

## Sponsoring a War of Aggression? The German Basic Law and the Continuing Large-Scale Import of Russian Fossil Fuels

### I. The Russian war on Ukraine from the legal perspective

1. A classical war of aggression, not a "special military operation"
  - a long-planned, unprovoked unilateral assault, not a spontaneous escalation of a "conflict"
  - an all-out attack against the territorial integrity and very existence of the victim state, not a limited special operation
  - a classical imperialistic war of conquest, barely disguised by easy-to-see-through disinformation narratives
2. A clear violation of the prohibition of the use of force under art. 2 no. 4 UN Charter
 

**Art. 2 no. 4 UN Charter:** "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

  - a violation of a *cornerstone of the modern international order*<sup>2</sup> that forms part of ius cogens
  - a manifest violation without even a semblance of justification, classified as such in a broad global consensus
  - also a contempt of an *order of the International Court of Justice of 16.03.2022*<sup>3</sup> to suspend military operations
3. A violation of the universally recognized principles and norms of international law as a component part of the Russian legal system (cf. art. 15(4) of the Russian Constitution of 1993)
4. Crimes punishable under the Rome Statute of the International Criminal Court
  - war crimes (art. 8) and crimes against humanity (art. 7); no ICC jurisdiction on Russian crimes of aggression
5. The bigger picture: a fundamental attack on the rule-based world order of sovereign states with self-determination of peoples
  - Ukraine is only the beginning: the imminent threat for Moldova, Georgia, the Baltic States, Finland, Poland, Taiwan...
  - an attempt to rebuild an empire by force and regain hegemonic control over an arrogated geo-regional sphere of influence
  - Russia's and China's plans for a new world order that will divide the world into spheres of influence of a few hegemonic powers and, consequently, deny self-determination to small and medium-sized peoples

### II. The German response to the Russian attack on Ukraine

1. The German response in general
  - symbolic proclamation of a "turn of the times" ["Zeitenwende"] with little consequences
  - political condemnation of the attack and declarations of solidarity to Ukraine
  - participation in the far-reaching sanctions of the European Union against Russia
    - but resistance to a complete ban of Russia from SWIFT
    - but late final abandonment of the new gas pipeline Nord Stream 2
  - reception and preferential treatment of more than 915.000 refugees from Ukraine (19.07.)
    - warm welcome and strong support, also active support, by the population
  - massive use of financial resources to support Ukraine
    - a total of financial, humanitarian and military commitments of 3.34 billion € = 0.093 % of GDP (06.07.)<sup>4</sup>
  - but reluctant and very limited supply of weapons to Ukraine
    - delayed again and again by the Federal Government
    - after 5 months of war, only a few heavy weapons have been delivered
  - gradual fading of the war in public consciousness in summer 2022
2. The limits of solidarity: the continuing large-scale import of Russian fossil fuels
  - a) A reluctant and hesitant reduction of the huge imports of Russian coal, oil and gas<sup>5</sup>
    - 5 months to reduce the share of Russian hard coal in consumption from 50 to 8 %, 6 months until a total ban
    - 5 months to reduce the share of Russian crude oil from 35 to 12 %, 10 months until a planned total ban
    - 10 months planned to reduce the share of Russian natural gas moderately from 55 to 30 %
      - a temporary greater reduction was not intended but forced by Russian delivery cuts
    - the outcome: a **significant German contribution to the financial stabilisation of the aggressor**, which undermines the effect of the sanctions taken by the international community
      - Russia's fossil fuels revenue exceeds its estimated spending on the invasion
      - Germany in the first two months with 8.3 billion € largest contributor to Russia's 58 billion € fossil fuels revenue<sup>6</sup>

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<sup>2</sup> Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

<sup>3</sup> International Court of Justice, order on provisional measures of 16.03.2022, Ukraine vs. Russian Federation, <http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

<sup>4</sup> Data according to Arianna Antezza; André Frank; Pascal Frank; Lukas Franz; Ekaterina Rebinskaya; Christoph Trebesch, Ukraine Support Tracker, updated 06.07.2022, [www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker](http://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker).

<sup>5</sup> Data according to Federal Ministry for Economic Affairs and Climate Action, Dritter Fortschrittsbericht Energiesicherheit [Third Energy Security Progress Report], 20.07.2022, p. 7 ff., [www.bmwk.de/Redaktion/DE/Downloads/Energie/20220720\\_dritter-fortschrittsbericht\\_energiesicherheit.html](http://www.bmwk.de/Redaktion/DE/Downloads/Energie/20220720_dritter-fortschrittsbericht_energiesicherheit.html).

<sup>6</sup> Cf. Center for Research on Energy and Clean Air (editor), Financing Putin's war on Europe: Fossil fuel imports from Russia in the first two months of the invasion, 27.04.2022, updated 17.05.2022, p. 2, 4, <https://energyandcleanair.org/financing-putins-war>.

- Germany in the first 100 days *with 12.1 billion € still second largest contributor* to Russia's 93 billion € revenue and thus *main foreign funding source of the Russian war after China* (12.6 bn. €)<sup>7</sup>
- Germany spends *more than 3.5 times as much for Russian fuels than for supporting Ukraine*

- b) The refusal to stop or largely reduce gas imports already during the war
- Federal Government envisages end of imports not before summer 2024 - hoping not to arrive at this point?
  - cautious reduction of imports widely backed by politicians, economic stakeholders and population
  - background: *the unwillingness to accept supply shortages* that would cause a severe economic crisis
    - albeit the dimension of the crisis to be expected is disputed
    - in summer 2022, the threat of gas shortage in winter draws more public attention than the ongoing war in Ukraine
  - problem: How far must a free and democratic constitutional state go, what dimension of crisis must it be prepared to endure, to defend democracy, human rights, the rule of law and the rule-based international order in Europe?

### 3. Narratives influencing the German response to the Russian attack on Ukraine

- not the reason but additional factors favouring the reluctance to stop fossil fuel imports:
- the distorted historical narrative of the German atrocities in the Soviet Union during World War II
  - correct on the atrocities as such but with a lopsided focus on atrocities against Russians, not denying but neglecting those against Ukrainians and Belarusians
  - often the whole Slavic area of the Soviet Union is simply referred to as "Russian"
- the narrative of historical guilt towards Russia
  - correct but leading Germans sometimes to turn a blind eye to Russian threats to law, democracy and human rights
- the narratives of appeasement and submissive pacifism
  - persistently ignoring the historical experience in World War II, the Yugoslav war and with Russia in early 2022
  - flanked by the narrative of an imminent danger of an atomic war, as spread by Russian politicians and media
  - culminating in an open letter of intellectuals of 28.04.2022 demanding to give in to the aggression with a "compromise that both sides can accept"
- the narrative of Germany as always true great supporter and benefactor of the East European countries
- the narrative of Germany as most committed, always solidary and never selfish promoter and defender of human rights, democracy and rule of law in the world - even though it has never taken on any heavy sacrifice in this role
- the narrative of a "conflict" between two equally responsible parties, in which Germany should remain neutral
- Russian propaganda narratives, e.g. conspiracy theories, absorbed by coronasceptics ("Querdenker"), parts of the right-wing extremists and some left-wing extremists

## III. The ongoing fossil fuels import from the constitutional perspective

1. No violation of general rules of public international law as integral part of federal law (art. 25 BL)
  - these rules include the *prohibition of complicity* (aid or assistance) in the illegal use of force
  - but imports from Russia not complicity because
    - narrow concept of complicity requires a significant specific support - no general ban of trade relations with an aggressor under public intern. law
    - payments not made to help aggressor but in return for a significant material consideration
    - imports must be seen in the context of the overall economic relations, which have been restricted
2. Violation of the principle of the rule of law [Rechtsstaatsprinzip] (art. 20(3) BL)?
  - a) The comprehensive German concept of rule of law
    - numerous elements worked out in the abundant jurisprudence of the Federal Constitutional Court, which is still open for judicial further development of law
  - b) No violation of the primacy of the law or other classical elements of the rule of law
    - imports do not violate any specific norm of national or international law, nor even the EU sanctions
    - imports not contrary to the well-established special sub-principles of the rule of law
  - c) Violation of the *duty of commitment and loyalty to the rule of law* (here: to the primacy of the law in international relations) by strengthening the financial resilience of a serious international lawbreaker?
    - aa) The duty of commitment and loyalty to the rule of law as part of the concept of the rule of law
      - this concept requires the state not only to respect the law but also to be considerate for and stand up for the rule of the law within the state and in international relations - even if this demands sacrifices
        - a still rather unchartered general aspect of the rule of law that needs further exploration with inspiration from compared constitutional, human rights and European jurisprudence and the work of the Venice Commission
      - basic idea: the *duty to refrain* not only from unlawful action but also *from* action which, although lawful in itself, contributes significantly, individually or in sum, intentionally or unintentionally, to weaken the rule of law (here: the rule-based international order) as such, e.g. by *generally strengthening or stabilising a serious lawbreaker* to such an extent that it enables and encourages him to continue
      - this duty is by nature limited to what is necessary and reasonable to exclude severe cases of de facto general support of serious lawbreakers
      - the duty *needs to be concretised* in the individual situation *by thorough balancing*, with the typical margin of appreciation and evaluation of the political institutions, taking into account
        - the severity of the ongoing threat to the law,
        - the possible harm to others caused by further serious breaches of law to be expected,
        - the disadvantages caused by the refraining to the refraining state and how they can be avoided or minimised

<sup>7</sup> Cf. *Center for Research on Energy and Clean Air (editor)*, Financing Putin's war: Fossil fuel imports from Russia in the first 100 days of the invasion, 13.06.2022, p. 2, 4, 6, <https://energyandcleanair.org/publication/russian-fossil-exports-first-100-days>. The EU in total contributes with 57 billion €.

bb) Aspects to be considered in the concretisation of this duty

- the fact that *Russia's high fossil fuels revenue exceeds its estimated spending on the war*
  - thus largely neutralising the effect of the international sanctions and allowing for a solid funding of its war
- the risk that this revenue enables and encourages Russia to attack other states, such as Moldova or the Baltic States, in the near future
- Germany's high share in the revenue's generation that makes it *de facto a main financier* of Russia's war
  - 13 % compared to a share of 48.3 % of all 26 other EU member states combined
  - a role not outweighed by the financial support and the rather cosmetic weapons supply to the victim
- the fact that Russia's *aggression targets* not only one state but *the rule-based international order as such*
- the fact that Germany has voluntarily made itself dependent on the Russian supplies, despite the warning of its allies, and therefore now cannot expect to be spared from supply shortage
  - Germany may need to live up to its *own dogma of "self-responsibility"* [Eigenverantwortung] of each state, with which it has pressurised other states in other crises to take on heavy burdens
- the *threat of a severe economic crisis in Germany* with millions out of work in case of major supply shortages
  - but also the fact that the magnitude to expect is unclear, the public discussion is distorted by lobbyist scare-mongering and solutions are discussed in science how to minimise the crisis
- the threat of supply shortages causing social unrest and fuelling attempts to destabilise German democracy
  - but also the fact that this risk can be reduced, though not averted, by social and economic assistance programs

cc) The violation of this duty by the insufficient reduction of the fossil fuel imports

- considering all aspects, an immediate import ban could not and cannot be required, even if necessary to stop the Russian aggression, since it would cause unreasonable (undue) hardship to German citizens and economy
- however, the *sluggish reduction of the huge imports over a long period of time* of up to 2.5 years, planned to exceed even the duration of the war, the *only marginal reduction during six months of war* and the *categorical refusal to accept any supply shortages* out of solidarity
  - ignore the dynamics of a crisis situation caused by a war,
  - significantly neglect the interests of the victim and the threatened EU and NATO partners and
  - place national economic interests regardlessly above the need to protect the rule-based international order;
  - ▶ it is not apparent how this could be assessed appropriate to fulfill Germany's duty of commitment and loyalty to the rule of law in international relations under art. 20(3) BL
- YOUR OWN ASSESSMENT: \_\_\_\_\_

3. Violation of the general commitment to human rights as basis of every community, peace and justice in the world (art. 1(2) BL)

**Art. 1(2) BL:** The German people are ... committed to inviolable and inalienable human rights as the basis of every human community, of peace and justice in the world.

- a commitment to human rights as a universal value, also outside the territorial scope of the Basic Law and the fundamental rights guaranteed there
  - a *legally binding commitment* in a *constitutional norm*, not just a political proclamation in the preamble
- this norm has not yet been practically activated but a teleological interpretation with regard to the need to ensure its "effet utile" would mean that it requires to be considerate for and stand up for the human rights in all aspects of international relations, including to *refrain from any trade or economic policy that could have the effect or side effect*, even by unintended significant funding, *to facilitate serious human rights violations* in or by foreign countries, as committed by Russia on a large scale against Ukrainian civilians

4. Violation of the German determination to promote world peace (preamble BL)

- not a constitutional norm but only a preamble consideration
- can continued large-scale trade that is particularly lucrative to the aggressor of a war of aggression and contributes significantly to its financial stabilisation, be in line with promoting world peace?
  - the German reluctance to finally abandon the failed neo-liberal concept of "change through trade" ["Wandel durch Handel"]

#### IV. Outlook

- Will Germany be a reliable NATO partner if Russia, financially fueled by its high fossil fuel revenues, decides to attack the Baltic States next?
  - the obligation under art. 5 NATO Treaty is unconditional, but will Germany be prepared to live up to it without ifs and buts if Russia threatens nuclear annihilation on the one hand, but holds out the prospect of cheap natural gas on the other?
  - will the Federal Government resist predictable campaigns of intellectuals to give in to this aggression with a "compromise that both sides can accept"?
- Germany has presented itself for decades as a committed promoter of rule of law, human rights and democracy in the world, but it has yet to prove that it is willing to make heavy and painful sacrifices to defend these values