Putin’s War against Ukraine: Mocking International Law

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By Ralph Janik February 28, 2022

Russia’s attack on Ukraine is an obvious violation of international law. Neither self-defense nor the entirely baseless accusation of a purported “genocide” in Eastern Ukraine serves as a sufficient legal basis and any Ukrainian concessions would be legally invalid. Russia has created a new and utterly sad textbook example of a violation of the prohibition of war – first enshrined in the Kellogg-Briand Pact – and the use of force in article 2(4) UN Charter, one of “the most fundamental principles and rules of international law” (as the ICJ recently re-confirmed in its February 2022 judgment in the reparations phase of the Armed Activities on the Territory of the Congo case, para. 65).

One must also not forget that it had violated this obligation much earlier, i.e. by annexing Crimea (see UNGA resolution 68/262 from 1 April 2014), supporting separatists in Eastern Ukraine and sending special forces (which triggered a parallel international armed conflict). The preceding troop movements in the region, tied to military exercises and demands of “security guarantees”, also amounted to an unlawful threat of the use of force (see Anne Peters’ recent post at Max Planck Law).

Abusing the ius ad bellum

Yet, states never openly admit violations of international law in general and, even less, one of its “cornerstones” (see the ICJ’s 2005 judgment in the Congo v. Uganda case) in particular.

In light of the obvious absurdity of seeking previous Security Council approval, Russia justified its attack with a mixture of the right to (collective) self-defense, fake claims of genocide and a quasi “ideological intervention”. Needless to say, none of these arguments hold up to scrutiny.

Self-defense: the “magic hat”

In hindsight, it seems as if Putin was determined to attack Ukraine all along and all negotiation efforts might thus have been futile from the very beginning. The only remaining question was which justifications he would rely on most given that there were no indications of an imminent or actual armed attack by Ukraine in the sense of article 51 – one does not need to be a general officer to know that striking Russia’s military first is a very bad idea. So one option might have been a fabricated pretext: In January 2022, the Pentagon accused Russia of planning to stage a “false flag” operation – a claim rejected by foreign minister Sergei Lavrov as “nonsense”.

Ultimately, Putin chose an equally brazen argument, namely the right to (collective) self-defense of the self-declared "People's Republics" of Luhansk and Donetsk. The first problem with this approach is that support for non-state armed groups is unlawful under international law. As the ICJ held in the famous Nicaragua case (para. 246),

it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State [and even that is questionable, see the Institute of International Law's 1975 Wiesbaden Session], were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.

To overcome this legal obstacle – even more so since it would render outside support for, e.g., Chechen rebels admissible – Russia recognized these entities as states under international law (similar to what it e.g. did with Abkhazia and South Ossetia).

The "People's Republic" are not States

Such recognitions during ongoing armed conflicts constitute violations of the non-intervention principle, even more so since both breakaway regions are completely dependent on Russia and thus not sovereign. To quote Hersch Lauterpacht,

[r]ecognition is unlawful if granted *durante bello*, when the outcome of the struggle is altogether uncertain. Such recognition is a denial of the sovereignty of the parent State … Premature recognition is a wrong not only because, in denying the sovereignty of the parent State actively engaged in asserting its authority, it amounts to unlawful intervention. It is a wrong because it constitutes an abuse of the power of recognition. It acknowledges as an independent State a community which is not, in law, independent and which does not therefore fulfill the essential conditions of statehood.

Russia itself knows that all too well since it has been blocking Kosovo's recognition and admission to the UN to protect Serbia's interests and territorial integrity – although the war there ended in 1999 and Kosovo only declared independence in 2008, a substantial difference to Eastern Ukraine. Most importantly and as a way of justifying its actions in Georgia, Russia endorsed the doctrine of "remedial secession" but held that its prerequisites had not been fulfilled in Kosovo.

Russia's attack can thus not be based on the right to collective self-defense. Although the situation in the 2008 Georgia war was somewhat different because Georgia had been obliged to refrain from using force against South Ossetia by virtue of two agreements from 1992 and 1994 and a memorandum from 1996, the *Independent International Fact-Finding Mission on the Conflict in Georgia Report* (Volume II) rejection of a right for breakaway regions to seek outside help also applies to Ukraine. The Mission stated that:

the inadmissibility of an intervention upon invitation by the South Ossetian de facto Government would be undermined by allowing collective self-defence in favour of South Ossetia … a right [to collective self-defense] would not de-escalate, but escalate the

conflict and therefore run counter to the objectives of the United Nations. (p. 282)

From a policy perspective, it also deserves to be mentioned that Russia's expansive recognition practice runs counter to Chinese interests since they could be interpreted as further inspirations for secessionist ambitions in Tibet, Hong Kong, or Taiwan. One may speculate about the impact of this step on China's decision to abstain from using its veto on the draft Security Council resolution which would have condemned Russia's aggression, despite the recently deepened ties to Xi Jinping. You cannot have your cake and eat it.

Abusing the Protection of Nationals-Doctrine and the Responsibility to Protect – again

In addition, Russia has also relied on a mixture of abusive interpretations of the protection of nationals-doctrine and the Responsibility to Protect. This is similar to Russia's reliance on these concepts in the 2008 Russia-Georgia war and the annexation of Crimea (until it switched and relied on an invitation by then-ousted Ukrainian president Viktor Yanukovych, see also here).

The protection of nationals doctrine holds that states may engage, as a last resort, in minimally invasive "special operations" to rescue their citizens from imminent threats abroad. The archetypical example is the Israeli Defense Forces' effort to free 103 Israelis taken hostage by Palestinian and German terrorists at the airport in Uganda ("Operation Entebbe").

Yet, while rescue missions can be at least understandable in some cases (one could also think of the Tehran hostages crisis), their lawfulness has not been commonly accepted (see Tom Ruys' extensive survey on this subject-matter). Weaker states in particular fear abuse as countries with substantial minorities with ties to powerful states would have to live under a permanent threat: as the Parliamentary Assembly of the Council of Europe held in resolution 1633 (2008) on *The consequences of the war between Georgia and Russia*,

from the point of view of international law, the notion of "protecting citizens abroad" is not acceptable and is concerned by the political implications of such a policy by the Russian authorities for other member states where a substantial number of Russian citizens reside.

Last but not least: Even if the protection of nationals-doctrine were generally accepted, the situation in Ukraine would not fit the criteria outlined above as there are no indications of an ongoing or imminent threat to Russians in Ukraine.

Even if there were any, Russia's action would still have to be proportionate to the danger. Outside of mass atrocities, invasions and other large-scale attacks are excessive. In this connection, it needs to be emphasized that Vladimir Putin's recent accusations of an ongoing genocide in the Donbas are just as baseless as those brought up by the Russian

government in Georgia 2008. Furthermore, one also needs to remember that the Responsibility to Protect has not altered the requirement of Security Council authorizations for military interventions.

Putin's End Game

Behind the rhetorical masquerade of self-defense and protecting Russians in the East of Ukraine are ambitions to extort concessions by Ukraine to stay outside of NATO. Any such agreement with Ukraine would, however, be invalid due to the preceding coercion (see Article 52 Vienna Convention on the Law of Treaties).

Going even further, Putin's "de-nazification" pretext hints at regime change and the installation of a puppet regime. As the ICJ's brief briefly stated in *the Nicaragua* case, such an "ideological intervention" would be "a striking innovation" (para. 266) and thus does not constitute a legal argument.

The Role of International Law

Self-defense has been the most common reason to resort to wars throughout history and even more so in the UN Charter era. Aggressors routinely try to build up their own narratives to justify the unjustifiable, as absurd as they may often seem.

Where do we go from here? Those who desperately want to consider the glass half full in times like these may conclude by noting that not even rogue actors like the Russian government go as far as denouncing the prohibition of the use of force *in toto*. While Putin and Lavrov consider the current international order as some sort of "Western construct", this worldview does not seem to apply to Article 2(4) UN Charter. In legal theory at least, we are not back in the dark days of war as a regular and generally accepted tool of *continuation of politics by other means*. Not much, I know.