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Russia, Ukraine and the Law of War. Crime of Aggression: Scott Ritter

Scott Ritter, in part one of a two-part series, lays out international law regarding the crime of aggression and how it relates to Russia's invasion of Ukraine.

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"To initiate a war of aggression is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulative evil of the whole." – Judges of the International Military Tribunal at the Nuremberg Trials.

When it comes to the legal use of force between states, it is considered unimpeachable fact that in accordance with the intent of the United Nations Charter to ban all conflict, there are only two acceptable exceptions. One is an enforcement action to maintain international peace and security authorized by a Security Council resolution passed under Chapter VII of the Charter, which permits the use of force.

The other is the inherent right of individual and collective self-defense, as enshrined in Article 51 of the Charter, which reads as follows:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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."

A plain-language reading of Article 51 makes it clear that the trigger necessary for invocation of the right of self-defense is the occurrence of an actual armed attack — the notion of an open-ended threat to security does not, by itself, suffice.

Prior to the adoption of the U.N. Charter, the customary international law interpretation of the role of pre-emption as applied to the principle of self-defense was Hugo Grotius, the 17th century Dutch legal scholar who, in his book *De Jure Belli Ac Pacis* ("On the Law of War and Peace") declared that "war in defense of life is permissible only when the danger is immediate and certain, not when it is merely assumed," adding that "the danger must be immediate and imminent in point in time."

Grotius formed the core of the so-called "Caroline Standard" of 1842, (named after a U.S. ship of that name which had been attacked by the British navy after aiding Canadian rebels back in 1837) drafted by then U.S. Secretary of State Daniel Webster. It supported the right of pre-emption or anticipatory self-defense only under extreme circumstances and within clearly defined boundaries.

"Undoubtedly," Webster wrote, "it is just, that while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to eases in which the '*necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation*.'"

Until the adoption of the U.N. Charter in 1945, Webster's criteria, borrowing heavily from Grotius, had become Black Letter Law regarding anticipatory action in international law. However, once the United Nations was established and the U.N. Charter sanctified as international law, the concept of pre-emption or anticipatory self defense lost favor in customary international law.

George Ball, deputy under-secretary of state for President John F. Kennedy, made the following famous remark about the possibility of a U.S. attack on Cuba in response to the deployment of Soviet nuclear-armed missiles on Cuban territory in 1962. As it was being discussed in the White House Situation Room, Ball said: "A course of action where we strike without warning is like Pearl Harbor…It's…it's the kind of conduct that's such that one might expect of the Soviet Union. It is not conduct that one expects of the United States."

Oct. 29, 1962 Executive Committee of the National Security Council meeting during the Cuban Missile Crisis. (Cecil Stoughton, White House, in the John F. Kennedy Presidential Library and Museum)

The Ball standard guided the administration of President Ronald Reagan when, in 1983, Israel bombed the Osirak nuclear reactor in Iraq. Israel claimed that "in removing this terrible nuclear threat to its existence, Israel was only exercising its legitimate right of self-defense within the meaning of this term in international law and as preserved under the U.N. Charter."

The Reagan administration ultimately disagreed, with U.S. Ambassador to the U.N. Jeane Kirkparick saying, "our judgement that Israeli actions violated the Charter of the United Nations is based on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute." Kirkpatrick, however, noted that President Reagan had opined that "Israel might have sincerely believed it was a defensive move."

The American argument dealt with the process of the Israeli action, namely the fact that Israel had not brought the problem before the Security Council as required by Article 51. In this, the U.S. drew upon the judgement of Sir Humphrey Waldock, the head of the International Court of Justice, who in his 1952 book, *The Regulation of the Use of Force by Individual States in International Law*, noted:

> "The Charter obliges Members to submit to the Council or Assembly any dispute dangerous to peace which they cannot settle. Members have therefore an imperative duty to invoke the jurisdiction of the United Nations whenever a grave menace to their security develops carrying the probability of armed attack."

After Iraq's invasion of Kuwait in August 1990, the United States was able to assemble a diverse international coalition by citing not only Article 51, which provided a somewhat weak case for intervention based upon self-defense and collective security, but also Security

Council resolution 678 passed under Chapter VII of the U.N. Charter. That authorized the use of force to evict Iraq from Kuwait. Regardless of where one stood on the merits of that conflict, the fact is, from the standpoint of international law, the legality underpinning the U.S. and coalition use of force was rock solid.

The aftermath of Operation Desert Storm, the U.S.-led military campaign to liberate Kuwait, however, lacked such clarity. While Kuwait was liberated, the Iraqi government was still in place. Since Resolution 678 did not authorize regime change, the continued existence of Iraqi President Saddam Hussein's government posed a political problem for the United States, whose president, George H. W. Bush, had likened Saddam Hussein in an October 1990 speech to the Middle East equivalent of Adolf Hitler, requiring Nuremburg-like retribution.

US Misuse of Ceasefire Resolution

The Security Council, under pressure from the United States, passed a ceasefire resolution, 687, under Chapter VII, which linked the lifting of economic sanctions imposed on Iraq for invading Kuwait to the verified disarmament of Iraqi weapons of mass destruction (WMD) under the auspices of U.N. weapons inspectors.

The U.N. disarmament process was troubled by two disparate undercurrents. The first was the fact the Iraqi government was an unwilling participant in the disarmament process, actively hiding material, weapons, and documentation pertaining to banned missile, chemical, biological, and nuclear programs from the inspectors.

This active program of concealment constituted a de facto material breach of the ceasefire resolution, creating a *prima facia* case for the resumption of military action for the purpose of compelling Iraq into compliance.

The second was the reality that the United States, rather than using the disarmament process authorized by the Security Council to rid Iraq of WMD, was instead using the sanctions triggered by continued Iraqi noncompliance to create the conditions inside Iraq to remove Saddam from power.

The weapons inspection process was only useful to the United States if it furthered that singular objective. By the fall of 1998, inspections had become inconvenient to U.S. Iraq policy.

In a move carefully coordinated between the U.N. inspection team and the U.S. government, an inspection-based confrontation was orchestrated between U.N. inspectors and the Iraqi government, which was then used as an excuse to withdraw the U.N. inspectors from Iraq. The U.S. government, citing the threat posed by Iraqi WMD in an inspection-free environment, launched a three-day aerial bombardment of Iraq known as Operation Desert Fox.

Neither the U.S. nor the U.K. (the two nations involved in Operation Desert Fox) had received authority from the U.N. Security Council prior to taking military action. There is no specific legal authority that would allow either the U.S. or Britain to act in a unilateral fashion regarding the enforcement of a Chapter VII resolution such as 687. While the Security Council would obviously be able to authorize compelled compliance (i.e., the use of

force), no single nation nor collective possesses unilateral enforcement authority, making Operation Desert Fox an illegal act of aggression under international law.

The U.S. has sought to get around this legality by crafting a case for military action under the rubric of the "right of reprisal", with the act of Iraq being in material breach of its obligations under resolution 687 serving as the justification for reprisal. To argue what by most accounts is a tenuous case, however, the strike in question would have to be limited to targets that could be exclusively defined as being related to weapons of mass destruction (WMD).

The fact that the U.S. and U.K. struck a plethora of sites, none of which were related to the manufacture or storage of WMD, undermines the legitimacy of any justification under a claim of reprisal, making Operation Desert Fox an unauthorized (i.e., illegal) use of military force.

Deterrence

U.N. weapons inspectors in central Iraq, June 1, 1991. (UN Photo)

One of the purposes alleged to justify an action under the "right of reprisal" was the notion of deterrence, namely that by carrying out a limited reprisal in response to a documented material breach of a Chapter VII resolution, the U.S. and UK would be deterring Iraq from any future acts of non-compliance.

One of the key aspects of deterrence in defense of the law, however, is the need for the act upon which deterrence is derived being itself legitimate. Given that Operation Desert Fox was, *prima facia*, an illegal act, the deterrence value generated by the action was nil.

The inability to craft a valid deterrence policy produced the opposite of what had been

intended — it emboldened Iraq to defy the will of the Security Council under the misguided conclusion that its constituent members were impotent to act against it.

In 2003 the administration of President George W. Bush proved the Iraqis wrong.

Having failed to implement a viable doctrine of military deterrence when dealing with Iraq's unfulfilled obligations under Security Council resolutions, the U.S. crafted a new approach for resolving the Iraqi problem once and for all—the doctrine of pre-emption.

This doctrine was first articulated by President Bush in his June 2002 address to West Point, where he declared that while "in some cases deterrence still applied, new threats required new thinking … if we wait for threats to fully materialize, we will have waited too long."

On Aug. 26, 2002 Vice President Dick Cheney specifically linked Bush's embryonic doctrine of pre-emption to Iraq, declaring at a convention for the Veterans of Foreign Wars that:

> "What we must not do in the face of a mortal threat is to give in to wishful thinking or willful blindness…deliverable weapons of mass destruction in the hands of a terror network or murderous dictator or the two working together constitutes as grave a threat as can be imagined. The risks of inaction are far greater than the risks of action."

Certified Pre-Emption

In early September 2002 the Bush administration published its National Security Strategy (NSS), which certified as official U.S. policy the principle of pre-emption. It noted that the Cold War-era doctrines of containment and deterrence no longer worked when dealing with a post-9/11 threat matrix which included rogue states and non-state terrorists.

"It has taken almost a decade for us to comprehend the true nature of this new threat," the NSS stated.

> "Given the goals of the rogue states and terrorists, the U.S. can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker…and the magnitude of potential harm that could be caused by our adversaries' choice of weapons do not permit that option. We cannot let our enemies strike first."

The NSS went on to offer a legal argument for this new doctrine. "For centuries international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat — most often a visible mobilization of armies, navies and air forces preparing to attack."

According to the NSS, the concept of immediacy as a pre-condition for the legitimate employment of anticipatory self-defense had to be adapted to the new kinds of threats that had emerged. "The greater the threat," the NSS declared, "the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts, the United States will, if necessary, act pre-emptively."

The new Bush Doctrine of pre-emption was not well received by legal scholars and international relations specialists. As William Galston, at the time a professor of public policy for the University of Maryland, observed in an article published on Sept. 3, 2002,

> "A global strategy based on the new Bush doctrine of preemption means the end of the system of international institutions, laws, and norms that we have worked to build for more than half a century. What is at stake is nothing less than a fundamental shift in America's place in the world. Rather than continuing to serve as first among equals in the postwar international system, the United States would act as a law unto itself, creating new rules of international engagement without the consent of other nations."

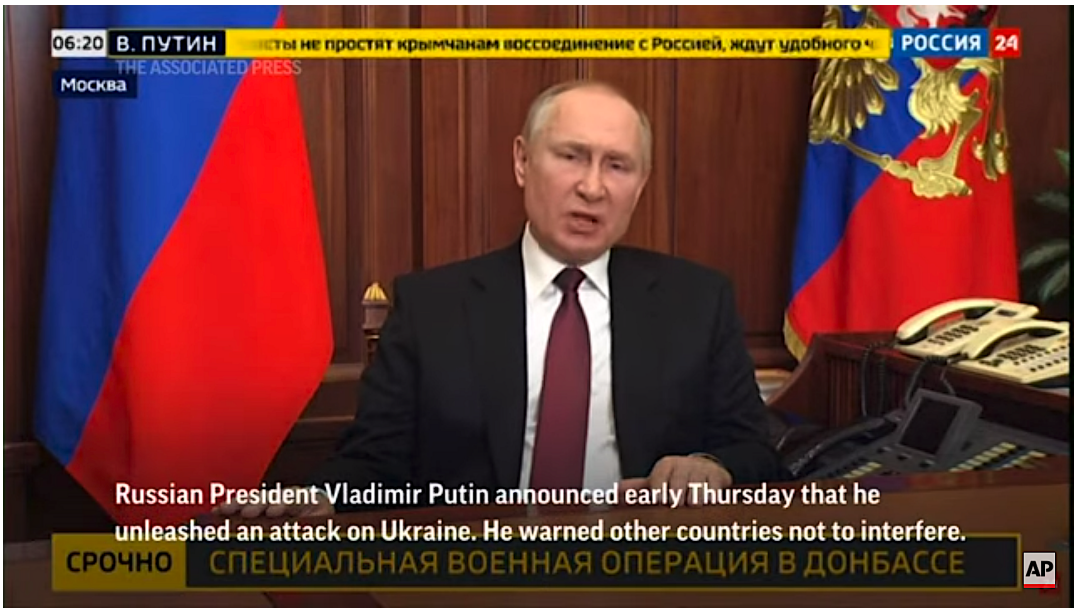
Galston's words were echoed by then U.N. Secretary General Kofi Annan, who shortly after the NSS was published declared that the notion of pre-emptive self-defense would lead to a breakdown in international order. For any military action against Iraq to have legitimacy under the U.N. Charter, Annan believed, there needed to be a new Security Council resolution which specifically authorized a military response.

The U.S. and U.K. did, in fact, seek to secure such a resolution in early 2003, but failed. As such, the U.S.-led invasion of Iraq, launched in March 2003 under the sole authority of the U.S. doctrine of pre-emption, "was not in conformity with the U.N. charter," according to Annan, who added "From our point of view and from the charter point of view it was illegal."

As the de facto first test case of the new American doctrine of preemption, the U.S. would have benefitted from having been proven right in the major threat assumptions which underpinned the need for urgency. History has shown that the major threat issue — that of Iraqi WMD, was fundamentally flawed, derived as it were from a manufactured case for war based on fabricated intelligence.

Likewise, the so-called nexus between Iraq's WMD and the al Qaeda terrorists who perpetrated the terrorist attacks of 9/11 turned out to be equally as illusory. The doctrine of pre-emption carries with it a high standard of proof; about Iraq, this standard was not remotely met, making the 2003 invasion of Iraq illegal under even the most liberal application of the doctrine.

Ukraine



Putin announcing military operation against Ukraine on Feb. 24. (AP screenshot)

Concerns that any attempt to carve a doctrine of pre-emption out of the four corners of international law defined by Article 51 of the U.N. Charter would result in the creation of new rules of international engagement, and that that would result in the breakdown of international order were realized on Feb. 24.

That is when Russian President Vladimir Putin, citing Article 51 as his authority, ordered what he called a "special military operation" against Ukraine for the ostensible purpose of eliminating neo-Nazi affiliated military formations accused of carrying out acts of genocide against the Russian-speaking population of the Donbass, and for dismantling a Ukrainian military Russia believed served as a de facto proxy of the NATO military alliance.

Putin laid out a detailed case for pre-emption, detailing the threat that NATO's eastward expansion posed to Russia, as well as Ukraine's ongoing military operations against the Russian-speaking people of the Donbass.

"[T]he showdown between Russia and these forces," Putin said, "cannot be avoided. It is only a matter of time. They are getting ready and waiting for the right moment. Moreover, they went as far as aspire to acquire nuclear weapons. We will not let this happen." NATO and Ukraine, Putin declared,

> "did not leave us [Russia] any other option for defending Russia and our people, other than the one we are forced to use today. In these circumstances, we have to take bold and immediate action. The people's republics of Donbass have asked Russia for help. In this context, in accordance with Article 51 of the U.N. Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on February 22, I made a decision to carry out a special military operation."

Putin's case for invading Ukraine has, not surprisingly, been widely rejected in the West. "Russia's invasion of Ukraine," Amnesty International declared, "is a manifest violation of the United Nations Charter and an act of aggression that is a crime under international law. Russia is in clear breach of its international obligations. Its actions are blatantly against the rules and principles on which the United Nations was founded."

John B. Bellinger III, an American lawyer who served as legal adviser for the U.S. Department of State and the National Security Council during the George W. Bush administration, has argued that Putin's Article 51 claim "has no support in fact or law."

While Bellinger notes that Article 51 does not "impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations," he hastens to note that Ukraine had not committed an armed attack against Russia or threatened to do so.

Bellinger is dismissive of Russia's claims to the contrary, noting that "Even if Russia could show that Ukraine had committed or planned to commit attacks on Russians in the Ukrainian regions of Donetsk and Luhansk, Article 51 would not permit an action in collective self-defense, because Donetsk and Luhansk are not U.N. member states."

While the notion that a lawyer who served in an American presidential administration which

crafted the original doctrine of pre-emption used to justify the U.S.-led invasion of Iraq would now be arguing against the application of that very same doctrine by another state would seem hypocritical, hypocrisy alone does not invalidate Bellinger's underlying arguments against Russia, or the claims put forward by its president.

Unfortunately for Bellinger and those who share his legal opinion, a previous U.S. presidential administration, that of William Jefferson Clinton, had previously crafted a novel legal theory based upon the right to anticipatory collective self-defense under Article 51 of the U.N. Charter.

The Clinton administration argued that this right was properly exercised under "normative expectation that permits anticipatory collective self-defense actions by regional security or self-defense organizations where the organization is not entirely dominated by a single member." NATO, ignoring the obvious reality that it was, in fact, dominated by the United States, claimed such a status.

While the credibility of the NATO claim of "anticipatory collective self-defense" collapsed when it transpired that its characterization of the Kosovo crisis as a humanitarian disaster infused with elements of genocide that created, not only a moral justification for intervention, but a moral necessity, turned out to be little more than a covert provocation carried out by the C.I.A. for the sole purpose of creating the conditions for NATO military intervention.

While one may be able to mount a legal challenge to Russia's contention that its joint operation with Russia's newly recognized independent nations of Lugansk and Donetsk constitutes a "regional security or self-defense organization" as regards "anticipatory collective self-defense actions" under Article 51, there can be no doubt as to the legitimacy of Russia's contention that the Russian-speaking population of the Donbass had been subjected to a brutal eight-year-long bombardment that had killed thousands of people.

Moreover, Russia claims to have documentary proof that the Ukrainian Army was preparing for a massive military incursion into the Donbass which was pre-empted by the Russian-led "special military operation." [OSCE figures show an increase of government shelling of the area in the days before Russia moved in.]

Finally, Russia has articulated claims about Ukraine's intent regarding nuclear weapons, and in particular efforts to manufacture a so-called "dirty bomb", which have yet to be proven or disproven. [Ukrainian President Volodymyr Zelensky made a reference to seeking a nuclear weapon in February at the Munich Security Conference.]

The bottom line is that Russia has set forth a cognizable claim under the doctrine of anticipatory collective self defense, devised originally by the U.S. and NATO, as it applies to Article 51 which is predicated on fact, not fiction.

While it might be in vogue for people, organizations, and governments in the West to embrace the knee-jerk conclusion that Russia's military intervention constitutes a wanton violation of the United Nations Charter and, as such, constitutes an illegal war of aggression, the uncomfortable truth is that, of all the claims made regarding the legality of pre-emption under Article 51 of the United Nations Charter, Russia's justification for invading Ukraine is on solid legal ground.

Coming in Part 2: Russia, Ukraine, and the Law of War: War And War Crimes.

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Scott Ritter is a former U.S. Marine Corps intelligence officer who served in the former Soviet Union implementing arms control treaties, in the Persian Gulf during Operation Desert Storm and in Iraq overseeing the disarmament of WMD.

Featured image: Nuremberg Trials. 1st row: Hermann Göring, Rudolf Heß, Joachim von Ribbentrop, Wilhelm Keitel. 2nd row: Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel. (Office of the U.S. Chief of Counsel for the Prosecution of Axis Criminality/Still Picture Records LICON, Special Media Archives Services Division (NWCS-S)
