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Untangling the significance of the Ukraine and the Netherlands vs Russia Case on the determination of the international nature of the conflict and on the onset of the use of force by the Russian Federation against Ukraine: 2022 OR 2014?

João Frey Pinto de Almeida

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UNTANGLING THE SIGNIFICANCE OF THE UKRAINE AND THE NETHERLANDS VS RUSSIA CASE ON THE DETERMINATION OF THE INTERNATIONAL NATURE OF THE CONFLICT AND ON THE ONSET OF THE USE OF FORCE BY THE RUSSIAN FEDERATION AGAINST UKRAINE: 2022 OR 2014?

DESVELANDO O SIGNIFICADO DO CASO *UCRÂNIA E PAÍSES BAIXOS VS RÚSSIA* NA DETERMINAÇÃO DA NATUREZA INTERNACIONAL DO CONFLITO E NO ALVOR DO USO DA FORÇA PELA FEDERAÇÃO RUSSA CONTRA A UCRÂNIA: 2022 OU 2014?

JOÃO FREY PINTO DE ALMEIDA[1]
Escola do Porto da Faculdade de Direito da Universidade Católica Portuguesa
joaofpdealmeida@gmail.com
[2]

Abstract: This article will draw from the ECtHR's judgement of 30/11/2022, without offering a direct commentary on that decision. My aim is to build upon the Court's stance and analyse it in the context of the international framework of the use of force. I believe it gives rise to a prolific discussion on *jus ad bellum*, which allows, by resorting to case-law and relevant documents and scholar's legal theories, to question whether the violation of the prohibitive principle of the use of force in international relations only occurred when Putin authorized a "special military operation" in 2022, or if it goes back to 2014. I am going to endorse this latter viewpoint, but not before putting in prominence the Court's assessment on the ECHR's extraterritorial application and whether it allows to link the Russian Federation to the "separatists'" warlike acts, imparting an international nature to an apparently internal armed conflict.

Keywords: conflicts in Donbass; 2014; use of force; Russia's collaborators; (inter)national(ized) armed conflict

Resumo: Este artigo basear-se-á na decisão do TEDH de 30/11/2022, sem, no entanto, a comentar diretamente. O meu desiderato primacial será arrancar deste aresto para analisar a posição do Tribunal à luz do regime jurídico internacional do uso da força. Estou em crer que esta decisão propicia uma discussão profícua sobre o *jus ad bellum*, que abre aso a, recorrendo à jurisprudência, documentos e doutrina relevantes, questionar se a violação desse princípio proibitivo ocorreu apenas quando Putin autorizou o lançamento de uma "operação militar especial" em 2022, ou se remonta a 2014. Endossarei este último ponto de vista, mas não sem antes perscrutar a decisão do Tribunal no que tange à jurisdição extraterritorial da Rússia, de modo a aferir se o sentido desta permite ou não estabelecer uma ligação entre a Federação Russa e os atos belicosos dos "separatistas", imprimindo um caráter internacional a um conflito armado aparentemente interno.

Palavras-chave: conflitos no Donbass; 2014; uso da força; colaboradores da Federação Russa; conflito armado (inter)nacional(izado).

1. Law student.
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1. Introduction

As I am writing this article, it is impossible to ignore the harrowing truth of this grim reality looming large: the war in Ukraine persists, leaving behind a trail of immensurable devastation with no end in sight. It is undisputable that the Russian Federation, by the end of February 2022, unlawfully used armed force against Ukraine. Nevertheless, I believe that the ECtHR's decision of 30 November 2022 on the Ukraine and The Netherlands vs Russia Case[3] lends itself to a fruitful discussion on *jus ad bellum*, allowing to question whether the violation of the prohibitive principle of the use of force in international relations only occurred when Vladimir Putin authorized the launch of a "special military operation" in 2022, or if the violation goes back to 2014.

Nonetheless, it is not my intention for this article to be perceived as a straightforward commentary on this ruling. Indeed, my main goal is to contextualize the significance of this decision in the framework of *ius ad bellum*.

This decision covered three applications: app nos 8019/16, 43800/14 and 28525/20, the first two applied by the Ukrainian Government, and the other by the Dutch Government. Both governments argue that their grievances fall under the jurisdiction of the Russian Federation. Given the ongoing nature of many of the alleged violations, the Court examined evidence until 26 January 2022, the date of the hearing on admissibility in the Case, even though the Russian Federation ceased to be a High Contracting Party to the ECHR as from 16 September 2022, prior to the pronouncement of the Court.

The interest of this ruling to the study of the institute of the use of force – and its general prohibition – in international relations shines through if we attentively examinate the message that lies in between its lines. Since the Court concluded that the Donbass region was under Russia's effective control, I am confident to be able to establish a relevant connection between the Russian Federation and those falsely called "rebels" already back in 2014[4].

One of my objectives is to present some elements that densify this connection and critically assess whether it has the potential to lend credibility to the idea that the Russian Federation initiated the use force against Ukraine as early as 2014, when a scenario of warfare erupted in Donetsk and Lugansk. In fact, if the acts of the Pro-Russian "separatists" stem from their relationship with Russian authorities, I may have conditions to affirm that this conflict, at that time, did already transcend a mere civil war or non-international armed conflict (hereinafter NIAC), worthy of the classification of an international armed conflict (hereinafter IAC) – and that is precisely what, latent in this decision, the ECtHR suggests.

Given the considerations, we come across the task of finding the classification and the legal regime applicable to situations resembling the one discussed in this article.

3. *Ukraine and the Netherlands v. Russia* App Nos 8019/16, 43800/14 and 28525/20, (ECtHR, 30 November 2022), paras. 576-697.

4. Ibid., paras. 576-697.

2. The Extraterritorial Application of the ECHR

For the first task, I will shed some lights on extraterritorial application of the ECHR.

2.1. The Applicability of International Human Rights Law During Armed Conflict

Although I will not delve into that matter – who faces a number of obstacles along the way and that, as Vale Pereira points out, "[...] is evidently still evolving" (2019: 308) – it is important to emphasize that, given the alleged human rights violations on Ukrainian soil occurred during an armed conflict, the case at hand necessarily calls for the interrelation between IHL and IHRL – two branches of International Law that, although mutually influencing and with "considerable overlap" (Melzer, 2019: 34), differ from each other – more precisely the one enshrined in the ECHR. Regardless of whether we opt for a *lex specialis* approach (Vale Pereira, 2019: 282 ss.; Tavares, 2020: 224-225; Melzer 2019: 29-30; Landais, Bass, 2015: 1297; Hampson, 2011: 187-213) or for a more systemic approach (Schabas, 2007: 593-613; Bowring, 2009: 485-498), it is undeniable that both disciplines aim to protect the rights of human beings as such (Tavares, 2020: 223) and, therefore, share several basic rules (Sudre, 2012: 33).

In the past, the applicability of IHRL during armed conflict has been debated. Notwithstanding, nowadays, following the precedent set by the ICJ on the Nuclear Weapons Case regarding human rights enshrined in the ICCPR[5], and further expanded to the general application of human rights on the Wall Case[6], which set the tone for future cases[7], it is generally acknowledged by State practice that, in times of armed conflict, in general, two protective frameworks are activated in parallel: IHL, as well as IHRL.

As a result, in Lubell's expressive statement, those who in the past deny the applicability of human rights law in situations of armed conflict[8], e.g. Israel[9] and the USA[10], "[...] are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict" (2005: 738).

We should, therefore, move the spotlight to the problems arising from the application of both IHL and IHRL during armed conflict.

2.2. The Extraterritorial Jurisdiction of the Russian Federation

5. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 246, para. 25.

6. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 136, Paras. 106.

7. See, e.g. *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (Merits) [2005] ICJ Reports 168, para. 119.

8. Can they be considered persistent objectors to this nowadays costumary rule? It is highly questionable given that many human rights are *jus cogens*. See Droege (2007: 323-324).

9. See, e.g., Summary of Legal Position of the Government of Israel, Annex I to the Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10713 (24 November 2003) UN Doc. A/ES-10/248.

10. See, e.g., HUMAN RIGHTS COMMITTEE, Concluding Observations: United States of America (87th session, 2006) UN Doc. CCPR/C/USA/CO/87.

A key issue that emerges from that joint application of these two different branches of International Law is the extraterritorial applicability of human rights obligations. We must now determine whether the ECHR is applicable in the *sub judice* case.

It is paramount to ascertain whether actions are carried out within the jurisdiction of the State Party in question, as if they are, the State is obligated to ensure to everyone [11] all rights and freedoms enshrined in the ECHR, being accountable for any violation thereof.

On the Case of Ukraine and the Netherlands v. Russia we will set our focus exclusively towards the issue of whether Russia had effective control of over the territory in eastern Ukraine.

The ECtHR concluded, on the issue of extraterritorial jurisdiction [12], that the extensive evidence and report presented demonstrates that from 11 May 2014 onwards, Russia's military, political, and economic support resulted in its effective control over separatist areas in eastern Ukraine, thereby having jurisdiction to ensure to everyone within it the respect for the rights and freedoms enshrined in the ECHR. This jurisdiction persisted up to the hearing on 26 January 2022, which means that the acts and omissions committed by the "separatists" are attributable to the Russian Federation in the same way as the acts and omissions of any subordinate administration engage the responsibility of the territorial State [13]. *Ergo*, the Court declared itself competent to assess the situation, declaring the majority of the complaints admissible.

Quoting Schabas, who references the Ilas¸cu Case [14], "there exists a presumption that jurisdiction is normally exercised throughout the territory of a State Party" (2015: 95).

However, this is rebuttable in two situations. One of those exceptions concerns acts carried out outside the territory of the State Party, yet still attributable to it, incurring, therefore, liability for those actions under art. 1 of the ECHR. Thus, the challenge we encounter *in casu* regarding the ECHR's applicability lies in the fact that the actions purportedly attributed to the Russian Federation – a State Party to the ECHR – that led to the alleged human rights violations occurred outside its territory, although within the territory of Ukraine, another State Party to the ECHR. Hence, we must assess whether the territorial scope of the ECHR extends to encompass such behaviours. In essence, the core issue is not the strict extraterritorial application of the ECHR, as Ukraine is a State Party to the Convention. Instead, the focus is on whether a State's jurisdiction covers actions attributable to it that occurred outside its own territory, as our key question on these regards is to determine whether the Russian Federation was obligated to ensure respect for the rights and freedoms enshrined in the ECHR during the incidents that occurred in Eastern Ukraine in 2014.

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11. As Judge Bonello underlines, the universality that the term "everyone" establishes was the cornerstone of the Convention". See *Al-Skeini and Others v. United Kingdom* (2011) 53 EHRR 18, Concurring Opinion of Judge Bonello, para. 9.

12. *Ukraine and the Netherlands v. Russia* (n 3), paras. 508-705.

13. Ibid., paras 690-697.

14. *Ilas¸cu and Others v. Moldova and Russia* (2005) 40 EHRR 1030, para. 312. In the same vein, see, e.g., *Banković and others v. Belgium and 16 others* (2007) 44 EHRR SE5, para. 59; *Al-Skeini* (n 18), para. 131; *Hassan v. United Kingdom* App 29750/09 (ECtHR, 16 September 2014), para. 74.

In the Cyprus v. Turkey Case, the ECommH considered that the jurisdiction *ratione loci* of a State is not confined to its territory [15]. This line of thought was reaffirmed and expanded upon by the ECtHR in the Loizidou Case, additionally mentioning, furthermore, that effective control can be exerted directly through its armed forces or indirectly through a subordinate local administration [16], that survives due to the support of that third State [17]. In light of this jurisprudence, it could be submitted that if a situation surpasses the effective control test – and there's no need for it to be lawful whatsoever [18] –, then we can affirm a foreign State jurisdiction over acts that occurred outside its own national territory.

The concept of "effective control" for this purpose of extraterritorial application of the ECHR, and even more broadly, in the general framework of IHRL, bears resemblance to its usage in the law of occupation under IHL [19]. However, there are notable differences between the meaning it assumes in each of these branches of International Law. The notion under scrutiny is broader and more flexible than the one used in the law of occupation (Droege, 2007: 332).

Concerning this issue, as Carrillo Salcedo asserted, effective control boils down to a question of fact (1999: 136) [20]. It does not oblige the foreign state to exert highly detailed control over the actions of the authorities in the territory where the events occurred [21], since the effective control required by the notion of jurisdiction of art. 1 includes not only the acts directly perpetrated by a State Party's armed forces but also the ones carried out, indirectly, through a subordinate local administration [22], that survives due to the support of that third State [23]. In the Al-Skeini Case, the Court listed relevant facts to determine whether a third State exerted effective control, which included the strength of military presence, as well as the extent to which the military, economic and political support for the local subordinate administration provides it with influence and control over the region [24]. In this regard, we may also consider the decisive influence as propounded in the Catan v. Moldova and Russia [25]. If these are the relevant elements to assess factual situation that have to be observed in order to establish effective control, then there is no doubt that the Court was absolutely right in stating that the Russian Federation exerted effective control over the Donbass region, considering the value attributed to the evidence presented, which supports the assertion that Russia provided military support to the separatists from the outset – supplying them with weapons, ammunition,

15. *Cyprus v. Turkey*, App nos 6780/74 and 6950/75 (ECommH, 26 May 1975), para. 7.

16. *Loizidou v. Turkey* (1995) 20 EHRR 99), para. 62.

17. *Cyprus v. Turkey* (2002) 35 EHRR 30), para. 77.

18. *Loizidou* (n 24), para. 69.

19. Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entry into force 26 January 1910) art. 42.

20. In the same light see, *Catan and Others v. Republic of Moldova and Russia* App Nos 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012), para. 119.

21. *Cyprus v Turkey* (n 25), para. 315; *Al-Skeini* (n 18), para. 139.

22. *Loizidou* (n 24), para. 62.

23. *Cyprus v Turkey* (n 25), para. 77; *Ilas¸cu* (n 21), para. 316.

24. *Al-Skeini* (n 18), paras. 139, 149. In the same vein, see ECtHR, *Ilas¸cu* (n 21), paras. 387-394.

25. *Catan* (n 29), paras. 121-122.

and military equipment, and providing military training – while also offering significant political backing – recognizing the results of the "referendums", acknowledging official documents, and vetoing the establishment of a tribunal for the MH16 crash – as well as offering financial support. Moreover, it established not only that Russian troops were concentrated around the border, but also that the Russian armed forces were present and active in eastern Ukraine, indicating a strong military presence in the relevant territory.

However, the applicant Russian Government advocated for a much more restrictive interpretation of the concept of extraterritorial jurisdiction than that followed by the ECtHR, recalling the Banković Case. In fact, in the Banković Case, in an unexpected shift in its jurisprudence, the ECtHR adopted a narrower interpretation of the State's jurisdiction. By proclaiming that a State's jurisdiction will only exceptionally extend to acts committed beyond its borders, as it is primarily territorial, the Court submitted that extraterritorial jurisdiction will only exceptionally happen when the State, through the effective control of the relevant foreign territory and of its inhabitants "[…] exercises all or some of the public powers normally to be exercised by that Government" [26].

According the ECtHR, if the drafters' intention was to adopt a concept of jurisdiction as extensive as proposed by the applicants, they could have embodied this intention in the text of the ECHR by adopting a formulation identical or similar to that used in common art. 1 of the Geneva Conventions of 1949 (hereinafter GC) [27]. As they did not, regarding the aerial bombardments launched by NATO in Belgrade in the context of the Kosovo War, the ECtHR considered that the ECHR was not applicable, since there was at issue "an instantaneous extraterritorial act […]" and "[…] the wording of Art. 1 does not accommodate such an approach to «jurisdiction»", adding that such a broad interpretation would mean that "[…] anyone adversely affected by an act imputable to a Contracting State […] is thereby brought within the jurisdiction of that State for the purpose of Art. 1 of the Convention" [28]. Besides, the Court used a rather obscure geographical argument, proclaiming that the Former Yugoslavia did not fall in the "European Legal Space" [29], which means that, as Azeredo Lopes observes, the ECtHR relinquishes "[…] the ability to hold State Parties accountable for potential violations, even gross ones, of the ECHR if they act outside the European space" (2011: 63).

However, in my opinion, the reference to this precedent cannot be warranted.

First and foremost, restricting the concept of jurisdiction to the European space is irrelevant since Ukraine is included in this realm as a State Party to the ECHR. Yet, even if it weren't, such a constraint would be favouring the human rights of certain individuals over others simply because they are not within the European space, when the reality is that individuals outside this space are no less than those within it, therefore, equally deserving of

26. *Banković* (n 21), paras. 59, 61, 71.

27. Geneva Conventions of 1949 (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 31.

28. *Banković* (n 21), para. 75.

29. Ibid., para. 80.

enjoying the same rights recognized to all individuals as a reflection of their inherent dignity, regardless of their location (Vale Pereira, 2019: 291-292).

Furthermore, we cannot overlook the umbilical relationship between International Law and politics. Political considerations not only guide the decision-making of international actors, as Judge Alvarez pointed out [30], but also, whether we like it or not, influence the decisions of international jurisdictions, given that they are historically situated, and sometimes strict application of International Law can result in undesirable outcomes. That's precisely what happened *in casu*, as Vale Pereira highlights, since this decision was motivated by the political nature of the issues involved and the urge to decide preliminary matters (2019: 291-292). We should not give undue emphasis to the Banković case, since it was a politically driven decision. As such, this precedent can only be successfully utilized as an authoritative argument regarding the interpretation of the ECHR when there is a political situation akin to the one that prompted its judgment. That is what subsequent case-law from the ECtHR abundantly demonstrates, as it has consistently revisited the effective control test to determine the jurisdiction of a foreign State over a given territory [31]. The ECtHR jurisprudence ulterior to the Banković Case unquestionably throw shade over that decision, showing that the Court follows the teleological argument put forth by the IACHR in the Coard v. United States Case [32] when the Commission stated that human rights are inherent to all human beings by virtue of their humanity, and not only to the persons within certain regions.

To wrap up this topic, it can be inferred that the ECtHR's stance aligns with that of other international human rights bodies – such as the UNHRC [33], the ICJ [34] and the IACHR [35] –, agreeing that the basic requirement for the extraterritorial application of its respective human rights treaty is the effective control, which can be established either over the territory or over an individual. As such, the content of the obligations ascribed in this provision derives from the fact such control, whether directly exercised, or through a subordinate local administration. As Hannah Russel highlights, International practice indicates that "[…] the ECHR can even apply outside of Europe in certain exceptional circumstances" (2017: 83), in defiance of the potential implications of the Banković Case.

After delving into its jurisprudence, we can conclude that, in the view of the ECtHR, at least an exception to the principle of territorial jurisdiction has crystallized, which pertains to incidents occurring beyond borders but within territories under the effective control of a foreign State Party to the Convention. That threshold was clearly surpassed in the Case of Ukraine and

30. *Corfu Chanel (United Kingdom v. Albania)* (Merits) [1949] ICJ Reports 4, Separate Opinion of Judge Alvarez, pp. 41 ss..

31. *Ilas¸cu* (n 21), para. 312; *Al-Skeini* (n 18), paras. 108, 130-149; *Öcalan v Turkey* (2005) 41 EHRR 985, para. 91; Issa (n 33), para. 71; *Al-Saadoon and Mufdhi v the United Kingdom* (2010) 51 EHRR 9, paras. 86-89; *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010), para. 67; *Hassan* (n 21) paras. 74-80.

32. *Coard v United States of America* (1999) IACHR Case No 10.951, Report 109/99, para. 37.

33. See, e.g., UNHRC, General Comment 31 on Article 2 of the Covenant: The Nature of the General Obligations Imposed on States Parties to the Covenant (29 March 2004) CCPR/C/21/Rev.1/Add.13, para 10.

34. See, e.g. *Wall* (n 12) paras. 108-111.

35. See, e.g., *Coard* (n 44); Salas v. USA (1993) IACHR Case No 10573, Report 31/93, para. 6.

the Netherlands v. Russia, and for that reason, I cannot help but agree with the Court's decision: after 11 May 2014, most of the Donbass region was under the jurisdiction of the Russian Federation.

Anyway, in my opinion even the narrower concept of jurisdiction of the *Banković* Case would be fulfilled in the *sub judice* Case, because the "political structures" of "DPR" and "LPR"[36] whose members were mostly Russian nationals who exerted functions as agents of the Russian Federation or in support of that State[37] clearly exerted public powers that should be exercised by the legitimate Ukrainian Government, by taking control of public buildings as well as police and security facilities in cities and towns across the Donbass region to the point of complete control of entire towns[38], affirming, thereafter, a larger project to build the self-proclaimed Confederation of Novorossiya.

Since the ECtHR will apply the ECHR in an armed conflict scenario, this means that, as we previously mentioned, IHL and IHRL will apply in parallel. Nevertheless, the Court must apply the Convention with particular prudence, because, as Landais and Bass accurately point out, since we broaden the application of the ECHR to govern Russian actions perpetrated beyond borders and, thus, the protection afforded by IHRL, the enforcement of these system's rules shouldn't be excessively inflexible, as doing so "[…] could impose unrealistic obligations on States […]" in armed conflicts situations (2015: 1296), since, as Hampson asserted, "[…] the law cannot be based on a best-case scenario", because when rules are perceived as unrealistic they are likely to garner less respect than other rules than can be applied in practice (2011: 192).

As I will observe, the facts underlying the extension of Russia's jurisdiction to parts of the Donbass region of Ukraine in 2014 will play a pivotal role in classifying this conflict as an international armed conflict. Likewise, amidst this conflict's internationalization, it will serve to highlight that the violation of the principle prohibiting the use of force in international relations dates back to 2014.

3. The Conformation of the Case under *Jus ad Bellum*

I will now frame this decision in the light of *ius ad bellum*, but first I will outline the basics on the skeleton of this international legal regime.

3.1. The Prohibition of the Threat or Use of Force in International Relations

3.1.1. A Brief Overview of the Attempts to Restrict the Freedom of States to Resort to War

The peace negotiations held in the cities of Münster and Osnabrück (1641-1648), that put an end to the Thirty Years' War (1618-1648), lead to the affirmation of the principle of sovereign equality of States as a cornerstone

36. *Ukraine and the Netherlands v. Russia* (n 3), paras. 140-166.

37. Ibid., paras. 97-131.

38. Ibid., paras. 41-92.

for International Law and for the configuration of the International Society. Following Cardinal Richelieu's footsteps, who advocated for France's external policy autonomy from the Holy Roman Empire of the German Nation, the period after the Peace of Westphalia is often regarded as the genesis of International Law, or, at least, of modern International Law (Anzilotti, 1929: 4-5; Malanczuk, 1997: 9; Crawford; 2012: 7; Hall, 2016: 5-6). By establishing a "Balance of Power" among States, the principle of sovereign equality of States as propounded by Bodin and Hobbes prevents States from syndicating the fairness of the action of their peers. This framework ensures that each state maintains its autonomy and independence, shaping the landscape of international relations.

Subsequent to these events, the concept of just war was replaced by the idea that war was a prerogative of States' sovereignty, thus proclaiming themselves as equal and independent regarding external affairs (Guedes, 2006: 574). Once the concept of the just war was relegated to the realms of morality and once, due to classification juggling perpetrated by the aggressors, the focal point in international relations moved from a subjective construction of war to an objective one, International Law gave birth to the principle prohibiting the use of force in international relations. This followed several attempts to restrict or even eliminate the use of force at the international theatre, putting emphasis on these regard in the Drago-Porter Convention, in the Covenant of the League of Nations and in the Kellogg-Briand Pact.

The prohibition of the threat or use of force is, therefore, a fairly recent rule of International Law, with the age of a human life. As Hall commented, because of the absence of a centralized body for the creation and enforcement of International Law under the aegis of an inorganic and decentralized International Society, it was accepted by the International Community that when the States think themselves aggrieved they could obtain satisfaction through war: war was recognized "[…] as a permitted mood of giving effect to its decisions" (1924: 81). As Azeredo Lopes highlights, "up until the beginning of the 20th century, war represented an attribute of State sovereignty" (2020: 9). For this reason, Dinstein remarked that "[…] war was viewed with resignation as a perennial fact of life" (1994: 70).

The proposition to hang onto is that, as soon as the doctrine of the just war was abandoned, war was considered justified if it was fought to protect the interests of the Nation and, as Akehurst praises, each State was the only judge to decide what its vital interests were (1985: 268). Essentially, the idea to retain is the consideration that the State, as it is sovereign, incorporates within its attributes of sovereignty the possibility of unfettering resort to military force in defence of its egotistical national interest, having the right "[…] to embark upon war wherever it pleased" (Dinstein, 1994: 72), apart from any considerations of justice, thus having total liberty to indulge in war without thereby violating International Law (Azeredo Lopes, 2020: 98 ss.; Dinstein, 1994: 69 ss.).

3.1.2. The Prohibition of the Threat or Use of Force Enshrined in the Charter of the United Nations

The CUN was the first instrument to expressly enshrine, in its art. 2 (4), a general prohibition on resorting to force, meaning that all inter-State

disputes must be settled amicably, according art. 2 (3) of the Charter [39]. This prohibition, which is part of a regime "[...] committed to the elimination of war as an instrument of national policy" (Jinks, 2014: 660), emerged as a reaction to the exponential increase in the destructive potential of States through the use of weapons of mass destruction, having in mind that the more the States are equipped with nuclear capacity, the greater the risk of an escalation with dramatic consequences, making peace the supreme goal of the International Community (Cassese, 2005: 55).

The international legal regime of the use of force assumes a neuralgic value in International Law in such a way that, as Shaw points out, it contributes to provide the framework for the international legal order (2017: 851). As Gray brilliantly underlines, it must be highlighted that this is a very controversial area in which an apparent ineffectiveness of International Law is most conspicuous, and that because of the grave consequences associated with the violation of this general prohibition, the States' practice seek to rely on a legitimizing speech "using the language of International Law to explain and justify their behaviour" (2018: 601), as we saw, for example, when Japan invaded Manchuria, in 1931, and labelled its conduct as a policing operation on the railways, or even, nowadays, when President Putin calls the invasion of Ukraine a "special military operation" [40].

Due to its paramount relevance, the language on the law of the use of force lacks precise conceptual and linguistic rigor or clarity, as the flip side of the coin of a clear definition that encompasses certain acts is that it may end up excluding others deserving of inclusion. As Klabbers emphasizes, "the Law on the use of force needs to be able to accommodate the imperative of peacekeeping" (2015: 491-506), and we must not forget that this imperative must prevail over linguistic precision.

According to art. 2 (4) of the CUN, (1) the object of the prohibition is the threat or the use of force (2) in the context of international relations (3) if it is perceived to go against (3.1) the territorial integrity and political independent of any State or (3.2) if it is in any other manner inconsistent with the purposes of the United Nations and (4) it is a prohibition that binds the Members of the United Nations.

To summarize, nowadays, *ius ad bellum* sets forth a general prohibition to resort to armed force in general relations, along with its respective exceptions, establishes the applicable sanctions in case of unjustified violation of the prohibitive principle, and indicates the methods for peaceful dispute resolution that should be considered as alternatives. This entire framework is design to ensure the maintenance of international peace and security by revoking the authority of states to use force, instead granting this power to the UNSC, and only recognizing to States the possibilities to use force in cases of legitimate self-defense. Even though the UN System is far from perfect, with many claiming for a reform of the SC [41], the reality is that as Guedes underlines, it is undeniable its catalysing effect that has hindered the onset of a third World War, marking it as a success in comparison to the failure of the League of Nations, which ended in disaster with the eruption of World War II (2006: 583), if nothing else, because, as

39. Albeit there have been previous endeavours to limit the discretionary possibility to resort to force.

40. For the full text translated to English text of Putin's state of Nation Speech, see http://en.kremlin.ru/events/president/news/67843.

41. For a proposal regarding the reform of the Security Council, see Pinheiro (2024: 1-162).

Wood notes "collective decisions [...] are almost invariably better than unliteral ones" (2013: 366).

3.2. Analysing the ECHR's Assessment on Extraterritorial Jurisdiction under the Framework of the United Nations Charter's Prohibition of the Threat or Use of Force in International Relations

The Case examined by the ECHR object of this commentary raises the question of whether the *sub judice* conflict is a purely internal conflict or if it is an international one. The answer to this question is of pivotal importance inasmuch as it is a condition for the application of the prohibition contained in art. 2 (4) of the Charter that we move within the scope of international relations, although this alone is not sufficient.

3.2.1. Russia's Intervention in Ukraine's Internal Affairs

One thing is for sure, as we saw *supra*: the ECtHR asserted that the Russian Federation provided financial and political support as well as the existence of a significant influence of the political hierarchy of the Russian Federation on the military strategy of the "separatists". By doing so, there is no doubt that Russia violated International Law. In fact, the Friendly Relations Declaration (1970) [42] forbids States from organizing, instigating, assisting, or participating in acts of civil strife in another State as well as imposes over them the duty not to foment, incite, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, at the risk of violation of the principle of non-intervention in the internal affairs of other States. The principle of non-intervention is a general principle of International Law (art. 3 (2) of Additional Protocol II to the Geneva Conventions (hereinafter AP II) [43] and art. 22 (5) of the Second Protocol to the Hague Convention for the Protection of Cultural Property [44]) based on the idea that every sovereign State has a right to territorial integrity and political independence (Jennings, Watts, 1992: 430).

Perhaps it was in order to try to avoid the implications of such a violation that its Ministry of Foreign Affairs expressed Russia's respect for the results of the "referendums" of the 12 May 2014 and the will of the people regarding the "elections" of 2 November 2014. Another relevant event in this regard was Putin's recognition of "passports" and other "DPR" and "LPR" documents in 2017 and 2019.

With these statements, it appears there is an implicit *de facto* recognition, on the one hand, of the "DPR" and of the "LPR" as State, and, on the other hand, of the "Governments" that emerged from those "elections" by the Russian Federation.[45]. If the "DPR" and the "LPR" were worthy of the attribute of statehood, the Russian Federation would be providing

42. UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

43. Additional Protocol II to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entry into force 7 December 1978).

44. Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entry into force 7 August 1956).

45. This *de facto* recognition would later become a *de iure* recognition when, on 21 February 2022, President Putin issued two decrees recognizing "DPR" and "LPR" as independent States.

assistance to the Government of a State. However, if those entities could not be considered States, then the Russian Federation would be providing assistance to an opposition forcibly to overthrow the government, which is forbidden, as the ICJ asserted in the Nicaragua Case [46].

International practice shows that, in the confrontation between the two main thesis around this topic, the declaratory theory of recognition prevails over the constitutive one, as seen, for example, in the Bosnian Genocide Case [47]. It was also in this sense that the ACECPCY referred to the "[...] existence or disappearance of a state [...]" as a "[...] question of fact [...]" [48]. This is also the position expressly taken in legislative instruments such as art. 13 of the Charter of the American States, art. 3 of the Montevideo Convention or even art. 9 of the Pact of Bogotá, in which, although they do not create general International Law, owing to their regional scope, they nevertheless demonstrate the conviction of the States that are Parties to them, and therefore reinforce the conviction that the customary rule of State recognition gives it merely declaratory effects. Even the State of Israel is still not recognized by several Arab States, such as Saudi Arabia, and yet these entities that do not recognize it as a State are nevertheless demanding Israel's international responsibility for violating IHL for the current bombings of Gaza. So, we have an unrecognized State being subject to international claims by States that don't recognize it as his peer. In other words, even though they don't recognize Israel as a State, their practice, i.e., the fact that they demand international responsibility from Israel, shows that they do in fact admit that the State of Israel exists, since international responsibility is an IHL procedure limited to sovereign States.

Due to the inevitable influence that this particular predisposition of the International Community reflects, I believe we are in a position to identify the complete formation of a customary rule of declaratory recognition, since, as we have seen, this practice has been reiterated and we believe that this reiteration merely reflects the conviction of obligation that intrinsically underlies it. In fact, although the Russian Federation have implicitly recognized "DPR" and "LPR" as State, it is not this recognition that makes it what it is not. This means that "DPR" and "LPR" can only be considered sovereign States if they meet all the elements of statehood.

According to this dominant thesis, international subjectivity as a State springs up in the International Community independently of recognition as such by the other subjects of this System, which would mean that, as Azevedo Soares tells us, "[...] the legal personality of the State does not arise with recognition, but rather when all its constitutive elements come together" (1988: 205). In other words, the act of recognition is limited to stating a pre-existing fact, thus aiming to make known the existence of this factual situation that underlies the birth of a State entity, which logically implies that the birth of the State is prior to its recognition which, as such, does not create it.

Recognition will therefore have a retroactive effect (Gonçalves Pereira, Fausto de Quadros, 2002: 312), with its effects referring to the moment of

46. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Reports 14, para. 209.

47. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) [2007] ICJ Reports 43, para. 230.

48. ACECPCY, Opinion No 8 (4 July 1992) 31 ILM, p. 1521.

the actual birth of the State and not to the moment after recognition when it precedes it.

In short, once certain requirements have been met, the existence of a State becomes a fact of International Law and, therefore, it is irrelevant for the purposes of being a state or not that it is recognized by other states as their equal. It follows that once the factual situation that legitimizes the consideration of an entity as a State has been verified, it acquires the corresponding international subjectivity, even if no other State recognizes it as such. In the 1936 Resolution of the ILI, Brussels session, it was maintained that "the existence of a new State, with all the juridical effects which are attached to that existence, is not affected by the refusal of recognition by one or more States" [49]. At the same time, accepting this theory would also oblige us to accept that it is not because an entity that does not meet the characteristics of a State is recognized as such that it will be granted statehood, since, in the words of Dinh, Daillier and Pellet, "[…] the granting of recognition is not sufficient to create a State […]", but it can nevertheless contribute to the opening of diplomatic relations between the recognizing State and the entity which, although it is not a State – since recognition is not constitutive and it does not meet all the conditions for statehood – is recognized as such (2003: 571) .

Some intermediate positions have been proposed. For example, Lauterpacht contended that once aspiring states meet the criteria outlined by international law for statehood, incumbent states are obligated to extend recognition. This approach stemmed from the absence of a central authority in the international realm empowered to confer legal status (1947: 1-38). I believe that the Lauterpacht doctrine can be perceived as a modern approach to the constitutive theories as it embodies both declarative and constitutive aspects, resting on certain facts but also relying on recognition by other States in the International Community. Although some more recent constitutive theories have tried to resolve their primitive congenital inconsistencies with the idea of constitutive recognition with merely "*inter partes*" effects, in my point of view they are insurmountable, if only because this supposed palliative solution proposed, for example, by Lauterpacht, can never be approved insofar as it involves an intolerable limitation on the sovereignty of States. States must remain free in their interpretation, more or less political, of the verification of a given factual situation and the effects they wish to draw from it, which is why I hold that there is no duty to recognize, but rather a right to recognize, because I consider recognition, as a rule, a discretionary act.

That being said, in order to know whether the "DPR" and "LPR" are sovereign States, we must go beyond Russia's recognition to find if the elements of statehood are verified.

No international legal instrument applicable to all International Law actors fully defines the State in the sense attributed to it by International Law, but even so the Montevideo Convention is often cited for identifying the elements of statehood. The Montevideo Convention is an international convention with a regional scope whose binding force, by virtue of the principle of the relative effectiveness of treaties, is limited to certain States (art. 34 of the Vienna Convention of 1969 [50]). Despite its regional scope it

49. ILI. Resolutions concerning the Recognition of New States and New Governments, American Journal of International Law. 1936; 30(s4): 185-187. doi:10.2307/2213442.

50. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).

holds great significance because it is understood that somehow reflects in its art. 1 what is considered a State for International Law purposes. In fact, there are those who believe that, in a more or less complete way, this provision enshrines the criteria that, according customary International Law, characterize a State, as if codifying this customary rule into a written rule. Thus, according to that provision, a State, as an international legal person, must have the following characteristics: (i) a permanent population, (ii) a defined territory, (iii) a Government, and (iv) the capacity to establish relations with other States [51].

Despite having a permanent population and a defined territory, and even though the implicit recognition by the Russian Federation may reinforce the idea that the recognized entities are able to establish relations with other international actors, the position taken by the overwhelming majority of the International Community in this regard denies this proposition. In my point of view, it is clear that, even though I may consider that at a certain point in time Russia's collaborators were in *de facto* control of the territory around the Donbass region, there was not an effective Government of the so-called "DPR" and "LPR" because, as I will explain later on in this paper, there were never any separatist pretentions; instead, Russia's collaborators took on the persona of "separatists" to disguise Russia's "Grachev Doctrine's" geopolitical and military strategy, acting, from the beginning, under directions or control of the Russian Federation.

Furthermore, I can't turn a blind eye to the lack of independence of those entities as mere Russian puppets, moreover with independence being the central criterion for statehood (Crawford, 2006: 62): without a minimum degree of independence no entity can be considered a State.

For Brierly, the word "independence" "designates [...] the status of a State which directs its external relations without interference from others, as opposed to one which does not direct them at all [...] or which only partially directs them" (1965: 126). It is in this sense that the arbitrator Max Huber, in the Island of Palmas Case, defined independence as the right to exercise in a portion of the globe the functions of a State, to the exclusion of any other State [52]. Also in the Aaland Islands Case, the International Commission of Jurists seems to have demanded a certain degree of material independence for an entity to be a State [53]. That is to say that it would be necessary to exercise its jurisdiction throughout its territory without the aid of a third State.

However, nowadays, with the decline of isolationist conceptions becoming one of the major trends in International Law, no State is truly independent, and its relations are based on interdependence. Proof that no State can live alone, isolated from others, was Kim Jong-un's recent meeting with Vladimir Putin at the Cosmodrome which showed that North Korea itself is showing

51. However, this list of characteristics is not considered an exhaustive list, since, more often than not, access to statehood presupposes the fulfilment of other types of requirements, in addition to the objectifiable criteria set out in this rule and more demanding than these, as evidenced by the ACECPCY – see ACECPCY, Opinion No 1 (29 November 1991) 31 ILM, p. 1494.

52. *Island of Palmas or Miangas Arbitration (Netherlands v United States of America)* [1928] Reports of International Arbitral Awards, p. 838.

53. Report of the International Commission of Jurists appointed by the Council of the League of Nations to Give an Advisory Opinion on the Legal Aspects of the Aaland Islands Question. Official Journal of the League of Nations, Special Supplement No 3, October 1920.

some openness to the International Society of States. In an increasingly globalized International Society, States end up voluntarily accepting restrictions on their independence, which has made the concept of "total independence" obsolete, a mere illusion.

The control exercised by foreign powers over ostensibly independent States is undeniable, and that doesn't mean they are no longer independent. Independence is only called into question if a foreign State systematically and permanently influences a wide range of decision-making by another international entity. It is with this in mind that Brownlie suggests establishing "a distinction between representation and control, on the one hand, and «*ad hoc*» interference and «advice», on the other" (1997: 86): in the former situation, we will not be faced with an independent entity; in the latter, the entity advised or "occasionally interfered with" will be an independent State. Certain forms of interference by other International Law subjects have already been considered compatible with the statehood of an entity (Cassese, 2015: 73). Indeed, a large number of deeply "dependent" entities have increasingly been accepted as States, such as Egypt – in the Case of the Suez Canal, built and exploited by the British and French and constituting a focal point of Egypt's geopolitics and economy –, Belarus – strongly controlled by Russia –, or even Cuba before the 1959 Revolution – which was almost a summer camp for the Americans.

To judge the independence of the "DPR" and of the "LPR", we must ask ourselves whether they had a minimum degree of independence, in the sense of whether or not they were capable of making their own decisions, even if this capacity may be conditioned by directives issued by the Russian Federation. To put it differently, there must be at least a minimum degree of independence and that minimum must be the capacity of a State to be able to oblige itself. For "DPR" and "LPR" to be considered States, at the very least, mere formal independence is required, and I submit that that minimum level of independence is not met because those entities were completely subjugated to the commands of the Russian Government, who even sat at the head of the table during the signing of the Minsk Agreements [54], particularly in Minsk II.

To summarize, the adoption of the declaratory theory of recognition implies the assertion that since, for the aforementioned reasons, the entities, either implicitly or through the proxy "State" of South Ossetia, recognized as States by the Russian Federation, because they lacked at least the independence to act externally and are not entitled to the right of self-determination, cannot be considered States for the purposes of the International Law, despite the fact of the Russia Federation having recognized them as such. This means that Russia's assistance was provided to an opposition to forcibly overthrow the Government, in violation of International Law, as stated in the Resolution 2625 of the UNGA [55].

On top of that, these entities do not even pass the test for lawfulness alluded by Korotkyi and Hendel, meaning that, as the pretence statehood of this entities collides with Ukraine's territorial integrity, and since the recognition as State they may obtain violates the principle of non-interference, "[…] these entities should be regarded as illegal from the point of view of

54. Agreement on Implementation of the Minsk Protocol (signed 5 September 2014) (Minsk I); Package of Measures for the Implementation of the Minsk Agreements (signed 12 February 2015) (Minsk II).

55. UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

International Law [...] and, as such remain under the jurisdiction of Ukraine and subject to internal qualifications" (Korotkyi Hendel, 2018: 148-149).

Besides, because, as we will see better later on, its declaration of independence was based in an illicit use of force perpetrated by the Russian Federation, that decision supported by the illicit occupation of the territory of eastern Ukraine is "null and void", to echo the words of the SC in its Resolutions 497[56] and 662[57] and previously expressed by the GA in its Resolution 44/22[58]. Therefore, "the only legitimate Government on the territory of Ukraine, including the Donetsk and Luhansk oblasts, is the Ukrainian Government", and the Russian Federation intervened in Ukrainian's affairs (Korotkyi Hendel, 2018: 148-149).

3.2.2. Did the Russian Federation Violate the Prohibition of the Threat or Use of Force in 2014?

The prohibition of the threat or use of force is wider than the principle of non-interference, since a violation of the first necessarily involves a violation of the latter, but a violation of the latter can occur without any threat or use of force (Azeredo Lopes, 2020: 21 ss.). Therefore, it urges to ascertain whether this intervention in Ukraine's affairs amounts to a violation of art. 2 (4).

3.2.2.1. Was there a Threat or a Use of Force?

Before moving on to verify the other elements of the prohibition, we must inquire whether the Russian Federation threatened to resort to force or even used force.

It is now important to clarify what should be understood by "force".

There is no doubt that this concept is broader than the concept of "war" (Azeredo Lopes, 2020: 29-30), being the latter an especially serious form of use of force. The use of this broader concept by art. 2 (4) denotes that the prohibition covers not only armed attacks, "[...] but that it is applicable to any military operations conducted by one State against the other", leaving aside, however, the mere police measures, as Corten emphasized (2021: 63, 76 ss.). This means that, as Brownlie pointed out, "force" "[...] is not confined to armed force or to the employment of forces officially designated as the armed forces of a state" (2002: 431).

However, we must take under consideration that the *travaux préparatoires*, and the rejection of Brazil's proposal to extend the prohibition to economic coercion in the San Francisco Conference, in 1945, were unequivocal in confining the scope of the prohibition to armed force (Crawford, 2012: 720). It is also in that direction that points art. 44 of the Charter, when it supports the view that every time the Charter uses the term "force" it means "armed force". This prevailing view is also corroborated by Randelzhofer's teleological based interpretation of art. 2 (4), as this Author suggests that if the prohibition were to extend to other forms of force, "[...] States would be left with no means of exerting pressure on other States that violate

56. UNSC Res 497 (17 December 1981) UN Doc S/RES/497.

57. UNSC Res 662 (9 August 1990) UN Doc S/RES/662.

58. UNGA Res 44/12 (4 December 1989) UN Doc A/RES/44/12.

International Law". Such a scenario would not be compatible with the absence of a centralized organ for the creation and enforcement of International Law under the aegis of an inorganic and decentralized International Society (2010: 112). This conclusion is also corroborated by the General Assembly's Friendly Relations Declaration (1970) [59].

Additionally, if we consider that there can be a threat of force when there is an implied promise by a State to resort to force conditional on non-acceptance of certain demands of that State's Government, then, as the ECtHR found that there was a build-up of troops on the border that, according the Court, "[…] carried the implication that, if the need arose, the forces were available and ready to be deployed in the conflict", and considered reasonable to infer "[…] that these troops were deployed to that region in order to be available to further deployment to eastern Ukraine" [60], we must acknowledge there was indeed a threat to use force by the Russian Federation. That threat itself must, therefore, be considered illegal "if the promise is to resort to force in conditions in which no justification for the use of force exists […]" (Brownlie, 2002: 364).

In regards of evaluating whether force was actually used in eastern Ukraine back in 2014, besides an abstract evaluation of the gravity of the events, which, *in casu*, is evident, it is pivotal to determine the awareness and willingness of the alleged pro-Russian "separatists" to resort to force against Ukraine, having in mind that I tag along with Corten when the Belgian legal scholar says that that willingness depends only on the intention to force the will of another State (2021: 85 ss.). This subjective element of intention was taken in consideration by the ICJ [61]. Whilst the ICJ's Cases were referred to the concept of armed attack, I submit that the considerations set out therein are perfectly transposable for our purpose. In the *sub judice* case, the gravity of the military action by the Russian troops in Ilovaisk, where, when the Russian troops were deployed, there were perpetrated attacks against strategical infrastructures and targets, reveals the existence of such an intention in order to restore "Novorossiya" in the spirit of the "Grachev Doctrine" that has previously motivated the use of force against Georgia.

However, the use of force can take various forms, with some being more serious than others. I tend to concur with Azeredo Lopes, when he grades them from the least to the most severe, starting with the mere threat of force, followed by forms of force that do not reach the severity to ascend in level, and culminating in the most serious form: armed attack (2020: 83) [62]. This reasoning means that whenever there is an armed attack, there is a violation of art. 2 (4). Nevertheless, not every breach of this provision amounts to an armed attack, and only when such a grave use of force has taken place, and only then, is the victim entitled to exercise its inherent right to self-defence according to art. 51 of the Charter, since the intention of the drafters of the Charter was to restrict this possibility of resorting unilaterally to force as much as possible.

59. UNGA, Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

60. *Ukraine and the Netherlands v. Russia* (n 3), paras. 659-662.

61. *Nicaragua* (n 77), para. 109; *Oil Platforms (Islamic Republic of Iran vs. United States of America)* (Merits) [2003] ICJ Reports 161, para. 64.

62. I do not aim to achieve the utmost rigor with this statement, as it is evident that certain forms of threat of force – e.g. the threat to use nuclear weapons – end up being more serious than lesser forms of actual use of force – e.g. a boarder incident.

In perhaps an effort to provide clarity on the concept of aggression, the UNGA outlined a in its Resolution 3314 a definition of this concept [63], listing in its art. 3 various acts that constitute aggression. Art. 2 of this Resolution is particularly significant because, by enshrining the so-called presumption of the first shot, it clarifies from the outset that in the conflict addressed in this article, if there were any doubts, the Russian Federation is the aggressor. In other words, it was Russia that first resorted to the use of armed force, thereby violating *ius ad bellum*.

In its 5th preliminary paragraph, the UNGA stated that "[…] aggression is the most serious and dangerous form of the illegal use of force […]", in what has been interpreted as an alignment of the concept of aggression with that of armed attack, which, as the only form of the use of force that legitimizes the victim to act in self-defence under art. 51 of the Charter, would logically be the most severe form of the use of force.

Azeredo Lopes emphasizes, and rightly so in my point of view, that the "identification" between these two concepts ultimately provides greater interpretational flexibility to art. 51 of the Charter, making it easier to invoke the right to self-defence as outlined in this provision. At the same time, this author also underscores that it allows for an alignment between any behaviour disallowed by the prohibition in art. 2 (4) and the sphere of legitimization under its art. 51 (2020: 88-89).

That being said, we can objectively regard the actions established by the ECtHR as being carried out by the Russian Federation as acts of both direct and indirect aggression, according to arts. 1 and 3, paras. a), b), c), d), e) and g) of the UNGA Resolution 3314. In fact, the ECtHR asserted that evidence from international observers and statements from Putin confirmed Russian military activity in eastern Ukraine from the start of the conflict, drawing a parallel with the events that took place in Crimea in late February and early March 2014. When assessing the extraterritorial application of the ECHR, the ECtHR considered that regular Russian troops were present in eastern Ukraine, going so far as to affirm the participation of the Cossacks and Chechens in the conflict, fighting on the side of the separatists in Eastern Ukraine [64]. It was therefore established that the increasing direct military participation from the Russian Federation in the hostilities occurred during the Battle of Ilovaisk, which had begun in 12 August 2014 and carried over the Summer of 2014, when its conventional army helped the separatists reacquire control over vast swathes of land in the Donbass region, which had previously been lost to the Ukrainian military forces. This, according the ECHR, "[…] shows large-scale Russian troop deployment in eastern Ukraine" [65], and "this vast body of material provides strong evidential support for the allegation that Russian soldiers were present in the armed groups and that regular Russian troops were deployed in their military units, notably to participate in certain battles" [66]. These acts are so severe that they transcend mere aggression, constituting an armed attack. Now, if the scope of an armed attack, as the most severe form of the use of force, is more restrictive than other forms of the use of force, and if we are asserting that Russia launched an armed attack, then it follows, *a fortiori*, that its actions

63. UNGA Res 3414 (XXIV) (14 December 1974) UN DOC A/RES/3314(XXIX), art. 1.

64. *Ukraine and the Netherlands v. Russia* (n 3), para. 600.

65. Ibid., para. 605.

66. Ibid., para. 588-612.

constitute an act of aggression and, for even greater reason, a use of force, thus violating this element of the prohibition of art. 2 (4) of the CUN.

I submit, thereby, that the Russian Federation not only threatened to use force by deploying its troops near the border but actually used it, carrying out an armed attack, particularly evident from the Battle of Ilovaisk onwards.

3.2.2.2. Are we operating in the Sphere of International Relations? Is it a National or an International Armed Conflict, or is it an Internationalized Armed Conflict?

The Russian Federation claimed that the conflict within eastern Ukraine in 2014 was an internal one. If the conflict in eastern Ukraine were a purely NIAC, then, it would be impossible to envisage a violation of the prohibitive principle enshrined in art. 2 (4) (Azeredo Lopes, 2020: 36).

The concepts of IAC, NIAC or of internationalized NIAC fall under the aegis of IHL, and, therefore, I will not delve into specific details, as my purpose is to frame the *sub judice* situation in the light of *jus ad bellum* and not of *jus in bello*.

However, given that *jus ad bellum* is entirely absent from NIACs, it's essential to clarify the meaning of those concepts.

IHL and *ius ad bellum* are two branches of International Law independent from each other, as the latter governs the legal legitimacy to resort to armed force, whereas the first accepts the use of force that led to the existence of an armed conflict as a fact, and aims only to humanize that use of force, independently of its lawfulness, governing the conduct of hostilities in order to reduce as much as possible collateral damage. To attain this aim, IHL remains unbiased irrespective of whether one warfare Party's actions adhere to *ius ad bellum* principles (Tavares, 2020: 220-221).

We can define IHL, like Tavares, as "[…] the branch of Public International Law that, applicable in armed conflict situations, regulates the conduct of hostilities by limiting the means and methods of combat on one hand, and protecting war victims on the other" (2020: 214), whose purpose is to ensure the protection and humane treatment of persons who are not, or no longer [*hors de combat*], taking a direct part in the hostilities, establishing, therefore, minimum standards of humanity that must be respected in any situation, even in times of armed conflict (Melzer, 2019: 17). If we conclude that there was an armed conflict, which is a question of fact (David, 2014: 353), irrespective of its nature, then IHL will regulate the conduct of hostilities (Melzer, 2019: 53); if that armed conflict is an IAC or an internationalized NIAC, then the prohibition to resort to armed force may also have been violated.

Nowadays, the first two paragraphs of common art. 2 of the GC establish a dichotomy that separates IAC from NIAC. Understanding the essence of armed conflict is a paramount preliminary issue, as it shapes the framework through which we approach it and determines the extent of protection provided in each scenario, even though, as Byron underlines, the law applicable to NIAC has been expanded with AP II regulating them as well as several other international instruments (2001: 64). It is vital to take into

account the dichotomy settled in the GC, because, as they constitute costumary International Law [67], they are universally binding.

3.2.2.2.1. Is it an International Armed Conflict?

In an entirely synoptic view, we can perceive as an IAC one who takes place between two or more states [68], i.e. where one or more States, with a deliberate belligerent intent (Melzer, 2019: 56-57), launch an attack over another, regardless of its brevity, reasons [69], intensity or even the labels the parties assign to it. Indeed, it's the identity of the belligerents that will define the character of the armed conflict, as in an IAC the actors involved in the hostilities are States (Ferraro, Cameron, 2016: 80): it is an interstate conflict [70].

As opposed to what happens in NIAC, for IAC there is no threshold for the intensity or duration of hostilities, given that, as Ferraro and Cameron underlines, "any unconsented-to military operations by one State in the territory of another State should be interpreted as an armed interference in the latter's sphere of sovereignty and thus may be an international armed conflict under" under this provision (Ferraro, Cameron, 2016: 86).

3.2.2.2.2. Is it a Non-International Armed Conflict?

In another comprehensive approach, NIAC are negatively defined in common art. 3 to the GC [71] as opposed to an IAC. As they aren't interstate conflicts, they "[...] are first of all armed conflicts which oppose the Government of a State Party and one or more non-State Parties", also comprising armed conflicts where no State Party is involved (Cameron, et al., 2016: 143-144).

The ICRC, acknowledging this is a rather vague definition, has provided additional criteria to assess whether there is a NIAC, which was considered and developed in International Criminal Law jurisprudence. According the ICTY, the determinative elements of the existence of a NIAC are the intensity of the conflict and the level of organization of the parties – allowing us to apart NIAC from banditry [72] – and those issues "[...] need to be decided in light of the particular evidence and on a case-by-case basis" [73].

67. ICRC, Geneva Convention of 1949 achieve universal acceptance, 21 August 2006. Available at https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/geneva-conventions-news-210806.htm.

68. *Prosecutor v. Dusko Tadić* (Judgement in Appeals Chamber) [1999] ICTY-94-1-A (15 July 1999), para. 84.

69. ICRC, How is the Term Armed Conflict Defined in International Humanitarian Law? Opinion Paper, March 2008, p. 1.

70. Common art. 2 (1) of the GC.

71. The first text which expressly addressed NIAC. For a historical evolution of IHL, see Guedes (2006: 561-572).

72. *Prosecutor v. Dusko Tadić* (Judgement in Trial Chamber) [1997] ICTY-94-1-A (7 May 1997), para. 562.

73. *Prosecutor v. Limaj et. al.* (Judgement in Trial Chamber II) [2005] ICTY -03-66-T (30 November 2005), para. 84.

As to the first, the hostilities must have reached a certain level of gravity and duration. David quite accurately notes that that level of gravity is reached when there are "[…] open hostilities between the warring parties" (2014: 356). *In casu*, "separatist" armed groups immediately seized public buildings and established there their strategic bases; they further attacked towns and cities, taking over most of the Donetsk and Luhansk regions. Moreover, they engaged in back-and-forth battles with the Ukrainian army which had to intervene as the police forces were no longer capable of dealing with the situation. All of this indicates that the criterion of intensity is verified [74].

Regarding the duration, it has to be a protracted armed conflict, meaning that in a given territory "[…] there was serious fighting over an extended period of time" [75], but in light of common art. 3 of the GC the protracted nature refers more to the intensity than to the duration itself [76]. Concerning the second element, it is undisputable that since 2014 the "separatist" non armed groups had the required level of organizations, as they had their own headquarters in the building of the Security Service of Ukraine, they had a hierarchy among the group; the group had easy access to weapons, mainly provided by the Russian Federation; they had the ability to plan and carry out military operations [77].

However, this relative broad scope of NIAC's under common art. 3 counterposes a narrower one under AP II. In fact, although AP II provides more protection, its art. 1 (1) establishes a higher threshold – and a more realistic one (Junod, 1987: 1253) – than common art. 3, particularly regarding the legal status of the belligerents, as it only applies to "vertical" civil wars and the required control of a discernible part of the State's territory to such an extent that allow the insurgents both to carry out sustained and concerted military operations, i.e. continuous operations with a particular duration and to implement the protocol. Notwithstanding, as I mentioned in the beginning of this article, as of 2024, the scenario of warfare in eastern Ukraine persists, so it is impossible to deny the continuous character of the hostilities. Thus, if we frame the conflict in eastern Ukraine back in 2014 as a NIAC, both the AP II and common art. 3 of the GC are applicable.

Plus, if we considered the situation *sub judice* a NIAC, this "vertical" civil war clearly reaches the threshold of duration and intensity required by AP II. As a result, AP II binds the Ukrainian Government. Nevertheless, it is possible that AP II binds also the "separatists", as whilst they are not allowed as a Party to this treaty, it can however produce legal effects for this "third party" According the customary rules codified in the Vienna Convention of 1969, whose arts. 34-36 acknowledge such a hypothesis (i) if the Contracting Partys intended the treaty to grant such rights and (ii) if the "separatists", as a third party to AP II, accept its rights and obligations.

Cassese accurately argued that the intention of the Parties is for AP II to bind insurgents, supporting his stance with three arguments (1981: 420-428). First, the Protocol's purpose is to develop and supplement common art. 3, to which it is inseparably connected. Common art. 3 unequivocally binds insurgents. Hence, if when the situation meets the necessary threshold,

74. *Prosecutor v. Limaj* (n 133), paras. 135-173; P*rosecutor v. Ramush Haradinaj et. al.* (Judgement in Trial Chamber I), [2008] ICTY-04-84-T (3 April 2008), paras 90-99.

75. *Prosecutor v. Dario Kordić et Mario Čerkez* (Judgement in Appeals Chamber) [2004] ICTY -95-14/2-A (17 December 2004), para. 341.

76. *Haradinaj* (n 135), para 49.

77. Ibid., para 60.

common art. 3 requires AP II for its own application, then Protocol II will inevitably apply to insurgents, as it operates under the same vessel as common art. 3 but broadens its protective measures to encompass additional realms. Second, as the application of AP II relies on the fulfilment of certain organizing conditions to the extent that the insurgents are capable to implement the Protocol, it would be absurd for the Protocol require such a high threshold from the insurgents for its application to bind only the State Party. Such an interpretation should be discarded as it's contrary to the principle of effective interpretation and would render AP II nugatory since the International Community isn't an utopian world. Finally, at the end of hostilities, if the insurgents achieve military success, art. 6 (5) of AP II binds them, and Cassese points out that if AP II may apply to them in the end of the hostilities, it is logical for it to apply during the entire NIAC.

As for the required assent by the "separatists" to the rights and duties deriving from AP II, Cassese proposed a case-by-case evaluation (1981: 428-430), but obviously if they do not assent, it is less likely for their counterparty to comply with its legal obligations under AP II. The reality is that only if the insurgents accept to be bound by the treaty will AP II be capable of assuring a less inhumane NIAC.

3.2.2.2.3. Is it an Internationalized Non-International Armed Conflict?

Even if a *prima facie* approach to the 2014 incidents may indicate that the conflict was born without an international character, the reality is that the alluded to Russian intervention would undoubtfully be a vehicle of transformation into an internationalized NIAC. Foreign intervention only shapes the IHL applicable if "[…] a factual link can be established between the intervention of one or more third powers and the pre-existent or concomitant armed conflict" (Ferraro, 2015: 1233), as in such cases the law applicable to NIAC, at the very least, will not be enough. The question we face in this regard revolves around determining whether this support is sufficient to establish the mentioned connection and, consequently, internationalize the purported NIAC.

As Ferraro stated, the ICRC has developed a position regarding pre-existing NIAC involving foreign intervention capable of influencing the applicable IHL (2015: 1228-1232), distinguishing within the interventions that impact the applicability of IHL, two forms of foreign intervention: on the one hand, situations where the foreign power supports one of the belligerents; on the other hand, situations where the foreign power exercises overall control over one of the belligerent parties (2015: 1233-1240), and applying a different framework under *ius in bello* to each of those situations (2015: 1240-1250).

As we saw, in the *sub judice* Case, the ECtHR asserted, regarding the extraterritorial jurisdiction, that in the beginning, the Russian Federation provided political, financial, logistical, and military support to the "separatists", without apparently engaging its armed forces directly in the hostilities. While that political and financial support is irrelevant for the applicability of IHL, Russia's logistical and military aid to separatist forces in terms of transportation, coordination of military operations, and provision of weapons may trigger its application insofar as it could potentially link Russia to the conflict in eastern Ukraine under the purview of IHL. Therefore, I submit that Russia itself was operating in eastern Ukraine through the "separatists".

I believe there is no doubt that the Russian Federation was intervening in the apparent NIAC by supporting the "separatists" when they supplied weapons and other military equipment as well as providing military training to the "rebels".

However, we must ask ourselves whether they were controlled by the Russian Federation, insofar as such a form of foreign intervention indicates a deeper connection between the NIAC and the foreign power.

To assess if there was such control, we must determine whether the actions in question are attributable to the Russian Federation. Ferraro perceives that attribution reveals "[…] the extent of the relationship between the non-State party and the foreign power […]" and establishes whether the members of the non-State armed group can be considered agents of the foreign power, preventing it from evading its IHL's obligations by claiming not to be a part in that NIAC (2015: 1235).

As IHL is silent on this topic, the Trial Chamber of the ICTY in the Tadić Case [78] imported the rules from the International Law on State Responsibility that revolve around the notion of control, as interpreted by the ICJ [79], and transposed it for this purpose, laying down the high threshold effective control test. Accordingly, there must be a relationship of dependence, on the side of the rebels, and control, on the side of the foreign power, for effective control to be established and, consequently, for the acts of the first to be attributable to the latter [80].

Notwithstanding, later on, the Appeal Chamber, even though recognizing the need to find a test of control [81], laid severe criticism on the effective control test which did not find persuasive [82] and considered it contrary to international judicial and State practice [83], concluding that if we are dealing with organized armed groups, then the effective control test must be abandoned, and we should rather adopt the lower threshold of the overall control test [84].

Regarding the determination of the legal classification of a situation of armed conflict under IHL, the "overall control" test has been constantly followed and further developed by case law [85].

It is often used as evidence to establish "overall control" the extensive financial and logistic support, as well as transferring of personal between the

78. *Tadić* (n 132) para. 585. In the same vein, *Prosecutor v. Aleksovski* (Judgement in Trial Chamber) [1999] ICTY-95-14/1-T (25 June 1999), paras. 11-14.

79. *Nicaragua* (n 77), para. 109.

80. *Tadić* (n 132), paras. 585, 588.

81. *Tadić* (n 124), paras. 93-95, 97-98.

82. Ibid., paras. 115 ss..

83. Ibid., paras. 124 ss..

84. Ibid., para. 131.

85. See, e.g., *Prosecutor v. Delalić et. al.* (Judgement in Appeals Chamber) [2001] ICTY -96-21-A (20 February 2001), para. 26; *Prosecutor v Aleksovski* (Judgement in Appeals Chamber) [2000] ICTY-95-14/1-T (24 March 2000), para. 134; *Prosecutor v Dario Kordić et Mario Čerkez* (Judgement in Trial Chamber III) [2001] ICTY -95-14/2-A (26 February 2001), para. 115; *Kordić et Čerkez* (n 136), para. 361; *Prosecutor v. Naletilić and Martinović* (Judgement in Trial Chamber) [2003] IT-98-34-T (31 March 2003), para. 198; *Prosecutor v. Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* [2007] ICC-01/04-01/06 (29 January 2007), para. 211; *Genocide* (n 78), para. 404.

foreign state and the rebels military, among others, that allow us to assert that overall control requires the foreign power to provide military support, by training the insurgents and supplying them weapons and other equipment, as well as economic support, and to actively participate in the organization and co-ordination, or planning, of military operations. This evidence indicates that the "overall control" test is not a mere monitoring of the activities, requiring the exercise of some sort of authority, although broader and more general than the "effective control" test, requiring only the general direction and co-ordination of the armed group.

This view is widely accepted in jurisprudence and international practice, but, even so, Mačák's critique is very relevant when he argues that this approach is methodologically flawed. The notion that IHL, as *lex specialis*, lacks provisions on attribution and therefore necessitates turning to State responsibility law to address this gap is unconvincing, because IHL is not *lex specialis* to the law of State Responsibility and we cannot fill the gaps of the primary rules of International Law systematically belonging to the subdiscipline of IHL with the secondary rules of International Law on the question of State Responsibility (Mačák, 2018: 43-44). This author advocates reviving in part the stance expressed by Judge Shahabudden, who stated that the decisive factor to determine the nature of the conflict was to assess whether one State has used force against another either directly or through the intermediary of the foreign armed entity concerned [86]. However, in my point of view Mačák's position is more consistent, since whilst Judge Shahabudden's position is too broad and loose, Mačák proposes objective criteria to assess whether a State has used armed force through a non-State group. This author proposes an interpretation of the notion of armed force in the specific context of IHL as an action intended or likely to injure either the persons or the objects of the adversary forces or the protected persons, which requires "[…] the necessary level of involvement by an outside State that will amount to an act intended or likely to cause these outcomes", submitting that the two elements of the "overall control" test would "provide a suitable and applicable yardstick", with the added value that, while maintaining methodological accuracy, leading to a practical result similar to what would be achieved through the application of the "overall control" test, maintaining "[…] the soundness of the international jurisprudence since Tadić" (Mačák, 2018: 44-47).

Focusing our attentions on our *prima facie* NIAC in eastern Ukraine, I can confidently say that, as we saw, in the *sub judice* Case, the ECtHR asserted that the Russian Federation provided political and financial support to the separatists. However, that kind of support is absolutely irrelevant for the applicability of IHL. Only military or logistical support influences the applicability of this body of rules. *In casu* it was established by the Court that the Russian Federation logistically supply the separatist forces, by providing them transportation, and also furnished them with military support, promptly planning and coordinating their military operations. The Court went as far as to establish the presence of Russian Federation armed forces in eastern Ukraine actively and directly engaged in the theatre of operations, which indicates that alongside an indirect intervention through control of the insurgent group, there is also direct intervention in this purported NIAC, ultimately found elements that fulfil this criterion, when addressing the issue of extraterritorial jurisdiction [87].

86. *Tadić* (n 124), Separate Opinion of Judge Shahabudden, paras. 5-14, 24.

87. *Ukraine and the Netherlands v. Russia* (n 3), paras. 576-697.

To summarize, the factuality underlying the Case of Ukraine and the Netherlands v. Russia indicates an even more stringent control of the Russian Federation over the separatists than the one required by the effective control test, meaning that, *a fortiori*, it fulfils the broader threshold of both the "overall control" test and the solution proposed by Mačák and, for an even greater reason, the criteria proposed by Judge Shahabudden.

I conclude, therefore, that if we were to consider that this conflict was born as a NIAC, it then got internationalized because of the overall control exercised by the Russian Federation over the separatists.

That internationalization will have significant implications over the applicable IHL.

If, on the one hand, there were those who proposed a global approach of applying the law of IAC globally to all warfare parties through the entire territory of the State in question, and others, advocating a mixed approach, considered that the foreign intervention wouldn't have any effect on the nature of the ongoing conflicts, applying the law of IAC to regulate the bilateral relations between the territorial State and the foreign power, and the law of NIAC to govern the bilateral relations between the territorial State and the insurgents, I esteem that virtue lies in middle ground, i.e., in the fragmented approach proposed by the ICRC (Ferraro, 2015: 140-150)[88], which differentiates the applicable IHL according to the extent of the connection between the foreign power and the NIAC.

According to this construction, if the foreign power only supports the insurgents, then the law of NIAC will continue to apply to the bilateral relations between insurgents and central Government, whereas the law of IAC will govern the bilateral relationship between it and the foreign power (Ferraro, 2015: 1245-1247). However, if the foreign power exercises "overall control" over the insurgents, then their acts are attributable to the intervening party who, substituting the insurgents, affirms itself as the single party engaged in the armed conflict against the territorial State. In such a hypothesis, the Law of IAC will be the only applicable law to govern what the ICRC now considers a full-blown IAC between the State Party and the foreign intervening power, which is precisely what apparently happens in the *sub judice* case (Ferraro, 2015: 1249-1250).

3.2.2.2.4. My Assessment on the Nature of the Conflict Framed Under *Ius Ad Bellum*

In my perspective, the conflict in eastern Ukraine was never a NIAC; rather it was inherently an IAC from its inception.

This concrete question was already studied by Heinsch, who considered that given the evidence at his disposal as he was writing his article, there were no clear proof of a direct involvement of Russian Federation troops and weaponry, that being the sole reason he refused to qualify this situation as an *ab initio* IAC, although recognizing its relevance for International law as it

88. On a different note, Mačák's perspective of the so-called "hybrid model" most of the times ends up getting the same results, but instead of putting the emphasis on the extent of the connection, he considers the degree of armed violence used and the extent to which it affects the other conflict pairs, the dividing point being the moment where two parties begin to use force against another party – see Mačák (2018: 99-104).

was internationalized (2015: 360). Heinsch's line of thought would lead us to infer that only from the moment that Russia's intervention was no longer of mere support and ascended to an overall control of the so-called separatists, would the law of IAC apply between Ukraine and the Russian Federation who absorbed the separatists, substituting them. Until this point in time, ICRC's fragmented approach dictates that in the bilateral relations between the Ukrainian central Government and the separatists, the law of NIAC would still be applicable, despite the intervention of a foreign power, whilst the bilateral relations between the intervening State and Ukraine would be governed by the law of IAC.

Well, in the Case of Ukraine and The Netherland v. Russia, the ECtHR found abundant proof of the contrary, which motivated its assessment that there were members of the Russian military operating inside eastern Ukraine at the relevant time. Indeed, given the direct involvement that Russia had in hostilities, the acts carried out by the Russian Federation also constitute direct aggression, since, at least since the Battle of Ilovaisk, Russian troops directly invaded eastern Ukraine in the Summer of 2014, and a corollary of the aggression is Russia's unlawful effective control of Donbass.

Let's take a look at some of the materials Heinsch lacked when he was writing his article and revisit some he already had.

According to an International Criminal Court Prosecutor's 2016 report on Russia's war against Ukraine, the evidence points to "[…] direct military engagement […] that would suggest the existence of an international armed conflict in the context of armed hostilities in eastern Ukraine from 14th July 2014, at the latest […]" [89].

The Legal Remedies to Human Rights Violations on the Ukrainian Territories Outside the Control of the Ukrainian Authorities' report of the Parliamentary Assembly of the Council of Europe also points in this direction, adding, furthermore, that the war in Donbass is a true international armed conflict [90].

Additionally, in its 2015 Concluding Observations on the Seventh Periodic Report of the Russian Federation, the UNHRC recognized that a significant portion of the Donbass region was under Russia's effective control [91].

In 2017, the OSCE Parliamentary Assembly's Resolution on the Continuation of Clear, Gross and Uncorrected Violations of the OSCE Commitments and International Norms by the Russian Federation, the Assembly considered "[…] the actions by the Russian Federation […] in certain areas of the Donetsk and Lugansk regions of Ukraine, constitute acts of military aggression against Ukraine", having the Assembly also recognized the presence of Russian regular armed forces in the territory of Ukraine.

Even some Non-Governmental Organizations, such as Amnesty International back in 2014, have recognized the war in eastern Ukraine as an IAC. Even representatives of some States supported this understanding, such as, for example, the then Minister of Foreign Affairs of Lithuania, Linas Linkevičius, who stated in 2017 that the conflict in eastern Ukraine "[…] is an external

89. ICC Prosecutor's Report on Preliminary Examination Activities (14 November 2016), para. 169.

90. Parliamentary Assembly of the Council of Europe, Legal Remedies to Human Rights Violations on the Ukrainian Territories Outside the Control of the Ukrainian Authorities (2016) Doc. 14139.

91. UNHRC, Concluding Observations on the Seventh Periodic Report of the Russian Federation (28 April 2015) UN Doc CCPR/C/RUS/CO/7.

aggression […]" and "[…] not an internal conflict, not a civil war", remaining a "[…] principal supporter of Ukraine's sovereignty, independence and territorial integrity" [92], further claiming that Russia's continued aggression against Ukraine and other neighbouring countries remained a major security challenge within the OSCE region.

Whilst it may be argued that the hostilities arose as a national armed conflict that has been internationalized, I concur with Tsybulenko and Francis, when they underline that this conflict was born as an international one (2018: 129 ss.).

The political scenario in Ukraine leading up to the end of 2013 was characterized by a peaceful environment with no issues whatsoever regarding territorial boundaries and with the right of Russian-speaking populations to their language being fully upheld, despite Ukrainians representing the ethnic majority in Donbass. Until that point in time, there were no political tensions among Ukrainians over independence, meaning that we cannot identify any so called "rebels" or "separatists" because of the absence of such a covet for independence.

What happened was that on 21 November 2013, when former Ukrainian President, Viktor Yanukovych, suspended the signature of an already signed association agreement with the European Union, the crisis began, with violent mass protests in Kyiv from the Ukrainian people that wanted to get away from Russia's marked influence with the desire to "westernize" themselves. This movement is commonly known as "Euromaidan". On 22 February 2014, Yanukovych departed, first from Kyiv and then from Ukraine, seeking exile under the auspices of the Russian Federation. Therefore, as Tsybulenko and Francis emphasize "[…] the conflict only came into being after Euromaidan […]" (Tsybulenko and Francis, when they underline that this conflict was born as an international one [2018: 129 ss.]). As a result, that means that the so called "rebels" or "separatists" were, in fact, Russian collaborators that took that persona to disguise Russia's "Grachev Doctrine's" geopolitical and military strategy, much like what happened in 2008 in Georgia or in that period of time that is relevant in Crimea.

In addition to that, because of the evident link between Russia's agenda and its collaborators, and since the ICJ [93] established the "effective control" test to determine the degree of control over collaborators, and in line with art. 8 of the Resolution 56/83 of the UNGA [94], it becomes clear that those collaborators acted under directions from or control of the Russian State, as the ECHR found that there was Russian troops engaged on the ground in Donbass taking command of many military operations. It was even declared by OSCE monitors that, at times, civilians were "forcibly enrolled in «armed forces» of the so-called «Donetsk's People's Republic» or obliged to dig tranches" [95].

This degree of control suggests that the collaborators are fighting for Russia's interests and not for separation, thus becoming abundantly clear that this was never a civil war, but rather an IAC between the Russian

92. Statement by H.E. Mr. Linas Linkevičius Minister of Foreign Affairs of the Republic of Lithuania, 21st OSCE Ministerial Council, First Plenary Session, "Addressing the Crisis of European Security, the Way Forward" (4 December 2014).

93. *Nicaragua* (n 77) paras. 105-115.

94. UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

95. OSCE, Press Release, Latest News from the OSCE Special Monitoring Mission to Ukraine, based on information received until 18:00h, 16 July (17 July 2014).

Federation and Ukraine with the first occupying the territory of the latter, for the reason that, as asserted by ICTY [96], an IAC exists when States resort to armed force against each other.

In conclusion, we must show our agreement with the vehement proposition of Tsybulenko and Francis that "the situation must be deemed to be an IAC […]" (Tsybulenko, Francis, 2018: 140). Moreover, since it is always a harder task to classify the nature of an armed conflict in its early stages rather than in its prologue, I thoroughly believe that if Heinsch had access to the same evidence we have today, he would have also regarded this conflict as an IAC.

That being said, whilst I fully tag along with the understanding adopted by the ECtHR regarding its assessment on the extraterritorial jurisdiction of the Russian Federation over Donetsk and Lugansk, I cannot, however, fail to point out my criticism towards the nomenclature used by the Court when he labels them "separatists", as this reflects an idea of internationalization of a conflict that, in my point of view, was already born international.

In short, we find ourselves within the scope of an IAC, either because, as I have contended, it was born *ab initio* with that nature (as I submit), or because, commencing as a NIAC, it has since internationalized, which opens the door to a possible violation of Article 2(4) of the CUN, subject to the fulfilment of the rest of the prohibition's composing elements.

Although classifying the conflict as an IAC under *jus in bello* does not necessarily entail a violation of *jus ad bellum*, one thing is certain: it allows for such a possibility. Contrastingly, if it were to occur a pure NIAC, which, it would completely preclude this possibility.

3.2.2.3. Was the Force Used in the Context of International Relations perceived to Go Against Territorial Integrity or Political Independence or in Any Other Way Inconsistent with the United Nations?

Since I have already established that force was used by Russia in international relations, launching an armed attack in the context of an *ab initio* international armed conflict, we must now determine whether that armed attack launched in the context of an *ab initio* international armed conflict collides with Ukraine's territorial integrity or political independence.

At this point, I assume there is no doubt that Russia's offensive over eastern Ukraine clashes with Ukraine's territorial integrity, as the Donbass region is part of the territory over which Ukraine exercises its sovereignty, having in mind that the use of force is not required to cover the entire territory.

The Kremlin may argue that its intention was not to attempt against Ukraine territorial integrity, at least in the beginning, and that its purpose was to create a temporary buffer zone to secure the transportation of energy, water, food, etc. to the Crimean Peninsula and Slovyansk. However, as Azeredo Lopes emphasizes, the *animus* to incorporate the portion of territory where force was being used is not imperative, in clear disagreement with d'Amatto's restrictive construction (1987: 58-59), which he considers to be an attack on the letter and spirit of the Charter. Azeredo Lopes, drawing on Dinstein's teachings in this regard (1994: 84 ss.), considers that there is a

96. *Tadić* (n 124), para. 10.

violation of the territorial integrity of a State, even if the portion of territory where force was used is not permanently lost (Azeredo Lopes, 2020: 37).

As Distefano underlines, we should interpret this term in light of the objective and purpose of the Charter (art. 31 (1) of the Vienna Convention of 1969) which is to restrict the unilateral use of force by States (2014: 547-548). Furthermore, in the S. Francisco Conference it became evident that the objective of the inclusion of this clause was "to strengthen rather than to dilute the prohibition". Therefore, we should read "territorial integrity" as "territorial inviolability", meaning that even short-lived use of force would contend with Ukraine's territorial integrity.

Hence, even though it can be argued that Russia's intents in 2014 were not to incorporate the Donbass region into its own territory, there is no doubt that the use of military force in eastern Ukraine deprived the latter of its right to territorial integrity. Moreover, considering that it's primatial motivation emerged from Euromaidan, we can easily conclude that this use of force by the Russian Federation aims to condition the political independence of Ukraine, in order to keep it under its sphere of influence.

For the disclosed reasons, we are led to infer that the use of force perpetrated by the Russian Federation in 2014 did not constitute a justified use of force. Therefore, any consequences that may rely on this acts of Russian use of force are "null and void", to, once again, echo the words of the UNSC in its Resolutions 497 and 662 and previously expressed by the UNGA in its Resolution 44/22.

4. Conclusion

The current warfare in Ukraine is the crystallization of a very long period of illicit use of force in the gravest form of an armed attack by the Russian Federation that began following the Euromaidan events, when the Russian Federation, in order to disguise its "Grachev Doctrine's" aspiration, sent some collaborators, wrongfully called "separatists" by the media, to pursue its geopolitical and military ambition of "restauration of Novorossiya".

This means that, in the beginning, the Russian Federation not only violated the principle of non-intervention in the internal affairs of other States when providing financial and political support to its own collaborators, but, in addition to interfering in the internal affairs of Ukraine, its interference took the form of an armed attack, hence violating the prohibitive principle of the use of force in international relations in the utmost severe manner. As such, I submit that the hostilities did not become internationalized, but rather that they arose *ab initio* as an international armed conflict which violated the general prohibition enshrined in art. 2 (4) of the Charter from its commencement.

This statement is revolutionary, as it gives Ukraine the right to self-defence since the moment an armed attack was carried out against Ukrainian's political independence in 2014. The fact that Ukraine's right to self-defence in light of art. 51 of the CUN dates back to 2014 is of the utmost relevance, as this means that, if, in the future, the Case of the War in Ukraine is subject to the ICJ's judgement or to the appreciation of any other international body, any acts carried out by Ukraine in which force was used against Russia after 2014, provided that the other prerequisites for the exercise of the right of self-defence are met, they will be justified, and the justification for the use of force will not be limited only to the counter-offensive that took place since 2022, rather covering all acts performed since that moment.

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