

**LAW AND WAR IN THE INTERNATIONAL SYSTEM: STRIKING A BALANCE
BETWEEN INTERNATIONAL LAW AND INTERNATIONAL POLITICS**

Joseph Matawa¹

Abstract

The existence of a strong international order rests on the foundation of global peace and security. That is why the maintenance of peace and the prohibition of the use of force in the conduct of international relations lies at the core of modern international law. Sadly, and all too often, states resort to the use of force in pursuit of national interest and to achieve some geopolitical objective. This has raised questions as to the effectiveness of international law in preventing armed conflicts and the role international politics as presently structured, understood and practiced plays in fomenting hostilities in the global scene.

Using the Russia-Ukraine conflict as a point of reference, this essay will consider the implications of such conflicts in international law and politics. To be specific, we shall consider the relationship between International Law and International Politics, the not so effective measures of international law in preventing armed conflicts and explore the possibility of utilising international politics to supplement international law efforts in maintaining global peace.

Keywords: War, International Law, International Politics, International System

Introduction

On February 24, 2022, days after recognising the Donetsk and Luhansk regions of Ukraine as independent states, Russian president Vladimir Putin ordered a full scale invasion of Ukraine. Putin said the aim of the 'special military operation' was the 'demilitarisation' of Ukraine, but claimed he did not plan to occupy the smaller neighbor.² This invasion, a major escalation of the conflict that has been simmering between Russia and Ukraine since the removal of the pro-Russian President Viktor Yanukovich in February 2014, attracted widespread international condemnation. U.S President Joe Biden called it an 'unjustified' and 'premeditated' war, and said the U.S. and its NATO allies would respond in a 'united and decisive way.' The response has majorly been in the form of economic

¹ Joseph Matawa is of the University of Benin, Edo State. Nigeria

² Harold Maass '10 things you need to know today: February 24, 2022' <<https://theweek.com/briefing/daily-briefing/1010553/10-things-you-need-to-know-today-february-24-2022?amp>> accessed 26 March 2022.

sanctions and supply of weapons to Ukraine. So far, the NATO and US have avoided direct military confrontation with Russia, but for how long?

The Russian invasion of Ukraine as expected raises many questions of international law. The war clearly is a breach of global peace. This is even more so because the invasion, as we will show subsequently, cannot be justified under any known international law principle. We will argue that wars like the present Russia-Ukraine conflict arises from a flawed understanding of power and could be addressed through a reevaluation of the present geopolitical system. If global peace must be achieved and sustained for long, we must strive to strike a balance between international law and international politics.

The Nexus between International Law and International Politics

International law is a system of law that regulates the conduct of states in the exercise of their external relations with other states. To Kelsen, international law refers to ‘a complex of norms regulating the mutual behaviour of states, the specific subjects of international law.’³ Kelsen’s definition highlights an important difference between international law and municipal law which is that unlike the latter, the principal subjects of international law are nation-states, not individual citizens. This distinction embodies the very essence of international law and the question of its enforceability. International law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions.⁴ The main sources of international law include treaties, international customs, generally recognised principles of law, scholarly writings etc.

Politics, in its broadest sense, refers to the activity through which people make, preserve and amend the general rules under which they live.⁵ Politics is inextricably linked to the phenomena of conflict and cooperation. International Politics therefore, is the study of the interactions between nations and these relations are generally determined by political, diplomatic, military and strategic terms. International politics usually involves power relations among different states. Thus, H.J. Morgenthau succinctly defines International Politics as ‘struggle for and use of power among nations.’⁶ This

³ Hans Kelsen, *Pure Theory of Law* (Berkeley, CA: University of California Press, 1967), 320.

⁴ Malcom N. Shaw, *International Law* (6th edn, Cambridge University Press, Cambridge, 2008) 2.

⁵ Neha Singh ‘Why Politics & Political Science?’ <https://thecamford.org/politics-and-education-in-school-why-politics-political-science/> accessed 26 March 2022.

⁶ Hans Morgenthau 1948. *Politics among nations: the struggle for power and peace*. (5th edn, A.A Knopf, New York, 1978).

definition very clearly articulates that international politics is determined by power. Each nation tries to accumulate and maximise power in pursuit of their national interest in the global scene.

International law and international politics cohere in the sense that they traditionally deal with relations between sovereign states. International law regulates the activities of states in their quest for power and attainment of national objectives. It secures minimum conditions for international exchange and cooperation under predictable and equal terms. International law promotes order in inter-state relations and ensures that states, in their quest for power, abide by the generally accepted norms of conduct so as to avoid conflict.

International Law and the Use of Force

After the end of the Second World War, the different nations of the world felt the need to establish a body that will prevent future wars. This need led to the establishment of the United Nations (UN) which is an intergovernmental organisation whose primary purpose is to maintain international peace and security, develop friendly relations among nations, achieve international cooperation, and be a centre for harmonising the actions of nations.⁷ Many international law scholars and commentators consider the United Nations as a rebranding of the League of Nations. This owes largely to the fact that many of the extant organs of the United Nations are derived from the old League of Nations. For instance; the ‘League of Nations’ was replaced by the ‘United Nations’; the ‘Permanent Court of International Justice’ was replaced by the ‘International Court of Justice’; the ‘Assembly’ was replaced by the ‘General Assembly’; and the ‘Council’ was replaced by the ‘Security Council’. But that is where the similarity ends. The League of Nations as a creature of the old world order did not unequivocally prohibit the right to the use of force by member states, it merely attempted to restrict that right and provide peaceful dispute resolution mechanisms to delay the exercise of the right to use force.⁸ At its core, the League of Nations allowed states to resort to war, especially after exhausting the peaceful dispute resolution process contained in the covenant.⁹

However, unlike the League of Nations, the prohibition of the ‘use of force’ by member states lies at the core of the United Nations Charter. Article 2(4) of the Charter declares that, ‘All members shall

⁷ See UN Charter Art. 1.

⁸ Article 12 of the Covenant allowed states to go to war after exhausting the peaceful means provided by the Covenant to resolve the dispute.

⁹ Oona A. Hathway and Scott J. Shapiro, ‘International law and its transformation through the outlawry of war’ (International Affairs, 2019)

https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.researchgate.net/publication/46460612_The_Transformation_of_International_Law&ved=2ahUKEwjUw7TdkMX9AhUz57slHbqXCg8QFnoECBoQAQ&usg=AOvVaw3n19S2U2oeqv7OAY5r0Lwl

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 is now considered to be part of customary international law and as such is binding upon all states in the world.¹⁰

Nonetheless, the Charter refers to two circumstances in which the prohibition on the use of force does not apply. First, forcible measures may be taken or authorised by the Security Council, acting under Chapter VII of the Charter. Article 39 of the Charter in particular, authorises the Security Council to determine the existence of, and take action to address, any threat to international peace and security. In practice this exception is hardly utilised to override the prohibition on the use of force as provided in article 2(4). This is because the five permanent members of the Security Council with veto powers traditionally have competing interests and hardly ever agree to act under Chapter VII to authorise the use of force.

A second ground for the use of force is the exercise of the right of individual or collective self-defence, as contained in article 51 of the Charter. Article 51 of the Charter provides that, ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations [...]’

Article 51 therefore recognises the inherent right of self-defence under customary international law. However, there is quite a bit of controversy as to the exact extent of the right of self-defence in light of article 51 of the Charter. Some writers believe that states can only rely on article 51 to act in self-defence where an actual armed attack occurs, and that other forms of self-defence are prohibited by article 2 (4) of the Charter. A second and more widely accepted interpretation of article 51 posits that the right to self-defence under the Charter include situations outside of actual armed attack which are guaranteed by customary international law. Indeed, the International Court of Justice in the Nicaragua case¹¹ affirmed that the right of self-defence existed as an inherent right under custom international law as well as under the UN Charter. The court emphasised that:

Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter... it cannot, therefore, be held that article 51 is a provision which ‘subsumes and supervenes’ customary international law.

¹⁰ Shaw (n 2) 1123.

¹¹ ICJ Reports, 1986, pp. 14, 94; 76 ILR, pp. 349, 428.

The traditional customary rules on self-defence is derived from the so-called Caroline case¹² which established that there had to exist "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation,' and that any action taken must be reasonable and proportionate.

Another interesting question is whether the concept of self-defence extends to a response to an attack that is reasonably perceived to be imminent. Because international law and geopolitics are intrinsically intertwined, it is extremely difficult for states to agree on the niceties that constitutes where an attack is imminent as opposed to where it is merely foreseeable. It appears that states generally have a limited right to act in self-defence only in cases where an armed attack is imminent.¹³ It is a matter of evidence as the state in question would have to prove that it acted reasonably based on the weight of information available to it at the relevant time.

Although not expressly mentioned by the UN Charter, a third but highly contentious ground is increasingly being used by states as an exception to article 2(4) prohibition of the use of force. This third exception is dubbed humanitarian intervention and refers to forceful intervention by a third state or states to protect people from the brutality and misdeeds of their own government. In this case, one state uses force in the territory of another state under the banner of protecting the citizens of the latter state from human right violations.¹⁴ The use of force in this manner is neither authorised by the UN Security Council nor is it regarded as a form of self-defence. Consequently, the use of humanitarian intervention as justification for interfering with territorial integrity of a state is opposed by many countries on the grounds that it has no basis in law, and is prone to abuse by powerful states who can use it as a pretext to invade weaker states. Apparently, more is needed to be done to legitimise the use of humanitarian intervention as an exception to the prohibition of the use of force. Clear, precise and generally accepted rules must be formulated to control acts of humanitarian intervention. Until such rules are codified, states should not be allowed to unilaterally resort to the use of force without the permission of the Security Council. Given the volatility of the international system, all actions, especially those encompassing the use of force must have legal validity.

¹² An incident between the United States and United Kingdom in 1837 in which British subjects seized and destroyed a vessel in an American Port over claims that it had been supplying American nationals conducting raids in Canadian territory

¹³ Shaw (n 2) 1139

¹⁴ Saban Kardas 'Humanitarian Intervention: A Conceptual Analysis' (2003) 2 Alternatives: Turkish Journal of International Relations 1

Limitations of International Law in Preventing Armed Conflicts: A History of Non-compliance

The present international law system is founded on the principle of prohibiting armed conflict, especially of an international nature, by encouraging belligerent states to exploit peaceful means of settling disputes. As discussed earlier, article 2(4) of the Charter enjoins states to refrain from the use of force in the conduct of their international relations. Meanwhile, article 33 of the Charter charges parties to a dispute '...the continuance of which is likely to endanger the maintenance of international peace and security' to first of all '...seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

A community reading of the foregoing provisions, in addition to article 92 which established the International Court of Justice, underscore the importance of peace to the international system. But how effective are these provisions in maintaining international peace and security? Historically, international law, by itself, is a highly imperfect tool for regulating the behaviour of states, especially the more powerful states. Thus, when the United States decided to attack Iraq without a mandate from the UN Security Council, there was no way of stopping it. In the same way, it was not possible to enforce the ruling of the International Criminal Court in the case of Nicaragua vs. the USA. At the heart of this futility are the problems of compliance and enforceability. As we mentioned earlier, unlike municipal law, the primary subjects of international law are sovereign states, not individual citizens. This makes it difficult to enforce it where there are instances of non-compliance. The sticky question always is, how to enforce international law and rulings without corroding the sovereignty - a key component of international law - of the erring state?

The present Russia-Ukraine conflict is a perfect illustration of this dilemma and sums up the near futility of international law in preventing armed conflicts. For instance, the UN's International Court of Justice (ICJ) in The Hague on the 16th of March, in a ruling by 13 votes to two, ordered that 'the Russian Federation shall immediately suspend military operations that it commenced on 24 February 2022 in the territory of Ukraine.'¹⁵ More than a year after the start of the war, this ruling has not been obeyed.

But what are the reasons for the present war between Russia and Ukraine? What does Russia hope to achieve with its invasion of Ukraine and how does it all fit into a pattern of non-compliance with

¹⁵ Julian Borger, "UN international court of justice orders Russia to halt invasion of Ukraine" *The Guardian* (Washington, 16 March 2022) <https://www.google.com/amp/s/amp.theguardian.com/world/2022/mar/16/un-international-court-of-justice-orders-russia-to-halt-invasion-of-ukraine> accessed 28 January 2023

international law? Putin has offered several reasons for his invasion of Ukraine. The first and most repeated, is that the war is aimed at arresting the eastward expansion of NATO that has accelerated since after the collapse of the Soviet Union in 1991. Putin has consistently criticised NATO's expansion to areas that were hitherto part of the Soviet Union and has declared NATO's presence in nations on Russia's borders as an act of provocation.¹⁶ The war in Ukraine is therefore framed as a sort of self-defence against NATO's expansion. Another claim for the invasion by Putin is that Ukraine is committing genocide against ethnic Russians and has called the Ukraine government a NAZI regime.¹⁷ None of these claims have been verified by an independent body and many commentators have dismissed them as mere pretexts to invade and seize Ukrainian territory.

The Russian invasion of Ukraine does not align with any of the established exceptions to the international law prohibition of the use of force. It cannot be reasonably claimed that Russia was acting in self defence. So far, Russia has not revealed any evidence showing that it was under the threat of an imminent attack by Ukraine or even NATO. The claim of self defence is therefore flimsy and cannot stand any sustained scrutiny from an independent body. Also, Russia's claim that it is only attempting a 'denazification of Ukraine' fly in the face of logic, particularly when it is considered that Ukraine's President, Volodymyr Zelensky, is Jewish. When all the fluffs and fuzz have been removed what lies underneath is naked misuse of power by one strong state to coerce a smaller one into doing its biddings. At its core, the Russian invasion of Ukraine offends the most sacred norms of international law and politics and should not be allowed to succeed. This is a war Ukraine cannot afford to lose.

A New System of International Politics as a Panacea?

What happens when a state breach, or threatens to breach global peace? In what ways should the international community respond to an unjustified act of aggression by a stronger state against a weaker state? And how can we ensure there are no more outbreaks of senseless wars? All these are questions of enforcement of international law. There are two options open for the enforcement of international law. The first, and more drastic option, is to establish an enforcement arm under the UN. This body, like its municipal counterparts, will ensure compliance with international law by means of force where necessary. This however, is highly improbable and may become counterproductive. It

¹⁶ Kelsey Vlamis, "Why is Russia attacking Ukraine? Here are 5 reasons Putin and others have given for the invasion" *Insider* (New York City, 24 February 2022) <https://www.google.com/amp/s/www.businessinsider.com/why-russia-is-attacking-ukraine-putin-justification-for-invasion-2022-2%3famp> accessed 28 January 2023

¹⁷ *ibid*

may also end up igniting more conflicts than it would help avoid. Also, it is very unlikely as it is, for sovereign states to agree to donate such invasive powers to the UN.

A second, subtler and theoretical option, is to reimagine a new system of international politics where the ultimate goal is not the 'struggle for and use of power', but equal distribution of power based on the understanding of our collective need for peace and security. A new system of international politics where the East need not fear that the expansion of the West will be detrimental to its survival. What is needed is a global system where our collective existence is guaranteed not by the fear of mutual destruction, but by the need for international cooperation in addressing global challenges. In such an ordered system built on trust and cooperation, force will not be necessary in enforcing international law. Sovereign states will comply with international law and rulings not out of fear of sanctions, but because they understand and appreciate the importance of international law to global peace.

Admittedly, it will be a long shot, and may take a long time for states to bridle the urge to struggle for and use power to further their interests, but it is a shot worth taking. The overhauling of international politics from a power centred one to a need based system represents our best shot at attaining true and lasting global peace and it will be foolhardy not to take it.

Conclusion

If there is one thing we should learn from the present Russia-Ukraine war, it is that international politics as presently structured places too much emphasis on power relations and too little on respecting international law and cannot therefore support true global peace. Also, international law by itself is inadequate in preventing the use of force. States, especially the more powerful ones, are never shy of relying on their military might to secure national interests or promote their power in the geopolitical scene. This is despite the existence of clear provisions in international law against the use of force. We have argued that what is needed for an enduring international peace, is a new understanding of international politics that will make it possible to enforce international law without having to resort to force. Again, international law alone cannot prevent global hostilities. We need a new international system hinged on trust and cooperation to bring the world from the brink of hostilities.