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ESCALATION OF THE CONFLICT BETWEEN RUSSIA AND UKRAINE IN 2022 IN LIGHT OF THE LAW ON USE OF FORCE AND INTERNATIONAL HUMANITARIAN LAW**

Abstract: *The aim of this article is to assess the military operation started on 24 February 2022 by Russia against Ukraine in light of the law on use of force, having in mind all the justifications officially expressed by Russian authorities and in light of international humanitarian law. The author claims that there is no justification for the Russian military action and thus it must be qualified as aggression. This, due to the serious violation of the peremptory norm, implies obligations on the part of states and international organizations (i.e. the international community). In addition, the current conduct of hostilities clearly shows that it is mainly Russian forces which neglect international humanitarian law principles, which might amount to war crimes.*

Keywords: Ukraine, Russia, war, international armed conflict, war, war crimes, international humanitarian law, use of force, aggression

INTRODUCTION

In February 2014 Russia invaded Crimea and subsequently occupied it and illegally annexed it, thus committing an act of aggression.¹ The occupation of Crimea

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¹ See V. Bilkova, *The Use of Force by the Russian Federation in Crimea*, 75 Heidelberg Journal of International Law 27 (2015); W. Czapliński et al. (eds.), *The Case of Crimea's Annexation Under International Law*, Wydawnictwo Scholar, Warszawa: 2017; T.D. Grant, *Aggression Against Ukraine. Territory, Responsibility, and International Law*, Palgrave Macmillan, New York: 2015; P. Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)*, XXXIV Polish Yearbook of International Law 39 (2014); S. Sayapin, E. Tsybulenko (eds.), *The Use of Force against Ukraine and International*

triggered the application of the law of international armed conflicts (although it is debatable whether this implied the existence of an international armed conflict on the territory of the whole of Ukraine and Russia).²

In the following weeks, in the eastern part of Ukraine (the Donbas region) the conflict between separatists – supported by Russia – and Ukraine evolved. It is debatable whether Russian involvement was direct (by sending its own armed forces and other armed groups) or indirect (by sending arms and logistical and financial support); or whether Russia had any control over the separatists and if so, whether it was an effective or only of an overall character. The findings (which still need to be verified by the European Court of Human Rights due to, e.g., the inter-state application of the Netherlands against Russia – nos. 8019/16, 43800/14 and 28525/20 regarding its role in the downing of flight MH17 in eastern Ukraine on 17 July 2014) would impact the possibility to assign the responsibility to Russia for the further use of force against Ukraine and the alleged violations of international humanitarian law and human rights law during the hostilities in Eastern Ukraine. It would also impact classification of the conflict in Eastern Ukraine from the point of view of international humanitarian law, as depending on the kind of involvement the conflict could be classified as only non-international or as both a non-international one (between the separatists and Ukraine) and an international one (between Russia and Ukraine).

In 2014 and 2015 two ceasefire agreements were signed (Minsk I of 5 and 19 September 2014, and after further negotiations Minsk II – of 12 February 2015). According to Minsk II, the immediate cessation of hostilities starting on 15 February 2015 was agreed upon. All foreign military formations had to be withdrawn, as well as heavy weaponry by both sides at equal distances in order to create a security zone. The Donbas region was considered as part of Ukraine, but Ukrainian authorities were obliged to adopt a new constitution and to implement a law granting special status to certain areas of the Donetsk and Luhansk regions.³ As a result of those actions, Ukraine would regain control over 400 kilometers of

Law – Jus ad Bellum, Jus in Bello, Jus Post Bellum, T.M.C. Asser Press, Den Haag: 2018.

² See common Art. 2 of the 1949 Geneva Conventions on the Protection of War Victims (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, which usually is interpreted as a definition of an international armed conflict, although its literal reading indicates that the Geneva Conventions differentiate between armed conflict between states and all cases of partial or total occupation of the territory of the state, even if the said occupation met with no armed resistance. In the latter case, the 1949 GCs should also be applied, but it does not necessarily mean that an international armed conflict is taking place, which would imply the application of international humanitarian law to the whole territory of both engaged states.

³ Text of the Package of measures for the Implementation of the Minsk agreements available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf (accessed 30 June 2022).

the border with Russia.⁴ The Package of Measures for the Implementation of the Minsk Agreements was endorsed by the UN Security Council in Resolution 2202 of 17 February 2015.

Unfortunately, both sides failed to engage in the full implementation of Minsk II. Russian forces were still present in Donbas, but at the same time Ukrainian authorities did little to adopt legal measures introducing a new constitution and new regime for Donbas. Regular exchanges of fire took place (followed by other ceasefires), but they were not so devastating as the hostilities in 2014 and 2015.⁵ Tens of thousands of Russian soldiers were stationing near the Ukrainian border (and allegedly in Donbas), but in the middle of February 2022 this number rose to around 190.000 soldiers.⁶ On 24 February 2022 Russia began a “special military operation” against Ukraine which appeared to be a full-fledged invasion.⁷

The aim of this article is to assess the military operation commenced by Russia against Ukraine in February 2022 in light of the law on use of force, having in mind all the justifications officially expressed by Russian authorities and in light of international humanitarian law (IHL). The author concludes that there is no legal justification for the Russian military action, and thus it must be qualified as aggression. Inasmuch as the prohibition of aggression is a peremptory norm, its violation triggers obligations on the part of the international community to cooperate to bring an end, through lawful means, to any serious breach of this kind of norm. This excludes any kind of support for the aggressor. In addition, the current conduct of hostilities clearly shows that it is mainly Russian forces which neglect basic international humanitarian law principles, which might amount to war crimes. As the prohibition of certain war crimes is also considered as *jus cogens*, their violation also triggers the above-mentioned obligations on the part of the international community.

1. USE OF FORCE

In a situation of tension between two states, the accumulation of 190.000 soldiers on the border with Ukraine (both the Russian-Ukrainian and Belarussian-Ukrainian borders) must be perceived as a clear violation of the prohibition of a threat to use

⁴ S. Kardaś, W. Konończuk, *Minsk 2 – a fragile truce*, Ośrodek Studiów Wschodnich, 12 February 2015, available at: <https://bit.ly/39hJl8E> (accessed 30 June 2022).

⁵ See e.g. Uppsala Conflict Data Program, Department of Peace and Conflict Research, *Ukraine*, available at: <https://ucdp.uu.se/country/369>; K. Nieczypor, A. Wilk, P. Żochowski, *The Donbas crisis: between bluff and war*, OSW, 6 April 2021, available at <https://bit.ly/3PcYMze> (both accessed 30 June 2022).

⁶ D. Brown, *Ukraine conflict: Where are Russia's troops?*, BBC News, 23 February 2022, available at: <https://www.bbc.com/news/world-europe-60158694> (accessed 30 June 2022).

⁷ SC/14803, 23 February 2022.

force (Art. 2(4) of the UN Charter⁸). With the commencement of the invasion on 24 February 2022, accompanied by attacks on targets throughout the whole of Ukrainian territory, Russia violated in a most manifest way the prohibition of the use of force enshrined in Art. 2(4) of the UN Charter. It engaged in actions described as acts of aggression in Resolution 3314 (1974) by the UN General Assembly (GA) and incorporated into Art. 8bis of the Rome Statute.⁹ Firstly, it was an invasion and/or attack by the armed forces of one State on the territory of another State, as Russian armed forces entered Ukrainian territory from the territory of Belarus, from the East, and from the South, i.e. Crimea; and it was also a military occupation, however temporary, resulting from such invasion or attack – in violation of Art. 3(a) of Resolution 3314.¹⁰ Secondly, it was comprised of the bombardment by the armed forces of one State against the territory of another State, and/or the use of weapons by one State against the territory of another State (a violation of Art. 3(b)), as targets were hit by land forces, air forces or naval forces in the whole of Ukraine, including its western parts like the cities of Luck or Lviv, the latter of which is situated less than 100 kilometers from the Polish border. Thirdly, Russia's acts constituted the blockade of the ports or coasts of one State by the armed forces of another State (a violation of Art. 3(c)); having in mind, for example, the blockade of the port of Mariupol and ports of the Sea of Azov, which made it impossible to export Ukrainian grain and trapped almost one hundred ships with foreign banners.¹¹ Fourthly, it was an attack by the armed forces of one State on the land, sea or air forces, or marine and air fleets of another State (a violation of Art. 3(d)) – as all kinds of Ukrainian forces were attacked. Fifthly, the sending by or on behalf of one State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein, constitutes a violation of

⁸ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

¹⁰ It must be stressed that Ukrainian authorities overused the notion of “occupant”, as according to Art. 42 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land a “territory is considered occupied when it is actually placed under the authority of the hostile army” and the “occupation extends only to the territory where such authority has been established and can be exercised”; therefore the control over certain communication lines is not sufficient to constitute an occupation of a particular territory. Only those terrains where Russia managed to establish its authority could be considered as occupied; see e.g. the announcement that: “Ignoring the presence of the Russian authorities in the territory of Enerhodar by the city and districts’ authorities is considered criminal” as proof that Enerhodar was effectively occupied by Russian armed forces, available at: <https://twitter.com/loogunda/status/1508683652217122816> (accessed 30 June 2022).

¹¹ K. Ahmed, *UN warns Russian blockade of Ukraine's grain exports may trigger global famine*, The Guardian, 18 April 2022; *Ukraine: UN expert warns of global famine, urges end to Russia aggression*, OCHR, 18 March 2022, available at: <https://bit.ly/3suVBsS> (accessed 30 June 2022).

Art. 3(g); here one can cite the example of the Wagner group, a mercenary group with the alleged aim, among others, of assassinating the Ukrainian president.¹² In addition, Belarus is also responsible for the aggression commenced on 24 February 2022, as it allowed Russia to use its territory to perpetrate an act of aggression against Ukraine in violation of Art. 3(f).

The general part of the definition of aggression in the UNGA's Resolution 3314 requires that the use of force must be "against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." This means that all possible justifications for the use of force enshrined in the UN Charter must be assessed.

Vladimir Putin stated:

They did not leave us any other option for defending Russia and our people, other than the one we are forced to use today. In these circumstances, we have to take bold and immediate action. The people's republics of Donbas have asked Russia for help. In this context, in accordance with Article 51 (Chapter VII) of the UN Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on February 22, I made a decision to carry out a special military operation. The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime. To this end, we will seek to demilitarise and denazify Ukraine, as well as bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation.¹³

Despite this statement, Russia cannot be deemed to be acting in self-defence as no armed attack was conducted against Russia. Even if there were some exchanges of fire between Ukraine and the separatists, no Russian territory was attacked and there was no imminent threat that it would be attacked (hence the legally debatable concept of anticipatory self-defence is also excluded). Reference to the threats related with expansion of

¹² A. Speri, *Russia's Newest Weapon in Ukraine May be Mercenaries Linked to Putin*, The Intercept, 31 March 2022, available at: <https://bit.ly/3wdKaQw>; R. Lawless, *Are Mercenaries in Ukraine?*, Lieber Institute, 21 March 2022, available at: <https://lieber.westpoint.edu/are-mercenaries-in-ukraine/> (both accessed 30 June 2022).

¹³ *Address by the President of the Russian Federation*, Kremlin, 24 February 2022, available at: <http://en.kremlin.ru/events/president/transcripts/67843> or (as the Kremlin's websites are currently often unavailable) the address could be also found at: <https://rusemb.org.uk/fnapr/7088> (both accessed 30 June 2022). See also the Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to UN addressed to the Secretary-General, S/2022/154, 5 March 2022.

NATO¹⁴ are legally unacceptable,¹⁵ as the last group of states neighbouring with Russia which joined NATO – namely Poland, Lithuania, Latvia, and Estonia – did so in 1999 or 2004; thus it is ridiculous to refer to an accession process which took part 20 years ago to justify the use of force against another neighbor state which is not a NATO member. The UN Charter is very clear in Art. 2(1) about the sovereign equality of states, which implies the right to shape their foreign policy and security, including choice of military alliance(s), according to their free will. Analysis of the documentation of NATO-Russian relations¹⁶ clearly proves NATO's will to cooperate with Russia on its terms; and even in the case of such blatant ongoing aggression against a sovereign state, NATO limited itself to statements that it will defend the territory of its members. Neither the UN Charter, nor customary law recognize a right to use force in order to prevent a state from joining a particular security organization.

Russia opted to use the same maneuver as in the case of Crimea, so it recognized the two separatist republics as states on 21 February 2022, and then claimed that was acting in the “execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Luhansk People's Republic, ratified by the Federal Assembly on February 22” in their request to act in collective self-defence. However, Russian recognition of the two separatist republics did not create new states,¹⁷ thus no authorities from Donetsk or Luhansk could ask for Russia's intervention on their behalf.¹⁸

Moreover, it is very much subject to debate whether or not the population living in Donbas had a right to secede in order to secure its right to self-determination.

¹⁴ See the following excerpt from the Address by the President of the Russian Federation (*ibidem*) concerning:

the fundamental threats which irresponsible Western politicians created for Russia consistently, rudely and unceremoniously from year to year. I am referring to the eastward expansion of NATO, which is moving its military infrastructure ever closer to the Russian border. (...) Even now, with NATO's eastward expansion the situation for Russia has been becoming worse and more dangerous by the year. Moreover, these past days NATO leadership has been blunt in its statements that they need to accelerate and step up efforts to bring the alliance's infrastructure closer to Russia's borders. In other words, they have been toughening their position. We cannot stay idle and passively observe these developments. This would be an absolutely irresponsible thing for us to do. Any further expansion of the North Atlantic alliance's infrastructure, or the ongoing efforts to gain a military foothold of the Ukrainian territory, are unacceptable for us. Of course, the question is not about NATO itself.

¹⁵ J.A. Green, Ch. Henderson, T. Ruys, *Russia's Attack on Ukraine and the Jus Ad Bellum*, Journal on the Use of Force and International Law (2022), published online, DOI: 10.1080/20531702.2022.2056803, pp. 5 ff.

¹⁶ R. Kupiecki, M. Menkiszak (eds.), *Documents Talk NATO-Russia Relations After the Cold War*, The Polish Institute of International Relations, Warszawa: 2020, available at: <https://bit.ly/3N3p5pK> (accessed 30 June 2022).

¹⁷ It is too early to state that both people's republics have “capacity to enter into relations with the other states”, which is one of the qualifications of a state mentioned in Art. 1 of the 1933 Montevideo Convention on the Rights and Duties of States (165 LNTS 19). Despite support for Russia's policy towards the Donetsk and Luhansk regions expressed by few states (e.g. Belarus, Central African Republic, Nicaragua, Sudan, Syria or Venezuela), so far none of them have officially recognized either of the republics.

Firstly, there is no distinct “people” in Donbas to whom the right to self-determination could apply (interestingly, the Russian-speaking population is affected by Russia’s military operations to the same extent as the Ukrainian speakers); secondly, the right to self-determination is nowadays understood as the right to exercise a certain autonomy (which could be understood as the request to establish a special regime).¹⁹ The lack of the progress in the establishment of such a special regime for Donbas raises concerns, but there were no massive human rights violation which would justify the use of force in order to execute the remedy of secession (and in any case the involvement of a third state would still be unlawful).²⁰ Thirdly, there is no information about any use of force which would amount to an armed attack against the allegedly-independent Luhansk and Donetsk People’s Republics, which excludes references to self-defence as it is understood in the UN Charter and international customary law.

Russia has argued that it is acting in defence of the Russian (i.e. Russian-speaking) people. However, the alleged genocide against Russian people in Donbas was not noted by any human rights body nor the OSCE, which closely monitors the situation in the region. In addition, the Responsibility to Protect (R2P) doctrine endorsed by the UN in the 2005 World Summit Outcome Document (paras. 138-140) still requires actions within the framework of the UN Charter to be based on either the concept of self-defence (i.e. an armed attack is required to use force) or on authorization by the Security Council (SC). Russia has never attempted to discuss the situation in Donbas as a situation requiring the SC’s action based on the R2P concept. It has never used any peaceful means to settle disputes (fact-finding committees; the International Court of Justice (ICJ); human rights-based claims, except app. no. 36958 of 22 July 2021 in European Court of Human Rights focused on the situation in Crimea, etc.) to verify information about the alleged crimes committed against the Donbas population. Consequently, the awaited conclusions of the ICJ concerning the question whether acts of genocide occurred in the Luhansk and Donetsk oblasts of Ukraine; and whether on that basis Russia could recognize

¹⁸ The legality of interventions in a civil war is debatable; see Ch. Redaelli, *Intervention in Civil Wars. Effectiveness, Legitimacy and Human Rights*, Oxford University Press, Oxford: 2021.

¹⁹ G. Wilson, *Crimea: Some Observations on Secession and Intervention in Partial Response to Müllerson and Tolstykh*, 14 Chinese Journal of International Law 217 (2015), p. 219; Th. Christiakis, *Les conflits de secession en Crimée et dans l’est de l’Ukraine et le droit international*, 141 Journal de droit international 733 (2014), pp. 737ff; see also the oft-cited case of the Supreme Court (Canada), *Reference re. secession of Quebec*, Judgment, 20 August 1998, 2 SCR 217, paras. 126 and 138.

²⁰ See e.g. UN Office of the High Commissioner, *Report on the Human Rights Situation in Ukraine, 1 August 2021-31 January 2022*, 28 March 2022, available at: <https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-1-august-2021-31-january-2022> (accessed 30 June 2022).

the so-called “Donetsk People’s Republic” and “Luhansk People’s Republic” and implement a “special military operation” against Ukraine cannot be overestimated.²¹

Even if any of the above-mentioned justifications based on a broadly understood right to self-defence would be found convincing by anyone, the use of force in self-defence must still comply with the principles of necessity and proportionality.²² A full-fledged invasion, including the siege of Kyiv and bombardment of Western part of Ukraine, are *prima facie* questionable from the point of view of proportionality.²³ Although Russia could claim that such a massive military operation was necessary to prevent any further armed attacks from Ukraine,²⁴ an operation aimed at changing the regime is unacceptable from the point of view of the principle of proportionality and the general respect for the sovereignty and independence of states. It is true that Western states did a lot to undermine the current legal regime²⁵ by the 2003 military operation against Iraq (or expanding its actions, originally based in UN SC resolution 1973 of 2011, by the abuse of the institution of no-fly zone Libya to topple Qaddafi), and Russia could compare its politics of denazification to e.g. “de-Baathification”.²⁶ Interestingly, Russia during the war has started to use the argument of the alleged works of Ukraine on dirty bombs and tactical nuclear weapons,²⁷ so sooner rather than later Russia will definitely refer to the need to prevent the use of weapons of mass destruction, i.e. the same explanation which USA used in 2003. Tellingly, in Putin’s Address of 24 February 2022 the Western operations against Serbia, Iraq, Syria, and Libya were mentioned. However, these isolated breaches of the prohibition to use force did not establish any new custom-

²¹ International Court of Justice, Press Release No. 2022/4, *Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures*, 27 February 2022, available at: <https://www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf> (accessed 30 June 2022).

²² See e.g. ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Rep 2003, p. 161, paras. 73, 77.

²³ Cf. ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Rep 2005, p. 168, para. 147 (“The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end”).

²⁴ On the problems related with the assessment of proportionality in the use of force, see J. Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, Cambridge: 2004, pp. 155ff; D. Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24(1) European Journal of International Law 235 (2013).

²⁵ See more P. Grzebyk, *Impact of Western military interventions on the evolution of law on use of force*, in: M. Madej (ed.), *Western Military Interventions After the Cold War. Evaluating the Wars of the West*, Routledge London: 2019, pp. 188 ff.

²⁶ Term “de-Baathification” means the purge of thousands of former members of Saddam Hussein’s Baath Party from the public service positions, mostly from the government and from the Iraqi security services. See e.g. <https://www.cfr.org/backgrounder/iraq-debaathification> (accessed 30 June 2022).

²⁷ Reuters, *Russia, without evidence, says Ukraine making nuclear “dirty bomb”*, The Intercept, 6 March 2022, available at: <https://reut.rs/3FFA8TK> (accessed 30 June 2022).

ary law (*abusus non tollit usum*). Russia frequently and (rightly) severely criticized the Western operations in Serbia, Iraq, Syria or recently in Afghanistan,²⁸ thus it is illogical for it to rely on them as precedents in order to commit its own aggression in 2022.

The aforementioned UNGA Resolution 3314, implies that a state can commit several acts of aggression (i.e. that the state is responsible for aggression as such; but that within an ongoing aggression subsequent acts of aggression can be committed and can be treated separately). This also implies that, for example, the occupation of Crimea which commenced in 2014 does not give any right to expand the aggression by other acts of aggression. The underlying idea is to separate different acts of aggression in order to put pressure on an aggressor to stop each of them and prevent further ones (which is why in Art. 3(a) of the UNGA Resolution 3314 States decided to separate invasion, occupation, and annexation in order to not suggest that an invasion must result in occupation or annexation).

Commission of the chain of acts of aggression (no matter how stretched-out over time) cannot be justified by the classification of a situation as an international armed conflict (or – as some prefer – as the situation to which the law of international armed conflicts is applied) in light of international humanitarian law. This is emphasized by the preamble of 1977 Protocol Additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts (AP I),²⁹ which emphasizes “that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations.” The fact that there is ongoing conflict between particular states due to the occupation of a part of territory claimed by both states does not give the right to escalate and commit other acts of aggression. That is why, for example, some states officially declared the incident of 25 November 2018 in Kerch Strait (when Ukrainian warships attempting to pass through Kerch Strait from the Black Sea to the Azov Sea were blocked by a Russian tanker and subsequently attacked by Russian forces) as a separate act of aggression of Russia against Ukraine.³⁰

Consequently, the “special military operation” Russia started in February 2022 must be classified as a flagrant breach of the UN Charter and as an aggression, which

²⁸ See e.g. S/PV.8848, 30 August 2021.

²⁹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3.

³⁰ See e.g. the reactions of Estonia (<https://bit.ly/3yseeBx>), Lithuania (<https://bit.ly/39U9afb>), the UK (<https://bit.ly/3w6isNV>) (both accessed 30 June 2022).

was confirmed in the UN General Assembly³¹ and Human Rights Council³² in their resolutions. The same conclusion was confirmed in statements of the Institut de Droit International,³³ International Law Association,³⁴ American Society of International Law,³⁵ European Society of International Law,³⁶ and in many national ILA branches statements³⁷, i.e. by members of bodies devoted to the analysis of international law norms.

The prohibition of aggression is a peremptory norm,³⁸ thus its violation triggers certain obligations on the part of the international community if a breach of such obligation is serious, i.e. it involves a gross or systematic failure by the responsible state to fulfill its obligations. As Russia systematically attacks Ukraine and has committed and continues to commit various acts of aggression, there is no doubt that the breach is serious. In Art. 41 of the 2001 Articles on State Responsibility for Internationally Wrongful Acts³⁹ (as well as in Art. 42 of the 2011 Articles on International Organizations' Responsibility for Internationally Wrongful Acts⁴⁰), the International Law Commission stressed that the international community should cooperate to bring an end, through lawful means, to any serious breach of this kind of norm; and additionally it should not recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining such a situation. This conclusion was described as "now recognized in international law" in the Commentary to the 2019 Draft Conclusions on Peremptory Norms of International Law.⁴¹ Consequently, states cannot invoke, for example, neutrality laws (regulated

³¹ A/ES-11/1, 2 March 2022.

³² A/HRC/RES/49/1, 7 March 2022.

³³ *Déclaration de l'Institut de Droit International sur l'Aggression en Ukraine*, 1 March 2022, available at: <https://www.idi-iil.org/fr/declaration-de-linstitut-de-droit-international-sur-lagression-en-ukraine/> (accessed 30 June 2022).

³⁴ *ILA Statement on the Ongoing and Evolving Aggression in and against Ukraine*, 3 March 2022, available at: <https://www.ila-hq.org/index.php/news>. See also *Statement by Members of the International Law Association Committee on the Use of Force*, 4 March 2022 published in many languages on <https://bit.ly/39guRWx> (both accessed 30 June 2022).

³⁵ *Statement of ASIL President Catherine Amirfar Regarding the Situation in Ukraine*, 23 February 2022, available at: https://www.asil.org/sites/default/files/pdfs/ASIL_Statement_Situation_in_Ukraine.pdf (accessed 30 June 2022).

³⁶ *Statement by the President and the Board of the European Society of International Law on the Russian Aggression against Ukraine*, 24 February 2022, available at: <https://bit.ly/3kZEeMX> (accessed 30 June 2022).

³⁷ See <https://www.ila-hq.org/index.php/news>; the Polish Branch published its statement on 22 February 2022, available at <https://przegladpm.blogspot.com/2022/02/list-grupy-polskiej-ila.html> (accessed 30 June 2022). There is also additional Statement of Polish Lawyers of 4 March 2022 available in the section Polish Practice in International Law in current volume.

³⁸ See e.g. Yearbook of the International Law Commission, 2001, vol. II, Part Two (A/56/10), p. 85.

³⁹ *Ibidem*.

⁴⁰ Yearbook of the International Law Commission, 2011, vol. II, Part Two, A/66/10.

⁴¹ *Report of the International Law Commission on the Work of its 71st Session* (29 April – 7 June and 8 July – 9 August 2019), UN Doc A/74/10, p. 194. In the Commentary to the 2001 Articles on State Responsibility for

in the 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and in the 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War), as the current international system does not allow for neutrality in response to violations of such peremptory norms as the prohibition of aggression. Arts. 2(5) and 2(6) of the UN Charter require solidarity with the attacked state. In the case of Russia's aggression, it has been impossible to achieve a UN SC resolution condemning its action and imposing enforcement measures, which is why the "Uniting for Peace" procedure was adopted⁴², as a result of which the UN SC can call an emergency session of the GA, which can then make appropriate recommendations based on the UN Charter principles. This procedure was commenced with the UN SC Resolution 2623 of 27 February 2022, and now it is possible to use the GA and refer to its decisions in order to end serious breaches of peremptory norms.⁴³

The international community has positive obligations in response to the breach of a peremptory norm, with inaction and disturbance of efforts on the part of other states to apply international procedures to stop the breach of the peremptory norm being a violation of these obligations. These obligations should also impact, for example, the interpretation of conventions such as the 1936 Montreux Convention Regarding the Regime of the Straits,⁴⁴ which were part of the system where neutrality played greater role, but now they need to be interpreted in light of the UN principles, including the prohibition to use force and solidarity with the victim of aggression.

Two consequences of serious breaches of peremptory norms for the international community must be mentioned. Firstly, no state in the world can support Russia in its aggression. This would mean that any transfer of weapons to Russia, services provided to Russian military staff, or engagement in trade which is clearly a source of financing current aggression are prohibited. Secondly, in light of the statement of the GA in resolution A/ES-11/1 of 2 March 2022, in which it deplored "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" and demanded that "the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State"; the adoption of the resolution of the Human Rights Council no. 49/1 of 7 March 2022 which "[c]ondemns in the strongest possible terms

Internationally Wrongful Acts, A/56/10, p. 114, the conclusions concerning obligations of states to cooperate to end serious breaches of peremptory norms were described as those which "may reflect the progressive development of international law."

⁴² A/377(V), 3 November 1950.

⁴³ See more R.J. Barber, *Cooperating Through the General Assembly to End Serious Breaches of Peremptory Norms*, 71 International and Comparative Law Quarterly 1 (2022).

⁴⁴ 173 LNTS 213.

the human rights violations and abuses and violations of international humanitarian law resulting from the aggression against Ukraine by the Russian Federation”; and the ICJ’s order of 16 March 2022 on provisional measures in which the Court indicated that “the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine”, no state can claim that it is unaware of the circumstances of the internationally wrongful act. Therefore, any cooperation with the aggressor (e.g. transfer of weapons) could be classified as aid or assistance in the commission of an internationally wrongful act (Art. 16 of the ILC’s Articles on State Responsibility), which is itself a breach of a peremptory norm. Consequently counter-measures *should* (not “could”) be applied against any aiding/assisting state, as once again the international community’s obligation is triggered according to Art. 42 of the aforementioned ILC Articles. Even if states have different views concerning the scope and type of the response which needs to be undertaken, they undoubtedly need to assess the situation and work on the recommendations within the GA.

2. INTERNATIONAL HUMANITARIAN LAW

The conflict between Russia and Ukraine is an international armed conflict, to which the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land with its Regulations;⁴⁵ the 1949 Geneva Conventions on Protection of War Victims and its 1977 Protocol Additional relating to the Protection of Victims of International Armed Conflicts; as well as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, together with its first protocol⁴⁶ are all applicable. Ukraine and Russia are parties to all of these agreements, as well as subject to the binding rules of customary law.⁴⁷ Unfortunately, in October 2019 Russia withdrew from the declaration made by the Union of Soviet Socialist Republics at the time of the ratification of the Additional Protocol I in accordance with Art. 90(2), recognizing ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission. Therefore, in the case of any violation of IHL, it is impossible, without a separate agreement, to engage the International Humanitarian Fact-Finding Commission. However, it should be added that even before 2019 Ukraine was also not willing to engage the aforementioned Commission to verify allegations concerning war crimes.

⁴⁵ Available at: <https://ihl-databases.icrc.org/ihl/INTRO/195> (accessed 30 June 2022).

⁴⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict with the Protocol (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

⁴⁷ J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I-III, Cambridge University Press, Cambridge: 2005; updated online version available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (accessed 30 June 2022).

In the assessment of the legality of the means of warfare used in the current war, in which Russia has allegedly used landmines, cluster munitions, thermobaric, vacuum bombs, and white phosphorus, it needs to be stressed that neither Russia nor Ukraine are parties to the 1998 Oslo Convention on Cluster Munitions; nor is Russia a party to 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; while Ukraine deposited its documents of ratification in December 2005, and it ratified the 1996 Amended Protocol II to the 1980 Convention on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. In addition, according to Customary Rules 81-82 “when landmines are used, particular care must be taken to minimize their indiscriminate effects” and “a party to the conflict using landmines must record their placement, as far as possible.” Based on these binding customary rules, Russia is obliged to at least warn about the planting of landmines and to use only those landmines which can be detected with standard demining equipment; meaning that Russia cannot use booby-traps which are in the form of apparently harmless portable objects, such as children’s toys (e.g. butterfly mines which look like toys⁴⁸). Ukraine, as it is a party to the Ottawa Treaty, should not use landmines at all, but Russia accuses it of violation of its obligations and denies any use of landmines on its part.⁴⁹

The mere use of cluster munitions or landmines is not considered as a war crime in light of the Rome Statute, therefore it is difficult to argue that landmines or cluster munitions should be considered as weapons which are by their nature intended to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate in violation of the international law of armed conflicts.⁵⁰ Nevertheless, even if this weapon is not prohibited it still cannot be used in an indiscriminate manner, e.g. in cities where there is a dense urban environment, where it is impossible to distinguish military targets from civilian objects, or against the civilian population, and these kinds of actions are classified as war crimes.⁵¹

Both states to the conflict, as parties to the 1980 Convention on Certain Conventional Weapons⁵² together with all its protocols, should not use, for example, any weapon the primary effect of which is to injure by fragments which escape de-

⁴⁸ W. Wilde, *Fact Check: Is Russia using butterfly mines in Ukraine?*, DW, 15 March 2022, available at: <https://www.dw.com/en/fact-check-is-russia-using-butterfly-mines-in-ukraine/a-61120270> (accessed 30 June 2022).

⁴⁹ See e.g. RIA Novosti news, available at: <https://ria.ru/20220302/dnr-1776111551.html>, 2 March 2022; <https://ria.ru/20220302/miny-1776096271.html>; 2 March 2022 (both accessed 30 June 2022).

⁵⁰ Art. 35(2) API; Art. 8 Rome Statute; Arts. 70-71 of the Customary Rules of IHL.

⁵¹ Art. 57(4) AP I; Art. 8(2)(b)(i) and (ii) and (iv) Rome Statute.

⁵² Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III) (adopted 10 October 1980, entered into force 2 December 1983), 1342 UNTS 137.

tection in the human body by X-rays (therefore the use of Molotov Cocktail against soldiers is prohibited, as the result of such an attack is that small pieces of glass can remain in the human body); nor can incendiary weapons be used against civilian populations, individuals, or objects. It is also prohibited to attack, by air-delivered incendiary weapons, a military objective located within a concentration of civilians. In the case of other than air-delivered incendiary weapons, their use is possible when a targeted military objective is clearly separated from a concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to ensure the avoidance, and in any event to minimize, the incidental loss of civilian life, injury to civilians, and damage to civilian objects. However, thermobaric (vacuum) bombs or white phosphorus are not classified as incendiary weapons, as they are not primarily designed to set fire or to cause burn injuries, although they depend on a chemical reaction. For example, in the case of thermobaric bombs, their aim is to generate blast and pressure; its primary task is not to set fire. It is tempting to consider a thermobaric weapon as causing superfluous injury or unnecessary suffering (Art. 35(2) AP I) as “it just blows your lungs out of your mouth. It kind of turns you inside out”,⁵³ but at the same time it “is not calculated to inflict suffering beyond that justified by military necessity.”⁵⁴ As this kind of weapon is in the arsenal of “specially interested states” – i.e. China, UK, USA and Russia – it is impossible to deduct that this weapon is, based on customary law, considered as indiscriminate by nature.

Therefore, Russia can legally use cluster munitions, landmines, incendiary weapons, and thermobaric bombs or white phosphorus against military targets in general. These means cannot however be used – the same as with any other kind of weapon – against civilians and civilian objects and they cannot be used in a manner which would be indiscriminate – for example in densely populated urban areas, or when it is possible to use some other kind of weapon to achieve the same military results without exposing civilians to risk of death or injury.⁵⁵ It is worth recalling that Russia recently supported the adoption of several UN SC resolutions or presidential statements in which it noted the “threats posed by landmines, explosive remnants of war (ERW) and improvised explosive devices (IEDs).”⁵⁶ It is thus all the more disturbing that Russia has no problems with causing those threats in the current conflict.

⁵³ L. Greenemeier, *What is the ‘Mother of All Bombs’ That the US Just Dropped on Afghanistan*, Scientific American, 13 April 2017, available at: <https://bit.ly/3w4dVv4> / (accessed 30 June 2022).

⁵⁴ M. Montazzoli, *Are Thermobaric Weapons Lawful*, Liber Institute, 23 March 2022, available at: <https://liber.westpoint.edu/are-thermobaric-weapons-lawful/> (accessed 30 June 2022).

⁵⁵ ODIHR, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022 by Professors Wolfgang Benedek, Veronika Bilková and Marco Sassòli*, ODIHR.GAL/26/22/Rev.1, 13 April 2022, p. 31.

⁵⁶ Just in 2021, see e.g. S/RES/2589, 18 August 2021; S/RES/2592, 30 August 2021; S/RES/2612,

In the first two days of the current escalation of the conflict, Russians were attacking mainly military targets (military airports; deposits of weapon or fuel, Ukrainian armed forces etc.). Unfortunately, in the following days civilian buildings were destroyed by Russian armed forces, such as schools, kindergartens, apartments, hospitals etc. In all these cases, without proper fact finding it is impossible to state whether international humanitarian law was violated, as it has to be verified whether all those objects maintained their civilian character – in other words it must be verified that they were not used or planned to be used for military purposes.⁵⁷ It is telling that Russia in each case when a hospital or school has been bombed has justified its attack by stressing that it was used, for example, by a certain battalion;⁵⁸ or supplying reprints of alleged intercepted talks between soldiers in which they complain that particular apartments are housing both civilians and fighters,⁵⁹ which would turn those apartments into military targets. Attacks on humanitarian corridors were justified by Russia by the fact that Ukrainians allegedly used school buses for manoeuvre shelling,⁶⁰ and in the case of the theatre of Mariupol – which sheltered hundreds of civilians – the explosion was allegedly provoked by Ukrainians as Russia did not engage in any attack at that time.⁶¹ Similarly, an attack on a television tower was justified by the argument that this tower was part of the Ukrainian military infrastructure.⁶² All these justifications might well be examples of lies, but without objective verification it would be difficult to talk about the responsibility of Russia and its soldiers. It also must be stressed that despite the fact that the Ukrainians are defending their country against aggression, this does not give them more rights under IHL. Ukrainian combatants (including their commanders, as

20 December 2021; S/PRST/2021/8, 8 April 2021.

⁵⁷ Art. 52(2) API. It is telling that in the draft of the resolution submitted by Belarus, Democratic People's Republic of Korea, the Russian Federation, and Syrian Arab Republic in Security Council (S/2022/231) on 23 March 2022 it was emphasized that the SC "Demands from all parties concerned full respect for provisions of international humanitarian law in connection with objects indispensable to the survival of the civilian population and civilian infrastructure that is critical to enable the delivery of essential services in armed conflict, and to refrain from deliberately placing military objects and equipment in the vicinity of such objects or in the midst of densely populated areas, as well as not to use civilian objects for military purposes." As can be seen, the protection of civilian objects was thus linked with the reminder that they cannot be used for military purposes and their protection can be secured only if they are not in the vicinity of military objectives.

⁵⁸ See e.g. statements of Dmitry Polyanskiy, First Deputy Permanent Representative of Russia to the UN of 9 March 2022, available at: https://twitter.com/Dpol_un/status/1501688008621363205; or statement of 7 March 2022, available at: <https://russiaun.ru/en/news/070322n> (both accessed 30 June 2022).

⁵⁹ See Twitter account of Ukrainian Parliament, e.g. <https://bit.ly/37ChXBz> (accessed 30 June 2022).

⁶⁰ See e.g. statements of Michail Mizincev of 10 March 2022 cited in: <https://russian.rt.com/ussr/news/974261-ogneye-tochki-v-avtobusah>; or statements of Vladimir Putin of 9 March 2022 cited in: <http://kremlin.ru/events/president/news/67953> (both accessed 30 June 2022).

⁶¹ See e.g. <https://bit.ly/3wn4Psh> (accessed 30 June 2022).

⁶² See <https://russian.rt.com/ussr/news/969829-minoborony-udar-sbu-pso> (accessed 30 June 2022); as well as the analysis of the attacks against television towers in ODIHR report, *supra* note 55, p. 27.

well as the commander-in-chief, who is the President of Ukraine) are legal targets; those civilians who are taking part in hostilities, i.e. throw Molotov cocktails, disturb the movement of military vehicles, provide strategic information to Ukrainian armed forces, steal military equipment etc. are also not protected during this kind of engagement and can be attacked.⁶³ The fact that the President of Ukraine was urging its own population to fight against the “occupants”⁶⁴ could be understood as encouragement to form and participate in *levée en masse*. While civilians who join *levée en masse* are entitled to the status of combatants/prisoners of war, at the same time they lose their protection against attacks and thus they can be lawfully killed.⁶⁵

There are some facts from Mariupol, Bucha, Irpin and many other Ukrainian cities and villages which are against the Russian narration of the complete legality of their conduct of hostilities. Even if sieges are allowed, Russia should not prevent the delivery of humanitarian aid, as starvation is prohibited and its use as a method of warfare is a war crime.⁶⁶ Forcing men from Donbas to serve in the Russian army is also a war crime, as Donbas is still Ukrainian territory and compelling its citizens to serve in a hostile army is prohibited.⁶⁷ In addition, the extremely high number of destroyed hospitals and schools and the total destruction of the city of Mariupol indicates an indiscriminate conduct of hostilities, which is a war crime.⁶⁸ Also, the destruction of agricultural infrastructure and killing of farmers trying to cultivate the soil is a war crime, as these are civilians and farmlands are objects indispensable to the survival of the civilian population.⁶⁹ Kidnapping, taking as hostages, or shooting public officials are also war crimes;⁷⁰ as is attacking protesters in the occupied cities,

⁶³ See Art. 51(3) AP I.

⁶⁴ S. Watts, *Are Molotov Cocktails Lawful Weapons?*, Liber Institute, 2 March 2022, available at: <https://lieber.westpoint.edu/are-molotov-cocktails-lawful-weapons/> (accessed 30 June 2022).

⁶⁵ Art. 4(6) GC III and Art. 48 AP I.

⁶⁶ Art. 8(2)(b)(xxv) Rome Statute; Art. 51(1) AP I. See information from ICRC on its team being unable to reach Mariupol, 1 April 2022, available at: <https://www.icrc.org/en/document/ukraine-icrc-team-unable-reach-mariupol-renewed-attempt-tomorrow> (accessed 30 June 2022). See also T. Dannenbaum, *Siege Starvation: A War Crime of Societal Torture*, 22 Chicago Journal of International Law 368 (2021-2022).

⁶⁷ Art. 8(2)(a)(v) and (b)(xv) Rome Statute; Art. 23(h) 1907 HR; Art. 130 GC III; Art. 147 GC IV. See also Reuters, *Conscripts sent to fight by pro-Russia Donbas get little training, old rifles, poor supplies*, 4 April 2022, available at: <https://reut.rs/3L73Oda> (accessed 30 June 2022).

⁶⁸ Art. 8(2)(b)(iv) Rome Statute; Art. 51(4) AP I. K. Collins et al., *Russia's Attacks on Civilian Targets Have Obliterated Everyday Life in Ukraine*, New York Times, 23 March 2022, available at: <https://nyti.ms/3FDknwf>; M. Wall, *Russia's devastation of Mariupol, Ukraine visible from space in satellite photos*, Space 25 March 2022, available at: <https://www.space.com/russia-ukraine-invasion-mariupol-damage-satellite-photos> (both accessed 30 June 2022).

⁶⁹ Art. 8(2)(b)(xxv) Rome Statute; Art. 54(2) AP I. Iurii Mykhailov, *Russian Bomb AG Machinery Warehouses, Says Ukrainian AG Journalist*, Successful Farming, 15 March 2022, available at: <https://bit.ly/3ssOt0h> (accessed 30 June 2022).

⁷⁰ Art. 8(2)(a)(i) and (viii) and (b)(i) Rome Statute; Art. 147 GC IV; Art. 11 AP I. See also CBS, *Russian troops tortured and executed a village mayor and her family, Ukrainian officials say*, CBS News, 4 March 2022, <https://cbsn.ws/3N6OeJs> (accessed 30 June 2022).

as protesting is not direct participation in hostilities and in this case law enforcement measures must be applied.⁷¹ Last but not least, shooting persons in Russian hands without a proper trial is a war crime, as is torturing or raping anyone.⁷²

All the violations of IHL committed by Russian armed forces result in the responsibility of Russia (as is also the case of the Ukrainian armed forces which are accused of, for example, abuse of prisoners of war or using illegal means and methods of warfare, including attacks against civilian objects⁷³). All those violations which amount to war crimes entitle states to prosecute individuals (including the commanders and civilian superiors who did not prevent them and did not repress them⁷⁴).

Inasmuch as the basic rules of international humanitarian law are considered as peremptory norms, the above-mentioned comments concerning the obligations of the international community to respond to the serious breaches of peremptory norms are relevant in the context of the prevention of war crimes. Those obligations are emphasized by the letter of common Art. 1 of 1949 GCs and Art. 1 AP I, which expect all state parties to not only respect IHL but also to ensure respect for it. As in case of GCs, all states in the world are their parties, which means that all states in the world need to take concrete actions to prevent any further violations. An example of this kind of action was the referral of the situation in Ukraine to the International Criminal Court and the opening of investigations by some states (e.g. by Estonia, Germany, Lithuania, Poland, Slovakia, and Sweden).

CONCLUSIONS

Russia violated the prohibition of threat or use of force enshrined in Art. 2(4) of the UN Charter. Due to the gravity of its violations, undoubtedly Russia has committed and is still committing acts of aggression. In an international armed conflict such as the one ongoing on the territory of Ukraine, all four 1949 GCs and 1977 AP I are applicable, as well as the 1907 HC IV with its annex and the 1954 Hague Convention with its first protocol, and customary law. Unfortunately, the facts clearly demonstrate the basic rules of international humanitarian law have been and

⁷¹ Art. 8(2)(b)(i) Rome Statute; Art. 147 GC IV; Art. 11 AP I. R. Sullivan, *Russian troops 'open fire on Ukrainian protesters' in Kherson*, The Independent, 21 March 2022, available at: <https://bit.ly/38khzrO> (accessed 30 June 2022).

⁷² Art. 8(2)(a)(i), (ii) and (iii) Rome Statute; Art. 130 GC III; Art. 147 GC IV; Art. 11 AP I. T. John et al., *Bodies of 'executed people' strewn across street in Bucha as Ukraine accuses Russia of war crimes*, CNN, 3 March 2022, available at: <https://edition.cnn.com/2022/04/03/europe/bucha-ukraine-civilian-deaths-intl/index.html> (accessed 30 June 2022).

⁷³ ODIHR, *supra* note 55, p. 26.

⁷⁴ Art. 28 Rome Statute; Art. 87 AP I.

are being transgressed; i.e. the principle of distinction, principle of proportionality, and the principle of not causing unnecessary suffering have all been violated. As the prohibition of aggression and prohibition of certain war crimes are considered as peremptory norms, this means that the international community (states and international organizations) has a legal obligation to undertake appropriate measures to stop violations and to not recognize the results of those violations. No subject of international law can support an aggressor, as this could amount to aiding and assisting in aggression, and in consequence would constitute a violation of obligations to properly react to the serious breaches of peremptory norms.