



The Legality of Russia's Special Military Operation Against Ukraine from International Law Perspective

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Abstract

Russia has launched a Special Military Operation against Ukraine, which resulted in a crisis therein. According to Vladimir Putin, current Russia's President, the action aimed to exercise the state's inherent right of individual and collective self-defense for the Donetsk People's Republic ('DPR') and Luhansk People's Republic ('LPR'). This article was aimed to analyze the legality of Russia's use of force. This article applied normative legal research and using statutory, case, conceptual, and fact approaches in analyzing the case. The study indicated that Russia's Special Military Operation constitutes illegal use of force. Based on the criteria set in international law, Russia's justification for individual self-defense is invalid since no armed attack exists, unnecessary and unproportionate. As well as its collective self-defense plea, which does not apply in these circumstances as DPR and LPR statehood is not clear, let alone its United Nations membership status. Suppose that it does apply, the use of force is still unlawful since other non-forcible means are available to achieve the end sought.

1. Introduction

The Russian Federation ('Russia') and Ukraine are neighboring states in Eastern Europe. Both were previously one state, part of the Union of Soviet Socialist Republic ('USSR').¹ After the USSR's dissolution, Russia was *de facto* declared an independent state on June 12th, 1991, while Ukraine was on August 24th, 1991.² Demographically, the two states comprise a significant number of Slavic populations³ which claim a common heritage.⁴ The relationship between these two, however, is arguably volatile.⁵

¹ Szporluk, R. (2000). *Russia, Ukraine, and the Breakup of the Soviet Union*. Stanford: Hoover Institution Press, p. xix.

² Magocsi, P.R. (1996). *A History of Ukraine*. Toronto: University Toronto Press, p. 674.

³ Council of Europe. (2020). *Application of The European Charter for Regional or Minority Languages, initial monitoring cycle*, p. 14.

⁴ Kubicek, P. (2008). *The history of Ukraine*. California: Greenwood Press, p. 4.

⁵ Lapenko, M. (2014). The Ukrainian Crisis and its Effect on the Project to Establish a Eurasian Economic Union. *Connections*, 14(1): 121-136. DOI: <http://dx.doi.org/10.11610/Connections.14.1.06>, p. 128.

The Russian-Ukraine relations were complex for five years after their independence, yet got better when both states signed a treaty of friendship, cooperation, and partnership in 1997.⁶ However, the relations were back tense from 2005 to 2010 when Viktor Yushchenko ruled Ukraine, then reduced when the 2010 president-elect Viktor Yanukovich began his presidency.⁷ In 2014, the relationship was more heated due to Russia's annexation of Crimea, which eventually insulted the Ukrainian territorial integrity⁸ – the fundamental must-respected principle of international law – since it was done illegally.⁹

Following the annexation, Ukraine strengthened its cooperation with North Atlantic Treaty Organization (NATO),¹⁰ a military alliance established in 1949 to create a collective self-defense mechanism between its members.¹¹ In 2020, a new national security strategy was introduced due to Ukrainian-NATO's deepened cooperation which led to the possibility of Ukraine's membership in NATO.¹² The membership status would allow Ukraine to have a strong international military backing, eventually protecting the state from any national security crisis. Unsurprisingly, Ukraine's movement with NATO's membership provoked a more complicated relationship with Russia.¹³ The entitlement of such status would expand the border of the West-led military alliance closer to Russia and thus is considered a threat.

In response, Russia started to conduct negotiations with NATO to prevent Ukraine from getting membership status.¹⁴ However, through press conferences, NATO reacted unfavorably to Russia's demand based on the notion that Ukraine has the right to choose its security arrangement and alliances.¹⁵ Such a stance builds up paranoia for Russia. Its fear of security threats has shown in the most recent action of mobilizing more than 100,000 troops with the initial aim of security guarantees and halting Ukraine from

⁶ Kappeler, A. (2014). Ukraine and Russia: Legacies of the imperial past and competing memories. *Journal of Eurasian Studies*. 5(2): 107-155. DOI: <http://dx.doi.org/10.1016/j.euras.2014.05.005>. p. 109.

⁷ *Ibid.*

⁸ United Nations General Assembly Resolution 68/262, (1 April 2014), A/RES/68/262.

⁹ Russia claimed that Crimea has the right to separate from Ukraine under the basis of remedial secession. However, the circumstances did not fulfill the requisites. There was no gross and systematic violation of human rights in Crimea as affirmed by international organizations, e.g., The Office of the High Commissioner for Human Rights. Hence, Russia's use of force in aiding the secession and its annexation of Crimea is unjustified and illegal, see Grant, T.D. (2015). Annexation of Crimea. *The American Journal of International Law*. 109(1): 68-95. DOI: 10.5305/amerjintelaw.109.1.0068. pp. 93-94.

¹⁰ North Atlantic Treaty Organization. *Relations with Ukraine*. Available from https://www.nato.int/cps/en/natohq/topics_37750.htm. (Accessed on 11th March 2022).

¹¹ North Atlantic Treaty, Art. 5.

¹² North Atlantic Treaty Organization, *op.cit.*

¹³ NATO was initially established to repress the USSR's military power in the Cold-War era, see Sperling, J., & Webber, M. (2017). NATO and the Ukraine crisis: Collective securitisation. *European journal of international security*. 2(1): 19-46. DOI: doi:10.1017/eis.2016.17, p. 1.

¹⁴ Reuters. *Russia urges NATO to break promise to Ukraine as part of security package*. Available from <https://www.reuters.com/world/europe/russia-demands-rescinding-nato-promise-ukraine-georgia-2021-12-10/>. (Accessed on 25th February 2022).

¹⁵ The Moscow Times. *U.S., NATO Reject Russia's Ukraine Demands, Offer 'Diplomatic' Path Forward*. Available from <https://www.themoscowtimes.com/2022/01/26/us-nato-reject-russias-ukraine-demands-offer-diplomatic-path-forward-a76166> (Accessed on 27th February 2022)

joining NATO.¹⁶ In the end, Vladimir Putin, Russia's current president, ordered a Special Military Operation against Ukraine on Thursday, February 24th, 2022, to respond to what he called "the question of life or death" derived from NATO expansion.¹⁷ Simply stated, Russia acted in self-defense,¹⁸ an inherent right owned by every state to respond to a threat.¹⁹

In his televised speech, Vladimir Putin also stated other reasons behind his order of military operation in Ukraine. The reason relates to the crisis, which involved pro-Russian separatist groups therein. Historically, the crisis in the Donbas region initially started with Maidan protests which were joined by around 800.000 Ukrainians conducted in Kyiv.²⁰ One contributing factor to the protest is the disappointment with the Ukrainian government's renouncement of the Deep and Comprehensive Free Trade Agreements ('DCFTAs') with the European Union.²¹ The protests eventually turned into violence as Yanukovich – the ruling president at the time – dispersed the rallies by force.²² The protest continued with the deadly event known as the "sniper massacre"²³ The aftermath of the Maidan protests has created the opportunity for foreign intervention,²⁴ utilizing the political crisis, i.e., Russia's annexation of Crimea.²⁵ The secession of Crimea has resulted in the popularity growth of pro-Russian organizations in the Donbas region, consequently echoing the separatism agenda in Donetsk and Luhansk.²⁶

The growing separatism agenda coupled with "humiliation and genocide" allegation²⁷ has intrigued Russia to recognize the so-called Donetsk People's Republic and the Luhansk People's Republic. The recognition further justifies its Special military

¹⁶ Aljazeera. *Putin says he wants Ukraine's NATO question resolved 'now'*. Available from <https://www.aljazeera.com/news/2022/2/15/putin-ukraine-nato-membership-question-must-be-resolved-now>. (Accessed on 27th February 2022).

¹⁷ The New York Times. *Putin Announces Start to "Military Operation" Against Ukraine*. Available from <https://www.nytimes.com/2022/02/23/world/europe/ukraine-russia-invasion.html> (Accessed on 27th February 2022).

¹⁸ The Spectator. *Full Text: Putin's Declaration of War on Ukraine*. Available from <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine> (Accessed on 28th February 2022).

¹⁹ Charter of United Nations, Art. 51. ("UN Charter")

²⁰ Onuch, O. (2014). The Maidan and Beyond Who were The Protestors?. *Journal of Democracy*. 25(3): 44-51. DOI: 10.1353/jod.2014.0045. p. 44.

²¹ Tolksdorf, D. (2014). The European Union to Ukraine's Rescue. *Politique étrangère*. I(3): 109-119. DOI: <https://doi.org/10.3917/pe.143.0109>. p. 112.

²² Katchanovski, I. (2016). The Separatist War in Donbas: A Violent Break-up of Ukraine?. *European Politics and Society*. 17(4): 473-498. DOI: <https://doi.org/10.1080/23745118.2016.1154131>. p. 474.

²³ Ishchenko, V. (2016). Far right participation in the Ukrainian Maidan protests: an attempt of systematic estimation. *European Politics and Society*. 17(4): 453-472. DOI: <https://doi.org/10.1080/23745118.2016.1154646>. p. 454.

²⁴ Zelinska, O. (2017). Ukrainian Euromaidan protest: Dynamics Causes, and Aftermath. *Sociology Compass*. 11(9): 1-12. DOI: <https://doi.org/10.1111/soc4.12502>. p. 7.

²⁵ Kudelia, S. (2014). The Maidan and beyond: The house that Yanukovich built. *Journal of Democracy*, 25(3), 19-34. DOI: <https://doi.org/10.1353/jod.2014.0039>. p. 32.

²⁶ Giuliano, E. (2018). Who Supported Separatism in Donbas? Ethnicity and popular opinion at the start of the Ukraine crisis. *Post-Soviet Affairs*. 34(2-3): 158-178. DOI: <https://doi.org/10.1080/1060586X.2018.1447769>. p. 158.

²⁷ The Spectator, *loc.cit.*

operation in Ukraine lying on the plea of collective self-defense as authorized in Article 51 of the UN Charter.

Whatever the reasons are, what clearly can be seen from the Special Military Operations is the crisis faced by society therein. As of March 14th, 2022 – less than a month since the operation was conducted – The Office of the United Nations High Commissioner for Human Rights recorded 1.761 civilian casualties in Ukraine, including 90 children killed and more than 100 injured.²⁸ As the war goes on, the number of casualties will grow higher. Moreover, the United Nations High Commissioner for Refugees also calculated that the rapid growth of the refugee crisis stems from the war. As of March 15th, 2022, cumulatively 3.069.765 Ukrainians sought refuge in other countries due to unsafe conditions in Ukraine.

The international community has been attempting to prevent Russia from going further. States such as the United States of America, the United Kingdom, Canada, and the European Union have imposed sanctions since the early dates, severely affecting Russia's economy.²⁹ The United Nations Security Council ('UNSC') has also made a draft resolution on Ukraine to stop the ongoing military aggression, voted in favor by 11 members.³⁰ Furthermore, The United Nations General Assembly ('UNGA') has also adopted a resolution demanding that Russia unconditionally end its military operation in Ukraine.³¹ Russia, on the other hand, stands firm in its stance. *Firstly*, it issued counter-sanctions to minimize the circulation of foreign currency. The sanctions also cover the restriction of divestment of foreign investors from Russian assets.³² *Secondly*, notwithstanding the overwhelming support by member states to said draft resolutions – 11 and 141 states voted in, respectively, UNSC and UNGA resolutions – Russia vetoed the UNSC resolution and voted against the UNGA resolution, then carried on the military operation. *Thirdly*, Russia started its information campaign to depict the Special Military Operation as lawful conduct, indicating its persistent view that the action was justified. The campaign can be seen from several actions, namely:

- a. Detaining 7.000 people who participated in the anti-war protest movement;³³

²⁸ Office of the High Commissioner for Human Rights. *Ukraine: Civilian Casualty Update 14 March 2022*. Available from <https://www.ohchr.org/en/news/2022/03/ukraine-civilian-casualty-update-14-march-2022#:~:text=OHCHR%20notes%20the%20report%20of,and%20more%20than%20100%20injured>. (Accessed on 14th March 2022).

²⁹ CNN Business. *The List of Global Sanctions on Russia for The War in Ukraine*. Available from <https://edition.cnn.com/2022/02/25/business/list-global-sanctions-russia-ukraine-war-intl-hnk/index.html>. (Accessed on 1st March 2022).

³⁰ United Nations News. *Russia blocks Security Council action on Ukraine*. Available from <https://news.un.org/en/story/2022/02/1112802> (Accessed on 1st March 2022).

³¹ United Nations General Assembly Resolution A/ES-11/L.1.

³² Herbert Smith Freehills. *Sanction Tracker - Russian Counter Sanctions*. Available from <https://hsfnotes.com/sanctions/2022/03/03/sanctions-tracker-russian-counter-sanctions/#page=1> (Accessed on 4th March 2022).

³³ France 24. *Dozens detained at anti-war rallies in Russia*. Available from <https://www.france24.com/en/live-news/20220302-dozens-detained-at-anti-war-rallies-in-russia> (Accessed on 3rd March 2022).

- b. Blocking and censoring the internet blogs that refer to the operation as an invasion, attack, or declaration of war;³⁴ and
- c. Producing and distributing handbooks through the school system, which provide justifications for the Special Military Operation.³⁵

Given the totality of circumstances described above, there is a clear message. Russia clearly understands that international law prohibits the use of force. The rule is enshrined in Article 2(4) of the UN Charter³⁶ and declared as a rule of custom by the International Court of Justice ('ICJ').³⁷ Hence, to avoid the breach of international law, it justifies its actions by invoking self-defense (in response to NATO expansion) and collective self-defense (in relation to the self-proclaimed Republics in the Donbas area).

This article aims to analyze the lawfulness of Russia's Special Military Operation from the perspective of international law. The scope of this article revolved around the analysis of the legality of the use of force based on Russia's plea for its justification in carrying out its military operation against Ukraine. Due to the novelty of the issue, until this paper was submitted, journal articles elaborating on the legality of Russia's Special Military Operation in Ukraine, which has been happening recently, are yet to be found. Therefore, discussion on this matter is needed.

Nevertheless, researchers have researched the legality of the use of force. Jerry Indrawan, in his publication entitled "*Legalitas dan Motivasi NATO (North Atlantic Treaty Organization) dalam Melakukan Intervensi Kemanusiaan di Libya*" has researched the legality and motives of NATO's use of force through "Operation Unified Protection" under the doctrine of humanitarian intervention. The author found a misapplication of the humanitarian intervention doctrine since no serious peril occurred in Libya.³⁸ In contrast, the author found that NATO's motive was to gain access to oil in Libya, making it dubious to accept the humanitarian intervention plea.³⁹

Besides, Mochammad Havis Yanuar and Sasmini in "*Legalitas Intervensi Rusia Terhadap Ukraina (Studi Kasus Krimea)*" have also researched Russia's intervention in Ukraine's Crimea through its use of force. Yanuar and Sasmini's article assessed such intervention based on the five grounds of justifications, i.e., collective intervention under Part VII of the UN Charter, responsibility to protect, self-defense, relation of protectorate state over its dominion and humanitarian intervention. The authors found that Russia's action was illegal, violating international law.⁴⁰

³⁴ Aljazeera. *Do not call Ukraine invasion a 'war', Russia tells media, schools*. Available from <https://www.aljazeera.com/news/2022/3/2/do-not-call-ukraine-invasion-a-war-russia-tells-media-schools> (Accessed on 3rd March 2022).

³⁵ *Ibid.*

³⁶ UN Charter, Art. 2(4).

³⁷ Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment 1984 ICJ Report 392, para. 73.

³⁸ Indrawan, J. (2013). *Legalitas dan Motivasi NATO (North Atlantic Treaty Organization) dalam Melakukan Intervensi Kemanusiaan di Libya*. *Jurnal Kajian Wilayah*. 4(2): 127-149. DOI: <https://doi.org/10.14203/jkw.v4i2.264>. p. 133.

³⁹ *Ibid*, p. 145.

⁴⁰ Havis, M. & Sasmini. (2015). *Legalitas Intervensi Rusia Terhadap Ukraina (Studi Kasus Krimea)*. *Belli ac Pacis Jurnal Hukum Internasional*. 2(1): 5-19, p. 16.

Yanuar and Sasmini's article has similarities with this article regarding the concerned parties. The scope and the case involved, however, remained different. Both examine the legality of individual self-defense yet in different conditions. *Firstly*, the circumstances in Russia's Crimea intervention are different from Russia's recent military operation and its background and motives. Thus, the circumstances assessed are distinct. *Secondly*, in the former, the individual self-defense justification is hypothetical. Meanwhile, this article assesses the official invocation of such justification. Hence the basis of assessment is different. *Thirdly*, the individual self-defense analysis in this article includes possible invocation of preventive self-defense while the former does not. Furthermore, unlike this article, Yanuar and Sasmini's article does not deal with collective self-defense. Conversely, this article analyzes such justification by firstly examining the legality of Russia's recognition of LPR and DPR.

2. Research Method

This article uses the normative legal research method to assess the legality of Russia's use of force against Ukraine. In doing so, this article analyzed the relevant rules of international law using descriptive analysis. In addition, four approaches were applied in this article, namely the statutory approach, case approach, conceptual approach, and fact approach. The content of this article will be contingent upon the primary sources, such as international treaties, customary international law, and general principles of law, with secondary sources, such as international court decisions, books, journals, international organization reports, and online websites collected through literary study.

3. Result and Discussion

3.1. Individual Self-Defense Justification for Special Military Operation

Individual self-defense is indeed an inherent right for a state.⁴¹ Notwithstanding the foregoing, self-defense must be practiced strictly,⁴² requiring it only to be performed when necessary and proportionate⁴³ to respond to an armed attack against the defending state.⁴⁴ In the *Nicaragua decision*, the International Court of Justice ('ICJ') has noted that this test applies in assessing every self-defense given its customary character.⁴⁵

a. The Existence of Armed Attack

The right of self-defense arises when an armed attack exists.⁴⁶ This criterion is derived from the direct interpretation of Article 51 of the UN Charter by its ordinary meaning,⁴⁷ which states:

⁴¹ UN Charter, Art. 51.

⁴² *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)*, Merits, 1986 ICJ, Rep 14, para. 176. ("Nicaragua")

⁴³ *Nicaragua*, para. 176.

⁴⁴ *Legality of the Threat or Use of nuclear weapons*, Advisory Opinion, ICJ Rep 1996, para 40. ("Nuclear Weapon")

⁴⁵ *Nuclear Weapon*, para 40.

⁴⁶ Gray, C. (2018). *International Law and the Use of Force Fourth Edition*. Oxford: Oxford University Press, p. 128.

⁴⁷ Vienna Convention on The Law of Treaties, Art. 31(1).

*“Nothing in the present charter shall impair the inherent right of individual or collective self defence **if an armed attack occurs against a Member of the United Nations**.....”* (Emphasized added)

ICJ has confirmed this direct interpretation in its decisions.⁴⁸ Conversely, as supported by highly qualified scholars,⁴⁹ if an armed attack is absent, no right of individual self-defense shall be triggered.⁵⁰ Accordingly, the use of force in self-defense that responds to other than an armed attack is considered unlawful.⁵¹

The problem in determining whether this criterion has been met may arise from the difficulty to define ‘armed attack’.⁵² The evolution of modern weapons coupled with no clear threshold of what constitutes an armed attack contributes to this circumstance. However, explanations in several ICJ judgments – although not crystal clear – provide some guidance to identify an armed attack.

In the *Nicaragua case*, the ICJ concluded that sending armed groups by or on behalf of a State is classified as an armed attack.⁵³ Decades later, in the *Oil Platform case*, the Court set another requirement for an attack to qualify as an armed attack, i.e., the attack must be undertaken with the specific intention of harming.⁵⁴ Moreover, non-military threats do not suffice to be constituted as armed attacks.⁵⁵

Russia’s plea for self-defense appears to be inconsistent with the first criteria. President Putin mentioned nothing concerning Ukraine’s armed attack yet only focused on the threats which may be imposed if Ukraine joins NATO.⁵⁶ It seems clear that the said self-defense argument is based on NATO member-expansion policy, which would allow the ally to deploy military bases in the state’s member territory. Russia’s worries about the possible threats are somehow understandable. On the geo-political analysis, NATO state members consist of the USSR’s (the predecessor of Russia) rivals in the Cold-War era. However, it still does not qualify as an armed attack.

The possible argument to justify self-defense in the absence of an actual armed attack might be the preventive self-defense doctrine since it is a means to prevent an attack.⁵⁷

⁴⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment, 2005, ICJ, 168, pp. 143-147; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ, 136, para. 139.

⁴⁹ Brownlie, I. (1963). *International Law and the Use of Force by States*. Oxford: Clarendon Press, p. 278; Jessup, P.C. (1968). *A Modern Law of Nations*. Hamden, CT: Archon Books, p. 165; Henkin, L. (1990). *International Law: Politics, Values and Function*. Leiden: Martinus Nijhoff, p. 156.

⁵⁰ Weller, M. (2017). *The Oxford Handbook of the Use of Force in International Law*. Oxford: Oxford University Press, p. 664.

⁵¹ Detter, I. (2000). *The Law of War*. New York: Cambridge University Press, p. 85.

⁵² Crawford, J.R. (2019). *Brownlie’s Principles of Public International Law* (9th Edition). Oxford: Oxford University Press, p. 1384. (“Crawford I”).

⁵³ *Nicaragua*, para 103 citing UNGA Res 3314 (XXIX), 14 December 1974, Annex, Art 3(g).

⁵⁴ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, 2003, ICJ Rep 161, para. 64.

⁵⁵ Davis, A., Cardiel, J.L.A., Macherel, L. (2018). Modern Self - Defense the Use of Force Against Non-Military Threats. *Columbia Human Rights Law Review*. 49(3): 99-192, p. 103.

⁵⁶ *The Spectator*, loc. Cit.

⁵⁷ Shiryayev, Y. (2007). The right of armed self-defense in international law and self-defense arguments used in the second Lebanon war. *Acta Societatis Martensis*, 3: 80-97, p. 92; Stephen C. Neff. (2005). *War and the Law of Nations: A General History*. New York: Cambridge University Press,

However, the doctrine has been subjected to academic discourse with polarized views.⁵⁸ This doctrine has been contested due to its high probability of being abused.⁵⁹ Indeed, the international community rejected the invocation of such doctrine unless with authorization by UNSC.⁶⁰ In this vein, unilateral preventive self-defense is not permissible under international law. Therefore, the application of preventive self-defense on Russia's special military operation is not justified as it is a unilateral action with no authorization given by the security council. If this applies to the *status quo*, the necessity and proportionality test must still be passed.

b. The Necessity Test

If a threat did exist, Russia's Special Military Operation must meet the necessity test. Necessity has generally been interpreted as meaning that the defending state must have no other option in the circumstances than to act in forceful self-defense.⁶¹ Thus when all non-forcible measures have not been exhausted, the use of force is not necessary.⁶² In this regard, the invoking state must validate the unavailability of other measures to resolve the problem deemed a threat.⁶³

Admittedly, Russia has been negotiating with NATO not to expand its membership in Eastern Europe. The United States and NATO, on the other hand, rejected the negotiation. However, Russia still has options to negotiate with Ukraine, building a good political relationship to prevent it from being the ally that allegedly could threaten Russia. Furthermore, even if Ukraine were a member of NATO, it does not necessarily mean it would immediately attack Russia. These other means show that Russia's special military is an unnecessary use of force.

c. The Proportionality Test

Proportionality requires that the response's size, duration, and target correspond to the attack in question.⁶⁴ This test is quite hard to be proven as no clear indication of attack exists in the first place. However, the test of proportionality is interconnected to the necessity test. A use of force is proportionate when such action is strictly necessary means⁶⁵ to achieve the ends sought.⁶⁶ As proven *infra*, the Special Military Operation is not necessary. Therefore, it is not a proportionate use of force acting in self-defense.

p. 127; Brown, C. (2003). Self-defense in an imperfect world. *Ethics & International Affairs*. 17(1): 2-8. DOI: <https://doi.org/10.1111/j.1747-7093.2003.tb00412.x>, p.3.

⁵⁸ Green, J.A. (2015). The 'ratione temporis' elements of self-defence, *Journal on the Use of Force and International Law*. 2(1): 97-118. DOI: <https://doi.org/10.1080/20531702.2015.1043097>. p. 109.

⁵⁹ Shiryayev, *Op.cit*, p. 83.

⁶⁰ Weller, *Op.cit*, p. 668.

⁶¹ Gardam, J. (2004). *Necessity, Proportionality, and the Use of Force by States*. New York: Cambridge University Press, p. 149-153

⁶² Schachter, O. (1984). Rights of States to Use Armed Force. *Michigan Law Review*. 82(5): 1620-1636, p.1635.

⁶³ Upeniece, V. (2018). Conditions for the lawful exercise of the right of self-defence in international law. In SHS Web of Conferences (Vol. 40, p. 01008). *EDP Sciences conference*. p. 3.

⁶⁴ Gray. *Op.cit*. p. 150.

⁶⁵ Shiryayev, Y. *Op.cit*. p. 92.

⁶⁶ Kretzmer, D. The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum. *European Journal of International Law*. 24(1): 235-282. DOI: <https://doi.org/10.1093/ejil/chs087>, p 276.

3.2. The Collective Self-Defense Justification for Special Military Operation

The concept of collective self-defense involved more than one state. Russia's plea for collective self-defense introduces a unique challenge in assessing its legitimacy due to the unclear status of the self-proclaimed Donetsk People's Republic and Luhansk People's Republic. Accordingly, the author will firstly analyze the statehood of both entities based on the requirement of the state's creation before going further with the collective self-defense claim.

3.2.1. Statehood Status of Donetsk People's Republic ("DPR") and Luhansk People's Republic ("LPR")

a. The Montevideo Convention Criteria of Statehood

The 1933 Montevideo Convention is the only international treaty that provides the criteria for statehood. According to Article 1 of the Montevideo Convention, states must possess four things, namely: (i) a permanent population, (ii) a defined territory, (iii) government, and (iv) the capacity to enter relations with the other states.⁶⁷ Although the provision is not exhaustive,⁶⁸ these criteria of state formulation have been accepted widely⁶⁹ as the minimum threshold for a state's existence.⁷⁰

Applying these custom-reflective criteria⁷¹ in the situation of DPR and LPR, it is argued that both entities did not pass the requirements.⁷² The population claimed to be permanent therein are merely Ukrainian citizens.⁷³ Subsequently, the legitimate government is only the Ukrainian government, including the Donetsk and Luhansk oblasts.⁷⁴

Scholars noted that the formal indicator of the fourth criteria fulfillment is recognition.⁷⁵ In addition, Article 3 Montevideo convention governed that recognition is essential in determining the political existence of an independent state.⁷⁶ *In casu*, it seems clear that DPR and LPR lack recognition from the international community. Although South

⁶⁷ Montevideo Convention on Rights and Duties of States, Art. 1. ("Montevideo Convention")

⁶⁸ Shaw, M. (2017). *International Law Eighth Edition*. New York: Cambridge University Press, p. 157

⁶⁹ Crawford, J. (2006). *The Creation of States in International Law*. Oxford: Oxford University Press, pp. 45-46 (Crawford II); Wong, D. (2013). Sovereignty Sunk-The Position of Sinking States at International Law. *Melbourne Journal of International Law.*, 14, 346. p. 8.

⁷⁰ Lowe, V. (2007). *International Law*. Oxford: Oxford University Press, p. 153.

⁷¹ Harris, D. (2010). *Cases and Materials on International Law*. London: Sweet & Maxwell, p. 92.

⁷² Zadorozhnii, O. (2016). "Revisiting the International Legal Personality" of DPR/LPR. *European Political and Law Discourse* 3(4): 7-14, p. 8.

⁷³ Korotkyi, T., Handel, N. (2018). The Legal Status of the Donetsk and Luhansk (People's Republics". In: Sayapin, S., Tsybulenko, E. (eds) *The Use of Force against Ukraine and International Law*. The Hague: Asser Press, p. 149.

⁷⁴ *Ibid.*

⁷⁵ Daase, C., Geis, A., Fehl, C., Kolliarakis, G (Eds). (2015). *Recognition in International Relations: Rethinking Political Concept in A Global Context*. Frankfurt: Springer, p. 142; Coppieters, B. (2018). Four Positions on the Recognition of States in and after Soviet Union, with Special Reference to Abkhazia. *Europe-Asia Studies* 70(6): 991-1014, DOI: <https://doi.org/10.1080/09668136.2018.1487682/> p. 992; Minakov, M. (2019). On the Extreme Periphery. The Status of Post-Soviet Non-Recognised States in the World-System. *Ideology and Politics Journal*. 1(12): 39-72, p. 45.

⁷⁶ Montevideo Convention, Art. 3.

Ossetia has established diplomatic relations with DPR and LPR, the recognition is problematic since the former's recognition is lacking.⁷⁷ The strongest non-recognition indication of both entities has shown in UNGA resolution A/ES-11/L.1, which is supported by 141 states that stated:

“Deplores the 21st February 2022 decision by the Russian Federation related to the status of certain areas of Donetsk and Luhansk region of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter.”

The stance presents a powerful message that the international community views Donetsk and Luhansk not as independent states. Consequently, DPR and LPR do not acquire statehood status under Montevideo convention criteria.

b. The Doctrine of Remedial Secession

Russia's purported recognition of DPR and LPR was based on the principle of remedial secession.⁷⁸ Notably, secession is part of the right of self-determination.⁷⁹ The practice of such a right is protected under international law.⁸⁰ However, secession is usually accepted as lawful in the context of decolonization⁸¹ since the exercise of self-determination beyond the said framework is limited by the parent state's territorial integrity.⁸² *In casu*, Donetsk and Luhansk are not subject to colonization. Thus, the first thing to be discussed is the legal basis for invoking the doctrine.

Remedial secession is conceptualized as a last-resort action to end oppression experienced by a group of people through seceding from the parent state.⁸³ The concept has been subject to an academic debate, mainly on the question of whether the doctrine has emerged as a rule of international law, specifically Customary International Law ('CIL'). ICJ, in its precedents, has made clear that a rule to be considered as CIL shall be

⁷⁷ Minakov, *ibid*.

⁷⁸ EJIL: Talk! Blog of European Journal of International Law. (2022). *Was Russia's Recognition of the Separatist Republics in Ukraine 'Manifestly' Unlawful?* Available from <https://www.ejiltalk.org/was-russias-recognition-of-the-separatist-republics-in-ukraine-manifestly-unlawful/> (Accessed on 5th March 2022).

⁷⁹ Vidmar, J. (2010). Remedial Secession in International Law: Theory and (Lack of) Practice. *St Antony's International Review*. 6(1): 37-56, p. 38.

⁸⁰ International Covenant on Civil and Political Rights, Art. 1(1); International Covenant on Economic, Social and Cultural Rights, Art. 1(1).

⁸¹ Crawford I, *op.cit*, p. 1384; Dries, S.F. (2015). Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law. *Netherland International Law Review*. 62: 329-363. DOI: <https://doi.org/10.1007/s40802-015-0043-9>, p. 337.

⁸² McCorquodale, R. (1994). Self-Determination: A Human Rights Approach. *International and Comparative Law Quarterly*. 43(4): 857-885, p. 875-876.

⁸³ Vidmar, J. p. 37.

supported by constant,⁸⁴ uniform,⁸⁵ and widespread state practices⁸⁶ as objective element⁸⁷ and sufficient *opinio juris*⁸⁸ as the subjective element.⁸⁹

Practices of remedial secession beyond decolonization are infrequent. One possible example of the practice of remedial secession is in the case of Bangladesh.⁹⁰ The former East-Pakistan seceded from Pakistan in 1971 after severe atrocities and denial of internal self-determination occurred. However, the international community was reluctant to recognize Bangladesh as a state. The admission of Bangladesh into the United Nations was rejected until Pakistan granted consent.⁹¹ This practice suggests that the formation of Bangladesh was consensual rather than unilateral. Furthermore, in the *Kosovo case*, states such as Argentina,⁹² Azerbaijan,⁹³ and Bolivia⁹⁴ rejected this doctrine, and eventually, the ICJ noted that this doctrine is subject to varied standings among states.⁹⁵ The lack of support in constant and uniform state practices and *opinio juris* indicates that remedial secession is not a rule of CIL.

On the assumption that this theory has emerged as a custom rule to justify secession, the invocation must meet a high threshold. Scholars have noted that remedial secession might be permitted in the case of gross violation of human rights, e.g., genocide. Furthermore, the doctrine should only be exercised as *ultimum remedium*,⁹⁶ meaning other measures such as internal self-determination shall be conducted prior.⁹⁷

Russia has suspected a crime of genocide is currently happening in Donetsk and Luhansk.⁹⁸ Nonetheless, no concrete evidence may support this allegation. Russia merely relied on a document that purportedly circulated at the United Nations, accusing

⁸⁴ International Law Commission. (2018). *Draft Conclusions on identification of customary international law, with commentaries* UN Doc. A/71/10, Conclusion.8, Commentary. (2)

⁸⁵ Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgment, 1950, ICJ Rep, paras. 276-277.

⁸⁶ Jurisdictional Immunities of The State (Germany v Italy), Judgment, 2012, ICJ Rep 99, para. 101.

⁸⁷ Shaw, p. 60.

⁸⁸ North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands), Judgment, 1969, ICJ Rep 3, para. 37.

⁸⁹ Shwa, p. 62.

⁹⁰ Crawford II, p. 393.

⁹¹ Vezebergaite, I. (2011). *Remedial Secession as An Exercise of The Right to Self-Determination of Peoples*. Central European University, p. 76.

⁹² Embassy of the Argentine Republic. (2009). *Written Statement of The Argentine Republic Accordance with International Law of The Unilateral Declaration of Independence by The Provisional Institutions of Self-Government of Kosovo*, para. 85-86.

⁹³ *Written Statement of The Republic of Azerbaijan Accordance with International Law of The Unilateral Declaration of Independence by The Provisional Institutions of Self-Government of Kosovo*, para 24-26.

⁹⁴ Embassy of Bolivia the Hague. (2009). *Written Commentary by The Plurinational State of Bolivia to Request for An Advisory Opinion of The International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo Is In Accordance With International Law*, para. 30.

⁹⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010, ICJ, Rep, p. 403, para. 82.

⁹⁶ Laurinavičiūtė, L., Biekša, L. (2015). The Relevance of Remedial Secession in The Post-Soviet "Frozen Conflicts", *International Comparative Jurisprudence*. 1(1): 66-75. DOI: <http://dx.doi.org/10.1016/j.icj.2015.10.008>, p. 70.

⁹⁷ Dries, S.F., *Op.cit*, p. 351.

⁹⁸ Aljazeera. (2022). 'Smell of Genocide': How Putin Justifies Russia's war in Ukraine. Available from: <https://www.aljazeera.com/news/2022/3/9/smells-of-genocide-how-putin-justifies-russias-war-in-ukraine> (Accessed on 11th March 2022).

Ukraine of “extermination of the civilian population” therein.⁹⁹ The accusation was later found baseless. In fact, in the most recent Human Rights Committee’s (“HRC”) concluding observation of Ukraine’s periodic report, the committee commends Ukraine for its efforts to enhance the protection of civilians in relation to civilians’ right to life in the Donetsk and Luhansk region.¹⁰⁰ These findings show that the fundamental requirement to apply remedial secession is not fulfilled, making Russia’s recognition invalid.

Aside from being invalid, Russia’s recognition of both entities has violated Ukraine’s territorial integrity. Territorial integrity is a fundamental principle in international law and is regarded as a general principle¹⁰¹ in the sphere of Article 38(1)(c) of the ICJ Statute.¹⁰² The duty to respect a state’s territorial integrity has been apparent in UNGA resolutions¹⁰³ and instruments which bind both Russia and Ukraine, such as their 1998 bilateral treaty of friendship¹⁰⁴ and the Helsinki Final Act 1975.¹⁰⁵ Therefore, the recognition exhibits a flagrant violation of international law.

3.2.2. International Law’s Requirement of Collective Self-Defense

From the two-layer analysis of the DPR and LPR statehood above, a simple conclusion can be drawn that both entities are not states. However, assuming that DPR and LPR are States, collective self-defense still does not apply for two reasons. *Firstly*, DPR and LPR are not state members of the United Nations. In Article 51 of the UN Charter, collective self-defense may be invoked if “*an armed attack occurs against a Member of the United Nations*”. DPR and LPR are currently not member states of the UN. Hence, Special Military Operation as the collective self-defense is null.

Secondly, even if collective self-defense may apply to a non-state member, the Special Military Operation is an unnecessary use of force. As stipulated in the *Nicaragua case*,¹⁰⁶ *Nuclear Weapon case*,¹⁰⁷ *Oil Platform case*,¹⁰⁸ and *Armed Activities case*,¹⁰⁹ collective self-defense must be necessary. *In casu*, the Special Military Operation is not necessary to respond to the alleged “genocide” – assuming it is happening – due to the availability of other measures. Russia and Ukraine are parties to the 1948 Convention on the

⁹⁹ The Conversation. (2022). *Putin’s Claims that Ukraine is Committing Genocide are Baseless, but not Unprecedented*. Available from <https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unprecedented-177511> (Accessed on 11th March 2022).

¹⁰⁰ Human Rights Committee. (2022). Concluding observations on the eighth periodic reports of Ukraine. CCPR/C/UKR/CO/9, para. 21.

¹⁰¹ Marxsen, C. (2015). Territorial Integrity in International Law - Its Concepts and Implications for Crimea. *Heidelberg Journal of International Law*. 75(1): 7-26. p. 7.

¹⁰² Statute of International Court of Justice, Art. 38(1)(c),

¹⁰³ United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression); United Nations General Assembly Resolution 2625 (XXV) (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).

¹⁰⁴ Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, Art. 2.

¹⁰⁵ Helsinki Final Act 1975, Declaration 1(a)(IV), (VI), (VIII).

¹⁰⁶ Nicaragua, para. 14.

¹⁰⁷ Nuclear Weapons, para. 245.

¹⁰⁸ Oil platform, para. 161.

¹⁰⁹ Armed Activities, para. 223.

Prevention and Punishment of the Crime of Genocide.¹¹⁰ The convention has granted the opportunity for Russia to call upon competent organs of the UN to take actions for the prevention and suppression of acts of genocide.

Moreover, Russia may bring the case before ICJ according to Article IX of the Genocide Convention.¹¹¹ Russia could present its argument that genocide is happening in Ukraine. If genocide is factually happening there and Russia could prove it. This measure will arguably stop the alleged genocide. Here, the author argues that alternative non-forcible measures are available, indicating Russia's Special Military Operation is not the last resort to be conducted immediately.

4. Conclusion

In conclusion, Russia's Special Military Operation is an illegal use of force under international law. Its plea for self-defense to Ukraine fails to satisfy the required existence of armed attacks embodied in Article 51 UN Charter. Assessing an alleged attack *in casu* is quite difficult due to ambiguity stems from Russia's perspective. The only clue given was the paranoia of a possible attack from Ukraine if it acquired NATO's membership which still does not qualify as an armed attack. Given the absence of Ukraine's attack, Russia might invoke preventive self-defense. The doctrine, however, is highly contested. Russia's use of force also did not pass the test of necessity and proportionality as the requisites governed in customary international law. Other non-forcible measures to respond to the perceived threat or attack are still available, e.g., using diplomacy. Russia's choice to launch the military operation indicates its unproportionate character. The plea for collective self-defense is also invalid. The first problem that arises from this justification is the statehood of DPR and LPR, given that collective self-defense only applies to two or more states. As argued above, DPR and LPR did not possess statehood custom-reflected criteria in the Montevideo Convention. Moreover, Russia's recognition based on remedial secession is unlawful since it is not a rule of CIL. Even if it is, the circumstance in Donbas does not suffice to meet the gross violation of human rights, as the recent HRC findings show otherwise. Suppose the self-proclaimed republics are states, the UN non-member states' status will bar the rise of collective self-defense rights as Article 51 UN Charter requires such status. In any event, the use of force in exercising the collective self-defense is invalid as no attack or threat exists. Russia only uses vague accusations of genocide in Donetsk and Luhansk to justify its actions. If genocide is occurring in Ukraine, the use of force is not necessary as other measures available under Genocide Convention to achieve the sought goals, i.e., to stop the genocide.

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¹¹⁰ United Nations. (2019). The Genocide Convention. Available from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en (Accessed on 11th March 2022)

¹¹¹ Genocide Convention, Art. IX.

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