



# Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine

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## Abstract

Russia's invasion of Ukraine which commenced on 24 February 2022 represented just the latest, albeit most devastating, intervention in a neighbouring former Soviet state. This article considers the legal justifications for Russia's actions and finds them to be far from satisfactory. The claims advanced by Russia closely mirror those made in respect of its prior interventions in the former Soviet space, underlining an attempt to distort some of the most fundamental norms of international law in order to afford an air of legitimacy to its actions. Although it is too soon to conclude with any certainty what the longer term implications of the recent conflict will be, both politically and legally, it is apparent that it can be seen as part of a wider policy objective on Russia's part to maintain and/or reassert influence over its 'near abroad'. While in some respects indicative of the possible emergence of a new 'Cold War', the international reaction to its intervention in Ukraine suggests that any intention to manipulate or reconstitute legal norms in support of its agenda is meeting with mass rejection.

**Keywords** Use of force · Self-determination · Human rights · War · Ukraine · Russia

## 1 Introduction

On 24 February 2022, Russia commenced military action against Ukraine. The action was widely condemned by the international community as a violation of fundamental norms of international law, while as the conflict progressed allegations of the commission of war crimes by Russian forces grew. Although the most severe

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action of its kind, the operation against Ukraine represented just the latest in a series of incidents over the course of the post-Cold War era in which Russia has sought to reassert its authority over former Soviet states. In so doing it has relied upon a familiar series of purported legal justifications grounded in norms pertaining to the right of self-determination of peoples and permitted exceptions to international law's prohibition on the use of force. This article considers the justifications asserted by Russia in support of its action against Ukraine, within the context of previous incursions against the Crimea and Donbas regions of Ukraine and South Ossetia and Abkhazia within Georgia. We begin by outlining the historical and political background to Russia's invasion of Ukraine, before briefly introducing Russia's purported legal justifications and the international reaction. The main body of the article is then separated into analysis, in turn, of the justifications advanced by Russia grounded in references to self-determination and permitted exceptions to the prohibition of the use of force respectively. The article concludes with some tentative observations upon the wider implications of the Russia/Ukraine conflict.

## 2 The Historical and Political Background to the Invasion of Ukraine

Conventional wisdom holds that the Cold War was lost by the Soviet Union. In developments famously labelled as ushering in the 'end of history',<sup>1</sup> the states of Eastern Europe which had comprised the Warsaw Pact and effectively operated as Soviet satellites overthrew communism and became liberal democracies in the western tradition.<sup>2</sup> Gradually, many became members of the European Union (EU)<sup>3</sup> and/or the North Atlantic Treaty Organization (NATO).<sup>4</sup> These developments were accompanied by the disintegration of the Soviet Union, which ceased to exist on 1 January 1992. Although dissolved into its constituent republics, Russia assumed the Union of Soviet Socialist Republics' (USSR's) international personality for most legal and political purposes.<sup>5</sup> The period since, has been characterised by tensions arising from Russia's loss of influence in its near abroad and policies centred on efforts to reclaim this in the face of indications on the part of some ex-Soviet states, principally Ukraine, that they seek a future founded on closer relationships with the EU and NATO, leaving Russia feeling 'boxed in' by the perception of the reach of these organisations extending ever closer to its borders.

In making sense of the recent Russian invasion of Ukraine as simply the latest and most extreme stage in the evolution of its policy of reasserting regional hegemony, comparisons with its earlier interventions in Georgia (2008) and Crimea (2014) are

<sup>1</sup> Fukuyama (1992).

<sup>2</sup> Stokes (2011).

<sup>3</sup> In the first wave of the EU's eastern expansion, 2004 saw ten new member states join including the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. Bulgaria and Romania joined in 2007, followed by Croatia in 2013.

<sup>4</sup> The Czech Republic, Hungary and Poland joined NATO in 1999, followed by Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia in 2004.

<sup>5</sup> Blum (1992).

particularly relevant.<sup>6</sup> Long-running tensions between Georgia and Russia escalated into full-blown armed conflict during 2008 which, albeit brief in duration, was used by Russia to intervene in support of separatist factions in the regions of Abkhazia and South Ossetia.<sup>7</sup> Russia justified its interventions by reference to humanitarian necessity,<sup>8</sup> subsequently moving to recognise the independence of these areas which have not been recognised by very many other states.<sup>9</sup> However, Russia's intervention enabled it to exert de facto control over significant swathes of Georgian territory along its border. Russia's 2014 annexation of the Crimea region of Ukraine came in the aftermath of Ukraine's 'revolution of dignity', during which its Parliament had impeached its Russian supported President and given a clear indication that the country desired a future built upon closer relations with the EU.<sup>10</sup> In response, Russia intervened to support separatist factions take control of Crimea, instigating a referendum in which a reported 96% backed union with Russia.<sup>11</sup> On 18 March 2014, Russia effectively annexed Crimea by proclaiming it part of Russia.<sup>12</sup> In his speech justifying Russia's actions in Ukraine and Crimea's annexation to the Russian Federation, Putin outlined Russia's strong historical ties with the Crimean region and claimed that Russia was responding to Crimea's request for help because its Russian-speaking population feared repression following events that had unfolded in the Ukraine. He went on to refute claims that Russia was acting in contravention of international law. Putin stated that the Crimean people were doing nothing more than exercising their right to self-determination granted to them by the UN Charter—a precedent which he claims was set by Ukraine when it seceded from the USSR and by Kosovo when it seceded from Serbia. The move was widely condemned, including by the UN General Assembly.<sup>13</sup>

In April 2014, aided by Russia, separatists subsequently seized control of the Donetsk and Luhansk regions, collectively known as the Donbas.<sup>14</sup> The rebels called for referenda on independence to be carried out in both cities and publicly demanded that Russia send 'peacekeepers' to protect them. Hastily organised referenda were carried out on 11 May 2014, despite Russian President Putin's call on the rebels to postpone them. Voter turnout was reportedly high and results showed that over 90% of voters in both Donetsk and Luhansk endorsed political independence from Kiev. The Peoples' Republic of Luhansk and The Peoples' Republic of Donetsk were subsequently declared quasi-independent entities by rebel separatists. The referendum process and its outcome were widely criticised and declared illegal

<sup>6</sup> On which, see Wilson (2016).

<sup>7</sup> For discussions of the 2008 military action, see Toomey (2009).

<sup>8</sup> See Toomey (2009).

<sup>9</sup> For discussion, see Samkharadze (2021). The only United Nations (UN) member states apart from Russia to recognise the independence of these entities are Nicaragua, Venezuela, Syria and Nauru.

<sup>10</sup> See Shveda and Park (2016).

<sup>11</sup> The Guardian (2014a).

<sup>12</sup> The Guardian (2014b).

<sup>13</sup> GA Res. 68/262. The General Assembly voted 100-11 to condemn Russia's actions, with 58 abstentions.

<sup>14</sup> The Guardian (2014c).

by most countries. The Kremlin Press Service stated that ‘Moscow respected the outcome of the referendum and called for peaceful “practical implementation” of the people’s wishes in those regions of eastern Ukraine’. Within hours of declaring itself independent, the Republic of Donetsk asked to join the Russian Federation, urging Moscow to listen to the will of the people. Russia, at that stage did not publicly respond to this request.

Following the two referenda, violent clashes escalated between Ukraine militia and the separatist rebels. This led to the outbreak of civil unrest in the eastern region of the Ukraine that saw the loss of thousands of lives and caused numerous people to flee from their homes. In order to end months of fighting in the Donbas region, on 5 September 2014, Ukraine and pro-Russian rebels signed a peace deal (The Minsk Protocol) drafted by the Trilateral Contact Group on Ukraine, consisting of Ukraine, Russia, and the Organization for Security and Co-operation in Europe (OSCE). The agreement failed to stop fighting and was subsequently followed with a revised and updated agreement, Minsk II, which was signed on 12 February 2015. This agreement consisted of a package of measures, including the possible granting of special status to rebel-held parts of Ukraine’s eastern Donetsk and Luhansk regions, giving them broader autonomy for a temporary 3-year period. While fighting subsided following the agreement’s signing, it never ended completely, and the agreement’s provisions were never fully implemented. While in all of these incidents Russia sought to play down the extent of its intervention in the states affected, a common theme in its official explanations of them was to portray each development as an expression of self-determination on the part of separatist entity which it had intervened on behalf of.<sup>15</sup>

Amid growing tensions over the following years, during 2021 it became apparent that Russia was building up its military presence along the Russian border.<sup>16</sup> Despite its protestations to the contrary,<sup>17</sup> speculation grew that Russia was preparing to launch a military operation against Ukraine. Russia made clear its objections to the prospect of NATO expansion to, or even closer cooperation with, Ukraine, which it regarded as a hostile act.<sup>18</sup> Over a period of several weeks, extensive diplomatic missions were undertaken by a range of states and international organisations to both Ukraine and Russia with a view to defuse the situation.<sup>19</sup> However, following Russia’s recognition of the independence of the Donbas on 21 February 2022, the commencement of an armed attack appeared inevitable.<sup>20</sup>

<sup>15</sup> BBC News Online (2014).

<sup>16</sup> The Guardian (2021).

<sup>17</sup> The Independent (2022a).

<sup>18</sup> For discussion of Russian concerns about NATO expansion, see Suny (2022).

<sup>19</sup> Financial Times (2022).

<sup>20</sup> BBC News Online (2022).

### 3 The Invasion of Ukraine: Justification and Reaction

Following Russian recognition of Donetsk and Luhansk as independent states on 21 February 2022, Russia's Federation Council moved the following day to authorise the use of force against Ukraine and Russian troops entered both regions.<sup>21</sup> This was followed on 24 February by Vladimir Putin's announcement of a special military operation to 'demilitarise' and 'denazify' Ukraine.<sup>22</sup> A significant military action against Ukraine commenced rapidly, consisting of the deployment of ground forces, air strikes and missile weaponry.<sup>23</sup> It was readily apparent that far from constituting a limited military action with narrow aims, the Russian attack on Ukraine represented a full onslaught which had as its ultimate goal the occupation of Ukraine and removal of its government.<sup>24</sup> In an alarming indication of the severity of the situation, Russia placed its nuclear forces on a state of high alert just days into the conflict.<sup>25</sup>

Russia's formal legal justification for its attack on Ukraine, the central tenets of which might be discerned from statements made by Vladimir Putin and Russian authorities both before and during the action, is considered in greater detail below. Far from representing a clear, coherent narrative, various claims were asserted. Some attempts were made to question Ukraine's entitlement to statehood, with suggestions being made that historically it had no significant record of independence and that ethnically Russians and Ukrainians were essentially the same.<sup>26</sup> However, the core theme of Russian efforts to justify its actions centred on the characterisation of Ukraine as posing a threat which needed to be removed. Various claims were made that Ukraine was responsible for denying the right to self-determination to Russian speakers,<sup>27</sup> and that it was responsible for attacks and crimes of genocide against such minorities in the Donbas region.<sup>28</sup> In this sense, Russian legal justifications were couched primarily in a confused blend of self-defence and humanitarian necessity.

Russia's attack on Ukraine was met with widespread international condemnation. Although a Russian veto prevented the UN Security Council passing a condemnatory resolution,<sup>29</sup> the General Assembly quickly stepped in to do so by an

<sup>21</sup> The Independent (2022b).

<sup>22</sup> New York Times (2022c). Similarly, in the UN Security Council Russia's representative stated: 'We are not waging a war against Ukraine or the Ukrainian people. We are carrying out a special operation against nationalists to protect the residents of Donbas and for the purposes of denazification and demilitarization', UN Doc. S/PV.8979, p. 14.

<sup>23</sup> Sky News (2022).

<sup>24</sup> The UK stated thus in the UN Security Council debate following the invasion, suggesting Putin's 'aim is to remove its Government and subjugate its people', UN Doc. S/PV.8979, p. 4.

<sup>25</sup> The Guardian (2022b).

<sup>26</sup> New York Times (2022b).

<sup>27</sup> New York Times (2022c).

<sup>28</sup> New York Times (2022c).

<sup>29</sup> UN Doc. S/2022/155. See UN Doc. S/PV.8979.

overwhelming margin.<sup>30</sup> Other prominent organisations were similarly scathing in denouncing Russia's actions, including NATO,<sup>31</sup> the EU,<sup>32</sup> and the OSCE.<sup>33</sup> International measures to exert pressure upon Russia to reverse its actions have largely taken the form of the implementation of extensive sanctions. Although UN mandated sanctions would not be possible in light of Russia's ability to veto any such measures, many states—including the United States (US) and the United Kingdom (UK)—and the EU have imposed a range of sanctions targeted to weaken and isolate Russia, including significant measures pertaining to the banking and financial services sector, and measures targeted at individuals including financial assets freezes.<sup>34</sup> While stopping short of direct involvement in hostilities, a number of states have provided military equipment to Ukraine,<sup>35</sup> while several have offered refuge to those fleeing Ukraine.<sup>36</sup>

#### 4 The Distortion of Fundamental Norms (I): Self-Determination

The right to self-determination is found in multiple international treaties and conventions,<sup>37</sup> and has 'crystallised into a rule of customary international law, applicable to and binding on all states'.<sup>38</sup> In simple terms, self-determination denotes the legal right of a people to decide their own destiny in the international order. Precisely what people achieve through self-determination is unclear and remains contested in international law. In practice, self-determination has ranged from secession and granting independence to a people from the parent state (external self-determination) through to granting a people (national minorities) the right to self-government or autonomy within the confines of their parent state (internal self-determination). Although there is no official stance on what self-determination entails, the right to secession has been strongly disfavoured under international law in order

<sup>30</sup> The General Assembly resolution passed by a 141-5 margin, with 35 abstentions. See UN Doc. GA/12407, 2 March 2022.

<sup>31</sup> Statement by the North Atlantic Council on Russia's attack on Ukraine, 24 February 2022, [https://www.nato.int/cps/en/natohq/official\\_texts\\_192404.htm](https://www.nato.int/cps/en/natohq/official_texts_192404.htm) (accessed 27 June 2022).

<sup>32</sup> Press Statement of President Charles Michel of the European Council and President Ursula von der Leyen of the European Commission on Russia's unprecedented and unprovoked military aggression of Ukraine, 24 February 2022, Statement/22/1321, [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_22\\_1321](https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1321) (accessed 27 June 2022).

<sup>33</sup> OSCE Press Release, 24 February 2022, <https://www.oscepa.org/en/news-a-media/press-releases/2022/osce-parliamentarians-condemn-russian-military-action-in-ukraine-call-for-de-escalation-at-vienna-winter-meeting> (accessed 27 June 2022).

<sup>34</sup> For details of UK sanctions on Russia, see <https://www.gov.uk/government/collections/uk-sanctions-on-russia>. For details of EU sanctions, see <https://www.consilium.europa.eu/en/infographics/eu-sanctions-against-russia-over-ukraine/>. For details of US sanctions, see <https://www.state.gov/ukraine-and-russia-sanctions/> (all accessed 27 June 2022).

<sup>35</sup> Curtis and Mills (2022).

<sup>36</sup> The Guardian (2022a).

<sup>37</sup> Art. 1 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Art. 1 UN Charter 1945.

<sup>38</sup> Sterio (2013), p. 9.

to protect the territorial integrity and political unity of existing states.<sup>39</sup> Exceptions to this rule have traditionally applied to people under colonial domination or some kind of oppression. More recently the right to secede from a state has also been granted in situations where a people have been denied civil and political rights and subject to serious human rights abuses (remedial secession).

Kosovo's unilateral declaration of independence from Serbia in 2008, was singled out as a case *sui generis*, a form of 'remedial secession' which was necessary because of the circumstances of the situation. This justification has not been universally accepted. Although Kosovo's independence has been recognised by over 100 countries worldwide, including the US and most EU states, countries like China and Russia, have refused to recognise it as a legitimate state, citing the importance of respect for the principle of territorial sovereignty as the primary reason for their position. Russia further emphasised that self-determination of peoples by way of secession should only be recognised in extreme circumstances. Utilising the territorial approach for its definition of a people, it sustained that the term represented the population of a state taken as a whole as opposed to sub-national groups.<sup>40</sup> In fact, on the basis of this argument Russia did not recognise the citizens of Kosovo as a 'people' for the purposes of self-determination because they were a sub-national group.<sup>41</sup>

#### 4.1 Self-Determination Used as a Justification for Russia's Intervention in February 2022

On 21 February 2022, President Putin took what he described as a 'long and overdue decision' and recognised 'the independence and sovereignty of the Donetsk People's Republic and the Luhansk People's Republic'. Russia then signed Treaties of Friendship, Cooperation and Mutual Assistance with the leaders of those regions. He justified this decision on the basis that the Donbas communities were 'facing horror and genocide' by Ukraine forces. He further continued by stating that the people of these regions 'are fighting for their elementary right to live on their own

<sup>39</sup> Sterio (2014–2015), p. 299.

<sup>40</sup> Two approaches have been used to identify a people for the purposes of self-determination: the *territorial approach* and the *characteristics approach*. The territorial approach looks at all persons within a defined territory and identifies them as a people. It was used during the decolonisation era and was based on the principle of *uti possidetis*, which meant that colonies would become independent on the basis of established colonial boundaries. The characteristics approach on the other hand identifies a people by the common characteristics of its members. In 1989, during one of its expert meetings, the UN Educational, Scientific and Cultural Organisation (UNESCO) identified 'a people' as a group of individual human beings who enjoy some or all of the following common features: a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and a common economic life. It further stated that 'the group as a whole must have the will to be identified as a people or the consciousness of being a people' and that the group may have institutions or other means of expressing its common characteristics and will for identity.

<sup>41</sup> Cavandoli (2016), p. 880.

land, to speak their own language, and to preserve their culture and traditions'.<sup>42</sup> Putin's announcement drew widespread condemnation. The UN Secretary-General responded by stating that the decision of the Russian Federation was a 'violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations'.<sup>43</sup> US President Joe Biden 'strongly condemned' Putin's decision 'to purportedly recognize the "independence" of the eastern regions of Ukraine'.<sup>44</sup> French President Emmanuel Macron tweeted: 'By recognising the separatist regions in eastern Ukraine, Russia is violating its commitments and undermining Ukraine's sovereignty'. Australian Prime Minister Scott Morrison slammed as 'nonsense' Putin's claims that the troops being sent into eastern Ukraine were peacekeepers. He further stated, 'we cannot have threats of violence being used to seek to advantage nation's positions over others'.<sup>45</sup>

When President Putin commenced his 'special military operation' he maintained it was in accordance with Article 51 of the UN Charter, following a request by the peoples in the Donbas Republics. In his speech, Putin talks about the right to self-determination and the fact that 'people living in certain territories that are part of modern Ukraine, were not asked how they wanted to arrange their lives'. He continues by stating that Russia's policy 'is based on freedom, the freedom of choice for everyone to independently determine their own future and the future of their children. And we consider it important that this right—the right to choose—could be used by all the peoples living on the territory of today's Ukraine, by everyone who wants it'.<sup>46</sup>

## 4.2 Do the People of the Donbas Region Have a Right to Self-Determination by Way of Secession?

The Donbas (the area of the Don River basin, 85% of which is currently within the modern-day Ukrainian administrative regions of Donetsk and Luhansk) is strategically important, because it was the mining and manufacturing, iron and steel-industry capital of the Soviet Union. It was an area to which many Russians immigrated into during that industrialization campaign. The Donbas only accounts for 9% of Ukrainian territory, but for 17% of its population and 21 per cent of its industrial output. Also, the Donbas is the geographical lynchpin to a whole area of Ukrainian territory from Kharkiv in the north-east to Odesa in the south-west that is fervently contested between Ukraine and Russia. More than three-quarters of Ukraine's

<sup>42</sup> Address by the President of the Russian Federation, 21 February 2022, <http://en.kremlin.ru/events/president/news/67828> (accessed 11 March 2022).

<sup>43</sup> 'Secretary-General Says Russian Federation's Recognition of "Independent" Donetsk, Luhansk Violate Ukraine's Sovereignty, Territorial Integrity', SG/SM/21153, 23 February 2022, United Nations Press Release, <https://www.un.org/press/en/2022/sgsm21153.doc.htm> (accessed 27 June 2022).

<sup>44</sup> 'Readout of President Biden's Call with President Zelenskyy of Ukraine', 21 February 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/21/readout-of-president-bidens-call-with-president-zelenskyy-of-ukraine-4/> (accessed 27 June 2022).

<sup>45</sup> Al Jazeera (2022).

<sup>46</sup> New York Times (2022c).



Russian speaking minority live in this area (eastern and southern Ukraine). Moreover, 3.6 million of these are in the Donbas, where they form 44% of the local population, the largest percentage in Ukraine, apart from Crimea.<sup>47</sup>

As a result of this unique identity, residents of the Donbas region have traditionally favoured a political order which, though subject to Ukrainian sovereignty, maintained close ties with Russia economically, socially, and politically.<sup>48</sup> In fact, in 1994, during the first Ukrainian elections, post-independence, the Donbas region's support for much closer ties with Russia was confirmed by poll results in Donetsk and Luhansk on the question of joining the Commonwealth of Independent States (CIS): 88.7% of Donetsk voters and 90.7% of Luhansk voters' voted in favour of joining.<sup>49</sup> These same attitudes came to a head with the Euromaidan revolution, when President Yanukovich was overthrown in 2014. As a Donbas native, residents of this region saw Yanukovich as 'one of them' and someone who made decisions 'in their best interest'. His removal was perceived as a threat to the interests of people living in the region and the culmination of irreconcilable differences in priorities over Ukraine's future.<sup>50</sup> These events are what spurred separatist rebels in April 2014, to demand referenda on independence from Ukraine in the cities of Donetsk and Luhansk.

As a general premise, the right to self-determination does not give rise to a unilateral at-will justification for secession of any group defined as a 'people'.<sup>51</sup> As previously mentioned, the right to self-determination only permits unilateral secession in limited circumstances. This was highlighted by the Supreme Court of Canada in its advisory opinion on the legality of the secession of Quebec. The court held that a right to secession arises where a people is governed by a colonial empire; where a people is subject to alien subjugation, domination, or exploitation and where a people is denied meaningful access to its right to self-determination within the state of which it forms part. Unless any of those conditions are met, peoples are expected to achieve self-determination within the framework of their existing state.<sup>52</sup> In the Declaration on Friendly Relations, the principle of self-determination was limited in the following way:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a gov-

<sup>47</sup> Wilson (1995), p. 267.

<sup>48</sup> Pirie (1996), pp. 1098–1100.

<sup>49</sup> See Pirie (1996), p.1098.

<sup>50</sup> Esposito (2020), p. 144.

<sup>51</sup> The notion of a people has depended mainly on the context in which the right to self-determination has been invoked, and has included former colonised peoples, citizens from a given state and self-identifying peoples.

<sup>52</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 222, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do> (accessed 27 June 2022).

ernment representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>53</sup>

Donetsk and Luhansk did not fall under any of the above conditions. In 2014, when people of both republics voted to secede, it was not because they had been denied meaningful access to self-determination by Ukraine, it was because of the ousting of President Yanukoych from the country and the fall of the Donbas-based Party of Regions from power. Following the Euromaidan crisis however, as a direct reaction to Russia's interference in the Donbas, the government in Kyiv introduced several measures which may be interpreted as undermining the self-determination of the majority Russian-speaking population in the Donbas region. On September 2017, the Ukraine Parliament passed an education reform bill that included a clause making Ukrainian the required language of study in state schools from the fifth grade onwards. Russia's Foreign Ministry stated that the law was designed to 'forcefully establish a mono-ethnic language regime in a multinational state'.<sup>54</sup> In 2018, the Ukrainian Supreme Court overturned a 2012 law which permitted national minorities in their home regions to carry out official business with the government, in their native language.<sup>55</sup> In January 2022, a new state language law came into force which requires that Ukrainian be used in most aspects of public life.<sup>56</sup> This new law has raised concerns about the protection of minority languages. Article 25, regarding print media outlets, makes exceptions for certain minority languages, English, and official EU languages, but not for Russian. Ukrainian authorities justify this by referring to the country's European ambitions and 'the century of oppression of [...] Ukrainian in favour of Russian'.<sup>57</sup> The Ukrainian government has every right to promote its state language and strengthen its national identity, however a balance is required, to avoid discrimination against linguistic minorities, especially, Russian.

The degree of deprivation of internal self-determination that would justify a case for secession is not clear. Commentators in the past, have stressed the importance of exhausting other avenues for peaceful resolution of disputes before secession can take place, such as resolving the matter internally within the same state structure or making legal remedies available to put an end to the situation.<sup>58</sup> While the level of deprivation necessary for secession to be legitimate will always be an area of disagreement, cases concerning genocide would not necessarily prove to be as controversial. Given the extensive international human rights mechanisms available,

<sup>53</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 24 October 1970, Principle V.

<sup>54</sup> Wesolowsky (2017).

<sup>55</sup> UKRINFORM (2018).

<sup>56</sup> Law of Ukraine, On ensuring the functioning of the Ukrainian language as the state language, <https://zakon.rada.gov.ua/laws/show/2704-19#Text> (accessed 27 June 2022).

<sup>57</sup> Denber (2022).

<sup>58</sup> Points put across by Cassese and Doehring mentioned in Wilson (2009), p. 469.

serious violations of such norms require appropriate remedies, which in extreme circumstances might entail secession.<sup>59</sup>

President Putin's speech on 24 February 2022 mentions his intention to protect people subjected to bullying and to stop the 'genocide of millions of people living there'. He continues by stating that 'it was these aspirations, feelings, pain of people that were for us the main motive for making a decision to recognise the people's republics of Donbas'.<sup>60</sup> Like with Crimea in 2014, Putin justified the independence of the Donbas republics on 21 February through the medium of remedial secession which has been used in non-colonial situations where a people has been persecuted and subjected to serious human rights violations by the parent state.<sup>61</sup>

Putin's claim of genocide has been emphatically denied by the Ukrainian government. On the 26 February 2022, the Ukraine sought a pronouncement by the International Court of Justice (ICJ) on what it retained to be a false claim of genocide made by Russia as an excuse to use force, in the context of Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which both states are signatories. On 16 March 2022, the ICJ issued an order on provisional measures. The Court in essence accepted all arguments made by Ukraine for the purposes of the provisional measures stage of the proceeding and rejected those in Russia's submission to the Court that followed its non-appearance. The Court accepted as plausible Ukraine's argument that it had a right under the Convention not to be subjected to a false claim of genocide which was then used as a basis for using force against it.<sup>62</sup> Russia's remedial secession thesis regarding the Donbas region, manifestly fails on account of evidence, but more than that, it remains legally inconclusive from the point of view of positive international law.<sup>63</sup>

### 4.3 What About the Ukraine's Right to Self-Determination?

Referring to the invasion of Ukraine on 24 February 2022, the vice president of Taiwan, Lai Ching-te, tweeted that the 'principle of self-determination cannot be erased by brute force'. Russia's armed intervention of Ukraine is a clear breach of its territorial sovereignty and an attempt at undermining Ukraine's existence as a sovereign independent state.

Ukraine officially declared itself an independent country on 24 August 1991. In early December of that year, the Ukrainian declaration was ratified by a referendum with a 90% 'yes' vote. Leonid Kravchuk was elected as its first president. The same month, Gorbachev resigned and the Soviet Union ceased to exist. The Union could

<sup>59</sup> See Wilson (2009), p. 473.

<sup>60</sup> See New York Times (2022c).

<sup>61</sup> The argument for remedial secession was used in the cases of Bangladesh declaring itself independent from Pakistan (1971) and in the partition of North and South Sudan (2011).

<sup>62</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, paras. 59–60, <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> (accessed 27 June 2022).

<sup>63</sup> Pentassuglia (2022).

not continue without Ukraine, the closest, most important partner to Russia in the Soviet Union construct. In fact, the then US ambassador in Moscow, Robert Strauss, advised Washington that this result was devastating for Russians—‘the most revolutionary event of 1991 for Russia may not be the collapse of Communism, but the loss of something Russians of all political stripes think of as part of their own body politic, and near to the heart at that: Ukraine’.<sup>64</sup>

When Ukraine declared independence from the Soviet Union, it emerged from 70 years of totalitarianism, having suffered civil war in the Bolshevik revolution, famine (*holodomor*) in the 1930s, the Nazi occupation, holocaust of the Second World War, and in more recent decades several political upheavals.<sup>65</sup> The Soviet Union was a Russian-dominated political construct with the Ukrainian communist party a puppet of Muscovite rulers. Ukrainian culture and language were suppressed and considered secondary to Russian which was the language that enjoyed privileged status.<sup>66</sup> 1991 marked a historical milestone, a profound change in the cultural, social, political, and economic life of the Ukrainian people. An opportunity for them to finally exercise their right to self-determination and ‘freely determine their political status and freely pursue their economic, social and cultural development’.<sup>67</sup> Respect for this right was further reaffirmed in 1994 when the Budapest Memorandum on Security Assurances was signed by the US, Russia, and Britain, who committed ‘to respect the independence and sovereignty and the existing borders of Ukraine’ and ‘to refrain from the threat or use of force’ against the country.

In July 2021, in his essay, ‘On the historical unity of Russians and Ukrainians’, published on the Kremlin’s website, Putin made an emotional claim to Ukrainian territory by sustaining that Ukrainians, Belarusians and Russians are one people bound by a shared common heritage, the heritage of a realm known as Kievan Rus (862–1242), which was a loose medieval political federation located in modern-day Belarus, Ukraine, and part of Russia. Putin claims that Ukraine never existed as a separate state and had never been a nation.<sup>68</sup> Instead, he argues, Ukrainian nationality was always an integral part of a triune nationality: Russian, Belorussian, and Ukrainian. Putin essentially accuses the Bolsheviks of detaching from Russia its historical territories, in complete disregard of people’s views. He continues by stating that Ukraine’s ruling circles decided to justify their country’s independence through the denial of its past.

The ‘historical reality’ of modern-day Ukraine is more complex than Putin’s version of events, encompassing ‘a thousand-year history of changing religions, borders and peoples’.<sup>69</sup> Over the course of centuries, the territory recognised today as Ukraine has been conquered, controlled, or taken over by the Mongol Empire, later the Polish-Lithuanian Commonwealth, the Austro-Hungarian Empire, and the

<sup>64</sup> Sarotte (2022).

<sup>65</sup> Lutsevych (2021).

<sup>66</sup> Besemeres (2016), p. 337.

<sup>67</sup> Art I. ICCPR and ICESCR 1966.

<sup>68</sup> See Putin (2021).

<sup>69</sup> Cengel (2022).

Russian Empire, while Crimea was at one point a client state of the Ottoman Empire. Between the World Wars, portions of western Ukraine were ruled by Poland, Romania, and Czechoslovakia. Ukraine's history is undoubtedly connected with Russian history, but it's also intertwined with Polish history, with the history of the Greek Orthodox Church, even Romanian history, and the history of the Turkic peoples on the Eurasian Steppe.<sup>70</sup>

A further point to highlight, is that Putin's claims about the lack of cultural and other distinctions between Ukrainians and Russians makes his application of the principle of self-determination difficult to reconcile with the situation in the Donbas region. As mentioned earlier, the right of self-determination only attaches to a distinct 'people', whatever that term might imply. Putin's statements asserting that Ukrainians and Russians are a single 'people' would seem to undermine its application in this case.

Russia's ongoing use of force in Ukraine is a clear violation of Ukraine's territorial integrity, sovereignty, and political independence. If there is any lesson that Putin should have learned from Ukraine's Revolution of Dignity, it is that the annexation of Crimea and the undeclared war in eastern Ukraine have only reinforced the Ukrainian people's resolve to leave Russia's orbit and to seek closer ties to the West.<sup>71</sup> Ukrainians aren't only fighting for the independence of their state; they're fighting for the survival of their identity because Russia has long been a neighbouring power that has tried to wrestle control over the people of Ukraine to bring it under its influence.

## 5 The Distortion of Fundamental Norms (II): Use of Force

### 5.1 The Prohibition of the Use of Force

The starting point for the assessment of the legality of any state's use of military force against another is Article 2(4) of the UN Charter, which prohibits 'the threat or use of force against the territorial integrity or political independence of any state'. Article 2(4)'s prohibition has evolved into a *jus cogens* norm of customary international law,<sup>72</sup> and the dominant view amongst international lawyers is that it represents a complete prohibition on the use of force, subject to expressly stated exceptions.<sup>73</sup> The UN Charter recognises two exceptions to Article 2(4): military enforcement action authorised by the UN Security Council, in response to a determination of the existence of a threat to the peace, breach of the peace or act of aggression and the right of individual or collective self-defence in response to an

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<sup>70</sup> Lenoe (2022).

<sup>71</sup> Rumer and Weiss (2021).

<sup>72</sup> See, e.g., UN Doc. A/C.6/32/SR.64, 6 December 1977; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, ICJ Reports 1986, p. 100, para. 190.

<sup>73</sup> For discussions of the scope and requirements of Art. 2(4)'s prohibition, see, e.g., Corten (2010), chs. 1 and 4; Dinstein (2017), pp. 89–105; Schrijver (2015), pp. 465–484.

armed attack. While further exceptions to Article 2(4) have been advocated,<sup>74</sup> the most prevalent of which has been the doctrine of humanitarian intervention,<sup>75</sup> these have been controversial and there is at best limited consensus upon their existence.

In the absence of any legal justification by way of exemption, there appears to be little doubt that Russia's action against Ukraine constitutes a *prima facie* violation of Article 2(4). As Corten notes in respect of the prevailing legal consensus, 'there is no doubt that article 2(4) [...] is applicable to any military operations conducted by one state against another'.<sup>76</sup> Russia has subject Ukraine to the application of military force, directed against its territory with the ultimate objective of furthering goals inconsistent with its political independence. Notwithstanding any legal justifications offered, Russia confirmed on 24 February 2022 that it had launched military operations against Ukraine. Any claim to the contrary would be futile in light of the overwhelming evidence accumulated in media reportage of the effects of Russia's attack. Beyond constituting a *prima facie* violation of Article 2(4), Russia's invasion also places it in breach of the Budapest Memorandum, under the terms of which it pledged to respect Ukraine's independence and sovereignty, and, mirroring Article 2(4), refrain from any threat or use of force against it.<sup>77</sup> Several other international legal principles are also infringed,<sup>78</sup> including Ukraine's own right of internal self-determination.<sup>79</sup>

Absent any legal justification, the invasion of Ukraine is also capable of amounting to the commission of the international crime of aggression.<sup>80</sup> There have been reports suggesting that some of the hostilities directed against targets in Ukraine have been the acts of non-uniformed Russian directed personnel.<sup>81</sup> Under the law of state responsibility, however, where attacks are committed by those under the 'effective control' of a state, these acts will be attributable to that state.<sup>82</sup> Thus, these would still constitute Russian acts for the purposes of Article 2(4) to the extent that they involve the application of coercive force upon or directed against Ukrainian territory.<sup>83</sup>

<sup>74</sup> For example, pro-democratic intervention and intervention in support of self-determination. See Wippman (2015), pp. 797–815; Chadwick (2015), pp. 841–860.

<sup>75</sup> There is a voluminous literature on humanitarian intervention. Some of the more substantive treatments include Weiss (2016); Wheeler (2000); Chesterman (2001).

<sup>76</sup> Corten (2010), p. 52.

<sup>77</sup> Budapest Memorandum on Security Assurances, 5 December 1994, paras. 1–2.

<sup>78</sup> For example, principles enshrined within the Helsinki Final Act to protect the subjection of sovereign states within Europe to the threat or use of force, inviolability of their frontiers and the compromise of their integrity. See Conference on Security and Co-operation in Europe Final Act 1975, Pt. I(a)(ii)–(iv). See also the Doctrine of Non-Intervention, reiterated in GA Res. 2131 (XX); GA Res. 2625 (XXV).

<sup>79</sup> See above.

<sup>80</sup> This issue is beyond the scope of the present article.

<sup>81</sup> New York Times (2022a).

<sup>82</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, ICJ Reports 1986, para. 115.

<sup>83</sup> See also the Definition of Aggression (GA Res. 3314 (XXIX)), which informed the ICJ's development of its 'effective control' test in the *Nicaragua* case, *ibid.*

A state may avoid violating Article 2(4) where its intervention is at the request of the state upon whose territory it deploys its forces, in order to assist in quashing internal violence or disorder.<sup>84</sup> Claims of an invitation have been advanced by Russia previously as part of efforts to legitimise its interventions in its near abroad, including in Crimea during 2014 when it purported to have been invited to intervene by ousted Ukrainian President Yanukovich, albeit with little merit.<sup>85</sup>

Only a state's highest authorities may extend such an invitation, which must be validly given.<sup>86</sup> Certainly, the Ukrainian authorities have extended no such invitation. It may have been assumed that Russia's recognition of Donetsk and Luhansk as independent states may serve as a precursor to its invocation of an invitation on their part to assist in tackling threats directed against them by Ukraine. In Putin's case for Russian intervention, he suggested that '[t]he people's republics of Donbas have asked Russia for help'.<sup>87</sup> That this represented such a small part of a lengthy statement which went on to refer to bases for action grounded in the right of self-defence and humanitarian intervention,<sup>88</sup> however, would suggest perhaps limited belief in the strength of the invitation claim. In any event, serious difficulties arise in respect of such a claim. Firstly, only sovereign states are entitled to invite assistance from external actors.<sup>89</sup> Notwithstanding Russia's recognition of Donetsk and Luhansk, they are not so recognised by the overwhelming majority of the international community for whom they remain part of Ukraine. This makes any discussion pertaining to the standing which must be enjoyed by those authorities extending the invitation irrelevant.<sup>90</sup> It is arguably for similar reasons that Russian claims to be undertaking 'peacekeeping' in the Donbas have been scoffed at.<sup>91</sup> Secondly, if Donetsk and Luhansk did indeed constitute independent states, any threat posed to them by Ukraine would instead represent an inter-state challenge and engage debates surrounding the right of collective self-defence.<sup>92</sup>

## 5.2 Russia's Purported Legal Justifications

Vladimir Putin's address of 24 February represented a long, rambling series of assertions within which can be identified the strands of two central justifications

<sup>84</sup> On the general principles of invitation as a ground precluding the unlawfulness of the use of force, see Corten (2010), pp. 249–310; Fox (2015).

<sup>85</sup> See Wilson (2016), pp. 167–168.

<sup>86</sup> See Corten (2010), pp. 259–260, 266–276.

<sup>87</sup> See New York Times (2022c).

<sup>88</sup> See below.

<sup>89</sup> See Wippman (2015), pp. 797–815; Chadwick (2015), pp. 841–860.

<sup>90</sup> Although see Roth (1999), pp. 136–149.

<sup>91</sup> UN Secretary-General Antonio Guterres labelled such claims a 'perversion of the concept of peacekeeping. [...] When troops of one country enter the territory of another country without its consent, they are not impartial peacekeepers. They are not peacekeepers at all'. See 'Secretary-General's opening remarks at press encounter on Ukraine', 22 February 2022, <https://www.un.org/sg/en/node/262001> (accessed 27 June 2022).

<sup>92</sup> See below.

for its military action against Ukraine: these take the form of a blend of references to self-defence and humanitarian intervention, embedded within broader justificatory language not too dissimilar from that employed to rationalise Russian military interference in Georgia in 2008 and Crimea and the Donbas in 2014. Putin made a number of assertions which suggested the emergence of various threats from various sources. In implying the existence of a NATO threat against Russia, he proclaimed that its ‘military machine is moving and [...] approaching our border’.<sup>93</sup> By making comparison with the USSR’s failure to pre-empt its invasion by Nazi Germany in 1940/41, Putin claimed that ‘[w]e will not make this mistake the second time [...] a military presence in territories bordering on Russia, if we permit it to go ahead, will [...] [be] creating an ever mounting and totally unacceptable threat for Russia’.<sup>94</sup> Linking these perceived threats to Ukraine, he asserted that ‘Russia cannot feel safe [...] while facing a permanent threat from the territory of today’s Ukraine’.<sup>95</sup> Significantly, Putin invoked Article 51 of the UN Charter, noting it was ‘in accordance with [its provisions] [...] [that he] made a decision to carry out a special military operation’.<sup>96</sup> In so doing, that this represented at least partially a collective self-defence action was hinted at, Putin claiming that ‘[t]he people’s republics of Donbass have asked Russia for help’, and that its military operation constituted execution of treaties entered into with Donetsk and Luhansk.<sup>97</sup>

Although Putin did not expressly refer to any right of humanitarian intervention in explaining Russia’s actions, references were made to some of the alleged humanitarian effects of conflict in attempting to justify them. In respect of events in the Donbas region, he asserted that ‘we had to stop that atrocity, that genocide of the millions of people who live there’, adding more generally in respect of its military operation that it served a ‘purpose [...] to protect people who [...] have been facing humiliation and genocide perpetrated by the Kiev regime [...] we will seek to demilitarise and denazify Ukraine’.<sup>98</sup>

### 5.3 Self-Defence Against Who, from What Threat, and Constituting an ‘Armed Attack’ When?

The right of self-defence is governed by Article 51 of the UN Charter, which provides that:

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

<sup>93</sup> New York Times (2022c).

<sup>94</sup> New York Times (2022c).

<sup>95</sup> New York Times (2022c).

<sup>96</sup> See New York Times (2022c).

<sup>97</sup> See New York Times (2022c).

<sup>98</sup> See New York Times (2022c).



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.

As noted, President Putin invoked Article 51 in his statement setting out Russia's case for action against Ukraine. Russia also wrote to the UN Security Council informing it of its invocation of the right of self-defence,<sup>99</sup> as required by Article 51, albeit not expanding upon its exercise of the right in any detail or having subsequently updated the Council on the specific measures taken in the exercise of this right.<sup>100</sup> Article 51 permits both individual and collective self-defence. Thus, Russia would be equally entitled to afford military assistance to another state that has been attacked as it would be to defend itself. However, there are several problems in categorising Russia's military action against Ukraine as a defensive act.

Article 51 is predicated on there having been an armed attack against the state exercising the right of self-defence or that which it is supporting through collective self-defence measures. There is a certain degree of confusion in Putin's statement as to who is responsible of having attacked who. Putin went to some lengths to spell out the threat felt by Russia as a consequence of NATO's eastward expansion, but there is no suggestion that NATO members have attacked Russia, while Putin goes on to specifically refer to a 'permanent threat from the territory of today's Ukraine'. However, Putin fails to cite any specific military action that has been taken by Ukraine against Russia, and indeed there is no evidence to suggest that any such act has taken place prior to Russia's commencement of military operations on 24 February. Although Russia has made claims that Ukraine has undertaken actions against the territory of Donetsk and Luhansk,<sup>101</sup> warranting Russian military assistance in support of their collective self-defence, apart from doubts over the satisfaction of evidential standards to warrant such assertions, the ability to assist these regions in acts of self-defence would be dependent upon their statehood. A sub-state unit does not enjoy a right of self-defence against a parent state. Article 51 is quite clear in this respect, reserving the right to responses to armed attacks against members of the United Nations—which only states can be.<sup>102</sup> It is surely significant that Russia moved to recognise Donetsk and Luhansk before commencing military operations against Ukraine, yet the fact that other states have declined to do so underlines the fact that on most assessments they fail to satisfy the criteria for statehood. That these regions only found themselves able to exercise a degree of de facto independence

<sup>99</sup> Letter 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.

<sup>100</sup> The Russian letter merely annexed Putin's statement of the same day by way of explanation. See *ibid.*, Annex.

<sup>101</sup> See, e.g., UN Docs. S/PV.8968 (at pp. 9–12), S/PV.8974 (at p. 11), S/PV.8979 (at p. 12).

<sup>102</sup> Art. 4 UN Charter.

from Ukraine as a result of Russian intervention further undermines their claims to independence,<sup>103</sup> a duty of non-recognition arising in such circumstances.<sup>104</sup>

There is increased acceptance within discussions of the right of self-defence that, notwithstanding Article 51's requirement of an armed attack, it permits defensive action to be taken in response to broader threats directed against states. In particular, there is a considerable body of support for the existence of a right of anticipatory self-defence derived from customary international law.<sup>105</sup> This permits states to take action in anticipation of an armed attack that is imminent.<sup>106</sup> Although Russia has not formally suggested that it acted in anticipation of an attack by Ukraine, its proclaimed objective of 'demilitarising' Ukraine might be taken to implicitly suggest that it was regarded as posing an imminent military threat that needed to be eliminated. However, no evidence has been adduced to support any such assumption. Furthermore, on the basis of any informed assessment of the relative military capacities of Russia and Ukraine,<sup>107</sup> to label Ukraine as a military threat to Russia would appear preposterous.

Putin's reference to the growing threat posed to Russia as a result of NATO's presence in neighbouring countries and a permanent threat faced from Ukraine as a result of potential NATO expansion further eastward might be taken as indicative of a desire to take action to weaken or remove the prospect of military action in the future being directed against Russia from Ukraine. This would sit coherently with Putin's proclaimed objective of the military action launched on February 24 to 'demilitarize' Ukraine. By destroying Ukraine's military capacity, any ability to threaten Russia in the future would be severely weakened. However, this would be to take the basis of Russia's justificatory discourse into the realms of pre-emption, a hugely controversial notion in international law. Whereas anticipatory self-defence is based on action to respond to threats in circumstances where an armed attack is imminent, there being relatively conclusive evidence of its impending nature, the logic of pre-emption is that states may act to remove threats before they even materialise. In this sense it is a very speculative notion. Famously advanced by the US in its post-9/11 national security strategy,<sup>108</sup> there is little support for the doctrine in state practice.<sup>109</sup>

Even where a legitimate right of self-defence arises, it is conditioned by requirements which govern the manner of its exercise. Measures taken in self-defence must

<sup>103</sup> Katchanovski (2016).

<sup>104</sup> For discussion of the content of the duty of non-recognition, see Talmon (2005), pp. 99–125.

<sup>105</sup> See, e.g., Wilmhurst (2005); Maogoto (2004); Ronzitti (2006).

<sup>106</sup> The classic formulation of anticipatory self-defence under customary international law is found in the Caroline Incident, which required 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. The incident is summarised in Wood (2018).

<sup>107</sup> According to SIPRI data, Russia's military expenditure in 2020 was over ten times that of Ukraine. See SIPRI, Military Expenditure by Country (2021), <https://sipri.org/sites/default/files/Data%20for%20all%20countries%20from%201988%E2%80%932020%20in%20constant%20282019%29%20USD%20%28pdf%29.pdf> (accessed 27 June 2022).

<sup>108</sup> US National Security Strategy, September 2002, Pt. V, <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/> (accessed 27 June 2022).

<sup>109</sup> See, e.g., Henderson (2010), pp. 171–193; Deeks (2015), pp. 661–678.

be necessary and proportionate in response to the threat which they seem to repel, requirements that have been confirmed in ICJ rulings on multiple occasions.<sup>110</sup> Although it is difficult to establish any solid legal basis for Russia's exercise of a right of self-defence against Ukraine, even if the requirements for such a right to arise were satisfied it would be difficult to consider Russia's military action from 24 February onwards as being compliant with the strictures of necessity and proportionality. Measures taken in self-defence would typically be expected to be targeted and specific in nature, designed at repelling the armed attack against which they had been initiated in response. Although President Putin claimed that Russia did not intend the occupation of Ukraine, the scale of the military operation undertaken by Russia represents an onslaught of the gravest form with it being difficult to draw any conclusion other than that its ultimate objective is the complete subjugation and domination of Ukraine. This further undermines any suggestion that Russia's actions are compatible with the right of self-defence.

#### 5.4 Humanitarian Intervention? Identifying an Oppressor and a Victim

In some respects, it may be easier for Russia to attempt to base its military action against Ukraine on the doctrine of humanitarian intervention than self-defence, as this does not require evidence of any attack committed by Ukraine against Russia or hinge upon the legal status of Donetsk and Luhansk if it is alleged they have suffered from military action originating from Ukrainian authorities. However, humanitarian intervention represents a controversial notion which continues to divide the international community, although there are some indications that it has gained in terms of its perceived acceptability,<sup>111</sup> even if traditionally states have avoided invoking it as their justification for the use of force.<sup>112</sup> The major difficulty with humanitarian intervention as an exception to the prohibition on the use of force lies in the fact that it is not one of those grounds upon which military force may be exercised provided for within the UN Charter, it being necessary to identify its emergence as a principle of customary international law grounded in state practice. While it cannot be claimed that there is an undeniable right of humanitarian intervention, there have certainly been some signs in the post-Cold War era that states look more favourably upon what would otherwise constitute unlawful uses of force where accompanied by humanitarian objectives than was once the case. A significant step was arguably the international reaction to NATO's military campaign against the Federal Republic of Yugoslavia (FRY) in response to the FRY authorities oppression of the Kosovar Albanian population. Although UN Security Council authorisation for the

<sup>110</sup> See, e.g., *Nicaragua case*, *supra* n. 72; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, at p. 245.

<sup>111</sup> See, e.g., discussions cited *supra* n. 75.

<sup>112</sup> Classic examples of such an approach being taken by intervening states are found with the interventions in Bangladesh, Uganda and Cambodia during the 1970s when notwithstanding the severe humanitarian crises existing and addressed by the military interventions, legal justifications offered were grounded in the more conventional right of self-defence. See Wheeler (2000), chs. 2–4.

operation was not forthcoming due to the likelihood of Russian and Chinese vetoes, it is notable that a draft resolution condemning NATO was roundly defeated in the Council,<sup>113</sup> leaving the action with an air of legitimacy if not strictly legality.<sup>114</sup> In subsequent proceedings before the ICJ some of the intervening NATO states cited humanitarian grounds in support of the action.<sup>115</sup> The UN's later endorsement of the Responsibility to Protect doctrine underlined the fact that there is growing collective appreciation of the need for robust action to tackle humanitarian crises,<sup>116</sup> and the Security Council has referred to the doctrine in the context of the conferment of mandates to use force to further humanitarian objectives.<sup>117</sup> Although there is no consensus upon what specifically humanitarian intervention is or requires, it can be regarded on a general level as entailing non-consensual military intervention by one or more states within the territory of another state for the purpose of ending or ameliorating the effects of serious human rights abuses or humanitarian crises.<sup>118</sup>

A number of assertions by Russia have hinted at the humanitarian basis of their intervention against Ukraine, ranging from claims that Russian speakers have been oppressed to wilder charges of genocide being perpetrated by Ukraine.<sup>119</sup> There is no evidence to support the more outlandish claims made by Russia. In proceedings brought before the ICJ by Ukraine pursuant to the Genocide Convention, the ICJ went so far as to assert that it found no evidence to substantiate Russia's claims of genocide.<sup>120</sup> While it is plausible that instances of human rights abuses may have arisen in Ukraine,<sup>121</sup> even if such claims could be substantiated they would be likely to fall far short of the threshold which is typically laid down for the exercise of any right of humanitarian intervention to arise. Put simply, it requires far more than the existence of some human rights abuses, instead necessitating widescale abuses causing significant deaths.<sup>122</sup> Furthermore, any Russian claims of serious human rights

<sup>113</sup> UN Doc. S/1999/328, 26 March 1999.

<sup>114</sup> For discussions of the legal nature of the military action, see, e.g., Simma (1999); Cassese (1999).

<sup>115</sup> See ICJ: *Legality of Use of Force (Serbia and Montenegro v. Portugal, United Kingdom, Netherlands, Italy, Germany, Canada, France, Belgium)* [February 18, 2005], 44 *ILM* 299 (2005). For discussion, see Vitucci (2006).

<sup>116</sup> UN Doc. A/60/L.1, paras. 138–139.

<sup>117</sup> E.g., SC Res. 1973 (2011), in relation to Libya. It is important to note, however, that the Council's references to the Responsibility to Protect have accompanied authorisations to use force pursuant to its UN Charter powers, and not in respect of unilateral military interventions lacking its authority.

<sup>118</sup> For example, Pattison defines humanitarian intervention as 'forcible military action by an external agent in the relevant political community with the predominant purpose of preventing, reducing, or halting an ongoing or impending grievous suffering or loss of life', in Pattison (2010), p. 28.

<sup>119</sup> See New York Times (2022c).

<sup>120</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, para. 59.

<sup>121</sup> For independent assessments of levels of protection for human rights in Ukraine, see e.g., Amnesty International's 2021 Ukraine report, <https://www.amnesty.org/en/location/europe-and-central-asia/ukraine/report-ukraine/> (accessed 27 June 2022).

<sup>122</sup> Those who have advanced criteria to govern the exercise of any such right have set high the threshold of suffering or fatalities which would warrant intervention. For example, Cassese envisaged 'gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity'. See Cassese (1999), p. 27.

abuses on the part of Ukraine are undermined by the nature of their own military campaign which has come to utilise bomb and missile attacks against civilian targets, likely placing it in breach of fundamental norms of international humanitarian law.<sup>123</sup>

To the extent that Russia has offered any legal justification for its attack on Ukraine, it has sought to manipulate existing norms by advancing what are for the most part outlandish factual claims to serve as the basis for their vague implicit articulation of established legal principles in support of military actions undertaken to reassert Russian control within the former Soviet space. The claims made in respect of Ukraine simply reflect those made at the time of its earlier interventions in Georgia and Crimea, and in this sense current events are simply the latest, most brutal stage in Russia's approach to retaining influence in its near abroad.

## 6 The Wider Implications of Russia's Interference in Ukraine

While unpicking the strategic and policy objectives underpinning Russia's intervention in Ukraine in detailed terms is a task for which international relations scholars are better placed to undertake, it is nonetheless possible to make some general observations upon the nature of the Ukrainian situation and its potential wider implications in both legal and political terms. In simple terms, Russia's intervention can be understood by reference to its policy objective of maintaining and/or extending its influence within its near abroad, essentially the former component republics of the Soviet Union, particularly those which neighbour it.<sup>124</sup> This objective may be regarded as serving a combination of assertive and defensive aims, Russia seeking to reassert a level of influence that has waned in the post-Cold War era, while also acting to pre-empt threats which it perceives may come to endanger its interests associated with political developments in neighbouring states. Recent developments in Ukraine cannot be understood in isolation from Russia's previous interferences in the Donbas and Crimea, as well as yet earlier interventions in Georgia. While the events of 2022 may have taken on a far more severe form than those earlier cited actions on Russia's part, they all form part of an ongoing, overriding narrative built around a singular policy goal. Furthermore, while varying to a degree in terms of their specifics, there is a certain level of consistency in Russia's purported legal justifications for its actions that rely on dubious claims of a humanitarian imperative to act, invitations to intervene and farcical assertions of exercising the right of self-defence. Russia's justificatory discourse on each occasion has been accompanied by an attempt to link it to proclaimed rights of self-determination on the part

<sup>123</sup> In particular, Art. 51 of the 1st Protocol Additional to the Geneva Conventions 1949, adopted in 1977. This provision prohibits targeting of civilians or civilian objects. The UN Office of the High Commissioner for Human Rights (OHCHR) itself raised the possibility that Russian attacks on civilian targets may amount to war crimes. See 'Russian attacks on civilian targets in Ukraine could be a war crime: UN rights office', OHCHR, 11 March 2022, <https://news.un.org/en/story/2022/03/1113782> (accessed 27 June 2022).

<sup>124</sup> See Abushov (2009); Simao (2016); Rezvani (2020).

of allegedly oppressed groups and its recognition of their independent statehood to bolster its questionable bases for the use of force. Russian legal discourse becomes all the more questionable when it is considered that they have rejected similar arguments related to humanitarian intervention and self-determination when advanced in other situations, particularly that of Kosovo.<sup>125</sup>

Growing tensions between Russia and the US, which replaced the newfound cooperation between them which represented one of the hallmarks of the early post-Cold War era, have prompted the question of whether the world has entered a new Cold War. An exploration of the contrasts between that period and current circumstances is far beyond the scope of this article, but it is pertinent to note that some analogies certainly exist with Soviet interventions in the satellite states of Eastern Europe—Hungary 1956 and Czechoslovakia 1968 specifically—where the governments of those states sought to chart a political course at odds with that favoured by their Soviet masters.<sup>126</sup> It is difficult to foresee Russia attempting or being able to easily assert its influence over those former satellite states that now enjoy membership of the EU and/or NATO, but it does not appear to have given up on this objective insofar as the neighbouring former Soviet states are concerned. Now, as during the Cold War, Russia enjoys a certain degree of immunity from punitive international measures for its actions in legal terms through its permanent membership of the UN Security Council (and accompanying veto power) and politically by virtue of its nuclear status.

At the time of writing, it is not possible to predict how the current situation will develop or conclude. It appears difficult to envisage a situation emerging in which Russia seizes complete control of Ukraine and most discussions centre on the post-conflict status of Ukraine *vis-à-vis* its relationship simultaneously with Russia and those organisations to which it aspires to join. Some indications have emerged of progress in peace talks,<sup>127</sup> although the key issues of contention are likely to centre on Ukraine's potential neutrality status, and control of the Donbas and Crimea regions. As the price for a lasting peace, it appears conceivable that Ukraine may accept a neutral status which would involve its foregoing of possible NATO membership, while concessions may also be made which envisage a potential change to the territorial status of those regions which Russia has recognised as independent states or annexed as part of Russia.<sup>128</sup>

Outcomes along some of these lines may legitimately warrant charges that international law has been ineffective, actions widely condemned as unlawful having instigated consequences that represent a gross compromising of Ukraine's sovereignty and territorial integrity. Undoubtedly, international law suffers from its limitations in the face of the application of might by a major power. However, the scale

<sup>125</sup> See, e.g., UN Doc. S/PV. 3989, pp. 5–6 for Russian condemnation of NATO's intervention in response to events in Kosovo, and UN Doc. S/PV. 5839, pp. 6–7 for its rejection of Kosovo's purported independence from Serbia.

<sup>126</sup> For an overview of developments in these states culminating in Soviet intervention, see Judt (2005), pp. 313–323, 440–447.

<sup>127</sup> New York Times (2022d).

<sup>128</sup> The Guardian News (2022).

of international condemnation of Russia's intervention in Ukraine and the accompanying widespread imposition of sanctions by significant swathes of the international community demonstrate the continued respect for the fundamental applicable norms of international law and disinclination to tolerate consequences brought about by their violation. In this respect, the international unity evidenced stands in contrast to the more polarised nature of the global divisions that perpetuated the Cold War environment. The Cold War remains lost for Russia, but there is a danger that it stands to become a pariah state in the eyes of much of the international community unless it moderates its means of furthering its policy objectives accordingly. Russia's successful engagement as a serious global actor arguably depends upon such a change taking place.

## 7 Conclusion

The Russian government's 'special military operation' in Ukraine is still ongoing at the time of writing. President Putin's distorted interpretation and application of international legal norms has led to the loss of thousands of lives, the destruction of numerous cities and the largest refugee crisis in Europe since WWII. The key contention of this article has been to demonstrate how key principles of public international law, including self-determination and the use of force have been manipulated by Russia to justify the invasion of Ukraine. As previously mentioned, such tactics are not new and were used by Russia in its earlier interventions in Georgia (2008) and Crimea (2014). The only difference this time around is that the intervention has not been so straightforward thanks to the unexpected resistance of the Ukrainian army.

It has been suggested that Putin is nostalgic for the Soviet Union and wishes to re-form the USSR. In 2005, Putin called the Soviet collapse 'the biggest geopolitical catastrophe of the twentieth century'. He further clarified this statement by adding, 'tens of millions of our citizens and countrymen found themselves outside Russian territory'.<sup>129</sup> In other words, the Soviet collapse was a catastrophe specifically for Russians because it left their country divided and incomplete. In December 2021, Putin further elaborated on this point and described the fall of the USSR as 'the disintegration of historical Russia under the name of the Soviet Union'. 'We turned into a completely different country', he claimed. 'And what had been built up over 1000 years was largely lost'.<sup>130</sup>

Putin considers Ukraine to be the greatest loss of all. The invasion of Ukraine has been on the cards for some time. In March 2014, Putin wrote 'Kiev is the mother of Russian cities. Ancient Rus is our common source and we cannot live without each other'.<sup>131</sup> A few days later Russia went ahead and annexed Crimea. Shortly after,

<sup>129</sup> BBC News Online (2005).

<sup>130</sup> Kuzio (2022).

<sup>131</sup> Address by President of the Russian Federation, 18 March 2014, <http://en.kremlin.ru/events/president/news/20603> (accessed 27 June 2022).

Russia instigated civil conflict in the Donbas region causing the loss of thousands of lives over a period of 8 years. On 21 February 2022, Putin revisited this idea by stating that ‘Ukraine is not just a neighbouring country for us, it is an inalienable part of our own history, culture and spiritual space’. He continued by repeatedly denying Ukraine’s independence and existence as a sovereign nation.<sup>132</sup> When one looks at these pronouncements it is clear what Putin’s dominant motive is. Denying that Ukraine has any right to statehood independent of Russia and glorifying the expansionism of his country’s Czarist and Stalinist past, he is engrossed in a reactionary nostalgia for empire. Or put simply, his aim is to Make Russia Great Again.<sup>133</sup> Putin’s imperialist fantasy poses a serious threat to international peace and is a clear affront to fundamental principles of international law.

However, the consequences of Russia’s actions for the future of international law must not be overstated. While it is difficult to view the political situation arising from Russia’s intervention in Ukraine in anything other than negative terms, arguably it is possible to consider its wider international legal dimension through a more optimistic lens. Russia’s flagrant violation of core tenets of the global legal order undoubtedly demonstrates the fragility of international law in the absence of automated enforcement mechanisms, which are all the more problematic where powerful states seek to advance policy objectives that are justified by controversial or unfounded claims, grounded in gross distortions of fundamental norms of international law. The limits of international law are undeniable. However, all systems of rules are imperfect in the extent of their observance. Arguably the future legitimacy of international law is only seriously damaged if attempts to distort its core principles come to set precedential value to the extent that they result in a major overhaul of those principles and the assumptions upon which they are based. This is avoided where the wider international community of states reject and condemn such distortions, as indeed they roundly have in response to Russia’s actions against Ukraine. States have always sought to interpret legal norms to support their courses of action. This in itself highlights the value which is attached to the system of international law and the perceived legitimacy which derives from its invocation.

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<sup>132</sup> Address by the President of the Russian Federation, 21 February 2022, <http://en.kremlin.ru/events/president/news/67828> (accessed 27 June 2022).

<sup>133</sup> See Wittner (2022).



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