

THE 2022 RUSSIA-UKRAINE WAR FROM THE PERSPECTIVE OF *JUS AD BELLUM*: IS INTERNATIONAL LAW STRENGTHENED?

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Abstract

In February 2022, Russia declared war against Ukraine in the hope of winning a major victory in the short term. However, the circumstances at the front progressed differently and it turned into a long-term war. In order to legitimize the war, Russia put forward the doctrine of the right of self-defense, the doctrine of intervention by invitation, and the responsibility to protect, within the framework of international law. Since these arguments did not fulfill the necessary criteria, Russia has violated international law. Ukraine is a sovereign and independent state. It has the right to decide independently on its internal and external status within the framework of the self-determination right. Sovereignty, territorial integrity, the prohibition of the use of force, and the prohibition of interference in internal affairs are and should remain the basic principles of the international community.

Keywords : *Russia, Ukraine, right of self-defense, intervention by invitation, responsibility to protect*

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Doi: 10.51655/ejl.2022.10

Received: 08.05.2022

Accepted: 02.06.2022

Introduction

The 2022 Russia-Ukraine war, which outbroke at a time when conventional wars between states have decreased, while domestic conflicts and civil wars have increased, led to a system crisis in terms of international relations, and may have important consequences in the long term, thus should be analyzed from the perspective of international law. As the reaction of the international community to this war is significant not only for the future of Ukraine but also for the future of the international legal order.¹

The Russia-Ukraine war is within the scope of international law in many respects. In terms of international law, especially the unilateral declaration of separatist units as a state and the recognition problem of these *de facto* states, the issue of the legitimacy of war in terms of the law of the use of force (*jus ad bellum*), the compliance of war with international law in terms of the law of armed conflicts (*jus in bello*), and lastly, the responsibility of states and individuals due to international crimes committed are among the important issues. In this article, the legitimacy of war will be examined in terms of the use of force law (*jus ad bellum*).

On February 24, 2022, as the main reason for Russia's invasion attempt of Kyiv, Putin put forward NATO's rapid expansion to the east in the last thirty years and the probable existence of NATO on Russia's borders in case Ukraine's NATO membership request, which has been going on since 2008, is approved. Claiming that he used the "right of self-defense" within the framework of Article 51 of the UN Treaty, Putin declared, "We have been left no other option to protect Russia and our people." Apart from this main argument, Russia rested on the intervention by invitation doctrine by claiming that the separatist Donetsk People's Republic and Luhansk People's Republic administrations in eastern Ukraine wrote a letter to Russian President Vladimir Putin and asked for help from Russia to repel the aggression of the Ukrainian armed forces and formations and to prevent civilian

1. Hathaway, Oona A., "International Law Goes to War in Ukraine", <https://www.foreignaffairs.com/articles/ukraine/2022-03-15/international-law-goes-war-ukraine>

(Accessed: 18.03 .2022).

casualties. Lastly, Russia claimed that it used force within the framework of the doctrine of “*responsibility to protect the people who have been subjected to ill-treatment and genocide for eight years*” and by citing the grounds of purging Nazis. Russia is a state that claims to attach great importance to international law. It is a member of the UN Security Council. The Security Council is the cornerstone of the UN collective security system.² Are these arguments put forward by Russia to justify its international military interventions convenient for the United Nations (UN) system and international law? What is the impact of the Russian invasion of Ukraine on the norms of international law governing the use of force? Did international law emerge this process stronger or weaker? This article will try to find answers to these questions.

I - Historical Background of Events

World War II, in which 60 million people died in 1945, had ended and the great powers that won the war established the United Nations Organization (UN) on June 24, 1945, to establish a new world order dominated by peace and stability. However, after a short time, the Cold War emerged, and bipolar world order was established. One of the poles, the Union of Soviet Socialist Republics (USSR), was the losing party in the ideological, military, and economic rivalry with the Western Bloc, especially the USA. Therefore, by 1985, the USSR was on the verge of economic collapse. Mikhail Gorbachev, who was the head of the USSR at that time, declared the policies of Glasnost (openness and transparency) and Perestroika (reconstruction) to stop this process. Yet, this atmosphere of freedom accelerated the disintegration. On December 21, 1991, with the Alma-Ata Protocol, the USSR was officially dissolved. The international community accepted the Russian Federation as the “successor state” of the USSR while recognizing the other departing republics. Thus, the Russian Federation maintained its status as a permanent state with veto power in the UN Security Council. The Russian Federation, which entered a turbulent

² Bellinger, John B., “How Russia’s Invasion of Ukraine Violates International Law”, <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law>, (Access: 18.03.2022).

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period with increased ethnic conflicts with the declaration of independence by autonomous republics such as Tatarstan and Chechnya in 1991, intervened militarily in Chechnya twice in 1994 and 1999.

A new page has been opened for the Russian Federation when Vladimir Putin became the president in the year of 2000. Seeing the dissolution of the Soviet Union as “the greatest tragedy of the 20th century”, Putin strived to give a fresh impetus to the Russian Federation.³ On August 7, 2008, Putin's Russia entered a short-term war with Georgia and defeated them heavily, and on August 26, 2008, recognized Abkhazia and South Ossetia (the autonomous republics of Georgia) as unipolar states.⁴ After the spread of the internal turmoil that started in Ukraine in 2013 to Crimea, Russia made a military intervention in Crimea on February 28, 2014, and annexed Crimea on March 18, 2014, which declared its independence with a controversial referendum held in Crimea on March 16, 2014.⁵ A large part of the international community considered the case of making Crimea a part of the Russian Federation, which was legitimized on the basis of the remedial secession right as a last resort, as a clear violation of international law.⁶ On March 27, 2014, the UN General Assembly adopted a resolution calling for the non-recognition of changing the autonomous status of the city of Sevastopol and Crimea, declaring Russia's annexation invalid, and reaffirming the territorial integrity of Ukraine, based on the March 16 referendum.⁷ Countries such as the USA, England, Canada, Australia, and EU states have applied

³ “Vladimir Putin”, <https://www.britannica.com/biography/Vladimir-Putin>, (Erişim: 28.03.2022); “Foreign Policy of Vladimir Putin”, https://en.wikipedia.org/wiki/Foreign_policy_of_Vladimir_Putin#:~:text=Putin's%20Russia%20maintains%20strong%20and,toward%20growing%20Chinese%20energy%20needs, (Access: 28.03.2022).

⁴ Broers, Laurence, (2014). “Mirrors to the world: the claims to legitimacy and international recognition of de facto states in the south Caucasus”, *Brown Journal of World Affairs*, 20(2), p. 153-154.

⁵ Grant, Thomas D, (2015). “Annexation of Crimea”, *American Journal of International Law*, 109(1), p. 70-71.

⁶ Grant, Thomas D., agm, p. 77.

⁷ “Backing Ukraine’s Territorial Integrity, UN Assembly Declares Crimea Referendum Invalid”, <https://news.un.org/en/story/2014/03/464812-backing-ukraines-territorial-integrity-un-assembly-declares-crimea-referendum>, (Access: 16.03.2022).

economic sanctions in a coordinated way to force Russia to change its policy on the Crimea issue.⁸ However, despite these measures, Russia did not withdraw from the annexation of Crimea.

After the collapse of the USSR, the Ukraine problem, which was considered a result of the geopolitical conflicts that could not be resolved between the West and Russia, has continued until today.⁹ In April 2014, the Donetsk People's Republic (DNR) and the Luhansk People's Republic (LNR) in the Donbas Region declared independence unilaterally.¹⁰ During this period, the separatists in the Donbas region could not separate the region from Ukraine. Thereupon, Russia supported the separatists by sending irregular troops and providing military equipment to the region from Transnistria and waged a hybrid war in the region. Russia has made efforts to destabilize Ukraine by making use of its domestic problems.¹¹ By 2021, Russia escalated the crisis to prevent Ukraine's desire to join NATO and articulate with the West and began massing extensive troops and equipment in eastern Ukraine. Putin questioned Ukraine's independence by expressing irredentist views.¹² The provocative statements of Western states, especially the USA, provoked Putin to attack Ukraine. Diplomatic efforts between the parties to solve the problem have been insufficient. Diplomatic negotiations gave way to war after Putin signed the decrees

⁸ Ashford, Emma, (2016). "Not-so-smart sanctions: the failure of western restrictions against Russia", *Foreign Affairs*, 95(1), p. 115; "Sanctions after Crimea: Have they worked?",

<https://www.nato.int/docu/review/articles/2015/07/13/sanctions-after-crimea-have-they-worked/index.html>, (Access:28.03.2022).

⁹ Piliaiev, Igor, (2019). "The Nature of The Armed Conflict In The Donbas: A Postnonclassical Viewpoint, Ideology and Politics, 3(14), p. 80.

¹⁰ During this period, 27.4% of the people in Donetsk and 30.3% of the people in Luhansk wanted to leave Ukraine and unite with Russia. See, Giuliano, Elise, "The Origins of Separatism: Popular Grievances in Donetsk and Luhansk", PONARS Eurasia Policy Memo, No. 396, 2015, <https://www.ponarseurasia.org/the-origins-of-separatism-popular-grievances-in-donetsk-and-luhansk/>, (Access: 29.03.2022).

¹¹ Muradov, İbrahim, (2019). *The Donbas Conflict As A Form Of Hybrid Warfare: A Neoclassical Realist Analysis* (A Thesis Submitted to the Graduate School of Social Sciences of Middle East Technical University), Ankara.

¹² Paul, Kirby, "Why has Russia invaded Ukraine and what does Putin want?", <https://www.bbc.com/news/world-europe-56720589>, (Access: 28.03.2022).

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recognizing the two separatist regions in Donbas on February 21, 2022, and giving the order for a full-scale invasion of Ukraine on February 24, 2022. On February 24, 2022, Russian forces began to occupy the capital, Kyiv. Ukraine showed an unexpected military resistance under the leadership of Volodymyr Zelensky. In the face of the full-scale invasion of Ukraine, Western countries such as the USA, England, Canada, Australia, and EU states have begun to impose comprehensive and strict economic sanctions ranging from banking to the financial sector, from the arts to sports and fashion.¹³ While the war was going on, the parties continued to keep the diplomacy option on the table. Russia requested Ukraine to abandon its NATO membership and to be neutralized under the guarantee of countries such as the USA, Germany, England, and Turkey.¹⁴

II - 2022 Russia-Ukraine War From *Jus Ad Bellum* Perspective

Are the arguments put forward by Russia to justify its international military interventions convenient for the United Nations (UN) system and international law? What is the impact of the Russian invasion of Ukraine on the norms of international law governing the use of force? Did international law emerge from this process stronger or weaker?

¹³ Notable among these sanctions: Russian banks were excluded from the international payment system SWIFT; the assets of the Central Bank of Russia were frozen; Germany suspended the Nord Stream II project; the sale of goods, technology, and services related to the aerospace industry from Western countries to Russia was prohibited; EU countries closed their airspace to Russian planes; The International Association of Football Associations (FIFA) banned Russia from hosting international matches; the assets of Russian oligarchs and diplomatic figures were frozen. See, "What sanctions are being imposed on Russia over Ukraine?"

<https://www.bbc.com/news/world-europe-60125659>, (Access: 28.03.2022).

¹⁴ See, "Ukraine and Russia explore neutrality plan in peace talks," <https://www.ft.com/content/7b341e46-d375-4817-be67-802b7fa77ef1>, (Access: 18.03.2022); "Russia pledges to scale down military activity near Kyiv, Chernihiv", <https://www.dw.com/en/russia-pledges-to-scale-down-military-activity-near-kyiv-chernihiv-live-updates/a-61286047>, (Access: 29.03.2022).

1. Right of Self-Defense and the 2022 Russia-Ukraine War

The UN Treaty, signed at the San Francisco Conference on June 24, 1945, is today the most fundamental document that explicitly prohibits states from using force and threatening to use force in their international relations.¹⁵ This prohibition is article 2(4) provides as follows: “*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*” However, there are significant different views¹⁶ between states and international law schools on the interpretation of this prohibition. Although there are opinions in the doctrine claiming that the prohibition has already disappeared with state practices, the majority of jurists interpret the prohibition as a “wide-ranging” prohibition. Although there are opinions arguing¹⁷ that the prohibition in Article 2(4) has the status of a prescriptive rule (*jus cogens*) among those who adopt this view, there are also opinions claiming that the prohibition is not yet in the structure of *jus cogens* in all aspects due to the uncertainties in state practices.¹⁸ In jurisprudence, the International Court of Justice (ICJ) acknowledges that the prohibition on the use of force has become an integral part of customary international law.¹⁹ In the case of a violation of the prohibition in article 2(4) of the UN Charter, the collective security system set out in Chapter VII of the UN Charter must be operated. The UN Security Council, which is primarily responsible for the maintenance of international peace and security,

¹⁵ Schmidt, Dennis R. ve Luca Trenta, (2018). “Changes in the Law of Self-defence? Drones, Imminence, and International Norm Dynamics”, *Journal on the Use of Force and International Law*,

¹⁶ Glennon, Michael J, (2004). “The Rise and Fall of the UN Charter’s Use of Force”, *Hastings International and Comparative Law Review*, 27(3), p. 507.

¹⁷ See. Schmitt, Michael N, (2003). “Preemptive Strategies in International Law”, *Michigan Journal of International Law*, 24 (513), s.525; Gray, Christine, (2000). *International Law and the Use of Force*, Oxford University Press, Oxford, p. 24.

¹⁸ Green, James A, (2011). “Questioning the Peremptory Status of the Prohibition of the Use of Force”, *Mich. J. Int’l L.*, 32 (2), p. 254-255.

¹⁹ Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. the United States of America*) Merits, Judgment of 27 June 1986, para.188, <https://www.icj-cij.org/en/case/70/judgments>, (Access: 28.03.2022).

after determining any “*existence of any threat to the peace, breach of the peace, or act of aggression*” under section VII article 39 and shall make recommendations or determine what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.²⁰

Except for the collective security system, the only exception to the prohibition on the use of force regulated in article 2(4) of the UN Charter is the right of “self-defense” in article 51. The right of self-defense is regulated in article 51 as follows: “*Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, 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-defense 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.*” The right to self-defense has conditions under article 51 of the UN Treaty. These conditions are: i) an “armed attack” has taken place against a UN member state; ii) self-defense is the “natural” is a right; iii) self-defense is a “collective” right; iv) self-defense is a “temporary” right. In addition to these conditions, criteria of i) necessity, ii) urgency, and iii) proportionality arising from customary international law also should be added to these conditions.²¹

Within the framework of the aforementioned norms regarding the use of force, Russia's invasion of Ukraine on February 24, 2022, violated the prohibition on the use of force in Article 2(4) of the UN Treaty.²² In the face of this violation, the collective security system in Chapter VII against Russia could not be operated. On February 25, 2022, the UN Security Council wanted to pass a draft resolution condemning Russia's invasion of Ukraine and demanding its immediate withdrawal from Ukraine, however in the voting in which 11 states cast

²⁰ Taşdemir, Fatma, (2020). *Terörizm ve Ülke Dışı Kuvvet Kullanma Hakkı*, Nobel Publishing, Ankara, p. 118.

²¹ Taşdemir, (2020). p. 153-156.

²² Hathaway, Oona A., “International Law Goes to War in Ukraine”, <https://www.foreignaffairs.com/articles/ukraine/2022-03-15/international-law-goes-war-ukraine>, (Access: 18.03.2022).

an affirmative vote, and China, India, and the United Arab Emirates abstained, this was not possible because of the veto of Russia.²³ On the other hand, on March 2, 2022, the UN General Assembly convened for the first time since 1997, calling for an emergency session, and a draft resolution condemning Russia's military attack on Ukraine was adopted by 141 votes to 5. Russia, Belarus, Syria, North Korea, and Eritrea voted against the proposal, while 35 states abstained. The resolution demanded that the Russian Federation immediately, completely, and unconditionally withdraw all its military forces from the territory of Ukraine within its internationally recognized borders.²⁴ The aforementioned General Assembly resolution is not legally binding and is an advisory decision. However, the resolution is of great importance as it symbolizes that the invasion of Ukraine is against international law and that this action poses a threat not only to the future of Ukraine but also to the future of the international legal order.²⁵

Russia claimed that it used force against Ukraine based on its right of self-defense within the framework of article 51 of the UN Treaty. In order for Russia to legally apply the right of self-defense, it must first be subjected to an “armed attack”. However, there was no actual “armed attack” against Russia originating from Ukraine. Russia's attack on Ukraine is an act of disproportionate use of force. While occupying Ukraine, Russia also uses tools and methods that violate the law of armed conflicts.

It is also necessary to evaluate Russia's invasion action against Ukraine in terms of the right of “preventive self-defense”. Though Russia did not directly raise the preventive right of self-defense. However, based on Putin's statement that “*We are left with no other choice but to defend Russia and our people*”, it appears that Russia considers NATO's eastward expansion and Ukraine's goal of becoming a NATO member as an armed attack that “will definitely happen”.

²³ “Russia blocks Security Council Action on Ukraine”, <https://news.un.org/en/story/2022/02/1112802>, (Access: 18.03.2022).

²⁴ “General Assembly resolution demands end to Russian offensive in Ukraine”, <https://news.un.org/en/story/2022/03/1113152>, (Access: 18.03.2022).

²⁵ Hathaway, Oona A., “International Law Goes to War in Ukraine”, <https://www.foreignaffairs.com/articles/ukraine/2022-03-15/international-law-goes-war-ukraine>, (Access: 18.03.2022).

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Since September 11, 2001, a broader interpretation of the right of self-defense, especially a more flexible criterion of “urgency”, has been accepted among states and international organizations such as NATO and the Organization of Africa.²⁶ In this context, it is important whether Ukraine's goal of becoming a NATO member can be considered an armed attack that “will definitely happen”. It is a fact that after the collapse of the USSR, 14 Eastern European countries became NATO members and four of them had direct borders with Russia.²⁷ Moreover, NATO has violated the commitments of Mutual Relations, Cooperation, and Security between NATO and the Russian Federation. It is also true that these actions of Western states provoked Russia. However, it is clear that all these enlargements and Ukraine's goal of becoming a NATO member since 2008 will not constitute an armed attack that “will definitely/imminently happen”.

Russia has used its “preventive” right of self-defense, which came to the fore in the Bush doctrine, which the international community does not accept and finds unlawful. The argument of the right of self-defense, which Russia used to legitimize its invasion of Ukraine, is an act of using force contrary to international law since it does not meet the conditions in article 51 of the UN Charter. On the contrary, Russia committed the crime of “aggression” defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” as it is specified as “Definition of Aggression” in Article 1 of the UN General Assembly resolution 3314 (XXIX) dated 1974.²⁸ Since the collective security system could not be operated due to the veto of Russia, the collective security system once again collapsed due to the veto power of a permanent member state responsible for the invasion.

²⁶ Schmidt, Dennis R. and Luca Trenta, (2018). s. 23-40.

²⁷ These NATO member countries are: Czech Republic (1999), Hungary (1999), Poland (1999), Estonia (2004), Latvia (2004), Lithuania (2004), Romania (2004), Slovakia (2004), Slovenia (2004), Albania (2009), Croatia (2009), Montenegro (2017) and North Macedonia (2020).

²⁸ Definition of Aggression, General Assembly Resolution 3314 (XXIX), <https://Legal.Un.Org/Avl/Ha/Da/Da.Html>, (Access: 29.03.2022).

2. The Intervention by Invitation Doctrine and the 2022 Russo-Ukrainian War

The doctrine of intervention by invitation is another legal argument put forward by Russia to justify its invasion of Ukraine. The doctrine of intervention by invitation is a doctrine that is frequently preferred by the states and eliminates the violation of the prohibition of the use of force in the UN Treaty Article 2(4). Between 1946 and 2009, foreign intervention was made in dozens of internal armed conflicts either on behalf of the government or opposition forces, with the argument of invitation or consent.²⁹ USSR is one of the states that most frequently applied to the doctrine of intervention by invitation in the past. Today, the Russian Federation is the state that most frequently applies to the doctrine of intervention by invitation. For example, while Russia legitimized its intervention in Georgia in 2008, it resorted to the doctrines of privileged interests, self-defense, intervention by invitation, and humanitarian intervention.³⁰ Russia based its 2014 intervention in Crimea on President Yanukovich's previous, written invitation. However, the international community accepted that Yanukovich, who was removed from the administration and left the country, lost his "effective control" in the country, and that there was no legitimate authority to consent to foreign military intervention. Moreover, instead of re-establishing the Yanukovich regime, Russia supported the secession of Crimea.³¹ Russia intervened militarily in Syria in 2015, upon the Assad regime's request for military and financial support in its fight against non-state armed actors such as DAESH. Russian intervention in favor of the legitimate government was deemed legitimate because it respected Syria's sovereignty and

²⁹ Lieblic, Eliav, (2011). "Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements", *Boston University International Law Journal*, 29, p. 339.

³⁰ Mastroianni, Marissa, (2016). "Russia Running Rogue: How the Legal Justifications for Russian Intervention in Georgia and Ukraine Relate to the U.N. Legal Order", *Seton Hall Law Review*, 46(2), s. 632-642; Ferro, Luca ve Tom Ruys (2018). "The Saudi-led Military Intervention in Yemen's Civil War-2015", *Oxford University Press*, s. 85.

³¹ Mastroianni, Marissa, (2016). s. 650-651.

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territorial integrity.³² After the civil disobedience actions, which started as a result of the excessive increase in oil prices in Kazakhstan in January 2022, turned into violent clashes between the protesters and security officials in a short time, Kazakhstan President Tokayev requested assistance from the Collective Security Treaty Organization (CSTO) to combat domestic and foreign terrorists.³³ Thereupon, the CSTO, led by Russia, sent a peacekeeping force to Kazakhstan on January 6, 2022, and the mission of the peacekeeping force was completed on January 13, 2022. Unlike in 2008 Georgia and 2014 Ukraine, Russia resorted to the doctrine of intervention by invitation in Kazakhstan to support a pro-Russian government, not to overthrow pro-Western governments.³⁴ Finally, Russia relied on the doctrine of intervention by invitation to legitimize the 2022 Ukraine war.

One of the best-known principles of international law is the prohibition of interference in the internal affairs of another state.³⁵ Despite this generally accepted prohibition of intervention, if states' interventions upon invitation fulfill the necessary conditions, they comply with the UN system and gain legitimacy. The International Law Institute, which is a highly prestigious institution, regulates assistance by invitation/request in article 1 (a) as follows: *“to provide direct military assistance by another state, at the request of another state, by sending military force to the requesting state”*. Article 1(b) regulates

³² Lutta, Joseph, (2018). “How Russian intervention in Syria redefined the right to protect in armed conflict”. *Russian Law Journal*, 6(2), s. 25-26.

³³ CSTO, of which Russia, Armenia, Kazakhstan, Kyrgyzstan and Tajikistan are members, is a collective security organization established in the post-Soviet period. Cf. Hasar, Seyfullah, “Kazakhstan: Another Intervention by invitation that played out as expected”, <https://opiniojuris.org/2022/02/07/kazakhstan-another-intervention-by-invitation-that-played-out-as-expected/>, (Access: 30.03.2022)

³⁴ Chausovsky, Eugene, “Why Russia Sent Troops into Kazakhstan”, <https://foreignpolicy.com/2022/01/07/kazakhstan-russia-troops-csto/>, (Access: 30.03.2022)

³⁵ Cf. U.N. General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 21 December 1965, A/RES/2131 (XX); U.N. General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV); U.N. General Assembly, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 1981, A/RES/36/103.

that “request” means “the requesting State's consent to the terms and types of military assistance, which freely reflects its will”.³⁶ In this context, one of the most important conditions of intervention by invitation is the existence of consent. Consent is seen as an aspect of sovereignty as a natural right of every state.³⁷ A State's consent to the use of force in its territory is not considered a violation of Article 2(4). A valid consent also has some conditions of its own. In theory, consent can be “ad hoc” or unanimous. Consent can be expressed or implied. However, consent cannot be assumed.³⁸ Consent to the interference must not be impaired by error, deception, fraud, or force.³⁹ One of the prerequisites for valid consent is that it is given by the competent authority. Therefore, local authorities, opposition authorities, diplomatic officials, and military and intelligence officials do not have the authority to invite.⁴⁰ It is generally accepted that intervention by invitation is allowed on the government side and prohibited on the opposition side. As a matter of fact, many documents prohibiting aid to the opposition support this view. However, there are important questions to be answered about the specific qualifications of the government to consent to the intervention in practice.⁴¹

³⁶ Hafner, M. Gerhard (Reporter), “Present Problems of the Use of Force in International Law. Sub-Group C Military Assistance on Request”, Institut de Droit International, Session of Rhodes (Greece), 10.th Commission, Plenary, 8 September 2011 (Nov. 2, 2019), https://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf, (Access: 10.01.2022).

³⁷ Perisic, Petra, (2019). “Intervention by Invitation When Can Consent from Host State Justify Foreign Military Intervention”, *Russian Law Journal*, 7(4), pg. 9.

³⁸ Perisic, Petra, (2019). pg. 11- 12.

³⁹ Perisic, Petra, (2019). pg. 15-16.

⁴⁰ Committee on the Use of Force, International Law Association, Final Report on Aggression and the Use of Force, Sydney Conference (2018), <https://www.tandfonline.com/doi/full/10.1080/20531702.2019.1596468>, (Access: 02.04.2022).

⁴¹ U.N. General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 21 December 1965, A/RES/2131 (XX); U.N. General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV), parag. 42-53.

There is widespread support among international lawyers for the principle that consent cannot be given in the midst of a civil war.⁴² In order for an intervention by invitation to be legitimate, the internal turmoil in the country must be below the threshold of a full-fledged civil war; the doctrine should not be applied in the event of state failure or anarchy.⁴³ According to those who adopt this view, none of the warring parties can represent the state in a period of internal armed conflict. The purpose of this doctrine is to secure the principle of non-intervention and the principle of self-determination.⁴⁴ Because the right to self-determination is eroded during the intervention by invitation, and the prohibition on the use of force in Article 2(4) is also eroded. According to the International Law Institute, intervention by invitation should not be allowed when the armed conflicts in the country exceed the threshold of non-international armed conflict.⁴⁵ The principle that no side can demand military aid in a civil war is called the "negative equality doctrine".⁴⁶ If military intervention by invitation during a civil war violates the people's right to self-determination in Article 1(2) and Article 55 of the UN Treaty, the ban on the use of force is simultaneously violated.⁴⁷ The only exception to the non-intervention hypothesis is counter-terrorism. According to this exception, it is accepted that the legitimate government that fights terrorism has the right to receive explicit assistance in the fight against terrorists, including direct intervention by invitation.⁴⁸ Even assuming that the

⁴² Koen, Louis ve Brooke Hanson, (2018). "The Obligation on an Intervening State to Respect the Host State's IHL and IHRL Obligations in an Intervention by Invitation: An Analysis of the Saudi Intervention in Yemen, *Groningen Journal of International Law*, 6(1), s. 205.

⁴³ Ulfstein, Geir ve Hege Fosund Christiansen, (2013). "The Legality of the NATO Bombing in Libya", *International and Comparative Law Quarterly*, 62 (1), s. 169.

⁴⁴ Ferro, Luca ve Tom Ruys, (2018). "The Saudi-led Military Intervention in Yemen's Civil War-2015", *Oxford University Press*, 65, s. 88.

⁴⁵ *Institut de Droit International*, Resolution on Military Assistance on Request art. 2(1) (Sept. 7, 2011).

⁴⁶ De Wet, Erik, (2017-2018). "Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle", *AJIL Unbound*, 111, s. 389.

⁴⁷ De Wet, Erik, (2017-2018). s. 309.

⁴⁸ Bultrini, Antonio, (2018). "Reappraising the Approach of International Law to Civil Wars: Aid to Legitimate Governments or Insurgents and Conflict Minimization", *Canadian Yearbook of International Law*, 56, s. 164-165.

negative equality doctrine is supported by state practice, the exception to terrorism erodes the doctrine as a whole. Because the counter-terrorism exception can lead all opposition groups to be viewed as terrorists and strengthen the position of the recognized government.⁴⁹ On the other hand, states do not refrain from assisting the rebels with weapons, including logistics and intelligence; they assist with covert operations. For example, Russia supported pro-Russian rebels in the Donbas region in 2014 without obtaining permission from the Ukrainian authorities.⁵⁰

Considering the above criteria of intervention by invitation, we can say that the separatist Donetsk People's Republic and Luhansk People's Republic administrations in eastern Ukraine do not have the authority to invite foreign forces to military intervention in the country. Because the consent was not given by the "legitimate" central government. Consent was given by separatist, non-state de facto units. Currently, the legitimate government of Ukraine has not requested military assistance from Russia. The international community did not see the invitation of these units, which are not recognized as separatists and states, as legitimate in terms of international law.

It can be argued that the internal dimension of self-determination right of the people in the Donbas region is systematically violated, the people here are excluded from the representative system, and therefore they use the right to secession as a last resort. Today, the meaning of the right to self-determination has been translated from external to internal. However, as self-determination has become internalized, its scope, content, and application procedures have become unclear.⁵¹ Certain criteria must be met for the legitimate exercise of the internal right of self-determination against a despotic government. It should be a last resort against legitimate government tyranny, gain widespread support from the entire population, and have an appropriate transition plan that ensures the representation of all

⁴⁹ De Wet, Erik, (2017-2018). s. 311.

⁵⁰ Bultrini, Antonio, (2018). s. 175-179.

⁵¹ Nahlawi, Yasmine, (2014). "Self-Determination and the Right to Revolution: Syria", *Human Rights & International Legal Discourse*, 8(1), s. 88.

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citizens.⁵² The central government in Ukraine has lost its "effective control" in the Donbas region since 2015. With the Minsk process, wide autonomy was given to the separatist de facto units in the region. For this reason, it does not seem possible to argue that the internal dimension of self-determination right of the people in the Donbas region has been violated.

3. The Doctrine of Responsibility to Protect the 2022 Russo-Ukrainian War

The responsibility to protect doctrine (R2P) was adopted in the 2005 UN World Summit Outcome Document. It aims to protect people against crimes such as genocide, war crimes, ethnic cleansing, and crimes against humanity. The responsibility to protect, which is outlined in paragraphs 138 and 139 of the Conclusion Document, falls first and foremost on the states, and if the states are insufficient or unwilling to fulfill this responsibility, this responsibility passes to the international community (A/RES/60/61). It is stressed that this responsibility will be fulfilled using appropriate diplomatic, humanitarian, and other peaceful means within the framework of chapters VI and VIII of the UN Charter. In the event that peaceful means are insufficient, it is stated that this responsibility will be carried out through the UN Security Council on the basis of cooperation with relevant regional organizations, including Chapter VII.⁵³ For the use of force to be legitimate under the responsibility to protect doctrine, it must comply with article 2(4) and article 51 of the UN Charter.⁵⁴

Russia has put forward the doctrine of responsibility to protect (human intervention) to legitimize the Ukraine war, as it did in the Crimean intervention. Putin stated that their aim is "*to protect the people who were subjected to genocide by Kyiv, to rid Ukraine of Nazism and militarism*". Putin claimed that Ukraine should be demilitarized and de-Nazified in order to prevent human mistreatment

⁵² Nahlawi, Yasmine, (2014). s. 106.

⁵³ "Responsibility to Protect", <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>, (Access: 25.03.2022).

⁵⁴ Qureshi, Waseem Ahmad, (Summer 2018). "International Law and Military Intervention: U.S. Action in Syria." *University of Hawai'i Law Review*, 40 (2), s. 147-148.

and genocide.⁵⁵ It is necessary to examine these claims in terms of the terms of the responsibility to protect doctrine (R2P).

After the 2014 Crimean incident, conflicts continued between Russian-backed separatist forces and Ukrainian military units in the Donetsk and Luhansk regions in eastern Ukraine. In order to end these conflicts, Russia, Ukraine, the Organization for Security and Cooperation in Europe (OSCE) and representatives of the two separatist regions came together in Minsk, the capital of Belarus, and signed the I Minsk Protocol. However, due to the violation of the ceasefire agreement by the parties, Minsk II Agreement was signed in February 2015.⁵⁶ Despite the mentioned ceasefire agreement, conflicts in the region still continue; 14 thousand people including civilians, soldiers, and rebels died. Both sides committed violations of human rights and humanitarian law.

Considering that Ukraine lost its de facto effectiveness in 2015 in the Donbas region, the claim that Ukraine committed genocide against Russian-speaking peoples raises questions. Russia has not been able to produce solid evidence regarding this issue. Moreover, by declaring that one of the main aims of the Ukraine war was to overthrow Volodymyr Zelensky, that is, regime change, Putin shifted from the claim of protecting civilians to the goal of regime change.

Ukraine showed an unexpected military resistance against the occupation of Russia. On the other hand, it immediately resorted to legal instruments strategically to gain an advantage in its struggle against Russia.⁵⁷ On February 26, 2022, Ukraine applied to the Court under Article 9 of the 1948 Genocide Convention and Article 36(1) of the Statute of the International Court of Justice (ICJ) for violation of the

⁵⁵ “Smells of genocide’: How Putin justifies Russia’s war in Ukraine”, <https://www.aljazeera.com/news/2022/3/9/smells-of-genocide-how-putin-justifies-russias-war-in-ukraine>, (Access: 25.03.22).

⁵⁶ “Ukraine-Russia crisis: What is the Minsk agreement?”, <https://www.aljazeera.com/news/2022/2/9/what-is-the-minsk-agreement-and-why-is-it-relevant-now>, (Access: 25.03.2022).

⁵⁷ Crawford, Julia ve Thierry Cravellier, “Ukraine Responds To Warfare With “Lawfar”, <https://www.justiceinfo.net/en/89266-ukraine-responds-to-warfare-with-lawfare.html>, (Access: 25.03.2022).

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1948 Convention on the Prevention and Punishment of the Crime of Genocide. Ukraine requested the Court to immediately order "interim measures" to prevent irreparable damage and to prevent violations of rights. Russia, on the other hand, first declared that it would not attend the "oral" hearing before the Court, and then demanded that the Court was not authorized to hear the case and to refrain from taking interim measures and to remove the case from the list of the Court. On 16 March 2022, the Court ruled that Russia's non-participation in the oral hearing stage, with 2 votes to 13 (Russia and China), did not prevent it from taking the interim injunction. The Court requested that Russia end its occupation of Ukraine and immediately suspend its military operations on Ukrainian soil, as no evidence could be found that Ukraine had committed "genocide" against Russian-speaking people. The Court ruled that Russia was unfair and accepted all the arguments of Ukraine.⁵⁸

Ukraine also wanted to operate the mechanism of the International Criminal Court (ICC) due to international crimes. Neither Ukraine nor Russia are parties of the Criminal Court. Despite not being a party, Ukraine made the first notification that it accepted the jurisdiction of the Criminal Court for international crimes committed between 21 November 2013 and 22 February 2014. Then, it made a second notification due to international crimes committed since February 20, 2014. The ICC chief prosecutor initiated a preliminary investigation by processing Ukraine's application.⁵⁹ The ICC declared that it would investigate both sides for war crimes and crimes against humanity, and will show "zero tolerance", especially for sexual crimes, gender-based crimes and crimes against children.⁶⁰ In addition, the UN Human Rights Council (UNHRC) established an independent

⁵⁸ "UN international court of justice orders Russia to halt invasion of Ukraine", <https://www.theguardian.com/world/2022/mar/16/un-international-court-of-justice-orders-russia-to-halt-invasion-of-ukraine>, (Access: 25.03.2022); "ICJ Orders Russia to "Immediately Suspend Military Operations in Ukraine", <https://news.un.org/en/story/2022/03/1114052>, (Access: 25.03.2022).

⁵⁹ "Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation", <https://www.icc-cpi.int/Pages/item.aspx?name=20220228-prosecutor-statement-ukraine>, (Access: 25.03.2022).

⁶⁰ "ICC insists on 'zero tolerance' of crimes against children in Ukraine", <https://www.usnews.com/news/world/articles/2022-03-16/icc-prosecutor-khan-visits-ukraine-holds-virtual-meeting-with-president-zelenskiy>, (Access: 25.03.2022)

international investigation commission to detect future violations.⁶¹ All these processes point out that Ukraine is a victim state, while Russia is an "aggressive" state that commits international crimes.⁶² As a result, the protection responsibility argument put forward by Russia was not considered legitimate by an important judicial body such as the Court.

In the escalating conflicts in Ukraine, civilian buildings were destroyed, civilians were killed and approximately 4 million people became refugees in neighboring countries (such as Hungary, Poland and Moldavia). While 7 million people had to relocate within the country, 12 million people were in need of humanitarian aid. 902 civilians were killed and 1459 were injured on March 20, 2022.⁶³ From a different perspective, the human tragedy has brought up the possibility of Western countries to engage in a "military intervention within the framework of the responsibility to protect doctrine" in order to end the humanitarian tragedy in Ukraine. Since Russia has not been given a way out, the risk of its resorting to nuclear weapons, and the fact that nuclear weapons may cause disproportionate humanitarian tragedies without making a distinction between civilians and combatant, has decreased this possibility.⁶⁴

⁶¹ "Human Rights Council to establish Commission of Inquiry on Ukraine", <https://news.un.org/en/story/2022/03/1113292>, (Access: 25.03.2022).

⁶² Crawford, Julia ve Thierry Cravellier, "Ukraine Responds To Warfare With 'Lawfare'", <https://www.justiceinfo.net/en/89266-ukraine-responds-to-warfare-with-lawfare.html>, (Access: 25.03.2022).

⁶³ "Ukraine Refugee Situations", <https://data2.unhcr.org/en/situations/ukraine>, (Access: 25.03.2022); Roy, Diana, "How Bad is Ukraine's Humanitarian Crisis?", <https://www.cfr.org/in-brief/ukraine-humanitarian-crisis-refugees-aid>, (Access: 25.03.2022).

⁶³ "Ukraine Refugee Situations", <https://data2.unhcr.org/en/situations/ukraine>, (Access: 25.03.2022); Roy, Diana, "How Bad is Ukraine's Humanitarian Crisis?", <https://www.cfr.org/in-brief/ukraine-humanitarian-crisis-refugees-aid>, (Access: 25.03.2022).

⁶⁴ Ralph, Jason, "Ukraine and the Responsibility to Protect: the consequences for the vulnerable (and the not yet vulnerable) should be front and centre of our reasoning", Access: 25.03.2022).

CONCLUSION

As a result, Russia's attack on Ukraine has severely violated the prohibition on the use of force in article 2(4) of the UN Treaty. However, She did not base it on an argument that the prohibition on the use of force in 2(4) had been abolished, on the contrary, She tried to legitimize its actions against Ukraine by relying on international law, based on the doctrines of self-defense, consensual intervention and responsibility to protect. Therefore, this attitude of Russia causes strengthening the existence of the prohibition rather than weakening the prohibition on the use of force in Article 2(4) of the UN Treaty.

On the other hand, when compared to the invasion of Iraq by the USA, which is a permanent member of the UN Security Council, and the regime change process in 2003, the international community reacted sharply to Russia's actions against Ukraine and remembered the importance of international legal norms. In fact, since Russia has veto power in the UN Security Council, the collective security system in Chapter VII of the UN Agreement could not be operated in this case, and the veto power was abused. However, the international community harshly condemned Russia with the resolution of the UN General Assembly. Regional organizations such as NATO and the EU, and countries such as the USA, Canada, England, Germany, France and Italy have also resorted to imposing strict economic sanctions against Russia. Russia's attack on Ukraine has revealed the importance of international legal norms and the necessity for all states to respect these norms.

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