

I. ARTYKUŁY

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THE RUSSIAN INVASION OF UKRAINE: AN ANTI-CONSTITUTIONAL MOMENT IN INTERNATIONAL LAW?¹

NAPAŚĆ ROSJI NA UKRAINĘ: MOMENT ANTYKONSTYTUCYJNY W PRAWIE MIĘDZYNARODOWYM?

The Russian invasion of Ukraine was the first open and blatant aggression against a sovereign neighbour state in Europe since 1945. Does this war have systemic significance for the legal order as a whole? The contribution singles out legal trends that relate to three fundamental principles of the current international legal order: peace, people (humanity), and the planet. My thesis is that, although Russia has breached a fundamental, even constitutional, principle of international law, namely the prohibition of inter-state military force, this breach has productively – though unintentionally – boosted, firstly, a modest reform of the UN architecture and, secondly, a further humanization of international law. A third trend is the ‘greening’ of the law surrounding war and of the legal status of the individual. These are important positive developments that go to the very heart of international law. With some optimism, the ‘Ukraine moment’ can therefore be seen not only as an anti-constitutional, but at the same time also as a constitutional moment.

Keywords: global constitutionalism; aggression; veto; armed conflict; humanization

Rosyjska inwazja na Ukrainę była pierwszą otwartą i jawną agresją przeciwko suwerennemu państwu sąsiedzkiemu w Europie od 1945 r. Czy wojna ta ma systemowe znaczenie dla całego porządku prawnego? W artykule wyróżniono trendy prawne, które odnoszą się do trzech podstawowych zasad obecnego międzynarodowego porządku prawnego: pokoju, ludzkości i planety. Moja teza jest taka, że chociaż Rosja naruszyła fundamentalną, a nawet konstytucyjną zasadę prawa międzynarodowego, a mianowicie zakaz stosowania siły w stosunkach międzypaństwowych, to naruszenie to w spo-

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sób produktywny – choć niezamierzony – pobudziło, po pierwsze, skromną reformę architektury ONZ, a po drugie, dalszą humanizację prawa międzynarodowego. Trzecim trendem jest „zazielonienie” prawa dotyczącego wojny i statusu prawnego jednostki. Są to ważne, pozytywne zmiany, które dotyczą samego serca prawa międzynarodowego. Zatem z pewnym optymizmem „moment ukraiński” można postrzegać nie tylko jako antykonstytucyjny, ale jednocześnie jako konstytucyjny.

Słowa kluczowe: globalny konstytucjonizm; inwazja; weto; konflikt zbrojny; humanizacja prawa

I. INTRODUCTION

On 24 February 2022, the German Federal Chancellor announced a *Zeitenwende* – an epochal change.² The Russian invasion of Ukraine was the first open and blatant aggression against a sovereign neighbour state in Europe since 1945. This paper analyses whether and to what extent this war has a systemic significance for the legal order as a whole.³ It does so by singling out legal trends that relate to three fundamental principles of the current international legal order: peace, people (humanity), and the planet.

The focus on a moment (constitutional or anti-constitutional) risks falling prey to the ‘crisis mode’ of international lawyering that overlooks and thus even reifies the everyday injustices in the workings of international law (Charlesworth, 2002). With due acknowledgement of this risk, an analysis of legal ruptures has the potential to bring to light injustice and to help understanding legal evolution.

My thesis is that although Russia has breached a fundamental, even constitutional, principle of international law, namely the prohibition of inter-state military force, this breach has productively – though unintentionally – boosted both a modest reform of the UN architecture (Section III) and led to a further humanization of international law (Section IV). A third trend is the ‘greening’ of the law surrounding war and of the legal status of the individual (Section V). These are important positive developments that go to the very heart of international law. With some optimism, the ‘Ukraine moment’ can therefore be seen not only as an anti-constitutional, but at the same time also as a constitutional moment.⁴

II. KEY CONCEPTS

Before explaining and assessing the constitutional significance of the Russian invasion, I need to briefly explain my analytic lens.

² Governmental statement, Olaf Scholz, special session on the war in Ukraine, German Federal Parliament, Berlin on 27 Feb. 2022.

³ On this question from a global constitutionalist perspective, see Suami (2023). See also Lange (2023, p. 27, and the literature cited in Section III.1.4).

⁴ For the ‘Ukraine moment’ in international criminal law, see Labuda (2023, p. 1096).

1. Global constitutionalism

Global constitutionalism, as an ‘-ism’, involves both a positive analysis and a normative agenda. The positive analysis describes and reconstructs some features and functions of international law – in its interplay with domestic law – as forming constitutional elements and as reflecting constitutionalist principles. The idea is that we can identify a (scattered) body of global constitutional law that governs and guides the making, interpretation, and application of all rules of international law (Peters, 2019).

The overarching fundamental objectives (purposes) of the contemporary international legal order as a whole are to safeguard peace, human flourishing, and the planet. These three objectives have been articulated and consolidated over time. For centuries, the principal (maybe the sole) objective of international law was to safeguard inter-state territorial peace. The 1945 UN Charter moved beyond this objective and espoused a strong prohibition of the use of force secured by a novel system of collective security, and additionally articulated the promotion and encouragement of ‘respect for human rights and fundamental freedoms’ as the organization’s ‘purposes and principles’.⁵ In order to implement these principles and work towards these purposes, the whole range of international legal bodies, rules, and procedures can be seen as forming two pillars: those institutions that seek to secure peace, and those institutions that protect the human being (Ratner, 2015, pp. 65 and 73).⁶ Additionally, a third objective of the international legal order has moved to the foreground more recently: safeguarding our planet.⁷ The ‘ecological’ third pillar has become indispensable, because without it, pillars one and two would break down.

What would Krzysztof Skubiszewski say about such a framing of international law in the paradigm of global constitutionalism? In the *Festschrift* for Hermann Mosler, Skubiszewski (1983) wrote an essay on the ‘Interpretation of the United Nations Charter’ in which he remarked that ‘[t]he meaning of the word “constitution” changes when transposed from the domestic to the international scene; it does not automatically carry with it the introduction of domestic patterns into the interpretation of the law of international organization’ (p. 893). I read this as a cautious acknowledgement of the relevance of constitutionalist thought in international law. Moreover, Skubiszewski did not uphold a strict separation between international and domestic law but recognized that these bodies of law interact. In a thorough study entitled ‘Elements of custom and the Hague Court’, he expressed a view that was quite

⁵ See Article 1(1) and Article 1(3) of the UN Charter. Human rights became operational only in the 1960s and 1970s, with the adoption and entry into force of the UN human rights covenants, and became an overarching paradigm that imbues all areas of international law only in the 1990s.

⁶ For the Security Council’s ‘monopoly on the use of force’ and human rights protection as two major elements of the constitutionalization of the international legal order, see Frowein (2000, pp. 432–438).

⁷ ‘Transforming our World: The 2030 Agenda for Sustainable Development’ (UN Doc. A 70/1) of 25 Sept. 2015 formulates the following as objectives: ‘people, planet, prosperity, peace, partnership’.

‘progressive’ at the time, namely that acts of state organs not directed at the external sphere, such as court decisions and parliamentary laws, can be part of state ‘practice’ which contributes to the formation of international customary law (Skubiszewski, 1971, p. 815). Finally, Skubiszewski (2007) recognized the importance of natural law, for example by arguing that ‘[n]atural law lies at the origin of at least some of the rules of *jus cogens*. The case in point is human rights: in its essential part, positive law on human rights is dictated by natural law. However, there is interaction between these two types of laws’ (p. 505).

As mentioned, the basic idea of global constitutionalism as a re-description is that certain norms of international law are – in their interaction with domestic law – so fundamental that they deserve the label global constitutional law. This body of law is often associated with the idea of *jus cogens* and with ‘positivized natural law’ (a term that seems to fit to Skubiszewski’s conception as explained above). Overall, Skubiszewski’s writings, covering the architecture of international organizations, the interplay between domestic and international law, the normative centrality of the human being, and Skubiszewski’s interest in natural law, seem to suggest that he might have been open to the idea of global constitutionalism.

2. Constitution, de-constitution, and re-constitution

From the perspective of global constitutionalism, the question arises of whether the Russian invasion of 24 February 2022 was an anti-constitutional moment. The term ‘constitutional moment’ is borrowed from Bruce Ackerman (1989, p. 545, yet without using the term), who coined it with regard to the constitutional history of the United States. By ‘constitutional moment’, Ackerman referred to extraordinary political situations in which new constitutional principles emerge without any formal legal reform and later become accepted and entrenched. This lens was applied to historical breaks in European history, and the dissolution of the socialist block in 1989 has also been qualified as such a ‘constitutional moment’ (Grothe & Schlegelmilch, 2020, p. 8). A parallel concept in international law is the concept of a ‘Grotian Moment’, named after the ‘father’ of international law, Hugo Grotius. ‘Grotian Moments’ are ‘rapid crystallisations of new rules and doctrines of customary international law’ (Sparks & Somos, 2021a, p. 179).

In particular, the Nuremberg trials of 1946 have in hindsight been characterized as a ‘Grotian Moment’, also in legal practice, for example by the Co-prosecutors at the Extraordinary Chambers in the Courts of Cambodia.⁸ In those trials, the idea of direct duties of individuals under international law, even to the extent of attracting a criminal penalty, was first spelled out clearly. The famous passage of the Nuremberg judgement seeks to veil the revolu-

⁸ Extraordinary Chambers in the Courts of Cambodia (ECCC), *Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise*, Case File No. 002/19-09-2007-ECCC/OCIJ of 31 Dec. 2008, para. 11. See also Scharf (2021, p. 199).

tionary character of its ruling, not the least to escape the accusation that the prohibition on retroactivity (*nullum crimen sine lege*) had been violated: 'It was submitted that International Law is concerned with the actions of sovereign States and provides no punishment for individuals. ... In the opinion of the Tribunal ... [t]hat International Law imposes duties and liabilities upon individuals as well as upon States *has long been recognized*. ... Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.'⁹

Such 'recognition' had before Nuremberg been scarce, but the concept of individual criminal responsibility was after Nuremberg quickly accepted.¹⁰ In the prototypical 'Grotian Moment' of 1946, the International Military Tribunal placed the individual at the centre of international law, and removed what Hersch Lauterpacht (1970) had called the 'screen of irresponsibility' between the rule of international law and the agency that should give effect to it, and would shield the perpetrators against legal liability (p. 280).

As a flipside of a constitutional moment exemplified by Nuremberg, I qualify the sudden breakdown of core norms of international law as an anti-constitutional moment. Just as a constitutional moment *constitutes* a new feature in international law, an anti-constitutional moment tears something down, it *de-constitutes* it. In addition, legal developments are probably never linear; set-backs can be followed by reforms that restore the status quo ante or even introduce new legal institutions, depending on the circumstances and political constellation. When such legal reform, after prior roll-back or erosion, concerns fundamental rules, it amounts to *re-constitution*.

This paper will show how the 'Ukraine moment' was de-constitutive and re-constitutive for different aspects of the international legal order.

III. THE FIRST PILLAR: PEACE

1. De-constitution by the Russian aggression?

Russia has violated the prohibition on the use of force, and Putin and his Troika have presumably committed the crime of aggression. These ongoing grave violations could not be prevented and have not been stopped or even contained by any international legal mechanism. At first sight, the invasion

⁹ International Military Tribunal, judgement of 1 Oct. 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg*, Germany, Part 22 (22 August 1946 to 1 October 1946), pp. 446–447 (emphasis added).

¹⁰ Article 6 of the Nuremberg Charter (Annex to the London Agreement of 8 Aug. 1945). Also UN GA res 95(I) of 11 Dec. 1946; ILC, 'Formulation of the Nürnberg Principles', Report of the International Law Commission on its Second Session, 5 June to 29 July 1950 (GAOR, 5th sess. Suppl. No. 12 (A/1316), YB ILC 1950 II, pp. 374–378 (374–375), Principle 1, with commentary para. 102. For international criminal trials before Nuremberg, even before World War I, see Bohrer & Pirker (2020).

seems to have dismantled, de-constituted or at least eroded the international regime on the use of force. However, the responses by the international community have led to a confirmation of the underlying principles ('re-constitution'), and have even given rise to some new legal developments, some of them with an arguable systemic and hence 'constitutional' significance. These responses might be flawed by double standards. 'Selective' condemnations of breaches of the international *jus ad bellum* pose an additional problem for global constitutionalism, because selectivity violates the fundamental requirement to treat like cases alike. The problem of double standards will be discussed in Section IV.3.2.

1.1. International law-talk

The Russian breaches of international law do not only concern Ukraine and a bilateral legal relationship, but presumably the international legal order as a whole. Putin declared a war not only against Ukraine but explicitly against 'the West'.¹¹ Russia also employed the language of international law to defend its course of action. President Putin, in his speech that was annexed to Russia's letter to the Security Council, relied on arguments claiming self-defence, pointed to an invitation by the 'republics' of Donetsk and Luhansk, and expressed the need to protect Russian citizens against human rights violations.¹²

In order to assess the systemic significance of the Russian conduct (including the Russian speech acts), its consequences for the value and validity of the prohibition on the use of force must be analysed. Has the prohibition of the use of force been 'killed' by the Russian invasion – or have announcements of its death have been greatly exaggerated?

1.2. Legal evolution through contestation

Already before the 24 February of 2022, the Charter prohibition of the use of military force had been breached many times, especially by great powers, with impunity. The Charter principle has therefore many times been declared to be a dead letter (Franck, 1970; but see Henkin, 1971), notably after the United States' unlawful invasion of Iraq in 2003 (Franck, 2003, p. 610; but see Wippman, 2007). But not every violation of the law, especially of international law, weakens international law. Breaches of the law, non-compliance, are a normal fact of legal life. So, the question is when, under what conditions, violations indeed lead to norm erosion and when – on the contrary – breaches, cloaked by legal justifications, confirm or maybe even strengthen the underlying rules of international law.¹³

¹¹ Putin in the ceremony on the annexation of the regions Donetsk and Luhansk on 30 Sep. 2022 (<http://en.kremlin.ru/events/president/news/69465>).

¹² Letter dated 24 Feb. 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General (UN Doc. S/2022/154 of 24 Feb. 2022).

¹³ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement of 27 June 1986, para. 186.

This question has been examined in detail in the field of international relations. That discipline has identified ‘norm contestation’ as a productive force for the development of the law. The international legal scholar Christian Marxsen (2018, pp. 32–33; Lesch & Marxsen, 2023) has further developed the concept of norm contestation to distinguish between applicatory contestation (disputes about the application of a norm), legislative contestation (violation of the law with the intention to develop the law) and finally systemic contestation which seeks to shatter the rule, or with which the violator steps outside the legal framework. Antje Wiener (2017) has called the latter form a ‘deep contestation’.

1.3. ‘Deep contestation’

The Russian claims accompanying its aggression are a ‘deep’ or ‘systemic’ contestation¹⁴ for the following reasons: Russia’s law-talk consisted of legally untenable claims which were not recognized either by States or by scholars as defensible legal arguments.¹⁵ They did not pass the ‘laugh test’ that Thomas Franck (1990, p. 55) had once established. Especially the principal claim, the assertion that Russia acts in self-defence, is off the mark, because no armed attack against Russia (which is the precondition of any self-defence), was in sight. The additional rules invoked by Russia were not established rules, but controversial ones. For example, any ‘allowance’ to assist one’s own nationals abroad by military means is no established norm but is – on the contrary – highly disputed and predominately denied.¹⁶

Russia’s sham-legal arguments to ‘justify’ its war against Ukraine turn out to be a mere cynical employment of words to veil blatantly unlawful conduct. The Russian claims have been termed as, ‘demonstrably rubbish justifications’ (Zarbiyev, 2022; see also Janik, 2022), as ‘bullshit’ in the sense of Harry G. Frankfurt (2005) or as an ‘abuse’ of the language of international law¹⁷ that has ‘distorted’ fundamental norms of international law (Cavandoli & Wilson, 2022). This is a ‘weaponization’ of international law (Jorgensen, 2022) which ultimately forms a kind of ‘Orwellian Newspeak ... a stratagem

¹⁴ Lesch & Marxsen (2023, p. 320); Hilpold (2023): Russia’s ‘message aims at the destruction of the discursive basis of international law formation on which modern understand [*sic*] of these legal orders basically rests’ (p. 423). But see, for a different understanding from the perspective of international relations, dos Reis & Grzybowski (2023): Independently of the legal correctness of the stated grounds, the Russian claims and the other states’ responses show how international law provides a shared vocabulary, thus facilitates the articulation of grievances and expectations, and therefore plays ‘a crucial part ... by providing the semantic infrastructure’ (quote from the abstract).

¹⁵ For a complete legal analysis, see Green et al. (2022).

¹⁶ ILC, ‘Draft Articles on Diplomatic Protection with commentaries thereto’, Commentary to Article 1 (comment 8), in Report of the International Law Commission on the work of its fifty-eighth session (1 May – 9 June and 3 July – 11 August 2006) (A/61/10), Yearbook of the International Law Commission Vol II Part Two, (Part 2), Chapter IV.E, pp. 27–28 (A/CN.4/SER.A/2006/Add.I).

¹⁷ Statement of the Board and the Council of the German Society of International Law (DGIR), *Völkerrechtsblog*, 24 Feb. 2022, <https://doi.org/10.17176/20220225-000935-0>

intended to use words and concepts of international peace law to justify war' (Hilpold, 2023, p. 432).

Additionally, the legal 'justification' was based on obvious factual lies. In the context of armed conflict, such lies are typical. Probably the most famous lie to cloak aggression with a veneer of lawfulness is Hitler's faked news about an attack on the broadcasting station Gleiwitz in Silesia, and his speech before the Reichstag on 'shooting back against Poland since 5.45 o'clock' on 1 September 1939.¹⁸ Also Putin's denial of the presence of Russian soldiers in Crimea in the spring of 2014 has become infamous, and the press spoke of 'little green men'.¹⁹

Because of these obvious legal and factual flaws of the argumentation, the Russian stance manifests the state's turn against the existing international legal order. Russia (implicitly) advocates an international order that deviates significantly in its basic orientation from the existing one. The Russian state seems to favour a framework in which states within Russia's sphere of influence do not enjoy a right to sovereign equality (Lesch & Marxsen, 2023, p. 32). This paradigm resembles the so-called Brezhnev Doctrine of the Cold War that the leader of the Soviet Union and Secretary General of the Central Committee of the Communist Party among other things proclaimed at a party congress in Warsaw.²⁰ *If accepted*, the new order would be a *Großraumordnung*, an order based on hegemonic spheres, in the sense of Carl Schmitt's 'Theory of Greater Space' (Lesch & Marxsen, 2023, p. 32; see also Hilpold, 2023, p. 409; Mälksoo, 2015, pp. 4, 103, 144). In that case, the aggression against Ukraine would have made history as an anti-constitutional moment in international law.²¹

1.4. Refutation in state practice and scholarship

However, such acceptance did not occur. A scholarly consensus against Russia's legal claims quickly consolidated. Notably, the universal Institut de Droit International (IDI) and several national and regional learned societies of international law issued official statements that denounced the violation of international law in clear terms.²²

¹⁸ Adolf Hitler, Speech of 1 September 1939, *Verhandlungen des Reichstags*, 4. Wahlperiode, Band 460, Stenographische Berichte 1939–1942, pp. 45–48 (47).

¹⁹ *Washington Post*, 'Transcript: Vladimir Putin's April 17 Q&A', 17 Apr. 2014. Putin himself did not say 'little green men', but mentioned local self-defence units. https://www.washingtonpost.com/world/transcript-vladimir-putins-april-17-qanda/2014/04/17/ff77b4a2-c635-11e3-8b9a-8e0977a24aeb_story.html

²⁰ Speech by First Secretary of the Soviet Union, Leonid Brezhnev, of 13 Sept. 1968, *Pravda*, Warsaw, 26 Sep. 1968; translated by Novosti, Soviet press agency (Brezhnev Doctrine – Center for Security Studies | ETH Zurich). Brezhnev also formulated it at the 5th Party Congress of the Polish United Workers' Party on 12 Nov. 1968 (German transl. in *Europa-Archiv*, 24 (1969), Folge 11, p. D256–259).

²¹ In this sense, see Hilpold (2023): 'The Russian aggression against Ukraine has become a catastrophe ... for the international order as a whole' (p. 430).

²² IDI, *Déclaration de l'Institut de droit international sur l'agression en Ukraine* of 1 Mar. 2022 (Déclaration-de-l'Institut-de-Droit-international-sur-l'agression-en-Ukraine-1-mars-2022-FR.pdf [idi-ii.org]); Statement of ASIL President Catherine Amirfar Regarding the Situation in

More important than the scholarly consensus is the fact that also the states rejected the Russian ‘legal’ argument, and condemned the invasion. In the General Assembly, the vast majority of states has deplored in the strongest terms the Russian aggression in violation of Article 2(4), and this General Assembly resolution of 12 October 2022 received 143 votes in favour (out of 193) with only five votes against.²³ A smaller majority of states also supports the sanctions.²⁴

Olivier Corten and Vaios Koutroulis (2023) have meticulously analysed the exact wording of state pronouncements in the Security Council and in the General Assembly. Their analysis of states’ reactions reveals that the Russian invasion has ‘been condemned not only in political but also in specific legal terms’ (p. 1014).²⁵ Corten and Koutroulis therefore conclude that ‘the *jus contra bellum* regime has been confirmed by a general *opinio juris* representing the international community as a whole’ (p. 1021).

A caveat is that the international community’s condemnation of Russia’s conduct was only partly backed up by sanctions. The EU, the United States of America, and many democratic states ranging from Canada to Australia, New Zealand, and Japan have been upholding travel bans and financial and economic sanctions, while states like China, India, Israel, and many African states have not joined these measures.²⁶ In conclusion, the Russian attempt to overturn the international constitutional principle of non-use of force has so far not been accepted by the international community. However, the primarily ‘Western’ sanctions are undermined by the continuation and even increase of trade and investment flows between Russia and important states with large markets, such as China, India, and many Central Asian states (Lawniczak, 2023; Schott, 2023). It is therefore far from certain that the sanctions will have any coercive effect (a sceptical assessment by van Bergeijk, 2022).

Ukraine of 23 Feb. 2022 (Microsoft Word – Intervention in Ukraine 2-23-2022.docx [asil.org]); Statement of the German DGIR (note 17); European Society of International Law (ESIL), ‘Statement by the President and the Board of the European Society of International Law on the Russian Aggression against Ukraine’, 24 Feb. 2022, esil-sedi.eu/statement-by-the-president-and-the-board-of-the-european-society-of-international-law-on-the-russian-aggression-against-ukraine/; International Law Association (ILA), Statements by members of the ILA Committee on the Use of Force, Just Security of 4 Mar. 2022; ILA (French Branch), espoused by the Société Française de Droit International (SFDI; Résolution BF ENG [sfdi.org]).

²³ UN GA, ‘Aggression against Ukraine’ of 1 Mar. 2022 (ES 11/1) (votes: 141 – 5 – 35); UN GA, ‘Territorial integrity of Ukraine: Defending the principles of the Charter of the United Nations’ of 12 Oct. 2022 (ES 11/4) (votes: 143 – 5 – 35 and 10 non-participation). The five negative votes were from Russia itself and states that have a record of non-compliance with international law: Belarus which is anyway complicit; Syria, which is in military terms completely dependent on Russia, North Korea, and (on 1 Mar. 2022) Eritrea viz. (on 12 Oct. 2022) Nicaragua.

²⁴ UN GA, ‘Furtherance of remedy and reparation for aggression against Ukraine’ of 14 Nov. 2022 (ES 11/5) (votes: 94 – 17 – 73).

²⁵ Only two states (Russia and Syria) were in favour of the extensive interpretation of Article 51 as expressed in the Russian Federation letter to the Security Council of 24 Feb. 2022 (Corten & Koutroulis, 2023, p. 1019).

²⁶ https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en

2. Re-constitution: A reform to deter the use of the veto

On the other side, the Russian aggression pushed long-standing efforts to curtail the veto towards a procedural reform. I would like to qualify this as kind of a ‘re-constitution’, as a (modest) strengthening of the pillar of the law on the preservation of peace.²⁷

2.1. The ‘veto initiative’ of 2022

On 26 April 2022, two months after the Russian invasion of Ukraine, the UN General Assembly adopted the so-called ‘veto initiative’.²⁸ Under GA Resolution 262/76, the President of the General Assembly must ‘convene a formal meeting of the General Assembly within 10 working days’.²⁹ This important resolution establishes a standing mandate to publicly discuss and criticize each and every veto in the General Assembly: by all member states. The procedure was triggered in June 2022 with a General Assembly debate on the vetoes cast by Russia and China on a draft Security Council resolution seeking to condemn intercontinental ballistic missile launches and nuclear tests by the Democratic People’s Republic of Korea (DPRK), in violation of multiple prior Security Council resolutions.³⁰ In the General Assembly debate,³¹ numerous states from all regions of the world made explicit and very positive statements on the new procedure. At least 11 states characterized the debate as ‘historic’, as a ‘milestone’, or as a landmark.³² Sixteen states view the new mechanism as a way to enhance the transparency and accountability of the Security Council.³³ Others saw an improvement of effectiveness or efficiency of the Council.³⁴ Especially Liechtenstein expressed its hope ‘that the prospect of accountability to the Gen-

²⁷ For the concept of re-constitution, see above Section II.2. Section III.2 contains passages from Peters (2023).

²⁸ UN GA Res 76/262, ‘Standing mandate for a General Assembly debate when a veto is cast in the Security Council’ (UN Doc. A/RES/76/262) of 26 Apr. 2022, adopted by consensus.

²⁹ UN GA Res 76/262, para. 1: ‘Decides that the President of the General Assembly shall convene a formal meeting of the General Assembly within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast, provided that the Assembly does not meet in an emergency special session on the same situation.’

³⁰ Draft resolution of the Security Council proposed by the US on 26 May 2022 (UN Doc. S/2022/431); vetoes by Russia and China (UN SC, 9048th meeting, 26 May 2022, S/PV.9048, 3).

³¹ Agenda item 124 (in three parts): UN GA, 77th Plenary Meeting, 8 June 2022, 10 a.m. (UN Doc. A/76/PV.77, 1–29); 78th Plenary Meeting, 8 June 2022, 3 p.m. (UN Doc. A/76/PV.78, 10–27); UN GA 81st Plenary Meeting, 10 June 2022, 10 a.m. (UN Doc. A/76/PV.81, 11–18).

³² Denmark (PV.77, 9); USA (PV.77, 14); Costa Rica (PV.77, 18); Turkey (PV.77, 19); Indonesia (PV.77, 23); Switzerland (PV.77, 26); Poland (PV.77, 27); Kuwait (PV.78, 14); Estonia (PV.78, 19); Peru (PV.78, 23); Mexico (UN Doc. A/76/PV.79, 10); Hungary (UN Doc. A/76/PV.81, 16).

³³ Denmark (PV.77, 9); Liechtenstein (PV.77, 11); Ecuador (PV.77, 13); Ireland (PV.77, 17); Mexico (PV.77, 18–19); Singapore (PV.77, 22 and A/76/PV.79, 11); Indonesia (PV.77, 23); Australia (PV.77, 24); Kuwait (PV.78, 14); Germany (PV.78, 16); Slovenia (PV.78, 19); Peru (PV.78, 23); Portugal (UN Doc. A/76/PV.79, 7); South Africa (UN Doc. A/76/PV.79, 19); Uruguay (UN Doc. A/76/PV.81, 11); Chile (UN Doc. A/76/PV.81, 13).

³⁴ Singapore (PV.77, 22); Poland (PV.77, 27).

eral Assembly will lead to more Security Council action and fewer vetoes being cast.³⁵ Several states welcomed the empowerment and the ‘vital’ role of the General Assembly.³⁶ The state using a veto would no longer have ‘the last word’³⁷ but the General Assembly could step in and assume a useful function.³⁸ GA Res 262/76 (2022) marks, according to Uruguay, ‘a turning point in the relationship between the Council and the Assembly’.³⁹ Other states pointed out that the new mechanism serves the process of upholding, strengthening or improving the multilateral system.⁴⁰ Only Syria criticized the new standing debate in the General Assembly, deploring a ‘political polarization’.⁴¹

2.2. Legal qualification

The veto initiative was implemented without any formal amendment of the UN Charter. Was it an admissible evolutive interpretation of the Charter? And how would Skubiszewski have qualified this legal development?

As a matter of principle, the UN Charter, formally a treaty, may be interpreted (and re-interpreted) by ‘taking into account’ any ‘subsequent agreement between the parties regarding the interpretation of the treaty’ (Article 31(3) lit. a) of the Vienna Convention on the Law of Treaties [VCLT]) or by taking into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ (Article 31(3) lit. b) of the VCLT).

Although Skubiszewski had cautioned against the constitutional paradigm, he also wrote in 1983 ‘that, it cannot be denied that the constitutional nature of the treaty [the UN Charter] has an influence on its interpretation’ (p. 893). The constitutional style of interpretation is normally said to be slightly more dynamic, with constitutions being a ‘living instrument’, to borrow the famous qualification of the European Convention of Human Rights (ECHR) by the Strasbourg Court (ECtHR)⁴² that is reminiscent of the US Supreme Court’s approach to the US American Constitution in the first half of the twentieth century.⁴³ However, Skubiszewski (1983) was careful not to confuse dynamic

³⁵ UN Doc. A/76/PV.79, p. 15.

³⁶ Liechtenstein (PV.77, 11); Ireland (PV.77, 17); Turkey (PV.77, 19); Lithuania (UN Doc. A/76/PV.81, 12).

³⁷ Liechtenstein (PV.77, 11); Ecuador (PV.77, 13).

³⁸ Austria (PV.77, 21); Switzerland (PV.77, 26); Italy (UN Doc. A/76/PV.79, 22); Ecuador (UN Doc. A/76/PV.79, 7); Malaysia (UN Doc. A/76/PV.79, 9); Slovenia (UN Doc. A/76/PV.79, 23); El Salvador (UN Doc. A/76/PV.81, 17).

³⁹ Uruguay (UN Doc. A/76/PV.81, 11).

⁴⁰ EU (PV.77, 8); Albania (PV.77, 12); Singapore (PV.77, 22); Poland (PV.77, 27); Ukraine (UN Doc. A/76/PV.81, 15); El Salvador (UN Doc. A/76/PV.81, 17).

⁴¹ Syria (PV.77, 28).

⁴² ECtHR, *Tyrer v. the United Kingdom*, Judgement of 25 Apr. 1978 (App. no. 5856/72), para. 31: ‘the Convention is a living instrument which ... must be interpreted in the light of present-day conditions.’

⁴³ US S.Ct., *Missouri v. Holland*, 252 U.S. 416, 433 (1920): The authors of the Constitution of the United States ‘called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.’

interpretation with amendment: ‘Obviously, the perception of the Charter as a Constitution does not entail the power to extend, alter or disregard its provisions under the guise of interpretation’ (p. 893). Resolutions such as the veto initiative may only, according to Skubiszewski, amount to an interpretative agreement (in the sense of Article 31(1) lit. a) of the VCLT), if all member states have expressed their agreement (p. 899). In contrast, ‘practice by only some of the Member States, even if expressed through a U.N. organ in a valid resolution, is nothing more than practice of those States and of the organ concerned. It is not equivalent to subsequent conduct of the parties’ (p. 896). This view is quite ‘sovereigntist’. Other scholars have argued that ‘recourse to the practice of international organizations now stands on an independent legal basis’ (Lauterpacht, 1976, p. 460). That ‘progressive’ view can rely on the growing significance of organizational practice both for the formation and identification of international law.⁴⁴

Still, the International Court of Justice (ICJ) or ‘the Court’ shies away from qualifying the practice of the organs of an international organization – here the UN General Assembly as an organ of the United Nations – as law-generative. According to the Court, the practice of the organs of an organization (without the support of the member states) may (only) count as an indicator for the proper interpretation especially of the organization’s founding treaty.⁴⁵ But the practice of the organs, such as the General Assembly, does not amount to a ‘subsequent agreement’ or ‘subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties’, says the Court.⁴⁶ If this reasoning is accepted, the veto initiative cannot be qualified as a tacit Charter amendment, but was ‘only’ an interesting dynamic interpretation of the Charter.

2.3. Objectives

The new procedural obligation to hold a General Assembly resolution goes beyond past practice. Members of the Security Council previously used to explain their vetoes in a public meeting of the Council. The new mechanism

⁴⁴ Article 2(1) j) of the Vienna Convention on the Law of International Organizations 1986: “rules of the organization” means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and *established practice of the organization*’ (emphasis added); ILC, Draft conclusions on identification of customary international law [2018], Conclusion 4(2): ‘In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law’ (UN Doc. A/73/10, 117). ILC, Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Special Rapporteur Georg Nolte (UN Doc. A/CN.4/683, 7 Apr. 2015), paras. 49 and 51.

⁴⁵ ICJ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgement of 31 Mar. 2014, ICJ Reports 2014, 226, para. 46.

⁴⁶ For the practice of the Whaling commission, *mutatis mutandis*, see ICJ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgement of 31 Mar. 2014, ICJ Reports 2014, 226, para. 83.

was therefore criticized as being duplicative and superfluous.⁴⁷ However, the novel idea of the veto initiative is that this explanation now must be repeated in the General Assembly, in front of all UN member states, which also have the right to take the floor. Importantly, the purely procedural move under GA Res 262/76 (2022) does not address the substance of the veto competence and it also does not address the root cause of the discomfort with the veto, namely that such a special privilege for five states (including two European middle powers) does not reflect contemporary geo-political realities. Unsurprisingly, emerging states such as Brazil and India have voiced some scepticism about the new procedure.⁴⁸ Russia, not without merit, pointed out that the veto remains a necessary device to prevent the adoption of resolutions on military action without the support of states that are willing and able to actually deploy military action.⁴⁹ Without such support, these decisions would be mere paper tigers and would destroy the authority of the Security Council. Therefore, the question remains which normative and factual power lies in such procedures. The twin objectives of the veto initiative are to deter the use of the veto and to create accountability. Deterrence might result from the (slight) increase of the costs of exercising the veto, namely the shaming effect of the broad and public debate. Putting veto users ‘under the spotlight’⁵⁰ in the General Assembly generates transparency which is in itself a mild form of accountability (Bianchi & Peters, 2013). Generally speaking, the obligation to explain and give reasons forces a decision-maker (in our case the veto holder) to base its acts on claims regarding the general interest rather than on selfish appeals. This has been called the ‘civilizing force of hypocrisy’ (Elster, 1998, p. 111). The reasons given, even if they may be hypocritical, still have the consequence of generating better outcomes, because in an official debate the ‘bad’ reasons cannot be stated. The obligation to explain itself before the General Assembly leaves the exercise of the veto within the realm of discretion of the permanent member of the Security Council, but still forces this state to rationalize the exercise of its veto right. This allows not only all other states, but also the public to criticize these reasons. In the long run, the necessity to justify the veto might lead to ruling out those most blatant abuses that can simply not be rationalized. The question is whether these goals of the veto initiative have been realized. Recent practice does not point in this direction.

2.4. Effects

The second General Assembly debate under the new mechanism took place after a Russian veto against cross-border humanitarian assistance in

⁴⁷ See the critique by Nicaragua, Belarus, and Cuba in the General Assembly. UN GA, 96th Plenary Meeting, 21 July 2022, 3 p.m. (UN Doc. A/76/PV.96, 1–14 [at 8, 11, 12]).

⁴⁸ UN GA, 69th meeting, UN Doc. A/76/PV.69 of 26 Apr. 2022, 10 a.m., pp. 7–8 (Brazil); pp. 9–10 (India).

⁴⁹ UN GA, 69th meeting, UN Doc. A/76/PV.69 of 26 Apr. 2022, 10 a.m., p. 15.

⁵⁰ ‘UN takes step to put veto users under global spotlight’, NPR (27 Apr. 2022; <https://www.npr.org/2022/04/27/1094971703/u-n-takes-step-to-put-veto-users-under-global-spotlight>).

Syria.⁵¹ The third application of the new mechanism again concerned Ukraine. Albania and the United States had tabled a draft resolution to condemn and declare invalid the referendums conducted at the end of September 2022 in the occupied oblasts (regions) of Donetsk, Luhansk, Kherson and Zaporizhzhya.⁵² Russia cast its veto.⁵³ Within ten working days, as prescribed in GA Res 76/262, the General Assembly met. But in the plenary of the General Assembly of October 2022, the new accountability mechanism – that had been celebrated in June – was barely mentioned.⁵⁴ The debate concentrated on the violation of international law by the Russian annexation, and the General Assembly adopted a resolution entitled ‘Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations.’⁵⁵

Also with regard to the massive Israeli military operation in the Gaza Strip in response to the Hamas massacre of 7 October 2023, the new veto mechanism did not seem to deploy any containing effect: a string of draft Security Council drafts were vetoed in the usual patterns.⁵⁶

To conclude, the veto initiative may be qualified as a dynamic interpretation of the UN Charter falling short of an informal Charter amendment that would have been unlawful (even ‘unconstitutional’). The legal change, formally effected through a General Assembly resolution, has a constitutional significance for the United Nations and for international law as a whole, because it modifies a cornerstone of the UN architecture. The reform’s fundamental objective is to improve the effectiveness of the Council by deterring a veto and thus enabling the Council body to act against breaches of the peace, and also to secure a mild form of accountability through public critique. The initiative can therefore be qualified as an attempt at a *re-constitution* of the constitutional pillar of peace that had been shaken by the Russian invasion. However, the new practice has not been very intense. The permanent members that cast the veto with regard to the situations in Ukraine and in Gaza explained their vote both in the Secu-

⁵¹ The Russian Veto was cast on 8 July 2022, in the 9087th meeting of the Security Council under agenda item ‘The situation in Middle East’ (UN Doc. S/PV.9087) on the Security Council draft resolution sponsored by Ireland and Norway (UN Doc. S/2022/538) of 8 July 2022.

⁵² Draft Security Council resolution ‘Maintenance of peace and security of Ukraine’ (UN Doc. No. S/2022/720) of 30 Sept. 2022.

⁵³ UN SC, 9143rd meeting, 30 Sept. 2022, S/PV.9143.

⁵⁴ This took place in the framework of the resumed 11th Special Emergency Session (ES) of the General Assembly that had been convened in response to the Russian invasion by UN SC Res 2623 (2022) of 27 Feb. 2022 ‘Decision to call an emergency special session of the General Assembly’; UN GA, ‘Uniting for Peace’, Resolution UNGA/ES-11/L.1 of 1 Mar. 2022. The ES has been standing since 1 Mar. 2022. For the debate on the veto, see UN Doc. A/ES-11/PV.14 General Assembly Eleventh Emergency Special session 14th plenary meeting Wednesday, 12 Oct. 2022, 3 p.m. (GAOR).

⁵⁵ A/RES/ES-11/4 of 12 Oct. 2022.

⁵⁶ Brazilian draft of 18 Oct. 2023 (UN Doc. S/2023/773), vetoed by the US; US-American draft of 25 Oct. 2023 (UN Doc. S/2023/792), vetoed by China and Russia; draft of the United Arab Emirates of 8 Dec. 2023 (UN Doc S/2023/970), vetoed by the US; Algerian draft of 20 Feb. 2024 (UN Doc S/2024/173); vetoed by the US; US-American draft of 22 Mar. 2024 (UN Doc. S/2024/239), vetoed by Russia and China.

rity Council and in the General Assembly.⁵⁷ It is an open question whether the new procedure will generate more robust and critical debate on the exercise of a veto, and whether such practice will indeed contribute to deterring the use of the veto. The ongoing vetoes with regard to Ukraine and Gaza do not point in the direction of a containment of the veto. Therefore, the ‘re-constitutive’ potential of this procedural reform remains doubtful for the time being.

IV. THE SECOND PILLAR: PEOPLE

The second pillar of international constitutional law is formed by the principles on the humanity and the dignity and inviolability of humans. I submit that in a fully ‘constitutionalized’ international legal order, the individual human being is the primary normative reference point and should be recognized as the ‘natural’ person also of international law.⁵⁸

1. Constitutionalization by humanization

The developments in the international legal order of the 1990s reflect a constitutionalization in that sense. The doctrines of international human rights were more and more refined, so that human rights now permeate the entire field of international law (Kamminga & Scheinin, 2009; Nußberger, 2023). This means that each and every special rule must be interpreted in the light of human rights, and that human rights impact assessments and human rights due diligence must be conducted.⁵⁹ Human rights here often operate as a counterforce, for example against free trade, foreign investment, resource extraction, or in international finance law.⁶⁰ In other regimes, human rights function to reinforce legal rules, such as in the fields of development cooperation (Alston & Robinson, 2005) and in international environmental law including climate law and biodiversity (see, e.g. Knox, 2019; Wegner, 2018). Skubiszewski noted in 2007 that ‘[t]his rich law-making activity was so broad

⁵⁷ No additional meeting of the General Assembly to discuss the veto needed to be convened by the Assembly’s President, because both situations are covered by (ongoing) Emergency Special sessions of the General Assembly. The war in Ukraine is dealt with in ES 11; the war in Gaza falls under ES 10. The resolution on the veto initiative requires a convocation within ten days only ‘provided that the Assembly does not meet in an emergency special session on the same situation’ (UN Doc. A/RES/76/262 of 26 Apr. 2022, para. 1).

⁵⁸ This section uses passages from Peters & Sparks (2024a, 2024b).

⁵⁹ De Schutter et al. (2012) updated by Taylor (2013).

⁶⁰ The most intense debate relates to ‘business and human rights’. See UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie), with Guiding Principles in the Annex (UN Doc. A/HRC/17/31 of 21 Mar. 2011), adopted by the UN Human Rights Council (UN Doc. A/HRC/RES/17/4 of 6 July 2011) and Open-ended intergovernmental working group (OEIGWG), OEIGWG Chairmanship, third revised draft of 17 Aug. 2021 of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises.

that some parts of it became known as having given birth to “new” human rights or even to their “new generations” (p. 506). Skubiszewski firmly insisted that some of these what he called ‘man-made’ human rights, and here he particularly meant social rights, are ‘also essential’ (p. 507). However, Skubiszewski did not anticipate newly emerging rights, such as the right to the city or the right to erasure in the internet, to name only a few.⁶¹

2. Critique: ‘Rights overreach’

Fifteen years after Skubiszewski’s essay, human rights suffer from a broad and deepened ideational critique which goes far beyond the ‘classic’ cultural relativist objection against human rights as a crusade of the West against the rest (Peters, 2021). Critics speak of ‘rights inflation’, ‘rights proliferation’ (Mchangama & Verdirame, 2013), ‘rights overreach’, ‘rightsification’ (Gershman & Morduch, 2015, p. 21), and of an undue ‘right-ing’⁶² of and in international law. They are sceptical towards ‘a creeping individualist sensibility, which seeks to place individual rights at the core of the international legal regime in its entirety’ (Lieblich, 2023, p. 351).

The renewed theoretical critique against human rights now spans all ideational camps, from neo-Marxism and populism through to neo-liberalism and conservative originalism. For example, a catholic-led US presidential commission on ‘unalienable rights’ in 2020 released a report which concluded that ‘[t]here is good reason to worry that the prodigious expansion of human rights has weakened rather than strengthened the claims of human rights and left the most disadvantaged more vulnerable. More rights do not always yield more justice.’⁶³ On the other side of the spectrum, neo-Marxists consider rights only as the superstructure of the material class condition and a shield for the ruling classes as well as for capitalists’ property (Marx, 1844/2005,⁶⁴ p. 164). To conclude, there is an unholy alliance against human rights.

3. Re-constitution: Humanization of the law surrounding armed conflict

Against this background, it is significant that – far from weakening the legal status of humans in international law – the Russian aggression against Ukraine has given additional momentum to the debate on the ‘humanization’

⁶¹ On these ‘new’ human rights, see von Arnault et al. (2020).

⁶² The term ‘righting’ was coined by Karen Knop and applied in a critical spirit to the law of occupation by Aeyal Gross (2017, Chapter 5).

⁶³ Report of the Commission on Unalienable Rights of 26 Aug. 2020, p. 38, <https://www.state.gov/report-of-the-commission-on-unalienable-rights/>. This commission had been established by the US Secretary of State, Michael Pompeo, a member of the Republican Party. Its chair was the Harvard professor Mary Ann Glendon, who had also served as the US ambassador to the Holy See.

⁶⁴ Written in the autumn of 1843, printed according to the journal, first published in the *Deutsch-französische Jahrbücher*, 1844. For a contemporary reprisal, see e.g. Chadwick (2019).

of the law surrounding military action (Suami, 2023, pp. 28–29).⁶⁵ In particular, Ingrid Brunk (2022) has interpreted the Russian invasion not as a turning point but as a kind of ultimate proof that the past ‘expanding of international law to focus on human rights and humanitarian objectives at the expense of territorial integrity has created credibility and other problems that weaken the international legal system as a whole.’ She therefore demands that international law and its institutions should be re-focussed on generating interstate peace by territorial settlement, as opposed to being diverted and diluted by human rights concerns. Far from honouring this call for restraining international law, the Russian invasion rather seems to have boosted its further ‘expansion’ by humanization.

3.1. Humanization in four dimensions

Humanization has, firstly, manifested in the procedural law of international adjudication (Sparks & Somos, 2021b). The ICJ’s order on provisional measures in the case on allegations of genocide that Ukraine had filed two days after the Russian invasion demanded that Russia suspend its military operations in the territory of Ukraine.⁶⁶ With this order, the ICJ (over)stretched its *prima facie* jurisdiction under the Genocide Convention in response to human suffering in the war. The subsequent judgement on preliminary objections contained this expansion and denied jurisdiction for Ukraine’s claims regarding the Russian use of force and its recognition of the ‘Republics’ of Donetsk and Luhansk in Eastern Ukraine, as falling outside the scope of the compromissory clause of Article IX of the Genocide Convention.⁶⁷

Secondly, a profound shift seems to have occurred in the law *contra bellum*. Traditionally, the prohibitions of the use of force and of aggression had been seen to protect only the sovereignty and territorial integrity of states.⁶⁸ With this argument, the English House of Lords (UKHL) had, still in 2008, rejected a human rights claim brought by mothers of British soldiers killed in the Iraq war of 2003. The Law Lords said that – even though this war violated the United Nations Charter, its illegality did not lead to a breach of the right to life of the employed soldiers: the UK had not – according to the House of Lords – violated its duties of protection and care under Article 2 ECHR.⁶⁹ By contrast, the UN Human Rights Committee in its General Comment No. 36 of 2019 opined that ‘States parties engaged in acts of aggression as defined in

⁶⁵ See Brunk (2022) arguing in favour of a narrow conception of international law focussing on the preservation of territorial peace.

⁶⁶ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 Mar. 2022, para. 81.

⁶⁷ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgement on preliminary objections of 2 Feb. 2024, para. 147.

⁶⁸ For a discussion, see Pobjie (2017). Another inroad into the pure inter-state view of the *jus contra bellum* has been the acceptance of self-defence against attacks by non-state (collective) actors – only marginally related to the humanization of this area of law.

⁶⁹ UKHL, *R v. The Prime Minister and others*, Judgement of 9 Apr. 2008, UKHL 20.

international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant.⁷⁰ This reasoning has recently been extended to less grave violations of the prohibition of the use of force by a state, even when short of an outright aggression (Kreß, 2023).⁷¹

By logical extrapolation, human rights violations committed *through* the breach of Article 2(4) of the UN Charter would not only be committed against the individuals (both civilians and combatants) in the victim state. Indeed, an aggression would – according to this logic – also violate the international human right to physical integrity and life of the aggressor state’s own combatants (Mégret & Redaelli, 2022). This reasoning, as presented by Frédéric Mégret and Chiara Redaelli, would even more run against the grain of the traditional logic of war. The novel focus on the individual in the *jus contra bellum* has been criticized as conveying a ‘reductive individualism’ (Lieblich, 2021, p. 584, n. 17). Indeed, such ‘individualization’ of war (Welsh, 2023) has far-reaching repercussions. It would, among other things, lead to an obligation to provide remedies to the individual victims. This would then even lead to a quest for remedies also for harm and damage caused to combatants, notably those of the defending state (Jöbstl & Rosenberg, 2024).

Thirdly, after Russia’s denunciation of the ECHR, the Strasbourg Human Rights Court⁷² remains competent to deal with the currently pending 8,500 individual applications and four state complaints and future complaints against Russia in relation to acts and omissions until 16 September 2022, including in Crimea and Donbass. That means that – as a matter of principle – human rights abuses in the course of the war will be under Strasbourg’s jurisdiction.⁷³

Fourthly, an increased salience of human individuals in the law surrounding armed conflict is visible in the unprecedented efforts to hold leading Russian figures personally accountable for all crimes committed. While the International Criminal Court (ICC) has jurisdiction only over Russian soldiers’ war crimes but not over the crime of aggression allegedly committed by Russian leaders, a special tribunal for the crime of Russian aggression is contemplated.⁷⁴ A regional and international judicial machinery to deal with

⁷⁰ United Nations, International Covenant on Civil and Political Rights, Human Rights Committee, Comment No 36 of 3 Sept. 2019, para. 70.

⁷¹ For more, see Kreß (2023, esp. pp. 156–157) on a ‘limited subjectivisation’ of the prohibition on the use of force: the ‘systemic integration’ of these two branches of international law does not create a new individual right but only removes a permission to restrict human right to life.

⁷² ‘Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights’ of 22 Mar. 2022. See Article 58 ECHR.

⁷³ ECtHR, *Georgia v. Russia* (II) [GC], Judgement (Merits), App. no. 38263/08 (21 Jan. 2021), paras. 83, 110, esp. para. 126, refuses jurisdiction for the ‘active phase of hostilities’. More recently ECtHR, Grand Chamber, *Ukraine v. Russia and Netherlands v. Russia* (App. nos. 8019/16, 43800/14 and 28525/20), decision on the admissibility of 25 Jan. 2023, para. 558.

⁷⁴ Council of Europe, Committee of Ministers, Doc. CM/Del/Dec(2024)1497/10.2 of 30 Apr. 2024 on a potential agreement with Ukraine to establish a special tribunal for the crime of Russian aggression; Parliamentary Assembly, Resolution 2556 (2024), ‘Legal and human rights aspects of the Russian Federation’s aggression against Ukraine’ of 26 June 2024.

the war-related crimes has been set in motion, in a remarkable scale and intensity, with new procedures for collecting evidence, registering damages, and so on. It has been said that this ‘international judicial process’ is an important legal trend, a legal ‘counter-attack’ that stands in stark contrast to the failure of international law to prevent the unlawful aggression (Kelly, 2023). Overall, the above mentioned ‘individualization of war’ plays out in the said four dimensions.

3.2. Deconstitutionalization by double standards?

Especially the last-mentioned trend to secure individual criminal accountability for the alleged Russian aggression has received criticism. I will focus on the critique of double standards.

In their joint political statements, Russia and China regularly condemn ‘double standards’ of the West, notably in the fields of human rights protection and anti-terrorism: ‘It is necessary to reject politicization of the issue of human rights protection, the practice of using human rights as a pretext for interference in the internal affairs of other States and the application of double standards.’⁷⁵ The two states ‘oppose politicization and double standards in the fight against terrorism and extremism’.⁷⁶

Accusations of ‘double standards’ are also typically made with regard to the use of military force and especially against potential international criminal law-based responses to such breaches, besides the invocation of state responsibility. For example, double standards might show up in the fact that commanders of ‘Western’ states such as the US and the UK have not been prosecuted for illegal aggression and war crimes (e.g. in Iraq after 2003).

Indeed, the Russian invasion has triggered an ‘*unprecedented* demand for accountability’ (Labuda, 2023, p. 1113, emphasis added). Does this manifest a ‘selective justice’ (Dannenbaum, 2022)? As it well known, the US, China, France and the UK have not consented to jurisdiction for the crime of aggression – either by not ratifying the ICC statute in the first place (US and China), or by carving out a complicated exemption for aggression in the Kampala amendment (France and the UK). The legal argument in favour of an *exceptional* tribunal for the Russian crime of aggression resigns itself vis-à-vis this fact and might be seen to hollow out international law: ‘By positioning arguments for a new aggression tribunal within the four corners of the existing international legal order, and thereby making Russian accountability an

⁷⁵ Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions of 23 Mar. 2021; Letter dated 31 Mar. 2021 from the Permanent Representatives of China and the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. A/75/840-S/2021/324.

⁷⁶ Joint Statement of the Russian Federation and the People’s Republic of China on deepening comprehensive partnership and strategic cooperation for a new era of 21 Mar. 2023, annexed to the letter dated 28 Mar. 2023 from the representatives of China and the Russian Federation to the United Nations addressed to the Secretary-General and the President of the General Assembly, UN Doc. A/77/845-S/2023/229.

exception not the rule, international lawyers are implicitly accepting an order that cloaks the powerful with immunity and in the process making Swiss cheese out of international law through more loopholes and one-time exceptions' (López 2023, p. 68).

A second unevenness is that 'white' victims of crimes in Ukraine are receiving a great deal of attention while prior and ongoing wars raging in Africa are neglected by the international community. Along this line, the UN Ambassador of the Democratic Republic of Congo stated in the UN General Assembly: '[W]e deplore the politics of the double standards of the powerful of this world when it comes to Africa. ... We support Ukraine. We want to see the war ended, but we would like to see the international community take similar action against other situations in the world where countries are being invaded and occupied.'⁷⁷ The lament that African conflicts are neglected is surprising, given that previous critique was that the ICC has been focussed too much on the prosecution of international crimes committed in Africa which was denounced as a neo-colonial judicial intervention (Iyi, 2023, pp. 27–28). Facing these complaints that point in different directions, the ICC seems 'damned if it does, damned if it does not'. An easy reproach of double standards does not capture these complexities.

Beyond the issue of allegedly selective criminal prosecution, further examples of double standards and selectivity are identified by critical observers in all three pillars of the international legal order. In the second pillar of the constitutionalized international order ('people'), we might cite the UN General Assembly's decision to replace the Human Rights Commission with a new body, the Human Rights Council. A major motivation of this institutional reform was to terminate selectivity and double standards in the activity of the Human Rights Commission. The General Assembly expressed this clearly in its foundational decision of 2006, recognizing the importance of 'objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization'.⁷⁸ Unfortunately, the Human Rights Council has so far not lived up to the objective of 'non-selectivity'. Since its establishment in 2006, Israel has received 108 condemnatory resolutions, while Iran has been condemned 15 times and North Korea 15 times. In 2022 (before the outbreak of the Gaza war), Israel was condemned more often than Afghanistan, Myanmar, North Korea and Syria.⁷⁹ The instances of (perceived) double standards could be multiplied, and must be taken extremely seriously from a constitutionalist perspective.

⁷⁷ Georges Nzongola-Ntalaja, General Assembly official records, 11th emergency special session: 13th plenary meeting, 12 Oct. 2022, UN Doc. A/ES-11/PV.13, p. 24, <https://digitallibrary.un.org/record/4000524?ln=en>

⁷⁸ UN GA Res 60/251, 'Human Rights Council' of 3 Apr. 2006, preamble.

⁷⁹ Until the time of writing (5 June 2024). See UN Watch Resolution database, filter: UN Body: HRC; Condemnatory; Country Concerned.

3.3. Responses

From the perspective of global constitutionalism, we should note that double standards are a problem (only) for *public* agents or authorities. The expectation that equally situated actors are treated fairly, evenly, or equally is only directed at public authorities in or beyond the state. This legal expectation is not addressed to private actors who may – under the law – act whimsically and even arbitrarily in their private sphere. Thus, the concern about double standards is a manifestation of a recognized public law-quality of international law, in contrast to the classic private law analogy. The critique actually reinforces the constitutional paradigm as espoused in this paper.

Double standards in the international legal system are legally reprehensible, because they strike at the heart of the (international) rule of law. It is a core principle of justice to treat like cases alike. A consistent or even growing practice of double standards would therefore signal an erosion of international constitutionalism.

However, the reproach of double standards is in many instances ultimately not justified, and can rather be unmasked as a strategic ‘whataboutism’ that deviates attention from violations of international law. Such unmasking can rely on three considerations. Firstly, from a moral perspective, past violations of international law by a Western state (e.g. the unlawful Iraq war of the US conducted in 2003) do not remedy or excuse violations of the prohibition of the use of force by a non-Western state (e.g. Russia, in 2014 and since 2022), because two wrongs do not make a right. Secondly, as a matter of logic, a past wrong, for instance by the US, does not render the current allegation – that is, against Russia – false (Lieblich, 2024, p. 3).

Thirdly, the lawyerly operation of distinguishing helps to identify true instances of double standards and to distinguish them from false ones. The argument of double standards hits the mark only when the two situations that are compared are indeed in moral and legal terms so similar that they deserve equal treatment by the law. Only then does their different treatment manifest a double standard. In contrast, when two situations are distinct in legally relevant terms, it is adequate and it may even be necessary to treat them differently.⁸⁰ For example, the Kosovo intervention of 1999 can be distinguished from the use of force against Ukraine (in 2014 and since 2022) on several grounds. The situation in Yugoslavia had been qualified as a threat to peace by the Security Council. Serbia was not invaded by a neighbouring state but attacked by an international organization (NATO). The perceived moral need for a humanitarian intervention was genuine at the time, in the face of documented massacres and hundreds of thousands of internally displaced persons in the region. The need to react was felt by Western states after the dire failure of the international community to robustly respond to the Rwandan genocide only four years previously. Also, the military action against Serbia was never condemned by the UN General Assembly. Kosovo was not annexed by

⁸⁰ For the scope of application of the human right not to be discriminated against: *seminally* ECtHR (GC) *Thlimmenos v. Greece*, App. no. 34369/97, 6 Apr. 2000, para. 44.

the United States. Based on these considerations, a legal distinction between Kosovo and Crimea is possible and then justifies different legal responses.

That said, it remains the case that ‘unclean hands’ undermine the credibility of states that wish to criticize other states for their alleged violations of international law. For example, in pillar one (peace), the practice of targeted drone strikes by the US undermines the Western critique of violations of international humanitarian law by Russia. In pillar two (people), the excessive surveillance of public spaces in the UK undermines the Western critique of restrictions of freedom of assembly in Russia. In pillar three (our planet), the Western states’ reluctance to receive climate-induced migrants while massively contributing to global warming through emissions also raises moral questions. Another example is the Russian veto to prevent the adoption of a Security Council resolution that had been tabled by a broad group of states and sought to encourage the Security Council to pay due regard to the security implications of climate change.⁸¹ The Russian representative argued that the ‘lamentable position of many of the most vulnerable States, from a climate perspective, is a direct consequence of previous colonial policies from Western donors.’⁸² Such arguments are not completely wrong, but they are less appealing when they are made by a state that acts as a quasi-colonial, imperialist power in its direct neighbourhood.

While taking the danger of weakening the legal discourse seriously, we need to steer far from overblown assertions of double standards. Alleged ‘selectivity’ is often the result of political constellations that differ from each other, notably when power is distributed unevenly. This explains why Western states manage to insert human rights conditionalities in trade agreements with frail African states but not in their trade agreements with China. The diverging treatment of China and African states differs from the Russian invasion of Ukraine, because there is no legal prohibition to tie trade to human rights, and therefore such treaty clauses are not unlawful per se.

Returning to the attempted criminal prosecution of the alleged Russian crime of aggression, Patryk Labuda (2023) has shown that the ‘mass mobilization for accountability seems largely to be a function of the war’s inter-state nature and the Ukrainian government’s unconditional embrace of law as a means of de-legitimizing imperialism’ (p. 1114). The fact that the other permanent members of the Security Council can, under the ICC-Statute as it stands, *not* be prosecuted for aggression does not fatally flaw this mobilization for Russian accountability. Although the ideal move would be to amend the ICC-Statute and to bring also the US and China under its umbrella, this move cannot be forced upon the big powers. Should one of them commit a similar crime, it is possible that an ad hoc mass mobilization for *their* accountability will occur. As it looks now, the war in Ukraine *is* unique because Putin threatened to use nuclear weapons to flank his aggression, and – as mentioned –

⁸¹ United Nations, Security Council Draft Resolution S/2021/990, 13 Dec. 2021, paras. 1 and 2.

⁸² United Nations, Security Council 8926th meeting, 13 Dec. 2021, S/PV.8926, p. 4.

declared war against ‘the West’, against the ‘real masters’.⁸³ The current war in Ukraine therefore has a systemic, constitutional, significance that distinguishes it from other armed conflicts in the world, and which appropriately warrants novel responses. And treating different cases differently is faithful to the constitutional principle of equal treatment.

V. THE THIRD PILLAR: THE PLANET

The third pillar of the edifice of international law is the ecological one. The principle of sustainable development is a foundational, a constitutional principle of international law. The urgent need to become more sustainable to save the planet, the basis of our existence, is recognized by international law. All big multilateral agreements of the last years are ecological treaties: the Paris Climate Agreement of 2015, the Convention on Biodiversity Beyond National Jurisdiction of 2023,⁸⁴ and the Plastic Pollution Treaty’s zero draft under negotiation since 2023.⁸⁵ Krzysztof Skubiszewski did not deal with this area of law. But if he was alive now to see the state of the earth, he would realize the necessity of greening international law.

The Russian invasion has some impact on the legal developments around the ecological pillar, although these are less visible than those around the first two pillars. The war has disastrous ecologic consequences (Hryhorczuk et al., 2024; Rawtani et al., 2022). The destruction of ecosystems and oil spill by the breaking of the Nova Kakhovka Dam on the Dnieper River and the contamination of the battlefield with landmines are the most spectacular ones. In the face of ecologic disaster, it is understandable that Ukrainian President Zelensky’s Peace Plan of 2022 contained as point 1 the ecological recovery of the region.⁸⁶

1. Constitution: Human rights for ecological action

Independently of the Russian invasion, international human rights law has since the 1990s been employed for a better protection of the environment. The imbuelement of international environmental law with human rights (which themselves function as international constitutional law) can be described as a form of constitutionalization of (both international and domestic) environ-

⁸³ Putin in the ceremony on the annexation of the regions Donetsk and Luhansk on 30 Sept. 2022 (<http://en.kremlin.ru/events/president/news/69465>).

⁸⁴ UN General Assembly, Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN Doc. A/CONF.232/2023/4, 19 June 2023.

⁸⁵ United Nations Environment Programme, Zero draft text of the international legally binding instrument on plastic pollution, including in the marine environment, 4 Sep. 2023, UNEP/PP/INC.3/4.

⁸⁶ President of Ukraine, President Zelensky Peace Formula: Ukraine’s Peace Formula Philosophy, 11 Oct. 2022, www.president.gov.ua/storage/j-files-storage/01/19/53/32af8d644e-6cae41791548fc82ae2d8e_1691483767.pdf

mental law. Such ecologic constitutionalization has virtually exploded in the last two years. First, the ‘traditional’ human rights to private life and bodily integrity have been activated by the regional human rights courts and by domestic courts to force states to take measures to protect the environment. This also concerns climate action (carbon emission mitigation, adaptation, and financing).⁸⁷ The pending request for an ICJ Advisory Opinion on state obligations with regard to climate change among other things asks the Court to analyse obligations flowing from the UN Declaration on Human Rights.⁸⁸ Also the International Tribunal for the Law of the Sea (ITLOS) notes in its Advisory Opinion that ‘that climate change represents an existential threat and raises human rights concerns.’⁸⁹

Second, a new human right to a clean and healthy environment has been recognized, for example by the Inter-American Court of Human Rights (IACtHR)⁹⁰ and in a UN General Assembly resolution of 2022.⁹¹ Third, the rights of the elements of nature, such as rivers, volcanoes, glaciers, and animals, are being recognized by courts mostly in Latin America and India.

The human rights approach to environmental protection has been activated to tackle the ecologic disaster caused by the war in Ukraine (Ukhorskiy, 2023). Moreover, the war has boosted international criminal responses that include the environmental destruction into the criminal charges, up to a breakthrough for the (previously marginalized) concept of ‘ecocide’ (Wirthová, 2023). In conclusion, the war has become a catalyst for a new type of ecological constitutionalization in international law.

2. Post-humanist critiques

The rise of rights in the ecological context has exposed the dark side of humanism, in this context mostly denounced as ‘anthropocentrism’. Anthro-

⁸⁷ For only the most prominent cases, see Supreme Court of The Netherlands, *The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, Ruling No. 19/00135 of 20 Dec. 2019; Federal Constitutional Court of Germany, Order of the First Senate of 24 Mar. 2021, 1 BvR 2656/18; ECtHR (GC), *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, App. no. 53600/20, Judgement of 9 Apr. 2024; Republic of Chile and Republic of Colombia, Request for an Advisory Opinion on Climate Emergency and Human Rights to the IACtHR of 9 Jan. 2023 (pending). The Brazilian Supreme Court declared the Paris Agreement to be a ‘type of human rights treaty’ and thereby awarded it a ‘supranational’ status: *PSB et al. v. Brazil*, ADPF 708, Judgement of 30 June 2022, para. 17. In scholarship, see Rodríguez-Garavito (2021).

⁸⁸ Resolution adopted by the General Assembly on 29 Mar. 2023, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 4 Apr. 2023, UN GA A/Res/77/276.

⁸⁹ ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Islands States on Climate Change and International Law*, Case No. 31, Advisory Opinion of 21 May 2024, para. 66.

⁹⁰ IACtHR, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 Nov. 2017; IACtHR, *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra v. Argentina)*, Judgement of 6 Feb. 2020, Series C No. 400, paras. 202–209.

⁹¹ UN GA Res 76/300 of 28 July 2022.

pocentrism is an undue focus on humans at the expense of proper attention to the ecological sphere. In the Anthropocene, with the climate catastrophe unfolding, and the sixth mass extinction underway, the call to recognize the human being, the ‘anthropos’, as the normative reference point of international law has become suspect. These debates have generated calls for a post-humanist ecocentrism or ‘zoocentrism’ (centrally Braidotti, 2013; see also McHugh, 2022). At this juncture, one strand of scholarship suggests that personhood and (international) rights be extended also to animals (see e.g. Kurki, 2019; Stucki, 2023) and to the elements of nature (influentially, Stone, 1972; also Tănăsescu, 2022).

Others, quite to the contrary, oppose such extensions and propose that the category of personhood and rights should be eliminated altogether in order to remove the primary cause of the law’s neglect of nature (Petersmann, 2023, esp. p. 2). These critical posthumanists seek ‘to dismantle the idea that the human sits in hierarchical supremacy over other subjects – including the environment and non-humans’ (Jones, 2021, p. 83; Petersmann, 2022, p. 772). They are convinced that the human rights-focussed ‘liberal response’ to the ecological challenges falls short (Petersmann, 2022, p. 780). These critics see a need to ‘de-anthropocentre’ the law relating to environmental crises (Petersmann, 2022, p. 780; see also Favre, 2020; Offor, 2020).

3. Re-constitution: Greening humanism

The Russian aggression illustrates the morally unacceptable outcomes of abandoning the focus on humans as propagated by post-humanism and related ideologies, even if they are well-minded and nature-friendly (Grear et al., 2021; Hohmann, 2021). The invasion is accompanied by the Russian government’s gross neglect of the lives and well-being of their own soldiers and characterized by ethnic discrimination in the recruitment. This behaviour is ideationally undergirded by the statism and sovereigntism that Russia propagates as lead principles of the international order.⁹²

These atrocious consequences demonstrate that a post-humanist approach to international environmental law is not recommended. Such giving up on the human would mean leaving behind all those members of humanity, for example the population of Russia, for whom the era of ‘humanization’ has barely begun (Scott, 2021, p. 191; Theilen, 2021, p. 853). Rather, individuals should receive a proper place in international law, within social structures which themselves must be situated within the eco- and earth systems upon which they depend.

We thus need to address the ecological challenge by navigating between throwing the human under the bus (as Russia is doing), on the one side, and a simply backward-looking, repetitive, re-humanization on the other side (Herbrechter et al., 2022, p. 16). Between these extremes lies a middle course

⁹² Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions of 23 Mar. 2021; for a critical comment, see Skordas (2021).

of designing ‘more-than-human legalities’ (Braverman, 2018, p. 137) and ‘more-than-human rights’ (MOTH).⁹³ A more-than-human international law approach would mean critically working through the foundations of humanism and questioning some of the traditional premises, notably the hierarchy of humans over the rest of the world and the isolation of the single human person. This could actually constitute an international legal order that adequately responds to the serious ecological crises. In the end, a green, ‘entangled humanism’ (Connolly, 2017) that is equivalent to a ‘human-inclusive ecocentrism’ (Garver, 2021, esp. p. 96) would make a contribution to the re-constitutionalization of international law.

VI. CONCLUSIONS

Let us revisit the Russian aggression. Was it an anti-constitutional or – on the contrary – a constitutional moment?

In the context of international law’s first constitutive pillar, the law of interstate territorial peace, Russia has committed and continues to exacerbate its egregious breach that has so far not been stopped. One of the obstacles against terminating the breach is Russia’s abuse of its veto position in the Security Council to prevent a collective security response to its illegal conduct. Moreover, Russia has – through its words and actions since 2014 – deeply and systemically contested the basic principle of sovereign equality of states in its ‘sphere of influence.’ Russian lip service to state sovereignty and prohibition of the use of force are mere cynical abuses of the language of the law to cover up its violations (Section III.1). Nevertheless, the core constitutional norm, the prohibition on the use of force, has been verbally upheld by the entire international community. Such law-speak is however undermined by the circumvention of sanctions by a number of powerful states.

The threat of a de-constitutionalization of the entire regime of peace and security is only weakly mitigated by the procedural innovation of the public explanation of the casting of a veto. Moreover, the new procedure has only lightly been applied in the Gaza war, and has so far failed to deter vetoes (Section III.2).

Concerning the second pillar of international law that constitutes the international legal status of the human individual, the contribution has shown how the Russian invasion has boosted a humanization of the law surrounding armed conflict in four dimensions. Both individual rights and obligations (including criminal responsibility) have become relevant institutions in the context of armed conflict, where they had no or a very marginal place before. Examples are the right to life of soldiers (not ‘only’ of civilians) and the operationalization of the personal criminal accountability for war crimes and the crime of aggression (Section IV).

⁹³ Research project at NYU led by César Rodríguez Garavito. <https://mothrights.org/>

Finally, the third pillar of a much more ecological international law has been at least indirectly boosted by the ecological disaster created by the war in Ukraine. This ‘greening’ concerns all areas of international law, including the law of peace and the law on humans (Section V).

However, and despite the current trends of re-constitution outlined in this paper, these pillars might not be strong enough. They are at risk of falling down like a house of cards under the pressure of the material conditions (economic and military). These factors lie to some extent outside the reach of the law. Besides, ideas and ideals – even if dialectically co-shaped by material conditions – influence the path of legal evolution. The reason is that law is – after all – a creation of the human mind. Therefore, it is a worthy task for international lawyers to develop good legal ideas that may prepare legal change. Such change may occur quickly and unexpectedly, if a minimal legal infrastructure and legal procedures for channelling a legal evolution are in place. At this juncture and in the current context of serious world disorder, an important constitutional principle is the avoidance of double standards and selectivity. Consistency must govern the interpretation and application of all three constitutional principles examined in this article, in order to properly digest (and where necessary refute) the ubiquitous reproaches of double standards and hypocrisy formulated by states and scholars of the Global South and the ‘non-Western’ world against the ostensibly biased international legal order of our time.⁹⁴ Assessing like cases alike and different cases differently will not in itself bring about changes in action where the state practice is indeed selective or unlawful. Lawyers can merely call out violations and thereby raise reputational costs. Only with this qualification we can say that the power of ideas has a chance to prevail over brutal aggression.

As the preamble of the UNESCO Constitution reminds us: ‘Since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed.’⁹⁵ This is what we must do, in the spirit of Krzysztof Skubiszewski. As Jerzy Makarczyk (1996, p. 12) wrote in his introduction to the *liber amicorum* in honour of his teacher: ‘It is thanks to men like him that we, the younger generation of lawyers ... never lost faith in human values, in the primacy of law both in internal and international relations.’

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⁹⁴ See above Section IV.3.2, and Labuda (2022); Lieblich (2024).

⁹⁵ Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 Nov. 1945.

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