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World Responsibility to Act in Russia's War Against Ukraine

Abstract: The article aims to address the following question: in the case of a war in Ukraine, is public international law an obstacle to the application of combined international enforcement action within the framework of the collective security system under the auspices of the United Nations, or whether such impediments lie elsewhere? Russia's presence in the Security Council as a permanent member, and thus endowed with the privilege of vetoing resolutions, paralyses this body. Therefore, the subject of the analysis is what other actions of the United Nations are permitted by law. It is important for assessing the status of the UN as a collective actor in international relations, the main objective of which, under Art. 1 of the UN Charter, is "to maintain international peace and security, and, to that end: to take effective collective measures for (…) the suppression of acts of aggression". Bearing in mind the fact that international law is a consensual legal order, the article assesses its available compulsory mechanisms and instruments. The supplementary objective is to determine whether it is permissible to use the term "war" with regard to the armed conflict between Russia and Ukraine.

Keywords: *United Nations, public international law, the war in Ukraine, the system of collective security, Russia*

Introduction

The day Russia launched its military invasion of Ukraine – 24.02.2022 – marked the beginning of the most difficult period in the history of the modern Ukrainian state and its people. In the case of aggression of one state against another, the global system of collective security

created by the instruments of public international law should come into play. The question arises whether this is already happening or the system is defective, and the adequate resources at its disposal will not be deployed. The functioning of the collective security system depends on many legal, military, and political factors (Ipsen, 1999, p. 964), including public international law (hereinafter referred to as PIL). Therefore, important issues addressed in this analysis concern the possible options and barriers raised by PIL. It should be emphasised that international law is one of the main regulators of international relations and is also present in the core discourses in which the international community is engaged. "Through it, arguments are made about what is good and what is bad, as well as about the limits of legally permissible behavior, about power and membership, and about the entire range of international affairs" (Reus-Smit, 2008, p. 438). PIL is a consensual legal order, but it features materially and procedurally compulsory mechanisms. This article aims to assess whether the norms of contemporary international law prevent the application of UN-organised coercive sanctions in the event of a war in Ukraine. That, in turn, will make it possible to assess the current state of the United Nations as an organisation with its own compulsory mechanisms, such as collective action aimed at suppressing acts of aggression.

In the very first days of Russia's attack on Ukraine, a group of Ukrainian lawyers not only postulated that its neighbour's assault on their territory should be qualified as an act of aggression, a breach of international *ius cogens* norms and, at the same time of current international *erga omnes* obligations but also demanded that the term "war" be expressly applied. The legal qualification of acts, including clearly indicating their illegal nature, is of significant moral importance. The supplementary aim of the analysis is to identify whether, in the light of international law, the use of the term "war" is correct in relation to the armed conflict in question.

The present study makes use of several investigative techniques and procedures. Firstly, the method of legal-dogmatic research is used to analyse, in particular, the norms of the international legal acts to assess what actions within the framework of the UN collective security system have been, and can be, taken. Secondly, the comparative legal method is employed, among other things, to compare the steps outlined in the UN Uniting for Peace mechanism (which, being a resolution of the General Assembly, is a form of soft law) with the steps specified in Chapter VII of the UN Charter (which constitutes hard law). Thirdly, in the present case study, i.e., the war in Ukraine, the functioning of international law is also assessed on the ground of the political and military context.

The Current Legal Situation and State of Knowledge

As regards the question of whether, from the viewpoint of international law, the term "war" is appropriate to describe an armed confrontation between states, it is important to note that PIL does not include a legal definition of "war" as prescribed in the form of norms, and the latest provisions of international law no longer apply this concept. It has been superseded

by the concept of "armed conflict", which is a designation encompassing various forms of armed confrontation, including conflicts of a non-international nature or undeclared conflicts. In particular, it was to ensure that, with regard to such conflicts, the application of the provisions of the Geneva Conventions of 1949 is not questioned and follows immediately after the actual start of hostilities and that states do not hide behind the lack of a legal definition of the term "war" (Commentary of 1952 and Commentary of 2016 to Paragraph 1 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, August 12, 1949). As for the term "war" itself, current doctrine usually draws attention to the following features of war: 1) a state of armed struggle; 2) this state exists between states, and 3) this state is formally characterised by the fact that the transition from peaceful relations to a state of war occurs through a declaration of the latter – that trend is reflected in textbooks (Butkevych, 2004 p. 328, 379; Góralczyk & Sawicki, 2015, p. 361; Dinstein, 2011, p. 5). Some researchers list the following three basic features of war: 1) a prior and unequivocal notification of the initiation of hostile steps (under Article 1 of the Hague Convention relative to the Opening of Hostilities of 1907); 2) the breaking of diplomatic relations with an enemy state; 3) the expiry of bilateral international agreements, mainly political in form (Repetskyy & Lysyk, 2007, p. 121).

It is also worth noting that in its colloquial meaning, "war" has primarily negative connotations. It is an emotionally charged term that conveys a sense of tragedy and thus indirectly stigmatises the aggressor. It has also been embedded in our linguistic fabric longer than the concept of "armed conflict". Numerous linguistic studies have been conducted on the imagery and understanding of war. The studies highlight the complexity of the problem and point to the fact that war is an ambiguous concept without a closed catalogue of designates (Grabowska, 2015, pp. 267–268). Nevertheless, collocations with the noun 'war' excerpted from dictionaries reflect its associations with such terms as 'fight', 'conflict', 'army', 'military expedition', and 'military service' (Kaczmarczyk, 2015, p. 31), and thus project a suitably expressive image of a specific phenomenon of the world.

As to the possibility of UN bodies acting to stop hostilities, both the law in its current form and *prima facie* international practice leave no doubt about the matter, at least in the sense that the Security Council bears the main responsibility for maintaining world peace and security. Moreover, when collective coercive action is required, this responsibility is, as a rule, an exclusive competence reserved for this particular body (Art. 11 (2), second sentence, and Art. 12 (1) of the Charter of the United Nations). It means that even the plenary body of the United Nations (the General Assembly) cannot replace the Security Council in this respect nor interfere in its activities (Joiner, 2009, p. 161). When there has been a breach of the peace, and in particular an act of aggression, which, according to resolution 3314/1974 of the General Assembly, is understood as the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations", then, the Security Council shall take many specific actions. The first step is the recognition of this act of aggression (Art. 39 of

the Charter), which serves as the basis for the following steps. At this point, it is worth pointing out that the provisions of the UN Charter include the terms "aggression" and an "armed attack". The term "aggression" appears in the title of Chapter VII and the opening provision of Art. 39 of the Charter, and an "armed attack" in Art. 51. It follows from these provisions that the victim state itself recognises that an attack has taken place, based on which it has the authority to act in self-defence (individually or collectively). On the other hand, an act of aggression is not declared by the victim state itself but rather by the UN Security Council. It allows the latter to enforce collective measures to determine the most appropriate global response in a given case. Unlike a state under attack, i.e., a state that defends itself, a state that is a victim of aggression, as established by the Security Council, must wait for the UN to undertake authoritative actions against the aggressor. In practice, as a rule, a state under attack is both a state that is being attacked and a victim of aggression, but the fact that this act of aggression has been recognised allows for further institutionalised actions to be taken. They form the following sequence: the Security Council may first exercise the right to issue provisional measures (Article 40 of the Charter), which in practice translates into the formulation of appropriate appeals or declarations, such as, for example, a call for a cease-fire or a call on an aggressor to withdraw troops from a foreign territory (Buchan & Tsagourias, 2021, p. 33). The Council may also decide on sanctions, both those that do not involve the use of armed force – e.g., the complete or partial interruption of economic relations or communication with the aggressor state (Article 41 of the Charter), as well as those sanctions that amount to military coercion (Art. 42 of the Charter) (Costelloe, 2017, pp. 128–151). It should also be emphasised that the Security Council is not obliged to organise the measures it applies in a graduated way, although it does in practice.

The outlined sequence can be observed in the history of contemporary armed conflicts. One clear example is the decisions taken by the Security Council following Iraq's aggression against Kuwait in August 1990. The chain of resolutions adopted at the time – from Resolution No. 660/1990 to Resolution No. 678/1990 – assumed the following form: the condemnation of the act of aggression, the formulation of appropriate appeals, and the imposition of economic and financial sanctions.

In response to the abuse of veto rights by permanent members of the Security Council, in 1950, the General Assembly passed Resolution No. 377 – Uniting for Peace. This mechanism allows the functions of the Security Council to be performed to some extent by the General Assembly, an organ in which no state has a veto. According to this resolution: "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security". However, attention should also be drawn to the fact that

in its Advisory Opinion of 20 July 1962 the International Court of Justice declared that it is "only the Security Council which can require enforcement by coercive action against an aggressor" while at the same time stating the following: the "Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security" (ICJ Rep., 1962, p. 163). Current doctrine emphasises the role of the General Assembly in maintaining international peace and security in relation to which the role of the Security Council is of secondary importance, as is evidenced by Art. 11 of the Charter, which constitutes a more specific version of Article 10, focussing explicitly on the peacekeeping function itself. It likewise highlights the fact that, with regard to the competencies of the General Assembly in question, there is no mention of the word "action" in the Charter, unlike in the case of the Security Council (Reicher, 1982, pp. 31–33). It leads to the conclusion: the "problem is not to be solved by simple formulas but two considerations may be advanced. On the one hand it is probably that there should be a presumption that an organ of the UN Charter is acting constitutional. On the other as a matter of policy, organs should take the greatest care to ensure that resolutions authorising or ordering measures involving the use of force should be clearly and firmly based on the provisions of the Charter" (Brownlie, 1963, p. 335).

At this point, the idea of a "no-fly zone" should be mentioned. This term was originally used in the military rather than the legal context. Security Council resolutions, namely: 781/1992, 816/1993 and 1973/2011, feature the phrase "flight ban", and only in the latter case was the phrase "no-fly zone" actually used (Kaiser, 2011, p. 402). It seems, however, that the problem does not lie in the name, as the varying terminology employed does not result in any significant differences in the subject matter addressed. However, when it comes to closing the airspace over a state that has fallen victim to aggression, the question that needs to be asked is whether such an act of closure constitutes a "coercive action", i.e., an action that only the Security Council is entitled to undertake. Although it can be assumed *prima facie* that the mere establishment of a "no-fly zone" does not constitute such a step, it is nevertheless connected with the enforcement of a no-fly zone. It thus includes the deployment of military forces of the UN member states operating under the auspices of the Security Council, which would be ready to apply coercion in such a case. Therefore, it seems that the General Assembly, acting as a substitute for the Security Council, based on the "Uniting for Peace" mechanism, is not entitled to resort to the mentioned measure. At this point, it should also be pointed out that from a formal point of view, the resolutions of the General Assembly are not binding in each case. It is additionally indicated by the language of Resolution 377/1950 itself, which only mentions the "recommendations" of the General Assembly, and thus statements that are not legally binding (Tomuschat, 2008, p. 1).

New Approach?

Even though contemporary PIL replaces the term "war" with "armed conflict", we argue that there are no legal obstacles to using the former in the context of certain armed conflicts. Here, mention should be made of the Geneva Conventions of August 12, 1949 for the Protection of War Victims, which "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them" (art. 2 common to the Conventions).

Concerning the ability of the UN to reduce and halt hostilities in Ukraine, there are many legal arguments to the effect that the paralysis of the Security Council caused by the veto of one of its permanent members does not, in principle, prevent the General Assembly acting in its full capacity in its stead (cf. Sałkiewicz-Munnerlyn & Żyłka, 2022, p. 24). The first such argument lies in Resolution 377/1950, which stipulates that the General Assembly may recommend the "use of armed force" while the nature and manner of such force are not specified. The content of Resolution 377/1950 alone did not thus establish the limits of the General Assembly's actions within the framework of the "Uniting for peace" mechanism. The second argument might be thought to expose a weakness in the competence of the General Assembly, namely that it does not have the authority to make decisions but only to issue recommendations. However, it should be pointed out that within this framework, the following procedure is possible: the General Assembly issues a recommendation to the member states to engage in armed action against an aggressor, but the implementation of this recommendation is not based on the provisions of Article VII of the Charter of the UN, i.e. as part of a collective security system, but rather is pursuant to Article 51 of the Charter of the UN, i.e. it is an act of collective self-defence (similarly, Grzebyk, 2020, p. 161) The third argument is that the United Nations does not reject ideas and actions that break the literal wording of the UN Charter but are undertaken *pro homine*, such as acts of humanitarian intervention developed according to the principle of R2P. Moreover, when we seek the basis for such an evolution, we find it in the values underpinning the principles expressed in Art. 2 Charter of the United Nations.

It is worth adding that as a system of standards, PIL possesses yet another important compulsory tool. However, this is not a procedural tool, i.e., a universal decision-making and enforcement mechanism (Security Council), but rather a material one. While PIL norms rarely provide for sanctions, the PIL system as a whole does, and it is employed by states and international organisations to enforce PIL compliance. When the measures provided in Chapter VII of the UN Charter cannot be implemented to combat aggression, states can effectively replace them by coordinating non-UN sanctions in finances, trade, transport, communication, or elsewhere.

Russia's Path to Extremism in the XXI Century and the War in Ukraine in 2022

After the collapse of the Soviet Union, Russia became involved in many conflicts, many of which it instigated. In some countries of the post-Soviet area, it pursued a policy of destabilisation while at the same time conducting an effective information war. Chechnya's attempts to declare independence led to the first Russian-Chechen armed conflict (1994–1996), which was de facto perceived as a conflict with separatists, and thus deemed non-international. The second Russian-Chechen war (1999–2009) was waged primarily as an anti-terrorist operation. The 2001 attack on the World Trade Center influenced this perception of the conflict. In the case of Chechnya, the UN dealt only with the issue of human rights violations, and no resolutions of the Security Council or the General Assembly were adopted, which qualified Russia's military actions in the light of the PIL. Similarly, in 2008, the Security Council and the General Assembly failed to pass a resolution recognising Russia's military actions as acts of aggression on Georgian territory. On the other hand, Russia justified its invasion of Georgian territory by invoking the right of self-defence of Russian citizens and the need to protect a peace contingent (UN Security Council Letter S / 2008/545).

In 2014, Russia committed an act of aggression against Ukraine in Crimea. It then began its occupation and supported alleged separatists in the Donbas. This time, in response to Russia's actions, the UN bodies took legal action. On March 27, 2014, the General Assembly adopted Resolution 68/262/2014 "Territorial integrity of Ukraine", in which it was declared that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on March 16, 2014 had not been authorised by Ukraine and that the UN remained committed to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognised borders. Neither the General Assembly nor the Security Council was able to recognise Russia as an aggressor at that time. The content of Security Council Resolution (2202/2015) endorsed a "Package of Measures for the Implementation of the Minsk Agreements" and gave Russia the status of Participant in the Trilateral Contact Group. The international community believed that it was able to check Russia's ambitions within the framework of the Minsk Agreements.

An international armed conflict has been going on in Ukraine since 2014. However, it was not until Russia invaded Ukraine in 2022 that it resulted in a breakdown of diplomatic relations and the declaration of a state of emergency in Ukraine.

While from the perspective of international law, using the term "war" would be problematic in the case of the events of 2014, the Russian invasion of Ukraine in February 2022 would meet the criteria for this term. In the latter case, the following formal conditions of war have been met: Putin's announcement of the launch of a "special military operation" in Ukraine on February 24, 2022; Ukraine severing diplomatic relations with Russia on the same day; the closure of checkpoints on Ukraine's borders with Russia and Belarus on February 28, 2022, as well as the existence of an armed struggle between Russia and Ukraine. Given

these facts and the absence of legal obstacles, the demand that the term "war" be used in this context can now be met in the legal context. Moreover, this term can, to some extent, be useful in distinguishing the events of February 2022 onwards from the earlier crisis of 2014.

In its response to the war in Ukraine, the General Assembly began to take steps in place of the Security Council, i.e., using the "Uniting for Peace" resolution, less than 24 hours after receiving the mandate of the Security Council expressed in its vote, in which no permanent member could exercise its veto. Then, on March 1, 2022, it adopted Resolution No. A/ES-11/L.1, which follows the sequence of steps described in this analysis based on the provisions of Chapter VII of the Charter of the United Nations. The resolution of the General Assembly declared, inter alia, that Russia had committed an act of aggression against Ukraine (and thus, the Assembly fulfils the task of the Security Council defined in Article 39 of the Charter) and, as a consequence, the Assembly demanded the unconditional, complete withdrawal of all Russian troops from the territory of Ukraine (in this way the Assembly made use of the option provided for by the Security Council in Article 40 of the Charter). In the case of Iraq's aggression against Kuwait mentioned earlier in this text, the Security Council went much further in its actions, i.e., right up to the use of enforcement measures. However, in the current situation, in which Russia has been the aggressor against Ukraine, Russia exercised its veto to block the Security Council, but then the General Assembly decided to act in its place. Nevertheless, although it can be assumed that contemporary international law is furnished with mechanisms that would allow the UN General Assembly to take the pioneering legal step of recommending that member states engage in military action against Russia, in particular through the introduction and enforcement of a no-fly zone over Ukraine, this assessment, based on non-juridical factors, indicates that this will not happen. The functioning of a collective security system depends on legal but also on military and political factors. In the case of the war in Ukraine, two factors are decisive in this respect: 1) Russia's possession of nuclear weapons, together with statements made by the country's leaders indicating their willingness to resort to their use; 2) a network of multiple and varied interests linking Russia with many economies around the world.

However, it should be pointed out that both individual states and international organisations have implemented multiple packages of various sanctions against Russia on an unprecedented scale, and they are supplying Ukraine with weapons of self-defence. In particular, EU countries have imposed sanctions designed to thwart further aggression, and NATO countries (though not the organisation itself) are coordinating arms deliveries to Ukraine, the legality of which can be based on the principle of international law denying recognition of illegal situations (Russia's attack on Ukraine).

Conclusions

In 2022, Russia – a permanent member of the Security Council and one of the guarantors of world peace – launched an invasion on a scale far exceeding its earlier military actions

in the post-Soviet area, and the conflict it triggered has both an interstate character and represents a sheer act of aggression.

In the case of a war in Ukraine, public international law does not constitute an obstacle to legally applying under the auspices of the United Nations an organised coercive response against the aggressor. However, we should not expect this to happen due to the realities of the actual environment in which PIL operates. The decisive element in this respect will be the military factor, namely Russia's possession of nuclear weapons.

PIL includes a mechanism that goes beyond the sphere of a consensual legal order and involves a compulsory material and procedural system of UN collective security. Despite its imperfections, PIL is overall capable enough to ensure that, were it not for non-legal factors, adequate military measures against Russia could be implemented. Russia's privileged position in the Security Council is not an insurmountable barrier, and the UN is not merely a plane of coordination based on respect for the interests of the powers that have a veto. Despite the disappointment with the UN's response to the aggression against Ukraine, we should not write off this organisation and consider it archaic and based on the privileged status of 5 countries that enables the latter to act contrary to PIL. Even in its current legal form, the UN would meet the present challenge, although its institutional reform is desirable.

PIL also has other compulsory mechanisms designed to enforce compliance with it, namely non-UN non-military sanctions. These sanctions, as agreed-upon coercive measures, are to some extent suitable, though only when applied in the long term, as a replacement for the instruments of Chapter VII of the UN Charter.

The central problem, therefore, is not legal blockades but the threat posed by weapons of mass destruction. The view that PIL does not work in a vacuum and, as such, cannot perform the role of an independent guarantor of peace is not a new one, but it remains very relevant today.

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