

Chapter 10: The Russian War of Aggression against Ukraine: A Classification under International and Human Rights Law

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Abstract

This chapter examines the Russian war of aggression against Ukraine from the perspective of international and human rights law. First, the framework of general international law, in particular the prohibition of the use of force under international law, is discussed. Hereupon, the conflict is assessed from the perspective of international humanitarian law, international human rights law, and international criminal law. Ukraine's institution of proceedings before the International Court of Justice (ICJ) is also examined. The chapter shows that the Russian attack on Ukraine is a clear violation of international law. Fundamental rules of general international law, human rights, international humanitarian law, and international criminal law are violated. However, the response options of the international community are limited, given the fact that Russia is a permanent member of the Security Council with veto power.

Keywords

Russian war of aggression, general international law, prohibition of the use of force, international human rights law, international humanitarian law, international criminal law

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1 Introduction

Russia¹ launched an armed war of aggression against Ukraine on February 24, 2022, for some constituting a paradigm shift, a *Zeitenwende* (turning point), in international relations. Not only did the Russian Federation's attack on its neighboring country bring war back to Europe. From the perspective of international law, the war of aggression by a permanent member of the Security Council also invalidates the collective security system of the United Nations (UN) Charter as it was conceived after World War II. This is because Russia's veto prevents effective action by the UN Security Council.²

All this requires a classification of the Russian war of aggression in terms of international and human rights law. The range of international law areas involved is considerable. They include general international law, including the fundamental principles of international law as enshrined in the UN Charter; in addition, international humanitarian law (IHL), international human rights law (IHR), and international criminal law – all focusing on the protection of the individual – are particularly relevant. While the former regimes (IHL, HR) focus on the responsibility of states, international criminal law is concerned with the criminal responsibility of individuals.

The number of international institutions involved in the conflict is also extraordinary. To remain only within the scope of the areas of international law discussed here: the UN (Security Council, General Assembly, Secretary General, International Court of Justice (ICJ)), the Council of Europe (especially the European Court of Human Rights (ECtHR)), the International Criminal Court (ICC), and the Organization for Security and Co-operation in Europe (OSCE). The latter has, *inter alia*, established two expert missions under the Moscow Mechanism activated for the conflict, which published *fact-finding* reports on violations of IHL, human rights, and international criminal law in April and July 2022.

In the following, the framework of general international law, the *ius ad bellum*, will be discussed first. This will be followed by an assessment from the perspective of international humanitarian law, international human rights law, and international criminal law. The referral to the ICJ will also be examined.

1 Russia is used interchangeably with Russian Federation in the following.

2 Details below, part 2.

2 General International Law: *ius ad bellum*

The Russian war of aggression against Ukraine is a clear violation of international law. The prohibition of force as enshrined in Art. 2(4) of the UN Charter,³ the central rule of international relations, has been breached by the Russia's acts of aggression commencing on February 24, 2022. The threshold of an armed aggression is clearly reached.⁴ However, the options for responding to this aggression within the UN framework are limited. The UN Security Council, which could adopt collective measures in the event of breaches of the peace and acts of aggression, is blocked because of Russia's veto.⁵

The UN General Assembly, in turn, has only certain limited options for dealing with Russian aggression. It has already used these to some extent. For example, the General Assembly has repeatedly condemned the Russian invasion⁶ and, among other things, decided on April 20, 2022 – on the initiative of Liechtenstein – to convene a mandatory meeting after each exercise of the veto power in the Security Council to discuss the situation

3 Art. 2(4) UN Charter: “The Organization and its Members shall act in accordance with the following principles in pursuit of the objectives set forth in Art. I: [...] 4. All members shall refrain in their international relations from any threat or use of force against the territorial integrity or political independence of any State or otherwise inconsistent with the purposes of the United Nations. [...]”

4 Art. 3 UNGA: Definition of Aggression, <https://daccess-ods.un.org/tmp/9177219.8677063.html>.

5 Art. 39ff UN Charter; the right of veto is enshrined in Art. 27 UN Charter. For a more detailed history and context, see Hovell, Devika: “Council at War: Russia, Ukraine and the UN Security Council”, EJIL: Talk! Blog of the European Journal of International Law, 25 February 2022.

6 On March 2, 2022, the UNGA condemned the invasion of Ukraine by a large majority, called on Russia to withdraw, and withdrew recognition of the so-called People's Republics (141 in favor | 5 against | 35 abstentions). On March 24, this was reaffirmed in a second resolution (140 for | 5 against | 38 abstentions). The whole thing was done under the “Uniting for Peace” framework. See <https://daccess-ods.un.org/tmp/2521322.07155228.html>; <https://digitallibrary.un.org/record/3966630?ln=en>; on the resolution, see Barber, Rebecca: “What can the UN General Assembly do about Russian Aggression in Ukraine?”, EJIL: Talk! Blog of the European Journal of International Law, 26 February 2022.

(“veto initiative”).⁷ This is intended to increase the political costs.⁸ The General Assembly also decided to exclude Russia from the UN Human Rights Council in April 2022.⁹ These initiatives have high political symbolic power, but in practice they remain relatively toothless.

Similarly, the mediation efforts of UN Secretary-General Antonio Guterres have so far been comparatively unsuccessful. It is true that in July 2022, under his mediation (as well as that of Turkish President Recep Erdogan), an agreement was reached between Ukraine and the Russian Federation on the export of Ukrainian grain.¹⁰ However, efforts to declare the area around the Zaporizhzhia nuclear power plant a demilitarized zone or, more broadly, to achieve a ceasefire have been fruitless.

The possibilities of the ICJ – the main judicial organ of the UN – are also limited, as will be shown in detail in Part 6. Thus, in the face of aggression by a permanent member of the Security Council, the UN has only a very limited set of instruments at its disposal for dealing with Russia’s war of aggression.

Ukraine itself is entitled to the right of self-defense in accordance with Art. 51 UN Charter¹¹ in view of the armed aggression by Russia. Thereby (theoretically) also other states may support Ukraine, upon its request, within the framework of collective self-defense in the military response to the Russian aggression. This would be in conformity with international law and within the scope of Art. 51 UN Charter.¹² However, military intervention by other states on the side of Ukraine makes these states parties to the

7 UN Digital Library: Standing mandate for a General Assembly debate when a veto is cast in the Security Council, <https://digitallibrary.un.org/record/3969448?ln=en>, 10 November 2022.

8 See Donaldson, Ben: “Liechtenstein’s ‘Veto Initiative’ Wins Wide Approval at the UN. Will It Deter the Big Powers?”, *PassBlue*, 26 April 2022.

9 93 states voted in favor, 24 against, and 58 abstained. See United Nations: UN General Assembly votes to suspend Russia from the Human Rights Council, 7 April 2022.

10 MDR Aktuell: “Russland und Ukraine unterzeichnen Abkommen über Getreide-Exporte”, 22 July 2022.

11 Art. 51 UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...”.

12 In this respect, it must not be answered by countermeasures from the Russian side. See i.d.S Krajewski, Markus: “Neither Neutral nor Party to the Conflict?”, *Völkerrechtsblog*, 9 March 2022.

conflict.¹³ It risks an even further escalation: the danger of a “Third World War” has been raised repeatedly. Accordingly, the attempts are being made to avoid direct involvement as a party to the conflict, as can be seen, for example, in the consistent rejection of the establishment of no-fly zones by the USA/NATO. Military support and arms deliveries, including heavy military equipment, do not make a state a party to the conflict. Therefore, the question of whether and which weapons a state wants to supply to Ukraine is, in principle, dependent on political and military considerations.¹⁴ This much needs to be said about the *ius ad bellum*, the prohibition of the use of force.

3 International Humanitarian Law (IHL): *ius in bello*

Moreover, also when considering the Russian war of aggression from the perspective of IHL, *ius in bello*, the laws of war, numerous violations of international law can be observed. The application of IHL rules is independent from the question of the (il)legality of the war (*ius ad bellum*). The rules apply to both sides, to Russia as well as to Ukraine.¹⁵ Since this is an international armed conflict, the four Geneva Conventions of 1949, the First Additional Protocol relating to the protection of victims of international armed conflicts – ratified by Ukraine as well as the Russian Federation – and customary international law applicable to armed conflicts are particularly relevant. Furthermore, both states are parties to the 1907

13 This would make the respective states parties to the conflict. However, an armed reaction of Russia against the respective states would violate the prohibition of the use of force of Art. 2(4) UN Charter and would therefore be contrary to international law. Within the framework of IHL, however, Russia would be allowed to attack military bases in other states, from which aircraft take off for military support of Ukraine, as a legitimate war target. The assessment from the perspective of *ius ad bellum* and *ius in bello* thus differs. Belarus can also be considered a party to the conflict, since Russian attacks are carried out from Belarusian territory. Deutscher Bundestag: Sachstand – Rechtsfragen der militärischen Unterstützung der Ukraine durch NATO-Staaten zwischen Neutralität und Konfliktteilnahme, 16 March 2022, p. 9.

14 This is different for neutral states like Austria.

15 Note in this context that at the Russian domestic level, since the 2020 amendment to the Russian Constitution, the Constitution has been given precedence over decisions of international courts and treaty bodies. See for details Mälksoo, Lauri: International Law and the 2020 Amendments to the Russian Constitution. In: American Journal of International Law, Vol. 115, Issue 1, January 2021, pp. 78–93.

Hague Regulations concerning the Laws and Customs of War on Land (1907 Hague Convention).

International humanitarian law contains, in particular, rules for dealing with specially protected persons such as the wounded, prisoners of war, and civilians. It also limits the manner of waging war (e.g. in terms of which weapons may be used); standardizes the principle of distinction (that civilians and civilian objects may not be the target of an attack); the principle of proportionality (that harm to the civilian population may not be excessive in relation to the expected military advantage); and the precautionary principle (that the parties to the conflict must take all feasible precautions to avoid harm to the civilian population and civilian objects). A concrete legal framework for the occupation of territory is standardized in the Fourth Geneva Convention of 1949¹⁶ and Articles 42–56 of the 1907 Hague Convention.¹⁷ The provisions of IHL concerning the law of war are thus relatively clear.

They are violated on a massive scale, especially by Russia. The expert missions deployed by the OSCE under the Moscow Mechanism have identified systematic violations of IHL, primarily by the Russian side.¹⁸ Specifically, the report published by the OSCE Commission in April 2022 made the following summary findings, among others, and speaks of:

- 16 Note in this context that Russia denounced the relevant 1977 First Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts, on 23 October 2019. See ICRC: Treaties, States parties, and Commentaries – Signatory States – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Since the denunciation in principle takes effect one year later, the provisions of the Additional Protocol are no longer applicable to the Ukraine conflict.
- 17 Yet Luhansk and Donetsk are clearly occupied territory; application to all of Ukraine after February 24, 2022, is more contentious. In any case, Russia exercises control over numerous towns and villages that make it the occupying power. In general, it seems reasonable to follow a functional concept of occupation that can be applied gradually: from the moment a negative act can be exercised, it is prohibited (see, for example, the ban on deportation of civilians).
- 18 See OSCE: Report of the OSCE Moscow Mechanism's mission of experts entitled "Report On Violations Of International Humanitarian And Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022", 13 April 2022; OSCE: Report of the OSCE Moscow Mechanism's mission of experts entitled "Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April–25 June 2022)", 14 July 2022.

“[...] clear patterns of IHL violations by the Russian forces on many of the issues investigated. This concerns in particular their conduct of hostilities. It is not conceivable that so many civilians would have been killed and injured and so many civilian objects, including houses, hospitals, cultural property, schools, multi-story residential buildings, administrative buildings, penitentiary institutions, police stations, water stations and electricity systems would have been damaged or destroyed if Russia had respected its IHL obligations in terms of distinction, proportionality and precautions in conducting hostilities in Ukraine. The conduct of the siege of Mariupol is an extreme example. [...] Some violations and problems were also identified regarding practices of Ukraine. The Mission is in particular concerned about the treatment of prisoners of war, originally considered criminals, and treated in ways that are incompatible with the Geneva Convention III.”¹⁹

The report of the second OSCE expert mission came to very similar conclusions and confirmed the findings of the first mission regarding serious violations (among others) of IHL.²⁰ The numerous violations by the Russian Federation can only be addressed by few mechanisms for compliance with and enforcement of the law in the IHL regime; at most, an *International Humanitarian Fact Finding Commission* could be considered, which could be established as a *special fact-finding body* within the framework of Art. 90 of the 1st AP to the Geneva Conventions.²¹ However, such a commission is limited to fact-finding, in addition to the practical difficulties of setting it up.²² The enforceability of IHL is thus severely limited,²³ especially with regard to the interstate dimension. International criminal law, however, as will be shown (Part 5), allows for the prosecution of *individuals*

19 Report of the First OSCE Expert Mission, 13 April 2022, p. 93.

20 See, for example, the Report of the Second OSCE Expert Mission, 14 July 2022, p. 114.

21 See the IHFFC.org website.

22 Russia withdrew its initial general consent on October 23, 2019. See the Report of the Second OSCE Expert Mission, 14 July 2022, p. 110: “The IHFFC is a permanent international body composed of 15 experts which may investigate allegations of grave breaches and serious violations of IHL committed in international armed conflicts. It may do so with respect to states which have accepted its jurisdiction through a general declaration or on an *ad hoc* basis. So far, over 70 states, including Ukraine, have issued a general declaration. The Russian Federation did so as well but it withdrew the declaration on October 23, 2019. The *ad hoc* acceptance of the IHFFC would however still be an option [...].”

23 See, however, below in Section 5.

who commit the most serious violations of international humanitarian law, such as war crimes and crimes against humanity.

4 International Human Rights

The framework for assessing human rights is provided (regionally) primarily by the Council of Europe and the European Convention on Human Rights (ECHR). At the global level, the UN human rights treaties and customary international law in general are applicable. Numerous human rights standards are violated by the Russian war of aggression.

Against this background, the UN Human Rights Council established an independent international commission of inquiry to document human rights violations in Ukraine as soon as March 2022.²⁴ At the regional European level, Russia was expelled from the Council of Europe on March 16, 2022; the same day, Russia also notified its withdrawal.²⁵ Russia's exclusion also results in, among other things, the termination of its party status under the ECHR, which takes effect six months after withdrawal from the Council of Europe (Art. 58(2), (3) ECHR).²⁶ This means that human rights violations that occurred until September 16, 2022 and are attributable to Russia can still be invoked before the ECtHR. After September 16, 2022, relevant human rights obligations for Russia may still arise at least from global human rights treaties (especially the International Covenant on Civil and Political Rights, ICCPR) or customary international law.²⁷

With regard to Russia, another question is the extent to which it has human rights obligations on Ukrainian territory. This would be the circumstance in particular in the case of effective control over territories (especially in the People's Republics of Luhansk and Donetsk) or persons. However, the Grand Chamber of the ECtHR noted in *Georgia v Russia (II)* that no state can gain effective control over territory in the active phase of international armed conflicts. This is without prejudice to any obligations based on effective control over persons or certain procedural

²⁴ See UNHRC: Independent International Commission of Inquiry on Ukraine.

²⁵ See Council of Europe: War in Ukraine: Follow up, 16 March 2022.

²⁶ As a consequence of its exclusion from the Council of Europe on 16 September 2022, Russia will also withdraw as a contracting party from the revised European Social Charter.

²⁷ Ukraine remains bound by all human rights requirements: it is a party to the ECHR and all relevant human rights treaties.

obligations.²⁸ In contrast, with respect to the right to life, the UN Human Rights Committee now takes a more expansive, purely functional view, i.e. the direct and reasonably foreseeable effects on the right to life.²⁹ Wars of aggression that result in the loss of life are, according to the Human Rights Committee, *per se* a violation of the right to life.³⁰ This broadens the scope of any Russian responsibility for human rights violations accordingly. However, the generally complementary applicability of human rights and IHL in armed conflicts requires an examination from an IHL perspective, especially in the case of violations of the right to life and the right to personal liberty.³¹

In the reports already mentioned, the expert missions deployed by the OSCE have identified corresponding violations of fundamental human rights, especially in the areas under Russian control:

“The Mission has also considered the impact of the current conflict on human rights. While it has not been able to verify all the reported incidents which might involve violations of IHRL, it has found credible evidence suggesting that such violations, concerning even the most fundamental human rights (right to life, prohibition of torture and other inhuman and degrading treatment and punishment), have been committed, mostly in the areas under the effective control of Russia.”³²

28 Milanovic, Marko: “Georgia v. Russia No. 2: The European Court’s Resurrection of Bankovic in the Contexts of Chaos”, *EJIL: Talk!* Blog of the European Journal of International Law, 25 January 2022.

29 See UN MRA, GC Comment No. 36, Right to Life, 3 September 2019, paragraph 63: “[...] all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.”

30 See *ibid.*, paragraph 70: “States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life, including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while CCPR/C/GC/36 15 respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.”

31 For details, see Doswald-Beck, Louise/Vité, Sylvain: International Humanitarian Law and Human Rights Law – International Review of the Red Cross, No. 293, ICRC, 30 April 1993.

32 Report of the First OSCE Expert Mission, 13 April 2022, p. 93.

The second OSCE expert mission also comes to very similar conclusions.³³ Thus, numerous human rights obligations and standards appear to be violated.

As far as the enforcement of human rights obligations is concerned, the ECtHR is the key. As is well known, the ECtHR hands down binding judgments and, as mentioned above, can still deal with violations of international law by the Russian Federation that have been committed before September 16, 2022.

Indeed, Ukraine filed an inter-state complaint against Russia before the ECtHR on the very day of the Russian invasion, February 24, 2022.³⁴ In early March, the ECtHR adopted interim measures for the protection of civilians against Russia under *Rule 39* of its Rules of Procedure.³⁵ However, these have been and continue to be ignored by the Russian side. Nor can future implementation be expected: on June 11, 2022, the Russian Federation enacted a law that it would not implement “decisions of the ECtHR entering into force after March 15, 2022”.³⁶ In this respect, the prospects of success of enforcing the violation of human rights obligations against Russia are extremely limited (at least in the short and medium term).

5 International Criminal Law

Another dimension is provided by international criminal law. The primary institution at the international level for the enforcement of the criminal responsibility of individuals is the International Criminal Court (ICC), which was established on the basis of a multilateral treaty (ICC Statute, Rome Statute) that entered into force in 2002. Neither Russia nor Ukraine are states parties to the ICC Statute. However, in April 2014 and September 2015, Ukraine recognized the jurisdiction of the ICC as of November

33 See, for example, Report of the Second OSCE Expert Mission, 14 July 2022, p. 114.

34 ECtHR, Appl. No. II055/22, *Ukraine v. Russia* (X).

35 Specifically, the ECtHR called on the Russian government “[to] refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.” Crawford, Julia: “Ukraine vs Russia: What the European Court of Human Rights can (and can’t) do”, Justiceinfo.net, 7 April 2022; Cf. press release, 1 March 2022: <https://hudoc.echr.coe.int/eng-press%20>.

36 See for details the Report of the Second OSCE Expert Mission, 14 July 2022, p. 12.

21, 2013, pursuant to Art. 12 (3) of the Rome Statute. Thus, the ICC has jurisdiction over violations of international criminal law on the territory of Ukraine.³⁷ However, this does not apply to the crime of aggression (i.e. the act of armed aggression *per se*), where both the attacking and the attacked state must have submitted to the jurisdiction of the ICC.³⁸ For the punishment of the latter, some call for the establishment of a special international tribunal.³⁹

In terms of substantive law, this means that war crimes and crimes against humanity, and possibly also genocide,⁴⁰ are probable offenses. Specifically, in interstate armed conflicts, attacks on civilians and civilian objects, e.g. the deliberate bombing of residential buildings, constitute war crimes. Attacks on military objects, on the other hand, are generally permissible. This under the condition, however, that they do not involve disproportionate civilian collateral damage.⁴¹ Certain violations of IHL (such as killing, torture, or rape) may also constitute crimes against humanity if they are committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (Art. 7, ICC Statute). In the Ukraine war, corresponding war crimes as well as crimes against humanity, in particular by the Russian side, were established by the OSCE expert missions.⁴²

As for the concrete enforcement of international criminal responsibility, on March 1 and 2, 2022, several states referred the situation in Ukraine to the ICC.⁴³ On March 2, the ICC’s chief prosecutor officially opened

37 Other possibilities would be prosecution at the national level (mainly by Ukraine, but also by Lithuania, Poland, Spain, Sweden, and Germany); see also the initiative for the establishment of a special international tribunal for Ukraine to punish the crime of aggression. For details, see the Report of the Second OSCE Expert Mission, 14 July 2022, pp. 112ff.

38 See Art. 15bis (5) ICC Statute.

39 See *ibid.*

40 Genocide is more difficult to argue in that, in addition to the objective elements of the crime, it also requires the subjective element (*mens rea*), the intent to exterminate a particular ethnic group (see Art. 6 ICC Statute).

41 However, at the substantive legal level, in the case of war crimes (Art. 8 ICC Statute), the challenge remains to distinguish the use of military force permissible under international law from punishable violations of the laws and customs of war.

42 See, for example, Report of the Second OSCE Expert Mission, 14 July 2022, p. 112.

43 As of August 25, 2022, four additional states had joined the joint *referral* or submitted an independent *referral* (Japan, North Macedonia, Montenegro, and Chile). Thus, a total of 43 states have referred the situation in Ukraine to the ICC: <https://www.icc-cpi.int/ukraine>.

investigations into the events in Ukraine. These cover alleged war crimes, crimes against humanity, and genocide since November 21, 2013. The ICC's action opens the possibility that, at least in the longer term, the individuals primarily responsible for the most serious human rights violations will be held criminally accountable. Prosecutions by domestic courts, carried out in Ukraine but also in other states on the basis of the principle of universal jurisdiction over the most serious crimes, also contribute to this.

6 International Court of Justice (ICJ)

Another forum for establishing Russia's responsibility under international law is the ICJ, the main judicial body of the UN. Although all UN members (including Ukraine and Russia) are parties to the ICJ Statute, this does not automatically mean that the ICJ has jurisdiction over a dispute. Rather, the ICJ's jurisdiction must be recognized accordingly. In principle, this can be done in three ways: through a general declaration of submission (optional clause); by asserting jurisdiction within the framework of a specific treaty ("compromissory" clause); and *ad hoc*, for a specific dispute.⁴⁴

For the present dispute, the ICJ lacks broad jurisdiction; neither Ukraine nor Russia has made a general declaration of submission. Therefore, realistically, jurisdiction can only be based on specific treaties that contain a compromissory clause. This is the case, for example, in the Genocide Convention, ratified by both Ukraine and Russia (see Art. IX of the Convention).

On February 26, 2022, Ukraine initiated proceedings against Russia based on Art. IX of the Genocide Convention.⁴⁵ It argues generally that Ukraine itself did not commit genocide in Luhansk and Donetsk and that the recognition of the Luhansk and Donetsk People's Republics and the "special military operation" are based on this false allegation – thus finding no basis in the Genocide Convention. In this regard, Russia challenges the ICJ's jurisdiction.⁴⁶

44 See Art. 36 ICJ Statute.

45 International Court of Justice: Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. Ukraine v. Russian Federation, 26 February 2022.

46 See Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, 7 March 2022.

On March 16, 2022, the ICJ (upon application) found that it had *provisional jurisdiction*, indicated interim measures (*provisional measures*), and ordered that: Russia immediately cease all military operations in Ukraine launched since February 24, 2022; Russia ensure that no military, paramilitary, or other forces under their control continue military operations; and neither party take any actions that contribute to further escalation. The parties had until September 23, 2022 (Ukraine), or March 23, 2023 (Russia), to make their written submissions on the matter. Numerous states (e.g. Latvia, Lithuania, New Zealand, Germany, the United States, Sweden, France, Romania, Italy, Poland, Denmark, and Ireland) have since joined the proceedings as intervenors; the European Union (EU) has also provided “information”.⁴⁷

The ICJ’s indication of provisional measures is apparently not being observed by Russia. However, the possible enforceability of the same is limited in several respects. It is true that Art. 94 UN Charter states that all members of the UN must comply with the decisions of the ICJ and that if one party in a dispute fails to perform the obligations incumbent upon it under a judgment, the other party may have recourse to the Security Council. The SC could then decide on the necessary measures to give effect to the decision. However, this option fails because of Russia’s veto power. Furthermore, only judgments, but not provisional measures in the sense of Art. 94(2) UN Charter can be enforced.⁴⁸ This being said, at least the violation of the order of provisional measures on the part of Russia could however be determined by the ICJ; as well as the amount of compensation. Still, also the enforcement of this determination is bound to fail because of the Russian veto. Thus, the options of the international community are limited here as well.

<https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf>.

47 The intervention of the States concerned was made pursuant to Art. 63 of the ICJ Statute; the EU provided information to the Court on its own initiative on 18 August 2002, pursuant to Art. 34(2) of the ICJ Statute and Art. 69(2) of the Rules. Press Release 2022/19, 18 August 2022: <https://www.icj-cij.org/public/files/case-related/182/182-20220818-PRE-01-00-EN.pdf>; see also <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

48 See generally Borjas, Diego Sanchez: “The ICJ Order in Ukraine vs Russia. Quo Vadis?”, Völkerrechtsblog, 28 March 2022. The only possibility would be to obtain “soft enforcement” of the SC under Chapter 6 UN Charter; since parties involved in disputes have to abstain according to Art. 27(3) UN Charter.

7 Conclusion

A classification of the Russian war of aggression against Ukraine in terms of international and human rights law paints a clear picture: the Russian attack is a blatant violation of international law. Fundamental rules of general international law, human rights, international humanitarian law, and international criminal law are being violated.

At the same time, the Russian war of aggression reveals the weaknesses of international law, which is decentralized and has limited institutions for enforcement in the event of violations. Power politics, especially when it comes from a state like Russia, which is a permanent member of the Security Council and has nuclear weapons, trumps. At least in the short term. From a long-term perspective, it is to be hoped that international institutions, multilateral cooperation, and the international legal framework in general will once again become policy-determining. Institutions such as the ICC make it possible, at least in the longer term, to hold accountable those most responsible for the most serious human rights violations committed in Russia's war of aggression. The clarification of the international legal framework, the establishment of Russia's international responsibility by the ICJ, for example, is also valuable in its own right. Other important initiatives by the international community include commissions of inquiry and fact-finding mechanisms. The OSCE Moscow Mechanism, mentioned above, whose reports published in April and July of 2022 and have already been referred to, is one such possibility. The Commission of Inquiry established by the UN Human Rights Council in March 2022 also contributes to this.⁴⁹ This will at least make it possible to put facts beyond dispute and to document human rights violations that have been committed, with multilateral cooperation and international law prevailing in the long term rather than the power politics of the strongest.

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⁴⁹ UNHRC: Independent International Commission of Inquiry on Ukraine.

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