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Foreword

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FOREWORD

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On February 24, 2022, the Russian Federation invaded Ukraine. After more than two years, this conflict has caused an uncountable number of victims and more than six million Ukrainian refugees are spread around the world begging for protection and safe harbour. This ongoing conflict and the increasing level of force, the questionable nature of means and methods of warfare used begs the question whether international institutions in general, and International Law in particular, are still effective means "*to maintain international peace and security, and to that end: to take effective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead*." (Article 1 UNC).

It is not without discomfort that scholars of International Law are often questioned about the reality and contemporary value of the Latin maxim *"inter arma enim silent leges"* (Cicero) or the ferocious von Clausewitz when argued that "politics is the womb on which war develops." It is reason to ask: International Law *quo vadis*?

Early generations of theologians and lawyers tried to distinguish legitimate causes of war and the rules that parties to a conflict must observe during military operations. Tis two branches of rules gave place to the distinction between *Jus ad Bellum* (the norms of international law which regulate the possibility to use force by States) and *Jus in Bello* (norms applicable whenever an armed conflict erupts), aiming to find the balance between the right of States to pursue their military operations and the duty to protect civilians and civilian objects from attacks.

In what concerns the sphere of *Jus ad Bellum*, its questions have occupied scholars for centuries. The design of a legal framework establishing limits to the "right to go to war" it is a complex endevour. States, slowly accepted their sovereignty to be limited. As the Permanent Court of International Justice stated that "restriction upon the independence of States cannot . . . be presumed."[1]

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1. S.S. "Lotus" (France/Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7).

States have to manifest their expressed consent to be bound by norms of international law, and it was only with the end of the WW II, and the United Nations Charter ("UNC"), that the prohibition of the use of force became enshrined in Article 2(4) of the UNC. As the article provides:

> *"all members shall 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"*

The customary nature of the prohibition in Article 2(4) is questionable, but so too is the the statement of the ICJ in the *Nicaragua Case* according to which Article 2, Paragraph 4 of the Charter of the United Nations has come to be recognized as *jus cogens.* As the ICJ argued, "this principle is a 'universal norm,' a 'universal international law,' a 'universally recognized principle of international law,' and a 'principle of *jus cogens*.'"[2]

The 1969 Vienna Convention on the Law of Treaties ("1969 VCLT") Article 53 clarifies the concept of *jus cogens* by providing that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The absolute terms in which these norms are described in the 1969 VCLT and the reality of Ukraine's war make us question the validity of the norms enshrined in Article 2(4). There is no question that the invasion of Russia violates the Prohibition on the Use for Force, falling under the category of war and crime of aggression as defined in Resolution 3314 (XXIX) as "the most serious and dangerous form of the illegal use of force" and in Article 8(bis) of the Rome Statute. However, the Russian Federation is not a member of the Rome Statute, and a question necessarily has to be asked: Is there any legal way of holding the Russian Federation accountable? Is the possibility of a "hybrid court" defended by some States the solution on the horizon?

The problems do not emerge only at the level of *Jus ad Bellum* but also from the point of view of *Jus in Bello*. The four 1949 Geneva Conventions and the 1977 Additional Protocols are the fundamental instruments of International Humanitarian Law and one of its fundamental rules provides that "in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited" (Article 35 API). The recent use of autonomous technologies of warfare in Ukraine raises questions regarding the respect for the Principle of Distinction and the rule of proportionality, and questions whether IHL is able to deal with the challenges of new emerging technologies such drones, autonomous weapons systems.

2. Military and Paramilitary Activities in and Against Nicaragua (Nicar v U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 190 (June 27).

Finally, it is impossible not to consider the implications of this conflict from the lens of International Human Rights Law and Refugee Law. The precarious situation of millions of refugees asks the question of what it means to be a refugee and the values of hospitality are recognized in the 1951 Refugee Convention. Looking at the concrete experiences of refugees at the borders and how they can be stripped of their dignity by hosting States cannot leave the scholars and thinkers at rest.

It was in this context that the University of Saint Louis School of Law promoted two different but complementary events in April 2023. The first, *Refugees at Risk to Refugees as an International Risk*, a full day workshop who counted with the Professor James Hathway (University of Michigan) as the keynote speaker, Professor Benedita M. Queiroz (Portuguese Catholic University School of Law – Porto) and Dr. Petra Molnar, Dr. Pedro Rodriguez-Ponga (University of Deusto) and Dr. Rosario Frada (SLU Law Researcher). The second event, *The Legitimacy and Legality of War: from Philosophical Foundations to Emerging Problems*, was a three day symposium in which 12 preeminent scholars had the opportunity to present and discuss their current research: Afonso Seixas-Nunes (SLU-Law) Daragh Murray (Queen Mary University, UK); Gina Heathcote (University of Newcastle, UK); Jean d'Aspremont (University of Manchester, UK and Universite Sciences Po, France); Marco Roscini (University of Westminster, UK); Nicholas Tsagourias (University of Shefield, UK) Nori Katagiri (University of Saint Louis, USA); Rebecca Mignot-Mahdavi (University of Manchester, UK) Russell Buchan (University of Reading, UK); Tom Dannenbaum (Tufts Fletcher School). On the final day, Steven Hill (former NATO Legal Adviser) closed our work by addressing all the academic and civil community, reflecting on the efforts and difficulties that the International community has been faced to gather evidence regarding the crimes committed in the war in Ukraine.

The articles published in this journal reflect the work and quality of many of the presentations made during the two international events organized by SLU Law in 2023.