

Roman Kwiecień

Professor of law at the Jagiellonian University in Kraków (Poland), Faculty of Law and Administration, Head of the Chair of Public International Law

<https://orcid.org/0000-0003-0831-9203>

**THE AGGRESSION OF THE RUSSIAN FEDERATION
AGAINST UKRAINE: INTERNATIONAL LAW AND
POWER POLITICS OR ‘WHAT HAPPENS NOW’**

Abstract: The article deals with the relationship between international law and power politics in the light of the Russian aggression against Ukraine. The relationship between international law and politics is very close, even natural, since the principles and rules of international law primarily act in international relations, that is in a political reality. It is the problem of observance and violations of the legal principles and rules on the use of force that is the key point of reference for the discussion of this issue. The serious breach of Article 2(4) of the UN Charter by Russia, the crime of aggression and other alleged crimes committed during this international armed conflict incline the author 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 test since the end of World War II, at least in Europe. The author claims that such crises as the Russian aggression against Ukraine clearly prove that international law is what states want it to be.

Keywords: aggression, armed attack, power politics, Russia, Ukraine

On 24 February 2022, the Russian Federation committed an armed attack against Ukraine. This act was a gross violation of the fundamental principles of international law embodied in the Charter of the United Nations (the UN Charter) and in customary international law: 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 Russian Federation asserts that, in reality, its “special military operation” on the territory of Ukraine is based on Article 51 of the United Nations 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 United Nations Charter.¹ However, 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 Federations constitute, as indicated, a clear 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 prohibition, i.e. they were neither conducted with the prior authorisation of the UN Security Council given under Chapter VII, nor were they undertaken in self-defence on the basis of the Article 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 was an act of aggression, as understood by the 1974 United Nations General Assembly Resolution 3314,² reflecting 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

¹ S/2022/154.

² UN doc. A/RES/29/3314.

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 *erga omnes*. As a result, all states can undertake actions in order to cease a breach of such a norm, and are also obliged not to recognise as lawful a situation created by the aforementioned breach. Therefore, sanctions and countermeasures directed by states and organisations against the Russian Federation as the state responsible for the internationally wrongful act are subsequently, in principle, lawful.

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 also responsible for aggression, and as a result, adequate countermeasures might and should also be undertaken against it.

The Russian Federation 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 its president, have perpetrated a crime of aggression, which entails international criminal responsibility. A crime of aggression was defined in the Rome Statute of the International Criminal Court (ICC).³ 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 definition of a crime of aggression, and the conditions of exercise of jurisdiction over this crime. This means that the ICC has no jurisdiction over the crime of aggression committed by the Russian president, the Belarusian president and other members of their 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”. 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 in the Ukraine, on the basis of the Ukrainian declaration of 8 September 2015 recognising the jurisdiction of the Court in regard to the events taking place in Ukraine starting from 20 February 2014. The jurisdiction of the

³ *Amendments to the Rome Statute of the International Criminal Court on the Definition of the Crime of Aggression*, 2922 UNTS 199.

ICC includes not only persons who commit those crimes, but also those persons who order, solicit, or induce the committing of such crimes, or in any other way contribute to committing such crimes. 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.

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 highlighting 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 evidence of committed crimes but may also lead to conducting alternative judicial procedures of states over low-rank perpetrators and, as a result, to an effective conviction of the perpetrators of the crimes in Ukraine. It seems that the prosecution of committed crimes will not be effective without the wide assistance of local jurisdictions, either by local documentation concerning perpetrated crimes combined with criminal proceedings over the perpetrators, and by possible cooperation with the ICC. Moreover, as the ICC cannot prosecute the crime of aggression committed by the members of Russian and Belarusian authorities, there is a special role to play by the national criminal courts of those states whose penal legislation allows for conviction of those guilty of the crime of aggression. However, the procedural obstacle following from customary international law in this respect, should be mentioned; namely, the personal immunities enjoyed by heads of states, prime ministers, and ministers of foreign affairs. 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. However, it will be dependent on the determination and good will of the members of the international community and, obviously, on the indictment of suspects.

The armed conflict between Russia and Ukraine has 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 2022.⁴ 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

⁴ UN doc. A/RES/ES-11/L.1.

2(4) of the Charter” (para. 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” (para. 3). Such a consistent reaction of almost all states to the Russian aggression shows that the Article 2(4) of the UN Charter has not been killed, as once Thomas Franck proclaimed,⁵ and is still alive. Also, the International Court of Justice in its order on provisional measures of 16 March 2022⁶ indicated that “the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine”.

The gross violation of Article 2(4) of the UN Charter, the crime of aggression and other alleged crimes committed during this international armed conflict incline us 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 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,⁷ one can ask: what happens now in the international legal order? This issue will be discussed under the relationship between international law and politics, including a self-interested diplomacy-as-usual problem and observance and violation of international legal norms. It will allow several conclusions to be drawn, on the one hand, about 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. Additionally, as Hans Morgenthau put it, international relations have been governed by the distribution of power among states. His *Politics among Nations* (1948) is seen as the beginning of a new discipline of international relations: ‘realism’. Also, at the same time, as a book on the practical limitations of law in the international reality. Although Morgenthau

⁵ See Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States”, 809.

⁶ *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.

⁷ Franck, “What Happens Now? The United Nations after Iraq”, 607.

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.⁸ Morgenthau emphasised the 'national interest' as a primary factor of the observance or violation of international law. Today, the proposition by Jack Goldsmith and Erick Posner is probably the 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 '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 interests.⁹ This view can be seen 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 recognised in the realist lens by the emphasis placed on a functioning balance of power as a necessary enabler for international law to function. Thus, the search for the actual rules in the political reality, but not legal rules, characterises 'realism' as opposable to 'idealism' or legalism founded on the belief in the 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".¹⁰ It is worth adding that the failure of the League of Nations shaped Morgenthau's view on international relations as governed by the distribution of power between states.

A question arises whether international law is 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

⁸ Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, 251.

⁹ See Goldsmith, Posner, *The Limits of International Law*, 3-9, 14-15, 189-193.

¹⁰ Carr, *Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations*, 161.

description”.¹¹ 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.¹²

‘Realism’ and ‘idealism’ as extremes can hardly be considered as convincing approaches to the reality of international relations. ‘Realists’ who do not recognise the force of law in foreign policy are not realistic, whereas ‘idealists’ who do not recognise the limitations of international law are “largely irrelevant to the world that is”, as Henkin put it.¹³ 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 law-making is the search for solutions to international problems, while the purpose of 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 framed in legal structures. This is the task of international law and international lawyers.¹⁴

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 decentralised 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

¹¹ Crawford, *Chance, Order, Change: The Course of International Law*, 54.

¹² Henkin, *How Nations Behave. Law and Foreign Policy*, 42.

¹³ *Ibid.*, 269.

¹⁴ Slaughter, *International Law and International Relations*, 9, 235.

breaches international peace and security. This is the case with the Russian aggression against Ukraine. However, 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 the supremacy of law or power politics that does matter in this case.

Does this case support realism as opposed to legalism founded on the observance of law and enforcement of responsibility for its violation? This depends on the response of the international community to this grave violation of the peremptory norm of international law, in particular, its actions to bring the Russia Federation and the perpetrators of international crimes to responsibility. The response to violations of law seems to be crucial. It is worth taking into account what Henkin said on the observance and violation of international law. First, all legal norms and obligations are “political”, since their observance or violation are political acts in the international realm. This explains why, for any state, the cost and advantage of law observance or violation must be seen largely in the context of its foreign policy.¹⁵ 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 society running and keeping international relations orderly because they desire to protect friendly relations with other states.¹⁶ Therefore, Henkin claims, “the norm against unilateral use of force has survived and it has been largely observed”.¹⁷ 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.¹⁸

Is this true of the aggression against Ukraine? 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. Another view of Henkin which is relevant to this act of aggression is worth mentioning:

¹⁵ Henkin, *ibidem*, 48.

¹⁶ *Ibid.*, 46, 48.

¹⁷ *Ibid.*, 135.

¹⁸ *Ibid.*, 252.

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 war. Failure of the principal norm of contemporary international law can only cast doubt on the efficacy and legitimacy of all international law.¹⁹

Indeed, the observance and enforcement of the prohibition of the threat and use of force must not become a “political football”. Otherwise, peace as a fundamental value of the international community and the primary purpose of the United Nations is constantly at risk. This explains 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 unilaterally decide that their rights have been violated and they may resort to the use of force. The gross unlawful acts of the Russian Federation against Ukraine incline to further comments on the relationship between international law and power politics.

International law is primarily shaped (created, applied, and enforced) by states that are sovereign geopolitical actors. Political choices include attempts to expand states’ spheres of influence and also their neutrality concerning specific international conflicts, disputes, and situations. The extent to which these choices are influenced by legal considerations still remains a matter of dispute. Hans Morgenthau claimed that if no interests are shared by states or if there is no balance of their powers, there is no international law. In his opinion, two factors contribute to the development of this law: the common consent of states and the protection of common interests. As he observed, states generally comply with the vast majority of rules that constitute international law without the need for coercion because it is generally in their interests to honour their legal obligations.²⁰ Headley Bull, a well-known representative of the English school of international relations, claimed that international law may contribute significantly to the international order only if its rules would be observed in the mutual relations of states.²¹ However, it is not only

¹⁹ Ibid., 249-250.

²⁰ Morgenthau, *ibidem*, 266.

²¹ Bull, *The Anarchical Society. A Study of Order in World Politics*, 143.

realistically minded international relations scholars but also some jurists, such as Henkin, who acknowledge that the cost of non-compliance with international law is sometimes lower than the cost of its observance.²² This seems to be clearly visible, at least at first glance, in the world of geopolitics, within which the main actors are sovereign territorial entities that pursue their interests within the framework of specific geopolitical conditions. The attitudes of states to international law and the obligations arising from it (such as approval, rejection, seeking change, or tolerating violations of law) are linked to the construction of a geopolitical space that is beneficial for a state's interests. This space is determined by linking political phenomena, processes, and facts with particular geographical conditions. If the principles and rules of international law safeguard the interests of the states concerned, there is no conflict between law and politics in a given geopolitical space. The question that recurs here is whether international law effectively constrains the geopolitical aspirations of states, or whether it is geopolitics that shapes the international legal order. It is a legal position of the great powers that matters for this relationship. The UN Charter regulations on the UN Security Council seem to be crucial as they reflect the impact of the geopolitical position of the great powers exerted on international law (this was even more the case before World War II). The ability of the UN to take effective action in the event of any "threat to the peace, breaches of the peace and acts of aggression" (Chapter VII of the UN Charter) is dependent on the consensus of the permanent members of the UN Security Council and, in particular, the absence of a veto by any of the permanent members. The opposition of even one of the permanent members is a legal impediment to action taken by the organisation as a whole. As the practice of the Security Council demonstrates, considerations aimed to protect the geopolitical interests of one state frequently outweighed the legal rationales in the activities of the permanent members, including the "primary responsibility for the maintenance of international peace and security" entrusted to the Council under Article 24(1) of the UN Charter. What should also be mentioned is the UN Charter regulation, which rejects the principle of *nemo iudex in causa sua* as it gives the permanent members of the Security Council the right to vote on matters that directly affect them. This is how contemporary international law legitimises the position of the great powers (i.e. the permanent members of the Council), as they, under the UN Charter, cannot be in practice subjected to collective coercive

²² Henkin, *ibidem*, 65.

measures, including the use of armed force. This allows the great powers to pursue their strategic geopolitical interests as was demonstrated at the beginning of the March 2022 by the veto of Russia to the decision of the UN Security Council concerning its aggression against Ukraine.

This poses the question of the extent to which the applicable international law is 'hegemonic law', i.e. law, as defined by Detlev F. Vagts, operating primarily in the interests of geopolitically powerful states.²³ The gap between the static nature of legal norms and the dynamics of change in the international community is what creates situations that offer states the opportunity to express hegemonic aspirations that confirm vitality in international law of the *ex factis ius oritur* principle. Realists often perceive the practice of violating existing international law as simply being an announcement of a change of its rules rather than as a destruction of the international order. Are international legal rules and principles strong enough to reject these claims? What should be taken into account is that the principles of the prohibition of the threat or use of force, the peaceful settlement of international disputes, the fulfilment in good faith of international obligations, the sovereign equality of states, and the disallowance of interference in the internal affairs of states are recognised as binding law by all states. However, the condition and well-being of the international legal order is not only built on the principles and rules of substantive law; it is also shaped by the observance of established rules and principles in practice, the response to their violation and the effective institutional means of enforcing responsibility for violations. Stephen Neff ending his history of international law, claims:

Throughout history, international law has been critically dependent on a general willingness of governments to abide by it. [...] International law, lacking this elaborate institutional network, is necessarily more dependent on voluntary, uncoerced cooperation by its subjects. [...] [It] remained heavily reliant on the good will of the governments that are subject to it. Whether this is a healthy state of affairs has been, and continues to be, the subject of vigorous debate.²⁴

Indeed, good will in law, like in ethics, does matter.

The Russian Federation has grossly breached the peace. Thus, this act of aggression against Ukraine has infringed one of the principal community

²³ Vagts, "Hegemonic International Law", 843-848.

²⁴ Neff, *Justice among Nations. A History of International Law*, 478-479.

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. the exclusion of Russia from the Council of Europe, but also the possible omission 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 a unified system of sanctions and the trivialisation of violations of legal rules. However, there have been both institutional sanctions and countermeasures in international law to respond these violations. The international legal order should rather be 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. However, if not, should international law not be relegated to the category of ‘positive morality’, as John Austin put it? Coercion measures against the gross violation of law, therefore, are needed. It is the will, choices, actions and omission of states that determine whether there is a symbiosis or antagonism between their individual interests and the community interests protected in the law. This relationship is an expression of either the belief of states in the power of legal solutions or their conviction 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 states indicates whether the international community is a legal community.

The conclusion that may be drawn is as follows: it is crises such as the Russian aggression against Ukraine that clearly prove that international law is what states want it to be. Paraphrasing the maxim, *ubi societas, ibi ius*, it can be said that “what international law, such an international society”. And *vice versa*.

Bibliography

1. Bull, Hedley. *The Anarchical Society. A Study of Order in World Politics*. London: Macmillan, 1977.
2. Carr, Edward Hallet. *Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations*, London: Macmillan, 2nd ed., 1946.
3. Crawford, James. *Chance, Order, Change: The Course of International Law*, The Hague: The Hague Academy of International Law, 2014.
4. Franck, Thomas M. "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States", *American Journal of International Law*, no 64 (1970): 809-837.
5. Franck, Thomas M. "What Happens Now? The United Nations after Iraq", *American Journal of International Law*. No 97 (2003): 607 - 620.
6. Goldsmith, Jack L., Posner, Eric A. *The Limits of International Law*, Oxford: OUP, 2005.
7. Henkin, Louis. *How Nations Behave. Law and Foreign Policy*, New York: Praeger Publishers, 1970.
8. Morgenthau, Hans. *Politics among Nations: The Struggle for Power and Peace*, New York: Alfred Knopf, 2nd ed., 1954.
9. Neff, Stephen C. *Justice among Nations. A History of International Law*, Massachusetts: Harvard University Press, Cambridge, 2014.
10. Slaughter, Anne-Marie. *International Law and International Relations*, Recueil des Cours Académie de Droit International de la Haye, 2000, vol. 285.
11. Vagts, Detlev F. "Hegemonic International Law", *American Journal of International Law* 95 (2001): 843-848.
12. *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.
13. S/2022/154
14. UN doc. A/RES/29/3314.
15. UN doc. A/RES/ES-11/L.1.
16. Amendments to the Rome Statute of the International Criminal Court on the Definition of the Crime of Aggression, 2922 UNTS 199.

