



VLADIMIR PUTIN'S INVASION OF UKRAINE: LEGALITY AND PUTIN'S NEW ASPECT TO NUCLEAR DETERRENCE

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Abstract

The invasion of Ukraine by Vladimir Putin's Russia has seriously threatened world peace more than anything since the end of the Cold War. The laws of war have been violated by Russian troops in Ukraine and human rights have been wantonly violated by them. This paper critically examines the legality of the invasion of Ukraine by the Russian Federation. It considers the theory of nuclear deterrence against Putin's use of the threat of nuclear attack to scare states from entering the war in Ukraine on the side of Ukraine. It argues that Putin's tactic of using threats of nuclear attack to scare states away while violating international law in Ukraine is a wide stray from nuclear deterrence theory and constitutes a bad precedent for other nuclear-armed states with expansionist territorial ambitions. It urges states to unite against violations of international law by norm-disregarding states if the international order must be preserved.

Key Words: Invasion, Ukraine, Legality, Nuclear Deterrence, International law

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Introduction

On 24 February 2022 Russian forces invaded Ukraine in an operation President Vladimir Putin called ‘Special Military Operation’.¹ The invasion was the culmination of months of bickering between the two Eastern European nations over Ukraine’s plan to acquire membership of the North Atlantic Treaty Organisation (NATO).² There is apprehension in the Kremlin that allowing Ukraine (a neighbour with strong historical ties) to acquire NATO membership would threaten the security of the Russian Federation. Ukraine on its part considers that being a sovereign nation it reserves the right to become a member of the military alliance if it so elects.

The invasion has been widely condemned as a war of aggression,³ and, accordingly, violated international law.⁴ This is because Putin resorted to the use of armed force against sovereign Ukraine contrary to article 2 of the United Nations (UN) Charter which prohibits the employment of armed force in the resolution of international disputes. In ordering the invasion of Ukraine, Putin ignored all UN mechanisms for the amicable settlement of disputes. The invasion was also not necessitated by the need for self-defence under article 51 of the UN Charter, Ukraine having not previously employed or threatened to employ armed force against the Russian Federation.

In the prosecution of the war, Russia is alleged to have taken various actions which violate the laws of war. Schools and hospitals have been bombed and unarmed civilians killed in basements

¹ United Nations, ‘Russian Federation Announces ‘Special Military Operation’ in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict’ <<http://www.press.un.org/en/2022/sc14803.com.htm>> accessed 8 September 2023.

² Ukrainian President Volodymyr Zelensky announced that Ukraine would officially apply to join the NATO military alliance after Vladimir Putin announced in a ceremony in the Kremlin that Russia would annex four Ukrainian provinces. See Luke Harding and Isobel Koshiw, ‘Ukraine Applies for NATO Membership after Russia Annexes Territory’ <<http://www.theguardian.com/world/2022/sep/30/ukraine-applies-for-nato-membership-after-russia-annexes-territory>> accessed 2 October 2022.

³ Kristen E Eichensehr, ‘Contemporary Practice of the United States Relating to International Law: State Practice and Consular Relations: Russian Invasion of Ukraine Draws Widespread but not Universal Condemnation’ (2022)116 *Am. J. Int’l L.*, 605-14; Aljazeera, ‘At UN General Assembly, Leaders Condemn Russia’s War in Ukraine’ <<http://www.aljazeera.com/amp/s/news/2022/9/21/at-un-general-assembly-leaders-condemn-russias-war-in-ukraine>> accessed 21 October 2022.

⁴ See Claudio Grossman, ‘The Invasion of Ukraine: A Gross Violation of International Law’ 25 *Hum. Rts. Br.*, 74-81; Anthony Dworkin, ‘International Law and the Invasion of Ukraine’ <<http://www.ecfr.eu/article/international-law-and-the-invasion-of-ukraine%3famp>> accessed 23 April 2022;

and pits and, in some cases, execution-type.⁵ Passages for evacuation of Ukrainian civilians have also come under attack and ceasefires have been violated.⁶ Due to these alleged violations, there have been calls by Ukraine for investigations into possible commission of war crimes by the Russian military in Ukraine.⁷ The International Criminal Court (ICC) Prosecutor and other international entities have opened investigations into possible commission of war crimes in Ukraine.⁸ In fact, numerous cases of war crimes are alleged to have been committed in different parts of Ukraine by Russian troops and have been documented by the Office of the United Nations High Commissioner for Human Rights.⁹ Ukraine wasted no time in filing an application at the International Court of Justice (ICJ) invoking the jurisdiction of that Court against the Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁰ Unlike in the 1990 invasion of Kuwait by Iraq in which a coalition of states led by the U.S. had directly intervened,¹¹ there has been no intervention by third states in Russia's war of aggression in Ukraine. The U.S., together with its allies, has limited its involvement to supplying military hardware and providing humanitarian support to Ukraine. The U.S. particularly has consistently avowed its intention not to get directly involved in the raging war. Putin had from the incipient stage of the armed conflict expressed Russia's willingness to deploy nuclear weapons should third

⁵ See Office of the United Nations High Commissioner for Human Rights, *Killing of Civilians: Summary Executions and Attacks on Individual Civilians in Kyiv, Chernihiv, and Sumy Regions in the Context of the Russian Federation's Armed Attack against Ukraine* (United Nations, 2022).

⁶ Reuters, 'Mariupol Authorities say Russia Violates Ceasefire during Evacuation Operation' <<http://www.reuters.com/world/europe/mariupol-city-council-says-car-hit-during-evacuation-attempt-one-ukrainian-2022-05-06>> accessed 10 August 2022; Aljazeera, 'Russia-Ukraine War: Ceasefire Attempt to Evacuate Civilians Fails' <<http://www.aljazeera.com/news/2022/3/5/ukraine-russia-announces-limited-ceasefire-to-allow-evacuations>> accessed 10 August 2022.

⁷ Euronews, 'Ukraine's Zelensky calls for Special War Crimes Tribunal at the Hague on Russian Invasion' <http://www.euronews.com/2022/07/14/nations-discuss-coordinating-ukraine-war-crimes-probe> accessed 10 August 2022.

⁸ See Kristen E Eichensehr, 'Contemporary Practice of the United States Relating to International Law: International Organisations: International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses' 116 *Am. J. Int'l L.*, 631-47.

⁹ See Office of the United Nations High Commissioner for Human Rights, *Killing of Civilians: Summary Executions and Attacks on Individual Civilians in Kyiv, Chernihiv, and Sumy Regions in the Context of the Russian Federation's Armed Attack against Ukraine* (United Nations, 2022).

¹⁰ See U.S. Department of State, 'Ukraine's Filing at the International Court of Justice' <<http://www.state.gov/ukraines-filing-agaisnt-russia-at-the-international-court-of-justice>> accessed 23 December 2022.

¹¹ A United Nations-authorized coalition of forces led by the U.S. intervened in the Iraqi Invasion of Kuwait forcing Iraqi forces to withdraw from Kuwait.



states intervene in the conflict on the side of Ukraine.¹² This threat has been repeated by the Kremlin and appears to have achieved the desired purpose because European allies of Ukraine and the U.S. have exercised a studied caution in their involvement in the war.

Russia has the largest nuclear arsenal in the world with the United States coming a distant second.¹³ The other overt nuclear powers include the United Kingdom (U.K.), France, China, India and Pakistan.¹⁴ Since the Cold War era, nuclear weaponry has balanced power between the defunct Soviet Union and the U.S. and has largely prevented armed conflicts from escalating between them. On account of this balance, conflicts between the two had always de-escalated as they avoided the apocalypse of nuclear war. To deter more nations from acquiring nuclear capabilities and thus reduce the possibility of a nuclear war, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was adopted by the UN on 1 July 1968.¹⁵ The NPT was adopted with the objective of checking the spread of nuclear weapons and weapons technology, to promote cooperation in the peaceful uses of nuclear energy, and to promote the goal of nuclear disarmament.

Nuclear deterrence therefore consists in the use of nuclear weapons by a nuclear-weapons state to deter aggression by other states. The invasion of Ukraine by Russia would, however, appear to have introduced a novel aspect to deterrence, an aspect that transcends the use of nuclear capability to deter potential aggressors, to extend to a licence to do as a state pleases using the threat of nuclear attack to scare and silence third states. In the war in Ukraine, Putin has employed nuclear deterrence to do as he pleases, laying, thereby, a worrisome precedent not only for other nuclear-weapons states, but for not-yet nuclear-weapons states, and putting in danger, decades of global nuclear non-proliferation effort.

¹² BBC News, 'Ukraine Invasion: Putin puts Russia's Nuclear Forces on 'Special Alert'' <<http://www.bbc.com/news/world-europe-60547473>> accessed 20 March 2022; Washington Post [Editorial Opinion], 'Putin Threatens Nuclear War: The West must Deter Disaster' <<http://www.washingtonpost.com/opinions/2022/10/03/putin-nuclear-war-ukraine-deter>> accessed 20 December 2022.

¹³ See Federation of American Scientists (FAS), 'Status of World Nuclear Forces' <<http://www.fas.org/issues/nuclear-weapons/status-world-nuclear-forces>> accessed 12 July 2022

¹⁴ Therese Delpech, *Nuclear Deterrence in the 21st Century: Lessons from the Cold War for a New Era of Strategic Piracy* (RAND Corporation, 2012) 4.

¹⁵ The Treaty was negotiated between 1965 and 1968 by the Eighteen-Nation Committee on Disarmament, an organisation sponsored by the UN based in Geneva, Switzerland. It became effective on 5 March 1970.



This paper will explore the background to the armed conflict in Ukraine and examine the legality of the invasion under international law. It will critically analyse the rather new aspect President Putin has introduced to nuclear deterrence theory in the course of the war. The paper proceeds in three Parts. Part Two will provide a background to the war. Part Three will examine the theory of nuclear deterrence. In Part Four, the paper will focus on Putin's novel approach to nuclear deterrence in the Ukrainian war; while Part Five is the concluding part of the paper.

Background to the Invasion

Until the Soviet Union disintegrated in 1991, Ukraine remained an important member of the former Soviet Union.¹⁶ Despite the resulting political status of Ukraine after independence, the two countries remained connected both historically and culturally. The dissolution of the Soviet Union did not change the prevalence of Russian culture and language in Ukraine, especially in the south-east region.¹⁷ A large population of Ukrainians speak Russian. There was, therefore, strong Russian cultural and political influence over Ukraine in the post-Soviet-Union era.

Increasingly, however, agitation for disconnection from Russian paternalism and establishment of closer ties with Western European nations became rife among Ukrainians, a development that offended Russia. In 2013, then President of Ukraine Viktor Yanukovich opposed an agreement for association proposed between the European Union (EU) and Ukraine which would have solidified Ukrainian relations with the EU. In response, protests by Ukrainian nationalists against the persisted influence of Russia in Ukraine erupted in many parts of Ukraine in the 2014 Ukraine Revolution. The protests called Euro-maiden¹⁸ culminated in the removal of Yanukovich, a pro-Russian leader, from power.¹⁹ It must be pointed out that while the rest of Ukraine revolted against

¹⁶ A Bebler, 'The Russian-Ukrainian Conflict over Crimea' (2015) 52 *Teorija in Praksa Let*, 1-2.

¹⁷ Luka Cenciarini, 'The Origin of the Ukrainian Crisis' <<http://www.researchgate.net/publication/34878722>> accessed 10 October 2022.

¹⁸ Maiden is a square in central Kyiv where the protest started.

¹⁹ E Conant, 'Behind the Headlines: History and Geography Help Explain Ukraine Crisis' <<http://www.nationalgeographic.com/news/2014/2/140224-ukraine-protests-president-ousted-history-geography-background/>> accessed 12 October 2022.

Russian control, the western region of the country preferred close ties with Russia rather than with the EU.

It has been argued that the 2014 Ukrainian Revolution that led to the removal of Yanukovich from power was not just the consequence of a nationalistic momentum in Ukraine or opposition to Russian control, but was strongly connected to EU politics.²⁰ From early 2000s the EU shifted attention beyond the frontiers of Europe, seeking new agreements and alliances with the eastern countries, an area Russia had historically had influence.²¹ In the eastern side of Europe, an increased EU alliance or partnership with eastern European countries was considered incompatible with Russia's programme to establish a Russia-led economic union among historically and geographically close states called Custom Union.²² For these reasons, Russia kept an eye on Ukraine for 20 years.

In March 2014, following the failure of planned EU membership for Ukraine, Russia invaded Crimea and key Government buildings in the east of the country were occupied by pro-Russian separatists. The Russian invasion of Crimea followed a pattern of increasing Russian involvement and intrigues in the states that constituted the former Soviet Union. Russia's involvement in those countries had earlier manifested in cyberattacks on Estonia in 2007, its support of Russia-speaking separatists in Moldova, and Russia's war in Georgia when Georgia tried to retake South Ossetia in 2008. Crimea became a part of what became the Russian Empire in the year 1783 following the Russian annexation of Crimean Khanate. President Vladimir Putin claimed that the annexation of Crimea was necessitated by the need to protect Crimea from far-right extremists who overthrew President Yanukovich and because Russia had a historical claim to it.²³ In response, the U.S. and the EU declared that the annexation violated the sovereignty and territorial integrity of Ukraine and imposed a co-ordinated set of sanctions against Russia.²⁴

²⁰ Cenciarini (n 16) 5.

²¹ *Ibid.*

²² *Ibid.*

²³ Jane Clinton, 'Why did Russia Annex Crimea? What Happened when Putin invaded in 2014 and how NATO Reacted to the Annexation' <<http://www.inews.co.uk/news/world/russia-annex-crimea-why-putin-invaded-2014-what-happened-nato-annexation-explained-1424682>> accessed 15 May 2022.

²⁴ Dan Roberts and Ian Traynor, 'US and EU Impose Sanctions and Warn Russia to Relent on Ukraine Standoff' <<http://www.theguardian.com/world/2014/mar/06/us-eu-sanctions-obama-russia-ukraine-crimea>> accessed 20 October 2022.

It could safely be said that, since the cessation of the Cold War, the greatest stress to the relationship between Russia and the West was the eastward expansion of NATO, a relationship in which Ukraine found itself trapped in between.²⁵ As early as 1994 following the Soviet disintegration in 1991, Russian leadership became furious over signs of possible NATO expansion towards Eastern Europe.²⁶ It was not long after the dissolution before Eastern European countries began to toy with the idea of joining NATO. Poland, Hungary and Czechoslovakia particularly found themselves in an uncertain security environment. With a vivid recollection of Russian Imperialism, they feared that Russia could rise again and wanted an alliance with NATO before it was too late. Polish officials had, as a matter of fact, in 1993 expressed distrust for the Russians and insisted that the only alternative to Poland joining NATO was acquiring the nuclear bomb.²⁷ On 12 March 1999 Czech Republic, Hungary and Poland joined NATO. In 2004, Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia were also admitted into the alliance. Estonia, Latvia and Lithuania were members of the former Soviet Union while the other countries were part of the former Soviet bloc. Almost about the same time, colour revolutions followed in quick succession around Russia – Georgia in 2003, Ukraine in 2004, and Kyrgyzstan in 2005. In each of these revolutions, protests had been used to oust a pro-Russian leader.²⁸ While all these were celebrated in the West, Moscow saw them as a threat to Eastern Europe and an incursion into Russian sphere of influence.

In April 2008 NATO members met in Bucharest and made a promise that Georgia and Ukraine would be inducted into the alliance.²⁹ Few months later, and before Georgia could be inducted into the military alliance, it was attacked and defeated by Russia in a five-day war. Had Georgia

²⁵ Keith Gessen, 'Was it Inevitable? A Short History of Russia's War on Ukraine' <<http://www.theguardian.com/world/2022/mar/11/was-it-inevitable-a-short-history-of-russia-s-war-on-ukraine>> accessed 15 May 2022.

²⁶ William Noah Glucroft, 'NATO: Why Russia has a Problem with its Eastward Expansion' <<http://www.dw.com/en/nato-why-russia-has-a-problem-with-its-eastward-expansion/a-60891681>> accessed 15 May 2022.

²⁷ *Ibid.*

²⁸ The Rose Revolution in Georgia in 2003 resulted in the collapse of the regime of President Eduard Shevardnadze seen by Georgians as a puppet for Russia. In Ukraine protests led to the removal of President Viktor Yanukovich from office in 2014; while the 2005 Tulip Revolution in Kyrgyzstan forced President Askar Ayakev out of office.

²⁹ See para. 23 Bucharest Summit Declaration of 3 April 2008. See also David Brunnstrom and Susan Cornwell, 'NATO Promises Ukraine, Georgia Entry One Day' <<http://www.reuters.com/article/us-nato-idUSL0179714620080403>> accessed 12 October 2022.

become a member of the alliance months earlier, history would have taken a different course. In the case of Ukraine, President Putin realised that he was gradually losing Ukraine to the West. The EU-Ukraine Agreement opposed by Russia-supported President Yanukovich which led to the 2013 protests was eventually signed in 2014. Aside from incursion by the EU, NATO was also inching close. Unless Moscow acted decisively, therefore, Ukraine would not only be gone to the EU but would also acquire NATO membership.

In 2014 separatist rebels took control of the south-eastern, Russian-speaking Ukrainian regions of Donetsk and Luhansk, areas collectively called the Donbas and proclaimed the regions independent republics. Ukraine and the West allege that the separatists were backed by Russia or were Russian soldiers in disguise, a charge Moscow has continued to deny.³⁰ Since 2014, there has been fighting in the regions between pro-Russian separatists and Ukrainian forces in which over 14,000 people have been killed.³¹ After the separatists took power in the Donbas in 2014, they held a highly contested referendum and declared independence.³² No countries recognised the independence of these self-proclaimed states. The Minsk Agreements³³ signed in 2014 and 2015 called for the grant of a large amount of autonomy for the two regions within Ukraine.³⁴ On 21 February 2022, however, in the build up to the Ukrainian invasion, Russia recognised the independence of both regions, signed documents declaring them no longer parts of Ukraine and ordered Russian troops into the regions.³⁵

³⁰ Niko Vorobyov, 'Ukraine Crisis: Who are the Russian-backed Separatists?' <http://aljazeera.com/news/2022/2/4/Ukraine-crisis-who-are-the-russian-backed-separatists> accessed 12 October 2022.

³¹ VOA News, 'What to Know about the Donetsk and Luhansk Regions' <<http://www.voanews.com/what-to-know-about-the-donetsk-and-luhansk-regions-/6452835.html>> accessed 12 October 2022.

³² Pavel Polityuk, 'Russia Holds Annexation Votes; Ukraine says Residents Coerced' <<http://www.reuters.com/world/ukraine-marches-further-into-liberated-lands-separatists-calls-urgent-referendum-2022-09-19>> accessed 12 October 2022.

³³ The first Agreement called the Minsk Protocol was negotiated between the Triumvirate made up of Ukraine, Russia and the Organisation for Security and Co-operation in Europe, with the leaders of France and Germany mediating. The Agreement was hoped to stop the fighting in the Donbas part of Ukraine. When the fighting did not stop, it was revised and updated and is usually referred to as Minsk II.

³⁴ See clause 4 Minsk II.

³⁵ Sergey Ponomarev, 'Moscow Orders Troops to Ukraine's Separatist Regions after Putin Recognises their Independence' <<http://www.newyorktimes.com/live/2022/02/21/world/Ukraine-russia-putin-biden-.html>> accessed 14 October 2022.



In November 2021, Russia began to move troops to Ukrainian borders and by mid-February 2022 had collected about 190,000 troops on those borders, a troop mobilisation that has been described as the biggest since World War II.³⁶ Diplomatic moves were made to de-escalate the conflict. Russia demanded ‘legal guarantees’ from the U.S. and NATO that NATO would not expand further eastwards.³⁷ The U.S. regarded the demand as nonstarters but expressed its willingness to negotiate with Russia. Relying on available intelligence, the U.S. issued repeated warnings of imminent Russian invasion of Ukraine, charges that were repeatedly dismissed by Moscow.³⁸ On 24 February 2022, however, the invasion of Ukraine by Russian Forces, on Putin’s order, became a reality.

Legality of the Invasion

Sequel to the invasion of Ukraine by Russian forces, and considering the circumstances surrounding the invasion, the question of the legality of the invasion has been on the front burner of international discourse. It has been argued that there was no legal justification for the invasion.³⁹ Any discussion on the legality of the invasion will, of necessity, proceed from an analysis of the cardinal concept of state sovereignty. The concept of sovereignty has recently become a thorny issue within international law and international relations theory.⁴⁰ The concept has been invested

³⁶ Patrick Wintour, ‘Russia has Amassed up to 190,000 Troops on Ukraine Border, US Warns’ <<http://www.theguardian.com/world/2022/feb/18/russia-has-amassed-190000-troops-on-ukraine-borders-us-warns>> accessed 14 October 2022.

³⁷ Andrew Roth, ‘Russia Issues List of Demands it says must be met to Lower Tensions in Europe’ <<http://www.theguardian.com/world/2021dec/17/russia-issues-list-demands-tensions-europe-ukraine-nato>> accessed 12 October 2022.

³⁸ Julian Borger and Dan Sabbagh, ‘Us Warns of ‘Distinct Possibility’ Russia will Invade Ukraine in Days’ <<http://www.theguardian.com/world/2022/feb/11/biden-ukraine-us-russian-invasion-winter-olympics>> accessed 12 October 2022.

³⁹ See John B Bellinger III, ‘How Russia’s Invasion of Ukraine Violates International Law’ <<http://www.cfr.org/article/how-russias-invasion-invasion-ukraine-violates-international-law%3famp>> accessed 12 October 2022; Pnina Sharvit Baruch and Ori Beeri, ‘The Russian Invasion of Ukraine: Legal Aspects’ <<http://www.inss.org.il/publication/russia-invasion-law>> accessed 12 October 2022; Elizabeth Wilmschurst, ‘Ukraine: Debunking Russia’s Legal Justification’ <<http://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justification>> accessed 29 September 2022; Marie Gavendova, ‘Is Russian Invasion of Ukraine Justifiable from the View of Public International Law’ <<http://www.humanrightscentre.org/blog/russian-invasion-ukraine=-justifiable-view-public-international-law>> accessed 20 September 2022.

⁴⁰ H Spruyt, *The Sovereign State and its Competitors: An Analysis of System Change* (Princeton University, Princeton 1994) 21.

with variegated interpretations across time and space.⁴¹ While some have interpreted it along the state-centred, Westphalian doctrine of the inviolable rights of states to non-intervention, non-interference and self-government, others have interpreted it in much more limited terms.⁴²

On the international plane, sovereignty connotes independence and non-interference by states in the internal affairs of other states. The international system is based on the principle of state equality by which states are to respect as inviolable, the independence and territorial integrity of other states as equals (at least notionally). The UN Charter in very clear terms recognises the sovereignty and equality of all member states of the UN.⁴³ Sovereign equality of states simply connotes the supremacy of the powers of the state in exercising state powers within its territory, and the duty of other states to respect such exercise of power without interfering therewith.⁴⁴ It is an acceptance among states that each state, in the exercise of its powers within its territory is considered equal to others. Sovereign equality is therefore characterised by a common expectation that states will not try to take away the right of other states to exercise sovereign powers within their territories and a duty not to violate their territorial integrity.⁴⁵

The prohibition of the use of force as an instrument of national policy dates back to the Kellogg-Briand Pact of 1928.⁴⁶ Under the Pact, the High Contracting Parties declared their condemnation of war as a means of resolving international controversies, and renounced it as an instrument of national policy in inter-state relation.⁴⁷ As part of the UN recognition and respect for state sovereignty, the UN Charter also prohibits any threat or resort to force against the territorial integrity and political independence of any state. Article 2(4) of the Charter provides that '[a]ll members shall refrain in their international relations from the threat or use of force against the

⁴¹ SS Parma, 'Understanding the Concept of 'Sovereignty'' (2017) 3(1) *International Journal of Law*, 34.

⁴² See, generally, John Hilla, 'The Literary Effect of Sovereignty in International Law' (2008) 14 *Widener L. Rev.*, 77- 148.

⁴³ Article 2(1) United Nations Charter.

⁴⁴ It is important to point out, though, that sovereignty nowadays is seldom monopolised by the state, but is regularly divided and shared among state and non-state actors at all levels of governance, depending on the issue or problem at hand. See J Bartelson, 'The Concept of Sovereignty Revisited' (2006) 17:2 *European Journal of International Law*, 466.

⁴⁵ See Vincent Iwunze and Mary Udofia, 'Recurrent Xenophobic Violence in the Republic of South Africa: A Case for Extending the Frontiers of State Responsibility (2020) 9 *University of Uyo Law Journal*, 253.

⁴⁶ The treaty was signed at Paris on 27 August 1928. It renounced war as an instrument of national policy. It is also referred to as the Treaty of Paris.

⁴⁷ Art. I Kellogg-Briand Pact, 1928.

territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.’ Aside from the UN Charter, the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States⁴⁸ emphasises that:

[n]o state has the right to intervene, directly or indirectly, *for any reason whatsoever*, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.

This position was reaffirmed in the 1970 Declaration on Principles in International Law,⁴⁹ which, beyond condemning all forms of interference, declared them violations of international law. In the *Corfu Channel* case,⁵⁰ the ICJ did not mince words in deprecating violation of the territorial integrity of Albania by Britain. In response to the British claim to have acted in accordance with a right to sweep mines in the Corfu channel to secure evidence against Albania, the ICJ deprecated the British intervention and declared it a manifestation of a policy of force which could result in abuses, and which has no place in international law. Similarly, in the *Nicaragua case*,⁵¹ the Court decided that by laying mines in Nicaraguan waters, the United States breached its obligations under customary law not to use force against another state, intervene in its affairs, or violate its sovereignty. The Court concluded that good relation between states is enhanced by respect by independent states of each other’s territorial integrity.⁵²

The only exceptions to the rule against threat or use of force against other states are where such threat or use of force was in self-defence under article 51 of the UN Charter, or where military action was taken or authorised by the UN Security Council,⁵³ or where the use of force has crystallised into custom, binding on all states.⁵⁴ Other than under these exceptions, the threat or

⁴⁸ General Assembly Resolution 2131 (XX). [Emphasis is the author’s].

⁴⁹ General Assembly Resolution 2625 (XXV).

⁵⁰ ICJ Reports, 1949, p. 4.

⁵¹ ICJ Reports 1986, p. 14.

⁵² *Ibid.*, at 109-110.

⁵³ See Chapter VII of the United Nations Charter.

⁵⁴ J. Scudder, ‘Territorial Integrity - Modern States and the International System’ <http://www.exploringgeopolitics.org/pun;ication_scudder_jamie_territorial_integrity_modern_states_international_political_system_jurisdiction_peace_westphalia_lebanon_somalia> accessed 20 November 2022.

actual use of force by a state against another or other states will find no support under extant rules of international law.

In justification of the invasion, President Putin declared to Russians that his goal was to ‘demilitarise and de-Nazify Ukraine’, protect people who had been bullied and visited with genocide by the Ukrainian government for eight years, and ensure the neutrality of Ukraine.⁵⁵ What Putin means by demilitarisation and *de-Nazification* of Ukraine remains unclear. There has been no evidence of Nazism or Nazis in Ukraine to warrant Putin’s purported *de-Nazification* objective in Ukraine. Ukraine has vehemently denied the allegation of Nazism against it. In fact, Ukraine’s Foreign Minister Dmytro Kuleba called Russia’s claim in this regard ‘crazy’ and cannot be explained even by the Russians themselves.⁵⁶ The allegation of bullying and genocide levelled against Ukraine is a reference to Russia’s claim that the Ukrainian government had been engaged in acts of genocide against the Russian-speaking population in the Donbas where the Ukrainian army has been fighting separatists allegedly backed by Russia starting from 2014.

What appears to be the main reason for Russia’s invasion of Ukraine is what Moscow considers as the all-important task of ensuring Ukraine’s neutrality in the post-Cold War relation between Russia and the West. Russia feels threatened by the increasingly close diplomatic ties between Ukraine and the Western European countries, at the heart of which is Ukraine’s planned NATO membership. Russia had since the 2000s expressed its displeasure with NATO’s eastward expansion. President Putin had weeks before the NATO 2008 Summit in Bucharest warned that no Russian leader would watch idly while Ukraine took steps to join NATO.⁵⁷ He called any such move as ‘a hostile act toward Russia’.⁵⁸ Russia claims that both the U.S. and NATO have broken commitments they made in the early 1990s not to extend the membership of NATO towards East Europe, an allegation both U.S. and NATO have denied.⁵⁹

⁵⁵ Paul Kirby, ‘Why has Russia Invaded Ukraine and what does Putin Want?’ <<http://www.bbc.com/news/world-europe-56720589.amp>> accessed 1 May 2022.

⁵⁶ *Ibid.*

⁵⁷ Jonathan Masters, ‘Why NATO Has Become a Flashpoint with Russia in Ukraine’ <<http://www.cfr.org/background/why-nato-has-become-flashpoint-russia-ukraine>> accessed 10 June 2022.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*



Without denying Russia's right to its security as a nation, it must be emphasised that as a sovereign state Ukraine is entitled to an inviolable right to freely establish diplomatic relation with any state it deemed fit. Its decision to seek induction into any lawful international organisation such as the Transatlantic Alliance is an internal affair with which other states must not interfere. On the basis of sovereign equality, no state could lawfully dictate to the Ukrainian Government regarding the country's desire to become a member of NATO. To state otherwise would be to deny the concept of sovereign equality of states. Russia is duty bound to strictly respect the sovereignty of Ukraine, its territorial integrity and political independence. Any unjustified violation of the sanctity of its territorial integrity whether on its land, sea or airspace is a breach of international law. It is therefore beyond argument that Ukraine's territorial integrity was violated when, on 24 February 2022, it was invaded by Russian forces.

As already said, article 2(4) of the UN Charter disallows the threat or use of force between states. The parties to any international dispute the continuance of which would jeopardise international peace and security are obligated under the Charter to first seek a resolution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.⁶⁰ Where the parties fail to settle the dispute through those means, they are to refer the dispute to the Security Council.⁶¹ Only the Security Council may use force to restore international peace and security where other peaceful means have failed.⁶²

It needs to be pointed out that the allegations levelled against Ukraine by Russia even if true are matters subsumable under the rubric of internal affairs of state. Any possible existence of Nazis in Ukraine is an internal affair of the Ukrainian state unless Russia could show how that threatened the Russian Federation or Russian nationals' resident in Ukraine. Evidence of these has yet to be furnished by the Russian Government. On the allegation of genocide by the Ukrainian Government in the Donbas region, there is again no substantiating evidence. Genocide is an 'exceptionally odious crime',⁶³ and one with which the international community does not trifle. It is the killing

⁶⁰ Art. 33 UN Charter.

⁶¹ Art. 37 *ibid.*

⁶² Art. 42 *ibid.*

⁶³ Aljazeera, 'Smells of Genocide': How Putin Justifies Russia's War in Ukraine' <<http://www.aljazeera.com/news/2022/3/9-smells-genocide-how-putin-justifies-russia's-war-in-ukraine>> accessed 11 June 2022.

or inflicting of mental or bodily harm on a national, ethnical, racial or religious group with intent to destroy it, whether in part or as a whole.⁶⁴

Russian authorities cite alleged indiscriminate shelling of civilians in the Donbas by Ukrainian forces and discovery of mass grave sites in the region to support Russia's allegation of genocide. Assuming this is true, does it establish the crime of genocide in the context? In other words, was there an intention to erase a group? Regarding the genocide claim, it has been argued that a distinction must be drawn between collateral deaths or injuries arising from reckless or indiscriminate firing, and a deliberate effort to wipe out a national, ethnical, racial, or religious group.⁶⁵ It has also been argued that though there are harrowing accounts of civilian suffering on either side of the conflict, there is still nothing suggesting that this was part of a an organised campaign to wipe out Russian-speaking people in the Donbas.⁶⁶ There has, therefore, not been anything in the fight between the Ukrainian forces and separatists allegedly backed by Russia in the eastern Donbas region to suggest a genocidal intent on the part of Ukraine.

Under article 51 of the U.N. Charter, however, a state may legitimately deploy force against an adversary state in self-defence. The article provides:

[n]othing 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 the measures necessary to maintain international peace and security.'

States are, therefore, permitted, individually or collectively, to defend themselves against such aggression pending when the Security Council has taken appropriate measures to restore international peace and security. Could the invasion of Ukraine be justified by Russia as self-defence? To constitute self-defence, there must have been a threat or use of force against the state exercising the right of self-defence. That is, the aggression responded to must be actual or imminent. Aside from this, the aggressive action taken in self-defence must be necessitated by the aggression offered; and the self-defensive action taken must be proportionate.⁶⁷ Until invaded on

⁶⁴ Art. II Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

⁶⁵ Aljazeera (n 62).

⁶⁶ *Ibid.*

⁶⁷ I Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1963) 279; C Gray, *International Law and the Use of Force* (Oxford University Press, Oxford 2001) 105; P Franke, 'A Pre-emptive

24 February 2022, Ukraine neither threatened nor carried out an armed attack on Russia or Russian interests anywhere in the world. The Russian aggression against Ukraine is, therefore, not self-defence as envisaged under the UN Charter.

As argued above, the chief reason for the Russian aggression against Ukraine was the contemplated induction of Ukraine into the NATO alliance. The Kremlin was apprehensive that a Ukrainian membership of NATO would bring the West, especially the U.S. dangerously close to Russia and endanger Russia's national security. While Ukraine had yet to apply for NATO membership, the alliance only mooted at the 2008 Bucharest Summit that Ukraine would in future be inducted into the alliance. The Russian aggression against Ukraine based on the threat the Kremlin feared that the induction of Ukraine into NATO would pose was, therefore, merely pre-emptive and not in self-defence.

This brings us to the concept of pre-emptive self-defence. Self-defence is pre-emptive when it is carried out, not for the purpose of halting an actual or imminent attack, but for the purpose of preventing future ones. It is 'the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action that is not yet threatening, but which, if permitted to continue, could result in some future point in an act of armed coercion against the first state.'⁶⁸ The concept developed during the Cold War era as more states began to expand the concept of self-defence beyond the 'imminence' criteria to include more remote, futuristic threats.⁶⁹

No incidents, perhaps, best illustrate the use of pre-emptive self-defence to justify military actions that fall short of self-defence under the UN Charter than the Cuban Missile Crisis of 1962 and the Israeli attack on the Iraqi Osirak Reactor in 1981. In the Cuban Missile Crisis, the Soviet Union had secretly installed ballistic missiles in Cuba as the Cold War raged. On discovering the missiles, the U.S. asserted that the weapons constituted a serious threat to world peace and the security of the U.S. and imposed a naval quarantine to prevent further delivery of weapons to Cuba.⁷⁰

Call to Arms: Questioning the Legality and Effectiveness of Pre-emptive Self-Defence as a Strategic Element of US National Security and Foreign Policy' (2004-2005) 12 *Tilburg Foreign L. Rev.*, 232.

⁶⁸ SD Murphy, 'The Doctrine of Pre-emptive Self-Defence' (2005) 50:3 *Villanova Law Review*, 704.

⁶⁹ C Henderson, *The Use of Force and International Law* (Cambridge University Press, Cambridge 2018) 281.

⁷⁰ United States Proclamation 3504, Interdiction of the Delivery of Offensive Weapons to Cuba, reprinted in (1963) 57 *American Journal of International Law*, 512-513.

President J. F. Kennedy authorised the U.S. military to intercept and search all vessels sailing to Cuba and to use force, where necessary, to board them.⁷¹ Though the U.S. did not claim self-defence when the crisis was brought up at the Security Council, the action was indeed taken to forestall possible future Cuban missile attacks on the U.S., and therefore constituted pre-emptive self-defence.

The Osirak was a 40 megawatt light-water French-type nuclear reactor built by Iraq with the assistance of France near Bagdad. Israeli intelligence claimed that the reactor would be producing weapons-grade nuclear material intended for the production of nuclear weapons that would in future be used to attack Israel. On 7 June 1981, the Israeli Air force bombed the Osirak and left it in ruins quickly enough before the Iraqi defences could respond to the attack. Neither evidence existed of an Iraqi plan to launch a nuclear attack against Israel, nor was there an actual or imminent attack from Iraq. Israel simply attacked the Osirak pre-emptively.

Though resorted to in a number of cases by powerful states, especially the U.S., the legality or otherwise of pre-emptive self-defence remains controversial. The ICJ has not expressly and unequivocally declared it illegal. The Security Council has also not passed any resolution accepting or denouncing it. International lawyers are also not in agreement on the legality of this form of military action. Their opinions have differed depending on their respective interpretation of 'self-defence' under article 51 of the U.N. Charter.⁷² Be that as it may, pre-emptive self-defence has not become state practice because its practice by states is still sparse.⁷³ The disparities in opinion notwithstanding, the majority of international lawyers appear to reject pre-emptive self-defence.⁷⁴ Self-defence sequel to an armed attack is therefore favoured over pre-emptive self-defence.⁷⁵ In the Charter era, therefore, the concept of pre-emptive self-defence has remained controversial and not generally accepted.⁷⁶

⁷¹ United States Congress, *Joint Resolution Expressing the Determination of the United States with Respect to the Situation in Cuba*, 3 October, 1962.

⁷² For a detailed discussion on the various schools of thought that have emerged among international lawyers, see Murphy (n 67) 706-18.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ See Y Dinstein, *War, Aggression and Self-Defence* 3rd edn. (Cambridge University Press, Cambridge 2001) 167.

⁷⁶ S Mahmoudi, 'Self-Defence and International Terrorism' (2005) 48 *Scandinavian Studies in Law*, 203.

Pre-emptive self-defence, it could be argued, may become necessary in view of the development of rapid and devastating weapons systems that possess the capability of being initiated with little or no warning window. Its advocates argue that it would be preposterous to expect a target state to tarry until there has been an actual attack against it with such weapons.⁷⁷ This is because a nuclear strike, for example, could render the attacked state incapable of any manner of defensive action. A Pre-emptive strike would appear to be the most reasonable course of action when a state is faced with such situation.

Despite the plausibility of this argument, it is submitted that an acceptance of the practice could result in pre-emptive attacks by states that are based on mere suspicions and claims not backed by evidence or reliable intelligence. Such state of affairs could be a recipe for international chaos. Riesman and Armstrong aptly articulated this point when they wrote:

As one moves from an actual armed attack as the requisite threshold for reactive self-defence, to the palpable and imminent threat of attack, which is the threshold of anticipatory self-defence, and from there to the conjectural and contingent threat of the mere possibility of an attack at some future time, which is the threshold of pre-emptive self-defence, the self-assigned interpretive latitude of the unilateralist becomes wider, yet the nature and quantum of evidence that can satisfy the burden of proof resting on the unilateralist becomes less and less defined and is often, by the very nature of the exercise, extrapolative and speculative.⁷⁸

An incident that clearly shows the danger posed by pre-emptive self-defence is the invasion of Iraq by the U.S. and Britain in 2002-2003 on the allegation that the then Iraqi leader Saddam Hussein was developing Weapons of Mass Destruction (WMD). In October 2002, at the request of the U.S. Congress, the National Intelligence Council came up with a National Intelligence Estimate (NIE) which stated that Iraq was revamping its nuclear programme to produce a nuclear device. Based on this intelligence estimate, Congress passed its Joint Resolution Authorizing the Use of Force against Iraq.⁷⁹ In the Resolution, Congress made a strong case that Iraq had demonstrated

⁷⁷ M Reisman and A Armstrong, 'The Past and Future of the Claim of Pre-emptive Self-Defence' (2006) 100 *Am. J. Int'l L.* 526; AC Arend, 'International Law and the Pre-emptive Use of Military Force' (2003) *The Washington Quarterly*, 95.

⁷⁸ *Ibid.*

⁷⁹ See Joint Resolution Authorizing the use of Force against Iraq, Pub. L. No. 107-243, 116 Stat. 1498, 1499 (2002) <<http://www.govinfo.gov/content/pkg/PLAW-107publ243/PLAW-107publ243.html>> accessed 10 March 2022.



capability and willingness to use such weapons, and that the risk that the regime in Iraq would either employ those weapons to launch a surprise attack against the U.S. or deliver them to terrorists who would do so justified action on its part to defend itself.⁸⁰ It was on this basis that Iraq was invaded, and the Saddam Hussein regime ultimately changed.

After regime change had been achieved in Iraq through the invasion, not a few people were outraged by the fact that no smoking guns were found in Iraq. It is still a matter of controversy whether the invasion of Iraq in 2002 on fears that Saddam Hussein was developing WMD was as a result of intelligence failure or a ploy to achieve some objectives of the Bush Administration in Iraq and the Middle East as a whole.⁸¹ However, the Rob Silberman Commission⁸² that investigated the invasion concluded in its Report that the invasion of Iraq was a result of failure of intelligence. In the Commission's Report to the President of the United States, it put it in the following way:

The failure was in large part the result of analytical shortcomings; intelligence analysts were too wedded to their assumptions about Saddam's intentions. But it was also a failure on the part of those who collect intelligence – CIA's and the Defence Intelligence Agency's (DIA) spies, the National Security Agency's (NSA) eavesdroppers, and the National Geospatial-Intelligence Agency (NGA) imaginary experts. In the end, those agencies collected precious little intelligence for the analysts to analyse, and much of what they did collect was either worthless or misleading. Finally, it was a failure to communicate effectively with policymakers; the intelligence community didn't adequately explain just how little good intelligence it had – or how much its assessments were driven by assumptions and inferences rather than concrete evidence.⁸³

It is clear from the above analysis that the Russian invasion of Ukraine was pre-emptive in nature and therefore can have no support in international law. It falls short of self-defence under article

⁸⁰ *Ibid.*

⁸¹ R Hinnebusch, 'The US Invasion of Iraq: Explanations and Implications' (Fall 2007) 16:3 *Critique: Critical Middle Eastern Studies*, 209-228.

⁸² The Commission was established by Executive Order 13328 signed by President George W. Bush on 6 February 2004. It was required to ascertain whether the U.S. intelligence community was adequately authorised, equipped, trained, and had the resources to identify and provide timely warning, and to support U.S. Government efforts to respond to technologies and materials associated with the proliferation of Weapons of Mass Destruction, related means of delivery, and other related threats of the 21st Century.

⁸³ Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction <<http://www.govinfo.library.unt.edu/wmd/report/report.html#overview>> accessed 5 October 2022.

51 of the UN Charter. It constitutes a breach of article 2(4) of the UN Charter which outlaws the deployment of force against any state. It derogates from the entrenched principles of sovereign equality of all member States of the UN,⁸⁴ and settlement of international disputes between members by peaceful means.⁸⁵

Putin's invasion of Ukraine is also contrary to Russia's obligations under the Helsinki Final Act.⁸⁶ By virtue of article I of the Act, States Parties undertake to 'respect each other's sovereign equality and individuality as well as the rights in and encompassed by its sovereignty, including ... the right of every State to territorial integrity and to freedom and political independence.' Under the same article, the States Parties recognise that each state has the right to 'define and conduct as it wishes, its relation with other States, in accordance with international law ...' By seeking to prevent Ukraine from joining the NATO alliance, Russia interfered with Ukraine's right to define its relation with other states as it wishes as permitted under international law. By invading Ukraine, it violated Ukraine's territorial integrity.

Aside from these, the invasion was a flagrant breach of the Budapest Memorandum on Security Assurances.⁸⁷ Under the Memorandum, in return for Ukraine surrendering its nuclear arsenal to Russia in line with the international nuclear non-proliferation aspiration, the States Parties reaffirmed their commitment to respect the sovereignty and borders of Ukraine.⁸⁸ They also reaffirmed their obligation to refrain from the threat or use of force against Ukraine, and to ensure that their weapons would ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations.⁸⁹ The Memorandum was, thus, regarded as a major achievement in Russia-Ukraine relations since the end of the Cold War.

⁸⁴ Art. 2 (1) UN Charter.

⁸⁵ *Ibid.* Art. 2(3).

⁸⁶ The Final Act was signed under the auspices of the Conference on Security and Economic Co-operation in Europe on 1 August 1975.

⁸⁷ Under the Memorandum signed on 5 December 1994, leaders of the U.S., the United Kingdom, and the Russian Federation gave assurances of security to Ukraine for its accession to the Treaty on Non-proliferation (NPT) of Nuclear Weapons as a non-nuclear-weapons State (hereinafter 'Budapest Memorandum').

⁸⁸ Art. 1 of the Budapest Memorandum.

⁸⁹ *Ibid.* art. 2.

The Budapest Memorandum was first breached by Russia in 2014 when it annexed the Crimean Peninsula, a part of sovereign Ukraine.⁹⁰ It was further undermined on 21 February 2022 when Russia recognised the self-proclaimed Donetsk People’s Republic and Luhansk People’s Republic (both of which are parts of sovereign Ukraine). Though not a legally binding treaty, the Memorandum was aimed at providing security guarantees that would ensure international peace and security. Granted that its transgression by Russia does not constitute a breach of international law due to the Memorandum’s lack of legal force, it yet represents a serious breakdown of international order and detracts from the general worth of security assurances globally.⁹¹

The aggression against Ukraine also constitutes a violation of the NATO-Russia Founding Act, 1997.⁹² Under the Act, the Parties agree to refrain from the threat or use of force against each other or against other states. Though a political agreement (not a legally binding treaty), the Act, in our view, constitutes the height of security cooperation between NATO and Russian since the end of the Cold-War. By using force against the sovereign state of Ukraine, Russia disregarded its obligations under the Act and in so doing seriously undermined security in Europe. The annexation of Crimea by Russia and the subsequent invasion of Ukraine have threatened further cooperation under the Act, and NATO is increasingly being urged to ignore its own obligations under the Act,⁹³ the basis of cooperation having been destroyed by Russia.

Nuclear Deterrence Theory

The development of the atomic bomb by the U.S. during World War II changed armament as hitherto known to mankind. Though organised violence by one group against others has been a

⁹⁰ See Mariana Budjeryn and Matthew Bunn, ‘Budapest Memorandum at 25: Between Past and Future’ Conference Summary, Belfer Centre for Science and International Affairs, March 2020, 1.

⁹¹ D Yost, ‘The Budapest Memorandum and Russia’s Intervention in Ukraine’ (2015) 91:3 *International Affairs*, 505, 538; Kieran O’Meara, ‘Understanding the Illegality of Russia’s Invasion of Ukraine’ <<http://www.e-ir.info/2022/03/13/understanding-the-illegality-of-russias-invasion-of-ukraine>> accessed 16 June 2022.

⁹² In 1997 NATO and Russia negotiated and signed the Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation in Paris, France.

⁹³ See, for examples, Daniel Fried, Steven Pifer and Alexander Vershbow, ‘NATO-Russia: It’s Time to Suspend the Founding Act’ <<http://www.thehill.com/opinion/international/3514801-nato-russia-its-time-to-suspend-the-foundingact>> accessed 10 October 2022; John R Deni, ‘The NATO-Russia Founding Act: A Dead Letter’ <<http://www.carnegieeurope.eu/strategieurope/71385>> accessed 19 October 2022.



constant feature of human life since prehistoric times,⁹⁴ the number of people killed and the devastation in Hiroshima and Nagasaki resulting from the first and only atomic bombs ever detonated in war marked a watershed in armed conflict.⁹⁵ The magnitude of devastation occasioned by those bombs struck fear in the heart of mankind; fear that has prevented nations from deploying such weapons ever again in armed conflicts since World War II. Mankind's apprehension in this regard is made more profound by the fact that the atomic bombs that devastated Hiroshima and Nagasaki were the least powerful of these bombs ever created.⁹⁶ Added to this is the fact that more countries have since 1945 become nuclear capable while others aspire to join the league.⁹⁷ It is the fear of a nuclear Armageddon in the event of a nuclear war that is at the heart of nuclear deterrence. In other words, extermination attacks appear to be the fundamental threat that makes nuclear deterrence effective.⁹⁸

To deter is to prevent or restrain one by fear, difficulty or danger from acting or proceeding.⁹⁹ Deterrence involves the use of the fear factor to discourage certain behaviour from others.¹⁰⁰ With regard to nuclear weapons, nuclear deterrence theory is to the effect that a state could be deterred from carrying out a nuclear attack on another state out of fear that if it does, it will fail to achieve its objective and may suffer unacceptable consequences for doing so.¹⁰¹ It means to induce restraint

⁹⁴ See, generally, LH Keeley, *War before Civilization: The Myth of the Peaceful Savage* (Oxford University Press, Oxford 1996).

⁹⁵ The atomic bomb dropped on Hiroshima on 6 August 1945 killed an estimated 70,000 people instantly and over 100,000 by the end of the year. The blast also destroyed two-thirds of the city of Hiroshima. See 'Atomic Bombings of Hiroshima and Nagasaki', <<http://www.britannica.com/event/atomic-bombings-of-hiroshima-and-nagasaki>> accessed 4 January 2023.

⁹⁶ The most powerful nuclear bomb ever created, the Russian 'Tsar Bomba', is about 3,300 times more powerful than the 15 kilotons nuclear bomb that devastated Hiroshima in August 1945, and 10 times more powerful than all the munitions used during World War II. See Owen Jarus, 'The 9 Most Powerful Nuclear Weapons Explosions' <<http://www.livescience.com/most-powerful-nuclear-explosions>> accessed 12 December 2022; Christina Foltynova and Carlos Coelho, 'Weapon of Last Resort: How the Soviet Union Developed the World's Most Powerful Bomb' <<http://www.rferl.org/amp/tsar-bomba/31530341.html>> accessed 4 January 2023.

⁹⁷ There are currently seven overt nuclear powers (the U.S., Russia, Britain, France, China, India and Pakistan), one covert nuclear power (Israel) and three aspirants (Iran, North Korea and Syria). See Therese Delpech, *Nuclear Deterrence in the 21st Century: Lessons from the Cold War for a New Era of Strategic Piracy* (RAND Corporation, 2012) 4.

⁹⁸ Ward Wilson, 'The Myth of Nuclear Deterrence' (2008) 15(2) *Nonproliferation Review*, 421, 429.

⁹⁹ The New International Webster's Comprehensive Dictionary of the English Language (2010 edn, Typhoo Media Corporation 2010) 349.

¹⁰⁰ Bryan A, Garner, *Black's Law Dictionary* 7th edn (West Group, 1999) 460.

¹⁰¹ KP Chilton, 'On US Nuclear Deterrence' (2017) *Strategic Studies Quarterly*, 2, 3-4.

in others by offering threats of pain – in this case, threat of use of nuclear weapons against them.¹⁰² It is a strategy employed by states with nuclear capability to influence the behaviour of other states that are, usually, also nuclear-capable. It is the theory that a state would exercise restraint in attacking another state with nuclear weapons for fear that a devastating nuclear retaliation would come from the state first attacked. States reason that the cost of nuclear war will far outweigh any benefits from such war, making any victory a pyrrhic one. Even a controlled test of nuclear weapons is a matter of considerable concern to states. The gravamen of nuclear deterrence, therefore, is the object of inducing caution in others by threat of nuclear attack.¹⁰³

Nuclear deterrence not only deters nuclear-armed opponents from carrying out a nuclear attack on a nuclear power, it also deters them from carrying out nuclear attacks on its allies. This is what is now known as extended deterrence. Extended deterrence aims at securing allies from nuclear attacks by an adversary and preventing such allies from developing nuclear weapons themselves.¹⁰⁴ This type of deterrence is a cardinal security policy of the U.S. in Western Europe. During the Cold War, for example, the U.S. had over 7,000 tactical nuclear weapons spread across Europe to protect its European allies from Soviet Intimidation.¹⁰⁵ Another purpose of extended deterrence as could be gleaned from the U.S. security framework in Europe is to surround the opponent's periphery (in the case of the U.S., the former Soviet Union) with reliable allies whose security costs are minimised by their lessened dependence on local defensive ability.¹⁰⁶

¹⁰² John Borrie, 'Human Rationality and Nuclear Deterrence' in Beyza Unal, Yasmin Afina and Patricia Lewis (eds), *Perspectives on Nuclear Deterrence in the 21st Century* (Chatham House, London 2020) 8.

¹⁰³ Wilson (n 97) 432.

¹⁰⁴ See, generally, Cristina Varriale, 'Connecting the Dots: US Extended Nuclear Deterrence and Denuclearization of the Korean Peninsula' in: Beyza Unal, Yasmin Afina and Patricia Lewis (eds), *Perspectives on Nuclear Deterrence in the 21st Century* (Chatham House, London 2020) 19-22; Tanya Ogilvie-White, 'Australia and Extended Nuclear Assurance' in Beyza Unal, Yasmin Afina and Patricia Lewis (eds), *Perspectives on Nuclear Deterrence in the 21st Century* (Chatham House, London 2020) 23-26.

¹⁰⁵ William Beecher, 'U.S. Has a Stockpile of 7,000 Nuclear Weapons in Europe for NATO' <<http://www.nytimes.com/1969/12/04/archives/us-has-a-stockpile-of-7000-tactical-weapons-in-europe-for.html>> accessed 4 January 2023.

¹⁰⁶ This was pointed out by Henry Kissinger when he wrote that the chief aim of the intricate structure of US extended deterrence in Europe was to have US allies surround the Soviet frontiers so that an attack on any of them would not be lightly contemplated. See Henry Kissinger, *Nuclear Weapons and Foreign Policy* (Harper Brothers, New York 1957) 239.

The theory of nuclear deterrence developed after the former Soviet Union detonated its first nuclear device in 1949, before which the U.S. was the sole nuclear power.¹⁰⁷ As more states acquired nuclear bombs, the fear of a nuclear confrontation was raised a notch higher, and it became more imperative for states to avoid nuclear conflagration. In fact, between the U.S. and the Soviet Union, the concept of Mutual Assured Destruction (MAD)¹⁰⁸ developed and remained effective throughout the Cold War. It is thus argued that the absence of a nuclear conflagration between the U.S. and the Soviet Union throughout the period of the Cold War is evidence of the efficacy of nuclear deterrence.¹⁰⁹ The world has thus moved from a unipolar situation in 1945 to a multipolar deterrence today due to which the terror of nuclear attack has been balanced between multiple nuclear-capable nations. The belief in the efficacy of nuclear bombs as deterrent means, therefore, that the failure of nuclear deterrence poses an existential risk to human populations.¹¹⁰

Nuclear deterrence theory rests essentially on two basic assumptions – (i) the rationality of decisions-makers,¹¹¹ and, (ii) second-strike capability.¹¹² Rationality entails that a state is rational and would therefore weigh the gains of a nuclear attack on another state against the losses of a retaliatory strike on itself. It is an assumption that decision-makers would exercise restraint in carrying out a nuclear attack on another state in consideration of the grave consequences of a successful retaliatory strike. Nuclear deterrence theory therefore assumes that a nuclear-armed state would weigh the potential benefits of a nuclear attack on a nuclear-armed adversary against the costs and risks associated with such attack. Rationality, therefore, dictates to adversaries that no advantage could be gained by striking first.¹¹³

¹⁰⁷ Andrew Brown and Lorna Arnold, 'The Quirks of Nuclear Deterrence' 24:3 *International Relations*, 293, 293.

¹⁰⁸ Mutual Assured Destruction theory assumes that, between the U.S. and the Soviet Union, if one superpower attempted to destroy the other first, it will also itself be destroyed by the other.

¹⁰⁹ See, for example, GT Allison, 'The Cuban Missile Crisis at 50' (2012) 91:4 *Foreign Affairs*, 11-16. Analysts have continued to argue, however, whether the lack of a major armed confrontation between the two powers could be attributed to deterrence or to some other factors. See, for instance, W Wilson, 'The Myth of Nuclear Deterrence' (2008) 15:3 *The Nonproliferation Review*, 421-39; D Culp, "A Critical Examination of the "The Myth of Nuclear Deterrence"" (2012) 19:1 *The Nonproliferation Review*, 51-68.

¹¹⁰ Brown and Arnold (n 106) 293.

¹¹¹ Borie (n 101) 8-13.

¹¹² Maria R Rublee, 'Nuclear Deterrence Destabilized' in: Beyza Unal, Yasmin Afina and Patricia Lewis (eds), *Perspectives on Nuclear Deterrence in the 21st Century* (Chatham House, London 2020) 14-15.

¹¹³ Constance Baroudos, 'The Underlying Logic of Nuclear Deterrence Remains Valid' <http://www.lexingtoninstitute.org/the-underlying-logic-of-nuclear-deterrence-remains-valid/> accessed 12 July 2022.

Second strike capability is the assumption that a nuclear-armed state attacked with nuclear weapons will still possess the capability to strike back despite the devastation caused by the attack on it. A thermonuclear strike has the capability of rendering the attacked state incapable of any reasonable response to the attack considering the extent of destruction such a strike could occasion. Nuclear deterrence theory assumes that, for deterrence to succeed, the attacked state would still possess the capability to deliver a devastating retaliatory strike on the aggressor. To ensure second strike capability, nuclear-armed states developed systems that ensure that a return nuclear blow is always possible following a nuclear strike on them.

Without the rationality of decision-makers and a trusted or assumed second strike capability of an adversary, therefore, nuclear deterrence becomes a matter of chance. The ability of states to place on the balance the gains and costs of a nuclear attack, and the assured ability of an adversary to return a nuclear strike basically compel states to refrain from starting a nuclear war. The dyad of rationality and second-strike-capability, therefore, ensures and strengthens the global nuclear peace attributed to the international nuclear security system by nuclear deterrence theorists. Successful deterrence therefore hinges on actual nuclear capabilities on the part of a state and the belief in the national will of the adversary state to strike back.¹¹⁴

Putin's New Aspect to Nuclear Deterrence

In the prosecution of the war in Ukraine, Russia had at the earliest opportunity drawn global attention to its willingness to resort to nuclear warfare if need be. On 27 February 2022 President Putin ordered the Russian military to put Russia's nuclear deterrence forces on high alert.¹¹⁵ This was a clear signal that Putin was 'prepared to resort to the most extreme level of brinkmanship in his effort to achieve victory in Ukraine.'¹¹⁶ Putin's nuclear alert order was aimed at deterring Western nations from coming to the aid of Ukraine. The Russian leader had threatened that there

¹¹⁴ *Ibid.*

¹¹⁵ Andrew Roth and others, 'Putin Signals Escalation as he puts Russia's Nuclear Force on High Alert' <<http://www.theguardian.com/world/2022/feb/27/vladimir-putin-puts-russian-nuclear-deterrence-forces-on-high-alert-ukraine>> accessed 12 July 2022.

¹¹⁶ *Ibid.*

would be dire consequences for interference by the West in the conflict, such consequence that the West had never experienced.¹¹⁷ In his words:

Whoever tries to hinder us, and even more so, to create threats to our country, to our people, should know that Russia's response will be immediate. And it will lead to such consequences that you have never encountered in your history.¹¹⁸

Russia became a nuclear power in 1949 after it successfully exploded its first atomic bomb, known in the West as Joe-1.¹¹⁹ It is reported to currently have a stockpile of approximately 5,977 strategic and tactical nuclear weapons, many more than any other nation.¹²⁰ With Russia's obvious global nuclear superiority, states would not trifle with its threat of nuclear attack in the event of interference by the West in the aggression against Ukraine. This is especially so after President Putin said that his threat of using nuclear weapons must not be taken for a bluff.¹²¹

If Putin's threat of nuclear attack in the event of Western interference in the war in Ukraine was intended to deter Ukraine's Western allies from getting directly involved in the war, it succeeded. No nation has got directly involved in the war in Ukraine on the Ukrainian side so far. Though the U.S. and its allies have provided enormous support to Ukraine in terms of weaponry and equipment, they have exercised circumspection in getting directly involved in the conflict. As earlier said, the U.S. had from the onset expressed its policy not to send troops to Ukraine. This is at variance with the intervention by the U.S. and its allies in the Gulf War following the invasion of Kuwait by Iraq in 1990. The involvement of the Allied Forces in the Gulf War served to protect and preserve Kuwaiti sovereignty and to deter a recrudescence anywhere in the world.

¹¹⁷ Yaroslav Lukov, 'Ukraine War: Putin warns against Foreign Intervention' <<http://www.bbc.com/news/world-europe-6125320>> accessed 12 July 2022; Ewan Somerville and others, 'Vladimir Putin Threatens Nuclear Strikes if West Intervenes' <<http://www.telegraph.co.uk/world-news/2022/04/27/ukraine-war-news-russia-latest-weapons-attacks-kyiv-putin/>> accessed 12 July 2022.

¹¹⁸ President Vladimir Putin quoted in Mark Gollom, 'Putin Implies Nuclear Attack if West Interferes in Ukraine: Why it's just not an Empty Threat' <<http://www.cbc.ca/amp/1.6362890>> accessed 12 July 2022.

¹¹⁹ Steven Dowling, 'The Monster Atomic Bomb that was too big to Use' <<http://www.bbc.com/future/article/20170816-the-monster-atomic-bomb-that-was-too-big-to-use>> accessed 3 January 2023.

¹²⁰ Federation of American Scientists (FAS), 'Status of World Nuclear Forces' <<http://www.fas.org/issues/nuclear-weapons/status-world-nuclear-forces>> accessed 12 July 2022;

¹²¹ Nataliya Vasilyeva, 'I'm not bluffing on Nuclear Weapons', Putin Tells West' <www.telegraph.co.uk/world-news/2022/09/21/putin-calls-300000-reseervists-partial-mobilisation> accessed 3 January 2022.

Aside from obvious international restraint in the conflict, calls by Ukrainian authorities for the U.S. to establish a no-fly zone over Ukrainian airspace were turned down. Establishing a no-fly zone over Ukraine would halt Russian bombings in Ukraine but would require the presence of U.S. warplanes for enforcement. Deploying U.S. warplanes into Ukrainian airspace to stop the Russian bombings would require U.S. willingness to shoot down Russian aircraft, and would, almost certainly, escalate the conflict. This is a possibility the U.S. would not want to risk given Russia's nuclear posturing.

It would be recalled that, for the first time in history, the U.S. imposed a no-fly zone over the Kurdish region of northern Iraq at the end of the Gulf War in what was called Operation Provide Comfort.¹²² Operation Provide Comfort and its successor Operation Northern Watch were aimed at preventing a recurrence of incidents like the Halabja massacre in which 300 Kurdish civilians were killed by an airborne chemical weapons attack.¹²³ In 1992 the U.S. carried out a similar no-fly operation codenamed Operation Southern Watch to protect Shiite areas of southern Iraq.¹²⁴

Following the Iraqi example, NATO, through Operation Deny Flight, imposed a no-fly zone over Bosnia and Herzegovina from 1993 to 1995 during the war in the former Yugoslavia.¹²⁵ The intention was to protect Bosnian civilians from Serbian aircraft and to facilitate delivery of needed humanitarian aid. It was hoped to stabilise the situation in Bosnia so that a peaceful settlement could be achieved.¹²⁶ Similarly, in 2011 NATO carried out Operation Odyssey Dawn which imposed a no-fly zone over Libya under UN Security Council Resolution (UNSCR) 816.¹²⁷ It was used to protect civilian populations from Muammar Gaddafi's forces. In the few cases they were

¹²² Joshua Keating, 'What is a no-fly? Why Ukraine wants one, and why NATO is Refusing' <<http://www.grid.news/story/global/2022/02/09/what-is-a-no-fly-zone-why-ukraine-wants-one-and-why-nato-is-refusing/>> accessed 22 July 2022.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Kevin Breuninger, 'U.S., U.K Resist Call for No-fly Zone over Ukrain's Plea: 'Our Goal is to end the War, not to Expand it' <<http://www.cnn.com/2022/03/09/us-uk-resist-calls-for-no-fly-zone-over-ukraine-peas.html>> accessed 13 October 2022.

¹²⁶ MO Beale, *Bombs over Bosnia: The Role of Airpower in Bosnia-Herzegovina* (Air University Press, Alabama 1997) 20

¹²⁷ The Resolution was passed in October of 1992 for the purpose of prohibiting unauthorised flights over Bosnia-Herzegovina.



used, no-fly zones served the purposes of saving civilian lives and, where possible, stabilizing the armed conflict.

In all of these cases, failure to act would have resulted in lots of civilian deaths. The number of civilian lives already lost,¹²⁸ and the enormity of destruction occasioned in Ukraine would ordinarily have necessitated at the most, extraterritorial intervention by third states, and the minimum, the imposition of a no-fly zone over Ukraine. Allegations have been variously made of the wanton violation of the laws of war and human rights by Russian forces in Ukraine.¹²⁹ There have also been allegations of war crimes perpetrated by Russian troops in Ukraine. In fact, evidence has been documented for possible prosecutions for war crimes. Despite all these, the U.S., its NATO allies and other states have exercised the greatest restraint in getting directly involved in the armed conflict courtesy of Russia's threat of nuclear attack.

In context, therefore, the theory at the back of Putin's approach to the ongoing war in Ukraine is intimidation and scare. It does not seek necessarily to protect the Russian Federation from any threat, but one that is rather designed to frighten and scare the world. In its simplest formulation, it means: *we will violate the law of nations, and we will scare nations from action by threat of nuclear attack*. This is a stray from nuclear deterrence theory by miles. It is a development that lays a dangerous precedent that could embolden other nuclear-armed or would-be nuclear-armed states nursing expansionist territorial ambitions.

Conclusion

Sovereign equality of states is a cardinal principle of international law that has immensely contributed to peace and security globally. Adherence to the principle has resulted in respect for the internal affairs and political independence of sovereign states and enhanced peaceful cooperation among states. The Russian Invasion of Ukraine marked a radical departure from this

¹²⁸ As at 11 July 2022, 5,024 civilians had been killed in the war in Ukraine, comprising 1905 men, 1316 women, 141 girls, 161 boys as well as 41 children and 1460 adults whose sex was yet unknown. See United Nations Human Rights Office, 'Ukraine: Civilian Casualty Update 12 July 2022' <<http://www.ohchr.org/en/news/2022/07/Ukraine-civilian-casualty-update-12-july-2022>> accessed 22 July 2022.

¹²⁹ Human Rights Watch, 'Ukraine: Apparent War Crimes in Russia-Controlled Areas' <<http://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>> accessed 4 January 2023.



time-honoured international law principle since the invasion of Kuwait by Iraq. Unlike the invasion of Iraq which prompted extra-territorial armed intervention by the U.S. and its allies, the Ukrainian invasion has left members of the international community watching from afar to forestall a nuclear confrontation with Russia. Russia's threat of nuclear attack on nations that intervene in the war with Ukraine introduces a novel, if not wayward, aspect to traditional nuclear deterrence. Imbued in it is the propensity to embolden similar invasions in other parts of the world and to set back international efforts at nuclear non-proliferation. The continued devastation of Ukraine by Putin's forces only lends credence to the weakness of the international legal system. It depicts the ascendancy of powerful nations over the rule of law on the international plane. It is of utmost importance that states unite against breaches of the law of nations by norm-disrespecting states, wherever they occur, if the international order must be preserved.