

War or peace? – International legal issues concerning the use of force in the Russia–Ukraine conflict

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ABSTRACT

The Russian Federation launched an armed invasion of Ukraine on 24 February 2022, resulting in an international armed conflict of a level unprecedented since the Second World War. This article attempts to clarify the main international legal issues concerning the use of force and the support to of the belligerent parties. In the first part, it evaluates the Russian claims that the use of force is in accordance with the rules of international law, i.e. whether self-defence, the protection of nationals or humanitarian intervention could justify the intervention. In the second part, it investigates whether supporting one of the belligerent parties, especially Ukraine, could amount to a violation of the rules of neutrality or even constitute participation in the Russia–Ukraine conflict.

KEYWORDS

Russia, Ukraine, use of force, self-defence, humanitarian intervention, protection of nationals, neutrality, participation in armed conflict

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1. INTRODUCTION

Ukraine has been in an international armed conflict with the Russian Federation since 2014. On 22 February 2014, Ukrainian Prime Minister Viktor Yanukovich was forced to leave the country after months of protests against his pro-Russian policies undermined his power. On the same day, Russian military forces began an invasion of the Crimean Peninsula, and on 16 March 2014, in a controversial referendum the population of the territory declared its secession from Ukraine and the creation of the Autonomous Republic of Crimea, which Russia immediately recognised as an independent state. On 18 March, the alleged republic submitted an application for accession to the Russian Federation, which Russia ratified on 21 March. At the same time, with significant Russian military support an armed uprising against Ukrainian authority broke out in the eastern Ukrainian provinces of Donetsk and Luhansk, populated by a predominantly ethnic Russian population. The independence of the Donetsk and Luhansk People's Republics were proclaimed on 11 May 2014, following a similarly controversial referendum. From this period onwards, there has been an ongoing armed conflict between the eastern Ukrainian territories and Ukraine, in which Russian military forces have been actively involved, although officially the Russian political leadership has consistently denied that its troops are present on Ukrainian territory. Consequently, an international armed conflict has been taking place between Ukraine and Russia since 22 February 2014.¹

On 21 February 2022, tensions between Ukraine and Russia reached their peak. Although until then the Russian side had consistently denied that the troop deployments near the Ukrainian border since March 2021 were aimed at preparing an armed attack against Ukraine, on that day President Vladimir Putin announced that the Russian Federation declared its recognition of the independence of the separatist entities in eastern Ukraine - the Donetsk and Luhansk People's Republics - and would send Russian peacekeeping troops to their territory. From this moment, direct military confrontation between the two countries was inevitable. At dawn on 24 February, the Russian army launched an invasion of Ukraine that President Putin tried to justify as a 'special military operation' adducing a number of justifications in his televised speech to the Russian people.²

The aim of this study is to analyse the international legal issues related to the interstate use of force in the new phase of the Russian–Ukrainian conflict starting on 24 February 2022. In the first half, it examines whether the Russian armed intervention launched on 24 February 2022 is compatible with the rules of public international law in the light of Russian official statements. In the second half it analyses the question of whether different forms of assistance without direct armed intervention to one of the parties to the conflict can constitute direct participation in the Russian–Ukrainian conflict.

2. THE REGULATION OF USE OF FORCE IN INTERNATIONAL LAW AND THE RUSSIAN–UKRAINIAN CONFLICT

After 1945, the international law of interstate violence changed fundamentally. Whereas classical international law considered the initiation of war as a sovereign prerogative of states, the United

¹For more background, see Czapliński et al. (2018).

²Putin (2022a).



Nations, as reflected in the Preamble to the UN Charter, had the primary objective of protecting future generations from the ‘scourge of war’, and accordingly sought to strictly limit violence between states.³ This ambition is reflected in Article 2, paragraph 4 of the Charter, which states:

All members of the Organization shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations.⁴

With this provision, the United Nations introduced a general prohibition of the use of force, which has become a new basic norm of the international legal order. Although the exact concept of force is undefined in the Charter,⁵ it clearly prohibits any form of the use of armed force against another state and is considered by most authors as an *ius cogens* norm.⁶ The text of the Charter provides for exceptions to this rule in only two cases: the exercise of the right of self-defence, and military action with a prior authorisation granted by the Security Council under Chapter VII of the Charter.⁷ In addition, other exceptions have been claimed to have emerged, such as humanitarian intervention, that are further discussed in the article.⁸

It is important to stress, however, that the military intervention of the Russian Federation is a clear example of an interstate use of force, regardless of the fact that the Russian state officially designates it a ‘special military operation’.⁹ This choice of terminology has no relevance in international law, but is intended to signal that the military intervention does not constitute war according to Russian constitutional law, i.e. only contracted soldiers can be deployed in combat and Russia has not ordered a general conscription of the population.¹⁰ Accordingly, in the following, the article will attempt to clarify whether the Russian position that the attack on Ukraine does not violate the norms of interstate violence can be considered well-founded by analysing the international legal norms invoked directly or indirectly by the Russian Federation.

³For details see e.g. Corten (2021); Gray (2018).

⁴Charter of the United Nations (1945).

⁵UN General Assembly resolutions 2625 of 1970 and 3314 of 1974 provide an exemplary list of the most typical forms of violence. See United Nations General Assembly (1970) and United Nations General Assembly (1974).

⁶See, for example, Orakhelashvili (2006) 51; Frowein (2013). The International Law Commission, in its draft conclusions on the peremptory norms of general international law, cites the prohibition of aggression as the first of its conclusions. International Law Commission (2022).

⁷The UN Charter appears to allow a third exception. According to Article 107 of the Charter, ‘Nothing in the present Charter shall affect or prohibit any operations which the Governments responsible for such operations may have undertaken or authorized in the Second World War against any State at war with any signatory to the present Charter as a consequence of the war.’ However, such measures against so-called ‘enemy States’ have never been used, and by now this provision has become obsolete. Wood (2008).

⁸For details see Sulyok (2004). This article does not address the issue of consent as it was not invoked in this conflict.

⁹In Russia, since the beginning of the military intervention, several media have been subject to administrative proceedings for calling the military operation an ‘attack’, an ‘invasion’ or a ‘war’. See Amnesty International (2022).

¹⁰Slavin (2022). Gorobets, however, argues that the term is intended to emphasize that Russia does not consider Ukraine to be a state of equal status with itself, but merely a dependent territory against which it is not even capable of using state-to-state armed force. See Gorobets (2022).



2.1. The right to self-defence

The right of self-defence in cases of inter-state violence is the most frequently invoked norm in the post-1945 international legal order. Since the existence of a Security Council mandate can usually be established quite easily,¹¹ states typically attempt to legitimize their armed actions by invoking self-defence.¹² Article 51 of the UN Charter provides the right of self-defence as follows:

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.

This regulation thus makes the exercise of self-defence conditional upon the occurrence of an armed attack, within the framework established by customary international law, and requires that self-defence measures be reported immediately to the Security Council.

In his speech announcing the attack on Ukraine, President Putin explicitly invoked the right of self-defence¹³ and its full transcript was attached to the Russian Federation's notification to the Security Council, by which it reported the taking of self-defence measures under Article 51 of the Charter.¹⁴ Likewise, the Russian Federation has also qualified the armed intervention as an act of self-defence in the proceedings before the International Court of Justice and has also attached President Putin's speech to its written submission.¹⁵

2.1.1. Anticipatory self-defence against a Ukrainian attack? Although the wording of Article 51 of the Charter seems to suggest that self-defence is only lawful if an armed attack has already occurred, some states¹⁶ and international legal scholars¹⁷ support the broader interpretation that self-defence measures can be taken to avert an imminent external armed attack.

However, the acceptability of this interpretation in international law is highly debated, as illustrated by the failure of the international community to reach a consensus on this issue during the UN reform process. The report of the High-Level Panel commissioned by Secretary-General Kofi Annan stated that 'a threatened State, according to long established international

¹¹See, however, the international legal justification for the 2003 armed intervention against Iraq, in which the US and UK parties invoked the 'revival' of UNSCR 678 (1990). For a detailed analysis, see [Weller \(2018\)](#).

¹²[Kajtár \(2015\)](#) 56.

¹³[Putin \(2022a\)](#).

¹⁴Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc S/2022/154 (5 March 2022). The Security Council declared the Russian military intervention illegal by a vote of 11-1, but as the Russian Federation voted against the draft resolution, it could not enter into force. China, India and the United Arab Emirates abstained in the vote. [United Nations Meetings Coverage and Press Releases \(2022\)](#).

¹⁵[Russian Federation \(2022\)](#).

¹⁶[Ruys \(2010\)](#) 330–34.

¹⁷[Henderson \(2018\)](#) 277–81.



law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.¹⁸ Kofi Annan's report similarly stated that

Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.¹⁹

Still, no reference to the concept of an imminent attack was included in the final declaration adopted by UN member states, not least because a significant number of states, particularly developing countries, consistently reject approaches that broaden the potential application of use of force²⁰ and a significant number of continental legal scholars take a contrary position.²¹

While the narrow concept of preventive self-defence²² has some support in the international community, the broader interpretation, which would give the authority to exercise self-defence against distant threats, is almost unanimously rejected. Following the terrorist attacks of September 11 2001, the United States of America invoked an extremely broad mandate to deter external threats. The 2002 US National Security Strategy stated that: 'For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.....' From this it concluded that:

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries..... The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.²³

However, this approach is not supported by state practice and is rejected by the vast majority of international lawyers.²⁴

From Russian official statements, it seems that the Russian Federation launched the armed intervention to prevent a distant threat from Ukraine. President Putin's speech on 24 February made several references to threats against Russia emanating from Ukraine's territory, but did not

¹⁸High-level Panel on Threats, Challenges and Change (2004) para. 188.

¹⁹Annan (2005) para. 124.

²⁰See Ruys (2010) 336–38.

²¹See Corten (2021) 407–43 and the authors cited there.

²²There is a degree of terminological uncertainty in international legal literature concerning the designation of the narrow concept of preventive self-defence. Most authors use the term 'anticipatory self-defence'. See, for example, Szabó (2011). However, some scholars also use the term 'pre-emptive self-defence'. See, inter alia, Ochoa-Ruiz and Salamanca-Aguado (2005); Reisman and Armstrong (2006). While there is notable disagreement among different authors concerning the concept of imminence, this does not need to be addressed in this article since the Russian Federation did not claim to be acting to prevent an imminent armed attack.

²³United States of America (2002) 14.

²⁴See Gray (2018) 248–56. Even Lord Goldsmith, the UK Attorney General, stated in his legal opinion on the attack on Iraq in 2003 that proof of 'some degree of imminence' was required 'to pre-empt danger in the future'. Goldsmith (2003).



mention any actual examples of imminent armed attacks. The speech focused on NATO's expansion plans rather than on threats to Ukraine. Putin said that for Russia

... it is a matter of life and death, a matter of our historical future as a nation. This is not an exaggeration; this is a fact. It is not only a very real threat to our interests but to the very existence of our state and to its sovereignty. It is the red line which we have spoken about on numerous occasions. They have crossed it.²⁵

In his speech on 9 May, the Russian President returned to this issue again and made it clear that 'Russia launched a pre-emptive strike at the aggression. It was a forced, timely and the only correct decision. A decision by a sovereign, strong and independent country.'²⁶ This approach is supported by the fact that one of the declared strategic goals of the Russian Federation in attacking Ukraine was to demilitarise the country. Russia, however, has not substantiated its claim that NATO's eastward enlargement would pose a real threat to its national security.²⁷

Following the military intervention, Russia has identified another alleged threat to its security. At the Security Council meeting of 11 March 2022, Russia announced that Ukraine had approximately 30 US- and NATO-supported biological weapons development facilities operating on its territory, which were conducting a research programme that posed a threat to the Russian Federation.²⁸ However, UN Under-Secretary-General of Disarmament Affairs Nakamitsu Izumi indicated at the meeting that the UN was not aware of Ukraine developing any biological weapons,²⁹ and the United States expressly denied the Russian allegations.³⁰ It is worth noting that the description of the US-sponsored research programme was already publicly available on the website of the US Embassy in Ukraine before the Russian invasion,³¹ and that the programme has existed for decades as a public research project, not aiming to develop biological weapons, but to prevent potential biological threats all over the globe.³² In addition, Russia appears to have repeatedly accused other states of developing biological weapons without evidence, making similar allegations against Georgia in 2011³³ and 2018.³⁴

²⁵Putin (2022a).

²⁶Putin (2022b).

²⁷The 1997 NATO-Russian Federation Charter on Mutual Relations, Cooperation and Security (27 May 1997) even states that 'NATO and Russia do not consider each other as adversaries.' In the same document, Russia also gave assurances that it would not threaten the sovereignty, territorial integrity or political independence of other states and would refrain from the use of force. *Founding Act (1997)*. Moreover, prior to the Russian invasion NATO deployed no more than 5000 personnel in Poland and the Baltic states, which could have hardly seemed threatening for the Russian Federation. *Gill (2022)* 123., fn. 4.

²⁸8991st meeting of the Security Council (11 March 2022) UN Doc. S/PV.8991.

²⁹At the 9033rd meeting of the Security Council (13 May 2022), Thomas Markram, Director and Deputy to the High Representative for Disarmament Affairs, confirmed that the United Nations remained unaware of any biological weapons testing, while the representative of the Russian Federation reiterated this claim. UN Doc. S/PV.9033.

³⁰Ned Price, the Spokesperson of the U.S. Department of State claimed that 'The Kremlin is intentionally spreading outright lies that the United States and Ukraine are conducting chemical and biological weapons activities in Ukraine.' He added that 'Russia is inventing false pretexts in an attempt to justify its own horrific actions in Ukraine.' *Price (2022)*.

³¹U.S. Embassy in Ukraine (2020).

³²National Academies of Sciences, Engineering, and Medicine (2020).

³³Walker (2002).

³⁴Wright and Pandey (2018).



Based on the above, it seems that one of Russia's main reasons for intervening in Ukraine was to avert a distant threat to the country. However, the Russian Federation has not been able to substantiate the claim that either Ukraine's possible accession to NATO or the biological research programmes on its territory posed any threat to its national security. Nevertheless, even if Russia could have identified any potential distant threats, it would not have provided the basis for military intervention under the extant international norms on self-defence.

2.1.2. Exercising collective self-defence to assist the People's Republics of Luhansk and Donetsk? Article 51 of the Charter explicitly recognises the existence of collective self-defence. According to the International Court of Justice, its exercise requires that the victim of an unlawful armed attack expressly requests another State's military assistance,³⁵ consequently armed intervention in defence of another state is lawful under international law.³⁶ This presupposes, of course, that the act of self-defence is carried out for the benefit of a State, which actually exists.³⁷

On 21 February 2022, President Putin signed Presidential Decree No 71 'On the Recognition of the Donetsk People's Republic' and Presidential Decree No 72 'On the Recognition of the Luhansk People's Republic'. Both decrees recognised the existence of the alleged states based on the freely expressed will of the local 'people' and guaranteed that the Russian Federation would perform 'peace support functions' on their territory.³⁸ This ostensibly created a legal basis for Russian 'peacekeepers' to be present on the territory of the two republics without Ukraine's consent, and from then on, Ukrainian military actions in eastern Ukraine could be considered by Russia as an armed attack on the republics, against which the exercise of collective self-defence was permitted.³⁹ The overwhelming majority of the international community vehemently rejected this move. UN Secretary General António Guterres stressed that 'the decision of the Russian Federation to recognize the so-called 'independence' of certain areas of Donetsk and Luhansk regions is a violation of the territorial integrity and sovereignty of Ukraine' and it leads to 'the perversion of the concept of peacekeeping'.⁴⁰ Similarly, the UN General Assembly has stated that recognition of the statehood of the Donetsk and Luhansk People's Republics is 'a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter'.⁴¹

³⁵International Court of Justice (1986) para. 199.

³⁶Dinstein (2011) 278–82.

³⁷The International Court of Justice held that 'the principle of non-intervention derives from customary international law. It 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...' International Court of Justice (1986) para. 246.

³⁸Miklasová (2022).

³⁹On 9 March 2022, the Russian Ministry of Foreign Affairs announced that Ukrainian military documents found during the attack proved that Ukraine was preparing for a major military offensive in the Donbas region, and that the Russian military intervention was therefore also a preventive collective self-defence. Ministry of Foreign Affairs Russia (2022). However, this argument hardly holds water, as this information was not available to the Russian Federation before the attack was launched, and can therefore be considered as an ex-post attempt at justification. Green et al. (2022) 20.

⁴⁰United Nations Secretary-General (2022).

⁴¹United Nations General Assembly (2022) para. 5.



However, 8 years earlier, during the annexation of Crimea, the Russian Federation had already followed the same scenario: on 17 March 2014, President Putin signed Presidential Decree No.147 ‘On the Recognition of the Republic of Crimea’, and on 18 March 2014, the Republic of Crimea signed the Agreement on Accession to Russia, which was ratified by the Duma on 21 March.⁴² At the same time, the UN General Assembly reaffirmed its commitment to ‘to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders’ and called on members of the international community to refuse to recognise the annexation.⁴³

Nevertheless, the official position of the Russian Federation is that the Crimean ‘people’ freely chose to determine its political system and ensure its economic, social and cultural development by exercising the right of self-determination recognised by international law.⁴⁴ Thus, the accession of the Republic of Crimea to Russia was a sovereign decision of an independent state and cannot be considered a violation of Ukraine’s territorial integrity. Although the expansive interpretation of the right of peoples to self-determination, which allows for the right to secession, is highly contested in international legal discourse,⁴⁵ UN General Assembly Resolution 2625 does not explicitly exclude this possibility. While the resolution prohibits the invocation of the right of self-determination to dismember or impair the territorial integrity or political unity of a State, it only applies to States which conduct themselves ‘in compliance with the principle of equal rights and self-determination of peoples... and thus possessed of a government representing the whole people belonging to the territory, without distinction as to race, creed or colour.’⁴⁶

One possible interpretation of this clause would entitle groups suffering discrimination and other serious human rights violations to secede from their oppressive state if all other attempts at peaceful settlement of disputes fail (remedial secession).⁴⁷ During the advisory opinion proceedings on the unilateral declaration of independence of Kosovo, several states, including Russia, submitted written statements to the International Court of Justice indicating that they agreed with this interpretation,⁴⁸ but many states have stated that the right of peoples to self-

⁴²For details, see Grant (2015) 18–21.

⁴³United Nations General Assembly (2014).

⁴⁴International Covenant on Civil and Political Rights (1966) Art. 1.

⁴⁵For details, see Sterio (2018); Walter et al. (2014).

⁴⁶United Nations General Assembly (1970).

⁴⁷See, for example, the Supreme Court of Canada’s decision on the question of Quebec secession, which stated that secession may be lawful under international law ‘if a particular group is denied meaningful access to government in the interests of its political, economic, social and cultural development’, *Supreme Court of Canada (1998)* 217, para. 138.

⁴⁸Reply of the Government of the Republic of Albania, pp. 33–34, para59; Written Statement of Estonia, p. 6, para 2.1; Written Statement of Finland, p. 4, para 9; Written Statement of Germany, pp. 33–35; Written Statement of Ireland, p. 9, para 30; Verbatim Record, 10 December 2009, CR 2009/32, p. 15, paras 27–28 (Netherlands); Written Statement of Poland, p. 25, Paragraph 6.5; Written Statement of Switzerland, p. 16, paragraphs 62–63; Verbatim Record, 8 December 2009, CR 2009/30, p. 44, paragraphs 20–22 (Russia). At the Security Council meeting, the representative of the Russian Federation, Vassily Nebenzia, confirmed that the recognition of the statehood of the Donetsk and Luhansk People’s Republics was based on Resolution 2625. *Nebenzia (2022a)*.



determination does not include the right to secession.⁴⁹ Nevertheless, President Putin claimed that all the peoples of the former Soviet Union are entitled to exercise the right to self-determination and they were prevented from doing so after the dissolution of the Soviet Union.⁵⁰ This, however, begs the question why the Russian authorities have consistently denied the exercise of the right to self-determination of the minority groups within the Russian Federation.⁵¹

In the light of the above, the customary status of the right to secession is highly dubious. Moreover, even if the right of self-determination extends to secession from other countries, its proponents argue that it is only acceptable if the group concerned suffers such serious human rights violations at the hands of the government that the situation can only be remedied through independence.⁵² This is not the case for the population of Crimea and the Donbas region. While there is no doubt that the Ukrainian government's measures restricting the use of the Russian language may constitute human rights violations, this does not rise to the level of legitimizing the secession of these territories from Ukraine, and their alleged secession is solely due to the military, economic and political support of the Russian Federation.⁵³ The Donetsk and Luhansk People's Republics are therefore not truly sovereign states, and the Russian Federation cannot legitimately use force in their interests in the exercise of collective self-defence.

2.1.3. Are Russian military actions necessary and proportionate? Even if the Russian Federation's claim that military intervention against Ukraine is based on individual and/or collective self-defence were correct, self-defence would still have to meet the criteria of necessity and proportionality. In its case law, the International Court of Justice has consistently held that these form an indispensable part of the exercise of self-defence under customary international law.⁵⁴

Based on the concept of necessity, even in a self-defence situation, violence can only be used when it is clearly not possible to resolve the conflict in a peaceful manner.⁵⁵ As for the proportionality principle, there are several possible interpretations. On a narrow interpretation, an

⁴⁹Verbatim Record, 3 December 2009, CR 2009/27, p. 24, para. 40 (Azerbaijan); Verbatim Record, 7 December 2009, CR 2009/29, p. 35, para. 23 (China); Verbatim Record, 7 December 2009, CR 2009/29, pp. 47–48, paras 58–61 (The Republic of Cyprus); Written Statement of Iran, p. 6, 4.1; Written Statement of Romania, p. 40, para 138; Written Comments by the Republic of Serbia, 14 July 2009, pp. 142–145; Written Statement of Slovakia, para 28; Verbatim Record, 8 December 2009, CR 2009/30, p. 17, paras 37–44 (Spain).

⁵⁰President Putin pronounced that 'The outcomes of World War II and the sacrifices our people had to make to defeat Nazism are sacred. This does not contradict the high values of human rights and freedoms in the reality that emerged over the post-war decades. This does not mean that nations cannot enjoy the right to self-determination, which is enshrined in Article 1 of the UN Charter. Let me remind you that the people living in territories which are part of today's Ukraine were not asked how they want to build their lives when the USSR was created or after World War II. Freedom guides our policy, the freedom to choose independently our future and the future of our children. We believe that all the peoples living in today's Ukraine, anyone who want to do this, must be able to enjoy this right to make a free choice.' Putin (2022a).

⁵¹For instance, the Russian Constitutional Court in 1995 held that General Assembly Resolution 2625 did not allow for secession from the territory of the Russian Federation. [Russian Constitutional Court \(1996\)](#).

⁵²See [Cassese \(1995\)](#) 118.

⁵³See [Korotkyi and Hendel \(2018\)](#).

⁵⁴[International Court of Justice \(1986\)](#) paras. 194 and 237; [International Court of Justice \(1996\)](#) para. 41; [International Court of Justice \(2003\)](#) paras. 43, 73–74 and 76; [International Court of Justice \(2005\)](#) para. 147.

⁵⁵[Schachter \(1984\)](#) 1635.



act of self-defence is only proportionate if its intensity does not significantly exceed that of the armed attack,⁵⁶ while on a broader interpretation, even if the use of armed force is vastly in excess of the initial armed attack, it is not disproportionate if it is carried out with the intention of restoring the original situation prior to the attack.⁵⁷

The military intervention of the Russian Federation does not seem necessary even if one accepts the premise that it is indeed an exercise of self-defence, since the possibility of a peaceful settlement of the dispute still existed, as shown by the fact that prior to the attack, several states had tried to mediate between the parties to the dispute.⁵⁸ And since the Russian armed intervention was initially aimed at occupying all of Ukraine and then, in the period after 3 April 2022, primarily at occupying and presumably annexing the Donbas region of eastern Ukraine, it cannot even be said to meet the broad interpretation of proportionality.

2.2. Armed intervention to protect Russian citizens?

Before the Second World War, states retained the right to armed intervention to protect their citizens abroad if they could not defend their fundamental rights through diplomatic means.⁵⁹ However, there is no explicit reference in the UN Charter to the existence of such a right. A minority of international scholars consider intervention to protect nationals as an integral part of the concept of self-defence⁶⁰ or recognise its legality on other grounds⁶¹ but the majority of international lawyers have rejected this claim, mainly because its acceptance could potentially lead to a further escalation of violence between states.⁶² However, even authors arguing for the recognition of the legality of armed intervention to protect nationals, unanimously stress that the use of force in such cases must be strictly limited to the extent that is necessary to protect citizens.⁶³

Article 61 (2) of the Russian Constitution declares that: ‘The Russian Federation shall guarantee to its citizens protection and patronage abroad.’ Russia interprets this provision as a right to armed intervention when it is necessary for the protection of Russian citizens. Thus, for example, Russian Foreign Minister Andrei Kozirev stated as early as 1995 that Russia is prepared to use armed force to protect its citizens and that this is approach in accordance with the UN Charter.⁶⁴

In the early 2000s, the Russian Federation initiated the so-called ‘passportisation’ policy, i.e. it has taken an increasing number of measures to make it easier for ethnic Russians living in the

⁵⁶Christodoulidou and Chainoglou (2015) 1191–92.

⁵⁷Gardam (1993) 403.

⁵⁸Neuman (2022).

⁵⁹Brownlie (1963) 289–91.

⁶⁰See, for example, Schachter (1984) 1632; Wingfield (1999–2000).

⁶¹Some international jurists do not consider military action taken to protect citizens as a case of self-defence, but argue that such action does not violate the territorial integrity and political independence of the state concerned, i.e. does not fall under Article 2(4) of the Charter. See, Henkin (1979) 145. Finally, some authors consider the protection of citizens to be a form of human rights enforcement, i.e. a form of humanitarian intervention. Ronzitti (1985).

⁶²Ruys (2008) 234–36.

⁶³Ruys (2008) 264.

⁶⁴Lynch (2000) 95.



post-Soviet space to acquire Russian citizenship, and has even resorted to armed intervention in their interests.⁶⁵ This was for example the case in the 2008 Georgian conflict, when Russia invoked, *inter alia*, the protection of Russian citizens living in South Ossetia and Abkhazia,⁶⁶ but also the annexation of Crimea was preceded by a broad extension of Russian citizenship.⁶⁷ Similarly, prior to the invasion of 24 February 2022, some 720,000 passports were issued to residents of eastern Ukraine between April 2019 and February 2022.⁶⁸ This gives a specific context to the words of President Putin, who highlighted the need to 'bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation', as one of the reasons for the invasion of Ukraine.⁶⁹

From the above, it can be concluded that Russia is effectively trying to create territorial jurisdiction from personal jurisdiction by first massively extending Russian citizenship and then using military intervention instead of diplomatic protection to supposedly represent their interests.⁷⁰ This practice seems to be more of a pretext for a military invasion rather than a genuine attempt to safeguard human rights⁷¹ and ignores the possibility of exercising diplomatic protection to protect citizens.⁷² Therefore, even if the legality of armed intervention to protect citizens were recognised by international law, the Russian practice would still arguably constitute an abuse of rights and the scale of the intervention would be disproportionate to the military force required to protect the rights of citizens.

2.3. Humanitarian intervention to protect the Ukrainian population?

Since the 19th century, both in international legal discourse and in the declarations of certain states, it has been suggested that international law authorizes military intervention to prevent mass violations of human rights of the civilian population.⁷³ However, humanitarian intervention as an exception to the general prohibition of the use of force is extremely rarely invoked in state practice. Its adherents typically give priority to the practice of Western states,⁷⁴ while

⁶⁵Green (2010) 54.

⁶⁶Hoffmann (2008).

⁶⁷Green (2014).

⁶⁸Green et al. (2022) 15.

⁶⁹Putin (2022a).

⁷⁰Hassler and Quéniwet (2018) 75.

⁷¹Ginsburg (2020) 133.

⁷²The UN International Law Commission has previously stressed that 'the use of force, prohibited by Article 2.4 of the UN Charter, is not a permissible means of enforcing the right to diplomatic protection.' [International Law Commission \(2006\)](#) 27–28.

⁷³See, for example, [Heraclides \(2014\)](#).

⁷⁴See [Chesterman \(2003\)](#).



official declarations of Third World countries and the states concerned typically denying the existence of such a right are considered secondary,⁷⁵ if taken into account at all.⁷⁶

Nevertheless, even those states that declare that they are carrying out military intervention in the interests of the civilian population generally refrain from recognising humanitarian intervention as an exception to the prohibition of the use of force. Remarkably, although the 1999 NATO intervention is often cited as a textbook case of humanitarian intervention, no NATO member state⁷⁷ except Belgium that has publicly claimed that humanitarian intervention provided its legal basis.⁷⁸

The United Kingdom is the only major military power that takes the legal position that armed intervention for humanitarian purposes is lawful in the absence of a Security Council mandate.⁷⁹ However, this position has not been formally adopted by any state other than Denmark,⁸⁰ so the existence of a customary norm of humanitarian intervention as an exception to the prohibition of use of force seems highly implausible.⁸¹

2.3.1. Humanitarian intervention to protect the ethnic Russian population in Ukraine?

Russian official statements seem to emphasise that one of the main objectives of the ‘special military operation’ is to save the Russian population in Ukraine from serious human rights violations. The Russian Federation has been accusing Ukraine of genocide against the Russian

⁷⁵Developing countries have repeatedly affirmed that they consider humanitarian intervention to be illegal under international law. Following the Kosovo intervention, the 133-member G-77 ‘rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law’ in 1999 and 2000. See G-77 (1999) para 69; G-77 (2000) para 54. In addition, the Doha Declaration issued by the Non-Aligned Movement at the 2005 Summit with the attendance of 120 non-aligned countries stated that they “reiterated the rejection by the Movement of the so-called ‘right’ of humanitarian intervention, which has no basis either in the UN Charter or in international law”. *Non-Aligned Movement (2006)* para. 249.

⁷⁶Franck, for example, argues that ‘the Charter is what the main organs do’. *Franck (2003)* 206.

⁷⁷Belgium has invoked humanitarian intervention as a legal basis for military intervention before the International Court of Justice, although it has stressed that its legality is only acceptable in the case of humanitarian disasters recognised by UN Security Council resolutions. *Legality of Use of Force (Yugoslavia v. Belgium)*, Public sitting held on Monday 10 May 1999 at 3 p.m. at the Peace Palace. CR 99/15.

⁷⁸NATO Secretary General Javier Solana also stressed that ‘NATO has a moral duty’ ‘to prevent more human suffering and more repression and violence against the civilian population of Kosovo’ and that the military intervention ‘seeks to support the political aims of the international community’. *Solana (1999)*.

⁷⁹On 29 August 2013, the UK Government published its legal position on the issue, which states that humanitarian intervention to alleviate extreme suffering is lawful under international law in exceptional circumstances, subject to three conditions: ‘(i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)’. *United Kingdom (2013)*; *United Kingdom (2018)*.

⁸⁰*Ministry of Foreign Affairs of Denmark (2013)*. Recently, the representative of New Zealand suggested to the International Court of Justice that ‘In exceptional circumstances, where peaceful means and actions have been exhausted, it may be that an emerging customary norm of unilateral humanitarian intervention provides a justification for the use of force to protect a population from genocide.’ However, this statement only tentatively suggests the potential emergence of a new customary norm, which cannot be considered an evidence of *opinio juris*. *New Zealand (2022)* para. 31.

⁸¹*Kleczkowska (2020)*.



population in Ukraine since 2014, when the armed conflict against the breakaway republics in eastern Ukraine resulted in numerous civilian casualties,⁸² and the Investigative Committee of the Russian Federation has launched criminal proceedings.⁸³ President Putin also stressed in December 2021 that ‘developments in Donbass look like genocide’,⁸⁴ and in his speech announcing the military intervention in Ukraine he stated that ‘we had to stop that atrocity, that genocide of the millions of people who live there’.⁸⁵ In addition to the civilian victims, the Russian Federation also considers the language law declaring Ukrainian the exclusive state language⁸⁶ as evidence of an attack on the Russian population, with Russian Foreign Ministry spokeswoman Maria Zakharova referring to it as ‘linguistic genocide’.⁸⁷

In the proceedings before the International Court of Justice, initiated by Ukraine against the Russian Federation for alleged violations of the Genocide Convention, Russia did not submit any evidence of the alleged genocide and stressed that it did not carry out military intervention in Ukraine in violation of the Genocide Convention, but acted in self-defence.⁸⁸ Nevertheless, the Court stated that ‘it is doubtful that the Convention, in light of its object and purpose, would authorize a Contracting Party’s unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.’⁸⁹

Based on the available evidence, there is no indication that the Ukrainian state committed genocidal acts. For example, the monitoring mission of the Organisation for Security and Cooperation in Europe (OSCE) has comprehensively documented the fighting in eastern Ukraine since 2014, but has found no indication of a military action aimed at the systematic destruction of the Russian population in Donbass.⁹⁰ Moreover, the application of the Ukrainian language law, while undoubtedly restricting the language rights of the non-Ukrainian-speaking population,⁹¹ cannot possibly result in the physical destruction of the ethnic Russian population.⁹²

2.3.2. Humanitarian intervention to protect the entire Ukrainian population? In addition to the ethnic Russian population, Russian official statements declared that the military intervention is also aimed at rescuing all Ukrainian citizens. President Putin stated in his speech before the

⁸²According to the UN Human Rights Monitoring Mission in Ukraine, between 14 April 2014 and 31 December 2021, the fighting resulted in 3,404 deaths, including 298 people on the Malaysian airline plane shot down on 17 July 2014. [United Nations Office of the High Commissioner for Human Rights \(2022\)](#).

⁸³Sayapin (2018).

⁸⁴n.d. (2021).

⁸⁵Putin (2022a).

⁸⁶On ensuring the functioning of Ukrainian as a state language (25.04.2019).

⁸⁷Ramsay and Robertshaw (2019) 82.

⁸⁸Russian Federation (2022) para. 15.

⁸⁹International Court of Justice (2022) para 59.

⁹⁰OSCE Special Monitoring Mission to Ukraine (n.d.).

⁹¹See, for example, the relevant report of the European Commission for Democracy through Law (Venice Commission). [European Commission for Democracy through Law \(2019\)](#).

⁹²The concept of ‘cultural genocide’ is absent from the Genocide Convention, however, in the scholarly literature, it has been suggested that it already forms part of the definition of genocide. See [Novic \(2016\)](#).



Russian attack that he would seek to ‘demilitarise and denazify’ Ukraine,⁹³ referring to what he believes is the Ukrainian political leadership’s construction of a Nazi regime. On 25 February 2022, he went on to describe the Ukrainian government as a ‘band of drug addicts and neo-Nazis’.⁹⁴ The Russian International Law Society, whose presidency issued a statement attempting to justify the Russian military intervention, similarly claimed that ‘the Russian Federation was forced to go on a special operation - to militarily liberate Russian citizens living in these territories, all Russians and Ukrainians from the Nazis and nationalists of Ukraine’.⁹⁵

The only concrete factor cited by official Russian statements as evidence of alleged Ukrainian neo-Nazi influence is the existence of the so-called Azov battalion.⁹⁶ While there is no doubt that the Azov Battalion was originally created as a paramilitary unit following far-right ideologies and later became part of the Ukrainian state army,⁹⁷ and that the level of far-right extremism in Ukraine has significantly increased since the Russian Federation’s attack in 2014;⁹⁸ there is no evidence that any part of the Ukrainian state leadership follows neo-Nazi ideals. This is also highly unlikely because the Ukrainian president, Volodymyr Oleksandrovych Zelensky, is of Jewish descent, which seems uncommon in states following national socialist ideals. If the mere fact that there are soldiers of far-right ideology serving in the Ukrainian army justified the need for denazification, it would probably also be necessary even in the Russian Federation, as there are a significant number of neo-Nazi soldiers serving in the Russian army and in the separatist forces fighting alongside it.⁹⁹

Thus, ‘denazification’ does not seem to be a persuasive argument for a humanitarian intervention, but more likely a propaganda slogan that, together with the reference to genocide, can be used to evoke the memory of the Great Patriotic War, which helps to legitimise military intervention for the Russian public.¹⁰⁰

2.3.3. The proportionality of humanitarian intervention. There is a broad consensus among proponents of the concept of humanitarian intervention that intervention to protect civilians must be proportionate, i.e. the armed force employed must not cause more negative consequences than it is intended to prevent.¹⁰¹ As Nigel Rodley aptly pointed out, ‘The point is that the interventionist prescription cures, rather than aggravates, the malady, much less kills the patient.’¹⁰²

The proportionality of the Russian military action is highly questionable, because even if we accept that the humanitarian intervention is legal under international law and that the Russian

⁹³Putin (2022a).

⁹⁴Epstein and Haltiwanger (2022).

⁹⁵Russian Association of International Law (2022).

⁹⁶See, for example, the note sent to the UN Secretary General, which describes the Azov battalion as a ‘Nazi battalion’.
Nebenzia (2022b).

⁹⁷John and Lister (2022).

⁹⁸Likhachev (2018).

⁹⁹Schmid (2022).

¹⁰⁰Priemel (2022).

¹⁰¹See e.g. McMahan (2010).

¹⁰²Rodley (2015) 791.



Federation is indeed acting to protect the Russian and the Ukrainian population as a whole, it is difficult to explain how such a military operation with such devastating consequences could possibly serve to protect the human rights of the civilian population. Given the total or partial destruction of several towns and municipalities and the fact that more than 6 million Ukrainian citizens have left the country¹⁰³ and an additional 6.65 million have become internally displaced¹⁰⁴ this seems highly unlikely.

3. POTENTIAL PARTICIPATION IN THE RUSSIA–UKRAINE CONFLICT

Following Russia's military intervention, there has been considerable political debate about exactly how and to what extent assistance to Ukraine can be provided without the donor states being considered parties to the international armed conflict between Russia and Ukraine. Given Russia's nuclear arsenal, a nuclear holocaust could potentially be triggered if, NATO countries directly clashed with the Russian Federation. Nevertheless, many states consider that not only the provision of humanitarian and economic assistance, but even the transfer of offensive military technology to Ukraine does not constitute direct involvement in the Russia–Ukraine conflict.¹⁰⁵

In contrast, the Hungarian government has consistently maintained a political position that 'Hungary must stay out of this military conflict,' and has therefore refused to supply arms to Ukraine,¹⁰⁶ or allow the arms supplies to pass through Hungarian territory.¹⁰⁷ This position was eventually modified to the effect that only 'military equipment designed to deliver lethal force' cannot go directly to Ukraine via Hungary, but other types of arms shipments can.¹⁰⁸ On the other hand, Hungary has again voted in favour of the European Union's European Peace Facility, which will provide €2 billion in aid to the Ukrainian armed forces to defend the country's territorial integrity and sovereignty against Russian aggression, despite the fact that a significant part of the aid is for offensive weapons.¹⁰⁹

Seemingly confirming the official Hungarian position, the Russian Federation has repeatedly warned that in its view, arms supplies to Ukraine, and even sanctions against Russia, constitute participation in the conflict and that arms supplies constitute a military target that could be attacked even on the territory of EU countries.¹¹⁰

¹⁰³6,307,137 Ukrainian asylum seekers were registered in European countries by 3 August 2022. [United Nations High Commissioner for Refugees \(2022\)](#).

¹⁰⁴[United Nations Office for the Coordination of Humanitarian Affairs \(2022\)](#).

¹⁰⁵As of 1 July 2022, 31 countries have sent military assistance to Ukraine and 41 countries have provided humanitarian and financial assistance. [Kiel Institute for the World Economy \(2022\)](#).

¹⁰⁶[Hungarian Government \(2022\)](#).

¹⁰⁷[Szijjártó \(2022\)](#).

¹⁰⁸[Hungarian Government Decree No. 120/2022](#). Nevertheless, it appears that NATO and Ukrainian airlifters have also transported weapons to Ukraine through Hungarian airspace. [Zubor \(2022\)](#).

¹⁰⁹[Council of the European Union \(2022\)](#).

¹¹⁰[Radio Free Europe \(2022\)](#); n.d. (2022b).



In the following, I will try to explain what constitutes participation in an international armed conflict under international law and to answer the question of whether it is possible to provide combat capability support to Ukrainian forces without the country being a belligerent.

3.1. The rules of neutrality in international law

Until the 20th century, the right to wage war was a sovereign prerogative. Classical international legal doctrine divided international law into the law of war and the law of peace,¹¹¹ in which states could declare their intention to wage war (*animus belligerendi*) at any time by means of a declaration of war or ultimatum, which they could terminate primarily by concluding a peace treaty. The existence of a war thus depended essentially on the public declaration of the *animus belligerendi*, by which the belligerent state notified the other states of the existence of a state of war.¹¹² Accordingly, the actual existence of hostilities between states and the formally recognised state of war could be distinct, so that armed confrontations between states did not necessarily constitute war, nor was a state of war always accompanied by actual fighting.¹¹³ However, in addition to the concept of formal war, states sometimes recognised that clashes between armed forces under state control constituted war without being declared by either side¹¹⁴ (the so-called *de facto* state of war),¹¹⁵ - unless all belligerent states explicitly denied the existence of a state of war.¹¹⁶

Moreover, in times of war, a state not taking part in the hostilities on either belligerent's side had to respect the rules of neutrality codified in the 1907 Hague Conventions V¹¹⁷ and XIII.¹¹⁸

¹¹¹See e.g. Hugo Grotius's famous treatise *De Jure Belli ac Pacis* (On the Law of War and Peace) originally published in 1625.

¹¹²See, for example, [McNair \(1926\)](#) 45; [Eagleton \(1938\)](#) 32–34. Even Grotius considered the declaration of war as an indispensable requirement for a duly instituted war, stressing that 'But that War may be called just in the Sense under Consideration, it is not enough that it is made between Sovereigns, but (as we have heard before) it must be undertaken by publick Deliberation, and so that one of the Parties declare it to the other.' [Grotius \(2005\)](#) 1252. However, this formal requirement only formally became general with the adoption of the Hague Convention III of 1907. Art. 1 of the Convention specified that 'The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.' [Convention \(III\) relative to the Opening of Hostilities \(1907\)](#).

¹¹³President Truman, for example, announced on 31 December 1946 that 'although a state of war still exists... hostilities have terminated'. [Green \(1971\)](#) 269.

¹¹⁴In June 1900, for example, the British Prime Minister, Robert Gascoyne-Cecil, confirmed that a clash between Chinese and British forces in Taku would constitute a state of war if Chinese troops acted on state orders. [Grob \(1949\)](#) 202. See also [Hamilton v. McLaughry \(1900\)](#).

¹¹⁵Thus, in the *Teutonia* case, the Privy Council emphasized that 'War may exist *de facto* without a declaration, but only where there is an actual commencement of hostilities.' [Duncan and other v Koster \(1872\)](#). In reality, most armed conflicts before the 20th century started without a formal declaration of war, and Maurice estimates that between 1700 and 1870, out of 117 armed conflicts between states, in only 10 cases did states issue a formal declaration of war. [Maurice \(1883\)](#).

¹¹⁶A striking example of this was the naval battle of Navarino in 1827 between Britain and Turkey, in which 60 Turkish ships were sunk and 4,000 Turkish soldiers died. The clash was subsequently described by Britain as an 'accident'. [Solis \(2010\)](#) 151.

¹¹⁷[Convention \(V\) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land \(1907\)](#).

¹¹⁸[Convention \(XIII\) concerning the Rights and Duties of Neutral Powers in Naval War \(1907\)](#).



The aim was both to ensure that the neutral state was subjected to as little wartime violence as possible and that the neutral state was not merely neutral in name but did not actually support any of the belligerents.¹¹⁹ Thus, of course, the neutral state could not supply any military material directly or indirectly to any belligerent¹²⁰ and was obliged to prevent the violation of its neutrality, for example by allowing its territory to be used for military purposes, and could employ military force to repel any such attempts. Neutrality could also be enforced by the belligerents against the neutral state, even by force.¹²¹

By the time of the Second World War, however, this clear position had become more complex. The United States introduced the category of ‘qualified’ or ‘benevolent’ neutrality, under which it considered it legitimate to depart from the classic rules of neutrality in order to assist the victims of armed aggression. This allowed the enactment of the Lend-Lease Act of 11 March 1941, which provided substantial logistical support to states fighting the Third Reich, despite the fact that the US still had not entered the war.¹²²

With the adoption of the UN Charter, it has become widely accepted that respecting the traditional concept of neutrality in the event of a violation of the prohibition of inter-state use of force would actually favour the aggressor, i.e. the traditional approach of neutrality cannot be maintained.¹²³ This new interpretation is also supported by the terminology of the 1977 Additional Protocol I, which distinguishes between ‘neutral’ and ‘other state not a Party to the conflict’.¹²⁴ It is important to stress, however, that no violation is committed by a State which chooses to apply the traditional neutrality approach in such a conflict.¹²⁵

However, there is also the view that a derogation from the rules of neutrality can only be legitimate if the UN Security Council has taken coercive measures in accordance with Chapter VII of the Charter or at least has determined in a resolution that an act of aggression, breach or violation of the peace has occurred.¹²⁶ While this approach appears to be consistent with the

¹¹⁹Dinstein (2011) 25.

¹²⁰Article 6 of Convention (XIII) specified that ‘The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.’ Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (1907). Interestingly, in relation to land warfare, Convention (V) of 1907 does not include the same obligation, but international lawyers agree that it can be equally derived from the general concept of neutrality. See, for example, Bothe (2013) 561.

¹²¹Hostettler and Danai (2015).

¹²²Jackson (1941) 353–54. For more on the United States approach, see Department of Defense (2015) 946–53.

¹²³See e.g., Greenwood (1983) 230.

¹²⁴See, for example, Article 2(c), which states that ‘Protecting Power’ means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol.’ See also Article 9(2)(a); Article 19; Article 22(2)(a); Article 39(1); Article 64. Protocol Additional to the Geneva Conventions of 12 August 1949 (1977). Von Heinegg argues that this difference in terminology may be explained by the uncertainty of the negotiating delegations as to whether the rules of neutrality apply in all international armed conflicts or only in times of classical ‘war’. Heinegg (2007) 554. However, this interpretation is not supported by the official commentary of the International Red Cross, which explicitly mentions that there are forms of non-participation in armed conflict other than neutrality under customary international law. Sandoz, Swinarski and Zimmermann (1987) 61.

¹²⁵Bothe (2015). For example, Switzerland prevented Germany from exporting Swiss-made munitions to Ukraine. n.d. (2022a).

¹²⁶Kunz (1951).



operational logic of the Charter and with post-1945 state practice,¹²⁷ it ignores the very common situation where a state uses force against another state in a manifestly unlawful manner, but the Security Council is unable to take coercive action because it is prevented from doing so by the veto of a permanent member of the Security Council.¹²⁸

Given that open Russian military aggression has resulted in exactly this situation, it is not surprising that some authors have changed their previous positions as a result. Von Heinegg, for example, who had previously made a derogation from the rules of neutrality conditional on a Security Council decision,¹²⁹ now argues that

neutral States can no longer be bound by an obligation of strict impartiality and a prohibition to supply the victim of aggression with the means necessary to defend itself against an aggressor State that is obviously determined to ignore core principles and rules of international law. If the notion of a “rule-based international order” is to be of any significance, States continuing to rely on and believe in international law can no longer stand by and allow an aggressor government to pursue its apparently illegal aims...¹³⁰

3.2. Participation in an international armed conflict

In the light of the above, it can be concluded that international assistance to Ukraine does not violate international law, just as direct military support to Ukraine would be also lawful on the basis of collective self-defence. It is not clear, however, at what point support for Ukraine could amount to participation in the international armed conflict between Russia and Ukraine, i.e. when the supporting state would become a co-belligerent.¹³¹ This is a key issue, as the states supporting Ukraine have confirmed that they do not wish to be a belligerent party to the conflict on Ukraine’s side, as an armed confrontation between nuclear powers could potentially bring about the destruction of all human civilisation.

However, neither the relevant state practice nor the international legal scholarship provides a clear answer to this question. It is generally accepted that a State becomes a belligerent by participating in an armed conflict to a significant extent,¹³² but this abstract definition is difficult

¹²⁷During the Iraq-Iran war, for example, the UN Security Council did not distinguish between the two belligerents, but called on all states to refrain from escalating the conflict; in other words, it imposed a neutrality obligation on countries not involved in the conflict. See, for example, Security Council Resolution 540. [United Nations Security Council \(1983\)](#). It is important to stress, however, that in the Iraq-Iran conflict, the international community was not yet in a position to clearly determine, at the outbreak of fighting, which party was responsible for the violation of the prohibition of use of force. See for example, [Wang \(1994\)](#) 91.

¹²⁸Pedrozo tries to reconcile the two opposing approaches by calling for the application of state responsibility rules. In his view, providing support in the absence of a Security Council resolution, while violating the rules of neutrality, can be seen as a legitimate countermeasure against the perpetrator of aggression. [Pedrozo \(2022\)](#).

¹²⁹[Heinegg \(2007\)](#) 557.

¹³⁰[Heinegg \(2022\)](#).

¹³¹The concept of co-belligerency is not spelt out in any international agreement but could be defined as ‘a concept that applies to international armed conflicts and entails a sovereign State becoming a party to a conflict, either through formal or informal processes.’ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2013) para. 60.

¹³²[Bothe \(2013\)](#) 558. The US Military Commissions Act regards a state that provides direct support to a common enemy in armed conflict as a co-belligerent. [United States of America \(2006\)](#) 948a(1)(B).



to apply in situations where a State does not intervene with military force on the side of a belligerent but still provides significant support.

During the Iraq-Iran war, for example, the Iranian government publicly declared that it considered Kuwait to be a belligerent on Iraq's side, not only because of its financial support to Iraq, but also because it provided various forms of logistical support, including allowing access to Kuwaiti ports and airspace, which gave Iraq a significant military advantage during the military conflict.¹³³ However, this interpretation was rejected by other states, such as the United States, France and the Soviet Union.¹³⁴ Similarly, during the 2003 intervention in Iraq, Italy, which provided logistical support to the military operation and allowed its airspace to be used by the combat aircrafts involved in the intervention, denied that it was a belligerent party on the side of the United States, as the Italian military was not directly involved in the fighting.¹³⁵

The state practice of the past decades shows that the threshold for participation in armed conflict is very high, and that the mere violation of the classical rules of neutrality does not transform a state into a belligerent party. It would seem that even though allowing state territory to be used to commit aggression also constitutes an act of aggression,¹³⁶ additional direct military assistance, or at least some direct, causal link between state conduct and military operations, is required to achieve the status of co-belligerent.¹³⁷

In the context of the Russia–Ukraine conflict, it is clear that states supporting Ukraine do not consider financial and logistical support to Ukraine as participation in the armed conflict. Although Russia has repeatedly protested against this, it has made it clear that it would consider a 'crossing of a red line' if other countries were to allow the use of their air bases for Ukrainian forces or establish a no-fly zone in Ukraine's airspace, which they would try to enforce by armed force.¹³⁸ This is in line with previous state practice.

At the same time, intelligence sharing can have a decisive impact on the outcome of combat operations, in particular by helping to identify military targets. Lloyd Austin, the US Secretary of Defense, has admitted that the United States has shared a significant amount of intelligence information with Ukraine,¹³⁹ which, according to The New York Times, focused primarily on

¹³³United Nations Security Council (1987).

¹³⁴Upcher (2020) 58–60.

¹³⁵Carlo Giovanardi, Minister for the Relationship with the Parliament, explained that 'we did not have to take a decision regarding the authorization to use the infrastructures and the transport system, but we simply had to acknowledge that our Ally exercised the authorization already received... avoiding the refusal of the transit on the national territory, we contributed to the exercise of credible pressure on the Iraqi regime in order to make it co-operate actively in the full implementation of UN Resolution 1441 and we supported the will of the United Nations for a pacific settlement of the crisis within its field of action.' Giovanardi (2003). In Hungary, Boldizsár Nagy raised this issue tangentially during the 1999 NATO intervention, but in the end his paper did not examine the question of participation in the armed conflict, but the legality of the intervention itself. Nagy (1999).

¹³⁶See Article 3(f) of UN General Assembly Resolution 3314, which includes in the list of acts of aggression 'The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.' United Nations General Assembly (1974).

¹³⁷Upcher (2020) 58–69. Nevertheless, there is a view in the literature that the mere act of allowing the use of territory for the purpose of conducting a military operation may constitute participation in an armed conflict. See, for example, Hostettler and Danai (2015).

¹³⁸Miguel (2022).

¹³⁹Baldor (2022).



the Russian military's mobile headquarters and allowed the Ukrainian military to eliminate Russian military leaders.¹⁴⁰ The United States, however, has officially denied that it transmitted detailed intelligence that enabled the targeting of specific Russian soldiers. According to the US position, the intelligence provided would only assist the Ukrainian side in strategically shaping its response to a Russian invasion,¹⁴¹ but did not include information on the geographic location of senior Russian officers.¹⁴² Nevertheless, it appears that US military hackers are actively assisting the Ukrainian armed forces in their cyber operations.¹⁴³

Information sharing and assistance in cyber warfare already raises the possibility that US assistance could form an essential part of military operations, which would mean involvement in the international armed conflict between Russia and Ukraine.¹⁴⁴ In Schmitt's view, if the purpose of the information transfer is to allow the United States to directly influence events on the battlefield at the tactical level by enabling Ukrainian forces to avoid specific Russian attacks or to carry out strikes against specific targets, then it should be considered a belligerent party to the conflict.¹⁴⁵ However, other states merely providing assistance to Ukraine cannot be considered as belligerents in the armed conflict.

While the United States might be considered a co-belligerent, I submit that Belarus' participation in the international armed conflict between Russia and Ukraine can be ascertained. The Republic of Belarus has not only ceded its territory to the Russian army to commit military aggression against Ukraine,¹⁴⁶ and provided logistical support to continue the fighting, but also threatens Ukraine with a potential attack by continuously massing troops and conducting military exercises along the Belarus–Ukraine border, thereby tying up part of the Ukrainian forces.¹⁴⁷ This behaviour goes beyond a breach of the rules of neutrality and constitutes actual participation in the Russian–Ukrainian conflict.¹⁴⁸

4. CONCLUSION

The military intervention of the Russian Federation is a violation of international law unprecedented since the Second World War, in which Russia has committed every single act of

¹⁴⁰Barnes et al. (2022).

¹⁴¹Bertrand and Lillis (2022).

¹⁴²Kirby (2022).

¹⁴³Martin (2022).

¹⁴⁴Wentker (2022).

¹⁴⁵Schmitt (2022b).

¹⁴⁶Coakley (2022).

¹⁴⁷Borges (2022).

¹⁴⁸However, the mission of the Organisation for Security and Co-operation in Europe has concluded that as long as Belarus does not engage in acts of violence or conduct that would give rise to direct involvement in the clashes attributable to Belarus, it cannot be considered a party to the conflict. Benedek et al. (2022). Similarly, Schmitt only considered the transfer of Belarusian territory to Russian troops as a violation of the right to neutrality. Schmitt (2022a).



aggression listed in the UN General Assembly resolution 3314 on the definition of aggression.¹⁴⁹ What makes it exceptional is not merely the scale of the military intervention, but also the thinly veiled intention to annex a significant part of Ukraine's territory, despite Russia's previous explicit acceptance of Ukraine's sovereign statehood and territorial integrity in several international treaties.¹⁵⁰

This attack also marks a break with the Russian strategy, which has so far sought to disguise its expansionist policy in the post-Soviet space, at least on prima facie acceptable grounds in international law. The Russian approach has hitherto been characterised by the creation of frozen conflicts, the extension of citizenship and the threat or implementation of armed intervention to maintain frozen conflicts, but has avoided the actual annexation of the territory of other sovereign countries. Although the seizure of Crimea was a partial departure from this strategy, the Russian Federation avoided an outright denial of the international legal order by invoking the right to self-determination.

The Russian military intervention in Ukraine is an attempt to bring about a decisive change in international law. Although the Russian Federation formally bases its military intervention on the right of self-defence, its plan of territorial conquest endeavours to erase the international consensus based on the prohibition of use of force and annexation and ultimately return the international legal order to the 19th century, when war was a sovereign prerogative.¹⁵¹

However, the prohibition of the use of force between states has been declared dead countless times since the Second World War, only to be resurrected with renewed vigour,¹⁵² and the reaction of the international community has confirmed that even Russia's political allies have no desire to revert to the era of classical international law. Only three states, Cuba, Syria, and Venezuela, claimed that the Russian attack was legal,¹⁵³ while a resolution adopted by the United Nations General Assembly Special Session condemned 'the aggression of the Russian Federation against Ukraine in violation of Article 2(4) of the Charter' and stressed that 'the Russian Federation is conducting a military operation inside the sovereign territory of Ukraine on a scale not seen in decades by the international community in Europe'.¹⁵⁴

Russia has violated the fundamental rule of prohibition of inter-state use of force, which is a *jus cogens* rule of international law that requires absolute application. In this situation, it is the

¹⁴⁹Green et al. (2022) 6.

¹⁵⁰Charter of the Commonwealth of Independent States (1993) Art. 3.; Memorandum on Security Assurances in connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (1994). Art. 2; Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation (1997) Art. 2.; Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border (2003).

¹⁵¹The continuation of the Russian military action is also a violation of the interim measures of the International Court of Justice, which has ordered the Russian Federation to suspend military operations pending final judgment. International Court of Justice (2022) para. 81. Although this could be seen as a sign of further erosion of the international legal order, 41 countries have made a joint declaration welcoming the trial and pledging their support for a rules-based international order. United Kingdom (2022).

¹⁵²Wippmann (2007) 387–406.

¹⁵³Dunkelberg (2022).

¹⁵⁴United Nations General Assembly (2022). Only Belarus, Eritrea, North Korea, Syria and the Russian Federation voted against the adoption of the resolution.



duty of all states to cooperate in a lawful manner to put an end to such a serious violation.¹⁵⁵ Since support for Ukraine does not violate the rules of neutrality, it remains a potential means of combatting Russian aggression. However, if the level of support reaches the level of substantial involvement in the fighting, the supporting state should be considered a belligerent party. Still, this would simply mean that the state concerned is now exercising collective self-defence to assist the victim of an armed aggression.

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¹⁵⁵Articles on Responsibility of States for Internationally Wrongful Acts (2001) Art. 41(1).



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