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Pusat Kajian Keamanan Nasional
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Russia-Ukraine Disputes based on International Law

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Abstract

The recent escalation of tensions between Russia and Ukraine has caught the world's attention. Tensions are characterized by the leadership of hundreds of thousands of Russian troops on Ukraine's borders and the response of many NATO members, including the United States, to Russian pressure. NATO threats against Russia have played a role in increasing tensions on the Russia-Ukraine border. This article analyzes the nature of Russian-Ukrainian relations, the background to rising tensions between the two countries, and the international reaction to the situation. It is the duty of the international community to continue to seek peaceful solutions to avoid the threat of another world war. The ongoing conflict will ultimately harm many parties not only in European countries, but also in other regions.

Keywords: *Russia-Ukraine, NATO, International Law.*

Abstrak

Meningkatnya ketegangan baru-baru ini antara Rusia dan Ukraina telah menarik perhatian dunia. Ketegangan ditandai dengan kepemimpinan ratusan ribu tentara Rusia di perbatasan Ukraina dan tanggapan banyak anggota NATO, termasuk Amerika Serikat, terhadap tekanan Rusia. Ancaman NATO terhadap Rusia telah memainkan peran dalam meningkatkan ketegangan di perbatasan Rusia-Ukraina. Artikel ini menganalisis sifat hubungan Rusia-Ukraina, latar belakang meningkatnya ketegangan antara kedua negara, dan reaksi internasional terhadap situasi tersebut. Sudah menjadi kewajiban masyarakat internasional untuk terus mencari solusi damai untuk menghindari ancaman perang dunia lain. Konflik yang terus berlangsung pada akhirnya akan merugikan banyak pihak tidak hanya di negara-negara Eropa, tetapi juga di kawasan lain.

Kata Kunci: *Rusia-Ukraina, NATO, Hukum Internasional*

Introduction

The Russian-Ukrainian conflict flared up again in early February 2022 after a Russian fighter fleet appeared on the Ukrainian border. It is estimated that the Russian troops sent in large enough numbers can be used as a force to carry out an invasion of Ukraine, and be the cause of the escalation of tensions in Russian-Ukrainian relations.

Tensions between Russia and Ukraine have actually been going on since 2014. Russia's interest in resolving Ukraine's internal conflict has become an attempt to exploit Russia to gain territory in Crimea. Crimea's strategic location seems to have been used by Russia to strengthen its influence in Eastern and Central Europe. In the end, the Crimean parliament held a referendum when the Crimean crisis ended on March 16, 2014 by joining Russia and breaking away from Ukraine. After the Crimean crisis, the ebb and flow of Russian-Ukrainian relations continued until February 2022. The crisis began when NATO (The North Atlantic Treaty Organization) sought to expand its membership to Eastern Europe by targeting Ukraine.

Despite the crisis of trust between Russia and Ukraine, efforts to resolve the conflict still need to be done. The United Nations (UN) has called for diplomacy and dialogue to be the best way to resolve conflicts. This is important to do to prevent a new chapter of the "Cold War" that could occur between Russia and the US. Therefore, Russia at least needs to rethink if it is going to carry out a military invasion of Ukraine. NATO indirectly has an interest with the Ukrainian state. NATO, which is the organization of the European Union's defense alliance, opened the door for Ukraine to join.

On the other hand, President Putin, who feels threatened by the actions of Western countries using NATO to encircle Russia, wants the alliance to stop its military activities in Eastern Europe. Russia considers NATO's activities to approach the countries of the former Soviet Union as a threat. In fact, Putin himself considers the US to be violating an old agreement under which NATO would not expand its reach into Eastern Europe. NATO denies this by stating that a number of small countries bordering Russia have now joined NATO as a defense alliance, including Estonia, Latvia and Lithuania.

NATO's statement is considered to get an international reaction. The international reaction to the tensions that occurred, including from these small countries, basically did not want war. Therefore, many think that if there is a war it will cause problems for the international community, such as obstruction of gas supply, especially for the European Union and other problems related to the security situation in Europe. If an invasion by Russia occurs, it will cause instability for Europe. Therefore, before that happens, now is the right time to defuse tension, reduce movement, and contain threats, including stopping rhetoric that can inflame tensions. What must be done now is to prevent war, considering its impact will also have an impact on various sectors such as economic, social, energy, especially with neighboring countries from Ukraine and Russia, including Belarus, Hungary, and Romania.

Discussion

The Russian parliament adopted a resolution on February 16, 2022 asking President Vladimir Putin to recognize as an independent state two regions in eastern Ukraine controlled by Russian-backed armed groups. On February 21, President Putin signed two decrees recognizing the independence of the two regions and submitting them to parliament for ratification. After that, he issued orders to the Russian armed forces, which have been congregating on the border with Ukraine for months, to carry out “peacekeeping” in the self-proclaimed “Donetsk People’s Republic” (“DNR”) and “Luhansk People’s Republic”. (“LNR”). The situation in eastern Ukraine, if Russian troops formally entered the territory, would be included in the meaning of occupation in the Fourth Geneva Convention of 1949. Neither claims of sovereignty by local “authorities” in the self-proclaimed “LNR” or “DNR”, nor their recognition as independent by the Russian government, do not affect the application of international occupation law.

The armed conflict between government forces and Russian-backed armed groups has taken a heavy toll on civilians in eastern Ukraine. The conflict, which has lasted for nearly eight years, has killed more than 16,000 people, including combatants and civilians, and has displaced nearly 1.5 million people. The fighting has also caused widespread damage and destruction of civilian infrastructure, including homes, hospitals and schools on both sides of the 427-kilometer line of contact, which separates territory controlled by Ukrainian government forces from territory controlled by armed groups. of “DNR” and “LNR”.

Hostilities between the Russian armed forces and the Ukrainian armed forces constitute an international armed conflict governed by international humanitarian treaty law (especially the four Geneva Conventions of 1949 and its first additional protocol of 1977 (Protocol I), and the Hague Convention of 1907 which regulates the means and methods of warfare), as well as the rules of customary international humanitarian law (Both Ukraine and Russia are parties to the 1949 Geneva Conventions¹ and Protocol I²).

International human rights law remains in force and continues to apply at all times, including during armed conflict and occupation, where the laws of war also apply. In some circumstances the norms of humanitarian law can override the norms of human rights, as *lex specialis*, or norms that are more specific to certain circumstances. Ukraine and Russia are parties to a number of regional and international human

¹ “Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949”, ICRC Database, accessed April 28, 2022, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_view-States=XPages_NORMStatesParties&xp_treatySelected=375.

² “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977”, ICRC Database, accessed April 28, 2022, <https://ihl-databases.icrc.org/ihl/INTRO/470>.

rights treaties, including the European Convention on Human Rights (ECHR)³, the International Covenant on Civil and Political Rights (ICCPR)⁴, and the Convention Against Torture and Other Cruel, Inhumane Treatments. or Degrading Treatment or Punishment (UNCAT)⁵. While the ECHR and ICCPR allow some restrictions on certain rights during times of war or public emergencies that are officially declared “threatening to the life of the nation,” any reduction of rights during a public emergency must be extraordinary and temporary and must be limited. “To the extent required by the urgency of the situation.”

The Russia-Ukraine conflict clearly has implications for the issue of the use of force in international law. It is clear that Russia has violated Article 2 (4) of the UN Charter⁶ when it uses military force against the territorial integrity and political independence of Ukraine. International legal prohibitions against the use of force are also part of customary law and *Jus Cogens Norms*⁷; international law is more than emphatic that this type of Russian behavior constitutes a flagrant violation of one of the fundamental norms of international law. However, despite this, international law remains limited in its ability to respond to Russian actions due to the fact that collective decision-making regarding authorization to use force against a sovereign state is tied to the Security Council, over which the Great Powers, such as Russia, have a veto. Experts have written about the possibility of limiting the use of the veto in the Security Council⁸; such changes and perhaps broader Council reforms are urgently needed in a situation like this, where a veto-wielding member clearly violates the basic norms of the Charter. Interestingly, the Russian self-defense ‘claim’ actually consists of several claims. As is well known, Article 51 states that the state has the right to ‘individually and collectively defend itself’.⁹ Russia uses both. These are conceptually distinct, though interrelated, claims, so it is useful to take them in turn.

The first aspect of Russia’s individual self-defense claims is the perceived encroachment threat posed by NATO’s eastward expansion, which President Putin clearly identified as an existential threat to the Russian state. In his words: “For the

³ “The European Convention on Human Rights (ECHR)”, European Court of Human Rights, accessed April 28, 2022, https://www.echr.coe.int/documents/convention_eng.pdf.

⁴ “The International Covenant on Civil and Political Rights (ICCPR)”, United Nations, accessed April 28, 2022, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁵ “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, United Nations, accessed April 28, 2022, https://treaties.un.org/doc/Treaties/1987/06/19870626%2002-38%20AM/Ch_IV_9p.pdf.

⁶ “Article 2 (4) UN Charter”, United Nations, accessed May 1, 2022, https://legal.un.org/repertory/art2/english/rep_supp7_vol1_art2_4.pdf.

⁷ M. Cherif Bassiouni, “International Crimes, Jus Cogens and Obligatio Erga Omnes”, Law and Contemporary Problems, Vol. 59 No. 4.

⁸ Jennifer Trahan, “Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes” (Cambridge University, 2020), 142-145.

⁹ “Article 51 UN Charter”. United Nations, accessed May 1, 2022, <https://legal.un.org/repertory/art51.shtml>.

United States and its allies, this is a policy of restraining Russia, with clear geopolitical dividends. For our country, it is a matter of life and death, a matter of our historical future as a nation. This is no exaggeration, this is a fact. This is not only a very real threat to our interests, but also to the very existence of our country and its sovereignty. This is a red line that we have talked about on many occasions. They (NATO) have crossed it."¹⁰

UN Charter Article 51 states that the right of self-defense is invoked 'if an armed attack occurs against a Member of the United Nations'.¹¹ The term 'armed attack' is understood broadly to refer to the 'grave' use of force, although this is not a universal understanding of the term¹² and even if one accepts that a qualitatively more severe use of force is necessary, it is unclear exactly what level of 'gravity' is sufficient to carry out an armed attack.¹³

While the wording of Article 51 would have made it clear that an armed attack must have 'occurred' or is 'occurring', there is now substantial support from both states¹⁴ and scholars for the idea that if an armed attack is temporally imminent, a state can use force in self-defence, without having to wait for the 'hammer to fall'. This concept of what is sometimes called 'anticipatory self-defence'¹⁵ in the face of an imminent armed attack is by no means free from controversy amongst states and international lawyers, with many continuing to insist that self-defence remains a possibility if, and only if, 'an armed attack occurs'.¹⁶

Therefore, one can interpret Russia's claim in this regard as that NATO has progressed to the point that it is now a threat to Russia from an imminent armed attack, which can be responded to with the use of anticipatory defense force. This is further evidenced by the fact that NATO member states had very limited military assets near their eastern borders prior to the Russian invasion¹⁷ (of course compared to the 130,000 troops and thousands of tanks that Russia had gathered together along the Ukrainian border), as well as the fact that, even after Moscow started 'special military operations', NATO member states did not want to be dragged into armed conflict with Russia.¹⁸ In fact, the fear of a possible direct confrontation with its eastern

¹⁰ The Spectator, "Full text: Putin's declaration of war on Ukraine", The Spectator, February 24, 2022, <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>.

¹¹ "Article 51 UN Charter".

¹² Tarcisio Gazzini, "The Changing Rules on the Use of Force in International Law" (Manchester University Press, 2005), 138.

¹³ Tom Ruys, Olivier Corten & Alexandra Hofer, "The Use of Force in International Law: A Case-Based Approach" (Oxford University Press, 2018), 111.

¹⁴ James A. Green, "The International Court of Justice and Self-Defense in International Law" (Hart Publishing, 2009), 122.

¹⁵ James A. Green, "The Ratione Temporis Elements of Self-Defence", *Journal of the Use of Force and International Law*, Vol. 97, 102-103.

¹⁶ Johanna Friman, "Revisiting the Concept of Defence in the Jus ad Bellum" (Hart Publishing, 2017), 60.

¹⁷ Michael N. Schmitt, "Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense", Lieber Institute West Point, February 28, 2022, <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>.

¹⁸ Robin Wright, "The Growing Fear of a Wider War between Russia and the West", *The New Yorker*,

neighbor is the main reason why various NATO members refrain from supporting Ukraine's potential membership in NATO.¹⁹

Aside from the alleged threat posed by NATO and the changing European security architecture, it is clear that President Putin has also identified threats to Russia directly from Ukraine as the basis of his claims to individual self-defense. In part, this appears to involve claims that Ukraine poses a threat to Russia itself, as a territorial entity: 'Russia cannot feel safe, thrive and exist in the face of a permanent threat from Ukrainian territory today.' Again, of course, it is a clear fact that 'Russia itself was not a victim of the Ukrainian armed attack.'²⁰

Indeed, it is difficult to understand why Ukraine would want to trigger a conventional war with its so far militarily superior neighbor (with estimated ratios of 5 to 1 and 10 to 1 for armored fighting vehicles and military aircraft), respectively,²¹ not to mention that it is a nuclear weapons state), and which has engaged in massive mobilization along its borders for weeks (thus also ruling out the hypothetical benefit of a surprise attack). At the same time, dependence on 'citizen protection' has not been a common legal claim in the United Nations era and, especially since there are notable examples of it being misused as a pretext for the use of force for non-defense purposes, it remains controversial.²² Nonetheless, it is not 'overruled' by Article 51 and it can be argued that there has been a level of support for it as a manifestation of self-defense during the UN era. In particular, there appears to be broader support for 'non-combatant evacuation operations' that seek only to evacuate citizens from harm.²³

In addition, one might note the widespread provision of Russian passports to individuals in the Donbas region in the period leading up to the invasion, and the pretexts they sought to give.²⁴ It has been widely reported that between April 2019 and the time of the invasion in February 2022, some 720,000 passports were fast-tracked to people in eastern Ukraine.²⁵ Mass distribution of passports to 'manufacturing' a

March 10, 2022, <https://www.newyorker.com/news/daily-comment/the-growing-fear-of-a-wider-war-between-russia-and-the-west>.

¹⁹ Natasha Turak, "Russia is 'a power in decline' but still poses a military threat, NATO chief says", CNBC, December 16 2021, <https://www.cnbc.com/2021/12/16/russia-is-in-decline-but-still-poses-military-threat-nato-chief.html>.

²⁰ Sergey Sayapin, "Thou Shalt Not Distort the Language of International Law", *OpinioJuris*, March 3, 2022, <http://opiniojuris.org/2022/03/07/thou-shalt-not-distort-the-language-of-international-law/>.

²¹ Angela Dewan, "Ukraine and Russia's militaries are David and Goliath. Here's how they compare", CNN, February 25, 2022, <https://edition.cnn.com/2022/02/25/europe/russia-ukraine-military-comparison-intl/index.html>.

²² Francis Grimal & Graham Melling, "The Protection of Nationals Abroad: Lawfulness or Toleration – A Commentary", *Journal of Conflict and Security Law*, Vol. 16 No. 3, 541.

²³ Tom Ruys, "The 'Protection of Nationals' Doctrine Revisited", *Journal of Conflict and Security Law*, Vol. 13 No. 2, 233.

²⁴ Fabian Burkhardt, "Passports as Pretext: How Russia's Invasion of Ukraine Could Start", *War on the Rocks*, February 17, 2022, <https://warontherocks.com/2022/02/passports-as-pretext-how-russias-war-on-ukraine-could-start/>.

²⁵ Dasha Litvinova & Yuras Karmanau, "With fast-track passports, Russia extends clout in Ukraine",

population of citizens within the territory of another country, so that in order to later be able to assert self-defense claims to protect the population of those citizens is now established the *modus operandi* of Russia. The Kremlin previously did this both in South Ossetia and the Abkhazia region of Georgia immediately before the invasion in 2008, and in Crimea before the unlawful annexation of Ukraine in 2014.²⁶

Russia's claim of collective self-defense in connection with its invasion of Ukraine is based on its recognition of two separatist-leaning regions in Ukraine's Donbas region – Donetsk and Luhansk – as sovereign states. As much as President Putin may wish to proclaim the 'People's Republic' of Donetsk and Luhansk states, wishful thinking is not enough; Russia's recognition of these entities as states does not alchemically turn them into states, *de jure*. On the other hand, 'premature' recognition of separatist territory as a new state while internal armed conflict is still ongoing will usually result in violations of international law.²⁷

Two weeks after the invasion began, Russia appeared to put forward another version of the collective self-defense claim, which can be understood as one of anticipatory collective self-defense. The Russian Ministry of Defense announced on March 9, 2022 that its forces in Ukraine, while conducting a 'special military operation', had 'disclosed' classified documents confirming that Ukraine was secretly preparing (with, further alleged Russia, supporting NATO training) significant military operation in the Donbas region in March 2022.²⁸ However, putting aside the temporal paradox at the heart of this strand of Russia's *ad bellum* argument, at the time of writing the veracity of the document alleging an imminent attack by the Ukrainian armed forces in the Donbas region has not been independently verified and its authenticity remains highly questionable.²⁹

In addition, the use of NATO-led force to defend a non-member state remains illegal under international law, as long as the use of such force remains unlawful by the Security Council. While many defend the 1999 NATO airstrikes against FRY (Former Republic of Yugoslavia) as legitimate³⁰ or morally permissible, or on humanitarian³¹ grounds, these airstrikes are illegal under international law.

abcnews, February 17, 2022, <https://abcnews.go.com/international/wireStory/fast-track-passports-russia-extends-clout-ukraine-82947863>.

²⁶ James A. Green, "The annexation of Crimea: Russia, passportisation and the protection of Nationals revisited", *Journal on the Use of Force and International Law*, Vol. 1 No. 1, 3.

²⁷ Hersch Lauterpacht, "Recognition of States in International Law", *The Yale Law Journal*, Vol. 53 No. 3, 390.

²⁸ Sputnik, "Secret documents "surfaced": Ukraine designed military operation in Donbas for March", b92, March 9, 2022, www.b92.net/eng/news/world.php?yyyy=2022&mm=03&dd=09&nav_id=113234.

²⁹ Al Jazeera and News Agencies, "Russia's invasion of Ukraine: List of key events from day 14", *Aljazeera*, March 9, 2022, <https://www.aljazeera.com/news/2022/3/9/russias-invasion-of-ukraine-list-of-key-events-from-day-14>.

³⁰ "The Kosovo Report", The Independent International Commission on Kosovo, accessed May 3, 2022, <https://reliefweb.int/report/albania/kosovo-report>.

³¹ Christine Chinkin, "The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law", *The International and Comparative Law Quarterly*, Vol. 49 No. 4, 910.

This conflict also underscores the limitations of international law in terms of accountability. In theory, the political and military leaders who ordered the atrocities committed should be held accountable. Article 8bis of the ICC Rome Statute defines an act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”

In this regard, it is clear that Russian President Putin has carried out an act of aggression vis-a-vis Ukraine. However, although the ICC may exercise jurisdiction over genocide, crimes against humanity, and war crimes in situations involving non-state parties (if the crimes are committed by nationals of the state party on the territory of the non-state party), the regime’s jurisdiction over crimes of aggression is significantly more limited. Thus, while it is certain that Putin has carried out acts of aggression in Ukraine, it is almost certain that he will not face accountability at the ICC. It is important to note here that the ICC has the potential to exercise jurisdiction over three other ICC crimes in Ukraine.

In fact, Ukraine accepted³² ICC jurisdiction over crimes allegedly committed there by Russian forces starting in 2013. Thus, the ICC could continue to investigate and possibly prosecute those responsible for crimes against humanity and war crimes in Ukraine. However, as the current ICC Prosecutor, Karim Khan has confirmed³³, the ICC remains unable to investigate and prosecute the most important crime committed by Putin against Ukraine, aggression.

The conflict also highlights the limited efficacy of the International Court of Justice (ICJ). In this case, Ukraine has sued Russia in the ICJ³⁴, basing jurisdiction on the Genocide Convention, to which both states are parties. Thus, although the ICJ could order Russia to cease using military force in Ukraine, the court has no direct ways to enforce its own judgment. It is very likely that a Great Power such as Russia would simply ignore the ICJ’s judgment. In short, the power of the ICJ to contribute to the actual resolution of this conflict remains limited.

³² Mike Corder, “Crime watch: ICC prosecutor is monitoring Ukraine invasion”, abcnews, February 26, 2022, <https://abcnews.go.com/International/wireStory/crime-watch-icc-prosecutor-monitoring-ukraine-invasion-83125179>.

³³ Karim A.A. Khan QC, “Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: ‘I have been closely following recent developments in and around Ukraine with increasing concern’”, ICC-CPI, February 25, 2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following>.

³⁴ Anthony Deutsch & Toby Sterling, “Ukraine rejects Russia’s genocide claim, asks U.N. court to halt invasion”, Reuters, February 28, 2022, <https://www.reuters.com/world/europe/ukraine-lodges-case-against-russia-world-court-zelensky-2022-02-27/>.

Conclusion

In conclusion, international law contains clear legal norms that condemn Russia's invasion of Ukraine and which, at a theoretical level, link state responsibility to Russia and individual criminal responsibility to its leader, Vladimir Putin. However, as discussed in this post, international law is still limited in its ability to deal with conflict. Authorization for the use of force against Russia remains deadlocked in the veto-blocked Security Council; the crimes of the limited jurisdiction regime of aggression effectively shielded Russian leaders from accountability in the ICC; The ICJ has no prospect of enforcing a decision that would condemn Russia. It could be argued that this relative ineffectiveness of international law has to do with the super-sovereign status of Great Powers, such as Russia, which has benefited from the institutional design of international law.

International law, because of its general lack of enforcement mechanisms and because of its institutional designs such as the veto in the Security Council, contributes to an unequal state order, in which those with super-sovereign powers seem able to get away with breaches of fundamental norms with almost no consequences. Russia, because of its status as a Great Power, has violated fundamental norms of international law but may remain isolated from the reach of international law.

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