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Dai Tamada *Editors*

The War in Ukraine and International Law

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Introduction

Masahiko Asada and Dai Tamada

At the time of writing, the war in Ukraine was fast approaching its second anniversary since its commencement on 24 February 2022. As we discuss in detail in this book, there are multiple international legal issues that arise and require addressing. What is more, the very international legal order is under threat, insofar as international law obligations are not being complied with and international rules are ignored in the face of such blatant aggression as is the war in Ukraine.

As an introductory remark to this book, we would like to sketch out the outline that frames the ensuing discussion on the war in Ukraine from an international law perspective.

Importance of the Legal Evaluation of the War in Ukraine

Scholarly debate—particularly, international legal evaluations of the war in Ukraine—is expected to bring a variety of impacts. First, scholarly evaluations could be directed to Russia's civil society, which may not necessarily be familiar or open to objective evaluations of Russia's role in the war from an international legal perspective. Russians reportedly believe that the threat of NATO encroachment to Russia is considerable, and that the population of Donbas has experienced genocide at the hands of Ukraine. An objective, legal evaluation of the facts may help make Russians critical towards their government's war propaganda. Second, scholarly evaluations could also be directed to ordinary citizens in the West who may now be sceptical about their States continuing to both militarily and economically support Ukraine and to impose economic sanctions against Russia. To maintain their motivation in thwarting Russia's efforts, it may be necessary to emphasise issues of legitimacy. Third, scholarly evaluations may also be directed to the 'Global South'

which does not currently participate in global economic sanction efforts against Russia. For the moment, economic sanctions against Russia are one of the most realistic means of weakening Russia's war capacity and, eventually, of ending the war. To make sanctions effective, persuading abstaining States, mainly from the Global South, to join the sanctions is the key. For this, international legal discussions may foster perceptions of legitimacy when it comes to sanctions and those who take such action against Russia.

On the other hand, international legal evaluations must be based on impartiality and conducted consistently, in the sense that international law must be applied equally to all similar sets of circumstances. At the time of writing, another conflict was under way in the Gaza Strip since 7 October 2023. Against a gruesome attack carried out by Hamas, Israel commenced full-scale military action, resulting in considerable loss of civilian life among the population of Gaza. These hostilities have given rise to calls as to why the chorus of, for the most part, Western States seems not to have attempted to prevent Israel from committing international crimes, including war crimes, crimes against humanity and genocide, in the way that it has when it comes to Russia. Many States, from the Global South, may regard such disparity as Western double standards that disincentivises them from joining efforts to sanction Russia. Being law, international law must be uniformly and consistently cited and applied to various situations, even when the realities surrounding the reach (or even possibility) of judicial scope mean that some situations are unlikely to ever come before some adjudicative competent body. Otherwise, criticisms of Russia risk being perceived as matters of political expediency and thus becoming devoid of legal substance.

Overview of the Book

This book attempts to showcase and analyse various aspects of international law engaged by the war in Ukraine. While some of the articles herein are openly critical of Russian aggression, they nonetheless adhere to scholarly standards of objectivity, following the positivist approach to international law.

Chapter 'The War in Ukraine Under International Law: Its Use of Force and Armed Conflict Aspects' (Masahiko Asada) deals with the main issues of *jus ad bellum*, United Nations law, and the law of neutrality and belligerency, as the basis for discussion. Chapter 'Use of Force by Russia and *jus ad bellum*' (Tatsuya Abe) analyses the use of force by the USSR and Russia and their legal justifications, to conclude that they have breached international law. Chapter 'Russia's War of Aggression Against Ukraine and the Crime of Aggression' (Claus Kreß) focuses on the crime of aggression in the context of the war in Ukraine, in light of the possibility to punish it before the ICC and a Special Tribunal for the Crime of Aggression against Ukraine. Chapter 'War in Ukraine and the International Court of Justice: Provisional Measures and the Third-Party Right to Intervene in Proceedings' (Dai Tamada) analyses the current two International Court of Justice Orders in the

Allegations of Genocide case, to clarify the dilemma that the ICJ has faced. Chapter 'Economic Sanctions Against Russia: Questions of Legality and Legitimacy' (Mika Hayashi and Akihiro Yamaguchi) examines questions of legality of the autonomous economic sanctions against Russia unsettled despite the apparent legitimacy of these sanctions. Chapter 'Freezing, Confiscation and Management of the Assets of the Russian Central Bank and the Oligarchs: Legality and Possibility Under International Law' (Kazuhiro Nakatani) explains and analyses the financial aspects of sanctions against Russia, with a particular focus on the freezing of Russian assets. Chapter 'Trade Sanctions Against Russia and Their WTO Consistency: Focusing on Justification Under National Security Exceptions' (Fujio Kawashima) analyses the question as to whether trade sanctions against Russia satisfy the requirements of the security exception under Article XXI of the GATT. Chapter 'WTO Dispute Settlement and Trade Sanctions as Permissible Third-Party Countermeasures Under Customary International Law' (Satoru Taira) focuses on the permissibility of sanctions against Russia within the context of WTO dispute settlement under customary international law on third-party countermeasures. Chapter 'War in Ukraine and Implications for International Investment Law' (Dai Tamada) analyses the investment arbitration cases that have arisen and are likely to arise from the war in Ukraine, including the annexation of Crimea. Concluding section (Martin Paparinskis) makes comments on each chapter for situating it in a broader context of international law in relation to the war in Ukraine.

In total, this book grapples with and sheds light on key issues of international law arising from the war in Ukraine, covering not only the use of force by Russia but in particular the legal evaluation of economic sanctions against Russia. We hope this book will contribute meaningfully to the legal discussion on the war in Ukraine, as well as bear some practical impact, however minute, to the ending of the ongoing war.

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Part I
Military and Criminal Aspects

The War in Ukraine Under International Law: Its Use of Force and Armed Conflict Aspects

Masahiko Asada

Abstract More than two years have passed since the Russian aggression against Ukraine started in February 2022. However, there appears to be no prospect for a ceasefire. The long duration of this situation, which fundamentally undermines the prohibition of the use of force and flatly disregards rules on armed conflict, was unexpected. The international order thus faces a critical situation, but a calm and objective analysis is still necessary. Such a perspective is significant as it helps to maintain the rule of law in the international community over the long run, while simultaneously shedding light on possible constraints that other States have in relation to the aggressor State. This article analyzes the legal aspects of the war in Ukraine, focusing on rules concerning the prohibition of the use of force and the law of neutrality.

1 Introduction

More than two years have elapsed since the Russian armed forces started to invade Ukraine on 24 February 2022. While the conflict on the ground is constantly evolving, there appears to be no prospect for a ceasefire, at least at the time of this writing. The long duration of this situation, which fundamentally undermines the prohibition of the use of force and flatly disregards rules on armed conflict, was rather unexpected. The international order thus faces a critical situation, but a calm and objective analysis, including with regard to the claims of justification by Russia, is still necessary. Such a perspective is valuable as it helps to maintain the rule of law in the international community over the long run while simultaneously shedding light on possible constraints that other States have in relation to the aggressor State. This article, therefore, analyzes the legal aspects of the war in Ukraine, focusing on rules concerning the prohibition of the use of force and the law of neutrality.

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2 Prohibition of the Use of Force

2.1 Justification by Russia

2.1.1 Individual and Collective Self-Defense

Russia called its invasion a "special military operation", but it was nothing other than a use of force under international law. This characterization can be confirmed by Russia's own letter to the UN Secretary-General sent on the day of the invasion.[1] It referred to the "measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence".[2] The letter took the unusual form of simply attaching the text of President Putin's speech to the Russian people on the same day (the "Putin speech"). The Putin speech was also later attached to the Russian document[3] sent to the International Court of Justice (ICJ) in an effort to deny the Court's jurisdiction over the case brought by Ukraine on 26 February 2022 (*Allegations of Genocide* case). Thus, the speech can be seen as a central argument for legal justification by Russia.

Despite the lack of legal clarity given its context as a public address, the Putin speech primarily based the Russian use of force on the right of individual and collective self-defense. By referring to the expansion of the North Atlantic Treaty Organization (NATO) to the east,[4] the speech argued that there was a "real threat" to

[1] UN Doc. S/2022/154, 24 February 2022.

[2] Ibid., p. 1. For a detailed analysis of the Soviet and Russian history of invasion, see Chapter 'Use of Force by Russia and *jus ad bellum*' '(Tatsuya Abe) of this volume. For the question on the crime of aggression, see Chapter 'Russia's War of Aggression Against Ukraine and the Crime of Aggression' (Claus Kress).

[3] ICJ, "Document (with annexes) from the Russian Federation Setting Out Its Position regarding the Alleged 'Lack of Jurisdiction' of the Court in the Case" (7 March 2022), at https://icj-cij.org/case/182/other-documents. The body of the document points out, *inter alia*, that Article IX of the Genocide Convention does not provide the basis for jurisdiction over the present dispute as the Convention does not regulate either the use of force between States or the recognition of States, that the "special military operation" is based on the right of self-defense under the UN Charter and customary international law, and that the recognition of the Donetsk and Luhansk Peoples' Republics is related to the right to self-determination. Ibid., paras. 10, 12, 13, 15, 17, 19.

[4] In December 2021, Russia even proposed a treaty between Russia and NATO countries, in which all NATO member States would "commit themselves to refrain from any further enlargement of NATO, including the accession of Ukraine as well as other States". "Agreement on Measures to Ensure the Security of the Russian Federation and Member States of the North Atlantic Treaty Organization", 17 December 2021, Art. 6, at https://augengeradeaus.net/wp-content/uploads/2021/12/20211217_Draft_Russia_NATO_security_guarantees.pdf. It is ironic that Finland and Sweden applied for NATO membership both on 18 May 2022, after Russia's invasion of Ukraine. Finland was admitted on 4 April 2023 and Sweden on 7 March 2024. NATO Parliamentary Assembly, "Finland and Sweden Accession", (date not given), at https://www.nato-pa.int/content/finland-sweden-accession; NATO, "Finland Joins NATO as 31st Ally", 4 April 2023, at https://www.nato.int/cps/en/natohq/news_213448.htm. And now even Ukraine seems poised to gain membership in the future. NATO, "Vilnius Summit Communiqué", 11 July 2023, para. 11, at https://www.nato.int/cps/en/natolive/official_texts_217320.htm.

Russia's interests and to its "very existence". It was followed by a statement that there was "no other way to defend Russia", suggesting that it was an exercise of the right of individual self-defense.

At the same time, the speech referred to a "genocide" that was allegedly taking place in the Donbas region of eastern Ukraine, to appeals for help from the two "People's Republics of Donbass", and to the Treaties of Friendship, Cooperation and Mutual Assistance Russia had concluded with both "Republics".[5] These explanations allegedly justified the Russian decision to conduct a special military operation "in accordance with Article 51 ... of the Charter of the United Nations", clearly relying on the right of collective self-defense.[6]

However, it is not possible for Russia to resort to the right of individual self-defense in the absence of an armed attack *against Russia*. Even if one recognizes the doctrine of anticipatory self-defense against an imminent armed attack,[7] it cannot be said that such a threat *against Russia* existed at that time.

Regarding the right of collective self-defense, the Russian justification for its use of force against Ukraine referred to the requests by the two "Republics" in Donbas. This appears to have followed the ICJ's *Nicaragua* judgment of 1986, which stated that "in customary international law, ... there is no rule permitting the exercise of collective self-defence in the absence of a *request* by the State which regards itself as the victim of an armed attack"[8] (emphasis added). However, such a request must come from a sovereign State. In the same judgment, the ICJ also stated that "[the principle of non-intervention] would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an *opposition group* in another State"[9] (emphasis added). This statement was made in the context of the principle of non-intervention, but it seems to apply equally or *a fortiori* to the case of collective self-defense.

This statehood prerequisite is also important in relation to the requirement of an armed attack in self-defense. In its advisory opinion in the *Israeli Wall* case of 2004 (though it was an individual self-defense case), the ICJ stated that "Article 51 of the [UN] Charter thus recognizes the existence of an inherent right of self-defence in the

[5] The treaties were signed on 21 February 2022, the day Russia recognized both Republics as States, and on the following day, the parliaments of all the "States" concerned approved them. For their texts, see UN Doc. A/76/740-S/2022/179, 7 March 2022.

[6] In fact, the two treaties contain a provision agreeing to afford each other the necessary assistance in the exercise of the right of collective self-defense (Art. 4). Ibid., pp. 3, 9.

[7] The Russian Defense Ministry suggested early in March 2022, after the invasion commenced, that the special military operation was a pre-emptive response to Ukraine's alleged plans to launch a major offensive in the Donbas region. James A. Green, Christian Henderson and Tom Ruys, "Russia's Attack on Ukraine and the *Jus ad Bellum*", *Journal on the Use of Force and International Law*, Vol. 9, No. 1 (2022), p. 20.

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports 1986*, p. 105, para. 199.

[9] Ibid., p. 126, para. 246.

case of armed attack by *one State against another State*"[10] (emphasis added). Therefore, the initially attacked entity must be a "State".

However, the statehood of the two "Republics" in Donbas is questionable. The two "Republics", as puppet States of Russia, have not satisfied all the requirements for an entity to be a State under international law as contained in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.[11] The fact that Russia is virtually the only country that has recognized the two "Republics" as independent States additionally provides strong evidence that they have not achieved statehood.[12] Indeed, Resolution ES-11/1 of the UN General Assembly's emergency special session of 2 March 2022 "[d]eplore[d]" Russia's recognition of the two "Republics" as a "violation of the territorial integrity and sovereignty of Ukraine", and "[d]emand[ed]" Russia "immediately and unconditionally reverse the decision related to the status of . . . the Donetsk and Luhansk regions of Ukraine".[13] Although both "Republics" declared independence in May 2014, the Minsk Agreement II of 12 February 2015 (signed by representatives of the OSCE, Ukraine, Russia, Donetsk and Luhansk and aimed at an immediate and comprehensive ceasefire in Donbas) specifically envisaged no more than a "special status" for the two regions, not independent statehood.[14]

Russia recognized both "Republics" as sovereign States only on 21 February 2022, three days before the invasion of Ukraine, and the Putin speech referred to the "genocide" in Donbas as the main reason for the recognition. This claim, along with the subsequent reference to the right to self-determination in the speech, suggests that President Putin may have had in mind so-called "remedial secession", the right to external self-determination when a people is blocked from the meaningful exercise of its right to self-determination internally.[15]

For an entity within an existing State to become an independent State under international law, it is required to be in circumstances where it could lawfully

[10] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, p. 194, para. 139.

[11] Article 1 of the Montevideo Convention enumerates as qualifications for a State as a person of international law: (a) a permanent population, (b) a defined territory, (c) government and (d) capacity to enter into relations with the other States. It seems that the two "Republics" do not satisfy qualification (d).

[12] In addition to mutual recognition by the two "Republics", they have been recognized as sovereign States by South Ossetia and Abkhazia. See "South Ossetia Recognizes 'Luhansk People's Republic", *Radio Free Europe/Radio Liberty*, 19 June 2014, at https://www.rferl.org/a/south-ossetia-recognizes-luhansk-peoples-republic/25427651.html; "Abkhazia Recognises Ukraine's Donetsk and Luhansk", *OC Media*, 26 February 2022, at https://oc-media.org/abkhazia-recognises-ukraines-donetsk-and-luhansk/.

[13] UN Doc. A/RES/ES-11/1 (2 March 2022), 18 March 2022, paras. 5, 6.

[14] "Minsk Agreement: Full Text in English", 12 February 2015, para. 11, at https://www.unian.info/politics/1043394-minsk-agreement-full-text-in-english.html.

[15] For an argument supporting remedial secession as positive law, see Christian Tomuschat, "Secession and Self-Determination", in Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge U.P., 2006), pp. 38–42.

exercise the right to external self-determination. However, it is unclear whether remedial secession has been established as such a right under international law, as pronounced by the Supreme Court of Canada in the 1998 "Secession of Quebec" case. According to the Court, while the right to exercise external self-determination for colonial peoples as well as peoples subject to alien subjugation, domination or exploitation is undisputed, "it remains unclear" whether remedial secession actually reflects an established international law standard.[16]

Russia itself, in its written statement in the 2010 *Kosovo* case of the ICJ, in which remedial secession was discussed, stated that remedial secession is only permitted in "truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question", and argued that there were no such extreme circumstances in Kosovo[17] (the Court, however, did not rule on this point because it thought the issue was beyond the scope of the question posed[18]).

Concerning the situation in Donbas, neither the Organization for Security and Co-operation in Europe (OSCE) nor the UN High Commissioner for Human Rights (UNHCHR) reported that the Donbas region faced circumstances that blocked its peoples from meaningfully exercising self-determination internally.[19] The ICJ, in its order on provisional measures in the case of *Allegation of Genocide (Ukraine v. Russian Federation)* in March 2022, also stated that "the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory".[20]

While it is true that there have been repeated armed clashes between the Ukrainian forces and pro-Russian armed groups in the Donbas region, this is not sufficient to satisfy the requirements for secession (even if one recognizes the

[16] "Supreme Court of Canada: Reference re Secession of Quebec [August 20, 1998]", *International Legal Materials*, Vol. 37, No. 6 (November 1998), pp. 1372–1373, paras. 131–138, esp. para. 135.

[17] ICJ, "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of the Self-Government of Kosovo: Written Statement by the Russian Federation", 16 April 2009, paras. 88, 98, 99.

[18] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, *ICJ Reports 2010*, p. 438, paras. 82–83.

[19] The OSCE monitoring mission reported that there were some 1500 civilian casualties in the Donbas region in 2016–2021, but with a sharp decrease since 2018, with just 91 total cases (16 killed and 75 injured) in 2021. Organization for Security and Co-operation in Europe, "2021 Trends and Observations from the Special Monitoring Mission to Ukraine", at https://www.osce.org/files/f/documents/2/a/511327.pdf. Also, the Office of the UN High Commissioner for Human Rights reported 3100 civilian deaths (excluding some 300 deaths on board Malaysian Airlines flight MH17 on 17 July 2014) in Ukraine in 2014–2021, with the overwhelming majority occurring in 2014 and 2015. Office of the High Commissioner for Human Rights, United Nations Human Rights Monitoring Mission in Ukraine, "Conflict-related Civilian Casualties in Ukraine", 27 January 2022, at https://ukraine.un.org/sites/default/files/2022-02/Conflict-related%20civilian%20casualties%20as%20of%2031%20December%202021%20%28rev%2027%20January%202022%29%20corr%20EN_0.pdf.

[20] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order, 16 March 2022 [hereinafter cited as "*Allegations of Genocide*, Provisional Measures"], para. 59.

doctrine of remedial secession). If one were to assume that this alone satisfies the requirements for secession, then it would permit rebel groups an almost unrestricted right to secession as long as they could stage an armed uprising.

It is true, as the Canadian Court stated, that "an illegal act may eventually acquire legal status if . . . it is recognized on the international plane".[21] However, as noted above, the number of recognitions of the two "Republics" as independent States is not such that their secession can be legalized. Thus, their recognition by Russia, which was legally dubious, should be viewed primarily as a steppingstone taken by Russia to justify its military intervention in response to the requests for assistance by the "Republics". This seems particularly plausible when one recalls the date of recognition (three days before the invasion). Thus, the Russian justification of its use of force in collective self-defense, relying on the *request* by two "Republics" against which an *armed attack* allegedly occurred, cannot be sustained.

On a related note, a "request" for assistance from another State may be (i) one of the requirements for the lawful exercise of the right of collective self-defense, or (ii) used as an independent justification for the use of force on its own.[22] While the two can be distinguished conceptually, it can be harder in practice to draw the distinction, particularly when the use of force is limited exclusively to the territory of the requesting State.

In the present case, however, both cases are difficult to sustain, even setting aside the statehood issue of the requesting entity. In relation to (i) above, the "Republics" failed to satisfy the requirement of a preceding armed attack. With regard to (ii), such a request would not justify the use of force against a State (the other regions of Ukraine which Russia invaded) other than the requesting "States" (the "Republics").

2.1.2 Protection of Nationals Abroad and Humanitarian Intervention

The Putin speech may potentially offer other justifications beyond the right of self-defense, including the use of force to protect nationals abroad. After stating that he had decided to conduct a "special military operation" in accordance with Article 51 of the UN Charter, President Putin stated that the purpose of the operation was to "protect people who have been subjected to abuse and genocide by the Kiev regime". To this end, he would seek the "demilitarization and de-Nazification of Ukraine" as well as the "prosecution of those who have committed numerous bloody crimes against the civilians", "including citizens of the Russian Federation".[23]

In the last quoted part above, he was highlighting the protection of Russian nationals living in Donbas, to whom Russia granted nationality by providing Russian passports. This policy of "passportization", which previously had been

[21] "Supreme Court of Canada", supra note 16, paras. 141, 146.

[22] See ILA, "Use of Force: Military Assistance on Request, Proposal for an ILA Committee", pp. 2–4, at https://www.ila-hq.org/en_GB/documents/background-information.

[23] UN Doc. S/2022/154, supra note 1, p. 6.

implemented in South Ossetia and Crimea, is a popular practice of Russia. In the Donbas region, approximately 720,000 passports were reportedly fast-tracked between April 2019 and February 2022.[24]

It still appears overly simplistic to consider that such actions could justify the use of force on the ground of protection of nationals abroad. The scope of a State to extend its nationality to whomsoever it wishes is unlimited in principle, but this is true only insofar as it is not inconsistent with international law.[25] Additionally, while the Russian Constitution contains a provision that has been interpreted as supporting the legality of the use of force to protect nationals abroad,[26] this principle has notably been the subject of a long-running debate in international law. A plea by a State justifying its use of force as necessary to protect its nationals does not receive broad support in scholarship nor among States.[27]

[24] See Green, Henderson and Ruys, "Russia's Attack on Ukraine and the *Jus ad Bellum*", supra note 7, p. 15. See also James A. Green, "Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defence", in James A. Green and Christopher P.M. Waters (eds.), *Conflict in the Caucasus: Implications for International Legal Order* (Palgrave Macmillan, 2010), pp. 66–68. It is reported that the Russian government issued some 2.82 million Russian passports in the four annexed "Republics" and oblasts in Donbas by September 2023. *Yomiuri Shimbun*, 1 October 2023.

[25] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford U.P., 2019), pp. 495–511. The practice of passportization may not in itself be completely without question from the viewpoint of the principle of "effective nationality" or the "genuine link" doctrine in relation to the provision of diplomatic protection. *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase, Judgment, *ICJ Reports 1955*, pp. 20–24. However, the Articles on Diplomatic Protection adopted by the International Law Commission (ILC) in 2006 provides for that principle only in cases of the exercise of diplomatic protection by one State against the other where an individual possesses dual nationality (Art. 7). *Yearbook of the International Law Commission, 2006*, Vol. II, Pt. 2, pp. 34–35.

[26] Article 61 (2) of the Russian Constitution provides that "[t]he Russian Federation shall guarantee to its citizens protection and patronage abroad", which Russia has interpreted to provide for a right of armed intervention when it is necessary to protect Russian citizens. Tamás Hoffmann, "War or Peace? - International Legal Issues concerning the Use of Force in the Russia-Ukraine Conflict", *Hungarian Journal of Legal Studies*, Vol. 63, No. 3 (September 2022), p. 215.

[27] See, generally, Tom Ruys, "The 'Protection of Nationals' Doctrine Revisited", *Journal of Conflict and Security Law*, Vol. 13, No. 2 (2008), pp. 233–272. During the drafting of the Articles on Diplomatic Protection in the ILC, draft Article 2 ("The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where ...") proposed by the Special Rapporteur, John R. Dugard, was deleted due to overwhelming opposition in the ILC as well as in the UN General Assembly's Sixth Committee. The Commentary on Article 1 ("diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State ...") of the adopted Articles on Diplomatic Protection clearly states that "[t]he use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection". *Yearbook of the International Law Commission, 2000*, Vol. II, Pt. 1, p. 218; *Yearbook of the International Law Commission, 2006*, Vol. II, Pt. 2, pp. 27–28, Article 1, Commentary, para. 8. It is said that only one member of the ILC did not challenge draft Article 2, and Italy was the only country which supported it in the Sixth Committee. Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law,* 2nd ed. (Hart, 2021), pp. 515–516. For arguments against or doubtful of the "protection of nationals"

As quoted above, President Putin in his speech stated that the operation was warranted to "protect people who have been subjected to abuse and genocide by the Kiev regime for eight years". This can be viewed as a justification relying on the doctrine of "humanitarian intervention". However, not only is the fact of genocide highly questionable, as pointed out earlier in relation to "remedial secession", but also whether humanitarian intervention can be recognized as an exception to the prohibition of the use of force is a matter of debate under international law; negative voices seem dominant.[28] Indeed, the ICJ, in its order on provisional measures in the *Allegations of Genocide* case, seems to have denied the legality of the unilateral use of force even in the case of genocide.[29]

Moreover, such a justification would be inconsistent with what Russia has done in Donbas, particularly its practice of granting Russian nationality to people in the region by providing passports. If "humanitarian intervention" was one of the justifications for Russia to use force against Ukraine, the alleged massive human rights violations must have been committed by Ukraine against the Ukrainian population

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doctrine, see, e.g., Josef Mrazek, "Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law", *Canadian Yearbook of International Law*, Vol. 27 (1989), p. 97; Albrecht Randelzhofer, "Article 51", in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed. Vol. 1 (Oxford U.P., 2002), pp. 798–799; Crawford, *Brownlie's Principles of Public International Law*, 9th ed., supra note 25, p. 729. On the other hand, some commentators argue or suggest that the use of force to protect nationals abroad is not prohibited under Article 2 (4) of the UN Charter, and is permissible on the basis of the right of self-defense or as an independent exception to the prohibition of the use of force, subject to certain conditions. See, e.g., Louis Henkin, *How Nations Behave: Law and Foreign Policy,* 2nd ed. (Columbia U.P., 1979), p. 145; Oscar Schachter, "The Right of States to Use Armed Force", *Michigan Law Review*, Vol. 82, Nos. 5–6 (April/May 1984), pp. 1629–1633; Natalino Ronzitti, "Rescuing Nationals Abroad Revisited," *Journal of Conflict and Security Law*, Vol. 24, No. 3 (Winter 2019), pp. 431–448.

[28] In its judgment in the *Nicaragua* case, the ICJ stated that the use of force "could not be the appropriate method to monitor or ensure . . . respect [for human rights]" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, supra note 8, p. 134, para. 268). In addition, the 2005 UN World Summit Outcome document took a negative position on humanitarian intervention as a unilateral measure taken by individual States. It stated that, while each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, the international community, through the United Nations, also has the responsibility to use peaceful means to help to protect populations and that the international community is prepared to "take collective action, in a timely and decisive manner, *through the Security Council, in accordance with the [UN] Charter, including Chapter VII,* on a case-by-case basis . . ., should peaceful means be inadequate and national authorities are manifestly failing to protect their populations . . ." (emphasis added). UN Doc. A/RES/60/1, 24 October 2005, paras. 138–139. Moreover, while a handful of States, such as the UK, recognize the legality of humanitarian intervention under very limited conditions, member States of the Non-Aligned Movement have repeated their "rejection of the 'right' of humanitarian intervention, which has no basis either in the UN Charter or in international law". Malcolm N. Shaw, *International Law*, 9th ed. (Cambridge U.P., 2021), pp. 1017–1019; Corten, *The Law against War,* supra note 27, p. 512.

[29] The Court states that "it is doubtful that the Convention . . . 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". *Allegations of Genocide*, Provisional Measures, supra note 20, para. 59.

on the Ukrainian territory, by definition.[30] However, from the Russian point of view, that was not the case as most victims are the "Russian" population and the location is in the newly established "Republics". Therefore, assuming President Putin's thinking was coherent, one should question whether he really had humanitarian intervention in mind as a justification for the use of force in Ukraine.

In any event, this section clearly concludes that none of the claims made by Russia, including self-defense as its primary justification, could justify its use of force against Ukraine.[31]

2.2 *Act of Aggression and the UN Response*

The Security Council is the principal UN organ that should respond to situations involving the use of force. However, the current situation involves force used by Russia, a permanent member of the Security Council with veto power. On 25 February 2022, the Security Council failed to adopt a resolution condemning Russia[32] (co-sponsored by 82 States) due to a veto cast by Russia (11 in favor, 1 against [Russia], and 3 abstentions [China, India, UAE]).[33] The Security Council then adopted Resolution 2623 (2022) (co-sponsored by Albania and the United

[30] For the discussions based on the concept of humanitarian intervention being for the protection of the population of the target State, not the nationals of the intervening State, see, e.g., Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force* (Routledge, 1993), pp. 113–114; Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press, 1996), pp. 15–16; Stanimir A. Alexandrov, *Self-Defense against the Use of Force in International Law* (Kluwer, 1996), p. 204; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester U.P., 2005), p. 173; Yoram Dinstein, *War, Aggression and Self-Defence*, 6th ed. (Cambridge U.P., 2017), p. 279; Christine Gray, *International Law and the Use of Force*, 4th ed. (Oxford U.P., 2018), pp. 40–44; Christian Henderson, *The Use of Force and International Law* (Cambridge U.P., 2018), p. 379; Shaw, *International Law*, 9th ed., supra note 28, p. 1016. The use of force to protect nationals abroad is sometimes discussed within the framework of humanitarian intervention. See, e.g., Schachter, "The Right of States to Use Armed Forces", supra note 27, p. 1629; Corten, *The Law against War*, supra note 27, p. 491.

[31] There are, however, a handful of States which argue that Russia has a right to invade or otherwise express support for the Russian invasion, such as Cuba, DPRK, Syria and Venezuela. "State Responses to Russian Invasion of Ukraine", (date not given), at http://opiniojuris.org/wp-content/uploads/State-Reactions-to-Russian-Invasion-of-Ukraine.pdf.

[32] UN Doc. S/2022/155, 25 February 2022. The draft resolution, like the UN General Assembly's emergency special session resolution (to be discussed below), used the phrase "[d]eplores in the strongest terms the Russian Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter" (para. 2). It would have further "[d]ecide[d]" that Russia "shall immediately cease its use of force against Ukraine" and "shall immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine" (paras. 3 and 4). But an earlier draft reportedly contained harsher language under Chapter VII of the UN Charter. See below.

[33] UN Doc. S/PV. 8979, 25 February 2022, p. 6.

States) on 27 February based on the 1950 "Uniting for Peace" resolution, with the same voting result but without the blocking power in the Russian negative vote,[34] and it decided to hold an emergency special session of the UN General Assembly. Despite the procedure expressly stipulated in the 1950 resolution,[35] the eleventh emergency special session was convened while the General Assembly was apparently "in session".[36] The Security Council may have intended this procedural abnormality to signal that this was an "emergency" situation.

With regard to the veto, Russia perhaps should have abstained from voting entirely as it was a party to the dispute. This calls into question the validity of the veto itself. Article 27 (3) of the UN Charter provides that "in decisions under Chapter VI, and paragraph 3 of Article 52, a party to a dispute shall abstain from voting". This mandatory abstention only applies to a decision for the peaceful settlement of disputes, not for an enforcement action under Chapter VII.

Looking to the drafting history of the abortive Council resolution against Russia, there is additional support for the argument that Russia should have abstained. The original draft resolution, proposed by Albania and the United States, which condemned Russia's aggression against Ukraine and its decision to recognize the Donetsk and Luhansk "People's Republics", reportedly contained explicit reference to a breach of international peace and security as well as Chapter VII of the UN Charter. However, in response to China's preference for a Chapter VI resolution, all references to Chapter VII were removed.[37] Assuming this history is accurate, the draft resolution vetoed by Russia should have been considered as falling within the purview of Chapter VI rather than Chapter VII, and Article 27 (3) should have applied. In fact, Norway raised this point at the very Council meeting when the draft was vetoed.[38]

In 2014, there would have been a stronger argument for demanding Russia's abstention from voting because the vetoed draft resolution (concerning the referendum on the status of Crimea) urged all parties to pursue the "peaceful resolution of this dispute through direct political dialogue".[39] But the Article 27 (3) issue was not

[34] UN Docs. S/2022/160, 27 February 2022; S/RES/2623(2022), 27 February 2022; S/PV.8980, 27 February 2022, p. 2.

[35] The "Uniting for Peace" resolution stipulates that if the General Assembly is "not in session", an emergency special session may be convened.

[36] The 76th regular session opened on 14 September 2021 and closed on 13 September 2022. See https://www.un.org/en/ga/76/. In the case of Crimea, the General Assembly *in regular session* adopted a resolution concerning its status after a draft resolution was vetoed in the Security Council. UN Doc. A/RES/68/262 (27 March 2014), 1 April 2014. See also UN Docs. S/2014/189, 15 March 2014; S/PV.7138, 15 March 2014, p. 3.

[37] "In Hindsight: Ukraine and the Tools of the UN", *Security Council Report*, March 2022 Monthly Forecast.

[38] Norway stated that "in the spirit of the Charter, as a party to a dispute Russia should have abstained from voting on the draft resolution". UN Doc. S/PV. 8979, supra note 33, pp. 7–8.

[39] UN Doc. S/2014/189, supra note 36, para. 2.

raised at that time,[40] and scholars have pointed out that this mandatory abstention requirement has been ignored for more than 60 years in practice.[41]

In any event, on 2 March 2022, Resolution ES-11/1 (co-sponsored by 96 countries), almost identical in content to the one rejected by the Security Council, was adopted by the General Assembly with 141 votes in favor (including UAE this time) and 5 against (Russia, Belarus, North Korea, Eritrea and Syria) with 35 abstentions (including China and India). In the Resolution, the General Assembly:

(i) "[d]eplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the [UN] Charter" (para. 2);
(ii) "[d]emand[ed] that the Russian Federation immediately cease its use of force against Ukraine ..." (para. 3); and
(iii) "demand[ed] that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders" (para. 4).[42]

Subsequently, between 23–27 September 2022, Russia held so-called "referenda" in the Donetsk and Luhansk "People's Republics" as well as in the oblasts of Zaporizhzhya and Kherson (the latter two neither declaring independence nor receiving State recognition), and signed "treaties" annexing the four "Republics" and oblasts on 30 September. All procedures for annexation were completed on 5 October, but the date of annexation was set for 30 September.[43]

In response to this development as well as the rejection by a Russian veto[44] of a draft Security Council resolution seeking to invalidate the "referenda",[45] the emergency special session of the General Assembly on 12 October 2022 adopted Resolution ES-11/4 (co-sponsored by 44 States) with a vote of 143 in favor (including UAE again) and 5 against (Russia, Belarus, North Korea, Nicaragua and Syria) with 35 abstentions (including China, Eritrea and India). The Resolution, after referring to Russia's "unlawful actions" with regard to the "illegal so-called referenda" taken in parts of Ukraine's regions of Luhansk, Donetsk, Kherson and

[40] Enrico Milano, "Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 75 (2015), p. 230. At a subsequently held General Assembly meeting, however, Liechtenstein raised this point. UN Doc. A/68/PV.80, 27 March 2014, p. 8.

[41] It is said that the last few occasions on which the obligatory abstention from voting was arguably applied include that of the determination concerning the dispute between Argentina and Israel over the kidnapping of Eichmann in 1960. Milano, "Russia's Veto in the Security Council", supra note 40, pp. 222–224; "In Hindsight", supra note 37. See also Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations*, 5th ed. (Brill, 2016), pp. 94–101.

[42] UN Docs. A/RES/ES-11/1, supra note 13, paras. 2–4; A/ES-11/PV.5, 2 March 2022, pp. 14–15.

[43] "Putin Signs Annexation of Ukrainian Regions as Losses Mount", *Japan News*, 6 October 2022, at https://japannews.yomiuri.co.jp/news-services/ap/20221006-62664/; *Yomiuri Shimbun*, 6 October 2022.

[44] UN Doc. S/PV.9143, 30 September 2022, p. 4. The vote result was 10 in favor, 1 against (Russia) and 4 abstentions (Brazil, China, Gabon and India).

[45] UN Doc. S/2022/720, 30 September 2022, para. 3.

Zaporizhzhya, declared that they "can have no validity and cannot form the basis for any alteration of the status of these regions of Ukraine, including any purported annexation".[46]

These developments within the UN are substantively similar to what occurred in 2014 following Russia's annexation of Crimea. Nevertheless, the voting results in the current context demonstrate that the international community has united in stronger opposition to, and condemnation of, Russia's actions. General Assembly Resolution 68/262, invalidating the referendum held in Crimea and Sevastopol in 2014, was adopted with just 100 votes in favor, 11 against and 58 abstentions.[47]

Resolution ES-11/1 is particularly noteworthy in its description of Russia's actions as "aggression". While it is difficult to deny that aggression occurred in light of Article 3 of the 1974 "Definition of Aggression" resolution of the General Assembly,[48] such a declaration by the UN General Assembly arguably represents the "public opinion" of the international community.

Under the UN Charter, the Security Council has the authority to determine the existence of an act of aggression (Art. 39). However, it seems that under Article 10 of the Charter, on which the "Uniting for Peace" resolution is also based, the General Assembly could equally determine the existence of an act of aggression. In accordance with the "Uniting for Peace" resolution, the General Assembly is entitled to make recommendations for "collective measures" (i.e., enforcement measures), and thus it follows that, as a precondition for such recommendations, the General Assembly is entitled to make determinations on the existence of an act of aggression just like the Security Council. This point is also important in relation to the obligation of neutrality and its qualifications, which will be discussed in Sect. 3.1 below.

2.3 Possible Limit on the Ukrainian Use of Force in Self-Defense

2.3.1 Recovery of Crimea

One additional question to be addressed in connection with the Russian aggression against Ukraine is to what extent Ukraine is allowed to use force in self-defense. More specifically, the question is whether Ukraine's right of self-defense may cover

[46] UN Docs. A/RES/ES-11/4 (12 October 2022), 13 October 2022, para. 3; A/ES-11/PV.14, 12 October 2022, pp. 11–12.

[47] UN Docs. A/RES/68/262, supra note 36, para. 5; A/68/PV.80, supra note 40, p. 17. Those voted against were Russia, Armenia, Belarus, Bolivia, Cuba, North Korea, Nicaragua, Sudan, Syria, Venezuela and Zimbabwe.

[48] UN Doc. A/RES/3314(XXIX), 14 December 1974, Annex, Article 3 refers to: (a) the invasion or attack by the armed forces of a State of the territory of another State and (b) bombardment by the armed forces of a State against the territory of another State, etc.

the forceful recovery of its Crimean territory having been occupied by Russia since 2014. This is not a hypothetical question as it has been reported that Ukraine has carried out attacks on Russian-occupied Crimea several times, and Ukraine acknowledged its involvement in some of the cases.[49]

The exercise of the right of self-defense is subject to several conditions and requirements, including not only the occurrence of an armed attack as provided for in Article 51 of the UN Charter, but also necessity, proportionality and immediacy under customary international law.[50] The requirement of immediacy means that there must not be undue time-lag between the initial armed attack and the use of force in self-defense.[51] Although the ICJ has not expressly recognized this requirement, it seems to have included this element within the requirement of "necessity", as it found in the *Nicaragua* case that the condition of necessity was not fulfilled because the United States action against Nicaragua commenced several months after the major offensive had been completely repulsed.[52]

In the Ukraine case, no problem in this regard would arise in relation to the Russian invasion commenced on 24 February 2022. However, Crimea may be different as it was invaded by Russia in March 2014 without much resistance on the Ukrainian side,[53] and it has been occupied for some eight years before the subsequent Russian invasion started in February 2022. Since then, the Ukrainian government has repeatedly been calling for the "restoration of Ukraine's territorial integrity", as exemplified by President Volodymyr Zelenskyy's 10-point peace plan announced on the occasion of the summit of the Group of Twenty (G20) in November 2022[54]—a statement implying his determination to recover Crimea.[55]

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[49] *Asahi Shimbun*, 22 July 2023. On 22 September 2023, Ukraine attacked the headquarters of Russia's Black Sea fleet in Crimea, reportedly killing 34 officers including the fleet's commander. "Russian Black Sea Fleet Commander Killed in Crimea Strike, Ukraine Claims", *VOA News*, 25 September 2023.

[50] See, e.g., Dinstein, *War, Aggression and Self-Defence*, 6th ed., supra note 30, pp. 249–252.

[51] Ibid., p. 252.

[52] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, supra note 8, p. 122, para. 237.

[53] Michael Kofman, Katya Migacheva, Brian Nichiporuk, Andrew Radin, Olesya Tkacheva, and Jenny Oberholtzer, *Lessons from Russia's Operations in Crimea and Eastern Ukraine* (RAND Corporation, 2017), pp. xii, 9, 10, 11, 16, 31.

[54] President of Ukraine (Official Website), "Ukraine Has Always Been a Leader in Peacemaking Efforts; If Russia Wants to End This War, Let it Prove it with Actions - Speech by the President of Ukraine at the G20 Summit", 15 November 2022, at https://www.president.gov.ua/en/news/ukrayina-zavzhdi-bula-liderom-mirotvorchih-zusil-yaksho-rosi-79141.

[55] President Zelenskyy has also specifically referred to Crimea. President of Ukraine (Official Website), "The World Should Know: Respect and Order Will Return to International Relations Only When the Ukrainian Flag Returns to Crimea – Address of President Volodymyr Zelenskyy", 7 April 2023, at https://www.president.gov.ua/en/news/svit-maye-znati-lishe-todi-povernutsya-v-mizhnarodni-vidnosi-82153. See also Veronika Melkozerova, "Ukraine Gives Russia Two Options: Leave Crimea Peacefully or Be Ready for Battle", *Politico*, 6 April 2023, at https://www.politico.eu/article/ukraine-russia-crimea-war-peace-volodymyr-zelenskyy/.