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WHAT SHOULD LAW DO WITH THE WAR?

The Russian invasion of Ukraine has once again raised the question of the relationship between war and law. On the one hand, unmotivated aggression is prohibited under international law.[1] On the other hand, it is clear that despite the arrest warrant of the International Criminal Court against the main war criminal (the head of the Russian Federation V. Putin), the chances that Russian leader will end up in the jail do not depend on the strength of the judiciary, but on the outcome of the war, which will be decided by the armies on the battlefield. At first glance, law and war may seem mutually exclusive. As the modern Swiss legal scholar M. Mahlmann has noted,

> War is widely and rightly regarded as the negation of law. The rule of law is the epitome of the human attempt to rationalize the social order and substitute arbitrary power with rules that provide certainty and guarantee foreseeable forms of social interaction. The rule of law is also intrinsically connected to material values of justice, solidarity and fundamental rights. War, in contrast, silences the voice of law; naked force throws off the shackles of normative constraints and rules supreme.[2]

To answer the aforementioned question, we must reconsider both the phenomenon of war and that of law. Is it possible to call "war" every armed conflict in which two or more states are directly or indirectly involved? Should law be understood exclusively as a formally defined system of norms that regulates social relations? And is law capable of regulating war not after its ending only, but also during it? Also, it must be remembered that the modern interpretation of war as fundamentally unlawful gained universal acceptance only after the

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[1] UN-Charta, Art. 1 (4).

[2] Matthias Mahlmann, "War – the Disenchantment of Law?" *Filosofiia prava i zahalna teoriia prava* 1 (2023): 10.

Second World War.[3] The modern prevailing concept of law as a system of normative-legal moral values, which is binding for all "civilized" participants in international legal relations, also emerged in its present form in the late 1970s and early 1980s (in the works of R. Alexy, R. Finnis and others).

At the same time, it is obvious that both war and law are much older phenomena. Therefore, war must be analyzed from a legal perspective, employing methodological tools and ideas that are appropriate to the object of study in this context. More exactly, if the current actions of the Russian Federation (imperial expansion through armed aggression within the framework of the doctrine of effective occupation) do not align with modern concepts of war and law, it is reasonable to revisit approaches specifically developed for such cases to better understand the situation). In this case, the work of the German legal scholar Carl Schmitt "Nomos der Erde" ("Nomos of the Earth") proves to be an indispensable resource. Written in 1950, it was based on a historical context that closely parallels the present day. The Russian Federation's attempts at imperial expansion, justified by claims of "fulfilling historical justice," "protecting the rights of Russian-speaking populations," or "defending the Russian world," immediately draw direct historical parallels to Hitler's aggression, such as the "protection of the German population" in Poland and Czechoslovakia, the "special historical destiny of the Third Reich," and similar pretexts. Therefore, Carl Schmitt's book is inspired by the same problems (aggressive war, violations of international law and mass deaths of civilians) that concern us today. It is particularly noteworthy that, despite the author's closeness to National Socialism, "Nomos der Erde" was written by Carl Schmitt himself after the end of the Second World War and his imprisonment. In other words, the work of Carl Schmitt offers a profound and systematic analysis of the relationship between law and war, incorporating historical conclusions – the inevitable collapse of all imperial ambitions based on the unbridled will to power of the initiators of these processes.

The aforementioned questions shape the structure of this article and the logic of its content. First, we will examine Carl Schmitt's understanding of *Nomos* (I). Next, we will address the concept of *Landnahme*, which Schmitt considers the foundation of all law (II). The third section explores Schmitt's interpretation of the term "war" (III). Finally, we will attempt, drawing on Schmitt's insights, to answer the question of how law should address war in the current context (IV).

[3] As the modern Italian legal scientist I. Trujillo states: "The whole traditional doctrine of *bellum justum* made plausible the idea that war was not permitted. Nevertheless, its status in international law was uncertain until the Second World War. But, if in the 1940s Kelsen could keep the question open as to whether war was or was not prohibited under international law, after the United Nations Charter and the Universal Declaration of Rights, this question has a clear-cut answer. War is prohibited. In the case of aggression – unambiguously, an illicit warfare – self-defense is permitted. The justification is, roughly, the admissibility of the reaction for the survival of the State and its citizens." (Isabel Trujillo, "Human Rights and *jus contra bellum*," *Filosofiia prava i zahalna teoriia prava* 1 (2023): 34).

I. Der Nomos

First of all, to understand law in C. Schmitt's work correctly, it is necessary to leave the ground of legal metaphysics. As is well known, metaphysics emerges from the distinction between the sensible and supersensible worlds.[4] The named fact became the basis for the metaphysical understanding of law as Ought (Sollen), isolated from Being (Sein). As C. Schmitt said, "In the contemporary world situation, it (Nomos – *O. S.*) expresses only the positivistic artifice of what is enacted or obliged – the mere will to compliance, or, in Max Weber's sociological formulation, the will to realize a "chance to compel obedience."[5] The similar statement is enough to understand that C. Schmitt's "Nomos" in no way cannot be interpreted as positive law in opposition to natural law ("Physis"). The German legal philosopher himself cautions against such an interpretation, which, in his opinion, only arose during the classical period in the debates between Socrates and the Sophists. By Aristotle "Nomos clearly can be seen as an original distribution of land"[6] and does not mean any domination of the abstract Ought. Also, if we consider C. Schmitt's view of law, we have to refuse the temptation to interpret his position in the light of modern concepts. It is widely recognized that, law is currently understood primarily as a set of norms that regulate social relations. Contemporary discussions focus on whether such norms of law inherently reference morality ("the claim to correctness")[7] or whether they can be defined independently of moral values.[8]

In contrast C. Schmitt is particularly interested in the ontological origins of legal normativity. More exactly, his well-known thesis of the earth as "the mother of law" has to be understood in this context.[9] Of course, the German legal philosopher is not alone in his endeavor to disclose the foundations of law. Among such attempts we can mention the "rule of recognition" by H. L. A. Hart,[10] the "basic norm" by H. Kelsen[11] and many others. Our aim, however, is not to analyze such attempts. It is good enough for us to point out that for an adequate understanding of law in C. Schmitt's vision it is necessary to distinguish between so-called "traditional law" – norms that regulate the behavior of legal subjects – and those legal acts in which the source of the validity of traditional law is rooted. It is precisely these acts that are the focus of the German legal scholar's attention.

As C. Schmitt emphasizes, law is therefore not based on the will of the sovereign and not on morality, but on the historical event of land appropriation (die Landnahme). "To this extent, from a legal perspective, one might say that land-appropriation has a categorical

[4] Immanuil Kant, *Critique of Practical Reason* (Cambridge University Press, 2015), 127.
[5] Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New-York: Telos Press Publishing, 2006), 70.
[6] Ibid, 68.
[7] Robert Alexy, "Law's Dual Nature," *Ordines* 1 (2019): 42–51.
[8] Eugenio Bulygin, *Essays in Legal Philosophy* (Oxford: Oxford University Press, 2015).
[9] Schmitt, *The Nomos of the Earth*, 13.
[10] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 100–10.
[11] Hans Kelsen, *Pure Theory of Law* (Clark, New Jersey: The Lawbook Exchange LTD, 2005), 193, 195.

character."[12] The similar process (the land appropriation) is called "Nomos." Before advancing to a positive explication of this phenomenon, it should be noted that C. Schmitt does not understand "Nomos" as an abstract, static Ought, but rather as a dynamic process, an event, a happening. As he says Nomos is "the Greek word for the first measure of all subsequent measures, for the first land-appropriation understood as the first partition and classification of space, for the primeval division and distribution."[13] The content of this event consists of the main features such as order ("die Ordnung") and orientation ("die Ortung"). Similar to measuring (die Messung), order and orientation do not mean static phenomenon, but have to be understood as events. Therefore "in its original sense, however, Nomos is precisely the full immediacy of a legal power not mediated by laws; it is a constitutive historical event – an act of legitimacy, whereby the legality of a mere law first is made meaningful."[14]

But how does the Nomos determine the content of concrete law? As C. Schmitt emphasizes, the land appropriation is a law-established process that establishes law in two directions (internally and externally).[15] On the one hand, law organizes the relationships within the space outlined in the process of orientation. On the other hand, orientation presupposes the delimitation of space and its distribution between sovereign states. The essence of land's appropriation as a legal process therefore, lies in the unity of order (internal relations) and orientation (external borders). This event occurs as a measuring (die Messung), i.e. the determination of a certain *constellation* (italics mine – *O. S.*) – the mutual position of the states through the drawing of borders (orientation) and the ordering of the social relations within these borders (order).

Therefore, Nomos should not be understood in a simplistic way as a mere conquest of land that is legalized "post factum" by subsequent positive-legal institutions. Within the framework of Nomos as the *constellation* of the entire relational order, no boundary can be violated arbitrarily without undermining the order as a whole. It is precisely such a system of equilibrium that forms the core of the Nomos and the foundation of all law. Nevertheless, the establishment of law through the appropriation of land immediately raises the following question: What if the appropriation of land was carried out by force? Does this mean that annexation, occupation and other violent forms of land seizure are the basis of law?[16] It is therefore necessary to consider more closely how German legal scholar actually understands the event of the "Landnahme" itself.

[12] Schmitt, *The Nomos of the Earth*, 46.
[13] Ibid, 67.
[14] Ibid, 73.
[15] Ibid, 45.
[16] As for example M. Mahlmann noted: "Related, though not identical, is an apologism for violence in its various, not necessarily warlike forms as the source of the creation of political orders. Examples include Carl Schmitt's legal thought that meandered between various outlooks such as decisionism and thinking in concrete orders (*konkretes Ordnungsdenken*) and led to the idea that the taking of territories could create laws, a crude version of the justification of imperial policies." (Mahlmann, "War – the Disenchantment of Law?" 13.)

II. Die Landnahme

Even a brief analysis of "Nomos der Erde" provides ample reasons to assert that the appropriation of land as the foundation of law does not equate to mere occupation. As C. Schmitt says,

> not every invasion or temporary occupation is a land-appropriation that founds an order. In world history, there have been many acts of force that have destroyed themselves quickly. Thus, every seizure of land is not a Nomos, although conversely, Nomos, understood in our sense of the term, always includes a land-based order and orientation.[17]

For this reason, C. Schmitt's position should not be oversimplified. To clarify the views of the German legal scholar, it should be noted that, according to him, "the many conquests, surrenders, occupations, annexations, cessions, and successions in world history either fit into an existing spatial order of international law, or exceed its framework and have a tendency, if they are not just passing acts of brute force, to constitute a new spatial order of international law."[18] For example, the redistribution of land after the Second World War clearly created a new European (and world) order. Therefore, a distinction should be made between land appropriation that occurs within the framework of the existing order and land appropriation, which constitutes a new order.[19]

As we can see, from C. Schmitt's perspective, only land appropriation that does not disrupt the existing order of relations within a given territory is legally valid. If the seizure of land challenges the existing order, it is either deemed unlawful or justified only by the establishment of a new Nomos. At the same time, it must be emphasized that while any land appropriation by force is illegal, this does not exclude the waging of hybrid wars, the creation of "grey zones" and "disputed territories" (Northern Cyprus, Abkhazia, Transnistria, Crimea, etc.).[20] To better understand the current situation, it is necessary to examine the differences in the types of land appropriation mentioned by the German legal scholar.

C. Schmitt first suggests distinguishing between occupation and succession (transfer/assignment of territorial rights). "The territorial change (in order to be 'die Sukzession' – *O. S.*) should proceed within the framework of an existing spatial order. In other words, the land-appropriation must be institutionalized in international law."[21] Otherwise, the actual

[17] Schmitt, *The Nomos of the Earth*, 80.
[18] Ibid, 82.
[19] Ibid.
[20] As M. Mahlmann noted: "This antagonism (law and war – O. S.) has motivated centuries-old attempts to tame war by the means of law and, ideally, to prevent new wars from being begun. These attempts have culminated in international humanitarian law and the prohibition of aggression in the UN Charter, Art. 1 (4) – both, however, with limited practical effect." (Mahlmann, "War – the Disenchantment of Law?" 10.)
[21] Schmitt, *The Nomos of the Earth*, 194.

possession of the land, regardless of duration, is considered as occupation. In other words, without a basis in a generally recognized territorial order (explicit recognition of the appropriation of land by the other members), an occupation, no matter how effective it is (i.e. even if the occupied territory is included in the administrative order), remains illegal. Similarly, in the case of continued resistance to the occupation of the indigenous population of the occupied territory (sabotage, guerrilla warfare), such an occupation can be regarded as a violation of the people's right to self-determination. It can therefore be assumed that, according to the current Nomos of the Earth, occupation can only be considered succession under the following conditions: 1) consent to the cession of territory by the rightful sovereign of the occupied territory; 2) recognition of the occupation of land by all or the overwhelming majority of the members of the general territorial order; 3) consent of the population of the occupied land. Otherwise, for instance, the annexation of Crimea by the Russian Federation, remains illegal despite its long-term nature and effectiveness, as it is carried out in violation of the European Nomos (lack of consent by Ukraine, non-recognition of the occupation by Ukraine and the international community, resistance by the Crimean Tatars, holding a so-called "referendum" on the "Anschluss" of Crimea to the Russian Federation in violation of international law).

It should be emphasized that the conditions described above for the legal land appropriation, doctrinally anchored in the modern Nomos of Europe, make open occupation practically impossible. However, the aggressor regimes have developed several effective strategies aimed at legitimizing control over foreign territory, even if only to a minimal extent. Especially C. Schmitt emphasizes the diversity of modern forms of territorial control

> … whose first characteristic is renunciation of open territorial annexation of the controlled state. The territorial status of the controlled state is not changed if its territory is transformed by the controlling state. However, the controlled state's territory is absorbed into the spatial sphere of the controlling state and its special interests, i.e., into its spatial sovereignty.[22]

Similar forms of control include the creation of quasi-state entities, the establishment of puppet regimes and interventionist treaties.

As we can see, the Russian Federation consistently employed these methods to undermine Ukraine's independence. For example, the war in 2022 was initially launched with the goal of overthrowing the legitimately elected President Zelensky and installing a puppet regime led by Medvedchuk and Yanukovych in Ukraine. Similarly, in 2014, with the active support of the Russian Federation, quasi-state entities "Donetsk People's Republic" and "Luhansk People's Republic" were founded on the territory of Ukraine, which were not recognized by the international community and served as the springboard for the hybrid war between the Russian Federation and Ukraine.

[22] Schmitt, *The Nomos of the Earth*, 252.

However, the third of the aforementioned methods – the conclusion of an intervention agreement seems the most interesting. As C. Schmitt shows,

> political control and domination were based on intervention, while the territorial status quo remained guaranteed. The controlling state had the right to protect independence or private property, the maintenance of order and security, and the preservation of the legitimacy or legality of a government. Simultaneously, on other grounds, it was free, at its own discretion, to interfere in the affairs of the controlled state. Its right of intervention was secured by footholds, naval bases, refueling stations, military and administrative outposts, and other forms of cooperation, both internal and external. The controlling state's right of intervention was recognized in treaties and agreements, so that, in a strictly legal sense, it was possible to claim that this was no longer intervention.[23]

Such an intervention treaty was signed between the Russian Federation and Ukraine in 2010. As is well known, the 2010 "Kharkiv Treaties" provided for the presence of the Russian Black Sea Fleet on Ukrainian territory until 2042 (with the possibility of an extension), as well as the lease of Ukrainian territory in the Autonomous Republic of Crimea for this purpose. It can therefore be assumed that, according to similar logic, the annexation of Crimea by the Russian Federation in 2014 and the intervention in Donbass had their doctrinal (quasi-legal) roots precisely in the aforementioned treaty, which can appropriate rightly be described as interventionist.

At the same time, the occupation of Crimea and its integration into the administrative-territorial structure of the occupied country made it impossible to provide a doctrinal justification for further Russian aggression (due to the fact that Crimea was integrated into the administrative-territorial structure of the occupied country and the "Kharkiv Treaties" were denounced by the Russian Federation in the same year (2014)). Thus, the actions of the Russian Federation towards Ukraine serve as a "living illustration" of "Nomos of the Earth" and consistently reproduce all stages of attempts to establish territorial control – from an interventionist agreement to quasi-state entities and attempts to establish a puppet regime, and finally to full-scale war.

Thus, we can conclude that from a careful reading of the "Nomos of the Earth," it follows quite clearly that not every land appropriation is a "Nomos," i.e. the legitimate foundation of a new national or international legal order. Based on the doctrinal presuppositions of the modern world order, the event of "Nomos" can only be recognized under the next conditions: consent to the cession of territory by the legitimate sovereign of the occupied territory, recognition of the land appropriation by all or the overwhelming majority of the members of the general territorial order, consent of the population of the occupied territory. Consequently, within the framework of Carl Schmitt's studies, the actions of the Russian

[23] Schmitt, *The Nomos of the Earth*, 252.

Federation towards Ukraine must undoubtedly be recognized as the intervention without any legitimate and reasonable justification.

III. Der Krieg

At the same time, the above considerations leave unanswered the question of whether C. Schmitt views war as the legitimate basis of the new order – Nomos. We will therefore continue to attempt to analyze both the German jurist's interpretation of the phenomenon of war and the question of how war can become an event that establishes a new spatial order of the Earth.

To understand the phenomena of war correctly, one should first pay attention to its inherent duality. On the one hand, the modern Nomos of Europe (and perhaps the whole world) as an order of spatial relations between states was clearly established by the victors of the Second World War and its results consolidated. On the other hand, modern international law fixes the illegality of war, thus depriving it of the status of a legally constitutive event. Thus, it is obvious that such an ambivalent approach to war obscures the situation rather than clarifies it. We should therefore examine C. Schmitt's concept of war more closely.

Firstly, it should be noted that German legal scholar considers war phenomenological and understands it as a particular *sense of the event*. In other words, just as not every deprivation of life is a murder, not every armed conflict qualifies as war. Similarly, just as criminal law sanctions do not prevent people from committing crimes, but only punish their commission, the criminalization of war does not prevent armed aggression. Therefore, as C. Schmitt shows, "in particular, it was not the abolition of war, but rather its bracketing that has been the great, core problem of every legal order."[24] From a similar point of prospective, international law as a whole is essentially a set of norms and institutions designed to limit aggressive violence.

As a means of limiting war, C. Schmitt emphasizes *equality*, i.e. the mutual recognition of each other's sovereignty by the warring parties. In other words, justa causa as the attempt to limit the war to a just cause is replaced by the recognition of the enemy as the *equally* entitled party – justus hostis. According to the German legal scholar, "instead of justa causa, international law among states was based on justus hostis. Any war between states, between equal sovereigns, was legitimate. Given this juridical formalization, a rationalization and humanization – a bracketing of war was achieved for 200 years."[25] As C. Schmitt stressed,

> the essence of European international law was the bracketing of war. The essence of such wars was a regulated contest of forces gauged by witnesses in a bracketed space. Such wars are the opposite of disorder. They represent the highest form of order within the scope of human power. They are the only protection against a circle of increasing reprisals, i.e., against nihilistic hatreds

[24] Schmitt, *The Nomos of the Earth*, 74.
[25] Ibid, 121.

> and reactions whose meaningless goal lies in mutual destruction. The removal and avoidance of wars of destruction is possible only when a form for the gauging of forces is found. This is possible only when the opponent is recognized as an enemy on equal grounds as a justus hostis. This is the given foundation for a bracketing of war.[26]

The second legal factor that restricts war is the *equal affiliation* of the belligerent rulers to the European or world order. Such an order is based on the aforementioned orientation of borders, their measurement. As C. Schmitt shows, "only with the clear definition and division of territorial states was a balanced spatial order, based on the coexistence of sovereign persons, possible."[27] This situation is the true basis of any international law as the legitimate foundation for limiting the actions of sovereign states. As C. Schmitt says,

> …the essential and very effective bond, without which there would have been no international law, lay not in the highly problematic, voluntary ties among the presumably unrestrained wills of equally sovereign persons, but in the binding power of a Eurocentric spatial order encompassing all these sovereigns, The core of this Nomos lay in the division of European soil into state territories with firm borders, which immediately initiated an important distinction, namely that this soil of recognized European states and their land had a special territorial status in international law.[28]

"Whoever began a European war knew that all the European powers would be interested in the result."[29] In other words, all states are interested parties in the question of the structure of a common, all-encompassing spatial organization.[30] "The interest of participants indirectly concerned need not be less intense than of those who have gained directly or have lost land."[31] At the doctrinal level, modern international law thus includes the limitation of war (the obligation to comply with the rules of war) by recognizing the equality of rights and the sovereignty of the warring parties within the general order. The well-known Schmittian "katechon" as a special mission of an individual state is replaced here by "katechon" as a mission to limit the war of all states that belong to the corresponding order (Nomos) of the acquired region.

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[26] Ibid, 187.
[27] Ibid, 145.
[28] Ibid, 148.
[29] Ibid, 189.
[30] This construction by C. Schmitt is fully applicable to what is happening in Ukraine. As the modern Greek legal scholar K. A. Papageorgiou notes, "this war is of major significance not only for Ukraine; it has serious political, economic and trade-related consequences for all of Europe and the world. It is not therefore a local war at a remote part of the world, which we could regard as not affecting us directly. As we are all bitterly aware, this has an impact on the strategy of the Russian aggressor but also on the capacity of Ukraine to defend itself." (Konstantinos Papageorgiou, "A Manifestly Unjust (but also Manifestly Just) War," *Filosofiia prava i zahalna teoriia prava* 1 (2023): 59.)
[31] Schmitt, *The Nomos of the Earth*, 188.

But just as the legal norms present a challenge for an unscrupulous lawyer to find a loophole in the law to make a fundamentally illegal decision, the aforementioned doctrinal provisions force the current aggressor to look for suitable ways to circumvent the sovereign equality of states, which serves as a "catechon" and stops the war.

The current aggressor first tries to *portray his opponent as unequal to himself,* i.e. as the one who has no sovereignty in the truest sense of the word. This effect can be achieved by declaring the enemy to be a terrorist, a mutineer, an illegitimate armed group, and so on. As C. Schmitt emphasizes, "A non-public war is a non-state war. Not only was it illegitimate; it was no longer war in the sense of the new international law. It could be anything else rebellion, mutiny, breach of the peace, barbarism, and piracy – but not war in the sense of the new European international law."[32]

As observed it is precisely this method that the Russian Federation has actively employed to justify its war of aggression against Ukraine, which the Kremlin disingenuously refers to as a "special military operation." The refusal to call what is happening a "war" and the constant references by the aggressor country to the "illegitimacy of the Kiev regime" are not just a propagandistic rhetorical move, but an attempt to convince other members of the world order that Ukraine is not a fully-fledged member of this order and that it is not possible to wage war with it in the true sense of the word. Thus, all war crimes committed in Ukraine – violations of the rules and customs of warfare, the murder of civilians and, finally, aggression as such – are justified by the Russian Federation on the grounds that because (in the view of the Russian Federation) power in Ukraine is illegitimate, these restrictions on war, which are presupposed by the mutual sovereignty of the parties, do not apply to Ukraine.

Such statements by the Russian Federation were refuted by the final declaration of the 2024 Peace Summit in Switzerland. As is well known, according to this declaration, what is happening in Ukraine was explicitly recognized as a war, and thus (implicitly) the participants of the world Nomos confirmed the sovereignty of Ukraine (since, as already mentioned, war can only be waged between sovereign subjects with equal rights). The legal (or quasi-legal) inequality of the parties as a pretext for justifying a war of aggression can be supplemented by references to the *inequality of the parties in terms of military power*. As C. Schmitt shows, "to war on both sides belongs a certain chance, a minimum of possibility for victory. Once that ceases to be the case, the opponent becomes nothing more than an object of violent measures."[33] In other words, as the German legal scholar continues,

> the victors consider their superiority in weaponry to be an indication of their justa causa, and declare the enemy to be a criminal, because it no longer is possible to realize the concept of justus hostis. The discriminatory concept of the enemy as a criminal and the attendant

[32] Schmitt, *The Nomos of the Earth,* 158.
[33] Ibid, 320.

implication of justa causa run parallel to the intensification of the means of destruction and the disorientation of theaters of war.[34]

The above provides sufficient doctrinal grounds for bringing together seemingly unrelated facts, such as Russian attacks on peaceful Ukrainian towns far from the front line, Russian assurances of the incomparability of the military power of Ukraine and the Russian Federation, and the extremely negative reaction of the Kremlin to the supply of Western weapons to Ukraine. As demonstrated, this case extends beyond the mere intimidation of civilians, the propaganda of military power, or the fear of potential retaliatory strikes from Ukraine. On the contrary, all the events mentioned above represent an attempt by the aggressor country to *justify* the unleashed war *with the inequality between Ukraine and the Russian Federation* – now no longer politically, but militarily. Therefore, the supply of Western weapons to Ukraine and Ukraine's effective resistance to Russian aggression is not only a *military fact*, but above all the destruction of the quasi-doctrinal basis of a war of aggression, i.e. a legal fact from the point of view of international law.

Similarly, just as the lawyers' tricks to circumvent the law prompt prosecutor to actively seek ways to counteract such manipulations, the doctrinal (quasi-legal) strategies employed by an aggressor state incite the development of retaliatory measures aimed at preserving the existing Nomos of the Earth. Among them, the illegitimacy of aggression as such should be mentioned first.[35] Consequently, the one who has started a war of aggression is no longer just an aggressor, but a criminal. The equality of sovereign parties as the basis for war in the traditional sense of the word is thus once again destroyed, albeit from the other side. The state that has committed the act of aggression is no longer equal to the victim of the aggression. As C. Schmitt shows, "…the present theory of just war aims to discriminate against the opponent who wages unjust war. War becomes an 'offense' in the criminal sense, and the aggressor becomes a 'felon' in the most extreme criminal sense: an outlaw, a pirate."[36] As the German legal philosopher underlines, "yet, the injustice of aggression and the aggressor lies not in any substantive or material establishment of guilt in war, in the sense of determining the cause of war, but rather in the crime de l'attaque, in aggression as such."[37]

In other words, just as the aggressor seeks to render the victim by militarily discriminating against the enemy or questioning their sovereign status, the armed struggle against the aggressor does not constitute war in the strict sense of the term. It may be an act of atonement,

[34] Schmitt, *The Nomos of the Earth*, 321.

[35] As K. A. Papageorgiou says, "The Russian invasion of Ukraine was an illegal act according to International Law. The Charter of the United Nations contains very clear provisions prohibiting so-called aggressive war (§ 4, article 2) and essentially permitting (subject to ch. 7) defensive war. The Russian claims to the effect that the 'military operation' in the Ukraine has a preventive character have absolutely no basis in fact; there was not the slightest threat that could conceivably emanate from Ukrainian territory." (Papageorgiou, "A Manifestly Unjust (but also Manifestly Just) War," 59–60.)

[36] Schmitt, *The Nomos of the Earth*, 122.

[37] Ibid.

an anti-terrorist operation or similar. For this reason, the restrictions that are permissible vis-à-vis a sovereign with equal rights no longer apply vis-à-vis the aggressor as a criminal. According to C. Schmitt,

> in the modern, discriminatory concept of war, the distinction between the justice and injustice of war makes the enemy a felon, who no longer is treated as a justus hostis, but as a criminal. Consequently, war ceases to be a matter of international law, even if the killing, plundering, and annihilation continue and intensify with new, modern means of destruction. Since, on one side, war becomes a punitive action in the sense of modern criminal law, on the other, the opponent no longer can be a justus hostis. It is no longer war waged against him, any more than against a pirate, who is an enemy in a sense completely different from that in European international law. He has committed an offense in the criminal sense: the crime of aggression, le crime de l'attaque. Thus, the action taken against him is no more war than a police action against a gangster.[38]

In such a case, the armed action against the aggressor becomes a form of punishment, i.e. transforming a war into a legal remedy). In the event of a successful military action against the aggressor country, the perpetrators are brought to justice, with traditional law completing what has been initiated (an example of this includes the trials of Saddam Hussein or Savo Milosevic).

As demonstrated above, C. Schmitt's concept of the Nomos of the Earth is far from a simplistic legitimization of war as a means of establishing a new spatial order. On the contrary, in the context of the German jurist's views, what is happening in Ukraine, paradoxically, cannot be defined as war from the perspective of the modern Nomos of the Earth. This is not a classic war of equal sovereigns (justum bellum), as one of the warring parties (the Russian Federation) has obviously committed an act of aggression against the other (Ukraine) and is therefore a criminal liable to prosecution. The crime committed by the Russian Federation in this case is not simply aggression as such and a violation of the rules of war, but a violation of the current Nomos, the European and world order, which presupposes the inviolability of borders as its key principle. With the other words, Ukraine

> … might claim legitimately that the other side (in our case – Russian Federation – O. S.) was pursuing an unjust war. This could be done if its opponent's actions tended to deny the existing interstate spatial order of European international law (in which the claims of both sides had their legitimacy) as the fundament of the entire European order, and, in so doing, to upset the axis of that order.[39]

Thus, the events in Ukraine (at least until the Swiss peace summit) cannot be classified as war from the perspective of international law, despite full-scale military action involved.

[38] Ibid, 124.
[39] Ibid, 160.

The reason for this lies in the absence of mutual recognition between the warring parties, with the Russian Federation denying Ukraine's sovereignty, while Ukraine, in turn, did not recognize the Russian Federation as justus hostis, but rather as a criminal responsible for armed aggression. On the contrary, the actual – doctrinal – result of the Swiss peace summit as a first step towards reconciliation lies, as already mentioned, in the recognition of the events in Ukraine as a war. Thus, on the one hand, Ukraine is recognized as a "great power" (C. Schmitt) under international law (a sovereign state in the truest sense of the word) and the Russian Federation has been transformed from a criminal aggressor into a warring party with which it is possible to negotiate. At the same time, it is obvious that both punishment ((as a criminal sanction for waging a war of aggression) and negotiation fall within the domain of the law. This leads to the fundamental question: what role can law play in resolving the current situation?

IV. What Should Law Do with the War?

The foregoing provides sufficient insight into why the law remains still silent on the war in Ukraine and why peace negotiations could only commence two years after its onset. In order to initiate the legal process of a peaceful solution, the status of the warring parties first had to be *"equalized."* Initially, to justify the so-called "special military operation," the Russian Federation denied the subjectivity of Ukraine, characterizing it as an "illegitimate quasi-state entity," while Ukraine denied the subjectivity of the Russian Federation, labeling it as a felon (aggressor). According to C. Schmitt, both positions rendered mutual recognition between the parties – and thus any legal means of resolving the war – impossible.

We can therefore conclude that the mutual recognition of the warring parties cannot be reduced to the possession of formal sovereignty. Above, we have already examined the consequences of the conclusion of an intervention treaty (the "Kharkiv Treaties") for a formally sovereign country (Ukraine), which, doctrinally, transformed Ukraine into a territory under the control of the Russian Federation. At the same time, C. Schmitt cites the example of Japan, which, thanks to the victory over Russia in the 1904 war, became a country with no formal but full sovereignty. To name this process, the German legal scholar introduces the construction "recognition as a Great Power." "That recognition as a Great Power was the most important legal institution of international law with respect to land-appropriation. It signified the right to participate in European conferences and negotiations, which was fundamental for the reality of European interstate international law."[40] Such treaties and conferences involving neutral countries represent an opportunity to end the war in a way that is adapted to the spatial situation.

Therefore, it is appropriate to define the processes taking place in Ukraine as the evolution of Ukraine from a post-colonial country concluding interventionist treaties to its recognition as a major power organizing international conferences (such as the peace summit

[40] Schmitt, *The Nomos of the Earth*, 191.

in Switzerland). Accordingly, the key question of the new Nomos of Europe is whether Ukraine should pay for such recognition with part of its territory or whether this is possible within the framework of the existing Nomos of Europe? Because, as C. Schmitt has noted, "Every recognition in international law is essentially an expression of the fact that the recognizing state has recognized a territorial change or a new regime. This recognition either is based on the existing spatial order or is compatible with a newly created spatial order."[41]

So, if the war in the Ukraine ceases until the entire territory of Ukraine is liberated and the leader of the Russian Federation is deposed, this may mean that the following situation must be legally fixed. On the one hand, the Russian Federation did not succeed in destroying the sovereignty of Ukraine and it was recognized as a great power in the European and world Nomos. On the other hand, Ukraine (at least so far) has not been able to fully implement an atonement measure against the aggressor. As a result, it may be necessary, rather than pursuing criminal judgement against the Russian Federation (possibly), to sign a legal agreement with it that establishes a particular status quo as the outcome of the armed conflict. It can be assumed that such a status quo can be consolidated both within the framework of the existing European order (recognition of the inviolability of the borders established by the division of land in 1945) and within the framework of a certain new Nomos, if, for example, a categorical demand on stability of existing borders can be informally imposed in return for the legal consolidation of Ukraine's withdrawal from the Russian Federation's sphere of influence ("Greater Empire") (Ukraine's accession to the EU, NATO). In the other words, as C. Schmitt emphasized, "Every order of international law must guarantee, if it does not disavow itself, not the given territorial status quo of a particular historical moment, with all its many details and more or less contingent circumstances, but rather its fundamental Nomos – its spatial structure, the unity of order and orientation."[42]

From this we can clearly identify the three directions in which law can operate after the cessation of hostilities. Firstly, in the situation described above, law proves to be a legal instrument for *establishing the equality of the parties* when the mutual recognition of sovereignty/subjectivity enables the conclusion of a peace treaty. As already mentioned, such a treaty should take into account not only the interests of the warring parties, but of all participants in the modern world order. This can either be an agreement based on the Nomos of the Earth, which was established after the consequences of the Second World War, or the establishment of a new spatial order.

If Ukraine succeeds in liberating the occupied territories through political processes and the current leader of the Russian Federation is deposed, the law will fulfil its punitive function. On the other hand, the resolution of the issue of the legal consequences of the long stay of Ukrainian citizens in the territories occupied by the Russian Federation (and the inevitable cooperation with the occupation authorities) will most likely lead to the legal

[41] Ibid, 298.
[42] Schmitt, *The Nomos of the Earth*, 186.

need for an amnesty (forgiveness) in respect of those persons who have not committed war crimes or other serious offences.

Conclusion

All of the above leads to the following conclusions:

(I) C. Schmitt's concept of the "Nomos of the Earth" must not be understood as a vulgar justification (legitimization) of the armed seizure of land.

(II) "Nomos" in C. Schmitt is a historical event whose essence is the "measurement" of space as the unity of its external orientation and internal order. Such an event and the spatial order it creates are constitutive for all traditional law (both positive and natural law) on the territory in question.

(III) The land appropriation only appears to be lawful if it fits into the existing order of spatial relations and is carried out in a way that is acceptable within this order. If the land appropriation violates the existing order, it can only be recognized as a new "Nomos of the Earth" under the conditions of recognition of this appropriation: 1) by the legal sovereign of the territory; 2) by all or the vast majority of the member states of the spatial order to which the appropriated territory belongs as a part; 3) by the population of the appropriated territory. Otherwise, such appropriation of land is deemed to be an occupation (regardless of its actual duration).

(IV) In C. Schmitt's conception, war cannot be equated with an armed conflict involving two or more states. According to the German jurist's approach, war is a relationship between two or more sovereign states, conducted in accordance with the norms of international law. Otherwise, the armed conflict can be classified as a mob action, intervention, unmotivated aggression or atonement against a terrorist or aggressor. At the same time, the final categorization of the conflict often depends on its actual outcome.

(V) The above theoretical constructs make it possible to define the military actions in Ukraine as an intervention/unmotivated aggression by the Russian Federation against Ukraine. From the perspective of international law, these military actions can be transformed both into a punitive operation against the aggressor country (in the case of a victory for Ukraine and the collapse of the current Kremlin regime) and into a war in the proper sense of the word (in the event of the failure of the Russian Federation's plans to conquer Ukraine and Ukraine's simultaneous inability to regain the occupied territory by military means).

(VI) The recognition of the acts of warfare in Ukraine as war (which was legally formalized at the 2024 Peace Summit in Switzerland) provides a basis for the mutual recognition of the warring parties as equal entities between which a legally significant (peaceful) agreement can be concluded (a peace agreement, ceasefire, etc.). At the same time, two other legal strategies for ending the war in Ukraine are punishment (of war criminals) and forgiveness (amnesty) for individuals who collaborated with the occupation authorities and did not commit serious crimes.

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Олексій Стовба. Що має право робити з війною?

Анотація. У статті здійснюється філософсько-правове осмислення війни України і РФ. Методологічною базою цього дослідження слугує концепція "Номосу землі" відомого німецького правознавця К. Шмітта. При цьому "номос" не береться в його традиційному значенні, як право позитивне, що протистоїть "фюсіс" як праву природньому. Під "Номосом землі" німецький філософ права розуміє подію промірювання землі, сутність якої складають феномени впорядкування і локалізації. Завдяки вказаній події як позитивне, так і природне право отримують свій онтологічний фундамент. В свою чергу, історичним еквівалентом Номосу є акт присвоєння землі. Саме історична подія розподілу і присвоєння землі на думку німецького правознавця є тим актом, що встановлює політичний, економічний та правовий порядок. Будь-яке право має за свій буттєвий початок певну виокремлену територію. Разом з тим під захопленням землі не слід розуміти чисто свавільне, збройне захоплення. Тому у статті наводяться ті критерії (надання згоди юридичним сувереном, надання згоди переважною більшістю суб'єктів міжнародного права, надання згоди корінним населенням окупованої території), завдяки яким фактичне заволодіння землею перетворюється на правову подію, яку можливо вписати у світовий чи континентальний правопорядок. Логічним наслідком подібної процедури є і переосмислення феномену війни, під яким розуміється збройний конфлікт рівних суверенів, який ведеться по певних правилах. У разі, якщо ці правила порушуються, мова йде вже не про війну, а про каральну акцію відносно агресора як порушника міжнародного права. Відтак право має на меті не заборонити, але обмежити війну. У підсумку автор доходить висновку, що право під час війни діє тільки відносно рівних суб'єктів та має три основні напрямки дії: покарання, прощення (амністію) та примирення.

Ключові слова: номос; право; війна; захоплення землі; рівність; окупація.

Oleksiy Stovba. What Should Law Do with the War?

Abstract. The article provides a philosophical and legal understanding of the war between Ukraine and the RF. The methodological basis of this study is the concept of the "Nomos of the Earth" by the famous German lawyer C. Schmitt. At the same time, "Nomos" is not taken in its traditional sense

as a positive law that is opposed to "physis" as a natural law. By "Nomos of the Earth," the German legal philosopher understands the event of measuring the earth, the essence of which is the phenomena of ordering and localisation. Due to this event, both positive and natural law receive their ontological foundation. In turn, the historical equivalent of Nomos is the act of seizure of land. According to the German legal scientist, it is the historical event of the distribution and appropriation of land that establishes the political, economic and legal order. Any right has its origin in a certain designated territory. At the same time, the seizure of land should not be understood as a purely arbitrary, armed takeover. Therefore, the article sets out the criteria (consent of the legal sovereign, consent of the overwhelming majority of subjects of international law, consent of the indigenous population of the occupied territory) by which the actual seizure of land turns into a legal event that can be included in the global or continental legal order. A logical consequence of this procedure is a rethinking of the phenomenon of war, which is understood as an armed conflict between equal sovereigns that is conducted according to certain rules. If these rules are violated, it is no longer a war, but a punitive action against the aggressor as a violator of international law. Therefore, the law aims not to prohibit but to limit war. As a result, the author concludes that law in time of war applies only to equal subjects and has three main directions of action: punishment, forgiveness (amnesty) and reconciliation.

Keywords: Nomos; law; war; land seizure; equality; occupation.

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