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**DOI**

[10.1163/18754112-25020002](https://doi.org/10.1163/18754112-25020002)

**Publication date**

2022

**Document Version**

Final published version

**Published in**

Journal of International Peacekeeping

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[Link to publication](#)

**Citation for published version (APA):**

Gill, T. D. (2022). The *Jus ad Bellum* and Russia's "Special Military Operation" in Ukraine. *Journal of International Peacekeeping*, 25(2), 121-127. <https://doi.org/10.1163/18754112-25020002>

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# The *Jus ad Bellum* and Russia’s “Special Military Operation” in Ukraine

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## Abstract

This editorial commentary examines the justifications put forward by the Russian government for its “special military operation” against the background of the law governing the use of force (*jus ad bellum*). It also addresses the relevance of that body of law in light of what has transpired since the Russian invasion of Ukraine commenced.

## Keywords

Russia – Ukraine – special military operation – *jus ad bellum* – legal justifications and consequences

## Introduction

The war in Ukraine has been raging since 24 February 2022, which at the time of writing this editorial, is seven weeks since the conflict began. Much has since then been written on the legal issues surrounding the conflict, including on the law relating to the use of force, also often referred to as the *jus ad bellum*, so I will try to be as brief as possible and avoid unnecessary repetition.<sup>1</sup> I will firstly

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<sup>1</sup> See *inter alia* the online article sized editorial by James A. Green, Christian Henderson & Tom Ruys (2022) “Russia’s attack on Ukraine and the *jus ad bellum*”, *Journal on the Use of Force and International Law*, DOI: 10.1080/20531702.2022.2056803; See also Articles of War, Lieber Institute, U.S. Military Academy, Ukraine Symposium available at <https://lieber.westpoint.edu/symposium-intro-ukraine-russia-armed-conflict/> with posts on self-defence, law of neutrality, law of armed conflict and more.

address the question whether any of the arguments used to justify the invasion of Ukraine have any basis in the law relating to the use of force and then go on to discuss why this law matters and what bearing it still has on the conflict.

### Russia's Justifications and the Law

Russia's representative in the UN Security Council invoked the right of self-defence and attached the speech by President Putin announcing the "special military operation" as justification for its action immediately following the invasion of Ukraine by Russian forces. In that statement Putin referred to various reasons for its claim of self-defence. These included past allegedly unlawful uses of force by Western nations in Iraq, Syria, Libya and Yugoslavia, the "threatening expansion" of NATO towards Russia's borders, the alleged plight of persons of Russian ethnicity in Ukraine, especially the Donbas region and the "genocide" supposedly being perpetrated against them, and the "request for assistance" by the breakaway enclaves of Luhansk and Donetsk, which had been recognized as independent States by Russia only days before the invasion commenced. All of this made it in his words imperative to take action to rid Ukraine of supposedly "anti-Russian" and "Nazi" elements and enforce its "demilitarization and neutrality".<sup>2</sup>

While there is certainly ample room for discussion concerning some of the earlier uses of force by Western nations referred to in Putin's speech, and even reasonable doubt concerning the legality of some of them, they do not singly or cumulatively amount to an armed attack, incipient armed attack, or even a threat of force directed against the Russian Federation – now or when they occurred – some as far back as nearly 25 years ago. Whatever their legal status at the time, they have little to do with the present situation in Ukraine, which is largely the product of tensions which originated in 2013–2014, with the Maidan revolution, Ukraine's wish to orient itself towards Europe and the annexation of the Crimean Peninsula by Russia.<sup>3</sup> There are no grounds to claim that the

2 The full transcript of President Putin's speech on 24-02-2022 giving reasons for the "special military operation" is available on Bloomberg at <https://www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24>.

3 The background to the conflict is discussed inter alia on the Council of Foreign Relations website *Global Conflict Tracker* available at <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>. See also Matthew M. Bigg, "A history of the tensions between Ukraine and Russia" *N.Y. Times*, 26/03/2022 at <https://www.nytimes.com/2022/03/26/world/europe/ukraine-russia-tensions-timeline.html>.

accession of States to NATO and the European Union, which during the Cold War had belonged to the Warsaw Pact and were allied to the Soviet Union, in any way constituted a threat of attack on Russia. Likewise, there is zero evidence of a "genocide" aimed at or perpetrated against the ethnic Russian population of (East) Ukraine. While Ukraine's record on minority protection prior to the invasion was less than perfect, it in no way constituted a systematic oppression or policy of extermination or expulsion of the Russian speaking portion of Ukraine's population. Neither was there any acute threat of violence aimed at Russian nationals immediately preceding, or at the time Russia commenced its "special military operation". Likewise, there was no evidence or likelihood of an impending Ukrainian offensive to retake areas in eastern Ukraine under the control of Russian backed separatists or of the Crimea. On the contrary, prior to the invasion, Russia massed a force of well over one hundred thousand troops in the border region of Russia and Belarus adjacent to the Ukraine border under the guise of conducting "military manoeuvres" and repeatedly dismissed claims that it was contemplating an invasion of Ukraine as Western propaganda. In sum, there is no evidence whatsoever of an (impending) attack by Ukraine, either on its own or in concert with any other State, on Russia in the days and weeks leading up to the invasion.<sup>4</sup> Hence, the invasion of Ukraine by Russia is a *prima facie* violation of the prohibition of the threat or use of force in international relations under the UN Charter and customary international law and violates multiple other undertakings by Russia to respect Ukraine's sovereignty and territorial integrity, including the Helsinki Final Act of 1975, the Budapest Memorandum of 1994 and the Minsk Agreements

4 All of these claims are examined in more detail in the sources cited in n. 1 above. Prior to the annexation of Crimea in 2014, NATO had no troops deployed on its eastern flank. From 2017, NATO established its "Enhanced Forward Presence" in Poland and the Baltic States on a rotational basis totalling four battalion sized battlegroups and several squadrons of aircraft forming the Baltic Air Patrol. The US also moved approximately 1000 troops from Germany to Poland during the Trump Administration as a sign of displeasure on the part of then President Trump with Germany's NATO expenditures and import of Russian gas. See *inter alia* "NATO's military presence in the east of the Alliance" last updated 28/03-2022 at [https://www.nato.int/cps/en/natohq/topics\\_136388.htm](https://www.nato.int/cps/en/natohq/topics_136388.htm). On the move of some US troops stationed in Germany to Poland see Deutsche Welle 23-09-2019 "Trump confirms more US troops will be sent to Poland" at <https://www.dw.com/en/trump-confirms-more-us-troops-will-be-sent-to-poland/a-50554660>. These troops taken together totalled approximately 5000 personnel, whose purpose was largely symbolic, namely to show solidarity with the member States of NATO on its eastern border. Since the invasion of Ukraine, NATO has greatly expanded its presence in the eastern part of the alliance to approximately 40,000 troops deployed from the Black Sea to the Baltic. See e.g. BBC News, 23/03-2022 at <https://www.bbc.com/news/world-europe-60853052>.

of 2014 and 2015.<sup>5</sup> We will now examine the law a little more closely to see if there could be any justification under international law for Russia's decision to invade Ukraine, whatever name one wishes to label it by.

There are only two recognized bases for the use of force across an international border under international law. The UN Security Council can itself take or authorize the taking of measures by one or more States (sometimes acting under the auspices of a regional organization or arrangement) to maintain or restore international peace and security under the UN collective security system. States also have the inherent right of individual and collective self-defence. Neither of these legal justifications are pertinent to Russia's invasion. The UN collective security system can be used as an instrument to maintain or restore international peace and security pursuant to a decision by the UN Security Council to act in response to a threat to or breach of the peace or act of aggression under Chapter VII of the UN Charter. Needless to say, no decision was made by the Council to authorize the Russian invasion. On the contrary, following the Russian invasion the matter was brought before the Council in a draft resolution submitted by the US demanding an end to the invasion and an immediate withdrawal of Russian troops and was only halted from being adopted by a Russian veto, with three other members abstaining. Following the veto by Russia of the resolution condemning its invasion of Ukraine in the Security Council, the UN General Assembly, acting on the basis of the "Uniting for Peace" procedure in an emergency session, voted by a resounding majority of well over two thirds of Member States to condemn the Russian invasion, with only four States voting against the condemnation of the invasion alongside Russia.<sup>6</sup>

As for self-defence, the applicability of that right is dependent upon the existence of an ongoing armed attack or credible evidence of an impending armed attack in the immediate future. As mentioned earlier, there was no evidence whatsoever of any such attack by Ukraine, or by any other State. The argument that the expansion of NATO over a period spanning more than twenty years constituted a threat of impending attack on Russia would expand

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5 On the Helsinki Final Act see the website of the OSCE at <https://www.osce.org/helsinki-final-act> On the Budapest Memorandum of 1994 see Council of Foreign Relations at <https://web.archive.org/web/20140317182201/http://www.cfr.org/arms-control-disarmament-and-nonproliferation/budapest-memorandums-security-assurances-1994/p32484> On the Minsk Agreements, see e.g. Reuters "Factbox: What are the Minsk Agreements on the Ukraine Conflict" 21/02/2022 at <https://www.reuters.com/world/europe/what-are-minsk-agreements-ukraine-conflict-2022-02-21/>.

6 On the UN General Assembly resolution ES11-1 of 2/3/2022 see <https://news.un.org/en/story/2022/03/1113152>.

the concept of imminent armed attack beyond all recognition and virtually gut the prohibition of the use of force by making foreign policy preferences a justification for preventive war. While Russia was clearly not in favour of NATO membership for its former vassal States in Eastern and Central Europe, their decision to join the alliance was wholly voluntary and a result of the free choice by them as sovereign and independent States, and at no time was there a credible threat of attack or impending attack on Russia posed by the membership of NATO of those States. In the absence of an armed attack or immediate and manifest threat of attack, no plea of self-defence is credible.<sup>7</sup>

There was also absolutely no evidence whatsoever of the existence of any acute threat of violence or serious harm to Russian nationals residing in Ukraine, or of large scale violence amounting to genocide or crimes against humanity planned or perpetrated by Ukraine against ethnic Russians which could conceivably serve as legal justifications for a Russian invasion on the basis of the highly disputed doctrine of "humanitarian intervention" or the somewhat less controversial, but narrowly defined doctrine of "rescue and evacuation of nationals". Finally, since the so-called republics of Luhansk and Donetsk were themselves creations of Russia only several days prior to the invasion, they had no right to invite foreign forces onto "their" territory, leaving aside the fact that so-called "consensual intervention" has no relevance to the use of force between States or across recognized international frontiers or lines of demarcation, which requires as stated earlier, a justification on the basis of a Security Council decision or on the basis of self-defence in response to an (incipient) armed attack.<sup>8</sup>

Consequently, the Russian invasion lacks any credible legal justification and is without doubt one of the most serious and flagrant violations of the core international legal rule prohibiting the use of armed force in international relations since the Charter came into force in the closing stages of the Second World War. It is also an almost open and shut example of the crime

7 On self-defence in general see *inter alia* Yoram Dinstein, *War, Aggression and Self-Defence*, 6th ed. Cambridge University Press (2017), 195ff. On the lack of any basis for a plea of self-defence by Russia in relation to Ukraine, see *inter alia* the post of 28/2/2022 by Michael Schmitt "Russia's Special Military Operation and the (Claimed) Right of Self-Defense" on the Articles of War website referred to in n. 1 *supra* at <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>.

8 On the inapplicability of the implicit claims of humanitarian intervention, protection of nationals and intervention by invitation to the invasion of Ukraine, see *inter alia* the post I made on the Articles of War website on 9/3/2022 "Remarks on the Law Relating to the Use of Force in the Ukraine Conflict" at <https://lieber.westpoint.edu/remarks-use-of-force-ukraine-conflict/>.

of aggression and as such this has definite consequences beyond the largely theoretical possibility of criminal liability of the persons responsible for the planning and initiation of the invasion to which I will turn presently.

### Legal Consequences and Why They Matter

In the wake of the invasion, which has resulted in the almost complete destruction of cities such as Mariupol, thousands of civilian deaths, mounting evidence of systematic atrocities perpetrated by Russian forces on the civilian population and the lack of any response by the UN other than verbal condemnation, one might ask what difference the *jus ad bellum* makes when it can be trampled on with what seems at first glance to be virtual impunity. However, I would caution against the cynical dismissal of a body of law which is the expression of the will of virtually the entire international community and which is generally considered as a prime example of a *jus cogens* norm of fundamental importance. This is not the first time the prohibition of the use of force has been violated and it will not be the last. But the violation of a rule of law does not result in its being vitiated unless it is clear that the violation is an expression of the will to discard the rule. That is far from being the case as the vote in the previously mentioned General Assembly emergency session clearly indicates. If the violation of a rule resulted in its cancellation, there would be precious few rules left, since almost every rule of law has been violated, often egregiously, at one time or another.

The clear and widespread condemnation of the Russian invasion of Ukraine by the large majority of the international community emphasizes the importance the international community attaches to the rules relating to the use of force and are a clear sign that Russia's spurious justifications lack credibility and its conduct is viewed as unacceptable by most States. That means that Russia stands virtually alone in its attempt to reassert its imperial pretensions by armed force and that any forced acquisition of territory or other concessions it imposes by force will be null and void and have no legal effect or recognition. It also opens the way for the imposition of countermeasures in the form of far-reaching economic, financial and diplomatic sanctions. It also makes a good case for the legality of the provision of arms and other forms of support to Ukraine short of direct military intervention on the basis of "qualified neutrality". Whatever the scope of contemporary neutrality law may be in the context of the UN collective security system, the overwhelming condemnation of the Russian invasion amounting to a verdict of aggression on its part very plausibly opens the way to lawfully provide various forms of support



which under the traditional law of neutrality would be violations of neutrality. In cases of clear aggression such as here, many experts and States take the position that neutrality rules are qualified by the fact that one party to a conflict is acting in clear violation of the prohibition of aggression. While the UN Security Council would be obvious organ to make such a determination, in a case where a Permanent Member having the power to block meaningful action by the Security Council makes any such determination impossible, the General Assembly acting under the emergency "Uniting for Peace" procedure can speak on behalf of the international community when it does so by an overwhelming majority such as in this case.<sup>9</sup> In my view and that of others, that is the case here and it has the consequence that States which wish to support Ukraine, even including the provision of arms and other military equipment, can do so without violating the rules of qualified neutrality or becoming co-belligerent States unless they undertake military action against the State engaged in a clearly unlawful use of force or allow their territory to be used as a base of operations by the other belligerent. That means in practical terms that assistance to Ukraine is lawful and assistance to Russia would be unlawful. While direct intervention on the side of Ukraine would be lawful as a measure of collective self-defence assuming Ukraine requested such assistance (which it has by asking for the imposition of a no-fly zone), it is unlikely to occur and in the view of many, including myself, would be dangerous from a policy standpoint because of the clear danger of escalating the conflict and potentially opening the possibility that Russia might feel itself under existential threat and resort to the use of nuclear weapons.

In summary, the law regulating the use of force is, despite the oft-heard perception that it is vague and open ended, in actual fact crystal clear in relation to the unequivocal illegality of Russia's invasion of Ukraine and this has real consequences for the degree of support open to Ukraine and the corresponding isolation of Russia, alongside the immaterial, but continuing central role of the *jus ad bellum* as linchpin of the contemporary international legal order.

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9 On neutrality and its application to the Ukraine conflict, see *inter alia* the post by Wolff Heintschel von Heinegg of 1/3/2022 "Neutrality in the War Against Ukraine" on the Articles of War website referred to in n.1 *supra* at <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>.