

Comment

Sleepwalking on the Road to War

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Russia's war of aggression against Ukraine violates the core principle of international law. United Nations (UN) and European bodies as well as the vast majority of the states have confirmed as much. To claim the opposite would be an expression of legal nihilism. Therefore, it is not worthwhile for an honest international lawyer to search for meaning in the Russian submissions or to weigh and measure all the far-fetched and aberrant arguments that the Russian representatives have proposed. They are below the intellectual level from which a meaningful legal discussion should start.¹

The interesting – and currently broadly neglected – question is how Europe, including Russia, could reach a point where it is once again haunted by the ghost of 1939. 1989 marked the beginning of a honeymoon between the former enemies that was supposed to last forever. A unified world came into existence. For the first time, the UN Security Council, with the participation of all permanent members, could adopt a chapter VII resolution authorising the use of force against Iraq. Russia was invited to international treaties and organisations; to a certain degree, it was even integrated into the Western defence system in the North Atlantic Treaty Organization (NATO)-Russian Council. The famous Founding Act of 1997 – a NATO-Russian agreement – officially declared that Russia and the NATO would not consider each other adversaries anymore and that they would 'build together a

¹ To date, there is no serious article by a well-known Russian international lawyer dedicated to this war. Indeed, the use of the notion 'war' in this context has been declared punishable by the Russian government.

lasting and inclusive peace in the Euro-Atlantic area on the principles of democracy and cooperative security²

To understand why relations soured, once again turning into open enmity and culminating in the ongoing war in Ukraine, we can distinguish three strings of development, namely in Ukraine, in the West, and in Russia. Although it is difficult to identify what elements were indispensable in leading to the war, all factors described below clearly played a role in producing a climate that favoured confrontation and ultimately the war.

While these developments are interwoven and influenced each other, they will be analysed separately to facilitate understanding.

I. Ukraine: In Quest of Its Identity

Today, Ukraine's shift towards the West seems to be a law of nature, leading to a final split between Russia and Ukraine by an act of Ukrainian self-determination and within the constitutional frame. However, a closer look at history reveals a different picture.

1. Ukraine Oscillating between East and West

Ukraine became independent in 1991 within the borders between the republics of the Soviet Union. Russia recognised these borders in several treaties.³ The population was divided: While the East and the South, including Crimea with its strong Russian speaking population, was closer to Russia,⁴ the West – specifically the former Galicia, which never belonged to the Russian Empire before 1939 – had a Western inclination.⁵ Ukrainian foreign policy turned out to be unstable.

13 years after Ukraine gained independence, the first revolution broke out, leading the country to orient itself towards the West while still maintaining close economic ties to Russia. NATO membership, which the majority of the

² <https://www.nato.int/cps/su/natohq/official_texts_25468.htm>.

³ This guarantee was given in the Budapest Memorandum of 1994 and in the Treaty on Friendship, Cooperation and Partnership of 1997.

⁴ At the beginning of the century, 60 % of the population spoke Ukrainian while 30 % spoke Russian; almost all were fluent in Russian.

⁵ The pro-Russian presidential candidates almost always had their strongholds in the eastern and southern regions whereas the pro-Westerners won in the western part of the country, <<https://www.eurasian-research.org/publication/geography-of-the-presidential-elections-in-ukraine/>>.

population did not support at the time, was not even a topic under discussion.⁶ Ukraine's request for NATO membership in 2008 was shelved after France and Germany intervened. In 2010 the voters, dissatisfied with politicians who looked to the West, brought Yanukovich to power in elections declared to be fair by international observers.⁷ Once in power, Yanukovich practiced a see-saw policy between Russia and the West: He strengthened economic relations with Russia while entering into negotiations with the European Union (EU) about an association agreement.⁸ He did not pursue NATO membership anymore. During the global financial crisis, the economy drastically deteriorated. By that time, 30 % of Ukrainian trade was with Russia, and another 30 % was with the EU.⁹

2. Under Pressure and Forced to Choose: East or West

When it came to the ratification of the association agreement, Yanukovich asked for financial support to adapt the economy to Western standards and to compensate for Russian reactions to Ukraine's turn to the West, as Russia threatened to stop according Ukraine preferential treatment.¹⁰ The EU bluntly rejected Yanukovich's request. It also refused his proposal to start trilateral negotiations that would include Russia in order to take all interests involved into consideration.¹¹ This could have led to a more inclusive approach, thereby avoiding a political dichotomy. Indeed, Ukraine could have served as a mediator between East and West.

To lure Ukraine away from the EU, Russia was willing to grant the country a credit of \$ 15 billion, also promising it privileged treatment in the

⁶ In 2008 more than 40 % of Ukrainians considered NATO a threat, while only 15 % considered it a protection and 30 % thought of it as neither, <<https://news.gallup.com/poll/167927/crisis-ukrainians-likely-nato-threat.aspx>>.

⁷ <<https://www.oscepa.org/en/news-a-media/press-releases/press-2010/international-observers-say-ukrainian-election-was-free-and-fair>>.

⁸ The negotiations started in 2012. They were encumbered by the imprisonment of the former Ukrainian prime minister Timoshenko and by Yanukovich's rapprochement to the customs union established by Russia, Belarus, and Kazakhstan. The then president of the EU Commission Barroso declared that a State could not simultaneously be a member of a customs union and a member of a common free-trade area with the EU.

⁹ <<https://wits.worldbank.org/CountryProfile/en/Country/UKR/Year/2013/TradeFlow/EXPIMP/Partner/all>>.

¹⁰ <<https://web.archive.org/web/20140129060924/>>; <<http://www.aljazeera.com/news/europe/2013/11/ukraine-still-wants-sign-eu-deal-20131129111345619208.html>>.

¹¹ Russia combined its willingness to participate in such negotiations with open threats to Ukraine's statehood should Ukraine sign the association agreement with the EU, <<https://www.theguardian.com/world/2013/sep/22/ukraine-european-union-trade-russia>>.

trade of energy.¹² Under economic and political pressure, Yanukovich accepted the Russian offer and declared that he would not ratify the association agreement, albeit without definitively refusing the Western option. This decision provoked demonstrations and increasing resistance by citizens. The uprising turned violent, and more than 100 persons were killed. At the same time, Western governments got more and more involved. Politicians participated in demonstrations on the Maidan. Behind the scenes, representatives of various states engaged in disputes on the future composition of the Ukrainian government.¹³ When the situation risked spiralling out of control, the foreign ministers of Germany, France, and Poland went to Kiev to prepare an agreement between the President and the representatives of the demonstrators that provided for the presidential snap elections.¹⁴ However, this agreement, which could have facilitated a peaceful transformation, was foiled by the protesters, and amidst increasing violence, Yanukovich fled to Russia.

The parliament removed the president in a procedure that did not live up to constitutional requirements.¹⁵ The regime change can thus be described as an action without constitutional legitimacy.

Presidential and parliamentary elections in spring 2014 transformed the political landscape. Ukraine embarked on a clear westward course.¹⁶

It is worth pondering whether history would have taken a different course had the agreed snap elections taken place and had the change in power been brought about not by violence in the streets but by elections.

3. Unwillingness to Compromise

Russia took advantage of Ukraine's weakness and the legal turmoil to annex Crimea in a clearly illegal way. This was a heavy blow to Ukrainian-

¹² The price for gas should be cut by one third, <<https://web.archive.org/web/20140406083527/http://www.bbc.com/news/world-europe-25411118>>.

¹³ Nuland's unforgettable 'Fuck EU' expressed frustration that the EU did not want to join ranks with the US in preparing a new government for Ukraine in January 2014, <<https://www.bbc.com/news/world-europe-26079957>>.

¹⁴ They decided that the presidential elections should be moved up four months from March 2015 to December 2014.

¹⁵ The constitution did not provide for removal from office for leaving the country. A removal from office for high treason – Art. 111 – required the involvement of the Constitutional Court and a vote of three quarters of the deputies. 72 % of the deputies supported the decision to remove Yanukovich from office.

¹⁶ The government appointed after the elections in October 2014 included persons from abroad, like the minister of finance, Jaresko, from the USA, the minister of economy, Abromavicius, from Lithuania and minister of health, Kvitashvili, from Georgia, all of whom received Ukrainian citizenship when they were appointed.

Russian relations and, beyond that, to relations with the West. Russia demonstrated its willingness to defend its interests even if not enshrined in law by force.

At the same time, Russia fanned unrest that had broken out in the eastern part of Ukraine. Ukraine lost factual control over these territories. An armed struggle between the insurgents and Ukrainian forces intensified, with 10.000 persons killed within a year as a result. Germany and France stepped in, and in September 2014¹⁷ and in February 2015,¹⁸ the Minsk Agreements were concluded between Russia, Ukraine, representatives of the insurgent territories and the Organisation for Security and Co-operation in Europe (OSCE). The second agreement finally became binding when it was incorporated in a UN Security Council Resolution.¹⁹

Ukraine was never happy with the Minsk agreements. Its main grievances concerned the amnesty to be granted, as it considered the insurgents terrorists who had committed grave crimes and had to be brought to trial. Moreover, Ukraine rejected any special status for the eastern part of the country, as required by the agreements, because it held that federalisation would not solve existing issues but would instead create future problems. And finally, Ukraine did not believe that independent elections could be held as long as it did not control the border with Russia. Due to these misgivings, Ukraine never fully implemented the Minsk agreements. It did not grant amnesty to the rebels and it denied a special status to the eastern territories.²⁰ No elections were held, and Russia – against its obligations under the Minsk agreement – continued to support the eastern regions. All declarations to stick to the Minsk Agreements were mere lip service. The conflict remained unchanged. Since 2015, another 4000 persons have been killed, among them 1300 persons not involved in the armed clashes.²¹ The war might have been prevented had the legal obligations deriving from the Minsk agreements been implemented in a reasonable and timely way. Neither the OSCE as a signing party nor the West, which had brokered the agreement that the international community and all parties directly involved declared to be the only viable path to peace, took efforts to enforce the implementation.

¹⁷ <<https://www.osce.org/files/f/documents/a/a/123258.pdf>>.

¹⁸ <<https://www.osce.org/files/f/documents/5/b/140221.pdf>>.

¹⁹ The unanimously adopted UN Security Council Resolution 2202.

²⁰ A draft of a law on the region's autonomy was dropped after violent unrest in front of the parliament in 2015.

²¹ <<https://www.statista.com/statistics/1293409/civilian-deaths-related-to-russia-ukraine-conflict/>>. There is no evidence to support Russian claims of a genocide in eastern Ukraine. The Russian statements can be described as the attempt to plagiarise the Western narrative of the war in Kosovo.

Due to the ongoing conflict, Ukraine's position towards Russia became more and more entrenched. Ukraine tried to establish a 'nation-state' with a special emphasis on strengthening the Ukrainian language. Since 2020, children from the 5th class on are taught in Ukrainian. Since 2022, newspapers have to be published in Ukrainian,²² TV programs must be in Ukrainian or synchronised, and more than 50 % of the books in bookshops must be in Ukrainian. While this has further promoted patriotism, it has also increased distrust, among minorities other than Russian-speaking ones as well.²³

Since 2014, Ukraine has started a rearmament program. It was supported by Western states, which delivered weapons – among them very effective drones from Turkey – and trained the Ukrainian armed forces. By the end of 2021, the Ukrainian army seemed able to reconquer its territories in eastern Ukraine. Russia could no longer uphold the status quo in eastern Ukraine by waging a hybrid war with private combatants and a clandestine arms supply. The balance of military powers in Donetsk and Luhansk, which had now tipped in favour of Ukraine, could have been compensated either by a stable agreement or by open intervention.

In the end, the outcome for Ukraine will be less favourable than it would have been had both sides implemented the Minsk Agreement in due time.

II. Russia: Attempt to Renew Its Dreams of Becoming a Great Power

1. Russia's Unsplendid Isolation

After the Warsaw Pact and the Council of Mutual Economic Assistance were dissolved, Russia sought greater integration in the international community. It joined the Council of Europe and the World Trade Organization (WTO) and even aspired to accede to the EU. The EU and Russia developed a special relationship and established formats for meetings twice a year. However, the West's intervention in Kosovo and later in the war in Georgia in 2008 unsettled the reciprocal trust, and although cooperation continued, not least in the economic field, the affirmation of the Founding Act of 1997 that the NATO and Russia do not consider each other adversaries became meaningless.

²² While newspapers can still be published in Russian, this has become very expensive because there must also be a Ukrainian edition.

²³ Hungary was upset by the Ukrainian legislation on language, which affected the Hungarian minority of 100.000 persons.

Russia's hopes to find its place as part of the West never materialised, and the country remained isolated. The Commonwealth of Independent States (CIS), created after the dissolution of the Soviet Union in 1991, never really took off. The Baltic states immediately refused to participate. Ukraine signed but never ratified the charter of the CIS, while Turkmenistan did not participate actively, and Georgia left. Thus, the system as a whole was never effective. Two other organisations became more important, namely the Organization of the Treaty on Collective Security (CSTO) and the Eurasian Economic Union (EAEU). The Treaty on Collective Security obligates each member to support another member that has been attacked. This system was activated once during the insurrection in Kazakhstan in early 2022. Only six states participate in this alliance²⁴ since Azerbaijan, Georgia, and Uzbekistan left the organisation. This does not demonstrate great solidarity among the Member States of the former Union of Soviet Socialist Republics (USSR). Although Russia invoked Art. 51 of the UN Charter to justify its armed intervention in Ukraine, this did not trigger the *casus foederis*. By now, none of the members of the EAEU actively supports Russia. Kazakhstan maintains strict neutrality: when the vast majority of states condemned Russia's aggression in the UN General Assembly, it abstained. Belarus, while allowing Russia to use its territory to wage the war of aggression, has not deployed its own troops to date. This replicates the situation after the annexation of Crimea when Belarus and Kazakhstan withheld a formal recognition of Crimea as a part of Russia for many years.²⁵ Armenia, for a long time one of Russia's most reliable partners, has oriented itself towards the West since President Pashinian came to power.

The Eurasian Union was meant to be an answer to the European Union. Yet only five states participate,²⁶ and the Union has been unstable since its foundation. When Russia imposed sanctions on western agricultural products in 2014, Belarus proved to be extremely inventive in bypassing them, and there were permanent struggles about free trade, specifically with Kazakhstan.²⁷ For a long time, Belarus tried – more or less successfully – to seesaw between Russia and the West. Ukraine's ambiguous attitude towards the Eurasian Union finally ended in the Maidan revolution, which deprived Russia of its most powerful partner.

²⁴ Russia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, and Armenia.

²⁵ Belarus recognised Crimea as part of Russia only in 2021, and the newly elected Kazakh president declared in 2019 that the Russian Federation had not annexed Crimea, <<https://www.themoscowtimes.com/2019/12/04/we-dont-call-it-annexation-kazakh-leader-says-of-crimea-a68473>>.

²⁶ Russia, Belarus, Kazakhstan, Kyrgyzstan, and Armenia.

²⁷ It is telling that Kazakhstan decided, in 2017, to switch from the Cyrillic to the Latin alphabet for the Kazakh language, which implicitly distances Kazakh from Russian.

Russia never succeeded in constructing a system of reliable alliances. All of its allies flirt with the West from time to time, and it certainly has not strengthened its partners' trust to witness that Russia uses force to solve conflicts with its neighbours. Russia remained isolated, as became evident in the United Nations General Assembly (UN GA) vote condemning the invasion of Ukraine. Only 4 'outlaws', namely North Korea, Eritrea, Syria, and Belarus, backed the Russian war of aggression. Lining up for membership in the Eurasian Union – a phenomenon quite common for the European Union – is unthinkable. What Russia has to offer politically and economically does not seem attractive enough. Russia is aware of the contrast between its aspirations to become a great power and the reluctance with which its potential allies meet these aspirations. The unloved tends towards violence.

2. Past Splendour and Future Destiny: The Retrospective Look as Vision

For many centuries, Russia felt it had a special mission with quasi-religious dimensions: It conceived of itself as the third Rome, selected to carry on the flame of Christian culture after Rome and Byzantium. Putin's zeal to pursue this mission was matched by his growing contempt for the West, which he described as decadent, roundly rejecting the Lesbian, Gay, Bisexual, and Transgender (LGBT) movement, for instance.

A second mission throughout history was to unify territories that had belonged to the Russian empire at a certain time in history. In Putin's understanding, Russia as a world power must incorporate or at least control the areas bordering it.

The ethnic dimension was added to this line of reasoning. In a famous article of 2021, Putin displayed his historical vision of the triune Slavic nation, describing Russians, Ukrainians, and Belarusians as part of the same people.²⁸ He denied Ukraine a legal title to the Donbas and even questioned its statehood in general. Thus, he relied exclusively on historic considerations without even mentioning legal concerns.

Russia's contribution to the victory over Nazi Germany seemed to confirm its distinctive role in world history. It is remarkable to what extent Russia's successes in the Second World War were glorified; any vilification of the USSR's feat is now subject to criminal punishment. Putin borrowed the objectives of the Potsdam Agreement to specify the goals of the current war:

²⁸ <<https://www.prlib.ru/en/article-vladimir-putin-historical-unity-russians-and-ukrainians>>.

denazification and demilitarisation. This reveals the ideological sources that feed Russia's political thinking.

Given this self-perception, Russia felt humiliated by being qualified as a regional power.²⁹ Putin's ambition is to change this. Unfettered by legal qualms, he has shown the absolute resolve to re-establish Russia as a great power – if not by negotiations, then by the use of force. It started with the war in Georgia and the establishment of two puppet governments in South Ossetia and Abkhazia and was followed by the annexation of Crimea and the hybrid war in eastern Ukraine. The war of 2022 is only the logical consequence of this line of reasoning.

III. The West: Self-Centered Conduct

1. Rules-Based Order?

The idea after the end of the Cold War was to establish a rules-based order that would best protect the interests of all states. However, this goal was undermined by the increasing number of attempts to settle conflicts by the unilateral use of force.

The first disappointment was the Kosovo war, when the NATO intervened in Serbia without proper legal justification. While there was a common reaction to the terror attacks of 2001, Russia, while opening its air space for US and western war planes,³⁰ did not get actively involved in the war in Afghanistan. Instead, it watched with a certain distrust as the United States (US) and Western allies established army bases in central Asian countries. In 2003, Russia was irritated that the US acted unilaterally against Iraq, without any authorisation by the UN.³¹ Moreover, Russia criticised the fact that many Western states spontaneously recognised Kosovo after the unilateral declaration of independence, in contradiction to the requirements established by the UN Security Council resolution 1244. Russia later used this as a model, applying it to the secession of Abkhazia and South Ossetia from Georgia and in the context of the annexation of Crimea. Lastly, the war in Libya, as conducted by the Western states and NATO, was not firmly based in international law. In this context, the UN Security Council had authorised the

²⁹ This was the qualification by Obama, <<https://www.reuters.com/article/us-ukraine-crisis-russia-weakness-idUSBREA2O19J20140325>>.

³⁰ However, to Russia's mild astonishment the Western states did not ask Russia for advice in the war in Afghanistan.

³¹ Putin pointed this out in his famous speech at the Munich Conference in 2007.

implementation of a no-fly zone and the protection of the civilian population, but Western states stretched this authorisation to justify toppling the Gaddafi government. As a result, Russia – like China – expressed its distrust of the US by denying any chapter VII UN Security Council resolution regarding the conflict in Syria.

Whenever Russia was blamed for violating international norms, it answered by referring to precedents. That may not always have been correct, and sometimes it was just a whataboutism; a violation of law can never be justified by alluding to others' violations.

However, the fact that Western states' conduct had eroded basic rules of international law strengthened Russia's conviction that a real power must be beyond the law. Since Western states often interpreted international law in ways that best served their interests, thus depriving international law of its normative function, Russia was guided not so much by the norms of international law but by others' violation of these norms. This became the breeding ground for legal nihilism, which has a certain tradition in Russia.

2. Extension of the NATO

One of the main arguments with which Russia has justified the war is the expansion of NATO to the east, which may lead to Russia's military encirclement. The membership of NATO has doubled since 1989. All new members are Central and Eastern European states. Russia alleges that the NATO has violated promises that belong to the prerequisites of German reunification. The treaty on German reunification contains a provision that prohibits the deployment of NATO forces in the territory of the former German Democratic Republic (GDR). On this basis, Russia has concluded that a fortiori a deployment of armed forces closer to the border of Russia is implicitly prohibited.

However, such a NATO commitment is not documented anywhere. When German unification was negotiated, the extension of the NATO states to areas other than the former GDR was not a topic, as the Warsaw Pact still existed and there were no plans to dismantle it. An expansion of NATO did not constitute a breach of international norms.

However, one may raise the question if it was politically wise to extend the NATO without developing a common security concept that considered Russian interests. This does not mean that Russian fears are justified: the NATO never set foot on Russian soil, and a closer look at its military capacities must lead to the conclusion that it is not prepared to do so. Politics

should not be limited to objective external facts, however, but must also factor in concerns and sensitivities, which also play out in international relations.

3. The End of Disarmament

The end of the Cold War began with agreements on arms control. These treaties were dismantled step by step, quite often at the initiative of the West. The political landscape has changed since the times when arms control began. A bipolar world grew into a multipolar world in which China, unrestricted by arms control treaties, claimed its place.

First, in 2001, the US terminated the Anti-Ballistic Missiles (ABM) treaty limiting the deployment of antiballistic missile systems. The Treaty on Conventional Armed Forces was negotiated in 1990 when the Warsaw Pact was still in place. With the end of this alliance, the treaty became moot and was supplemented by a 1999 agreement that was ratified only by the Eastern states. All NATO members rejected the ratification due to the ongoing presence of Russian troops in Georgia and in Transnistria. Ultimately, the Russians did not withdraw their troops from the territories but instead claimed that the treaty was senseless if only one party felt bound by it. In 2018, the United States announced that it intended to withdraw from the Intermediate-Range Nuclear Forces Treaty, concluded in 1987. The West blamed Russia for having violated the Treaty by developing new missiles. Conversely, Russia criticised the West for deploying missile launchers in Romania and Poland, maintaining that these could also launch intermediate missiles. Finally, the US terminated the Open Sky Treaty permitting surveillance flights over the territories of the other side. The only remaining treaty related to arms control is the New Strategic Arms Reduction Treaty, which was extended for five years in 2021.

At the same time, almost all NATO Member States continue to increase their defence budget. The budget of the United States of America (USA) is larger than those of the next ten states on the list of countries investing most in their armed forces, and the defence budget of all NATO members taken together exceeds the Russian defence budget twentyfold. While Russia started an ambitious rearmament program at the beginning of this century, it could not compete with the Western states, given its weak economy. It saw itself on the losing side of history, always fearing that the NATO could use its force to interfere in Russia. Indeed, the NATO's power must impress a state whose policy is largely determined by categories of military strength.

The end of disarmament marked the beginning of an era in which cooperation was no longer a top priority on the political agenda.

IV. Conclusion

The Russian president decided to start the war in Ukraine, and it is evident that there is no justification for this war. This is the simple answer to the question of who is responsible. However, a conflict never begins when war breaks out: There is always a preceding history that might have offered alternative paths leading away from the direct route to cataclysmic confrontation. Had all parties implemented the generally accepted Minsk Agreements, Ukraine would have had better options than whatever will be the outcome of the war. Had Russia been integrated in modern international institutions in a sustainable way, it might have averted the country's disconcerting turn back to history and its desperate quest for allies. An updated transparent arms control system could have upheld the principles of trust and cooperation. Finally, had all states strictly abided by the law at all times, international law could have continued to serve as a generally recognised source for the friendly settlement of disputes.

Matthias Hartwig