

Ukraine Settlement Project

BACKGROUND PAPER: THE IMPLICATIONS OF THE USE OF FORCE AGAINST UKRAINE FOR A POLITICAL SETTLEMENT

This paper establishes the legal framework for analysis of the invasion of Ukraine by the Russian Federation. This legal framework consists of the most fundamental rules of international law which had been hitherto unchallenged.

Even states acting in violation of these rules would generally not question these core rules of the international system. Rather, they would either deny their conduct (as the Russian Federation did in 2014), or they would invoke the accepted legal justifications that form part of the prohibition of the use of force. This would mainly be the right of self-defence or, as in the case of the US-led invasion of Iraq, an argument based on collective security mandate granted by the UN Security Council.

In applying the core rules of the international legal system to the invasion, this paper sets out to establish the legal framework for the attempts to negotiate a settlement to the conflict. The special, high order legal character of the rules involved, including the principle that prohibits the acquisition of territory by force under any circumstance, rather limits the space for a negotiated settlement.

However, as the further papers in this series demonstrate, practical ways can be found to accommodate the interests of the sides, without disturbing the principal that territory cannot be acquired forcibly.

Marc Weller is Professor of International Law and International Constitutional Studies in the University of Cambridge, the former Director of the Lauterpacht Centre for International Law and of the European Centre for Minority Issues, a former United Nations Senior Mediation Expert and a Barrister (Middle Temple) at Doughty Street Chambers. He served as advisor in a large number of international peace negotiations. He is the co-editor of International Law and Peace Settlements, Cambridge University Press, 2021. The views expressed are his own alone.

I. UKRAINE

A. Background

Ukraine occupies a territory of 603,000 square kilometres and is bordered by the Russian Federation, Belarus, Poland, Slovenia, Hungary, Romania and Moldova. It has a population of about 44.5 million. 77.8 per cent are ethnic Ukrainian, 17.3 per cent ethnic Russians (or Russian-speakers), with smaller groups of Belarusians, Moldovans, Crimean Tatars and others. The proportion of Russian-speakers in parts of eastern Ukraine is considerably larger than in the rest of the country (see below).

During the post-World War II era, Ukraine and Belarus held separate UN membership. However, this was a device to add to the weight of the otherwise isolated USSR in the UN General Assembly. It did not really suggest that the two entities were anything other than constituent republics of the USSR. Still, according to Articles 71 and 72 of the Soviet

Constitution, they were formally recognized as self-determination entities complete with a full and express right to secession.

B. Dissolution of the USSR and Recognition of Ukraine and her Territories

When the USSR dissolved in 1991, Belarus, the Russian Federation and Ukraine concluded the Minsk Agreement of 8 December 1991. In Article 5 of the Agreement establishing the Commonwealth of Independent States, the parties ‘recognize and respect one another’s territorial integrity and the inviolability of existing borders within the Commonwealth.’

In the Alma Ata Declaration of 21 December 1991, which effectively ended the Soviet Union, the heads of state of the eleven successor states of the USSR, including the Russian Federation and the Ukraine, similarly confirmed the respect of each other’s territorial integrity and the inviolability of existing borders.

A further *Agreement on the Councils of Heads of State and Government* of the newly established Commonwealth of Independent States of 30 December 1991 confirmed the respect for non-interference in internal affairs, the renunciation of the use of force and the threat of force, territorial integrity and the inviolability of existing frontiers as operating principles within the Commonwealth of Independent States.

When the Ukraine acceded to the Treaty on the Non-Proliferation of Nuclear Weapons and gave up the nuclear arsenal inherited on its territory from the Soviet Union, it concluded a memorandum on security assurances with the Russian Federation, the USA and the United Kingdom—the Budapest Memorandum of 1994. In it, the three nuclear powers confirmed their respect for the ‘independence and sovereignty and the existing borders of Ukraine.’ Moreover, they reaffirmed:

... their obligation to refrain from the threat or use of force against the territorial integrity or political independence of the Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations; ...

They also reaffirmed their commitment to ‘refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the right inherent in its sovereignty and thus to secure advantages of any kind.’ The Memorandum is a formal, legally binding treaty.

[UNTS Vol 3007, p. 167.

[https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52241.pdf.](https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52241.pdf)]

C. The Maidan Rising

Despite these pledges, the Russian Federation mounted covert military operations against the Donbas region of Ukraine and Crimea and Sevastopol in the wake of the Maidan Revolution of February 2014. The revolution was itself, at least in part, sparked by the intervention of the Russian Federation in the internal affairs and foreign affairs choices of Ukraine.

Under pressure from the Russian Federation, in 2013, Moscow-friendly President Viktor Yanukovich decided to abort the process of Ukrainian EU integration that was then well under way. Instead of signing a EU agreement on free trade and association that had been approved overwhelmingly by the parliament of Ukraine, he announced that Ukraine would integrate with the Eurasian Economic Union dominated by the Russian Federation. This led to widespread protests that became known as the Euro-Maidan rising. The demonstrations were suppressed with considerable violence.

The situation escalated in January and February of 2014, leading to the killing of over 100 protesters by police and special forces. As protesters started storming government buildings in Kyiv and marched onto the parliament, on 21 February 2014, the government and opposition reached an agreement on an interim government, constitutional reforms and early elections. In particular, it was agreed that the previous constitution of 2004 would be re-instituted.

The day after the agreement was concluded, police withdrew from the positions they had previously held, effectively ceding control to the opposition. In the wake of further protests, President Yanukovic fled, first to eastern Ukraine and then to the Russian Federation. The Ukrainian parliament decided by a majority of 358 out of 450 members that he had deserted his post and removed him from office. The lawfulness of that procedure, adopted *ad hoc* and instead of the more lengthy impeachment procedure foreseen in the constitution, was contested. Later that year, the issue was resolved when Petro Poroshenko was elected President in early elections.

The assertion that a counter-constitutional coup had taken place aiming to disenfranchise the population is difficult to maintain. After all, at the time of the removal of the President, both he and the opposition had already agreed on a settlement that provided for the suspension of the constitution and an alternative interim government. The existing constitution was in abeyance, reference being made to the previous constitution. As the constitutional situation was in flux, it would be difficult to speak of a counter-constitutional coup, all the more so as the action that was taken was overwhelmingly backed by a very large majority of elected representatives.

In the Kosovo Advisory Opinion, the Court found that the members of the Kosovo Assembly, or parliament, were acting as representatives of the people of Kosovo when declaring independence. They were not acting as the institution of the parliament, stepping outside of the existing legal framework, and hence were not constrained by the constitutional framework in force at the time. '[T]hey were not bound by the frame-work and powers and responsibilities established to govern the conduct' of the Assembly according to the constitutional instrument. [Kosovo AO, ICJ Reports 2010, p 403.] The same rationale would apply in this instance, where government and opposition, with the backing of the overwhelming majority of elected representatives, had arranged for an irregular, interim constitutional order which suspended the application of the regular processes.

The Russian Federation complained of the 'illegal seizure of power in Kyiv.' [S/2014/146, 3 March 2014.] As will be noted below, its regular and irregular armed forces were then deployed and used in the two Oblasts of Luhansk and Donetsk in eastern Ukraine, known as the Donbas region, and in Crimea.

The Russian Federation, on the one hand, denied the involvement of its armed forces in Donbas and Crimea. On the other hand, it defended its intervention by arguing that the ousted President Viktor Yanukovich had invited it to intervene. It conveyed to the UN Security Council a letter from Mr Yanukovich, dated 1 March 2014, stating:

I therefore appeal to the President of Russia, V.V. Putin, to use the armed forces of the Russian Federation to restore law and order, peace and stability and to protect the people of Ukraine. [Id., annex.]

However, this note was written and dated after the former President had left Ukraine and had been dispossessed of power by the democratically elected representatives of the people of Ukraine, meeting in the parliament on 21 February.

The Russian Federation nevertheless argued that the political change was a coup that robbed the people of Ukraine of their legitimate leadership and constitutional order. As President Putin asserted in 2014 in relation to the political changes that occurred:

They resorted to terror, murder and riots. Nationalists, neo-Nazis and anti-Semites executed this coup. They continue to set the tone in Ukraine to this day. [S/2014/202, 20 March 2014.]

This refrain was repeated in the addresses of President Putin when justifying the invasion of 2022. [Addresses by the President of the Russian Federation, 22 and 24 February 2022.]

In any event, in 2014 and 2019, parliamentary and presidential elections were held in Ukraine. These were considered free and fair and so certified by the Organization for Security and Cooperation in Europe. [<https://www.osce.org/odihr/elections/Ukraine>.] Hence, even if the initial change in government in Ukraine in 2014 had been irregular, there is no possibility to argue that this state of affairs persisted. Instead, the authority of government was grounded, again, on an exercise of the will of the people.

In any event, the rising and resistance of the people of Ukraine against the armed invasion undertaken by the Russian Federation in 2022—an invasion that is supposedly aiming to liberate them from the yoke of tyranny—negates the narrative of supposed state-capture by a gang of Nazi thugs against the will of the population.

In 2014, the Russian Federation also argued that that it had to use force to save the ethnic Russian population of the Donbas region from destruction or repression. This claim was somewhat inconsistent with Russia's denial at the time that its forces were in fact involved in the operation. Moreover, there is no evidence of any assaults or systematic repression of the ethnic Russian population elements.

D. Crimea

Crimea is a territory in the Kherson Oblast of Ukraine, boasting a pre-conflict population of some 2.2 million. It is located on the Sea of Azov and the Black Sea and includes the major city of Sevastopol. The Crimea is a peninsula off the south eastern tip of mainland Ukraine, connected to the mainland by way of two bridges. Of Crimea's population of 2.5 million before 2014, 64 per cent were ethnic Russians, 23 per cent ethnic Ukrainians, with 10 per cent of Crimean Tatars. [Carina Korostelina (2003) *The Multi-ethnic State-building Dilemma: National and Ethnic Minorities' Identities in the Crimea*, *National Identities*, 5:2, 141-159, 143.] Under the Ukrainian constitution, Crimea enjoys a special, autonomous status different from other Oblasts.

Crimea was part of the Russian Soviet Socialist Republic within the USSR. On 19 February 1954, it was transferred to Ukraine by the USSR Supreme Soviet. As was noted above, the Russian Federation has recognized the borders of Ukraine, including the incorporation of Crimea, in a number of foundational and legally binding instruments. Accordingly, it has no legal claim to the area.

On the other hand, at the time of the forcible take-over of Crimea in 2014, President Putin himself confirmed that he had instructed Russian Federation officials to delimit the boundary with Ukraine in that area:

we admitted *de facto* and *de jure* that Crimea was Ukrainian territory, thereby closing the issue. [S/2014/202, 20 March 2014.]

According to the doctrine of the stability and finality of boundaries, the confirmation of Ukraine's boundaries, restated consistently since 1991, cannot be undone by the state having expressed such a confirmation.

Crimea had traditionally been a major base for the Soviet naval forces in the Black Sea. In 1997, the Ukraine and Russia concluded a set of agreements on the stationing of the Black Sea Fleet in the Crimea. The agreements established locations, force levels and protocols for major movements of the forces. In 2010, the arrangement was extended for a further 25 years beyond its initial period of expiry, to 2042, with automatic extension for further five-year periods unless terminated with one year's notice.

Under the agreement, major movements of Russian forces required consultation with the Ukrainian authorities and the agreed force levels could not be increased unilaterally. Contrary to these obligations, Russia augmented its forces in the Crimea without the consent of Ukraine. However, the Russian Federation argued:

Russia's armed forces never entered Crimea; they were there already in line with international agreement. True, we did enhance our forces there; however—this is something I would like everyone to hear and know—we did not exceed the personnel limit of our armed forces in Crimea, which is set at 25,000, because there was no need to do so. [Id.]

In the wake of the Maidan Revolution, the Russian Federation deployed these forces outside of the agreed bases, taking control over key installations in Crimea, such as airports, train stations and bus terminals, communications nodes, government buildings, etc. They encircled the Ukrainian units in their bases and forced their withdrawal from the territory. Through these actions the Russian Federation created space for the pro-Russian local authorities in Crimea to displace the lawful public authorities of the Ukraine.

As in Donbas, the Russian Federation denied the participation of its sizeable armed forces in the developments in Crimea. The Russian armed forces operated without displaying their insignia, supposedly as deniable 'little green men,' as they became known. President Putin noted, however:

Those who opposed the coup were immediately threatened with repression. Naturally, the first in line here was Crimea, the Russian speaking Crimea. In view of this, the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives, ...

Naturally, we could not leave this plea unheeded; we could not abandon Crimea and its residents in distress. This would have been betrayal on our part.

In essence, the Russian Federation thus acknowledged that it did intervene in the situation in Crimea. As President Putin put it: 'we had to help create conditions so that the residents of Crime for the first time in history were able to peacefully express their free will regarding their own future.' [Id.]

Under the protection of the Russian armed forces, the local authorities in Crimea called a referendum on independence for 16 March. The referendum was conducted instantly, and was not conducted in accordance with international standards. Participation was effectively only open to those supporting the line of the imposed authorities. According to the President of the Russian Federation, the referendum had 82 per cent participation from among the electorate, with 96 per cent supporting independence.

Immediately after the referendum, Crimea purportedly declared itself independent. It then, again almost instantly, requested annexation by the Russian Federation. Consistent with a

decision by the Russian Federal parliament, or Duma, this was granted in a celebratory, formal act held in Moscow, under the chairmanship of President Vladimir Putin.

The brief minute of supposed intervention was therefore a mere device to overcome the admission by the President of the Russian Federation that the appurtenance of Crimea to Ukraine had indeed been accepted *de jure* and *de facto*. Any outright change in the status of the territory would have conflicted with the prohibition of the acquisition of territory by force—a cardinal rule of international law.

Of course, the referendum and the purported declaration of independence were immediately identified as a device to disguise the forcible acquisition of the territory, as will be noted below.

E. Donbas

The Donbas region is composed of the two Ukrainian Oblasts, or provinces, of Luhansk and Donetsk, occupying an area of 22.5k and 26k square kilometres respectively.

Before the present hostilities, Donetsk had a population of 4.1 million, and Luhansk boasted 2.1 million residents. Around 57 per cent of the local population is ethnic Ukrainian, with a largely urban population segment of Russian speakers of around 37 per cent. The region is known for its output of coal and steel.

In 2014, following the Maidan Revolution, ‘up to 6,500 Russian troops, organized into battalion tactical groups, invaded Donetsk oblast.’ [<https://www.chathamhouse.org/2020/05/minsk-conundrum-western-policy-and-russias-war-eastern-ukraine>, p 8.] Local armed forces, with the support of the Russian contingents, managed to capture close to half of the two Oblasts, but were subsequently pushed back somewhat, retaining control over roughly one third of the territories.

The continuing confrontations, which are said to have cost a total of around 14,000 lives on both sides, took place despite the conclusion of the Minsk agreements of 2014 and 2015 respectively.

The first Minsk agreement provided for an OSCE-monitored cease-fire, amnesty for those who had taken up arms against Ukraine and the removal of ‘unlawful military formation and military hardware, as well as militants and mercenaries, from the territory of Ukraine.’ [https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_140905_MinskCeasfire_en.pdf, Article 10.] In addition, Ukraine pledged, in Article 3, to:

Implement decentralization of power, including by enacting the Law of Ukraine on the interim status of local self-government in certain areas of the Donetsk and Luhansk regions (Law on Special Status).

The second agreement provided, *inter alia*, for:

6. Reinstatement of full control of the state border by the government of Ukraine throughout the conflict area, starting on day 1 after the local elections and ending after the comprehensive political settlement (local elections in certain areas of the Donetsk and Lugansk regions on the basis of the Law of Ukraine and constitutional reform) to be finalized by the end of 2015,
7. Withdrawal of all foreign armed formations, military equipment, as well as mercenaries from the territory of Ukraine under monitoring of the OSCE. Disarmament of all illegal groups.
8. Carrying out constitutional reform in Ukraine with a new Constitution entering into force by the end of 2015, providing for decentralization as a key element

(including a reference to the specificities of certain areas in the Donetsk and Lugansk regions, agreed with the representatives of these areas), as well as adopting permanent legislation on the special status of certain areas of the Donetsk and Lugansk regions in line with measures as set out in the footnote until the end of 2015.

[https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf.]

The crucial footnote to Article 8 provided for the following provision in the law on the special order for local self-government in certain areas of the Donetsk and Luhansk regions:

- Exemption from punishment, prosecution and discrimination for persons involved in the events that have taken place in certain areas of the Donetsk and Lugansk regions;
- Right to linguistic self-determination;
- Participation of organs of local self-government in the appointment of heads of public prosecution offices and courts in certain areas of the Donetsk and Lugansk regions;
- Possibility for certain governmental authorities to initiate agreements with organs of local self-government regarding the economic, social and cultural development of certain areas of the Donetsk and Lugansk regions;
- State supports the social and economic development of certain areas of the Donetsk and Lugansk regions;
- Support by central government authorities of cross-border cooperation in certain areas of Donetsk and Lugansk regions with districts of the Russian Federation;
- Creation of the people's police units by decision of local councils for the maintenance of public order in certain areas of the Donetsk and Lugansk regions;
- The powers of deputies of local councils and officials, elected at early elections, appointed by the Verkhovna Rada of Ukraine by the law, cannot be early terminated.

These requirements are in fact fairly limited, approximating a modicum of local self-governance, rather than formal autonomy for the mainly Russian-speaking parts of Luhansk and Donetsk. However, even these modest provisions remained largely unimplemented, encountering significant opposition in the parliament of Ukraine.

Opinion polls undertaken before the present conflict suggested that a majority of the population (55%) in Donbas favoured remaining part of Ukraine. Among the ethnic Ukrainians, 65 per cent expressed themselves in favour of retaining the status of Luhansk and Donetsk as internal administrative areas like the other oblasts in the territory, rather than giving a special status to the region. [<https://theconversation.com/most-people-in-separatist-held-areas-of-donbas-prefer-reintegration-with-ukraine-new-survey-124849>.]

II. INTERNATIONAL LAW ON TERRITORY AND THE USE OF FORCE

A. Introduction: International Law as a Framework for the Conflict and its Settlement

The search for a settlement in Ukraine is bounded by international law. International law establishes a universal legal order. In its most important aspects, that legal order is firm and fixed—the most essential rules of the international community as a whole cannot be abandoned, or derogated from, by any single state.

Three of these core sets of legal rules of international constitutional standing are particularly relevant to the conflict in Ukraine: The prohibition of the use of force, the prohibition of ethnic cleansing and genocide, and humanitarian law. These rules make up the core of the most fundamental legal rules of humanity, also known as peremptory norms of international law, or *jus cogens*.

B. The Prohibition of the Use of Force as a Peremptory Norm of International Law

Article 2 (4) of the UN Charter contains a comprehensive prohibition of the threat or use of force against the territorial integrity or political independence of any state. This rule is also part of general customary law applicable to all states. In fact, the prohibition of the use of force is the prime example of a peremptory norm of international law.

Formally, a peremptory norm of general international law is a rule accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.’ [Vienna Convention on the Law of Treaties, Article 53.] Peremptory norms, or *jus cogens* rules, apply to all states under all circumstances, and their application cannot be suspended. States cannot even agree amongst themselves not to apply the rule in question (for instance, in a peace settlement agreement).

International law and practice, including the pronouncement of the International Court of Justice, offer a clear understanding of the content of the prohibition of the use of force. The UN Definition of Aggression, adopted by the General Assembly in 1974, includes an armed invasion as the prime example of the most serious breaches of the prohibition of the use of force:

Article 3. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

... [Resolution 3314 (XXIX), Article 3.]

A significant armed intervention involving the use of force, for instance on behalf of ethnic or secessionist insurgents abroad, also qualifies as a violation of the prohibition of the use of force in international law:

The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of

support for subversive or terrorist armed activities within another State, ... These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. [Nicaragua, ICJ Rep. 1986, p. 101, para 205, also Armed Activities, ICJ Reports 2005, p. 168, paras 161f].

Hence, it seems clear that both the 2022 full-scale invasion of Ukraine, and the 2014 armed intervention, would be inconsistent with the prohibition of the use of force.

C. The Obligation not to Acquire Territory by Force and Not to Recognize Acquisition of Territory by Force

If force can no longer be used as a lawful tool of international politics, then the acquisition of territory by force can no longer be legally valid either. As the foundational United Nations General Assembly resolution on Friendly Relations states: ‘The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.’ [Resolution 2625 (XXV).] This principle of law was authoritatively confirmed on many occasions, for instance, in relation to the conflicts in the former Yugoslavia:

According to a well-established principle of international law, the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act; [Badinter Opinion No 3, <http://www.ejil.org/pdfs/3/1/1175.pdf>]

If the act of acquiring territory by force is ‘not capable of producing any legal effect,’ *i.e.*, if such an act is a legal nullity, there are additional consequences. These arise in the context of what have become known as ‘serious breaches of peremptory norms.’ As noted, the prohibition of the use of force is the prime example of such peremptory norms, or *jus cogens* rules.

One of these consequences is the obligation incumbent on third states not to recognize the outcome of the serious breach. This obligation reaches back to the famous Stimson Doctrine, adopted by the US in 1932, and later by other states, in the wake of the Japanese invasion and purported forcible acquisition of Manchuria in 1931.

The obligation not to recognize fruits of a serious violation of peremptory norms, and in particular of the prohibition of the use of force, has been consistently restated in international standards, ever since the Nuremberg Trials. General Assembly Resolution 2625 (XXV), which provides an authentic interpretation of the UN Charter, states:

No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

Resolution 3314 (XXIX) on the *Definition of Aggression* also confirms in Article 4 (3) that ‘no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.’ [GA Res 3314 (XXIX)]. Similarly, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, confirms:

Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation. [General Assembly Resolution 42/22, Article 10.]

In the context of Israel and Palestine, the International Court of Justice confirmed the positive obligation that ‘all States are under an obligation not to recognize the illegal situation’ resulting from a serious violation of a peremptory norm. [Wall, ICJ Rep 2004, p. 136, para 159.] Again, this is not a policy proposition but, as the Court noted, it is a requirement of law:

... the principles as to the use of force incorporated in the Charter reflect customary international law ... ; the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force. [Wall Advisory Opinion, ICJ Reports 2004, p 136, para 87.]

The UN Security Council has consistently administered this principle in practice. This also applies to instances where a supposed new state declares itself independent in consequence of an external use of force, as was the case in Crimea in 2014, and Luhansk and Donetsk in 2020. Drawing a distinction to the case of Kosovo, this rule was noted by the International Court of Justice in the Kosovo Advisory Opinion in relation to a whole series of other instances, including Southern Rhodesia, the supposedly independent Bantustans established by South Africa in pursuit of its policy of *apartheid*, Northern Cyprus and the so-called Republika Srpska:

... in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). [Kosovo Advisory Opinion, ICJ Reports 2010 ICJ 403, para 81.]

This long-established obligation of non-recognition featured in the Draft Articles on State Responsibility adopted at first reading by the United Nations International Law Commission at first reading a quarter of a century ago. Considering serious violations of peremptory norms as international crimes, the Commission included the ‘obligation not to recognize as lawful the situation created by the crime.’ [Draft Article 53.]

This obligation of non-recognition is now reflected in the final version of the International Law Commission Articles on State Responsibility, which are broadly taken to reflect customary international law. Article 40 (2) states that ‘no state shall recognize as lawful a situation created by a serious breach’ of a peremptory norm of international law.

If a full-scale invasion amounts to a serious violation of peremptory norms triggering the obligation of non-recognition, it is also true that an intervention involving armed force can do the same. In the Armed Activities case, the international Court of Justice expressly determined that a military intervention, in that instance undertaken by Uganda, amounted to a grave or serious violation of the prohibition of the use of force, as noted by the ICJ:

The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter. [Armed Activities, ICJ Rep 2005, p. 168, paras 161-165.]

Overall, therefore, it seems clear that any purported acquisition of territory by force will trigger the obligation of non-recognition on the part of other states. This might rule out recognition of the annexation of Crimea on the part of the Russian Federation, the recognition of supposed states (Luhansk and Donetsk) that emerged in the context of the unlawful use of force, or

potentially the annexation of further territories, perhaps in the wake of further referenda held in areas that may fall under Russian Federation occupation.

D. Ethnic Cleansing in Donbas and Potentially Other Areas

Ever since the brutal conflict in the former Yugoslavia, it is clear that the practice of ethnic cleansing is also a practice prohibited by fundamental rules of international law of the highest standing, along with the prohibition of genocide.

Ethnic cleaning consists of an organized and violent policy of forcing the removal of ethnic populations from certain territories. This practice will often aim to support a territorial claim to a certain territory, based on the dominant ethnicity of a population within it. It is an attempt to create ethnically 'pure' territories with a view to justifying their incorporation or forcible association with an ethnic kin state.

Forced displacement on an ethnic basis will generally be pursued with utmost brutality against the local 'undesirable' population elements. It can involve the surrounding of villages and towns by military forces, destroying the civilian infrastructure, denying the supply of food and medical services and causing starvation, shelling homes, schools and hospitals, and attacking civilians outright, even when attempting to find shelter in designated safe-areas. When the surrounding forces eventually enter the locality, they may drag some males from their houses, torture and execute them in view of their family members and neighbours. Others may be deported to concentration camps. Houses and property of the affected community are then destroyed, adding further pressure on the local population to permanently leave the area.

During the Yugoslav wars of 1991-1995, the organized international community resisted the attempts to create ethnically 'clean' statelets dominated by Bosnian Serbs and Bosnian Croats which sought incorporation by Serbia and Croatia respectively.

In relation to that conflict, the UN General Assembly condemned the violation of the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina:

... as well as the massive violations of human rights and international humanitarian law, in particular the abhorrent practice of 'ethnic cleansing.' And demands that this practice be brought to an end immediately and that further steps be taken, on an urgent basis, to stop the massive and forcible displacement of population from and within the Republic of Bosnia and Herzegovina, ... [Resolution 46/242, para 6.]

As the campaign of ethnic cleansing or genocide often serves to support the claim of a neighbouring, ethnic kin state to the territory in question, a claim to territory that was acquired through this practice is legally invalid and must be internationally rejected. Accordingly, Resolution 46/242 called upon all states:

Not to recognize the consequences of the acquisition of territory by force and the abhorrent practice of 'ethnic cleansing.'

In this instance, the reported indiscriminate shelling of cities, towns and villages, along with their isolation from humanitarian assistance, and the atrocities apparently committed against members of the civilian population, may suggest a similar pattern of practice. The encirclement of civilian concentrations has been widely reported. This was accompanied by the bombardment and destruction of the civilian infrastructure, including water, electricity and, in the midst of winter, heating. Hospitals have been attacked. Humanitarian supplies were cut off. And civilians were directly targeted, including marked localities offering hope-for shelter for women, children and the elderly. [E.g., Human Rights Watch, Apparent War Crimes in Russia-

controlled Areas, 3 April 2022, <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>; UN High Commissioner on Human Rights, <https://www.ohchr.org/en/press-releases/2022/05/high-commissioner-special-session-human-rights-council-ukraine-many>.]

In areas vacated by Russian Federation forces, evidence of execution of prisoners of war, found shot with their hands bound behind their backs, and of ordinary civilians, has been uncovered:. For instance, the UN reported:

In Bucha and other settlements to the north of Kyiv that were occupied by Russian armed forces, we have reports of the unlawful killing of over 300 men, women and children. Unfortunately, these numbers will continue to grow as we visit more areas. [UN Human Rights Monitoring Mission for Ukraine, <https://www.ohchr.org/en/press-briefing-notes/2022/05/plight-civilians-ukraine>.]

Through such practices, very significant numbers of the non-ethnic Russian population have fled the areas under Russian occupation. This has led to the suggestion that a campaign of demographic manipulation could be intended. This might culminate in further referenda among the, by then, mainly Russian-speaking population segment that remains, perhaps expressing itself in favour of annexation or the creation of a further, supposed state in south eastern Ukraine (Kherson).

The ethnic cleansing undertaken in preparation of such a step would further undermine any claim to the legality of the supposed referendum and the resulting supposed independence or annexation, and add to the requirement on the part of other states not to recognize the outcome.

E. Humanitarian Law

As was just noted, the systematic violation of the rights of civilians in armed conflict, placing the lives of thousands in jeopardy, will often be associated with ethnic cleansing and the aim of territorial acquisition by force. This practice not only violates the prohibition of ethnic cleansing. It also offends against humanitarian law. The starving of civilians by blocking humanitarian access, attacks against medical facilities and civilian infrastructure, and direct attacks against places of refuge for civilians, are all proscribed techniques of warfare employed in campaigns of this kind. Again, this is often accompanied by arbitrary killings in occupied towns and villages, sexual violence, and forced displacement. Such practices constitute grave breaches of humanitarian law applicable in armed conflict as reflected in the Geneva Conventions. Moreover, whether committed in peace or war, systematic assaults on a civilian population using such techniques would also qualify as crimes against humanity.

In addition, humanitarian law is essentially based on the principle of distinction, which seeks to isolate civilians from the consequences of armed confrontation as far as may be possible. This excludes attacks on civilian concentrations or targets, including installations necessary for their survival, hospitals, schools and nurseries, food distribution centres, etc. As the International Court of Justice put it in the Nuclear Weapons Advisory Opinion:

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of

attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. [ICJ Reports 1996, p. 226, para 78.]

There is evidence that this principle was systematically violated during the hostilities of 2022, especially in relation to territories under fierce contestation, including Donbas, Mariupol and a number of other places.

Again, these rules are part of the *corpus* of non-derogable international legal obligations of the highest order. As the ICJ confirmed, ‘a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” . . .’, that they are ‘to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.’ [Id., para 79.]

In the Wall Advisory opinion, the Court affirmed that these rules incorporate obligations which are essentially of an *erga omnes* character, or peremptory norms of international law. [ICJ Reports 2004, p. 136, para 157.] The Court continued:

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Accordingly, grave violations of humanitarian law amount to additional, serious violations of peremptory norms of international law. Third states must not recognize a change in status of territory obtained in consequence of such a violation, they must not assist the perpetrator of the violation in maintaining it in place, and they should work together through international bodies to try to overturn the consequences of the violation.

III. APPLICATION TO THE RUSSIAN ACTION AGAINST UKRAINE

A. Crimea

A day before the referendum on independence in Crimea, on 15 March 2014, a draft resolution opposing it was introduced in the UN Security Council. It attracted 13 positive votes, but failed due to the negative vote of the Russian Federation (China abstaining). The resolution would have reaffirmed the territorial integrity of Ukraine within its internationally recognized boundaries and would have urged states not to recognize the results of the planned referendum. [SC/11319, 15 March 2014.]

Russian Federation Justification

In the Security Council, the Russian Federation argued that this was an exceptional case of self-determination arising from the fact that co-existence of Russian- and Ukrainian-speakers within Ukraine had become impossible. Also, the Russian Federation claimed that the case arose in a legal vacuum following the supposed unconstitutional coup against the sitting government. Moreover, Crimea had been part of the USSR until 1954, when it had been transferred from Russia to Ukraine. No account had been taken of the wishes of the population then. [See also S/PV.7144, 19 March 2014.]

Crimea is not a Self-Determination Entity

International law recognizes the right of self-determination and secession even if independence is opposed by the central, metropolitan government. However, this privilege only applies to colonial peoples and territories. It does not apply to Crimea which was evidently not a colony in the sense of classical, overseas imperialism.

The dissolutions of the USSR and the former Yugoslavia have confirmed an additional right of constitutional self-determination where a federal state union dissolves. The idea is that the former sovereign entities that came together to form the union or federation will become states once more when the federation falls apart. But again, this principle does not cover Crimea. The Russian Federation and Ukraine within their established Soviet boundaries were full federal or union subjects and could emerge as states. Other entities contained within them did not enjoy that privilege, as the Russian Federation has made clear very forcefully in relation to, say, Chechnya.

Inconsistently with this practice of its own, the Russian Federation has invoked the precedent of Kosovo on several occasions. In 2008, Kosovo obtained independence against the wishes of the government of what remained of the former Yugoslavia.

Kosovo was an autonomous province within Yugoslavia, but unlike Crimea in Ukraine, it also enjoyed a federal status under the constitution of the Socialist Federal Republic of Yugoslavia. It had its own member of the Federal Presidency, maintained its own central bank, etc. When Yugoslavia dissolved, the federal units and Kosovo could emerge as states.

The Ukraine is no federation. It is a unitary state. The Ukrainian constitution determines that the ‘territory of Ukraine within its present borders is indivisible and inviolable.’ While establishing Crimea as an autonomous territory, it adds that Crimea is ‘an inseparable constituent part of the Ukraine’. Moreover, in contrast to the former Yugoslavia, there is no suggestion that the Ukraine is dissolving, allowing its constituent units simply to emerge as states.

Some argue that entities within states that have suffered prolonged and severe repression, or lack representation in the state organs, might also enjoy a right to remedial self-determination, although this remains controversial. Again, while this principle might apply to Kosovo, it does not cover Crimea.

Serbia had unlawfully removed most of Kosovo's constitutionally guaranteed autonomy and excluded it from genuine representation in the federal organs. Ukraine had not touched the enhanced constitutional status of Crimea in any way. It had not removed the autonomy awarded to Crimea under the existing constitution. Indeed, it was offering to negotiate about enhanced autonomy for Crimea. There is no case for immediate independence in such circumstances.

In contrast, Kosovo had suffered a decade of severe repression from Serbia, followed by an armed conflict involving the forced displacement of roughly half of its population by Serbia. The organized international community took the view that Kosovo could not be expected to return to the control of Serbia after that traumatic experience. Ukraine has not repressed or expelled its ethnic Russian population, nor has it used force in Crimea. Hence, the doctrine of remedial secession, if it does exist in international law, would not apply.

Violation of the Process Aiming towards Secession

The Russian Federation has nevertheless pointed to Kosovo as a precedent, invoking the Advisory Opinion given by the International Court of Justice at The Hague concerning Kosovo's declaration of independence of 2008. In the opinion, the Court suggested that international law does not preclude declarations of independence by secessionist units as the rule of territorial integrity only applies between states, but not within a state.

However, even a territorial unit that is repressed or excluded from representation in the state cannot simply leave. Instead, it needs to first explore alternatives to secession in line with the international preference for maintaining the unity of existing states. In this case, autonomy was already in existence and Kiev had offered to enhance it further.

If secession is to be pursued, the entity seeking it must engage in an involving process of negotiation about the referendum and potential independence with the central authorities. This was confirmed by the Canadian Supreme Court in relation to Quebec. The UK government engaged in detailed negotiations with Scotland about the forthcoming referendum. Spain refused such an act altogether in relation to Catalonia.

In the case of Kosovo, the process of negotiation was attempted under the guidance of the United Nations. Only when it became clear after several years that negotiations were being frustrated by Serbia was the path towards independence cleared. This was done by the UN mediator himself, who determined that returning Kosovo to rule from Belgrade was not a viable option.

No process of negotiation with the central authorities was attempted in the case of Crimea. Instead, a referendum was forced when Ukrainian authorities had been displaced unlawfully through the use of Russian troops in the territory. The supposed independence of the territory was immediately declared, followed by a similarly instantaneous annexation by the Russian Federation.

Independence was Tainted by the Armed Intervention Aimed at Annexation

The purported declaration of independence by the Crimean parliament was not really aimed at independence. Instead, it was merely a device intended to open the way towards the absorption of Crimea by the Russian Federation. Rather than conquering a territory and annexing it outright, this detour was supposed to avoid the rule which prohibits the forcible acquisition of territory. This context taints the purported referendum just as much as the circumstances

surrounding the holding of the poll, called without adequate notice, without space for a campaign open to all sides on the issue, and in an atmosphere of control and intimidation created by the local authorities and by the unlawful involvement of the Russian Federation armed forces.

Accordingly, even if supported by the referendum held in the Crimea, territorial change achieved in circumstances involving the use of force would be legally invalid. This was confirmed by authoritative findings of the most appropriate international agencies.

The UN Security Council being unable to act due to the veto, the issue was addressed by UN General Assembly. In Resolution 68/262 of 27 March 2014 the Assembly:

Noting that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine,

1. *Affirms* its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders;

2. *Calls upon* all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means;

3. *Urges* all parties to pursue immediately the peaceful resolution of the situation with respect to Ukraine through direct political dialogue, to exercise restraint, to refrain from unilateral actions and inflammatory rhetoric that may increase tensions, and to engage fully with international mediation efforts;

4. *Welcomes* the efforts of the United Nations, the Organization for Security and Cooperation in Europe and other international and regional organizations to assist Ukraine in protecting the rights of all persons in Ukraine, including the rights of persons belonging to minorities;

5. *Underscores* that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol;

6. *Calls upon* all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.

B. Donbas

Purported Statehood by Way of Remedial Secession?

The Russian Federation has recognized the two entities of Luhansk and Donetsk as states, apparently based on the contested doctrine of remedial secession.

[\[https://www.ejiltalk.org/recognition/\]](https://www.ejiltalk.org/recognition/) This doctrine proposes that an entitlement to self-determination arises in consequence of manifest abuses of a population segment by its government, or of its exclusion from governance of the state.

Rather inconsistently with its position on Kosovo, where it had rejected that doctrine, the Russian Federation had also invoked this doctrine in the cases of Abkhazia and South Ossetia, along with Crimea. This justification was broadly rejected by other states [e.g., General Assembly Resolutions 68/262, and A/ES-11/L.1.]

As was already noted, it is not clear that this doctrine actually exists in international law. In the Kosovo Advisory Opinion, the International Court of Justice appeared to cast doubt on its existence. Moreover, even if it does exist, there was no factual basis for the allegation of genocide or any other significant outrage perpetrated by Ukraine against the populations of the relevant parts of Luhansk and Donetsk that might justify invoking remedial secession.

Indeed, the International Court of Justice upheld the challenge brought by Ukraine against the purported justification of genocide invoked by the Russian Federation in relation to Luhansk and Donetsk. In its Provisional Measures Order of March 2022, it found this argument entirely unpersuasive and even order the Russian Federation to suspend the entire invasion of Ukraine based on it. [See below.]

Effective Independence for Luhansk and Donetsk?

As the Badinter Commission noted, in the first place ‘the existence or disappearance of the state is a question of fact.’ [Badinter Opinion No. 1, 20 November 1991, para 1 (a), 31 ILM 1488, 1494.] The two Oblasts declared independence in 2014, in the context (and most would say, in consequence of) the Russian armed intervention of that year. Their purported statehood did not attract any significant international acceptance, including up to the eve of invasion of 2022, even by the Russian Federation.

It is doubtful that either entity satisfied the requirement of ‘independence,’ as they have remained entirely dependent on the Russian Federation in relation to security, economy and decisions concerning foreign relations. [See *Customs Regime between Germany and Austria*, PCIJ, Ser. A/B, No. 41, at 45.] There is also doubt about the question of territorial definition. The two entities claim their Ukrainian provincial, *uti possidetis*-type boundaries. The Russian Federation expressly extended its recognition to the full extent of those territories. [\[https://voelkerrechtsblog.org/russias-recognition-of-the-dpr-and-lpr-as-illegal-acts-under-international-law/\]](https://voelkerrechtsblog.org/russias-recognition-of-the-dpr-and-lpr-as-illegal-acts-under-international-law/)

There is ‘no rule that the land frontiers of a State must be fully delimited and defined.’ [North Sea Continental Shelf, ICJ Reports 1960, p, 32, citing (Monastery of Saint Naoum, PCIJ, Ser. B, No. 9, at 10).] Even if parts of the entity are under illegal occupation by another state at the time of its declaration of independence, this does not exclude statehood. This was demonstrated by the widespread recognition and admission of Croatia and Bosnia and Herzegovina to the United Nations in 1992.

However, in this case, each of the two entities controlled only roughly one third of their supposed state territory when the Russian Federation recognized them. The remainder was held by the state from which they sought to secede, casting doubt on whether they can lay claim to a defined territory, or at least to have established effective control over their purported state territory. This is reflected in the careful language adopted in the General Assembly Resolution overwhelmingly condemning the aggression against Ukraine and the purported change in status only ‘of certain areas of the Donetsk and Luhansk regions of Ukraine.’ [General Assembly Resolution ES-11/1., para 5.]

Moreover, even the limited extent of effective control exercised by pro-Russian forces within the Oblasts was dependent on, and created by, the initial unlawful armed intervention by the Russian Federation.

Kosovo is not a Precedent

This fact distinguishes this instance from the Yugoslav experience, invoked by the Russian Federation as a supposed precedent.

The former Yugoslavia was deemed to be in a process of dissolution at the point of wide-spread recognition of its former constituent republics. [Badinter Opinion No. 1, above.] It was no longer a legal person able to oppose the claim to effectiveness and statehood of Croatia and Bosnia and Herzegovina respectively. Moreover, both entities seeking recognition were of course the victims of an armed intervention by the then Federal Republic of Yugoslavia.

Here, the Oblasts are the co-authors of the intervention, having requested it from the Russian Federation. Hence, the purported independence of the two entities is the result of the initial armed intervention by the Russian Federation in 2014, reinforced by the further invasion of 2022. The wrongful use of force in order to obtain independence for an entity results in illegality and nullity of the status that may result. As the ICJ confirmed in the Kosovo Advisory Opinion in relation to a series of other cases involving the unlawful use of force:

... the illegality attached to the declarations of independence thus stemmed ... from the fact that they were, or would have been, connected with the unlawful use of force. [Kosovo AO, 2010 ICJ 403, para 81.]

In the case of Kosovo, there was no such manifest illegality in its birth as a state. NATO's use of force was justified in terms of the genuine overwhelming humanitarian emergency caused by the disproportionate counter-insurgency campaign by Serbia, along with the general repression exercised against the mainly ethnic Albanian population by Serbia. This had caused a massive outflow of refugees in the middle of the harsh Balkan winter of 1988/9. This emergency was duly attested by the UN Security Council and other appropriate agencies, and the NATO action was focused exclusively on averting that emergency. NATO did not occupy the territory, which was instead immediately transferred to UN administration according to Security Council Resolution 1244 (1999). The independence that resulted after some eight years of UN administration was the result of an involving UN-led negotiating process about final status. While Serbia did not accept that outcome, Kosovo fully implemented the UN peace plan and in excess of 100 states recognized the resulting independence.

Against this background, the International Court of Justice upheld the lawfulness of Kosovo's declaration of independence. On the other hand, in relation to Republika Srpska, an entity created through Serbia's armed intervention and ethnic cleansing campaign in Bosnia and Herzegovina, the UN Security Council confirmed the positive obligation not to recognize Republika Srpska as a state. [S/RES/787 (1992).]

In this instance, the control exercised over the minor part of the claimed territories of Luhansk and Donetsk was obtained through the armed intervention of the Russian Federation. Moreover, the supposed independence of the two Oblasts was quite clearly constructed to allow the Russian Federation to invoke the doctrine of collective self-defence.

Collective Self-defence

In the Security Council, the Russian Federation defended its 'special military operation' in Ukraine as follows:

The leadership of the Luhansk and Donetsk People's Republics have asked us to provide military support in accordance with the bilateral cooperation agreements concluded at the time as their recognition. ... That decision [to launch the special military operation] was made in accordance with Article 51 of the Charter of the United Nations, the approval of the Federation Council of the Russian Federation and pursuant to the *Treaty of Friendship and Mutual Assistance* signed with the Donetsk and Luhansk People's Republics. [S/PV.8974, at 12.]

The recognition of the two entities, and the literally instant conclusion of a collective defence treaty, along with the supposed receipt and simultaneous granting of a request for the exercise of collective self-defence, all occurred at the same moment. They were all part of the same artifice: to provide some form of legal cover for the invasion of Ukraine and the forcible change in status of parts of its territory. This ploy is as transparent as it is legally unpersuasive.

In the Kosovo Advisory Opinion, the ICJ confirmed that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States.' [Kosovo AO, para 80]. It protects Ukraine from external predation, but not its Oblasts from actions of their own central government. Similarly, 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack **by one State against another State.**' [Wall Advisory Opinion, ICJ Reports 2006, p. 136, para 139, emphasis added.]

Russia therefore manufactured the statehood necessary to invoke self-defence based on its previous invasion of parts of the two territories in 2014.

In addition, self-defence under Article 51 of the Charter requires the 'State concerned having been the victim of an armed attack' [(Nicaragua Case, ICJ Reports 1986, para. 195)]. There is no evidence of any kind that Ukraine, surrounded at the material time by a Russian armoured force approaching 200,000, had mounted a suicidal armed attack against the two entities and their Russian protectors, even if the prohibition of the use of force had applied in relation to Russian-held parts of Luhansk and Donetsk, which was not the case.

The Russian Federation alleged that there were at least acts of sabotage or other incidents directed against Russia itself. The US government had previously warned that 'false flag' incidents of this kind might be invoked by Russia to justify aggression. In any event, even if such limited incidents did occur, they would not amount to 'the most grave forms of the use of force' justifying self-defence. [Nicaragua, ICJ Reports 1986, p. 101, para. 191)]. That is to say, self-defence is not available in relation to limited border incidents or other relatively minor infractions.

Moreover, the wholesale invasion of the territory with a force of around 200,000 would hardly meet the criteria of necessity and proportionality inherent in the doctrine of self-defence. [Id., para 176, Platforms, ICJ Reports 2003, p. 161, para 76.]

Overall, therefore, self-defence does not offer any justification for the armed invasion undertaken by the Russian Federation.

Prevention of Genocide

President Putin asserted in his speech of 24 February that 'We had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia, on all or us.' Evidently, there were no signs at all that millions of people were threatened with immediate genocide. As the International Court of Justice confirmed in relation to this argument of the Russian Federation:

59. ... At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian

Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.

60. Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine. [Allegations of Genocide, Ukraine vs. Russian Federation, International Court of Justice, Order of 16 March 2022.]

The allegation of a campaign of extermination against the Russian speaking population of Luhansk and Donetsk, which were in fact in the main already under the control of the local authorities and the Russian forces deployed there since 2014, is manifestly without any foundation in fact.

International Response

In relation to the present conflict, the Russian Federation was constrained to veto a draft Security Council resolution that formally deplored its decision relating to the status of certain areas of Ukraine's Donetsk and Luhansk regions and decided that Moscow must immediately and unconditionally reverse that decision as it violates Ukraine's sovereignty and territorial integrity. [SC 14808, 25 February 2022.]

This was followed by the adoption in the UN General Assembly of a resolution sponsored by no less than 93 states and receiving 141 affirmative votes, entitled *Aggression against Ukraine*. The Resolution reaffirmed 'that no territorial acquisition resulting from the threat or use of force shall be recognized as legal,' and:

1. *Reaffirms its commitment* to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters;

2. *Deplores in the strongest terms* the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter;

...

5. *Deplores* the 21 February 2022 decision by the Russian Federation related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter;

6. *Demands* that the Russian Federation immediately and unconditionally reverse the decision related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine; ... [A/ES-11/L.1.]

The International Court of Justice even formally ordered Ukraine to cease its military operation based on the arguments of supposed self-defence and genocide:

75. The Court considers that the civilian population affected by the present conflict is extremely vulnerable. The "special military operation" being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also

caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population. Many persons have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating. A very large number of people are attempting to flee from the most affected cities under extremely insecure conditions.

81. The Court considers that, with regard to the situation described above, the Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. In addition, recalling the statement of the Permanent Representative of the Russian Federation to the United Nations that the “Donetsk People’s Republic” and the “Lugansk People’s Republic” had turned to the Russian Federation with a request to grant military support, the Court considers that the Russian Federation must also ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations.

C. Other Territories

It is also possible that the present conflict will add additional territorial issues to be addressed. That would occur if a settlement is to be achieved while the Russian Federation occupies territories in addition to Crimea and the parts of Luhansk and Donetsk that were beyond the control of the Ukrainian government as of 23 February 2022.

President Putin has made it clear that the recognition of Luhansk and Donetsk by the Russian Federation applies to the entire territories of those two entities as they are established in the domestic legal order of Ukraine. That is to say, the expectation is that the Russian armed action will result in significant territorial gains beyond what had been achieved in 2014 and held since then. At the time of writing, the Russian Federation had launched very major, fresh military campaign in eastern Ukraine, ostensibly with that aim in mind. Foreign Minister Lavrov confirmed that Russia’s intention is to achieve control over the entirety of the two Oblasts as defined in Ukrainian law.

In addition, the armed forces of the Russian Federation have captured some additional territory outside of the Oblast boundaries of Luhansk and Donetsk, appearing to aim towards forming a land bridge between Crimea, its own territory and that of Luhansk. This would include necessary communication links, but also access to fresh water supplies from the Dnieper River.

Finally, there could be even greater military acquisitions of territory extending along the south of Ukraine, potentially towards Odessa, or even further, connecting to the border with Moldova. The Russian Federation maintains another client statelet, Transnistria, which consists of a lengthy, thin strip of territory along Ukraine’s Western border in Moldova.

Achieving this connection would not only cut Ukraine off from the sea, but would also add to a sense of virtual encirclement of the country and to the threat to Moldova. Russian Federation General Rustam Minnekayev indicated that ‘control over the south of Ukraine is another way out to Transdnistria, where there are also cases of oppression of the Russian speaking population.’

Given the apparent initial failure of capturing all of Ukraine and achieving forced ‘regime change,’ Nikolai Patrushev, Secretary of Russia’s Security Council, stated to the Russian

newspaper Rossiyskaya Gazeta that the ‘disintegration of Ukraine into several states’ might occur.

Evidently, any of these potential territorial acquisitions would also be proscribed by the prohibition of the acquisition of territory by force in international law. A positive international obligation not to recognize the acquisition of any of these territorial gains would fall on all other states, along with the obligation not to do anything that might assist the Russian Federation to maintain these in place. In addition, other states would be bound to seek collective measures aiming to overturn these fruits of the unlawful use of force.

IV. RUSSIA'S ALTERNATIVE JUSTIFICATORY FRAMEWORK

In the UN Security Council, the General Assembly and other international bodies, the Russian Federation has generally sought to invoke known legal justifications for the use of force, including self-defence, forcible humanitarian action in the face of genocide, intervention by invitation, etc. While these justifications may exist in international law, what was missing was the factual element triggering their application (see below).

Yet, in other contexts, the Russian Federation has rather attempted to step outside of the international legal system as it is generally understood. President Putin's justification for the 'Special Military Operation,' as the invasion is termed, is rooted in a different framework—a framework that privileges a historical and national perspective or narrative over other considerations.

Already in 2007, in his now famous speech at the Munich Security Conference, President Putin laid out his vision of the world that foretold a sense of separation from the view of the West. While referencing the end of the ideological separation of the Cold War, he noted that the apparent onset of a unipolar system under US leadership was equivalent to a world 'in which there is one master, one sovereign.' This system, he argued, was leading the world into an 'uncontained hyper use of force—military force—in international relations, force that is plunging the world into an abyss of permanent conflict.' This, he said, had led to 'a greater and greater disdain for the basic principles of international law,' adding:

Independent legal norms are, as a matter of fact, coming increasingly closer to one state's legal system. One state and, of course, first and foremost the United States, has overstepped its national borders in every way. ...

And, of course, this is extremely dangerous. It results in the fact that no one feels safe. I want to emphasise this—no one feels safe. Because no one can feel that international law is like a stone wall that will protect them.
[\[https://is.muni.cz/th/xlghl/DP_Fillinger_Speeches.pdf.\]](https://is.muni.cz/th/xlghl/DP_Fillinger_Speeches.pdf)

Mr Putin emphasized that 'the only mechanism that can make decisions about using military force as a last resort is the Charter of the United Nations.' The United Nations Security Council is of course a body dominated by five nominally equal Permanent Members, including the Russian Federation. In the Council, the vote, or veto, of the Russian Federation has the same weight as that of the supposedly hyper-powerful US.

In essence, at the time, the Russian Federation appeared to join with China and the Group of 77, of developing states, in defending the classical, sovereigntist state system, dominated by the doctrines of sovereign equality and non-intervention. It would be a system where states interacted as solid units, impervious to external interference, and connected with an international legal system administered by them in their mutual interests as states. Human rights, talk of a democratic entitlement, and humanitarian interventions, the buzz words in the West at the time, had little place in this vision of the world.

In fact, in 1997, the same year of President Putin's Munich speech, Russia and China issued a Joint Declaration on a Multipolar World. In it, they stated:

The Parties are in favour of making mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual advantage, peaceful coexistence and other universally recognized principles of international law the fundamental norm for conducting relations between States and the basis for the new international order. [S/1997/384, 20 May 1997.]

Essentially, this was a plea for the restoration of the Cold War order without the ideological confrontation of the Cold War. This order, though, rested in part on the recognition of, at least, the prohibition of the use of force.

That year, Russia formally proposed to the US a new security treaty, in which NATO would pledge to stop admitting states from the former Soviet orbit. There would be no acts that Russia might consider hostile, or directed at giving an advantage to the US and NATO. Military deployments of NATO in Eastern Europe would be halted. The treaty was reissued again the following year, when the Russian Federation involved itself in an armed conflict with Georgia.

In the conflicts of post-Soviet readjustment in the Balkans and the Caucasus, Georgia had lost control over its eastern provinces of Abkhazia and South Ossetia. This loss of control was made permanent by the deployment of mainly Russian Federation ‘peace-keepers.’ For a decade and a half, Georgia attempted to solve the issue through re-integrating the provinces on conditions of wide-ranging autonomy. However, in August 2008, Georgian armed forces re-entered South Ossetia. They were rapidly defeated by Russian Federation armed forces who had been held in readiness just across the Russian border. Both territories then declared themselves independent, under the protection of the Russian forces. The Russian Federation made considerable play of the Kosovo precedent, arguing that it had responded to an aggression by the Georgian government against its own people. In such a situation, the will of the local population in favour of independence had to prevail over the wishes of the nominal central government. [S/PV.5969, 28 August 2008.]

While the EU asserted that a settlement of the conflict in Georgia ‘must be based on full respect for the principles of independence, sovereignty and territorial integrity recognized by international law,’ the international response to this event was muted. [Council of the European Union Conclusions on Georgia, 2889th External Relations Council Meeting, Brussels, 15/16 September 2008.]

The Russian Federation offered a similar justification in relation to the military operations in relation to the Donbas area of Ukraine, and the Crimea, in 2014, although the existence of any such operations was at the time denied. However, already by that time, the President of the Russian Federation added a further element to the justification of the military operations. This was an essentially ethno-historical narrative.

President Putin asserted that Crimea had always been an essential part of the Russian Empire, along with associated lands. It was the misconceived policy post-revolutionary Bolshevik policy to add:

large sections of the historical South of Russia to the Republic of Ukraine. This was done with no consideration for the ethnic make-up of the population, and today these areas form the southeast of Ukraine. Then, in 1954, a decision was made to transfer Crimean Region [sic.] to Ukraine, along with Sevastopol, despite the fact that it was a federal city. This was the personal decision of the Communist Party head Nikita Khrushchev. ...

It was only when Crimea ended up as part of a different country that Russia realized that it was not simply robbed, it was plundered. [S/2014/203, 20 March 2014.]

The historical perspective, and the sense of historical injustice done to the Russian Empire by the Marxist-Leninist intermezzo, was restated in even stronger terms in the context of the invasion of Ukraine of 2022. In fact, Lenin had espoused a strong doctrine of national self-determination. President Putin noted on the eve of the invasion:

... why was it necessary to appease the nationalists, to satisfy the ceaselessly growing nationalist ambitions on the outskirts of the former empire? What was the point of transferring to the newly, often arbitrarily formed administrative units—the union republics—vast territories that had nothing to do with them? Let me repeat that these territories were transferred along with the population of what was historically Russia. [Address by the President of the Russian Federation, 22 February 2022.]

Essentially, these statements demonstrate a sense of longing for regaining the historic role and territorial possessions of imperial Russia.

Stability and Finality of Boundaries

Of course, such a sense of historic injustice is one experienced by many nations and states around the world. With the exception of classical colonies, the post 1945 global order privileges stability and the post-war borders. This is based on the acceptance that peace requires an end to irredentist territorial claims. According to the doctrine of the stability and finality of boundaries, once a boundary is established between states, it is final and beyond unilateral challenge:

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question [Temple of Preah Vihear, Merits, 1962 ICJ, 33ff.]

This principle also applies in relation to relations between newly established states, as was the case when Ukraine and the Russian Federation, along with the other union republics, became states at the end of 1991.

Preservation of the Boundaries of Newly Independent States (uti possidetis)

This is also the case where an existing state splits up into its constituent parts. As President Putin noted, the union republics actually enjoyed a right to self-determination and even secession under the Soviet constitution. As the entire Union dissolved, its constituent units were indeed able to gain full independence. Under the legal doctrine of *uti possidetis*, the formerly internal boundaries between the union republics became the boundaries of the newly emerging states:

the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. [Burkina Faso/Mali Frontier Dispute, Merits, 1986 ICJ 564, para 23.]

This principle was declared by the ICJ not only to be a special rule pertaining to one specific region or system of international law. Instead, 'it is a general principle, which is logically connected with the phenomenon of obtaining independence wherever it occurs.' [Burkina Faso/Mali Frontier Dispute, Merits, 1986 ICJ 564, 565.] In relation to Eastern Europe, the Badinter Arbitration Commission expressly confirmed the application of this rule, once more declaring it to be of universal application:

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, [Badinter Opinion No 3, <http://www.ejil.org/pdfs/3/1/1175.pdf>.]

Rather anticipating the later objections by the Russian Federation to the perceived injustices of previous history, the International Court has ruled that 'these frontiers, however unsatisfactory they may be, possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law.' [Burkina Faso/Mali Frontier Dispute, 1986 ICJ 633.] Prophetically, the International Court of Justice noted that the 'obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles.' [Burkina Faso/Mali Frontier Dispute, Merits, 1986 ICJ 564, 565.]

Accordingly, the international legal system does not accept alternative justifications for claims to territory based in history and a sense of historic injustice. Instead, the post-1945 boundaries are to be accepted as final and beyond question. In this case, of course, the Russian Federation repeatedly confirmed the boundaries of the former Soviet Republics upon independence. This included, in a whole series of treaties, the boundaries of Ukraine, including Crimea and Donbas.

Western Double Standards?

The Russian Federation has tried to persuade some other states that the rhetoric of a rules-based international system is part of a Western campaign to extend its influence at the expense of states like the Russian Federation and China. It can point to instances of the use of force which, in its view, undermined the legal system so proudly proclaimed and defended by the USA and her allies. The instances invoked by President Putin include Kosovo, Afghanistan, Iraq, Libya and Syria.

While each case is different, action in relation to these instances, even if controversial in the eyes of some, can be explained with reference to legal justifications that do not altogether strain the bounds of the international legal system.

It was already noted that the situation in Kosovo of 1999 amounted to a genuine response to an overwhelming humanitarian emergency placing at risk the majority ethnic Albanian population in the territory. The UN Security Council had attested the existence of that emergency. As the Council was unable to agree on further action, NATO intervened. However, its actions were strictly limited to achieving the aims previously set out by the Security Council. [Resolution 1199 (1998).] No NATO member proposed to annex Kosovo in consequence of the armed action. Instead of armed occupation by NATO, the territory was placed under United Nations administration for an extensive period. Its final status emerged from a UN-mandated and run process of negotiations, even if the Republic of Serbia eventually failed to approve the outcome.

The US-led armed action in Afghanistan could be based on the right to self-defence in the aftermath of the 9/11 attacks on New York and Washington, D.C. of 2001. The UN Security Council confirmed that self-defence applied. [Security Council Resolutions 1368 (2001) and 1373 (2002).] Moreover, much of the fighting was undertaken by indigenous Afghan forces.

The armed action that displaced the regime of Colonel Gaddafi from Libya was in fact mandated by a Chapter VII mandate of the UN Security Council, expressed in Resolution 1973 (2011). While the Russian Federation asserted that the US and France exceeded their mandate to protect the population of Libya, then under imminent threat from the onslaught by Col Gaddafi's forces, the collapse of his regime was perhaps inevitable given the circumstances.

Finally, it was the Russian Federation which intervened decisively in Syria, rather than Western states. Through this action it controversially assured the survival of the Assad regime, in the war with its own population, when it appeared to face defeat in 2015. In contrast, Western intervention remained very limited. The UK and US stepped back from their pledge to

undertake significant military action even in response to the repeated uses of chemical weapons by the Syrian regime against its own population.

The 2003 US-led invasion of Iraq, on the other hand, is more difficult to justify. The UK invoked the authority of Resolution 1441 (2002), while the US claimed that it had authority to rule on the original cease fire it had concluded with Iraq after the liberation of Kuwait in 1991. Both views were rather isolated and legally dubious. But the point is that the states attempted to place their military action within the ambit of the accepted rules of the international system, even if their explanation may not have been fully persuasive.

Of course, even in case of a clear violation, one grave violation of the fundamental rules of international conduct cannot excuse another. In fact, in criticizing this operation, or a series of actions by the West, the Russian Federation (and China) have invoked the very standards on the use of force that the Russian Federation is now overturning in the Ukrainian conflict.

Consensus on the Rules on the Use of Force

The US abandoned some of its more controversial views on the lawfulness of the use of force in the wake of the Iraq operation. Instead, it supported, along with all other states, the Millennium-plus-five Declaration of the UN General Assembly. In that declaration, the entire organized international community reaffirmed the international rules on the use of force that had previously been challenged by the US:

77. We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter.

...

79. We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter. [UN GA Resolution 60/1, 2005, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.]

The rules on the use of force to which the organized international community committed itself again in 2005 are in fact quite well understood amongst states and international lawyers. However, there is a second element. This second element concerns facts.

Possible legal justifications for the use of force come with reasonably clear factual criteria that trigger their application. For self-defence, there must be an actual or imminent armed attack.

For collective self-defence, there must also be an invitation of an actual state to assist in its defence, rather than a supposed state recognized for the very purpose of issuing such an invitation.

For forcible humanitarian action, if the doctrine is accepted at all, there must be an overwhelming humanitarian emergency threatening the very survival of an entire population segment that can only be averted through intervention, and the intervention must be strictly limited to this aim, etc.

For the rescue of one's own nationals abroad, these must in the first place be nationals of the state mounting the operation, rather than foreigners who have merely been issued with passports in order to justify military action on their behalf. Second, they must be threatened with overwhelming peril. Third, there must be no alternative to an armed intervention in

averting that peril. Fourth, the operation must be strictly limited to what is necessary to extract the threatened population from the situation of overwhelming emergency, rather than annexing the territory on which it may be present.

Facts and Rules

Simply inventing facts that do not exist in order to fulfil the legal criteria of the justifications for the use of force does not suffice. True, states claim to be sovereign and largely unconstrained in their governmental action. But where they act in relation to the international realm, they must accept that the facts they invoke must be facts, not phantasy. The claimed facts must withstand scrutiny by others, including the scrutiny and judgment of the best placed and objective international institutions.

For example, in this instance, rather spectacularly, the venerable International Court of Justice ruled that the facts invoked by the Russian Federation to justify the armed invasion of Ukraine were simply inexistant. There was no genocide committed by Ukrainian authorities against Russian-speakers. As the invasion has been based on that allegation, the Court even instructed the Russian Federation to suspend it.

In other words, actual facts, rather than invented or notional ones, matter, when combined with the relevant legal standards.

International Law as the Fundamental Framework

From the perspective of international law, it is therefore legitimate to take the foundational rules of international conduct as the starting point, or as the necessary framework, when seeking to craft a solution for the crisis in Ukraine. The facts, as confirmed by the relevant international institutions, must then be evaluated according to that framework. The resulting findings will then guide the identification of the range of solutions the sides will likely consider in their negotiations.

This is not an act of taking sides, or of adopting an unneutral or partial attitude. Rather, this approach is required by the international system. Disregarding these requirements and legal rules in the interests of the one or other state, or perhaps in the interest of power politics and supposed realism, would be unneutral or partial.

The diversity of national perspectives on aspects of international politics and on the history or relations with other countries or peoples, will always persist. But in the end, any difference in perspective needs to be addressed within a common system that preserves and protects the minimum of values agreed by humanity over the past decades.

This conclusion somewhat constrains what is possible in international settlement negotiations. In particular, it would be difficult to foresee a settlement that endorses territorial change achieved through the use of force and/or ethnic cleansing or other significant violations of essential rules. Such a settlement would not, in fact, have legal validity. It could not be easily accepted by the organized international community, acting through the UN Security Council.

If the settlement to the conflict cannot be broadly accepted as being consistent with the essential rules of the international legal system, the disruption of economic relations through sanctions would likely remain.

Such an outcome would also be unlikely to offer a permanent settlement between Ukraine and the Russian Federation. The losing state would likely claim the right to re-ignite the conflict and to re-capture territory unlawfully taken once its military apparatus has been fully restored.

V. CONCLUSION

In this instance, it is clear that the uses of force in 2014, and after 24 February 2022, were unlawful. This concerns several categories of territories:

- Crimea, including the City of Sevastopol;
- The areas of Luhansk and Donetsk that were placed beyond the control of the Ukrainian government in 2014;
- The remaining areas of the Oblasts of Luhansk and Donetsk as defined in the Ukrainian legal order that may now come under Russian Federation occupation;
- And any other areas occupied by the Russian Federation, for instance in the south-east, connecting areas under Russian Federation control with Crimea, and perhaps reaching further, towards Odessa or even the border with Moldova.

The occupation and potential acquisition of any of these territories is international unlawful. Possession of these territories by the Russian Federation is legally tainted by virtue of the unlawful use of force involved.

The prohibition of the use of force is the cardinal example of a peremptory norm of international law. Serious violations of peremptory norms trigger consequences for third states, including the duty of non-recognition of territorial change that may result from them.

Moreover, in this instance other serious violations of peremptory norms may have been committed, including grave and persistent violations of humanitarian law and of the international prohibition of ethnic cleansing.

In addition to the duty not to recognize the consequences of such serious violations, third states must not assist the offending state in maintain them in place, and they should cooperate through international institutions in seeking to reverse them.

These considerations constrain what can be offered and agreed in a peace settlement. Territorial conquest cannot be consolidated through a further use of force and internationally condoned. Instead, practical ways need to be found to recognize current realities, without formally accepting as lawful the fruits of the unlawful use of force.