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# Understanding the Illegality of Russia's Invasion of Ukraine

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KIERAN O'MEARA, MAR 13 2022

The Russian Federation is now past the initial stages of its widespread military invasion of Ukraine. This began just days after Russian sovereign recognition of the contested Donetsk and Luhansk regions. Following months of tensions, the claims that Russian foreign policy would *not* involve either irredentism or the invasion of another sovereign state's territory has been revealed as a cold falsehood amidst a melange of Russian force. This violates the very quality that defines the manifestation of the Society of States: the common obligation to international law by its members given a condition of international anarchy. The Russian Federation continues to treat its international legal commitments with contempt through its practices; flouting the international prohibition on the use of force and intervention, whilst also disregarding its obligation to respect the sovereignty and territorial integrity of other states.

As international law has been breached, reactive procedure within the institutions of global governance have been set in motion. This has been seen no more so than in the United Nations (UN), the very symbolic institution of the society of states (Bull 2012, 176). At its institutional centre, the UN Security Council (UNSC) held four urgent meetings and the UN General Assembly (UNGA) an emergency special session in the initial week of the invasion alone. Before the intentions of this piece are set out, let us briefly recall the events of these sessions.

The first, on the evening of February 21<sup>st</sup>, was requested by Ukraine and followed the announcement that Russia would recognize the sovereignty of the Donetsk and Luhansk regions on Ukraine's eastern frontier. Alongside the representative of Ukraine, Sergiy Kyslytsya, each member of the Security Council presented statements. Russia's permanent representative, Vasily Nebenzya, specified that western colleagues should 'come to their senses, put aside their emotions and not make the situation worse' by avoiding any 'hysteria' that a Russian invasion was imminent (UN News 2022a).

The second, on February 24<sup>th</sup>, was marred when Russian forces invaded Ukrainian sovereign territory under the characterisation of a 'special military operation' just minutes into the session. With emotional rhetoric at the fore, the meeting closed with Nebenzya claiming that 'the root of today's crisis around Ukraine is Ukraine itself', whilst falsely accusing Ukraine of a Russophobic genocide in the Donbass; the Secretary General, Antonio Guterres, labelled this as 'the saddest moment' in his tenure, whilst pleading for an end to the violence 'for humanity', and Kyslytsya contested the legitimacy of the Russian seat on the Security Council (UN News 2022b).

The third, February 25<sup>th</sup>, saw draft resolution S/2022/155 vetoed by the Russian Federation, a draft sponsored by the US and Albanian delegations whilst additionally co-sponsored by more than eighty other UN member-states (United Nations Security Council 2022). Eleven votes were cast in favour of the resolution and three members abstained: China, India and the United Arab Emirates. Only Russia voted against the proposal, thus vetoing the draft resolution under provisions laid out in Article 27 of the UN Charter; a privilege it holds as a permanent member of the UNSC. This was followed by emotive statements from all delegations, regrettably asserting that the council had failed to uphold its function in maintaining international peace and security with the veto. Kyslytsya, who received applause in demanding a momentary silence for those caught in the conflict, declared that Nebenzya's statement on behalf of the Russian Federation was simply 'a letter of application for an upscale seat in hell', before proclaiming that the wider membership of the UN would come to have its say (United Nations Meetings Coverage and Press Releases 2022a).

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Kyslytsya's proclamation became reality. On February 27<sup>th</sup>, the Security Council voted to request an emergency special session of the General Assembly to consider the draft resolution, following a written request from the Ukrainian delegation. This is provided for under the first section of the General Assembly resolution 377(V) 'Uniting for Peace', in which the General Assembly can decide whether or not to overturn a veto in the UNSC and subsequently implement the previously undermined resolution as one of its own in the name of peace.

With the emergency special session having come to a head on March 2<sup>nd</sup>, the draft resolution condemning Russian aggression against Ukraine passed with 141 affirmative votes to five, with 35 abstentions; cementing international solidarity condemnation for the invasion (UN News 2022c). Nonetheless, UNGA resolutions are *not* legally binding. Rosalyn Higgins (1963, 5) adds to this interpretation by affirming that because of their constructive effect on practices and norms, UNGA resolutions do however 'provide a rich source of evidence about the development of customary law.' Although UNGA resolutions are not obligatory to comply with like those of the Security Council, being only recommendations, they are salient because of their normative capability to adapt the landscape of customary international law. This is so by the manner in which they are able to crystallise loose widespread international agreement into the status of a legal norm, precedent or convention (Joyner 1981). This is significant precisely as it infers the capability of UNGA resolutions to have an effect on decision-making in constructing precedent that underpins the principles of the legal international order and international society.

Equally, UNGA resolutions can be interpreted as collective legitimisations of common judgement. As a statement, UNGA resolutions act as a mechanism for collective legitimisation of a certain perspective, narrative or sought-after practice, such as de-escalation or the rearticulation of territorial sovereignty. Simply put, resolutions passed by the assembly can be projected as manifesting and articulating the collective political judgement of the international society of states (Claude 1966; Hurd 2021, 104). Herein lies the salience of adopting the vetoed draft resolution.

Even for scholars of international politics, the UN system can be mind-boggling and complicated. The focus of this piece will be to provide two services to the reader. Primarily, this exploration intends to clear the fog of confusion that usually clusters around those references to the legality of certain action; explaining how the invasion has breached international law in an easily comprehensible manner. Therefore, this examination seeks to offer an explanatory source to the reader which can be used to aid one's grasp of the legality of the conflict as the crisis unfolds. As such, it aims to clarify why many consider the Russian invasion of Ukraine to be illegitimate by reference to those commonly cited documents of the international legal order itself. In order to achieve its dual function, this investigation will centre its focus on the legality of Russia's invasion by reference to the UN Charter, the UN's principal legal document, alongside a brief note on the 1994 Budapest Memorandum on Security Assurances. In this, each article of the UN Charter and the Budapest Memorandum that has been widely cited to have been breached will be unpacked and contextualised. This will permit the reader a grasp of how and why these particular authoritative fragments have a role to play in the present conflict and the diplomacy that comprises its shadow.

Given the chiefly explanatory nature of this piece, a certain critical evaluation of the UN system as a whole is notably absent. Nonetheless, this is not to be taken as if the UN system has gone critically unexamined. Quite the opposite. There have been a variety of critical perspectives centring focus on, but by no means limited to: the conceptual history of the UN (Kennedy 2007; Mazower 2012), its constitutionalism (Reisman 1993), its use as a tool of national interest and hegemony (Holmes 1993; Puchala 2005), its lack of reform to incorporate developing states into decision-making processes (Mayer-Mruwat 1998), its leadership in the use of force (Pico 1994), its failures in peacekeeping (Sahnoun 1994; Shukla 2000), its truncated transitional and legal development (Higgins 1963; Thakur 2016), its role in humanitarian intervention (Wheeler 2000; Cunliffe 2020), and its tendency to enhance the carefully balanced power struggles of international society (Wight 1956, 1979). As fascinating and significant to a broad grasp of the UN system as these critiques are, their discussion falls outside of the scope of this exploration and its objectives.

In order to achieve such objectives, this examination will unpack articles from both the UN Charter and the 1994 Budapest Memorandum that are applicable to this case. These fragments have been selected as they are seemingly the two most cited documents in diplomatic discourse on the issue thus far. This shall permit a greater understanding of both the illegality and the discourse unfolding at the UN concerning the Russian use of force. Understanding

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should not be for diplomats and scholars alone, nor would they have it such a way, but accessible to all. Consequently, I have divided the relevant documents into two sections to be discussed in turn. In each case, the passages that are of current significance are recalled verbatim, prior to their unpacking with an eye to our own milieu. Firstly, the articles of the UN Charter that have recurring pertinence to the current situation will undergo examination precisely because it is through the Charter that the legality of Russia's actions will be weighed against. Following this, the 1994 Budapest Memorandum on Security Assurances shall then briefly take the spotlight; a lesser-renowned document, but one that is essential to grasp. Finally, this investigation will come to a close with some concluding remarks.

## The UN Charter

Signed in 1945, the Charter is the UN's founding constitutional document. As in the case of any constitutional document, its function is to lay out the most fundamental principles of the organisation, its institutional organs, bureaucratic and amendment processes, procedures, alongside those obligations of signatory member-states; who, by virtue of becoming members approve of and seek to uphold its contents. Not only is the Charter the founding document of the UN, but it reinforces and seeks to legitimate the self-determining sovereign equality of all states. Such a quality truly makes it the normative, symbolic and textual crystallization of international society and the contemporary rules based international order.

In the words of Ramesh Thakur (2016, 47), 'The Charter sets out the principles that the UN must defend and the values it must uphold'. Consequently, with this as the common interpretation, it is primarily against the Charter that the actions of belligerent states are evaluated. The articles of the UN Charter (United Nations 1945) laid out below are those that are relevant to the current Ukrainian crisis in their citation by diplomats and scholarly commentators alike. The hope is that by examining these articles this investigation may be able to explain why Russian action constitutes a violation of the obligations entailed in their contents.

The Charter is comprised of 111 Articles. Of these, only 13 will be examined in this exploration; the 13 that have been continually cited in the diplomatic dialogue surrounding the events of the invasion. In each case, an article will be presented, its applicable clauses recalled and its relevance to the Russian invasion of Ukraine unpacked. Ensuing this, an ephemeral discussion of the 1994 Budapest Memorandum on Security Assurances will be engaged with so to comprehend the wider diplomatic discourse to a greater extent.

### *Article 1 – The Purposes of the UN*

The Purposes of the United Nations are:

- (i) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.
- (ii) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace
- (iv) To be a centre for harmonizing the actions of nations in the attainment of these common ends.

The first article of the Charter sets out the purposes of the UN. No single article nor clause uniquely summarises the function of the UN as a supranational organisation more so than Article 1(i). Here, the *raison d'être* of the organisation is clearly disclosed: 'to maintain international peace and security'.

In reference to the three clauses relayed above, Russia stands accused by much of the 'family of nations' as having undermined all three. In the first instance, its invasion of Ukraine constitutes an act of aggression that the Russian Federation then clearly sought to hamper the role of the UN in addressing. Such a hampering took place through the mechanism of its veto in the Security Council, effectively blocking the UN from attending to the conflict and reaffirming the Ukrainian right to sovereign self-determination. In doing so, the claim has been made that Russia has facilitated the functional paralysis of the organisation, preventing it from achieving its aim of collective peace and

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security. This inadvertently implies that the aspiration to conscious co-ordination that allows for the society of states to be a self-governing political entity is thrown into disarray (Northedge 1976, 23–24). In other words, the harmonisation of action to common ends is foreclosed and the most fundamental principles of the UN system and global governance, let alone international law, violated.

## *Article 2 – The Guiding Principles of UN Members*

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

- (i) The Organization is based on the principle of the sovereign equality of all its Members.
- (ii) All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
- (iii) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
- (iv) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
- (v) All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

If Article 1 of the Charter lays out the function of the UN, Article 2 describes its foundational norms and principles that member-states have the legal responsibility to uphold. The most salient of these is clause (iv), by which the aggressive threat or use of force is outlawed and a principle of non-intervention reinforced.

By invading Ukraine, the Russian Federation has flouted four of the five clauses presented above. Primarily, Russia has neglected its obligation to recognise the sovereign equality of its fellow member-state Ukraine – snubbing clauses (i) and (ii). Alongside this, the Russian regime has chosen to wage an aggressive war through the use of force against Ukrainian territorial integrity and political independence, endangering international peace and security – slighting paragraphs (iii) and (iv). Equally, it can also be added that should action by the UN be taken against Russia, Belarus will then have undermined its obligations as laid out in clause (v), given its current status as an active, bellicose ally of Russia.

It must be said that it has oft been remarked that Articles 2 and 51, discussed below, are directly contradictory. If the use of force is outlawed by Article 2, a member-state is unable to engage in forceful self-defence under Article 51 without in some way renegading from the obligations the Charter compels, meaning intervention can only be justified in the most particular and narrowly defined circumstances (Rengger 2013, 105). Such a contradiction and 'narrowly defined circumstances' will no doubt be highlighted by the Russian permanent representative ahead, in order to present a narrative justification for the invasion *in eventum*, as Russia's claim to self-defence is further interrogated.

## *Article 4 – Admission to Membership*

- (i) Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
- (ii) The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

During the emergency sessions, representative Kyslytsya of Ukraine raised the question of the Russian Federation's membership to the supranational organisation as a whole. With the passing of the Union of Soviet Socialist Republics (USSR) in 1991, the Russian federation became the inheriting state of the USSR's membership to the UN, including its permanent seat on Security Council and all other organs of the UN system. Kyslytsya highlights that the process set out in clause (ii) of Article 4 did not take place, but simply a letter was received by the Secretary-General from the then Russian President, Boris Yeltsin, informing him of the Russian Federation's intent to take up the position of the

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USSR. The intention is thus to rhetorically cast doubt on the legitimacy of the Russian Federation's membership and equally its status as a 'peace-loving state'. If the UN chose to act on Kyslytsya's assertion, it would face a constitutional and legal crisis the likes of which it has yet seen, not yet having faced such a challenge.

## *Article 6 – The Expulsion of a State*

A Member of the United Nations which has persistently violated the principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

In extension to the question raised by the iteration of Article 4, it has been suggested by some that the Russian Federation should have its permanent seat on the Security Council removed, following its intent to disturb the UN's capability to pursue peace. Although there has been little immediate published academic debate on the matter (Macleod 2022), it must be stated that there is no mention in the charter of removing a permanent member of the Security Council. Ultimately, this reveals the partially limited and restricted character of the Charter, exposed through such a salient lacuna with this absence. Nonetheless, Article 6 lays out the process for expelling a member from the organisation as a whole. This has never been triggered and would be expected to be vetoed by the Russian Federation, as is their right under Article 27(iii). Most speculative routes for circumnavigation would run up against political or legal obstacles, and as such the Ukrainian claim should be treated as a narrative-influencing interjection to emphasise a historical pattern of Russian legal abuses.

## *Article 23 – The Composition of The Security Council*

(i) The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council.

Much as in the discussion of Articles 4 and 6 above, Article 23 has been rhetorically appealed to by Ambassador Kyslytsya on a number of occasions during the emergency sessions. The purpose of this exercise has been to raise uncertainty over the Russian Federation's position as a permanent member of the UNSC, given that it is not the USSR and that the process entailed in Article 4 for the Russian Federation's membership has yet to be undertaken. Just how much credence one wishes to lend to such an argument varies, but the rhetorical and normative capacity of Kyslytsya's claim cannot be denied to have had some impact on the international discourse to some extent.

## *Article 25 – The Binding Nature of UNSC Resolutions*

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

As the primary responsibility of the UNSC is to ensure and maintain international peace and security, the UN Charter makes it necessitous for member-states to adhere to UNSC resolutions. Consequently, Article 25 is commonly interpreted as certifying the legal and binding nature of such resolutions. In this regard, the Russian invasion of Ukraine breaks international law by violating Resolution 2202 and therefore Article 25.

Resolution 2202 was *unanimously* adopted in 2015 with all fifteen members of the council voting in favour of its implementation. This resolution holds broad significance, concerning itself only with the Ukrainian crisis that came as a result of the 2014 Revolution of Dignity and the annexation of Crimea. In its responsibility to uphold both Article 25 of the Charter and the wider convention that agreements one makes must be kept (*pacta sunt servanda*), the Russian Federation is breaching its legal obligations in a three-fold manner with regards to UNSC Resolution 2202 (United Nations Security Council 2015).

Firstly, the resolution reiterated that all signatories reaffirm 'full respect for the sovereignty, independence and territorial integrity of Ukraine.' Secondly, although Russian diplomats now claim to have not been a participating signatory of the 2015 Minsk agreements, the Russian Federation has clearly signed an obligation to withdraw all

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'armed formations, military equipment, as well as mercenaries from the territory of Ukraine' under the annex of this legally binding agreement. And lastly, as part of the Resolution, Vladimir Putin himself is listed alongside other world leaders as personally reiterating their full respect for the sovereignty and territorial integrity of Ukraine, by which 'They firmly believe that there is no alternative to an exclusively peaceful settlement.'

It subsequently appears that there has been a five-pronged violation by Russia in this regard alone. By the use of such force against Ukraine, the Russian federation has firstly disregarded a legally binding resolution that it willingly agreed to uphold in the manner discussed above. In doing so, such action thus flouts Article 25 of the Charter, renegading on its legal obligations to a load-bearing pillar of international law. Finally, in defying such responsibility and ignoring their own active commitment to Resolution 2202, the Russian Federation has diluted the very sanctity of the legal convention that states are obliged to uphold the agreements that they willingly have a hand in forging. As such, Russia has chosen to overturn and disrupt the common norms and law of international society.

## *Article 27 – Voting Procedure in The Security Council*

- (i) Each member of the Security Council shall have one vote.
- (ii) Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
- (iii) Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Article 27 explicates the voting procedure of the UNSC. In its third clause, provision is made for permanent members to trigger their technical, or 'negative', veto power. The veto power of the permanent members can be categorised as 'negative' precisely because there is no clause providing for a veto affirmatively, as a clear mechanism for use. Rather, a resolution may be blocked by simply preventing the permanent members from voting unanimously, even if all fourteen other members of the security council are united. Subsequently, the output of the body whose function it is to ensure international peace and security is greatly susceptible to the whims of national interest amongst its permanent members. This has led to accusation in widespread commentary that the veto stymies the practice of collective justice in international society in the name of power politics, and so should be amended to mirror the norms of the contemporary era (Wight 1979; Blum 2005; Mayer-Mruwat 1998; Soderberg 2015; Thakur 2016).

In this case, the draft resolution calling for Russian aggression in Ukraine to be brought to an end was vetoed by Russia on February 25<sup>th</sup>. This usurped not only the function of the council, and that of the UN broadly as set out in Article 1(i), but equally contravened the final section of Article 27(iii), that 'a party to a dispute shall abstain from voting'. Instead, Russia vetoed the draft resolution, contravening its responsibilities whilst sitting as president of the council no less. This is a flagrant legal abuse and mockery of the UN system which in turn undermines its efficacy as a mechanism of international justice.

Such a violation of the Charter was consequently sought to be circumnavigated through appeal to the General Assembly, under resolution 377(V) 'Uniting for Peace'. As passage of the draft resolution to the General Assembly under resolution 377(V) is a procedural matter, the process for which is accounted for within Article 27(ii) above, no unanimity of the permanent members was required. The issue passed to the General Assembly with 11 votes in favour, three abstentions and Russia alone in its resistance (United Nations Meetings Coverage and Press Releases 2022a).

However, as already stated, although significant in their own modality, UNGA resolutions are only recommendations. This means that they lack not only the weight of binding international law but, as in the specific case of 377(V) 'Uniting for Peace', are thus unable to reinforce collective security, making it both politically and legally contentious (Andrassy 1956; Wight 1979, 227).

## *Article 33 – The Peaceful Settlement of Disputes*

- (i) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace

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and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

(ii) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

It has been claimed that both Russian aggression and its resultant action to block the draft resolution in the UNSC go some way to undermine the attempt at achieving a peaceful outcome to the crisis (United Nations Meetings Coverage and Press Releases 2022b). This goes against Article 33, which obliges states to peacefully settle disputes by way of negotiation and judicial settlement prior to engaging in the use of force. No such avenue was taken prior to Russia's invasion. Ultimately, this will be the longstanding goal of the UN until any conclusion to the conflict arises: to facilitate a peaceful settlement of dispute.

## *Article 36 – Recommendations for Adjustment by The Security Council*

(i) The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

The vetoed draft resolution is significant precisely because of its relation to Article 36. The provisions of the draft resolution sought to recommend such 'methods of adjustment' to the current conflict. The draft resolution S/2022/155 (United Nations Security Council 2022) explicitly states that the Russian Federation is to 'immediately cease its use of force against Ukraine' and 'immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukrainian territory within its internationally recognised borders', which would include the Donetsk and Luhansk regions. In doing so, it cannot be claimed that the Security Council has neglected its responsibility to Articles 33 nor 36. Russia, through its use of the veto, can however be said to have obstructed the council from adhering to such responsibility, and as such the UNSC from performing its function under the Charter.

## *Article 39 – The Security Council May Determine 'Aggression'*

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

With the right to determine and recommend appropriate procedures for peaceful de-escalation, Article 39 begins the seventh chapter of the Charter, in which the process for condoning intervention as a mechanism of collective security is expounded. The vetoed draft resolution S/2022/155 sets out clearly that with the right afforded to the Security Council through Article 39, the Russian Federation's actions against Ukraine can only be categorised as a threat to peace and consequently as an act of aggression that undermines its obligations to Article 2(iv) of the Charter (United Nations Security Council 2022). Although the Russian Federation do not contest the suitability of the Security Council to hold such a right, their claim is that this contradicts Article 51, discussed below, with their actions narratively constructed as defensive.

## *Articles 41 and 42 – The Interventionary Power of The Security Council*

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

The content of Articles 41 and 42 constitute the gravitas of the Charter's seventh chapter. In these two articles, the

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powers of the Security Council to apply measures in the name of international peace and security are presented. There is indeed a precedent for this, having been used several times in the last three decades, especially under the doctrine of the 'Responsibility to Protect' (Welsh 2018, 467). Article 41 is the basis for UN action that does not entail armed force, permitting the formation of sanctions committees and thus 'severe economic embargoes', as seen during the First Gulf War and in the Balkan Wars of the 1990s (Sievers and Daws 2014, 519). Article 42 provides equally for the UN to impose the use of armed force for the maintenance of international security and to give effect to its past decisions, as in the case of the 2011 intervention in Libya so to enforce a ceasefire.

As legal scholars contend, a Security Council Resolution is considered to be 'a Chapter VII resolution' only if it explicitly determines that a situation under consideration constitutes a threat to the peace as an act of aggression, and/or explicitly or implicitly states that the Council is acting under Chapter VII (Johansson 2009, 326). The vetoed resolution makes no explicit reference to Chapter VII, but does indeed contend that Russia's actions constitute a use of aggression that violates the Charter. Although the extent to which the draft resolution entails action that could be considered a mode of intervention is debatable, it makes neither implicit nor explicit reference to enforceable measures. Nevertheless, if aggression were to continue and the situation deteriorate at a greater humanitarian expense, Articles 41 and 42 could emerge in the broader diplomatic and legal dialogue as in past cases.

## *Article 51 – The Right to National Self-Defence*

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The Russian diplomatic defence for the invasion of Ukraine rests with Article 51 of the Charter. Nebenzya throughout several of the emergency sessions in the UNGA and UNSC, has commented on the precedence of Article 51 to the Russian case, making it the prime legal defence of the Russian diplomatic corps. Article 51 entitles any member state to individual or collective self-defence until measures are taken for peace. As briefly cited above, this creates a central contradiction with the prohibition of the use of force and reinforcement of non-intervention eschewed out in Article 2(iv).

Russia is entitled to self-defence under the Charter. That is not up for debate. This being said, it has been acknowledged by a number of legal scholars that the crucial quality of Article 51 lies in the term 'armed attack'. Following precedent, the immanence of an attack must be so overt that defensive action is required in the name of existential sovereign self-preservation; in turn this delegitimises the use of force in regards to a 'perceived' threat, lacking the factual clarity and evidence of a truly existential hazard (Schachter 1995; Wheeler 2000, 87). Therefore, in order to claim that a state is acting in-step with Article 51, both support and immanent bellicosity is required to be 'active' as opposed to 'passive', otherwise widening the scope of legitimate self-defence risks a full and total erosion of the Charter's purpose and central principles (Glennon 2002, 542; Paoletti 2011). Such a widening should accordingly be avoided for the sake of the international legal order itself, and applicable to all.

How does this relate to the current crisis in Ukraine? There have been no threats of force against Russia from Ukraine, nor from NATO member states – being a defensive alliance (Wilmschurst 2022). In this case, there is a distinct lack of 'clarity', 'immanence' and 'active bellicosity' towards Russia from Ukraine. Although some may claim that Article 51 entitles Donetsk and Luhansk to legitimate self-defence, this is not so. Neither Donetsk nor Luhansk are recognised sovereign states on any legal or widespread basis, not being UN member-states and subsequently not provided for in international law. As such to recognise either the Donetsk or Luhansk People's Republics is to infringe upon the sovereignty of Ukraine.

Consequently, Article 51 does not apply in this case, except to Ukraine in their self-defence against clear aggression from the Russian Federation that is an 'armed attack' and commonly perceived as such. The focus of the current



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investigation will now shift its attention from the UN Charter to a brief exposition of the 1994 Budapest Memorandum on Security Assurances, unpacking this commonly cited agreement in regards to the Russian invasion so to provide a greater sense of clarity and understanding, following the objectives of this exploration as a whole.

## The Budapest Memorandum on Security Assurances (1994)

Ukraine, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America... Taking into account the commitment of Ukraine to eliminate all nuclear weapons from its territory within a specified period of time,

(i) Reaffirm their commitment to Ukraine...to respect the independence and sovereignty and the existing borders of Ukraine.

(ii) Reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations. (United Nations 1994).

Signed at the December 1994 Organization for Security and Co-operation in Europe (OSCE) conference in Budapest, the 'Budapest Memorandum on Security Assurances' details a milestone for Russia-Ukraine relations in the post-cold war era. In return for surrendering their stockpile of nuclear weapons to the Russian Federation and thereby engaging with the international programme of nuclear non-proliferation, Ukraine was to receive recognition of sovereignty over existing borders and an obligation to refrain from the use of force, except such right ensured by Article 51 of the UN Charter.

The first clause of the memorandum was breached in 2014 with the February Revolution of Dignity and the annexation of the Crimean Peninsula; whereby the limitations of the Memorandum were revealed to be unable to account for the problem in status of Russian military forces in a Ukrainian region that had been annexed with a referendum (Sakwa 2015, 68–69). Hence, in regards to the conflict in 2022, the Memorandum can be clearly said to have been wholly undermined with the recognition of Ukrainian sovereign territory reneged on and the aggressive use of force employed.

Although the assertion that Russian aggression has breached the Budapest Memorandum is salient, it must be declared that the Budapest Memorandum is *not* legally binding, despite the claims of a number of commentators. The purpose of the memorandum was to provide a reaffirmation of commitment to certain security assurances. Even though the document cites the UN Charter at a number of points as part of such a re-affirmation, this does not make it an international legal treaty.

In such a regard, Moscow's transgression of the Memorandum may not be a strict legal infringement, but it does represent a landmark in the breakdown of international order and the very worth of security assurances broadly (Yost 2015, 538). Subsequently, the Budapest Memorandum as a phenomenon in itself has frequently been mentioned at the emergency sessions of the UN. Nevertheless, for the sake of understanding and clarity, it should not be forgotten that breaking the Budapest Memorandum is not a violation of international law and should only contribute to evidencing a breakdown in the norms underpinning the international order.

The breach of the Budapest Memorandum is an erosion of a propensity towards the cordial and trusted relations between states, as opposed to a contravention of a binding legal code. As such, breaking the Budapest Memorandum is not a significant enough source to singlehandedly claim the Russian invasion of Ukraine is illegal. To do so would be to misunderstand the distinction between laws and assurances.

## Final Thoughts

In the first week of the conflict, the UN High Commissioner for Refugees have published that a million refugees have fled Ukraine, the most rapid exodus of the contemporary era that seems to be expanding in magnitude with every passing moment (United Nations High Commissioner for Refugees 2022a). Usually such a claim involving 'with every passing moment' is made as a rhetorical device. This is not the case. Some five days later, just twelve days into the

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invasion as a whole, this already vast figure has doubled to over two million (United Nations High Commissioner for Refugees 2022b). Such a humanitarian crisis has been the subject of several UNSC sessions since the UNGA voted to denounce the Russian invasion. In these sessions, Kyslytsya and Nebenzya have continued to fiercely debate the legality of the Russian invasion of Ukraine using the language of and references to the documents discussed in this piece, reiterating such arguments.

The purpose of this investigation was to elucidate and explain the chief pair of documents that have been raised in the wider diplomatic discourse concerning the legality of the Russian invasion. Such discourse is significant because it forms the basis of the global politics that we are all connected to in some way, and as such should be made accessible for any and all interested in understanding its character to a greater extent.

In this examination of the UN Charter and the 1994 Budapest Memorandum on Security Assurances, it can clearly be stated that the Russian Federation and its Belarussian stalwart have committed a twofold assault on the rules based international order. In the first sense, it is nothing but abundantly clear that Russia's invasion of Ukraine is illegal. As this investigation has shown, Russia's actions contravene a plethora of both legally binding resolutions and articles within the UN Charter – the lynchpin of obligatory international law that it has a very clear and concrete lawful duty to uphold. Although Russia has both undermined and breached the 1994 Budapest Memorandum on Security Assurances also, it has been emphasised that this was never a legally binding treaty and so does not testify in isolation to the legal illegitimacy of Russia's aggression. It does however demonstrate the breakdown in normative reciprocity within international society.

In discussing the collapse of the norms that underpin international society, this brings us to the secondary manner in which we can conclude that Russia's use of force has assaulted the rules based international order. The Russian Federation have sought only to hamper the ability of the UN system to achieve its chief function of maintaining international peace and security. Consequently, not only has the Russian Federation clearly violated binding international law with their invasion, but have added insult to injury by abusing the legal word of the Charter in bad faith, such as in the case of Article 51 or Article 27(iii); seeking to undermine the very principles upon which the Charter and the UN were forged to maintain.

Following the thought of Martin Duffy (2022): 'The UN has a perfect right to expect the highest level of integrity from all its members, and especially from the P5.' In wholly undermining that very integrity, Russia has not only broken international law in the most flagrant manner, but has devalued the very system that underpins international society – that of its common interests, norms, values, laws and practices that bind states in a social relation with one another.

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## About the author:

**Kieran O'Meara** is a PhD Candidate in International Relations at The University of St. Andrews. His academic interests focus on the intersection between the English School of International Society, transnational revolutionary groups, global revolution, the praxis of global social movements and World Order. He is also a Director and Editor-at-Large at E-International Relations. Find him on Twitter/X: @kieranjomeara.