

The Russian Special Military Operation in Ukraine from the Perspective of Jus ad Bellum

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By

Themistoklis Tzimas

**Cambridge
Scholars
Publishing**



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This book first published 2024

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-0364-0710-1

ISBN (13): 978-1-0364-0710-0

To George,
To my Parents
And always to Dora, Panos Sofia

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INTRODUCTION

THE LEGAL QUESTIONS UNDER EXAMINATION

The world has long borne the scent of gunpowder, and over the past decade, international relations have steadily veered towards militarization. In this context, the ongoing war in Ukraine stands as a significant milestone in a broader global transformation.¹ Undoubtedly, this conflict is one of the most crucial events in recent decades, perhaps ranking as the most significant war since World War II. Largely viewed as a proxy war among global military powers, it poses a potential catalyst for a generalized, direct conflict on a global scale. The unique dimensions and implications of a war in Ukraine were recognized, yet the associated risks were widely overlooked.²

This conflict raises profound questions concerning both international relations and international law. The objective of this book goes beyond simply identifying which party is in violation of international law and on what grounds. While this perspective has been analyzed to varying degrees, often lacking the necessary academic impartiality, the deeper and unique purpose of this book is to trace the theoretical and practical steps that led to interpretations of international law enabling attempts at legal justification for military operations like Russia's intervention in Ukraine.

The book ambitiously navigates the ambiguities and complexities of international law by scrutinizing the arguments put forth by the side that initiated the ground military initiative—the so-called Special Military Operation (SMO), led by Russia. The focus on the SMO is justified not only

¹ Mearsheimer, John J. "Why the Ukraine Crisis Is the West's Fault." *Foreign Affairs*, pp. 1-12. <https://www.mearsheimer.com/wp-content/uploads/2019/06/Why-the-Ukraine-Crisis-Is.pdf> (accessed August 7, 2022).

Reshetar, John S. "The Ukrainian Revolution in Retrospect." *Canadian Slavonic Papers / Revue Canadienne Des Slavistes* 10, no. 2 (1968): 116-32. <http://www.jstor.org/stable/40866155>.

² Mearsheimer, John J. "Why the Ukraine Crisis Is the West's Fault." *Foreign Affairs*, pp. 1-12. <https://www.mearsheimer.com/wp-content/uploads/2019/06/Why-the-Ukraine-Crisis-Is.pdf> (accessed August 7, 2022).

due to its pivotal historical significance but also because it places nuclear powers and permanent members of the United Nations Security Council (UNSC) on a collision course. In seeking legitimacy, Russia invokes various approaches, echoing tactics previously used by the United States and its allies.³

Doctrines such as preventive self-defence, remedial or reparative secession, responsibility to protect, and the extension of self-defence extraterritorially are analyzed as legitimizing bases for Russia's military intervention. The book also explores issues such as the right to self-determination, collective self-defence, invitation or consent to foreign intervention, and the legitimacy of *uti possidetis*. These are not the sole critical issues; the UN Security Council's inaction stemming from conflicting approaches among its permanent members, prompts questions about whether alternative bodies like the UN General Assembly or individual member states should address it. Additionally, it questions the exclusive competence of the UNSC in ensuring international security and peace, even amid internal confrontations.

The book contemplates whether, in the event of deeming Russian intervention illegal, a response based on collective self-defence should be activated, potentially leading to a repetition of events that the UN aims to prevent—a world war, possibly involving nuclear weapons. In the first chapter, an analysis of historical facts leading to the SMO is conducted, acknowledging the unprecedented disruption of information flow due to censorship on both sides. Carefully navigating through historical data and information, the book strives to maintain an impartial view. Subsequent chapters scrutinize each of Russia's main arguments under *jus ad bellum*. In the conclusions, beyond assessing the legal justification for the Russian SMO, the book addresses whether new doctrines of international law emerge under the influence of Russian actions.

³ Tzimas, Themis. *Greece and Hellenism in the Post-American Era: After Ukraine, What?* 2022, Topos Publications.

CHAPTER 1

HISTORICAL EVENTS LEADING TO THE WAR AND TO SMO

Exploring the history of Ukraine and its relationship with Russia may take us back several centuries, touching upon events and trends of the past. To prevent a broad dispersion of historical references across time, this examination specifically focuses on events most closely connected to the ongoing war, considering them from both a timely and political perspective. Ukraine's intricate and challenging relations with Russia are well-documented, and the current formation of present-day Ukraine is a gradual process resulting from the synthesis of populations with diverse cultural determinants. The complexities of Ukraine's history are acknowledged, and this analysis emphasises the events most relevant to the present conflict, providing a nuanced understanding of the intricate relationship between these neighboring nations.⁴

Parenthetically, issues concerning Ukraine's independence surfaced during the Soviet revolution. As a socialist republic, Ukraine held a unique position at the UN despite being a part of the USSR. The transformation into an independent state occurred with the dissolution of the USSR in the year 1991, marking a period of cataclysmic changes and the eventual disintegration of the Soviet Union. This process unfolded rapidly, giving rise to a plethora of political and legal considerations. Ukraine's declaration of independence took place through a referendum on December 1, 1991, garnering strong majority support. This historic event marked a pivotal moment in Ukraine's trajectory, as it stepped onto the global stage as a sovereign nation following years of political transformation and the dissolution of the Soviet Union.⁵

⁴ Plokhyy, Serhii M., *Ukraine and Russia in Their Historical Encounter*, Canadian Slavonic Papers / Revue Canadienne Des Slavistes 35, no. 3/4 (1993): 335–44.
<http://www.jstor.org/stable/40869517>.

⁵ Hunczak, Terrace. *The Ukraine, 1917-1921: A Study in Revolution*. Cambridge: Harvard University Press, 1977, pp. 391-395.

“Independent Ukraine.” Britannica.

Many analyses typically commence — and frequently conclude — with the referendum on Ukraine’s independence. However, the full context involves an earlier referendum that transpired before the vote for Ukrainian independence. On March 17, 1991, a significant moment unfolded when citizens of the USSR were posed the following question in a referendum: “Do you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics in which the rights and freedom of an individual of any nationality will be fully guaranteed?” This pre-independence referendum set the stage for subsequent political developments and laid the groundwork for the eventual dissolution of the Soviet Union. Understanding this pivotal moment provides a more comprehensive perspective on the historical events leading to Ukraine’s independence.⁶ In defiance of USSR laws, six republics chose not to participate in the referendum. Interestingly, from today’s standpoint, Ukraine took part in the process. The results in Ukraine overwhelmingly favoured the preservation of the USSR, mirroring the trend seen in all participating republics. In Ukraine, 70.5% voted “yes,” while across the entire USSR, 76.43% supported the preservation of the union. This divergence in participation and outcomes highlights the complex political dynamics and sentiments within the various republics during this crucial period in the early 1990s.⁷

The referendum was conducted in accordance with the Fourth Congress of People’s Deputies of the USSR. In his address to the country on February 7, 1991, Mikhail Gorbachev underscored the multinational synthesis of all the socialist republics. Gorbachev argued that the dissolution of the USSR into distinct national states would be catastrophic for the populations living outside their “republic of origin,” a group numbering no less than 75 million people across the entire USSR. This perspective shed light on the complex socio-political considerations that weighed on the decision-making process

<https://www.britannica.com/place/Ukraine/The-Maidan-protest-movement> (accessed June 24, 2022).

⁶ Siegelbaum, Lewis. “March Referendum.” Seventeen Moments in Soviet History. <https://Soviethistory.msu.edu/1991-2/march-referendum/> (accessed April 2, 2023).

⁷ Kireev, Alex. “Ukraine: Referendum on the Preservation of the USSR 1991.” Electoral Geography 2.0.

<https://www.electoralgeography.com/new/en/countries/f/ukraine-referendum-on-the-preservation-of-the-ussr-1991.html> (accessed April 2, 2023).

Zykov, Kirill. “Soviet Collapse Violated the People’s Will, Gorbachev Says.” Moscow Times. <https://www.themoscowtimes.com/2021/03/17/Soviet-collapse-violated-the-peoples-will-gorbachev-says-a73267> (accessed April 2, 2023).

during this critical period in Soviet history.⁸

The results of the referendum were disregarded, notwithstanding the expressed will of the vast majority of Soviet citizens in the majority of the Soviet republics—9 out of 15. Shortly before the planned implementation of the referendum outcome, an attempt to stage a coup against Gorbachev occurred in August of the same year. While the coup ultimately failed, it also derailed the approved reformation of the USSR. Instead, and in contrast to the March referendum, the USSR was dissolved into independent national states. This dissolution – contrary to the previously expressed will of the Soviet people – was initiated by the heads of the former socialist republics, altering the course of history and fundamentally reshaping the geopolitical landscape of the region.⁹

Ukrainian independence was officially declared through a referendum on December 1, 1991, with a resounding majority, as part of the larger dissolution of the USSR. Remarkably, within less than one year, two referenda occurred with contradictory outcomes. The first, held in favour of preserving the USSR, was followed by the second, which took place after the practical dissolution of the USSR. The second referendum, in favour of Ukrainian independence, presented no alternative as the USSR had already ceased to exist. This sequence of events underscores the dynamic and rapidly changing political landscape during that pivotal period in history.¹⁰

After gaining independence, Ukraine's leadership leaned towards the West, but Russian intervention did not occur until 2014. Until that point, the country maintained a neutral stance between NATO and Russia, delicately

⁸ Sakwa, Richard, ed. *The Rise and Fall of the Soviet Union, 1917-1991*. London: Routledge, 1999, pp. 471-473.

⁹ Backhouse, Fid et al. "1991 Soviet Coup Attempt." *Britannica*.

¹⁰ Hunczak, Terrace. *The Ukraine, 1917-1921: A Study in Revolution*. Cambridge: Harvard University Press, 1977, pp. 391-395.

"Independent Ukraine." *Britannica*.

<https://www.britannica.com/place/Ukraine/The-Maidan-protest-movement> (accessed June 24, 2022).

Still the interpretation of the vote is not unanimously interpreted. In certain, eastern parts it had pro-socialist and not pro-nationalistic meaning.

Predborska, Irina, Katya Ivaschenko, and Ken Roberts. "Youth Transitions in East and West Ukraine." (2004) *European Sociological Review* 20 (5): 403-409.

Esposito, Rocky. "Ukraine, Self-Determination, and Emerging Norms for Unilateral Secession of States." (2020) *Washington University Global Studies Law Review* 19(1): 141-142.

balancing a pro-Western orientation and Russian influence.

Furthermore, and in terms of the internal structure of newly independent Ukraine, Crimea held autonomous status; however, this autonomy generated additional tensions and calls for independence. It's crucial to note that historically, Crimea was not part of Ukraine before its administrative transfer to Ukraine under Khrushchev. As early as 1994, a separatist movement emerged in Crimea, challenging the authority of the central Ukrainian state. This led to unstable compromises, emphasizing the establishment of a semi-autonomous regime in Crimea. The historical complexities and ongoing regional dynamics played a significant role in shaping the geopolitical landscape of Ukraine during this period.¹¹

Additionally, highlighting the challenges within Ukraine from the early stages of its independence was the 1994 referendum held in the Donetsk and Lugansk oblasts. In these regions, the vast majority voted in favour of a federal form of statehood rather than a centralized one. In Donetsk, there was also strong support for preserving the Russian language as an official language. This referendum underscored the diverse perspectives within Ukraine and the complexities of national identity and governance that continued to shape the trajectory of the country.¹² The outcome of the 1994 referendum did not negate Ukrainian independence. However, it reflected a sense of caution, if not outright hostility, towards the central government. This sentiment was further expressed in a more overt manner through the Crimean referendum of 1994, which was illegal under Ukrainian law. These events underscored the complex dynamics within Ukraine, with certain regions expressing reservations about the central authority and seeking alternative forms of governance.¹³

Hopes for robust post-Soviet development in Ukraine, buoyed by its industrial prowess and agricultural production, were quickly shattered due to pervasive corruption and ineffective policies.¹⁴ Ukraine remained

¹¹ Buchanan, Kelly. "Crimean History, Status, and Referendum." In Custody Legis. <https://blogs.loc.gov/law/2014/03/crimean-history-status-and-referendum/> (accessed June 24, 2022).

¹² Flynn, M. K. "Political Mobilization in Eastern Ukraine: The Referendum of 1994 in the Donetsk Oblast." *The European Legacy* 1:1 (1996): 342-349. DOI:10.1080/10848779608579417.

¹³ Buchanan, Kelly. "Crimean History, Status, and Referendum." In Custody Legis. <https://blogs.loc.gov/law/2014/03/crimean-history-status-and-referendum/> (accessed June 24, 2022).

¹⁴ Sutela, Old Maid. "The Underachiever: Ukraine's Economy Since 1991." Carnegie

profoundly divided, a division that became increasingly apparent in its electoral processes. Oscillating between Western and Russian influences, the country witnessed the culmination of the confrontation between the pro-Western and pro-Russian factions — represented by Yushchenko and Yanukovych, respectively — in the years leading up to the events of 2014. The precarious balance was ultimately disrupted by the Maidan events in 2013-2014, a series of protests against the pro-Russian President Yanukovych, marking a decisive turning point in the course of Ukrainian history.¹⁵ In the aftermath of these events, the possibility of Ukraine joining NATO gradually became more imminent, leading to a cascade of consequential developments.¹⁶

This was not the first instance of internal upheaval in Ukraine associated with, or caused by — depending on one's political affiliation and interpretation of events — Yanukovych's election. A few years prior, Ukraine had experienced a "colorful revolution" in response to an earlier and highly disputed electoral victory of Yanukovych, which was ultimately overturned. However, by 2014, Yanukovych was back in power, and this time, there was no challenge to the legitimacy of his election. Ukraine had initiated talks for an economic association with the EU. Despite the usual political divisions and easy categorizations, Yanukovych was one of the main advocates for the agreement with the EU. The refusal of the EU and the IMF to provide the necessary financial support to Ukraine resulted in the initial suspension and eventual breakdown of the negotiations.¹⁷ The collapse of the negotiations triggered protests against Yanukovych's

Endowment for International Peace. March 9, 2012.

<https://carnegieendowment.org/2012/03/09/underachiever-ukraine-s-economy-since-1991-pub-47451> (accessed June 25, 2022).

¹⁵ Masters, Jonathan. "Ukraine: Conflict at the Crossroads of Europe and Russia." Council on Foreign Relations, December 2, 2021.

¹⁶ Gordon, April. "A New Eurasian Far Right Rising: Reflections on Ukraine, Georgia, and Armenia." *A New Eurasian Far Right Rising*, Freedom House, January 2020.

Averre, Derek. "Competing Rationalities: Russia, the EU and the 'Shared Neighbourhood'." *Europe-Asia Studies* 61 (2009): 10.

Averre, Derek, and Kataryna Wolczuk. "Introduction: The Ukraine Crisis and Post-Post-Cold War Europe." *Europe-Asia Studies* 68(4) (2016): 551-555. DOI: 10.1080/09668136.2016.1176690.

¹⁷ Piper, Elizabeth. "Special Report: Why Ukraine spurned the EU and embraced Russia." Reuters, December 19, 2013. <https://www.reuters.com/article/us-ukraine-russia-deal-special-report-idUSBRE9BI0DZ20131219> (accessed August 9, 2022).

presidency in November 2013.¹⁸

Amidst the protests, violent clashes erupted, leading to the tragic deaths of both protesters and police officers. To this day, the blame for the violence and casualties is contested, with former President Yanukovich and the then opposition accusing each other.

High-ranking political figures from the EU and the US openly supported the pro-Western opposition during these events. Despite the tension and clashes, an agreement was brokered to address the crisis between President Yanukovich and the opposition. The agreement included provisions for new presidential elections by December 2014 and the normalization of the situation.

Regrettably, the agreement was not honored by both sides, resulting in the continuation of protests, further exacerbated by the involvement of far-right elements. The unresolved tensions and the breakdown of the agreement set the stage for a tumultuous period in Ukraine's political landscape.¹⁹ Subsequently, there was an attempt to assassinate President Yanukovich, leading to his flight to Russia for refuge. This event marked a significant and tumultuous turn in the political developments unfolding in Ukraine.²⁰ With certain public buildings occupied by protesters, the Ukrainian parliament moved to impeach President Yanukovich. However, the procedural steps taken fell short of securing the necessary constitutional majority, complicating the efforts to formalize the impeachment process. This period was marked by political uncertainty and institutional challenges

¹⁸ Kuhn, BurgsdorffAnd. "The Euromaidan Revolution in Ukraine: Stages of the Maidan Movement and Why They Constitute a Revolution." *Inquiries Journal/Student Pulse* 7(02) (2015): <http://www.inquiriesjournal.com/a?id=986> (accessed August 14, 2022).

¹⁹ "Ukraine's revolution and the far right." BBC News, March 7, 2014. <https://www.bbc.com/news/world-europe-26468720> (accessed August 14, 2022).

Marcetic, Abhilash. "A US-Backed, Far Right-Led Revolution in Ukraine Helped Bring Us to the Brink of War." *Jacobin*, February 7, 2022. <https://jacobin.com/2022/02/maidan-protests-neo-nazis-russia-nato-crimea> (accessed August 14, 2022).

Likhachev, Vyacheslav. "The Far Right in the Conflict between Russia and Ukraine." *Russia Nei Visions* (July 2016): 95, pp. 9-11.

²⁰ "Resolution 'On conferring powers of the President of Ukraine on the Chairman of the Verkhovna Rada according to article 112 of the Constitution of Ukraine'." portal.rada.gov.ua/en/news/page/news/News/News/88111.html (accessed June 25, 2022).

in Ukraine.²¹ Despite the constitutional challenges and the incomplete impeachment process, Ukraine's leadership, positioned in an unconstitutional manner, garnered recognition as legitimate from both the United States and gradually from member states of the European Union. This recognition underscored the complex and evolving nature of the political situation in Ukraine during that period.²²

The violence did not abate; on the contrary, it escalated further. On February 26, 2014, unidentified gunmen seized strategically important buildings in the Crimean capital, Simferopol. Subsequently, the Autonomous Republic of Crimea was declared, and a referendum on union with Russia was swiftly organized and conducted, garnering approval by a substantial majority of the participants. This series of events marked a critical and contentious chapter in the unfolding crisis in Crimea.²³ On March 17, 2014, the "Autonomous Republic of Crimea," based on the results of the previous day's referendum, declared its independence and subsequently submitted a request to the Russian Federation for membership. This request was accepted by the Russian Federation a day later, further escalating tensions and contributing to the deepening crisis in the region.²⁴

These developments unfolded as the Russian army effectively controlled the territory of Crimea, executing a bloodless operation without facing resistance from Ukrainian forces. Notably, the Russian side initially denied the presence of its own armed forces, attributing the control to local militias in Crimea. This stance appeared to reflect a cautious approach to avoid accusations of illegal use of force against Ukraine. The situation on the ground, however, indicated a significant and controversial military intervention by Russia in the region.²⁵

²¹ "Agreement on the Settlement of Crisis in Ukraine." Kyiv, February 21, 2014. www.auswaertiges-amt.de/cae/servlet/contentblob/671350/publicationFile/190027/140221-UKR_Erklaerung.pdf (accessed October 9, 2016).

²² Amos, Howard, and Harriet Salem. "Ukraine clashes: dozens dead after Odessa building fire." *The Guardian*, May 2, 2014. <https://www.theguardian.com/world/2014/may/02/ukraine-dead-odessa-building-fire> (accessed June 25, 2022).

²³ "Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol." www.voltairenet.org/article182723.html (accessed June 25, 2022).

²⁴ "Agreement on the accession of the Republic of Crimea to the Russian Federation signed," March 18, 2014. narrow.kremlin.ru/news/6890 (accessed July 10, 2022).

²⁵ Borgen, Chris. "The Crimea, Compliance, and the Constraint of International Law." *Opinio Juris*, March 3, 2014. <http://opiniojuris.org/2014/03/03/crimea->

The legitimacy of the referendum in Crimea was questioned, although there is no confirmed evidence of large-scale fraud according to commonly accepted international committees. While the Ukrainian Constitutional Court and the Ukrainian Parliament declared the referendum invalid, these decisions did not deter its organizers. The referendum faced condemnation from the United States, the European Union, and the United Nations General Assembly (UNGA). With a strong majority, the UNGA called on states not to recognize the change in Crimea's regime. The international community, through these declarations, expressed its disapproval of the events in Crimea and their implications on the region's political landscape.²⁶

During this period, Odessa witnessed atrocities against a portion of the Russophone population, including the arson of the Trade Unions building, resulting in numerous casualties. It is acknowledged that the new leadership of Ukraine expressed a willingness to restrict the rights of Russian speakers, particularly in linguistic terms. Some legislation addressing these issues was initially adopted and later revoked. However, solid evidence of a coordinated campaign, initiated as early as February and March 2014, to establish a system of permanent and institutional discrimination against Russian-speaking populations by the new Ukrainian authorities is lacking.

In contrast to Crimea, where outbreaks of violence were not prevalent, the situation in the Donbass region took a different turn. In April 2014, two independent "People's Republics" were proclaimed in the Donbass region—Lugansk and Donetsk, respectively—and clashes ensued with Ukraine's armed forces. The events in both Crimea and the Donbass region further fueled the complexities of the political and social landscape in Ukraine during this tumultuous period.²⁷

compliance-constraint-international-law/ (accessed July 11, 2022).

²⁶ "Verkhovna Rada of Ukraine."

iportal.rada.gov.ua/en/news/page/news/News/News/89664.html (accessed June 25, 2022).

UN GA/11493, March 27, 2014.

Mälksoo, Lauri. "Crimea and (the Lack of) Continuity in Russian Approaches to International Law." EJILTalk, March 28, 2014. <https://www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law/> (accessed July 11, 2022).

²⁷ Sullivan, B. "Russia's at war with Ukraine. Here's how we got here." NPR, February 24, 2022. <https://www.npr.org/2022/02/12/1080205477/history-ukraine-russia?t=1657615910439> (accessed July 12, 2022).

The two “People’s Republics” in the Donbass region received support from Russia, although officially without the deployment of troops. However, Russia did not formally recognize these entities until the eve of the “Special Military Operation” (SMO). The number of casualties from the clashes, according to journalistic estimates, reached around 14,000 before the SMO in February 2022. Accurate numbers and impartial verification of the origins of these casualties on both sides remain elusive.

In the absence of truly impartial sources, it is challenging to definitively identify the facts. However, it is undeniable that there were bloody conflicts, human rights violations on both sides, discrimination against Russian-speaking people, and a de facto breach of Ukraine’s state sovereignty. From the Ukrainian perspective, these events result from a covert Russian invasion of its territory as early as 2014. While it can be speculated that Russia provided military support to the separatist movement in Donbass, there was also a significant internal basis for the separatist demand, both politically and militarily. Clashes with the Ukrainian army occurred, followed by two referendums, leading to the proclamation of the Donetsk and Lugansk “People’s Republics,” respectively.²⁸

The referendums in Donetsk and Lugansk were not recognized as legitimate, and the self-proclaimed republics were not recognized by any country, including Russia, until February 2022. Meanwhile, the displaced President Yanukovich had called for Russian intervention, a request that, if considered legitimate, could be interpreted as providing legal consent to foreign interference. This complex situation further contributed to the intricate web of geopolitical dynamics and legal interpretations surrounding the events in Ukraine.²⁹

²⁸ David Stout, *Ukrainian Rebels Claim Huge Victory in Self-Rule Referendum*, Time, (12 May, 2014), (<https://time.com/95748/ukrainian-separatists-referendum-donetsk-luhansk/>, insult. 25-06-2022).

²⁹ BBC News, *Ukraine’s Yanukovich asked for troops, Russia tells UN*, (March 4, 2014), (<http://www.bbc.com/news/world-europe-26427848>, access. 9-10-2016).

Wishart, Daniel. “The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?” EJIL Talk, March 4, 2014. <http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/#more-10459> (accessed October 9, 2016).

Allison, R. “Russian ‘deniable’ intervention in Ukraine: how and why Russia broke the rules.” *International Affairs* 90(6) (2014): 1255, p. 1264.

Indeed, it is noteworthy that Russia, while continuing to recognize Yanukovych as the legitimate president and acknowledging his invitation for Russian intervention in Ukraine, never officially invoked this invitation. In 2014, Russia denied sending its regular troops to Ukraine, asserting that only Russian volunteers were involved in the conflicts in Donbass. By 2022, Russia cited different arguments regarding its military involvement in the region, highlighting the evolving and complex nature of its justifications over time. This adds a layer of intricacy to the narrative surrounding Russia's role in the events in Ukraine.³⁰

The internal conflict in Donbass, as perceived by the Ukrainian side as internationalized, experienced a temporary freeze with the two Minsk agreements or protocols.³¹ The main provisions of these agreements, in addition to the ceasefire and the withdrawal of heavy weapons, included granting autonomy to the Donbass region coupled with a simultaneous change in Ukraine's constitution and the restoration of Ukraine's sovereignty. However, the constitution was never amended, the agreements were not fully implemented, and shortly before the conflict that began on February 24, 2022, President Zelensky declared that the agreements could not be realized. This underscores the ongoing challenges in finding a lasting resolution to the conflict in the region.³²

Based on reports from UN bodies on the human rights situation in Ukraine prior to Russia's Special Military Operation, violations of human rights and the erosion of the rule of law were identified on both sides. The ongoing clashes resulted in victims on both sides, as outlined in these reports. UN bodies cited figures indicating 3,405 civilian deaths and twice as many

³⁰ Interview with Radio Europe 1 and TF1 TV channel, June 4, 2014. www.bbc.monitoringonline.com (accessed October 9, 2016).

V. Churkin at Security Council 7125th meeting, March 3, 2014.

It is interesting to note here that US declined Yanukovych's consent -at least partially- on the basis of the unconstitutionality of his act.

Allison, R. "Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules." *International Affairs* 90, no. 6 (2014): 1255-1265.

³¹ Organization for Security and Co-operation in Europe. "Package of Measures for the Implementation of the Minsk Agreements." Press release, 12 February 2015. <https://www.osce.org/files/f/documents/5/b/140221.pdf>. or <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html>.

³² Instead, a series of legislative measures by the Government of Ukraine tended rather towards the exclusion of minorities from the internal life of Ukraine and to a "restoration" of the Nazi past.

wounded, underscoring the severe human toll of the conflict in the region. The reports shed light on the complex and challenging human rights landscape amid the ongoing hostilities.³³ The 2016 report by the UN Commissioner for Human Rights, which attributes serious violations of human rights and international humanitarian law to both sides, provides a significant and impartial perspective on the complexities of the conflict. This underscores the importance of considering multiple sources and viewpoints to gain a comprehensive understanding of the human rights situation and the broader context in which the conflict in Ukraine unfolded. The acknowledgment of wrongdoing on both sides emphasises the need for accountability and justice in addressing the consequences of the conflict.³⁴

The conflicts and the possibility of Ukraine joining NATO, amid broader international political considerations, culminated in the open conflict that erupted on February 24, 2022, between Russia and Ukraine. Russia's "special military operation" in Ukraine began on February 24, 2022, following months of heightened tension and a failed attempt by Russia to negotiate a new international agreement with NATO and the US. A key element of these negotiations was the proposed non-expansion of NATO to the east, particularly Ukraine's non-accession to NATO.

Before launching the operation, Russia took a significant political and legal step by recognizing the two self-proclaimed "People's Republics" as sovereign states. According to the Russian perspective, this recognition served as the basis for the special military operation (SMO), conducted in defence of the two "People's Republics" from Ukraine.

President Putin stated that the objectives of the SMO were to defend the two republics from Ukraine's attacks, which Russia claimed had caused 14,000 deaths over 8 years, amounting to genocide. Additionally, the goals included the de-nazification and demilitarization of Ukraine, as well as ensuring Russian security, which, according to President Putin, was threatened by Ukraine's potential entry into NATO, with Ukraine being considered an adversary by Russia.³⁵

³³ United Nations Human Rights Office of the High Commissioner. Report on the Human Rights Situation in Ukraine, 1 August 2021-31 January 2022. 2022, para. 31.

³⁴ United Nations Human Rights Office of the High Commissioner. Accountability for Killings in Ukraine from January 2014 to May 2016. 2016, pp. 3-51.

³⁵ It is obvious that the interethnic political canvas of Russian intervention is dominated by the possibility of Ukraine's entry into NATO. It is worthwhile to dwell

Since February 24, the war in Ukraine has continued. Determining when the war in Ukraine began is a matter of debate, with one approach identifying February 22, 2022, as a crucial date, while another, considered more accurate by the author of this book, sees the conflict as a continuum from the internal conflict that started in 2014. This latter approach, viewing different phases of the same war, is deemed more correct, especially in light of the Minsk agreements. The choice between these approaches carries both political and legal implications. In this book, we deliberately focus on the examination of the “Special Military Operation” – SMO – and its legitimacy, specifically analyzing the role of *jus ad bellum* in relation to this specific military intervention.

It’s important to note that only *jus ad bellum* issues are explored here, not *jus in bello*, despite the existence of many related issues. At the heart of the Russian intervention are reasons invoking the right to self-determination, collective security, the protection of Donbass inhabitants, Russia’s self-defence, the legitimacy of *uti possidetis* and its implementation in the post-Soviet world. This book examines these arguments, specifically addressing

on the George F. Kennan: “The expansion of NATO would be the most fatal mistake of American policy in the post-Cold War era. Such a decision can be expected . . . that it will force Russian foreign policy to move in directions that we clearly do not like.”

Thomas L. Friedman, “Foreign Affairs; Now a Word From X,” *The New York Times*, May 2, 1998. <https://www.nytimes.com/1998/05/02/opinion/foreign-affairs-now-a-word-from-x.html>.

David J. Kramer, “No Need to Expand NATO,” *The Christian Science Monitor*, February 8, 1995. <https://www.csmonitor.com/1995/0208/08191.html>.

Ted Galen Carpenter, “Ignored Warnings: How NATO Expansion Led to the Current Ukraine Tragedy,” CATO Institute, February 24, 2022. <https://www.cato.org/commentary/ignored-warnings-how-nato-expansion-led-current-ukraine-tragedy>.

So is Russia’s decision to claim another international security architecture, as President Putin himself had explained since 2007, at the Munich conference on international security. Claiming a polycentric world, in which China is also Russia’s ally.

Vladimir Putin, “Transcript: 2007 Putin Speech and the Following Discussion at the Munich Conference on Security Policy,” March 10, 2007. <https://russialist.org/transcript-putin-speech-and-the-following-discussion-at-the-munich-conference-on-security-policy/>.

A. Osborn & P. Nikolskaya, “Russia’s Putin authorises ‘special military operation’ against Ukraine,” *Reuters*, February 24, 2022. <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/> (accessed July 1, 2022).

whether they can legitimize the Russian intervention in Ukraine (SMO) or not. The next chapter, focusing on self-determination and its relationship with the SMO, is critical to understanding the foundation of the Russian argumentation.

CHAPTER 2

THE RIGHT TO SELF-DETERMINATION

2.1 Introduction

In his speech announcing the initiation of the “SMO,” the President of the Russian Federation made explicit and implicit references to self-determination. Throughout the speech, the issue of self-determination and the resulting right of the people of Ukraine to make a “choice” emerged as a central theme. This aspect, along with the analysis of Russia’s argument about protecting itself from NATO and the USA, is further examined in the respective chapter. Russia asserted that it was – at least partially – acting in self-defence of the two “People’s Republics,” which it had recently recognized as independent, thereby invoking the concept of collective self-defence. President Putin specifically referred to the aspirations of the people of Donbass and cited Article 51 of the UN Charter, stating, “...in execution of the treaties of friendship and mutual assistance with the Donetsk People’s Republic and the Lugansk People’s Republic...” This highlights the legal framework Russia claims to be operating within, based on its interpretation of international law and the right to self-determination.³⁶

The right to self-determination plays a complex role in the conflict, as is frequently the case in such wars. If the Russian argument concerning the republics is considered valid, its compliance with international law can be reasonably asserted. Consequently, a comprehensive understanding of self-determination and its diverse facets and applications becomes paramount. To delve into the current examination, we will initially touch upon self-determination as a right within international law, followed by its analysis in the specific context of the war in Ukraine.

³⁶ The Print Team, “Full text of Vladimir Putin’s speech announcing ‘special military operation’ in Ukraine,” February 24, 2022. <https://theprint.in/world/full-text-of-vladimir-putins-speech-announcing-special-military-operation-in-ukraine/845714/> (accessed May 9, 2023)., access. 9-5-2023).

2.2 The right of self- determination

In this chapter, we will present the main components of self-determination and then adapt them to the issues highlighted by the justification for the SMO on the Russian side. The right of self-determination, with its various aspects, places peoples at the forefront of international law. It encompasses both the sovereignty and independence of existing states and the aspirations of communities aiming for statehood or seeking to assert their political, economic, social, and cultural rights within states.

According to Marc Weller, self-determination can be viewed from five perspectives: as an individual right, a political right for members of groups and the groups themselves (such as minorities), a right of particular importance in the context of indigenous groups,³⁷ a right with implications for political and territorial autonomy, and a right linked to limited territorial

³⁷ Of particular importance on the issue of minorities is the case of the Islands Aaland, which also demonstrates the different stages in which the establishment of this right has gone through, hence briefly I will refer to its conclusion. The committee appointed by the League of Nations - now League - renounced the view that self-determination at the given stage was part of positive law, since it was not included in the Pact of the League, although he acknowledged that it was already part of modern political thought. In this particular case, Finland had just been liberated from Russia, without yet having acquired the status of a definitive constitutional state and without yet being an independent member of the international community. On the basis of the above, and although the committee was in principle in favour of considering the issue of secession as an internal matter of the States, in this particular case it argued that the matter was the responsibility of the League. The committee's main long-standing points were firstly that the protection of minorities and the right to self-determination shared a common basis and that whenever geographical, economic or other similar factors prevented recourse to the right to self-determination, the solution would have to come through a compromise on the basis of the protection of minorities. The second point had to do with the fact that when a state abused minorities or proved unable to protect them, the dispute ceased to be considered of internal competence and the right to secession had to be accepted as an exception.

N. Berman, "Sovereignty in Abeyance: Self-determination and International Law," *Wisconsin International Law Journal* 7, no. 51 (1988): 69-72.

J. Oloka-Onyango, "Heretical Reflections On The Right To Self-Determination: Prospects And Problems For A Democratic Global Future In The New Millennium," *American University International Law Review* 15 (1999-2000): 151-159.

League of Nations, "Report Presented to the Council of the League by the Commission of Rapporteurs," Council Doc.

www.ilsa.org/jessup/jessup10/basicmats/aaland2.pdf (accessed February 2, 2015).

changes. Within this context, the self-determination of peoples may imply the right to unilateral secession, as argued by some international scholars.³⁸

The concept of self-determination delves into the question of identifying a subject endowed with the potential for self-determination, a more challenging task at the collective level than at the individual level.³⁹ It assumes the ontological and political existence of the subject making decisions about its disposition, disrupting the established “normality” or legality, including pre-existing state sovereignty and cohesion.⁴⁰

Determining who qualifies as a subject entitled to the right of self-determination is a complex political and legal issue, subject to differing interpretations and applications in international law and politics. Defining a group of people as “peoples” or a “nation” presents one of the most intricate historical and legal challenges.⁴¹ When referring to the entire and legal population of a state, it typically involves the citizens of that state or those legally residing there.⁴² In addition, the use of the term “minority”, in spite

³⁸ Marc Weller, “Why the Legal Rules on Self-determination Do Not Resolve Self-determination Disputes,” in Marc Weller & Barbara Metzger eds., *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (2008): 20–23.

³⁹ Thus, the self is determined in relation to the other who denies the “self-identification” of the subject.

S. A. Paulk, “Determination of Self in A Decolonized Territory: The Dutch, The Indonesians, And the East Timorese,” *Emory International Law Review* 15 (2001): 267, at 296-297.

⁴⁰ H. Fan, “The Missing Link Between Self-Determination and Democracy: The Case of East Timor,” *Northwestern Journal of International Human Rights* 6 (2007): 1, at 18.

⁴¹ H. G. Espiell, “The Right to Self-Determination: Implementation of United Nations Resolutions,” para. 59, U.N.Doc. E/CN.4/Sub.2/405/Rev.1 (1980).

A. E. Eckert, “Free Determination or the Determination to be Free? Self-Determination and the Democratic Entitlement,” *UCLA J. International Law & Foreign Affairs* 4 (1999): 55, at 68.

A. Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law,” *Harvard International Law Journal* 40 (1999): 1, at 7.

Conference on Security and Cooperation in Europe: Final Act (1975), www1.umn.edu/humanrts/osce/basics/finact75.htm (accessed February 7, 2015).

Charter of Paris (www.osce.org/mc/39516 insult. 7-2-2015).

F. L. Kirgis, Jr., “Comment, The Degrees of Self- Determination in the United Nations Era,” *American Journal of International Law* 88, no. 304 (1994): 304-306.

⁴² Al. Pellet, “The Opinions of the Badinter Arbitration Committee: A Second

of its significance when referring to the exercise of rights within a state, becomes less helpful when such groups transition from asserting rights within a state to seeking recognition as distinct peoples with the right to self-determination, including secession.

Although common features such as a shared language, religion, cultural proximity, geographical context, and self-perception have been proposed as the ontological basis for the right to self-determination, the historical reality and understanding of the term “peoples” prove to be much more complex. Consequently, a combination of criteria, including the subjective “feeling” of self-determination and the act of claiming it against the existence of the state, must be considered.

However, formulating a predetermined equation for the internal relationship of these criteria to identify subjects capable of claiming self-determination is challenging. Each claim to self-determination, beyond state sovereignty and in contrast to it is in each case a unique situation and if successful, it results in the detachment of territory from a state, aiming to create a new state or unite with a third state.⁴³

It is therefore no surprise that self-determination as a right has gone through a difficult and confrontational development⁴⁴ with different currents of international law and international politics arguing over its correct interpretation

Breath for the Self-Determination of Peoples,” *European Journal of International Law* 178 (1992): 178, at 178.

⁴³ M.Cohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, 2006), 2-3.

J. Dahlitz (ed.), *Secession and International Law: Conflict Avoidance, Regional Appraisals* (Asser Press, 2003), 6.

J. Crawford, *The Creation of States in International Law* (Oxford University Press, 2006), 375.

⁴⁴ At relation with the evolution her from beginning at right see: “Whereas the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights.”

H. G. Espiell, “The Right to Self-Determination: Implementation of United Nations Resolutions,” para. 59, U.N.Doc. E/CN.4/Sub.2/405/Rev.1 (1980).

A. E. Eckert, “Free Determination or the Determination to be Free? Self-Determination and the Democratic Entitlement,” *UCLA J. International Law & Foreign Affairs* 4 (1999): 55, at 68.

A. Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law,” *Harvard International Law Journal* 40 (1999): 1, at 7.

and application throughout various areas.⁴⁵

The right, however, in its newest form is legally enshrined at the aftermath of World War II. The most important point of reference is the UN charter, where article 1 par. 2 as one of the purposes of the UN defines the development of “... friendly relations among nations based on respect for

⁴⁵ The persistence of self-determination even after the process of de-colonization is illustrated, inter alia, by the Helsinki Final Act of 1975 and by the Charter of Paris. Both texts reaffirm the enduring nature of self-determination as a right and emphasise its internal dimension.

Conference on Security and Cooperation in Europe: Final Act (1975), www1.umn.edu/humanrts/osce/basics/finact75.htminsult (accessed February 7, 2015).

Charter of Paris (www.osce.org/mc/39516 insult. 7-2-2015).

F. L. Kirgis, Jr., “Comment, The Degrees of Self- Determination in the United Nations Era,” *American Journal of International Law* 88, no. 304 (1994): 304-306.

Consonants with the Leninist approach, self-determination consisted of the right of ethnic groups or nations to determine their destiny. It should be applied at the aftermath of the war, and also referred to the right of liberate of peoples under colonial domination.

V. I. Lenin, “Theses,” at V. I. Lenin, “Selected Works,” (Lawrence and Wishart eds, London, 1969), 157.

V. I. Lenin, “The Right of Nations to Self-Determination” (www.marxists.org/archive/lenin/works/1914/se/f-det/insult, accessed February 2, 2015).

The Wilsonian the approach understood self-determination as a component of four dimensions: firstly, the right of each people to choose the type of government of their choice, secondly the reconstruction of the Central European states, thirdly the promotion of territorial changes on the basis of self-determination and fourthly the gradual de-determination of the central European states; colonization according to the system of the mandate of the League of Nations.

M. Pomerance, “The United States and Self- Determination: Perspectives on the Wilsonian Conception,” *American Journal of International Law* 70, no. 1 (1976): 17-27.

M. Macmillan, *The Peacemakers, Six Months That Changed the World* (Foundation Publications, 2005), 11-25.

The legacy of the French Revolution in relation to self-determination concerns the change of state borders with the exception of colonized peoples, minorities, ethnic, religious, cultural groups.

A. Cassese, *Self-determination of peoples, A Legal Reappraisal* (Cambridge University Press, 1995), 11-13.

E. M. Morgan, “The Imagery and Meaning of Self-Determination,” *New York University Journal of International Law & Policy* 20 (1988): 355, at 357.

E. Kolodner, “The Future of the Right to Self- Determination,” *Connecticut Journal of International Law* 10 (1994): 153, at 154.

the principle of equal rights and self-determination of peoples...” In addition, it is found in Article 55.⁴⁶ The consultations that took place before the adoption of the Charter can prove to be partly enlightening about the attitude of the authors of the charter. Some states were hesitant or even hostile to the inclusion of the right to self-determination in the UN charter for fear of losing their colonies, separatist movements or distorting the exploitation of the right, while on the contrary other states enthusiastically supported its inclusion in the Charter.⁴⁷

The committee tasked with drafting regulations on the right to self-determination put forward four key points: first, it should be included in the Charter; second, it pertains to the governance of peoples and not secession; third, it generally applies to a mixture of nationalities if they choose it freely;

⁴⁶ The adoption of both terms – nations and peoples – was a deliberate choice in order to include through the term nations, colonies, orders, protectorates and almost states as well as states, therefore both state and non-state entities and by reference to the term peoples, groups of people who constituted or were not, states or nations.

C. J. Iorns, “Indigenous Peoples and Self- Determination: Challenging State Sovereignty,” *Case Western Reserve Journal of International Law* 24 (1992): 199, at 246.

Charter of the United Nations, Article 55.

“With a view to creating the conditions of stability and prosperity necessary for peaceful and friendly relations between nations, based on respect for the principle of equal rights and self-determination of peoples, the United Nations will favour:

- a. raising the standard of living, working for all and conditions of economic and social progress and development.
- b. the solution of international problems, economic, social, public health and other related, international cultural and educational cooperation and
- c. global and effective respect for human rights and fundamental freedoms for all, without distinction of race, sex, language or religion. “

⁴⁷ The reference to the original interpretation of the charter by the founders of the UN is crucial but not the only method of interpreting it that must take into account and Newer Developments. In relation to the different ways of interpretation indicatively see:

Ibid. O. Schachter, *United Nations Law*, on p.16,

L. Henkin, *International Law: Politics, Values and Functions*, (Martinus Nijhoff, 1990), In Sna. 146,

N.D. Arnison, *International Law and Non- Intervention, When Do Humanitarian Concerns Supersede Sovereignty?*, 17- *Sum Fletcher F. World AFF.* (2003), 199, at pa. 203,

T. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, (2005-2006), 6, *Chicago Journal of International Law*, 597, at p. 601.

fourth, a crucial aspect of the right of self-determination is the free and authentic expression of the will of the peoples, contrasting with instances of alleged and supposed popular will, as invoked by nazi Germany and fascist Italy.⁴⁸

The right further developed in the years following World War II, particularly influenced by the USSR and third-world countries. The main points focused on the struggle against colonialism and racism, illegal occupation of territories, and neo-colonialism, especially in the exploitation of natural resources in developing states by foreign powers. Indirect references can also be found in the Universal Declaration of Human Rights, both in the preamble and in Articles 21 and 22, addressing political and economic self-determination.⁴⁹

Above all, it is the International Covenant on Economic, Social and Cultural Rights, as well as the Covenant on Civil and Political Rights, which, in their shared Article 1, make a clear reference to the right to self-determination. They guarantee that self-determination has both an external and an internal dimension. The external dimension pertains to the prohibition of external intervention—an element that aligns it with the prohibition of aggression and the more traditional state-centric security—ensuring the political

⁴⁸ Cassese, *Self-determination of peoples*, at p. 40.

⁴⁹ Universal Declaration of Human Rights, Preamble.

“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.”

Article 21:

“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives... The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

Article 22:

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”