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The Russian Invasion of Ukraine: A TWAIL Analysis of the Use of Force in International Law

Rushmi Wickramagamage
Attorney-at-law

rushmi.wick@gmail.com

Abstract

It has been more than two years since Russia launched its invasion of Ukraine on the 24th of February 2022, an act which has been, almost universally, characterised as an illegal use of force under international law. However, international law displays a tendency to favour more powerful First World States often to the detriment of Third World States. This facet of international law is recognized by TWAIL, which seeks to critique international law from the perspective of the Third World. The prohibition in international law against the use of force has been gradually weakened through the development of various exceptions to the doctrine as well as the paralysis of the United Nations Security Council (UNSC). Further, the characterisation of force fails to include economic force which may be used against Third World States. However, the prohibition against the use of force is still vital for the protection of Third World States.

Keywords: Use of force; Russian invasion; Ukraine; TWAIL

1 Introduction

The sovereign equality of States enshrined in Article 2(1) of the United Nations Charter is supposedly a foundational principle of international law.[1] However, 'all animals are created equal, but some are more equal than others'[2] and this is true of States as well. B.S. Chimni states that in fact 'the growing assemblage of international laws, institutions and practices coalesce to erode the independence of Third World countries in favor of transnational capital and powerful States.'[3]

[1] Malcolm Shaw, *International Law* (Cambridge University Press, 2017, 8th edition), p. 851.
[2] George Orwell, *Animal Farm* (Secker and Warburg, 1945), p. 45.
[3] B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review*, p. 26.

Thus, international law while propounding the equality of States sometimes helps perpetuate their inequality.

States which belong to the Third World are invariably 'less powerful'. Third World States are linked by a common history of subjection to colonialism coupled with continuing underdevelopment and marginalization. [4] The presumption in international law that States are equal is to the detriment of these States, as it ignores the reality of developmental disparities and inequalities in power. [5] President Sukarno of Indonesia, when declaring open the Bandung Conference of newly independent States in 1955, sounded a warning regarding the continuing presence of a new form of colonialism, by identifying capitalist States and transnational corporations as two new actors perpetuating new forms of colonialism.[6] Thus, the exploitation and subjugation of Third World States has continued after colonialism through neo-colonialism and global imperialism.[7]

This reality is evident in Sri Lanka, which at one point was subject to colonialism and presently struggles to maintain sovereignty during an ongoing economic crisis. Sri Lanka is stuck between a rock and a hard place, on one hand being at the mercy of the International Monetary Fund and the World Bank, institutions that Kwame Nkrumah called 'instruments of imperial governance' backed by the United States (US),[8] and on the other subject to pressure by China which had objected to Sri Lanka seeking IMF assistance.[9]

Third World Approaches to International Law (TWAIL) recognizes that international law reveals its true meaning in the context of the history and experience of people in the Third World States,[10] and allows for a 'comprehensive and sustained critique' of international law. [11] As such, TWAIL allows for introspection into the ugly realities of international law. Going beyond introspection, TWAIL is also an important tool in the quest for 'universal' justice, recognizing that there cannot be global justice unless there is justice for the people in the Third World while also revealing inadequacies in the international

[4] Ibid, p. 5.
[5] Graham Evans, 'All States are Equal, but…' (1981) 7 *Review of International Studies*, p. 60.
[6] Radha D' Souza, 'A Radical Turn in International Law and Development? Corporations, Capitalist States and Imperial Governance' (2022) 43 *Canadian Journal of Development Studies*, p. 25.
[7] Sandra Halpern, 'Neocolonialism' *Encyclopedia Britannica*, available at: https://bit.ly/3LwENsY (visited 20 Nov., 2024).
[8] Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Thomas Nelson and Sons, 1965), p. 242.
[9] Shailendree Wickrama Adittiya, 'Discussion with IMF Impact $ 2.5 b Assistance from China', *DailyFT*, available at: https://bit.ly/3kpyj3q (visited 20 Nov., 2024).
[10] Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2005) *Chinese Journal of International Law*, p. 78.
[11] Note 3 above, p. 26.

legal order which impedes the achievement of justice and further providing an alternate vision of international law.[12]

In this context, the article will examine the international law on the use of force, the development of which should be of importance to Third World States, especially considering the developments which have occurred since the Russian invasion of Ukraine.[13] The focus will be on how the international law on the use of force has enabled neo-colonialism, culminating in the ability of the Russian State to justify their actions. There will also be a brief examination of how the reactions of transnational corporations to the invasion show a new kind of economic 'force' which is not yet recognized as such in international law. Finally, the viability of international law on the prohibition of the use of force as a protection for Third World countries from the imperialist agendas of powerful States within the international community will be addressed.

2 Russian Invasion of Ukraine: A Brief Overview

On the 24th of February 2022, Russia launched what at the time was termed a 'full-scale assault on Ukraine' following recognition by the Russian President, three days earlier, of the two separatist regions in the east of the country.[14] The International Court of Justice (ICJ) has since then characterized Russia's actions as a use of force, though without pronouncing on its legality.[15] While the conflict itself is still, and hopefully will remain, confined to Ukraine and Russia, it has dealt a severe blow, bringing with it soaring fuel prices and food insecurity to Third World countries, including Sri Lanka, which are already struggling to recover from the COVID-19 pandemic,[16] an issue that has received the attention of the UNSC.[17] The Russian invasion has tested the effectiveness of international law in addressing the use of military force by one sovereign State against another, especially where one appears to vastly overpower the other.

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[12] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 *EJIL*, p. 11-12.

[13] 'One Year into Russian Invasion, Ukraine's Zelenskyy Vows Victory', *Al Jazeera*, available at: https://www.aljazeera.com/news/2023/2/24/one-year-into-invasion-ukraine-mourns-vows-victory (visited 20 Nov. 2024).

[14] Carole Landry, 'Day 1 of Russia's Invasion', *The New York Times*, available at: https://nyti.ms/3vnB8rT (visited 19 March, 2022).

[15] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v Russian Federation), [2022] Order of 16 March 2022 at 5, available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-00-EN.pdf (visited 20 Nov. 2024).

[16] Kali Robinson, 'How Russia's War in Ukraine Could Amplify Food Insecurity in the Mideast', *Council on Foreign Relations*, available at: https://on.cfr.org/3MGU3Uf (visited 20 Nov., 2024).

[17] 'Spotlighting Russian Federation-Ukraine War's Impact on Global Food, Energy Stability, Delegates in Security Council Urge Renewing Graine Initiative', *United Nations*, available at: https://press.un.org/en/2023/sc15233.doc.htm (visited 20 Nov. 2024).

A question can be raised whether Ukraine is a Third World State, given that it was part of the Second World during the period when such designations were coined. However, it too has been subject to domination by various powers including Russian and was one of the earliest constituent republics of the Soviet Union until 1991, when it gained independence following the dissolution of the USSR. Thus, it has experienced great political and economic instability and is, arguably, in a similar situation as the Third World countries. In any case, it is certainly a 'less powerful' State vis-à-vis its powerful neighbour and its erstwhile colonial master, and therefore the experiences of the Ukrainian State are important for Third World States as well.

3 Use of Force

3.1 Why is it important to view the use of force through TWAIL?

The legal regime governing the use of force is extremely important given that the lives of billions of people, military and civilian alike, are at stake.[18] This area of law appears to regulate the ability of States to use military force in the international arena and thus prevent 'violence' in international relations. However, the censure of violent acts by States has always exhibited a double standard from colonial times, with violence being considered a characteristic of non-European peoples, often designated as 'infidels' and 'barbarians', whilst colonial powers were perceived to only engage in violence legitimately either as a means of self-defence or to save non-European peoples from themselves.[19] This attitude is not a thing of the past, as amply demonstrated in the reaction of Western media to the Russian invasion of Ukraine, treating it as especially heinous and shocking in contrast to their reaction to the US invasion of Iraq and other Middle-Eastern countries.[20] Thus, Ukraine is seen or presented as a special case, given it is a European, majority Caucasian and Judeo-Christian State, making it easier for peoples in 'powerful' First World States to relate to the plight of the Ukrainian people and to identify with them. This seemingly special status is exemplified by news that Ukraine has reached a staff-level agreement with the IMF to receive a loan which has been described as the biggest such loan given by the IMF to a nation embroiled in an active conflict.[21]

[18] Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2005), p. 223.
[19] Note 10 above, p. 85-86.
[20] Moustafa Bayoumi, 'They are 'Civilised' and 'Look Like Us': the Racist Coverage of Ukraine', *The Guardian*, available at: https://bit.ly/36X0hQO (visited 20 Nov. 2024).
[21] 'IMF Staff Reaches Agreement with Ukraine for $15.6bn Loan', *Al Jazeera*, available at: https://www.aljazeera.com/news/2023/3/22/imf-staff-reaches-agreement-with-ukraine-for-15-6bn-loan (visited 26 March, 2023).

Unfortunately, this double standard has seeped into the international law regarding the use of force. While in theory international law is formed through the collective behaviour and beliefs of States, developments in international law are often shaped by 'powerful' States, while Third World States are treated as receptors of international law rather than its producers.[22] This is despite the fact that it is the ability of 'powerful' States to accumulate capital and then build up their 'military industrial complex' which often leads to violence in the international arena.[23] As the following will demonstrate, changes in international law related to the use of force are often to allow 'powerful' States to 'erode the independence of Third World countries'.[24] While such 'powerful' States may at certain junctures be opposed to each other, ultimately they act in ways that preserve their own 'class' of States, to the detriment of 'less powerful' Third World States. For example, while the United States of America (United States) initially condemned the Russian invasion of Ukraine[25] as the following will demonstrate, the justifications used by the Russian State are eerily similar to those used by the United States in previous instances, especially in relation to the invasion of Iraq.

But the truth of the matter is that 'powerful' States do not always use force to exercise dominance in the international system, rather resorting to less visible, stealthy means. As such, the disparity in treatment of States is often evidenced in relation to international economic law.[26] However, the threat of overwhelming military force wielded by 'powerful' States always hangs over Third World nations, and 'powerful' States are willing to use and have used this military force, as the United States did in Nicaragua, as well as numerous States including the United States, Russia and the United Kingdom in the Middle-East. The Russian invasion of Ukraine is merely the most recent example of such use and, thus, how it has played out is a useful guide to examining how the law related to the use of force operates, and whether it really has any effect at all.

[22] JT Gathii, 'The Promise of International Law: A Third World View' (2021) 36 *American University International Law Review*, p. 379.
[23] Rosa Luxemburg, *The Accumulation of Capital* (Agnes Schwarzschild tr, Lector House, 2019), p. 462.
[24] Note 3 above, p. 26.
[25] Note that this article was authored while the Biden-administration was in power. Therefore, this article considers the stance of the Biden-administration regarding the Russian invasion of Ukraine, and not of the more recent Trump-administration.
[26] Ibid, p. 29.

3.2 The exploitation of the law on the use of force by 'powerful' States

Shaw calls the rules governing the resort to force a central element of international law, which is part of the framework of international law along with territorial sovereignty, independence, and the sovereign equality of States.[27] In theory, there is an absolute prohibition on the resort to war, which can be traced back to the 1928 General Treaty for the Renunciation of War.[28] However in practice, international law has developed in a way to allow for exceptions to this prohibition.

At present, the prohibition against the use of force is also enshrined in Article 2(4) of the United Nations Charter, often described as its cornerstone,[29] which dictates that 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or any manner inconsistent with the purposes of the United Nations'. This is subject to the qualification in Article 51 of the Charter, which establishes the ability of States to resort to 'self-defence' in the event of an 'armed attack'. In any case, it should be emphasized that the prohibition against the threat or use of force is a norm of customary international law (CIL) as well, co-existing with the norm in the Charter, and is of such importance that it is considered to be *jus cogens*.[30]

Subsequently, the International Law Commission has accepted that the prohibition against aggression is *jus cogens*,[31] with 'aggression' being defined 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.[32] Aggression is thus a particular form of use of force, and even in this form its absolute prohibition and elevation to the status of *jus cogens* is important for Third World States, given their constant battle to maintain their sovereignty and independence. Aggression is also a crime for which individual criminal responsibility may be imposed under the Rome Statute, pursuant to the 2010 Kampala review. Under the Rome Statute, Article 8 bis 1 provides that the crime of aggression 'means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political

[27] Note 1 above, p. 851.
[28] General Treaty for the Renunciation of War (27 August 1928); Conway W. Henderson, *Understanding International Law* (Wiley-Blackwell, 2010), p. 218.
[29] James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 2012, 8th edition), p. 746.
[30] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] I.C.J. Rep. 14 at [190], [195].
[31] I.L.C., 'Articles on the Responsibility of States for Internationally Wrongful Acts' UN Doc A/56/49, Commentary art. 26 85 [5], Commentary art. 40 112 [4].
[32] Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974) Annex art. 1.

or military action of a State, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. However, the jurisdiction of the International Criminal Court (ICC) over the crime of aggression was only activated by the adoption of a resolution of the Member States on the 15th of December 2017, with the resolution entering into force on the 17th of July 2018.[33] No person has been prosecuted for aggression as of yet, and therefore the practical effect of these new developments remains in doubt, especially in light of the fact that the ICC would lack jurisdiction over crimes involving a State which is not a party to the Rome Statute, which includes Russia, China and the United States.[34]

While such a crucial norm of international law should be developed and modified only with the contribution of all or at least the majority of States in the international community, the prohibition against the use of force, in practice, has been applied and developed maintaining the dominance of 'powerful' States. That is not to say that the exceptions sought by 'powerful' States to the prohibition are always considered to be established as law, and there is considerable debate on the matter.

Nevertheless, the disparity between theory and practice is such that two 'codes' have developed regarding the use of force in international law. One code, the 'institutional code', is formed through the judgements, resolutions and other decisions of international institutions through a 'structured, collective and deliberate process sharing a similar normative impulse' and is more restrictive of unilateral uses of force.[35] The other code, referred to as the 'State code', arises from the behaviour of States that regularly use military force to shape world affairs, and is more permissive.[36] In fact the exceptions which have been formed by this State code are such that some scholars have claimed that Article 2(4) has been virtually repealed.[37] States that regularly use military force are invariably those which have the capability, financially, to fund large militaries and the capacity to act transnationally, and thus Third World States which by necessity focus funding on development (or rather should do so) are generally not part of this group, and in contrast are often the victims of their actions. Accordingly, the 'State code' is very much a creation of 'powerful' States for their own benefit.

[33] 'Activation of the jurisdiction of the Court over the crime of aggression', Resolution ICC-ASP/16/Res.5 (ICC-ASP/16/20).
[34] 'The States Parties to the Rome Statute', *ICC*, available at: https://bit.ly/3QFJOU3 (visited 20 Nov. 2024).
[35] M. Hakmi, 'The Two Codes on the Use of Force' (2016) *European Journal of International Law*, p. 262.
[36] Ibid, p. 263.
[37] T. Franck, 'Who Killed Article 2(4)?' (1970) 64 *American Journal of International Law*, p. 809.

In legal terms, it is the so-called institutional code that is accepted as the 'law' on the use of force, and thus, in theory, 'powerful' States cannot exert as much pressure on this area of the law. However, in reality the institutional code has frequently attempted to accommodate the State code, and thus developments in the State code at the whim of 'powerful' States change the institutional code as well.[38] This has led to inequalities in the development of the law, allowing 'powerful' States to act in the territories of other sovereign States with seemingly legal justifications. In what follows, the inequalities perpetrated by these developments that have come to light in relation to the Russian invasion of Ukraine, will be highlighted focusing on the primary exception to the prohibition of self-defence, the role of the UNSC, humanitarian intervention and the responsibility-to-protect doctrine, and the treatment of nuclear weapons.

3.2.1 Self-defence

The most significant exception to the law prohibiting the use of force is self-defence, and this exception has been misused by 'powerful' States. The requirements for invoking this exception are often traced back to a letter written in 1837 by the US Secretary of State in correspondence with British authorities, where they have been identified as the existence of 'a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation' with the responding act of self-defence required to be reasonable and not excessive.[39] The application of this exception is often confusing given that Article 51 of the UN Charter limits it to instances where there is an armed attack against a State, without defining what would constitute an armed attack.[40] However the *Nicaragua* judgement proposed a scale and effects test to make the determination, and makes it clear that more than a mere use of force is required to trigger the right.[41] The Russian invasion of Ukraine, at least formally, was justified on the basis of self-defence under Article 51 of the Charter.[42] In what follows, Russia's justification will be examined in line with several purported expansions and interpretations previously championed by 'powerful' States in relation to the doctrine of self-defence.

[38] Note 35 above, p. 272.
[39] *The Caroline Case* (1837) 29 Brit and For St Papers; note 17 above, p. 227.
[40] *Oil Platforms* (Islamic Republic of Iran v United States of America) [2003] I.C.J. Rep. 161 at [51].
[41] Note 30 above, at [195].
[42] Marko Milanovic, 'ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe', *EJIL:Talk*!, available at: https://bit.ly/39dD3GP (visited 20 Nov. 2024)

A) Use of self defence against non-State armed actors

The moulding of this concept of self-defence to suit the needs of 'powerful' States is nowhere more evident than in the changes that occurred following 9/11. At the outset, the right of self-defence was only invoked in relation to attacks by States.[43] However, the day after 9/11, an attack perpetuated by a non-State actor, Al Qaeda, the UNSC adopted Resolution 1368 in which it specifically referred to the inherent right of individual or collective self-defence under the Charter,[44] which was reaffirmed by Resolution 1372.[45] This was followed by the acceptance by the international community of the United States' invasion of Afghanistan and Iraq.[46] As a result, the exception of self-defence was expanded to allow that large-scale attacks by non-State actors might amount to an armed attack within the meaning of Article 51 without any need to attribute the actions to a State party, and consequently justify use of force in the sovereign territory of another State which seemingly had little to do with the attack being responded to.[47] It is instructive to recollect at this juncture that just a year earlier in September 2000, the UNSC had rejected the claim that Rwanda could use defensive force against Hutu insurgents in the Democratic Republic of Congo, despite the cross-border activities of these insurgents.[48]

Subsequently, in the case of ISIL in Syria and Iraq, the UNSC called upon Member States 'that have the capacity to do so' to take all necessary measures, in compliance with international law, on the territory under the control of ISIL in Syria and Iraq, under the assumption that the territorial State did not have the capacity to combat ISIL.[49] In the case of Syria, while the government did give consent for intervention by Russia and Iran, consent was not given to the United States-led coalition, and the Syrian government denounced airstrikes conducted by this coalition as a violation of its sovereignty.[50] This has led to States, such as the United States and Russia, acting militarily in Syria and Iraq to the detriment of peoples living in them, who become 'collateral damage'.

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[43] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] I.C.J. Rep. 136 at [139]; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) [2005] I.C.J. Rep. 219 at [146], [147].
[44] UNSC Res 1368 (12 September 2001) UN Doc S/Res/1368.
[45] UNSC Res 1372 (28 September 2001) UN Doc S/Res/1372.
[46] Note 29 above, p. 772.
[47] Note 1 above, p. 865.
[48] UNSC Res 1304 (16 June 2000) UN Doc S/Res/1304 2.
[49] UNSC Res 2249 (20 November 2015) UN Doc S/Res/2249 [5].
[50] Raphael Van Steenberghe, 'From Passive Consent to Self-Defence after the Syrian Protest Against the US-led Coalition', *EJIL:Talk!*, available at: https://www.ejiltalk.org/13758-2/ (visited 20 Nov. 2024).

This expansion of the self-defence exception did contribute to the Russian invasion of Ukraine as well, given that subsequent to the UNSC's liberal interpretation which allowed for action to be taken by one State, in response to attacks against it by non-State armed actors operating on the territory of another State, led to the toleration of Russia's operations against Chechen rebels in Georgia in 2007, despite the fact that Georgia had been trying to combat these actors themselves.[51] This was followed by Russia invading Georgia in 2008 in a manner similar to its invasion of Ukraine, to ostensibly prop up a so-called separatist region but allegedly to annex Georgian territory, a strategy later repeated in the Donbas and Luhansk regions of eastern Ukraine.[52] Accordingly, the toleration of Russia's actions in Georgia likely emboldened the State to engage in similar actions in Ukraine.

This exception still polarizes First World and Third World States, and this became evident in 2021 when the UNSC was called upon to consider the legality of airstrikes conducted by the United States against positions of Iraqi militias in Syria. In this case the majority of the States which opposed the legality of this action in the absence of consent by the Syrian State were Third World States while those who supported the action constituted a majority of First World States.[53]

This expansion of the self-defence exception is thus dangerous for Third World States, considering that it has facilitated armed intervention by 'powerful' States into the sovereign territory of such States, without consent.

B) Doctrine of anticipatory self-defence

The institutional code, adapting itself to the State code, was also evident in the formation of the doctrine of anticipatory self-defence. This doctrine was expressly rejected by the ICJ in the *Armed Activities* case, with the Court noting that Article 51 does not allow the use of force by a State to protect perceived security interests.[54] However, in 2003 the US justified the invasion of Iraq implicitly on this ground.[55] Subsequently, anticipatory self-defence has been tolerated. For example, in 2007, Israel reportedly attacked a partially constructed

[51] Note 35 above, p. 280.
[52] Patrick Kingsley, 'Ukraine Reminds Georgia of Its Own War with Russia. That Creates a Dilemma', *The New York Times*, available at: https://nyti.ms/3rYnLwa (visited 20 Nov. 2024).
[53] Adil Haque, 'Self-Defence Against Non-State Actors: All Over the Map', *Just Security*, available at: https://bit.ly/3y1Ro3B (visited 20 Nov. 2024).
[54] Note 43 above, at p. 145-146.
[55] Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), p. 170.

nuclear reactor in Syria without censure, despite the fact that the UNSC had condemned a very similar operation in 1981.[56]

In the Russian invasion of Ukraine as well, several arguments related to anticipatory self-defence were floated by the Russian authorities and adopted by allies of the Russian State. The first was related to the expansion of NATO and the second was the alleged presence of nuclear and/or chemical weapons in Ukraine.[57] The first justification presented by Russia as authorizing its resort to Article 51 was the expansion of NATO, which would constitute a threat to the existence and sovereignty of the Russian State.[58] The second argument which appeared later on in the invasion is ironically similar to the United States' justification in invading Iraq, invoking memories of the so-called 'Weapons of Mass Destruction' (WMD) which were ultimately found to be non-existent. In both cases, absolutely no evidence was produced, nor has it been produced since, regarding the existence of the overwhelming threat (of WMD) referred to, though it has resulted in catastrophic consequences for the people living in the victim States.

3.2.2 The role of the UNSC

The UNSC has gained importance as an arbiter of the legality of the use of force in international law. Article 42 of the Charter allows the UNSC to permit States to use force when it deems other measures to be inadequate or have proved to be inadequate. Tellingly, the UNSC has only explicitly authorised the use of force on two occasions, the first was to allow the United States to put together a coalition to push back the North Korean Army beyond the 38th parallel,[59] and the second was to authorize the United States-led coalition's invasion of Kuwait in order to expel Iraq from Kuwait.[60] This unfortunately put an end to an existing argument that the UNSC's failure to provide authorization would allow for the United Nations General Assembly (UNGA) to use 'Uniting for Peace' resolutions to authorize force.[61] Subsequent implicit authorization was utilized by the United Kingdom and United States for air strikes on Iraqi military installations supposedly in response to breaches by Iraq of the WMD inspection

[56] UNSC Res 487 (19 June 1981) UN Doc S/Res/487; ibid.
[57] Mathew Goldenberg and William C. Potter, 'Russia Misinformation About Ukrainian Radiological Weapons Capabilities and Intentions', *Nonproliferation.org*, available at https://bit.ly/3s1K5VT (visited 20 Nov., 2024).
[58] Elizabeth Wilmshurst, 'Ukraine: Debunking Russia's Legal Justifications', *Chatham House*, available at https://bit.ly/38BmofZ (visited 20 Nov. 2024).
[59] UNSC Res 83 (27 June 1950) UN Doc S/Res/83.
[60] UNSC Res 678 (29 November 1990) UN Doc S/Res/678.
[61] Note 35 above, p. 268.

regime,[62] and to 'facilitate the departure' from Haiti of the military leadership in the country and restore the democratically elected president.[63]

As a result, the power to authorize the use of force has been left in the hands of a body controlled by the five permanent Member States which have veto power, being the US, Russia, China, France and the United Kingdom. All of these States have perpetuated some form of colonialism or neo-colonialism, and continue to exert coercive power over Third World States. Thus, Third World States are effectively cut out of this process of authorizing force even if they are members of the UNSC, as it is the veto-holding States that actually have the power of authorization.

The absurdity of bestowing veto power upon a handful of 'powerful' States in the UNSC lies in the fact that it is these States that engage, more often than not, in the use of military force against other States. In such situations, the UNSC is rendered toothless as both the authorization of use of force as well as the condemnation of such actions can be blocked by these States. This became evident, again, when the Russian invasion of Ukraine occurred, where the UNSC has been prevented from doing anything meaningful due to Russia's veto power.[64] This is despite the fact that Russia appears to have violated both the UN Charter and a *jus cogens* norm.[65] The UNSC itself has acknowledged that the lack of unanimity among its permanent members 'prevented it from exercising its primary responsibility for the maintenance of international peace and security'.[66]

Thus, the veto power in the Charter has allowed permanent members to circumvent foundational norms of international law. The legality of this ability however is questionable, and one course of action suggested by scholars at the time was for the UNGA, under Article 96(1) of the Charter, to request an Advisory Opinion from the ICJ to determine the legality of the ability of the veto to trump a *jus cogens* norm.[67] While the ICJ is generally conservative in making determinations of the law, there was a likelihood that this possibility would have been considered by the Court given that the provisional measures judgement in relation to the case filed by Ukraine against Russia was observed to have 'gone out of its way to make points it was not legally required to make but were required

[62] UNSC Res 687 (3 April 1991) UN Doc S/Res/687; UNSC Res 1154 (2 March 1998) UN Doc S/Res/1154.
[63] UNSC Res 940 (31 July 1994) UN Doc S/Res/940.
[64] Vanessa Romo, 'Russia Vetoes UN Security Council Resolution that Denounces Its Invasion of Ukraine', *npr*, available at: https://n.pr/3vpRjF4 (visited 20 Nov. 2024).
[65] Jennifer Trahan, 'Aggression and the Veto', *OpinioJuris*, available at: https://bit.ly/39riCGHn (visited 20 Nov. 2024).
[66] UNSC Res 2623 (27 February 2022) UN Doc S/Res/2623.
[67] Note 65 above.

by the necessity of the moment'.[68] However, this course of action was not followed, perhaps because other States holding veto power were unwilling to compromise the veto. This is further evident in the fact that while Russia's use of the veto in the UNSC has been criticized, there have been no calls for abolishing the veto power altogether by the veto holding members.

In response, the UNGA in April 2022 passed a resolution which would trigger a debate in the UNGA whenever any of the five permanent members used the veto, thus allowing for some degree of scrutiny.[69] However, this mechanism falls short of actually negating the veto or requiring the veto-wielding States to defend such use.

The UNSC's role within the regime of international law governing the use of force cripples the United Nations from taking any meaningful action to combat illegal use of force by veto-holding members. It would fairer and reasonable to make the UNGA, where all States are equal in terms of voting power,[70] to make decisions in this regard. This would also grant Third World States a say in how international law and international institutions would respond to the use of force, and prevent 'powerful' States with imperialist agendas from maintaining a chokehold on such authorisations. This is not to say that Third World States would always vote objectively. Sri Lanka's abstention in the 'Uniting for Peace' resolution for Ukraine is a good example of how such votes themselves are influenced by allegiances to 'powerful' States.[71] However, by and large, allowing for Third World States to have equal power in making such decisions would be a check against 'powerful' States seeking to exploit the law on the use of force.

3.2.3 Humanitarian intervention and the responsibility to protect

Another example of authorization to use force arising from the State code is the doctrine of 'humanitarian intervention', also modified as 'Responsibility to Protect' (R2P), which justifies the use of force.[72] The R2P doctrine relates to the protection of vulnerable populations from governments that expose them to war crimes, genocide, or crimes against humanity.[73] This doctrine was used in the NATO bombing campaign against Serbia in an attempt to stop Serbian attacks

[68] Note 42 above.
[69] UNGA Res 76/262 (26 April 2022) UN Doc A/RES/76/262.
[70] United Nations Charter, (adopted 20 December 1965, entered into force 31 August 1965) 1 UNTS XVI art. 27.
[71] Sriram Lakshman, 'UN General Assembly Votes to Suspend from Human Rights Council; India Abstains from Vote', *The Hindu*, available at: https://bit.ly/3MJ4LKh (visited 20 Nov. 2024).
[72] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1; note 51, p. 158.
[73] Ibid, p. 174.

on civilians in Kosovo, which was actually opposed by Russia and China at the time.[74] The crucial factor here is that while the NATO intervention was not condemned widely, though criticized by a few States, previous invocations of the exception by India in 1971, Vietnam in 1978, and Tanzania in 1979 were rejected by other State parties.[75] In fact, India was sanctioned by the United States for its intervention in East Pakistan (later Bangladesh) and so was Vietnam for ending rule by the Khmer Rouge regime in Cambodia.[76] Thus, attitudes changed in relation to the doctrine only after it was utilized by a coalition of 'powerful' States to their own advantage.

Russia, in justifying its use of force under Article 51 of the Charter, invoked the right of collective self-defence after recognizing the separatist Donbas and Luhansk regions as independent States, on the basis that genocide was being conducted by the Ukrainian government against people in these regions.[77] Another claim which has been consistently made by the Russian State is the need to 'denazify' Ukraine, in an attempt to fall back on a justification for the use of force which had been successfully used by the Soviet Union during World War II.[78] Though not explicit, this justification does draw from the doctrine of humanitarian intervention and R2P. While the claims may not be substantiated in fact, the Russian State has been able to use this justification to at least uphold a veneer of legality for its actions.

Particularly the use of 'denazification' as a justification for the use of force has also been compared to the United States' justification for its invasion of Iraq, which purported to rid Iraq of the influence of the Ba'ath party.[79] This justification has also been echoed by Israel in recent months, with claims being made that the use of force (and the consequent mounting civilian casualties) by the Israeli State is simply to rid Gaza of Hamas who have been dubbed the 'new Nazis' by the Israeli Prime Minister as well as Germany's Chancellor.[80] This shows how these grounds can be manipulated by 'powerful' States in order to interfere within the sovereign territory of another State without consent, and, in fact, in direct opposition to the government of that State, thus allowing for global

[74] Note 29 above, p. 230-231.
[75] Note 18 above, p. 232; note 31 above, p. 276; M. Dixon, R. McCorquodale and S. Williams, *Cases and Materials on International Law* (Oxford University Press, 2016, 6th edition), p. 627.
[76] Note 35 above, p. 276-277.
[77] Note 58 above.
[78] A. Kotova and N. Tzouvala, 'In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law' (2022) 116 *AJIL*, p. 714.
[79] Ibid.
[80] Sarag Fortinsky, 'Netanyahu labels Hamas 'the new Nazis' alongside Germany's Scholz', The Hill, available at: https://thehill.com/policy/international/4261308-netanyahu-labels-hamas-the-new-nazis-alongside-germanys-scholz/ (visited 20 Nov. 2024)

imperialism.[81] As such while the legality of this exception has not been concretely established, the fact that it is being consistently utilized may ultimately lead to it becoming a part of Customary International Law (CIL), if it has not already.

Conversely, there have also been calls for other 'powerful' States to establish a 'no-fly zone' over Ukraine as a form of assistance.[82] This action also has a precedent in the doctrine of humanitarian intervention as it was done in 1991 over Northern Iraq by the United Kingdom and the United States, and this zone lasted till 2003 without criticism from the UNSC or UNGA.[83] However, predictably, given that it is another 'powerful' State who is perpetrating invasion in Ukraine, the United States and other NATO countries have been reluctant to engage in this action.[84] While it is probably for the best to avoid escalation of the conflict, this shows that the 'humanitarian' intervention doctrine is not very effective to protect Third World people or even people of States deemed 'less powerful' when they are subject to invasion by a 'powerful' State.

3.2.4 Nuclear weapons

While the ICJ has great potential to restrict legal exceptions to the prohibition of the use of force and develop international law in a manner which protects the independence and sovereignty of Third World States, the Court has allowed for inequality in military force to exist. This was illustrated in the Court's *Advisory Opinion to the General Assembly on the Legality of the Threat or Use of Nuclear Weapons* in 1996.[85] Rather than acknowledging the existential threat such weapons posed to all States, and the fact that access to such weapons was and still is inherently unequal considering that Third World nations in particular lack the technical and financial capabilities to develop them, and moreover are often not allowed by 'powerful' States to develop them, the ICJ did not deem the possession and use of such weapons as illegal. The Court ultimately held that the possession of nuclear weapons could not be considered a threat or use of force, and thus would not always be illegal, and legality would depend on whether it is directed against the territorial integrity or political independence of a State or against the purposes of the UN Charter or whether it would violate the principles of necessity and proportionality.[86]

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[81] B.S. Chimni, 'Capitalism, Imperialism and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law*, p. 31.

[82] Jorge Liboreiro, 'Why Doesn't NATO Impose a No-Fly Zone over Ukraine?', *euronews*, available at: https://www.euronews.com/my-europe/2022/03/09/why-doesn-t-nato-impose-a-no-fly-zone-over-ukraine (visited 20 Nov. 2024).

[83] Note 17 above, p. 320.

[84] 'US and UK Rule Out No-Fly Zone over Ukraine, Again', *Al Jazeera*, available at: https://bit.ly/3EZnuyg (visited 20 Nov. 2024).

[85] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] I.C.J. Rep. 226.

[86] Ibid [48].

The implication of this advisory opinion is that the use of nuclear weapons could in certain circumstances be legal. What such circumstances would be remain undefined 28 years later in the absence of a test case. In defence of the ICJ, the question posed to it by the UNGA - whether 'the threat or use of nuclear weapons in any circumstance permitted under international law' - may be considered too broad and abstract to have been answered satisfactorily.[87]

Judge Weeramantry's dissent in this case is more nuanced and reflective of the real concern which is inherent in the very concept of nuclear weapons. Judge Weeramantry determined that nuclear weapons would be illegal in any circumstances as it violates the fundamental principles of international law.[88] His separate opinion acknowledged the fact that nuclear weapons have the potential to destroy all civilizations and would cause transnational damage and, most importantly, that nuclear weapons violate the sovereignty of other countries who have in no way consented to the intrusion upon their fundamental sovereign rights which is implicit in the use of nuclear weapons.[89]

Nevertheless, the consequences of the ICJ's determination, that nuclear weapons could legitimately be used in conformity with international law regulating the use of force, is felt keenly in relation to the Russian invasion of Ukraine, given that Russia has threatened to use nuclear weapons against States which directly support Ukraine, and even Ukraine itself.[90] While this may be considered an example of the illegal threat of force envisaged by the ICJ, there is nothing that can be done considering that States were allowed to possess nuclear weapons in the first place. This entire threat could perhaps have been avoided if the ability of States to possess nuclear weapons was deemed illegal in the first place. While the international community has supposedly engaged in de-nuclearisation, 'powerful' States, including all five permanent members of the UNSC, possess nuclear weapons.[91] Thus, Russia has managed to effectively prevent any possibility that another State would intervene in the conflict merely by virtue of the fact that it possesses weaponry that is so overwhelmingly destructive although refraining from action may result in colossal death and destruction in the Ukrainian State.

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[87] Christopher Greenwood, 'The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law' (1997) 316 *International Review of the Red Cross*, p. 64.
[88] Note 85 above, p. 433.
[89] Ibid, p. 495.
[90] Note 14 above.
[91] James Eagle, 'Animated Chart: Nuclear Warheads by Country (1945-2022)', *Visual Capitalist*, available at: https://bit.ly/3vroPuL (visited 20 Nov. 2024).

4 Transnational Corporations and the Response to the Russian Invasion

Another aspect of the prohibition on the use of force, which shows that it preserves and protects the ability of 'powerful' States to assert their dominance in covert ways, is that it is confined solely to armed force used directly or indirectly and does not extend to political or economic coercion.[92] The principal reason for this was that Articles 2(4) and 51 were drafted in the post-WWII context and by drafters from 'powerful' States who were only concerned regarding armed force.[93]

The ability of 'powerful' States to wield economic force effectively has become evident in the response to the Russian invasion of Ukraine as well, especially through the actions of private transnational companies. TWAIL recognizes that transnational corporations are one faction of the transnational capitalist class which perpetuates the new imperial social formation.[94] Such corporations enable dominant States in which they are based to exert power beyond the boundaries of the State given that corporations are limited only by market and not national boundaries.[95]

In line with the sanctions imposed by States, a large number of transnational corporations have pulled out of Russia, not out of any sense of moral or legal obligation but, likely, in order to retain the larger markets they have in the First World States backing the invasion and the sanctions.[96] These transnational corporations are thus guided by market forces such as profit, and would only act if the States containing their biggest markets would compel them to act. In such a situation, it is highly unlikely that these companies would react in the same way if these 'powerful' States did not see fit to retaliate against the illegal use of force.

No companies pulled out of the US following its invasion of Iraq or from Israel in response to its actions in Palestine. This demonstrates the capacity of 'powerful' States to wield economic force in addition to military force.

In this light, more consideration should be given in international law regarding how the use of economic force can have deleterious effects on Third World or 'developing' nations, which are already at an economic disadvantage.

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[92] Note 29 above, p. 747.
[93] Ibid, p. 748.
[94] Note 81 above, p. 19.
[95] Note 6 above, p. 29.
[96] Andrew Sanger, 'Piercing the State's Corporate Veil', *EJIL:Talk!*, available at: https://bit.ly/3OW1cCm (visited 20 Nov. 2024).

5 International Law on the Use of Force as Protection

TWAIL does not reject international law in its entirety despite the latter's culpability in preserving inequalities in the world order; rather, it deems international law as having the potential to 'make a difference',[97] by limiting and resisting power.[98] Thus, international law can be seen as attempting to provide solutions to global problems.[99] The potential of the prohibition on the use of force to protect 'less powerful', and thus Third World States and people from the actions of 'powerful' States was illustrated in the International Court of Justice's *Advisory Opinion in the Construction of a Wall*. Here, the Court reiterated the fact that no territorial acquisition resulting from the threat or use of force shall be recognized as legal.[100] The Court also asserted that the inadmissibility of territory acquired by war was CIL, and rejected Israel's arguments that its actions were justified under Article 51.[101] The Court made a similar determination regarding East Timor which had been captured by Indonesia through use of force with the tacit support of the United States.[102]

As such, the prohibition of the use of force at its core offers protection for Third World States and its peoples, with further interpretation of this doctrine as enshrined in the UN Charter emphasizing this potential. For example, the 1965 Declaration of the Inadmissibility of Intervention in the Domestic Affairs of States[103] provides that 'no State has the right to intervene, directly or indirectly for any reason whatsoever in the internal or external affairs of any other State'. This was followed by the 1970 Declaration on Principles of International Law which elaborated on the prohibition of force by alluding to the crime of aggression, reiterating that States must not threaten or use force to deprive people of their right of self-determination and independence.[104] Accordingly, aspects of the prohibition of the use of force do relate, in theory, to preventing States from engaging in colonial and neo-colonial endeavours. At the very least, it would provide other States with a justification with which to condemn the actions of 'powerful' States, and strip away the 'moral cloaks' they cast over their interventions to justify them.[105]

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[97] Note 22 above, p. 405.
[98] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005), p. 312.
[99] Note 81 above, p. 39.
[100] Note 43 above, at [86].
[101] Ibid [116], [138].
[102] *Case Concerning East Timor* (Portugal v Australia) [1995] I.C.J. Rep. 90.
[103] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965).
[104] Ibid.
[105] Note 28 above, p. 229.

Thus, this law does in fact seek to protect Third World States from 'powerful' States, and therefore Third World States should be compelled to resist any efforts by 'powerful' States to expand and add exceptions to this doctrine, recognizing the role that the practice and *opinio juris* of Third World States can play in shaping international law. Accordingly, Third World States should be more proactive in efforts to present their own views of the law and highlight the detriments that can occur if the law related to the prohibition on the use of force is subject to exceptions, especially through the UNGA.

6 Conclusion

While a detailed consideration of the use of force by Israel in Gaza and the West Bank purportedly in the exercise of the right of self-defence in response to the attacks by Hamas on the 7th of October 2023 is beyond the scope of this article, this event has renewed the discourse on the justifications for use of force, and has raised further concerns as to how the community of nations reacts differently to use of force depending on the user-State. States in this context would do well to keep in mind that it is not only State action, but also inaction and acquiescence which may contribute to the development of CIL.[106]

Viewing the Russian invasion of Ukraine through the lens of TWAIL shows that international law, particularly on the use of force, has developed in a way that favours more 'powerful' States, and has thereby weakened in response to their needs and wants. Unfortunately, in the use of force within the international community, it is the rule of the strong which has prevailed over the rule of law.[107] The cumulative impact of the actions of 'powerful' States, through the years, has in fact led to a great deal of confusion regarding the efficacy of the prohibition against the use of force, and its adequacy to protect the sovereignty and independence of Third World States and their peoples. However, as the regime of international law on the use of force is vital for the protection of Third World States, these States must be proactive in using avenues available to them to establish state practice to combat the creation of exceptions to the use of force.

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[106] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (United Nations, 2018), Conclusion 6.
[107] Conway W. Henderson, *Understanding International Law* (Wiley-Blackwell, 2010), p. 229.