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The legality of the 2022 Russian invasion of Ukraine in light of Article 2(4) of the UN Charter

On 24 February 2022, Russian president Mr. Vladimir Putin launched a “special military operation” in Ukraine. This article examines the *jus ad bellum* arguments advanced by Mr. Putin to clarify whether and to which extent they are able to justify Russia’s use of force against Ukraine under international law.¹

The first part highlights the main reasons that lead to Russia’s military intervention in Ukraine while the second part deals with the legal questions subsequently followed by the outbreak of the war and examines Russia’s *jus ad bellum* claims in the light of international law.

The Invasion of Ukraine

When Russia invaded Ukraine in the night of 24 February 2022, almost everyone expected the conflict to be over within a couple of weeks with Russia emerging as the victor, replacing the Ukrainian government under the leadership of Wolodymyr Zelenskyy² with a Russian puppet government. But contrary to expectations, the conflict has evolved into a prolonged humanitarian crisis with Russian forces suffering crushing defeats and being currently on retreat.³

Russia’s military intervention aka “*special military operation*”⁴ in Ukraine is probably the most devastating conflict on European soil that the world has seen since the end of the Second World War in 1945. Given Kyiv’s battlefield successes, NATO Secretary General Jens Stoltenberg proclaimed that “*the war is not going to plan [for Russia] and that Putin has utterly failed in his strategic objectives*”⁵. Nonetheless, underestimating Russian military capabilities would be a big mistake. Mr. Putin has made it clear that he is

willing to use everything at his disposal to defend Russia’s territory including the four annexed regions of Ukraine (Donetsk, Kherson, Luhansk and Zaporizhzhia) and its people.

The reasons that lead to the invasion

Ukraine's political situation

One of the main reasons that lead to the outbreak of the armed hostilities between the belligerent parties is of political nature: Ukraine was ruled by the regime in Moscow for most of its existence before gaining independence in 1991.⁷ By the 2000s, Kiev faced a deep political crisis. When pro-Russian-oriented Viktor Yanukovich declared himself the winner of a rigged presidential election in 2004, he sparked mass protests that became later known as the “Orange Revolution.” The Orange Revolution forced a re-election, which Viktor Yanukovich subsequently lost to the western and pro-European-oriented Viktor Yushchenko. Moscow critically followed the political developments in Ukraine and Ukraine’s course towards a stronger relationship with the West, in particular with the United States.⁸

In 2010 Viktor Yanukovich, who in the meantime had become Ukraine’s prime minister, was running for presidency again and ultimately won the election against his arch-rival Yulia Tymoshenko. His probably most notorious move during his presidency was his refusal to sign an agreement with the EU in November 2013 that would have integrated Ukraine more closely with the European Union. Instead, he announced that he would seek dialogue with Moscow and had plans for Ukraine to become part of the Eurasian Customs Union under the auspice of Russia.⁹

¹ Since a full discussion of all international law issues triggered by the invasion would go far beyond the scope of this article, the reader should bear in mind that its main focus is on the prohibition on the use of inter-state force enshrined in Article 2 (4) of the UN Charter.

² Ukraine’s current president.

³ Joseph S. Nye, “What Caused the Ukraine War?,” 2022, accessed 24.11.2022, <https://www.project-syndicate.org/commentary/what-caused-russia-ukraine-war-by-joseph-s-nye-2022-10>

⁴ Emphasis added.

⁵ Camille Gijss, and Lili Bayer, “Ukraine Formally Applies for Fast-Track Nato Membership,” 2022, accessed 24.11.2022, <https://www.politico.eu/article/ukraine-formal-application-join-nato/#:~:text=NATO%20allies%20in%202008%20pledged,question%20of%20Ukraine's%20possible%20membership>

⁶ Steve Mollman, “Putin Vows to Use ‘All Means Available’ to Defend Annexation, Ukraine Intel Warns of ‘Very High’ Nuclear Threat,” 2022, accessed 24.11.2022, <https://fortune.com/2022/09/30/putin-russia-ukraine-annexation-nuclear-weapons-nato-biden/>

⁷ Kubicek, 9-10.

⁸ Ibid.

⁹ Andrew Gardner, “Russia Behind Ukraine U-Turn on EU,” 2013, accessed 5.12.2022, <https://www.politico.eu/article/russia-behind-ukraine-u-turn-on-eu/>

His actions caused the “revolution of dignity” and led to the outbreak of nationwide protests (Euromaidan Protest). After months of brutal clashes between the protesters and the armed forces of the state, Viktor Yanukovich was ousted¹⁰ and replaced by Petro Poroshenko, a pro-West oligarch, who shifted the country again towards the West by signing an association agreement with the European Union.¹¹ The events surrounding the Revolution of Dignity and Ukraine moving away from Russia caused the Kremlin’s outrage. Mr. Putin claimed that the Euromaidan Protest was the work of the US and accused Washington of trying to put a government in Kyiv in place that would be more favorable to the West.

When political turmoil increased in parts of Eastern Ukraine and affected the Crimea Peninsula, Mr. Putin was forced to act. The peninsula was transferred from the Russian Socialist Federal Republic to the Ukrainian Socialist Federal Republic in 1954 to celebrate the 300th anniversary of Russian-Ukrainian unification. Given the fact that Russia and Ukraine were both part of the Soviet Union at that time, the act had only little consequences for former Russia. But with the collapse of the Soviet Union in 1991, which many Russians, including Mr. Putin, view as “*the biggest geopolitical catastrophe of the 20th century*”¹², Russia lost control over Crimea to independent Ukraine.¹³

In 2014, Mr. Putin mobilized Russia’s forces along the Ukrainian border and soon after gave the order to invade Crimea. He justified the military intervention by insisting that Russia had a historic claim to the peninsula and that it must protect ethnic Russians from far-right extremists. After the invasion, he held a referendum on whether Crimea should become part of Russia. The vast majority of voters (95,5%) in Crimea supported the annexation.¹⁴ Consequently, Russia formally incorporated Crimea as two Russian federal subjects (The federal city of Sevastopol and the Republic of Crimea) on 18 March 2014.

It goes without saying that the annexation of Crimea drew broad international condemnation and violated international law. But neither did that bother nor stop the Kremlin. In fact, Russia even started to aid separatists in two breakaway republics in Eastern Ukraine (Donetsk People’s Republic and Luhansk People’s Republic) to fight against Ukrainian forces.¹⁵

NATO expansion

The United States took advantage of Russia’s vulnerability after the collapse of the Soviet Union in 1991 and started to expand its power and influence in Eastern Europe. It reshaped European security architecture by enlarging the North Atlantic Organization. Russia, at that time, could not really stop these developments since it struggled with internal issues and thus did not place a high priority on its foreign policy.

When Vladimir Putin came to power in 2000, Russia changed its tone: after Mr. Putin had strengthened the economic situation of Russia and calmed down internal political disturbances, he tackled Russia’s foreign policy issues and aimed to rebuild Russia’s superiority in the world. He particularly opposed the expansion of NATO and the idea that Ukraine might become part of this alliance in the future, claiming that this would encroach too closely on Russia’s territory and thus threaten its peace and security.¹⁶

During the annual Munich Security Conference in 2007, he criticized the United States for trying to create a unipolar world¹⁷ and underlined that Russia would consider the NATO expansion (especially in parts of the former Soviet Union) as an act of provocation that reduced the level of mutual trust.¹⁸

The relationship between NATO and the West with Russia worsened in 2008. During the Bucharest Summit, the United States tried to gain the support of other NATO countries towards opening NATO membership for Georgia and Ukraine and ratifying Membership Action Plans

¹⁰ BBC News, “Profile: Ukraine’s Ousted President Viktor Yanukovich,” 2014, accessed 25.11.2022, <https://www.bbc.com/news/world-europe-25182830>

¹¹ “The Poroshenko Administration,” 2022, accessed 26.11.2022, <https://www.britannica.com/place/Ukraine/The-crisis-in-Crimea-and-eastern-Ukraine>

¹² Cecilia Capanna, “Putin Vs Gorbachev: Night and Day,” 02.04.2022, accessed 23.11.2022, <https://www.pressenza.com/2022/04/putin-vs-gorbachev-night-and-day/>

¹³ Robert Hunter, “The Ukraine Crisis: Why and What Now?,” *Survival* 64, no. 1 (2022): 7-8.

¹⁴ Jane Clinton, “Why Did Russia Annex Crimea? What Happened When Putin Invaded in 2014 and How Nato Reacted to Annexation,” 2022, accessed 26.11.2022, <https://inews.co.uk/news/world/russia-annex-crimea-why-putin-invaded-2014-what-happened-nato-annexation-explained-1424682>

¹⁵ Bogdan Koszel, “The European Union and the Conflict in Ukraine (2014–2018),” *Środkowoeuropejskie Studia Polityczne*, no. 1 (2020): 80-81.

¹⁶ Sertif Demir, “The 2022 Russia-Ukraine War: Reasons and Impacts,” *Bölgesel Araştırmalar Dergisi* 6 (2022): 19-20.

¹⁷ For Vladimir Putin, unipolar world means “one centre of authority, one centre of force, one centre of decision-making” see Vladimir Putin, “A Speech Delivered at the MSC 2007 by the President Vladimir Putin,” 2007, accessed 23.11.2022, https://is.muni.cz/th/xlqhl/DP_Fillinger_Speeches.pdf

¹⁸ *Ibid.*

(forerunners to a NATO membership) for these countries. Even though the US failed to achieve its goal because other NATO members were too afraid to exacerbate the fragile relationship with Russia by granting membership status or giving security commitments to Georgia or Ukraine, they agreed that Ukraine and Georgia could eventually become NATO members in the future.¹⁹

The controversial Bucharest Summit declaration in 2008 triggered the Kremlin's anger which claimed that NATO would seek to surround Russia's territory and try to weaken Russia's influence in Europe. Thus, Russia wanted to revise the European security architecture. It proposed a new security treaty for Europe in 2009 that would provide "indivisible security" for nations from Vancouver to Vladivostok. One of the most controversial parts of this treaty was the "Equal Security for all" principle which banned security measures that could be perceived as a threat to the security of another member state.²⁰

From a Western point of view, it was clear that the main goal of Russia's proposal was simply to stop the NATO enlargement by granting Moscow a de facto veto right and to decrease the influence of the US in Europe.²¹ The then-Russian president Dmitry Medvedev denied these allegations and instead promised that the treaty would enhance synergies and foster international peace and security.²² He was not able to convince NATO governments with his arguments who in the end rejected Russia's proposal. This decision was seen by Russia as proof of its claim that the West does not consider Russia as an equal partner.²³

After Volodymyr Zelenskyy became the president of Ukraine in 2019 and pushed towards Ukraine becoming a member state of NATO, Mr. Putin repeatedly warned Ukraine and NATO governments that Russia would not tolerate NATO's expansion to Ukraine and that the West was "playing with fire" if it ignored Russia's opinion

on this matter. To underline Russia's position, Vladimir Putin demanded a formal concession from Ukraine and its Western allies in form of a legally binding agreement that would "exclude any further NATO expansion eastward and the deployment of weapons systems that would threaten us [Russia] on the territories of neighboring countries, including Ukraine."²⁴

But NATO rejected Vladimir Putin's demands, claiming that Ukraine is a sovereign country that could decide for itself if it wanted to apply for NATO membership and that Russia would have no veto right to interfere in that process.²⁵ In response, Russia intensified its military movements and mobilized around 130,000 Russian troops near the Ukrainian border to leverage concessions from the West.²⁶

When Mr. Putin realized that the West would never respond to his demands, he saw no other way but to use force to achieve Russia's goals and thus launched a "special military operation" in Ukraine on 24 February 2022.²⁷

Russia's main objectives

It remains contested what Mr. Putin really wants to achieve with his military intervention in Ukraine. Officially, Mr. Putin has announced in his notorious Declaration of War speech on February 24, that the special military operation's main objectives would be the demilitarization and denazification of Ukraine to protect "people who have been subjected to bullying and genocide by the Kiev regime":²⁸

Forced demilitarization in essence means that Ukraine dissolves virtually all its armed forces and put a ceiling on its troop numbers and the frequency of military exercises. Moreover, it would prohibit Ukraine from using its territory for international troop deployments or opening of foreign military bases.²⁹ All things considered, demilitarization would drastically limit Ukraine's

¹⁹ "Bucharest Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Bucharest on 3 April 2008," 2008, accessed 28.11.2022, https://www.nato.int/cps/en/natolive/official_texts_8443.htm

²⁰ Marcin Kaczmarek, "The Russian Proposal for a New European Security System," *Ces Commentary*, no. 11 (2018): 1-3.

²¹ *Ibid.*

²² Patrick Nopens, *A New Security Architecture for Europe? Russian Proposal and Western Reactions* (Egmont Institute, 2009), 2-4.

²³ Hunter 15.

²⁴ Natasha Bertrand, "Biden Faces High-Stakes Test in Call with Putin over Ukraine," 2021, accessed 25.11.2022, <https://www.cnn.com/2021/12/06/politics/joe-biden-vladimir-putin-call-on-ukraine/index.html>

²⁵ Vladimir Isachenkov, and Yuras Karmanau, "Putin to Seek Guarantees on Ukraine as Invasion Fears Grow," 2021, accessed 25.11.2022, <https://apnews.com/article/europe-russia-ukraine-crimea-158c3406821bb207c07a279c5d48fadf>

²⁶ Thomas Kingsley, "New Satellite Images Show Russian Military Activity as '130,000' Troops Now on Ukraine Border," 2022, accessed 06.09.2022, <https://www.independent.co.uk/news/world/europe/russia-ukraine-satellite-images-b2015354.html>

²⁷ *The Economist*, "Russia Invades Ukraine," 2022, accessed 27.11.2022, <https://www.economist.com/europe/2022/02/24/russia-invades-ukraine>

²⁸ *The Spectator*, "Full Text: Putin's Declaration of War on Ukraine," 2022, accessed 06.09.2022, <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>

²⁹ Andreas Umland, "Russia's Inapt Dream to 'Demilitarize' Ukraine," 2022, accessed 28.11.2022, <https://hir.harvard.edu/the-kremlins-loudly-announced-disarmament-of-ukraine-has-like-most-of-its-other-aims-in-eastern-europe-little-chance-to-ever->

military capabilities and impose severe constraints on the country's future security policies. Hence, it is not wrong to claim that the demilitarization of Ukraine constitutes an existential threat to Ukrainian sovereignty.³⁰

The second objective, which is to stop the alleged ongoing genocide on the Russian-speaking minority carried out by Nazis in Ukraine under the auspice of the Ukrainian leadership seems to be born out of Mr. Putin's fantasy. According to an article published by the Russian state-owned news agency RIA Novosti on 3 April 2022,³¹ the term "denazification" refers to the destruction of the Ukrainian state and nation and that a Nazi is someone who self-identifies as Ukrainian and refuses to admit being a Russian.³² Having said that, one can assume that Mr. Putin mainly intends to arrest the civic and political leaders of Ukraine and get them out of power. This particularly includes the current president of Ukraine, Volodymyr Zelensky, whom he considers to be a Neo-Nazi totally ignoring the fact that Mr. Zelensky has a Jewish background and that his grandfather's family was murdered by Nazis during the Holocaust.^{33, 34}

Another objective that Moscow tries to achieve is to stop the NATO expansion which it perceives as a threat to Russia's peace and security. Mr. Putin even goes so far as to say that the NATO expansion to former Soviet Union countries would be "a matter of life and death, a matter of our [Russian] historical future as a people ... a real threat not just to our [Russian] interests, but to the very existence of our state, its sovereignty."³⁵ As noted above, he wants NATO and Ukraine to enter into a legally binding agreement which guarantees Russia that Ukraine would never be allowed to become a member of NATO.

Last but not least, Mr. Putin wants the international community to recognize that not just only the annexed Crimea Peninsula but also the Donetsk and Luhansk People's Republics (known together as the Donbas) as well as Zaporizhzhia and Kherson are part of the Russia Federation.³⁶

The legitimacy of Russia's use of force against Ukraine under the jus ad bellum

As noted in my introduction, many international law issues are related to Russia's invasion of – or special military operation in – Ukraine such as violations of international humanitarian law³⁷, war crimes and crimes against humanity.³⁸ It is far beyond the scope of this article to outline all of them. Instead, I want to focus on the law on the use of force, commonly cited as *jus ad bellum*, and examine the prohibition of the use of inter-state force. The following section deals with the legal justifications advanced by the Kremlin to justify Russia's military intervention in Ukraine and assesses to which extent Russia can justify its use of force under international law.

The prohibition of the use of force

*The non-use of force between sovereign states in their interstate relations is a core value of today's international legal order. The most important provision in that regard is the prohibition on the use of force which is codified in Article 2(4) of the UN Charter and obliges UN member states 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 Purpose of the United Nations."*³⁹

³⁰ Max Fisher, "Putin's Case for War, Annotated," 2022, accessed 30.11.2022, <https://www.nytimes.com/2022/02/24/world/europe/putin-ukraine-speech.html>

³¹ Mariia Kravchenko, "What Should Russia Do with Ukraine? [Translation of a Propaganda Article by a Russian Publication]," 2022, accessed 28.11.2022, https://medium.com/@kravchenko_mm/what-should-russia-do-with-ukraine-translation-of-a-propaganda-article-by-a-russian-journalist-a3e92e3cb64

³² Snyder Timothy, "Russia's Genocide Handbook," 2022, accessed 27.11.2022, <https://snyder.substack.com/p/russian-genocide-handbook?s=r>

³³ Accusing the Ukrainian president of being a Nazi even though his father was Jew and some of his family members were killed by the Nazis is absurd. However, in the view of Sergey Lavrov, the Russian Foreign Minister, "the greatest antisemites are ... the Jews" and "Adolf Hitler also had Jewish blood" see John Kunza, "No, Hitler Did Not Have 'Jewish Blood,' Despite Russia Saying So," 2022, accessed 27.11.2022, <https://jewishunpacked.com/no-hitler-did-not-have-jewish-blood-despite-russia-saying-so/>

³⁴ Timothy Snyder, "'Genocide' and Genocide. How Putin's Atrocity Talk Leads to Atrocities," 2022, accessed 1.12.2022, <https://www.iwm.at/blog/genocide>

³⁵ Al Jazeera Staff, "No Other Option': Excerpts of Putin's Speech Declaring War," 2022, accessed 29.11.2022, <https://www.aljazeera.com/news/2022/2/24/putins-speech-declaring-war-on-ukraine-translated-excerpts>

³⁶ Russia officially annexed these regions on the 30 September 2022 see Patricia Claus, "The History of Donbas' Donetsk and Luhansk Regions Annexed by Russia," 2022, accessed 27.11.2022, <https://greekreporter.com/2022/09/30/history-donbas-donetsk-luhansk/>

³⁷ Lise Morjé Howard, "A Look at the Laws of War – and How Russia Is Violating Them," 2022, accessed 28.11.2022, <https://www.usip.org/publications/2022/09/look-laws-war-and-how-russia-violating-them>, Marko Milanovic, "Three Posts on Articles of War on Current IHL Issues Regarding Russia and Ukraine," 2022, accessed 25.11.2022, <https://www.ejiltalk.org/three-posts-on-articles-of-war-on-current-ihl-issues-regarding-russia-and-ukraine/>

³⁸ International Criminal Court, "Statement of ICC Prosecutor, Karim A.A. Khan Qc, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation," 2022, accessed 27.11.2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>

³⁹ Charter of the United Nations (1945) 1 UNTS XVI (UN Charter) Article 2 (4), available at <https://www.un.org/en/about-us/un-charter/full-text>.

It is widely agreed that the prohibition of the use of force is not just a norm of treaty law but also constitutes a norm of customary international law.⁴⁰ Moreover, the prohibition is considered to have *peremptory* character⁴¹, meaning that there is no way for states to derogate from it (*jus cogens*).⁴²

It is uncontested that Russia's military offensive in Ukraine constitutes use of force in the sense of Article 2(4) of the UN Charter and thus a *prima facie* breach of international law. It almost ticks every box of the UN General Assembly's Definition of Aggression: the occupation of Ukraine's territory (Art. 3(b)), the blockade of the Sea of Azov⁴³ and the port of Mariupol (Art. 3(c)), the attack by Russian armed forces against the land, sea or air forces or marine and air fleets of Ukraine (Art. 3(e)) and the use of mercenaries⁴⁴, such as fighters from the notorious "Wagner Group", in support of Russian armed forces (Art 3(g)).⁴⁵

Consequently, if viewed in isolation, Russia's use of force against Ukraine constitutes an internationally wrongful act since⁴⁶

1. Russia's President gave the order for the attack and Russian armed forces are taking part in the hostilities meaning that the conduct in question is attributable to Russia which is a state under international law;⁴⁷
2. Russia's invasion of Ukraine comprises a breach of Russia's international obligation to refrain in its international relation from the use of force enshrined in Article 2(4) UN Charter.

Consequently, Russia would be liable for any direct loss, damage or injury suffered by Ukraine and its nationals. It would have to re-establish the situation that would have prevailed if Mr. Putin had not given the order to invade Ukraine. Likewise, other states would be obliged to abstain from recognizing the territorial changes created by the invasion nor support Russia's military intervention in Ukraine.⁴⁸

Exceptions to the prohibition of the use of force

Whether Russia actually violates the *jus ad bellum* and thus can be held accountable for its military assault in Ukraine must be assessed in light of the exceptions to the prohibition on the use of force. By and large, there exist three exceptions in universally binding treaties (right to self-defence⁴⁹, measures under the law of the sea⁵⁰ and the use of force by the Security Council under Chapter VII in case of a "threat to peace, breach of peace and act of aggression"⁵¹) and two (controversial) exceptions as unwritten norms of international customary law (protection of nationals abroad and humanitarian intervention). Given the fact, that the International Court of Justice (thereinafter ICJ) "*is not entitled to ascribe to states' legal view which they do not themselves formulate*"⁵² I will only outline and evaluate the legal justifications given by the Kremlin for its military intervention in Ukraine, which include on the one hand (individual as well as collective) self-defence pursuant to Article 51 UN Charter⁵³ and on the other hand the protection of nationals abroad and the humanitarian intervention doctrine.⁵⁴

⁴⁰ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) [Jurisdiction and Admissibility]*, para. 73; *Military and Paramilitary Activities in and against Nicaragua [Merits]* paras 187-90; *Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory]* para.87.

⁴¹ *Emphasis added.*

⁴² See *Military and Paramilitary Activities in and against Nicaragua [Merits]* ICJ Rep 151, 153; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Separate Opinion of Judge Elaraby]* ICJ Rep 246, 254.

⁴³ Alexander Lott, "Russia's Blockade in the Sea of Azov: A Call for Relief Shipments for Mariupol," 2022, accessed 28.11.2022, <https://www.ejiltalk.org/russias-blockade-in-the-sea-of-azov-a-call-for-relief-shipments-for-mariupol/>

⁴⁴ Razeq Hanan, and Ilya Barabanov, "War in Ukraine: How Russia Is Recruiting Mercenaries," 2022, accessed 28.11.2022, <https://www.bbc.com/news/world-europe-60711211>

⁴⁵ see UNGA Res 3314 (XXIX) UN Doc A/Res/3314 (14 December 1974).

⁴⁶ *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1*, available at: <https://www.refworld.org/docid/3ddb8f804.html>

⁴⁷ Art 4 and Art 7 *idem*.

⁴⁸ Dina Shelton, "Reparations," *Max Planck encyclopedia of public international law* (2015).

⁴⁹ Art 51 UN Charter (n 53).

⁵⁰ There exist certain rules of the law of the sea that grants states a right to interfere with aircrafts or ships under the flag of another state of military or non-commercial character above the high sea. For example, the right of boarding (Art 110 UN Convention on the Law of the Sea), the right to seize pirate ships (Art 105 UN Convention on the Law of the sea), and the right of hot pursuit (Art 111 UN Convention on the Law of the Sea). These rules of the law of the sea would be ineffective if states were not allowed to use armed force. Hence, it is generally accepted that the law of the sea contains exceptions to the prohibition of the use of force. This view was indirectly confirmed by the International Tribunal for the Law of the Sea which concluded that "international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law" see *Saint Vincent and Grenadines v Guinea [Merits]* ITLOS Reports 10, para. 155.

⁵¹ Art 48 UN Charter (n 52).

⁵² See *Military and Paramilitary Activities in and against Nicaragua [Judgment]* para 266.

⁵³ Marko Milanovic, "What Is Russia's Legal Justification for Using Force against Ukraine?," 2022, accessed 06.09.2022, <https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/>

⁵⁴ *Ibid.*

Right to Self-defence (Art 51 UN Charter)

Mr. Putin's is off the opinion that Russia's use of force against Ukraine would be in accordance with Article 51 of the UN Charter and therefore does not violate the prohibition on the use of force.⁵⁵ Article 51 of the UN Charter refers to the inherent right of (individual or collective) self-defence and allows states to use force if an armed attack occurs until "the Security Council has taken measures necessary to maintain international peace and security".⁵⁶

First, it shall be born in mind that it is not fully up to a state to exercise the right of self-defence and that Art 51 UN Charter does not justify every use of force. To clarify: any act of self-defence requires an armed attack as a prerequisite⁵⁷ and is only allowed to be directed against the state to which the armed attack is attributable.⁵⁸ Likewise, the act of self-defence must conform to the conditions of proportionality and necessity. In the literature, the term "proportionality" is generally understood to mean that the act of self-defence shall not exceed the level of intensity which is required to abolish or neutralize the armed attack whereas "necessity" means that the dispute cannot be solved by other peaceful means or methods.⁶⁰

Second, it has to be underscored that Art 51 UN Charter encompasses two forms of self-defence which are *individual*⁶¹ self-defence and *collective*⁶² self-defence. The *ad bellum* arguments given by Mr. Putin refer to both of them. That being said, I think it is useful for the reader to outline his arguments in turn since individual self-defence and collective self-defence are, albeit interrelated, conceptually distinct.

Evaluation of Russia's right to individual self-defence:

Russian officials view the NATO eastward expansion as an existential threat to Russia and its sovereignty.⁶³ As highlighted above, self-defence can only be exercised if an armed attack⁶⁴ had occurred which raises the question of whether the NATO expansion qualifies as such. Given the fact that NATO is a defensive organization and has never used force against Russia prior to the invasion, I think the answer is no.⁶⁵ Russian president Mr. Putin is well aware of this fact and thus does not argue that an armed attack occurred but is *temporally imminent*⁶⁶ and that Russia faces *future threats*⁶⁷ from NATO. Here, Mr. Putin is trying to invoke the right of "anticipatory self-defence" which means that a state is entitled to use force in self-defence if an armed attack is imminent. That is because it would make no sense if the state would have to wait for the "hammer to fall" before it is allowed to use force to defend itself. Mr. Putin anticipatory self-defence argument however has no coherent basis: neither could he provide any evidence for NATO's alleged intention to launch an armed attack against Russia in the near future⁶⁹ nor prove that the West is financing biological weapons programs in Ukraine that would pose an imminent threat to Russia's security.⁷⁰ In fact, NATO had deployed only limited personal and military equipment near Russian territory prior to the outbreak of the war because it was not interested in triggering a direct military confrontation with Russia.⁷¹

Likewise, Mr. Putin's underlying argument that Russia's use of force against Ukraine was lawful on the ground that Russia has the right to eliminate a *non-imminent* NATO threat that may occur at some point in the future, is invalid as

⁵⁵ The exact wording is as follows "... in accordance with Article 51 of Part 7 of the UN Charter, with the sanction of the Federation Council of Russia and in pursuance of the treaties of friendship and mutual assistance ratified by the Federal Assembly on 22 February this year with the Donetsk People's Republic and the Luhansk People's Republic, I decided to conduct a special military operation" see Mr. Putin declaration of war speech (n 41).

⁵⁶ Article 51 UN Charter (n 53).

⁵⁷ See *Military and Paramilitary Activities in and against Nicaragua [Merits]* paras 195 and 211.

⁵⁸ See *Armed Activities on the Territory of the Congo [Merits]* para 146.

⁵⁹ See *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* para 41; *Military and Paramilitary Activities in and against Nicaragua [Merits]* paras 194 and 237.

⁶⁰ V Upeniec, *Conditions for the Lawful Exercise of the Right of Self-Defence in International Law*, vol. 40, SHS Web of Conferences (EDP Sciences, 2018).

⁶¹ Emphasis added.

⁶² Emphasis added.

⁶³ See Mr. Putin declaration of war speech (n 41)

⁶⁴ Art 51 UN Charter (n 53).

⁶⁵ Zofia Stemplowska, "Nato Enlargement Is Not to Blame for Russia's War in Ukraine," 2022, accessed 30.11.2022, <https://blogs.lse.ac.uk/europpblog/2022/04/27/nato-enlargement-is-not-to-blame-for-russias-war-in-ukraine/>

⁶⁶ Emphasis added.

⁶⁷ Emphasis added.

⁶⁸ Tom Ruys, 'Armed Attack' and Article 51 of the Un Charter: Evolutions in Customary Law and Practice (Cambridge University Press, 2010), 330-42.

⁶⁹ Michael Schmitt, "Russia's Special Military Operation and the (Claimed) Right of Self-Defense," 2022, accessed 30.11.2022, <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>

⁷⁰ Olga Robinson, Shayan Sardarizadeh, and Jake Horton, "Ukraine War: Fact-Checking Russia's Biological Weapons Claims," 2022, accessed 30.11.2022, <https://www.bbc.com/news/60711705>

⁷¹ Schmitt, "Russia's Special Military Operation" (n 83).

well.⁷³ Mr. Putin is referring to the doctrine of “pre-emptive self-defence” which has found – other than the use of force against an imminent threat – no support in the field of international law;⁷⁴ not in 2002 when former U.S. President Georg W Bush used preemptive self-defence as a legal justification for the invasion of Iraq nor today when Mr. Putin tries to justify Russia’s invasion of Ukraine through preemptive self-defence.

The arguments that invalidate Mr. Putin’s justification of Russia’s use of force against Ukraine on the ground of an allegedly imminent/non-imminent threat posed by NATO also refutes Russia’s argument that Russia would face “a permanent threat from the territory of today’s Ukraine” and thus had “been left no other option to protect Russia” than the use of force. That is because there has been found no credible evidence that the Ukrainian government is planning to launch a military attack against Russia in the near future.⁷⁵ Hence, Mr. Putin’s reference to Article 51 and Russia’s use of force as a response to a threat posed by Ukraine to Russia are irrational.

Next, let us briefly elaborate on Russia’s annexation of the Ukrainian regions Luhansk, Zaporizhzhia, Donetsk and Kherson on 30 September 2022.⁷⁶ The international community widely condemned the annexation and has not recognized this action in view of its violation of international law.⁷⁷ As the occupying power, Russia was not only obliged to ensure safety and public order under International Humanitarian Law/Law of armed conflict but also to respect Ukrainian domestic law. Having said that, Russia was only allowed to exercise authority but no sovereignty over the occupied regions.⁷⁸ Thus, the

sham referenda in the occupied regions through which Russia acquired sovereignty over them clearly violates international law. Consequently, they have no legal effects,⁷⁹ meaning that Zaporizhzhia, Donetsk, Luhansk and Kherson remain part of Ukraine and that Russia cannot justify its use of force and its claim that it aims to defend Russian land against Ukrainian forces who try to recapture the occupied regions because they are not Russian land but Ukrainian land.

Evaluation of Russia’s right to collective self-defence:

First, it shall be borne in mind that the requirements of individual self-defence (armed attack, proportionality and necessity) also apply to collective self-defence. In addition to that, collective self-defence requires that the *government* of the victim state *requests*⁸² military support and allows another state to intervene on its behalf.

On 21 February 2022, Russia recognized the Ukrainian regions of Luhansk and Donetsk as sovereign states, namely as the “Luhansk People’s Republic” and the “Donetsk People’s Republic”. These regions then requested military aid from Russia to face “the aggression of the Ukrainian armed forces”.⁸³

Russia’s recognition of Luhansk and Donetsk as sovereign states (which it later annexed anyway) was not only a “violation of the territorial integrity and sovereignty of Ukraine”⁸⁴ but also a grievous breach of international law and thus widely condemned by the rest of the World.⁸⁵ Russia’s recognition did not change anything in reality,

⁷³ He claims that if Russia would continue to permit NATO’s eastward expansion, it would create “an ever mounting and totally unacceptable threat for Russia” see Mr. Putin’s declaration of war speech (n 41).

⁷⁴ Joe Boyle, “Making Sense of Self-Defence in the War on Terror,” *Journal on the Use of Force and International Law* 1, no. 1 (2014): 62-65.

⁷⁵ It is obvious that it would make no sense for Ukraine to attack Russia given the fact that the number of Russian armed forces and the country’s military capacity are by far larger and stronger than Ukraine’s. See Angela Dewan, “Ukraine and Russia’s Militaries Are David and Goliath. Here’s How They Compare,” 2022, accessed 30.11.2022, <https://edition.cnn.com/2022/02/25/europe/russia-ukraine-military-comparison-intl/index.html>

⁷⁶ thedailystar, “Russia Annexes Four Regions of Ukraine,” 2022, accessed 30.11.2022, <https://www.thedailystar.net/news/world/2022-russian-invasion-ukraine/news/russia-annexes-four-regions-ukraine-3132076>

⁷⁷ aljazeera, “West Condemns Russia’s ‘Illegal’ Annexation of Ukraine Provinces,” 2022, accessed 30.11.2022, <https://www.aljazeera.com/news/2022/9/30/west-condemns-russia-illegal-annexation-of-ukrainian-provinces>

⁷⁸ Prabhath Ranjan, and Aman Kumar, “Russia’s Continued Defiance of International Law,” 2022, accessed 30.11.2022, <https://www.thehindu.com/opinion/lead/russias-continued-defiance-of-international-law/article65993523.ece>

⁷⁹ rulac, “Referendums on Joining Russia in Luhansk, Donetsk, Zaporizhzhia and Kherson: What Impact on Conflict,” 2022, accessed 30.11.2022, <https://www.rulac.org/news/referendums-on-joining-russia-in-luhansk-donetsk-zaporizhzhia-and-kherson-w>

⁸⁰ Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2017), 320-21.

⁸¹ Emphasis added.

⁸² Emphasis added.

⁸³ Deutsche Welle, “Russia Says Donbas Separatists Ask Putin for Military Help,” 2022, accessed 2.12.2022, <https://www.dw.com/en/russia-says-donbas-separatists-ask-putin-for-military-support/a-60893224>

⁸⁴ The Moscow Times, “Global Reactions to Russia’s Recognition of East Ukraine Separatists,” 2022, accessed 1.12.2022, <https://www.themoscowtimes.com/2022/02/22/on-this-day-2002-tracing-russias-historical-ideologies-a76287>

⁸⁵ UNGA-Res ES-11/1, UN Doc A/RES/ES-11/1 (2.03.2022) para 5.

meaning that Donetsk and Luhansk are still considered to be part of Ukraine under international law.⁸⁶

However, even if we assume that Luhansk and Donetsk would have gained independence through Russia's recognition (which they have not) and thus could make a recognized collective self-defence request, Russia's use of force against Ukraine would still be illegal given the fact that the hostilities between Ukrainian forces and the pro-Russian groups in the Donbas region prior to 24 February 2022 did not amount to an "armed attack"⁸⁷ under international law. Thus, neither the government of the Luhansk People's Republic nor the government of the Donbas People's Republic could invoke Article 51 of the UN Charter.

Furthermore, Mr. Putin claims that the Ukrainian government perpetrates genocide against the Russian-speaking minority in the Donbas region and thus Russia is entitled to save its people. This argument fails to justify Russia's use of force as well since Mr. Putin could provide no credible evidence for his claim. I flag this since it is important to know that genocide could potentially qualify as an armed attack and thus trigger Article 51 of the UN Charter. But as has been noted above, this was clearly not the case.

Finally, I want to briefly touch upon Russia's argument of anticipatory collective self-defence: on 9 March 2022, the Russian Ministry of Defence twittered that Russian forces had found secret documents in captured parts of the Donbas region which confirm that the Ukrainian government was preparing a large-scale military operation against the pro-Russian rebels in Luhansk and Donetsk,⁸⁸ indicating that these regions faced an imminent threat and thus Russia had the right to defend them.

Here, Russia is trying to make the argument that a state has the right to use force against an unknown threat. This approach by Russia totally ignores the fact that anticipatory self-defence requires the threat to be at least demonstrable and specific. A speculative threat, however, is not enough.⁸⁹

Protection of Nationals

In his Declaration of War speech, Mr. Putin claimed that Russia has the right to protect its people in Ukraine (to be more precise Russian passport holders) from threats posed by the Ukrainian government.⁹⁰ He is thereby referring to the doctrine of "the protection of nationals abroad" which suggests that the use of force for the protection of nationals abroad does not infringe Article 2(4) of the UN Charter since it does not weaken the "political independence or territorial integrity" of the other state. Supporters of this doctrine believe that the use of force to protect nationals would constitute a legitimate act of self-defence since nationals are an essential attribute of a state and thus an attack on them would represent an attack against the state and ultimately trigger Art. 51 of the UN Charter.⁹¹

In any case, however, the doctrine of "the protection of nationals" does only legitimize the use of force if it is strictly confined to the protection of nationals abroad and not excessive. The latter means that the use of force has to comply to the parameters of proportionality and necessity. Furthermore, the intervention must be *ultima ratio*, meaning that there is an imminent threat of injury to nationals and that the territorial sovereignty is unable or unwilling to protect them.⁹²

Whether the use of force for the protection of nationals abroad is lawful under international law is the subject of much debate. In particular, there is no consensus on whether an attack on nationals amounts to an attack on the state itself, triggering Article 51 UN Charter.

Nonetheless, if we assume the credibility of this doctrine, one has to recall that Russia fails to deliver sufficient evidence for human rights violations against its citizens in Ukraine which amounts to an armed attack against Russia. Instead, the Kremlin tried to manufacture a population of Russian nationals within Ukraine by distributing hundreds of thousands of Russian passports to Ukrainians in eastern Ukraine prior to the start of the invasion in order to strengthen its "we need to protect our people from a genocide" argument.⁹³

⁸⁶ Samuel Pitchford, "Russian Recognition of Donetsk and Luhansk: Legal Analysis," 2022, accessed 1.12.2022, <https://www.humanrightspulse.com/mastercontentblog/russian-recognition-of-donetsk-and-luhansk-legal-analysis>

⁸⁷ Emphasis added.

⁸⁸ b92.net, "Secret Documents 'Surfaced': Ukraine Designed Military Operation in Donbas for March," 2022.12.2022, https://www.b92.net/eng/news/world.php?yyyy=2022&mm=03&dd=09&nav_id=113234

⁸⁹ James A Green, Christian Henderson, and Tom Ruys, "Russia's Attack on Ukraine and the Jus Ad Bellum," *Journal on the Use of Force and International Law* 9, no. 1 (2022): 20-21.

⁹⁰ "they [Ukraine] did not leave us any other option for defending ... our people" see Mr. Putin's Declaration of war speech (n 41).

⁹¹ Tom Ruys, "The 'Protection of Nationals' Doctrine Revisited," *Journal of Conflict & Security Law* 13, no. 2 (2008): 235-36.

⁹² C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International law" *Receuil des Courts* 81 (1952): 467.

⁹³ Fabian Burkhardt, "Passports as Pretext: How Russia's Invasion of Ukraine Could Start", 2022, accessed 1.12.2022, <https://warontherocks.com/2022/02/passports-as-pretext-how-russias-war-on-ukraine-could-start/>

And even if we consider that Russian nationals living in Ukraine face a genuine threat to their lives in Ukraine (which they do not), Russia's offensive military operation by far fails to satisfy the requirements of proportionality and necessity since the use of force is neither confined to regions of Ukraine where Russian citizens are allegedly genuinely at risk nor is the military operation's only objective to protect Russia's nationals.⁹⁴

Humanitarian Intervention

Another argument put forward by Russia's president to justify Russia's military intervention in Ukraine is that Russia would seek to "protect people who have been subjected to bullying and genocide by the Kiev regime"⁹⁵ This argument refers to the doctrine of humanitarian intervention, namely the right of a state to use force against another state to protect the population from human rights violations within the territory of that other state.⁹⁶

Whether the use of force to protect nationals and non-nationals alike from violations of human rights is lawful under international law is, like the protection of the national doctrine, controversial. In fact, many legal scholars deny it on the ground that the argument could easily be abused by states and that any intervention for humanitarian purposes has to be authorized by the UN Security Council.⁹⁷

Very interestingly, when NATO intervened in the Yugoslavia-Kosovo conflict in March 1999, Russia was against this controversial doctrine⁹⁸ and the former Russian president Boris Yeltsin even called NATO's military intervention "an open act of aggression ... that threatened international law and order".⁹⁹ Today, for unknown reasons, Russia's opinion seems to have shifted. Nonetheless, this does not change the fact that, up to now, Russia could provide no evidence for any large-scale human rights violations caused by the Ukrainian government, making the argument baseless. Moreover, given the geographical scale and intensity of Russia's use of force, Russia's special military operation cannot be labeled as a

humanitarian intervention since it neither respects the principle of proportionality nor the principle of necessity.¹⁰⁰

Conclusion

Russia's war goals have changed since the start of the invasion on February 24, 2022. Russian president Vladimir Putin originally claimed that Russia is not interested in occupying Ukraine and that the focus of the invasion would lie on the liberation of the Donbas region in eastern Ukraine. Russian Foreign Minister Sergei Lavrov, however, has openly said that Russia's goals have changed due to the developments on the battlefield, claiming that Russia is now forced to push even deeper into Ukrainian territory because of the continued military support of the West to Ukraine.¹⁰¹ I assume that it is very likely that Russian officials might continue to change their goals over the course of the conflict which is far from being over yet.

My research has demonstrated that Mr. Putin's *jus ad bellum* arguments fail to justify any of Russia's objectives. Hence Russia's invasion of – or "special military operation" in – Ukraine constitutes a violation of international law. This is certainly true for the prohibition on the use of force, but also for several other branches of international law, such as *jus in bello*, which have not been discussed in my article.

The findings of my research also question the efficiency of legal norms of international law such as the prohibition on the use of force and whether the system on which the UN is built upon, in particular the veto right of the permanent member states of the UN Security Council (France, the United Kingdom, China, the United States and Russia), can really "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."¹⁰² Nonetheless, given the fact that not even Russia has denounced the prohibition of the use of force *in toto*¹⁰³ and that the UN always offers a place for debate and discourse for the international com-

⁹⁴ Mr. Putin's declaration of war speech (n 41).

⁹⁵ *Ibid.*

⁹⁶ Oliver Dörr, "Use of Force, Prohibition Of," *Max Planck Encyclopedias of International Law* (2019).

⁹⁷ *Ibid.*

⁹⁸ Martin A Smith, and Paul Latawski, *The Kosovo Crisis and the Evolution of a Post-Cold War European Security* (Manchester University Press, 2003), 14.

⁹⁹ Statement by the Russian President, 24 March 1999, *Kosovo Documents*, p. 725.

¹⁰⁰ Green, Henderson, and Ruys 23-27.

¹⁰¹ Mark Trevelyan, "Russia Declares Expanded War Goals Beyond Ukraine's Donbas," 2022, accessed 27.11.2022, <https://www.reuters.com/world/europe/lavrov-says-russias-objectives-ukraine-now-go-beyond-donbas-2022-07-20/>

¹⁰² Preamble of the United Nation Charter (n 53).

¹⁰³ *Emphasis added.*

munity, I don't think that one should completely deny the efficiency of international law. However, there are several important reforms which need to be made to ensure a functioning global and multilateral international order in the days to come. Thus, the 2022 Ukraine-Russian crisis should be seen as an incentive for policymakers and legal scholars to get down to work without delay and find solutions to the threats that the international community order faces today.

WILLIAM OBIAGWU

WILLIAM OBIAGWU STUDIERT RECHTSWISSENSCHAFTEN AN DER UNIVERSITÄT WIEN. SEINE FORSCHUNGSSCHWERPUNKTE LIEGEN IM VÖLKER- UND EUROPARECHT. EINSCHLÄGIGE ERFAHRUNGEN IN DIESEN RECHTSGEBIETEN KONNTE ER DURCH AUSLANDSAUFENTHALTE (UNTER ANDEREM IN LOS ANGELES, NEW YORK UND BRÜSSEL) SOWIE DURCH SEINE TÄTIGKEIT AM INSTITUT FÜR EUROPARECHT, INTERNATIONALES RECHT UND RECHTSVERGLEICHUNG DER UNIVERSITÄT WIEN SAMMELN. ER IST PRO SCIENTIA STIPENDIAT SEIT 2023.