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RUSSIA'S LEGAL-POLITICAL ARGUMENTATION AT THE OUTBREAK OF ITS WAR AGAINST UKRAINE: A CRITIQUE

Thesis

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INTRODUCTION

In February of 2022, Russia invaded the sovereign territory of Ukraine. Russia had, for 8 years, already occupied and annexed the Ukrainian peninsula of Crimea, but the 2022 invasion was a drastic increase in their aggression towards Ukraine. In the months and weeks leading up to the invasion, it seemed predestined that Russia would invade. The international community condemned the invasion, and posited that the invasion was not only politically wrong but a flagrant violation of international law. This had little effect, and it seemed as if no legal obligation could stop Russia from going through with its plans.

Even with the fact that Russia's invasion was internationally condemned, they chose to initiate and continue their aggression. Despite the apparent flagrant disregard for international law, something interesting happened — the Kremlin continuously attempted to make legal excuses for their actions. Throughout the invasion of Ukrainian territory, the legal excuses for aggression made by the Kremlin have piled up: from the need to stand up to genocide to the exercise of self-determination.[1]

The Russian Federation is a permanent member of the UN Security Council, and was a member of the Council of Europe (until their 2022 expulsion)[2]. Indeed, Russia consistently engages in the international legal system, which is what makes their continued declaration of legality in regards to their "special military operation" in Ukraine unsurprising. Russia does not take action without claiming legal justification, even when there is seemingly none there. Whether there is basis for foreign policy decisions in the legal framework or not, the Kremlin staunchly defends its actions by cementing them in legal concepts.

Russia often approaches its political and legal ideology from an 'us vs. the West' mentality, allowing them to dismiss claims from other States as based on ideology rather than fact. And it is

[1] René Värk. "Russia's Legal Arguments to Justify its Aggression Against Ukraine" November 2022 International Centre for Defence and Security

[2] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51

this same approach that Russia uses when justifying their invasion of Ukraine, by dismissing the concerns of other States as Western propaganda. They also often employ a technique of legal argumentation that, in essence, consists of throwing things against a wall to see what will stick. Each action is approached with a multitude of excuses for its legality, making it hard to even pinpoint what the point of the argumentation is. Despite the sheer number of reasons that Russia has given for its use of force in Ukraine, there are only a few that are reasonable to examine.

The interest, however, in the legal reasoning of Russia for its war in Ukraine is not simply to evaluate if they are legitimate in the context of the war, but their legality as concepts in international law.

This thesis aims to critique the legal justifications used by Russia for their war in Ukraine. The aim of this thesis is not simply to condemn Russia's actions and legal justifications, or only to make a claim about if Russia's usage of these concepts is consistent with international law. Russia is far from the first, and unlikely to be the last, to use these legal concepts as a justification for the violation of another State's sovereignty through the use of force. And so examining the legal concepts that they employ, as well as how they were used by Russia in the current war, can help us to more fully understand the value of each legal doctrine and its framework. In essence, this thesis does not primarily seek to answer if the Russian Federation acted in compliance with international law or not. Of course this will be addressed, and each section will conclude if Russia acted in conformity with international law. However, the thesis will explore both the *lex lata* and how Russia attempts to apply the legal mechanisms, and also makes several conclusions and suggestions for *lex ferenda* application.

In this way, this thesis will examine each of the three legal arguments in depth. Firstly, the relationship to the international legal framework and the UN Charter for each concept must be examined, distinct from the usage by Russia. Secondly, the thesis will answer the question of if the way that Russia employed these legal doctrines is in compliance with international law. Finally, the criticisms and relationship with international law and the way that Russia utilised these concepts will be looked at together to discuss how these doctrines should, or should not, exist moving forward.

This thesis will consist of three Chapters, in each of which we will analyse one of the says that Russia attempts to justify their invasion of Ukraine:

1. Self-defence
2. Self-determination of peoples
3. Humanitarian intervention

It is important to note that these are by no means the only legal arguments made by Russia that have value to examine. However, the size limitations of this thesis do not allow for more of the legal argumentation to be examined in depth, and I have therefore chosen these three as the most important to examine.

The first Chapter will consist of a critique of Russia's invocation of self-defence in their current activities. This Chapter is divided into two subchapters to cover different areas of self-defence: anticipatory self-defence and collective self-defence.

In terms of the former, this is perhaps the most consistent argument made by Russia. Russia has argued that the expansion of NATO and Western incursion towards the east have created a necessary environment for them to take self-defence prior to any armed attack.[3] This argument is predicated on the acceptance that it is legal to act in self-defence prior to an armed attack. So to fully explore this topic, this chapter will cover different theories and critiques of anticipatory self-defence, as well as how it has been employed by the Russian Federation in their invasion of Ukraine. The final portion of this subchapter, I will discuss the viability and usage of anticipatory self-defence in international law moving forward.

In the second part of the first chapter, we will discuss collective self-defence, which Russia has attempted to use claiming that they are helping the Donetsk People's Republic and Luhansk

[3] Address by the President of the Russian Federation', Office of the President of the Russian Federation (24 February 2022) Available at: http://en.kremlin.ru/events/president/transcripts/67843 (official English translation, as published by the Kremlin);

People's Republic.[4] While this is a far less controversial legal mechanism than anticipatory self-defence, and perhaps the least controversial covered in the whole thesis, it is not without need for analysis. In particular, the development of current approaches to collective self-defence will be analysed, so as to provide a greater understanding of what exactly collective self-defence is and how it can be exercised within the legal framework of the United Nations.

The second chapter will examine self-determination of peoples. This being a somewhat ambiguous topic in international law, something odd considering that it is a *jus cogens* norm, we will first explore the evolution of the concept of self-determination in international law. This chapter relies heavily on the discussion of the development of self-determination as a concept. Thorough understanding of the development of self-determination as a norm in international law is crucial in order to understand exactly why there are controversies in its application and how it is used by Russia. In particular, questions of internal or external application will be addressed. It will also address the concept of remedial secession. Finally, the chapter will end by addressing how self-determination can be understood moving forward in international law.

The final chapter of this thesis will discuss the concept of humanitarian intervention. The idea of humanitarian intervention and if it even has a basis in international law today will first be analysed, before the contextual use of humanitarian intervention by the Russian Federation can be explored. This relies not only on the examples of use, varying scholars opinions, and legal framework, but also on the question of moral imperative as a foundation for humanitarian intervention. This chapter will also discuss how humanitarian intervention interacts with the Responsibility to Protect (R2P) concept. Finally, the thesis will look at Russia's usage of humanitarian intervention, and propose a workable legal framework for humanitarian intervention moving forward.

There are three main research questions that are applied to both the thesis as a whole and to each chapter:

1. What is the current legal framework applied to each legal concept explored in the thesis, and what are the criticisms?

[4] Värk, R.

2. Was Russia’s use of these legal mechanisms consistent with international law?
3. What can be derived from Russia's use of each legal mechanism in order to address the criticisms and change their application in the future?

In light of these research questions, the reader should keep one main question in mind: how effective, clear, and applicable are these concepts in contemporary international law?

From a methodology standpoint, this thesis utilises a mixed methodology, relying on legal data and opinion gathering through doctrinal, historical, and empirical methods. It further utilises comparative and, in the majority, analytical methodologies to discuss current *lex lata* and *lex ferenda* application. A number of authors with varying interpretations of international law are included, and their work serves to highlight the difference in opinion which can then be thoroughly analysed to draw conclusions about how the discussed mechanisms can be utilised moving forward.

Keywords: Russia, Ukraine, International Law, Anticipatory Self-Defence, Self-Determination, Humanitarian Intervention, Use of Armed Force

1. SELF-DEFENCE

Although there is a general prohibition of aggression and use of force in international law, there are some exceptions. One of those exceptions is that of self-defence. Self-defence is provided for in Article 51 of the Charter of the United Nations, and is an explicit exception to Article 2(4) of the UN charter.

> "2 (4). 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."[5]
>
> "51. 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 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"[6]

Yet, self-defence is not an all encompassing justification for the use of force, and requires that any use of force still falls under some preconditions. These conditions for both individual and collective self-defence will be discussed throughout this chapter of this thesis.

1.1. Anticipatory Self-Defence

Self defence is beholden to several conditions, however before one can examine if self-defence is being exercised correctly it needs to meet the precondition of armed attack. This condition is explicitly provided in Article 51 of the UN Charter, however this is not the only source of international law that has upheld armed attack as a condition for self-defence.

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[5] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Art 2(4)

[6] *Ibid*., Art 51

The International Court of Justice, in its seminal Nicaragua judgement, has also affirmed that self-defence is predicated on an armed attack.[7]

However, this strict interpretation is not without disagreement. Fred Wehling argues that

> "Customary international law has long recognized, though not without controversy, that states faced with an ''imminent threat'' of armed attack need not wait to suffer an initial strike but may act preemptively to thwart an attack that appears about to occur, as evidenced by noticeable preparations for offensive military action"[8]

And indeed, this is the theory of self-defence that Russia enacted in the case of their 2022 military action in Ukraine. Putin's speech on the 24th of February, 2022[9], highlighted what Russia perceived as threats from NATO and the west. The terminology used when discussing NATO in this speech is of particular importance when contextualising the preemptive self-defence argument from the Russian perspective.

Putin is careful to craft a narrative that can fit into the idea that there is some form of imminent threat to Russia from NATO and the west. He argues that "[NATO's] military machine is moving and, as I said, is approaching our very border."[10] and put forth examples of intervention in Libya, Iraq, and Syria to evoke a picture of death and destruction caused by the West, namely the United States, which would pose a serious threat to Russia.

Yet none of the threats that Putin has so carefully picked out to fashion a picture of threat from the West and NATO include current armed attack of Russia, normally a prerequisite to self-defence, so it is clear that Putin is attempting to invoke the right of self-defence as anticipatory.

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[7] Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICGJ 111 (ICJ 1984), 26th November 1984,

[8] Wehling, Fred.*A New Standard For Preemptive Military Action Against Wmd Threats.* The Nonproliferation Review Volume 19, 2012

[9] Address by the President of the Russian Federation. 24 February 2022

[10] *Ibid,.*

1.1.1. Preemptive vs Preventive Self-Defence

Under the sphere of anticipatory self-defence, there is a division between two different theories: preemptive and preventive. Both have their roots in the concept that a State may take action prior to the actual realisation of an armed attack, however they differ significantly. This difference can be defined as the level of materialisation and imminence of a threat.

1.1.1.1 Preemptive Self-Defence and the Caroline Test

When Fred Wehling stated that customary international law has recognised that states may act to an imminent threat, he is referring to preemptive self-defence. And indeed, from many perspectives the argument that states do or should have the right to act prior to an armed attack makes sense. Afterall, why should a State need to wait until there is an attack, damaging infrastructure and causing harm to its nationals, in order to defend itself. Certainly we would not tell someone that they need to wait to be stabbed in order to defend themselves if someone was running at them with a knife.

This is where the legal concept of preemptive self-defence comes in. It is grounded in the so-called Caroline test, which was developed in the mid 1837. As Canadian insurrectionists gained numbers in 1837, they found American sympathisers (Although the United States itself was neutral, and the government did not assist in the growing tensions in Canada).[11] The Canadian rebels were assisted with armament and attacks by the American sympathisers, and one such ship that helped was a small steamliner called the *Caroline*. In December 1937 the *Caroline* crossed the border into Canada, and shelled on Canadian land. British forces soon destroyed the ship claiming self-defence, and in response to the destruction US Secretary of State Daniel Webster wrote a series of letters from which the Caroline doctrine was born. Namely, the letters set fourth the now accepted conditions for preemptive self-defence: that a government must

[11] Miller, Hunter. *British-American Diplomacy : The Caroline Case*. Avalon Project Available online: https://avalon.law.yale.edu/19th_century/br-1842d.asp.

"show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[12]

Yet, it is important to note that the concept of preemptive self-defence, and the *Caroline* doctrine itself, is not without scrutiny. Craig Forcese makes it particularly poignant in his book *Destroying the Caroline: The Frontier Raid That Reshaped the Right to War* when discussing how the *Caroline* interacts with international law today, and if it should even be considered a doctrine of anticipatory self-defence.

Afterall, as mentioned above, the Caroline was not some ambiguous future threat, but rather had crossed into Canadian territory and engaged in armed activity. Forcese recons "[The Caroline] is most easily viewed as an effort to degrade a weeks-old attack and its expansion, rather than as an attempt to forestall the first blows of a not-yet mounted assault"[13] Forcese also highlights the distinctive differences between the political and legal climate of the 1837 and today, something that would make a factual distinction so large that it might negate the application of the Caroline Doctrine to modern ideas of preemptive self-defence.

Ian Brownlie, one of the foremost scholars of his time, echoes similar issues with the application of the Caroline doctrine.[14] Brownlie agrees that the Caroline doctrine is out of date with international law, however his issues with the doctrine have less to do with its initial formulation, and more with its application to international law today. Brownlie approaches the topic of anticipatory self-defence from a particularly restrictive stance, and makes the case that any basis of anticipatory self-defence and the Caroline doctrine in customary international law was prior to the UN Charter. Brownlie concludes that anticipatory self-defence can not be reckoned with the definition of armed attack under Article 51.[15]

However, one should note that there are those who oppose this view, and would interpret the Charter as allowing anticipatory self-defence. In fact, there are some who would contend to the

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[12] *Ibid,.*
[13] Craig Forcese. *Destroying the Caroline: The Frontier Raid That Reshaped the Right to War* (2018) p 228
[14] Ian Brownlie. *International Law and the Use of Force by States Revisited.* Australian Year Book of International Law,. 21, 2000, pp. 21-38
[15] *Ibid,.*

fact that Article 51 already does, or should, allow for preemptive self-defence. Schachter expresses this with their argument:

> "...We must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation. It does not seem to me that the law should leave such a defense to a decision *contra legem*. Nor does it appear necessary to read article 51 in that way — that is, to exclude completely legitimate self-defense in advance of an actual attack. In my view it is not clear that article 51 was intended to eliminate the customary law right to self-defense and it should not be given that effect."[16]

This argument via Schachter is directly contradictory to Brownlie. Brownlie views that there may have been customary international law allowing for anticipatory self-defence prior to the Charter, which was eliminated when the Charter was introduced. Shachter would argue that this customary international law was not eliminated with the introduction of the Charter. In this case, I would argue for an interpretation much closer to that of Schachter, however I contend any interpretation would necessitate the clear distinction between preemptive and preventive self-defence. As much of the legal practice, which will be discussed in the next subsection, does not actually support the view that anticipatory self-defence, when applied with an incredibly narrow interpretation, is contrary to international law.

One case frequently brought up by those who present the idea that preemptive self-defence is contrary to international law is the Osirak attack. In 1981 Israel attacked Iraq's Osirak nuclear reactor, partially destroying it.[17] Israel claimed that intelligence reports showed that the reactor was not being used for peaceful means, as was claimed by Iraq, and instead attested "that Iraq was on the brink of developing a nuclear weapons capability and justified the attack as an act of self-defense."[18]

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[16] Damrosch, Henkin, Pugh, Schachter, and Smit. p.969

[17] *Israeli Attack on Iraq's Osirak 1981: Setback or Impetus for Nuclear Weapons?*. National Security Archive, 24 Aug. 1979, Available online: https://nsarchive.gwu.edu/briefing-book/iraq-nuclear-vault/2021-06-07/osirak-israels-strike-iraqs-nuclear-reactor-40-years-later.

[18] *Ibid*

Now, it is true that the Security council, in resolution 487, condemned Israel's actions as a "violation of the Charter of the United Nations and the norms of international conduct;" [19] However, we must be careful not to conflate this condemnation as an official stance on preemptive self-defence or the Caroline doctrine. Unlike a court case, the one page long resolution made no mention as to the legality of the concept of preemptive self-defence or the Caroline doctrine. When hearing statements about the case, delegates in the United Nations Security Council "referred to the *Caroline Case* formulation of the right of anticipatory defence as an accepted statement of customary law"[20] Yet in the resolution, the security council made no reference to these statements or their legitimacy in light of the UN Charter. The simple condemnation, without assessment of the legal fact, can not be used to disprove the existence of preemptive self-defence as a legitimate legal construct under international law. It is true that the Security Council does not generally take a direct stance on specific doctrines, instead dealing with the crisis at hand. So, the specifics of Israel's actions itself are materially important to the interpretation of the Security Council's condemnation. This will be further discussed in the next chapter.

Further, this thesis must disagree with authors such as Forcese and Brownlie who would question if the Caroline doctrine should have its current place in international law. While the premise that substantive differences in the original meaning of the Caroline and the circumstances surrounding it today might affect the way that it is applied, to an extent the original meaning is of little value.

The fact is that the Caroline, intentionally or not, has evolved in its meaning to fit with the idea of preemptive self-defence. Afterall, it is not uncommon for the normative meaning of doctrines to shift in retrospect. To look only at the initial circumstances of the case without taking into account the evolution of the doctrine would be an oversight at best, and possibly particularly disingenuous.

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[19] Security Council resolution 487 (1981) [on the Israeli military attack on Iraqi nuclear facilities]
[20] Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit., *International Law: Cases and Materials* p 969

Even if the intention of the Websters letters were not to be applied to preemptive self-defence, the doctrine has been so widely regarded to apply that the original intention can be lost to history. That is not to say that the Caroline is universally accepted, after all anticipatory self-defence is not universally accepted. However, they are so tied together that even those authors who claim there is no basis for anticipatory self-defence state that the Caroline is tied to the very concept of it. This thesis posits that there are cases where preemptive self-defence is necessary, and the Caroline doctrine, whatever the original intention, is the correct tool for measuring the legality of preemptive self-defence.

We can accept that there is some form of preemptive self-defence in international law, however the question, especially when discussing the Russian use of it, is how the conditions set out in *Caroline* should be interpreted. In essence, how far away does the knife need to be before the attack becomes imminent?

1.1.1.2 Preventive Self-Defence

As mentioned above, I argue that anticipatory self-defence can be reckoned with international law, even in light of Article 51. However, this is limited to anticipatory self defence as preemptive self-defence. Preventive self-defence is much harder to alight with the norms of international law which is why it's almost definitely rejected.[21] And this is why making the distinction between preemptive and preventive self-defence is so important. It is also particularly important when discussing the Russian argumentation surrounding self-defence in their war against Ukraine.

Preventive self-defence distinguishes itself from preemptive self-defence by almost disregarding the principles set out in the Caroline doctrine. Instead of requiring that States "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for

[21] Tamás Hoffmann. War or peace? – *International legal issues concerning the use of force in the Russia–Ukraine conflict*. Hungarian Journal of Legal Studies 24 August 2022

deliberation"[22], the actual threat would not have to be materialised at the time of the armed action.[23]

This distinction is not arbitrary, nor something that should be dismissed. It is essential to highlight the divergence of preventive and preemptive self-defence because this distinction allows for the dismissal of preventive self-defence without dismissing preemptive self-defence. Without making clear definitional differences between preventive and preemptive we risk throwing the so-called baby out with the bathwater.

This issue is not new, and it is not uncommon for authors as well as policy makers to conflate these two forms of self-defence (sometimes intentionally and other times not). In fact Colin s. Gray's *The Implications Of Preemptive And Preventive War Doctrines: A Reconsideration* dives deep into the issues that arise from the conflation of preventive and preemptive self-defence.[24]

This thesis would propose that one of the main distinctions between preventive and preemptive self-defence is temporal. Again, this is of particular importance when discussing Russia's argumentation for its use of armed force in Ukraine. As will be discussed later in this Section, Russia demonstrated no imminence in the so-called threat against itself from NATO and the West. This is of course not the first time that temporal distinction has been posited as a distinction between these two concepts of anticipatory self-defence. However, there is no clear or universally accepted set definitional differences between these forms of self-defence as of yet. So this thesis must make clear what terms it is using for each concept.

If we define preemptive self-defence using the framework of the Caroline doctrine, then imminence is its main defining factor. Preemptive self-defence can be enacted only when there is

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[22] Hunter, M.
[23] Colin S. Gray *The Implications Of Preemptive And Preventive War Doctrines:: A Reconsideration* (2007)
[24] *Ibid*
Gray actually makes an argument that there is a third type of self-defence that can be included when analysing the legal characteristics of anticipatory self-defence: precautionary. In Gray's work, they distinguish precautionary self-defence as "war waged not on the basis of any noteworthy evidence of ill intent or dangerous capabilities, but rather because those unwelcome phenomena might appear in the future." While this third category is interesting, there is almost no argument that this would have any reasonable grounds in international law and is therefore not included in this analysis.

an imminent threat facing a State. On the other hand, I propose, the temporal difference of preventive self-defence means that the threat may exist in the future but is not impending.

By defining these two terms as entirely different, we are more able to effectively discuss the legal standing of each term. And to further exemplify this fact, we can look back to the Osirak attack discussed in the previous subsection. It is important to note that the facts of this case would fall under the definition of preventive self-defence, as opposed to preemptive. While Israel attempted to argue that there were intelligence reports demonstrating that there was development of nuclear weapons in the Osirak reactor, there was not presented evidence of imminence. In this way, the failure to meet the conditions set out in the Caroline test is not an indictment of the concept of preemptive self-defence, but rather further evidence of a temporal difference between preemptive and preventive self-defence.

In both preemptive and preventive self-defence, one of the major concerns that may arise is a potential requirement of *post facto* justification. However, this concern simply exemplifies the necessity of a clear legal framework for anticipatory self-defence, which would allow for preemptive self-defence and not prevenitive.

Another issue that arises from anticipatory self-defence is that of potential abuse. Once again, this is a concern that is much larger with preventive self-defence. However, this concern will be covered more in the following section 1.1.3.

1.1.2. Anticipatory Self-Defence and The United States

It is interesting, when looking into Putin's speech on the 24th of February, 2022, to note that Putin condemns the US invasion of Iraq. It is not surprising that Putin condemns the United States foreign policy in itself, afterall the speech is an attempt to paint the United States and NATO, which he claims is simply a puppet of the United States, as a significant threat to the Russian Federation. What is however interesting is the decision to bring up the Iraqi invasion, specifically how he discusses the reasoning for the invasion. “[The United States] used the

pretext of allegedly reliable information available in the United States about the presence of weapons of mass destruction in Iraq."[25]

Now this in itself is not a particularly odd statement — the United States is frequently criticised, even by its own politicians, for the Iraqi invasion. However the case of Iraq is a classic argument for anticipatory self-defence. It is therefore perhaps notable that Putin criticised the United States fabrication of evidence for the existence of Weapons of Mass Destruction (WMD) as the point that made the invasion inconsistent with international law. In this way, it is possible for Putin to both claim that the invasion of Iraq is a demonstration of the threat of the West and not denounce the underlying premise of the legality of anticipatory self-defence. Thus it is once again important to understand that denouncing the use of force by a state is not necessarily a condemnation or dismissal of the legal concept they are invoking, but rather if they met the necessary conditions for that legal concept.

In fact, the case of Iraq provides significant insight into the idea of armed attack and preemptive self-defence. The United States has long held one of the most liberal policies towards self defence post World-War II.[26]

> "Even as far back as 1946, the U.S. Government stated that the term 'armed attack' should be defined to include not merely the dropping of a bomb but 'certain steps in themselves preliminary to such an action'"[27]

Yet it is hard to recon the invasion of Iraq with the legal qualifications that this thesis proposed should be used to evaluate the legality of anticipatory self-defence in Section 1.1.1.1. The 2002 National Security Strategy, later referred to as the Bush Doctrine, is one of the main examples of anticipatory self-defence, and has shaped the field.[28]. In many ways, it exemplifies the core issues that legal and political scholars bring up when discussing the concept of anticipatory self-defence: the potential for serious abuse and the lack of evidentiary standards. However, this

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[25] Address by the President of the Russian Federation (24 February 2022)
[26] Damrosch, Henkin, Pugh, Schachter, and Smit. p 968
[27] I*Ibid,*.
[28] Miriam Sapiro. *Iraq: The Shifting Sands of Preemptive Self-Defense*. The American Journal of International Law , Jul., 2003,

thesis would argue that these issues, indeed apparent in the Bush doctrine, are not inherent to the concept of anticipatory self-defence. Instead, these issues are mainly due to the categorisation of anticipatory self-defence as a singular concept by conflating what I argue are important distinctions of preventive and preemptive self-defence, as noted previously.

Gray makes note of this fact, by stating that "It so happens, as nearly every scholarly commentator has complained, that the so-called Bush Doctrine of 2002 either deliberately or accidentally misused the concept of preemption."[29]

While Gray is more lenient in this quote, this thesis would argue that there was no 'accidental' misuse of the concept of preemption. Instead, the doctrine relied on the fact that there is a legal foundation of preemptive self-defence, and purposefully attempted to raise preventive to the same level without foundation.

1.1.3 Russian Application of Anticipatory Self-Defence and Future Application

Having thoroughly explored the concept of anticipatory self-defence, we must now look at how Russia has applied anticipatory self-defence at the outbreak of its war against Ukraine, and what that means for the future application of this concept.

As noted above, Putin carefully crafted a narrative in order to both condemn the United States application of anticipatory self-defence in Iraq, but not condemn the concept of anticipatory self-defence. Instead, Putin chose to attack the evidentiary reasons for the use of anticipatory self-defence in Iraq, by classifying the legal issue with the United States action as being due to the ".... fake and a sham"[30] evidence.

This thesis has made a clear distinction between preemptive and preventive self-defence, and claims that preemptive self-defence has a basis in international law, whereas preventive self-defence does not. when looking at the examples that some authors claim show that there is

[29] Gray, p.
[30] Address by the President of the Russian Federation (24 February 2022)

no longer customary law supporting anticipatory self-defence, we see that they have distinctly held a preventive nature. Therefore dismissing the concept is somewhat fallacious. Instead we can draw the conclusion that such a broad application of anticipatory self-defence is clearly inconsistent with today's international law, but a far narrower application may be in line with international law and the Charter.

Certialy under an interpretation that reflects someone such as Brownlie, Russia's actions are a clear breach of international law. However, on applying the concept that this thesis asserts, that preemptive self-defence is in line with international law, we need to look more in depth. So to clarify the legality of Russia's argumentation in favour of their invasion of Ukraine, we must examine which of these two concepts Russia defence would be categorised under.

Firstly, we will examine Russia's actions in light of preemptive self-defence. To do this, we will apply the Caroline test. As discussed above, in order to meet the conditions of the Caroline doctrine, and ask if the threat that Putin stated fulfils its requirements of "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[31] In this analysis we will particularly look at the temporal standards and imminence of evidence as proposed in Section 1.1.1.2 of this thesis.

Considering if the Russian invasion fulfilled these standards is actually relatively simple. Russia presented no evidence of an imminent armed attack by the United States, NATO or another Western power. However, it is not simply the fact that the evidence was insufficient or inadequate. Instead, there was no attempt at presenting an imminent threat. Their argument surrounding the so-called Western threat was focused on the characterisation of Western powers' illegal actions in Iraq, Libya and Syria.

With the absence of any presented evidence that there was an imminent threat to the Russian Federation, it must be applied that the Kremlin relied on the preventive self-defence argument for its military action. Indeed, this would fit with the fact that Putin specifically denounced the

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[31] Hunter, M.

evidentiary methods that the United States used to justify its invasion of Iraq instead of the actual legal concepts that the United States applied.

One can certainly see why Russia would choose to craft a narrative in which it does not denounce an attack on the grounds that preventive self-defence does not meet high enough of a standard to constitute legal anticipatory self-defence. In fact the threat that Russia claims exists is so far from materialised that it seems to even fall short of the already low standards to be seen as preventive self-defence.[32]

And so this thesis could conclude with the statement that Russia clearly violated international law in their application of anticipatory self-defence. However, this should be further examined as to how and if anticipatory self-defence can truly be used in international law. Instead of claiming that the distortion of international law is a reason that anticipatory self-defence should not be a normative legal concept, this thesis would argue that it simply serves to demonstrate why there needs to be more distinction between preemptive and preventive self-defence, as well as clear defined standards for preemptive self-defence. In order to prevent the abuse of preemptive self-defence it should be held up to the standard of temporal imminence.

As mentioned earlier in this chapter, both of these concepts of anticipatory self-defence raise the potential issue of abuse — somewhat perfectly demonstrated by Russia's application. However, Russia's application highlights the fact that this is significantly more prominent if the concept of preventive self-defence were to be accepted in international law. In reality, the potential manipulation of facts is not a particularly strong argument against a legal norm; after all any legal rule may be manipulated by a distortion of facts. Instead, we can look at the ease of abuse.

By implementing a clear and concise definition as well as particular conditions that must be met, preemptive self-defence can keep all of the benefits of allowing for defence in the modern world without allowing for the potential misuse of the lack of temporal standards that exist with preventive self-defence.

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[32] See footnote 18

1.2 Collective Defence

On February 21, 2022, the Russian Federation officially recognised the Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) as independent States.[33] This recognition also led to the conclusion of the Treaties of Friendship between Russia and the DPR and LPR being ratified.[34]

This recognition would lay the foundation for another one of Russia's arguments for their use of force: collective self-defence. Article 4 of the Treaties explicitly laid out the right and obligation to exercise collective self-defence of the contracting parties:

> "The Contracting Parties shall jointly take all measures within their power to remove threats to peace and breaches of the peace and to counter acts of aggression perpetrated against them by any State or group of States, and shall afford one another the necessary assistance, including military assistance, in the exercise of the right of individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations."[35]

On the same day, both the DPR and LPR formally requested assistance, a prerequisite of collective self-defect. And it was with this request that Russia used to justify deploying armed troops into the Donbass region.

Now, it is important to note that the DPR and LPR, despite Russia's attempt at recognition, are not independent States, but rather areas of Ukraines sovereign territory. This in itself creates an issue with any attempted use of collective self-defence. Collective self-defence applies to States, and from a legal perspective the DPR and LPR are not States.

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[33] *Ukraine: Putin Announces Donetsk and Luhansk Recognition*. *BBC News*, BBC, Available online: https://www.bbc.com/news/av/world-europe-60470900.

[34] *The State Duma Ratified Treaties of Friendship with the Donetsk and Lugansk People's Republics. The State Duma*, 22 Feb. 2022, Available online: http://duma.gov.ru/en/news/53516/.

[35] Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Donetsk People's Republic Art 4, Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Luhansk People's Republic Art 4,

Russia recognises the DPR and LPR as states under the guise of self-determination of peoples. However, the usage of self-determination will be further discussed in chapter 2 of this thesis. This creates a limit on this chapter for discussing the collective defence argument, however it will be elaborated on further in chapter 2. Instead of focusing on the aspect of collective self-defence in regards to the legitimacy of the DPR and LPR this chapter of the thesis will discuss collective self-defence in all other aspects, in line with the method laid out in the introduction: defining the concept and it's legal framework, discussing what issues arise in their application in international law, discussing Russia's use of the concept as a justification for their armed force in Ukraine, and proposing how these concepts should be used in international law.

1.2.1. Historical Development of Collective Defence

One of the essential elements of a State's very existence is that of a defined territory.[36] This is not only part of the modern definition of a State and what is needed to be accepted by the international community as a State, but also one of the only ways that a State has been able to effectively function throughout history. It is, therefore, unsurprising that international law discusses how a State can gain and protect its territory.

State territory throughout history has been relatively volatile. The lines of where a State's territory began and ended were frequently changing, and there were a variety of ways that States could acquire new territory. "Little legal emphasis was placed on the mode of acquisition; instead, the focus was on effective occupation of the territory in question since good title to land could only arise after it was effectively occupied."[37] It was not uncommon throughout history for States to gain territory through force, and it was seen as the responsibility of a State to protect their territory from being conquered, rather than the responsibility of a State not to take another State's territory.

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[36] Williams, Paul R. "What Makes a State? Territory." Proceedings of the ASIL Annual Meeting, vol. 106, 2012, pp. 449–450., doi:10.5305/procannmeetasil.106.0449.

[37] Hough, William J.H. "The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory." New York Law School Journal of International and Comparative Law., vol. 6, ser. 2, 1985, pp. 301–533. 2, Available Online: https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1213&context=journal_of_international_and_comparative_law.

The late 19th and early 20th centuries saw the birth of some of the most important treaties in international law today. In 1899 and 1907 the Hague conventions established a series of treaties governing war. Notably, however, they failed to mention territorial changes through the use of force.[38] In 1914 the world plummeted into the First World War, and it was not until 1917, near the conclusion of the war, that a universal idea of prohibiting annexation was proposed.[39] In 1919, following the conclusion of WWI, the League of Nations was formed. It was in the founding document of the League of Nations that we saw the first universal declaration of territorial integrity enshrined into international law, namely in Article 10 of the Covenant of the League of Nations.[40]

Although the concept of some sort of group defence was not new at this time — indeed allied nations had been helping defend territorial integrity for much of history — the development of the League of Nations and international law prohibiting the forcible seizure of territory began the development of the legal concept of collective defence as we see it today. The destruction left by the First World War created both a need and a desire for the protection of international peace and security. Indeed, this was the purpose of the League.

The League of Nations, in its effort to maintain international peace and security, also began to develop the first actual system of collective security.[41] "By establishing a bond of solidarity between Member States, the League is considered the first attempt to build a system of collective security. This principle relied on a simple idea: an aggressor against any Member State should be considered an aggressor against all the other Member States."[42]

It was in fact the idea of maintenance of peace and security that drove the idea of collective security. This was because peace and security began to become the obligation not of only a singular nation, but a collective responsibility. This can be seen, for instance, in the

[38] Hough, W. p.

[39] Treaties and discussions of prohibiting annexation, respecting the right of territorial sovereignty, and non-recognition of annexed territory by States did exist prior to 1917. However, those were mostly seen in regional agreements and conferences. It was not until 1917 that these principles began to impact universal international law.

[40] League of Nations, Covenant of the League of Nations, 28 April 1919

[41] "The League of Nations." *UN GENEVA*, https://www.ungeneva.org/en/library-archives/league-of-nations#:~:text=By%20establishing%20a%20bond%20of,all%20the%20other%20Member%20States.

[42] *Ibid*

Kellogg-Briand Pact. This pact not only emphasised the idea of territorial integrity through the denouncement of war, but also emphasised that peace was a collective idea.[43]

This, along with the League of Nations demonstrated a shift in the idea of responsibility for protection of peace, and laid the groundwork for collective self-defence as we see it today. However, it was also a demonstration of the failure of collective security. Despite these developments, World War Two still broke out. The concept of collective security and responsibility did nothing to stop the war, and in fact highlighted one of the major criticisms of collective security that exists to this day: powerful nations are able to abuse their position of power in the international community to stop other states from keeping them in check.

World War Two saw the breakdown of the League of Nations, and the war itself began to influence the idea of what collective defence meant. With the formation of the United Nations came a new legal framework for collective defence. While there were still collective surety measures that the United Nations could take, the concept of collective self-defence became an important pillar in collective security.

1.2.2 Collective Defence Today

Today, the legal framework for collective defence is enshrined in the Charter of the United Nations (the Charter). As the fundamental principle of the United Nations is to maintain international peace and security, one of the key concepts enshrined in the Charter is the prohibition of the use of force.

> "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."[44]

While the Charter, and the United Nations itself is designed to protect international peace and security, it does allow for the use of force in some, limited circumstances. Namely, the Charter

[43] Kellogg-Briand Pact 1928
[44] 1 UNTS XVI, preamble

allows for self-defence against an armed attack. This extended to the idea of collective self-defence. It also allows for collective security measures to be undertaken up member states, under the authority of the Security Council, such as sanctions. Finally, The Charter bestows the Security Council the power to authorise the use of force in situations that threaten international peace and security.

> "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 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."[45]

However, The Charter is not the only way that the United Nations has governed collective defence. The Security Council has adopted several resolutions that affirm the right to collective defence. Resolution 1368, which was a condemnation of the 2001 terrorist attacks in the United States of America, recognises "the inherent right of individual or collective self-defence in response to the terrorist attacks"[46]. This resolution served both to affirm Article 51 and to clarify its application.

In addition to the United Nations, regional international organisations also play a significant role in collective defence. For example, NATO, established in 1949, is a military alliance of 30 North American and European countries that provides collective defence against security threats to its members.[47] The organisation's principle of collective defence is embodied in Article 5 of the North Atlantic Treaty, which states that an attack against one member state will be considered an

[45] 1 UNTS XVI, Article 51

[46] Security Council resolution 1368 (2001) [condemning the terrorist acts of 11 September 2001 in New York, Washington, D.C. and Pennsylvania, United States]

[47] "About NATO." *U.S. Mission to the North Atlantic Treaty Organization*, 28 July 2021, https://nato.usmission.gov/about-nato/#:~:text=Formed%20in%201949%20with%20the,by%20political%20and%20military%20means.

attack against all member states.[48] In this way, NATO reflects a similar stance towards collective defence as what was established by the League of Nations.

In recent years, there has been an increasing focus on the role of collective defence in non-traditional contexts, such as cyber attacks. Of course the Charter could not predict the means and methods of force that would be used in the future, and as the world and methods of warfare rapidly change legal experts have begun to need to develop new means of clarifying how collective defence is used in the 21st century. New legal principles and frameworks to address the unique challenges posed by cyber warfare have been developed. The Tallinn Manual 2.0 on the International Law applicable to Cyber Operations, which is a non-binding guide to the application of international law to cyber operations, provides guidance on the use of force in self-defence in the cyber context.[49]

Summarily, the current legal framework for collective defence is primarily based on the United Nations Charter and relevant Security Council resolutions. The principle of collective defence is also embodied in the activities of regional organisations such as NATO. The concept of collective defence is adapting to new security challenges, such as cyber attacks, and new norms and principles are being developed to address these challenges.

1.2.3. Use Of Force And Collective Defence

When discussing the use of force and collective defence, we look to the same legal framework as set forth above for self-defence, as well as the right to intervene.

Self-defence, as noted above, is prescribed in Article 51 of the United Nations Charter, and permits the use of force, which is generally prohibited, in cases of self-defence when a state is under armed attack. The International Court of Justice has additionally affirmed in the Nicaragua v. United States judgement that the right to self-defence is not only codified within the Charter, but also enshrined as a part of customary international law.[50] However self-defence is not an all

[48] The North Atlantic Treaty. Washington D.C. - 4 April 1949
[49] Tallinn Manual On International Law Applicable To Cyber Warfare. Michael N. Schmitt ed., 2012
[50] *Nicaragua judgement*

encompassing defence for any and all acts of force when under attack. Not only do acts of self-defence still need to comply with international humanitarian law, they also must fulfil certain conditions.

In the same Nicaragua v. United States judgement as mentioned above, the ICJ established some of the conditions that self-defence must comply with. This judgement upheld that part of customary international law is that self-defence must be both necessary and proportionate.

"Necessity and proportionality operate to limit the right to use force in self-defence in two ways. The first bears on the question of whether a use of force is necessary at all, particularly where there are alternative (peaceful and diplomatic) mechanisms for protecting a State's fundamental interests. The principle of proportionality then operates in tandem with the requirement that a use of force in self-defence be necessary, namely that the defensive force be tailored, and not go beyond what is necessary to halt or repeal the armed attack to which it is responding"[51]

1.1.4 Russian Application of Collective Defence and Future Application

Another implication is the possibility of abuse of the collective defence principle, it can be used as a pretext for states interest, or used to justify military interventions that are not truly in defence of another state.

This is what we see in the case of Russia's invasion of Ukraine. While it is important to note that legally states are not necessarily able to use collective defence as a false pretext for invasion, they are able to do so politically. Yet it would be reductive to think that politics does not play a significant role in international law. On one hand it is the goal of international law to create obligations and standards for States, regardless of their political objectives. Yet international law is premised on State consent, and without any primary enforcement body its application is reliant on a States desire to comply with its standards. So, the political nature of decisions surrounding

[51] Kimberley N Trapp. *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors.*

collective defence must be considered alongside the exact legal framework. They can not, in many ways, be separated.

Let us, for a moment, suspend the issues with the lack of statehood on the DPR and LPR. We must be cautious in this approach. Afterall, Russia's argument invoking collective self-defence necessarily wants us to ignore the issues with lack of Statehood. In this case we can immediately say that Russia's actions are not consistent with international law — not Statehood means no right to collective self-defence. However, as the aim of this thesis is not only to answer the legality of Russia's actions but also to analyse their use of these concepts, it is necessary to examine the other implications of their use of force. What is important to examine when discussing the use of collective self-defence in the DPR and LPR is the fulfilment of other criteria for collective self-defence. As laid out above, two of these conditions are necessity and proportionality.

This is somewhat difficult to assess, as in fact Russia has provided no clear claim as to what actions the use of military force was necessary to stop. If the argumentation for individual anticipatory self-defence were vague, the argumentation for the necessity here is almost non-existent. In fact, the recent European Court of Human Rights case Ukraine and the Netherlands v. Russia decided that DPR and LPR were under the jurisdiction of the Russian Federation for over 7 years - from the 11th of May 2014 to the 26th of January 2022.[52] So what was necessary, when the regions were already under Russian jurisdiction, is unclear.

Further, both the principles of necessity and proportionality in this case beg unanswered questions. What was the necessity to attack regions outside of the DPR and LPR, namely Kyiv? Putin repeatedly claimed a need to rid what they call a Nazi regime in Ukraine, yet this certainly would not create a necessity for intervention outside of the DPR and LPR that they claim to defend. Further, what is proportionality measured against in this case?

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[52] Eastern Ukraine and flight MH17 case declared partly admissible, *Press Release*. European Court of Human Rights.
In fact the Court did not find that the regions were not under control of the Russian Federation only until 26 January 2022. Instead, the date of 26 January 2022 reflects the date of the hearing of the admissibility of the case and only considered evidence up until that date.

So, even when we exclude the lack of statehood of the DPR and LPR and apply the conditions of necessity and proportionality, Russia's use of force still does not meet the standards of collective self-defence in international law.

It is clear that Russia's claim to collective self-defence is not consistent with international law. However, this thesis does not aim simply to decide whether Russia acted consistently with international law or not. Now, unlike the anticipatory self-defence discussed in the earlier chapter, there is no argument about the legality of the legal concept of collective self-defence. It is clearly embodied within the UN Charter, and has been affirmed in numerous court decisions. But that does not mean that analysing Russia's use of collective self-defence cannot add insight into the application of collective self-defence and potential issues.

In particular, the use of force in collective defence is contingent on the aforementioned rules of self-defence set out in the Charter and customary international law. But just because it is sanctioned by international law does not mean that it comes without serious questions as to the effectiveness and positive qualities of collective defence. Namely, it can raise questions about state sovereignty and the principle of non-interference. This is double edged. As mentioned earlier, collective defence in many ways was developed alongside the idea of state sovereignty and the prohibition of the use of force for gaining territory. Yet, the exercise of collective defence itself can raise questions about sovereignty. This dichotomy is particularly interesting, yet not unique to collective defence. Indeed, most of international law is a balancing act of protecting sovereignty yet being required to give up sovereignty to participate in the system.

Additionally, the use of force in collective defence can also raise issues related to the responsibility to protect. This principle, established by the United Nations in 2005, holds that states have a responsibility to protect the population within their own borders, as well as the population of other states, from serious human rights abuses.[53] The use of force in collective defence may be justified under the responsibility to protect principle, but it can also raise

[53] "United Nations Office on Genocide Prevention and the Responsibility to Protect." *United Nations*, United Nations, https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml.

questions about the legitimacy of such interventions and the potential for abuse of the principle. The Responsibility to Protect and its implications is further explored in the third chapter.

The use of force in collective defence can have significant implications for international relations, as it may lead to tensions and conflicts between states, and may impact the balance of power in the international system. Once again, as a major enforcement mechanism of international law is political pressure to comply with it. Due to the imbalance of power between states this means that some actors need to comply with the law more than others. It is important that the use of force in collective defence is carefully considered and carried out in accordance with the principles and rules of international law.

The use of force in collective defence raises a number of legal and political implications. It is important that the legal framework limits how it can be exercised, and implements the restrictions of necessity and proportionality. Having limits based on necessity and proportionally helps to ensure that collective defence is not abused as an excuse for the use of force. However, these principles can only be used insofar as there are appropriate enforcement measures. In perhaps an ironic twist, it is the collective security of states that keeps in check the appropriate use of collective defence.

2. SELF-DETERMINATION OF PEOPLES

Russia has long justified territorial acquisition through force through the lens of self-determination. In the past 20 years Russia has used self-determination as a justification for military force in several regions, including Georgia and Ukraine. And their use of terminology regarding recognising the independence in Donetsk and Luhansk allude heavily to the same policy of self-determination. Embedded in both their political approach and attempted legal justification are sentiments that the people of the regions want to join the Russian Federation. This is also demonstrated by their so-called votes in occupied regions, where Russia claims a majority of the region has voted to leave Ukraine.

Yet self-determination is a tricky subject in international law. It has been cemented as a fundamental principle of international law, as both a customary norm and having been codified in several international treaties.[54] However, what exactly self-determination is and how it is used is often convoluted, and different States approach it in different ways.

The two most notable instrumental international instruments for the codification of self-determination are the International Covenant on Civil and Political Rights (ICCPR) and the Charter of the United Nations.

The ICCPR, Article 1 states

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[55]

The Charter also recognises self-determination as a principle of international law. It makes specific reference to self-determination in Chapter 1, Article 1, Paragraph 2:

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[54] Jörg Fisch (9 December 2015). A History of the Self-Determination of Peoples: The Domestication of an Illusion. Cambridge University Press.

[55] *International Covenant on Civil and Political Rights.* Treaty Series, vol. 999, Dec. 1966,

> "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen univer-sal peace;"[56]

Despite their mention of self-determination, neither convention actually defines what self-determination is or how it works within international law. In essence, self-determination boils down to an idea that a people have the right to determine their own sovereignty and how they are governed. But what exactly that means is not always clear. Does self-determination allow for the succession of territories, or does it allow only for internal decisions as far as culture and governance? Self-determination has been recognised as a reason for succession of territory, for but only with the consent of the state in which the territory has succeeded from.

It is important to note that self-determination is not only a legal concept, but a political concept. James Ker-Lindsay argues that "Instead of statehood, self-determination has been conceived of in terms of a right to self-government within the existing boundaries of a country"[57] It is, in some ways, disappointing that this chapter cannot provide a strict legal definition of self-determination. Does it apply to only internal governance, as Ker-Lindsay suggests, or does it also allow for secession? As was discussed in the previous chapter of this thesis, when Russia recognised the independence of the DPR and LPR, they stratified the Treaties of Friendship, Cooperation and Mutual Assistance.

Self-determination, as far as international law is concerned, does not subvert the principle of territorial integrity or sovereignty. In the modern ways self-determination has been invoked to justify the secession of territory; it has included the consent of the main state. It is unclear as to if self-determination is internal or external, and if self-determination applies to territorial decisions.[58] States have an averring approach to self-determination, which will be examined in this thesis.

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[56] *Nicaragua judgement*
[57] Ker-Lindsay, *Never Mention Self-Determination*
[58] Meissner, Boris. *The Soviet Concept of Nation and the Right of National Self-Determination*. International Journal. Vol. 32, No. 1, Communism. Winter, 1976/1977

While the consensus and theories of self-determination on an international level are of course important, what is particularly relevant in today's thesis is how Russia approaches self-determination.

As was discussed in the previous chapter of this thesis, when Russia recognised the independence of the DPR and LPR, they stratified the Treaties of Friendship, Cooperation and Mutual Assistance. Both the recognition of the DPR and the LPR are an assertion of self-determination. Further, their legal status is imperative to the argumentation of Russia when using collective self-defence. Therefore understanding self-determination, and in particular the Russian approach to self-determination, is important not only to understand the argumentation of self-determination but also collective self-defence.

2.1 Evolutions of The Russian Approach To Self-Determination

2.1.1. Early Stages of Self-Determination In Russia

Self-determination, in its early stages, was viewed as a right of cultural determination.[59] The right of people to determine their cultural identity was therefore not in conflict with the right of the state to make sovereign decisions, at least within the context of international law.

In 1912 the Bolsheviks formed an official party in Russia, and by 1917 they had taken over from the Tsarist regime. At the end of the Tsarist regime and beginning of Bolshevik rule there were many parts of the Russian empire that seemed almost predestined for autonomy. The Baltic states, consisting of Estonia, Latvia, and Lithuania, were vying for independence. In the early days of the Bolsheviks they were granted just that.

As the Baltics declared independence from Russia the Bolshevik response was clear: self-determination allows for former Russian empire territories to separate from Russia. Bolshevik leaders, during this time, even stated that territories were able to leave Russia if they

[59] Jörg, F.

so desired.[60] Their view on self-determination was collective and territorial, giving the right of a majority population to decide on their territorial independence.[61]

"***It was not, at least primarily, a question of individual rights, but rather the highest right of the peoples, of sovereignty and of political independence"

In 1918 US president Wilson released the '14 points', which, to an extent, replied to Lenin's 1917 decree on peace[62]. It emphasised the right of self-determination of peoples. Although these statements were pre cold war, the political conflict between Russia and the United States is clear in these indirect discussions. While both the United States and the Bolsheviks stated their recognition of self-determination, they did fundamentally differ. Namely, Wilson's 14 points emphasised that self-determination was "not a mere phrase; it is an imperative principle of action"[63], the Bolsheviks contrastingly emphasises that while self determination was a right there was no obligation to exercise it.

It is interesting to see this opposing view on self-determination from two states that held vastly different political structures. However, it is also important to note that these were outward statements. While the Bolsheviks did allow for self-determination to be exercised, the political climate of the newly formed government should be addressed. The Bolshevik statements and use of self-determination were during a time of great political change in Russia, following the collapse of the longest ruling empire in the country. This collapse was not due merely to economic matters, although these did play a significant role, but mass revolution by the citizens of the country. The ability of the Bolsheviks to maintain a ruling power in Russia was, at the time, still premised on the acceptance of their rule by the people. Richard Pipes asserts that Lenin was willing to make political concessions in order to assure the long-term benefit of the party.[64] The United States at the time did not face the same issues.

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[60] Jörg, F.
[61] *Ibid,.*
[62] "Wilson's Fourteen Points, 1918 – 1914–1920 –Milestones – Office of the Historian"
[63] *Ibid,.*
[64] Pipes, Richard (1995), A concise History of the Russian Revolution

2.1.2 Self-Determination During The Soviet Era

However Russia's allowance of self-determination from their territory did not last long, and almost as quickly as they had allowed for self-determination and signed peace treaties they began a campaign to reintegrate territories. Independent attempts were made to reintroduce former Russian territories throughout the 1920's, but the major shift in the Russian state approach to self-determination was marked by the beginning of Stalin's leadership, and by the beginning of the 1940s Russia had begun to dissolve the territories it had allowed to succeed in the early days of Bolshevik leadership.

Part of this change was due to an increase and change of definition of Russian nationalism.[65] The so-called re-unification of the Russian empire was an exercise in patriotism, and almost framed as a saviour of the territories that gained independence under Lenin's rule.[66] Yet it is important to note that Stalin's annexation of states was not originally framed as a reversal of self-determination policy, but rather as consensual reunification.[67] Additionally, part of the annexation of states included a 'russification' of states now under soviet control. Again, this was labelled as part of Soviet patriotism.

By the 1960's there was a push towards self-determination in the international sphere, however this was in the context of decolonisation.[68] Soviet leadership referred to nations in two distinct ways--- Soviet nations and so-called 'bourgeois' nations.[69] This dichotomy in recognition of types of states allowed them to recognise the right of self-determination in relation to decolonisation of nations from Europe, while simultaneously claiming that there was no need for self-determination within the Soviet empire. This division is emblematic of how Russia often approaches international law today-- with different rules for itself than for other states.

[65] Meissner, B.
[66] *Ibid*
[67] *Ibid*
[68] Ker-Lindsay
[69] *ibid*

2.1.3 The Fall of The Soviet Union And Self-Determination

When the Soviet Union dissolved, there was significant international discourse as to the status of the Baltic states: were they newly formed territories, or were they being restored to their pre-WWII states? The consensus of the international community was clear: their occupation during Soviet rule had been illegal and they were now merely restored states. However, Russia's response differed, claiming that they had not been illegally annexed and that they consensually succeeded in 1991.[70]

2.2. Russia And Self-Determination Today

The current international legal paradigm does not view the right of self-determination as a right of succession.[71] Russia seems to agree with this consensus when it comes to territories leaving Russia, but applies it as a right to succession if it will give them the possibility to gain more territory.

Since the early 2000's Russia has attempted to assist in the succession (and Russian integration of) several territories. It is the legal justification for this that is of particular importance: these territories are not succeeding, but rather are pre-existing states. This justification was used in 2014 by Minister Sergey Lavrov,[72] and again in Putin's speech when invading Ukraine in February 2022.[73] Russia's reference to self-determination has consistently referenced the historical and political background of territories as opposed to the idea that they are new states seceding from a territory. It should be noted that much of the historical territorial claims of Russia have been false. However their claims lack a factual basis and only emphasises their approach to self-determination under international law: self-determination of territory is only

[70]Socher, Johannes. Russia and the Right to Self-Determination in the Post-Soviet Space
[71] *Ibid*
[72] *Ibid*
[73] "Address by the President of the Russian Federation." *President of Russia*, 21 Feb. 2022, http://en.kremlin.ru/events/president/news/67828.

valid when that territory is reclaiming their independence, or that self-determination is of particular benefit to the Russian federation.

2.2.1. Remedial Secession and the Case of Kosovo

Furthering the point that Russia employs the framework of self-determination when it is beneficial to their interests, we can look to the idea of remedial secession and Russian statements in the 2009 Kosovo ICJ case.

Remedial secession is directly linked to the idea of self-determination, and if that self-determination can be applied to external self-determination without the consent of the so called parent state.[74] This is, most famously, addressed in the 1998 Quebec case. In the case, the Canadian Supreme Court found that external self-determination is permissible only in "the most extreme of cases and, even then, under carefully defined circumstances"[75]

This remedial secession approach to self-determination is not, however, broadly accepted in international law. Yet, quite similar to the concept of unqualified self-determination, it is also not dismissed as a legal concept. Indeed, little substantive law, including court cases or treaty interpretations, have addressed the concept of remedial secession. Jure Vidmar argues that the concept of remedial secession does not have enough evidence to suggest an international legal doctrine, however it can influence State policy on the recognition of new States.

In this, we can look to the International Court of Justices advisory opinion on the unilateral declaration of independence in respect of Kosovo, which sought to answer the question "'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law ?'"[76]

Firstly, we can look to the written statement of the Russian Federation to understand the approach Russia takes towards self-determination and remedial secession. Perhaps most

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[74] Parent state referring to the State whos territory a new State wishes to secede from.
[75] The Quebec case (1998)
[76] *Overview of the Case.* Kosovo Advisory Opinion. Available online: https://www.icj-cij.org/case/141

importantly, Russia argued in favour of an interpretation of external self-determination in line with the concept of remedial secession.

> "outside the colonial context, international law allows for secession of a part of a State against the latter' s will only as a matter of self-determination of peoples, and only in extreme circumstances, when the people concerned is continuously subjected to most severe forms of oppression that endangers the very existence of the people;"[77]

However, the court did not answer this argument in its advisory opinion. In fact, they specifically made note of the fact that the existence of self-determination and so-called remedial secession, arguments that had been brought out during proceedings not only by Russia but by other States as well, would not be addressed by the advisory opinion, and questions relating to the extent and usage of self-determination or remedial secession were beyond the scope of the advisory opinion.

Instead, the Court addressed the issue only from the standpoint of general principles of international law, concluding that "general international law contains no applicable prohibition of declarations of independence."[78]

2.3. Russia's Application of Self-Determination In Ukraine and Future Application

Russia's application of self-determination in the DPR and LPR at the onset of its war against Ukraine highlights not only the ambiguity but also the serious issues surrounding self-determination as a concept in international law. In particular, it highlights the issues with application to one State and not another.

It also serves as an example of the issue of potential abuse, should we accept external self-determination or remedial secession. To this end, René Värk "Russia either incites or manipulates the local population to exercise their alleged right to self-determination and to

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[77] International Court of Justice, "Written Statement by the Russian Federation", 16 April 2009

[78] International Court of Justice, "Accordance with international law of the unilateral declaration of independence in respect of Kosovo" Advisory Opinion, 22 July 2010

establish a separatist state".[79] And this statement is certainly true. There is no doubt that Russia has, and continues to, attempt to exploit the idea of self-determination in order to achieve its own political aims. This is further evidenced by its exploitation of self-determination in order to attempt to use collective self-defence as a justification for its use of armed force in Ukraine.

Consequently, we can look back to the issues raised in the first chapter of this thesis regarding collective self-defence. As discussed in that chapter, collective self-defence is a right conferred onto States to request assistance from other States (and participate in) armed force activities for the purposes of self-defence. With the light of application of self-determination, it is clear that the DPR and LPR do not possess legal statehood in order to exercise collective self-defence.

Yet it would be a disservice to look at these abuses of self-determination and conclude from it that the right to external self-determination should not exist. Conversely, I argue that the Russian application of, and subsequent abuse of, the right to self-determination highlights the need for there to be increased clarity and codified law surrounding when and how self-determination may be used to justify unilateral declarations of independence and secession.

I argue that external self-determination is a necessary principle, yet it indeed needs a more substantive legal framework to be adequately applied. We can look back to the Bolshevik era views on self-determination contrasted with Wilson's 14 points to emphasise how inconsistent the interpretation of self-determination among States has been for so long. It is this early division of ideas that had led to the long term effect of lack of clarity in international law.

And yet we know that regions will continue to attempt to secede from their parent States. In fact, one may argue that the concept of self-determination is not even possible to understand without territorial dispute. Perhaps self-determination as a concept can historically be understood without inclusion of territorial dispute. To be more precise — at one point self-determination can be, and was understood this way. However, this is not true in the modern understanding of the concept of self-determination. From the side of international law, self-determination is a question of territory. Political theory, while not necessarily needing to embrace the definitions of

[79] Värk, R.

international law, does exist within the same sphere. In the case of self-determination this is especially true — both the political and legal concept developed side-by-side. Even when discussing self-determination in a case without territorial dispute, it cannot be understood without considering the territorial aspect. Afterall, the modern idea of self-determination was born out of territorial disputes and conflict, and thus it is not possible to fully separate the concept from territorial disputes. It is coloured by a history and evolution which make the concept of self-determination what it is today, and to view self-determination without this would mean not fully viewing self-determination for what it is.

And so to reconcile this fact, this thesis would propose some necessary conditions that should be met in order to exercise external self-determination:

1. The potential new State must submit an official declaration to the United Nations
2. The potential new State must be able to fulfil the requirements of permanent population and defined territory as defined by Philip C. Jessup
3. The potential new state must demonstrate a capacity to effectively self govern if given statehood
4. The potential new State must be able to demonstrate a capacity to engage in relations with other states if given Statehood
5. The United Nations will conduct an impartial referendum within the potential new State. The referendum will only be accepted if at least 60 percent of adults aged 18 and up vote in the referendum, and a supermajority vote [80]for the independence of that territory.
6. A foreign force, defined as a force associated with a State other than the parent State, must not have been occupying the territory for at least 1 year prior to the referendum.

These conditions, of course, are not perfect. However, they would allow for the recognition of external self-determination and eliminate many of the issues with the Russian application of self-determination in their argumentation to justify its war against Ukraine.

[80] A vote of at least ¾ majority.

3. HUMANITARIAN INTERVENTION

As established earlier in this thesis, the legal framework for threat of or use of force is distinctly limited. Afterall, State sovereignty must be upheld unless there is a direct threat to another State. If we accept the premise that State sovereignty should only be violated when there is a substantial threat, the question becomes if that threat must be to another State; or can sovereignty be violated if the threat is internal and towards those living within the State?

In the case of Ukraine, Russia argues yes, that a serious threat towards those living in a sovereign territory can be so great as to allow the use of force to protect those people. In this case, Russia argues that the existence of a genocide committed by the Ukrainian government allows them to exercise humanitarian intervention by putting boots on the ground in Ukraine in an effort to stop the genocide.[81]

> "Its goal is to protect people who have been subjected to bullying and genocide by the Kiev regime for eight years. And for this we will strive for the demilitarisation and denazification of Ukraine, as well as bringing to justice those who committed numerous, bloody crimes against civilians, including citizens of the Russian Federation."[82]

Now, the 2022 invasion of Ukraine was not the first time that Russia made claims of human rights abuses and genocide of Russian speakers in Ukraine — in fact this rhetoric has been used for decades. Russia attempted to frame both their 2008 invasion of Georgia and 2014 annexation of Crimea as legal using the guise of humanitarian intervention.[83]

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[81] Supra note
[82] *Ibid*
[83] Alexander Hinton *Putin's Claims That Ukraine Is Committing Genocide Are Baseless, but Not Unprecedented.* The Conversation, 11 Apr. Available online: 2023,https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unpreced ented-177511.

These claims are far from factual, and there has been no internationally accepted evidence of any genocide of Russian speakers in Ukraine. However, the claim of genocide necessitates the analasis of humanitarian intervention.

3.1. Legal Framework for Humanitarian Intervention

In order to assess if humanitarian intervention is a valid premise for *jus ad bellum*, we must first look to the legal framework which would determine if it is consistent with international law or not. Afterall the concept is not universally accepted as legally permissible.

It is firstly imperative to distinguish the concept of humanitarian intervention from the Responsibility to Protect. These two concepts are often spoken about in the same breath, consequently meaning that they are often conflated with each other. This is a serious issue, considering that R2P is well grounded within international law, whereas humanitarian intervention is not. It is this lack of distinction that some would argue was used by Russia in order to attempt to justify their actions at the outbreak of its war against Ukraine. Värk writes:

> "Russia misrepresents the concepts of humanitarian intervention and responsibility to protect, unfortunately, finding sympathy from many politicians and academics, as well as from some states."[84]

Responsibility to protect was officially endorsed at the 2005 World Summit, through the adoption of UNGA resolution 60/1[85], and further confirmed the R2P in UNGA resolution A/Res/63/308.[86] This resolution indeed provides that there is some form of responsibility for states to protect against egregious crimes and human rights abuses.

Generally, the R2P is accepted to be divided into three pillars:

I. States must protect their population

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[84] Värk, R.
[85] UNGA A/Res/60/1
[86] UNGA A/Res/63/308

II. States undertake to assist other States in their protection of their population (through peaceful means)
III. Should a State fail in its responsibility to protect their population, other States should take collective action in order to ensure protection.

It is this third pillar that has, for the most part, created the ambiguous wording that those with ill intent use to justify military intervention. Afterall, the third pillar does allow for collective action, including *jus ad bellum* in the case that a State is not protecting its population. However, it is this third pillar that does actually create the functional difference between R2P and humanitarian intervention: UN Security Council authorisation.[87]

The concept of humanitarian intervention subverts the need for UN Security Council authorisation, and instead utilises the idea that a State may act unilaterally in order to protect a population. This unilateral nature is what makes humanitarian intervention so controversial, and will be discussed throughout the rest of this chapter.

3.1.1. The Moral Imperative to Intervene

The concept of humanitarian intervention is hotly debated as a legal justification for *jus ad bellum*. Although it was used throughout the 19th century,[88] there are several issues regarding how it fits within the framework of the United Nations. The concept of humanitarian intervention itself is a challenge to the established norms or state sovereignty.

Much like the concept of self-determination explored in the second chapter of this thesis, humanitarian intervention as a concept seems to hinge not only on the legality of the action, but also on some concept of morality and ethics. Those who are proponents of humanitarian intervention often rely not only on specific legal doctrine but the idea of some sort of moral imperative to intervene and prevent atrocities from occurring. Humanitarian intervention perhaps

[87] UNGA A/Res/60/1
[88] Damrosch, Henkin, Pugh, Schachter, and Smit. p 992

highlights one of the biggest issues within international law — the conflict between legal, moral, and political aspects of state action.

So to explore the legal framework of humanitarian intervention, we must attempt to create a distinction between moral imperative, which is often extralegal, and legal imperative for intervention.

These two concepts are often separate by defining the moral and political aspect to "responsibility to protect" and humanitarian intervention. Shane Reeves makes this distinction when discussing intervention in Syria, with the following:

> "Based upon the same theoretical underpinnings as the concept of Responsibility to Protect ("R2P"), but not limited by the same pragmatic limitations, humanitarian intervention provides a distinct legal basis for the use of force when there is a moral obligation to protect victims of war crimes, genocide, or other crimes against humanity. Humanitarian intervention unlike R2P, thus allows for a unilateral use of military force based solely upon the moral imperative to stop an ongoing crisis"[89]

I often find it important, when discussing the moral underpinnings on international legal concepts, to first examine how these same principles would be applied on a micro scale before extrapolating them to the macro scale of international law. To this end, we can look at how we apply moral imperative to intervention on private property.

Within the concept of private property, it is generally accepted that one may act as they like within the confines on their property. However, one may also generally accept that there are actions that an owner of private property may take that would be so immoral that others may reasonably intervene and even invade the property. If one was holding slaves or killing people there would be no doubt that others should stop this regardless of the fact that it would be a violation of private property.

[89] Shane Reeves, 'To Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened the Door for an Invasion of the Ukraine' (2014) 23 Mich St Int'l L Rev 199

While, of course, there are significant differences between the aforementioned example and humanitarian intervention, those that discuss moral imperative are essentially applying the same set of ideas: there are some wrongs that are so wrong they create a peremptory obligation to intervene and prevent atrocities regardless of a State's sovereignty. And this is the same moral idea that those who are proponents of humanitarian intervention extend to international law; there are certain atrocities that are so bad they justify the violation of sovereignty.

But what does morality have to do with international law? Afterall, legality and morality are not inherently tied together. While these two things may seem distinct, they are not as separated as one may think. International law is not something that exists in a vacuum, but rather takes on both codified legal instruments and political actions of States. I propose that humanitarian intervention can not exist as a legal concept without the acceptance of some form of moral imperative. If we accept the concept that sovereignty is held in the highest regard, and that something can not be violated without distinct reasoning, the reason for violation is always due to another concept which we hold in the same regard. Sovereignty can be violated in the case of self-defence or international peace and security, not only due to the fact that this reasoning is codified within the UN charter, but also because (and it is codified because of) the fact that we have accepted self-defence and international peace and security as so inherently important they are the *right* to violate sovereignty for. No legal argument for humanitarian intervention can be made without embracing the idea that preventing or stopping gross violations of human rights abuses is more important than State sovereignty.

In fact this moral imperative is an examination of the question of balance in international law. Chris O'Meara, when discussing if international law should recognise the right to humanitarian intervention, brings up the premise that the examination of humanitarian intervention can not exist without considering the idea of balance.

> "Tackling this issue requires an examination of the tensions that humanitarian intervention raises between State sovereignty on the one hand and the preservation of human rights on the other."

Reeves further elaborates on the concept by stating the following:

> "The foundation of a humanitarian intervention is the belief that a moral imperative to stop an ongoing crisis legally justifies using military force. A state relying on this use of force concept is not invoking their inherent right of self-defense but rather claiming the moral authority to act despite the general prohibition outlined in Article 2(4) of the U.N. Charter"[90]

This moral imperative is particularly important to understand in the context of Russia's usage of a supposed genocide as a legal justification for their incursion into Ukranian territory. Afterall, Russia does not simply use the letter of the law justification, but rather relies on the idea that there is a moral dictation for them to invade.

But it also highlights one of the biggest issues when discussing humanitarian intervention: who gets to decide what conditions predicate armed intervention for a humanitarian basis? Indeed, this question of "who gets to decide" runs through not only the examination of humanitarian intervention, but almost any question of international law when discussing the violation of State sovereignty.

If we accept that there is a moral underpinning for military action in order to prevent atrocities that circumvents the need for Security Council authorisation, who gets to decide how bad the situation within a State needs to be? And further, how do we prevent States from using humanitarian convention as a guise to violate sovereignty? These questions will be elaborated on further in this chapter of this thesis.

3.1.2. Legal Precedent for Humanitarian Intervention

Having accepted the fact that there is some value to intervention to stop human rights abuses that outweighs state sovereignty, we must look to the legal precedent for humanitarian intervention.

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[90] Reeves, S.

Afterall, there are plenty of concepts that we may accept as morally correct that do not conform to international law, and we must therefore examine if there is any solid base for the exercise of humanitarian intervention under international law. Humanitarian intervention has shifted significantly throughout history "The humanitarian intervention norm's content has fluctuated over the centuries. The result is a norm that has been riddled with ambiguity and is varyingly embraced by the international community."[91]

As discussed earlier in this thesis, the United Nations Charter explicitly prohibits the use of force in Article 2 (4)

> "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."[92]

The exceptions to which are quite limited, that being for international peace and security and self defence, provided in Articles 39-51[93]. So, at first glance it would seem that humanitarian intervention is not consistent with the Charter. But, as with most matters of international law, it is not so straightforward. And in fact this lack of consistency has been brought out as in several conflicts, with humanitarian intervention having been used several times to justify armed force.

3.1.2.1 Kosovo and NATO's use of Humanitarian Intervention

The 1999 intervention by NATO countries in Yugoslavia in regards to Kosovo is perhaps one of the most common examples that it brought up when discussing humanitarian intervention and the Responsibility to Protect. However its commonality should not be dismissed as somehow limiting novel discussion of the topic. In fact, the opinion of Russia about the actions of NATO are particularly important when discussing the application of humanitarian intervention as a legal justification for their actions in Ukraine, as well as the legitimacy of humanitarian intervention as a legal concept.

[91] Betcy Jose and Christoph H. Stefes. *Russia as a Norm Entrepreneur: Crimea and Humanitarian Intervention*
[92] 1 UNTS XVI.
[93] *Ibid*

After increased destabilisation preceded by economic collapse throughout Kosovo and the surrounding regions, there was a drastic increase of violence towards the Albanian ethnic majority in Kosovo. Serbian efforts for "ethnic cleansing" was creating a dire situation for Albanians in Kosovo. NATO allied States continuously attempted to help create a political agreement that would alleviate the situation. However these attempts would fail, and the February 1999 massacre of Albanians in Rajak became a deciding factor in NATOs succeeding military intervention.[94]

On March 24, 1999 the NATO allied forces began its intervention, bombing Serbian forces under the guise of the protection of Albanians living in Kosovo. This action was taken without the express authorisation of the Security Council. Now one should note that throughout the time there had been several resolutions by the UN Security Council that condemned the situation in Kosovo and called for action stopping the ethnic cleansing. There are those who argue that these resolutions were an implicit authorisation of force, although this thesis finds that claim not only demonstrably false, but also a dangerous precedent to attempt to set. Afterall, allowing Security Council resolutions to be implicit based on a State, or group of States, integration is a rabbit hole that international law and politics should not open up.

What is most important about this situation, for today's thesis, is to look at the Russian reaction to NATOs actions. In this case, the word dissatisfied does not begin to describe the reaction of Russia to the situation. Then Russian president Boris Yeltsi staunchly condemned the actions of NATO, calling them illegal.[95] Russia would then follow introduce a Security council resolution denouncing the actions of NATO, claiming that they were "'a flagrant violation' of the U.N. Charter".[96] The only Security Council members to support this resolution were Russia, China, and Namibia, meaning that the resolution did not pass. The lack of it's passing, however, should not be misconstrued as the other members (made up of several NATO allied States) found that

[94] Damrosch, Henkin, Pugh, Schachter, and Smit. p 998

[95] Erik Yesson. *NATO and Russia in Kosovo.* Perspectives , Winter 1999/2000, No. 13, SPECIAL ISSUE: The Balkans, NATO and European Security after the Kosovo War (Winter 1999/2000), pp. 11-19, *Russia condemns Nato at UN.* BBC News. 25 March 1999. Available online: http://news.bbc.co.uk/2/hi/europe/303127.stm

[96] Damrosch, Henkin, Pugh, Schachter, and Smit. p 999

the actions were consistent with international law — rather this is an example of the politics of the Security Council.

It must be noted, in this instance, that the evidence for the atrocities taking place in Kosovo was quite high. Unlike the current accusations of Genocide in Ukraine made by the Russian Federation, which have little factual basis, it was well accepted by the international community that the situation on the ground in Kosovo was indeed in line with the accusations made by NATO allied forced. Yet, that does not excuse the illegality of the actions .

3.1.3.1. The United Kingdom's Proposed Framework

When discussing the possibility of humanitarian intervention in Syria after the 2013 chemical weapons attack in Eastern Damascus, the United Kingdom released its legal opinion affirming the right to intervene without the Security Councils authorisation.[97] This opinion is of particular importance when examining the legal framework of humanitarian intervention. Not only does this opinion affirm the United Kingdom's position on humanitarian intervention, but it also lays out several conditions that need to be met in order to utilise humanitarian intervention. The United Kingdom's opinion is as follows:

> "If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

[97] UK Prime Minister, Chemical Weapon Use by Syrian Regime: UK Government Legal Position, GOV.UK. Aug. 29, 2013. Available online: https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version

(i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

(ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

(iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)."

These conditions seem to provide answers to the questions I laid out earlier when discussing the moral imperative to intervene. They take into account evidentiary standards that could be easily applied to any State undertaking humanitarian intervention in order to determine if it is legal or not.

Michael N. Schmitt, often considered a particularly preeminent expert in the area of use of force and humanitarian law, also proposes a fourth criteria: a plausibility of effectiveness. As Schmitt writes, "There must be some prospect of success, that is, the intervention must be likely to significantly alleviate the suffering to a degree not possible through non-forceful measures"[98]

When assessing the source of international law for humanitarian intervention we can rule out the idea that it derives from customary international law. Afterall, customary international law requires that states have taken the action, but also *opinio juris* . In this case there is neither consistent action nor reason to believe that it is the widespread *opinio juris* confirming that humanitarian intervention is legal in light of Article 2. In fact, the United Kingdom is one of the only States who have officially recognised humanitarian intervention, a surprising fact considering NATOs actions in Kosovo noted earlier in this thesis.

[98] Michael N. Schmitt. *The Syrian Intervention: Assessing the Possible International Law Justifications*. International Law Studies Vol. 89, 2013.

3.2. Russia's Application of Humanitarian Intervention In Ukraine and Future Application

While Russia has not explicitly stated that humanitarian intervention is the legal framework for its military invasion of Ukraine, it is clear that they are attempting to invoke the principle. Puntins speech on 21 February 2022 laid out the foundation of Russia's Humanitarian Intervention claim. As noted in the introduction of this chapter, there has been no substantial evidence of Russian claims of genocide against Russian speakers in Ukraine. Instead of presenting evidence, Putin chose to frame this as a Russia vs the West argument, claiming that "...the so-called civilised world, which our Western colleagues proclaimed themselves the only representatives of, prefers not to see this, as if this horror and genocide, which almost 4 million people are facing, do not exist."[99]

If we look at Russia's legal argument in the most restrictive, and perhaps most widely accepted, view there is almost nothing to be said; humanitarian intervention does not exist as a valid legal instrument and therefore Russia can not, no matter the substantive value of their genocide claims, utilise this as an excuse for armed force in Ukraine.

Should we choose to analyse this from a less restrictive view, with the perspective that humanitarian intervention does exist as a legal instrument, we can apply the United Kingdom's three conditions.

Firstly, is there clear convincing evidence of a genocide, which has been accepted by the international community as a whole? Certainly not. In fact, as mentioned before, Russia has put in minimal effort to even attempt to demonstrate that there is a genocide, instead opting to simply claim that the West would be unwilling to recognise their claims due to western ideology and anti-Russian sentiment.

Secondly, is there a practicable alternative to the use of force in this case? Answering this question is predicated on the fulfilment of the first criteria. However even if we were to suspend the fact that Russia is unable to fulfil the first criteria the answer to this would certainly be yes.

[99] Socher, J.

No attempt at peaceful resolution of the so-called genocide has been made, so there is no reason to consider that force is necessary.

Thirdly is the force necessary and proportionate, as well as limited in scope. Once again, to answer this question we must, for a moment, suspend the already established fact that there is no evidence of a genocide wich would require humanitarian intervention on the part of Russia. If there were, Russia would still not fulfil the requirements set forth in this condition.. Their military action has not been limited to those who are apparently responsible for the genocide, nor is it limited to the areas that Russia claims the genocide takes place in.

So regardless of the status of humanitarian intervention in international law, Russia's invasion of Ukraine is not consistent with international law.

As noted, the premise that there even is a genocide taking place in Ukraine against Russian speakers is simply not accepted. Why then, do we spend time asking if the Russian invasion meets the other conditions for humanitarian intervention? This thesis aims not only to answer those questions, but also to understand contextually how the Russian utilisation of humanitarian intervention brings up issues with the concept itself, and how it may be approached in the future.

The two largest criticism of humanitarian intervention is that it violates sovereignty and that it is easily manipulated by States for political gain instead of actually stopping a humanitarian crisis. The Russian invasion of Ukraine highlights these two issues, especially the latter, and provides us with an example to discuss the validity of these criticisms and what they should mean for humanitarian intervention moving forward.

Schachter argues, in regards to the potential for abuse in order to achieve political aims, that this should cause us to consider that humanitarian intervention is not an instrument that should be accepted in international law.

> “Our sympathy for victims of atrocities should not obscure the lessons of past invasions claimed to be humanitarian. Past armed invasions, going back to the 19th century

> incursions by imperial powers, have shown that intervening States have invariably had their own political agenda. They imposed conditions that were not freely chosen by the people of the country in question."[100]

This abuse of power is certainly true, and would reasonably explain even States that have *de facto* used humanitarian intervention have not provided a *de jure* acceptance of the concept. This Thesis fully accepts that there have been, and currently are with the case of Russia, serious issues with invoking humanitarian intervention with the aim to achieve political ends. However, this Thesis proposes that this potential abuse of humanitarian intervention is not an argument against humanitarian intervention being a legal instrument, as long as it has adequate conditions attached.

In order to discuss this, we must first define the humanitarian intervention doctrine and scope for the purposes of the continuation of this thesis. The United Kingdom's 2013 legal statement referred to, in its first condition, "extreme humanitarian distress"[101] But, this thesis would argue, that is far too ambiguous of a condition to allow for humanitarian intervention without the high risk of manipulation. Instead, I would argue that humanitarian intervention could be invoked in the case of the violation of certain *jus cogens* norms: The crime of genocide, Crimes against humanity, and War crimes. I specifically limit the use of humanitarian intervention to these humanitarian issues, as even allowing for all *jus cogens* would still be too broad. Afterall self-determination is considered a *jus cogens* norm but it is notoriously difficult to pinpoint and would give the green light to abuse humanitarian intervention.

Simply having a limited scope of circumstances that would trigger the possibility for a State to engage in humanitarian intervention, however, would still not address the possibility of abuse. Afterall, under this thesis's proposal genocide would be considered a valid reason for humanitarian intervention — which is the very excuse used by Russia in their invasion of Ukraine.

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[100] Damrosch, Henkin, Pugh, Schachter, and Smit. p 992

[101] UK Government Legal Position

So to address this, this thesis proposes a modified version of the United Kingdom's conditions. This was then the value of examining the Russian use of humanitarian intervention through these conditions. At each level, the Russian justification failed to meet the criteria. In coming to this conclusion, the fourth condition that Schmitt offers was also considered, however ultimately rejected. Rejection of Schmitts proposal is perhaps a bold move, but not done without careful consideration. This is done for two main reasons: firstly the goals of Schmitt's proposal can be achieved through a modification of the second and third conditions, and secondly the proposal opens up the potential issue of *post facto* justification for the exercise of humanitarian intervention.

In fact, *post facto* justification is perhaps another potential issue with humanitarian intervention, and is exemplified by commentary surrounding the action taken by NATO in Kosovo. The bombings by the NATO allied countries actually worsened the condition on the ground, leading to increased persecution of the Albanians in Kosovo that NATO set out to protect. This is of course a terrible consequence of humanitarian intervention, however, not always foreseeable. Although humanitarian intervention should always be carried out to alleviate the situation and not make it worse, holding States to a standard that would create issues with *post facto* justification would not alleviate these issues.

If we accept that there are certain circumstances in which humanitarian intervention should be allowed, as this thesis proposes, why then not do so under the framework of the Responsibility to Protect and allow force only when it is expressly authorised? Again we can turn to the Russian invasion of Ukraine in order to examine this. The Security Council, immediately after the February invasion, was presented with a resolution to condemn the use of force. This was, however, unable to pass even before it hit the floor; afterall, Russia is a permanent member and therefore able to veto the resolution. Short of making changes to the system of the United Nations, there will always be issues with authorisation intervention in the case it does not fit the geo-political goals of one of the permanent members.

Considering the above, this thesis would propose the following framework for humanitarian intervention:

Should action have been brought to the Security Council but was blocked, a State may take measures, including the use of force, in order to stop or reduce the impact of a humanitarian crisis under the framework of humanitarian intervention. This action may take place only if all of the following conditions are met:

1. there is convincing evidence, generally accepted by the international community as a whole, of Genocide, Crimes against humanity, or War crimes, which required immediate relief;
2. The State(s) invoking humanitarian intervention have reasonably exhausted peaceful resolution and it is reasonably clear that the use of force is the only way alleviate the situation; and
3. The scope of proposed use of force must be the most minimal that will achieve the aim of alleviating the situation, both in time and location, fulfil the requirements of necessary and proportionality

SUMMARY

In this thesis, I aim to critique three of Russia's legal defences used in attempting to justify their war against Ukraine. However, the research goals of this Thesis were not simply to decide if Russia is in conformity with international law, but rather to discuss the concepts as a whole, as well as how the Russian occupation demonstrates proposed needed changes to the legal framework.

As provided for in Article 51 of the Charter of the United Nations, self-defence is an explicit exception to Article 2(4) prohibiting use of force. However, this is not an all encompassing justification for the use of force. and requires that any use of force still falls under certain preconditions.

In section 1.1, this thesis explores the idea of anticipatory self-defence — which is still debated in international law. Putin's speeches regarding their invasion of Ukraine highlight what Russia perceived as threats from NATO and the west, but none of the threats included any materialised armed attack. The two theories of anticipatory self-defence are preemptive and preventive, which are distinguished by the imminence of differ significantly in the level of materialisation and imminence of a threat.

Preemptive self-defence is characterised by a distinctly imminent threat, and can be concretely measured using the Caroline test. The test requires that States "show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation". While some dismiss the validity of the Caroline test due to the fact that the Caroline incident, for which the test gets its name, actually had very little to do with preemptive self-defence. However, this thesis summarily dismisses this particular criticism, concluding that the evolution of the test has given it its rightful place in the discussion of preemptive self-defence.

Preventive self-defence distinguishes itself from preemptive self-defence by almost disregarding the principles set out in the Caroline doctrine and the level of iminance a threat would need to have. This thesis proposes that the main distinction between preventive and preemptive that

should be made is temporal. Preemptive self-defence can be enacted only when there is an imminent threat facing a State, whereas preventive self-defence relies on a level of future telling because the threat may exist within the future. This lack of materialisation leads to the dismissal of preventive self-defence as a mechanism in international law.

One example consistently used to dismiss preemptive self-defence is the Osirak attack. However, this is an unreasonable conclusion considering that Israel failed to meet the conditions of the Caroline test, and would fall firmly to the side of preventive self-defence. Another widely used example of anticipatory self-defence, usually used to dismiss the concept, is the US invasion of Iraq. While this is an example of anticipatory self-defence, once again it would fall into the category of preventive.

The conflation of preemptive and preventive self-defence is a serious issue with policy makers, and indeed was abused by Russia. To examine Russia's actions in light of preemptive self-defence, the Caroline test must be applied. Russia presented no evidence of an imminent armed attack by the United States, NATO or another Western power, so the Kremlin relied on the preventive self-defence argument for its military action. However this thesis concluded that there is no legal basis for preventive self-defence.

This thesis would argue that there needs to be more distinction between preemptive and preventive self-defence, as well as clear defined standards for preemptive self-defence. Preemptive self-defence can keep all of the benefits of allowing for defence in the modern world without allowing for the potential misuse of the lack of temporal standards.

In section 1.2, the utilisation of collective self-defence is analysed. This is perhaps the least controversial chapter of the whole paper, as unlike the other chapters there is no question as to if collective self-defence is permissible under international law; afterall it is provided for in the Charter.

The Kellogg-Briand Pact and the League of Nations laid the groundwork for collective self-defence, but due to the failure of the League it was not until the formation of the United

Nations that collective self-defence materialised as we see it today. The International Court of Justice affirmed in Nicaragua v. United States judgement that self-defence must be both necessary and proportionate.

The Russian Federation officially recognised the Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) as independent States on February 21, 2022, and concluded treaties with them. These treaties are the basis of their argument of collective self-defence. Even if the fact that the DPR and LPR are not legally States (self-determination and secession are discussed in later chapters) Russia still would not be in compliance with international law the way it used collective self-defence. The European Court of Human Rights case Ukraine and the Netherlands v. Russia decided that DPR and LPR were under the jurisdiction of the Russian federation for over 7 years, so why it would be necessary to attack regions outside of the DPR and LPR, namely Kyiv, is unclear. Finally, the principles of necessity and proportionality are not fulfilled, considering the use of force has gone far beyond any claimed need for defence. Russia's claim to collective self-defence is not consistent with international law. However, analysing Russia's use of collective self-defence can add insight into the application of collective self-defence and potential issues.

Collective defence is contingent on the rules of self-defence set out in The Charter and customary international law, but it can raise questions about state sovereignty and the principle of non-interference. Additionally, it can raise issues related to the responsibility to protect. The use of force in collective defence can have significant implications for international relations and the balance of power in the international system. It is important that the legal framework limits how it can be exercised and implements the restrictions of necessity and proportionality to ensure that collective defence is not abused as an excuse for the use of force.

The second chapter of this paper focuses on Self-determination. Self-determination is a tricky subject in international law, having been codified in law and being considered a *jus cogens* norm, yet still not having an exact definition. Russia's use of self-determination as a justification for armed force in Ukraine is not new to them, having previously used the same principle in Georgia. The two most notable instruments for codifying self-determination are the International

Covenant on Civil and Political Rights (ICCPR) and the Charter of the United Nations. Self-determination as a concept is the idea that a people have the right to determine their own sovereignty and how they are governed, but how this applies externally is still questioned.

In section 2.1, the thesis explores the evolution of self-determination, specifically through the context of Russia's development. In its most original form, self-determination was not in conflict with sovereign decision making, as it was purely a right to cultural determination. However, with the start of the Bolshevik era this shifted, and self-determination began to include the right to secession. At the same time, US President Wilson released his '14 points'. These 14 points highlight the deliverance of state opinion of self-determination even in its earliest form, with the United States emphasising obligation.

However, as power shifted in Russia so did the concept of self-determination. While Leninist Russia was willing to allow secession as self-determination, Stalin's government was no longer going to tolerate this. The increased nationalism of the 1940s started the shift in Russian application of self-determination, and began a campaign of reintegration of the territories that had seceded.

By the 1960s, there had been increased application of self-determination internationally. However, this application was applied to decolonization efforts. Russia participated in this division of who external self-determination could be applied to, finding a distinct difference between their former territories and colonised territories.

In section 2.2, this thesis examines the current legal framework of self-determination, as well as the concept of remedial secession. Russia has attempted to cite self-determination as a primary reason for its invasion of several States, with Ukraine only being the most recent. In doing this, they invoke shared historical and political backgrounds, implying that in some way this has an effect on self-determination. However it does not, as there is no legal right for external self-determination.

One answer to the lack of right of secession under the framework of self-determination is the concept of remedial secession. Remedial secession would allow a territory to secede from the parent State without the consent of the parent state, however only on the condition that there is a serious humanitarian crisis or other extreme situation. This opinion is supported by Russia in their written statements in the 2009 Kosovo ICJ case. The Russian statement qualifies that they assert that external self-determination can be applied only in cases of decolonisation and "when the people concerned is continuously subjected to most severe forms of oppression that endangers the very existence of the people;"[102] However, the Court did not give any opinion on self-determination or remedial secession, and the concept of remedial secession has little substantive law.

In section 2.3 I examine Russian application of self-determination in the DPR and LPR at the onset of its war against Ukraine. It is concluded that the use of self-determination by Russia in this case is not consistent with international law. However, it does highlight the potential abuse of self-determination, should we accept external self-determination or remedial secession as an applicable mechanism of international law. Upon the analysis of the historical development and current Russian application of self-determination, this thesis makes the conclusion that external self-determination should in fact be a valid legal mechanism in international law, and proposes 6 conditions that should be met for its exercise:

1. The potential new State must submit an official declaration to the United Nations
2. The potential new State must be able to fulfil the requirements of permanent population and defined territory as defined by Philip C. Jessup
3. The potential new state must demonstrate a capacity to effectively self govern if given statehood
4. The potential new State must be able to demonstrate a capacity to engage in relations with other states if given statehood

[102] International Court of Justice, "Written Statement by the Russian Federation", 16 April 2009

5. The United Nations will conduct an impartial referendum within the potential new State. The referendum will only be accepted if at least 60 percent of adults aged 18 and up vote in the referendum, and a supermajority vote for the independence of that territory.
6. A foreign force, defined as a force associated with a State other than the parent State, must not have been occupying the territory for at least 1 year prior to the referendum.

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The third chapter of this thesis explores the concept of humanitarian intervention.

In section 3.1 The legal framework for humanitarian intervention is discussed. Humanitarian intervention is perhaps the most controversial mechanism of international law, as it is not widely accepted. However, there does exist a similar concept, which is the Responsibility to Protect. Distinguishing between humanitarian intervention and Responsibility to Protect is of the utmost importance, as they are often conflated with each other. While there are some similarities, the main distinction is who can use force.Use of force under the R2P framework requires express Security Council authorisation, whereas humanitarian intervention is unilateral.

When discussing humanitarian intervention, it is important to understand that it is based not only on concepts within international law, but a level of moral imperative. Thus, we have to keep in mind the distinction between moral imperative, which is often extralegal, and legal imperative for intervention. There are some that argue that preventing or stopping gross violations of human rights abuses is more important than State sovereignty, while others argue that the moral imperative does not outweigh the foundation of sovereignty. The moral imperative of humanitarian intervention is an examination of the question of balance in international law. It is based on the belief that a moral imperative to stop an ongoing crisis legally justifies using military force. This moral imperative is particularly important to understand in the context of Russia's use of a supposed genocide as a legal justification for their incursion into Ukranian territory. It also highlights one of the biggest issues when discussing humanitarian intervention: who gets to decide what conditions predicate armed intervention for a humanitarian basis?

The legal precedent for humanitarian intervention is unclear, as the United Nations Charter explicitly prohibits the use of force against the territorial integrity or political independence of

any state. However, it has been used in the past. The 1999 intervention by NATO countries in Yugoslavia in regards to Kosovo is one of the most common examples. Russia condemned NATOs actions as illegal, and attempted to pass a Security Council resolution denouncing them. However the resolution failed, with only China, Namibia, and Russia supporting it. However the lack of support for the resolution highlights issues within the UN rather than proving that the Kosovo action was legal. In fact the lack of explicit security authorisation surly made this inconsistent with international law.

One of the only States to support humanitarian intervention *de juri* is the United Kingdom, whos legal opinion on Syria offered three conditions for using humanitarian intervention when the Security Council is blacked: convincing evidence of extreme humanitarian distress, objectively clear that there is no practicable alternative to the use of force, and the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need. Michael N. Schmitt proposes a fourth criteria: a plausibility of effectiveness.

In section 3.2, the thesis explores both Russia's legal argument for humanitarian intervention, and how humanitarian intervention should work in international law. While Russia has not explicitly stated that humanitarian intervention is the legal framework for its military invasion of Ukraine, it is clear that they are attempting to invoke the principle. In Putins numours speeches he alleges a genocide of Russian speakers in Ukrain, which would create a need for humanitarian intervention. However this has never been substantiated, and in fact no evidence has been presented. If we conclude that humanitarian intervention is not a mechanism in international law, then Russia can not use it as an excuse. However, even if we allow for quite liberal application of humanitarian intervention, Russian actions would still not be consistent. In fact, they fail all three conditions set out by the United Kingdom.

This thesis, however, does not accept that humanitarian intervention is not at all a mechanism in international law. Instead, it uses the issues of manipulation to formulate a revised set of the United Kingdom's conditions that could be used to resolve the criticisms of humanitarian intervention:

Should action have been brought to the Security Council but was blocked, a State may take measures, including the use of force, in order to stop or reduce the impact of a humanitarian crisis under the framework of humanitarian intervention. This action may take place only if all of the following conditions are met:

1. there is convincing evidence, generally accepted by the international community as a whole, of Genocide, Crimes against humanity, or War crimes, which required immediate relief;
2. The State(s) invoking humanitarian intervention have reasonably exhausted peaceful resolution and it is reasonably clear that the use of force is the only way alleviate the situation; and
3. The scope of proposed use of force must be the most minimal that will achieve the aim of alleviating the situation, both in time and location, fulfil the requirements of necessary and proportionality

UKRAINA-VASTASE SÕJA PUHKEMISEL VENEMAA POOLT ESITATUD JURIIDILISE JA POLIITILISE ARGUMENTATSIOONI KRIITIKA — KOKKUVÕTE

Käesolev magistritöö uurib Venemaa poolt 2022. aasta Ukraina sõja puhkemisel esitatud juriidilist-poliitilist argumentatsiooni, millega Moskva õigustas endapoolset relvastatud jõu kasutamist *jus ad bellum*'i raames. Töö on jagatud kolme peamisesse ossa ning uurib igakülgselt kolme juriidilist relvastatud jõu kasutamise õigustust: enesekaitset, rahvaste enesemääramisõigust ja humanitaarset interventsiooni. Uuritakse nii *lex lata* kui ka seda, kuidas Venemaa üritab juriidilisi mehhanisme rakendada, ning tehakse ka mitmeid järeldusi ja ettepanekuid *lex ferenda* rakendamiseks. Töös kasutatakse erinevaid meetodeid, tuginedes juriidilistele andmetele ja arvamustele, analüüsides neid doktrinaarsete, ajalooliste ja empiiriliste meetodite abil. Lisaks kasutatakse võrdlevaid ja enamasti analüütilisi metoodikaid.,. Töö eesmärk on leida vastus kolmele uurimisküsimusele:

1. Millist juriidilist raamistikku rakendatakse kõigile töös käsitletud õigusmehhanismidele, ja milles seisneb nende suhtes esitatud kriitika?
2. Kas nende juriidiliste mehhanismide Venemaa-poolne kasutamine oli kooskõlas rahvusvahelise õigusega?
3. Milliseid järeldusi saab teha sellest, kuidas Venemaa neid õigusmehhanisme on kasutanud, et kriitikale vastata ja muuta mehhanismide rakendamist tulevikus?

Selle töö esimene osa käsitleb enesekaitset ja on jagatud kaheks alajaotuseks: ennetav enesekaitse ja kollektiivne enesekaitse. Töös eristatakse ennetavat ja ärahoidvat enesekaitset ning järeldatakse, et peamiseks eristavaks teguriks on ohu vältimatuse ajaline aspekt – ennetav enesekaitse eeldab materialiseerunud ohtu ja sõltub rahvusvahelises tavaõiguses tuntud *Caroline'*i testist. Seda eristamist kasutatakse 2002. aasta Bushi doktriini ja 1981. aasta Osiraki rünnaku seaduslikkuse hindamisel, mida mõlemat peetakse sageli õigusvastaseks ja mis illustreerivad ennetava enesekaitse kriitikat ÜRO põhikirja artikkel 51 valguses. Töös jõutakse järeldusele, et mõlemad näited kuuluvad ärahoidva enesekaitse kategooriasse. See eristus võimaldab töös järeldada, et ennetav enesekaitse võib olla seaduslik, kuigi ainult siis, kui seda tõesti rakendatakse ennetaval eesmärgil. Teise uurimisküsimuse käsitlemisel jõutakse töös

järeldusele, et Venemaa poolt ennetavale enesekaitsele viitamine, mis on olemuselt ärahoidev, ei ole kooskõlas rahvusvahelise õigusega.

Kollektiivse enesekaitse kohta, millele Venemaa tugines tunnustades Donetski Rahvavabariiki (DRV) ja Luganski Rahvavabariiki (LRV) kui iseseisvaid riike. Töös nenditakse, et DRV-i ja LRV-i ei peetud juriidiliselt riikideks; seda käsitletakse aga rohkem teises osas. Töös nenditakse kõigepealt, et erinevalt töö teistest osadest on põhineb see mehhanism täielikult rahvusvahelisel õigusel, ja selle kohta käib üldine juriidiline arutelu, tuvastamaks, kas see eksisteerib või peaks eksisteerima. Seetõttu keskendub töö valdavalt kollektiivse enesekaitse arengule läbi aja. Töös jõutakse järeldusele, et isegi kui DPR ja LDR-i omariikluse puudumist mitte arvesse võtta, ei vastaks Venemaa kollektiivse enesekaitse kasutamine *Nicaragua* kohtuotsuses esile tõstetud vajalikkuse ja proportsionaalsuse standarditele ning on seetõttu vastuolus rahvusvahelise õigusega.

Teises osas uuritakse rahvaste enesemääramisõiguse käsitlemist rahvusvahelise õiguse raames. See algab ajaloolise aruteluga, mille käigus analüüsitakse, kuidas enesekaitse mõiste on läbi aegade muutunud, ja kas seda on võimalik siseselt või väliselt rakendada. Töös lahatakse enesemääramist bolševike ja stalinistliku enesemääramise poliitika raames, samuti Wilsoni 14-punktilist vastust, tuues esile, et juba enesemääramise algusaegadel tõlgendati seda mõistet erinevalt. Selles jaotises uuritakse ka tänapäevast enesemääramisega seotud arutelu. Lõpetuseks uuritakse nn *remedial secession*' i kontseptsiooni kasutades Kosovo juhtumit, demonstreerimaks, et nn remedial secession'i – õigus eralduda tekib alles vastuseks rahva fundamentaalsete õiguste rikkumisele - seaduslikkuse osas selge vastus puudub. Töös jõuti järeldusele, et enesemääramisõiguse rakendamine DRV-ile ja LRV-ile Venemaa poolt on vastuolus rahvusvahelise õigusega. See tähendab tingimata ka seda, et kollektiivne enesekaitse, mida eelpool mainiti, on vastuolus rahvusvahelise õigusega, kuna see kehtib ainult riikidele. Jaotus lõpeb *lex ferenda* enesemääramisõiguse tõlgendamise ettepanekutega, milles pakutakse välja kuus kriteeriumit, millele mistahes regionaalne üksus peaks vastama, et välist enesemääramist saaks ellu viia.

Käesoleva magistritöö viimases osa lahatakse humanitaarset interventsiooni. Selles käsitletakse nii riikide kui ka teadlaste erinevaid juriidilisi arvamusi humanitaarse interventsiooni kui juriidilise mehhanismi legaalsuse ja legitiimsuse kohta. Käsitletakse ka ideed sekkumise vajalikkusest moraalsetel kaalutustel ja jõutakse järeldusele, et kõik humanitaarse interventsiooni argumendid põhinevad tingimata ideel, et moraalne kohustus peatada inimõiguste laiaulatuslik rikkumine kaalub üles nii ÜRO põhikirja 2. artikli kui riigi suveräänsuse. Töös tehakse vahet humanitaarsel interventsioonil ja kohustusel end kaitsta, mispuhul kohustus kaitsta võimaldab relvastatud jõu kasutamist ainult Julgeolekunõukogu loal, ja humanitaarne interventsioon võimaldab ühepoolset relvastatud jõu kasutamist. Lisaks lahatakse NATO sekkumist Kosovos ja Venemaa tolleaegset reaktsiooni, milles Venemaa lühidalt kuulutas NATO tegevuse ebaseaduslikuks. Töös uuritakse ka Ühendkuningriigi pakutud kolme tingimust humanitaarse interventsiooni seaduslikuks arvestamiseks, kuid nenditakse, et Ühendkuningriigi humanitaarse interventsiooni tunnustamine juriidilise mehhanismina jätab nad teiste riikide hulgas vähemusse. Töös jõutakse järeldusele, et kuna humanitaarne interventsioon ei ole laialdaselt aktsepteeritud, on Venemaa-poolne relvastatud jõu kasutamine ebaseaduslik. Isegi kui relvastatud jõu kasutamist käsitleda kõige vähem piirava vaate kohaselt, ei oleks relvastatud jõu kasutamine kooskõlas mitte ühegi Ühendkuningriigi poolt välja pakutud tingimusega, ja oleks seetõttu ikkagi vastuolus rahvusvahelise õigusega. Käesolev töö osa lõpeb *lex ferenda* analüüsiga – milles märgitakse kokkuvõtvalt, et mingit laadi äärmiselt rangetele kriteeriumidele vastava humanitaarse interventsiooni võimalus peaks ikkagi ka õioguslikult eksisteerima. Töös pakutakse välja ja uuendatakse kolme tingimust, mis peaksid olema täidetud, et humanitaarset interventsiooni saaks teostada.

REFERENCE LIST

Books

1. Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit., *International Law: Cases and Materials*
2. Craig Forcese. *Destroying the Caroline: The Frontier Raid That Reshaped the Right to War* (2018)
3. Colin S. Gray *The Implications Of Preemptive And Preventive War Doctrines:: A Reconsideration* (2007)
4. Tallinn Manual On International Law Applicable To Cyber Warfare. Michael N. Schmitt ed., 2012
5. Kimberley N Trapp. *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors.*
6. Jörg Fisch. *A History of the Self-Determination of Peoples: The Domestication of an Illusion. Cambridge University Press.* 9 December 2015
7. Richard, Pipes. *A concise History of the Russian Revolution*. 1996

Journal Articles

8. René Värk. “Russia’s Legal Arguments to Justify its Aggression Against Ukraine”. International Centre for Defence and Security. November 2022.
9. Wehling, Fred.*A New Standard For Preemptive Military Action Against Wmd Threats.* The Nonproliferation Review Volume 19, 2012
10. Williams, Paul R. “What Makes a State? Territory.” Proceedings of the ASIL Annual Meeting, vol. 106, 2012, pp. 449–450., doi:10.5305/procannmeetasil.106.0449.
11. Hough, William J.H. “The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory.” New York Law School Journal of International and Comparative Law., vol. 6, ser. 2, 1985, pp. 301–533. 2, Available Online:

https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1213&context=journal_of_international_and_comparative_law

12. Ker-Lindsay, *Never Mention Self-Determination.* Europe-Asia Studies. Vol. 65, No. 5, Special Issue: Self-Determination After Kosovo. July 2013
13. Meissner, Boris. *The Soviet Concept of Nation and the Right of National Self-Determination.* International Journal. Vol. 32, No. 1, Communism. Winter, 1976/1977
14. Alexander Hinton *Putin's Claims That Ukraine Is Committing Genocide Are Baseless, but Not Unprecedented.* The Conversation, 11 Apr. Available online: 2023,https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unprecedented-177511.
15. Shane Reeves. *To Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened the Door for an Invasion of the Ukraine*. 23 Mich St Int'l L Rev 199. 2014
16. Michael N. Schmitt. *The Syrian Intervention: Assessing the Possible International Law Justifications*. International Law Studies Vol. 89, 2013.
17. Miriam Sapiro. *Iraq: The Shifting Sands of Preemptive Self-Defense*. The American Journal of International Law , Jul., 2003,
18. Betcy Jose and Christoph H. Stefes. *Russia as a Norm Entrepreneur: Crimea and Humanitarian Intervention*
19. Tamás Hoffmann. War or peace? – *International legal issues concerning the use of force in the Russia–Ukraine conflict*. Hungarian Journal of Legal Studies 24 August 2022
20. Ian Brownlie. International Law and the Use of Force by States Revisited. Australian Year Book of International Law,. 21, 2000, pp. 21-38

Legal text

21. Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51
22. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Art 2(4)

23. Security Council resolution 487 (1981) [on the Israeli military attack on Iraqi nuclear facilities]
24. Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Donetsk People's Republic
25. Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Luhansk People's Republic
26. League of Nations, Covenant of the League of Nations, 28 April 1919
27. Kellogg-Briand Pact 1928
28. Security Council resolution 1368 (2001) [condemning the terrorist acts of 11 September 2001 in New York, Washington, D.C. and Pennsylvania, United States]
29. The North Atlantic Treaty. Washington D.C. - 4 April 1949
30. *International Covenant on Civil and Political Rights.* Treaty Series, vol. 999, Dec. 1966,
31. UNGA A/Res/60/1
32. UNGA A/Res/63/308
33. UK Prime Minister, Chemical Weapon Use by Syrian Regime: UK Government Legal Position, GOV.UK. Aug. 29, 2013. Available online: https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version

Court cases

34. Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICGJ 111 (ICJ 1984), 26th November 1984,
35. The Quebec case (1998)
36. *Overview of the Case.* Kosovo Advisory Opinion. Available online: https://www.icj-cij.org/case/141
37. International Court of Justice, "Written Statement by the Russian Federation", 16 April 2009'

38. International Court of Justice, “Accordance with international law of the unilateral declaration of independence in respect of Kosovo” Advisory Opinion, 22 July 2010

Other sources

39. Miller, Hunter. *British-American Diplomacy : The Caroline Case*. Avalon Project Available online: https://avalon.law.yale.edu/19th_century/br-1842d.asp.
40. Address by the President of the Russian Federation’, Office of the President of the Russian Federation (24 February 2022) Available at: http://en.kremlin.ru/events/president/transcripts/67843 (official English translation, as published by the Kremlin)
41. *Israeli Attack on Iraq's Osirak 1981: Setback or Impetus for Nuclear Weapons?*. National Security Archive, 24 Aug. 1979, Available online: https://nsarchive.gwu.edu/briefing-book/iraq-nuclear-vault/2021-06-07/osirak-israels-strike-iraqs-nuclear-reactor-40-years-later.
42. *Ukraine: Putin Announces Donetsk and Luhansk Recognition*. *BBC News*, BBC, Available online: https://www.bbc.com/news/av/world-europe-60470900.
43. *The State Duma Ratified Treaties of Friendship with the Donetsk and Lugansk People's Republics*. *The State Duma*, 22 Feb. 2022, Available online: http://duma.gov.ru/en/news/53516/.
44. “The League of Nations.” *UN GENEVA*, https://www.ungeneva.org/en/library-archives/league-of-nations#:~:text=By%20establishing%20a%20bond%20of,all%20the%20other%20Member%20States.
45. “About NATO.” *U.S. Mission to the North Atlantic Treaty Organization*, 28 July 2021, https://nato.usmission.gov/about-nato/#:~:text=Formed%20in%201949%20with%20the,by%20political%20and%20military%20means.
46. Eastern Ukraine and flight MH17 case declared partly admissible, *Press Release*. European Court of Human Rights.
47. “United Nations Office on Genocide Prevention and the Responsibility to Protect.” *United Nations*, United Nations, https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml.

48. "Wilson's Fourteen Points, 1918 – 1914–1920 –Milestones – Office of the Historian"
49. Socher, Johannes. Russia and the Right to Self-Determination in the Post-Soviet Space
50. “Address by the President of the Russian Federation.” *President of Russia*, 21 Feb. 2022, http://en.kremlin.ru/events/president/news/67828.
51. Erik Yesson. *NATO and Russia in Kosovo.* Perspectives , Winter 1999/2000, No. 13, SPECIAL ISSUE: The Balkans, NATO and European Security after the Kosovo War (Winter 1999/2000), pp. 11-19, *Russia condemns Nato at UN.* BBC News. 25 March 1999. Available online: http://news.bbc.co.uk/2/hi/europe/303127.stm