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Aggression and Responsibility Under International Law – A Case of the Aggression of the Russian Federation Against Ukraine*

Abstract:
The aim of this article is to address the relationship between aggression, conceived both as an act of a state and as a crime, and responsibility for it under the law in the light of the Russian aggression against Ukraine. The Russian Federation as a state committed an act of aggression as the internationally wrongful act for which it is responsible under customary international law, while members of its authorities, headed by the president, perpetrated a crime of aggression, as defined in Article 8 bis of the Rome Statute of the International Criminal Court. The author argues that as far as the act of the Russian aggression is concerned not only Ukraine but also other states may make Russia responsible for its act of aggression. As the Russian Federation seriously breached of obligations under peremptory norms of general international law any state may claim from Russia, first, cessation of the internationally wrongful acts, and assurance and guarantees of non-repetition and, second, performance of the obligation of reparation in the interest of Ukraine or of the beneficiaries of the obligation breached. Although international law has not traditionally recognized individuals as victims of the crime of aggression, one should have in mind that not only states but also individuals are victims of the aggression. This is why individuals as victims of the Russian aggression may, even should, participate in the future regimes of criminal responsibility and reparation in the context of prosecutions for this crime. But it will be depended on the determination and good will of the members of the international community and, obviously, on the indictment of suspects. The author claims that a full restoration of peace in Ukraine will not take place if Russia is not held responsible for its wrongful act of aggression and the perpetrators of crimes committed during this armed conflict, including the crime of aggression, are not brought to criminal responsibility.
Keywords: act of aggression, crime of aggression, responsibility, international law, Russia, Ukraine

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I. Introduction

On 24 February 2022 the Russian Federation committed an armed attack against Ukraine. This act of aggression was a serious breach of the fundamental principles of international law embodied in customary international law and in the Charter of the United Nations (the UN Charter): the principle of fulfilling in good faith international legal obligations (Article 2(2) of the UN Charter), the principle of peaceful settlement of international disputes (Article 2(3) of the UN Charter) and the prohibition of the threat and use of force (Article 2(4) of the UN Charter).

The aim of this article is to address the relationship between aggression, conceived both as an act of a state and as a crime, and responsibility for it under the law in the light of the Russian aggression against Ukraine. The article is organised into four parts, including this introduction. Part II gives a brief legal appraisal of the use of force by Russia under *jus ad bellum*. There is no need to refer to this issue more broadly, as its legal assessment is not in doubt; it is unambiguous. In Part III the author addresses the relationship between aggression and responsibility for it in order to draw attention to power and weakness of international law, in particular, its institutional framework. Part IV seeks to justify the significance of responsibility of both the state and individuals for their unlawful acts. The author argues it is an important, even crucial part, of *jus post bellum*, that is, the legal regulations binding after the armed conflict.

II. The Russian armed attack against Ukraine under jus ad bellum

As it was claimed, the Russian Federation committed the act of aggression against Ukraine in gross violation of the basic principles of international law. However, its authorities assert that, in reality, its "special military operation" on the territory of Ukraine is based on Article 51 of the UN Charter and customary international law. This legal basis for the "special military operation" was communicated on 24 February 2022 to the Secretary-General of the United Nations and the United Nations Security Council by the Permanent Representative of the Russian Federation to the United Nations in the form of a notification under Article 51 of the UN Charter.[1] But the reverse is true, that is, it is the military actions of the Russian Federation that qualify as an armed attack under Article 51 of the UN Charter and customary international law. This is why, the military response of Ukraine constitutes internationally lawful self-defence. Circumstances indicate that the military actions undertaken by Ukraine hitherto fulfil the requirements set by the principles of necessity and proportionality. On the other hand, the military actions of the Russian Federation constitute, as indicated, a serious violation of the prohibition of the use of force, because they do not fall within the scope of any of the provided exceptions to this the prohibition, that is, they were neither conducted with the prior authorization of the UN Security Council given under Chapter VII, nor were they undertaken in self-defence on the basis of the Arti-

1 S/2022/154.

cle 51 of the UN Charter and customary rule, since they did not constitute a response to an armed attack from Ukraine – such a situation had not actually occurred.

The armed attack of the Russian Federation against Ukraine is a gravest manifestation of aggression, as understood by the 1974 United Nations General Assembly Resolution 3314,[2] reflecting the binding customary law. It defines an act of aggression 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" (article 1 of the Annex to the Resolution). The prohibition of aggression is today a peremptory norm (*jus cogens*) of international law and, as such, it is effective and opposable *ergo omnes*. As a result, all states are obliged not to recognize as lawful a situation created by the aforementioned breach. They can also undertake actions in order to cease a breach to this peremptory norm. Therefore, sanctions and countermeasures directed by states and organizations against the Russian Federation as a state responsible for the internationally wrongful act are subsequently in principle lawful, which is discussed in Part IV of the article.

The General Assembly Resolution 3314 enumerates as an act of aggression also allowing a state's territory, which has been placed at a disposal of another state, to be used by that other state for perpetrating an act of aggression against a third State. Accordingly, the Republic of Belarus, from whose territory an armed attack of part of the armed forces of the Russian Federation against Ukraine was committed, is responsible for aggression, and as a result, adequate countermeasures might and should be undertaken also against it.

The Russian armed attack and the armed conflict between Russia and Ukraine have been addressed in the framework of several intergovernmental institutions, including the United Nations (UN). The UN General Assembly adopted a resolution referring to many aspects of the conflict on 2 March 2022.[3] In this resolution titled *Aggression against Ukraine* and adopted by the overwhelming majority of the UN Member States, the GA "deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" (par. 2) and "demands 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" (par. 3). Such a consistent reaction of almost all states to the Russian aggression (just five states voted against the resolution) shows that the Article of 2(4) of the UN Charter has not been killed, as it once *Thomas Franck* proclaimed,[4] and is still alive. Also the International Court of Justice in its order on provisional measures of 16 March 2022[5] indicated that "the Russian Federation shall immediately suspend the

2 UN doc. A/RES/29/3314.

3 UN doc. A/RES/ES-11/L.1.

4 See *T.M. Franck*, Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States, American Journal of International Law, 64 (1970), p. 809. Thus, Michael Glennon was wrong in stating bluntly in 2005 that "the prohibition of the threat or use of force enshrined in Article 2 (4) of the UN Charter, is no longer a valid legal rule". See M.J. Glennon, *How International Rules Die*, Georgetown Law Journal, 93 (3) (2005), p. 958.

5 Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022.

military operations that it commenced on 24 February 2022 in the territory of Ukraine". Nevertheless, just as "rights without remedies are not rights at all", serious breaches of legal norms without bringing the perpetrators to justice lead to the erosion of legal order. This prompts to address the relationship between the Russian aggression and responsibility for it.

III. The Russian aggression and responsibility for it: between realism and legalism

Does the case of the Russian aggression support realism as opposed to legalism founded on the observance of law and enforcement of responsibility for its violation? It depends on the response of the international community to this grave violation of peremptory norm of international law, in particular, its actions to bring the Russia Federation and the perpetrators of the international crimes to responsibility. The response to violations of law seems to be crucial. It is worth taking into account what Louis Henkin said on the significance of observance and violation of international law for the international community. First, all legal norms and obligations are *political*, since their observance or violation are political acts in the international realm. This is why, for any state, the cost and advantage of law observance or violation must be seen largely in the context of its foreign policy.[6] Second, observance of international law, not violation, is, according to *Henkin*, the "common way of nations" because it appears to be generally "more advantageous" than violation. States have simply a common interest in keeping the society running and keeping international relations orderly because they desire to protect friendly relations with other states.[7] Therefore, *Henkin* claims, "the norm against unilateral use of force has survived and it has been largely observed".[8] He concludes:

> The law works. … Nations recognize that the observance of law is in their interest and that every violation may also bring particular undesirable consequences. … [T]he most important principle of law today is commonly observed: nations have not been going to war, unilateral uses of force have been only occasional, brief, limited.[9]

Is it true when the aggression against Ukraine is concerned? Has the use of force by Russia been occasional, brief and limited? This act of aggression is maybe occasional but it is neither brief nor limited. And another *Henkin's* view which is relevant to this act of aggression:

> Most important … is the need for a firm, clear, and credible stand by international society against unilateral use of national force. […] It would be tragic if the observance and enforcement of this norm became a political football, encouraging violation by any nation which was secure in its military or political power…. If this norm fails, we may not even be able to revert readily to the days when law applied in peace although it did not forbid

6 *L. Henkin*, How Nations Behave. Law and Foreign Policy, Praeger Publishers, New York 1970, p. 48.
7 Ibid., p. 46, 48.
8 Ibid., p. 135.
9 Ibid., p. 252.

> war. Failure of the principal norm of contemporary international law can only cast doubt on the efficacy and legitimacy of all international law.[10]

Indeed, the observance and enforcement of the prohibition of the threat and use of force must not became a 'political football'. Otherwise, peace as the fundamental value of the international community and the primary purpose of the United Nations is constantly at risk. This is why, the prohibition of threat or use of force is a norm of peremptory character and there must be no occasion to pretext for states to unilateral decide that their rights have been violated and they may resort to the use of force.

The serious breach of Article 2(4) of the UN Charter, the crime of aggression and other alleged crimes committed during the international armed conflict between Russia and Ukraine incline to address some questions on the power and weakness of international law. The power of international law is severely tested when it comes to the unilateral use of force by states. The Russian aggression against Ukraine is arguably the most important such a test since the end of World War II, at least in Europe. Therefore, following *Thomas Franck's* question after the 2003 US military intervention in Iraq,[11] one can ask: what happens now in the international legal order? This issue will be discussed under the relationship between the observance and violation of international legal norms and responsibility for them. It will allow several conclusions to be drawn about, on the one hand, the power and weakness of international law and, on the other, about power politics.

The relationship between international law and politics is very close, even natural, since the rules of international law primarily act in international relations, that is in a political reality. It is a truism. And, as *Hans Morgethau* put it, international relations have been governed by the distribution of power among states. His *Politics among Nations* (1948) is seen as a beginning of new discipline of international relations – *realism*, and, at the same time, as a book on the practical limitations of law in the international reality. Although *Morgenthau* himself did not deny the binding force, effectiveness and significance of most rules of international law, he claimed that international law was ineffective in spectacular situations directly concerning the distribution of, and struggle for, political power.[12] *Morgenthau* emphasized the 'national interest' as a primary factor of observance or violation of international law. Today a proposition by *Jack Goldsmith* and *Erick Posner* is probably a best known approach to the relationship between the observance of international law and the 'national interest'. According to them, the relationship between obeying laws and securing state interests, including the issue of which has priority between the two, is resolved by the 'rational choice theory', which leads them to the following conclusion: consistency of state actions with international law remains dependent on whether they serve state security, economic growth, and the protection of other goods that enhance state

10 Ibid., pp. 249-250.

11 *T.M. Franck*, What Happens Now? The United Nations after Iraq, American Journal of International Law 97 (2003), p. 607.

12 *H. Morgenthau*, Politics among Nations: The Struggle for Power and Peace, Alfred Knopf, 2nd ed., New York 1954, p. 251.

interests.[13] This view is an expression of belief in power politics and its supremacy over the law.

Realists say that international legal rules and principles, in themselves, are rather a poor restraint on the use of force by states. This is recognized in the realist lens by the emphasis placed on a functioning balance of power as a necessary enabler for international law to function. Thus, search for the actual rules in the political reality, but not legal rules, characterizes *realism* as opposable to *idealism* or *legalism* founded on belief in force of law. The British interwar historian *Edward H. Carr* pronounced the latter as a *utopian* claiming that "utopians think in terms of ethics, and realists […] think in terms of power".[14] It is also worth remembering that the failure of the League on Nations shaped *Morgenthau's* view on international relations as governed by the distribution of power between states.

A question arises whether is international law strong enough to be observed in the face of state power and interests? The answer does not seem to be unambiguous. Despite the occasional gross violation, day-to-day practice shows that the majority of international law provisions are followed by states. This has been admitted by many realists, including *Hans Morgenthau*. For this reason *James Crawford* seems to be right claiming that an "account of international relations that systematically trivializes […] legal norms and values, is manifestly inadequate even at the level of description".[15] Contrary to popular belief, states do observe international law, and its violations are comparatively rare. As *Louis Henkin* famously put it:

> Violations of law attract attention and the occasional important violation is dramatic; the daily sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.[16]

Realism and *idealism* as extremes can hardly be considered as convincing approaches to the reality of international relations. Realists who do not recognize the force of law in foreign policy are not realistic, whereas idealists who do not recognize the limitations of international law are "largely irrelevant to the world that is", as *Henkin* put it.[17] What the *international law and international relations* school proposes should be taken into account in this respect. *Anne-Marie Slaughter* claims that political relations between states indicate what must and what may be established legally. In her view, international lawmaking is the search for solutions to international problems, while the purpose of the international relations theory is to propose new solutions to old problems for which the assumptions of international law have become outdated or been discredited. According to *Slaughter* law and politics have always been and will always be intertwined, but a better world can only be built when it is imagined and

13 See *J.L. Goldsmith/ E.A. Posner*, The Limits of International Law, OUP, Oxford 2005, pp. 3-9, 14-15, 189-193.

14 *E.H. Carr*, Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations, Macmillan, 2nd ed., London 1946, p. 161.

15 *J. Crawford*, Chance, Order, Change: The Course of International Law, The Hague Academy of International Law, The Hague 2014, p. 54.

16 *Henkin*, fn. 6, p. 42.

17 Ibid., p. 269.

framed in legal structures. This is the task of international law and international lawyers.[18]

Realists are pessimists about the power of international law, since they doubt whether there is a room for effective compliance with international legal obligations and enforcement of responsibility for their violation in a decentralized international community, i.e. a community that suffers from a deficit of central legislative, executive, and judicial authority. The belief that the task of international law is to resolve conflicts and disputes by recourse to the rule of law instead of power is put to a special test in cases of gross violations of its fundamental norms. Each gross violation strikes at the core of the international legal system, especially when it breaches of international peace and security as the Russian aggression against Ukraine does. It is not a hard case under the law because the gross violation of international law by Russia is indisputable. It is an issue of supremacy of law or power politics that does matter in this case. At any rate, reactions of the members of the international community to this serious breach of obligations following from peremptory norms of international law will indicate the extent to which legal considerations of sovereign geopolitical actors – states, affects their political choices. In particular, whether it is generally in their interests to observe their legal obligations.

The Russian Federation has grossly breached the peace. Thus, this act of aggression against Ukraine has infringed one of the principal community interests, that is, the interests of the *international community as a whole*. The members of the international community today face the great challenge of responding to the gross violation of the core of international law protecting this interest. True, law, including international law, is not an end in itself. It is only a means of enhancing the social order. However, in cases of gross violation of the legal principles of this order, enforcement of responsibility for these violations towards the state as well as the individuals guilty of violations is necessary. Thus, the actions of the members of the international community already taken, e.g. exclusion of Russia from the Council of Europe, but also the possible omissions of states against the Russian aggression and other crimes committed during this conflict can answer the question of whether states perceive international law as an indispensable measure for shaping a better world.

International law used to be treated as an imperfect and incomplete legal order due to the absence of unified system of sanctions and trivialization of violations of legal rules. But there have been both institutional sanctions and countermeasures in international law to respond these violations. The international legal order should be rather examined in order to seek whether in fact states feel obliged to obey legal rules and principles and respond to their violations. If so, the better for states and international law. But if not, should international law not be relegated to the category of 'positive morality', as John Austin put it? Coercion measures against gross violation of law, therefore, are needed. It is the will, choices, actions and omissions of the states that determine whether there is a symbiosis or antagonism between their individual interests and the community interests protected by the law. This relationship is an expression of either the belief of the states in the power of legal solutions or their conviction

18 *A.-M. Slaughter*, International Law and International Relations, Recueil des Cours Académie de Droit International de la Haye, 2000, vol. 285, p. 9, 235.

that such solutions are ineffective in shaping the world order. In any case, it is a test that checks the condition of the international community and its members. Care for the observance of the fundamental legal principles by the states indicates whether the international community is a legal community.

IV. Why should Russia and perpetrators of international crimes be held responsible or why *jus post bellum* matters?

Today, the attention of the world public opinion is attracted by the methods and means of hostilities in Ukraine and, unfortunately, the reports on the crimes committed. Their legal qualification results from international humanitarian law (IHL or *ius in bello*) and national and international criminal law. The steady development of the IHL rules since the mid-19th century contradicts the belief that *inter arma silent leges*. Not everything is allowed in the course of hostilities. The numerous prohibition rules arising in this respect from international customs and treaties are intended, first, to protect civilians and civil property and, second, to limit the methods and means of conducting hostilities. These rules in specific cases should be interpreted in the light of the five basic principles of IHL: humanity, distinction, proportionality, military necessity and precaution. It is advisable to briefly recall their meaning. The principle of humanity emphases the "elementary considerations of humanity" being reflected and expressed in the Martens clause to the Fourth Hague Convention of 1907.[19] The principle of distinction requires those who wage hostilities to distinguish between people who take part in the hostilities and those who do not (or no longer) take part in them. The principle of distinction, along with the principle of protecting the civilian population, is fundamental to IHL. The principle of proportionality states that even if there is a clear military target, it may be attacked only if the risk of civilians or civilian property being harmed, or of civilians being killed, is not excessive in relation to the expected military advantage. From the principle of military necessity flows the prohibition of superfluous injury and unnecessary suffering. The premise underlying the principle of precaution is that constant care must be taken by all those involved in the planning and execution of attacks to spare the civilian population and civilian objects.

Numerous reports on the Russian attacks on civilians and civilian objects make it necessary to recall the principles and rules of IHL regarding personal and material targets in the armed conflicts. Under the principle of distinction there is a great difference between people who take part in the hostilities and those who do not take part in them: while combatants may be legitimate targets of attacks under the law, attacks on civilians, combatants who no longer take part in the hostilities, medical personnel and chaplains are prohibited. By analogy with this division, material objects and goods are

19 "[T]he inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907, https://ihl-databases.icrc.org/ihl/intro/195, preamble.

divided during hostilities into legitimate targets of attacks, that is, military objectives and civilian objects against which attacks are prohibited.

In view of reports about the enormous damages to civil infrastructure, especially in eastern Ukraine, led by Mariupol, it is worth quoting the treaty definitions of military objectives and civilian objects. Article 52 (2) of the I Protocol Additional to the Geneva Conventions of 12 August 1949 clearly stipulates: „Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[20] Article 52(1) of this treaty gives a negative definition of civilian objects: "Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2". Attacks on them are forbidden. Anyway, indiscriminate attacks are not allowed.

The basic principles of IHL, headed by distinction, precaution and proportionality, aim to protect the victims of wars. They hold that precautions must be taken in order to comply with the principles of distinction and proportionality. The principle of precaution requires that civilians be given advance warning when planned attacks on military objectives may harm them, unless the tactical situation does not permit it. The principle of precaution also applies to the choice of weapons and tactics. However, it is the prohibition of indiscriminate attacks that plays a key role. Its main consequence is as follows: if attacks, methods and means of hostilities cannot be limited to legitimate personal targets and military objectives and, if they are carried out, they will be attacks without distinction, that is, forbidden attacks under the law. The mentioned reports of the damages to the civil infrastructure and of civilian deaths indicate numerous war crimes and crimes against humanity committed during this armed conflict in Ukraine. As such, they should be subjects to the criminal proceedings. These proceedings seem to be an important part of *jus post bellum*, that is, the legal regulations after the cessation of hostilities in Ukraine.

Jus post bellum has three main dimensions. The first is to restore *status quo ante*, including the borders of Ukraine. However, it is not unreasonable to expect that the post-conflict regulations will guarantee security in the future for Ukraine as a victim of the Russian armed attack. But it does not seem possible to provide such guarantees to Ukraine without the involvement of the members of the international community. In any case, the mere restoration *status quo ante* without changing Russia's attitude towards Ukraine will not be enough, because it was the relations before the armed conflict that led to the armed attack and enormous damages and deaths.

The second dimension of *jus post bellum* is the enforcement of the international responsibility towards the aggressor – the Russian Federation. Ukraine is not only on its own in this respect. Russia has seriously breached the prohibition of aggression and thus breached one of the most important *erga omnes* obligations, that is, *the obligations of a State towards the international community as a whole*. The International

20 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 1125 *United Nations Treaty Series* 3.

Court of Justice from its 1970 judgment in *Barcelona Traction* case[21] has consistently held that these obligations apply to all states and that all states have a common interest in protecting them. These obligations can be seen as a normative core of international law as they protect community interests, that is, „interests of the international community as a whole".[22] Therefore, all states are entitled to take corrective actions against Russia.

The International Law Commission *Articles on Responsibility of States for Internationally Wrongful Acts* (2001)[23] (ARSIWA) systematize the customary rules on the responsibility of states for wrongful acts. Part II (chapter III) of this document says on *serious breaches of obligations under peremptory norms of general international law*. It is the peremptory norms (*jus cogens*), including the prohibition of aggression, that *erga omnes* obligations arise from. *Erga omnes* obligations are procedural measures to protect values embodied in peremptory norms.[24] According to Article 40(2) of the ARSIWA a serious breach of an obligation arising under a peremptory norm of general international law means a "gross or systematic failure by the responsible State to fulfil the obligation". This is the case of the Russian aggression against Ukraine. Article 41 of ARSIWA deals with particular consequences of a serious breach of an obligation under this chapter, that is, cooperation of states to bring to an end through lawful means any serious breach and non-recognition as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation. It is an injured state that is primary entitled to invoke the responsibility of another state (Art. 42). But any state other than an injured state is entitled to invoke the responsibility of another state if "the obligation breached is owed to the international community as a whole" (Art. 48(1)(b)). In such cases, any state may claim from the responsible state, first, cessation of the internationally wrongful acts, and assurance and guarantees of non-repetition and, second, performance of the obligation of reparation in the interest of the injured state or of the beneficiaries of the obligation breached (Art. 48(2)(a)(b)).[25]

21 Barcelona Traction, Light and Power Company Ltd (Belgium v. Spain), Second Phase, Judgment, ICJ Reports 1970, p. 3, 32, paras. 33-35. See also Institut de Droit International, Krakow Session 2005, Obligations Erga Omnes in International Law, preamble, https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_fr.pdf.

22 See e.g. *A.-L. Vaurs- -Chaumette*, The International Community as a Whole, in: *J. Crawford/ A. Pellet/ S. Olleson* (eds.), The Law of International Responsibility, Oxford University Press, Oxford 2010, p. 1023-1027.

23 Articles on Responsibility of States for Internationally Wrongful Acts (2001), ILC Yearbook 2001, vol. II(2); UN Doc A/56/49.

24 Cf. *J. Crawford*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, Cambridge University Press, Cambridge 2002, pp. 244–245; *Crawford*, fn. 15, pp. 266–269; *Ch. J. Tams*, Individual States as Guardians of Community Interests, in: *U. Fastenrath* et al. (eds.), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma, Oxford University Press, Oxford 2011, pp. 139–151.

25 For comments see e.g. *Crawford*, fn. 24, p. 277; *Id.*, Overview of Part Three of the Articles on State Responsibility, in: *Crawford/ Pellet/ Olleson* (eds.), fn. 22, pp. 931-940, *P. Klein*, Responsibilité pour violation d'obligations découlant de normes imperatives du droit international general et droit des Nations Unies, in: *P.-M. Dupuy* (éd.), Obligations multilaterals, droit impératif et responsibilité international des États, A. Pedone, Paris 2003, p. 206; *I.*

It follows from the above that Ukraine as a victim of the Russian aggression does not rely only on itself. Other states may also make Russia responsible for its act of aggression. The first step has already been taken by the states with the adoption by the UN General Assembly on March 2 the resolution condemning the Russian aggression and calling for its cease.[26] Third states have also applied economic, political and organizational sanctions against Russia, such as the exclusion of it from the Council of Europe. The effectiveness of sanctions depends, however, on the broad participation of states, their determination and consistency in their application. Moreover, the effects of these sanctions are deferred in time. Military sanctions, on the other hand, could legally only be adopted on the basis of a decision by the UN Security Council. The provisions on voting in this body, however, allow its permanent members to pursue their strategic geopolitical interests as was demonstrated at the beginning of March 2022 by the veto of Russia to the decision of the UN Security Council concerning its aggression against Ukraine.

The third important, even crucial, dimension of *jus post bellum* is the restoration of peace and the reconstruction of the state. *Responsibility to Protect* UN doctrine defines it as „responsibility to rebuild". It is the third states that will play a key role in the rebuilding Ukraine. Rebuilding the state is not only rebuilding from war damage, but also strengthening the structure of state powers, in particular representative institutions and the division and balance of powers. The financial support and political promises provided to Ukraine in this regard will be particularly needed and helpful when the armed conflict ceases.

However, the full restoration of peace in Ukraine will not take place if Russia is not held responsible for its wrongful act of aggression and the perpetrators of crimes committed during this armed conflict, including the crime of aggression, are not brought to criminal responsibility. The famous declaration of the Nuremberg Tribunal must be kept in mind: „Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[27]

The Russian Federation as a state has committed an act of aggression as the internationally wrongful act for which it is responsible under customary international law, while members of its authorities, headed by the president, have perpetrated a crime of aggression, which entails both national and international criminal responsibility. The crime of aggression has been defined in the Rome Statute of the International Criminal Court (ICC).[28] But neither the Russian Federation nor Ukraine is party to the Statute, let alone did they ratify the amendments to the Statute of 2010 concerning the

Scobbie, The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law', European Journal of International Law 2002, vol. 13(5), p. 1201 ff.

26 See supra note 3. Just five states voted against the resolution: Belarus, Eritrea, North Korea, Russia, Syria.

27 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Judgment, 14 November 1945 – 1 October 1946, American Journal of International Law 1947, vol. 41, p. 221.

28 Amendments to the Rome Statute of the International Criminal Court on the Definition of the Crime of Aggression, 2922 United Nations Treaty Series 199.

definition of the crime of aggression, and the conditions of exercise of jurisdiction over this crime. It means that the ICC has no jurisdiction over the crime of aggression committed by the Russian president and other members of the Russian authorities, which clearly follows from Article 15 *bis* (5) of the Rome Statute. It stipulates: "In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory". Such a proceeding before the ICC for crime of aggression would be important as it would have also been helpful for the attribution to Russia the act of aggression as a serious breach of the peremptory norm of international law, since a crime of aggression cannot be evidenced without an act of aggression committed by a state.[29]

However, the ICC is able to exercise its jurisdiction in regard to the ongoing armed conflict over the perpetrators of alleged war crimes and crimes against humanity committed in the Ukraine, on the basis of an Ukrainian declaration of 8 September 2015 recognizing the jurisdiction of the Court in regard to the events taking place in Ukraine starting from 20 February 2014.[30] The jurisdiction of the ICC includes not only persons who commit those crimes, but also those persons who order, solicit, or induce the commission of such crime, or in any other way contribute to the commission of such crime. The responsibility applies also to the president, the minister of the foreign affairs and the prime minister, because their immunities do not bar the ICC from exercising its jurisdiction over such officials. However, it should have into account that it is national criminal courts that have priority in prosecuting the criminal proceedings. As Article 1 of the Rome Statute of the ICC[31] stipulates, the Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions". At any rate, the Ukrainian criminal courts can exercise their jurisdiction over persons accused of committing international crimes.

On 3 March 2022 the Prosecutor of the ICC expressed his willingness to proceed with an investigation concerning the situation in Ukraine. It is worth underlying that Ukraine and other states can initiate their own inquiries on the basis of universal jurisdiction, documenting crimes committed on the territory of Ukraine. Such an investigation will not only aid the procedure before the ICC by providing evidences of committed crimes, but also may lead to conducting alternative judicial procedures of states over low-rank perpetrators and, as a result, to an effective punishment of the perpetrators of the crimes in Ukraine. It seems that the prosecution of committed crimes will not be effective without a wide assistance of local jurisdictions, either by local documentation concerning perpetrated crimes combined with criminal proceedings over the perpetrators, and by a possible cooperation with the ICC. Moreover, as the ICC cannot prosecute the crime of aggression committed by the members of Russian and Belarussian authorities, there is a special role to play by the national criminal

29 See broadly *M.S. Wong*, Aggression and State Responsibility at the International Criminal Court, International and Comparative Law Quarterly, October 2021, vol 70, p. 961 ff.

30 See https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

31 Rome Statute of the International Criminal Court, 2187 United Nations Treaty Series 3.

courts of those states which penal legislation allow for conviction of those guilty of the crime of aggression. It should be, however, mentioned on an procedural obstacle following from customary international law in this respect, namely, the personal immunities enjoying by heads of states, prime ministers, and ministers of foreign affairs.[32] States should therefore consider establishing a special international criminal court to prosecute the perpetrators of this crime which is unprecedented for its size since World War II. Responsibility for the crime aggression matters. Although international law has not traditionally recognized individuals as victims of the crime of aggression, one should have in mind that not only states but also individuals are victims of the aggression. The determination by the United Nations Human Rights Committee in General Comment No. 36 that any deprivation of life resulting from an act of aggression violates Article 6 of the International Covenant on Civil and Political Rights can serve to recognize a previously overlooked class of victims.[33] This is why individuals as victims of the Russian aggression may, even should, participate in the future regimes of criminal responsibility and reparation in the context of prosecutions for this crime. But it will be depended on the determination and good will of the members of the international community and, obviously, on the indictment of suspects.

As indicated above, the full restoration of peace in Ukraine, understood not only as an end to hostilities, but also as a distinction between the perpetrators of the crimes and their victims does not seem possible without bringing the former to criminal responsibility. For the absence of such a distinction would be an offense to the justice expected of the law. Therefore, actions in this field of international justice are an important task, even a duty, of all members of the international community.

32 See Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

33 Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018), CCPR/C/GC/36, para 70.1. See S. Darcy, Accident and Design: Recognising Victims of Aggression in International Law, International and Comparative Law Quarterly, January 2021, vol 70, p. 103 ff.