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ANALYSIS OF RUSSIA'S LEGAL ARGUMENTS FOR THE USE OF ARMED FORCE AGAINST UKRAINE

Master's Thesis

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INTRODUCTION

Nation-scale military intervention in Ukraine launched by the Russian Federation on 24 February 2022, is undoubtedly among the most impactful events in the contemporary global order, experienced within the past few decades. It has brought on unspeakable suffering, injured, and killed thousands of people and displaced millions of Ukrainians. Most directly the impact of devastation and horror are felt by the people of Ukraine, however the outcomes of Russia's "special military operation" go further to the very essence of contemporary international law and international order it is designed to safeguard. The recent events have shown that the norms governing the use of armed force are of crucial importance in both preserving the integrity and independence of states and protecting individuals from violence.

To understand comprehensively the reasons behind the intervention in Ukraine it is essential to look at the nature of Russia's perception of international law and its security strategy within both global and regional dimensions. Russia itself continuously makes use of international law in order to justify its actions in Ukraine, but also claims that Ukraine violates the rules of international law. It also portraits itself as a guardian of international law, claiming that only Russia truly understands the original meaning of fundamental legal instruments – the United Nations (UN) Charter and general principles of international law. Other states, according to Russia, misinterpret the rules and shake the stability of international relations. Indeed, international norms of sovereignty, prohibition of the use of armed force, principle of non-intervention and respect for territorial integrity are crucial for Russia and its conservative understanding of international law.

Russia also acknowledges the fundamental character of the UN Charter, and it makes references to the Friendly Relations Declaration (1970) adopted by the United Nations General Assembly (UNGA) and the Helsinki Final Act (1975) adopted by the Conference on Security and Cooperation in Europe (CSCE). These documents set that states shall refrain in their international relations from the threat or use of armed force against the territorial integrity or political independence of any states, as it constitutes a violation of international law.[1] Friendly

[1] United Nations, General Assembly resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States", A/8082, 24 October 1970, p. 122-123. Conference on Security and Cooperation in Europe, "Helsinki Final Act", 1 August 1975, Article II and IV.

Relations Declaration further identifies a war of aggression as a crime against peace, for which international responsibility follows.[2]

The Concept of the Foreign Policy of the Russian Federation (FPC) also emphasizes the importance of international law. The concept sets the need to promote strengthening of international peace and security based on collective decision-making, the UN Charter, independence, non-interference in internal affairs and sovereign equality of states.[3] At the same time Russia denies that it has done anything unlawful in Ukraine, claiming its actions are following the UN Charter.

If to look closely at the nature of Russia's politics, there is a substantial conflict between Russia and the Western states over their standards of international order. Russia prefers more an absolutist, nineteenth century understanding of sovereignty. With the changes brought by the post-Cold War definitions of international status, Russia remained deeply concerned about the weakening power and authority of nation-states, which it still regards as the primary guarantor of stability and order.[4] Domestically, however, Russia has built a huge security apparatus to preserve its sovereign-statehood status. It has been done by means of, among others, cultivating massive state patriotism, which put the state as the main priority, rather than the people. If Europe associates sovereignty with popular democracy, Russia sees it as a society's subordination to its state apparatus. As Russian officials usually emphasize, security is about making Russia strong again – both domestically and internationally.[5]

However, the international armed conflict – as a matter of international humanitarian law and a legal qualification that even Russia cannot deny – happening right in the centre of Europe has brought us again to acknowledging the dangers to the liberal world order, challenged by Russia's usage of international law, where military might constitutes a basis for its identity.

[2] United Nations, General Assembly resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States", Article 1. Significance of the principles set in the Friendly Relations Declaration lies in the normative character of the resolution. It refers to the Declaration as a landmark document in its preamble, representing the agreement of states' general approach to the core principles of the UN Charter. Due to its normative character as well as consensus during adoption, the document could be named as one of the most authoritative UNGA documents. The International Court of Justice stated in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, that the resolution constitutes *opinio juris* on the binding character of principles elaborated in it.

[3] Ministry of Foreign Affairs of the Russian Federation, "The Concept of the Foreign Policy of the Russian Federation", Approved by Decree of the President of the Russian Federation No. 229", 31 March, 2023, Chapter I, Article 2; Chapter III, Article 15 and 17.

[4] Andrej Krickovic, Yuval Weber, "What Can Russia Teach Us about Change? Status-Seeking as a Catalyst for Transformation in International Politics", *International Studies Review*, vol. 20, no. 2, June 2018, pp. 296-297.

[5] Aglaya Snetkov, "Russia's security policy under Putin: a critical perspective", London: Routledge, 2015, p. 5.

Armed interventions are perceived by Russia as essential and responsible acts of a Great Power state, rather than an aggressive destruction of the security order in Europe. Thus, according to Russia, annexation of Crimea in 2014 as well as use of armed force against Ukraine are carried out to uphold the norms of its sovereign statehood. As put by Tom Ginsburg, one of the approaches to international law is a so-called "authoritarian international law", which refers to the situation in which authoritarian states are trying to develop and shape norms of international law in ways that extend their ability to remain in power across time.[6]

Moscow's both "special military operation" launched in winter 2022 and its armed activities in eastern Ukraine long before 24 February originate from the fundamentals of Russia's political thinking, which includes elements of Kremlin's security strategy and its perceived historical realities. Russia regards Ukraine not as a separate state, but as a part of a single Russian political and cultural entity united by the Orthodoxy and common roots of Kievan Rus. It is followed by Russia's disapproval of new liberal international values in Europe, which Ukraine has aimed to adhere to since collapse of the Soviet Union. Overall, the "special military operation" could be viewed as a global struggle between democracies and dictatorships for gaining control over international order.

Already in the 1970s Thomas Franck was asking a question "Who killed Article 2(4) of the Charter?"[7] – the provision of fundamental importance, as it ensures that armed force shall not be used against territorial integrity or political independence of any state.[8] It is undisputed that in history of the provision, states have tended to occasionally disrespect the prohibition of Article 2(4) and violations have occurred with some regularity. However, Russia skilfully uses mistakes of other states to justify its own actions in Ukraine. References include but are not limited to the military operation in Kosovo by the North Atlantic Treaty Organization (NATO) in 1999 and invasion of Iraq by the United States in 2003.

Russia employs these incidents as precedents to justify its actions regardless of its numerous critiques of the West. In February 2022 President Putin used the UN Charter as a legitimate basis for the "special military operation" and at the moment, we are again confronted with a question posed by Thomas Franck nearly fifty years ago as to whether international law is

[6] Tom Ginsburg, "Article 2(4) and Authoritarian International Law", *AJIL Unbound, 116*, 2022, p. 130.
[7] Thomas M. Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States.", *AJIL*, vol. 64, no. 5, 1970, pp. 809-837.
[8] United Nations, "Charter of the United Nations", 1 UNTS XVI, 24 October 1945, Chapter 1, Article 2(4).

capable of protecting a state from atrocities when international legal norms are used in bad faith for fulfilling imperial ambitions.

For the military operation to be considered lawful under the *jus ad bellum*, Russia has a responsibility to prove that there is a legal justification to preclude its illegality. Indeed, President Putin introduced a set of legal justifications in his broadcasted TV speech for the operation launched on 24 February 2022. Therefore, the object of this Master Thesis is the legal arguments put forward by President Putin to justify the intervention in Ukraine under the *jus ad bellum*. As we already discussed, Russia has proven to be different in its use of international law, and its strategy of protecting Russia's interests has been focused on mimicking and repurposing the core international norms.

It follows, that the aim of this Thesis is to disprove the legality of Russia's legal justifications, demonstrating that its military action in Ukraine is without any basis in international law, as it fails on multiple grounds. Aggressors routinely try to build up their own narratives to justify the unjustifiable actions, even if they seem as absurd as possible. Understanding how Russia advances these narratives, constructs defence based on them and uses the ambiguities of the system, is the main component of this analysis. Further aim is also to demonstrate the danger of the "authoritative international law" approach and reflect on how it complicates our path to a consistent state practice in the field.

The significance of the topic is urgency in acknowledging and enforcing a more restrictive international legal approach towards the use of armed force. By constructing an alternative framework for the use of armed force in its sphere of influence, Russia underlines the major powers as factors of shaping the global order, who presumably define their own approach to international law.[9] As it has been proven in Ukraine, both the *jus ad bellum* and the UN system are of continuing relevance, as they serve the basis in structuring the discourse and debate regarding such horrific events, safeguarding the international community from implementing the frameworks of *realpolitik*.

For this purpose, the author will examine the legal basis for the use of armed force, including the UN Charter primarily, customary international law, international court practice, state practice and legal scholarship; Russia's FPC, Military Doctrine, Russia's Federal Laws as well

[9] William W. Burke-White, "Crimea and the international legal order", *Survival: Global Politics and Strategy*, vol. 56, 2014, p. 65.

as its more general legal ideas, political and social aspects. The study will focus on three legal justifications put forward by President Putin[10], in particular:

(i) Individual and Collective Self-defence
(ii) Prevention of Genocide of Russian-speaking Population in Ukraine
(iii) Protection of Nationals and Compatriots Abroad

The exposition of these legal arguments raises several research questions of both general and specific nature the author of this Thesis is aimed to answer.

(i) How is right to self-defence regulated from the perspective of international law and how is right to self-defence regulated from the perspective of the Russian Federation? What are the factors forming Russia's motives for exercising self-defence in Ukraine? In which ways, if any, are *jus ad bellum* approaches on individual self-defence influenced by the "special military operation" in Ukraine for the future legal discussion on Article 51 of the UN Charter? How does Russia create and advance its grounds for collective self-defence in a long-term perspective?

(ii) What is the crime of genocide from the perspective of international law and what is the legal situation of Russian-speaking population in Ukraine according to international human rights monitoring mechanisms? How are humanitarian intervention and responsibility to protect concepts regulated from the perspective of international law and how are these concepts perceived by the Russian Federation both generally and specifically in Ukraine throughout the years? In which ways, if any, are *jus ad bellum* approaches on humanitarian intervention influenced by the "special military operation" in Ukraine for the future legal discussion on the scope of Article 2(4) and Article 51 of the UN Charter?

And finally,

(iii) How is the doctrine of protecting nationals abroad regulated from the perspective of international law and how is the doctrine of protecting nationals abroad envisaged in laws, politics, and society of the Russian Federation? How do the modifications

[10] President of Russia, "Address by the President of the Russian Federation", 24 February 2022.

introduced by Russia into the scope of protection affect the doctrine from the international legal standpoint? Is there a place for the doctrine to be applied in Ukraine? In which ways, if any, are *jus ad bellum* approaches on the protection of nationals' doctrine influenced by the "special military operation" in Ukraine for the future legal discussion on the doctrine's position in international law?

To find answers to these research questions several scientific methods will be used. The first and foremost analytical method will be applied to conduct the basic legal research. It will assist the author with examination of relevant international legal norms in the field of *jus ad bellum* for further comparison with the circumstances invoked by Russia. The empirical method will be utilized as well, as this study consists of vast application of the ICJ (International Court of Justice) caselaw and other relevant judicial practice. Historical method will be employed in questions regarding developments of Russia's society and formation of ideas in different periods of time, as well as its opinions expressed on past incidents in international law.

The main bibliography is represented by the UN documents (UN and specialized agencies), their commentaries and International Law Commission (ILC) reports. Thesis also contains assessment of relevant documents issued by Russia, including but not limited to the treaties on friendship, acts on domestic and international policies, public addresses. Study will refer to numerous academic pieces of different legal scholars in the area including but not limited to Tom Ruys, René Värk, James Crawford, Ian Brownlie, Hersch Lauterpacht, Roy Allison. Finally, Russia's legal scholarship references to Fedor Fedorovich Martens and other members of legal discussions are included in the assessment.

The structure of this Thesis is divided into three main Chapters. First Chapter will cover the argument of self-defence under Article 51 of the UN Charter. Here, the author will examine the existence of individual self-defence against Western states and NATO, the problematics of anticipatory self-defence; and collective self-defence, which implied the recognition of the so-called Donetsk and Luhansk People's Republics, conclusion of treaties between Russia and the entities, and thus a question of statehood and international recognition. It will also cover such concepts as requesting military assistance, intervention by invitation, status of insurgent and separatist groups. Finally, the requirements of necessity and proportionality will be evaluated in light of scale and gravity of Russia's military operation.

Second Chapter will discuss the argument of preventing genocide, allegedly being committed against the Russian-speaking population in Ukraine. The author will assess legal nature and implications of humanitarian intervention and responsibility to protect (R2P), their understanding and application by Russia. The chapter will also address the phenomenon of remedial secession, relevance of Kosovo incident and its connection to recognizing People's Republics.

Third Chapter will evaluate the doctrine of protecting nationals abroad and Russia's innovatory amendment by including the notion of compatriots in the protection scope. It will encompass a basic discussion on the doctrine, conditions to be met for its application, relevant Russia's social and political ideas pertaining to its invocation in Ukraine, relationship of ethnicity, language, and nationality vis-à-vis international law.

Keywords: International Law, Armed Conflict, Intervention, Ukraine, Russia.

I. "SPECIAL MILITARY OPERATION" AND THE RIGHT TO SELF-DEFENCE

The UN Charter contains only two exceptions to the prohibition of deploying armed force, namely the collective enforcement action authorized by the UNSC (Security Council) in accordance with Chapter VII, and the right to exercise self-defence as an individual or collective measure pursuant to Article 51 of the UN Charter. Individual measure encompasses the right of a state being a victim of an armed attack to exercise self-defence against another state which is the perpetrator. Collective self-defence applies when the victim state invites another state to assist it in using armed force in self-defence. Both exceptions to the general norm are subjected to treaty and customary international legal rules.

Any state acting in self-defence must be a victim of an armed attack. The "armed attack" requirement thus constitutes an integral part of Article 51 – no self-defence can be exercised if no armed attack occurs. In its *Nicaragua* judgement, the ICJ proceeded from the statement that the existence of an armed attack is a *conditio sine qua non* for the exercise of self-defence either individually, or collectively.[11] The ICJ elaborated further on the notion of an armed attack – it follows that the right of self-defence cannot be carried out against acts which do not reach the threshold of an armed attack. "Attack" in its turn refers to a real action in progress, not to a threat or danger. It could be concluded on this point that the UN Charter does not allow to use armed force against an imminent attack or potential threat.

The fact that a state is permitted to act in self-defence does not mean that it is permitted to deploy unlimited, indistinctive armed force. Being a part of customary law, the established rule is necessity and proportionality of measures. In order to be lawful, recourse to self-defence must abide by these substantive criteria. Although it is not envisaged within the scope of Article 51 of the UN Charter, the ICJ has numerously emphasized the importance of these limitations, as constituting a part of customary international law.[12] Any act of self-defence must be necessary and proportional to the armed attack against the victim state, while the targets of such an act must be legitimate military targets open to attack in the exercise of self-defence.

[11] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Judgement, ICJ Reports, 27 June 1986, para 237.
[12] ICJ, *Nicaragua*, Judgement, para 176; International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports, 8 July 1996, para 41; International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgement, ICJ Reports, 19 December 2005, para 147.

One of the components of necessity can be identified as the need for self-defence to be a last resort measure. It implies that a state can only resort to armed force against another state if no other realistic alternative means are available and all means of peaceful settlement were exhausted. Another component concerns the choice of targets for the defensive action meaning to be consistent with the rules of international humanitarian law.[13] It also implies the adequacy of measures for repelling an armed attack, meaning to relate to the force to be repelled.[14] Proportionality requires that defensive action must be reasonably proportionate in scale and nature to an attack that triggered self-defence. The primary determinant is the nature and gravity of an armed attack. Any deviation needs to be justified by the defending state by reference to the imperative necessities of the defensive action, by the specific objective that the defensive action is designed to meet.[15]

Finally, as the UN Charter confers on the UNSC the primary responsibility for maintaining international peace and security, according to the second sentence of Article 51, the act of self-defence should be reported immediately to the UNSC so the Council would take the next steps. As the state practice illustrates, states have taken care to report their self-defence to the UNSC, especially after the *Nicaragua* case and the position of the US suffered due to not reporting to the UNSC. The ICJ held that the failure by the US to report its use of armed force was an indication that the US was not itself convinced it was acting in self-defence.[16] If a state wishes to make its position settled it should try to secure this expressed recognition of the right of self-defence.

Russia notified the UNSC promptly after the launch of the "special military operation"[17] by transmitting the letter signed by the Russian Representative to the UNSC, where the speech of President Putin was attached as the only annex explaining the measures taken under Article

[13] ICJ, *Legality of Nuclear Weapons*, Advisory Opinion, para 42.
[14] Avra Constantinou, "The right of Self-Defence Under Customary International Law and Article 51 of the United Nations Charter", Athènes: Sakkoulas, 2000, pp 170-171.
[15] Tom Ruys, "Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice", Cambridge University Press, p. 117.
[16] ICJ, *Nicaragua*, Judgement, para 235.
[17] For Russia, labelling its military action in Ukraine a "special military operation" is important. Inside the country, Russia criminalized using the word "war" with regard to the armed conflict in Ukraine. However, from the standpoint of international law the terminology does not make any difference. The UN Charter prohibits the use of "force", which refers to the reality on the ground. The prohibition in Article 2(4) of the UN Charter therefore precludes states from disregarding their legal obligations when putting misleading labels on their action. Moreover, the formal declaration of war is not required to invoke international obligations. The new terminology was deliberately introduced in 1945 to avoid a situation where states either hide behind the labels or avoid their legal obligations by not declaring war. The UN Charter removed this loophole.

51.[18] In its turn, the UNSC voted 11-1 to condemn Russia's military action, whereas Russia's vote against as a Permanent Five member well-expectedly killed the proposed resolution.

As the obligation to report was satisfied, the conditions to fulfil on the part of Russia are whether the military campaign is a lawful exercise of self-defence pursuant to the first sentence of Article 51. It implies that (i) alleged individual action satisfies the precondition of an "armed attack", and (ii) collective action is exercised either unilaterally or collaboratively with the victim state or entirely on its behalf. Following part will elaborate on the possible individual self-defence against Western states and NATO. It will also assess the legal status of Donetsk and Luhansk, legality of requesting assistance from Russia and the position of non-State groups.

1.1. Individual Measure Against the West: Anticipatory Self-Defence

As rightly put forward by historians, Russian history is best understood as the process of adaptation to relative backwardness and perceived external threats.[19] As to the use of armed force within the framework of Article 51 of the UN Charter, starting from the early 2000s Russian officials had been indicating that it might be permissible to use armed force against extraterritorial sources of imminent threat to Russian security, even in absence of an actual armed attack coming from those sources. Statements, that were made by politicians, military commanders, and President himself, were enthusiastically endorsed by Russian legal academics.[20]

Consequently, the latest Russia's FPC of 2023 indicates that Russia views Article 51 of the UN Charter as providing an adequate basis for the use of armed force in self-defence, and a norm not to be revised legal basis for the use of armed force in self-defence. It further grants the Armed Forces of the Russian Federation the right to address "the tasks of repelling and preventing an armed attack on Russia".[21] If read together with Russia's official opinions expressed, in particular that "to exercise self-defence a state does not need to wait for the

[18] United Nations, General Assembly, "Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General", S/2022/154, 24 February 2022, p. 2.
[19] Igor Torbakov, "What does Russia want? Investigating the interrelationship between Moscow's domestic and foreign policy", Deutsche gesellschaft für Auswärtige Politik, 2010, p. 5.
[20] Bakhtiyar R. Tuzmukhamedov, "Preemption by Armed Force of Trans-Boundary Terrorist Threats: The Russian Perspective", *International Law* Studies, vol. 83, 2007, pp. 83-85.
[21] Ministry of Foreign Affairs of the Russian Federation, "The Concept of the Foreign Policy of the Russian Federation", Approved by Decree of the President of the Russian Federation No. 229", 31 March, 2023, Chapter IV, Article 25.

negative consequences of an armed attack to take effect"[22], gives the perception of accepting the concept of anticipatory self-defence as to be potentially used. Finally, the 1996 Federal Law "On Defence" and its amendment introduced in 2009 in the aftermath of an armed intervention in Georgia envisages that in order to "maintain international peace and security and to protect the interests of the Russian Federation and its citizens, elements of the Armed Forces of the Russian Federation may be used beyond the territory of the Russian Federation".[23]

Fed with feeling of insecurity and international vulnerability, all the resources in Russia are being constantly mobilized for combatting supposed domestic and foreign threats. For President Putin all international institutions, except for the UN where the Russian Federation holds a permanent seat in the UNSC, do not play a role in guiding its international relations, and the US is the crucial reason of all Russia's international action. From Russia's perspective, everything done by the Western actor is directed on weakening Russia.[24] Thus, President Putin's external behaviour is built upon an idea of the "Western opposition" and, although expressed rather radically, but conspiracy against Russia.

It includes the paradigm of Western-initiated regime change in Ukraine, locating NATO military bases on the Ukrainian soil. For instance, the FPC once again accuses the US and their allies of aggravating the "longstanding anti-Russian policy", and unleashing "a new type of hybrid war" in Ukraine.[25] It continues, that the West "is aimed at weaking Russia in every possible way, including at undermining its constructive civilizational role, power…limiting its sovereignty in foreign and domestic policy, violating its territorial integrity".[26]

Concerns in this context are well-illustrated in Russia's Law.[27] In particular, Russia has a reference to a "group of states" that could commit an act of aggression. It could be presumed,

[22] Ministry of Foreign Affairs of the Russian Federation, "О Позиции России на 63 Сессии Генеральной Ассамблеи ООН" [On the Position of Russia at the 63rd session of the UN General Assembly], 10 September 2008, para 14.
[23] Russian Government, Федеральный Закон от 31.05.1996, n. 61-ФЗ "Об Обороне" [Federal Law of the Russian Federation "About Defence", Law of 31 May 1996, no. 61-FZ], Article 10(1).
[24] Nicolás De Pedro, Panagiota Manoli, Sergey Sukhankin, Theodoros Tsakiris, "Facing Russia's strategic challenges: Security developments from the Baltic Sea to the Black Sea", Directorate-General for External Policies Policy Department, 2017, p. 7.
[25] Ministry of Foreign Affairs of the Russian Federation, "The Concept of the Foreign Policy of the Russian Federation", Approved by Decree of the President of the Russian Federation No. 229", 31 March, 2023, Chapter II, Article 13.
[26] Ministry of Foreign Affairs of the Russian Federation, "The Concept of the Foreign Policy of the Russian Federation", Approved by Decree of the President of the Russian Federation No. 229", 31 March, 2023, Chapter II, Article 13.
[27] Bakhtiyar R. Tuzmukhamedov, "The Handbook of the Law of Visiting Forces", 2nd Edition, Part V Case Studies, Russian Forces in the Former USSR and Beyond, 2018, p. 696.

that this addition reflects anti-NATO sentiments prevailing in the Russian political community. Further, while an element of aggression according to the UNGA is an attack by the armed forces of a state on the land, sea, or air forces, or marine and air fleets of another state, Russia refines this provision by adding "location of their stationing notwithstanding".[28]

In his speech on 24 February 2022, President Putin expresses his worriedness about "the fundamental threats that year after year, step by step, are rudely and unceremoniously created by irresponsible politicians in the West" in relation to Russia, by which he means "the expansion of the NATO bloc to the east, bringing its military infrastructure closer to Russian borders".[29] He puts forward several examples of the past to the table to explain the threats he sees in the West and NATO, mentioning NATO and US military operations against the former Federal Republic of Yugoslavia (FRY), then referring to Syria and Iraq. From the perspective of Russia, NATO's operation in Kosovo was the Western tendency to put human rights and democracy ahead the rights of sovereign states to achieve their internal security. Russia claims all these to be launched contrary to international law, and thus sees such developments as a potential threat to its statehood and Russian people.

First part of the speech cited here demonstrates one of the legal justifications for the intervention – individual self-defence by Russia against the West and NATO. None of countries involved have acted militarily against Russia, which means President Putin is claiming the right to anticipatory self-defence. Indeed, the notion of anticipatory self-defence has long been subjected to intense debates in international legal fora, where the positions vary among states and legal scholars with no consensus so far. Self-defence of this kind implies two types of action: (i) pre-emptive action, and (ii) preventive action.

First type was previously developed in the pre-Charter era with the famous *Caroline* incident in 1837. The incident further brought Webster formula, which allowed self-defence if "necessity of self-defence was instant, overwhelming, leaving no choice of means, and no moment of deliberation".[30] However, even this example and its formula should be taken seriously as an expression of a strictly limited application. It can be only ensured if the rule is applied based on a heavy burden of proof which states claiming to exercise self-defence must

[28] Tuzmukhamedov, p. 695.
[29] President of Russia, "Address by the President of the Russian Federation", 24 February 2022.
[30] Michael Wood, "The Caroline Incident – 1837" published in "The Use of Force in International law: A Case-Based Approach", 2018, p. 5.

meet.[31] The adversary should decide on the visibly irreversible course of action, which therefore could satisfy the requirement of an immediate attack. Considering this, Russia fails to present a convincing proof, as there has been no evidence of any planned military action on behalf of either NATO or the US alone whatsoever directed upon Russia, its Armed Forces or Russian population. The argument further lacks any action of imminent, overwhelming character, leaving President Putin no other choice of means.

The second type of anticipatory self-defence is preventive self-defence, which causes even more controversies within its notion and usage. It stipulates military action taken against a threat, which has not yet materialized, and which is uncertain or very remote in time. So far there has been nothing in contemporary international legal norms that would suggest the attack anticipation of this broad character to amount to the exercise of self-defence, the concept is too far from customary legal norms. Moreover, state practice suggests that this action is being highly criticized. For instance, in 1981 Israel carried out an attack on the nuclear reactor "Osiris class" in Iraq, purchased from France. Iraq claimed it would be used strictly for peaceful purposes within the terms of the Treaty on the Non-Proliferation of Nuclear Weapons; Israeli military intelligence on the contrary presupposed the purchase constituted a part of Iraqi nuclear weapons program, thus the military operation was launched to destroy the reactor. In reaction, the UNSC strongly condemned the military attack by Israel concluding it to be in clear violation of the UN Charter and norms of international conduct.[32]

One distinct example of using the concept of preventive self-defence is the 2002 United Sates National Security Strategy (NSS), although text itself does not use the term, and names this approach as a pre-emptive action instead. Citing the NSS, nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack, where the existence of an imminent threat are most often a visible mobilization of armies, navy and air forces preparing to attack.[33] One may argue that it constitutes a worthy example of legitimate exercise of self-defence, however the policy adapted the concept of imminent threat to the "capabilities and objectives of today's adversaries", connecting it to the horrific events of 11 September 2001 and the "war on terror" policies conducted by the US. Thus, this statement cannot be reconciled with the *Caroline* requirement

[31] Bruno Simma, "The Charter of the United Nations (3rd Edition): A Commentary", vol. II, 2012, para 54.
[32] United Nations, Security Council resolution 487 (1981), 19 June 1981, S/RES/487(1981), paras 1-6.
[33] The National Security Strategy of the United States, 2002, p. 15.

of necessity. Overall, in other instances of potential and future threats the argument in favour of preventive self-defence is simply going too far in employing armed force.

If to assume however, that Russia exploited the argument of preventive self-defence, there is no evidence existed, that the Western states and NATO are engaged in military activities that would allow them to carry an armed attack against Russia in a visible future. There is also no evidence that a massive deployment of forces was carried out in the region or stationed on the Russian border, which would be sufficient for them to potentially attack Russia's Armed Forces. The number of military assets in places near NATO eastern borders is certainly way limited in comparison with the number of troops and equipment which Russia had gathered altogether along its border with Ukraine.

Finally, after launching the "special military operation" member states of NATO have been against the direct confrontation with Russia, which is illustrated through the numerous hesitant talks on Ukrainian membership in the Alliance, reluctance to close the sky over Ukraine and their absolute rejection of NATO putting boots on the ground. Thus, even if accepted by some scholars in legal theory, the concept of preventive anticipatory self-defence is out of relevance, as Russia could not present any credible evidence.

To draw conclusion on the issue, the author of this Thesis would like to express support for a restrictive view, implying that the concept of anticipatory self-defence of either pre-emptive or preventive type does not have basis in the UN Charter era, as the UN Charter brought a radical alteration of state's right to use armed force. Article 2(4) and Article 51 in sum establish a total ban on the unilateral use of armed force with explicit exception of self-defence when the armed attack is underway. Even if anticipatory self-defence was permitted in the years prior to the adoption of the UN Charter, pre-existing custom was modified by Article 51 of the UN Charter. As Tom Ruys puts it, in light of the equal normative position of customary and conventional law, and in accordance with the *lex posterior* principle, introduction of the UN Charter framework on the use of armed force has removed incompatible pre-existing custom.[34]

The restrictive view could also be supported by the *jus cogens* character of Article 2(4) and thus its non-derivability, as well as by the ICJ in its caselaw, where the Court is granting the condition of an armed attack a primary significance. It additionally emphasizes that not every

[34] Ruys, p. 259.

"use of force" constitutes an armed attack, by setting a threshold of "the most grave" forms of the use of force.[35] Finally, the fact that "the threat of force" and "threats to the peace" are mentioned in Article 2(4) and 39 of the UN Charter, proves that the drafters intended to submit the incidents concerned to the UNSC. For instance, in San Francisco some drafters made a distinction between the prevention and the repression of aggression. As noted by France, "as far as prevention is concerned, it vests in the UNSC the task of taking whatever measures are necessary…but as far as repression is concerned, and that is a form of legitimate individual or collective self-defence, the text indicates the right to act immediately".[36]

The incident of *Caroline* does not fulfil the requirement of an armed attack, and thus cannot have any legal effect in the contemporary international law. The situation in *Caroline* contributed to an already existed rebels' occupation of the British territory, thus to an already existed on-going armed attack. In this context, one could argue that if pre-emptive self-defence was permissible in case of non-state actors, surely it could be permissible in inter-state relations. However, the fundamental question to address is still whether this incident from 1837 can live on within the modern *jus ad bellum* framework in the first place. As argued previously by the author of this Thesis, the UN Charter mechanism brought radical changes as to when the resort to armed force is permitted, and *Caroline* outlived itself.

As put by Ian Brownlie, instead of relying on customary practice from the decades immediately preceding the UN Charter, the precedent invoked dates from an age where states were essentially free to resort to war against one another and lacked any legal regime of self-defence.[37] Indeed, before 1945, self-defence was not perceived as a legal concept, but simply a political excuse used by states to resort to armed force. It came only with the UN Charter framework, that the prohibition of armed force and consequently the legitimacy of self-defence become established as consistent and uniform legal concepts. It follows that to exercise self-defence properly, a State must comply with all the requirements established in Article 51 of the UN Charter and not with some vague conditions mentioned in a diplomatic incident between the US and the UK more than one hundred years ago. Overall, the incident would be a rather weak example advocating for anticipatory self-defence.

[35] ICJ, *Nicaragua*, Judgement, para 191.
[36] Documents of the United Nations Conference on International Organization, San Francisco, vol. XI, Commission III Security Council, 1945, p. 58.
[37] Ian Brownlie, "The principle of Non-Use of Armed Force in Contemporary International Law", 1989, pp. 17-27.

Finally, as we discussed before, the NSS 2002 document cannot be claimed as a convincing practice, as it was directed against a specific threat, and omitted any mentioning of necessity and proportionality. It could be said that overall, the NSS 2002 was not advocating for a new general right on the use of armed force, but rather demanded for an exception in treating this right for the purposes of its "war on terror" policies. Finally, the NSS represents one state' view, and similar reference to this type of action disappeared in the future editions of American national policy documents.

As it is illustrated in Ukraine, recognizing anticipatory self-defence weakens the general prohibition on the use of armed force and renders the UN Charter system helpless. Legal argument put forward by Russia demonstrates, how the distinction between defensive and offensive armed force becomes blurry. President Putin's allegations towards Western countries and NATO are without any legal basis in evidence, whereas the unilateral self-defence is based solely on one's own perception of threat. As it was illustrated through examples above, anticipatory self-defence has certain inherent weaknesses simply by its nature: there is no means to objectively verify the existence of an alleged threat, to evaluate the level of certainty for the attack to occur as well as to ascertain the genuine intention of a government in this decision-making process. Thus, it is a dangerous precedent, that eventually leads to abuses, and unthinkable consequences as displayed in Russia's aggression against Ukraine.

1.2. Collective Self-Defence on the Side of Donetsk and Luhansk

Russia decided to change its approach in relation to Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR), recognizing the entities as states on 21 February 2022. Indeed, before the intervention Russia had regarded Donetsk and Luhansk as parts of Ukraine, enabling Putin to deny presence of Russian forces in the region in 2014-2022, which did not correspond to the situation on the ground.[38] Second part of Putin's claim for exercising self-defence is invoking collective action for the protection of DPR and LPR, with which Russia concluded and ratified separate treaties of friendship, cooperation, and mutual assistance on 22 February 2022.

As stated in the President's speech, both DPR and LPR turned to Russia with a request for help, as they have allegedly been subjected to bullying and genocidal acts perpetrated by the

[38] ECtHR 8016/16, 43800/14, 28525/20 *Ukraine and the Netherlands v. Russia*, 25 January 2023, paras 690-697.

Ukrainian Government.[39] The concluded treaties, in their turn, should have become the basis for exercising self-defence of these entities. Both treaties for DPR and LPR are identical in wording. If to look at the relevant provisions, Article 3 authorizes Russia and the entity to consult in case of a threat of attack in order to ensure their common defence and determine the necessity, form and extent of the assistance they are ready to provide for the purpose of aiding in removing the threat; Article 4 further authorizes the parties to take jointly all measures to remove the threats, which includes military assistance as part of individual or collective self-defence and Article 5 grants each party the right to deploy its Armed Forces in the construction, use, and improvement of military facilities in its territory.[40]

It appears obvious, that the entire process of recognition, ratification and invitation was well prepared in advance. In one day of 22 February, the State Duma of Russia managed to ratify both treaties, the heads of DPR and LPR sent their requests for assistance in defence against the Ukrainian aggression, and President Putin approved the action, requesting Russia's Armed Forces to be stationed abroad with no further details on operation, its task and timeframe.[41] Moreover, several days before the launch of the military operation, it was declared that Russia's Armed Forces are deployed to conduct some peacekeeping functions in the region.[42] The move is not a new pattern of Russia's policies, but instead has been used on numerous occasions as a pretext for military operation since 1990s. The UN Secretary General reacted on this announcement by concluding, that Russia's Armed Forces "are not peacekeepers at all".[43]

As the ICJ stated in *Nicaragua*, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State, regarding itself as the victim of an armed attack.[44] International law recognizes the authority of the legitimate government of a sovereign state to have a right for inviting or consenting to a military intervention against a non-state party as long as the operation is not conflicting with a peremptory rule of international law. Legal basis

[39] President of Russia, "Address by the President of the Russian Federation", 24 February 2022.
[40] Government of the Russian Federation, "Договор о дружбе, сотрудничестве и взаимной помощи между Российской Федерацией и Донецкой Народной Республикой [Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Donetsk People's Republic]", 28 February 2022, Government of the Russian Federation, "Договор о дружбе, сотрудничестве и взаимной помощи между Российской Федерацией и Луганской Народной Республикой [Treaty of Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Luhansk People's Republic]", 28 February 2022, Article 3-5.
[41] René Värk, "Russia's legal arguments to justify its aggression against Ukraine", International Centre for Defense and Security, November 2022, p. 2.
[42] Paul McLeary, Andrew Desiderio, "As Putin sends troops into Donbas, White House avoids the 'I' word", *Politico*, 21 February 2022.
[43] United Nations, "Department of Public Information, Secretary-General's press encounter on Ukraine", 22 February 2022.
[44] ICJ, *Nicaragua*, Judgement, para 199.

primarily lies in sovereignty and state's authority over its territories, which is an attribute of sovereignty.

However, Putin's legal justification of self-defence falls from the first assessment as the right to request military action in self-defence is strictly limited to States. The ICJ emphasized customary nature of the principle of non-intervention, continuing that the principle would lose its effectiveness whatsoever if the intervention was justified by a request for assistance coming from opposition groups in the country.[45] Invitations violating a peremptory norm such as when a puppet regime is installed to issue this request or consent do not have legal effect. Thus, support for any insurgent entities is a blatant intervention into the state's domestic affairs.

At the first glance when assessing the claim of collective self-defence considering the so-called People's Republics and their "request for military assistance", a concept of "intervention by invitation" could be recalled. The concept of asking for military help at the invitation of state government is well established in international law.[46] It stipulates that the use of armed force is lawful if a receiving state consented to it. However, the problem arises in the validity of this consent. Any consent granted must be freely given and issued by the lawful authority of the consenting state, which is, most importantly, recognized under international law and national law of the consenting state as authorized to act on its behalf.

The identification of authority with effective control over territory of the state is the key determinator, as well as other conditions such as the way of acquiring the territory control and level of international recognition.[47] If to apply the concept to the present situation, it follows that the consent was given by the authorities of Donetsk and Luhansk, which allegedly acquired statehood. President Putin's claim "People's Republics have asked us for help" could be possibly taken as a basis for military assistance on request. However, straight after this argument, he proceeds with mentioning collective self-defence, which makes it unclear as to whether the claim of assistance was advanced at all.

Nevertheless, both arguments of collective self-defence and military assistance on request have "valid consent" requirement in common, as well as requirement to originate from a "state". This is not the case of DPR and LPR, as both entities are not states, do not have a broad international

[45] ICJ, *Nicaragua*, Judgement, para 246.
[46] Georg Nolte, "Intervention by Invitation", *MPEPIL*, 2010.
[47] Erika de Wet, "Military Assistance on Request and the Use of Force", Oxford University Press, 2020, pp. 21-73.

recognition, and make the consent invalid, originating from a non-state group. Moreover, the concept of military assistance on request presupposes that any military activity required is undertaken strictly on the territory of the state asking for it, as a state cannot give consent to use armed force on the territory of another sovereign state, allegedly Ukraine in this case.[48] As we clearly observe at the time of writing this Thesis, Russia's military activity is not limited to the areas of Donbas, but extends to the nation-scale strikes covering the whole territory of Ukraine since the first day of the "special military operation".

1.2.1. Manifestly Unlawful Recognition and Illegality of Military Intervention

Before moving to the next requirements, it is worthy to devote some time and assess a status of the People's Republics in depth, establishing a connection between a manifestly unlawful recognition and the legality of military intervention. Russia's recognition of the so-called People's Republics in Ukraine is manifestly unlawful and thus does not change the illegality of the intervention. It follows, that both entities remain separatist regions, which tried to separate from Ukraine in an unconstitutional way. In this regard, questions arise as to (i) whether the oblasts in question meet the criteria of statehood and, if so, (ii) whether this status is achieved through a serious violation of international law.

An important aspect to bear in mind is that although there is no minimum number of recognitions required to consider an entity a state under international law, the acts of recognition in violation of international law do not fall in that amount. The declarations of independence occurred in 2014 in the context of Russia's military activity that year, and thus statehood of the oblasts did not result in a wide international acceptance remaining so up to this point. The exceptions include Syria, North Korea, and the Russian Federation, whereas other states have been actively against both independence and recognition.

In terms of satisfying the criteria for statehood according to the Montevideo Convention,[49] the most essential requirement of independence is not met, as both republics remained under control of Russia concerning all the matters of security, economy, and decision-making in the field of foreign relations, being outside of Kyiv's effective control since 2014. According to the Committee on Legal Affairs and Human Rights of the Council of Europe (CoE) report, there

[48] James A. Green, Christian Henderson, Tom Ruys, "Russia's attack on Ukraine and the jus ad bellum", *JUFIL*, 2022, p. 22.
[49] Convention on Rights and Duties of States, Montevideo, 26 December 1933. LNTS 165, adopted by the Seventh International Conference of American States, Article 1.

can be no doubt that both the DPR and LPR have been wholly dependent on Russia, which applied to all their institutions, courts established by *de facto* authorities, not legitimate under Ukrainian and international law.[50]

More recently, in *Ukraine and the Netherlands v. Russia* case before the European Court of Human Rights (ECHR), the Court decided on 25 January 2023 on the Russia's involvement in the region. Among other things, it concluded that areas of DPR and LPR were, from 11 May 2014 and up to at least 26 January 2022, under the jurisdiction of the Russian Federation. It referred to the presence in eastern Ukraine of Russian military personnel from April 2014 and the large-scale deployment of Russian troops from August 2014 at the latest. The ECHR established beyond any reasonable doubt that Russia had a significant influence on the separatists' military strategy; that it had provided weapons and other military equipment to the DPR and LPR on a significant scale from the earliest days of their creation; that it had carried artillery attacks upon their requests and provided political and economic support to the separatists.[51] The conclusion we may arrive at is that Russia's rapid recognition after eight years of an ongoing military conflict in the region is designed to attempt to justify the nation-scale invasion of Ukraine on 24 February 2022.

In its advisory opinion on *Kosovo* and its declaration of independence, the ICJ ruled out a possibility of becoming a state as a result of the unlawful use of armed force. More specifically, the illegality attached to the declaration of independence stemmed not from the unilateral character of the declaration, but from the fact it related to the unlawful use of armed force or other violations of norms of general international law, those of *jus cogens* character.[52] Although the term used is not an "armed attack", it is clear that the military operation carried out by Russia since 2014 surely passes the threshold for the "use of force". As stated in the ICJ caselaw, the element of coercion which defines the prohibited intervention is obvious in the case of an intervention using armed force.[53]

To quote Hersch Lauterpacht, the recognition of this kind denies the sovereignty of the parent state actively engaged in asserting its sovereignty, amounting to unlawful intervention; and

[50] Council of Europe, Parliamentary Assembly of the Council of Europe, "Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities", resolution 2133 (2016), paras 3-4.
[51] ECtHR 8016/16, 43800/14, 28525/20 *Ukraine and the Netherlands v. Russia*, para 611.
[52] International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports, 22 July 2010, para 81.
[53] ICJ, *Nicaragua*, Judgement, paras 101 and 205.

constitutes an abuse of the power of recognition.[54] It does not change neither in case of direct military action, nor indirect support for armed activities within the state. Article 40(2) of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) emphasizes that no state shall recognize as lawful a situation created by a serious breach of a *jus cogens* norm.[55]

The unlawful character of status and recognition is also proven by the language used by the UNGA in its resolution dated 2 March 2022 on Aggression Against Ukraine, receiving 141 affirmative votes, in which it deplored the 21 February 2022 decision by Russia related to the status of "certain areas of the Donetsk and Luhansk regions of Ukraine" as a violation of territorial integrity and sovereignty of Ukraine, being inconsistent with the principles of the UN Charter.[56] Therefore, recognizing DPR and LPR as states and claiming their statehood in general is manifestly wrong both in terms of fact and law.

1.2.2. Necessity and Proportionality in Defending the People's Republics

As noted by the ICJ on numerous occasions, the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.[57] It is important to mention first, that the application of both conditions presupposes that the measures taken by state are pursuing a legitimate end. If a state however engages in a prohibited use of armed force, it cannot argue that the measures were lawful based on necessity and proportionality. Thus, the analysis according to these conditions normally enters if the actions of a state can be seen as a self-defence. However, if to follow Putin's playbook for a moment, assuming DPR and LPR were states, Russia still fails on its claim for collective self-defence, as the measures employed do not correspond to these universally accepted requirements.

Two requirements are designed to answer two questions: (1) necessary to do what? and (ii) proportionate to what? It is generally taken as limiting self-defence to action which is necessary to recover territory or repel an attack on state's Forces and which is proportionate to this end. The scale and scope of the Russia's military activity far exceed what required to defend the so-

[54] Hersch Lauterpacht, "Recognition of States in International Law." *The Yale Law Journal*, vol. 53, no. 3, 1944, p 392.
[55] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts", Supplement No. 10 (A/56/10), 12 December 2001, Article 40(2).
[56] United Nations, General Assembly resolution 11/1, "Aggression against Ukraine", 2 March 2022, para 5.
[57] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para 41.

called People's Republics. If to look at the first days of invasion, international community had been seeking for peaceful resolution, including the possible ways to de-escalate, consulting and negotiating in different forums. The UNSC had been present at the very time of invasion when the resolution was vetoed by the Russian Representative.

There is hardly accepted level of necessity met by Russia's Armed Forces when attacking Kyiv and other regions of Ukraine if a single purpose of the operation was to defend Donbas region and ethnic Russian population living there. Moreover, referring to the President Putin's speech, Russia's military operation would "strive for the demilitarization and denazification of Ukraine", which clearly illustrates the ambition to conquer and overthrow the government of Ukraine, possible amounting to the "ideological" intervention, which has not acquired any basis in international law so far.[58]

As to the second condition of proportionality, the latest Report of the Independent International Commission of Inquiry on Ukraine shows that the civilian harm caused by the "special military operation" is hardly to reconcile with Russia's intent to protect population of DPR and LPR. As submitted pursuant to the recent Human Rights Council (HRC) resolution, body of evidence collected shows that Russian authorities have committed a wide range of violations of international human rights law and international humanitarian law.[59] Many of its actions amount to war crimes as they include wilful killings, attacks on civilians, unlawful confinement, torture, rape, and forced transfers and deportations of children.

The Commission has concluded that Russia's Armed Forces have carried out attacks with explosive weapons in populated areas with an apparent disregard for civilian harm and suffering. It has documented indiscriminate and disproportionate attacks, and a failure to take precautions, in violation of international humanitarian law, such as artillery, airstrikes, and attacks on hospitals, educational institutions, cultural heritage and memorials, humanitarian corridors, and nuclear power plants.[60]

Considering the customary requirements for the right to self-defence, we may already conclude that the long list of measures deployed in Ukraine does not coincide with the collective self-

[58] ICJ, *Nicaragua*, Judgement, para 266.
[59] United Nations, Human Rights Council, "Report of the Independent International Commission of Inquiry on Ukraine", 15 March 2023, A/HRC/52/62, pp. 2-15.
[60] United Nations, Human Rights Council, "Report of the Independent International Commission of Inquiry on Ukraine", A/HRC/52/62, pp. 4-15.

defence to repel an armed attack. Consequently, no treaties on friendship, cooperation and mutual assistance with non-state separatist groups concluded by Russia, have any legal effects under international law. They cannot serve as a legal ground for Russia's military presence in Ukraine, as Russia's Armed Forces are present there without a consent of the Ukrainian government.

As was established elsewhere in this Thesis, unilateral presence without state consent amounts to the violation of the prohibition of the use of armed force and a clear act of aggression. To sum up on this legal justification, invoking right to collective self-defence of separatist regimes DPR and LPR are not compatible with Article 51 of the UN Charter.

II. PREVENTING A GENOCIDE OF RUSSIAN-SPEAKING POPULATION

President Putin in his address on 21 February 2022 prior to the invasion referred to the "horror and genocide" allegedly suffered by the Donbas communities at hands of the Ukrainian Government in Kyiv, articulated by Putin as "Kiev regime".[61] Again on 24 February 2022 he reaffirmed that Russia's legal justification for its use of armed force in Ukraine is "to protect people who have been subjected to bullying and genocide for eight years, to stop that atrocity inflicted upon the millions of people who pinned their hopes on Russia".[62] Also, Foreign Minister of Russia Sergey Lavrov justified this military operation by the need to "prevent the neo-Nazis and those who promote methods of genocide from ruling Ukraine".[63]

The crime of genocide requires a special intent (*dolus specialis*) to destroy a specific group in whole or in part based on race, religion, nationality, or ethnicity, and there is no factual basis pointing out to such a policy or series of actions perpetrated by the Ukrainian Government. According to the reports on the human rights situation and fundamental freedoms access in Ukraine by the Office of the United Nations High Commissioner (OHCHR) of the years 2019-2021, there is no factual basis presented to prove any genocidal acts perpetrated on the Ukrainian territories,[64] and no credible proof of committed or planned genocide emerged since the full-scale invasion erupted. Nevertheless, the accusations of genocide, as well as the overwhelming need on behalf of Russia to intervene and stop it, illustrate Russia's narratives of using the doctrines of humanitarian intervention and R2P.

Russia has not expressly articulated two doctrines when justifying its actions, however its reference to military intervention in Kosovo in relation to the remedial secession demonstrates their exploitation in Ukraine. It is essential to reflect on how Russia views both humanitarian intervention and R2P concepts throughout its past practice to not only show their non-applicability in Ukraine but also to reflect on the danger of abusing the prohibition envisage in Article 2(4) of the UN Charter due to the unsettled and controversial character of the concepts

[61] President of Russia, "Address by the President of the Russian Federation", 21 February 2022.
[62] President of Russia, "Address by the President of the Russian Federation", 24 February 2022.
[63] TASS, Russian News Agency, "Kiev regime controlled by West, neo-Nazis, Lavrov says", 25 February 2022.
[64] United Nations, Office of the High Commissioner of Human Rights, "Report on the Human Rights Situation in Ukraine (1 February - 31 July 2021)", 23 September 2021, para 21, "Update on the Human Rights Situation in Ukraine (1 August - 31 October 2021)", 1 December 2021, p. 1.

within the law of armed force regardless of some sympathy gained from international community.

2.1. Remedial Secession, People's Republics Recognition and Kosovo Reference

Secession in *stricto sensu* implies that there is a unilateral withdrawal from a state, its constituent part with territory and its population. As a consequence of secession, the existing state splits in two: the state continues to exist, but a new state comes into existence concurrently. However, the legality of secession looked in unrestricted reading runs counter to the principle of territorial integrity and the latter ultimately prevails. More precise, whereas secession is covered by the principle of self-determination as stipulated in Article 1(2) of the UN Charter, sovereignty and territorial integrity of states are protected by the Friendly Relations Declaration. It emphasizes, that the principle of self-determination does not permit any abuse of the state sovereignty.[65] However, the right to secession may be applied in exceptional circumstances when the fundamental rights are violated or denied in entirety. In case of people put in extreme danger to their existence, they have a right to separate from their parent state, using secession as the only remedy for survival.[66]

In the present case by claiming a genocide inflicted on millions of people President Putin uses the phenomenon of remedial secession in relation to the Donbas region and with its help he justifies the need to recognize DPR and LPR as independent states separated as a result of alleged grave human rights violations. The approach taken by Russia in Ukraine is not a new trick but was previously elaborated in relation to Kosovo independence of 2008 and subsequently used in Russia's legal arguments for annexing Crimea in 2014.

The position of Russia on Kosovo intervention is a well-known fact to be an absolute denial of its legality, constituting a mere intervention into internal affairs of FRY. As mentioned by President Putin himself in his speech on 24 February 2022, "a bloody military operation against Belgrade…in the heart of Europe, which some Western colleagues prefer to forget, instead emphasizing the circumstances which they interpret as they think is necessary".[67] The impact of NATO intervention in Kosovo cannot be underestimated when it comes to the core point of significant disagreement in the approaches between Russia and the West.

[65] Daniel Thürer, Thomas Burri, "Secession", *MPEPIL,* 2009, para 15-16.
[66] Värk, p. 6.
[67] President of Russia, "Address by the President of the Russian Federation", 24 February 2022.

The fact that intervention was led by NATO approved for Putin to have lost its *raison d'etre* and from early 2000s Russia's FPCs have emphasized the dangers of globalization, as it allegedly attempted to "belittle the role of the sovereign state as the fundamental element of international relations, which generate a threat of arbitrary interference in internal affairs".[68] By using the concept of remedial secession in Ukraine, President Putin contested the Western standard of sovereign statehood, claiming that what was done in Kosovo, Russia would do elsewhere in Ukraine allegedly for the sake of Russian population living in Ukraine. It turns out that for Russia it is possible to abandon its long-term argument and turn in favour of Western positions if they serve its interests better.

In its written statement on the ICJ's advisory opinion on *Kosovo,* Russia affirmed that outside the colonial context, international law allows secession of a part of a state against its will only when the people concerned are subjected to most severe forms of oppression that endangers their very existence.[69] As regards Kosovo, Russia disagreed with proclaiming the unilateral declaration of independence as being in accordance with general international law, because the alleged oppression of Kosovo Albanians by Serbia was not even close to the "extreme circumstances" to invoke the right to secession.[70]

The problem however is that the ICJ did not support the right to secede from a parent state. Its advisory opinion on *Kosovo* and more specifically paragraphs related to general international law have resulted in different interpretations. The approaches are often quite opposite and serve the narrative of the interpreter. It is thus relevant to analyse what stance the ICJ took considering sovereignty, territorial integrity, and secession and consequently what role it plays in the case of DPR and LPR claims.

Indeed, declarations of independence are not prohibited in international law. As stated by the ICJ, "general international law contains no applicable prohibition of declaration of independence".[71] In history there were several declarations of independence in 18th, 19th and 20th centuries met with opposition from the parent state; however, the pure fact of proclaiming their independence was not regarded as in violation of international law in accordance with state practice.[72] Also, the Court pointed out the lack of general prohibition against declarations

[68] Graeme Gill, James Young, "Routledge Handbook of Russian Politics and Society", Routledge International Handbooks, 1st Edition, 2012, p. 423.
[69] International Court of Justice, "Written Statement by the Russian Federation", 16 April 2009, pp. 39–40.
[70] International Court of Justice, "Written Statement by the Russian Federation", p. 38.
[71] ICJ, *Kosovo*, Advisory Opinion, para 84.
[72] ICJ, *Kosovo*, Advisory Opinion, para 79.

of independence within the UNSC, and several states objected to this giving examples of South Rhodesia, Northern Cyprus and Republika Srpska. The difference between Kosovo and those examples, as elaborated by the ICJ, is the difference of declarations' character – they were illegal not because of their unilateral character, but due to their connection with the unlawful use of armed force and other serious violations of general international law – *jus cogens* norms.[73] Thus, in the eyes of the ICJ, secession is neither a right, nor a breach under international law.

At the same time there was no confirmation for external self-determination or remedial secession in the advisory opinion. Although it might seem logical to assume that if a unilateral declaration is not prohibited under international law, it creates a right to secede, the ICJ concluded that it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.[74] Moreover, during the evaluation process it turned out that states have radically different views as to whether the right to self-determination provides the people the right to separate from a parent state outside the context of colonialism. Same was true for the right of remedial secession.

The ICJ did not conclude on whether the mentioned rights exist in international law, and it did not confirm that Kosovo is a state according to the Montevideo criteria of Statehood. It stated rather conveniently for itself, that it was not necessary to resolve those questions as they were not requested by the UNGA; they did not concern the declarations of independence, but rather the relevant legal consequences following such declarations.[75]

Referring to the international response towards the right to secede, there is a low chance to conclude the right exists.[76] For instance, the Independent International Fact-Finding Mission on the Conflict in Georgia emphasized in its findings that Abkhazia was not permitted to secede from Georgia under international law.[77] Same approach was taken in a well-known *Quebec* case of the Supreme Court of Canada. The Court declared that international law does not grant

[73] ICJ, *Kosovo*, Advisory Opinion, para 81.
[74] ICJ, *Kosovo*, Advisory Opinion, para 56.
[75] ICJ, *Kosovo*, Advisory Opinion, para 83.
[76] René Värk, "The Advisory Opinion on Kosovo's Declaration of Independence: Hopes, Disappointments and Its Relevance to Crimea", *XXXIV Polish Yearbook of International Law*, 2014, p. 125.
[77] The Council of the European Union, "Report of the Independent International Fact-Finding Mission on the Conflict in Georgia", vol. II, 2009, p. 147.

component parts of sovereign states the legal right to secede unilaterally from their parent state.[78]

Thus, if the right to self-determination does not entail the right to secession, *Kosovo* opinion fails to provide any support for Russia's claims of remedial secession in the so-called People's Republics in Ukraine. Finally, the ICJ also emphasized in its legal assessment, that declarations of independence could not be considered lawful if their pronouncement was achieved through violating the peremptory norms of general international law, in present case – unlawful use of armed force. Due to continuous military presence of Russia's troops in the eastern region since 2014, which not only escalated its armed activity in 2022, but also has controlled public infrastructure and local government for eight years, it is a case of the use of armed force to support the secessionist activities. In his speech on 24 February 2022, President Putin is giving us example of Crimea – how Russia used military force in the past to preserve Russia and assist Russian nationals. He draws a parallel with Donetsk and Luhansk regions, which according to Putin, have asked Russia to help them make their political choices freely.[79]

The claim could find some support from the Friendly Relations Declaration which reads that every state has the duty to respect the right to self-determination, meaning that a state may support the people to exercise this right if the parent state is unwilling to do that.[80] However, the provision does not imply the military intervention by states, otherwise abuses of the provision would follow. It could be concluded on this point, that not only the declarations of independence of DPR and LPR are illegal, but also the claim of remedial secession lacks any legal basis in case of these entities.

2.2. Misrepresentation of Humanitarian Intervention and Responsibility to Protect

Humanitarian intervention could be defined as use of armed force by a state, group of states, or international organization triggered by acts constituting large-scale serious violations of international human rights law and international humanitarian law in a foreign state for which no other means to halt the atrocities are available, including the absence of the UNSC authorization. Most authors, however, do not recognize a stand-alone right to conduct such an

[78] Supreme Court of Canada, *Reference re Secession of Quebec* case, Judgement, 20 August 1998, Canada Supreme Court Reports 217, para 111.
[79] President of Russia, "Address by the President of the Russian Federation", 24 February 2022.
[80] United Nations, General Assembly resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States", A/8082, p. 124.

intervention without the UNSC resolution.[81] As well-noted by Ian Brownlie, humanitarian intervention is "inherently vague" and open to abuse by powerful states.[82] Finally, the lack of consistency in the concept also undermines the UN system as a whole and would be avoided in ideal circumstances.

The doctrine of R2P, in its turn, was adopted by the UN at the 2005 World Summit, acknowledging that state sovereignty implies a responsibility to protect populations from mass atrocities, however it does not authorize states to unilaterally use armed force. Instead, it prescribes an action within a collective security framework with the UNSC being in control of the operation.[83]

The view of humanitarian intervention argued by Russia and Russian legal scholarship in particular is worthy of reflection as obvious question arises: why has the state, so strictly opposing the idea of violating sovereignty for the sake of human rights protection in the past, decided to intervene with the same cause?

Indeed, Russia's legal academia claims that humanitarian interventions have become an integral part of international relations in past decades and while their ideology is generated by the Western states, it began to build the world order not on the norms of international law but according to the rules changed by itself. It is admitted that Russia having begun a "special military operation" in Ukraine is guided by the criteria established by the West, and thus does not violate international law. Instead, Russia is allegedly conducting a humanitarian intervention to save the Russian population of Ukraine, at the same time carrying out civilization self-defence of the so-called "Russian World".[84]

To be more precise, having launched the "special military operation", using all capabilities of its Armed Forces, Russia has fought to preserve the civilizational identity of this "Russian World" both for the right to the Russian language for people, who due to geopolitical cataclysms of the 20th century found themselves on the Ukrainian territory and for the right of the multinational Russian people to live on their land according to the traditions of their ancestors.

[81] Yoram Dinstein, "War, Aggression & Self-Defence", Cambridge University Press, 6th Edition, 2017, pp. 75-77 and 97-98.
[82] Ian Brownlie, "International Law and the Use of Force by States", Oxford University Press, 1963, p. 338.
[83] United Nations, General Assembly, "2005 World Summit Outcome", A/60/L.1, 20 September 2005, para 139.
[84] Sergey Baburin, "Гуманитарная Интервенция: Теория и Практика Международного Права", [Humanitarian Intervention: Theory and Practice of International Law], Dostoevsky Omsk State University, 2022, p. 17.

As viewed by Russian scholars, the position of this kind is both morally and legally substantiated. [85]

Interestingly, the legendary figure of Fedor Fedorovich Martens plays a role in this argumentation and not for an empty reason. In particular, contemporary Russian scholars refer to a quote of Martens: "only that nation has the right to a historical role and to the existence, which, without stopping in its intellectual development, never lowers its moral level enough to lose faith in a better future, in its vitality and in its moral ideas", and find it a new and somewhat different interpterion – approving humanitarian intervention as a measure of last resort for the protection of the "Russian World", which has been an object of frequent attacks from the representatives of "hegemonic ambitions" on the territory of Ukraine.

Ironically, Russia's theory of international law – then, Soviet, was not enthusiastic about Martens that much, because his own view on the development of international law included the idea of international community with a lesser emphasis on state sovereignty and a bigger importance of state populations.[86] It is fascinating, however, how Marten's theory acquiring some liberal aspirations also encompassed the realist element – Russia being a guardian of international law, at the same time having an autocratic government. His view on international law and Russia's place in it reflects the present position within Russia's FPC. Indeed, it views Russia as a main follower of international law, as opposed to the US, however within the close regional proximity to Russia, where its interests are at stake, international law can transform into a different shape and can even employ the so-called "Western rules" as we recall in case of humanitarian action in Ukraine.

It is important to emphasize once again, that according to what we have seen so far, Russia's claims of genocide allegedly perpetrated by the Ukrainian Government have not been substantiated. The following parts will elaborate extensively on the problem of legality of humanitarian intervention, claiming that even if there was any convincing evidence, it would still be a rather problematic basis for Russia to unilaterally intervene. Additionally, it will focus on the requirements to be satisfied for the R2P application as well as Russia's opinion on the R2P overall.

[85] Baburin, p. 23.
[86] Lauri Mälksoo, "F.F. Martens and His Time: When Russia Was an Integral Part of the European Tradition of International Law", *EJIL*, vol. 25 no. 3, p. 822.

2.2.1. Humanitarian Intervention and Prohibited Use of Force

In the case of Ukraine Russia is conducting a military operation on its own behalf, meaning that the action concerns the unilateral humanitarian intervention. Use of armed force of this kind indisputably falls under the umbrella of Article 2(4) of the UN Charter, because Article 2(4) is invoked by any deliberate deployment of armed force in the territory of another state. From a legal perspective the key issue arises in relation to this: the legality of the use of armed force within Article 2(4) of the UN Charter.

There have been many debates within international scholarship as to whether unilateral humanitarian intervention could be exempt from the provisional scope of paragraph 4, suggesting that this phenomenon is not directed on causing territorial change, or hampering the political independence of the state. Supporters of this further justify humanitarian action as in conformity with the most fundamental international rules – peremptory norms, in this case – human rights.[87]

The human rights protection is a combined effect of Articles 1, 2, 55 and 56 of the UN Charter. Article 1(3) establishes the rule to promote and encourage respect for human rights and fundamental freedoms, Article 2(4) mentions the duty to refrain from actions that are "inconsistent with the Purposes of the UN, Article 55(c) authorizes the UN to promote respect and observance of human rights and finally Article 56 authorizes all Member States to take action to achieve the purposes in Article 55.

However, such an interpretation completely disregards the purpose put behind the UN Charter as to Article 2(4), demonstrated in the *travaux préparatoires* of the document. In particular, the terms "territorial integrity" and "political independence" are not intended to restrict the scope of the prohibition, thus an illegal use of armed force within the meaning of these two phrases not only occurs when a State's territorial existence or the status of its political independence is altered or abolished.[88] Integrity is read as inviolability, prohibiting any kind of forcible incursion into the territory of another state.

[87] Michael Reisman, Myres S. McDougal, "Humanitarian Intervention to Protect the Ibos", in R. Lillich (ed.), Humanitarian Intervention and the United Nations, University Press of Virginia, Charlottesville, 1973, p. 177.
[88] Simma, para 37.

The remaining component of this provision is "in any other manner inconsistent with the purposes of the United Nations". The fundamental purpose of the UN is to maintain international peace and security and suppress acts of aggression or other breaches of peace according to Article 1(1) of the UN Charter. Moreover, if to look at the UN Preamble, paragraph 7 sets a goal to ensure that armed force should not be used, save in the common interest. It follows, that the use of armed force is permitted only in cases labelled as explicit exceptions to Article 2(4) of the UN Charter – act in self-defence. As to the combination of human rights provisions, there is similarly no evidence within the preparatory materials from San Francisco, that this logic was present in the drafting process. Instead, the connection with these provisions was fostered by legal scholarship later.

Not only the UN Charter itself, but also further developments in the UN bodies demonstrate the weakness of this argument. Several UNGA Documents do not contain any support for this kind of military operations. In particular, the Declaration on the Inadmissibility of Intervention, which considers intervention as contrary to the basic principles of peaceful international cooperation and thus violating the UN Charter.[89] In the same vein, the already mentioned Friendly Relations Declaration sets the principle of non-intervention,[90] as well as Definition of Aggression by defining the acts of aggression excludes a claim of intervening on humanitarian grounds.[91] As to the relevant caselaw of the ICJ, the Court stated, that use of armed force is not a suitable method to monitor and ensure the fulfilment of human rights, because such military interventions are not compatible with international law and are events of the past.[92]

Consequently, there is no room for including the concept of unilateral humanitarian intervention, unless it falls within a recognized exception – self-defence in Article 51 of the UN Charter. It is important to mention first, that unilateral humanitarian intervention should be distinguished from the use of armed force to protect nationals abroad, which, although not without a controversy, is a separate concept and requires a separate assessment within Article 51. In contrast to actions for the purpose of protecting a state's own nationals abroad, which could also happen on humanitarian grounds, the objective of humanitarian intervention is the protection of foreign nationals. Moreover, humanitarian intervention is aimed at preventing

[89] United Nations, General Assembly resolution 2130 (XX), "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty", A/Res/20/2131, 21 December 1965, Preamble.
[90] United Nations, General Assembly resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States", A/8082, p. 122
[91] United Nations, General Assembly resolution 3314 (XXIX), "Definition of Aggression", 14 December 1974, Article 3.
[92] ICJ, *Nicaragua*, Judgement, para 268.

massive violations of human rights, to avoid humanitarian catastrophe, whereas protection of nationals includes any situation, putting nationals of intervening state under an extreme danger.

As discussed elsewhere in this Thesis, armed force in self-defence requires an armed attack on the intervening state, whereas no such armed attack takes place when a state unilaterally intervenes to protect nationals of another state from human rights violations. Interestingly, legal academia has occasionally attempted to bring humanitarian intervention within the scope of self-defence and its "inherent right" character. For instance, there is a claim that the defence of other, in this case the defence of foreign nationals, if abused by their government, is a part of inherent right of self-defence.

The justification is tightened up to the broader natural law, that is presumably grounded under Article 51 of the UN Charter.[93] However, this claim could be also confronted with the intentions behind the draft of Article 51, as the word "inherent" was not intended to recognize right to self-defence beyond what is permitted by the UN Charter. As was noted by Hans Kelsen, the effect of Article 51 would not change if the term "inherent" was not included.[94] Thus, invocation of self-defence still needs to satisfy the criteria of state being victim of armed attack, and civilian populations have no individual right of self-defence against an armed attack.

Another argument advocating for humanitarian intervention has been the justification based on the state of necessity, as one of the circumstances precluding wrongfulness according to Article 26 of the ARSIWA. However, this claim is invalid from the very wording of Article 26 due to the internationally-recognized character of Article 2(4) of the UN Charter – as *jus cogens* norm. Article 26 of the ARSIWA reads, that no circumstance can preclude the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of general international law, thus prohibiting the state to plead necessity regarding use of armed force.

Also, if to look at Article 25(a) envisaging the necessity clause, state may invoke it only if it is the only way for the state to safeguard an "essential interest" against "a grave and imminent peril". It is rather difficult to see how atrocities committed against foreign nationals pose a "grave and imminent peril" to an "essential interest" of the intervening state. On the contrary,

[93] David Ohlin, "The Doctrine of Legitimate Defense", *International Law Studies*, 2015, pp. 141–142.
[94] Hans Kelsen, "The Law of the United Nations: A Critical Analysis of Its Fundamental Problems", London: London Institute of World Affairs, 1950, pp. 791-792.

humanitarian intervention seriously impairs the essential interest of the intervened state, as the operation violates state's sovereignty and territorial integrity. Thus, even if Article 2(4) of the UN Charter was not an established jus cogens norm, ARSIWA provisions would still prohibit the intervening state to preclude wrongfulness by means of a necessity claim.

Finally, according to Article 25(2) of the ARSIWA, necessity may not be claimed if the international obligation excludes such a possibility, and as rightly put forward by Kevin Heller, the UN Charter is a closed system of rules, and thus it does not allow a state to claim a non-Charter-based rationale for the use of armed force.[95] The ARSIWA Commentary in relation to Article 25 confirms this by stating, that the plea of necessity is not intended to cover conduct regulated by the primary obligations, especially in relation to the rules relating to the use of armed force in international relations.[96]

The argumentation of scholars supporting the legality of humanitarian intervention has involved a claim that after the UN Charter established a new regime on the use of armed force and Cold War era ended the new customary international law has emerged allowing the intervention. However, for the new customary legal norm to emerge, there should be a consistent state practice favouring the approach.

Consistent state practice is formed first, if the intervening states invoke humanitarian intervention as a sole legal justification for its actions, instead of simply making the argument to go along other more traditional reasons, such as self-defence. The ICJ emphasized the importance of this in *Nicaragua* judgement, by stating that if a state acts in a way *prima facie* incompatible with a recognized rule but defends its conduct by appealing to justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[97] Thus the unlawfulness of humanitarian intervention is strengthened by the fact the state did not invoke it in the first place.

Secondly, due to the very political character of such interventions, not many intervening states offer a legal basis for their actions, and thus even if some humanitarian concerns were

[95] Kevin J. Heller, "The Illegality of 'Genuine' Unilateral Humanitarian Intervention", *EJIL*, vol. 32, no. 2, 2021, p. 618.
[96] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts", Supplement No. 10 (A/56/10), p. 84.
[97] ICJ, *Nicaragua*, Judgement, para 186.

eliminated throughout the operations, there is no official reason available as to why the state intervened. This situation is in place, where the state itself acknowledges that the operation is illegal and launches it in pursuing state interests in the territorial state. The military action which is not clearly justified on humanitarian grounds cannot amount to the establishment of a new customary norm. We could conclude at this point, that state practice in the area is characterized by the lack of broad consensus, selective approach, established negative reaction of the ICJ, and a danger of abuse.

Thus, there is no clear legal basis for humanitarian intervention within the prohibition of the use of armed force and Russia's invasion of Ukraine extensively contributes to the impossibility to form a new customary norm on humanitarian intervention. In particular, it demonstrates the tendency of states to mask their real ambitions in the territorial state with the argument of helping an oppressed population. Russia has been pursuing its national interests in Ukraine, or to put more adequately, self-interests of President Putin in relation to what political course is taken by Ukraine, urgency of Russia to stop those developments from materializing by overthrowing the "Kiev regime".

Even if to presume for a moment, that humanitarian intervention was a well-settled permitted action under international law, the requirements for invocation put forward by its supporters do not find any reflection in Ukraine. In particular, the UK is a strong advocator for the possibility to intervene on humanitarian basis. In 2018 the UK Government restated and developed its position on humanitarian intervention, which it asserted is "consistent with international law" of the following three conditions are met:

(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 armed force if lives are to be saved.
(iii) The proposed use of armed 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)[98]

[98] Parliament of the United Kingdom, "Global Britain: The Responsibility to Protect and Humanitarian Intervention: Government response to the Committee's Twelfth Report.", 19 November 2018.

As was already elaborated in the beginning of this Chapter, there is no convincing evidence, accepted by the international community of any foundations of either genocidal acts, or genocidal policies in Ukraine. On the contrary, human rights reports indicate international confirmation of a stable situation regarding human rights and, most importantly, human rights of Russian-speaking population. Further, no practicable alternative was ever discussed, as no general concerns about possible human rights violations were well-known to international community and thus put on the UN Agenda. Lastly, if the main target of genocide appears to be the population in eastern Ukraine, it is highly questionable as to why it was necessary to attack other regions of Ukraine, using unproportionate lethal force.

2.2.2. Requirements for Responsibility to Protect and Russia's Stance

Besides the concept of humanitarian intervention, Russia has indirectly exploited the doctrine of responsibility to protect in Ukraine. Before coming to the necessary steps to be fulfilled in case of invoking the R2P, it is worthy to address Russia's stance on the R2P, which is quite intriguing.

When the doctrine was placed at the UN Agenda in 2005, Russia was rejecting the broad application of the doctrine, warning against taking rash steps preventing its arbitrary application in specific states.[99] The reason for that is that R2P was brought up in the aftermath of humanitarian intervention and thus had a radically negative perception in the eyes of Russia. This suggests that Russia is not in favour of granting R2P a high status such as a norm of international law, and it reflects Russia's conservative approach towards the emergence of any new international norms.

At the same time, however, it does not want to appear as a state that objects the humanitarian ideas of saving endangered populations. Russia is emphasizing once again, that any intervention by the international community should be of an exceptional nature and fully compliant with international law, and the UN Charter, most importantly. As stated in Russia's FPC, there is a duty to counter any attempt to replace, revise or interpret in an arbitrary way the principles of international law enshrined in the UN Charter and Friendly Relations Declaration; while excluding from international relations the practice of taking illegal unilateral coercive measures

[99] United Nations, General Assembly, "Statement by M. Margelov, Special representative of the Russian President at the July 2009 General Assembly Debate on Responsibility to Protect", July 2009.

in violation of the UN Charter.[100] As build on its strategic culture of insecurity and suspect of the West, Russia suggests that intervention based on human rights justifications would undermine global stability and enable the West to intervene freely in the world at Russia's expense.[101]

Russia has not only been critical of the R2P phenomenon overall but has also expressed its critical stance as to the outcome of these operations. For instance, action in Libya in 2011 marked a precedent for Russia to argue that R2P operations are not to be trusted when carried out by the Western states. Russia's position on the UNSC resolution 1973 was that the resolution itself is a "scrap of paper to cover up a pointless military operation".[102] The operation marked by the Western state community as a model for future R2P implementation, was viewed by Russia as a pure regime change by force, depriving a country of central government, seized by different armed groups. Aftermath of this criticism also resulted in the future inability to agree on the action in Syria, having a harsh impact on the doctrine's credibility overall. Russia's Foreign Minister Sergey Lavrov when talking about the case of Syria, explained Russia's stance by referencing to Libya, as an action to be never allowed again.[103]

At the same time, as was illustrated before in invoking the humanitarian intervention, Russia has an exceptional approach when it launches military action. Although Moscow defends the idea of sovereign states and their control over internal affairs, the principle of non-interference and territorial integrity, these principles have not been observed in any of Russia's military operations so far. For instance, it claimed, among other justifications, the principle of the R2P in its 2008 military operation in Georgia due to the alleged Georgia's attack against the local population in the breakaway republic of South Ossetia. The attack was justified by Russia as the extreme need to prevent genocide of this population.

Russia's official position was that the exercise of the R2P does not only apply in the UN system when people "see some trouble in Africa", but also under the Russian Constitution when its

[100] The Ministry of Foreign Affairs of the Russian Federation, "The Concept of the Foreign Policy of the Russian Federation", Approved by Decree of the President of the Russian Federation No. 229", 31 March, 2023, Chapter V, Article 23 paras 1 and 4.
[101] Charles E. Ziegler, "Contesting the responsibility to protect", *International Studies Perspectives*, vol. 17, no.1, 2016, p. 80.
[102] President of Russia, "Interview by Dmitry Medvedev to Financial Times", 18 June 2011.
[103] Dogachan Dagi, "Revisiting the Libya Intervention and the Idea(L) of Responsibility to Protect", *Turkish Policy Quarterly*, 2021, p. 132.

own citizens were at risk.[104] As Sergey Lavrov commented on Russian Constitution and Russian Laws, those make it "unavoidable…to exercise responsibility to protect…if this is the area, where Russian citizens live".[105] Same rationale was used in Crimea to partially justify its annexation, claiming that Russians were threatened by extremist groups, stating that President Putin was authorized to "use all available means to protect the people of Crimea from tyranny and violence".[106] Finally, the full-scale invasion of February 2022 in Ukraine reflects the same approach by claiming the perpetration of genocide on Russian citizens and Russian-speaking population.

However, none of the legal justifications developed by Russia in light of the R2P doctrine are in compliance with this doctrine. It is necessary to look at the main document, establishing the concept and underline its necessary requirements. As adopted by the UN World Summit in 2005, the relevant UNGA resolution acknowledged that a state's unwillingness or inability to protect its own population from genocide, war crimes, ethnic cleansing, or crimes against humanity may rise to an international "responsibility to protect". Although limited to primarily peaceful means of action, in extreme circumstances forceful measures may be invoked.

Indeed, each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.[107] The international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the UN Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[108]

What is important is the requirement of collective action, carried out through the UNSC, in accordance with the UN Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate. Collective action is exercised if peaceful means are inadequate and national authorities are manifestly failing to protect their populations from the above-mentioned crimes. Additionally, there is several legitimacy criteria

[104] The Ministry of Foreign Affairs of the Russian Federation, "Interview by Minister of Foreign Affairs of the Russian Federation S. Lavrov to BBC", 9 August 2008.
[105] The Ministry of Foreign Affairs of the Russian Federation, "Interview by Minister of Foreign Affairs of the Russian Federation S. Lavrov to BBC", 9 August 2008.
[106] Brown Political Review, "Justifying Crimea: President Putin Invokes R2P", 11 April 2014.
[107] United Nations, General Assembly, "2005 World Summit Outcome", A/60/L.1, paras 138-139.
[108] United Nations, General Assembly, "2005 World Summit Outcome", A/60/L.1, para 138.

for interventions under the R2P, such as just cause, right intention, right authority, proportionate means, and last resort.[109] Overall, it could be divided into Three Pillars:

(i) State's responsibility to protect its population.
(ii) Assistance and capacity-building, implying peaceful measures.
(iii) Response by the international community – forceful action by the UNSC.

First, the primary emphasis made by President Putin in all the relevant speeches related to the invasion in Ukraine is the protection of Russian citizens and Russian-speaking population living in Ukraine, mostly in the eastern part of the country. Only after that, the allegation of genocide comes as a crime inflicted upon this part of population. As the World Outcome UNGA resolution states, the primary reason for the R2P implementation is the failure of the state to protect its population in general, not Russian citizens.

Further, Russia has neither proven a manifest failure of the Ukrainian Government to protect these people, nor seriousness of a threat. Just cause implies gross violations of fundamental human rights, and as emphasized elsewhere in this Thesis, there is a lack of any evidence to confirm it. Moreover, the right intention of President Putin is questionable because Russia's legal justifications have so far included "denazification", "demilitarization", as well as "self-defence" against several actors, suggesting intention to put an end to human rights violations is not a primary reason and thus raises doubts about its genuine character.

Other criterion is the proportional action, which implies minimal duration of the operation and minimal intensity of the military strikes. At the time of writing this Chapter, Ukraine marks one year anniversary from the beginning of Russia's military invasion with massive civilian casualties and industrial devastation, which demonstrates disproportional level of the operation. It could not be claimed as a measure of last resort either, as peaceful solution did not seem to have been out of reach. The decision to launch the "special military operation" was not discussed on any international forums, concerns about Russian citizens and Russian-speaking population were not dealt with by diplomatic means.

[109] Matthias Dembinski, Theresa Reinold, "The Responsibility to Protect: Background and Criteria.", Libya and the Future of the Responsibility to Protect – African and European Perspectives, Peace Research Institute Frankfurt, 2011, p. 4.

The issue of just authority as encompassed in Pillar 3 of the R2P, constitutes a fatal drawback in Russia's legal justification. Due to the UNSC primary responsibility in the international peace and security matters, states must in all cases seek the UNSC authorization prior to carrying out any military action, distinguishing the concept from humanitarian intervention. There was no resolution giving Russia legal authority for deploying military measures, which is interestingly the main cause of its dissatisfaction with the Kosovo operation in 1999.

It could be concluded, that although Russia fears that the R2P allows the West to act without the consent at the UNSC or abuse such mandates to influence the political regimes, to eliminate them while pursuing self-interests, Russia does precisely that in Ukraine. At the same time, Russia is also very careful when reserving this discourse only to Russian citizens and Russian-speaking population living in the post-Soviet states, where Russian claim of legitimate sphere of interest and influence can be used. Throughout the practice of both R2P and humanitarian intervention, Russia has repeatedly advocated for the huge-scale military operations to be considered only as a last resort option. However, no sign of caution or seeking an alternative solution was in place considering Ukraine.

Due to Russia's emphasis on safeguarding state sovereignty and territorial integrity, it has always viewed human rights violations threshold high and hard for state to prove. Thus, state's failure of protecting its population should be manifestly demonstrated, while Russia has not conducted any investigation whether the Ukrainian Government committed mass atrocities. Lastly, Russia has always granted the UNSC a status of an extreme relevance together with the UN Charter, meaning that any use of armed force within the R2P concept should have received an approval from the UNSC first. However, avoiding the explicit R2P terminology in Ukraine, it has been conducting an operation without the UNSC authorization. Consequently, there is no legal basis for Russia to claim in relation to the R2P concept in Ukraine.

Assessment of both humanitarian intervention and responsibility to protect first reflects on Russia's specific usage of international law applied for the protection of Russian citizens, Russian-speaking population in Ukraine and in post-Soviet state community overall. It demonstrates how the state foreign policy could be formed considering strategic national interests in places of "near abroad". By referring to the intervention in Ukraine, we may also highlight the double standard in how Russia sees and implements international law overall. It relies on traditional international legal norms and prohibitions, however, grants them a different interpretation within its regional neighbourhood.

III. PROTECTING RUSSIAN NATIONALS AND COMPATRIOTS IN UKRAINE

Protection of nationals abroad is an act generally referring to conducting a military intervention in the territory of another state aimed at protecting and rescuing nationals of the intervening state when being under threat. The doctrine is a somewhat controversial basis for the use of armed force in international law, as both legality and legal basis are strongly contested, thus before addressing Russia's application of the concept in its laws, and subsequently in Ukraine, it is worthy to briefly assess both legality and legal basis of the doctrine.

Operations of this kind have received some approval and a silent tolerance within international community. At the same time, those reactions have not resulted in establishing a clear rule under international law, as most of them would evaluate the intervention not from the point of its compliance with the UN Charter, but from the point of whether the intervention was necessary and proportional to its purposes. Due to the highly political character of the matter, such an intervention is rarely a clear-cut case of rescuing nationals, instead pursuing national interests in the host state, using the doctrine as a secondary justification, or "inventing" it after the military operation already commenced.

The dilemma with defining the doctrine of protecting nationals abroad as well as defining its scope is unresolved due to the fact, that there is a lack of any formal legal regulation. No multilateral treaty encompasses the doctrine; neither the acts of the UN bodies, nor the ICJ have done a lot to clarify its legal basis. The UNGA resolutions on Non-Intervention, Friendly Relations Declaration, as well as the Definition of Aggression lack the definitive conclusion on the protection of national's doctrine.

Also, for instance the ARSIWA mentions the doctrine in the commentary to Article 20 introducing the situation of consent given by the host state, however already accepted in the Charter Era as a lawful act.[110] The intervention when the consent is lacking or is of questionable legality is therefore remained unanswered. Article 25 of the mentioned document introducing the necessity clause refers to the humanitarian intervention, when there is a need to balance the conflict minimalization and the human rights protection. However, such a balancing of interests would be contrary to the traditional interpretation of the UN Charter, as it reminds states of

[110] Tom Ruys, "The Protection of Nationals Doctrine Revisited", *JCSL*, vol. 13, no. 2, 2008, p. 237.

avoiding military force as means of conducting international relations and does not include justifications for weighting the protected interests whatsoever.

The ICJ has not had the chance to fully assess the doctrine. In particular, notwithstanding the question posed before the ICJ as to whether the US intervention was necessary to save the lives of local citizens in *Nicaragua* case, the question concerned the humanitarian intervention, which is a separate matter.[111] Interestingly, in *Tehran Hostages* case, the Court dedicated two paragraphs to the raid conducted by the US Forces trying to release the hostages captured in its diplomatic premises in Tehran. Due to the military action, however being conducted during the adjudicating process, it observed that an operation undermined respect for the judicial process; and as the question of legality of the operation was not requested, the Court did not elaborate on it from the standpoint of the UN Charter.[112]

Generally, however, the doctrine as developed in the post-Charter era, is held to have much narrower application. It has comprised its claims for and against conducting military operation in the territory of a state aimed at protecting threatened nationals. Scholars supporting the legality invoke a variety of arguments, and one important being that these interventions do not infringe the prohibition of the use of armed force under Article 2(4) of the UN Charter, as it does not violate the "territorial integrity or political independence" of the state.

The second argument is that intervention constitutes an act of self-defence, because the inherent right of self-defence in customary law extends to the protection of nationals and since nationals form a part of essential attributes of a state, an attack against them abroad is an attack against the state itself within Article 51 of the UN Charter.[113] Both legal justifications however have their drawbacks, and thus will be assessed subsequently in the following parts.

[111] ICJ, *Nicaragua*, Judgment, para 268.
[112] International Court of Justice, *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*), Judgement, ICJ Reports 1980, 24 May 1980, paras 93-94.
[113] Ruys, *supra note* 110, p. 236.

3.1. Status of the Doctrine under Article 2(4) of the United Nations Charter

Article 2(4) of the UN Charter stipulates that member states shall refrain from the threat or use of armed force against the territorial integrity and political independence or in any other manner inconsistent with the Purposes of the UN Charter. The terms "territorial integrity" and "political independence" were not included in the provision to limit the scope of prohibition,[114] which should be therefore understood as the use of armed force within the scope of the provision does not only take place when a State's territorial integrity or political independence are violated.

The argument of rescue operations falling outside the scope of the provision cannot be supported if to refer to the *travaux preparatoires* of the UN Charter, which stipulated that the part "in any other manner inconsistent with the Purposes…" was included to avoid any grey areas in law.[115] The provision encompasses any possible kind of armed force even if the operation was not aimed at influencing State's political situation or changing its land size. The term "integrity" should be seen as "inviolability",[116] which therefore includes any military activity crossing the borders of the state.

This argument could find support in the words of Ian Brownlie regarding Article 31(1) of the Vienna Convention on the Law of Treaties, that the wording should not been given its ordinary meaning, but interpreted to have the same meaning it has been given in international law – the total of legal rights which a state has.[117] Therefore, Article 2(4) is not limited solely to attacks that jeopardize territorial integrity and political independence of the State, but includes these notions as mere examples of prohibited acts.

A supportive conclusion was issued by the ICJ in the *Corfu Channel* case, where the UK argued that its forcible intervention in Albanian territorial waters did not violate the provision as it was directed on recovering evidence instead of putting Albanian sovereignty at stake. The Court emphasized that the right of intervention being a manifestation of a force policy, has given rise to serious abuses thus cannot find a place in international law. Otherwise, the judgement

[114] Lassa F. Oppenheim, "International Law", vol. II. Disputes, War and Neutrality, 6th Edition, 1940, p. 154.
[115] Documents of the United Nations Conference on International Organization, San Francisco, vol. VI, Commission I General Provisions, 1945, pp. 334-335.
[116] Christian Tomuschat, "The Charter of the United Nations, A Commentary", vol. I, 2nd Edition, 2002, p. 123.
[117] Ian Brownlie, "Principles of Public International Law", 6th Edition, New York: Oxford University Press 2003, p. 266.

followed, it would be reserved for the most powerful states and would pervert the administration of international justice.[118]

Another support found for protection of nationals abroad is derived from the human rights narratives within the UN Chapter, similar to those arguing for the legality of the humanitarian intervention. In particular, Article 1 of the UN Charter underlines the promotion of human rights, thus presumably has a connection with the state nationals endangered in the third state. However, this argument fails on multiple grounds. This reasoning is inconsistent with the continuous interpretation of the UN Charter.

Article 1 does not only emphasize the importance of human rights, but also establishes the relevance of international dispute settlement as a tool to maintain international peace and security. It should be read in conjunction with Article 2(3) amounting in a broad interpretation of the use of armed force prohibition. The provision obligates member states to settle disputes peacefully. Maintenance of international peace and security serves a primary reason behind the UN Charter mechanism, whereas human rights protection, although being a fundamental value, should be achieved by different means. If Article 1(4) was interpreted in favour of this approach, it would imply possible exception for the use of armed force – namely, for the protection of human rights. As was discussed before in the context of humanitarian intervention, the ICJ concluded in its caselaw, that use of armed force is not a suitable method to monitor and ensure the fulfilment of human rights,[119] because such military interventions are not compatible with international law and are events of the past.

Analysis of Article 2(4) considering protecting nationals abroad clearly demonstrates the significance of maintaining respect for territorial sovereignty and political independence as fundamental conditions of international relations, which otherwise would lead to new exceptions introduced within the UN Charter framework, that were not intended at the time of its emergence. The author of this thesis is thus agreeing with the rule, that the prohibition of use of armed force envisaged in Article 2(4) should have a broad interpretation. Taking a contrary approach would lead to the manifest abuse of rights, where small states are deprived of any guarantees, as we are observing in the case of Russia's military claims in Ukraine.

[118] International Court of Justice, *Corfu Channel* case (*United Kingdom v Albania*), Judgement, ICJ Reports 1949, 9 April 1949, p. 35.
[119] ICJ *Nicaragua*, Judgement, para 268.

3.2. Protecting Nationals Abroad as an Act of Self-Defence

Second legal justification is seen to be more widespread, however still very controversial one. The supporters of this approach are further divided by what legal basis the doctrine of protecting nationals abroad has exactly within the UN Charter. Doctrine is to be seen through the lenses of Article 51 of the UN Charter, first deriving from (i) the idea of an "inherent" right to self-defence, which is encompassed through Article 51, and thus can regulate the doctrine implementation through the prism of international customary law; and second arguing that (ii) an attack on a state's nationals abroad can be regarded as an attack on the state itself and thus protecting national abroad falls within the provision of Article 51.

When considering the first legal basis, it is essential to evaluate whether the "inherent" right of self-defence includes the protection of nationals abroad doctrine. It is generally established, that the content of the inherent right to self-defence was embodied in the UN Charter to reflect the customary right of self-defence existing prior to the UN Charter adoption. The ICJ concluded on the link between Article 51 on self-defence and its customary reflection. Article 51 is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and thus it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the UN Charter. It was affirmed further, that the UN Charter having recognized the existence of this right, does not go on to directly regulate all aspects of its content.[120]

From the first glance the *Nicaragua* reference seems straightforward and clear-cut case, however this reasoning of the ICJ raised further questions about the possible discrepancies between the UN Charter provisions and customary international rules on the use of armed force. As Tom Ruys puts it, the approach taken by the ICJ in *Nicaragua* acquires a particular meaning when challenged against the doctrinal debate between the so-called "restrictionist" and "expansionist" schools.[121] Restrictionist school is the one advocating for the doctrine to be included within the scope of Article 51 of the UN Charter, thus this approach is worthy of examination.

[120] ICJ, *Nicaragua*, Judgement, Separate opinion of President Nagendra Singh, p. 141-142.
[121] Ruys, *supra note* 15, p. 9.

Restrictionists, such as Derek Bowett, have been arguing that the inclusion in the UN Charter of Articles 2(4) and 51 did not affect pre-existing customary law on the use of armed force.[122] According to this reasoning it follows that the reference to "inherent" right of self-defence illustrates the declaratory nature of Article 51 – as intended to merely put an emphasis on self-defence in case of an armed attack. Scholars of this school further argue that there is no convincing evidence the drafters of the UN Charter planned to impose new limits on the right to self-defence in its traditional understanding.[123] Thus, in the restrictionist view, Article 51 is a part of a broader customary law on the use of armed force, and consequently, protection of nationals abroad doctrine, among other acts such as imminent and non-imminent threats, falls within its scope.

The approach discussed is difficult to find support in the *Nicaragua* case, as the ICJ also asserted that the rules included in the UN Charter corresponded to those found in customary law.[124] Moreover, idea that pre-existing custom continued to exist unilaterally along the UN Charter does not find support as opinion of the ICJ was that customary international law developed under the UN Charter influence.[125] The author of this Thesis supports the expansionist approach, rejecting the parallel existence of pre-existing customary rule, as there is no viable practical legal regulation of two different concepts of self-defence at the same time. Finally, the ILC has observed that the great majority of international lawyers today hold without hesitation that Article 2(4) together with other UN Charter provisions authoritatively declares the modern customary law regarding the threat or use of armed force.[126]

Nevertheless, the UN Charter neither explicitly authorize nor definitely rule out protection of nationals abroad and the claim of extending the scope of "armed attack" to the state's nationals abroad cannot be crossed out. Support for this approach can be found in several examples of legal acts and legal scholarship. International law generally defines the state to be sovereign when having a permanent population, defined territory, effective government, and the capacity to enter international relations.[127]

[122] Derek W. Bowett, "Self-Defence in international law", Manchester University Press, 1958, p. 187.
[123] Myres S. McDougal, "The Soviet-Cuban Quarantine and Self-Defence", *AJIL*, vol. 57, no. 3, 1963, p. 599.
[124] ICJ, *Nicaragua*, Judgement, para 187.
[125] ICJ, *Nicaragua*, Judgement, paras 176 and 181.
[126] International Law Commission, "Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly", 1966, vol. II, *YBILC*, p. 247.
[127] Montevideo Convention, Article 1.

Scholars like Hans Kelsen have argued that the concept of nationality is the status of legally belonging to the state.[128] Thus, if population is a necessary condition for the existence of a state, Article 51 of the UN Charter encompasses the right to defend one's population in a third state. Another argument in this regard would be the UNGA resolution on Definition of Aggression, which although omits referencing the protection of nationals abroad in its armed attack inclusion, Article 3 is not an exhaustive list. Additionally, Article 3(d) illustrates that the concept of "armed attack" does not strictly correspond to attacks against a state territory.[129] Article 6 of the resolution also states that it should not be interpreted in a way that increases or decreases the scope of cases where using armed force is lawful in the UN Charter.

The major counterargument however would be the defined *ratione materiae* of "armed attack" in the *Nicaragua* and *Oil Platform* cases. The ICJ maintained in both cases, that an armed attack should be regarded as 'the most grave forms of the use of force" as contrary to "other less grave forms". In the view of the ICJ, armed attack should involve "the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries and a state's substantial involvement".[130] Thus, a situation where state's nationals are under threat does not always fall under "armed attack", because in many cases host states are either not capable of protecting that population, or merely tolerate the attack on them without an active involvement.

The possible alternative has emerged so far within the legal scholarship and state practice, introducing the non-combatant evacuation operation (NEO).[131] As follows from its name, focus is on evacuation and thus in principle, there is no interference in the state's domestic affairs. Theoretically speaking, the alternative looks more achievable and less harmful than the traditional protection of nationals abroad. The vast state practice of the protection of nationals' doctrine clearly shows that the replacement of the concept by the language of NEO would be less possible to abuse in comparison with the indefinite scope of the doctrine, which does not find a strong basis in international law. Otherwise, smaller states having any ties to powerful states would experience the situation of a permanent threat. However, in terms of the NEO its legal basis is still to be determined.

[128] Hans Kelsen, Robert W. Tucker, "Principles of International Law", 2nd Edition. New York, Chicago, San Francisco, Toronto, London: Holt, Rinehart and Winston 1966, p. 373.
[129] Ruys, *supra note* 15, p. 216.
[130] ICJ, *Nicaragua*, Judgement, paras 191 and 195, International Court of Justice, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgement, ICJ Reports 2003, 6 November 2003, para 51.
[131] Andrew W.R. Thomson, "Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation", *Washington University Global Studies Law Review*, vol. 11, no. 627, 2012, p. 654-666.

For now, there is no consensus on the legality and the legal basis of the protecting nationals abroad doctrine. However, there exists legal consensus that if the doctrine has place in international law, certain conditions should regulate its application. The relevant conditions are the mixture of the Webster formula concluded in the *Caroline* incident, mentioned elsewhere in this Thesis, and the Waldock criteria, designed specifically for the protection of nationals abroad. In particular, the formula concluded by Humphrey Waldock establishes:

(i) An imminent threat of injury to nationals abroad.
(ii) A failure or inability of the host state to guarantee their safety.
(iii) The measures of protection are strictly confined to the goal of protecting them against threat.[132]

First condition corresponds to acting in self-defence where threat is overwhelming and leaves no other choice of means and no moment of deliberation. Second and third reflect the customary requirements of necessity and proportionality respectively.

The following parts will assess the sources of doctrine's emergence in Russia, novelty of compatriots and their usage for advancing Russia's foreign policies, how preconditions for intervention on the doctrine's basis were created and whether the Waldock criteria was met.

3.3. Application of the Doctrine by Russia: Society, Politics and Legal Basis

Referring again to the speech of President Putin on 24 February 2022, the purpose of the "special military operation" is to "demilitarise and denazify Ukraine, as well as bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation".[133] Throughout the years Russia has repeatedly emphasized its willingness to use armed force in order to protect Russian citizens, as well as Russian compatriots outside its territory. It is introduced in its internal policy of developing Russian national ideas, its FPCs, Military Doctrine, as well as Russia's Federal Laws.

To understand the reasons behind Russia's active application of the doctrine, it is worthy to start with a brief look at its internal ideas as to Russian identity. Critical in understanding

[132] Humphrey Waldock, "The Regulation of the Use of Force by Individual States in International Law (vol. 81)", in Collected Courses of the Hague Academy of International Law, 1952, p. 467.
[133] President of Russia, "Address by the President of the Russian Federation", 24 February 2022.

language and politics of national idea in contemporary Russia is being aware of the meaning of "nation" to Russians. For them, this has meant the affiliation to a broader multi-ethnic, multi-national construction of what "Russia" is: a conglomeration of territories and nationalities dominated by its largest group – Russians themselves, which comprised the geopolitical space of the Russian Empire and later the Soviet Union.[134]

Due to the Soviet Union collapse, fresh ideologies regarding constructions of national identity emerged so to guide future directions of Russian relationship with the outside world. Among them, two distinctions are striking for the discussion in this Thesis: (i) Russian ethno-nationalism, and (ii) Greater Russian nationalism.[135] First idea is focused on defending the interests of the Russian people as ethnos, and second direction is based on restoring Russia's borders to something resembling the Russian Empire. The latter one explains for instance the need to reunify with Belarus by concluding numerous agreements of cooperation such as Russia-Belarus Union State, or to control those parts of Ukraine where tights to Russian ethnos, religion and language constitute a visible percentage of population.

It could be argued that it forms the concept of a well-known "Russian idea", which not only influences the inner societal structure in Russia, but also constructs its geo-political outlook. In this regard some formulations of the "Russian idea" are interesting to look at. Among some relevant for this Thesis, there is a concept of Neo-Slavophilism.[136] It is based on the historical notions of Russia as a protector and homeland of all the Eastern Slavs, including but not limited to Ukrainians. Fostering this scheme means the reestablishment of the union of these people within a "Greater Russia". Neo-Slavophilism seeks to reunify ethnic Russians of the post-union diaspora in areas such as Crimea, Donetsk, and Luhansk as a basis for a more viable Russian state.

As was rightly put by political scientist Andreas Umland, since coming to power in 1999, Vladimir Putin has purposefully instrumentalized Russian imperial nostalgia, national pride, and ethnocentric thinking for the legitimization of his authoritarian regime.[137] Thus, the reunification of the Russian Empire is one of his greatest ambitions. Russia's officials and

[134] John Brookfield, "Russian Nationalism", Routledge Handbook of Russian Politics and Society, 1st Edition, 2012, p. 386.
[135] Brookfield, p. 388. *See also* Emil Pain, "The Imperial Syndrome and Its Influence on Russian Nationalism", in The New Russian Nationalism: Imperialism, Ethnicity and Authoritarianism 2000–2015, edited by Pål Kolstø and Helge Blakkisrud, Edinburgh University Press, 2016.
[136] Aleksandr Dugin, "Основы геополитики. Мыслить пространством", [The Basics of Geopolitics. Thinking in Space], 2000, Moscow: Arktogeia-tsentr.
[137] Andreas Umland, "Russia: Nationalism's Revenge", *Foreign Policy Journal*, 2010.

political scientists in their turn have created a new ideological platform known as "Russian World", which implies the Russian language as a crucial element for preserving Russia's greatness.

President Putin himself expressed the idea in 2007, that the Russian language not only preserves an entire layer of truly global achievements but is also the living space for the many millions of people in the Russian-speaking world, a community that goes far beyond Russia itself. As the common heritage of many peoples, he continued, the Russian language will never become the language of hatred or enmity, xenophobia or isolationism.[138] Indeed, it creates a so-called international commonwealth based on connections with Russia, its language and culture, which is aimed to create a powerful space somehow similar to the Russian Empire.

Indeed, the ideas discussed underpin Russia's official patriotic program. "Russian World" is tightened up and gives inspiration for protecting not only Russian nationals but also Russian compatriots abroad. Political claims by Russian officials about the conflict zones within the Commonwealth of Independent States has encompassed the defence of Russian citizens and compatriots, because "life and dignity of our citizens, wherever they are, will be protected in accordance with the Constitution of the Russian Federation". The purpose is "not to allow the death of our compatriots to go unpunished", which appears quite open-ended and punitive,[139] and reflects the narrative used by President Putin in February 2022.

Military Doctrine emphasizes, that the Russian Federation has a legitimate right "to deploy the Armed Forces, other troops, and bodies to protect its citizens abroad in accordance with generally recognized principles and norms of international law and international treaties of the Russian Federation".[140] It does not mention the notion of "compatriots" but defines one of Russia's Forces main tasks to protect citizens abroad from armed attack on them. In its turn, as stated in Russia's FPC, with a view to upholding the national interests of the Russian Federation and achieving its strategic national priorities, the state's foreign policy activities "shall be aimed at, among others, ensuring comprehensive, effective protection of the rights and legitimate

[138] NATO Strategic Communications of Excellence, "Russian Information Campaign against the Ukrainian State and Defence Forces, Combined Analysis", 2016, p. 17.
[139] Roy Allison, "Russian Intervention in Georgia 2008", in Russia, the West and Military Intervention, 2013, p. 154. *See also* Statement by Foreign Minister Lavrov, "Почему действия России в Грузии были правильными?", [Why Russia's actions in Georgia were right?], 8 August 2008.
[140] Russian Government, "Military Doctrine of the Russian Federation", 25 December 2014, Section 32(j).

interests of Russian citizens and compatriots residing abroad, including within various international frameworks".[141]

Especially in the aftermath of Russia's military interventions in Georgia and Crimea, many foreign observers have been warning of the consequences of the sizeable presence of ethnic Russians, Russian-speaking population, and Russian nationals, that are collectively referred to as "compatriots" by Russia in relation to former Soviet states. The concept has become so fundamental in Russia, that it is used for goals of maintaining its regional influence. The question however remains as to what international law says about this extension of the doctrine. Subsequent parts will examine Russia's political and legal instrumentalization of the concept, as well as its effect if any on invocating protection of nationals' doctrine in Ukraine in February 2022.

3.3.1. Novelty of Compatriots and Approach Selectivity

As we saw previously, Russia's leaders continue to regularly emphasize their country's role as the guarantor of its compatriots' security and human rights overall. It could be claimed that Russia established a self-proclaimed right to protect compatriots from any perceived threat of violence against them and to reunite this population with its motherland. Russia threatens to use armed force in case of alleged violations.

The concept of the compatriot generally developed as part of a lengthy nation-building process in the post-communist Russia of 1990s. It evolved several definitions of the Russian nation also taking its inspiration from the ideologies discussed in the previous part. In particular, it included (i) "Union" identity, including the peoples of the former Soviet Union; (ii) ethno-cultural identity including all Eastern Slavic nations; (iii) linguistic identity thus including all Russian speakers; (iv) racial identity including those with blood ties; and (v) civic identity including all Russian citizens.[142]

Even more of a relevance is the further 1999 Federal Law "On Compatriots", passed to expand the official definition of compatriots to include "citizens of the Russian Federation permanently

[141] Ministry of Foreign Affairs of the Russian Federation, "The Concept of the Foreign Policy of the Russian Federation", Approved by Decree of the President of the Russian Federation No. 229", 31 March, 2023, Article 45.
[142] Vera Tolz, "Forging the Nation: National Identity and Nation Building in Post-Communist Russia", *Europe-Asia Studies*, vol. 50, no. 6, 1998, pp. 995-996.

residing abroad…individuals and their descendants who live abroad and are linked…to the peoples historically residing in the territory of the Russian Federation, as well as those who have freely chosen to be spiritually, culturally and legally linked to the Russian Federation, and those whose direct ancestors resided in the territory of the Russian Federation, including former Soviet citizens living in states that were part of the Soviet Union…"[143] Range covering the potential bearers is of considerable wideness and certainly affords Russia a visible flexibility in the "near abroad" where its population ended up living after the Soviet Union collapse.

The Federal Law has assisted Russia's officials with creating legitimate rationale for preserving Russia's role in the region. Russia's well-known position on state sovereignty and non-interference was called into question with the military operation launched in Georgia in 2008, in which Russia claimed to protect Russians abroad and developed the act into a foreign policy objective, justifying the use of armed force. Alleged humanitarian reasons were mentioned in Russia's rhetoric in provinces South Ossetia and Abkhazia to justify a "rescue mission", while the exact same rationale was used in 2014 for annexing Crimea.[144] Russia's "usage" of its diasporas in the region consequently breaches international legal principles Russia had so strongly advocated for in the past – among others, principle of non-interference in domestic affairs of other states.

Examples from the earlier years also demonstrate the selectivity of exercising protection of compatriots' policy. For instance, Russia has ignored many communities of its compatriots abroad. In 1990s when Yugoslav ethnic pogroms and mass displacement were of extreme concern for ethnic Russians living there, Russian ethno-nationalists of that times such as Aleksandr Solzhenitsyn observed "local nationalism suppressing and maltreating our severed compatriots".[145] However, no visible action by Russia was done to protect human rights of its population and seemed to fall on deaf ears.[146]

The difference in treatment visible through examples proves the deeper intention of Russia to put a compatriot novelty into the doctrine, mainly a military intervention due to the broader

[143] Russian Government, "Федеральный закон от 24.05.1999 No. 99-ФЗ" [Federal Law from 24.05.1999 No. 99-FZ], Article 1.
[144] Roy Allison, "Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules", *International Affairs*, vol. 90, no. 6, 2014, p. 1276.
[145] Aleksandr Solzhenitsyn, "The Russian Question at the End of the Twentieth Century", London: Harville Press, 1995, pp. 94-95.
[143] Aleksandr Solzhenitsyn, "The Russian Question at the End of the Twentieth Century", London: Harville Press, 1995, pp. 94-95.

national goals, masked under defending the rights and interests of its compatriots. This selectivity is also illustrated through approaches taken by Russia in order to safeguard compatriots' rights: if this population was threatened in Ukraine that much in February 2022, it required an armed intervention, why did the scale of this attack amount to so many casualties among civilian population with no distinction between Russian-speaking people, Russian citizens, and Ukrainian civilians? It is thus questionable that concept of compatriots is used to promise them unconditional support when endangered in the "near abroad", instead it is designed to achieve Russia's wider foreign policy objectives in this "near abroad".

3.3.2. Ethnicity, Language, Nationality, and International Law

In terms of international law, there has not been any state practice in the UN Charter era so far as to extending protection of nationals' abroad doctrine to protecting compatriots, having solely ethnic and linguistic connections with the intervening state. While nationality may give a state some rights vis-à-vis international law, ethnic origin and language spoken do not confer such rights. The opposite claim is at odds with fundamental principles of international law and is dangerously reminiscent of the rhetoric used before the World War II, when Nazi Germany used the argument of protecting German-speaking minorities living abroad to destroy Czechoslovakia and to annex its territory into the German Third Reich.

As regarding nationality, the link of nationality between persons of Russian ethnicity in Ukraine and Russia is questionable at best and raises doubts about its lawfulness due to the circumstances in which it has been established. First, Russia has conducted its famous policy of passportization, which can be established as Russian *modus operandi*, as the same pattern was followed in the South Ossetia and Abkhazia prior to its invasion in 2008, as well as in Crimea since 1991 until the peninsula was annexed by Russia in 2014.

In Ukraine since April 2019, residents of the occupied regions of Donetsk and Luhansk can become Russian citizens via a simplified procedure. On 24 April 2019, President Putin issued a Decree, identifying groups of individuals entitled to a so-called "fast-track procedure" to apply for Russian citizenship.[147] The order specifies, that "permanent residents in certain areas of Donetsk and Luhansk of Ukraine have the right to apply for Russian citizenship under the

[147] President of Russia, "Указ об определении в гуманитарных целях категорий лиц, имеющих право обратиться с заявлениями о приёме в гражданство России в упрощённом порядке", [Decree on the definition, for humanitarian purposes, of categories of persons entitled to apply for Russian citizenship under the simplified procedure], 24 April 2019.

simplified position".[148] Straight after Decree's issuance Russian Representative to the UNSC elaborated that "there is a high demand for Russian citizenship among people from south-eastern Ukraine whose living conditions Kiev has made intolerable". He continued, that "they themselves desire it" and "they would not survive without Russia".[149]

Already in April 2021, the deputy head of the Russian Presidential Administration responsible for the Donbas said that "Russia would be forced to protect its own citizens residing in the region – those citizens that Russia "created: by means of passportization – if the situation develops towards a "massacre like in Srebrenica: orchestrated by the Ukrainian Armed Forces"[150], and "such a military intervention to protect Russian citizens would mean the end of Ukraine".[151] The motif appears to suggest that Russia's passportization was aimed precisely at creating a justification for an outright military aggression in Ukraine.

International law does not restrict a state's right to confer citizenship, however it limits the recognition by other states if the grounds of citizenship are unreasonable. International law has traditionally required a factual relationship between the naturalized person and the naturalizing state, and it has never so far allowed a state to confer its nationality upon persons who already possess nationality of another state and to whom the conferring state has no factual relation. As the ICJ puts in the *Nottebohm* judgement, a traditional justification for the requirement of a factual connection between a state and its nationals lies in the legal bond of nationality to have "as its basis a social fact of attachment".[152]

For that matter, genuine links must be established between the person and the state. In *Nottebohm*, the Court mentioned strong factual ties, habitual residence, family ties, participation in public life, and attachment shown by a person to a given country.[153] Even if Russia was not *per se* prohibited to give Russian passports, it would need to be consistent with international law for Ukraine to recognize it.

[148] President of Russia, "Decree on the definition, for humanitarian purposes, of categories of persons entitled to apply for Russian citizenship under the simplified procedure", Article 1.
[149] United Nations, Security Council, "Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council", S/PV.8516, 25 April 2019, pp. 15-16.
[150] RBC News, "Козак допустил возможность России встать на защиту Донбасса" [Kozak allowed Russia to stand up for Donbass], 8 April 2021.
[151] RBC News, "Козак предупредил о начале «конца Украины» из-за войны в Донбассе" [Kozak warned of the beginning of the "end of Ukraine" because of the war in Donbass], 8 April 2021.
[152] International Court of Justice, *Nottebohm* case (*Liechtenstein v Guatemala*), Judgement, ICJ Reports 1955, 6 April 1955, p. 23.
[153] ICJ, *Nottebohm*, Judgement, pp. 22-24.

First, the process of naturalization should be carried out on a voluntary basis. It is very questionable, whether an adequate genuine link could be established between Russia and Ukrainian nationals being under the long-lasted military occupation. International law requires the acceptance of the Russian nationality to be voluntary. In the present case it is rather feasible that residents of eastern Ukraine do not have other choice at the moment of an armed conflict. Second, factual condition is necessary. Some of its elements, distinguished by the ICJ in *Nottebohm*, such as family ties, due to close family relations, marriages etc., could be in place and should be assessed on case-by-case basis. However, conferral of Russian nationality to persons living outside Russia only because they used to be citizens of the Soviet Union or on the pure basis of "ethnicity" does not fulfil the minimum requirement for a factual connection.

It is undertaken without any form of consultation with the state where the persons in question reside. The Ukrainian Government expressed its resolute protest in relation to the Russian "passportization" on the temporarily occupied territories of Donetsk and Luhansk oblasts already in 2014, and declared Russia's legal basis for it as legally null and void and stated that it shall not alter the affiliation to Ukrainian citizenship of the residents of certain territories of Donbas, occupied by Russia.[154]

Concluding on this point, the Russian policy of "passportization" should be qualified as an abuse of the discretionary right of states to confer nationality based on their internal law. The policy has been performed on a massive scale and concerns persons living in the DPR and LPR, the breakaway territories in Ukraine. The more persons are affected in number, the more plausible it is to find an abuse of Russia's right to naturalize persons. Also, it is implemented during an on-going armed conflict, and as we saw from Russia's comments on the matter, it is employed as a rhetorical justification for the use of armed force.

[154] Ministry of Foreign Affairs of Ukraine, "Statement of the Ministry of Foreign Affairs of Ukraine on the provocative and unlawful decision by Kremlin to issue Russian passports to Ukrainian citizens in occupied territories", 24 April 2019.

3.3.3. Assessment of Russia's Operation in Accordance with Waldock Criteria

Considering international legal stance of the doctrine as we examined before, the only possible, although still disputable, way to invoke protection of nationals abroad is Article 51 of the UN Charter – within the right to self-defence, and there are requirements to meet. In particular, there should be (i) an imminent threat to nationals abroad; (ii) a failure or inability of Ukraine to protect them; and (iii) the measures of protection are in compliance with the goal to protect them.

The previous assessment of Russia's activity in eastern Ukraine before the intervention is striking, as it artificially creates a precondition to claim the protection of Russian nationals by issuing Russian passports. It aims to satisfy the first requirement of an "imminent threat of injury". If to presume however that Russia's military action is not only directed on the "newly become" citizens of the Russian Federation residing in DPR and LPR, but also aimed at protecting Russian population, who have resided in Ukraine before the policy of "passportization" and obtained their nationality by birth in Russian Federation, the first Waldock requirement is still highly implausible to be met.

In state practice of the doctrine the best genuine case is the *Entebbe* incident of 1976. It considers Israeli intervention in Uganda to rescue Israeli hostages, when the terrorists hijacked French aircraft in Entebbe taking hundreds of people hostage. Terrorists threatened Israel that the hostages would be killed unless Israel complied with the hijackers' demands.[155] Israel did not obtain any authorization from Uganda, stormed the plane and all the terrorists, together with a small number of hostages, were killed. Almost all the hostages were released. Israeli justification before the UNSC was an application of the right of a state to take military action to protect its nationals in mortal danger.[156] There was no interference in internal affairs of Uganda and at least two conditions of Waldock test were fulfilled – namely, an imminent threat to nationals, and the limited nature of the operation. The case might serve an example of a threshold needed, at least for the first requirement of danger.

In case of Ukraine, there is no indication of an ongoing or imminent threat to Russian nationals residing in Ukraine. As discussed elsewhere in this Thesis, neither international human rights bodies have confirmed the human rights violations, nor any particular states have had the

[155] Ruys, *supra note* 110, p. 248.
[156] United Nations, Security Council, Official Records, S/PV.1941, 12 July 1976, paras 77-81.

relevant evidence. No Russian nationals were being held hostage and threatened with lethal force to coerce Russia to do or abstain from doing something. Also, an important aspect is certainly the additional Russia's motives fostered in President Putin's speech on 24 February 2022 – denazification, demilitarization, referral to "Kiev regime", and invitation on the side of Donetsk and Luhansk.

State practice is again very illustrative of such multiple justifications put forward by the invaders. In some cases, the rescue did not constitute a sole justification for the use of armed force in the host states. For instance, the operation of 1965 in the Dominican Republic received its protection of nationals' doctrine justification not as a basic argument and was overruled by the regional peacekeeping motives in cooperation with the Organization of American States. The operation seems to be conducted purposefully in a specific political situation in the Dominical Republic. The US admitted that they "would not permit the establishment of another communist government in the Western hemisphere, and this would be the common action and common purpose of the democratic forces". The resources were summoned, it followed, of the entire hemisphere to that task.[157]

In the same vein the US used armed force in 1980s, specifically in Grenada 1983 and Panama in 1989, where although the US nationals were in trouble, the US also had other interests in the countries. In Grenada the US, among other justifications, emphasized that the action had actually been invited by the governor-general of Grenada, "the sole remaining symbol of governmental authority on the island".[158] In Panama, the actions were presented as an exercise of self-defence, defending the integrity of the Panama Canal Treaties, the need to tackle drug trafficking and the supportive reaction by then new elected leaders of Panama.[159] Earlier, in 1956 the UK and France used armed force against Egypt in the *Suez Canal* incident. The UK had political and economic interest in using the Canal, and at the same time it argued for safeguarding its nationals.[160]

The operations were condemned by international community. Most scholars agreed that the danger to American lives were more a pretext than a reason for the US intervention operations that had gone far beyond what is envisaged under the protection of nationals' doctrine.[161] In the

[157] United Nations, Security Council, Official Records, S/PV.1196, 3 May 1965, para 81.
[158] United Nations, Security Council, Official Records, S/PV.2491, 27 October 1983, para 74.
[159] United Nations, Security Council, Official Records, S/PV.2899, 20 December 1989, pp. 31-36.
[160] Natalino Ronzitti, "Rescuing Nationals Abroad Revisited", *JCSL*, 2019, p. 436.
[161] Ved P. Nanda, "The Validity of United States Intervention in Panama Under International Law", *AJIL*, vol. 84, 1990, p. 497.

case of Ukraine words of the President Putin on 24 February 2022 also prove a certain pretext – namely, intention to change the "Kiev regime" installing a puppet regime. It could be claimed that the intervention has also acquired certain ideological context for Russia in terms of political direction chosen by Ukraine. On this matter, it was emphasized by the ICJ, that the intervention for ideological purposes would be an innovation and does not therefore constitute a legal argument at all.[162] Finally, the existence of mixed legal justifications demonstrates ungenuine character of operation as we reflected in the state practice above.

The second requirement of Ukraine's alleged inability to protect Russian nationals does not need further assessment, as the existence of imminent threat was concluded to be absent. Lastly, the operation to protect nationals should have been of limited nature both in terms of forces deployed and geographical scale to be necessary and proportionate. The amount of military force used by Russia in Ukraine is not proportionate to the alleged imminent threat to Russian nationals. In this connection we also saw that President Putin's accusations of an ongoing genocide in eastern Ukraine are baseless. Outside of mass atrocities, invasions and other large-scale attacks are excessive.

In conclusion, the application of the concept by the Russian Federation could serve as a prominent example of how the doctrine is being misused and widened up to advance country's political interests in the region. There is no credible evidence of deliberate attacks on persons of Russian ethnicity and nationality by the Ukrainian Government and President Putin's justification fails on both the grounds of lack of necessity to engage in a rescue of nationals and based on the nation full-scale of the intervention. The intervention is aimed to overthrow a democratically formed incumbent government of a sovereign state and to impose policy objectives of the intervening state. In terms of developing international law in the area, the example of Ukraine is to be regarded as a strong encouragement to proceed with talks on substituting this doctrine with the NEOs.

[162] ICJ, *Nicaragua*, Judgement, para 266.

SUMMARY

Russia's justifications for the use of armed force against Ukraine is without any basis in international law. Analysis of Russia's legal claims also demonstrates a different approach taken by the Russian Federation with regards to international law and *jus ad bellum*, that distorts our path to a consolidated practice in the field and is an alarming concern to enforce a restrictive approach towards the use of armed force.

This Thesis raises, analyses and subsequently answers several research questions. First Chapter examines Russia's legal argument for exercising the right to individual and collective self-defence. Right to self-defence from Russia's perspective is developed in a broad scope allowing much room for application and interpretation. Russia grants Article 51 of the UN Charter a primary significance, advocating for its non-revisable character, but at the same time Russia affords its Armed Forces the right to repel and prevent an armed attack, not waiting for the negative consequences of an attack to take effect.

It is established, that Russia accepts the phenomenon of anticipatory self-defence and is ready to exploit it to protect the interests of the Russian Federation domestically and internationally. Russia advances a narrative of the "Western opposition", that is presumably directed on weakening Russia and poses a threat, that can be regarded as a possibility for exercising anticipatory self-defence. It includes the narrative of Western-initiated regime change in Ukraine and locating NATO equipment on the Ukrainian territory. Russia's concerns are well-illustrated in its latest FPC of 2023, while Russia's laws regard location of the weaponry stationing as an element of aggression to which Russia is entitled to respond with an actual armed attack.

On the contrary, as argued by the author of This Thesis, international law prescribes a narrower approach towards self-defence limiting itself to Article 51 of the UN Charter, while the concept of anticipatory self-defence does not have a convincing legal basis in international law. Moreover, anticipatory self-defence has certain inherent weaknesses simply by its nature: there is no means to objectively verify the existence of an alleged threat, to evaluate the level of certainty for the attack to occur as well as to ascertain the genuine intention of a government in this decision-making process. Threats, that are not yet materialized and are distant in time are open to an abuse and depend solely on one's view of the threat.

Indeed, Russia's military action in Ukraine influences legal discussion on Article 51 of the UN Charter. As it is illustrated in Ukraine, recognizing anticipatory self-defence weakens the general prohibition on the use of armed force and renders the UN Charter system helpless. Legal argument put forward by Russia demonstrates, how the distinction between defensive and offensive force becomes blurry. It is established in this Thesis, that Russia's allegations on the West and NATO are with no legal basis in evidence, however they continue to bring horrific consequences. Therefore, the author of this Thesis argues, the restrictive approach towards the right to self-defence should be put on the international agenda, encouraged and enforced.

As to the second part of its self-defence argumentation, Russia claims a right to collective self-defence for the sake of the so-called People's Republics of Donetsk and Luhansk, that presumably asked Russia for help. Russia took a quite intriguing approach towards the DPR and LPR defence. It rapidly recognized the entities as states a few days before the "special military operation" was to be launched, despite the fact it had been refusing to do so for the eight years of its military activity in the Donbas region. Russia also managed to conclude and sign treaties with both entities in a similar timeframe. These developments demonstrate that the claim for a collective self-defence was well-prepared in advance to create and exploit further circumstances for Russia to intervene in Ukraine.

This Thesis establishes, that President Putin's justification fails from the primary assessment as the right to invoke a collective action is limited to states. Help requested by a puppet regime does not have legal effect, as demonstrated by the ICJ caselaw, amounting to a blatant intervention into the state's domestic affairs. The level of dependence of both the DPR and LPR is similarly established beyond a reasonable doubt in the ECHR recent jurisprudence. Moreover, although international recognition of states does not establish a certain number of recognitions needed to regard those entities – as states, recognitions stemming from the violation of a peremptory norm of international law do not count.

Thus, the DPR and LPR remain separatist entities and Russia's unilateral presence in that region without Ukraine's consent amounts to the violation of the use of armed force prohibition, being a clear act of aggression. Finally, Russia's claims of demilitarizing and denazifying Ukraine similarly do not find any legal basis in international law, as an intervention on ideological grounds is not accepted in the *jus ad bellum*. Invoking the right to collective self-defence of separatist regimes DPR and LPR are not compatible with Article 51 of the UN Charter.

Second Chapter discusses the claim of defending Russian-speaking population in Ukraine as it is an alleged victim of crime of genocide perpetrated by the Ukrainian Government. In light of this, two concepts were assessed: humanitarian intervention and R2P. First and foremost, this Thesis establishes that crime of genocide requires a special intent (*dolus specialis*) to destroy a specific group in whole or in part based on race, religion, nationality, or ethnicity, and there is no factual basis pointing out to such a policy or series of actions perpetrated by the Ukrainian Government.

Indeed, referring to the reports on the human rights situation and fundamental freedoms access in Ukraine by the OHCHR of the years 2019-2021, there is no factual basis presented to prove any genocidal acts perpetrated on the Ukrainian territories, and no credible proof of committed or planned genocide emerged since the full-scale invasion erupted. The author further reflects on the Russian views towards the concepts in question and how it advances them despite their "Western" nature.

Although Russia's legal academia claims that interventions motivated by humanitarian sentiments are generated by the Western states, it is comfortable with employing these concepts in Ukraine in order to save the Russian-speaking population in Ukraine and carry out its civilizational self-defence of the so-called "Russian World". This Thesis concludes on this point, that within the close regional proximity to Russia, where its interests are at stake, international law can transform into a different shape and can easily employ the so-called "Western rules" as we recall in case of humanitarian action in Ukraine.

From the international legal standpoint, the first phenomenon of humanitarian intervention is contested as to its legal basis and legality. The author of this Thesis examines the scope of Article 2(4) of the UN Charter, its preparatory materials and scholarship positions, concluding that humanitarian intervention cannot find its legal basis in this provision. As to its second possible basis derived from Article 51 of the UN Charter, state practice in the area is characterized by the lack of broad consensus, selective approach, established negative reaction of the ICJ, and a danger of abuse.

Due to its unsettled character in international law, we are again confronted with a discussion on the scope of Article 2(4) and Article 51 of the UN Charter. The author of this Thesis argues that Russia's intervention in Ukraine extensively contributes to the impossibility to form a new

customary norm on humanitarian intervention. It demonstrates the tendency of states to mask their real ambitions in the territorial state with the argument of helping an oppressed population.

The R2P phenomenon was evaluated in the context of Russia's opinions and reactions on the past incidents in international law. This Thesis establishes that due to its sentiments on the "Western opposition", culture of insecurity and suspect of the West, Russia suggests that intervention based on human rights justifications would undermine global stability and enable the West to intervene freely in the world at Russia's expense.

As was similarly concluded on the humanitarian intervention, Russia has an exceptional approach when it launches military action. Although Moscow defends the idea of sovereign states and their control over internal affairs, the principle of non-interference and territorial integrity, these principles have not been observed in any of Russia's military operations so far. From the international legal perspective, the R2P action, most importantly, requires an authorization of the UNSC, on which Russia places all its trust in international law. This requirement is fatal in Russia's argumentation, as no authorization to intervene on to stop an alleged genocide in Ukraine was obtained from the UNSC.

Overall, assessment of both humanitarian intervention and responsibility to protect firstly reflects on Russia's specific usage of international law applied for the protection of Russian citizens, Russian-speaking population in Ukraine and in post-Soviet state community overall. Secondly, it demonstrates how the state foreign policy could be formed considering strategic national interests in places of the "near abroad". By referring to the intervention in Ukraine, we may also highlight the double standard in how Russia sees and implements international law overall. The author of this Thesis argues, that although Russia relies on traditional international legal norms and prohibitions, it grants them a different interpretation within its regional neighbourhood.

Finally, Third Chapter assesses Russia's legal claim to protect its citizens and compatriots in Ukraine. From the international standpoint, the military action of this kind refers to the doctrine of protecting nationals abroad. The doctrine is similarly not without controversies within its legality and legal basis. It has comprised its claims for and against conducting military operation in the territory of a state aimed at protecting threatened nationals.

The author of this Thesis evaluates both arguments. In relation to Article 2(4) of the UN Charter, the conclusion is similar to what was achieved in the context of humanitarian intervention. The analysis demonstrates that Article 2(4) was intended by the founders in San Francisco to acquire a broad scope of restricting the use of armed force. It shows the importance of maintaining respect for territorial sovereignty and political independence as fundamental conditions of international relations, which otherwise would lead to the new exceptions introduced within the UN Charter framework, that were not intended at the time of its emergence. Taking a contrary approach would lead to the manifest abuse of rights, where small states are deprived of any guarantees, as we are observing in the case of Russia's military claims in Ukraine.

In relation to Article 51 of the UN Charter, the scope of self-defence neither explicitly authorize nor definitely rule out protection of nationals abroad and the claim of extending the scope of "armed attack" to the state's nationals abroad cannot be crossed out. However, there exists legal consensus that if the doctrine has place in international law, certain conditions should regulate its application.

This Thesis further studies Russia's political and social ideas on the Russian identity to introduce the background of protecting Russian citizens and compatriots abroad. The author of this Thesis views the study of the meaning of "nation" to Russia as a critical aspect in understanding language and politics of national idea in contemporary Russia. It forms the concept of a well-known "Russian idea", which not only influences the inner societal structure in Russia, but also constructs its geo-political outlook.

The analysis of differences in treating Russian citizens and compatriots abroad proves the deeper intention of Russia to put a compatriot novelty into the doctrine, mainly a military intervention due to the broader national goals, masked under defending the rights and interests of its compatriots. is thus argued that concept of compatriots is used to achieve Russia's wider foreign policy objectives in this "near abroad, instead of promising those people unconditional support when endangered in the "near abroad".

In international law, however, there has not been any state practice in the UN Charter era so far as to extending protection of nationals' abroad doctrine to protecting compatriots, having solely ethnic and linguistic connections with the intervening state. Ethnic origin and language do not confer rights in international law. The author further argues, that even in respect of invoking nationality, Russia artificially creates the circumstances for its invocation. This Thesis assesses

the relevant laws and policies, adopted in respect of the Donbas region and acquiring Russian citizenship in that area. The analysis concerns the policy of "passportization". The policy has been performed on a massive scale and concerns persons living in the DPR and LPR, the breakaway territories in Ukraine.

International law does not restrict a state's right to confer citizenship, however it limits the recognition by other states if the grounds of citizenship are unreasonable. After assessing the relevant ICJ caselaw and situation in Ukraine, the author of this Thesis concludes, that the Russian policy of "passportization" should be qualified as an abuse of the discretionary right of states to confer nationality based on their internal law. As it is implemented during an on-going armed conflict, the author argues that it is employed as a rhetorical justification for the use of armed force.

In light of these findings, the author emphasizes, that the "special military operation" should be regarded a strong encouragement for the international community to proceed with talks on substituting the protection of nationals' doctrine with the NEO. Although its legal basis is still to be determined, the replacement by the language of NEO would be less possible to abuse in comparison with the indefinite scope of the doctrine, which does not find a strong basis in international law. Otherwise, smaller states having any ties to powerful states would experience the situation of a permanent threat.

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