national investigations given that national criminal authorities have initiated such investigations in parallel to those of the POICC. However, such deferral is not mandatory for the POICC. If we think complementary international jurisdiction positively parallel investigations on both international and national level can make sense and produce better results. In order to do so the Prosecutor may, instead of deferring his investigations, request the Pre-Trial Chamber of the Court to authorise him to conduct his international investigations (Art. 18 para. 2 sentence 2 of the Statute). For lack of other information, we may assume such an authorisation, especially since it is not known whether the German (or other national) investigations have already focused on a specific individual or whether they are being conducted "against unknown persons", so to speak. Since these national investigations, including the German ones, are still at the beginning, we may further assume that they have not yet been concentrated on any certain perpetrators. Especially with such "open investigations" it makes sense that POICC also conducts parallel investigations. The exchange of results between national and international bodies is ensured by Art. 18 of the Statute.

The jurisdiction of the ICC is not only complementary, but also limited in subject matter. According to the second sentence of Art. 5 of the Statute, jurisdiction extends to genocide, crimes against humanity, war crimes and the crime of aggression. These crimes are defined in more detail by Art. 7 et seqq. of the Statute.

According to recent press releases by the Prosecutor at the ICC, Karim Khan, the ICC has evidence to suspect that war crimes have been committed in connection with the aggression of the Russian Federation on the territory of Ukraine.[86] These can be seen, for example, in the fact that on 3 March 2022 Russia bombed and then captured the power units of Zaporozhe NPP. Zaporozhe NPP is said to be one of the largest nuclear power plants in Europe. Its bombardment carried the risk of a nuclear catastrophe similar to that of Chernobyl , which at the time contaminated large parts of Europe with nuclear waste.[87] However, we may assume that is not the only crime in Karim Khan's perspective. Bombing fleeing civilians and bombing civil areas of Ukrainian cities are being constantly reported and may fulfil the requirements of war crimes under Art. 8 of the Rome Statute.

Art. 12 of the Statute contains further limitations on jurisdiction. According to Art. 12 para. 1 of the Statute, it only covers those States that are signatories or member States of the Statute. Neither

[86] *Süddeutsche Zeitung Nr. 52 of 4 March 2022, p. 6*

[87] *In connection with this attack on a Ukrainian nuclear power plant, voices have been raised in the West to dignify such attacks by the Russian Federation as an attack on NATO. That such an attack represents an alarming escalation in the conflict, but without detailed information it is too hasty to construct a NATO alliance case out of it. For as long as the reactors themselves are not attacked and damaged or destroyed, such an attack is to be assessed no differently than any other attack on a strategically important industrial facility. This seems to have been the case in the present case. The Russians did not want to destroy the reactors and thus trigger a nuclear catastrophe in Europe. They were more concerned with gaining control over nuclear power and thus gaining influence over Ukraine's energy supply.*



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Russia nor Ukraine are among them. The possibility of the UN Security Council submitting the situation in Ukraine to the Prosecutor at the ICC, thus enabling the latter to investigate (Art. 13 lit. b of the Statute), is highly unlikely in view of the majority situation in the Security Council (China and the Russian Federation have a veto right in the Security Council according to Art. 27 para. 3 of the Charter). However, the Member States of the Statute have the right under Art. 14 para. 1 of the Statute to refer to the Prosecutor at the ICC a situation in which it appears that one or more crimes within the jurisdiction of the Court have been committed. 39 States Parties have now referred the situation in Ukraine to the Prosecutor at the ICC.[88] There is another aspect confirming ICC's jurisdiction. Under the first sentence of Art. 12 para. 3 of the Statute, non-members of the Statute may recognise the jurisdiction of the ICC by depositing appropriate declarations with the Registrar of the Court. Such recognition had been given by Ukraine in view of the Maidan events from 21 November 2013 to February 2014 on 17 April 2014, then in view of the annexation of Crimea on 8 September 2015[89] and more recently again after the attack on Ukraine by the Russian Federation.

The definition of aggression in Art. 8$^{bis}$ of the Statute is based on the definition of aggression that we have already become familiar with under Art. 2 par. 4 of the Charter, so we can limit ourselves to that. However, it is in connection with the inclusion of Art. 8$^{bis}$ in the Rome Statute by the Kampala Conference of the Assembly of Member States in the run-up that the relationship of the ICC to the competences of the Security Council to decide whether there is aggression in the sense of the UN Charter was hotly disputed and that, as far as the exercise of the jurisdiction of the ICC is concerned, a compromise had to be found. This lies in a special trigger mechanism.

Art. 15$^{ter}$ para. 1 of the Statute States that the ICC's jurisdiction over aggression is no different from that over other serious crimes under the Rome Statute. Nor does the nature of the referral differ. The ICC can be referred by member States in the same way as well as *proprio motu*. In addition, however, Art. 15$^{bis}$ para. 4, first sentence, of the Statute provides that if the Prosecutor concludes that there are sufficient grounds to initiate an investigation into the crime of aggression, he must first ascertain whether the Security Council has made a determination that an act of aggression by the State concerned has occurred. To this end, the Prosecutor shall, in accordance with Art. 15$^{bis}$ para. 4, second sentence, of the Statute, inform the Secretary-General of the United Nations, submitting relevant information and documents. If the Security Council has made appropriate findings, the investigation may be commenced (Art. 15$^{bis}$ para. 7 of the Statute). If, on the other hand, no determination is made by the Security Council within six months of the date of notification to the UN Secretary-General, the Prosecutor may commence the investigation, provided that the Pre-Trial Division of the ICC authorizes the initiation of the investigation and the Security Council does not decide otherwise in accordance with Art. 16 of the Statute. It is significant that it is not a Pre-Trial Chamber of the ICC that gives the authorization, but the Pre-Trial Division of the Court, consisting of at least six judges (Art. 39 para. 1 sentence 2 of the Statute)[90].

[88] *Süddeutsche Zeitung Nr. 52 of 4 March 2022, p. 6*
[89] *Press Release by the ICC-OTP of 29 September 2015 - https://www.icc-cpi.int/Pages/item.aspx?name=pr1156*
[90] *Helmut **Satzger**, International and European Criminal Law, 2nd ed., München 2018, p. 323;*

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Actually, one does not know whether the POICC considers the crime of aggression. The published press releases from The Hague are rather vague and do only talk about "war crimes". Therefore, we do not know yet whether the POICC has triggered the mechanism as established by Art. 15$^{bis}$ of the Statute.

The trigger mechanism provided for the crime of aggression in Art. 15$^{bis}$ of the Statute makes it clear that parallel national prosecution authorities have the distinct advantage of not having to take into account the (political) supremacy of the UN Security Council. In this respect, Art. 15$^{bis}$ of the Statute clearly reinforces the complementarity of jurisdiction in favor of national prosecution of Rome Statute crimes. In the case of Germany, it should be added that the Federal Prosecutor General is a so-called political official and can be temporarily retired by the Federal Government at any time if the relationship of confidence between the Federal Prosecutor General and the Federal Ministry of Justice and Consumer Protection is permanently disturbed. The Federal Ministry of Justice and Consumer Protection is also his hierarchically superior authority, which is authorized to issue instructions. In criminal proceedings, on the other hand, the principle of legality applies, according to which the public prosecutor's office, including the Federal Prosecutor General, is obliged to intervene under criminal law if there are sufficient factual indications of a criminal offence. Against this background, it can be assumed that it has been agreed with the Federal Government that the German Prosecutor General will investigate crimes under the Rome Statute with regards to the Ukraine situation.

As a preliminary result, we can state that the ICC has jurisdiction over the events in Ukraine.[91] However, it would be naïve to assume that the investigations that have been launched will produce results soon. The crimes of Art. 5 seqq. of the Statute are already legally complex, but this complexity increases with regard to the evidence to be collected. This is also the reason for the ICC prosecutor's appeal to the Ukrainian population to closely follow the events of the war concerning them with an alert and attentive eye and to document them in order to provide his office with all possible information.

### 6.2. Exemptions from the Jurisdiction of ICC and of National Criminal Institutions: Are there Immunities?

The possibilities to avoid international or national criminal proceedings for crimes under the Rome Statute in foreign States are not that many. However, the Russian Federation itself is a safe haven of impunity for all those who have triggered and performed the aggression on Ukraine, as long as the regime will last. If other national or international criminal proceedings are nevertheless brought, those who are subject thereof will try to be exempted from any prosecution and adjudication. A theoretical possibility is that, if they are at the upper end of the fatal hierarchy of command of the Russian Federation be it on the military chain of command, be it in the civil or political hierarchy, they certainly will invoke immunity under international law.

[91] *In general, reflective Andreas **Zimmermann**, Internationaler Strafgerichtshof am Scheideweg, JZ 2022, p. 261 et seqq.*



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In the years before the end of the 19th century, most lawyers would have reacted bewildered to the question of the criminal responsibility of individuals under international law. The view on individuals in national as well as in international public law was that States exclusively had to regulate legal relations with and among their citizens and the other inhabitants of their territory (domaine réservé[92]). How they shaped those interrelations was left to their discretion. No one was entitled to interfere with these internal decisions. The 19th and early 20th centuries were still light years away from human rights, as we are used to invoking them today in almost all areas of internal and external affairs of the countries on our planet. According to the understanding of the time, international public law itself only concentrated on the legal relations between States. That the individual could be a bearer of rights and obligations under international law was outside the legal conception of the time.[93] However, this legal concept did not exclude the possibility that individuals could become point of reference for rights and obligations of States, which those States could invoke among themselves in their international interrelations. International law gave the State of origin of the individual the legal possibility of standing in front of its citizens through diplomatic or consular protection if third States treated them in an unlawful manner[94], for example expropriating them without compensation or depriving them of rights which were internationally be qualified as "minimum standard".[95] Thus, it

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*[92] .Cf. Katja S. **Ziegler**, Domaine réservé, in Anne Peters (ed.), Max-Planck-Encyclopedias of International Law, Oxford 2013; Eberhard **von Thadden**, Der vorbehaltlose Betätigungsbereich der Staaten (domaine réservé): eine völkerrechtliche Untersuchung. Abhandlungen aus dem Seminar für Völkerrecht und Diplomatie an der Universität Göttingen, Göttingen 1934; Tobias **Trautner**, Die Einmischung in innere Angelegenheiten und die Intervention als eigenständige Verbotstatbestände im Völkerrecht, Frankfurt am Main 1999; Jost **Delbrück**/Rüdiger **Wolfrum**, Völkerrecht Vol. I/3, 2nd ed., Berlin 2002, p. 804 et seqq.; Marco **Athen**, Der Tatbestand des völkerrechtlichen Interventionsverbots, Völkerrecht und Außenpolitik Vol. 85, Baden-Baden 2017, p. 165 – 232; Robert **Kolb**, Du domaine réservé. Réflexions sur la théorie de la compétence nationale, RGDIP 110 (2006), p. 597 et seqq. ; Wolfgang **Vitzthum** (ed.), Völkerrecht, 4th ed., Berlin 2007, margins 195 et seqq. ; Friedrich **Berber**, Lehrbuch des Völkerrechts, I st Vol.: Allgemeines Friedensrecht, 2nd ed., München 1975 p. 183 - 185*

*[93] Cf. Michael **Sachs**, Verfassungsrecht II – Grundrechte, Heidelberg 2017, p. 3-29; Klaus **Stern**, Das Staatsrecht der Bundesrepublik Deutschland, Vol. III/1, Allgemeine Lehren der Grundrechte, München 1988, p. 51 et seqq.; Andreas **Haratsch**, Die Geschichte der Menschenrechte, Studien zu Grund- und Menschenrechten, 5th ed., Potsdam 2020, p. 18 et seqq.; Christian **Neschwara**, Zur Entstehungsgeschichte der österreichischen Grundrechte. Vom Ur-Entwurf Eduard Sturms zum Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger 1867, Beiträge zur österreichischen Rechtsgeschichte 2014, p. 143 et seqq.; Judith **Hilker**, Grundrechte im deutschen Frühkonstitutionalismus, Schriften zur Verfassungsgeschichte vol. 73, Berlin 2005; Maximilian **Dombert**, Der Grundrechtsföderalismus der Vereinigten Staaten von Amerika. Eine Darstellung vor dem Hintergrund der Debatte um die Bindung der Mitgliedstaaten an die Grundrechte der Europäischen Union, Schriften zum öffentlichen Recht Vol. 21, Baden-Baden 2017*

*[94] ICJ Judgement of 5 February 1970 (Barcelona Traction Case)(ICJ Reports 1970, p. 34 et seqq.; Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margins 658 and 662; Alfred **Verdross**/Bruno **Simma**, Universelles Völkerrecht. Theorie und Praxis, Berlin 1984, p. 817; Friedrich **Berber**, Lehrbuch des Völkerrechts, I st Vol.: Allgemeines Friedensrecht, 2nd ed., München 1975, p. 385; Wilhelm Karl **Geck**, „Diplomatischer Schutz" in Jürgen Schlochauer et al. (eds.), Strupps Wörterbuch des Völkerrechts, 2nd ed., Heidelberg 1960, p. 379 et seqq.; Wilhelm Karl **Geck**, Der Anspruch des Staatsbürgers auf Schutz gegenüber dem Ausland nach deutschem Recht, ZaöRV 1956/1957, p. 476 et seqq.; Manfred **Dauster**, Der Anspruch des Staatsangehörigen auf Schutz gegenüber dem Ausland, Jura 1990, p. 26 et seqq.; Thomas **Jürgens**, Diplomatischer Schutz und Staatenlose, Schriften zum Völkerrecht Vol. 85, Berlin 1987; Matthias **Herdegen**, Diplomatischer Schutz und Erschöpfung von Rechtsbehelfen, in: Georg Ress/Torsten Stein (eds.), Der diplomatische Schutz im Völkerrecht und im Europarecht, Baden-Baden 1996, p. 63 et seqq.; Karl **Doehring**, Die Pflicht des Staates zur Gewährung diplomatischen Schutzes. Deutsches Recht und Rechtsvergleichung, Köln, Berlin 1959; Matthias **Ruffert**, Diplomatischer und konsularischer Schutz, in: Josef Isensee/Paul Kirchhoff (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. X: Deutschland in der Staatengemeinschaft, Heidelberg, München 2012, p. 67 et seqq.; Eckhart **Klein**, Status der deutschen Volkszugehörigen und Minderheiten im Ausland, in: Josef Isensee/Paul Kirchoff (eds.) Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. X: Deutschland in der Staatengemeinschaft, Heidelberg, München 2012, p. 225 et seqq.*

*[95] The "minimum standard" is a set of customary international law that is nowadays applied mainly in international investment law and requires the host country to treat the foreign investor fairly and equally. In any case, the standard includes the right of the foreigner to have access to the domestic legal protection of the host country like a national and that this legal protection is also effective. The extent to which the range of equal treatment for nationals extends is a question of the host country's domestic legislation; in the area of taxation, for example, it must not lead to foreign investors paying excessive taxes for the same activity in the host country's domestic market (Cf. Martins **Paparinskis**, The International Minimum Standard and Fair and Equitable Treatment, Oxford 2013; Alireza **Falsafi**, The International Minimum Standard of Treatment of Foreign Investor's Property: A Contingent Standard, Suffolk Transnational Law Review 2006-2007, p. 317 et seqq.; Alberto **Alvarez Jiménez**, Minimum Standard of Treatment of Aliens. Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case*

should ultimately come as no surprise that the diplomatic or consular protection depended on the political will of the governments, indeed it is not wrong to say that it was a means of shaping foreign policy relations. It should also come as no surprise that the States of the time often used diplomatic or consular protection of their citizens against third States only as a pretext for the stronger to show the weaker where their journey was going. Be that as it may. That sort of "gunboat politics"[96] of the past are not our topic today, although one can have the impression that this kind of muscle play on the international stage is just coming back. We must also bear in mind that the fundamental rights and freedoms that are standard equipment of almost any national constitutional order today are not that old either.[97] Additionally, fundamental rights and freedoms in the national constitutions, if the constitutions granted them at all, were more kind of ideological affirmations and highest programme sentences, which the legislator could orientate himself by, if he wanted to. The fact that citizens can invoke constitutionally guaranteed freedom and human rights in disputes with public authorities in court proceedings is a development that only really took off as the 20th century approached its midpoint.

To sum up, we come to the conclusion that until the end of the 19th century, individual liability for criminal action was not a concern of the international law in force at the time.

The turning point definitely came with First World War. This war made the international legal community not only thinking differently about aggression but also about individual liability for violations of humanitarian law in war and other war crimes. Art. 227 para. 1 of the Versailles Peace Treaty of 28 June 1919 ordered that the abdicated German Emperor Wilhelm II be tried for "a supreme offence against international morality and the sanctity of treaties" before an international tribunal whose judges were to be appointed primarily by the USA, Great Britain, Italy and Japan. The decision of this court was to be guided "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality". A trial never took place. In November 1918, Wilhelm II had found protection in the Netherlands, whose government refused to extradite the former German monarch to the Allies. The Dutch government had particular misgivings about the fact that the offences the German ex-monarch was accused of had not part been of international law at the time, when alleged crimes were

*before the International Court of Justice, Revista Academia e Institucional de la UCPR No. 84, p. 5 et seqq.; Mujeeb **Emani**, The Minimum Standards of Treatment in International Law: International Law and Evolution, South East Asia Journal of Contemporary Business, Economics and Law Vol. 24 (2021), p. 75 et seqq.). It is a completely different issue whether the person thus affected by a third State could claim the diplomatic protection domestically. In most of the countries such individuals are not entitled to legally enforce their right to diplomatic protection by domestic courts of their home country. Even less is the individual concerned legally able to enforce a certain modality of diplomatic or consular protection.*

*[96] The term refers to a demonstration of power by stronger against weaker maritime powers in imperialism in the second half of the 19th century up to the 1920s, through which in particular trade policy, but also other political interests of the stronger were to be enforced against the weaker by warships appearing off the coast of the weaker and also shelling ports and coastlines of the weaker. The German "Panther Leap" of 1911 became famous when the imperial government, in its colonial dispute with France, sent the warship SMS Panther off the coasts of Morocco, which France considered to belong to its colonial area of interest (see cf.: Anthony **Preston**/John **Major**, Send a Gunboat. The Victorian Navy and Supremacy at Sea, London 2007; Heinz **Britsche**, Kanonenbootpolitik, Berlin 1984; Jeremias **Schulthess**, Die Marokko-Show. Die zweite Marokkokrise 1911, Berlin 2011; Beatrice **Henser**, Moderne Kanonboot-Diplomatie. „Kräfteprojektion" und Konventionelle Abschreckung, in: Beatrice Henser (ed.), Den Krieg denken. Die Entwicklung der Strategie seit der Antike, Paderborn 2010, p. 321-324).*

*[97] From a philosophical point of view see: Stephan **Kirste**, Die naturrechtliche Idee überstaatlicher Menschenrechte, in: Josef Isensee/Paul Kirchhoff (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. X: Deutschland in der Staatengemeinschaft, Heidelberg, München 2012, p. 3 et seqq.*


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committed, and that the prohibition of retroactive application of criminal laws stood in the way of extradition.[98] Wilhelm II peacefully died in House Doorn[99] in the Netherlands on 4 June 1941 and was buried there in his mausoleum.[100] What is decisive and for the further development of international law is not the failure of the project to bring Wilhelm II before a court, but that the unthinkable was conceived: a toppled head of State of a country was held personally responsible under international law for what occurred in a war under his supreme command. In preparation for Art. 227 of the Treaty, the pressing question arose whether this was permissible to think under the classical understanding of the immunity of a head of State for his political actions. The Allies ultimately rejected such exemption from punishment.[101] But there was the rule of customary international law that heads of State (heads of government and certain members of governments) could not be prosecuted by foreign States as long as they were in office. Wilhelm II was no longer in office. Incidentally, it is easy to hear the view that in his particular case the treaty provisions of the peace treaty overruled any immunity provisions of customary international law. Moreover, Art. 228 of the Treaty imposed more obligations on Germany for further cooperation in (international) criminal matters. According to this article, the Allies had the right "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war". The provision was directed against Germany's political and military elite, who, in the view of the Allies, should be held accountable for the war crimes committed in and against Belgium and northern France in particular. Already during the treaty negotiations, the German side had declared that it would not cooperate with the demanded extraditions, and the Reich government maintained this position later on.[102] The German government refused to extradite the approximately 1,000 persons listed by the Allies.[103] The Allies finally relented and allowed the German Reichsgericht[104], the highest court of the German Reich, to conduct the war crimes trials.[105] The results were, as to be expected, sobering due the fact that the allied expectations had been too high, the delivered evidence sometimes poor, the allied charges too general and finally

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*[98] William A. **Schabas**, The Trial of the Kaiser, Oxford 2018, p. 266 et seqq.; Hans **Rall**, Wilhelm II. Eine Biographie, Graz – Wien – Köln 1995, p. 346 et seqq.*

*[99] See also: Christopher **Clark**, Kaiser Wilhelm II. Die Herrschaft des letzten deutschen Kaisers, München 2008; John C. G. **Röhl**, Wilhelm II., 4 volumes, München 1993-2008; Friedhild **den Toom**, Wilhelm II. in Doorn, Hilversum 2002*

*[100] Hans **Rall**, Wilhelm II. Eine Biographie, Graz – Wien- Köln 1995, p. 396 et seq.*

*[101] Best documented by William A. **Schabas**, The Trial of the Kaiser, Oxford 2018, p. 162-169*

*[102] Kurt **Freiherr von Lersner**, Die Auslieferung der deutschen „Kriegsverbrecher", in: Heinrich Schnee/Hans Dräger (ed.), Zehn Jahre Versailles, Vol. I: Der Rechtsanspruch auf Revision; Der Kampf um die Revision; Die wirtschaftlichen Folgen des Versailler Vertrages, Berlin 1929, p. 15 – 27; Gerd **Hankel**, Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg, Hamburg 2003, p. 21 et seqq.*

*[103] Gerd **Hankel**, Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg, Hamburg 2003, p. 41 et seqq. – It should be noted that the German Constitution of 11 August 1919 (RGBl. 1919, p. 1383) by Art. 178 par. 2 ruled that the provisions of the Peace Treaty signed in Versailles 28 June 1919 shall not be affected by this Constitution. State practice and constitutional law doctrine assumed that the provisions of the peace treaty took precedence over the provisions of the constitution. However, since an international treaty was not entitled to set aside constitutional rules that contradicted it, the solution to the conflict was that the constitutional provisions "rested", i.e. were inapplicable (Gerhard **Anschütz**, Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis, 14th ed., Berlin 1933 - reprinted in Bad Homburg 1968, p. 763). The peace treaty obligations to cooperate conflicted with Article 112 para. 3 of the constitution, according to which no German could be handed over to a foreign government for prosecution or punishment. This prohibition in its conflict with Art. 228 of the Peace Treaty was inapplicable (Gerd **Hankel**, Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg, Hamburg 2003, p. 51 et seq.).*

*[104] Gesetz zur Verfolgung von Kriegsverbrechen und Kriegsvergehen vom 18. Dezember 1919 (RGBl. 1919, p. 2125); Gesetz vom 24. März 1920 zur Ergänzung des Gesetzes zur Verfolgung von Kriegsverbrechen und Kriegsvergehen vom 18. Dezember 1919 (RGBl. 1920, p. 341); Gesetz vom 12. Mai 1921 zur weiteren Ergänzung des Gesetzes zur Verfolgung von Kriegsverbrechen und Kriegsvergehen vom 18. Dezember 1919 (RGBl. 1921, p. 508)*

*[105] Gerd **Hankel**, Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg, Hamburg 2003, p. 58 et seqq.*

the resistance within the German judiciary against executing "war winners' justice" simply manifest[106] Thereafter, there was a standstill at the level of international law with regard to personal liability for international crimes. However, we should not under-estimate the impact of the Leipzig Trials on the developing international criminal law and the individual accountability. What is also be noted is that the international perception of personal immunity of acting heads of State etc. did not evidently change.

Individual liability for serious crimes against international law became a topic of discussion with the defeat of the German Reich on 8 May 1945 by the Allies, who were determined to hold the leading Nazi figures criminally responsible for their misdeeds during the war. When the Quadripartite Agreement of 8 August 1945 was set up to regulate German affairs under the Allies' responsibility "for Germany as a whole", the Allies also agreed on the London Statute, which set up the Nuremberg Military Tribunal and its Statute[107]. The London Statute and the Nuremberg Court applying the principles of the Statute on "major figures of the NS Regime" – nowadays known as the "Nuremberg Principles", which included aggression as an international crime by Art. 6 of the Statute.[108] The results of the Nuremberg Military Trial are known and have become part of human history. Individual liability of those accused had been the base of their conviction; immunities under international law had not been an issue during the military trial.

Additionally, it should be noted that after 1945, the view that only States could be bearers of rights and obligations under international law and that international law could not address the individual in this way went also increasingly lost. The Universal Declaration of Human Rights of 10 December 1948[109] made a start, but was silent on how individuals could enforce their human rights under international law. In Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[110] took a major step towards legal subjectivity under international law. Art. 34 introduced the individual complaint in addition to the classic State complaint under Art. 33, and thus gave the person concerned the legal possibility of asserting his or her violated fundamental freedoms before the Human Rights Court in Strasbourg against his or her own State or against a foreign State if it is a member of the Convention. The examples can be multiplied. At the level of UN human rights protection[111], direct entitlement of the individual was established by Art. 1 of the Optional Protocol to the International Covenant on Civil and Political Rights of 19 December 1966[112], although the UN did not set up a human rights court on the European model for this purpose, but declared the Human Rights Committee to be responsible under Art. 28 et seqq. of the Covenant. Human rights were moving internationally.

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[106] *Gerd **Hankel**, Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg, Hamburg 2003, p. 518 et seqq.*
[107] *Also see the carefully composed documentary of the Nuremberg Trial and its foregoing events by Joe J. **Heydecker**/Johannes **Leeb**, Der Nürnberger Prozeß. Neue Dokumente, Erkenntnisse und Analysen, 2 volumes, Köln 1985*
[108] *Kerstin **Wolny**, Ist das Aggressionsverbrechen nach heutigem Völkerrecht strafbar? Eine Bestandsaufnahme im Lichte aktueller Kriegsdrohungen gegen den Irak, p. 48/53 et seq.*
[109] *Yearbook of the United Nations 1948-49, pp. 535-537*
[110] *which entered into force in Germany on 3 September 1953 in accordance with the announcement of 15 December 1953 (BGBl. 1954 II p. 14)*
[111] *International Covenant on Civil and Political Rights of 19 December 1966 (UNTS Vol. 999, p. 171)*
[112] *UNTS Vol. 999, p. 302*


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With rare clarity, Art. IV of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948[113] States that persons who commit genocide or any of the other crimes listed in Art. III are to be punished, whether they are governing persons, public officials or private individuals. Continuing the principles applied in the Nuremberg military trials, the Convention takes up individual responsibility. Individuals can no longer invoke immunities, regardless of their position in the chain of command. However, we shall note that the Geneva Convention on Genocide with its Art. IV was an exception.

Despite decades of efforts by the international community to create an international criminal law and thus to establish individual responsibility for international crimes, as were the subject of sentences in Nuremberg and Tokyo, the situation remained unregulated until the need for action arose with the collapse of Yugoslavia in 1991. The wars that then broke out in the Balkans in Croatia and especially in Bosnia and Herzegovina, which were accompanied by the most serious violations of international humanitarian law and, in Srebrenica, of the Genocide Convention, demanded answers under criminal law. The United Nations Security Council therefore established the International Tribunal for the Former Yugoslavia (ICTY) and provided the new international judicial institution for substance criminal law, which formed the base to prosecution and adjudication of war crimes "having been committed between 1 January 1991 and a date to be determined by the Security Council after restoration of Peace". The establishment of such an international judicial body as a sub-organ of the Security Council was unheard and unprecedented but quickly followed by the establishment of the International Rwanda Tribunal when genocide happened in this African country in a war between the Tutsi, Twa and Hutu people in the period between 7 April 1994 and 31 December 1994. Both institutions represent in general terms the turning point in a decades-long struggle for codifying crimes against "Rules in War" and resulted in the Rome Statute of 17 July 1998, which then established the ICC in The Hague.

Neither the ICTY-Rules equally applicable to the Rwanda Tribunal nor the Rome Statute of the ICC according to their wording exempt anybody from criminal liability before court. However, things are not that easy. Nor ICTY neither Rwanda tried acting top level officials in court as long as they were in official position. Slobodan Milosevic for example was a former head of Serbia when Serbia extradited him to The Hague. Same is to be said about Radovan Karadzic, the war head of State of the Republika Srpska. Ratko Mladic, the commander-in-chief of the Serb Military during the wars in Bosnia had retired. All of them were put to trial as private persons. As far as ICC has jurisdiction any sort of international immunity should not impede individual accountability. However things are not so easy. It just was the issue of the ICC conflict with African States when the ICC State Assembly in Kampala seized the concerns of the African Union about prosecuting "sitting heads of States" (and maybe other top levelled State officials) and concluded that respective amendments to the Statute should be considered. Such amendments will affect the rule of Art. 27 par. 1 of the Statute, which reads that this Statute shall apply equally to all persons, without distinction as to official capacity. In particular,

[113] *UNTS Vol. 78 p. 277*

official capacity as a Head of State or Government, as a member of the Government or of a Parliament, as an elected representative or as an officer of a Government shall not relieve a person of criminal liability under this Statute and shall not in itself constitute a ground for mitigation. As far as members of the Statute or non-members of the Statute having recognized the ICC's jurisdiction are concerned they are to be treated as if they have given up any right to immunity related to the personnel mentioned by Art. 27 para. 1 of the Statute.[114] Any amendment to the Statute takes legal effects only among its member States and those States, which recognize the Court's jurisdiction otherwise. As long as top levelled national officials held office and stay in their home country, which is not Member State of the Statute, they must not be afraid of international prosecution. Nothing to the contrary results from Art. 27 para. 2 of the Statute for these non-member States. The provision States that immunities or special rules of procedure attached to a person's official capacity under national or international law do not prevent the Court from exercising its jurisdiction over such a person. Since the Statute is a treaty under international law, the contracting parties cannot reach an agreement to the detriment of non-participating States (Art. 34 of the Vienna Convention on the Law of Treaties of 23 May 1969[115]).[116] In the interrelations between ICC and those non-member-States customary international law and its criminal exemption still take legal effect.[117] This applies in particular through immunity ratio personae to incumbent heads of State and governments, in second line to immunity ratio acta iure imperii.[118] In case of international crimes as defined under the Statute the basically unlimited immunity ratio personae may find their limits. If so, would that lead to liability

[114] *Helmut **Kreicker**, Immunität und IGH. Zur Bedeutung völkerrechtlicher Exemptionen für den Internationalen Strafgerichtshof, ZIS 2009, p. 350*
[115] *UNTS vol. 1155, p. 331*
[116] *Helmut **Kreicker**, Immunität und IGH. Zur Bedeutung völkerrechtlicher Exemptionen für den Internationalen Strafgerichtshof, ZIS 2009, p. 352*
[117] *For the various types of immunities under international law, see instead Karl **Doehring**, Völkerrecht. Ein Lehrbuch, 2nd ed., Heidelberg 2004, margin note 656 et seq.; Helmut **Satzger**, International and European Criminal Law, 2nd ed., München 2018, par. 13 margin notes 45 and 46; Gerhard **Werle**, Völkerstrafrecht, 2nd ed., Tübingen 2007, margin notes 604 et seqq. The content, scope and limits of immunities under international law are in a State of flux and are the subject of heated debate (cf. Andreas R. **Ziegler**/Stefan **Wehrenberg**, Völkerrechtliche Immunität vor Strafverfolgung in der Schweiz, 2013, p. 5 et seqq. https.//serval.unil.ch/resource/serval.BIB_DE73FDCD64DB1.P001/REF, retrieved on 6 September 2021; Michael **Bothe**, Die strafrechtliche Immunität fremder Staatsorgane, ZaöRV [Zeitschrift für ausländisches öffentliches Recht und Völkerrecht] 1971, p. 246 – 270; Ulf **Häußler**, Der Fall Pinochet: Das Völkerrecht auf dem Weg zu einem effektiven internationalen Menschenrechtsschutz, MenschenRechtsMagazin 1999, p. 96 – 105; Oliver **Dörr**, Staatliche Immunität auf dem Rückzug, AVR [Archiv des Völkerrechts] vol. 41 (2003), p. 201 – 219; Georg **Karl**, Völkerrechtliche Immunität im Bereich der Strafverfolgung schwerster Menschenrechtsverletzungen, Baden-Baden 2003; Georg **Karl**, Völkerrecht und Außenpolitik, Baden-Baden 2003; Gregor **Novak**/August **Reinisch**, Privileg und Immunität internationaler Organisationen in der Rechtsprechung österreichischer Gerichte, [Österreichische] Juristen Zeitung 2013, p. 492 – 507; Martin **Spitzer**, Inländische Gerichtsbarkeit und Immunität, [Österreichische] Juristen Zeitung 2008, p. 871 – 873; Felix **Würkert**, Historische Immunität?, AVR vol 53 (2015), p. 90 – 120; Helmut **Kreicker**, Völkerrechtliche Exemptionen. Grundlagen und Grenzen völkerrechtlicher Immunitäten und ihre Wirkungen im Strafrecht, Berlin 2007; Sebastian Senn, Immunitäten vor dem Internationalen Strafgerichtshof, Köln 2010; Anja **Höfelmeier**, Die Vollstreckungsimmunität der Staaten im Wandel des Völkerrechts, Berlin/Heidelberg 2018; Anja **Höfelmeier**, Die Vollstreckungsimmunität der Staaten im Wandel des Völkerrechts, Berlin/Heidelberg 2018; Mirjam **Baldegger**, Das Spannungsverhältnis zwischen Staatenimmunität, diplomatischer Immunität und Menschenrechten. Eine Analyse am Beispiel des Rechtsschutzes für ausgebeutetes Hauspersonal von Diplomaten, Botschaften und ständigen Missionen im Gastland Schweiz, Basel 2015. More importantly see decision of the International Court of Justice, Germany vs. Italy, decision of 3 February 2012, CIJ Recueil 2012, p. 99/122 et seqq., in particular p. 134 – 135.; Christoph **Tangermann**, Die völkerrechtliche Immunität von Staatsoberhäuptern. Grundlagen und Grenzen, Schriften zum Völkerrecht, vol. 145, Berlin 2002; Donald **Riznik**, Die Immunität <<ratio personae>> des Souveräns, Augsburger Studien zum internationalen Recht, Frankfurt am Main 2016; Bruno **Zehnder**, Immunität von Staatsoberhäuptern und der Schutz elementarer Menschenrechte: der Fall Pinochet, Dissertation Bern 2002.*
[118] *For the different types of immunity or exemption see: Helmut **Kreicker**, Völkerrechtliche Exemptionen. Grundlagen und Grenzen völkerrechtlicher Immunitäten und ihrer Wirkungen im Strafrecht, 2 volumes. Schriftenreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht, Vol. 107, Berlin 2007*


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of the leadership of the Russian Federation at least for the crime of aggression.[119] The Statement is bold because there is a lack of consolidated case law from the ICC on this.

Affirming statements on the given accountability of Russian leaders for the crime of aggression on Ukraine are daring. The ICC's jurisdiction is only complementary in its relationship to national criminal courts. Therefore, especially with regards to Ukraine, there is still room for investigations by national criminal institutions. Germany, after its accession and in fulfilment of the obligations laid down in Art. 125 of the Statute, created the Criminal Code of International Crimes[120]. This Code does not establish any exemption to the liability of individuals for crimes committed by them under the Rome Statute or under the national Criminal Code of International Crimes. Nevertheless, according to Art. 25 of the Basic Law of 23 May 1949, the German Constitution, customary international law is part of the German law of the land, precedes any law of the country and creates immediate legal rights and obligation of the inhabitants of the German territory. The customary international law rule on the exemption of heads of States from criminal prosecution by German courts is such a rule with immediate effects that all German courts have to take into account. In a decision of 28 January 2021, Germany's highest criminal court, the Federal Supreme Court of Justice, addressed the question of whether there could be an exemption from criminal prosecution in the form of functional immunity under international law.[121] The occasion for deciding that issue was a criminal proceeding against a low-ranking Afghan officer who was accused, among other things, of torturing prisoners of war in Afghanistan. After a thorough investigation into the international legal situation, the German Supreme Court of Justice came to the conclusion that there was no legal principle of international law that would grant a low-ranking officer of a foreign power immunity before German criminal courts. The court expressly did not comment on higher-ranking officers, on the level of commanders or on the highest (political) level. It is already conceivable in case that a Genocide case will be brought for the Federal Supreme Court, the Court might apply Art. IV of the Genocide Convention and also hold higher-ranking officials up to heads of State responsible for crimes against the Rome Statute. However with other exemptions as discussed it is uncertain whether the Federal Supreme Court will find its criminal jurisdiction established as far as the commanding elite in Moscow is concerned. In the event that Vladimir Putin and his regime members one day no longer hold office, the personal immunity now given to Putin as Russian Head of State (and his commanding entourage) will transpose into functional immunity, which finds its legal basis in the principle of State equality, which stipulates that no foreign State should sit in judgement on the sovereign acts of another State. It is to be hoped that the German Supreme Court will find the courage to take the position that, in view of the devastating macro-criminality of the Russian Federation, such restrictions can no longer stand.

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[119] *Helmut **Kreicker**, Immunität und IGH. Zur Bedeutung völkerrechtlicher Exemptionen für den Internationalen Strafgerichtshof ZIS 2009, p. 356*

[120] *Act of 26 June 2002 (BGBl. 2002 I, p. 2254), last amended by Art. 1 of the Act of 22 December 2016 (BGBl. 2016 I, p. 3150)*

[121] *File no. 3 StR 564/19 (NJW 2021 item 18, p. 1326 et seqq. and JZ 2021 item 14 p. 724 et seqq.); for commentaries on the judgement see further: Claus **Kreß**, NJW 2021, p. 1335; Claus **Kreß**, Fremde Staatsorgane vor deutschen Strafgerichten – Kleine Betrachtung zur deutschen Völkerstrafrechtspflege aus zwei aktuellen Anlässen, GWP – Gesellschaft Wirtschaft Politik 2-2021, p. 257-261; Gerhard **Werle**, JZ 2021, p. 732-736; Martin **Breuer**, Pinochet relaoded. Zur Entscheidung des BGH über die Immunität eines staatlichen Hoheitsträgers bei Kriegsverbrechen, VerfBlog 2021/212 -https.//verfassungsblog.de.pinochet.reloaded – viewed on 8 September 2021; Kai **Ambos**, StV 2021, p. 557 et seqq.; Stefanie **Bock**/Markus **Wagner**, Nationale Strafverfolgung von Völkerrechtsverbrechen – in kleinen Schritten weitergedacht, NJW 2020, p. 3146 et seqq.; also see: Helmut **Kreicker**, Völkerrechtliche Immunitäten und die Ahndung von Menschenrechtsverletzungen. Tendenzen zur Schwächung des nationalen Strafrechts, JR 2014, p. 298-305*

However, this is not certain. All the other inferior Russian officials, be it civilians, be it militaries face prosecution for their mal-conduct in Ukraine. However, it is naïve to believe that this expectation incites Russian soldiers and Russian civil officers who certainly will follow the military traces in order to administer conquered terrain will leave the Russian flag "en masses". They are simply not aware to what they are exposed under criminal law, be it international, be it national.

Thus the realisation is bitter: You hang the little ones, maybe you let the big ones go!


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## VII. ADDENDUM

This lecture was conceived at the end of February/beginning March 2022, and was to focus on the crime of prohibited aggression by the Russian Federation against Ukraine. The existence of this crime seemed as clear as daylight at the time. The further idea behind the restriction was that other war and international crimes are very complex offences. Without thorough and comprehensive evidence, they can hardly be presented in a serious manner. This assumption proved to be erroneous, to the abysmal horror detected in Ukrainian towns like Butsha.

Between the conception of the lecture and today, a lot has happened on the international level that is worth mentioning – with view first on international institutions and secondly and more importantly with view on what was detected recently: the genocide allegedly committed by Russian troops on Ukrainian civilians.

### 7.1. International Institutions

#### 7.1.1. The Order of the International Court of Justice of 16 March 2022[122]

On 16 March 2022, after a one-day oral hearing in which the Russian Federation did not participate, the International Court of Justice in The Hague, called upon by Ukraine, granted the Ukrainian application for provisional measures and decided (General list no. 182)[123]:

> 1. The Russian Federation shall immediately suspend the military operation that it commenced on 24 February 2022 in the territory of Ukraine.
> 2. The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it as well as any organizations and persons may be subject to its control or direction take no steps in furtherance of the military operations referred to in point (1) above.
> 3. Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Such ruling of the highest Court of the United Nations was quite unexpected. The legal basis for this order is the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. Russia and Ukraine are both State Parties to this Convention, which in its Art. IX provides that disputes between the Parties concerning the interpretation, application and implementation of the Convention shall be submitted to the International Court of Justice at the request of any of the Parties to the dispute. With its Article based on Art. IX of the Convention, Ukraine has countered Russian allegations that Ukraine is committing genocide "en masse" in the Donbas territories. This was one of many arguments used by the Russian Federation to justify its aggression against Ukraine, which began on 24 February 2022. In the proceedings before the International Court of Justice, however,

[122] *Stefanie **Schmahl**, Völker- und europarechtliche Implikationen des Angriffskriegs auf die Ukraine, NJW 2022, p. 969/p. 973 et seq.*
[123] *www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf; cf. Ronen **Steinke**, Klare Worte aus Den Haag. UN-Gericht fordert Russland zu Rückzug aus der Ukraine auf, in: Süddeutsche Zeitung no. 63 of 17 March 2022, p. 9*

the Russian Federation attempted to contest the Court's jurisdiction in the proceedings brought by arguing that in reality it had not justified its "special operation" on the basis of genocide allegedly committed by the Ukrainians in the Donbas. There was therefore no dispute within the meaning of Art. IX of the Genocide Convention. The Russian Federation completely failed in arguing in that way.

The ICJ first of all named the occurring circumstances in Ukraine a "human tragedy" (para. 17), what it is. Then the Court took notice of the non-appearance of the Russian Federation in the oral hearing and commented (para. 21): The non-appearance of a party has a negative impact on the sound administration of justice as it deprives the Court of assistance that a party could have provided to it. Nevertheless, the Court must proceed of its judicial function at any phase of the case (Arbitral Award of October 1899 [Guyana v. Venezuela], Jurisdiction of the Court, Judgement, I.C.J. Reports 2020, p. 464 para. 25; Military and Paramilitary Activities in and against Nicaragua [Nicaragua v. United States of America], Merits, Judgement, I.C.J. Reports 1986, para. 23, 27). Then the Court recalls (para. 23) "that the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures (United States Diplomatic and Consular Staff in Tehran [United States of America v. Iran], Provisional Measures. Order of 15 December 1979, I.C.J. Reports 1979, p. 13, para. 13). It emphasizes that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its decisions (cf. Arbitral Award of 3 October 1899 [Guyana v. Venezuela], Jurisdiction of the Court, Judgement, I.C.J. Reports 2020, p. 464, para. 26; Military and Paramilitary Activities in and against Nicaragua [Nicaragua v. United States of America], Merits, Judgement, I.C.J. Reports 1986, p. 23 para. 27). Should the present case extend beyond the current phase, the Russian Federation, which remains a Party to the case, will be able, if it so wishes, to appear before the Court to present its arguments (Military and Paramilitary Activities in and against Nicaragua [Nicaragua v. United States of America], Merits, Judgement, I.C.J. Reports 1986, pp. 142-143, para. 284). Thus, if Russia intended to engage in judicial obstruction through absence, this Russian tactic has failed completely. Insofar as the International Court of Justice is concerned with Russia's defence in its contestation of the Court's jurisdiction under Art. IX of the Convention, genocide was not raised by Russia as a justification for the aggression against Ukraine, the Court dealt intensively with the genocide propaganda that Russia had been cultivating for years and clearly states (para. 35) that it (= the Court) takes into account in particular any statements or documents exchanged between the Parties, as well as any exchange made in multilateral settings. In doing so, it plays special attention to the author of the statement or document, their intend or actual addressee, and their content. The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure (see Application of the Convention on the Prevention and Punishment of the Crime of Genocide [The Gambia v. Myanmar], Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 12 para. 26)." In this finding, the ICJ cites Russia's genocidal propaganda against Ukraine from 2014 until the recent events preceding the outbreak of aggression (paras. 37-42) and then states (para. 43) that "at the present stage of these proceedings, the Court is not required to ascertain whether any violations of obligations under the Genocide Convention have occurred in the context of the present dispute. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case. At the stage of making an order on a request for the indication of provisional measures, the


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Court's task is to establish whether the acts complained of by Ukraine appear to be capable of falling within the provisions of the Genocide Convention." Furthermore, the Court underlines (para. 45): "The statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention. The Court's view, the acts complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention."

As much as Ukraine in particular had hoped for these provisional measures by the ICJ, the decision was nevertheless surprising, firstly in its clarity, but secondly in its very rapid written drafting just one week after the oral hearing on 7 March 2022. What is not surprising is the reaction of the Russian Federation, which continued with its acts of aggression as if nothing had happened. This ignorance, as appalling and repulsive as it is, only shows once again the Russian Federation's disregard for international law. What role the decision of 16 March 2022 will play in the retrospective assessment of everything that happened and is still happening after 16 March 2022 remains to be seen. But its impact should not be underestimated today.

### 7.1.2. The Russian Federation and the Council of Europe

The Russian Federation suspected that the Council of Europe would not stand idly by and watch Russia's aggression against Ukraine. In this context, we must not overlook the fact that the killing of civilians constitutes war crimes at the macro-criminal level. However, at the micro-criminal level, when it comes to killed or injured Ukrainian civilians, such crimes can also constitute human rights violations. At the international level, only the International Criminal Court has jurisdiction over war crimes. However, when it comes to individual human rights violations, the European Court of Human Rights has jurisdiction, regardless of the war context.

The Russian Federation's rhetoric about its distance from the "decadent West" with its democratic and constitutional values already gave rise to fears in the months before the outbreak of violence in Ukraine that the Russian Federation would distance itself from the Council of Europe in order to preserve "true Russian values". This was compounded by recent repeated statements by former President and Prime Minister Dmitry Medvedev that Russia should consider reintroducing the death penalty for the most serious crimes. The abolition of the death penalty in the treaty area of the European Convention on Human Rights is, in my opinion, one of the greatest achievements of the Council of Europe.

On 25 February 2022, the Committee of Ministers of the Council of Europe had suspended the membership rights of the Russian Federation under the first sentence of Article 8 of the Statute of the

Council of Europe of 5 May 1949.[124] On 15 March 2022, the Russian Federation declared its withdrawal from the Council of Europe by notifying its Secretary General of its intention to withdraw in accordance with Article 7 of the Statute of the Council of Europe. The withdrawal thus declared would have taken effect, according to Art. 7 of the Statute, nine months after this notification. On 16 March 2022, the Committee of Ministers excluded the Russian Federation from the Council of Europe. This not only marked the end of a very difficult relationship between the institutions in Strasbourg and Moscow. At the same time, the Russian Federation left the European Convention on Human Rights. Consequently, on 16 March 2022, the European Court of Human Rights suspended all individual complaints against the Russian Federation pending before it under the European Convention on Human Rights until the ECtHR finally decides how to proceed with these cases. Of the approximately 70,000 individual complaints pending before the ECtHR, the "Russian" ones account for about 24%.

The complainants who saw their last hope for justice in the Strasbourg Court are now very likely to be left with nothing. Therein lies the tragedy of the events for the individuals concerned. The last judicial instance under the rule of law has been taken away from them and they will have to live with what the authoritarian Russian State grants them as "justice". The system in Moscow no longer has to fear any restrictions if it implements "Russian values".

### 7.1.3. The UN Council of Human Rights

On 7 April 2022, the United Nations General Assembly adopted a motion submitted by the UK and the US by 93 votes in favour (against 24 votes against and 58 abstentions [which do not count]) and suspended the Russian Federation's membership of the United Nations Human Rights Council, one of its sub-organs. This suspension is primarily symbolic, stating that no country that tramples on human rights itself, en masse, should "sit in judgement" over the human rights violations of other countries brought before the Human Rights Council.

[124] *Stefanie **Schmahl**, Völker- und europarechtliche Implikationen des Angriffskriegs auf die Ukraine, NJW 2022, p. 969/971 et seq.*


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## 7.2. Genocide in 2022

We have all seen in recent weeks that the Russian Federation is bombing whole regions of Ukraine to rubble and into the ground. We have also had to perceive the human misery caused by this. We have also had to see that, contrary to all international law, Russian troops have not concentrated on military targets, but have purposely also attacked and destroyed purely civilian targets in Ukraine with internationally forbidden explosives. Mariupol on the Black Sea has obviously been so badly destroyed that it will have to be rebuilt from scratch once the war will be over. Mariupol was an important Ukrainian port city but nobody is to pretend that the entire city was a legally designed shelling target. One can't get used to all this. The war crimes committed will keep both international and national law enforcement agencies busy for years to come.

Then came the withdrawal of Russian troops from the Kiev region, which the Russian Federation wanted to take but could not, thanks to Ukrainian resistance. The first pictures from the north of Kiev showed a scorched earth left behind. Disturbing enough! Then pictures from the small town of Butsha appeared on 4 April 2022, showing dead civilians on the streets, many of them with their hands tied behind their backs, some next to their bicycles, some next to their groceries. According to Ukrainian reports, but meanwhile confirmed by Western journalists, we are talking about hundreds of such victims, some of whom were lying in the street. Others were buried in makeshift mass graves. The Russian Federation thus joins the unspeakable series of genociders.

### 7.2.1. The Conditions of Genocide According to Art. 6 of the Rome Statute

After Srebrenica in the East of Bosnia and Herzegovina in July 1995 and the genocide in Rwanda, every one of us thought genocide according to Art. 6 of the Rome-Statute would never happen again. The Russian army is teaching us the opposite in 2022.[125] The Russian counter-propaganda that the Ukrainians set the gruesome scene or organised the massacre themselves is disproved, disproved by intercepted phone calls and radio transmissions, disproved by satellite images showing the bodies in the streets when the Russian military was still in control of Butsha. One must not be a forensic pathologist but whoever once was present at autopsies is able to conclude from the white skin on the victims' hands that the victims had been lying in the places where they were found for days. The Ukrainian arrangement of the bodies cynically claimed by Russia on that day of the recovery of Butsha by Ukrainian troops fell apart for objective observers that day and on the Russian leadership.

Genocide is a complex criminal offence. But its complexity does not require it to be directed against the entire Ukrainian people. It is sufficient for the offence that parts of the Ukrainian people were or are to be destroyed. With several hundred victims now known, and with an unknown number of

[125] *Ronen **Steinke**, Russlands pralle Strafakte. Machen sich russische Militärs des Völkermords und anderer Kriegsverbrechen schuldig? Wie die Ankläger des Internationalen Strafgerichtshofs ermitteln, in: Süddeutsche Zeitung Nr. 79 of 5 April 2022, p. 6; Florian **Hassel**, Berichte über weitere Massengräber nahe Kiew. In Busowa sollen Russen Dutzende Zivilisten ermordet haben, in: Süddeutsche Zeitung no. 84 of 11 April 2022, p. 7; as an immediate reaction to the news about Butsha the German Federal Government (as well as other governments in Western Europe) expelled 40 Russian diplomats (Süddeutsche Zeitung no. 79 of 5 April 2022, p. 1).*

further victims in other towns, villages and regions of Ukraine, it is no longer the question as to whether we can speak of genocide. The masses of victims speak for themselves - in Butsha alone. There are more similar crime scenes to come.

Genocide has a systematic element, but this does not go so far that one can only speak of genocide if the deed is planned and organised from the outset. Nor does it presuppose planning or organisation in the (military or civilian) hierarchy from top to bottom. The offence is also open to spontaneous genocidal actions that are not organised or planned, such as when war excesses occur in certain places, at certain times and under certain conditions of combat. In this case, it may prove problematic to attribute to upper and highest levels the acts of direct genocide on the spot and at a specific time. This problem is a problem of proof that we find again and again in our national legal systems when several individuals commit a criminal act and one of them gets into an excess of action in the course of it.

What the crime of genocide requires, however, is that the criminal act must be directed against a group of people defined according to objective characteristics and therefore distinguishable.[126] In this context, the Russian Federation's own rhetoric falls flat on its face. Part of this rhetoric is that a large number of Ukrainians (who is Ukrainian can be objectively determined on the basis of citizenship[127]) are afflicted with Nazi ideology and that the aim of the Russian "special operation" is to "weed out" these Ukrainians afflicted with "Nazi ideology", if necessary to "eliminate" them.[128] Although this is not the official language of the Kremlin, the Kremlin, through its controlled media, allows such elimination plans of individuals to be spread in Russia. Since the Kremlin otherwise keeps a tight leash on public opinion in Russia, it reflects on the leadership in Moscow when "private regime servants within media" use such inhuman language. In this context, just to add: Russia claims the competence to solely determine who belongs to the group of Ukrainians that Russia wants to consider as infected with national socialism. This is arbitrary in itself, but is obviously already being practised in Russian-controlled areas when Ukrainian officials refuse to cooperate with the Russian military or disobey its orders. National socialist in the Russian sense of the term are all those Ukrainian officials (and others beyond) who practice the defence of their fatherland. They are already being abducted, imprisoned and possibly mistreated or even "eliminated".

This raises the question of whether a group "according to political objectives" can be a group of persons protected by the offence of genocide. The question is answered differently in international law[129] because the political objectives can easily be changed and therefore the protective purpose of genocide becomes variable. The legal certainty sought in international criminal law can suffer as a result. In the end, this is not convincing. Religious groups are clearly protected by genocide. Within

[126] *Gerhard **Werle**/Florian **Jeßberger**, Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 875-882 with further references.*
[127] *ICTRwanda, judgement of 2 September 1998, para. 512; Gerhard **Werle**/Florian **Jeßberger**, Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 863*
[128] *Silke **Bigalke**, Stimmen aus der Parallelwelt. Bilder der toten Zivilisten in Butscha sieht man auch im russischen Fernsehen. Nur hören die Menschen hier, sie seien gefälscht und die Ukrainer alle Nazis. Über die Macht der Propaganda, in: Süddeutsche Zeitung Nr. 79 of 5 April 2022, p. 3*
[129] *Gerhard **Werle**/Florian **Jeßberger**, Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 888 with further references from the dogmatic discussion.*


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this group, however, there are also variations. Some may practise the religion under attack, others not and therefore "only" nominally count as part of the protected group of people. Some may practice the group's defining theology in an "orthodox" way, others may be "liberal" and "progressive". These beliefs may even lead to hostility within the religious group. But if the group is attacked, these internal differences cannot cause its overall protection to lapse. What matters in the end is the stability of the group's purpose, in the case of the Ukrainian officials in their rejection of the occupying power. Whether they belong to one or the other political party in their country in this stable stance is secondary. National legislation and acts of jurisprudence see this similarly and also extend the direction of protection to groups that the perpetrator(s) define according to arbitrary criteria.[130] Whether this will bear fruit at the level of international criminal law is uncertain, however, and remains to be seen with the further development of legal practice concerning genocide.

The objective acts under Art. 6 of the Rome Statute do not appear to be problematic. From what we can gather from the media, there have been killings of Ukrainian civilians (Art. 6 lit. a of the Statute), as well as torture, which can fulfil the characteristics of Art. 6 lit. b of the Statute. Serious physical or mental harm within the meaning of this provision also includes the reported rapes which accompanied the killings or torture.[131] The prerequisites of Art. 6 lit. c of the Statute, that destructive living conditions were imposed on the local population under Russian military administration, still appear problematic.[132] After appropriate investigations, this variant of the punishment provision may possibly apply to Mariupol or other places in Ukraine which are or will be under continuous Russian shelling.

On the subjective side of the offender, Art. 6 of the Rome Statute requires intentional commission. Art. 30 of the Statute is decisive for this. In the case of the "elimination" of factual groups, this requires an intent to destroy of whatever kind, above conditional intent and gross negligence, which must relate to the group taken into criminal view.[133]

Decisive are ascertainable objective circumstances that allow conclusions to be drawn about the inner side of the offence. In the case of Butsha, this is certainly the spatial clarity of the crime scene, which made it impossible for any Russian army member to see over the mass graves and the dead lying in the streets and over the rapes. Wiretapped conversations will again play a role in the evidence, as will the Russian counter-propaganda, which, to all appearances, has not been very cleverly staged. Genocide is never the act of an individual. Genocide has many perpetrators, instigators and accomplices. It is not necessary for every perpetrator to have the same intent to destroy.[134] Whether the legal concept of the Rome Statute on joint criminal enterprise can be made fruitful in this context is a question of fact and evidence. When the events in Ukraine come to be dealt with in Germany under international criminal law in 2022, I am sure that the German courts will draw on their experience and knowledge in dealing with National Socialist injustice in the period between 1939 and

[130] Gerhard **Werle**/Florian **Jeßberger**, *Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 889 and 890.*
[131] Gerhard **Werle**/Florian **Jeßberger**, *Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 895*
[132] Gerhard **Werle**/Florian **Jeßberger**, *Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 898-901*
[133] Gerhard **Werle**/Florian **Jeßberger**, *Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 924-931*
[134] Gerhard **Werle**/Florian **Jeßberger**, *Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 932-935*

1945. The secretary keeping the death lists in a concentration camp does not need to know exactly when and how the victims on the death list were gassed or shot. What is required to prove the crime is her awareness of being part of a comprehensive wheelwork and of contributing to it, even if the details of the atrocity did not become apparent to such an accessory to murder. A similar approach by German courts is likely to be taken with the military personnel in Butsha, whose unit has now been identified.[135]

### 7.2.2. Immunity and Art. IV of the Genocide Convention

If there is sufficient factual evidence that the Russian military committed genocidal acts within the meaning of Art. 6 of the Rome Statute in Butsha and possibly in other places, the question arises again whether there are procedural obstacles to the conceivable prosecution of the leadership of the Russian Federation. The question of immunities under international law also arises here. In particular, the question of functional immunity becomes acute, which can prevent individual perpetrators from being held accountable - no matter at which civilian or military level of the Russian Federation hierarchy they are located. This is where Article 27 of the Rome Statute comes into play. The provision stipulates that this Statute shall apply to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence (para. 1). Immunities or special procedural rules which may attach to the official capacity of a person, whether national or international law, shall not bar the Court from exercising its jurisdiction over such a person (para. 2). Since the Russian Federation is not a member State of the Rome Statute, it can be argued that Art. 27 of the Rome Statute does not apply to representatives of the Russian Federation. We have already discussed that this is an inadmissible contract under international law to the detriment of third parties. Particularly in national law, the functional immunity of the persons envisaged by Art. 27 of the Rome Statute may play a role under customary international law. We have already discussed this as well. In the case of genocide, however, functional immunity, even if it seems to prevent prosecution under customary international law, does not play a role in my view. In this respect, Art. IV of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 is decisive. Russia as well as Ukraine are signatories of this convention; the convention is binding for them. Art. IV of the Convention stipulates that persons who commit genocide or any of the other crimes listed in Art. III are to be punished, whether they are governmental persons, public officials or private individuals. Customary international law, including immunities, can be overridden by international treaty law. This is regulated by Art. IV of the Genocide Convention. By acceding to the Convention, the Russian Federation has waived once and for all any immunity for genocide perpetrators. Therefore, if it can be proven (which is certainly not that easy to prove) that the top leadership of the Russian Federation had knowledge of the genocide in Butsha and other places and did not prevent this genocide, the entire top leadership of the Russian

[135] *With view on the German court practice see Gerhard* ***Werle****/Florian* ***Jeßberger****, Völkerstrafrecht, 5th ed., Tübingen 2020, margin. 952-956 with further references.*


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Federation must face the fact that international and national courts can and hopefully will hold them criminally responsible for their involvement in the events in Butsha and other places.


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