Acta Universitatis Danubius

JURIDICA

Some Remarks on the Russian Aggression Against Ukraine in the Context of the United Nations System of Maintenance of International Peace and Security

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Abstract: The paper observes the Russian aggression against Ukraine in the context of the United Nations system of maintenance of international peace and security, analyzing both the functionality of the UN bodies in performing their functions under the UN Charter, as well as observing the conflict in light of the UN Charter provisions on the use of force and self-defense, and in light of some other possible grounds for the use of force, not provided by the UN Charter. The paper demonstrates how the persistent problem of the Security Council deadlock, which manifested itself also in the case of the Russian aggression on Ukraine, has led to the General Assembly assuming the primary role in maintenance of international peace and security. The Ukrainian crisis has thus revived the debate on the long-awaited structural reform of the United Nations, but also on the revisiting the existing rules on the use of force, primarily the right to self-defense, which is too easily being used by states as a pretext for their unlawful actions.

Keywords: Security Council; General Assembly; use of force; self-defense

1. Introduction

Up until the Russian aggression on Ukraine in 2022, the United Nations system of maintenance of international peace and security has, regardless of its evident flaws, mainly been perceived as successful, as there have not been any great wars among major world powers since the creation of the Organization, and the conflicts have mostly not been motivated by territorial expansion, which, for most of our history, has been the case.

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The Russian invasion of Ukraine, launched on 24 February 2022, dismantled the post-World War II system of international peace and security. Even if we do not go so far as to claim the death of the international legal order and international law itself, as some authors do (Kerr, 2022), it is inevitable to conclude that the system, which until now has been perceived as an achievement of the UN in the sphere of international peace and security, has been seriously impaired. This is not to say that Russia is the first state to violate international law on the use of force and to use the language of international law to justify its illegal actions. Various states have breached the prohibition of the use of force at some point, misinterpreting and stretching the rules in an attempt to provide a valid legal ground for their actions. The Russian invasion of Ukraine, however, is the most blatant example of the violation of the prohibition of the use of force; it is an attack on the sovereignty, territorial integrity and political independence of another state, undertaken, *inter alia*, with the aim of territorial expansion. The invasion was instantly characterized as aggression both by international scholars and the vast majority of states, which demonstrated a rarely seen unity in condemning the invasion and imposing sanctions upon Russia. Western states continuously provide assistance to Ukraine, (see Wentker, 2022) but do so in a cautious manner, so as not to cause Russia to realize its continuous threat to use nuclear weapons (Faulconbridge, 2023).

The present conflict has raised many legal issues and it would be beyond the scope of this paper to try to address them all. The paper will focus on the influence of the conflict on the UN system of maintenance of international peace and security. In the first part of the paper, it will be analyzed how the relevant UN bodies, in fulfilling their responsibilities under the UN Charter, responded to the invasion or failed to respond to it and why. In the second part of the paper, the UN Charter provisions concerning the use of force shall be observed in the context of the Russian aggression. Since the collective security system provided by Chapter VII was not functional in the present case, the focus will be on the right to self-defense, but also on other possible grounds for the use of force, which are not provided by the UN Charter, but which do find some support in the international law doctrine.

2. (In)ability of the UN Bodies to Respond to the Russian Aggression against Ukraine

2.1. The Security Council – a deadlock

The inability of the Security Council, as the UN body primarily responsible for maintaining international peace and security (Article 24, UN Charter), dramatically manifested itself in the case of the Russian aggression against Ukraine. Unfortunately, the deadlock of the Council by the veto of one or more of the permanent members has become a pitiful scenario in most of the situations in which relevant decisions concerning international peace and security need to be reached. But in spite of the fact that the international community was used to observing an impotent Security Council in the face of world crises, the current situation – in which a permanent member holding a right of veto was itself blatantly undertaking an aggressive act against another sovereign state – just added an insult to injury. In vain did the Ukrainian representative in the Security Council cry for action to stop the aggression, when his Russian counterpart, who was, quite ironically, presiding at the Council when the aggression began, dismissed his plea by claiming that Russian actions did not constitute war but rather a special military operation in the region of Donbas ("Speech by Ukrainian Ambassador", 2022). It is not quite clear what the Russian representative intended to achieve by these rhetorical maneuvers, if it is taken into consideration that any military intervention, be it a war or any other form of use of force, is prohibited under international law (Article 2(4), UN Charter), unless it is undertaken in self-defence or with the Security Council authorization (Articles 51 and 42, UN Charter).

As expected, Russia used its veto power and blocked the draft resolution on Ukraine, which found Russian aggression to be in violation of the prohibition of the use of force, stipulated in Article 2(4) of the UN Charter, and which required an immediate withdrawal of Russian troops from Ukrainian territory (SC/14808). Russia, although being a party to the dispute, was under no obligation to sustain from voting. Namely, Article 27(3) on voting in the Security Council provides for an obligation on the part of a state party to a dispute to abstain from voting, but only in case of decisions under Chapter VI and under Article 52(3). This, apparently, was not the case here, since the draft resolution on Ukraine was going to be adopted under Chapter VII of the Charter ("SC Report: Vote on Draft Resolution", 2022).

The instrumentalization of the veto power for pursuing permanent member states' own interests, instead of representing a checks and balances mechanism for all UN members, has existed practically ever since the creation of the UN and it has provoked extensive discussion about the structural reform of the Security Council, both within academics (Winther, 2020) and the Organization itself (GA/12091). And now that the permanent member state is at the same time the aggressor state, the recurrent veto instrumentalization made it utterly illusional that the Security Council could play any significant part in maintaining international peace and security. That is why the shift has been made from the Security Council to the General Assembly. And it is the Assembly who will be the crucial factor in overcoming the veto problem (Nollkaemper, 2022).

Steps towards accomplishing this goal have already started to be taken in the Assembly. In April 2022, the Resolution aimed at holding permanent Security Council members accountable for the use of veto was adopted. The Resolution, proposed by Lichtenstein and supported by 83 UN member states, provides that, in case of a veto cast by one or more permanent members of the Security Council, the Assembly President shall convene a meeting and hold a debate on the situation, provided that the Assembly does not meet in an emergency special session on the same situation (GA/12417). Similarly to Lichtenstein's veto initiative, the US proposed six principles of responsible behavior of the Security Council members, supporting the idea of accountability for the abuse of veto power, as well as supporting the reform of the Security Council ("Remarks by Ambassador Linda Thomas-Greenfield", 2022). These and similar initiatives may, of course, be perceived as nothing more than a formalism deprived of any real substance. That is to say that, for instance, states abusing veto power could nonetheless come up with pretextual explanations as to why they cast veto, only in this case they would do it before the General Assembly and not before the Security Council. As much as this may be true, it should not be overlooked that in the absence of legal procedures in place (the Charter provisions on its own revision are not likely to be applied, again because of the veto power), the political sentiment in the General Assembly and initiatives taken in this body are most likely to inspire changes.

2.2. The Central Role of the General Assembly in Tackling the Crisis

2.2.1. Condemnation of the Aggression

Faced with a Security Council deadlock, the General Assembly undertook its own responsibility with regard to maintaining international peace and security. The power of the Assembly to take such action rests on two grounds. First is Article 11(2) of the UN Charter, which provides that "The General Assembly may discuss any questions relating to the maintenance of international peace and security" and "may make recommendations with regard to any such questions".[1] The Assembly is, however, not entitled to make any such recommendations if the Security Council is exercising its functions with regard to that particular dispute or situation (Article 12(1), UN Charter). In the case of Ukraine, the Security Council did not exercise any of its functions, since it was deadlocked by the Russian veto. Yet the General Assembly did not invoke Article 11(2) of the Charter as a ground for taking action. The matter was, on the contrary, referred to it by the Security Council, under the "Uniting for Peace" Resolution. The Resolution, which was passed by the Assembly in 1950, as a means to overcome the problem of the Security Council deadlock by veto, provides that "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures" (A/RES/377A(V)). The Resolution envisages the possibility of convening an emergency special session, if the Assembly is not in session at the time.

On 27 February 2022, the Security Council adopted the Resolution (S/RES/2623(2022)), in which it called for an emergency special session of the General Assembly to examine the situation in Ukraine. The eleventh emergency special session[2] was convened and the General Assembly adopted the Resolution condemning the Russian aggression and demanding Russian withdrawal from Ukraine, as well as reversing the decision related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine (A/RES/ES-11/1). The Resolution

[1] General Assembly action may be taken if the question of international peace and security is brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2 of the Charter.

[2] An overview of all the emergency special sessions, see at: "Emergency special sessions", retrieved from https://www.un.org/en/ga/sessions/emergency.shtml.

also condemned violations of humanitarian law and human rights law and demanded that all parties allow both the safe passage to destinations outside Ukraine and safe access to humanitarian assistance for those in need in Ukraine. The General Assembly Resolution was considered "historic", as it was perceived as not just defending Ukraine or Europe, but the international order in general (Lynch, 2022). We now see, more than one year after its adoption, that none of the requests from the Resolution have been abided by. Fighting is still ongoing and human rights are being violated. ("War crimes have been committed", 2022) On top of that, in late September 2022, Russia announced the annexation of several occupied regions of Ukraine: the regions of Donetsk and Luhansk, as well as those of Kherson and Zaporizhzhia (Kirby, 2022). The Security Council again failed to adopt a resolution condemning the annexation, due to the Russian veto ("Russia vetoes SC resolution", 2022), but the plan of annexation was condemned by the General Assembly, ("UN GA demands…", 2022) as well as the UN Secretary-General. ("UN SG condemns…", 2022)

2.2.2. Subjecting Russia to Sanctions – Suspension and Alternative Sanctions

In the course of the Russian invasion, the question of subjecting Russia to suspension from the exercise of the rights and privileges of membership arose. According to Article 5 of the UN Charter, "a member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council." (Article 5, UN Charter) Such a procedure bars suspension against a permanent member of the Security Council for two reasons: first, no permanent member will be subjected to preventive or enforcement action by the Security Council, since it will surely veto the resolution providing for such an action; and second, even if the unlikely scenario of the Council taking such an action does occur, the permanent member would have an opportunity to cast a veto in the second step – the one in which a decision on suspension is being taken. This means that there is only a theoretical, and not a practical, possibility of a permanent member of the Security Council being subjected to suspension in terms of Article 5 of the UN Charter.

In spite of this, in state practice there have been various attempts to bypass the Security Council and to sanction a state in a different manner. One such way is to deprive a state from the credentials which are necessary for state representation in the work of the General Assembly. Prior to the beginning of each session, the Credentials Committee assesses the legitimacy of delegates wishing to participate

in the work of the Assembly. (*Rules of Procedure*, Articles 27-29) In most cases, making such an assessment is not problematic. But in certain situations, mostly those where a state is engaged in a civil war and two concurring governments claim to be legitimate representatives of the state, it is the task of the Credentials Committee to determine which of those two sides is eligible to represent a state. To be clear – the Credentials Committee is not entitled to deny a right of representation, but rather to determine which representative represents the majority of a state's population and is, therefore, a legitimate one. However, in practice the Credentials Committee did not refrain from using its powers to sanction states by denying them the right of participation in the work of the General Assembly. The most familiar example is the one of South Africa, when the Committee refused to accept its credentials, following the failure of the Security Council to accept the Assembly's initiative for expelling that state from the UN, due to its politics of apartheid. (Barber, 2022) It is evident that the Committee sidestepped its powers by doing so, but the fact remains that in practice it uses its powers in such a way to bypass the Security Council, when the latter is deadlocked by veto. In light of such practice, the same kind of sanctioning might have been applied to Russia, as a response to its aggression against Ukraine. That, however, did not happen, as the General Assembly 77th session of September 2022 was held with Russia participating.

Another way of sanctioning a state by bypassing the Security Council is suspending a state from the membership of subsidiary organs. Such a sanction was undertaken against Russia in April 2022, when the General Assembly adopted a resolution calling for Russian suspension from the Human Rights Council. Russia has been a member of the Council since January 2021, when it was elected to serve a three-year term. According to the resolution establishing the Council, the General Assembly may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights (A/RES/60/251, para. 8). The initiative to suspend Russia from the Council was prompted by reports on grave human rights violations in the Ukrainian city of Bucha. ("UN GA votes…", 2022)

Suspension from the UN subsidiary bodies has emerged in state practice as a way of bypassing the Security Council, in situations in which the sanction of suspension, provided by Article 5 of the UN Charter, may not be imposed. In the past, there have been instances of states being sanctioned for their actions by undergoing suspension from membership or participation in the work of one of the

UN subsidiary bodies. For instance, in the late 1950s and early 1960s, African states "whose policies, racial or colonial, were detrimental to the economic and social progress of Africa and the total liberation of the continent from colonialism, were deprived of or suspended from membership of the Economic Commission for Africa." (Akiwumi, 1972) As far as the Human Rights Council is concerned, Russia was not the first state that had its membership in that body suspended. In 2011, Libya underwent suspension as well, as a response to Gaddafi's violent suppression of anti-government protesters. (GA/11050)

The resolution on Russia's suspension was adopted with 93 nations voting in favour, 24 voting against and 58 abstaining. This result was somewhat surprising, when compared to the previous General Assembly resolution condemning the Russian invasion. The latter was adopted with 141 votes in favour, 5 votes against and 35 states abstaining (A/RES/ES/11-1). A decrease of states voting in favour of the second resolution raised the question of whether support for Ukraine had declined since the adoption of the first resolution, perhaps not even for ideological reasons, but for the practical benefit of not confronting Russia. It is worth mentioning that Russia, before voting on the suspension of its membership in the Human Rights Council, called on states to "vote against the attempt by Western countries and their allies to destroy the existing human rights architecture." ("UN GA votes…", 2022) But apart from the possible pragmatism in taking the vote, there is another, quite likely reason for such voting results, related to various states' own issues with human rights violations. The majority of states are to a certain extent involved in human rights abuses. For this reason, they are more cautious in condemning human rights violations than they are in condemning aggression (Freedman, 2022).

Suspending Russia from the Human Rights Council did not result in Russia's change of policy and sudden respect for human rights, just like none of the other sanctions managed to produce such a result. Nonetheless, in a situation of a raging war in Ukraine, any action, either symbolic or aimed at acquiring practical results, should be undertaken, if not to dissuade Russia from violating human rights, then to demonstrate the readiness of the international community to sanction such violations.

2.3. Actions by Other UN Bodies

The International Court of Justice. In the aftermath of the Russian invasion, Ukraine instituted proceedings before the International Court of Justice, requesting the Court to order provisional measures. Ukraine argued that Russia, by falsely accusing it of genocide to justify the invasion, violated the 1948 Genocide Convention. In its Order on Provisional Measures, which was generally perceived as "a clear win for Ukraine" (Sanger, 2022), the Court found that it had *prima facie* jurisdiction to decide on the merits of the case (*Allegations of Genocide*, para. 48) and it ordered Russia to suspend its military operations in Ukraine (*Allegations of Genocide*, para. 86).

The request for provisional measures, made by Ukraine, and the ICJ's reasoning in the case at hand draw considerable attention, for the arguments put forward by Ukraine and their acceptance by the Court were rightly characterized as "creative". (Sanger, 2022) To assert the Court's jurisdiction, Ukraine invoked Article IX of the Genocide Convention, according to which the ICJ shall have jurisdiction if there is a dispute between the parties "relating to the interpretation, application or fulfilment" of the Convention (*Genocide Convention*, Article IX). In the Ukraine's view, the disagreement on interpretation of the Convention did exist between the two states because Russia interpreted Article I of the Convention, obligating states to prevent and to punish genocide, as a ground for undertaking military action in and against Ukraine, using thereat false arguments of genocide occurring in Ukraine (*Allegations of Genocide*, para. 30-31). Russia, on the other hand, claimed that its actions were not motivated by the obligation to prevent and punish genocide, stipulated in Article I of Genocide Convention, but were motivated by the exercise of the right to self-defense (*Allegations of Genocide*, para. 39-40). The Court, however, found that the evidence presented by the parties demonstrated *prima facie* that statements made by the Parties referred to the subject-matter of the Genocide Convention in a sufficiently clear way to allow Ukraine to invoke compromissory clause contained in the Article IX of the Convention as a basis for the Court's jurisdiction (*Allegations of Genocide*, para. 44).

Having concluded that it had jurisdiction, the Court further established that Ukraine had a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine (*Allegations of Genocide*, para. 60), as well as that there was a link between that right and the requested provisional measures (*Allegations of Genocide*, para. 64). Finally, the Court examined whether there existed a state of

urgency, meaning that there was a real and imminent risk that irreparable prejudice will be caused to the rights of Ukraine before the Court gives its final decision. The Court found that such an urgency did exist, justifying an order for provisional measures (*Allegations of Genocide*, para. 77). Russia did not comply with the ICJ's provisional measures.

Apart from an "innovative" interpretation of the Genocide Convention, and consequently the Court's jurisdiction based on such an interpretation, the proceedings before the Court were marked by yet another, somewhat surprising momentum. A remarkable number of declarations of intervention has been filed – thirty-two by now.[1] But not only was there such a large number of requests for interventions, but these requests were, quite unusually, based on Article 63 of the Court's Statute. Prior to this case, states in most cases relied on Article 62 of the Statute when wanting to intervene in the case. In doing so, they were obliged to prove the existence of their own particular interest in the case. Article 63, on the other hand, requires no proof of the particular interest. It allows for an intervention to all states which are parties to a convention being interpreted by the Court in the given case, but makes its invocation conditional upon states' acceptance of the Court's decision as binding upon them (Articles 62 and 63, ICJ Statute).

The states' invocation of Article 63 of the Statute, instead of Article 62, raised a debate on reasons for such a shift in procedure. One probable reason is surely that states recognize the issue under debate as falling under *jus cogens* and *erga omnes* obligations, that is, those which are of interest to the entire international community. The ICJ itself stated in its 1951 Advisory Opinion that "in [the Genocide] convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest" (*Reservations to the Genocide Convention*, 22). It then reiterated its conclusion from the 1951 Advisory Opinion in its Order on provisional measures in *The Gambia v. Myanmar* case. (*Application of the Genocide Convention*, para. 41) Many of the states which filed a declaration of intervention referred in those declarations to the 1951 Advisory Opinion and the "common interest" argument.[2] However, apart from that argument, other factors, such as participation of the permanent member of the Security Council and the risk of nuclear escalation of the conflict, might have played a role in states choosing to intervene under Article 63. (Bonafé, 2022)

[1] Thirty-three states altogether have filed a declaration of intervention, with Canada and the Netherlands filing a joint declaration. See the list of states which filed a declaration of intervention on the ICJ website, https://www.icj-cij.org/en/case/182/intervention.

[2] For, example, Lichtenstein, Slovakia, Canada and The Netherlands, and others.

The Secretary-General. The UN Secretary-General resumed his responsibility with regard to the maintenance of international peace and security (Article 99, UN Charter), by condemning the war in Ukraine and stressing, in particular, its devastating effects on the civilian population. ("Guterres in Ukraine", 2022) In spite of the Secretary-General's efforts, his general role in the Ukrainian crisis attracted also a certain amount of criticism, mostly on account of his allegedly late involvement in the crisis and the fact of ignoring early warnings of the upcoming war. (Lynch, 2022)

3. The Law of the UN Charter on the Maintenance of International Peace and Security in the context of the War in Ukraine – Prohibition of Force, Self-defense and Beyond

The Russian invasion of Ukraine is a clear example of the violation of the "cornerstone" provision of the UN Charter (*Armed Activities*, para. 148), the prohibition of the use of force (Article 2(4), UN Charter). The invasion also matches the definition of aggression, as formulated by the General Assembly in its 1974 resolution on Definition of aggression (A/RES/ 3314 (XXIX)), comprising practically every single form of aggression enumerated in the Definition. It needs not be particularly stressed that the prohibition of aggression constitutes a peremptory norm of international law, from which no derogation is permitted. (A/74/10; Murphy, 2020)

The UN Charter provides for only two exceptions to the prohibition of the use of force: collective action, authorized by the Security Council (Article 42, UN charter), and self-defense, which is an inherent right of every state that suffers an armed attack (Article 51, UN Charter). In the absence of the collective action of the Security Council, self-defense on the part of Ukraine was the only permissible response to the Russian aggression. Interestingly, the same legal ground was invoked by Russia, as a justification for its own use of force.

At the beginning of the invasion, Russia amply emphasized the fact that Western powers themselves used to violate the prohibition of force in the past. ("Address by the President", 2022) This argument, naturally, may be solely of a political nature and has no legal relevance. There is no need to point out that the previous use of force by one state does not justify the use of force by another state. But in addition to this political argument, Russia offered several legal arguments to justify the invasion, some of them more explicit than others.

Generally speaking, the most commonly used argument to justify the use of force by states is the argument of self-defence. That is why it was not surprising when, in his speech announcing the invasion, President Putin invoked Article 51 of the UN Charter, along with the Agreement on Friendship and Mutual Aid with the so-called Donetsk People's Republic and Luhansk People's Republic, as a ground for undertaking self-defence.[1] It appears that both individual and collective self-defence were invoked.

Individual self-defence. In advancing arguments for individual self-defence, Russian President primarily elaborated on the threat posed to Russia by NATO. In Russian public discourse, it has often been voiced that possible Ukrainian membership in NATO is perceived as a threat to Russia. ("Putin repeats Opposition", 2022) Putin clearly articulated this by stressing that the issue of NATO expansion is a question of "the very existence of….[the Russian] state". ("Address by the President", 2022) However, apart from the threat allegedly emanating from NATO, Russia suggested that it was Ukraine itself that posed a threat, ("Address by the President", 2022) by planning to launch an attack in Donetsk and Luhansk. (Green, Henderson & Ruys, 2022)

If Russian claims are assessed in the context of self-defence, the first step is to determine whether there existed an armed attack emanating from either NATO or Ukraine. Russia has, in that respect, not offered any arguments to justify the invocation of self-defence, nor do other circumstances indicate that such an attack occurred. The relevant data show that there was very limited deployment of NATO forces in the region and on the Russian border, giving NATO no significant offensive capability against Russia. (Schmitt, 2022) In addition, Russian claim that the US and NATO use Ukrainian territory to conduct research of biological weapons, posing thus a threat to Russia, finds no support. The UN's High Representative for Disarmament Affairs has repeatedly stated that the UN had seen no evidence of biological weapons use in Ukraine. ("UN still Sees…", 2022)

With all this in sight, it may be observed that the "threats" to which Russia was referring are all vague and temporally distant. It is thus not even necessary to go into a discussion on the existence of a possible anticipatory self-defence, since the

[1] President Putin's speech was attached to the letter sent to the Security Council, informing it of Russia undertaking self-defense. In this way, Russia fulfilled the Article 51 requirement of reporting to the Security Council the exercise of that right. "Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/2022/154".

present circumstances clearly show that not only did an armed attack not occur, but nor was it imminent. (See Lubell, 2015; Dapo & Liefländer, 2013; O'Meara, 2022) Therefore, the only possible type of self-defence that might be taken as an argument for invading Ukraine is a preemptive one, advanced by President Putin himself. (Roth, 2022) Preemptive self-defence – also known as the Bush doctrine, for it was invoked in 2002 by President Bush, when the United States invaded Iraq – justifies acting in self-defence against non-imminent threats, that is, those which are temporally distant and, consequently, uncertain. ("The US National Security Strategy", 2002) There was much debate over the years on the permissibility of this concept of self-defense, but both states and academics have repudiated its validity, and we may say without doubt that pre-emptive self-defence "was wholly baseless in 2002 and it remained so in 2022". (Green, Henderson & Ruys, 2022)

Collective self-defence. A valid invocation of collective self-defense depends on the fulfilment of two essential requirements. Firstly, a state must be a victim of an unlawful armed attack, as in the case of individual self-defense, and secondly, there must exist a request *by that state*. (*Nicaragua,* para. 199) The argument of collective self-defence, advanced by Russia in the present case, thus, rests on the presumption that Donetsk and Luhansk are states in terms of international law. These two Ukrainian territories were recognized by Russia as sovereign states a couple of days prior to the invasion, ("Luhansk and Donetsk regions recognized", 2022) after which they conveniently requested Russian military support. ("Russia says Donbas…", 2022) However, not only does the Russian recognition not make these two regions states, but their recognition was, moreover, condemned by the UN General Assembly (A/RES/ES-11/1) and the Secretary-General as a violation of territorial integrity and sovereignty of Ukraine. ("Secretary-General's press encounter", 2022) Observed in the context of a well-established rule of international law that the existence of a state depends on the existence of a territory, a population and a sovereign authority,[1] it is beyond doubt that the

[1] Montevideo Convention on Rights and Duties of States provides in its Article 1 that the state as a person of international law should possess the following qualifications: a permanent population, a defined territory, a government and the capacity to enter into relations with other states. LNTS, vol. 165, 19, https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166aef. The Badinter Commission similarly found that "*the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty*". See: Pellet, A. (1992). The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples. *European Journal of International Law* 3, 182.

sovereignty element is lacking here, as the two Republics were practically all the time under Russian control (Mirovalev, 2022).

The recognition by Russia of these two self-proclaimed states is apparently based on the theory of "remedial secession", which is predicated on the requirement that "peoples" living in territories that secede from the parent state, and thus exercise their right of self-determination, are subjected to "massive and discriminatory" human rights violations "that approach genocide" (Hannum, 1998). Claiming to meet these requirements, Russia put forward the argument of genocide, which was allegedly committed by the Ukrainian state against Russians in Donbas. ("Ukraine Crisis", 2022) No evidence of genocide taking place in Ukraine seems to have been provided by Russia. But even if, hypothetically speaking, there was genocide, this would not justify the use of force by one state in the territory of another one. (Schabas, 2022) What comes in to play here is the issue of a possible applicability of the Responsibility to Protect (RtoP) doctrine. Under RtoP, each state undertakes "the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (A/RES/60/1, para. 138), while the international community as a whole undertakes the responsibility to use either peaceful means in accordance with the UN Charter, or collective action, through the Security Council, "should [such] means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (A/RES/60/1, para. 139). Understood this way, RtoP justifies the use of forceful measures to protect populations from genocide only if such measures are a part of institutionalized procedures within the UN, that is, if they are authorized by the Security Council. It could thus hardly be claimed that genocide, even if it existed, justified Russian unilateral military action.

Invoking the argument of remedial secession in the case of Donbas demonstrates the usual political pragmatism with regard to approving, or not approving, particular secessionist claims. Russia, for its part, had previously shown such pragmatism on several occasions. On the one hand, it neglected the right of its own republics, Chechnya and Ingushetia, to independence, while, on the other hand, it gave moral and military support to some other territories, such as the Georgian republics of South Ossetia and Abkhazia, in their aspirations to secede from their parent state. While doing so, Russia used the same arguments as it later put forward in the case of Ukraine: it accused Georgia of committing genocide and ethnic cleansing over the ethnic Ossetians, while in the case of Abkhazia, it claimed the

existence of the mere risk of genocide (Bakker, 2008; Sterio, 2010). Similar controversy surrounding Russia's approach towards secession manifested itself in the case of Kosovo secession from Serbia. Russia strongly opposed the Kosovo secession, failing to offer any coherent arguments as to why territories such as South Ossetia and Abkhazia should, and Kosovo should not, be granted independence. It appears that the argument of remedial secession is being inconsistently and volatilely used by Russia, depending on its current political interest.

Intervention by invitation. One of the possible grounds for the Russian invasion is the so-called intervention by invitation. It has already been mentioned in the context of collective self-defence that Russia justified its invasion of Ukraine on the grounds of a request for military assistance that came from the self-proclaimed states of Donetsk and Luhansk. The request for military aid may justify the use of force against another state, either as a ground for collective self-defence, or as a separate legal ground. (Visser, 2020) It is not considered to be an exception to the prohibition of the use of force, but a circumstance precluding wrongfulness (*Draft Articles*, 2001). The idea is the following: if a state consents to something, it is not coerced into it.

Not any consent, however, may be invoked as a circumstance precluding the wrongfulness of an act. To produce such an effect, consent must be valid, which means that it must be "freely given and clearly established;" (*Draft Articles*, *Commentary to Art. 20*, para. 6) it must be given by an agent or person who is authorized to do so on behalf of the state, and it must be given either in advance or at the time the conduct is occurring (*Draft Articles, Commentary to Art. 20*, para. 4).

In the case of Ukraine, the validity of consent is problematic, as the essential requirement – the one that consent must be given by a state – is not satisfied. It has been observed above that the two Ukrainian regions, Donetsk and Luhansk, are not states in terms of international law. If so, then a foreign military intervention is not allowed on their part. As the ICJ found in the *Nicaragua* case, intervention is allowable at the request of the government and not the opposition (*Nicaragua*, para. 246). Moreover, if the conflict between the government and the opposition forces reaches the threshold of a non-international armed conflict, not even the intervention on the side of a government is permissible, as the "negative equality" principle, requiring third states' neutrality towards all sides to the conflict, applies. ("Report of the Mission on Georgia", 2009) Foreign military interventions,

therefore, do not seem to be permissible on the side of the opposition in any case, excluding thus any possibility of Russia intervening on the side of the separatists in the Donbas region.

Rescuing nationals abroad. Prior to the adoption of the UN Charter, using force to rescue a state's own nationals abroad was considered allowed (Ruys, 2008). Although the law of the Charter does not envisage this circumstance as a valid ground for the use of force, actions of saving nationals abroad are not unfamiliar to state practice. The doctrine is most often associated with cases such as those of rescuing Israeli nationals at Entebbe Airport in Uganda in 1976, and the rescuing of hostages from the American Embassy in Tehran in 1979. In the context of Ukraine, the application of this doctrine is problematic on several counts. The first is the general controversy over the admissibility of this argument as a ground for the use of force in the UN Charter era. But apart from the general controversy, the circumstances of this particular case do not speak in favour of the permissibility of invocation of this doctrine. Firstly, the Russians in Ukraine may not be subsumed under the category of Russian "nationals". And this remains so regardless of the well-established Russian practice of "passportisation", that is, the quick provision of Russian passports to Ukrainian citizens in Russian-occupied areas. (Fix & Kimmage, 2022) Issuing passports to citizens of another state violates the sovereignty of that state and, therefore, runs contrary to international law. (Güven & Ribbelink, 2016) And secondly, exactly from what do the so-called Russian nationals in Ukraine need to be rescued? According to the rescuing national's doctrine, the use of armed force by a state is permitted "if it is aimed at removing its nationals from another state where their lives are in actual or imminent peril". (Arend & Beck, 1993; Ronzitti, 2019) No evidence of such peril exists, since – as already stated – Russian accusations of genocide have turned out to be baseless. (Janik, 2022) However, if we assume that, regardless of the non-existence of genocide, there has been another kind of imminent peril for the Russian nationals (A/HRC/40/59/Add.3), the rescuing of nationals theory would require that saving lives entails limited action, strictly confined to the object of protecting nationals against injury (Ruys, 2008), and not a large-scale attack against Ukraine.

As demonstrated, Russia has offered several legal arguments, and it is quite difficult to differentiate them from one another. For instance, it is not quite clear whether an argument of request for military assistance is an autonomous legal ground for Russian intervention, or is it a part of the collective self-defence argument. Also, the claim that there is genocide going on in Ukraine might be a

basis for humanitarian intervention, that is, for the application of the Responsibility to Protect doctrine, but also a basis for the rescuing of nationals abroad. In any case, none of the arguments put forward by Russia may validly serve as a legal basis for using force against Ukraine, and turn out to be nothing more than a fig leaf for aggression.

3. Conclusion

The weaknesses of the UN system of maintenance of peace and security are not new and are surely not born out of Russian aggression against Ukraine. To the contrary, these weaknesses have in large measure been present practically ever since the creation of the Organization. The collective security system established by the UN Charter was predicated on constructive cooperation between the permanent members of the Security Council. And the structure of the Council was supposed to guarantee a balance of power in decision-making, rather than a means for pursuing permanent states' interests. But the Cold War, which began in the years following the creation of the UN, thwarted the planned cooperation and made world peace hostage to Security Council permanent members' (in)ability to reach an agreement.

In face of the inefficiency of the Security Council, the focus has been shifted from the Council to the General Assembly. This world forum is surely an appropriate structure for discussing matters of international peace and security, in cases where the Security Council is deadlocked by veto. But the need to refer such matters to the Assembly at the same time indicates that the body which is primarily empowered by the UN Charter to deal with international peace and security issues is not capable of performing its functions. This is, of course, nothing new. But each instance of the unlawful use of force, accompanied by Security Council impotence, seems to be one more argument in favour of the long-awaited structural reform of the UN. And the structure of the Organization will dictate the need to amend the UN Charter and the way in which it will be amended. The whole system of maintaining international peace and security, established by the Charter, is dependent on a functional Security Council. If such functionality cannot be assured, it would be essential to provide in the Charter new solutions as far as the use of force is concerned. That would perhaps entail the broadening of the exceptions to the prohibition of the unilateral use of force, and the introduction of new legal grounds for such use, such as humanitarian intervention and the like.

The current situation has shown that Russia is pursuing the well-established pattern of states inventing legal justifications for their misconduct. This might serve as proof that, even in situations like this one, where a state manifestly violates the prohibition of the use of force, it does not neglect its legal validity. That, as many scholars have emphasized over the years, means keeping the prohibition of force alive. It must be admitted, though, that in face of egregious violations of the use of force, like the one in case of Ukraine, this argument is not particularly comforting. What does paying lip service to the prohibition of force mean if force is widely used and ostensibly justified?

Russian aggression against Ukraine marks a huge step towards the pre-Charter, and more generally pre-20th century era, when invasion of another state was considered to be a sovereign right of each state. This is a scenario we did not hope to see in the 21st century, as the progress that has been made in the sphere of regulation of the use of force was largely perceived as irreversible. However, the existing war in Ukraine, but also threats of the use of nuclear weapons and the danger of spilling the conflict beyond Ukrainian borders, have shown just how thin the line between war and peace is. And for that line not to be crossed, it is essential to have a functional world organization, which is equipped with appropriate mechanisms for responding to security challenges. If any good can come out of the war in Ukraine, it is an additional incentive to introduce so very necessary changes into the United Nations.

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