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The Use of Force against Ukraine and International Law

Jus Ad Bellum, Jus In Bello, Jus Post Bellum

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Foreword

The current conflict in Ukraine has had tremendous repercussions both on the individuals living in the affected territory and around the world. The 'Maidan' protests which began in November of 2013 as a response to the decision of Ukraine's pro-Russian former President Viktor Yanukovych not to sign an association agreement with the European Union set off a chain of events that not only toppled Yanukovych from power, but also provoked a furious Russian response that ultimately led to Crimea's annexation by the Russian Federation[1] and a war in Eastern Ukraine.

The twenty chapters of this book, *The Use of Force against Ukraine and International Law: Jus ad Bellum, Jus in Bello, Jus post Bellum*, represent an impressive attempt to address the legal and practical challenges posed by this difficult state of affairs. This book nuances the readers' understanding of the conflict, taking the perspective of those on the receiving end. Instead of involving authors only from Russia and Ukraine, a choice justified perhaps by the rawness and ongoing nature of the conflict, this book assembles a wide variety of scholars from around the world to address the complexities of Crimea's sudden incorporation into the Russian Federation and the conflict in Eastern Ukraine. It goes beyond *complaining* about the international illegality of the Russian Federation's activities to *explaining* how the Russian Federation has, for the most part, not dismissed international law as irrelevant, but has indeed endeavoured to explain it away or even redefine it. As one of the editor's notes, this represents a real challenge to both the content and the relevance of international law today.

Russia's annexation of Crimea resulted in dramatic legal changes for all of its formerly Ukrainian citizens: their currency, passports, rules regarding medical and social services, freedom of migration, freedoms of the press and the rights of assembly all were modified by a new legislative regime. President Vladimir Putin and Crimea's leadership signed agreements on 3 April 2014 making Crimea and the

[1] Office of the Prosecutor, Rep. on Preliminary Examinations 2017, 84–87 (4 December 2017) [hereinafter 2017 Preliminary Examinations Rep.].

city of Sevastopol part of the Russian Federation, and Russian legislation on the annexation of Crimea and Sevastopol became the vehicle for the extension of the entire corpus of Russian domestic law to the territory. Henceforth, all matters taking place in or in relation to the territory were subject to Russia's domestic jurisdiction and governed by Russian administrative bodies including its law enforcement authorities, judicial system and legislature. After annexing Crimea, Russian authorities expedited the issuance of Russian passports for the residents of the peninsula. As several authors noted, individuals who refused to take Russian nationality were allegedly subject to discrimination, while those who opposed the annexation, and certain minority groups, were subject to persecution. The International Criminal Court Prosecutor's Preliminary Examination 2017 Report contains allegations of disappearances, killings, ill-treatment, forced conscription, deprivation of fair trial rights, transfer of population from the Russian Federation into Crimea, seizure of property and alleged harassment of the Crimean Tatar population.[2] Although the absorption of Crimea by the Russian Federation was rapid and the numbers of specific violent crimes are not high, the overall impact of Crimea's integration into the Russian Federation has been enormous, causing financial and psychological harm in addition to the specific harms detailed above.

In Eastern Ukraine, the struggle between government and anti-government forces (allegedly supported by the Russian Federation) has already resulted in more than 10,000 deaths and 25,000 injuries, including thousands of civilians, and the alleged commission of war crimes including illegal detentions, torture and ill-treatment, sexual and gender-based violence, and disappearances.[3] This conflict continues today and threatens Ukraine as well as its neighbours.

Given the scope and magnitude of this ongoing conflict, the importance of this timely volume cannot be overstated. The first seven chapters discuss issues relating to the *jus ad bellum*, or the legality and characterisation of the conflict itself. The next, and longest section, Chaps. 8 through 15, discusses issues involving the *jus in bello*, although there is some overlap between Parts I and II and some chapters are concerned less with the *laws of war* than with the conduct of war itself, particularly in terms of the use of information warfare and cyber-operations by the Russian Federation and its surrogates. Finally, Chaps. 16 through 20 address issues involving the *jus post bellum,* largely in terms of the potential activity of the International Criminal Court (ICC).

Chapter 1, written by Miras Daulenov, sets the stage with a classic exposition of the law of the UN Charter on the use of force, as well as specific international agreements between the Russian Federation and Ukraine regarding the inviolability of the latter's borders, as well as the 1994 Budapest Memorandum on Security Assurances with Ukraine, Belarus, Kazakhstan and the Russian Federation, USA and the UK. Both he and Oleksandr Merezhko in Chap. 5 address the thorny question of the conflict's characterisation as international or non-international. Both

[2] *Id.* 96–103.

[3] *Id.* 104–110.

authors conclude in the light of the facts, treaties and customary law at play that both the conflict in Eastern Ukraine and the annexation of Crimea are international in nature. The International Criminal Court prosecutor has agreed with this assessment as to the situation involving Crimea,[4] but has thus far demurred regarding the conflict in Eastern Ukraine which it found to be as 'non-international' in nature, even as it 'continues to examine allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine'.[5]

All the authors in this section conclude that Russia's annexation of Crimea was unlawful and that the presence of several thousand troops of the Russian armed forces in the east of Ukraine not only violates international law but represents a serious threat to peace and stability in Europe, and to the continued territorial integrity of Ukraine. They observe that the international community has, nearly unanimously, refused to recognise any new States emanating from Ukraine, noting that only a handful of States have 'joined' Russia in either backing the Crimean 'referendum' or actively opposing measures supporting Ukraine's territorial identity.[6] (Tymur Korotkyi and Nataliia Hendel offer a reprise of this argument in Chap. 7.)

Valentina Azarova picks up this theme in Chap. 3, arguing that 'a third state that recognised as lawful the illegal situation […] would itself attract responsibility in international law'. Her chapter focuses not so much on the status of the conflict (as international or non-international), but on the effect of the conflict on the obligations of third-party States, concluding that because the 'annexing state is not permitted to extend international treaties to which it is a party, or benefits thereunder, to the annexed territory', as a consequence, 'third states must ensure that their dealings with an annexing state do not extend to the foreign territory it seeks to illegally annex'. She concludes that international law's 'foremost concern is to reverse the situation of suffering that results in the continuous production of violations […] States and international organisations are charged with the heavy lifting necessary to achieve these ends by upholding these obligations in their transactions with the occupying state and its subordinate authorities. Third states have a public right and duty to seek an end to such situations of foreign territorial control through international cooperation under a standard of due diligence; the mere refusal to admit unlawful revisions to the status of the occupied territory is insufficient to put an end to an illegal territorial regime'.

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[4] *Id.* 88.

[5] *Id.* 95.

[6] One hundred countries voted for UNGA Resolution 68/262, which reaffirmed the General Assembly's commitment to the territorial integrity of Ukraine within its international recognised borders. Eleven States voted against, fifty-eight abstained and twenty-four were absent. G.A. Res. 68/262, 80th Plenary Meeting, U.N. Doc. A/RES/68/262 (March 27, 2014). As one author has noted, States supporting Putin's position were either isolated regimes such as Cuba, North Korea, Syria, Sudan and Zimbabwe or 'post-Soviet autocracies'. Casey Michael, *Will Trump Recognize Russian Annexation of Crimea?*, The Diplomat, (January 9, 2017), https://thediplomat.com/2017/01/will-trump-recognize-russian-annexation-of-crimea/.

In *Conferral of Nationality of the Kin State—Mission Creep?*, Sabine Hassler and Noëlle Quénivet take up another aspect of Russia's intervention in Crimea arguing that the Russian Federation's policy of facilitating acquisition of Russian nationality combined with a nationalist discourse has allowed it to intervene in the internal affairs of neighbouring States by conferring nationality on individuals with a view to offering them diplomatic protection, then using force under the idea of protection of nationals abroad and, finally, annexing a part of the territory of another State. They suggest that contemporary international law 'has constrained Russia in its long-standing ability to influence neighbouring States and create a buffer zone around it so much that it has reverted to a pre-WWII policy of kin-State activism through the use of "nationality", potentially threatening the end of the post-WWII order in Europe, and in particular the Baltic states'.

This thoughtful chapter illuminates the wisdom, as seen in hindsight, of *Nottebohm's* distinction between nationality as defined under municipal law and the international validity of a State's assessment regarding whom it may extend diplomatic protection. As the authors' note, 'there seems little doubt that Russia uses nationality as a political, economic, and cultural tool of expansionism'. They suggest three phases to this strategy: *first*, 'conferral of nationality by way of passportisation to those identifying as Russian in Baltic states and Georgia'; *second* the use of force to protect these 'new' nationals abroad, in Georgia, for example; and *third* 'the use of force to acquire neighbouring territory on which Russians are living in order to recreate zones of influence'. This chapter suggests that the tendency of other States to use a 'self-defence' rubric to justify protection of their nationals abroad, such as the Israeli evocation of it in the *Entebbe* case and the US arguments in favour of the invasion of Grenada, should be treated with the utmost caution, as incidents justified, if at all, by extreme necessity, as opposed to an inherent rule of customary international law under Article 51 of the UN Charter.[7] William Burke-White makes a similar point in *Crimea and the International Legal Order*, arguing

> In claiming the legality of its actions, but twisting the law in subtle (and not so subtle) ways, Russia is taking a card straight from America's playbook. […] In Crimea, Russia is, perhaps for the first time since the Soviet Union, asserting itself as a renewed hub for a particular interpretation of international law, one that challenges the balance at the heart of the post-Second World-War order and the ability of the US to lead that order.[8]

In *Legal Challenges in Hybrid Warfare Theory and Practice: Is There a Place for Legal Norms at All?*, Gergely Tóth argues that the Russian Federation is using 'hybrid' or 'asymmetric warfare' to achieve its ends in Ukraine, thereby blurring the

[7] In a similar vein, Bill Bowring suggests that the justification for annexation of a 'right to self-determination by the people of Crimea' is unpersuasive. In his view, the only 'people' potentially having such a right would be the Crimean Tatars, who would potentially have such a right as an indigenous Turkic people. Bill Bowring, Chap. 2 in this Volume.

[8] William W. Burke-White, *Crimea and the International Legal Order*, U. Pa L. Sch. 2 (Fac. Scholarship Paper 1360, 2014).

space between war and peace. Unlike the so-called US 'war on terror' in which a small but feisty adversary who does not respect the traditions of the *jus in bello* is thought to asymmetrically attack a large, otherwise compliant adversary, the use of the term 'hybrid' or 'asymmetric' warfare in this volume, as also suggested by Olga Butkevych (Chap. 9), centres upon the fact that

> Military aggression is just one element of the Russian hybrid warfare against Ukraine. Other elements encompass: (1) propaganda based on lies and falsifications; (2) trade and economic pressure; (3) energy blockade; (4) terror and intimidation of Ukrainian citizens; (5) cyber-attacks; (6) a strong denial of the very fact of war against Ukraine despite large scope of irrefutable evidence; (7) use of pro-Russian forces and satellite states in its own interests; (8) blaming the other side for its own crimes.[9]

According to Toth and Butkevych, hybrid conflicts involve multilayered efforts designed to destabilise a functioning State and polarise its society. Unlike conventional warfare, the 'centre of gravity' in hybrid warfare is a target population. The adversary tries to influence influential policy-makers and key decision-makers by combining kinetic operations with subversive efforts. They argue that aggressors will often resort to clandestine actions, to avoid attribution or retribution.

Jozef Valuch discusses the conflict in terms of cyber-operations. As he notes in Chap. 10, non-destructive cyber-operations, like the attacks on the confidence of the national government, do not involve the use of force, at least according to the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, which suggests that cyber-operations involve the use of force only when their 'scale and effects are comparable to a non-cyber operation rising to the level of a use of force'.[10] This does not mean, however, that cyber-operations which do not include the use of force are consistent with international law. They may be prohibited by rules such as the principle of non-intervention, which forms part of the principle of the sovereign equality of States and is embodied in Article 2(1) of the UN Charter. The principle of non-intervention is also part of customary international law and according to the *Nicaragua* case 'forbids all states or groups of states to intervene directly or indirectly in the internal or external affairs of other states'.[11] He distinguishes the attacks in Ukraine as involving largely 'political and ideological effect', from those carried out presumably by the Russian Federation in Georgia, which were more closely allied, in his view, with military operations and therefore more clearly fell within the ambit of the laws of war.

In Chap. 11, *Foreign Fighters in the Framework of International Armed Conflict between Russia and Ukraine*, Anastasia Frolova considers whether international humanitarian lawfully addresses the complexities presented by the high level of foreign nationals' involvement in the ongoing conflict on Ukrainian territory. The

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[9] Olga Butkevych, Chap. 9 in this Volume.

[10] Tallinn Manual on the Internationa Law Applicable to Cyber Warfare, Rule 11 (Michael N. Schmitt ed., 2013).

[11] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, at 202-05. (June 27).

chapter notes certain ambiguities in outlining the parameters of the term, as well as difficulties with the application of international humanitarian law in cases of foreign fighters taken into either Ukrainian or Russian units. She points out, for example, that Belarus nationals—who formed part of the so-called Pahonia unit fighting on behalf of Ukraine—might not have protected status under the Third or Fourth Geneva Convention if captured by Russia if it can be argued that Russia usually exercises diplomatic protection over them. In such cases, she notes that international human rights law may provide a 'safety net'.

The plight of children afflicted by the conflict in Ukraine is taken in Chap. 12, *Children and the Armed Conflict in Eastern Ukraine*, penned by Natalia Krestovska. She notes the toll of the war on children, many of whom have been killed or wounded, and thousands more have been internally displaced. Children's living standards, educational attainment, health and security have been negatively affected by the conflict in violation of international humanitarian law and human rights law.

In Chap. 13, on the *International Legal Dimensions of the Russian Occupation of Crimea*, Evhen Tsybulenko and Bogdan Kelichavyi develop further the complications of Russia's occupation in terms of the legal regimes applicable to the annexed territory and the lives of the inhabitants there. As Butkevych's earlier chapter notes, the legal relationship between Russia and Ukraine and between individuals living in Crimea and both governments has been upended by the war. Butkevych observes that there were more than 350 treaties between Ukraine and the Russian Federation, the operation of which has largely been suspended or terminated, in many cases wrongfully, as a result of the armed conflict between them. Tsybulenko and Kelichavyi note that this has imposed real challenges to individuals currently living in Crimea as well as those displaced, who may have lost their passports, property rights, rights to social services and even political freedoms. Moreover, in response, Ukraine derogated from both the European Convention on Human Rights and the International Covenant on Civil and Political Rights, invoking special restrictions to the right to liberty and security, right to a fair trial, right to respect for private and family life, right to an effective remedy, freedom of movement in the territory of 'certain areas of the Donetsk and Luhansk *oblasts* of Ukraine'. Thus, the protection of human rights for all the individuals living in Ukraine (including Crimea) has been compromised. A particular worry evoked by this chapter, as well as Bowring's earlier essay on the fate of the Crimean Tatars (Chap. 2), is that the Russian invasion has put the Tatars of Crimea again 'on the brink of extinction', evoking the possibility that violation of the Genocide Convention may be in play. Ukraine, as they note, has turned to international legal institutions to make its case, submitting two declarations to the International Criminal Court relating to the conflict; applying to the European Court of Human

Rights for relief; initiating proceedings against Russia under the UN Convention on the Law of the Sea; and filing a claim against the Russian Federation with the International Court of Justice.[12]

In Chap. 14, Sergii Pakhomenko, Kateryna Tryma and J'moul A. Francis note the importance of 'historical memory' as a weapon of war, explaining that the Russian Federation has characterised its annexation of Crimea as restoring a 'historical right' and its aggression in the Donbas region of Ukraine as part of a struggle against fascism (evoking the Soviet Union's struggle against Nazism during WWII). While it may or may not be correct, as the authors' claim, that the 'possible destructive effects' of this historical revisionism are more harmful than those which took place in other twentieth-century European conflicts, it is likely that they helped to solidify the aggression that did take place much more quickly than in the past.

Picking up on this theme, Sergey Sayapin discusses a legal effort by the Russian Federation to influence and distort history by investigating an alleged 'genocide of Russian-speaking persons' in Eastern Ukraine allegedly masterminded and carried out by Ukrainian's 'supreme political and military leadership, Ukraine's Armed forces, and Ukraine's national guard […]'. Sayapin discusses the Russian Investigative Committee's 'faulty interpretation of groups protected by the definition of the crime of genocide and Russia's abusive exercise of jurisdiction in the case at hand'. As he notes, the Genocide Convention protects 'national' and 'ethnic' groups, and although language can be an indicator of nationality or ethnicity, 'Russian language speakers' as such are not a group protected under the Convention. Russia's strategy is also problematic in terms of its potential impact in other CIS States, as under Russian law, virtually all nationals and permanent residents in each of the CIS fifteen States that formerly comprised the Soviet Union could be considered 'compatriots abroad'. This permits Russia to promote and even insist upon the use of the Russian language in countries, such as Kazakhstan, which are challenging it and, combined with the (allegedly) extraterritorial application of Russian criminal law to this alleged 'genocide' in Ukraine, permits Russia to engage in a form of legal warfare (dubbed 'hybrid law enforcement' by the author) that accompanies the acts of physical violence and territorial conquest discussed in other chapters.

In Chap. 16, Gerhard Kemp and Igor Lyubashenko address the conflict in the Donbas region of Ukraine in terms of *International, regional and comparative perspectives of the* jus post bellum *options.* Their project is to canvas the broad fields of 'post-conflict justice and transitional justice', in considering responses to the conflict. They suggest that criminal remedies should be 'exceptional' rather than

[12]Subsequent to the writing of this chapter, the Court found that Russia must refrain from imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis, and ensure the availability of education in the Ukrainian language. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Request for the Indication of Provisional Measures, 2017 I.C.J. No. 166, 106 (April 19).

a primary response to serious violations of human rights and that peace and the right to truth are overriding objectives. They conclude that peace and justice are not contradictory and conflicting forces, but promote and sustain each other, and that both 'should play some role, with sustainable peace as the baseline outcome'. They worry that the hybrid nature of the conflict may be 'a significant constraint on the goal of peace' because it 'effectively conceals the international dimension of the conflict' and poses an obstacle to truth. The focus on truth as one of the primary casualties of the conflict is reinforced by the final chapter of this volume, *Post-Conflict Reconstruction of Trust in the Media*, written by Katrin Merike Nyman-Metcalf, who notes that creating trust in media, in a time of 'post-truth' and 'fake news' is particularly challenging. She catalogues the struggles Ukraine is facing with propaganda, intimidation of journalists, lack of access to information and other difficulties but concludes that the best response is to vigorously protect freedom of information.

Three chapters focus on the possibility of an International Criminal Court intervention into the situation in Ukraine. Beatrice Onica Jarka takes up the ICC's preliminary examination of the situation, noting the two Article 12(3) declarations filed by Ukraine regarding alleged crimes committed in its territory (i) from 21 November 2013 to 22 February 2014 in the first instance and (ii) from 20 February 2014 onwards in the second instance. Her analysis covers the Preliminary Examination Reports from 2014, 2015 and 2016. While she is sympathetic to the ICC's possible intervention, she suggests that by filing Article 12(3) declarations rather than ratifying the Statute as a whole, Ukraine may have hurt its cause and may have provoked the Russian Federation into formally withdrawing its signature from the Rome Statute.[13]

Rustam Atadjanov's chapter, *War Crimes Committed during the Armed Conflict in Ukraine: What Should the ICC Focus On?*, adds to Jarka's chapter by examining the possible violations of the laws of war that may have been—and continue to be—committed—as a result of the conflict. Atadjanov notes the temptation to see the conflict as 'frozen', dooming the region itself (particularly in Donbas) to becoming a 'long-term frozen zone' in which 'living standards are inferior, virtually no government support for the population can be found and no normal societal development is possible'. In Chap. 19, Ioannis Tzivaras complements Atadjanov by focusing on the possible application of the Rome Statute to crimes involving sexual violence in Ukraine. His chapter discusses the possibility not only of war crimes charges but the possibility of crimes against humanity as well.

This book reveals a complex and sad struggle for control of Eastern Ukraine and Crimea, pitting Ukraine's government on the one hand and the Russian Federation and its allies and surrogates on the other. While the picture it paints is incomplete—

[13]Russia withdrew its signature from the ICC Statute just days after the prosecutor issued a report stating that the conflict in Ukraine amounted to an international armed conflict with Ukraine and the Russian Federation with respect to Crimea that represents an 'ongoing state of occupation'. Robbie Gramer, *Why Russia Just Withdrew from the ICC*, Foreign Pol'y (November 16, 2016), http://foreignpolicy.com/2016/11/16/why-russia-just-withdrew-from-icc-putin-treaty-ukraine-law/.

capturing the conflict at a particular point in time and leaving out some of the historical and geopolitical context—it is an extraordinarily useful collection of essays on how international law and international legal institutions interact with the use of force. In making its case for the annexation of Crimea and the conflict in Eastern Ukraine, the Russian Federation used international law, twisting it to its advantage and often bending the facts to fit the law. Ukraine has responded with force where it can, but more importantly has sought refuge in international law, mustering a host of international legal institutions and strategies to shore up its position against a much larger and militarily more powerful adversary: actions before the International Criminal Court, the International Court of Justice, the UN General Assembly, the UN Tribunal on the Law of the Sea and human rights bodies in Europe and in Geneva. The ability of international law, international legal institutions and effective diplomacy to resolve the crisis in Ukraine will be a test of its efficacy and resiliency. Both States have tried to use the media to sway public opinion to them; Russia may have prevailed inside the Russian Federation, but it is clear that Ukraine has the sympathies of most of the rest of the world, at least for the time being. The conflict is currently considered a stalemate, and although fighting continues, sanctions on Russia, such as its removal from the G8 in 2014, and a tentative rapprochement of Ukraine with NATO have helped strengthen Ukraine's position. The election of US President Donald Trump, with his pro-Putin leanings, gave rise to speculation that the USA might recognise the annexation of Crimea by Russia, but thus far that has not happened. This book thus appears at a critical time in which the legal consequences of Russian activities are under scrutiny by courts and international organisations around the world, and these activities combined with effective international diplomacy might help to thaw this otherwise 'frozen' conflict and redress some of its more pernicious effects. The authors, and the two co-editors, are to be commended for this important contribution.

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Preface

The effects of Crimea's occupation and illegal annexation by the Russian Federation since early 2014, and of the ensuing Russian aggression in Eastern Ukraine, extend far beyond Ukraine's borders. In the Commonwealth of Independent States (CIS), this ongoing armed conflict is dividing entire peoples into 'pro-Russians' and 'pro-Ukrainians'. Individuals' daily lives are affected by broken friendships, and new friendships are made on the basis of respective affiliations. A rephrased version of a well-known Russian proverb[14] emerged and became quite popular over the past three years: 'Tell me whom Crimea belongs to, and I will tell you who you are'. On the international plane, most States and international organisations—*inter alia*, the UN, PACE, OSCE—aligned themselves with Ukraine, and sanctions against the Russian Federation were introduced, notably, by the USA, the European Union, Japan and some other States. In response, the Russian Federation introduced so-called countersanctions against States, which had introduced the 'original' sanctions against it,[15] empowered its Constitutional Court, in violation of the European Convention on Human Rights, to authorise (or decline authorising) the enforcement of the European Court of Human Rights' decisions on its territory,[16] and put in question the validity of international law as such, as a threat to its national sovereignty.[17] Some commentators went even further and asserted that, at this time, 'international law was absolutely not there [and] only the law of the strong [would] work',[18] whereas others, including a co-editor of the present volume, by contrast, regarded the armed conflict between Russia and Ukraine as a challenge to international law, which could make this law ever stronger.[19]

[14] The original proverb is as follows: 'Tell me who your friend is, and I will tell you who you are'.

[15] See Reuters (2017).

[16] See Roudik (2016).

[17] See BBC (2015).

[18] See Knyazev (2014).

[19] See *passim* Sayapin (2015).

This volume's co-editors were lucky to assemble a diverse team of authors from Europe, Asia, Africa and the Caribbean, who agreed to share their expert opinions on selected legal issues related to the ongoing armed conflict between Russia and Ukraine, with a common understanding that (1) the resulting volume would represent both internal and external perspectives—that is, the conflict would be reflected upon by authors from within and outside Ukraine, for the sake of scholarly objectivity; (2) the volume would cover the armed conflict in its three international legal dimensions—*jus ad bellum*, *jus in bello* and *jus post bellum*—with a view to identifying challenges that 'hybrid warfare' is posing in each of these dimensions; and (3) the opinions reflected in the respective chapters would be expressed for the purpose of this book project and should not be identified with anything said or written by the authors or co-editors elsewhere. It is also understood that all contributing authors were guided by academic freedom, and hence the co-editors do not necessarily share the views expressed in individual chapters.

Part I considers, from a variety of perspectives, the illegality of Russia's use of force against Ukraine in Crimea and Donbas. Miras Daulenov's inaugurating chapter recalls Russia's fundamental obligation under applicable international law not to have used force against Ukraine. Bill Bowring's and Valentina Azarova's chapters focus on aspects of Russia's use of force in Crimea. In the next chapter, Sabine Hassler and Noëlle Quénivet test the validity of Russia's claim to use force against Ukraine to protect 'nationals' abroad. Oleksandr Merezhko and Evhen Tsybulenko with J'moul A. Francis conclude Part I by analysing Russia's breach of the prohibition of the use of force in Eastern Ukraine.

Part II deals with selected issues of *jus in bello*, as applicable to the armed conflict between Russia and Ukraine. Gergely Tóth analyses the legal challenges posed by 'hybrid warfare'—an idea echoed, in their respective chapters, by Ondrej Hamulak and Jozef Valuch (in the chapter on cyber-attacks in the light of applicable international law) and by Sergii Pakhomenko and Kateryna Tryma (in the chapter on historical memory as an instrument of information warfare). The other chapters in Part II deal with the operation of treaties and international contracts in the context of Russia's aggression against Ukraine (by Olga Butkevych); with the participation of foreign fighters in the armed conflict between Russia and Ukraine (by Anastasia Frolova); with the plight of children in the armed conflict in Eastern Ukraine (by Nataliia Krestovska); with the international legal dimensions of Russia's occupation of Crimea (by Evhen Tsybulenko and Bogdan Kelichavyi); and with the 'hybrid' application of international criminal law against Ukrainian nationals accused of a 'genocide of the Russian-speaking persons' in Eastern Ukraine (by Sergey Sayapin).

Part III seeks to look beyond the end of the conflict in that it deals with issues of *jus post bellum*. Gerhard Kemp and Igor Lyubashenko consider possible models of post-conflict justice, which could be used in Ukraine. Beatrice Onica Jarka and Rustam Atadjanov study, in their respective chapters, the International Criminal Court's jurisdiction with respect to the core crimes under international law (with a focus on war crimes) committed during the armed conflict in Ukraine. Ioannis Tzivaras identified sexual violence in the conflict as a challenge to international

criminal justice. Finally, Katrin Merike Nyman-Metcalf's chapter considers the post-conflict reconstruction of trust in the media.

The Appendix contains links to the most significant resolutions adopted by international organisations and institutions and dealing with various aspects of the armed conflict between Russia and Ukraine, as well as Sergey Sayapin's *amicus* memorandum in defence of Nadiya Savchenko.

The co-editors take this occasion to thank all contributors wholeheartedly for their excellent work. English language editors at Academic Proofreading Services Ltd. trading as www.englishproofread.com were very helpful in proofreading selected chapters. The Department of Law of the Tallinn University of Technology should be credited for taking over a part of proofreading costs. A very special word of thanks is due to Professor Leila Sadat, Special Adviser on Crimes against Humanity to the Prosecutor of the International Criminal Court and James Carr Professor of International Criminal Law at Washington University School of Law, for her supportive Foreword.

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This volume is dedicated to the memory of Professor Oleksandr Zadorozhny, former President of the Ukrainian Association of International Law. Professor Zadorozhny taught and inspired many scholars and practitioners of international law in Ukraine and abroad, including both co-editors of this volume and several contributing authors. Professor Zadorozhny was invited, and agreed, to contribute a chapter to this book but passed away before this book was completed. He will remain in our memory as a patriot of sovereign Ukraine and a brilliant scholar and mentor.

Almaty, Kazakhstan — Sergey Sayapin
Tallinn, Estonia — Evhen Tsybulenko
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Part I
Jus ad Bellum

Chapter 1
The Legal Nature of States' Obligations Towards Ukraine in the Context of *Jus Contra Bellum*

Miras Daulenov

Contents

Abstract The development of the fundamental principles of international relations, which flow from the UN Charter, other treaties and international custom, has changed the understanding of the legal nature of states' international obligations. In this context, the 1994 Budapest Memorandum on Security Assurances is also a source of international obligations for the states involved. Given the importance of international community interests that are protected by *jus contra bellum*, the prohibition of the use of force can be regarded as a norm of *jus cogens*. The inherent right of states to self-defence is not covered by the scope of the prohibition of the use of force and cannot be understood as a derogation from the *jus cogens* norm. Finally, unilateral declarations of states may also have the effect of creating certain legal obligations in the context of *jus contra bellum*.

Keywords *jus contra bellum* · prohibition of the use of force · treaty · international custom · *jus cogens* · general principle · unilateral declaration · *erga omnes* · Ukraine

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1.1 The Meaning of *Jus Contra Bellum* in Current International Law

Since the earliest times, states have employed military force to pursue their political and economic objectives.[1] The use of armed force was one of the common measures taken by states in order to pressure less militarily and economically developed states, as well as non-state entities, such as self-governing cities and provinces. Frequently, wars and other armed conflicts involving several states at once were conducted over many years. Moreover, various sovereigns and men of state have launched wars based exclusively on personal reasons, rather than on account of their respective state's interests.

Since St. Thomas Aquinas explained the doctrine of a 'just war' in his *Summa Theologica*', the authority of a sovereign by whose command the war is conducted has become a matter of moral concern.[2] In his 1625 opus magnus *The Rights of War and Peace*, Grotius proposed that "the justifiable causes generally assigned for war are three, defence, indemnity, and punishment".[3]

Successively, however, the definitive establishment of a European balance of power system after the Peace of Westphalia and the corresponding emergence of legal positivism at a global level removed the doctrine of a 'just war' from international law as such.[4] This happened because of the strengthening and development of the principle of the sovereign equality of states. More precisely, the 'just war' doctrine's weak position was caused by a lack of any recognized international or even supranational authority, which was empowered to monitor and, in particular cases, decide upon whether or not the ethical 'standards' of a just war are met. States are equal in respect of their appurtenant sovereign rights, while there exists no lawful and recognized international authority that is competent to determine any legal consequences for a state in the case of an unjust war. Moreover, in the same way as Grotius' *jus ad bellum* doctrine (like other *jus ad bellum* doctrines) included first use of force as a natural element,[5] states have tried to justify their military actions by giving various doubtful reasons.

The 1919 Covenant of the League of Nations imposed on member states an obligation "not to resort to war".[6] Despite the fact that any war or threat of war was declared a matter of concern to the whole league,[7] the prohibition on the use of force was not provided by general international law or particular treaties at that time. A major step forward was taken by US Secretary of State Kellogg and French Foreign Minister Briand. The 1928 General Treaty for the Renunciation of War as an

[1] Higgins 2010, p. 238.

[2] Aquinas 1256, Q 40.

[3] Grotius 1625, Chapter I.

[4] Brownlie 1963, p. 14; Shaw 2014, p. 813.

[5] Bring 2000, p. 60.

[6] See 1919 Covenant of the League of Nations, Preamble, Articles 12 and 13.

[7] Ibid., Article 11.

Instrument of National Policy, also known as the Kellogg-Briand Pact, led to a significant transition from *jus ad bellum* to *jus contra bellum*.[8] Article I of the treaty provided that:

> The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.[9]

This assertion was a starting point for the formation of the customary rule precluding the use of force except in self-defence as 'the inherent right' of states. After the cataclysmic events of the Second World War, it was thought necessary to further clarify, in the UN Charter, that force could only be used in self-defence, and not to pursue legal rights or genuinely held notions of justice.[10]

Article 2(4) of the UN Charter provides the following:

> 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 UN.[11]

As was mentioned by the International Court of Justice (ICJ) in the *Nicaragua* case, the prohibition on the use of force in the UN Charter corresponds, in essential terms, to those found in customary international law.[12] In this case, the ICJ also confirmed that the 'natural' or 'inherent' right to self-defence provided by Article 51 of the Charter[13] reflects general international law,[14] and that "it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter".[15] The UN Charter, having itself recognized the existence of this right, does not, however, go onto directly regulate all aspects of its content.[16] Since the existence of the right to self-defence is established in customary international law, the ICJ has also noted that "whether the response to the attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence".[17]

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[8] See also Dinstein 2017, p. 87–88.

[9] See 1928 General Treaty for Renunciation of War as an Instrument of National Policy, LNTS XCIV.

[10] Higgins 2010, p. 238.

[11] See 1945 Charter of the United Nations, 1 UNTS XVI.

[12] ICJ, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgment, 27 June 1986*, ICJ Reports 1986, p. 99.

[13] See UN Charter (fn. 11), Article 51. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

[14] See the discussion on 'general international law' by Tunkin 1993, pp. 534–47.

[15] ICJ, *Nicaragua* (fn. 12), p. 94.

[16] Idem.

[17] Ibid., p. 103.

The ruling of the ICJ in the *Nicaragua* case is indeed crucial. It has been confirmed that the prohibition on the use of force, as envisaged in the UN Charter and reflected in customary international law, does not cover situations in which states exercise their right to self-defence. An additional exception to the ambit of Article 2(4) of the UN Charter is authorization by the UN Security Council, which allows the use of force in response to threats to the peace, breach of the peace, or act of aggression. In such cases, states are authorized to take all necessary measures on behalf of the UN as an international organization.

Whilst the ICJ has refrained from recognizing the prohibition on the use of force as a whole, it is equally clear that aggression is prohibited under general international law.[18] Moreover, the UN General Assembly in 1974 held that "a war of aggression is a crime against international peace".[19] The further development of *jus ad bellum* as "the law governing the right to use of force"[20] or "the right of going to war"[21] by the prohibition of aggression as such, while the admission of self-defence under the conditions enshrined in the UN Charter, is considered as the result of an evolutionary process of crystallization of the concept of *jus contra bellum*. This concept, however, is somewhat distinct from pacifism as its proponents continue to operate within the parameters of just war thinking.[22] International humanitarian law (*jus in bello*) and 'the law after war' (*jus post bellum*) have also been further refined.

The law against war[23] was recognized as a source of rules common to the international community as a whole. The continuing development of *jus contra bellum* as limiting the scope of the use of force can be stripped down to three basic elements. First, aggression is prohibited as a crime against international peace and security. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.[24] As a second element of this concept, self-defence will be considered to be lawful only if directed against aggression,[25] if proportionate and necessary in what it is seeking to achieve. Moreover, "states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives".[26] Third, as reaction to threats to the peace, breaches of the peace, or acts of aggression, the UN Security Council is able to authorize one or more states to use force, but, once again, only to restore international peace and security.

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[18] For a more extensive understanding of the crime of aggression, see Sayapin 2014.

[19] See UN General Assembly 1974, Resolution, Definition of Aggression, *UN Doc*. A/RES/3314.

[20] McCaffrey 2006, p. 236.

[21] Kant 1887, p. 53.

[22] Sharma 2009, p. 218.

[23] The term 'the law against war' is used, e.g., in Corten 2010.

[24] UN General Assembly Resolution (see fn. 18).

[25] Idem, Article 1. "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

[26] ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996*, ICJ Reports 1996, p. 242.