

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The 2022 Russian intervention in Ukraine: What is its impact on the interpretation of *jus contra bellum*?

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Abstract

This article examines the precedential value of Russia's 'special military operation' against Ukraine in February 2022 for the purpose of interpreting the rules of *jus contra bellum*. Following the methodology set down by the ICJ in its *Nicaragua* judgment, self-defence is identified as the legal basis explicitly invoked by Russia in order to justify its operation in Ukraine. The authors then examine closely the reactions by third states with respect to the legality of Russia's military operation and establish that the legal arguments put forth by Russia – including, more specifically, an innovative reading of the right to self-defence of entities unilaterally recognized as states – have been overwhelmingly rejected by third states. On that basis, the authors conclude that this precedent does not challenge the established understanding of the prohibition to use force in international relations and of its exceptions.

Keywords: aggression; humanitarian intervention; recognition of states; Russia/Ukraine conflict; self-defence

1. Introduction

On 24 February 2022, Russian troops crossed the Ukrainian border, not only in the East, from the Donbass region, but also in the North, from Belarus, and in the south, from the Crimean region occupied since 2014.¹ The invasion was also conducted by air and, with the support of the Russian navy, in the Black Sea.² Hostilities quickly spread over a large part of the territory of Ukraine and several cities, including Kiev, Ukraine's capital, and Lviv, a city near Ukraine's western border, suffered several missile strikes.³ Eventually, the Russian forces withdrew towards the eastern

¹M. Chance et al., 'Peace in Europe "shattered" as Russia invades Ukraine', *CNN*, 24 February 2022, available at www.edition.cnn.com/2022/02/24/europe/ukraine-russia-invasion-thursday-intl/index.html.

²T. Ozberk, 'Russia-Ukraine Conflict: What Happened in The Black Sea so Far?', *NavalNews*, 27 February 2022, available at www.navalnews.com/naval-news/2022/02/russia-ukraine-conflict-what-happened-in-the-black-sea-so-far/; H. Mongilio and S. LaGrone, 'Updated: Russian Navy Launches Amphibious Assault on Ukraine; Naval Infantry 30 Miles West of Mariupol', *USNI News*, 25 February 2022, available at www.news.usni.org/2022/02/25/russian-navy-launches-amphibious-assault-on-ukraine.

³A. Cheng et al., 'Explosions Reported Near Kyiv and Lviv; Mariupol's Fate in Balance', *The Washington Post*, 16 April 2022, available at www.washingtonpost.com/world/2022/04/16/russia-ukraine-war-news-putin-live-updates/; A. Schreck and M. Chernov, 'Russia Renews Strikes on Ukraine Capital, Hits other Cities', *Associated Press*, 17 April 2022, available at www.apnews.com/article/russia-ukraine-kyiv-europe-kharkiv-moscow-0a9b737d09fec032affe3d9e5e82893a; T. Luckhurst and M. Maglych, 'Ukraine War: First Civilian Deaths in Lviv Shatter Sense of Safety', *BBC*, 18 April 2022, available at www.bbc.com/news/world-europe-61141817.

border and the fighting focused on the eastern parts of the Ukrainian territory.⁴ At the time of writing, the conflict is still ongoing.

The Russian authorities called the intervention a ‘special military operation’ and justified it by using a variety of elements. Two letters best encapsulate the legal arguments advanced by Russia as a justification for its ‘special operation’: the first is a letter sent to the United Nations Security Council (UNSC) on the day of the beginning of the intervention;⁵ the second is a letter sent a few days later to the International Court of Justice (ICJ) in the context of the proceedings instituted by Ukraine with respect to the violation of the convention on the prevention and punishment of the crime of genocide.⁶

The unlawful character of the intervention has been swiftly denounced by a vast majority of states that insisted more fundamentally on the necessity to defend the integrity of the most basic rules of international law, particularly the prohibition of the use of force. On 25 February 2022, a draft resolution deploring the ‘Russian Federation’s aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter’ obtained 11 votes in favour (Albania, Brazil, France, Gabon, Ghana, Ireland, Kenya, Mexico, Norway, United Kingdom, USA), one against (Russia) and three abstentions (China, Russia, United Arab Emirates).⁷ Due to the Russian veto and the inability of the UNSC to discharge its duties, the question was transmitted to the UN General Assembly (UNGA).⁸ On 2 March 2022, the Assembly adopted a resolution entitled ‘Aggression against Ukraine’ in which it ‘[d]eplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter’.⁹ The resolution passed with 141 votes in favour, five against, and 35 abstentions.¹⁰ Beyond those condemnations inside the UN, the intervention was regretted or denounced by the representatives of various states and international organizations, such as the Council of Europe,¹¹ the European Union,¹² the Organisation of Security and Cooperation in Europe,¹³ the North Atlantic Treaty Organization

⁴O. Stashevskiy and D. Keyton, ‘Ukraine: Russians Withdraw from Around Kharkiv, Batter East’, *Associated Press*, 15 May 2022, available at www.apnews.com/article/russia-ukraine-kyiv-war-crimes-4cc0ea6b166aa0fd9fb1306f280739fc; M. Hunder and C. Humphries, ‘Russia Pummels Eastern Towns in Bid to Encircle Ukraine Forces’, *Reuters*, 29 May 2022, available at www.reuters.com/world/europe/ukraine-says-troops-may-retreat-eastern-region-russia-advances-2022-05-28/; S. Lewis and M. Hunder, ‘Russia Hammers Ukraine’s Donetsk Region after Seizing Luhansk’, *Reuters*, 6 July 2022, available at www.reuters.com/world/europe/after-losing-luhansk-ukraine-forces-regather-defence-donetsk-2022-07-05/.

⁵UNSC, Letter Dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, UN Doc. S/2022/154 (24 February 2022).

⁶*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* Document (with Ann.) from the Russian Federation (setting out its position regarding the alleged ‘lack of jurisdiction’ of the Court in the case), 7 March 2022, available at www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf (Russian Federation Letter to the ICJ).

⁷UNSC, Draft Res., UN Doc. S/2022/155 (25 February 2022); UNSC, Verbatim Record, (25 February 2022) UN Doc. S/PV.8979 (25 February 2022), 6.

⁸UNSC, Res. 2623, UN Doc. S/RES/2623 (27 February 2022), adopted by 11 votes in favour, one vote against (Russia), and three abstentions (China, India, United Arab Emirates); see UNSC, Verbatim Record, UN Doc. S/PV.8980 (27 February 2022), 2.

⁹UNGA, Res. ES-11/1, UN Doc. A/RES/ES-11/1 (18 March 2022). The discussions at the eleventh emergency special session of the UNGA relating to the intervention in Ukraine can be found in the following documents: UNGA, Verbatim Record, UN Doc. A/ES-11/PV.1 (28 February 2022); UNGA, Verbatim Record, UN Doc. A/ES-11/PV.2 (28 February 2022); UNGA, Verbatim Record, UN Doc. A/ES-11/PV.3 (1 March 2022); UNGA, Verbatim Record, UN Doc. A/ES-11/PV.4 (1 March 2022); UNGA, Verbatim Record, UN Doc. A/ES-11/PV.5 (2 March 2022).

¹⁰See UN Doc. A/ES-11/PV.5, *ibid.*, at 14–15.

¹¹Council of Europe, Committee of Ministers, Dec. ‘2.3 Situation in Ukraine’, Doc. CM/Del/Dec(2022)1426bis/2.3 (24 February 2022), available at search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5a1f1.

¹²European Union, ‘Russia’s Aggression Against Ukraine: Press Statement by High Representative/Vice-President Josep Borrell’, 24 February 2022, available at www.eeas.europa.eu/eeas/russias-aggression-against-ukraine-press-statement-high-representativevice-president-josep_en.

¹³OSCE, ‘Joint Statement by OSCE Chairman-in-Office Rau and Secretary General Schmid on Russia’s Launch of a Military Operation in Ukraine’, 24 February 2022, available at www.osce.org/chairstatement/512890.

(NATO),¹⁴ the African Union,¹⁵ the Economic Cooperation Organisation of Western African States,¹⁶ the Pacific Islands Forum,¹⁷ the Organization of American States,¹⁸ the Caribbean Community,¹⁹ and the Nordic Council.²⁰ Finally, it must be noted that the Russian military intervention was condemned as a violation of international law by various specialists of international law, either individually²¹ or through numerous academic societies like the Institute of International Law,²² the International Law Association and several of its branches,²³ the American Society of International Law,²⁴ the European Society of International

¹⁴NATO, 'Statement by NATO Heads of State and Government on Russia's Attack on Ukraine', 25 February 2022, available at www.nato.int/cps/en/natohq/official_texts_192489.htm; 'Statement by NATO Heads of State and Government', 24 March 2022, available at www.nato.int/cps/en/natohq/official_texts_193719.htm.

¹⁵African Union, 'Statement from Chair of the African Union, H.E President Macky Sall and Chairperson of the AU Commission H.E Moussa Faki Mahamat, on the Situation in Ukraine', 24 February 2022, available at www.au.int/sites/default/files/pressreleases/41529-pr-english.pdf.

¹⁶ECOWAS Commission, 'Communique on the War in Ukraine', 27 February 2022, available at www.ecowas.int/?p=53740.

¹⁷Pacific Islands Forum, 'Pacific Islands Forum Secretary General Puna-Statement on Ukraine', 28 February 2022, available at www.forumsec.org/2022/02/28/remarks-pacific-islands-forum-secretary-general-puna-statement-on-ukraine/.

¹⁸OAS, 'Statement from the OAS General Secretariat on the Russian Attack on Ukraine', 24 February 2022, Doc. E-008/22, available at www.oas.org/en/media_center/press_release.aspx?Codigo=E-008/22.

¹⁹CARICOM, 'CARICOM Statement on the Situation in Ukraine', 24 February 2022, available at caricom.org/caricom-statement-on-the-situation-in-ukraine/; 'Statement of the Conference of CARICOM Heads of Government on the War and Humanitarian Crisis in Ukraine', 3 March 2022, available at www.caricom.org/statement-of-the-conference-of-caricom-heads-of-government-on-the-war-and-humanitarian-crisis-in-ukraine/.

²⁰Nordic Council, 'President of the Nordic Council Condemns Russia's Attack on Ukraine', 24 February 2022, available at www.norden.org/en/news/president-nordic-council-condemns-russias-attack-ukraine.

²¹See J. A. Green, C. Henderson and T. Ruys, 'Russia's Attack on Ukraine and the *Jus Ad Bellum*', (2022) 9 JUFIL 4; A. Haidar et al., 'Statement by Members of the International Law Association Committee on the Use of Force', *Just Security*, 4 March 2022, available at www.justsecurity.org/80454/statement-by-members-of-the-international-law-association-committee-on-the-use-of-force/; G. Blum and N. Modirzadeh, 'The War in Ukraine and International Law – Harvard Law Professors Gabriella Blum and Naz Modirzadeh Analyze the Russian Invasion and the Global Response', *Harvard Law Today*, 2 March 2022, available at today.law.harvard.edu/the-ukraine-conflict-and-international-law/; C. F. J. Doebbler, 'Russia's Use of Force Against Ukraine: An International Law Perspective', *Jurist*, 2 March 2022, available at www.jurist.org/commentary/2022/03/curtis-doebbler-russia-use-of-force-against-ukraine/; T. D. Gill, 'Remarks on the Law Relating to the Use of Force in the Ukraine Conflict', *Articles of War, Lieber Institute*, 9 March 2022, available at www.lieber.westpoint.edu/remarks-use-of-force-ukraine-conflict/; H. Hannum, 'International Law Says Putin's War Against Ukraine is Illegal. Does That Matter?', *The Conversation*, 25 February 2022, available at www.theconversation.com/international-law-says-putins-war-against-ukraine-is-illegal-does-that-matter-177438; J. Kleffner et al., 'Perspective: This is Why the Russian Invasion of Ukraine is Unlawful', *Swedish Defense University*, 9 March 2022, available at www.fhs.se/en/swedish-defence-university/stories/2022-03-09-perspective-this-is-why-the-russian-invasion-of-ukraine-is-unlawful.html; M. Milanovic, 'What is Russia's Legal Justification for Using Force against Ukraine?', *EJIL:Talk!*, 24 February 2022, available at www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/; M. N. Schmitt, 'Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense', *Articles of War, Lieber Institute*, 28 February 2022, available at www.lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/; M. Sterio, 'Russia v. Ukraine: The Limits of International Law', *Intlaw Grlls*, 28 February 2022, available at www.ilg2.org/2022/02/28/russia-v-ukraine-the-limits-of-international-law/; M. Weller, '"A Perversion of both the Facts and the Law" Russian Attempts to Invoke International Law Dismantled', 9 March 2022, available at www.cam.ac.uk/stories/weller-ukraine; I. Wuerth, 'International Law and the Russian Invasion of Ukraine', *Lawfare*, 25 February 2022, available at www.lawfareblog.com/international-law-and-russian-invasion-ukraine; F. Zarbiyev, 'Of Bullshit, Lies and "Demonstrably Rubbish" Justifications in International Law', *Völkerrechtsblog*, 18 March 2022, available at www.voelkerrechtsblog.org/of-bullshit-lies-and-demonstrably-rubbish-justifications-in-international-law/.

²²Institute of International Law, 'Declaration of the Institute of International Law on Aggression in Ukraine', 1 March 2022, available at www.idi-iiil.org/en/declaration-de-linstitut-de-droit-international-sur-lagression-en-ukraine/.

²³ILA, 'ILA Statement on the Ongoing and Evolving Aggression in and Against Ukraine', 3 March 2022, available at www.ilajapan.org/doc/ila_statement_on_situation_in_ukraine.pdf; for the statements adopted by numerous ILA branches condemning the Russian attack against Ukraine, see ILA, available at www.ila-hq.org/index.php/news.

²⁴ASIL, 'Statement of ASIL President Catherine Amirfar Regarding the Situation in Ukraine', 23 February 2022, available at www.asil.org/sites/default/files/pdfs/ASIL_Statement_Situation_in_Ukraine.pdf.

Law,²⁵ the *Société française pour le droit international*,²⁶ the German Society of International Law,²⁷ and the Belgian Society of International Law.²⁸ All in all, unlike previous interventions that had divided states to a certain extent, the condemnation of the February 2022 intervention as illegal has been almost universal.²⁹

Some commentators have considered the Russian intervention in Ukraine as ‘a fundamental challenge to the prohibition of the use of force’,³⁰ one that laid bare the limits of international law especially in terms of enforcement mechanisms ensuring respect for its most fundamental rules.³¹ Indeed, as it has been observed, this is but another link to a chain of precedents showing that ‘international law has proven generally ineffectual when it comes to checking great powers’ actions’.³² Since Article 2(4) of the UN Charter can be violated (at least by powerful states) without any real consequences, it may be tempting to adopt a realist stance on the prohibition to use force and regard it either as not existing at all or as existing only on paper but with no real force on the ground.³³ Alternatively, a more formalist approach can be adopted, whereby beyond the actions of states close attention is paid to the justifications provided for such actions and the reaction of other states to these justifications. Under this approach, the violations of international law may, through the justifications invoked and the reactions of third states, consolidate rather than destroy the relevant rules of international law. This last approach has been clearly formulated by the ICJ in its famous judgment on the *Military and Paramilitary Activities in and Against Nicaragua* case (hereafter *Nicaragua* judgment) and has the significant advantage of not depriving international law scholars of their field of studies and possibly the reason of existence of their professions. Thus, according to the Court:

[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, *the significance of that attitude is to confirm rather than weaken the rule*.³⁴

On the contrary, ‘reliance by a State on a novel right or an unprecedented exception to a principle might, if shared in principle by other States, tend towards a modification of customary international law’.³⁵

Following the methodology adopted by the ICJ in the *Nicaragua* judgment, which will be adopted in this article, both the arguments advanced by Russia and the reactions or positions adopted by third states are relevant in this exercise.

²⁵ESIL, ‘Statement by the President and the Board of ESIL on the Russian Aggression Against Ukraine’, 24 February 2022, available at www.esil-sedi.eu/fr/statement-by-the-president-and-the-board-of-the-european-society-of-international-law-on-the-russian-aggression-against-ukraine-2/.

²⁶SFDI, ‘Communiqué de la SFDI sur l’agression de l’Ukraine par la Fédération de Russie’, 25 February 2022, available at www.sfdi.org/actualites/communiqué-de-la-sfdi-sur-lagression-de-lukraine-par-la-federation-de-russie/.

²⁷German Society of International Law, ‘Statement of the Board and Council of the German Society of International Law (DGIR) on the Russian Attack on Ukraine’, 24 February 2022, available at www.voelkerrechtsblog.org/dgir-statement-on-the-russian-attack-on-ukraine/.

²⁸Belgian Society of International Law, ‘Statement About the Situation in Ukraine’, available at www.bgir-sbdi.be.

²⁹Even in the case of the Iraqi war of 2003, the condemnations were not so numerous; see the various texts listed in (2003) 36 RBDI 248 ff.

³⁰See Weller, *supra* note 21.

³¹See Sterio, *supra* note 21; Hannum, *supra* note 21.

³²See Blum and Modirzadeh, *supra* note 21; Doebbler, *supra* note 21.

³³Cf. T. M. Franck, ‘Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States’, (1970) 64 AJIL 809.

³⁴*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 98, para. 186 (emphasis added).

³⁵*Ibid.*, at 109, para. 207.

In this context, it has been suggested that this approach should not be applied to the precedent at hand.³⁶ According to this view, the Russian arguments should be rejected outright as ‘demonstrably rubbish justifications’, so bereft of plausibility that do not deserve to be analysed as legal arguments.³⁷ Given that it would arguably be difficult to agree upon what is a ‘demonstrably rubbish justification’, it is our view that the arguments put forth by the Russian Federation do indeed deserve closer scrutiny under international law. We therefore consider this intervention as a precedent which is relevant for the interpretation of the rules of public international law relating to the prohibition of the use of force and which deserves to be analysed in order to identify whether indeed it reveals a fundamental challenge to this prohibition.

We will, thus, proceed in two steps: we will first identify the legal arguments invoked by Russia as a justification for the intervention in Ukraine in order to evaluate whether the Russian position can be translated into the invocation either of a new legal justification for the use of force or of a novel interpretation of an existing legal basis for lawfully resorting to the use of force (Section 2). The conformity of these arguments with *jus contra bellum* will not be analysed in a sustained and systematic manner. In this sense, the article does not undertake an in-depth analysis of self-defence and its conditions, or of humanitarian intervention; as it has already been mentioned, this analysis has already been done elsewhere. Instead, we will examine the reactions of other states to the arguments invoked by Russia in order to evaluate the legal significance of this precedent for the interpretation of the scope of the prohibition to use force and its exceptions (Section 3).

2. What is the scope of the Russian legal argument?

Several publications by international law scholars on the legality of Russia’s intervention in Ukraine analyse (and reject) a number of possible legal justifications for this intervention, namely self-defence (individual and collective), humanitarian intervention and the responsibility to protect, intervention by invitation or the protection of nationals abroad.³⁸ On 4 March 2022, in reaction to the statement published by the International Law Association condemning the Russian invasion, the president of the Russian Branch of the International Law Association published a statement pointing to a number of legal justifications for Russia’s operation:

On the basis of the provisions of the UN Charter on self-defence, on the protection of human rights, in accordance with the international treaties of the Russian Federation with the Donetsk and Lugansk republics, at the request of these states and taking into account the appeals of Russian citizens living on the territory of these republics, the President of Russia decided on a special military operation on the territory of Ukraine with the aim of its denazification and demilitarization.³⁹

However, only the legal justifications effectively invoked by the Russian authorities are of relevance for the purposes of examining the impact of this precedent on the interpretation of *jus contra bellum* rules. Therefore, the task that will be undertaken in this section is to distinguish the genuine ‘assertion[s] of rules of international law’ from grounds for intervening that are mentioned as mere ‘statements of international policy’.⁴⁰

³⁶See Zarbiyev, *supra* note 21.

³⁷*Ibid.*

³⁸See, for example, Green, Henderson and Ruys, *supra* note 21; Schmitt, *supra* note 21; Gill, *supra* note 21; Wuerth, *supra* note 21; Hannum, *supra* note 21.

³⁹Statement of the Presidium of the Russian Association of International Law’, 4 March 2022 in Russian and 7 March 2022 in English, available at www.ilarb.ru/html/news/2022/7032022.pdf.

⁴⁰See *Nicaragua* judgment, *supra* note 34, at 109, para. 207. See also E. Henry, ‘Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (with Special Reference to the *Jus Contra Bellum* Regime)’, (2007) 18 *Melbourne Journal of international Law* 279.

In view of the above, among the numerous speeches and statements made by the Russian authorities, we will put a particular emphasis on the letter sent to the UNSC on 24 February 2022 and the one sent to the ICJ in the context of the proceedings relating to the convention on the protection and punishment of the crime of genocide.⁴¹ Even if there are elements that seem to point to other justifications, on the basis of these documents, the sole legal argument explicitly invoked by Russia as a justification for the intervention in Ukraine is self-defence (Section 2.1). Indeed, in the first letter, the Russian authorities officially informed the UN ‘of the measures taken in accordance with Article 51 of the UN Charter in exercise of the right of self-defence’ and this position was reiterated in the letter sent to the ICJ.⁴² Once this has been established, the next element that will be clarified is the kind of self-defence that was invoked: is it individual or collective? And does Russia rely on any new elements in its interpretation of the right to self-defence? (Section 2.2)

2.1 Self-defence as the only genuine legal argument invoked by Russia

The above-mentioned letter sent by Russia to the UNSC according to Article 51 of the UN Charter only relies on self-defence. But it also more generally refers to an annex containing the text of an address made by President Putin on the day of the launch of the ‘special military operation’ in Ukraine. This address appears more as a political analysis of international relations in the world of the last decades than as a legal reasoning focused on the 24 February 2022 military intervention. However, at least if we put it in relation with other official statements, some conclusions can be drawn about the scope of the legal reasoning used by the Russian authorities.

A first element to be mentioned is the repeated reference to a ‘genocide’ which would have justified the ‘special military operation’. In the address annexed to the letter sent to the UNSC, the following passage is telling:

We had to stop this nightmare—a genocide against the millions of people living there who are pinning their hopes only on Russia, on us alone. It is their aspiration, the feelings and pain of these people that were the main motivating force behind our decision to recognize the independence of the Donbass People’s Republics . . . Its purpose is to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years. And to this end, we will seek the demilitarization and de-Nazification of Ukraine, as well as the prosecution of those who have committed numerous bloody crimes against civilians, including citizens of the Russian Federation.⁴³

A similar argument has been advanced by the representatives of the Russian Federation both in the UNSC and in the UNGA:

The purpose of the special operation is to protect people who have been subjected to abuse and genocide by the Kyiv regime for eight years. To that end, we will work towards the demilitarization and denazification of Ukraine and bring to justice the perpetrators of numerous bloody crimes against civilians, including citizens of the Russian Federation.⁴⁴

As a preliminary remark, it should be noted that Russia did not invoke the protection of nationals as an autonomous legal basis for the ‘special military operation’. Here the position of the Russian

⁴¹See UN Doc. S/2022/154, *supra* note 5; Russian Federation Letter to the ICJ, *supra* note 6.

⁴²See UN Doc. S/2022/154, *ibid.*, at 1; Russian Federation Letter to the ICJ, *ibid.*, at 4, para. 15.

⁴³See UN Doc. S/2022/154, *ibid.*, at 5–6.

⁴⁴UNSC, Verbatim Record, UN Doc. S/PV.8974 (23 February 2022), at 12; see also UN Doc. A/ES-11/PV.1, *supra* note 9, at 7; UNGA, Verbatim Record, UN Doc. A/76/PV.58 (23 February 2022), 14.

authorities is consistent with the one that was adopted in the context of the 2008 war in Georgia. The attacks by the Georgian armed forces against the Russian peacekeepers and Russian citizens were considered by Russia as an attack triggering its ‘inalienable right to self-defence enshrined in Article 51 of the UN Charter’, not as a stand-alone legal justification of the Russian operation.⁴⁵ This did not prevent the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFMCG or Georgia Mission) set up by the European Union from asserting that ‘[t]here is no customary law allowing’ military actions undertaken for the purpose of protecting nationals abroad.⁴⁶

In general, Russia’s claims seem similar to those put forward by several NATO states at the end of March 1999, when the massive bombing of the Federal Republic of Yugoslavia began, in the name of the protection of the Kosovars who were the victims of serious violations of human rights, sometimes characterized as acts of genocide.⁴⁷

But, in 2022 like in 1999, it is far from certain that the use of force was legally justified in the name of a right to humanitarian intervention or a responsibility to put an end to genocide. In 1999, the overwhelming majority of NATO states generally preferred to interpret existing UNSC resolutions broadly – thereby grounding their intervention on an alleged authorization by the UNSC – and eventually stated that their intervention could not be considered as a precedent at all.⁴⁸ In 2022, Russia envisages the alleged ‘genocide’ as an element illustrating the gravity of the armed attack supposedly launched by Ukraine against the Republics of Donetsk and Luhansk⁴⁹ without evoking an autonomous right to use force in order to put an end to this genocide anywhere in the letter sent to the UNSC. The doubts as to the legal nature of the argument appear to be shared by several of the scholars who have commented on the *jus contra bellum* aspects of the Russian intervention.⁵⁰

In any case, it could be argued that the proceedings initiated by Ukraine against Russia before the ICJ have dispelled any remaining doubt as to the legal argumentation of the Russian Federation. Claiming – on the basis of references to the commission of genocide made by Russian representatives – that Russia had ‘undertaken military and other actions against Ukraine . . . with the express purpose of preventing and punishing . . . alleged acts of genocide’, Ukraine ‘emphatically denie[d] . . . that the Russian federation ha[d] any lawful basis to take action in and against Ukraine for the purpose of preventing and punishing genocide’.⁵¹ Russia replied that its only legal argument was self-defence according to Article 51 of the UN Charter, that there was therefore no dispute about the interpretation or the application of the

⁴⁵IIFMCG, Report, September 2009, Vol. III, at 437–8, available at www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm.

⁴⁶*Ibid.*, vol. I, at 24, para. 23. See also vol. II, at 287: ‘The protection of nationals abroad does not constitute an independent exception to the prohibition of the use of force, and therefore does not provide a legal basis justifying a military intervention.’

⁴⁷See, for example, P. C. Tange, ‘Netherlands State Practice for the Parliamentary Year 1998-1999’, (2000) 31 NYIL 190.

⁴⁸*Allegations of Genocide* case, Provisional Measures, Order of 16 March 2002, Declaration of Judge Nolte, para. 6, available at www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-05-EN.pdf. For an analysis of the NATO intervention in Kosovo see, among many, O. Corten, *The Law Against War* (2021), 529–32; D. Franchini and A. Tzanakopoulos, ‘The Kosovo Crisis – 1999’, in T. Ruys and O. Corten (eds.), *The Use of Force in International Law – A Case-Based Approach* (2018), 594.

⁴⁹See, for example, UN Doc. A/ES-11/PV.5, *supra* note 9, at 12: ‘They are still bombing the citizens of Donbas, and they do not intend to stop at 14,000 dead, the vast majority of them in the Luhansk and Donetsk people’s republics. The aims of our special operation, declared on a basis of Article 51 of the Charter of the United Nations, are being carried out and will be achieved.’

⁵⁰Gill speaks of ‘Russia’s (implicit) reliance on some or all’ of the possible justifications of resort to force aside from self-defence; see Gill, *supra* note 21. Milanovic asserts that ‘there is something like a humanitarian intervention argument’ in the justifications put forth by Russia; see Milanovic, *supra* note 21.

⁵¹*Allegations of Genocide* case, Application instituting proceedings submitted by Ukraine, 26 February 2022, at 2–3, paras. 8–9, available at www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf.

genocide convention and, consequently, that the Court had no jurisdiction on this matter. The letter sent to the Court is particularly unambiguous in this regard:

The special military operation conducted by Russia in the territory of Ukraine is based on the United Nations Charter, its Article 51 and customary international law. The legal basis for the military operation was communicated on 24 February 2022 to the Secretary-General of the United Nations and the United Nations Security Council by the Permanent Representative of the Russian Federation to the United Nations in the form of a notification under Article 51 of the United Nations Charter. The relevant letter addressed to the UN Secretary-General with the request to circulate it as a document of the UN Security Council forwarded “the address of the President of the Russian Federation H.E. Mr. Vladimir Putin to the citizens of Russia *informing them of the measures taken in accordance with Article 51 of the UN Charter in exercise of the right of self-defense*” (emphasis added) (attached).⁵²

And the letter insists:

There are no references to the Convention in the statement of the President of the Russian Federation to which the Government of Ukraine refers. The analysis of the dire situation in Donbass, including atrocities and genocide, *provides a general humanitarian environment along with other factors and considerations*.⁵³

It has been correctly pointed out that the institution of proceedings before the ICJ implies that at least Ukraine has read the position of the Russian authorities as referring to a right of humanitarian intervention,⁵⁴ in this case a right to prevent and punish the commission of an alleged genocide or an exercise of its responsibility to protect the victims of this genocide. Ukraine of course has explicitly rejected that such a right exists and that the genocide convention can be interpreted as providing a legal basis for unilateral uses of force. In the words of Jean-Marc Thouvenin, counsel and advocate for Ukraine before the ICJ, ‘la Russie n’avait . . . strictement aucun droit, en vertu de la convention, d’engager l’action militaire débutée le 24 février 2022’ since ‘rien dans la convention n’autorise un Etat à pénétrer par la force sur le territoire d’un autre pour empêcher, prévenir ou punir le génocide’.⁵⁵ In the same vein, several states that intervened in the case supported the Ukrainian statement about the existence of a dispute with Russia about the interpretation and application of the Convention, including the question of whether and to which extent the Convention could justify a use of force.⁵⁶

⁵²See Russian Federation Letter to the ICJ, *supra* note 6, para. 15 (emphasis in original).

⁵³*Ibid.*, para. 20 (emphasis added).

⁵⁴See Green, Henderson and Ruys, *supra* note 21, at 24.

⁵⁵*Allegations of Genocide* case, Provisional Measures, Oral Proceedings, Verbatim Record 2022/5, 7 March 2022, Doc. CR 2022/5, at 29, para. 50 (‘Russia did not have any right whatsoever, by virtue of the convention, to engage in the military action launched on 24 February 2022’), and at 28, para. 44 (‘nothing in the convention authorizes a State to penetrate by force the territory of another State in order to put an end to, prevent, or punish genocide’) (our translation; official translation unavailable at the time of writing). See, more generally, *ibid.*, at 27–30, paras. 41–52.

⁵⁶Lithuania, 19 July 2022, 5, para. 16; New Zealand, 22 July 2022, 3, para. 11; United Kingdom, 1 August 2022, 12, para. 32; Germany, 1 September 2022, 11, para. 36; USA, 7 September 2022, 15, para. 31; Sweden, 8 September 2022, 12, paras. 33 and 13, para. 38; Italy, 12 September 2022, 8, para. 27; Poland, 15 September 2022, 12, paras. 30 and 14, para. 35; Denmark, 16 September 2022, 6, para. 23; Finland, 21 September 2022, 7, para. 29; Estonia, 22 September 2022, 9, para. 33; Spain, 28 September 2022, 7, para. 30; Australia, 30 September 2022, 15, para. 41; Portugal, 7 October 2022, 10, para. 30; Luxembourg, 11 October 2022, 9, para. 29; Croatia, 13 October 2022, 8, para. 31; Czech Republic, 21 October 2022, paras. 28–9; Norway, 10 November 2022, 8, paras. 22–3; Bulgaria, 11 November 2022, 9–10, paras. 21, 10, paras. 23 and 11, para. 28; Malta, 24 November 2022, 7, paras. 25 and 9–10, para. 31; Slovenia, 24 November 2022, paras. 25 and 30; Slovakia, 1 December, 13, para. 49; Belgium, 2 December, 14, para. 46; Cyprus, 9 December, 6, para. 25; Liechtenstein, 15 December 2022, para. 20. All the documents are available on the website of the Court www.icj-cij.org/en/case/182.

Understandably, this position can be considered as having been determined to a large extent by the strategy adopted in the context of the specific proceedings. The same can of course also be said for Russia's insistence that the genocide convention had nothing to do with the legal basis of the intervention.⁵⁷ This however does not mean that the arguments invoked can be rejected as bereft of legal significance. All legal arguments in legal proceedings are determined to a greater or lesser extent by the parties' chosen litigation strategy. That circumstance did not prevent the International Law Commission from including 'claims before national or international courts and tribunals' and 'assertions made in written and oral pleadings before courts and tribunals' as elements which are relevant for the identification and interpretation of rules of customary international law.⁵⁸ In view of the above, it can therefore be concluded that Russia *did not* invoke the perpetration of a genocide as a proper legal basis justifying the military operation in Ukraine.

It is true, however, that the Court considered that, *prima facie*, a dispute could be established covering not only the establishment of a genocide in Eastern Ukraine but also the possibility to use force on the basis on Article I on the Convention.⁵⁹ Consequently, the Court condemned, implicitly but clearly, the operation in its order dated 16 March 2022:

The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which *raises very serious issues of international law* . . .

[I]t is doubtful that the Convention, in light of its object and purpose, *authorizes a Contracting Party's unilateral use of force* in the territory of another State for the purpose of preventing or punishing an alleged genocide.⁶⁰

Several judges took up this point in their declarations or separate opinions. Judge Bennouna stated the following:

We know that since the adoption of the Charter of the United Nations, that the only exceptions to the prohibition of the use of force in international relations are individual or collective self-defence, under Article 51 of the Charter (which has also been invoked by the Russian Federation), and authorization by the Security Council, in accordance with Chapter VII of that text.⁶¹

⁵⁷See Zarbiyev, *supra* note 21: 'This is nothing more than a shameless attempt made for the purposes of a pending litigation to preclude the finding of jurisdiction.'

⁵⁸UN, Report of the International Law Commission, UN Doc. A/73/10 (2018), at 134 (Commentary to Conclusion 6, para. 5) and 141 (Commentary to Conclusion 10, para. 4).

⁵⁹*Allegations of Genocide* case, Provisional Measures, Order of 16 March 2022, at 11, para. 45.

⁶⁰*Ibid.*, at 5, paras. 18 and 13, para. 59 (emphasis added), available at www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf. The Court also stated (*ibid.*, at 13, paras. 57–8): 'A Contracting Party may resort to other means of fulfilling its obligation to prevent and punish genocide that it believes to have been committed by another Contracting Party, such as bilateral engagement or exchanges within a regional organization. However, the Court emphasizes that, in discharging its duty to prevent genocide, "every State may only act within the limits permitted by international law", as was stated in a previous case brought under the Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), 221, para. 430). The acts undertaken by the Contracting Parties "to prevent and to punish" genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter. In this regard, the Court recalls that, under Article 1 of the United Nations Charter, the purposes of the United Nations are, *inter alia*, "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".'

⁶¹*Allegations of Genocide* case, Provisional Measures, Order of 16 March 2022, Declaration of Judge Bennouna, para. 2 (see also paras. 7, 8), available at www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02-EN.pdf.

Along the same lines, Judge Robinson considered in this regard that:

while Russia may form its own appraisal as to the situation relating to the respect of the human rights of persons of Russian ethnicity in the Donetsk and Luhansk oblasts, in light of the object and purpose of the Genocide Convention and the circumstances of its conclusion, the use of force would not appear to be the appropriate method to monitor or ensure such respect.⁶²

Can we deduce from those statements that, alongside Ukraine, the Court also considered that, despite the clear denial made by its representatives, Russia *had* invoked some kind of ‘responsibility to protect’ as a genuine legal basis on which its intervention could be grounded? Aside the fact that we are still in the phase of provisional measures – and thus any finding on jurisdiction and *a fortiori* on the substance of the claims is by definition provisional – this is not necessarily the case. Indeed, the Court can perfectly condemn a legal argument which has not been invoked as such by the responding state. In the *Nicaragua* case, the Court clearly established that the only genuine legal argument used by the US was self-defence, qualifying the other arguments (like the protection of democracy) as the expression of ‘statements of international policy and not an assertion of rules of existing international law’.⁶³ This finding did not however prevent the Court from asserting – in a passage cited by Judge Robinson in his above-mentioned separate opinion – that ‘while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect’.⁶⁴ The same reasoning can be transposed to intervening states that denounced the possibility to refer to the genocide convention in order to justify a use of force.⁶⁵ Here again, these interventions and arguments can be understood as a means to reinforce a general, ‘orthodox’ interpretation of international law, similar to what some states did when they condemned the argument of preventive war in order to criticize the US war against Iraq in 2003, even if the US argument was in reality legally based on an extensive interpretation of existing UNSC resolutions, not on any preventive self-defence justification.⁶⁶

Finally, the current precedent should be interpreted in the same way than those of South Ossetia (in 2008) and Crimea (in 2014). In their search to legitimize their military interventions, the Russian authorities denounced atrocities (including acts of genocide) allegedly perpetrated by the Georgian and Ukrainian governments.⁶⁷ With respect to the 2008 Georgia/Russia conflict, despite a number of statements made by Russian authorities pointing to atrocities being committed by the government of Georgia and the responsibility to protect in this context, in

⁶²*Allegations of Genocide* case, Provisional Measures, Order of 16 March 2002, Separate Opinion of Judge Robinson, para. 29, available at www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf. Without disagreeing substantively, Judge Xue noticed that ‘the legal grounds that the Russian Federation invokes for its military operations are Article 51 of the United Nations Charter on self-defence and customary international law. Nowhere has the Russian Federation claimed that the Genocide Convention authorizes it to use force against Ukraine as a means of fulfilling its obligation under Article I thereof to prevent and punish genocide’; Declaration of Judge Xue, para. 3, available at www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf.

⁶³See *Nicaragua* judgment, *supra* note 34, at 109, para. 207.

⁶⁴*Ibid.*, at 134, para. 268.

⁶⁵Latvia, 21 July 2022, 16, para. 51; U.K., 1 August 2022, 21, para. 58; USA, 7 September 2022, 15, para. 29; Sweden, 8 September 2022, 15, paras. 47 and 16, para. 48; Romania, 30 March 2022, 10, para. 43; Poland, 15 September 2022, 9, para. 23; Denmark, 16 September 2022, 9, para. 38; Finland, 21 September 2022, 5, para. 23; Australia, 30 September 2022, 20, para. 52; Portugal, 7 October 2022, 12, para. 40; Norway, 10 November 2022, 10, para. 30; Cyprus, 9 December 2022, 7, para. 29.

⁶⁶O. Corten, ‘Opération Iraqi Freedom: peut-on admettre l’argument de l’“autorisation implicite” du Conseil de Sécurité?’, (2003) 36 RBDI 205.

⁶⁷For the 2008 conflict, see IIFMFC Report, *supra* note 45, vol. I, at 21, para. 17; vol. II, at 27. For the 2014 conflict see, for example, UNSC, Verbatim Record, UN Doc. S/PV.8714 (19 March 2014), at 9.

the responses addressed to the IIFMCG, the Russian authorities referred only to self-defence as the legal basis of their military operations, avoiding any mention of either humanitarian intervention or the responsibility to protect.⁶⁸ Again, this did not prevent the experts of the Georgia Mission from rejecting the argument that humanitarian intervention and responsibility to protect could constitute independent legal bases for unilateral interventions undertaken without a mandate by the UNSC.⁶⁹

In this respect, the Mission also underlined the fact that Russia ‘has consistently and persistently objected to any justification of the NATO Kosovo intervention as a humanitarian intervention’.⁷⁰ Indeed, on this particular point, the Russian position remains coherent. Firstly, Russia has denounced that kind of argument with respect to interventions undertaken by other states such as NATO’s intervention against Yugoslavia in 1999⁷¹ or the 2018 intervention by the US, the UK, and France against Syria (where a ‘right to humanitarian intervention’ had been clearly invoked by the UK).⁷² Secondly, as we have seen in the precedent of South Ossetia, it has refrained from clearly invoking a right of humanitarian intervention in order to justify its own military interventions under international law. Thus, leaving aside implicit invocations being extrapolated from various statements, the formal position of the Russian authorities has not changed in this respect.

This position corresponds to positive international law since, whatever claims may have been formulated over the years, humanitarian intervention or the responsibility to protect do not constitute a valid legal basis for resort to force between states which does not come under one of the two exceptions to Article 2(4) of the UN Charter: self-defence or authorization by the UNSC.⁷³ This undoubtedly explains why, both in its 2008 intervention against Georgia and in the ongoing 2022 intervention against Ukraine, Russia preferred to rely on one of these exceptions: self-defence under Article 51 of the Charter. But how was this argument framed by the Russian authorities in the case at hand? As we will show in the next section, an analysis of Russia’s official positions indicates that, even though the legal basis as such is not a novel one, some aspects of the legal reasoning relating to its interpretation may very well be.

2.2 The scope of the right to self-defence: Innovative interpretations of an old concept

In its letter sent to the UNSC, Russia contends it launched:

in accordance with Article 51 (Chapter VII) of the Charter of the United Nations . . . a special military operation . . . pursuant to the treaties on friendship and mutual assistance with the Donetsk People’s Republic and the Lugansk People’s Republic, as ratified by the Federal Assembly on 22 February this year.⁷⁴

To understand the reasoning, it must be reminded that those two self-proclaimed Republics were officially recognized by Russia as independent and sovereign a few days before the invasion of Ukraine.⁷⁵ Thus, Russia’s argument is construed in three successive steps: first, the Donetsk

⁶⁸See IIFMCG Report, *supra* note 45, vol. III, at 437–8.

⁶⁹*Ibid.*, vol. II, at 283–4.

⁷⁰*Ibid.*, vol. I, at 24, para. 22.

⁷¹See, for example, UNSC, Verbatim Record, UN Doc. S/PV.3988 (23 March 1999), at 2–3; UNSC, Verbatim Record, UN Doc. S/PV.3989 (26 March 1999), at 5–6.

⁷²See UNSC, Verbatim Record, UN Doc. S/PV.8233 (14 April 2018), at 25.

⁷³See, among many, N. Hajjami, *La responsabilité de protéger* (2013), 558; Corten, *supra* note 48, at 490–540; C. Gray, *International Law and the Use of Force* (2018), 40–64; Y. Dinstein, *War, Aggression and Self-Defence* (2017), 75–7.

⁷⁴See UN Doc. S/2022/154, *supra* note 5, at 6.

⁷⁵Russian Federation, President of Russia, ‘Address by the President of the Russian Federation’, 21 February 2022, available at www.kremlin.ru/events/president/news/67828: ‘I consider it necessary to take a long overdue decision and to immediately recognize the independence and sovereignty of the Donetsk People’s Republic and the Lugansk People’s Republic.’; UNSC, Verbatim Record, UN Doc. S/PV.8970 (21 February 2022), 11.

and Lugansk Republics were recognized as independent states on 21 February 2022; second, the two republics requested military assistance from Russia as victims of an armed attack committed by Ukraine; third, Russia was entitled to intervene in the name of collective self-defence according to Article 51 of the Charter. This argument has been expressed before the UNGA, on 28 February 2022:

As Ukrainian provocations against the people of Donbas not only failed to cease in February but also intensified, the leadership of the Donetsk People's Republic and the Luhansk People's Republic turned to us requesting military support in accordance with the bilateral cooperation agreements, which were concluded concurrently with our recognition of them, which was a logical step resulting from the Ukrainian regime's incessant aggressions.⁷⁶

One preliminary remark is useful at this point. The reference to the request for military assistance and to the relevant treaties concluded between Russia and the two separatist republics of Donetsk and Lugansk has led some scholars to consider these statements as offering an 'additional basis for the use of force' in the name of what is known as 'intervention by invitation'.⁷⁷ Although collective self-defence and intervention by invitation may have several points in common,⁷⁸ they constitute distinct legal basis for the use of force and should not be conflated. Even if one followed the legal analysis put forth by Russia and considered the two republics as states (*quod non*) and no other legal obstacle to the invocation of intervention by invitation existed, the request for military assistance expressed by the authorities of the separatist republics would not provide a valid legal basis for the use of force *outside* the territory belonging to these entities,⁷⁹ much like the invitation addressed by the government of Iraq to third states to provide military assistance in the fight against the Islamic state did not – and could not – provide a valid legal basis for the use of force outside Iraqi territory. The bulk of Russia's military operations against Ukraine would thus still remain unlawful, which is why this precedent should be viewed as relating to the collective exercise of the right to self-defence rather than to intervention by invitation.

It is also worth noting that Russia *did not* contend that the alleged violations of the Minsk agreements by the Ukrainian authorities would have, as such, justified its intervention. Therefore, Article 2(4) of the UN Charter only applies in 'international relations' and not in the relations between entities inside existing states.

Turning back to the three steps of Russia's legal construction identified above, the first and main legal obstacle to the invocation of collective self-defence – and this is a point shared with intervention by invitation – is of course the qualification of the two separatist republics of Donetsk and Lugansk as states. In this respect, in the letter sent to the UNSC, President Putin referred to:

the right of nations to self-determination as enshrined in Article 1 of the Charter of the United Nations ... [W]e consider it important that all peoples living on the territory of today's Ukraine, all those who want to exercise this right—the right to choose—should have the right to do so.⁸⁰

According to Russia, since Donetsk and Lugansk became states on the basis of the right to self-determination and as a reaction to the violation of this principle by Ukraine, their recognition as

⁷⁶See UN Doc. A/ES-11/PV.1, *supra* note 9, at 7.

⁷⁷See Kleffner et al., *supra* note 21; Gill, *supra* note 21; Wuert, *supra* note 21.

⁷⁸See, for example, L. Visser, 'Intervention by Invitation and Collective Self-Defence: Two Sides of the Same Coin?', (2020) 7 JUFIL 292.

⁷⁹Institute of International Law, Tenth Commission, Sub-Group C – Military Assistance on Request, Res. (Session of Rhodes, 8 September 2011), Art. 2(2), available at www.idi-ii.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf. See also Green, Henderson and Ruys, *supra* note 21, at 22.

⁸⁰See UN Doc. S/2022/154, *supra* note 5, at 6.

states cannot be considered as violating Ukraine's sovereignty and territorial integrity. This is clearly set out in the following statement made by the Russian representative in the UN:

I would like to recall that the principles of the sovereignty and territorial integrity of States, of which we are accused of violating in Ukraine, as stipulated in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, must be strictly observed with regard to "States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." That does not describe the current Government in Ukraine.⁸¹

This statement was reproduced by Russia in the letter sent to the ICJ.⁸² It constitutes a clear departure from what Russia had accepted in the context of the Minsk Agreements which refer to Donetsk and Luhansk as 'regions of Ukraine',⁸³ are accompanied by a declaration whereby Russia, Ukraine, France and Germany, 'reaffirm their full respect for the sovereignty and territorial integrity of Ukraine'.⁸⁴ Moreover, both instruments are annexed in a UNSC resolution whose first preambular paragraph also reaffirms the Council's 'full respect for the sovereignty, independence and territorial integrity of Ukraine'.⁸⁵

In fact, Russia's 2022 statements appear as an endorsement of the 'remedial secession' doctrine, initially advanced by some authors to support certain declarations of independence, notably the one made by Kosovo.⁸⁶ Through the recognition of entities that have acceded to statehood by virtue of such a remedial secession, Russia triggers the application of the right to collective self-defence in support of and by virtue of the request from the two secessionist republics of Donetsk and Luhansk. Indeed, if we follow the Russian interpretation put forward in February 2022, it would be sufficient to recognize such an entity as a state, arguing that the conditions of a supposed right of 'remedial secession' would be met, in order to justify a military action in favour of the newly-recognized state.

As will be demonstrated below, this line of argument does not reflect an orthodox interpretation of positive international law. It rather appears as the invocation of a 'novel right', not in the sense of an argument that has never been invoked before but rather as an argument that is problematic under positive international law, for the following six reasons.

First, concerning the validity of the 'remedial secession' argument as such, the Russian position is more than debatable. Leaving aside the factual dimension of the claim (was a genocide really perpetrated?), it must be stressed that the 'remedial secession' theory is far from having reached the status of a rule of positive international law.⁸⁷ No text clearly endorses or reflects this theory, including the ambiguous excerpt of UNGA Resolution 2625 cited by Russia. And, in practice, in-depth research reveals that a vast majority of states avoided to use this argument, even when they

⁸¹See UN Doc. S/PV.8974, *supra* note 44, at 11; UN Doc. A/ES-11/PV.1, *supra* note 9, at 8.

⁸²See Russian Federation Letter to the ICJ, *supra* note 6, at 5, para. 19.

⁸³UNSC, Res. 2202, UN Doc. S/RES/2202 (17 February 2015), at 2–3, Ann. I, Package of Measures for the Implementation of the Minsk Agreements (12 February 2015).

⁸⁴*Ibid.*, at 5, Ann. II, Declaration of the President of the Russian Federation, the President of Ukraine, the President of the French Republic and the Chancellor of the Federal Republic of Germany in support of the 'Package of Measures for the Implementation of the Minsk Agreements' (adopted on 12 February 2015).

⁸⁵*Ibid.*, at 1.

⁸⁶C. Ryngaert and C. Griffioen, 'The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to the Agora Papers', (2009) 8 *Chinese Journal of International Law* 573; C. Tomuschat, 'Secession and Self-Determination', in M. Kohen (ed.), *Secession: International Law Perspectives* (2006), 23, at 38–42.

⁸⁷See IIFFMCG Report, *supra* note 45, vol. II, at 138.

recognized Kosovo or other entities having unilaterally proclaimed their independence.⁸⁸ Against this background, the Russian argument represents at the very least a ‘novel right’.

That leads us to a second aspect of Russia’s legal reasoning: to consider that the peoples of the Donetsk and Luhansk Republics have the right to self-determination is one thing; to intervene on the sole basis of their appeal is a step further, a step that poses serious problems in *jus contra bellum*. Indeed, in the words of the IIFMCG Report, ‘military force is never admissible as a means to carry out a claim to self-determination, including internal self-determination’.⁸⁹ Even during the colonial period, no right to intervene militarily in support of the peoples subject to exploitation and domination was ever generally admitted.⁹⁰ This was confirmed in subsequent practice: there is no precedent in which an external intervention would have been justified – and more importantly accepted as lawful by the international community of states as a whole – in the name of an external or internal right to self-determination. To refer to what is probably the most prominent recent example, the war against Yugoslavia was *not* launched in the name of the appeal made by the ‘Kosovo people’ in 1999. The arguments used by the intervening powers were rather based on an alleged implicit authorization given by the UNSC, or, for a small minority of states, on a right to humanitarian intervention.⁹¹

Third, and beyond any claims based on self-determination, we cannot consider that the two ‘republics’ have become ‘states’ under international law. In customary international law, the existence of a state requires a territory, a population, but also an effective and sovereign government. This last condition implies for the new entity the power to be governed by itself: in international law, sovereignty signifies independence, to quote the formula of the classic *Island of Palmas* case.⁹² In the case at hand, the ‘Republics of Donetsk and Luhansk’ effective powers directly result from an outside interference. It is essentially thanks to a massive (diplomatic, economic and military) Russian support that those entities succeeded in gaining some effectivity in their fight against the Ukrainian central authorities. Against this background, the existence of those ‘states’ cannot be legally established. That explains why they were never recognized by any state until the recognition suddenly granted by Russia two days before the launch of the ‘special operation’ dated 24 February 2022.

Fourth, the Russian recognition cannot obviously suffice to justify a use of force in the Ukrainian civil war. Practice is crystal-clear in this respect: when states have intervened in the name of dissident authorities they unilaterally viewed as representatives of a state, they have been massively condemned. Soviet interventions in Hungary (1956)⁹³ and Czechoslovakia (1968),⁹⁴ Vietnam’s intervention in Cambodia (1978),⁹⁵ or, to the extent that the argument was invoked by Iraq, the 1990 Iraqi invasion of Kuwait,⁹⁶ are classical examples in this respect. The recent precedent of Crimea is of course more relevant to the 2022 intervention since it relates to the unilateral recognition not of a government or a dissident authority but of a state and its impact on the violation of Article 2(4) of the UN Charter. Such practice, although more scarce, is not unheard of, as can be attested by the recognition in 1903 by the United States (US) of Panama’s independence from Colombia, which led to the deployment of the US Navy in order

⁸⁸See, among many, O. Corten and A. Lagerwall, ‘La doctrine de la “sécession-remède” à l’épreuve de la pratique récente’, in J. F. Akandji-Kombe (ed.), *L’homme dans la société internationale – Mélanges en hommage au Professeur Paul Tavernier* (2013), 187; K. Del Mar, ‘The Myth of Remedial Secession’, in D. French (ed.), *Statehood and Self-Determination* (2013), 79.

⁸⁹See IIFMCG Report, *supra* note 45, vol. II, at 279.

⁹⁰See Dinstein, *supra* note 73, at 72–5; Gray, *supra* note 73, at 68–73. For an overview of the discussions on this issue during the adoption of UNGA Res. 2625 (XXV) and 3314 (XXIX) see T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (2010), 390–4.

⁹¹See, generally, Franchini and Tzanakopoulos, *supra* note 48.

⁹²*Island of Palmas (Netherlands, USA)*, Award, (1928) 2 RIAA 838.

⁹³See E. Lieblich, ‘The Soviet Intervention in Hungary – 1956’, in Ruys and Corten, *supra* note 48, 48.

⁹⁴See G. Hafner, ‘The Intervention in Czechoslovakia – 1968’, in *ibid.*, at 143.

⁹⁵See G. H. Fox, ‘The Vietnamese Intervention in Cambodia – 1978’, in *ibid.*, at 242.

⁹⁶See Corten, *supra* note 48, at 257.

to protect the new state and to the conclusion of a treaty whereby the newly independent Panama handed over control of the (still to be constructed at the time) Panama Canal to the US.⁹⁷ The illegality of such actions under international law, at least post 1945, bears no doubt. This has been confirmed in the clearest possible terms by the condemnation of Russia's unilateral recognition of Crimea's independence and the annexation that came as a result.⁹⁸

Fifth, this aspect of the Russian argument is problematic in regard of the definition of aggression annexed to UNGA Resolution 3314 (XXIX). Article I of this definition contains an 'explanatory note' according to which: 'In this Definition the term "State": (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations.'⁹⁹ As confirmed by the debates that preceded its adoption, the object of this note is clear: to exclude that recognition (a political act *par excellence*) would exert any influence on the legality of the use of force between states.¹⁰⁰ Admittedly, states had another scenario in mind at the time: they feared that an *absence* of recognition would be used to avoid the application of Article 2(4) of the Charter. The preoccupation was to ensure that non recognized states (like Israel, or, at those times, the German Democratic Republic, South Vietnam, North Korea, . . .) would be protected by the prohibition of aggression. Nevertheless, in view of its wording, this 'explanatory note' should be read as preventing more generally any invocation of a unilateral recognition to justify a use of force. This reading would include cases where the *presence* of recognition is used to trigger the application of an exception to Article 2(4) of the UN Charter, thereby seeking to justify a resort to force that would otherwise be unlawful under the Charter.

Sixth, even if none of the abovementioned obstacles existed and one were to accept in principle the Russian argument about self-defence, its application in practice is fraught with legal difficulties. When did the two entities become states, i.e., when did they become capable of being the victims of an armed attack? When did the armed attack triggering the right to self-defence start? Which acts exactly are to be considered as composing this armed attack? The Russian Federation does not seem to have a clear view on this. The Russian representative to the UNSC asserted that Donetsk and Lugansk had declared their independence back in 2014, thereby dissociating the declaration of independence by the two Republics from their recognition by Russia.¹⁰¹ However, reading this as an implicit acknowledgment of the two entities becoming states at the time of their declaration of independence would run counter to Russia's reaffirmation of its full respect for the sovereignty and territorial integrity of Ukraine in the context of the Minsk Agreements.¹⁰² Along similar lines, although the Russian Federation accused Ukraine of conducting and intensifying military strikes in the territories of Donetsk and Lugansk before the launching of the 'special military operation', the justification of the operation itself refers

⁹⁷M. Arcari, 'Panama Canal', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), vol. VIII, at 38–9, paras. 7–9. Hersch Lauterpacht mentions Panama's recognition by the US as raising the question of premature recognition, which Lauterpacht considers as violating international law even pre-1945; H. Lauterpacht, 'Recognition of States in International Law', (1944) 53 *Yale Law Journal* 385, at 391, 405.

⁹⁸See UNGA Res. 68/282, UN Doc. A/RES/68/282 (27 March 2014) (100 votes in favour, 11 against, and 58 abstentions). For an analysis of this precedent see O. Corten, 'The Russian Intervention in the Ukrainian Crisis: Was *Jus Contra Bellum* "confirmed rather than weakened"?', (2015) 2 *JUFIL* 17; A. Lagerwall, 'L'aggression et l'annexion de la Crimée par la Fédération de Russie: Quels enseignements au sujet du droit international?', (2014) 1 *Questions of International Law* 57; P. C. R. Terry, 'The Recognition of New States in Times of Secession: Is State Recognition Turning into Another Means of Intervention?', (2014) 20 *Asian Yearbook of International Law* 53. In the words of Mary Ellen O'Connell, 'Local leaders in Crimea, Luhansk, and Donetsk declared independence from Ukraine to establish the right to voluntarily join Russia or request assistance against Ukraine. The problem . . . is that the control exercised by pro-Russia parties has only occurred through unlawful Russian intervention. Russia's violation of Article 2(4) vitiates the legality of any invitations by groups taking control of Ukrainian regions.'; M. E. O'Connell, 'The Crisis in Ukraine – 2014', in Ruys and Corten, *supra* note 48, at 866.

⁹⁹UNGA Res. 3314, UN Doc. A/RES/3314(XXIX) (14 December 1974), Ann. 'Definition of Aggression', Art. 1.

¹⁰⁰See Corten, *supra* note 48, at 158–9.

¹⁰¹See UN Doc. S/PV.8970, *supra* note 75, at 12.

¹⁰²See notes 83–5 and accompanying text, *supra*.

globally to all Ukrainian actions since 2014, given the fact that the stated purpose of the operation 'is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime'.¹⁰³ These ambiguities about the scope of the armed attack are inherent to the legal construction itself since they are necessary in order to allow for the 'double counting' of the actions committed by the central government against the secessionist entity: the alleged 'atrocities' will constitute both the grounds for the exercise of the right to remedial secession (and as such they must necessarily occur before the state created by virtue of this right comes into existence) and the armed attack which justifies the resort to individual or collective self-defence by the newly-created state (in which case of course the 'atrocities' must be committed after the state which is the alleged victim of the armed attack has come into being). This temporal conundrum created by the Russian argument is not easily bypassed. Finally, and this is by no means a secondary point, these ambiguities make the application of the conditions of necessity and proportionality extremely difficult, if not impossible. Indeed, if we do not know what the armed attack consists of, how are we to evaluate whether the military action undertaken in self-defence is necessary and proportionate?

Taking into account all those elements, the Russian argument obviously represents a 'novel interpretation' of old concepts linked to the *jus contra bellum* regime.

Is this however the only novel interpretation of *jus contra bellum* made by Russia? The question appears when examining other aspects of the relevant official documents. In the letter sent to the UNSC, it is stated that:

The entire course of events and an analysis of incoming reports demonstrate that confrontation between Russia and these forces is inevitable. It is only a matter of time. They are getting ready and waiting for the right moment. Now they are also aspiring to possess nuclear weapons. We will not allow this to happen . . . Russia cannot feel safe, develop and exist with a constant threat emanating from the territory of present-day Ukraine . . . We had no other way to defend ourselves . . . Again, our actions are self-defence against the threats posed to us . . . This is a real threat not just to our interests, but to the very existence of our State and its sovereignty. This is the red line that has been talked about many times: they have crossed it.¹⁰⁴

Is Russia invoking, beyond the collective dimension mentioned above, a strictly individual self-defence? If this is indeed the case, then the armed attack to which Russia is reacting is not identified or circumscribed in clear terms. Does Russia consider that its operation is justified as a reaction to a future and more vague threat on behalf of its enemies? In other words, should the Russian argument be considered as a case of preventive self-defence, similar for example to the argument advanced by Israel against Iraq in 1983, the Bush administration in the context of the 2003 Iraqi war or the Obama administration in 2015 in Syria? This is far from certain. The words used by the Russian authorities are rather general and vague and could be considered as 'statements of international policy, and not an assertion of rules of existing international law'.¹⁰⁵ On the other hand, one cannot exclude that such an interpretation could be considered as the new Russian official legal doctrine. This interpretation would certainly be classified as going beyond what is accepted in *jus contra bellum*, in view of the rejection of the possibility to invoke self-defence against future armed attacks.¹⁰⁶

In this respect, it must be kept in mind that on 30 September 2022 the Russian Federation forcibly annexed the regions of Donetsk, Lugansk, Zaporozhye, and Kherson, following the result

¹⁰³See UN Doc. S/2022/154, *supra* note 5, at 6; see also Russian Federation Letter to the ICJ, *supra* note 6; UN Doc. S/PV.8974, *supra* note 44, at 11–12.

¹⁰⁴See UN Doc. S/2022/154, *supra* note 5, at 5–7.

¹⁰⁵See *Nicaragua* judgment, *supra* note 34, at 109, para. 207.

¹⁰⁶See Corten, *supra* note 48, at 403–35.

of referenda organized to this effect.¹⁰⁷ Russia's negative vote prevented a resolution condemning both the organization of the referenda and the forcible annexation as unlawful from being adopted by the Security Council.¹⁰⁸ It was thus the eleventh emergency special session of the General Assembly that confirmed the fact that the referenda and forcible annexation were in violation of international law in a resolution adopted on 12 October 2022.¹⁰⁹ Following the forcible annexation of these territories, it would have been logical for the Russian Federation to invoke individual self-defence in order to justify its military operations after the 1 October 2022. This however does not seem to have been formally the case. Indeed, until the end of 2022, no new letter invoking Article 51 and individual self-defence was sent to the Security Council nor did Russia refer to this specific argument explicitly in the discussions the Council held on Ukraine.¹¹⁰ So, the annexation of the four regions of Ukraine does not seem to have influenced the legal justification of the military operations put forth by the Russian Federation.

In any case, as it has been demonstrated above, a close examination of the official documents reveals a broad interpretation by Russia of Article 51 of the UN Charter. Legally speaking, this interpretation is clear in its collective dimension and remains ambiguous as far as individual (and preventive) self-defence is concerned. Be that as it may, the condemnation of the Russian invasion as unlawful has been so overwhelming and so unambiguous that it extends to all possible legal justifications, both the ones explicitly invoked by the Russian administration and those implicitly alluded to in the relevant documents. This will be shown in the next part, where we will closely examine the negative reaction of third states in order to measure the *opinio juris* of the international community of states as a whole with respect to the possible justifications for the Russian operation.

¹⁰⁷UNGA – UNSC, Letter Dated 3 October 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. A/77/505 – S/2022/738 (7 October 2022), Ann.: Address by the President of the Russian Federation, Vladimir Putin, on the occasion of the signing of treaties on accession of Donetsk and Lugansk people's republics and Zaporozhye and Kherson regions to the Russian Federation. The UNGA Res. adopted on 12 October 2022 (see note 109, *infra*) speaks of the 'attempted illegal annexation'. This language is in reality more political than legal and points to a misunderstanding between the reality of the annexation itself and the question of whether there is a change of sovereignty over the annexed territories as a result of the annexation. The first of course does not imply the second. In our view, there was an annexation by Russia of the four eastern Ukrainian regions as much as there was an annexation of Crimea in 2014. This of course does not alter the fact that this annexation is illegal or that the sovereignty over these regions still belongs to Ukraine. The term 'forcible annexation' better reflects the text of Art. 3 of UNGA Res. 3314, which speaks of 'any annexation by the use of force of the territory of another state'. Along the same lines, the UNGA Res. ES-9/1 of 5 February 1982 refers to the 'effective annexation' of the Syrian Golan Heights by Israel and the consolidation of the 'annexation' of occupied Palestinian territories. Naturally, the absence of adjectives like 'attempted' or 'purported' cannot be read as implying that these annexations are any less unlawful or any less unsuccessful in operating any change of sovereignty over the annexed territories.

¹⁰⁸UNSC, Albania and United States of America: Draft Resolution, UN Doc. S/2022/720 (30 September 2022); the result of the vote was ten in favour (Albania, France, Ghana, Ireland, Kenya, Mexico, Norway, United Arab Emirates, United Kingdom, United States), one against (Russian Federation), and four abstentions (Brazil, China, Gabon, India); UNSC, Verbatim Record, UN Doc. S/PV.9143 (30 September 2022), 4.

¹⁰⁹UNGA, Res. ES-11/4, Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations (12 October 2022); UN Doc. A/RES/ES-11/4 (13 October 2022). The discussions relating to the adoption of this resolution can be found in the following documents: UNGA, Verbatim Record, UN Doc. A/ES-11/PV.12 (10 October 2022); UNGA, Verbatim Record, UN Doc. A/ES-11/PV.13 (12 October 2022); UNGA, Verbatim Record, UN Doc. A/ES-11/PV.14 (12 October 2022). The resolution was adopted by 143 votes in favour, five against, and 35 abstentions; see UN Doc. A/ES-11/PV.14, at 12.

¹¹⁰See UNSC, Verbatim Record, UN Doc. S/PV.9161 (21 October 2022), 14–7; UNSC, Verbatim Record, UN Doc. S/PV.9175 (31 October 2022), 7–9; UNSC, Verbatim Record, UN Doc. S/PV.9195 (16 November 2022), 14–7; UNSC, Verbatim Record, UN Doc. S/PV.9202 (23 November 2022), 10–13; UNSC, Verbatim Record, UN Doc. S/PV.9208 (6 December 2022), 10–13; UNSC, Verbatim Record, UN Doc. S/PV.9216 (9 December 2022), 6–9, 18.

3. To what extent have the Russian arguments been rejected?

As revealed above, the Russian intervention in Ukraine has been the object of an overwhelming condemnation. In view of the clear formulation of the UNGA Resolution ‘Aggression against Ukraine’ adopted on 2 March 2022,¹¹¹ there is no doubt that the 141 states that voted in favour of the resolution consider the Russian operation as a violation of Article 2(4) of the UN Charter. What is more interesting is that, as we will see below, several states among the 35 that abstained¹¹² and even the five that voted against the Resolution (Belarus, Democratic people’s Republic of Korea, Eritrea, the Russian Federation, and the Syrian Arab Republic) adopted a negative stance towards the intervention. In reality, only one state other than Russia, the Syrian Arab Republic, expressed a clear endorsement of the legal arguments put forth by Russia as a justification of its operation.

How can we interpret this reality? In our view, an in-depth analysis of the numerous statements made by dozens of states leads to two conclusions. First, and this is not so frequent when analysing the positions of states expressed about military interventions, the condemnation has a clear and unequivocal legal significance. Indeed, the rejection of the ‘special military operation’ as unlawful is so broad that it covers all possible legal justifications that have been advanced explicitly or implicitly by the Russian Federation (Section 3.1). Second, more particularly, the extensive interpretation made by Russia about the possibility to invoke collective self-defence as a consequence of a unilateral recognition has been overwhelmingly disavowed by states (Section 3.2).

3.1 A rejection framed in legal terms

The main conclusion that can be drawn from states’ reactions to the Russian intervention is that it has been condemned not only in political but also in specific legal terms. The first element to be mentioned in this respect is the resolution adopted on 2 March 2022 whereby the UNGA explicitly denounced an ‘aggression’ perpetrated ‘in violation of Article 2(4) of the Charter’. It also demanded that Russia ‘refrain from any further unlawful threat or use of force’ and called it ‘to abide by the principles set forth in the Charter and the Declaration on Friendly Relations’.¹¹³ As already mentioned, a vast majority of the UN Members (141) voted in favour of this resolution.

Beyond this text, and in addition to the significance of their votes, a reading of the numerous statements made inside or outside the UN reveals that states did not only reject the facts underlying the Russian arguments (the existence of a genocide as such); they also refuted the lawfulness of the Russian operation under international law, although it is not always very clear what they considered the Russian legal argument to be. For example, it is difficult to know whether states have read into the justifications put forth by the Russian Federation an argument relating to humanitarian intervention, although some states have had the opportunity to clarify this point in the context of an intervention in the currently pending proceedings before the ICJ.¹¹⁴ This

¹¹¹See note 9 and accompanying text, *supra*.

¹¹²The abstaining states were the following: Algeria, Angola, Armenia, Bangladesh, Bolivia, Burundi, Central African Republic, China, Congo, Cuba, El Salvador, Equatorial Guinea, India, Iran, Iraq, Kazakhstan, Kyrgyzstan, Lao People’s Democratic Republic, Madagascar, Mali, Mongolia, Mozambique, Namibia, Nicaragua, Pakistan, Senegal, South Africa, South Sudan, Sri Lanka, Sudan, Tajikistan, United Republic of Tanzania, Uganda, Vietnam, Zimbabwe; see UN Doc. A/ES-11/PV.5, *supra* note 9, at 15. It should be noted that the United Arab Emirates, which had abstained during the vote for the resolution condemning the Russian operation before the Security Council (see note 7, *supra*), voted in favour of the resolution adopted by the General Assembly.

¹¹³See UN Doc. A/RES/ES-11/1, *supra* note 9, paras. 2, 3, 7.

¹¹⁴Ukraine’s application against Russia before the international Court of justice: joint statement, made on behalf of Albania, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Marshall Islands, Micronesia, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, United States, European Union’, 20 May 2022, available at www.gov.uk/government/news/ukraine-joint-statement-on-ukraines-application-against-russia-before-the-international-court-of-justice. See the interventions mentioned in note 56, *supra*.

is linked, as we have seen, to the difficulties in translating the Russian position into specific legal arguments. However, at a general level, this ambiguity does not reduce the importance of the positions expressed by states. On the contrary, the force with which states have expressed their disapproval of the Russian intervention indicates that they reject any legal justification that could possibly be invoked by the Russian side.

To turn more concretely to the positions put forward, four broad categories of states can be distinguished.

First, a vast majority of states, from different parts of the world, explicitly condemned the Russian intervention in clear legal terms. The following examples can be given:

Russia's actions grossly violate international law and are in clear breach of the Charter of the United Nations and the Helsinki Final Act of the Organization for Security and Cooperation in Europe, as well as Russia's specific commitments to respect Ukraine's sovereignty and territorial integrity under the Budapest Memorandum of 1994.¹¹⁵

[T]hat act breaches Russia's obligation as a member of the United Nations and its obligation to respect the provisions of Article 2, paragraph 4 of the Charter.¹¹⁶

[W]e are confronted with the invasion of one sovereign country by another, which constitutes a flagrant violation of Article 2, paragraph 4, of the Charter of the United Nations and also constitutes an act of aggression under the terms of General Assembly resolution 3314 (XXIX), adopted by all Member States of the United Nations.¹¹⁷

This is not self-defence under Article 51 of the Charter. It is naked aggression.¹¹⁸

Those condemnations emanate from states from all the continents. It is worth noting that some of them are not insensitive to some of the views expressed by Russia. Bolivia, for example, who abstained during the vote of the UNGA Resolution, affirmed that it:

¹¹⁵See UN Doc. A/ES-11/PV.1, *supra* note 9, 11 EU member States, North Macedonia, Montenegro, Albania, Bosnia and Herzegovina, Iceland, Norway, the Republic of Moldova, Georgia, San Marino, Andorra, Monaco, and Liechtenstein; see also *ibid.*, 13 Denmark (on behalf of Nordic countries: Estonia, Finland, Iceland, Latvia, Lithuania, Norway, Sweden), 14 France, 15 Georgia, 16 Poland, 17 Austria, 19 Czech Republic, 20 Switzerland, 21 New Zealand, 23 Bulgaria, 24 Italy; see UN Doc. A/ES-11/PV.2, *supra* note 9, 2 Slovakia, 6 Liechtenstein, 7 Slovenia, 9 Ireland, 16 Greece, 19 Albania; see UN Doc. A/ES-11/PV.3, *supra* note 9, 11 Luxembourg, 14 Spain, 19 Hungary, 20 Malta; see UN Doc. A/ES-11/PV.4, *supra* note 9, 1 Andorra, 3 Moldova; see UN Doc. A/ES-11/PV.4, *supra* note 9, 5 Bosnia and Herzegovina, 13 Romania, 13 Montenegro, 15 Cyprus, 15-16 Portugal, 17 North Macedonia.

¹¹⁶See UN Doc. S/PV.8979, *supra* note 7, 9 Ghana; see also UN Doc. A/ES-11/PV.3, *supra* note 9, 6 Ghana; UN Doc. A/ES-11/PV.4, *supra* note 9, 11 Niger, 16 Zambia; UN Doc. A/ES-11/PV.5, *supra* note 9, 3 Djibouti; UN Doc. A/ES-11/PV.2, *supra* note 9, 4 Fiji (on behalf of the member States of the Pacific Islands Forum – Australia, the Federated States of Micronesia, Kiribati, Nauru, New Zealand, Palau, Papua New Guinea, the Republic of the Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu, Vanuatu); UN Doc. A/ES-11/PV.3, *supra* note 9, 5 Palau, 7 Micronesia, 8 Australia, 11 Papua New Guinea, 18 Samoa, 23 Marshall Islands; UN Doc. A/ES-11/PV.1, *supra* note 9, 28 Singapore; UN Doc. A/ES-11/PV.2, *supra* note 9, 10 Japan, 23 Israel; UN Doc. A/ES-11/PV.5, *supra* note 9, 2 Myanmar, 22 Nepal, 23 Jordan; UN Doc. A/ES-11/PV.2, *supra* note 9, 5 Indonesia.

¹¹⁷See UN Doc. S/PV.8979, *supra* note 7, 5 Mexico; UN Doc. A/ES-11/PV.2, *supra* note 9, 10 Mexico; UN Doc. A/ES-11/PV.1, *supra* note 9, 22 Panama (also on behalf of Costa Rica and the Dominican Republic); UN Doc. A/ES-11/PV.2, *supra* note 9, 1 Uruguay, 13 Barbados, 14 Bolivia and Costa Rica, 16 Ecuador, 17 Peru, 18 Guatemala, 21 Chile; UN Doc. A/ES-11/PV.3, *supra* note 9, 3 Paraguay, 4 Dominican Republic and Suriname, 5-6 Antigua and Barbuda, 9 Guyana and Jamaica, 12 Saint Vincent and the Grenadines, 14-15 Belize; UN Doc. A/ES-11/PV.4, *supra* note 9, 4 Grenada, 6 Trinidad and Tobago; UN Doc. A/ES-11/PV.5, *supra* note 9, 6 USA; UN Doc. A/ES-11/PV.1, *supra* note 9, 27 Canada.

¹¹⁸See UN Doc. S/PV.8979, *supra* note 7, 4 UK; see also UN Doc. A/ES-11/PV.1, *supra* note 9, 15 UK; UN Doc. A/ES-11/PV.2, *supra* note 9, 3 Belgium.

rejects any war of aggression or threat of aggression as a means of resolving disputes or conflicts between states' and condemned broadly 'every invasion or unilateral action by various Powers in recent history, in violation of international law and the Charter of the United Nations itself. The examples of that include Afghanistan, Iraq, Libya, Syria, Palestine and now Ukraine.¹¹⁹

Apart from those condemnations based on general denunciations framed in legal terms, some states developed a more specific legal reasoning, focusing for example on the legal consequences of the unlawful character of the invasion. In this respect, Germany argued that Ukraine 'can defend itself against the aggressor, in line with Article 51 of the Charter of the United Nations'.¹²⁰ Argentina insisted that '[n]o territorial acquisition can be recognized as legal on the basis of the use or threat of force'.¹²¹ For its part, Colombia developed a reasoning based on international responsibility:

The current international law regime on the responsibility of States, adopted 21 years ago by the International Law Commission, makes the legal consequences of the invasion of Ukraine clear . . . Based on that, every State represented here should comply with some obligations. First, we have a positive obligation to cooperate using lawful means to put an end to Russia's serious breach of jus cogens norms. Secondly, we must comply with the negative obligation to refrain from recognizing a de facto situation imposed by force through a serious breach of international law and from assisting or enabling such a situation, along with all its implications.¹²²

The resolution adopted by the UNGA on 12 October 2022 confirms this point by noting that 'any annexation of a State's territory by another State resulting from the threat or use of force is a violation of the principles of the Charter and international law', by declaring that the referenda and annexation of September 2022 'have no validity under international law' and by calling upon 'all States, international organizations and United Nations specialized agencies not to recognize any alteration by the Russian Federation of the status' of the four Ukrainian regions 'and to refrain from any action or dealing that might be interpreted as recognizing any such altered status'.¹²³ Albania cited explicitly Article 3(a) of UNGA Resolution 3314 (XXIX) asserting that 'annexation by the use of force of the territory of another State is itself an act of aggression',¹²⁴ a position echoed by Mexico in its statement that:

in accordance with Article 4, paragraph 4, of the Charter of the United Nations, any attempts to alter borders by the threat or use of force or in any other manner inconsistent with the purposes and principles of the United Nations is in violation of international law.¹²⁵

In connection to the above, the unlawfulness of Belarus' involvement in the Russian invasion is also highlighted. In its 2 March 2022 Resolution, for example, the UNGA '[d]eplores the

¹¹⁹See UN Doc. A/ES-11/PV.2, *supra* note 9, at 14.

¹²⁰See UN Doc. A/ES-11/PV.4, *supra* note 9, 10 Germany.

¹²¹*Ibid.*, 9 Argentina.

¹²²See UN Doc. A/ES-11/PV.3, *supra* note 9, 2 Colombia.

¹²³See UNGA, Res. ES-11/4, *supra* note 109, last preambular para. and operative paras. 3, 4.

¹²⁴UNSC, Verbatim Record, (27 September 2022) UN Doc. S/PV.9138, 7. See also UN Doc. A/ES-11/PV.12, *supra* note 109, 22 Liechtenstein; UN Doc. A/ES-11/PV.13, *supra* note 109, 18 New Zealand.

¹²⁵See UN Doc. S/PV.9138, *supra* note 124, 10. See also UN Doc. A/ES-11/PV.13, *supra* note 109, 14 Cyprus, 15-16 Greece and 16 Liberia.

involvement of Belarus in this unlawful use of force against Ukraine, and calls upon it to abide by its international obligations'.¹²⁶ Some states were more specific in their statements in this regard. The Netherlands 'condemn[ed] Belarus for facilitating the attack, which is also an act of aggression under international law',¹²⁷ Croatia denounced Belarus as an 'accomplice',¹²⁸ whereas Liechtenstein quoted Article 3(f) of the definition of aggression adopted in UNGA Resolution 3314 (XXIX), which includes a state 'allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State'.¹²⁹

A second group of states did not condemn explicitly the Russian invasion as a violation of international law, but used terms that clearly indicate an implicit condemnation, here again based on legal terms. For example, Bangladesh, who abstained during the vote of Resolution ES-11/1, asserted that:

We believe that the obligations stipulated in the Charter of the United Nations with regard to the prohibition on the use of force, respect for sovereignty and territorial integrity, and the peaceful settlement of international disputes must be complied with in all circumstances, without exception.¹³⁰

Several other states expressed themselves along similar lines:

The principles of sovereignty and the sovereign equality of States are enshrined in the Charter of the United Nations. All States enjoy the right to full sovereignty in all their areas of jurisdiction. The Charter requires sovereign States to refrain from the use of force against the political independence and territorial integrity of any State. We especially condemn the use of separatism and secession as a weapon of diplomacy, which invites and inflicts terrible cruelties and indiscriminate killings far in excess of any other kind of conflict.¹³¹

In recent years, we have seen the progressive deterioration of the security situation and the balance of power in Eastern Europe. The undermining of the Minsk agreements by all parties and the discrediting of the security concerns voiced by Russia prepared the ground for the crisis we are all witnessing. Let me be clear, however—that situation in no way justifies the use of force against the territorial integrity and sovereignty of any Member State, which is against the most basic norms and principles we all abide by and a clear breach of the Charter of the United Nations.¹³²

Similar positions were advanced in the context of the adoption of the 12 October 2022 Resolution where a significant number of states, including states that abstained or voted against the Resolution of 12 October 2022, voiced their attachment either to the prohibition of the use of force, or to the territorial integrity or political independence of Ukraine, or more generally to

¹²⁶See UN Doc. A/RES/ES-11/1, *supra* note 9, para. 10.

¹²⁷See UN Doc. A/ES-11/PV.2, *supra* note 9, 4 Netherlands.

¹²⁸*Ibid.*, 8 Croatia.

¹²⁹*Ibid.*, 6 Liechtenstein; other States used more vague terms, see *ibid.*, 2 Slovakia, 3 Belgium, 9 Ireland, 10 Japan, 19 Albania; UN Doc. A/ES-11/PV.3, *supra* note 9, 11 Luxembourg; UN Doc. A/ES-11/PV.5, *supra* note 9, 6 USA. See also UN Doc. S/PV.9175, *supra* note 110, 4-5 Albania, 5 UK, 6 France, 7 Ireland, 15 Poland, 16 Latvia, 17 Germany.

¹³⁰See UN Doc. A/ES-11/PV.4, *supra* note 9, 17 Bangladesh.

¹³¹See UN Doc. A/ES-11/PV.3, *supra* note 9, 18 Philippines; see also UN Doc. A/ES-11/PV.2, *supra* note 9, 13 Maldives; UN Doc. A/ES-11/PV.3, *supra* note 9, 5 Brunei Darussalam, 18 Capo Verde, 21-22 Kuwait; UN Doc. A/ES-11/PV.4, *supra* note 9, 4 Nepal, 14 San Marino, 18 Vanuatu; UN Doc. A/ES-11/PV.5, *supra* note 9, 16-17 Sierra Leone.

¹³²See UN Doc. A/ES-11/PV.1, *supra* note 9, 25 Brazil.

the fundamental principles of the UN Charter, explicitly asserting in some cases that the referenda and forcible annexation are null and void and as such should not be recognized.¹³³

A third group of states, among which some of the most conspicuous abstaining states during the voting of Resolution ES-11/1, remained silent about the legality of the Russian intervention. However, their statements obviously cannot be interpreted as a support of the legal arguments advanced by President Putin. On the contrary, the generality of the terms employed reveal a reluctance to accept or condone any legal justification for the use of force, as illustrated by those examples:

It is our consistent and unequivocal position that all countries' sovereignty and territory integrity should be respected, and the purposes and principles of the United Nations Charter upheld. China will continue to play a constructive role in the pursuit of peace.¹³⁴

The contemporary global order was built upon the Charter of the United Nations, international law and respect for the sovereignty and territorial integrity of States. All Member States need to honour those principles.¹³⁵

We believe that every Member State of the United Nations has the right to security, sovereignty, independence and territorial integrity. . . . The United Arab Emirates restates its commitment to the territorial integrity, sovereignty and independence of all Member States of the United Nations.¹³⁶

Some of those states explained their abstention during the vote of the UNGA Resolution by political or diplomatic factors, or by procedural arguments, without in any manner supporting the substantive Russian legal arguments. The position of Iran is telling in this regard:

We believe that the text of resolution ES-11/1 lacks impartiality and realistic mechanisms for resolving the crisis through peaceful means. Furthermore, not all Member States were given the opportunity to engage in negotiations on the text of the resolution. It should be emphasized that the General Assembly is not in a position to determine the existence of an act of aggression, because in both Article 39 of the Charter and resolution 3314 (XXIX) of 14 December 1974, the Security Council is the organ that is called to do so.¹³⁷

¹³³See UN Doc. A/ES-11/PV.12, *supra* note 109, 12 Latvia also on behalf of Estonia, Denmark, Finland, Iceland, Lithuania, Norway, Sweden, 13 Fiji, 14 European Union and Turkey, 15 Singapore and Costa Rica, 16-17 Poland, 17 Indonesia, 18 Malta and the Netherlands, 19 Luxembourg, 20 Albania, 21 Austria, 23 Switzerland, 24 United Kingdom, 24-5 Mexico; UN Doc. A/ES-11/PV.13, *supra* note 109, 1 Guatemala, 2 Ireland, 3 Italy and Romania, 4 Bulgaria, 5 Ecuador and Slovakia, 6 Republic of Korea, 7 Australia, 7-8 Chile, 8 Vietnam, 9 Colombia and Czechia, 11 Moldova and Micronesia, 11-12 Croatia, 12 Hungary, 13 Spain, 14 Argentina, 15 Portugal; 16-17 Belgium, 17 Japan and Georgia, 17-18 Azerbaijan, 19 Slovenia and Uruguay, 20 Papua New Guinea, 22 Montenegro, 23 Ghana, 24 Cambodia and Democratic Republic of the Congo, 25 Palau, 26 Timor-Leste and Germany; UN Doc. A/ES-11/PV.14, *supra* note 109, 1-2 Canada, 4 France, 6 USA, 10 Nepal, 10-11 Saint Vincent and the Grenadines, 12 Angola and Saudi Arabia, 13 Algeria and South Africa, 14 Pakistan and Egypt, 16 Bangladesh, Thailand and Mauritius, 17 Brazil, 18 Bolivia.

¹³⁴See UN Doc. A/ES-11/PV.1, *supra* note 9, 22-23 China; and see UN Doc. A/ES-11/PV.5, *supra* note 9, 16. See also UN Doc. A/ES-11/PV.4, *supra* note 9, 8 Vietnam, 11 Thailand; UN Doc. A/ES-11/PV.14, *supra* note 109, 5 China.

¹³⁵See UN Doc. S/PV.8979, *supra* note 7, 7 India; see also UN Doc. A/ES-11/PV.2, *supra* note 9, 20-1; UN Doc. A/ES-11/PV.5, *supra* note 9, 18; UN Doc. A/ES-11/PV.14, *supra* note 109, 15. Along the same lines see UN Doc. A/ES-11/PV.4, *supra* note 9, 12 Nicaragua; UN Doc. A/ES-11/PV.5, *supra* note 9, 23 Iraq; UN Doc. A/ES-11/PV.14, *supra* note 109, 17 Cuba.

¹³⁶See UN Doc. S/PV.8979, *supra* note 7, 11; UN Doc. A/ES-11/PV.5, *supra* note 9, 18 UAE; see also UN Doc. A/ES-11/PV.4, *supra* note 9, 20 DRC and Nigeria, 21 Mauritius, 21-22 Tunisia, 22 Qatar; UN Doc. A/ES-11/PV.5, *supra* note 9, 1 Solomon Islands, 2 Pakistan, 4 Lao People's Democratic Republic and Cambodia, 5 Azerbaijan, 12-13 Serbia, 20 Algeria.

¹³⁷See UN Doc. A/ES-11/PV.5, *supra* note 9, 19 Iran; see also *ibid.*, 20 Tanzania, 21 South Africa.

Cuba, which was also among the abstaining states, asserted that it will always defend peace and unequivocally oppose the use or threat of use of force against any state, speaking of ‘the non-observance of legal principles and international norms’.¹³⁸ At the same time, it was sensitive to Russia’s view of the political context, criticized NATO’s expansion and affirmed that:

It was a mistake to ignore the Russian Federation’s well-founded demands for security guarantees for decades and to assume that it would not defend itself in the face of a direct threat to its national security. Peace cannot be achieved by surrounding and corralling States.¹³⁹

Like Cuba, other states often characterized as close to Russia referred to political arguments without any indication of endorsing Russia’s legal justifications for the use of force: ‘military blocks such as NATO cannot expand indefinitely, thus threatening the security of other regions of the world’.¹⁴⁰ In the same vein, even some of the states who voted against the resolutions did not reproduce or, much less, approve the legal arguments made by Russia. The Democratic People’s Republic of Korea considered that Russia had reasonable demands and legitimate security concerns, and that the West was to blame for other military interventions in Iraq, Afghanistan, or Libya.¹⁴¹ Eritrea also explained its negative vote by affirming that it was:

against the internationalization of issues, incessant rhetoric and the imposition of unilateral sanctions, which regrettably further polarize international relations and escalate situations, with enormous implications for civilians. Instead, we have consistently called for every region to be given the space and support it needs to address its political problems.¹⁴²

All in all, the refusal by some states to vote in favour of the resolutions or their abstention was not motivated by an adherence to the broad interpretation of self-defence advanced by Russia.

Finally, apart from Russia itself, the Syrian Arab Republic is the only state which can be cited as having supported the Russian interpretation. Indeed, the Syrian representative contended before the UNGA that the intervention in Ukraine was designed ‘to prevent the Russian Federation from defending its sovereignty, territories and security and protecting its people from the threats they face *in accordance with the Charter*’.¹⁴³ Contrary to the abovementioned positions which were sympathetic to the Russian rhetoric, this time the statement is clearly framed in legal terms.

In sum, the innovative Russian interpretation of *jus contra bellum* has been massively condemned. Beyond the arithmetic that results from the vote of the UNGA Resolution (141-5-35, plus about ten states that did not participate in the vote), the analysis of the statements is unequivocal: only two states (Syria and Russia itself) were in favour of the extensive interpretation of Article 51 contained in the letter sent to the UN on 24 February 2022. On the contrary, an overwhelming majority of states did not support this interpretation, either rejecting it explicitly or implicitly, or choosing to remain silent and not give any explicit endorsement to Russia’s legal views.¹⁴⁴ Even those states that are generally considered as Russia’s allies preferred *not* to challenge the existing legal regime. Therefore, the relevance of this legal regime was reaffirmed, both in

¹³⁸See UN Doc. A/ES-11/PV.3, *supra* note 9, 17.

¹³⁹*Ibid.*

¹⁴⁰See UN Doc. A/ES-11/PV.4, *supra* note 9, 8 Venezuela (who was not present during the vote on resolution ES-11/1); see also *ibid.*, 12 Nicaragua.

¹⁴¹See UN Doc. A/ES-11/PV.4, *supra* note 9, 16. See also UN Doc. A/ES-11/PV.5, *supra* note 9, 5 Belarus.

¹⁴²See UN Doc. A/ES-11/PV.5, *supra* note 9, 19.

¹⁴³See UN Doc. A/ES-11/PV.2, *supra* note 9, 20 (emphasis added).

¹⁴⁴All the States that voted against the resolution explained their position. Among the 35 States that abstained, the following 21 States chose not to take the floor and thus remained completely silent on their vote: Angola, Armenia, Burundi, Central African Republic, Congo, El Salvador, Equatorial Guinea, Kazakhstan, Kyrgyzstan, Madagascar, Mali, Mongolia, Mozambique, Namibia, Senegal, South Sudan, Sri Lanka, Sudan, Tajikistan, Uganda, and Zimbabwe.

general and in its more specific aspects. This reaffirmation is particularly important with respect to the condemnation of the Russian argument relating to the invocation of collective self-defence in favour on the unilaterally recognized entities of Donetsk and Lugansk.

3.2 A rejection of the collective self-defence argument based on unilateral recognition

As indicated previously, Russia has developed a subtle legal reasoning, according to which its recognition of the independence of the so-called ‘Republics of Donetsk and Luhansk’ would have made it possible to invoke the collective exercise of those states’ self-defence against Ukraine. But, here again, in view of the statements made by states, it is clear that this reasoning was denounced, even *before* the launching of the ‘special military operation’. This denunciation is made even more forceful by the fact that, contrary to what has been observed in other controversial invocations of self-defence, states did not hide behind considerations linked to the violation of the conditions of necessity and proportionality in order to condemn the intervention as unlawful. Indeed, had states condemned the Russian intervention as unnecessary or disproportionate, their position could have been interpreted as an implicit acceptance of the possibility to invoke self-defence in the first place or at least as indicative of a doubt as to the validity of the collective self-defence argument put forth by Russia. No such reading can be plausibly inferred from the views expressed by states in this precedent. To the contrary, all the relevant declarations reflect a clear rejection of collective self-defence in the circumstances at hand.

The debates that took place in the period directly following their recognition and preceding the beginning of the massive invasion, on 24 February, were particularly instructive in this regard. Some states bluntly denounced the Russian argument, as illustrated by this formula: ‘No other nation recognizes those areas of Ukraine as some other sovereign—that is a complete farce used to justify an invasion.’¹⁴⁵ Many others used a more specific legal discourse, in support of the same conclusion:

Russia’s recognition of the Donetsk People’s Republic and Luhansk People’s Republic as independent States is an attack on Ukraine’s sovereignty and territorial integrity and a blatant violation of international law.¹⁴⁶

Today, given the unilateral recognition as independent republics of the Donetsk and Luhansk regions, an integral part of the territory of Ukraine, a full State Member of the United Nations, Russia is violating three basic principles of international law: respect for the territorial integrity of States; the commitment to resolving disputes by peaceful means and to refrain from the threat or use of force; and respect for the political independence and non-intervention in the internal affairs of other States.¹⁴⁷

President Putin’s decision to recognize the independence of the separatist Ukrainian territories of Donetsk and Luhansk and to deploy troops to those areas flies in the face of that international

¹⁴⁵UNGA, Verbatim Record, UN Doc. A/76/PV.59 (23 February 2022), 22 Marshall Islands. See also *ibid.*, 1 Czech Republic. Along similar lines see UN Doc. A/76/PV.58, *supra* note 44, 8 EU (on behalf of the European Union (EU) and its states members; North Macedonia, Montenegro, Albania, Bosnia and Herzegovina, Iceland, Norway, Georgia, and Monaco align themselves with this statement), 10 Lithuania (on behalf of the eight Nordic-Baltic countries – Denmark, Estonia, Finland, Iceland, Latvia, Norway, Sweden), 14 Japan, 17 Turkey, 18 France, 20 Liechtenstein, 24 Croatia, 24-25 Netherlands, 26 Switzerland and New Zealand, 27 Italy; UN Doc. A/ES-11/PV.2, *supra* note 9, 8 Turkey, 16 Costa Rica; UN Doc. A/ES-11/PV.4, *supra* note 9, 5 Korea.

¹⁴⁶See UN Doc. A/76/PV.59, *supra* note 145, 2 Australia; see also *ibid.*, 2 Moldova, 4 Romania and Bulgaria, 7-8 Palau, 8 Guatemala, 9 Uruguay and Peru, 11 Slovakia, 12 Austria, 13 Republic of Korea, 15 Kenya and Slovenia, 16 Singapore, 17 Ireland and Malta, 18 Luxembourg, 19 Spain, 21 Greece, 23 Portugal, 25 Cyprus; UN Doc. A/ES-11/PV.1, *supra* note 9, 19 Austria; UN Doc. A/ES-11/PV.3, *supra* note 9, 19 Hungary.

¹⁴⁷See UN Doc. A/76/PV.59, *supra* note 145, 25 Dominican Republic; see also UN Doc. A/ES-11/PV.2, *supra* note 9, 1 Uruguay.

order, which is based on the rule of law. In particular, it constitutes a breach of the Charter of the United Nations; the Helsinki Final Act; the Minsk agreements, which were endorsed by the Security Council in its resolution 2202 (2015); and the Budapest Memorandum.¹⁴⁸

It is thus clear from those statements that the orthodox interpretation of Article I of the definition of aggression, according to which the establishment of a use of force must be made independently of the (in)existence of a recognition, has been confirmed.

4. Concluding remarks

Beyond the debate surrounding the legality of the Russian intervention in Ukraine as such, a broader question appears, as mentioned by the Greek representative, ‘([t]he attack is challenging fundamental concepts of international law, the inviolability of borders and sovereign States’ very right to choose their own orientation’.¹⁴⁹ This is why, to cite the Representative of Jamaica referring to ‘*the eternal and inspiring words of Bob Marley*’, it was vital for the UN members to ‘*get up, stand up, stand up for the rights*’ enshrined in the UN Charter.¹⁵⁰ Taking into account the number and the content of the official statements made inside and outside the UN, all the relevant resolutions adopted by the UNGA but also by other international organizations, as well as the legal opinions expressed by the vast majority of scholars, it is clear that this suggestion has been acted upon. In this sense, the *jus contra bellum* regime has been confirmed by a general *opinio juris* representing the international community as a whole. This overwhelming condemnation will prove crucial in maintaining the integrity of the relevant rules in the long run.

Apart from their impact on the evolution of the legal regime of *jus contra bellum* itself, the positions adopted by states in the context of a specific precedent are also important because they allow the evaluation of the consistency of a state’s approach to *jus contra bellum*. Aside from its legal significance, such consistency, or lack thereof, is also crucial in terms of legitimacy. Indeed, the debates in both the UNSC and the UNGA show that previous interpretations and violations of *jus contra bellum* by some states have been invoked – not only by the Russian Federation but also by others – as proof of the existence of double standards in the reaction to violations of international law.¹⁵¹

This ‘double standards’ discourse may be one of the elements explaining the fact that the rejection of the arguments put forth by the Russian Federation is not fully reflected in the votes in favour of the resolutions expressing it. This is even more evident when the concrete consequences for the aforementioned violations have been envisaged. Indeed, on 14 November 2022, the UNGA adopted a resolution recognizing that the Russian Federation:

must be held to account for any violations of international law in or against Ukraine . . . and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts,¹⁵²

¹⁴⁸See UN Doc. A/76/PV.59, *supra* note 145, 14 Belgium; UN Doc. A/76/PV.58, *supra* note 44, 22 Canada.

¹⁴⁹See UN Doc. A/ES-11/PV.2, *supra* note 9, 16 Greece.

¹⁵⁰See UN Doc. A/ES-11/PV.3, *supra* note 9, 9.

¹⁵¹See UN Doc. A/ES-11/PV.13, *supra* note 109, 21–22 Syrian Arab Republic, 24 Democratic Republic of the Congo; see UN Doc. A/ES-11/PV.14, *supra* note 109, 13 Algeria, 15 Egypt, 16–17 Mauritius, 17 Cuba, 18 Bolivia, 20 Democratic Republic of the Congo; UNGA, Verbatim Record, UN Doc. A/ES-11/PV.15 (14 November 2022), 17 Syrian Arab Republic, 17–18 Nicaragua, 19 Democratic People’s Republic of Korea, 22 South Africa, 23 Cuba, 25 Islamic Republic of Iran, 29 Venezuela.

¹⁵²UNGA, Res. ES-11/5, Furtherance of Remedy and Reparation for Aggression Against Ukraine (14 November 2022); UN Doc. A/RES/ES-11/5 (15 November 2022), para. 2.

and recommending:

the creation . . . of an international register for damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence gathering.¹⁵³

This Resolution was adopted by 94 votes in favour, 14 against and 73 abstentions,¹⁵⁴ an outcome markedly different than the March 2022 Resolution condemning the Russian aggression against Ukraine (141 in favour, five against, and 35 abstentions)¹⁵⁵ and the October 2022 Resolution on the referenda and forcible annexation of the four Ukrainian regions by the Russian Federation (143 in favour, five against, 35 abstentions).¹⁵⁶

The reluctance of behalf of several states to translate their legal interpretations and convictions into an affirmative vote is of course the result of many different political factors, whose analysis goes beyond the scope of this article. Insofar as the ‘double standards’ discourse is one of them – and this may very well be the case to a larger extent that what is visible from the formal positions communicated by states during the UNSG and the UNGA meetings – a consistent view on the interpretation and application of the rules of *jus contra bellum* would help to dispel the relevant accusations or at least make their formulation less convincing. There should be no illusions on this point: there are no *sui generis* precedents and arguments defended by states in past precedents may come back to haunt them.

¹⁵³*Ibid.*, para. 4.

¹⁵⁴See UN Doc. A/ES-11/PV.15, *supra* note 151, 30.

¹⁵⁵See notes 9 and 10 and accompanying text, *supra*.

¹⁵⁶See note 109 and accompanying text, *supra*.