

RUSSIA’S WAR AGAINST UKRAINE: A CONTRAVENTION OF INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT

In February 2022, Russian forces invaded Ukraine and began targeting military objectives in some major Ukrainian cities. In the following months, airstrikes continued and extended to other areas of Ukraine, including the capital Kyiv. Attacks started being conducted against civilians too. For instance, it has been reported that an apartment complex outside of Kharkiv – one of the main cities of Ukraine – was directly targeted. In addition, the United Nations noted that about 13 million people are unable to flee the areas affected by hostilities. International humanitarian law, or the laws of war, provides protections to civilians and other noncombatants from the dangers of armed conflict. It addresses the conduct of hostilities—the means and methods of warfare—by all parties to a conflict. Foremost is the rule that parties to a conflict must distinguish at all times between combatants and civilians. Civilians may never be the deliberate target of attacks. As analyzed in this article, parties to the conflict are required to take all feasible precautions to minimize harm to civilians and civilian objects and not to conduct attacks that fail to discriminate between combatants and civilians, or would cause disproportionate harm to the civilian population. The laws of war limit attacks to “military objectives.” Military objectives are personnel and objects that are making an effective contribution to military action and whose destruction, capture, or neutralization offers a definite military advantage. This would include enemy fighters, weapons and ammunition, and objects being used for military purposes, such as buildings and vehicles. While humanitarian law recognizes that some civilian casualties are inevitable during armed conflict, it imposes a duty on parties to the conflict at all times to distinguish between combatants and civilians, and to target only combatants and other military objectives. Civilians lose their immunity from attack during the time they are “directly participating in the hostilities” – such as by assisting combatants during a battle. This article aimed at contributing to the understanding of the contravention of the international legal framework that regulates the use

of force in Ukraine and how a powerful member of the United Nations Security Council (UNSC) deliberately circumvented treaty provisions on the use of force. The article concludes with a sidebar of the need to exploit avenues for accountability that will help to forestall future occurrences.

Keywords: International Humanitarian Law, Armed Conflict, Russia, Ukraine, United Nations

INTRODUCTION

The recent attack on Ukraine, similar to the previous cases of invasion of Georgia in 2008 and Ukraine in 2014 represents an obvious violation of international law. Following the February 2022 invasion of Ukraine, Russia's actions have come under severe criticism as many countries saw the action as a clear negation of the standard rule governing when states can take up arms or use force against one another. As a result of the inadequacy of legal parameters in understanding Russia's actions in Ukraine, many observers, not excluding the United States, France, United Kingdom, and other state and non-state actors have increasingly drawn attention to the numerous instances where Russian military attacked civilian populations and deliberately struck protected sites and creating large pool of refugees wandering across Europe. These actions by Russian military constitute egregious violations of international law governing the conduct of war. In essence, Russia's actions against Ukraine can hardly fit into the legal requirement for war thereby pushing Russia to rely on propaganda and unfounded approximations. To contribute to furthering the understanding of the complex issues at stake, this article is focused on the legal angle of an utterly political affair. Particularly, this attempt would contribute to the understanding of the contravention of the international legal framework that regulates the use of force in Ukraine and how a powerful member of the United Nations Security Council (UNSC) deliberately circumvented treaty provisions on the use of force. The article concludes with a sidebar of the need to exploit avenues for accountability that will help to forestall future occurrences.

THE LAWS OF WAR

By and large, the concept of the *law of war* specifically refers to a segment of international law that governs the initiation of war, use of force, the conduct of war, and the protection of victims of war.ⁱ On a general note, it provides the guidelines on which basis wars can be prosecuted.ⁱⁱ Some scholars including Antonio Cassese and Gary Solis prefer to use the terminology interchangeably with *International Humanitarian Law* (IHL) or even *law of armed conflicts*.ⁱⁱⁱ To further appreciate the extent of knowledge on the subject matter, there exist two main categories of the law of war: *jus ad bellum* (rules that regulate when a state can initiate or resort to the use of force) and *jus in bello* (legal rules governing the conduct of both states and foot soldiers during war).^{iv}

Though the two rules appear to be closely related, they function independently of one another. That is to say “compliance with one category is required regardless of compliance with the other.”^v That is to say, even if a state was attacked without legal due processes, its response in terms of defense must be seen to comply with the legal and acceptable procedure of conducting war. In relation to the specific case of Russia’s attack of Ukraine, the drafters of the law of war expect Ukraine to conduct its defense against Russian aggression within the ambit of the *law of jus in bello*.

JUS AD BELLUM: DISSECTING THE REASONS FOR THE HOSTILITIES IN UKRAINE

To analyze the focal point of *jus ad bellum* in general, and the specific case of Russia’s attack of Ukraine, one must pay priority to the United Nations Charter. In specific terms, Article 2(4) of the UN Charter formally forbids all member states from the threat or use of force against fellow member states. It reads “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”^{vi} In other words, this provision recognized the inviolability of borders, and further anchors the respect for the territorial integrity of states while also restraining the use of force against independent states.

Aside from the UN Charter's unambiguous prohibition of state intervention in the internal affairs of fellow states, there are a number of other agreements that were concluded based on the framework of the UN Charter that recalled the importance of peaceful settlement of disputes as well as cautioned member states from threatening the international relations. For example, one such declarations that seek to promote peaceful resolution of disputes is the resolution 2625 of the UN General Assembly of 24 October 1970 reads "*Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.*" However, there are exceptions to the rule of Article 2(4). As enshrined in Article 51 of the same UN Charter, states have a right to take either individual or collective actions in respect of self-defense.^{vii} More so, Chapter VII of the UN Charter permits members of the UN Security Council to resort to the use of military actions in the event that peaceful measures have proven ineffective in restoring peace and security.^{viii} Russia has not reported Ukraine for scrutiny within the Security Council and the UNSC have not exhausted peaceful avenues as required by Article 41.

The proposition by President V. Putin and other top officials of the Russian regime that its use of force in Ukraine can be justified under the provisions for self-defense as enshrined in Article 51 of the UN Charter cannot hold water. Article 51 reads "nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations." On the contrary, there is no record suggesting that Ukraine has threatened to commit and or have committed an armed attack against the Russian Federation. Again, there is nothing to suggest that Ukraine has taken up arms or threaten to take up arms against Russians living in Donetsk and Luhansk (two regions within the borders of Ukraine with significant Russian populations). Besides, even if Russia has gathered sufficient evidence suggesting that Ukraine had threatened or planned to take up arms against Russians in the Ukrainian regions of Donetsk and Luhansk, the cover provided by Article 51 cannot be overstretched to sanction a collective action under the guise of self-defense because the two regions are not members of the United Nations. In essence, Donetsk and Luhansk do not qualify as states going by the rule of state recognition in international law.^{ix}

Besides, under international law and *jus ad bellum*, it is legal and acceptable for a state to permit the use of force by another independent state on its territory. Usually, this must be consented to by the inviting state and maybe to assist in the fight against terrorists or rebel forces domiciled in the state that offers such invitation.^x Yet, the case under consideration does not witness any form of formal or informal invitation extended to Russia by Ukraine. Therefore, the invasion of Ukraine without invitation runs contrary to the rules of *jus ad bellum*.

RUSSIA'S ASSERTION OF *JUS AD BELLUM*

On the very morning that Russia's military tanks and ballistic missiles were prepared to start the bombardment of Ukraine, its permanent representative to the United Nations, Vasily Nebenzya alerted the Secretary General of the UN that Russia's military are underway to attack Ukraine.^{xi} Attached to the formal submission of the declaration of war was Vladimir Putin's speech in which he recounted some grievances as justification for the attack. Though it is difficult and unclear as to the position of international law regarding the invasion of Ukraine by Russia, Putin's letter to the UN provided some justifications under the pretext of international law. Some of the justifications were drawn from the body language of the UN Charter. A perusal of Putin's justifications anchored on three main arguments.

Fundamentally, Russia claimed that the United States and other European NATO members posed a general threat to its survival and thus the attack was initiated as a means to defend itself from such eminent threat. It argues that such threat posed by NATO emanates from within Ukraine as a friend of NATO members. While the UN Charter Article 51 reserves the "inherent right" of member states to self-defense in times of armed attack, it does not delineate the specific extent of such right. The question therefore arises as to measure of the threat that would warrant states to exploit self-defense measures under the article. Whatever may be the extent of provocation before a state can invoke the spirit of Article 51, commentators argued that the absence of physical threat or military action by Ukraine against Russia means that Russia's justifications cannot be valid under any guise.^{xii}

Another justification provided by Russia for the invasion of Ukraine is anchored on the principle of "collective self-defense."^{xiii} Prior to the invasion of Ukraine, Russia had declared the political independence of two regions of Donetsk and Luhansk arguing that these regions

have been subjected to all forms of violations by the state of Ukraine. Be that as it may, the regions cannot be treated as independent states by international law standard of statehood and thus do not fit into the equation of collective self-defense as envisioned by the drafters of the UN Charter. Further to the above point of analysis, legal thinkers have argued that the regions do not qualify as states mainly because their claim of independence was a function of forceful declaration. Again, these regions within Ukraine do not have absolute control over the territories under its domain and it is the Russian Federation that engineered its so-called independence.

In addition, even if the so-called independent territories have been fully recognized as states, thinkers have noted that the principles of *jus ad bellum*, including necessity and proportionality means that Russia's military action should have been limited to the regions and not an extensive attack aimed at "demilitarization" of the entire Ukraine.

Furthermore, the Russian Federation contended that its attack on Ukraine is contrived to prevent "genocide perpetrated by the Kiev regime"^{xiv} been perpetrated against the Russian people in Ukraine. On its part, Ukraine has unequivocally rejected any such allegation against its own citizens and has even approached the International Court of Justice for formal affirmation. In fact, there has been no formal or informal complains from the United Nations or any group of international human rights organizations regarding Ukraine's ill-treatment of Russian speaking populations within its border. In essence, observers argued that the idea that Russia's invasion of Ukraine was born solely to protect against Ukrainian genocide appears to be total fabrication and thus illegal and a contravention of international law.^{xv}

JUS IN BELLO: WHAT ARE THE CONDUCTS AND RESPONSIBILITIES OF BELLIGERENT NATIONS?

Since the disputes between Russia and Ukraine transited to full-scale war, the application of the principles of *jus in bello* become more important. The concept of *jus in bello* is founded on treaties and customary international law. While other additional treaties and agreements can also form a body of *jus in bello*, there are two main collections of international agreements that constitute it namely, the Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949. While Hague conventions are a set of rules governing the *modus*

operandi warfare, the Geneva Conventions serves to regulate the treatment of war victims and surrendered actors. It is noteworthy to stress that both Ukraine and Russia are parties to the core treaties. However, not all of them signed up to some of the related protocols. A violation of the Geneva Conventions constituting “grave breaches”^{xvi} can amount to “war crimes.”^{xvii}

The indispensable principles of *jus in bello* include first Military necessity. This principle requires states that are engaged in armed conflicts to exploit measures that are necessary to accomplish its legitimate military objectives, as long as those measures are within acceptable international law standards.^{xviii} Second, the humane principle requires all parties to a conflict must ensure to exploit only measures that would not inflict undue suffering, injury, or destruction. That is to say, parties to a conflict are required to not exploit measures that would lead to suffering, injury, or destruction if such measures would not lead to the accomplishment of its military objectives. Third, the principle of Proportionality which dictates in Articles 51 and 57 of the 1977 Additional Protocol I that all parties to a conflict are required to deploy military force that is commensurate with the force of the opponents and that would minimize civilian casualties. For this reason, the ICJ has expressed in the case of *Nicaragua v The United States of America* that: “self-defense [...] warrant[s] only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”^{xix} Similarly, the ICTY has noted in the *Kupreskic case* that: “In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness.”^{xx} The Court further recalled that these principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977.^{xxi} Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those that have not ratified the Protocol.^{xxii} The use of excessive force is therefore discouraged. Lastly, the principle of distinction states that parties to a conflict are required to provide the clearest distinction between civilians and combatants. This provision also required parties to distinguish protected and unprotected objects. Parties are required by this principle to protect both civilians and protected objects.

Apart from the general principles enumerated above, the rule of *jus in bello* required all parties to a conflict to protect some groups including civilians, children, medical and religious

personnel, and voluntary aid workers. The principle extended its shield to protect groups that no longer engage in hostilities such as prisoners of war, wounded, sick etc. In its Common Article 3, the four Geneva conventions provides a “minimum yardstick”^{xxiii} of protection that is required of any party that takes prisoners of war or war victims or those who can no longer take part in the conflict. Acts that are prohibited under Common Article 3 of the four Geneva Conventions include, sexual assault, rape, torture, cruel treatment, biological experiments, hostage-taking, murder, mutilation, or maiming of those not taking part in hostilities. Under this provision, certain properties are required to enjoy special protection. This includes historic monuments, hospitals, religious sites, art, science, or even charitable purposes and places where the sick and wounded are collected, provided they are not being used for military purposes.

The rule governing the prosecution of war also placed limitations on the weapons that parties to a conflict can use during arm conflict. Accordingly, *jus in bello* prohibits two forms of weapons. First, it prohibits weapons that cause unnecessary injury or weapons that can hardly be manipulated to distinguish targets.^{xxivxxv} Second, it also prohibits poisonous chemicals and biological weapons.^{xxvi} Similarly, *jus in bello* provides legal prohibitions against the use of certain forms of methods in prosecution of war including pillaging, limiting destruction and seizure of non-military property, requiring free passage of some humanitarian relief, and regulating the white flag of surrender, among other things.

THE EFFECTIVENESS OF *JUS IN BELLO* IN UKRAINE

The position of observers and some foreign governments such as the US and UK is that some of the actions taken by Russia have violated the laws of war. Some of the allegations against Russia which represents the position of facts of law and which are a contravention of law, including the use of ballistic missiles and other explosive weapons with no precision and indiscriminately on the Ukrainian populations, which constitute egregious violations of the laws of war, particularly the law on the use of weapons of mass destruction. The Use of ballistic missiles and other explosive weapons in an indiscriminate manner in densely populated areas. However, it is important to note that neither Russia nor Ukraine are parties to the convention on cluster Munitions, the indiscriminate use of sophisticate weapons have implications under

the *jus in bello*. Some have argued that certain elements of Ukraine's conduct are also unlawful. In particular, the public display of captured Russian soldiers during news conferences could implicate the Third Geneva Convention's requirement to treat soldiers humanely and protect them from "insults and public curiosity."^{xxvii}

In all these, proving that a party to the conflict has violated certain provisions is notwithstanding a difficult task. It requires identifying, gathering evidence of, and proving the violations are a fact finding mission that often do not see the light of the day, argues Weller^{xxviii} More challenging is to establish that civilian deaths are caused by intentional or deliberate and therefore unlawful acts by Russian armed forces. Again, it will be difficult to establish that Russia's actions are not deliberately taken by are incidental and not excessive (and therefore potentially permitted under the principle of proportionately).

INTERNATIONAL INSTITUTIONS RESPOND TO RUSSIA'S ACTIONS

In addition to financial sanctions imposed bilaterally by the United States and numerous other countries, Russia is likely to face widespread condemnation and isolation in international bodies. It is the opinion of this article that very few governments and law experts will agree that Russia's actions is permissible under international law. In line with this development, the Council of Europe suspended Russia's participation in its Committee of Ministers and its Parliamentary Assembly.^{xxix} Meanwhile, the UN Security Council voted on a binding resolution condemning the invasion and requiring Russia to cease its military actions and withdraw from Ukraine.^{xxx} But Russia, as a permanent member of the Security Council, vetoed the resolution.

On Sunday, the Security Council voted 11-1 (with Russia opposed and three members abstaining) on a nonbinding resolution calling on the UN General Assembly to hold an emergency special session to consider Russia's actions. This Security Council resolution comports with UN General Assembly Resolution 377(V) of 1950 (the so-called Uniting for Peace resolution), which resolved that in the case of a deadlock in the Security Council, the General Assembly shall "consider the matter immediately with a view to making recommendations to members for collective measures."^{xxxi} The General Assembly is likely

to overwhelmingly adopt a resolution opposing Russia's actions as a threat to Ukraine's territorial integrity, sovereignty, and political independence, as it did in 2014 after Russia annexed Crimea. The General Assembly could also mandate a UN investigation of Russia's actions, urge member states to impose sanctions on Russia, or recommend that Russia be expelled or suspended from certain UN bodies.

In addition, Ukraine also filed another claim against Russia in the International Court of Justice (ICJ) on Sunday, alleging that Russia misinterpreted the Genocide Convention to justify the invasion of Ukraine. The ICJ is already hearing two claims Ukraine filed in 2017 relating to Russia's actions in Crimea and eastern Ukraine.^{xxxii} Putin and other Russian officials could face an investigation by the ICJ for war crimes committed during the invasion. Although Russia is not a party to the Rome Statute, which established the International Criminal Court (ICC), Ukraine has accepted the ICC's jurisdiction for offenses that have occurred on its territory since 2013 (other than the crime of aggression, for which the ICC does not have jurisdiction for non-parties).

LEGAL RESPONSIBILITY AND US LEGISLATIVE ALTERNATIVES

Identifying avenues of accountability for law of war violations raises complex practical, legal, and jurisdictional questions. As discussed in this article that seeks to explain the illegality of Russia's invasion of Ukraine, Ukraine is pursuing cases against Russia in the International Court of Justice and other international tribunals, but constraints on jurisdiction and enforcement may limit the cases' practical impact. Some observers have called for the creation of a new international tribunal with broader jurisdiction to address Russia's actions. Germany has reportedly opened investigations into whether the invasion is leading to crimes that can be prosecuted under their respective domestic laws.^{xxxiii} The United States has a war crimes statute but it does not provide universal jurisdiction, and the Department of Justice has not prosecuted or convicted anyone for a war crimes offense under this statute. Some commentators have called for Congress to amend this statute to provide broader jurisdiction. Others have proposed amending the Foreign Sovereign Immunities Act to allow civil lawsuits against Russia and attachment of Russian assets.^{xxxiv}

At the United Nations, more than 100 sovereign nations voted for General Assembly Resolution ES-11/L.1, which “deplores” the incursion as an illegal use of force, but this resolution is nonbinding. Russia vetoed a different resolution at the U.N. Security Council that would have contained an obligatory “verdict” that Russia must without delay, stop using force and unreservedly pull out from Ukraine.^{xxxv} As examined in this paper, human rights and humanitarian institutions may possibly keep on addressing facets of the Russian offensive; while on the other hand; the U.N body have means to pressure or persuade the Russian Federation to end its acts of aggression in Ukraine.

The legislative body could reflect on legislation mandating the United States’ Foreign Claims Settlement Commission to allow claims arising from Russia’s attack and its probable nationalization of American-owned property in Russia. Discussed in this article, the Foreign Claims Settlement Commission is a quasi-judicial, independent agency within the Department of Justice that adjudicates claims of U.S. nationals harmed by foreign governments. Its authority is limited to country-specific programs created through legislation or by referral from the U.S. Department of State.

The United States, the United Kingdom, the European Union, and their allied countries have imposed sanctions on Russia to hold it responsible for attacking Ukraine. Some members of the United States Congress have advocated for expanding those sanctions. Members have also introduced legislation that would authorize the President to seize and liquidate Russian oligarchs’ assets in the United States. Chapter 35, section 1701 of the U.S International Emergency Economic Powers Act allows the President to block transactions and “freeze” assets, but the President’s authority to vest (i.e., take title to) those assets is limited to circumstances when the United States has been attacked or is engaged in hostilities.^{xxxvi}

CONCLUSION

The Russian references to “genocide” in Eastern Ukraine to justify its intervention cannot be substantiated and offer no justification for military action under international law. Instead Russia has violated the *jus ad bellum* regime, the conditions under which States may resort to war or to the use of armed force in general. Its actions constitute an act of aggression breaching

the cornerstone legal principle of the prohibition of use of force, laid down in article 2 (4) of the UN Charter.

It is the opinion of this article that apart from the *jus ad bellum* legal framework, Russia's invasion raises concerns with respect to the application of *jus in bello* - the body of international law related to the conduct of hostilities and the means and methods of warfare. As the military operations are still ongoing, it can only be reiterated at this stage that violations of this body of law may trigger war crimes accusations, whereas the particular provisions of the IV Geneva Convention on belligerent occupation will be of high relevance.

Finally, the displacement of many civilians who may ask for protection in other countries will activate international and regional refugee law. The dramatic events of the last few months have fundamentally challenge the basic premises of the international legal order as we know it; the normative consequences of this military operation remain to be seen.

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