

USE OF FORCE UNDER PUBLIC INTERNATIONAL LAW - THE CASE OF UKRAINE -

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Committee of Legal Advisers on Public International Law (CAHDI)
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1. Thank you very much, Madam Chair. It is an honour to be here to speak to members of the CAHDI and to contribute to your discussions. Typically, I would have said that it is a pleasure and an honour to be here, but of course, the circumstances in which we are meeting are extremely difficult and the topic that we will be discussing is one which we would rather not be speaking about. My heart goes out in solidarity to the people of Ukraine and to the Ukrainian delegation here in the room. I was asked to speak about the use of force under public international law in the case of Ukraine and on the range of related issues. I expect that your discussions will be somewhat wide-ranging, but of course, I can only cover a limited set of those issues. Russia's invasion and ongoing use of force in Ukraine constitutes a violation of international law yet it is probably useful to begin by setting out the particular areas of international law where we have seen violations. There have been violations of at least five areas of public international law.
2. First of all, this invasion constitutes a violation of the prohibition on the use of force contained in the UN Charter and in customary international law. The UN General Assembly, in the resolution that it adopted on 2 March 2022 by an overwhelming number of affirmative votes, characterised Russia's conduct as an "aggression by the Russian Federation against Ukraine in violation of Article 2, paragraph 4, of the Charter".¹
3. Second, from what we are seeing, the conduct of hostilities by Russian forces appears to involve violations of various aspects of international humanitarian law and I will pick up on two of those areas. In particular, we have seen multiple reports of Russian forces directing attacks on civilian objects in breach of Additional Protocol I to the Geneva Conventions. At the very least, we have seen attacks which breach the prohibition of indiscriminate attacks in the sense that they are not directed at a specific military objective, or they employ a method/means of combat which cannot be directed at a specific military objective. The other aspect of international humanitarian law that I wanted to concentrate on deals with what we are seeing in places like Mariupol which seems to be a return to siege warfare and a denial of humanitarian access which appears to be in breach of the law relating to humanitarian relief operations in situations of armed conflict.

¹ UNGA, 'Aggression against Ukraine', A/RES/ES-11/1, resolution adopted on 2 March 2022, at, para. 2.

4. The rules of international humanitarian law, with respect to humanitarian relief operations, provide that if civilians are inadequately provided with essential supplies, such as food, water, medical supplies, offers may be made to conduct relief operations that are exclusively humanitarian and impartial in character. Where such offers are made, Additional Protocol I, which, of course, applies to the conflict in question, provides that such humanitarian relief operations shall be carried out with the consent of the relevant party. However, international humanitarian law also provides that such consent shall not be arbitrarily or unlawfully withheld.
5. The third area where we have seen violations relates to the individual who commits acts that amount to violations of international humanitarian law. To the extent that these individuals do so with the requisite state of mind, then these acts would also constitute international crimes for which those individuals would bear individual criminal responsibility.
6. Fourthly, the acts of Russian forces in Ukraine may amount to violations of human rights law by the Russian Federation. The International Court of Justice held in the Israeli Wall in Palestine advisory opinion that the protections that are offered by human rights conventions do not cease to apply in case of armed conflict.² Of course, it is well known that in the case of particular human rights treaties, such as the European Convention on Human Rights and also the International Covenant on Civil and Political Rights, whether the state has obligations outside of its own territory will depend on whether victims fall within the jurisdiction of that state within the meaning of the particular provisions of those treaties.
7. Fifthly, Russia's continuing use of force in Ukraine amounts to a violation of the provisional measures order indicated by the International Court of Justice on 16 March 2022, in the case brought by Ukraine against Russia under the Genocide Convention. The International Court of Justice held that "the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine".³ The Court also stated that "the Russian Federation, shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point 1".⁴ The International Court of Justice has made clear that provisional measures order that it indicates are binding, and thus, Russia has a legal obligation to comply with the ICJ's order.
8. The question that then follows is what are the legal consequences of this illegality? I would like to focus on two issues, one, the legal consequences for others, and the second, the legal consequences for those who are themselves perpetrating these violations of international law.

² ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2002, I.C.J. Reports 2004, p. 136, at, para. 106.

³ ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Aggression (Ukraine v. Russian Federation), Order of 16 March 2022, Request for the indication of provisional measures, at, para. 86(1).

⁴ *Ibid.*, para. 86(2).

9. First, I would like to discuss the consequences for other States, in terms of how other States may react to this illegality. Many States have been taking measures to respond, and the question that arises relates to the legal basis for such reactions. The second question that I would like to address are the consequences for those individuals who are involved in these violations of international law. How may individuals be held responsible for violations of international criminal law?
10. Many of your states have taken a variety of measures to react to Russia's unlawful use of force, measures including freezing of assets of the Russian state, including those of the Russian Central Bank, freezing of assets of Russian nationals or entities who have a connection with the Russian government, the closure of airspace, trade restrictions and other measures. Now, in some cases, the measures in question fall within what we would characterise as "retortions" under international law. In that sense, while the measures are in response to violations of international law, the measures are not in breach of any legal obligation by the state that is taking the measure. While some of these measures may be unfriendly acts, they are acts which the state concerned has a legal right to take. This may be the case, for example, for travel bans because States do not, as a general matter, have an obligation to allow foreign nationals entry to their territory.
11. Other measures, however, may be specifically allowed by the relevant rules of the applicable legal regime, including applicable treaty rules. So it may be that the relevant treaty rules provide an exception to an otherwise applicable obligation. For example, with respect to trade obligations under the World Trade Organization Agreement, and in particular the General Agreement on Tariffs and Trade (GATT), it may be possible to rely on the security exception that we see in the GATT. For instance, Article 21 of the GATT allows contracting parties to take action which they consider necessary for the protection of essential security interests in time of war or other emergency and international relations. In this second category, we have acts which would otherwise be in breach of an applicable legal rule, but they are specifically permitted by an exception to be found in that legal regime.
12. Third, it may be that some of these measures rely on the suspension of the relevant treaty and that suspension of treaty obligations, and in particular cases, may be in accordance with the relevant provisions of the treaty concerned. These are cases where you find the legal basis within the regime, the applicable treaty or other legal regime.
13. Fourth, there may be cases where the measures being taken in response to the Russian aggression, on their face, are in breach of applicable legal rules, and there is not a relevant exception within the particular legal regime that would apply.
14. With respect to asset freezes in particular, a number of questions might arise. First of all, to what extent is the freezing of the assets of the Russian state consistent with the regime of state immunity, in particular, are measures of constraint on the property of a foreign state caught by rules regarding immunity from execution?. Second, to what extent are measures taken either against the Russian state or Russian nationals consistent with the customary international law minimum standard which a state is required to accord to foreign owned property? Third, to what extent are measures that

are taken against Russian nationals consistent with obligations under applicable bilateral investment treaties with Russia, including the provisions on expropriation and fair and equitable treatment? A fourth question would be, to what extent are the manners in which the measures have been taken consistent with the relevant human rights obligations of the state that is taking the measure. In particular for European states, to what extent are they consistent with the provisions of the ECHR and, in that regard, a particular consideration needs to be given to at least four rights in particular: the right to peaceful enjoyment of possessions under Article 1 of Protocol 1, the right to respect for one's home (Article 8), the right to a fair hearing (Article 6, paragraph 1) and the right to enjoy other ECHR rights without discrimination (Article 14).

15. These are a range of questions that one has to consider in order to see whether the measures are consistent with the rules in that regime, and if not, to what extent they may be justified under general international law. In respect of each of the foregoing questions, one may be able to determine that there is no breach of the relevant rule, and that determination of the absence of breach may be made with greater or less ease depending on the measure in question.
16. For human rights obligations previously mentioned, the fact that these rights in question are not absolute rights and the fact that the measures are taken in pursuance of a legitimate aim would make it more likely that the measures will be in conformity with the obligations of the state. Of course, these measures have to be proportional to the aim, but the gravity of the breach in question is likely to mean that it is easier to satisfy that proportionality requirement.
17. As we are speaking about human rights obligations and also about obligations relating to the protection of the interest of foreign nationals, there is a possibility of claims by individuals. On the one hand, these can be claims raising human rights issues in domestic courts or here in Strasbourg at the European Court of Human Rights, or, on the other hand, claims being brought under the relevant bilateral investment treaties (BITs). Whether the measures are consistent with the BITs, will depend on whether they fulfil rules of expropriation and obligations relating to fair and equitable treatment, but also whether for particular treaties, you can find an exception that covers the measures within those treaties.
18. Even if some of these measures are, on their face, in breach of otherwise applicable rules, it may be open to states taking these measures to rely on the fact that these measures are taken in response to Russia's violation of international law. In other words, the state may be able to rely on countermeasures as a justification for its own actions. Of course, to rely on countermeasures, a number of procedural and substantive conditions have to be fulfilled. A condition that needs to be pointed out is that a countermeasure cannot be used to justify infringement of fundamental rights. Thus, in relation to the obligations that I spoke about earlier, it is possible to justify those measures by referencing countermeasures in the investments and immunities context, but not in the human rights context.
19. It is clear that Russia's breaches of international law are breaches of obligations *erga omnes*, obligations owed to the international community as a whole and not simply breaches with respect to Ukraine. The critical issue with regards to countermeasures

here is whether third states that are not directly injured by an unlawful act can take them in solidarity with the directly injured state, in this case Ukraine. The ILC in its Draft Articles on Responsibility of States for Internationally Wrongful Acts was very cautious in the approach that it took back in 2001. Article 54 of the Draft Articles speaks of the right of any state to take lawful measures against the responsible state to ensure cessation of the breach or reparation in the interests of the injured state. That reference to lawful measures was precisely to avoid making a judgement as to whether countermeasures were permissible when taken by third states not directly injured. At that time, the ILC referred to the embryonic state practice in this regard.

20. However, since the ILC articles were finalised in 2001, there has been a significant increase in the practice of third states taking measures in response to violations of obligations *erga omnes*. It seems to me that the time has now come to end that debate and to acknowledge that third party countermeasures are indeed permissible in response to violations of obligations *erga omnes*. It is also probably time for states to start stating this explicitly, because, as I indicated, there is a possibility, perhaps even a likelihood, that some of these issues will come before international tribunals with respect to claims made by individuals. Those tribunals will need to make a judgement as to whether or not it is possible to rely on the general law of state responsibility in order to justify measures that are not necessarily consistent with the treaty regime that they are considering.
21. I will now come to the issue of accountability for international crimes, more precisely the consequences for individuals who are engaged in acts which violate international criminal law. I will try to briefly outline at least some of the issues. As already indicated, the acts we are seeing are not just violations of international law by the state, but they also entail individual criminal responsibility for individuals. The first issue that arises here is, what are the options for holding individuals to account? What mechanisms/tribunals may deal with this question of individual accountability? The second, but interrelated, issue is what crimes may individuals be held criminally responsible for?
22. With respect to the mechanism for establishing accountability under international criminal law, we have three possibilities. First of all, there is the possibility of prosecution before an international tribunal and in this regard, we have the International Criminal Court (ICC). We have seen a referral by a very large group of states to the ICC with the ICC prosecutor opening an investigation. The second possibility is that of prosecution in the domestic courts of Ukraine as and when they are able to exercise such jurisdiction. Then a third possibility is the prospect of prosecutions in foreign domestic courts, in the exercise of universal jurisdiction. A number of states have already opened investigations, and here I think it is important to recall that the grave breaches provisions of the Geneva Conventions do not just provide a right to exercise universal jurisdiction, but in some cases, they actually impose an obligation to do so.
23. The other issue is the issue of the crimes for which individuals may be held accountable. The jurisdiction of the ICC extends to war crimes, crimes against humanity, genocide and the crime of aggression. However, with respect to Russia's use of force in Ukraine there is a gap. While the Rome Statute, as amended in Kampala, provides for ICC jurisdiction over the crime of aggression, the ICC cannot exercise

jurisdiction over the crime of aggression in this situation. There are two reasons for this. The first is that under the Kampala amendments to the Rome Statute, for the ICC to exercise jurisdiction over the crime of aggression, the state that is engaged in aggression must be a state party. Of course, the Russian Federation is not a state party to the Rome statute. The second reason for the absence of ICC jurisdiction over the crime of aggression is that, while the UN Security Council can refer the crime of aggression to the ICC, even with respect to a non-state party, that is clearly not going to happen in this situation.

24. In sum, the ICC is not able to exercise jurisdiction over the crime of aggression. There has been an initiative to create a special tribunal to prosecute the crime of aggression against Ukraine. I suppose the first question that is worth thinking about is why it is important to seek investigation and prosecution of the crime of aggression in this situation. It might be useful to go back to what the Nuremberg Military Tribunals Nuremberg Tribunal said about the crime of aggression or what was at that time called "crime against peace". The Nuremberg Tribunal spoke about the crime of aggression as being the supreme international crime since it contains within itself the accumulated evil of the whole.
25. We have spoken about the violations of IHL that are occurring in Ukraine, but even if the entire operations were conducted consistently with IHL, the level of suffering that we have seen is tremendous, and that arises principally because of the waging of an aggressive war. That is one reason for trying to fill that gap. The second reason to do so is because of the practical difficulties that sometimes occur with respect to proving the responsibility of senior leaders for war crimes, violations of IHL, in particular situations. To establish individual criminal responsibility, there is a need to tie those individual situations to decisions and/or lack of decisions that are made by the particular individual.
26. The higher the rank and the greater the distance of the person concerned from the acts under consideration, the more difficult is it typically to establish that responsibility. If we look at the record of the ICC over the last 20 years we see the difficulties that the ICC has had with establishing responsibility of senior leaders for the commission of war crimes. We have probably seen nearly as many acquittals as we have seen convictions. Aggression, of course, is a leadership crime but, although it is a leadership crime, it is not just restricted to one or two people. In this particular case, it is probably easier, in terms of proof, to establish responsibility with respect to the waging of an aggressive war, then it might be for establishing responsibility for individual violations of IHL, which is what you would need in order to prove war crimes.
27. Concerning the initiative to establish a special tribunal for the crime of aggression one question is, how might such a tribunal be established? There are a range of options which might be looked at. One option is to establish a tribunal by treaty between Ukraine and a group of other states. You establish an international tribunal which is created by treaty, but it is an interstate treaty between states. In one sense similar to the model that we had for Nuremberg.
28. A second possibility would be to have a treaty which is between Ukraine and an international organisation establishing an international tribunal. It could be a treaty

between Ukraine and the UN, possibly between Ukraine and a more limited international organisation, the EU or some other international organisation. We have a number of models for that as well, we have got the Special Court for Sierra Leone, which was established on this basis, and, the Special Tribunal for Lebanon. Although the latter was established by a UN Security Council Resolution the original idea behind was a cooperation between Lebanon and the UN.

29. A third model is that you can have a tribunal, a hybrid tribunal, established by Ukrainian law but with the support of international organisations and states through some kind of arrangement whereby the international organisation or states provide practical, financial or other support to the tribunal. Maybe something similar to what we have seen with the Extraordinary Chambers in the Courts of Cambodia or perhaps something more similar to the Kosovo Specialist Chambers.
30. Final thing for now, and then we can open the floor for a discussion: the legal basis for the establishment of such a tribunal with respect to the crime of aggression. I think views differ to what the legal basis might be, but again, there is a range of options. Some people speak about a pooling of domestic universal jurisdiction with respect to the crime of aggression and not everybody accepts that there is universal jurisdiction for the crime of aggression. But a number of people have taken that view.
31. Second possibility is a delegation of Ukrainian territorial jurisdiction. I think it is well accepted that the state against which the crime of aggression has been committed on and on whose territory the crime of aggression has been committed has territorial jurisdiction with respect to the prosecution of those crimes which it can either exercise or could, in particular cases, delegate to an international tribunal. So that is another possibility for the establishment of such a tribunal. As I said at the beginning, I am sure that there is a wide range of issues that one might discuss with respect to the use of force against Ukraine. I have tried to focus on specific issues, and I am sure there will be others that colleagues might want to raise. Thank you very much Madam Chair.