

Editorial comment
Russia's attack on Ukraine and the *jus ad bellum*

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ABSTRACT

The 24 February 2022 Russian invasion of – or ‘special military operation’ in – Ukraine has sent shock waves across the globe. In this editorial the Editors-in-Chief of *JUFIL* examine in detail the legal justifications advanced by President Putin for Russia’s use of military force and subject them to scrutiny. Doing so highlights just how devoid of substance and credibility they are within the context of the *jus ad bellum* as it exists today. Furthermore, the Editors reflect on some of the broader questions that this use of military force poses for the *jus ad bellum*, including what the invasion of Ukraine says about the efficacy of the contemporary *jus ad bellum* and what is – or what might be – the ultimate impact upon the rules and norms governing the use of force.

KEYWORDS Russia; Ukraine; force; self-defence; humanitarian intervention; military assistance on request

1. Introduction

* All websites accessed 20 March 2022. Given that it relates to an ongoing and fast-changing situation, it is worth noting that this editorial was finalised on 20 March 2022.

Following weeks of mounting tension, with around 130,000 Russian troops mobilised along the Russian-Ukrainian border and within Belarus,¹ Russia finally launched a large-scale military assault on Ukraine on 24 February 2022.² At the time of writing, that assault has been ongoing for three-and-a-half weeks. With no clear end in sight, it has already caused enormous harm and suffering,³ and its immediate humanitarian consequences for the Ukrainian people must be the primary concern for the world. Yet the implications of Russia's actions for wider global security and the international rule of law are stark,⁴ and undoubtedly affect all nations and all peoples.

Obligations arising from several areas of international law are engaged (and in some cases, we would contend, seriously violated) by Russia's invasion of Ukraine.⁵ However, *JUFIL* is a journal that is focused on questions of the *jus ad bellum* and, as such, in this editorial we specifically focus upon the *ad bellum* claims advanced by Russia in relation to its use of force against Ukraine. In particular, it is important to unpick Russia's (intertwined) *ad bellum*

¹ See, e.g. Thomas Kingsley, 'New satellite images show Russian military activity as "130,000" troops now on Ukraine border', *The Independent* (15 February 2022) www.independent.co.uk/news/world/europe/russia-ukraine-satellite-images-b2015354.html.

² 'Russia invades Ukraine', *The Economist* (24 February 2022) www.economist.com/europe/2022/02/24/russia-invades-ukraine.

³ For example, as of 19 March 2022, the UN Office of the High Commissioner for Human Rights (OHCHR) had recorded 2,246 civilian casualties in Ukraine (847 killed and 1,399 injured), based on data collected by the UN Human Rights Monitoring Mission in Ukraine. However, the OHCHR was also explicit that it took the view that 'the actual figures are considerably higher ...'. See 'Ukraine: civilian casualty update', *OHCHR* (last updated 19 March 2022) www.ohchr.org/en/press-releases/2022/03/ukraine-civilian-casualties-update-19-march-2022. Further, also as of 19 March 2022, the UN High Commissioner for Refugees (UNHCR) estimated that more than 3.3 million refugees had fled Ukraine since 24 February 2022. See 'Refugees fleeing Ukraine (since 24 February 2022)', Ukraine refugee situation, *UNCHR* (last updated 19 March 2022) <https://data2.unhcr.org/en/situations/ukraine> (exact figure estimated by the UNHCR: 3,389,044 people). Moreover, the 'Protection Cluster' of UN agencies issued a joint report estimating that, as of the latest available data from 16 March 2022, an additional 6.48 million people had been internally displaced since 24 February as a result of the conflict. See 'Update on IDP figures in Ukraine', *UNOCHA* (18 March 2022) www.humanitarianresponse.info/en/operations/ukraine/document/protection-cluster-idp-population-estimation-figures-18-march-2022).

⁴ See, e.g. Nico Krisch, 'After hegemony: the law on the use of force and the Ukraine crisis', *EJIL:Talk!* (2 March 2022) www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis/ ('[t]he Russian invasion involves 'a great power openly flouting international law ... [and] in a decentralized order such as international law, the weight of the law is eroded if powerful actors treat it cavalierly'); Richard Gowan, 'The UN is another casualty of Russia's war: why the organization might never bounce back', *Foreign Affairs* (10 March 2022) www.foreignaffairs.com/articles/west-africa/2022-03-10/un-another-casualty-russias-war.

⁵ For example, one might note that following 39 state party referrals to the Office of the Prosecutor of the International Criminal Court, the Prosecutor opened an investigation into the situation in Ukraine which will investigate the commission of war crimes and crimes against humanity. See 'Statement of ICC Prosecutor, Karim A Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation', *International Criminal Court* (2 March 2022) www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine.

claims, not least because treating those arguments at face value and properly analysing them acts to shine a light on just how baseless and cynical they are, on multiple levels.⁶

2. The prohibition on the use of force and President Putin’s 24 February speech

There is no question that Russia’s invasion – the largest military offensive in Europe since the Second World War⁷ – was a *prima facie* breach of the prohibition on the use of force, as enshrined in Article 2(4) UN Charter⁸ and in customary international law.⁹ Indeed, when tested against the non-exhaustive list of ‘acts of aggression’ in the UN General Assembly’s Definition of Aggression,¹⁰ the operation pretty much ticks every box, involving, as it does, the invasion and occupation of another state’s territory (Article 3(a)), the bombardment of another state’s territory (Article 3(b)), the blockade of the port of Mariupol and the Sea of Azov¹¹ (Article 3(c)), an attack against the land, sea or air forces of another state (Article 3(d)) and even the sending of armed bands, irregulars or mercenaries (including Syrian fighters or mercenaries from the ‘Wagner Group’)¹² (Article 3(g)).¹³ It is worth recalling that the prohibition of

⁶ The 2022 invasion of Ukraine has led to an unprecedented number of statements of condemnation being issued by learned societies and groups of international law experts, all of which have zeroed in on the breach of the prohibition on the use of force and the fact that the military invasion constitutes an act of aggression. See, e.g. ‘Déclaration de l’Institut de Droit international sur l’agression en Ukraine’, *Institut de Droit international* (10 March 2022) www.idi-iil.org/fr/declaration-de-linstitut-de-droit-international-sur-lagression-en-ukraine; ‘Statement by the President and the Board of ESIL on the Russian Aggression against Ukraine’, *European Society of International Law* (24 February 2022) <https://esil-sedi.eu/statement-by-the-president-and-the-board-of-the-european-society-of-international-law-on-the-russian-aggression-against-ukraine/>; ‘ILA Statement on the Ongoing and Evolving Aggression in and against Ukraine’, *International Law Association* (3 March 2022) linked via www.ila-hq.org/index.php/news (the same webpage also links to a statement by the ILA Executive Chair, and – at the time of writing – 12 statements made by ILA national branches); ‘Statement by Members of the International Law Association Committee on the Use of Force’, *Just Security* (4 March 2022) www.justsecurity.org/tag/statement-by-members-of-ila-committee-on-use-of-force/ (available, at the time of writing, in 29 languages); Statement of ASIL President Catherine Amirfar Regarding the Situation in Ukraine, *American Society of International Law* (23 February 2022) www.asil.org/sites/default/files/pdfs/ASIL_Statement_Situation_in_Ukraine.pdf; ‘Statement on the Situation in Ukraine’, *Global Institute for the Prevention of Aggression* (24 February 2022) https://crimeofaggression.info/wp-content/uploads/GIPA-Statement_-Situation-in-Ukraine-24-February-2022.pdf.

⁷ Henry Foy, ‘Military briefing: Russia tightens grip on Ukraine’s south’, *Financial Times* (3 March 2022) www.ft.com/content/4589e3e3-bd75-49b5-bd7c-6a3174419192.

⁸ Charter of the United Nations (1945) 1 UNTS XVI (UN Charter) Article 2(4).

⁹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, paras 174–8.

¹⁰ UNGA Res 3314 (XXIX), UN Doc A/RES/3314 (14 December 1974).

¹¹ See Alexander Lott, ‘Russia’s blockade in the Sea of Azov: a call for relief shipments for Mariupol’, *EJIL: Talk!* (14 March 2022) www.ejiltalk.org/russias-blockade-in-the-sea-of-azov-a-call-for-relief-shipments-for-mariupol.

¹² See Hanan Razek and Ilya Barabanov, ‘War in Ukraine: How Russia is recruiting mercenaries’, *BBC News* (12 March 2022) www.bbc.co.uk/news/world-europe-60711211; ‘Russia drafting thousands in Syria for Ukraine war: monitor’, *France24* (15 March 2022) www.france24.com/en/live-news/20220315-russia-drafting-thousands-in-syria-for-ukraine-war-monitor.

¹³ To complete the list, it could be observed that Russia had already committed an ‘act of aggression’ in the sense of Article 3(e) of the Definition of Aggression (n 10) by using its forces in the Crimean peninsula in contravention

aggression is widely considered to be a *jus cogens* norm, from which no derogation is permitted.¹⁴

It follows that for Russia's invasion of Ukraine to be lawful under the *jus ad bellum*, Russia bears the burden of proving that a proper legal justification exists to preclude its *prima facie* illegality. This holds true notwithstanding the fact that an ongoing armed conflict could be said to have existed between Ukraine and Russia ever since the unlawful annexation of Crimea in 2014.¹⁵ The existence of an armed conflict triggering the obligations of the *jus in bello* indeed does not preclude the concurrent and ongoing need to apply (and, if necessary, reapply) the rules of the *jus ad bellum*¹⁶ – especially where a significant geographical escalation of a pre-existing conflict occurs, as in the present case. This is borne out by the fact that the two protagonist states, as well as the broader international community, all framed the (il)legality of the invasion through a *jus ad bellum* lens.¹⁷

Russia's *ad bellum* arguments – such as they are – predominantly can be found in President Putin's already infamous television address, made during the early hours of 24

of the conditions provided for in the troop stationing agreement with Ukraine when it took control of Crimea in 2014. See Mary Ellen O'Connell, 'Ukraine Insta-Symposium: Ukraine under International Law', *Opinio Juris* (7 March 2014) www.opiniojuris.org/2014/03/07/ukraine-insta-symposium-ukraine-international-law. Lastly, Belarus would appear to be implicated in the act of aggression through allowing its territory to be used by Russian armed forces to perpetrate its act of aggression against Ukraine (Article 3(f)).

¹⁴ See, e.g. *Text of the draft conclusions on peremptory norms of general international law (jus cogens), adopted by the Commission on first reading with commentaries*, Report of the International Law Commission on the work of its seventy-first session, UN Doc A/74/10 (2019) 141 (commentary to draft conclusion 23); *Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission on the work of its fifty-third session, UN Doc A/56/10 (2001) 112. Admittedly, some take the view that the *jus cogens* norm located within the *jus ad bellum* is not limited merely to the prohibition of aggression, but is more correctly identified as the prohibition on the use of force (see, e.g. Katie A Johnston, 'Identifying the *Jus Cogens* Norm in the *Jus Ad Bellum*' (2021) 70 *International and Comparative Law Quarterly* 29, particularly 42), or even that the entirety of the *ad bellum* regime is peremptory (see, e.g. Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) 51). Whereas others have queried the *jus cogens* status of the prohibition (see, e.g. James A Green 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215).

¹⁵ See, e.g., Patrycja Grzebyk, 'Classification of the Conflict between Ukraine and Russia in International Law (*Jus ad Bellum* and *Jus in Bello*)' (2014) 34 *Polish Yearbook of International Law* 39, particularly 41–8.

¹⁶ On the concurrent application of *jus ad bellum* and *jus in bello* obligations, see Keiichiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart Publishing, 2011) 31–5. See also Gal Cohen, 'Mixing Oil and Water? The Interaction between *Jus ad Bellum* and *Jus in Bello* During Armed Conflicts' (2022) *Journal on the Use of Force and International Law* (forthcoming, 42 pages).

¹⁷ In spite thereof, it is worth noting that some scholars have argued that the *jus ad bellum* is perhaps the incorrect legal prism through which to view the intervention, on the basis that Russia and Ukraine have been involved in an international armed conflict (occurring in parallel to a non-international armed conflict) ever since the Kremlin's unlawful annexation of Crimea in 2014 and the war in Donbas that soon followed; questions regarding whether Russia can lawfully use force in Ukraine under the *jus ad bellum* have thus already been asked – and answered, in the negative – 8 years ago. See, e.g. Marco Roscini, 'Russia has not breached the *jus contra bellum* in 2022; it did in 2014', *Völkerrechtsblog* (7 March 2022) <https://voelkerrechtsblog.org/russia-has-not-breached-the-jus-contra-bellum-in-2022-it-did-in-2014/>; David Turns, 'Ukraine – an international law perspective', *Cranfield University*, Press Release number PR-CDS-22-09 (22 February 2022) www.cranfield.ac.uk/press/news-2022/ukraine-an-international-law-perspective.

February, which effectively amounted to Russia's declaration of war against Ukraine (albeit couched as a 'special military operation').¹⁸ It is clear from that speech that at least the core of the Russian claim was the right of self-defence, with President Putin explicitly stating that 'we are acting to defend ourselves'¹⁹ and that this was 'in accordance with Article 51 (Chapter VII) of the UN Charter'.²⁰

This focus on self-defence was confirmed by the fact that President Putin's speech was then appended to a letter sent to the UN Security Council by way of fulfilling the reporting requirement under Article 51 UN Charter.²¹ The speech later was also annexed to a letter that Moscow submitted to the International Court of Justice (ICJ), as part of its attempt to demonstrate that the ICJ has no jurisdiction over the claim brought by Ukraine against Russia under the Genocide Convention.²² In spite of the foregoing, President Putin's speech also hinted, at least implicitly, at a number of alternative potential legal justifications, such as a supposed invitation to intervene or a 'humanitarian intervention' claim.

In section 3, we address Russia's central self-defence claim in detail. First, we consider Russia's claims to be acting in individual self-defence in response to alleged threats from both NATO and Ukraine itself. We then turn to Russia's purported claim of collective self-defence: i.e., that its invasion was an act to defend the separatist regions of the Donbas. Then, in section 4, we examine – and ultimately are compelled to dismiss – other potential legal bases. Section 5 concludes and offers some thoughts on the wider implications of Russia's invasion for the *jus ad bellum* and the international legal order.

3. Russia's claim(s) of self-defence

¹⁸ 'Address by the President of the Russian Federation', *Office of the President of the Russian Federation* (24 February 2022) <http://en.kremlin.ru/events/president/transcripts/67843> (official English translation, as published by the Kremlin); Обращение Президента Российской Федерации, *Президент России* (24 февраля 2022 года) <http://kremlin.ru/events/president/news/67843> (original Russian text, as published by the Kremlin).

¹⁹ *Ibid* (emphasis added).

²⁰ *Ibid*.

²¹ 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 (5 March 2022). On the reporting requirement generally, see James A Green, 'Article 51 Reporting Requirement for Self-Defense Actions' (2015) 55 *Virginia Journal of International Law* 563.

²² See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, 'Document (with annexes) from the Russian Federation setting out its position regarding the alleged 'lack of jurisdiction' of the Court in the case', ICJ Rep (7 March 2022) www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf. Russia refused formally to participate in the ICJ procedure, but in its letter of 7 March, *ibid*, para 3, explained that it had 'decided that its position regarding the lack of competence of the Court in this case should be hereby brought to its attention.'

Interestingly, Russia's self-defence 'claim' in fact consisted of multiple claims. As is well known, Article 51 provides that states have a right to 'individual and collective self-defence'.²³ Russia invoked *both*. These are conceptually distinct, albeit interrelated, claims, so it is useful to take them in turn.

3.1 Individual self-defence

In President Putin's 24 February address, he set out various intertwined threats both to Russia as a territorial state and to Russian nationals in Ukraine, against which, he argued, Russia must defend itself. Although it is somewhat artificial to do so, as they are closely linked, it is helpful further to separate these aspects of Russia's individual self-defence claim and take them in turn.

3.1(a) In response to a threat posed by NATO to Russia

The first aspect of Russia's individual self-defence claim is the perceived encroaching threat posed by NATO's eastwards expansion, which President Putin clearly identified as representing an existential threat to the Russian state. In his words:

[f]or the United States and its allies, it is a policy of containing Russia, with obvious geopolitical dividends. For our country, *it is a matter of life and death*, a matter of our historical future as a nation. This is not an exaggeration; this is a fact. It is not only a very real threat to our interests but to *the very existence of our state* and to its sovereignty. It is the red line which we have spoken about on numerous occasions. They [NATO] have crossed it.²⁴

Article 51 famously holds that the right of self-defence is triggered 'if an armed attack occurs against a Member of the United Nations'.²⁵ The term 'armed attack' is widely understood to refer to a 'grave' use of force,²⁶ albeit that this is not a universal understanding of the term²⁷

²³ UN Charter (n 8) Article 51.

²⁴ 'Address by the President of the Russian Federation' (n 18) (emphasis added).

²⁵ UN Charter (n 8) Article 51.

²⁶ See, e.g. *Nicaragua* (n 9) para 191; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (merits) [2003] ICJ Rep 161, para 51; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 403; Avra Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Bruylant, 2000) 57.

²⁷ See, e.g. United States, *Department of Defense Law of War Manual 2015* (updated May 2016) Office of General Counsel, Department of Defence, 47, para 1.11.5.2; Elizabeth Wilmshurst (ed), 'The Chatham House Principles

and even if one accepts that a qualitatively graver use of force is required, it is unclear exactly what level of ‘gravity’ will be sufficient to constitute an armed attack.²⁸ In any event, it is abundantly clear that there had been no armed attack – no use of force, ‘grave’ or otherwise – against Russia by NATO prior to the invasion on 24 February.

However, President Putin of course did not claim that there had been an armed attack against Russia by NATO. Instead, he indicated that Russia was facing *future threats* against which it must respond. While the wording of Article 51 would seem clear that an armed attack must have ‘occurred’ or be ‘occurring’, there is now substantial support both from states²⁹ and scholars³⁰ for the idea that if an armed attack is temporally *imminent*, a state can use force in self-defence, without having to wait for the ‘hammer to fall’. This concept of what is sometimes called ‘anticipatory self-defence’³¹ in the face of an imminent armed attack is by no means free from controversy amongst states and international lawyers, with many continuing to insist that self-defence remains a possibility if, and only if, ‘an armed attack occurs’.³² At the same time, the lawfulness of self-defence against an imminent armed attack may well have come to constitute the majority view.³³

One might therefore interpret Russia’s claim in this respect as being that NATO had expanded to the point that it now posed to Russia the threat of an imminent armed attack, to which it could respond with an anticipatory use of defensive force. However, even if one accepts the lawfulness of anticipatory self-defence, such a claim was factually baseless in this

of International Law on the Use of Force by States in Self-Defence’ (2006) 55 *International and Comparative Law Quarterly* 963, 966; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005) 138.

²⁸ See, e.g. Douglas Guilfoyle, ‘The Gulf of Tonkin Incident – 1961’, in Tom Ruys, Olivier Corten (eds) and Alexandra Hofer (assistant ed), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018) 108, 115.

²⁹ See the surveys of state practice in Tom Ruys, *‘Armed Attack’ and Article 51 of the UN Charter* (Cambridge University Press, 2010) 330–42; James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 112–29.

³⁰ See, e.g. Stefan Talmon, ‘Changing Views on the Use of Force: The German Position’ (2005) 5 *Baltic Yearbook of International Law* 41, 60–3; Rainer Hofmann, ‘International Law and the Use of Military Force Against Iraq’ (2002) 45 *German Yearbook of International Law* 9, 31; Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018) 277–81; Noam Lubell, ‘The Problem of Imminence in an Uncertain World’, in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 697, 701; Alex Bellamy, ‘International Law and the War with Iraq’ (2003) 4 *Melbourne Journal of International Law* 497, 515–7.

³¹ It is worth noting that the terminology with regard to claims of self-defence against attacks that have not yet occurred is not clear; various terms are used by different scholars to mean different things in this context. See James A Green, ‘The *Ratione Temporis* Elements of Self-Defence’ (2015) 2 *Journal on the Use of Force and International Law* 97, 102–3.

³² See, e.g. Johanna Friman, *Revisiting the Concept of Defence in the Jus ad Bellum* (Hart Publishing, 2017) 60–6; Corten (n 26) 406–43.

³³ Anthony Garwood-Gowers, ‘Israel’s Airstrike on Syria’s Al-Kibar Facility: A Test Case for the Doctrine of Preemptive Self-Defence?’ (2011) 16 *Journal of Conflict and Security Law* 263, 279; Green (n 31) 106.

instance. There was no evidence whatsoever ahead of the invasion of Ukraine to support the idea that NATO was about to launch, imminently, an armed attack against Russia.³⁴ This is further borne out by the fact that NATO member states had very limited military assets in place near their eastern frontiers ahead of Russia's invasion³⁵ (certainly in comparison to the 130,000 troops and thousands of tanks which Russia had massed together along the Ukrainian border),³⁶ as well as the fact that, even after Moscow initiated its 'special military operation', NATO member states were keen not to be dragged into an armed conflict with Russia.³⁷ In fact, fears of a possible direct confrontation with its eastern neighbour were a major reason why various NATO members had held back from supporting the potential Ukrainian membership of NATO.³⁸

Russia's repeated allegations,³⁹ including most prominently at the UN Security Council on 11 March 2022,⁴⁰ that Ukraine had become host to around 30 US/NATO funded biological weapons development facilities does not mean that NATO posed a realistic, imminent threat to Russia either. Although the US openly funds biological research being undertaken in Ukrainian territory,⁴¹ most of the various claims made alleging 'secret' facilities to weaponize such activity are demonstrably false, and all such claims were made without any evidence to support them whatsoever.⁴² In the same meeting of the Security Council where Russia formally brought these allegations to the UN, the High Representative for Disarmament Affairs made it

³⁴ Michael N Schmitt, 'Russia's "special military operation" and the (claimed) right of self-defense', *Articles of War* (28 February 2022) <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>.

³⁵ *Ibid.*

³⁶ See Kingsley (n 1).

³⁷ See, e.g. Robin Wright, 'The growing fear of a wider war between Russia and the West', *The New Yorker* (10 March 2022) www.newyorker.com/news/daily-comment/the-growing-fear-of-a-wider-war-between-russia-and-the-west.

³⁸ See Natasha Turak, 'Russia is "a power in decline" but still poses a military threat, NATO chief says', *CNBC* (16 December 2021) www.cnn.com/2021/12/16/russia-is-in-decline-but-still-poses-military-threat-nato-chief.html. Ukrainian membership would indeed have meant that Russia's attack on Ukraine would have triggered the collective defence obligation under the North Atlantic Treaty (1949) 34 UNTS 243, Article 5.

³⁹ See 'U.S. dismisses Russian claims of biowarfare labs in Ukraine', *Reuters* (9 March 2022) www.reuters.com/world/russia-demands-us-explain-biological-programme-ukraine-2022-03-09. It is notable that China explicitly repeated, on multiple occasions itself, Russia's unsubstantiated allegations of a US-run biological weapons programme in Ukraine. See William Langley and Edward White, 'China backs Russian allegations about US biological weapons', *Financial Times* (14 March 2022) www.ft.com/content/3f9b8164-e9d6-4dfd-880a-f4fa96966439.

⁴⁰ Video: 'Threats to international peace and security – Security Council, 8991st Meeting', *UN Web TV* (11 March 2022) <https://media.un.org/en/asset/k16/k16nsx50dm> (at time of writing, written Verbatim Record not yet available); Missy Ryan, Adela Suliman and Maite Fernández Simon, 'Russia accuses U.S. of supporting a biological weapons program in Ukraine at U.N. Security Council meeting', *The Washington Post* (11 March 2022) www.washingtonpost.com/world/2022/03/11/un-council-ukraine-russia-chemical-weapons-zelensky.

⁴¹ Olga Robinson, Shayan Sardarizadeh and Jake Horton, 'Ukraine war: Fact-checking Russia's biological weapons claims', *BBC News* (15 March 2022) www.bbc.co.uk/news/60711705.

⁴² *Ibid.*

very clear that the UN had no reason to believe that any such biological weapons programmes existed.⁴³ Two days earlier, the US White House Press Secretary, Jen Psaki, had already labelled such allegations ‘preposterous’.⁴⁴ It can be said that, at least at the time of writing, there is nothing that would in any way contradict Psaki’s assessment.

It is patently evident that there was, categorically, no credible basis for Russia to assert that it faced an imminent threat from NATO in February 2022. Interestingly, though, President Putin himself did not in fact appear to take the view that the threat from NATO that he was identifying was an imminent one. Rather, he seemed to be referring to a threat of a more temporally remote nature:

[T]he North Atlantic alliance [has] continued to expand despite our protests and concerns. Its military machine is moving and, as I said, is approaching our very border. ... [A] military presence in territories bordering on Russia, if we permit it to go ahead, will stay for decades to come or maybe forever, creating an ever mounting and totally unacceptable threat for Russia.⁴⁵

Russia’s individual self-defence claim in relation to NATO thus was based on the idea that a state can use force against a vague, non-imminent, threat that it perceives may occur at some unspecified point in the future. Many readers will recall that the US at least toyed with a similar argument prior to the Iraq invasion in 2003⁴⁶ – although it ultimately relied (albeit unconvincingly) on the idea of a pre-existing UN Security Council authorization.⁴⁷ This claim that self-defence can be exercised against non-imminent threats – sometimes referred to as ‘pre-emptive self-defence’⁴⁸ – was set out most prominently by former President George W Bush in the 2002 US National Security Strategy.⁴⁹

⁴³ Included in the full video of the 8991st meeting of the Security Council (n 40); also extracted in a shorter video: ‘Briefing by Izumi Nakamitsu, Under-Secretary-General and High Representative for Disarmament Affairs, on Ukraine’, *UN Web TV* (11 March 2022) <https://media.un.org/en/asset/k1n/k1nwy2r7os> (at time of writing, written Verbatim Record not yet available).

⁴⁴ Jen Psaki (@PressSec), *Twitter* (9 March 2022) <https://twitter.com/PressSec/status/1501676231988817927?s=20&t=KwYRmjT80rip6PAJzOJ5kA>.

⁴⁵ ‘Address by the President of the Russian Federation’ (n 18).

⁴⁶ See generally Christian Henderson, ‘The Bush Doctrine: From Theory to Practice’ (2004) 9 *Journal of Conflict and Security Law* 3; Christine Gray, ‘The US National Security Strategy and the New “Bush Doctrine” on Pre-Emptive Self-Defence’ (2002) 1 *Chinese Journal of International Law* 437.

⁴⁷ See Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2003/351 (23 March 2003).

⁴⁸ See n 31 regarding issues of terminology.

⁴⁹ The National Security Strategy of the United States of America (September 2002) <https://2009-2017.state.gov/documents/organization/63562.pdf>, particularly 15.

However, while many, if admittedly not all, states and scholars are now willing to accept the possibility for self-defence against an *imminent* attack, the notion of acting in self-defence against more temporally remote threats is, to put it mildly, not something that has found support.⁵⁰ To put it less mildly, as a matter of law ‘pre-emptive self-defence’ was wholly baseless in 2002 and it remains so in 2022. There is no legal basis to use force against a non-imminent threat (in the absence of pre-facto authorisation by the UN Security Council). In the words of the late Abraham Chayes, ‘[t]o accept [such a] reading is to make the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism either’;⁵¹ it would signal that military action is ‘governed by national discretion, not international law’.⁵² Ultimately, President Putin’s discourse is reminiscent of the idea that states can undertake military interventions simply to support broader geopolitical interests, a concept that may have resonated with late 19th-century and early 20th-century scholars,⁵³ but which is completely out of touch with the post-Charter international legal order. As the ICJ’s 2005 judgment in the *Armed Activities* case confirms, ‘security needs [that are] essentially preventative’ cannot sustain a self-defence claim.⁵⁴

Even if there were a basis to use force lawfully against a non-imminent threat (which there is not), under customary international law any action in self-defence must be both necessary and proportional.⁵⁵ It is difficult to see how the current devastation in Ukraine –

⁵⁰ See, e.g. Joe Boyle, ‘Making Sense of Self-Defence in the War on Terror’ (2014) 1 *Journal on the Use of Force and International Law* 55, 62–5; Gazzini (n 27) 221; Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (2003) 4 *San Diego International Law Journal* 7, 12–6; Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Ashgate, 2010) particularly 192–3; Heiko Meiertöns, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press, 2010) particularly 221–4. *Contra* John Yoo, ‘International Law and the War in Iraq’ (2003) 97 *American Journal of International Law* 563, particularly 571–4.

⁵¹ Abraham Chayes, *The Cuban Missile Crisis* (Oxford University Press, 1974) 65–6 (in this passage, Chayes, who was the US legal advisor at the time of the Cuban missile crisis, actually explains why the US had chosen not to invoke self-defence).

⁵² *Ibid.*

⁵³ See, e.g. Lassa Oppenheim, *International Law* (Longmans, Green and Company, 2nd edn 1912) 191, para 136 (‘As regards intervention in the interest of the balance of power, it is likewise obvious that it must be excused. ... The States themselves and the majority of writers agree upon the admissibility of intervention in the interest of balance of power’).

⁵⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (judgment) [2005] ICJ Rep 168, para 143.

⁵⁵ Chris O’Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (Oxford University Press, 2020); Mary Ellen O’Connell, ‘The Limited Necessity of Resort to Force’ in Dale Stephens and Paul Babie (eds), *Imagining Law: Essays in Conversation with Judith Gardam* (University of Adelaide Press, 2016) 37; Sina Etezazian, ‘The Nature of the Self-Defence Proportionality Requirement’ (2016) 3 *Journal on the Use of Force and International Law* 260; David Kretzmer, ‘The Inherent Right of Self-Defence and Proportionality in *Jus ad Bellum*’ (2013) 24 *European Journal of International Law* 235.

which appears to be an attempt to impose regime change⁵⁶ – can amount to a ‘necessary’ or ‘proportional’ response to the alleged threat posed to Russia by NATO. Admittedly, this is difficult to say with any certainty, because if one bothers to reach this point in analysing the Russian claim that it is responding to NATO, then one finds oneself in a counter-factual vortex, trying to measure the proportionality of a military ‘response’ taken against a threat of armed attack that does not exist (or, at least, a threat of armed attack that is so temporally remote as to be an abstraction).

3.1(b) *In response to a threat posed by Ukraine to Russian territory*

Aside from the alleged threat posed by NATO and the changing European security architecture, it was clear that President Putin was also identifying a threat to Russia directly from Ukraine as a basis for its claim in individual self-defence. In part, this seemingly involved a claim that Ukraine posed a threat to Russia itself, as a territorial entity: ‘Russia cannot feel safe, develop, and exist while facing a permanent threat from the territory of today’s Ukraine.’⁵⁷ Again, of course, it is a stark fact that ‘Russia itself has not been a victim of Ukraine’s armed attack.’⁵⁸

In respect of the threat that he saw as being posed by Ukraine, though, President Putin did seem to allude to a threat that was rather more ‘imminent’ than he did in relation to NATO: ‘[t]he same [referring to previous alleged threats emerging from Ukraine] is *happening today*. They did not leave us any other option for defending Russia...’⁵⁹ This, then, perhaps is an anticipatory self-defence claim that would be based on an interpretation of self-defence that has significantly more support – action against an imminent threat – than the claim to be responding to an alleged non-imminent threat from NATO. Yet the facts once again do not support it: no credible evidence has been produced to suggest that Ukraine was about to launch a large-scale assault against Russian territory. Indeed, it is difficult to comprehend why Ukraine would wish to trigger a conventional war with a neighbour that is by far its military superior (by an estimated ratio of 5 to 1 and 10 to 1 for armoured fighting vehicles and military aircraft respectively,⁶⁰ not to mention that it is a nuclear weapon state), and which had been engaging

⁵⁶ See, e.g. Alexander B Downes, ‘The problem with Putin’s endgame in Ukraine’, *CNN* (27 February 2022) <https://edition.cnn.com/2022/02/27/opinions/russia-war-regime-change-downes/index.html>.

⁵⁷ ‘Address by the President of the Russian Federation’ (n 18).

⁵⁸ Sergey Sayapin, ‘Thou shalt not distort the language of international law’, *Opinio Juris* (7 March 2022) <http://opiniojuris.org/2022/03/07/thou-shalt-not-distort-the-language-of-international-law/>.

⁵⁹ ‘Address by the President of the Russian Federation’ (n 18) (emphasis added).

⁶⁰ Angela Dewan, ‘Ukraine and Russia’s militaries are David and Goliath. Here’s how they compare’, *CNN* (25 February 2022) <https://edition.cnn.com/2022/02/25/europe/russia-ukraine-military-comparison-intl/index.html>.

in massive mobilisation along its borders for weeks⁶¹ (thus also ruling out the hypothetical benefit of a surprise attack).

3.1(c) *In response to a threat posed by Ukraine to Russian nationals*

President Putin's individual self-defence claim in relation to Ukraine did not refer solely to Russia as a territorial entity, but also to protecting Russian people abroad.⁶² This can be viewed as a form of 'protection of nationals' claim, in reference to the protection of Russian passport holders within Ukrainian territory (predominantly Russian speakers within the Donbas region).

The protection of nationals abroad – the idea that what can be defended with force goes beyond the territory of the state exercising self-defence to include its nationals (being an extension of 'the state') in other states' territories – is a legal argument that has been made on a number of occasions, including, famously, with respect to Israel's Entebbe raid in 1976.⁶³ Three cumulative criteria are usually identified: there must be an imminent threat of injury to nationals; (ii) a failure or inability on the part of the territorial sovereign to protect them and (iii) the action of the intervening state must be strictly confined to the object of protecting its nationals against injury.⁶⁴ At the same time, reliance on 'protection of nationals' has not been a common legal claim in the UN era and, especially because there have been notable examples of it being (ab)used as a pretext for force employed for non-defensive purposes, it remains controversial.⁶⁵ Nonetheless, it is not 'ruled out' by Article 51⁶⁶ and it may be said that there has been a degree of support for it as a manifestation of self-defence during the UN era.⁶⁷ In particular, there appears to be broader support for 'non-combatant evacuation operations' that merely seek to evacuate nationals out of harm's way.⁶⁸

⁶¹ See Kingsley (n 1).

⁶² 'Address by the President of the Russian Federation' (n 18) (asserting that there was not 'any other option for defending Russia and *our people*, other than the one we are forced to use today', emphasis added).

⁶³ For an overview of relevant practice see e.g. Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff, 1985) 26–49; Thomas C Wingfield and James E Meyen (eds), 'Lillich on the Forcible Protection of Nationals Abroad' (2002) 77 *International Law Studies Series – US Naval War College* 282.

⁶⁴ C M Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952–II) 81 *Receuil des cours* 4.

⁶⁵ See Francis Grimal and Graham Melling, 'The Protection of Nationals Abroad: Lawfulness or Toleration – A Commentary' (2011) 16 *Journal of Conflict and Security Law* 541.

⁶⁶ James A Green, 'Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defence' in James A Green and Christopher P M Waters (eds), *Conflict in the Caucasus: Implications for International Legal Order* (Palgrave Macmillan, 2010) 54, 58–64.

⁶⁷ See, e.g. Derek W Bowett, 'The Use of Force in the Protection of Nationals' (1957) 43 *The Grotius Society – Transactions for the Year 1957* 111.

⁶⁸ In this sense, see Tom Ruys, 'The "Protection of Nationals" Doctrine Revisited' (2008) 13 *Journal of Conflict and Security Law* 233.

President Putin argued that one aim of the Russian operation was to ‘bring to trial those who perpetrated numerous bloody crimes against civilians, *including against citizens of the Russian Federation*.’⁶⁹ Here, then, he seemed to be referring to attacks that have *occurred*, not attacks that are imminent. There certainly is evidence that serious and large-scale human rights violations have been perpetrated against people in separatist-leaning areas of eastern Ukraine since 2014 by both Ukrainian authorities and pro-Kyiv paramilitary groups (as well as by Russian forces and Russian-backed separatists).⁷⁰ Yet, assuming one accepts the protection of nationals as a basis for exercising self-defence in the first place, whether there is sufficient evidence of human rights violations having occurred *specifically against Russian nationals* in Ukraine, at least on a scale that could be equated to an *armed attack against Russia*, is highly doubtful.

In addition, one might note the widespread provision of Russian passports to individuals within the Donbas region in the period leading up to the invasion, and the pretext that it aimed to provide.⁷¹ It has been widely reported that between April 2019 and the time of the invasion in February 2022, some 720,000 passports were fast-tracked to people in eastern Ukraine.⁷² The mass distribution of passports to ‘manufacture’ a population of nationals within another state’s territory, so as then to be able to assert a self-defence claim to be protecting that population of nationals is now established Russian *modus operandi*. The Kremlin previously did this both in the South Ossetia and Abkhazia regions of Georgia immediately prior to its invasion in 2008,⁷³ and in Crimea ahead of its unlawful annexation from Ukraine in 2014.⁷⁴ Legally, the status of such recently ‘passportised’ nationals is at least questionable, in terms of how real their connection to the state may be,⁷⁵ and such mass passportisation could, in itself,

⁶⁹ ‘Address by the President of the Russian Federation’ (n 18) (emphasis added).

⁷⁰ See, e.g. ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his visit to Ukraine, Human Rights Council, UN Doc A/HRC/40/59/Add.3 (17 January 2019); ‘“You Don’t Exist”: Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine’, *Human Rights Watch* (21 July 2016) www.hrw.org/report/2016/07/21/you-dont-exist/arbitrary-detentions-enforced-disappearances-and-torture-eastern#.

⁷¹ See Fabian Burkhardt, ‘Passports as pretext: how Russia’s invasion of Ukraine could start’, *War on the Rocks* (17 February 2022) <https://warontherocks.com/2022/02/passports-as-pretext-how-russias-war-on-ukraine-could-start/>.

⁷² Dasha Litvinova and Yuras Karmanau, ‘With fast-track passports, Russia extends clout in Ukraine’, *abc News* (17 February 2022) <https://abcnews.go.com/International/wireStory/fast-track-passports-russia-extends-clout-ukraine-82947863>; ‘Russia has issued 720,000 fast-track passports in separatist-held areas of eastern Ukraine’, *Euronews* (17 February 2022) www.euronews.com/2022/02/17/russia-has-issued-720-000-fast-track-passports-in-separatist-held-areas-of-eastern-ukraine.

⁷³ See Green (n 66).

⁷⁴ See James A Green, ‘Editorial Comment – The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited’ (2014) 1 *Journal on the Use of Force and International Law* 3.

⁷⁵ International law leaves it for a state to decide under its own domestic rules whether to confer nationality and upon whom. However, as the ICJ set out in the *Nottebohm* case (*Liechtenstein v Guatemala*) merits [1955] ICJ Rep 4, 22–44, for an individual’s nationality to be enforceable against *other states* at the international level there

amount to an act of unlawful intervention.⁷⁶ In any event, it may be said that claiming to use force in self-defence to protect a large number of nationals who until recently were *not* nationals lacks credibility.

Importantly, of course, the action in response to the threat allegedly posed by Ukraine to Russia – whether it be its territory or its nationals within Ukraine – would still need to satisfy the twin requirements of necessity and proportionality.⁷⁷ As far as proportionality is concerned, the Russian invasion is, of course, lightyears removed from a targeted operation aimed at the evacuation of threatened nationals to Russia. Nor does it appear plausible to argue that offensive operations (e.g. through artillery shelling or air strikes) were somehow geographically confined to places where Russian nationals were under imminent threat (even by Russia’s own standards). Furthermore, while one of President Putin’s stated goals – to ‘demilitarise’ Ukraine⁷⁸ – might plausibly be a proportionate outcome in relation to a genuine threat of imminent armed attack, it has become clear that another of his stated goals – to ‘denazify’ Ukraine⁷⁹ – equates to regime change,⁸⁰ which is something that is plainly at odds with the purported aim of protecting nationals under imminent threat.

3.2 Collective self-defence

Alongside its intertwined individual self-defence claims, it is possible also to discern a claim of collective self-defence made by Russia. The criteria for individual self-defence – armed attack, necessity and proportionality – all also apply to collective self-defence.⁸¹ In addition, for a state to be able to use force in collective self-defence, the ‘victim’ state must *request* military aid in response to the (actual or imminent) armed attack in question.⁸²

is a requirement of ‘real and effective’ nationality based on a meaningful link. It is quite possible that this test could be met by a number of those in the Donbas region who have received fast track Russian passports (given ties of language, culture and ethnicity between Russia and many people in eastern Ukraine), but this is not necessarily clear and would be unlikely to be true in all cases.

⁷⁶ See, e.g. Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) vol II (30 December 2008) 172–3.

⁷⁷ See n 55 and accompanying text.

⁷⁸ ‘Address by the President of the Russian Federation’ (n 18).

⁷⁹ *Ibid.*

⁸⁰ See Downes (n 56).

⁸¹ See, e.g., Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 6th edn 2017) 317, 320–1.

⁸² See, e.g. *Nicaragua* (n 9) para 195; Sir Michael Wood, ‘Self-Defence and Collective Security’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 649, 654; Dino Kritsiotis, ‘A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence under International Law’ in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus Post Bellum* (Routledge, 2013) 170, 185–7; James

Russia's collective self-defence claim in relation to its invasion of Ukraine is premised on its recognition of two separatist-leaning regions in the Donbas area of Ukraine – Donetsk and Luhansk – as sovereign states. Moscow rebranded these entities on 21 February as the 'Donetsk People's Republic' and the 'Luhansk People's Republic', respectively.⁸³ These newly minted 'states' immediately then signed treaties of friendship and mutual assistance with Russia,⁸⁴ and requested its military aid.⁸⁵ As President Putin phrased the collective self-defence claim, '[t]he people's republics of Donbass ... asked Russia for help' and so it responded 'in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on February 22'.⁸⁶

It is worth noting that this is a version of another tactic that is now well-established in the Kremlin's playbook. For example, following its unlawful annexation of Crimea in 2014, Russia first recognised it as a sovereign state.⁸⁷ It then, *the next day*, signed an agreement with the leaders of the new-born 'state' of the 'Republic of Crimea' providing for its accession to the Russian Federation.⁸⁸

With regard to the 2022 iteration of this tactic, i.e. the claim to be defending Donetsk and Luhansk, it is crucial to recall that a request for assistance in collective self-defence must emanate from the government *of a state*.⁸⁹ As much as President Putin may wish the proclaimed 'People's Republics' of Donetsk and Luhansk to be states,⁹⁰ wishful thinking is simply not

A Green, 'Editorial Comment – The "Additional" Criteria for Collective Self-Defence: Request but not Declaration' (2017) 4 *Journal on the Use of Force and International Law* 4.

⁸³ See Presidential Decree of the Russian Federation, No 71, 'About recognition of the Donetsk People's Republic' (21 February 2022); Presidential Decree of the Russian Federation, No 72, 'About recognition of the Luhansk People's Republic' (21 February 2022).

⁸⁴ Treaty of Friendship, Cooperation and Mutual Assistance Between the Russian Federation and the Donetsk People's Republic (signed in Moscow, 21 February 2022); Treaty of Friendship, Cooperation and Mutual Assistance Between the Russian Federation and the Lugansk People's Republic (signed in Moscow, 21 February 2022). As of 15 March 2022, these treaties have not been deposited with the UN, nor has notice of their deposit been submitted.

⁸⁵ See documents released by the Kremlin and published by Russian news agencies on social media sites such as Telegram: e.g. TACC, *Telegram* (23 February 2022) https://t.me/tass_agency/111840.

⁸⁶ 'Address by the President of the Russian Federation' (n 18).

⁸⁷ Presidential Decree of the Russian Federation, No 147, 'About recognition of the Republic of Crimea' (17 March 2014).

⁸⁸ 'Agreement on the accession of the Republic of Crimea to the Russian Federation signed', *Office of the President of the Russian Federation* (18 March 2014) <http://en.kremlin.ru/events/president/news/20604>.

⁸⁹ Dinstein (n 81) 317–8.

⁹⁰ President Putin justified Russia's decision in the following terms: 'Let me remind you that the people living in territories which are part of today's Ukraine were not asked how they want to build their lives when the USSR was created or after World War II. Freedom guides our policy, the freedom to choose independently our future and the future of our children. We believe that all the peoples living in today's Ukraine, anyone who want to do this, must be able to enjoy this right to make a free choice.' See 'Address by the President of the Russian Federation' (n 18).

enough; the recognition by Russia of these entities as states did not alchemically turn them into states, *de jure*.

It is recalled that ‘radically different views’ exist on the existence of any right to ‘remedial secession’.⁹¹ At best, such a right would only exist in exceptional cases where a ‘people’ was deprived of its right of ‘internal’ self-determination and subject to grave and widespread human rights abuses,⁹² which was simply not the case when the conflict in eastern Ukraine erupted in 2014. By contrast, a ‘premature’ recognition of a separatist region as a new state when an internal armed conflict is still ongoing will normally entail a breach of international law.⁹³

This was the clear position of the UN General Assembly: having previously affirmed the territorial integrity of Ukraine within its internationally recognised borders following Russia’s unlawful annexation of Crimea in 2014,⁹⁴ the Assembly denounced in unequivocal terms the 2022 Russian recognition of the Donetsk and Luhansk regions ‘as a violation of the territorial integrity and sovereignty of Ukraine and [as] inconsistent with the principles of the Charter.’⁹⁵

Yet, even if the Ukrainian territories of Donetsk and Luhansk were in fact now independent states (which, as argued here, they are not) and thus a valid request for assistance by Russia in collective self-defence was made (*quod non*), the requirement of an armed attack remains.⁹⁶ It is uncontested that a non-international armed conflict erupted between Ukraine and pro-Russian armed groups in the Donbas region in 2014,⁹⁷ and that there had been ongoing, if sporadic, fighting ever since.⁹⁸ It is patently absurd, however, to suggest that such ongoing

⁹¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (advisory opinion) [2010] ICJ Rep 403, para 82.

⁹² *Reference Re Secession of Québec* [1998] 2 SCR 217, 37 ILM 1342, Supreme Court of Canada, paras 112 and 126.

⁹³ Hersch Lauterpacht, ‘Recognition of States in International Law’ (1944) 53 *The Yale Law Journal* 385, 390–6.

⁹⁴ UNGA Res 68/262, UN Doc A/RES/68/262 (27 March 2014).

⁹⁵ UNGA Res ES-11/1, UN Doc A/RES/ES-11/1 (2 March 2022) paras 5. See also *ibid*, para 6 (further demanding that ‘the Russian Federation immediately and unconditionally reverse the decision’ to recognise them). See further the ‘Statement by Members of the ILA Committee on the Use of Force’ (n 6) ([t]he right to self-determination is no legal basis for the creation of the Ukrainian territories Donetsk and Luhansk as “states”. Therefore, their recognition by the Russian Federation is a flagrant violation of Ukraine’s territorial integrity, and as such without legal effect. Since these territories are not states, the Russian Federation cannot invoke collective self-defense on behalf of these territories in order to justify its attack on Ukraine’).

⁹⁶ See n 25 – n 28 and accompanying text; n 81 and accompanying text.

⁹⁷ See, e.g. Grzebyk (n 15) particularly 41–8.

⁹⁸ Conservative estimates suggest more than 10,000 people have been killed in the conflict in the region since 2014. See ‘Conflict in Ukraine’, Global Conflict Tracker, *Council on Foreign Relations* (last updated 18 March 2022) www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine. However, the majority of those were combatants. In terms of civilian casualties, according to the OHCHR, the conflict in eastern Ukraine claimed over 3,000 civilian lives in the period 2014-2021, with circa 90% of these casualties concentrated in the years 2014 and 2015. See ‘Conflict-related civilian casualties in Ukraine’, *OHCHR* (8 October 2021)

intra-state hostilities could somehow be abruptly retrofitted into an ‘armed attack’ by one state against another, triggering the right of collective self-defence, through an act of recognition. Such a reading would also make a mockery of the ‘immediacy’ requirement for the right of self-defence, which presupposes a certain proximity in time between the initial attack (which would have to have been located in 2014) and the invocation of the right of self-defence.⁹⁹

On the other hand, the perpetration of ‘genocide’ by the Ukrainian military on the people of the ‘states’ of Donetsk and Luhansk – as was alleged by President Putin in his 24 February speech¹⁰⁰ – might well be something that could be seen as constituting an armed attack, and thus as justifying the invocation of the right of collective self-defence. Again, this would presuppose that the entities doing the requesting of military aid in response to the genocide were actually states.¹⁰¹ It also would, of course, presuppose that such a genocide had occurred or was occurring. However, as will be discussed in detail in subsection 4.2, there is no credible evidence whatsoever to support Russia’s allegations that a genocide had taken or was taking place in eastern Ukraine.¹⁰² Indeed, such allegations were patently false.

Two weeks after the invasion began, Russia appeared to advance another version of a collective self-defence claim, which might be understood as one of *anticipatory* collective self-defence. The Russian Ministry of Defence announced on 9 March 2022 that its forces in Ukraine, while undertaking its ‘special military operation’, had ‘uncovered’ secret documents confirming that Ukraine was covertly preparing (with, Russia further alleged, underpinning NATO training) a significant military operation in the Donbas region in March 2022.¹⁰³ The alleged documents were published via the official Russian Ministry of Foreign Affairs Twitter account on the same day.¹⁰⁴ Defence Ministry spokesperson Igor Konashenkov was clear that the ‘special military operation’ had pre-empted Ukraine’s alleged plans to launch a major

<https://ukraine.un.org/sites/default/files/2021-10/Conflict-related%20civilian%20casualties%20as%20of%2030%20September%202021%20%28rev%208%20Oct%2021%29%20EN.pdf>. Furthermore, indications are that there were few civilian casualties in the weeks and months preceding the 2022 Russian invasion. See ‘Conflict in Ukraine’s Donbas: A Visual Explainer’, *International Crisis Group* (last updated 25 February 2022) www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer.

⁹⁹ See, e.g. Lubell (n 30) 702–3.

¹⁰⁰ ‘Address by the President of the Russian Federation’ (n 18). These allegations will be discussed in detail, in relation to the concept of ‘humanitarian intervention’, in subsection 4(2).

¹⁰¹ See n 89 and accompanying text.

¹⁰² See n 144 – n 149 and accompanying text.

¹⁰³ See, e.g., ‘Secret documents “surfaced”: Ukraine designed military operation in Donbas for March’, *B92* (9 March 2022) www.b92.net/eng/news/world.php?yyyy=2022&mm=03&dd=09&nav_id=113234; Данила Титоренко, ‘В Минобороны России заявили о раскрытии планов Украины о вторжении в Донбасс’, *gazeta.ru* (9 March 2022) www.gazeta.ru/army/news/2022/03/09/17399521.shtml?updated.

¹⁰⁴ Ministry of Foreign Affairs of Russia (@mfa_russia) *Twitter* (9 March 2022) https://twitter.com/mfa_russia/status/1501461950735257602.

offensive in the Donbas region,¹⁰⁵ indicating that Russia thus was acting to defend the ‘states’ of Donetsk and Luhansk from an imminent attack.

An obvious problem with this argument is that it amounts to a response to an imminent armed attack (assuming that the alleged planned attack would have qualified as an armed attack) that the responder did not *know* was imminent (or even planned) at the time at which it responded. This meant that the claim was ultimately premised either on clairvoyance or time travel. Indeed, it is an ouroboros loop argument, where the documents that justify the action were found because of it.

It is worth noting that the identification of an imminent armed attack – for those who accept anticipatory self-defence at all – is generally said to need to be specific and demonstrable.¹⁰⁶ It thus cannot be speculative at the point at which force is employed in response, irrespective of whether a credible threat of imminent armed attack later is unearthed. In any event, leaving aside the temporal paradox at the heart of this strand of Russia’s *ad bellum* arguments, at the time of writing the veracity of the documents alleging an imminent attack by the Ukrainian armed forces in the Donbas region have not been independently verified and their authenticity remains very much in question.¹⁰⁷

Even if the documents were to be verified, though, and it be confirmed that Ukraine had indeed been planning a large-scale assault on Donetsk and Luhansk – and, again, assuming that one accepts the lawfulness of anticipatory self-defence *per se*¹⁰⁸ – this would still not allow for a forcible response in collective self-defence by Russia because, as previously outlined, Donetsk and Luhansk are not endowed with statehood and thus cannot make a collective self-defence request. And even if they were states (which they are not) we return to the fact that to be lawful any action in collective self-defence, just as with individual self-defence, must also be necessary and proportional under customary international law.¹⁰⁹ Once again, it is impossible to claim credibly that the scale of Russia’s invasion¹¹⁰ and its evident pursuit of regime change¹¹¹ in Ukraine can qualify as either of those things.

4. Claims beyond self-defence?

¹⁰⁵ Титоренко (n 103).

¹⁰⁶ See Lubell (n 30) 695; IIFMCG (n 76) vol II, 254–6.

¹⁰⁷ See ‘Russia’s invasion of Ukraine: List of key events from day 14’, *Al Jazeera* (9 March 2022) www.aljazeera.com/news/2022/3/9/russias-invasion-of-ukraine-list-of-key-events-from-day-14.

¹⁰⁸ See n 29 – n 33 and accompanying text.

¹⁰⁹ See n 55 and accompanying text; n 81 and accompanying text.

¹¹⁰ See Foy (n 7).

¹¹¹ See Downes (n 56).

The core of Russia's *ad bellum* claims clearly was the right of self-defence – albeit in a range of forms – but some commentators have at least suggested that there may be references to other possible legal justifications buried in President Putin's 24 February speech. We consider these here.

4.1 Military assistance on request

Some have suggested¹¹² that Russia may have claimed to be providing military assistance on request (sometimes known as intervention by invitation) to the so-called Donetsk and Luhansk People's Republics. The notion that military intervention can be lawful if it is undertaken at the request of the governing authorities of a third state is well established.¹¹³ This justification for using force is usually considered not to be, strictly speaking, a *defence* to an otherwise unlawful use of force, but instead a qualification that means that no unlawful use of force occurred in the first place, because the state within which the 'force' is used has consented to this.¹¹⁴ It is worth noting that 'military assistance on request' is not a legal panacea, however: its exercise presupposes *valid* consent.¹¹⁵ Problems may arise in identifying the individual or regime with authority to provide such a valid request and the relevant factors involved in such a determination. For example, identifying the individual or regime with effective control over the territory of the state has traditionally been seen as key in this respect, although other factors such as the democratic credentials of the individual or regime or the extent of their external recognition are today of increasing significance.¹¹⁶ Other problems arise in respect to the form

¹¹² See, e.g. Ingrid Wuerth, 'International law and the Russian invasion of Ukraine', *Lawfare* (25 February 2022) www.lawfareblog.com/international-law-and-russian-invasion-ukraine.

¹¹³ Support for it can be found, for example, in ICJ case-law (*Nicaragua* (n 9) para 246; *Armed Activities* (n 54) paras 39–54), the practice of the UN Security Council (e.g., UNSC Res 387, UN Doc S/RES/387 (31 March 1976)), and in the Definition of Aggression (UN Doc A/RES/3314 (n 10) Article 3(e) (*a contrario*)).

¹¹⁴ Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"' (2017) 4 *Journal on the Use of Force and International Law* 110, 125–6; Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implication of the Saudi-Led Military Intervention in Yemen' (2016) 65 *International and Comparative Law Quarterly* 61, 79–80. *Contra* Federica I Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force' (2020) 7 *Journal on the Use of Force and International Law* 227.

¹¹⁵ Max Brookman-Byrne, 'Intervention by (Secret) Invitation: Searching for a Requirement of Publicity in the International Law on the Use of Force with Consent' (2020) 7 *Journal on the Use of Force and International Law* 74, 79–82.

¹¹⁶ See, e.g. Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press, 2020) 21–73.

that such an invitation or consent must take,¹¹⁷ the limits upon the consent provided,¹¹⁸ and whether such an invitation is permissible in the context of a non-international armed conflict.¹¹⁹

In this instance, the (purported) claim would be that, based on the ‘consent’ of the Ukrainian territories of Donetsk and Luhansk – again, rebranded as ‘states’ – Russia can use force without violating Article 2(4). Taken in isolation, President Putin’s assertion that ‘[t]he people’s republics of Donbass have asked Russia for help’¹²⁰ could be taken as such an appeal to the notion of military assistance on request. However, the next sentence of his speech explicitly linked that request to an assertion that Russia was acting in collective self-defence¹²¹ (a claim that has already been discussed in subsection 3.2). As such, it is not at all clear that military assistance on request was even advanced by Russia.

The line between collective self-defence and military assistance on request is admittedly nowhere near as clear as one might hope: both require a valid request for military aid, for example.¹²² It is therefore possible that President Putin could have been invoking both. If so, though, another feature that collective self-defence and military assistance on request share is the need for that request to come from a *state*.¹²³ As such, any claim to be intervening with the consent of the Ukrainian territories of Donetsk and Luhansk fails because those entities are not states as a matter of law. Again, this was discussed in detail in subsection 3.2, so there is no need to revisit it here.

Moreover, the doctrine of military assistance on request requires that any military operations undertaken are limited to the territory of the state doing the requesting.¹²⁴ A state cannot consent to force being used on the territory of another sovereign state.¹²⁵ This would mean that any Russian military activity undertaken on the basis of providing military assistance on request would be restricted to the territories of the two proclaimed republics of Donetsk and Luhansk, which patently has not been the case.

¹¹⁷ See, e.g. Henderson (n.30) 371–4.

¹¹⁸ *Ibid*, 374–7.

¹¹⁹ See, e.g. Chiara Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (Hart Publishing, 2021).

¹²⁰ ‘Address by the President of the Russian Federation’ (n 18).

¹²¹ *Ibid* (‘The people’s republics of Donbass have asked Russia for help. *In this context*, in accordance with Article 51 (Chapter VII) of the UN Charter ... I made a decision to carry out a special military operation’, emphasis added).

¹²² Laura Visser, ‘Intervention by Invitation and Collective Self-Defence: Two Sides of the Same Coin?’ (2020) 7 *Journal on the Use of Force and International Law* 292, 307.

¹²³ *Nicaragua* (n 9) para 246.

¹²⁴ *Institut de droit international*, Session of Rhodes, Resolution (2011) Article 2(2).

¹²⁵ Visser (n 122) 308–11.

For the sake of completeness, it is noted that, in order to provide a legal basis for outside intervention, consent by the territorial state must be validly given *in advance*.¹²⁶ The implication is that, even if the Ukrainian government (or, *per hypothesis*, a puppet regime subsequently installed by Moscow) were to express its approval for Russia's military presence on Ukrainian soil at a later stage, such approval cannot retroactively 'legalise' the invasion (any more than an invitation by the Iraqi government in 2004 could retroactively have rendered the US-led intervention in that country lawful).

4.2 Humanitarian intervention

As was noted previously,¹²⁷ President Putin's 24 February speech included a claim that millions of people in the Ukrainian territories of Donetsk and Luhansk were suffering a genocide at the hands of Ukraine, and that Russia therefore was required to intervene:

you cannot look without compassion at what is happening there [eastern Ukraine]. It became impossible to tolerate it. We had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia, on all of us. ... The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev [Kyiv] regime.¹²⁸

It is possible to view this language as invoking 'something like a humanitarian intervention argument'.¹²⁹ In other words, one might take the view that President Putin was appealing to the idea of using force to protect *non-nationals* from gross violations of human rights within the territory of another state¹³⁰ (an argument that would, hypothetically at least, circumvent the fact that the breakaway regions of Donetsk and Luhansk did not qualify as *de jure* states and could accordingly not request outside intervention).

¹²⁶ Erika de Wet, 'Military Assistance Based on *Ex-Ante* Consent: A Violation of Article 2(4) UN Charter?' (2020) 93 *Die Friedens-Warte* 413, 417 ('It is well-established that consent must be given at the latest time that the forcible intervention commences').

¹²⁷ See n 100 and accompanying text.

¹²⁸ 'Address by the President of the Russian Federation' (n 18).

¹²⁹ Marko Milanovic, 'What is Russia's legal justification for using force against Ukraine?', *EJIL:Talk!* (24 February 2022) www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/ (emphasis added).

¹³⁰ There is a vast amount of literature on the concept of unilateral humanitarian intervention: a good starting point is J L Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2003).

This interpretation was given some credence by the issuance of a statement on 4 March by the President of the Russian Branch of the International Law Association (ILA).¹³¹ That statement followed the contours of President Putin’s arguments extremely closely and, in the context of such fidelity, it was notable that it argued that the invasion of Ukraine was lawful ‘on the basis of the provisions of the UN Charter on self-defense [and] *on the protection of human rights*’.¹³² This would suggest an interpretation of Russia arguments, from within the Russian Branch of the ILA at least, as including a humanitarian intervention limb. One might also note that Ukraine itself interpreted Russia’s arguments this way, as can be seen from the fact that the proceedings that it instituted at the ICJ against Russia were premised on the contention that false claims of genocide had acted as a basis for Russia’s invasion.¹³³

Admittedly, Russia did appear to step back from invoking humanitarian intervention to the extent that it was indeed present in President Putin’s original statement. In its 7 March letter submitted to the ICJ, in the context of the proceedings triggered by Ukraine’s request for provisional measures,¹³⁴ Russia seemed to indicate that the *only* basis for its action in Ukraine was the right of self-defence.¹³⁵ However, in awarding provisional measures in the case on 16 March, the ICJ was willing to conclude that Russia’s action may at least in part be premised on a humanitarian intervention justification (specifically, to prevent/punish genocide).¹³⁶ It is thus ultimately unclear whether (and, if so, the extent to which) Russia advanced such a claim.

¹³¹ ‘Statement of the Presidium of the Russian Association of International Law’ (7 March 2022) www.ilarb.ru/html/news/2022/7032022.pdf (emphasis added) (original Russian version, published three days earlier on 4 March 2022, www.ilarb.ru/html/news/2022/4032022.pdf).

¹³² *Ibid.*

¹³³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Application instituting proceedings submitted by Ukraine, ICJ Rep (26 February 2022) www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf, e.g. para 16 (Russia ‘launch[ed] a full-scale invasion against Ukraine, based on false and pretextual allegations of genocide in Ukraine’s Luhansk and Donetsk oblasts’).

¹³⁴ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Request for the indication of provisional measures submitted by Ukraine, ICJ (27 February 2022) www.icj-cij.org/public/files/case-related/182/182-20220227-WRI-01-00-EN.pdf.

¹³⁵ ‘Document (with annexes) from the Russian Federation’ (n 22) (‘The special military operation conducted by Russia in the territory of Ukraine *is based on the United Nations Charter, its Article 51 and customary international law*’, emphasis added). Based on this letter, Milanovic argued that ‘Russia is now firmly and explicitly denying that allegations of genocide against Russians/Russian-speakers in the Donbas have any kind of link to its use of force against Ukraine’. Marko Milanovic, ‘Russia’s submission to the ICJ in the Genocide Case; Russia’s withdrawal from the Council of Europe’, *EJIL:Talk!* (11 March 2022) www.ejiltalk.org/russias-submission-to-the-icj-in-the-genocide-case-russias-withdrawal-from-the-council-of-europe. This perhaps reads slightly more into the letter than is there, in that it does not even mention humanitarian intervention explicitly. However, the implication is, indeed, that Russia walked back from making any kind of humanitarian intervention claim.

¹³⁶ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Order of 16 March 2022, Request for the indication of provisional measures, ICJ Rep (16 March 2022) www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf, paras 45–6.

In any event, whether humanitarian intervention is a legal justification for the use of force is, of course, highly controversial. As is well-known, there is no explicit basis for it in the UN Charter; its advocates thus usually seek to identify its legal basis in customary international law.¹³⁷ It is sufficient here to note that the majority view – shared by the authors of this editorial – is that there is *de lege lata* no such legal basis for the use of force in international law (absent pre-facto UN Security Council authorisation).¹³⁸

However, even for the (not insignificant) minority of scholars who *do* support the *prima facie* lawfulness of force used to avert extreme humanitarian distress it would seem pretty clear that Russia's invasion of Ukraine would not qualify. Proponents of humanitarian intervention are consistent in requiring, on the one hand, that any such use of force must be taken in response to a significant, large-scale violation of human rights involving widespread loss of life among civilians (which must in principle follow from convincing evidence, generally accepted by the international community as a whole), and, on the other hand, that the action taken must be necessary and proportional to the goal alleviating that harm.¹³⁹

The perpetration of – or imminent occurrence of – *a genocide against millions*, as President Putin alleged,¹⁴⁰ admittedly would qualify as a sufficiently grave violation of human rights to trigger humanitarian intervention (again, for those who accept the lawfulness of humanitarian intervention at all). However, as has already been briefly noted in subsection 3.2, there is no evidence whatsoever to corroborate the claim that genocide had been perpetrated in the breakaway regions of Donetsk and/or Luhansk. Ukraine has ‘emphatically denie[d] that any such genocide has occurred’¹⁴¹ and, in its application instituting proceedings as at the ICJ, it requested *inter alia* that the Court ‘[a]judge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.’¹⁴²

Those proceedings at the ICJ are ongoing, and, as such, in awarding provisional measures on 16 March 2022, the Court unsurprisingly was careful not to pre-empt any finding

¹³⁷ Gábor Sulyok, ‘The Legality of Unilateral Humanitarian Intervention Re-examined’ (2003) 44 *Acta Juridica Hungarica* 199, 221 (setting out, but not necessarily subscribing to this approach).

¹³⁸ See Nigel Rodley, ‘Humanitarian Intervention’, in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 775–6 (noting that the majority of scholars reject the lawfulness of unilateral humanitarian intervention).

¹³⁹ See, e.g. *ibid.*, 788–93; Prime Minister's Office, ‘Chemical Weapon use by Syrian Regime: UK Government Legal Position’, policy paper (29 August 2013) www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.

¹⁴⁰ ‘Address by the President of the Russian Federation’ (n 18)

¹⁴¹ *Allegations of Genocide*, Application instituting proceedings submitted by Ukraine (n 133) para 3.

¹⁴² *Ibid.*, para 30.

as to whether a genocide had, or had not, taken place in eastern Ukraine: it noted that it will only be able to ‘take a decision on the Applicant’s claims [including its denial of the perpetration of genocide] if the case proceeds to the merits’.¹⁴³ Nonetheless, the Court went on to say that ‘[a]t the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory.’¹⁴⁴ Here, the Court arguably cast aspersions on Russia’s allegations of genocide even while explicitly refraining from considering them. In highlighting its lack of possession of any evidence, the Court allowed for the inference that this was because there *was no such evidence*.

We do not have to adopt the same coyness as the ICJ, and so can be more explicit that there certainly has been no credible evidence produced, whatsoever, to substantiate the claim that genocide has been committed at the hands of Ukraine.¹⁴⁵ It is worth noting that this lack of evidence is despite the constant monitoring of the situation in Ukraine by the Organization for Security and Co-operation for Europe¹⁴⁶ and the UN Office of the High Commissioner for Human Rights,¹⁴⁷ as well as various NGOs,¹⁴⁸ *none of which* have indicated anything even approaching the perpetration of a genocide.¹⁴⁹

Moreover, as with Russia’s purported claim(s) to be exercising the right of self-defence, the scale and geographical scope of the assault on Ukraine¹⁵⁰ clearly were disproportional to any purported goal of protecting the human rights of people in the Donbas region. In the end, the suggestion that Russia’s invasion could qualify as ‘humanitarian’ in nature strikes us as extremely cynical when one considers that civilian casualties from the armed conflict ongoing

¹⁴³ *Allegations of Genocide*, Order of 16 March 2022 (n 136) para 59.

¹⁴⁴ *Ibid.*

¹⁴⁵ See, e.g. Alexander Hinton, ‘Putin’s claims that Ukraine is committing genocide are baseless, but not unprecedented’, *The Conversation* (25 February 2022) <https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unprecedented-177511>; John B Bellinger III, ‘How Russia’s invasion of Ukraine violates international law’, *Council on Foreign Relations* (28 February 2022) www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law (‘There is *no evidence* that Ukraine engaged in any of the defined actions [that can constitute genocide] and *certainly no evidence* of an intent to destroy in whole or in part any group in eastern Ukraine’, emphasis added).

¹⁴⁶ See ‘Daily and spot reports from the Special Monitoring Mission to Ukraine’, *OSCE Special Monitoring Mission to Ukraine* (updated daily) www.osce.org/ukraine-smm/reports.

¹⁴⁷ See ‘Ukraine’, *OHCHR*, www.ohchr.org/en/countries/ukraine (linking to all news, reports, and activity of the UN Human Rights Monitoring Mission in Ukraine).

¹⁴⁸ See, e.g. ‘Joint NGO Statement on Recent Events in Ukraine’ (23 February 2022) www.nhc.nl/joint-ngo-statement-on-recent-events-in-ukraine/.

¹⁴⁹ See, e.g. U.S. Mission to OSCE (@usosce), *Twitter* (16 February 2022) (‘Russia’s claim of genocide in Ukraine is a reprehensible falsehood. The SMM has complete access to the government controlled areas of Ukraine and HAS NEVER reported anything remotely resembling Russia’s claims. Read the publicly available reports’).

¹⁵⁰ See Foy (n 7).

in eastern Ukraine since 2014 were in fact of lesser scale than the destruction of civilian infrastructure and the loss of civilian life resulting from Russia's own 2022 invasion.¹⁵¹

Interestingly, again in the context of issuing its provisional measures order on 16 March, the ICJ noted that 'it is doubtful that the [Genocide] Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.'¹⁵² Tellingly, the Court here was musing – entirely unnecessarily for the purposes of reaching its order – that it was 'doubtful' that lawful authority for the use of force could be found in the Genocide Convention. This could well be read as an implicit rejection by the Court of the entire concept of humanitarian intervention as an *ad bellum* justification.¹⁵³ Again, we need not be as coy as the ICJ, and so it is worth reiterating that a notable majority of scholars¹⁵⁴ – and a *significant* majority of states¹⁵⁵ – do not support a right of unilateral humanitarian intervention at all. We are therefore talking about a claim by Russia (assuming that it indeed made such a claim) that would fail, in more than one respect, to meet the criteria for a justification that most would not even consider to *be* a justification.

5. Conclusion

As is clear from what has been discussed in this editorial, a lawful justification for Russia's military invasion of – or 'special military operation' in – Ukraine does not exist; the various claims advanced by Russia not only all fail, but most of them fail on *multiple grounds*. The invasion of Ukraine constitutes an unlawful use of force, an act of aggression and an egregious violation of a rule of *jus cogens*.

President Putin's recitation of previous violations of the *jus ad bellum* by Western states when setting out Russia's legal justification for the military invasion of Ukraine in his 24

¹⁵¹ As previously noted, the conflict in eastern Ukraine claimed over 3,000 civilian lives from 2014-2021. However, almost all of those casualties were concentrated in the years 2014 and 2015, and indications are that there were very few civilian casualties in the weeks and months preceding the 2022 Russian invasion. See n 98. This can be contrasted to the 2,246 civilian casualties recorded by the OHCHR (although thought by the OHCHR to be notably under-representative of the true total) in Ukraine in the mere three-week period from 24 February to 19 March, as a result of Russia's invasion. See 'Ukraine: civilian casualty update' (n 3).

¹⁵² *Ibid.*

¹⁵³ See also *ibid.*, para 57 ('in discharging its duty to prevent genocide, "every State may only act within the limits permitted by international law"').

¹⁵⁴ See n 138 and accompanying text.

¹⁵⁵ See, e.g., *2005 World Summit Outcome*, adopted through UNGA Res 60/1, UN Doc A/RES/60/1 (16 September 2005) paras 138–9; UNGA Verbatim Record, UN Doc A/59/PV.86 (6 April 2005); UNGA Verbatim Record, UN Doc A/59/PV.87 (7 April 2005); UNGA Verbatim Record, UN Doc A/59/PV.88 (7 April 2005); UNGA Verbatim Record, UN Doc A/59/PV.89 (8 April 2005); UNGA Verbatim Record, UN Doc A/59/PV.90 (8 April 2005).

February speech¹⁵⁶ does not change this; indeed, it was described as ‘a morally corrupt and irrelevant distraction’.¹⁵⁷ Yet, condemnation of Russia’s illegal invasion from the states that engaged in these prior military actions, as well as suggestions emanating from them regarding the creation of ‘a special tribunal for the punishment of the crime of aggression against Ukraine’,¹⁵⁸ might indeed be seen as hypocritical or, at the very least, a little awkward in terms of clean-hands credibility.¹⁵⁹ From a formalist perspective, many of the military interventions recalled by President Putin (Kosovo, Iraq, Syria *et al*) did constitute violations of the prohibition of the use of force, with several of them resulting in regime change. And it is worth recalling that similar conclusions were reached about these interventions to those that have been made about Russia’s in this editorial.¹⁶⁰ Indeed, one take away from the current situation is that although past transgressions cannot abrogate present breaches and President Putin’s recalling of them on this occasion ‘offers no legal justification for the aggression that has been unleashed’,¹⁶¹ states – especially powerful states – have made credulity-defying legal justifications for using force before and they will again.¹⁶² At the same time, Russia’s conduct and discourse also send a warning to other states, specifically in the West, to exercise restraint when considering the creation of new precedents that seek to limit the scope of the prohibition on the use of force or to expand its exceptions.

While the situation is still very much evolving at the time of writing, two key questions that might be contemplated are what the invasion of Ukraine says about the efficacy of the contemporary *jus ad bellum* and what is – or what might be – the ultimate impact upon the rules and norms governing the use of force and the security architecture of the post-Second World War era.

Some will, of course, denigrate the fact that international law and the collective security system did not prevent this military invasion and occupation from occurring, or that it has (at

¹⁵⁶ ‘Address by the President of the Russian Federation’ (n 18) (‘First a bloody military operation was waged against Belgrade, without the UN Security Council’s sanction ... Then came the turn of Iraq, Libya and Syria’).

¹⁵⁷ ESIL Statement (n 6).

¹⁵⁸ See ‘Combined Statement and Declaration Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine’ (4 March 2022) <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>.

¹⁵⁹ Milanovic (n 129); Krisch (n 4).

¹⁶⁰ See, e.g. Gerry Simpson, ‘The War in Iraq and International Law’ (2005) 6 *Melbourne Journal of International Law* 167 (describing the legal justifications advanced by the states that invaded Iraq in 2003 as ‘arcane and unconvincing’); ‘Appel de jurists de droit international concernant le recours à la force contre l’Irak’ (2003) I *Revue belge de droit international* 266 (statement signed by a huge number of prominent international lawyers, in French, Dutch and English); ‘War would be illegal’, *The Guardian* (7 March 2003) (open letter signed by prominent international lawyers)

¹⁶¹ ESIL Statement (n 6).

¹⁶² See Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16 *European Journal of International Law* 369.

the time of writing) failed to bring about its cessation.¹⁶³ Such a critique holds some weight, as the UN era system of collective security has vividly been shown to be inadequate on several fronts. But it is also a somewhat unfair accusation, placing too much on the shoulders of any legal norm or system, as well as overlooking the broader functions and purposes of the law and relevant institutions in these situations.

First, international law – and more specifically, the *jus ad bellum* – on this occasion has at the very least proven to be the universal benchmark by reference to which military interventions are justified, evaluated, and denounced. Indeed, it was notable that, even in the midst of flagrantly disregarding the law on the use of force (and the wider international legal order), the Kremlin still felt the need at least to pay lip service to it. While it was somewhat obscured amongst the clear misinformation and rhetoric, it remained the case that Russia has been ‘using the language of the law to defend its actions.’¹⁶⁴ This is not unusual: states almost always seek to provide legal justification for their uses of force rather than remaining silent.¹⁶⁵ Even to the extent that it is used for self-serving interests, and paid lip service, at least some – if perhaps not a huge amount of – solace should be taken in the fact that the language of the *jus ad bellum* endures.¹⁶⁶

Furthermore, while the UN Security Council has been predictably hampered by the use of the Russian veto, much of the communication that has taken – and is currently taking – place has been within the various organs of the UN.¹⁶⁷ Of particular note is the fact that, in an emergency special session that took place on 2 March 2022 as a result of an invocation of the Uniting for Peace mechanism, the UN General Assembly condemned the intervention in unusually categorical terms – explicitly, and correctly, deploring it as an act of aggression – and with what was a surprising majority of states voting in support of its adoption.¹⁶⁸ While ultimately only acting as a rhetorical device, this has no doubt cemented the already strong

¹⁶³ See, e.g. Atul Alexander, ‘Russia-Ukraine conflict: has international law failed?’, *The Leaflet* (28 February 2022) <https://theleaflet.in/russia-ukraine-conflict-has-international-law-failed>.

¹⁶⁴ Elizabeth Wilmshurst, ‘Ukraine: Debunking Russia’s legal justifications’, *Chatham House* (24 February 2022) www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications.

¹⁶⁵ See James A Green, ‘An Unusual Silence’ (2007) 157 *New Law Journal* 1478.

¹⁶⁶ See Ralph Janik, ‘Putin’s war against Ukraine: mocking international law’, *EJIL:Talk!* (28 February 2022) www.ejiltalk.org/putins-war-against-ukraine-mocking-international-law ([t]hose 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*’).

¹⁶⁷ Devika Hovell, ‘Council at War: Russia, Ukraine and the UN Security Council’, *EJIL Talk!* (25 February 2022) www.ejiltalk.org/council-at-war-russia-ukraine-and-the-un-security-council.

¹⁶⁸ UN Doc A/RES/ES-11/1 (n 95). The resolution was sponsored by 96 states, and passed with 141 voting in favour, 5 against (Belarus, North Korea, Eritrea, Russia, and Syria) and 35 abstentions.

perception amongst states and other actors that Russia is engaged in an overtly aggressive war that cannot go unanswered.

Indeed, the international reaction to the attack – civil, political, and legal – has been unprecedented.¹⁶⁹ Although states have not, at least at the time of writing, assisted Ukraine through direct military means or imposed a no-fly zone in Ukrainian airspace, there has been notable provision of indirect military assistance, including unprecedented decisions by both Germany and the EU to procure and supply defensive weapons of a lethal nature.¹⁷⁰ In addition, some of the most extensive sanctions ever seen have been imposed upon Russia.¹⁷¹ Whatever the final outcome of President Putin’s decision to go to war it has – to date – to a great extent galvanised the international community in its response.¹⁷² Furthermore, rather than ensuring that NATO maintained a distance from Russian territory, Russia’s actions have meant that states such as Sweden and Finland have aligned themselves further with the organisation,¹⁷³ which has also put more, not fewer, troops into Eastern Europe.¹⁷⁴

Ultimately, the *jus ad bellum* could be viewed as a ‘paper tiger’, merely providing a part of the language of discourse between states in justifying and responding to their military activities, as opposed to a serious tool of restraint. The UN, for its part, similarly might be seen as just a ‘talking shop’ rather than an organisation delivering upon its promise to ‘save succeeding generations from the scourge of war’. On the basis of these assessments some will be quick to declare, again, that the prohibition of the use of force is ‘dead’.¹⁷⁵ Yet, it is equally possible to argue that the broad and overwhelming response to this egregious violation of the prohibition enables the conclusion to be drawn that it ‘lives and, while its condition is grave indeed, its maladies are not necessarily terminal.’¹⁷⁶ Russia’s latest act of aggression against

¹⁶⁹ See, e.g. the various statements listed at n 6.

¹⁷⁰ See David M Herszenhorn, Lili Bayer and Hans Von Der Burchard, ‘Germany to send Ukraine weapons in historic shift on military aid’, *Politico* (26 February 2022) www.politico.eu/article/ukraine-war-russia-germany-still-blocking-arms-supplies; Josep Borrell, ‘It is a matter of life and death. So the EU will provide weapons for Ukraine’s armed forces’, *The Guardian* (27 February 2022) www.theguardian.com/commentisfree/2022/feb/27/eu-will-provide-weapons-for-ukraine-josep-borrell.

¹⁷¹ ‘Ukraine: What sanctions are being imposed on Russia?’, *BBC News* (3 March 2022) www.bbc.co.uk/news/world-europe-60125659.

¹⁷² Allan Little, ‘Ukraine war: Putin has redrawn the world – but not the way he wanted’, *BBC News* (19 March 2022) www.bbc.co.uk/news/world-europe-60767454.

¹⁷³ Carl Bildt, ‘Are Sweden and Finland moving to apply for NATO membership?’, *The Washington Post* (16 March 2022) www.washingtonpost.com/opinions/2022/03/16/are-sweden-finland-moving-apply-nato-membership.

¹⁷⁴ Rowena Mason, ‘NATO to deploy extra troops to alliance nations in eastern Europe’, *The Guardian* (25 February 2022) www.theguardian.com/world/2022/feb/25/nato-deploy-extra-troops-eastern-europe-ukraine-russia-war.

¹⁷⁵ Thomas Franck, ‘Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States’ (1970) 64 *American Journal of International Law* 809.

¹⁷⁶ Louis Henkin, ‘The Reports of the Death of Article 2(4) are Greatly Exaggerated’ (1971) 65 *American Journal of International Law* 544, 544.

Ukraine has underscored that both the *jus ad bellum* and the UN are of continuing relevance and utility in structuring the discourse and debate regarding such tragic actions, and that those perpetrating them do not escape with complete impunity. That, at least, is something worth holding on to and trying to sustain.