



RUSSIAN MILITARY INVASION OF UKRAINE: AN ASSAULT ON DEMOCRACY AND INTERNATIONAL LAW

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ABSTRACT

For a long time, Russia has been harbouring territorial subjugation and conquest of Ukraine. The two political entities, over several centuries, have had a tense relationship. While Russia treats Ukraine as part of its own past imperium, the latter proudly proclaims itself as a free nation carrying distinct nationalistic identity. Ukraine, following the disintegration of USSR in 1991, emerged as a sovereign country, and has since then attempted to deepen its democratic structure in sharp contrast to Russia's elected autocracy. Vladimir Putin, in power in Russia since 2000, wants Ukraine to be a part of the resurgent Russian federation. To this end, his military forces have been attempting to subjugate the Ukrainians, first in 2014, and now 2022. However, Ukraine, a young and vibrant democracy, poses serious challenges to Putin's vision of reviving the old Russian imperial glory, which was once symbolised by the USSR. In view of Ukraine's fast forwarding to democratic, liberal, free-market economy, and its cosying up with the Western regime, the 'said' strategic vision of Putin now appears challenged and undermined. The latest military invasion of Ukraine by Putin's army is a textbook case of violation of Russia's obligations under international law generally, and UN Charter specifically. The launch of unprovoked military strikes by Russia against Ukraine's territorial integrity reminds the international community of further weakening of rule-based international legal order. In light of the ongoing military conflict and utter deterioration of relationship between Ukraine and Russia, the present paper attempts to examine the factors responsible for the long held hostilities between the two countries. It further examines the Russia's repeated breaches of its legal obligations under international law, in particular, how its use of force against the territorial independence and integrity of Ukrainian nation is an egregious violation of UN Charter.

I. INTRODUCTION

After each war there is a little less democracy to save.

Brooks Atkinson¹

The invasion of Ukraine by Russia, first in 2014 and now 2022 is a stark reminder of inevitability of war occasioned by power imbalances. Russia, one of the five permanent members of the UN Security Council and a reigning continental power, by invading its western neighbour Ukraine - a militarily weaker country - has demonstrated the futility

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¹ Originally quoted by Brooks Atkinson in his book *Once Around the Sun* (1951), see Susan Ratcliffe (ed.), *Oxford Treasury of Sayings and Quotations* 121 (OUP, 2011).

of UN in preventing wars as a means to settle political and territorial disputes between countries. The much vaunted legal architecture concerning ‘non-aggression’, ‘prohibition of use of force’, and ‘rule-based international order’ as often espoused under international law has been rendered meaningless by the Russian military invasion of an independent, sovereign nation of Ukraine- a full-fledged member of the UN.

The leading factor responsible for the long held hostilities between the two countries, lies in the way Ukraine, since its independence in 1991 from erstwhile USSR, embraced and marched towards democratic political system, and the way it developed close ties with the West and European Union, in particular NATO.²The democratic values as embraced by Ukraine have been seen as diametrically ‘opposed’ to Russia’s larger geo-political, strategic goals and interests in this part of the world. Russia, modelled on elected authoritarianism with Vladimir Putin holding on to power in an unchallenged manner for the last more than 20 years, does not want West led democracy (Ukraine) popped up near Russia’s border. It is pertinent to mention here that several newly independent countries that came on the international plane following USSR’s disintegration, by and large, adopted authoritarian model of political governance in their respective country.³Along with Ukraine, three Baltic countries, namely, Estonia, Lithuania and Latvia, which are geographically situated in close proximity with continental Europe, adopted West-styled democracy based on regular elections, rule of law and free market doctrines.

Ukraine, geographically the second largest country of Europe after Russia, has, since its independence in 1991, been consolidating its democracy within its territorial space, building democratic institutions, allowing freedoms to its people and market players in an attempt to entrench democratic values at the grass root levels in its society. Though, Ukraine cannot be described as a model democracy, as it has been facing a number of home grown problems related to its democratisation process. Yet, the emergence of West-styled democratic culture near Russia’s borders is seen as posing serious challenges to Putin’s grand vision of rebuilding Russian empire, which is built on

²Jonathan Masters, Ukraine: Conflicts at the Crossroads of Europe and Russia, (April 1, 2022)*available at*<https://www.cfr.org/backgrounder/ukraine-conflict-crossroads-europe-and-russia> (last visited on June 16, 2022)

³For example, authoritarian model of governance is/was adopted post-Soviet republics such as Kazakhstan, Tajikistan, Ujbekeistan, Kyrgyzstan, Turkmenistan, Moldova, Belarussia, Azerbaijan.

authoritarianism and backed by totalitarian neighbours. As Ukraine continuously assimilates democracy, freedom, rule of law, free market with the active assistance and co-operation from EU/West, Russia's wariness, at the same time, has grown in equal measure. Russia apprehends domino effect of Ukraine's full democratisation on Russia's other neighbouring countries. This, in all the possibility, as per 'Putinism' will shatter the dream of resurgent Russia to rebuild its past imperial glory.⁴ Be it the invasion of Georgia's territory in 2008, annexation of Crimea from Ukraine in 2014, disrupting elections in democracies, and a number of other hostile adventures⁵, Putinism provides the driving force to Russia's militaristic imagination to re-enact the old Soviet glory during the very reign of current President Vladimir Putin. It is relevant to mention here that Western democracies have often lamented Russia for disrupting and interfering with the democratic election process of other countries. In US election of 2020, such disruptive role of Russia even constituted one of the leading electoral issues.⁶

Acting on Putinism, Kremlin's strategists believes that resurgence of Russian State as a super power, which once erstwhile USSR stood as, will require militaristic recalibrations and aggressive posturing by the Russians at international stage, just as the USA, West or NATO have been accused of doing over the years in Middle East and elsewhere.⁷ But choosing this path is too much destabilising for world/regional peace and security. It essentially means direct and open undermining of United Nations and fundamental principles of international law.

The ongoing Russian invasion and military strikes against Ukraine, at its core, basically, openly hints at Russia's show of military and nuclear strength, and its willingness to violate international law with impunity. Exactly for this reason, Russia

⁴See generally, M. Steven Fish, "What is Putinism?" 28(4) *Journal of Democracy* 61-75 (2017) available at <https://www.journalofdemocracy.org/wp-content/uploads/2017/10/Fish-28-4.pdf> (last visited on June 16, 2022) (Author in his words describes Putinism as a form of autocracy, that is conservative, populist, and personalistic. It broadly prioritizes the maintenance of status quo while evincing hostility toward potential sources of instability. Putinism rests on unrestricted one-man rule and the hollowing out of parties, institutions, and even individuals other than the president as independent political actors).

⁵*Id.* p. 68

⁶Maggie Tennis, "Russia Ramps up Global Elections Interference: Lessons for the United States", (July 20, 2020) available at <https://www.csis.org/blogs/technology-policy-blog/russia-ramps-global-elections-interference-lessons-united-states> (last visited on June 16, 2022)

⁷Paul Kirby, "Why has Russia Invaded Ukraine and what does Putin Want?" (May 9, 2022) BBC, available at <https://www.bbc.com/news/world-europe-56720589> (last visited on June 16, 2022)

now openly challenges the rule-based international order founded on fundamental UN Charter provisions *viz.*, ‘prohibition of use of force’⁸, principles of ‘non-interference’⁹, and ‘sovereign equality of states’¹⁰.

II. UKRAINIAN MARCH TO DEMOCRATIC ORDER

Ukraine has been an independent country since 1991. In terms of land, population and economy, it is one of the principal successors of the USSR. Since its independence, it has been registering relatively better growth on developmental and democratic indices when compared with other post-Soviet republics (mostly authoritarian states) that now border Russia as its neighbours in the region.¹¹ On August 24, 1991, Ukrainians participated in the referendum over gaining total independence from former Soviet Union, following that, the Declaration of Independence was passed by Ukraine’s then legislature, thus paving the way for a new democracy in the country, with a new parliament, a president and a vice-president and a host of other democratic institutions including an independent judiciary.¹²

In nearly 31 years of independent existence, Ukrainian democracy, by and large, has stood the test of time, and is rated to be in a working shape, especially since the overthrowing of Russian leaning autocratic president (Victor Yanukovich) in the Euromaidan Peoples’ Revolution of 2014 (Dignity Revolution).¹³ International agencies such as Freedom House, dedicated to supervise democratic credentials of countries around the world, now grade Ukraine as ‘transitional’ or ‘hybrid’, but nevertheless a

⁸UN Charter, 1945, Article 2(4)

⁹*Ibid.*, Article 2(7)

¹⁰*Ibid.*, Article 2(1)

¹¹*See generally*, Bertelsmann Stiftung’s Transformation Index (BTI) 2022, *Country Report on Ukraine*, available at https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2022_UKR.pdf (last visited on June 16, 2022)

¹²Solchanyk Roman. “Ukraine, The (Former) Center, Russia, and ‘Russia’” 25 (1) *Studies in Comparative Communism* 31-45 (1992)

¹³The Euromaidan’s peoples’ protest is now regarded as a watershed event in Ukrainians’ attempt at preserving the democratic values and moving into the Western, liberal order. The student led massive protest in the capital city Kiev was organised to force Russian leaning government of Victor Yanukovich to sign an association agreement with the European Union. Yanukovich, being under Russian pressure, did not do so, which ultimately led to his ouster. The student revolution frightened the Putin’s Russia, and following this, Russia rolled out plan to invade and annex Crimea. *See*, Andrey Kurkov, *Ukraine’s Revolution: Making Sense of a Year of Chaos*, BBC (Nov. 21, 2014) available at <https://www.bbc.com/news/world-europe-30131108> (last visited on June 16, 2022)

democracy that has registered some improvements since the ouster of Victor Yanukovich (widely seen as a puppet of Russia) in the Dignity Revolution of 2014.¹⁴

In its cautious observation on Ukraine's current level of democracy, the Freedom House has reported as follows:

“Ukraine has been struggling in its response to challenges to human rights, justice and human security, yet the country has allowed the flourishing of civil society and has demonstrated space for vibrant and open media and commitment to pluralistic democracy, especially since Euromaidan revolution of 2014.”¹⁵

At any rate, it is quite a gain for Ukraine, if its peoples have allowed the country not to descend into authoritarianism even though so many post-Soviet republics adopted authoritarian model and have remained so due to Russia's strategic policy to remove or, at the least, limit any West inspired democracy in its immediate vicinity. While Ukraine's system of government is currently labelled as 'transitional' or 'hybrid', there is a growing optimism among the Ukrainian people that their country could one day make transition towards a full-fledged 'democratic-politico-legal order' at par with any developed Western democracy.¹⁶

Russian apprehension of spread of democracy in its close neighbourhood has been more acutely felt when repeated assertions were made by the current political leadership of Ukraine led by President Volodymyr Zelenskyy calling for NATO (a strong security alliance of 30 countries of Europe including USA) to include Ukraine in its organizational fold. Ukraine, for the sake of preserving its own territorial independence and sovereignty from the Russian aggression, has, since 2014, been requesting EU and NATO leadership to allow it to be a member of NATO. A membership to NATO will, *inter alia*, afford Ukraine the security benefits of Article 5 of the Treaty of NATO, 1949, by which “an armed attack against any member of NATO is treated as an attack against all the members, and consequently, if such an armed attack occurs, each of them, in exercise of the right of individual or collective

¹⁴See the Freedom House Report 2022, *Nations in Transit: Ukraine*, available at <https://freedomhouse.org/country/ukraine/nations-transit/2022> (last visited on June 17, 2022)

¹⁵*Ibid.*

¹⁶See generally, Andreas Umland, Valentyna Romanova, “Ukraine's Decentralization Reforms since 2014: Initial Achievements and Future Challenges”, Chatham House Research Papers (November 2, 2019) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479568

self-defence recognised by Article 52 of the Charter of the United Nations, will assist the member state(s) so attacked by taking individual and collective measures as NATO deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area.”

Ukraine’s legitimate call for inclusion into NATO is seen as the immediate cause of Russian special military operations against Ukraine. But, Russian apprehensions that such inclusion will bring NATO on its geographical doorstep - even if founded on Moscow’s security concerns- cannot be taken as the legitimate cause for launching military strikes against the Ukrainian cities and towns. The invasion, therefore, is devoid of any legal or moral justification, and as said before, is rather ill-guided by Putinism.¹⁷To put it in other words, Ukraine’s sovereign choice to join NATO cannot be controlled by Russia, as the former is not the vassal state of the latter. So, the political arguments, based on Russian apprehension of NATO coming to its doorstep, and thereby attempting to justify an unlawful aggression against Ukraine is, in reality, designed to continue the strategic goal of Moscow to prevent spread of Western democracy in its close neighbourhood.¹⁸

III. RUSSIAN INVASION UNDER INTERNATIONAL LAW

As things stand today, Russia’s blatant aggression against the Ukraine is indefensible under any provision of international law. The unjustness and futility of such aggression is evident in the way UN General Assembly voted on the issue recently. General Assembly, a global deliberative society of 193 member states, in its resolution rebuked the Russian aggression and called upon Moscow to immediately halt the military operations against Ukraine. An overwhelming 141 member states voted against Russia calling it to unconditionally and immediately withdraw from Ukraine’s sovereign territory. Only 5 members supported Russian position with 35 members abstaining from the voting.¹⁹As a face-saving exercise, the Russian side only pretended that it is not a war, but only a special military operation undertaken to prevent human rights

¹⁷*Supra* n. 4

¹⁸*See*, Maria Popova & Oxana Shevel, “Russia’s Invasion of Ukraine is Essentially not about NATO”, *Just Security*, (February 24, 2022) available at <https://www.justsecurity.org/80343/russias-new-assault-on-ukraine-is-not-entirely-maybe-not-even-largely-about-nato/> (last visited on June 17, 2022)

¹⁹*See* UN Doc. GA/12407, March 2, 2022, available at <https://www.un.org/press/en/2022/ga12407.doc.htm> (last visited on June 17, 2022)

violations by Ukrainian forces against Russian speaking population in Donetsk region of eastern Ukraine.

Moreover, world's premier human rights body *i.e.*, UN Human Rights Council went a step further and even suspended Russia from its membership.²⁰ Voting pattern once again showed Putin's total isolation at world stage, with 93 members voting in favour of suspending Russia from UN Human Rights Council, 24 opposing such suspension and 58 abstaining from voting process. So, the global community has resoundingly said big no to Russian aggression, but since such resolutions passed by General Assembly are legally non-binding, hence Russia has remained unmoved and has not yet shown any sign of stopping the war it waged unjustly against a militarily weaker country.

Unprovoked use of force by one state against another is declared illegal under international law. The law on prohibition on use of force and intervention into affairs of other countries is recognised both under treaty law and customary international law. In this regard, Article 2(4) of UN Charter clearly provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Moreover, ICJ in the landmark *Nicaragua case*²¹ had held that there is customary law obligation on a state not to use force against another state if the latter has not actually attacked the former. So, there has to have well-founded and justifiable legal reasons for use of force.

Russia's principle legal argument justifying its invasion of Ukraine is built around right to self-defence and humanitarian intervention. It insists that that it has acted militarily for defending its own territorial security interest in the region. This is merely a rhetorical assertion devoid of any legal basis, as the elements necessary for the exercise of the right to self-defence in the instant case do not exist. Right to self-defence as provisioned in Article 51 of the UN Charter states:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

²⁰UN News, "UN General Assembly Votes to Suspend Russia from Human Rights Council", (April 7, 2022) available at <https://news.un.org/en/story/2022/04/1115782> (last visited on June 17, 2022)

²¹*Military and Para-military Activities in and against Nicaragua* (1986) ICJ Rep.

international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”²²

A bare perusal of the above provision can easily lead to an obvious conclusion that “there must exist a prior and ‘actual’ armed attack” before a state can resort to use of force. In the instant case, there is no such factual condition existing in favour of Russia. Ukraine has not resorted to any actual armed attack against Russia prior to Russia’s use of armed invasion against Ukraine. On the contrary, it is the Ukrainians who have been attacked militarily first, so the argument for right to self-defence rightfully belongs to them and not to the Russians. Further, here even if Russian stance is received for the sake of argument, then till now the matter should have been legally dealt with by UN Security Council with the constructive cooperation of Russia, as mandated under the second para of Article 51. But, since Russia is a veto wielding permanent member of the UNSC, it made sure that the executive arm of the UN in the case remains totally dysfunctional and unworkable.²³

Further, the Russian justification for its pre-emptive right to attack in self-defence (anticipatory self-defence) also falls apart. In this regard the famous *Caroline* case (Test)²⁴ made abundantly clear by holding that:

“A state can acquire right to intervene in self-defence if intervention is necessary to contain the danger of actual armed attack, leaving no choice of means, and no moment for deliberation for the state concerned”.²⁵

As per *Caroline ratio*, first, there must exist necessities for the use of force and for that the threat must be seen to be imminent allowing for a definite conclusion that pursuing peaceful alternatives is not an option (principle of necessity), and second, the response must be proportionate to the threat (principle of proportionality).²⁶ Recognising the element of proportionality in matter of anticipatory self-defence, ICJ in *Nicaragua* case emphasized the proportionality rule has been long established under customary

²² UN Charter, 1945, Article 51

²³ See, UN News, “Russia Blocks Security Council Action on Ukraine”, (February 26, 2022) available at <https://news.un.org/en/story/2022/02/1112802> (last visited on June 18, 2022)

²⁴ *The Caroline case*, Jennings, 32 *AJIL* 82 (1938)

²⁵ *Ibid.*

²⁶ *Ibid.*

international law²⁷ and the same was further reaffirmed in the Advisory Opinion on *Nuclear Weapons* case.²⁸

Looking at the present crisis, it is but obvious that the two conditions propounded in *Caroline Test* do not exist and hence Russian intervention has no basis in law or in fact and can only be described as ‘unjust’ and ‘unlawful’ under the settled canons of international law.

Further, the Russian argument for humanitarian intervention²⁹ in Ukrainian Eastern region where it (counter) claims there have been violations of human rights of Russian speaking population by Ukrainian forces is also not supported by any governing law on this aspect. A unilateral decision of a state to take coercive actions under the principle of humanitarian intervention is not lawful *per se* as it is legally not settled till this date.³⁰ There is no Charter provisions backing such a unilateral coercive action of Russia in the name of humanitarian intervention. Even if such a right exists, a response under humanitarian intervention can only be a collective one and not arbitrary individual action.³¹ And for that too, proper authorisation from the UN Security Council must be obtained before any coercive military action could be taken in the name of humanitarian intervention. In the current individualised, unilateral intervention by Russia in Ukraine, it is but obvious that there is neither prior authorisation from the UNSC nor there is a collective action on grounds of humanitarian intervention. Hence, on this count as well Russian arguments lack legal merits and appear self-serving and rhetorical.

²⁷*Supra* n. 21 at *para* 176

²⁸Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep. *para* 41

²⁹Humanitarian Intervention is defined as the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognised rights. *See*, Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* 11-12 (University of Pennsylvania Press, 1996)

³⁰There are legitimate concerns that a state will use unilateral humanitarian intervention for its ulterior motives. Hence, its legality is uncertain and not settled.

³¹It is possible that UN Charter under Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) may allow for collective action when there is a rampant violations of human rights especially the right to life within the territorial space of state. The only condition is that such an occurrence must pose serious threat to the maintenance of international peace and security.

IV. CONCLUSION

Till date, the unprovoked military invasion of Ukraine by Russia continues with no end in sight. The ongoing war has caused immense loss of innocent lives and properties in the territory of Ukraine. Russia guided by Putinism has acted impulsively, and is therefore, required to make course correction, and immediately halt unjustified military invasion of Ukraine, as resoundingly stated through the recent UNGA Resolution.³²The blatant show of aggression against a militarily weaker state only shows that Vladimir Putin's illegal actions are solely guided by the medieval war policy of "might is right". The Russian actions have no credible support under international law. It is, thus, required that Russia being a continental power must act responsibly and in accordance with the foundational principles of international law so as to preserve the integrity of the international order as secured under the UN Charter. The futility of war measures should inform Moscow to end this unjustified aggression, and instead rely on peaceful diplomatic negotiations for creating a climate of peace in the region.

³²*Supra* n. 19