doi:10.1017/aju.2022.23

SYMPOSIUM ON UKRAINE AND THE INTERNATIONAL ORDER

AN UNLAWFUL WAR

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Russia's invasion of Ukraine violated the prohibition of force contained in the United Nations Charter and the peremptory norm of general international law prohibiting aggression. The invasion was not an exercise of individual or collective self-defense, or a humanitarian intervention, as Russia variously claimed. The United Nations General Assembly rejected all such claims when 141 member states voted to deplore "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" as well as "the involvement of Belarus in this unlawful use of force against Ukraine."[1] This essay traces the legal implications of Russia's act of aggression, and its violations of international humanitarian law, through international criminal law, international human rights law, and the law of state responsibility. It argues that Russia violates the human rights of every person it kills, and that states are permitted and may be required to provide military assistance to Ukraine and impose economic sanctions on Russia. As Ukraine fights for its survival as an independent state, international law remains both a moral guide and a strategic asset.

Russia's act of aggression is the sum of all the acts of violence carried out by its armed forces against Ukraine and its people. When Russian forces attack civilians, their homes and businesses, their hospitals and cultural sites, these attacks are illegal twice over. These attacks violate both the prohibition of aggression and the basic rules of international humanitarian law. But when Russian forces attack Ukrainian forces, these attacks remain illegal, because they remain part of Russia's illegal act of aggression. There can be no fully lawful attacks or truly legitimate targets in a war of aggression. To say this is not to deny the equal application of international humanitarian law, but simply to affirm the independent and asymmetrical application of the prohibition of aggression.

Russia incurs state responsibility for all the damage caused by its internationally wrongful act of aggression. As a matter of principle, states must make full reparation for all injuries directly caused by the unlawful use of force, whether or not these injuries result from violations of international humanitarian law.[2] This includes death or injuries inflicted on Ukrainian combatants, as well as death or injury inflicted on Ukrainian civilians that falls through the cracks in international humanitarian law. When Russia pursues unlawful ends by unlawful means it inflicts still greater harm and incurs still greater responsibility.

International Criminal Law

Russian forces appear to have committed war crimes on a large scale as part of a plan or policy that fall within the jurisdiction of the International Criminal Court. These apparent war crimes include but are not limited to: willfully

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[1] GA Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022).

[2] *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, paras. 145, 173, 214 (Int'l Ct. Just. Feb. 9, 2022).

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https://doi.org/10.1017/aju.2022.23 Published online by Cambridge University Press

killing and causing serious injury to civilians, torture, deportation, taking hostages, attacking civilians and civilian objects, pillage, rape, and starvation. The manifest unlawfulness of these crimes precludes any defense that the perpetrators were just following orders from their superiors.

Individual criminal responsibility for war crimes extends beyond those who commit them, or order their commission, to those military commanders who know or should know that such crimes will be committed and fail to take necessary and reasonable measures to prevent them. In principle, criminal responsibility extends all the way up the chain of command, to the Supreme Commander-in-Chief of the Armed Forces of the Russian Federation, Vladimir Putin.

Individual criminal responsibility for the crime of aggression lies, not with ordinary soldiers, but with Russia's political and military leaders who planned, prepared, initiated, or executed the invasion, occupation, bombardment, and blockade of Ukraine, and the sending of armed bands and mercenaries to commit acts of armed force against it. The leaders of Belarus may also bear individual criminal responsibility for allowing their territory to be used by Russia for perpetrating an act of aggression against Ukraine.[3]

Under the current terms of its Statute, the International Criminal Court may not exercise jurisdiction over the crime of aggression committed in Ukraine without Russia's consent—which Russia will not give—or a Security Council referral—which Russia will veto. Accordingly, states parties to the Rome Statute should amend it to permit the Court to exercise jurisdiction over the crime of aggression if the General Assembly, acting under the Uniting for Peace framework, refers a situation to the prosecutor in which aggression appears to have been committed. This could be done by modifying Articles 13 and 15*ter* of the Statute or by introducing a new article.[4] This proposal is both more principled and more pragmatic than the alternative proposal of creating an *ad hoc* aggression tribunal. It would avoid comparable charges of selectivity. Its legitimacy would track that of the Uniting for Peace framework, which was resoundingly reaffirmed by the resolution deploring Russia's act of aggression. It would build on an existing institution, with relatively modest increases in costs and staff. With Ukraine's consent and the support of the large majority of states, no one could accuse the Court of asserting jurisdiction it does not possess or should not exercise. Nor could Russian leaders plausibly assert personal immunities should the General Assembly refer the situation knowing full well that the Court famously denies the applicability of such immunities against the Court or against states parties executing the Court's request for arrest and surrender of a sitting head of state. The amendment process will take time and political will. Success is not guaranteed. But if a principled response to the crime of aggression is not doomed to failure at the outset, then it should be pursued and not surrendered without a fight.

Human Rights

Every person Russia kills in violation of international humanitarian law it also kills in violation of that person's human right to life. Such killings deprive those killed of their lives arbitrarily, in violation of legal rules that exist to protect their lives.[5] Such killings also violate the European Convention on Human Rights, which remains binding on Russia.[6] The Convention prohibits intentional deprivations of life, with narrow exceptions. In time of war,

[3] Rome Statute of the International Criminal Court, Art. 8*bis*(2)(f), July 17, 1998, 2187 UNTS 3.

[4] Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, Just Security (Mar. 16, 2022).

[5] General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, para. 64, UN Doc. CCPR/C/GC/36 (Sept. 3, 2019).

[6] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Nov. 4, 1950, 213 UNTS 222; Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights (Mar. 22, 2022).

https://doi.org/10.1017/aju.2022.23 Published online by Cambridge University Press

states may take measures derogating from their obligations under the Convention. However, no derogation from the Convention is permitted with respect to the right to life, except in respect of deaths resulting from "lawful acts of war," that is, from acts governed but not prohibited by international humanitarian law. Put the other way around, no derogation is permitted in respect of unlawful acts of war, which violate international humanitarian law. Such unlawful acts of war violate both international humanitarian law and the human rights of those they kill.[7]

Every person Russia kills in furtherance of its war of aggression it also kills in violation of that person's human right to life.[8] All such killings also violate the European Convention on Human Rights. In time of war, states may take measures derogating from their obligations under the Convention only if such measures are "not inconsistent with their other obligations under international law." Plainly, armed aggression is inconsistent with other obligations under international law. It follows that states may not derogate from their human rights obligations in order to carry out armed aggression.[9]

The European Court of Human Rights previously ruled that a state's obligation to respect the Convention applies outside its borders to occupied territory but not to the conduct of active hostilities.[10] In that case, *Georgia v. Russia (II)*, the Court essentially accepted Russia's contention that the "chaos" of active hostilities meant that the Georgian civilians Russia killed by aerial bombardment and artillery shelling remained outside Russia's jurisdiction and the Convention's protection. This previous ruling defies the plain text of the Convention—which expressly contemplates its application to deprivations of life by unlawful acts of war—and should be reversed. The Court should adopt the view expressed in partial dissent by Judges Yudkivska, Wojtyczek, and Chanturia. A state exercises effective control over a person when its decision to kill or spare them is regulated by international humanitarian law, which exists to guide the exercise of public power in the context of armed conflict. This view is exceptionally convincing. Russia plainly exercises effective control over the besieged cities it encircles, starves, shells, and bombards, where it traps civilians inside and keeps humanitarian relief out.[11]

Legal Consequences

Russia's violation of the peremptory norms prohibiting aggression and reflecting the basic rules of international humanitarian law triggered a number of legal consequences that continue to shape the strategic, political, and military landscape. Russia's armed aggression activated Ukraine's right of individual self-defense, and with it the right of any state in the world to fight alongside Ukraine in collective self-defense at Ukraine's request. Every state in the world is legally obligated not to assist Russia's aggression, not to recognize as lawful any situation arising from Russia's aggression, and to cooperate to bring Russia's aggression to an end through lawful means.[12] The military

[7] Georgia v. Russia (II) [GC], Judgment, Merits, App. No. 38263/08, paras. 21–25 (Eur. Ct. Hum. Rts. Jan. 21, 2021) (con. op., Keller, J.); Adil Ahmad Haque, *Turkey, Aggression, and the Right to Life Under the ECHR*, EJIL:*Talk!* (Oct. 21, 2019).

[8] General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, *supra* note 5, para. 70.

[9] *Georgia v. Russia (II)*, *supra* note 7, paras. 26–28 (con. op., Keller, J.), *citing* Haque, *supra* note 7.

[10] *Georgia v. Russia (II)*, *supra* note 7, Judgment, paras. 126, 137.

[11] The Court was correct to indicate interim measures protecting Ukrainian civilians from violations of international humanitarian law, which would necessarily also violate their human rights. The Court erred by not indicating broader interim measures protecting all Ukrainians, civilians and combatants, from all violence in furtherance of aggression. Eliav Lieblich, *Not Far Enough: The European Court of Human Rights' Interim Measures on Ukraine*, Just Security (Mar. 7, 2022).

[12] Articles on Responsibility of States for Internationally Wrongful Acts, Art. 41, 2 Y.B. Int'l L. Comm'n, pt. 2 (2001), UN Doc. A/CN.4/SER.A/2001/Add.1.

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assistance offered to Ukraine, and the economic sanctions imposed on Russia, reflect these legal rights and obligations.

Military assistance to Ukraine does not breach any obligations of neutrality owed to Russia. No such obligations exist, if they ever did. The classical law of neutrality presupposed the legal equality of the belligerent states. Today, there is no legal equality between aggressor and defender. A neutral state could set aside its "obligation" of impartiality between belligerents at any time, simply by exercising its discretionary right to declare war on either party. Today, states cannot set aside their binding obligation not to aid or assist an aggressor, let alone join the aggression already underway. The classical law of neutrality was abrogated, first by the Pact of Paris and later by the United Nations Charter, then abolished when the prohibition of aggression was accepted and recognized by the international community of states as a whole as a peremptory norm of general international law. Today, states have an obligation of partiality toward the victim of aggression. They may elect not to provide military assistance, but only if they cooperate with other states to bring the aggression to an end through other lawful means.

Economic sanctions against Russia include a mix of retorsions and collective countermeasures. Retorsions breach no legal obligation, so states have a legal obligation to deploy them as part of a cooperative effort to bring Russia's aggression to an end. Countermeasures breach legal obligations but their wrongfulness is precluded when they are taken as proportionate measures to induce another state to comply with its obligations. All states may take countermeasures against Russia because the peremptory norm prohibiting aggression gives rise to obligations owed to the international community as a whole (obligations *erga omnes*) in which all states have a legal interest. All states may invoke Russia's responsibility, and all states must take countermeasures against Russia to the extent required by a cooperative effort to bring Russia's aggression to an end.

All states must continue to recognize any territory controlled by Russia as an indivisible part of Ukraine and refuse to recognize any puppet government propped up by Russia. Russia may gain or lose possession of small or large parts of Ukraine's territory. But Russia can never seize title to an inch of it.

These legal consequences follow directly from Russia's act of aggression and the rules of international law. They do not require a resolution of the Security Council or the General Assembly. While an armed attack is ongoing, the rights of individual and collective self-defense justify the use of force to repel the armed attack until the Security Council takes necessary measures to restore international peace and security. If the Security Council fails to act, these rights remain activated. No state needs the Security Council's authorization to fight alongside Ukraine, and no state needs the Security Council's binding decision to aid or assist Ukraine. Similarly, states need not await a Security Council decision to take measures not involving the use of armed force before imposing economic sanctions on Russia.

The Legal High Ground

This is how international law imposes military and economic costs on aggressors, while denying them political benefits. This is why international law is central to Ukraine's war effort. Ukraine has pursued every legal avenue available to it, not because Russia cares about international law, but because the rest of the world cares about international law. By placing itself squarely on the side of international law, Ukraine makes it easier for those inclined to help to do so and harder for those beholden to Russia for oil or arms to stand idly by, or even tacitly support Russia's war aims.

It is legally, morally, and strategically imperative that Ukraine continue to adhere scrupulously to international law, including international humanitarian law. If Russian soldiers surrender, or are incapacitated, they must be treated humanely as prisoners of war, not made into objects of public curiosity, and criminally prosecuted in fair trials for their own individual conduct. Credible allegations of abuse must be investigated and individuals

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responsible for abuse must be prosecuted. An act of aggression does not excuse the violation of humanitarian rules. War crimes may be punished only upon proof of individual criminal responsibility in a fair trial.

These rules reflect a mix of principle and pragmatism. Every human being who no longer poses a threat to anyone else deserves humane treatment and protection from harm. Anyone suspected of committing a crime should be proven guilty before punishment, so that justice is not only done but seen to be done. At the same time, many soldiers go to war based on lies their government tells them. When they realize the truth, they should surrender rather than kill and die in an unlawful war. International law assures them that they will be treated humanely and not punished for their initial involvement. When Ukrainian President Volodymyr Zelensky implores Russian soldiers to surrender, promising them humane treatment, humanitarian principles and military advantage converge.

Ukraine has the legal and moral high ground. It must not give it up. International law will not shoot down a single Russian plane or blow up a single Russian tank. But international law remains one of the most powerful weapons Ukraine has in its arsenal.

Conclusion

In 1953, Hersch Lauterpacht published an essay in honor of his teacher, Hans Kelsen. The essay was called "Rules of Warfare in an Unlawful War."[13] The essay begins with the observation that the place of war in the system of international law has undergone a fundamental change. Aggressive war has ceased to be a sovereign right and has become an unlawful and criminal as well as an immoral act. Yet the legal consequences of this fundamental change are not all expressly stated in treaty texts or United Nations resolutions. Their identification requires the reasonable application of legal principles, guided by the axiom that international law is a coherent legal system rather than a mere set of rules.

Lauterpacht argued that the prohibition of aggressive war entailed, among other things, that aggressors must pay reparations for all injuries they inflict, whether or not in violation of international humanitarian law; that leaders responsible for the crime of aggression are not immune from criminal responsibility; that aggressors may not gain title to land by conquest; and that previously neutral states always may and often must discriminate against a state waging an unlawful war. At the same time, the rules governing the conduct of hostilities and the treatment of prisoners continue to apply equally to combatants on both sides for the sake of their common humanity. Whether Lauterpacht's essay merely identified these legal consequences or helped bring them about is hard to say.

Lauterpacht was born in the city now called Lviv in the west of what is now Ukraine. At the time of this writing, Lviv remains firmly in Ukrainian hands, though it has been repeatedly struck by Russian missiles. The old but modern city, multicultural and patriotic, now serves as a refuge and transit point for internally displaced persons as well as a base for diplomats and humanitarians. Its fate remains, not to be seen, but to be made by its people.

[13] Hersch Lauterpacht, *Rules of Warfare in an Unlawful War*, *in* LAW AND POLITICS IN THE WORLD COMMUNITY—ESSAYS ON HANS KELSEN'S PURE THEORY AND RELATED PROBLEMS IN INTERNATIONAL LAW (George A. Lipsky ed., 1953).

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