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**Bernard Stirn**

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# RED

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## War in Ukraine: Mutation or Resilience of the Principles of the United Nations Charter?

It is surely no exaggeration to state that never since 1945 has the international legal order been confronted with existential threats as great as those that have accumulated since the beginning of the 2020s. Some are immediate, others medium- or long-term, but all are due—more or less directly—to the folly of men, the inability of politicians to assume their responsibilities and resist the sirens of nationalism and populism and, sometimes, the demons of their own greed. The Russian aggression against Ukraine is only one of many such threats—the most spectacular without doubt, but not necessarily the most perilous on the long run.

The noble ideals of 1919, 1928 or 1945 of ‘outlawing war’ have in no way eradicated armed conflicts, neither international nor internal.<sup>1</sup> Russia’s aggression against Ukraine, however spectacular and ubiquitous, is far from being unprecedented; the US and UK’s aggression against Iraq in 2003 is a recent and lamentable example.<sup>2</sup> The fact remains that never since 1945 have so many of the principles of the United Nations Charter been so cynically flouted by a great power; never since the Cuban Missile Crisis of 1962 has the threat of the use of nuclear weapons been so openly brandished, with the exception of North Korea, a loyal supporter of Russia; never since the Second World War has an armed conflict, albeit limited to the territory of a single state, had such harmful consequences for so many countries.

This has led to major changes in the content and ordering of international legal principles and rules—and many other changes are yet to come. But it is still difficult, if not impossible, to assess with certainty the direct implications of the war in Ukraine and the devastation wrought

1. By 2021, 46 States had experienced armed conflict since 1945, including three major conflicts and 19 high-intensity conflicts, according to the Stockholm International Peace Research Institute, *Sipri Yearbook 2022, Armaments, Disarmament and International Security*, 2.  
2. Alain Pellet, ‘L’agression’, *Le Monde*, 22 March 2023.

by all the other crises that have revealed the flaws in the international legal order.

By launching its ‘special military operation’, the President of the Russian Federation violated almost all the principles set forth in Article 2 of the United Nations Charter.<sup>3</sup>

There is no doubt that Russia violated the principle embodied in paragraph 4, which enjoins members to refrain ‘in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’. This principle allows for only two exceptions: a decision of the Security Council under Chapter VII of the Charter authorizing the use of armed force, which is obviously out of the question in the present circumstances, or a situation of self-defense, contemplated in Article 51. Invoked by President Putin, this circumstance cannot be upheld even if Russia formally complied with the procedural obligation to ‘report [...] to the Security Council’ the measures taken in the exercise of this ‘inherent right’ by sharing the speech of the Russian President delivered in the early hours of 24 February before the start of the ‘special military operation’...<sup>4</sup> On the merits, the fanciful grounds advanced, without the slightest proof of alleged preparations for aggression by Ukraine and NATO against Russia, cannot deceive, even if one were to admit that preventive or ‘preemptive’ self-defence could be lawful, which is highly doubtful.<sup>5</sup> The United Nations General Assembly made no mistake and, in a resolution adopted overwhelmingly on 2 March 2022 deplored ‘in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter’.<sup>6</sup>

Russia’s self-proclaimed annexation of Crimea in 2014, followed by the Luhansk and Donetsk oblasts and the Zaporizhzhia and Kherson regions in September 2022, was a clear and serious violation of the principle of territorial integrity of States, albeit in different ways. In the case of Crimea, which became part of Ukraine in 1954, Russia did not openly use armed force despite the massive infiltration of special units which, without bloodshed or resistance from Ukrainian troops, took control of the main political centers and civilian and military infrastructure of Crimea, as a prelude to an irregular referendum. While it is a clear violation of international law, this operation could not, however, be qualified as an aggression,<sup>7</sup> unlike the

3. See Robert Badinter, Bruno Cotte and Alain Pellet, *Vladimir Poutine – L’accusation* (Fayard 2023) 48-59.  
4. Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General.  
5. See Olivier Corten, ‘La légitime défense préventive: un oxymore?’, *Médiathèque de droit international de l’ONU*, 24 March 2017; Mathias Forteau, Alina Miron and Alain Pellet, *Droit international public* (9<sup>th</sup> edn, LGDJ 2022) 1285, para 893.  
6. United Nations General Assembly Resolution ES-11/1, passed with 141 voting in favour, 5 against, and 35 abstentions.  
7. See Alain Pellet, ‘Crimée: une invasion, un référendum, une sécession?’, *Le Monde*, 14 March 2014.

annexation of Donbass, which was preceded by a military, political and economic ‘effective control’ by Russia since May 2014<sup>8</sup> and violent fighting with the Ukrainian army. This annexation is further a clear violation of the Minsk II Agreement of 12 February 2015. In both cases, the infringement of Ukraine’s territorial integrity—which should be assessed by reference to its territory at the date of independence<sup>9</sup>—is blatant and has been condemned by strong UN General Assembly resolutions recalling that ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal’.<sup>10</sup>

By challenging the legitimacy of Ukraine’s very existence as an ‘artificially created’ State, the Russian President is denying the sovereign equality of the Members of the United Nations, the first of the principles proclaimed by the Charter.<sup>11</sup> At the same time, Russia violated both the principle of equal rights and self-determination of peoples<sup>12</sup> and the principle of non-intervention in the internal affairs of States. In his speech of 24 February 2022, and in many others, the Russian head of State proclaimed his aim to ‘demilitarize and denazify Ukraine’ and requested its neutrality.<sup>13</sup> Paraphrasing a dictum of the International Court of Justice (ICJ) in its famous 1986 ruling in the *Nicaragua v. United States* case: ‘In any event, while [Russia] might form its own appraisal of the situation as to respect for human rights in [Ukraine], the use of force could not be the appropriate method to monitor or ensure such respect’<sup>14</sup>; furthermore, ‘in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception’.<sup>15</sup>

By resorting to massive use of armed force to settle disputes with Ukraine—largely based on imaginary grounds—Russia has disregarded the principle set out in Articles 2(3) and 33 of the Charter that ‘[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and

justice, are not endangered’. In his speech of 24 February 2022, Putin blamed Ukraine: ‘For eight years, endlessly long eight years, we have done everything possible to resolve the situation by peaceful, political means. All in vain.’<sup>16</sup> On the eve of the attack, he had declared himself ‘always open to direct and honest dialogue in order to find diplomatic solutions to the most complex problems’, but adding: ‘However, the interests and security of our citizens are non-negotiable for us’.<sup>17</sup> He and other senior Russian politicians have since repeated this ‘offer’ with more or less specific conditions (but always demanding the demilitarization, neutralization and ‘denazification’ of Ukraine and the acknowledgement of Russia’s territorial gains).<sup>18</sup> This empties negotiations of all meaning; as the ICJ insisted, ‘the concept of ‘negotiations’ [...] requires—at the very least—a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute’<sup>19</sup> and if there are discussions, ‘[the parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.’<sup>20</sup>

More generally, the result of all these violations is also a clear violation of the principle set out in Article 2, paragraph 2, of the Charter that Members of the United Nations ‘shall fulfil in good faith the obligations assumed by them in accordance with the present Charter’. While the principle of good faith, which is ‘one of the basic principles governing the creation and performance of legal obligations [...] is not in itself a source of obligation where none would otherwise exist’,<sup>21</sup> all the other breaches attributable to Russia are characterized by manifest bad faith.

The result is a systematic undermining of one of the founding principles of international law, that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’ (*Pacta sunt servanda*)<sup>22</sup>—for the UN Charter is not the only treaty flouted by Russia. The major conventions on ‘international humanitarian law’, in particular the Geneva Conventions

8. ECHR (Grand Chamber) *Ukraine and The Netherlands v. Russia* (applications nos 8019/16, 43800/14 and 28525/20) (Eastern Ukraine and flight MH17 cases), 30 November 2022, para 695.

9. See Yugoslavia Arbitration Commission, opinion n 2, 11 January 1992, *RGDIP* 1992, 266; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019* 95, paras 153-162.

10. See resolution 68/262 of 27 March 2014 and resolution ES-11-4 of 12 October 2022 ‘Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations’, which refer notably to resolution 2625(XV) of 24 October 1970 ‘The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States’.

11. Article 2, para 1 of the Charter.

12. Articles 1, para 2 and 55 of the Charter.

13. For a more recent speech by Vladimir Putin in this sense, see ‘Ukraine War: Russia Demands Annexations Recognised Before Talks’, *BBC News*, 2 December 2022; see also the 5 January 2023 telephone conversation between Vladimir Putin and Turkey’s President Recep Tayyip Erdoğan, <http://www.en.kremlin.ru/events/president/news/70770>.

14. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, at 134, para 268.

15. *Ibid.* at 135, para 269.

16. Speech cited above (n 4).

17. See ‘Congratulations on the occasion of Defender of the Fatherland Day’, 23 February 2022, <http://www.en.kremlin.ru/events/president/news/70575>.

18. See especially ‘Conversation with President of France Emmanuel Macron’, 28 February 2022 (<http://www.en.kremlin.ru/events/president/news/67850>) and ‘Telephone Conversation with Federal Chancellor of Germany Olaf Scholz’, 4 March 2022 (<http://en.kremlin.ru/events/president/news/69971>); see more recently ‘Ukraine War: Russia Demands Annexations Recognised Before Talks’, *BBC News*, 2 December 2022 (<https://www.bbc.co.uk/news/world-europe-63832151>); ‘Telephone conversation with President of the Republic of Turkey Recep Tayyip Erdogan’, 5 January 2023 (<http://www.en.kremlin.ru/events/president/news/70328/print>); ‘Concert marking the anniversary of Crimea’s reunification with Russia’, 18 March 2022 (<http://www.en.kremlin.ru/events/president/transcripts/68016>).

19. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011* 70, para 157 (*italics added*).

20. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969* 3, para 85.

21. *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988* 69, para 94 (*citation omitted*).

22. Article 26 of the Vienna Convention on the Law of Treaties (1969).



of 1949 (whose provisions largely reflect customary rules), are also systematically violated, justifying indictment not only of those who commit them directly on the ground but also of the head of State and other Russian decision-makers, for war crimes or crimes against humanity, as evidenced by the recent arrest warrants issued by the International Criminal Court for? against? Vladimir Putin and Maria Lvova-Belova, the Russian Children's Rights Commissioner, for their involvement in the deportation and transfer to Russia of Ukrainian children.<sup>23</sup> Other more specific treaties are also violated by Russia—for example the Minsk Agreements of 2014 and 2015, and the Budapest Memorandum of 5 December 1994, in which, together with the United States and the United Kingdom, Russia undertook to 'respect the independence and sovereignty and the existing borders of Ukraine' and 'reaffirm[ed] [its] obligation to refrain from the threat or the use of force against the territorial integrity or political independence of Ukraine, and that none of [its] weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations.'<sup>24</sup> This may be little more than a reaffirmation of pre-existing obligations, but their restatement through commitments that are specific to the two States further reinforces their binding nature; and, in the light of the war in Ukraine initiated by Russia, its commitment under Article 4 of the Memorandum 'to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used' sounds bitterly ironic. Moreover, Vladimir Putin's repeated threats about the possible use of such a weapon<sup>25</sup> are contrary to both Article 5 of the Memorandum and the Non-Proliferation Treaty itself, which also prohibits in particularly broad and categorical terms the direct or indirect transfer of nuclear weapons or 'other nuclear explosive devices' 'to any recipient whatsoever'<sup>26</sup>; the announced deployment of 'tactical' nuclear weapons in Belarus<sup>27</sup> would be a further violation.

Rarely, with the exception of Nazi Germany in its time, has a State violated so many principles and rules of international law in such a short period of time. There is no doubt that this is a deliberate policy, part of the Russian

dictator's desire to challenge the post-war international legal order—while pretending to aim to restore it to its original purity. Already in 2017, during the enlarged meeting of the Council of the Commonwealth of Independent States (made up of the heads of the States that emerged from the former Soviet Union), Putin had pleaded for 'the construction of a just international order based on the generally accepted principles of international law'.<sup>28</sup> More recently, as his foreign minister was castigating the 'rule-based order of the West'<sup>29</sup>, Putin accused the United States of having 'dismantled the post-World War II architecture of international relations'<sup>30</sup>.

There can be no doubt left that the accumulation of violations of the most established norms of international law by a major State—even if it is no longer a major power—with the (albeit cautious) support of China, can in itself contribute to undermining these principles. At their meeting in Moscow on 20-21 March 2023, the Chinese and Russian Presidents made no secret of their desire to radically change the international legal order, as stated by the former: 'Now there are changes that haven't happened in 100 years. When we are together, we drive these changes.'<sup>31</sup> But are changes really happening? That remains unclear.

What is clear is that several factors reinforce the challenges raised to the international order, as imagined in 1945 and strengthened by the fall of the Berlin wall in 1989. Western States, which were the promoters and main beneficiaries of the international order, have themselves cynically violated the rules they claimed to impose on the rest of the world, particularly with regard to the protection of human rights and even the use of armed force; there is no doubt that, among other causes, the addition of Russian violations to the repeated breaches committed by Western countries weakens these principles. Moreover, the bipolar world in which these principles were adopted and flourished has largely been replaced by an unequal multipolarity and what has been called 'polylateralism', characterized by the role played in the definition and implementation of the rules applicable to transnational activities by a wide variety of stakeholders—states, of course, but also, to the detriment of the traditional monopoly of the latter, civil society and transnational companies.<sup>32</sup> Finally, in this new environment, Russia is far from being isolated; the same challenges are raised by a large number of the States of the 'global south' and by China, which, while presenting itself as an alternative to the 'West-South' partnership and the champion of multilateralism, is working to 'confiscate' the multilateral order, thus sparking a new 'Cold War'—another

23. ICC, 'ICC Arrest warrants in the situation of Ukraine: Statement by President Piotr Hofmański', 17 March 2023 (<https://www.youtube.com/watch?v=FbKhCAaRLfC>); ICC, 'Situation en Ukraine: les juges de la C.P.I. délivrent des mandats d'arrêt contre Vladimir Vladimirovitch Poutine et Maria Alekseevna Lvova-Belova', press release, 17 March 2023.  
24. Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Budapest, 5 December 1994  
25. See 'Address by the President of the Russian Federation', 21 February 2022 (<http://www.en.kremlin.ru/events/president/news/67828>); see also Resolution adopted by the General Assembly on 2 March 2022 'Aggression against Ukraine', A/RES/ES-11/1. In the same vein, see the press release on the suspension of the New START Treaty by Russia on 28 February 2023.  
26. Article 1 of the Treaty on the Non-Proliferation of Nuclear Weapons of 22 April 1970.  
27. See BBC, 'Putin: Russia to station nuclear weapons in Belarus', 26 March 2023 (<https://www.bbc.com/news/world-europe-65077687>).

28. [www.en.kremlin.ru/catalog/persons/215/events/55818](http://www.en.kremlin.ru/catalog/persons/215/events/55818).  
29. See 'Russia had 'no choice' but to launch 'special military operation' in Ukraine, Lavrov tells UN', *UN News*, 24 September 2022 (<https://news.un.org/en/story/2022/09/1127881>).  
30. Presidential Address to Federal Assembly, 21 February 2023 (<http://www.en.kremlin.ru/events/president/transcripts/messages/70565>).  
31. Dan Peleschuk and Sergiy Chalyl, 'Russia hits Ukraine with missiles, drones as 'dear friend' Xi departs', *Reuters*, 22 March 2023.  
32. See Geoffrey Wiseman, 'Polylateralism' and New Modes of Global Dialogue' (Centre for the Study of Diplomacy Leicester 1999) 26; Pascal Lamy, 'Answering the crisis of multilateralism with polylateralism', *Revue européenne de droit* 2021, 26-29.

way of undermining the international order, undoubtedly more subtle and effective than Putin's brutality.

This being said, in a way, the aggression against Ukraine has contributed, at least in the short term, not only to closing the ranks of the West and to strengthening the EU and NATO, but also, from a legal perspective, to the solemn restatement of the principles transgressed by Russia, notably by the United Nations General Assembly in several resolutions adopted during its eleventh emergency special session.<sup>33</sup> Russia, moreover, was careful not to call these principles explicitly into question and, on the contrary, invoked them with aplomb, even pushing cynicism to the point of organising, on 24 April 2023, a debate in the Security Council chaired by the Russian Minister of Foreign Affairs Sergey Lavrov, dedicated to 'Effective Multilateralism through the Defence of the Principles of the UN Charter'. And, human rights aside—which is not negligible—China also constantly refers to them, attesting to their vitality.

Of course—parodying a famous witticism once applied to Article 2, paragraph 4, of the Charter—the reports of

death of the Charter's principles are greatly exaggerated,<sup>34</sup> although the war in Ukraine highlights their frailty. The values of peace that they embody remain as relevant as ever, and there is no reason to give in to calls for relativism in the field of human rights, despite the virulent criticisms of the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and, above all, their—albeit uncertain—implementation mechanisms. The fact remains that the long-term resilience of the principles proclaimed in 1945 would be better assured if they were adapted and supplemented to meet the demands of today's world. A thorough 'upgrade' is needed—first and foremost to make room for the imperative of rescuing the planet, which is not mentioned in the Charter, initially conceived as a response to the traumas caused by the war and Nazi barbarism. Without this *aggiornamento*, the principles it sets out, frozen in an anachronistic wording, will be open to criticism from their detractors and will be unable to respond to the terrible challenges of our time.

33. See in particular resolution ES-11/4 of 12 October 2022, 'Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations'.

34. Louis Henkin, 'The Reports of Death of Article 2(4) are Greatly Exaggerated', *American Journal of International Law*, 1971, 544-548, responding to Thomas M Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States', *AJIL*, 1970, 809-837.