

Near-border mobilization and anticipatory self-defense in the context of international armed conflict law: A case study of border tensions prior to the 2022 Russian invasion of Ukraine

Alanna Brannam[†]

I.	Introduction	319
II.	Statement of the Case	320
III.	Background Law	325
	A. Jus in bello and jus ad bellum	326
	B. Military necessity	326
	C. Imminence	328
IV.	Analysis	329
	A. Self-defense	330
	B. Armed attacks	330
V.	Conclusion	333
VI.	Appendix	335

Part I: Introduction

In what has been characterized as a “Cold War Reboot,” the Russo-Ukrainian War has captivated the world.¹ This ongoing conflict between the Russian Federation [hereinafter Russia] and Ukraine started in 2014, when Russia annexed Ukraine’s Crimean Peninsula.² In the period between 2014 and February 24, 2022, the conflict was not characterized by combat and battles, but rather

[†] J.D. Candidate, 2023, University of North Carolina School of Law; Online Editor, North Carolina Journal of International Law, 2022-23.

¹ Mark Gongloff, *Putin Launches an Unwelcome Cold War Reboot*, BLOOMBERG (Jan. 13, 2022), <https://www.bloomberg.com/opinion/articles/2022-01-13/putin-s-ukraine-threat-is-an-unwelcome-cold-war-reboot> [https://perma.cc/VN4T-R7X7].

² *Timeline: The Events Leading up to Russia’s Invasion of Ukraine*, REUTERS (Mar. 1, 2022), <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/> [https://perma.cc/H7XL-DEJJ].

standoffs and tension between the two states.³ In 2021, tensions heightened even more, and one of the conflict's defining aspects became Russia's mobilization of troops and weapons near the Ukraine-Russia border. Although thousands of troops and supplies were amassed, the two states avoided large-scale violence until the Russian invasion in 2022. Thus, a key question that arose when considering the Ukraine-Russia tensions during the period between the annexation of 2014 and February 24, 2022, was: did Ukraine have the right to defend itself in anticipation of a relatively likely attack from Russia?

This Note will explore the facts and circumstances of the Ukraine-Russia conflict in Part II. Part III will examine the background law governing the conflict, with a focus on near-border mobilization. Part IV will provide a legal analysis of the conflict to date. Finally, this Note will conclude that Ukraine did not have the ability to commit an act of self-defense in response to near-border mobilization, since near-border mobilization alone is not characterized as an act of aggression.

Part II: Statement of the Case

It is critical to include background information on events leading up to the mass mobilization of Russian troops near the Ukrainian border. While it may seem like the war began with Russia's invasion of Ukraine in 2022, the Russo-Ukrainian War actually began in 2014; in that year, Russian forces formally annexed Crimea in a remarkable show of force.⁴ After the annexation, the United Nations and many other states, including the United States, continued to consider Crimea as a Ukrainian territory.⁵ Tensions between the two states remained steady following the annexation of Crimea, and continued to heighten starting in 2021, largely due to the mobilization of troops and weapons near the Russo-Ukrainian border.⁶

³ *See id.*

⁴ *See* Michael Kofman et al., *Lessons from Russia's Operations in Crimea and Eastern Ukraine* 11, RAND CORP., https://www.rand.org/content/dam/rand/pubs/research_reports/RR1400/RR1498/RAND_RR1498.pdf [https://perma.cc/3GR6-YDDW] (last visited Apr. 17, 2022).

⁵ *See* G.A. Res. 75/34(a), at 11 (Dec. 7, 2020).

⁶ *See* Madeline Fitzgerald, *Russia Invades Ukraine: A Timeline of the Crisis*, U.S. NEWS (Feb. 25, 2022) <https://www.usnews.com/news/best-countries/slideshows/a-timeline-of-the-russia-ukraine-conflict?slide=9> [https://perma.cc/TRH8-VRRN].

The president of Russia, Vladimir Putin, “continue[d] to threaten an invasion of Ukraine with a major military buildup near the Russian-Ukrainian border and aggressive language.”⁷ It is important to note that this threat was not solely verbal; military actions accompanied Putin’s words. Russian military forces “deployed offensive weapons and systems within striking distance of Ukraine, including main battle tanks, self-propelled howitzers, infantry fighting vehicles, multiple launch rocket systems, Iskander short-range ballistic missile systems, and towed artillery.”⁸ The two figures in the appendix of this Note, 1(a) and 1(b), depict the mobilization of these military items near the Russian-Ukrainian border.

There are two international bodies at the forefront of handling this conflict: the United Nations and the North Atlantic Treaty Organization [NATO].⁹ Both Russia and Ukraine are members of the United Nations, and Russia is one of five permanent chairs of the United Nations Security Council.¹⁰ With the permanent seat comes the ability for Russia to veto any Security Council actions.¹¹ Therefore, it is reasonable to characterize the United Nations as a forum for diplomacy, rather than a body with the ability to use force to prevent or quell the Russo-Ukrainian War. Any actions against Russia would almost certainly be vetoed by Russia.

The Minsk Accords were “signed in 2015 by representatives of

⁷ Seth G. Jones & Philip G. Wasielewski, *Russia’s Possible Invasion of Ukraine*, CTR. FOR STRATEGIC & INT’L STUDS. (Jan. 13, 2022), <https://www.csis.org/analysis/russias-possible-invasion-ukraine> [https://perma.cc/K9DD-X7SK].

⁸ *Id.*

⁹ It is also important to mention the Organization for Security and Co-Operation [OSCE] in Europe, of which both Russia and Ukraine are members. The OSCE is also involved with the conflict between Russia and Ukraine; this Note will focus on the UN and NATO to focus on international reactions to the conflict outside of Europe. See ORG. FOR SEC’Y & COOP. IN EUR., *Participating States*, <https://www.osce.org/participating-states> [https://perma.cc/G44J-ASCL] (last visited Jan. 25, 2023); ORG. FOR SEC’Y & COOP. IN EUR., *Joint Statement by OSCE Chairman-in-Office Rau and Secretary General Schmid on Russia’s Launch of a Military Operation in Ukraine* (Feb. 24, 2022), <https://www.osce.org/chairmanship/512890> [https://perma.cc/YA5H-ZBEY].

¹⁰ *Current Members*, UNITED NATIONS SEC’Y COUNCIL, <https://www.un.org/securitycouncil/content/current-members> [https://perma.cc/R8Y8-N6E2] (last visited Apr. 16, 2022).

¹¹ *Voting System*, UNITED NATIONS SEC’Y COUNCIL, <https://www.un.org/securitycouncil/content/voting-system> [https://perma.cc/CU57-QRJP] (last visited Jan. 10, 2023).

the Organization for Security and Cooperation in Europe (OSCE), the Russian Federation, Ukraine and leaders of two pro-Russian separatist regions – [and] outline a series of political and military steps to settle the fighting between Government forces and separatists in eastern Ukraine.”¹²

Progress in implementing the Minsk Accords, however, remained slow. Since the signing and Security Council endorsement in 2015, tensions between Russia and Ukraine remained, and escalated into war in February 2022. Furthermore, it is critical to note that Russia is not formally named in the Minsk Accords.¹³ Thus, there exist claims that Moscow could be “sidestepping its obligations” due to this omission.¹⁴ The fact that Russia is not directly named is a glaring example of the United Nations’ hesitancy to reprimand or condemn the country directly. On the other hand, as described by the United Nations, “Kyiv’s obligations are ignored as it stubbornly avoids direct negotiations, fails to restore economic links between the two countries, and refuses to provide for the special status of certain regions, as mandated by the agreements.”¹⁵ Such criticism of Ukraine by the United Nations is notable with hindsight, particularly since Ukraine has suffered full-scale invasion from Russia in addition to occupation of a significant portion of the country.

In conclusion, the United Nations was focused on facilitating discussions between Russia and Ukraine, which clearly failed to prevent a Russian invasion. It is reasonable to state that any United Nations Security Council motion against the interests of Russia would have been swiftly vetoed by Russia (if not other nations with veto power, such as China). Since the United Nations Security Council is the primary avenue for the authorization of United Nations force, diplomatic solutions were the focus for Russo-Ukrainian relations at the United Nations. Such solutions were eventually proven to be ineffective in preventing war.

NATO is the other primary international body that is relevant to the Russo-Ukrainian conflict. Without the politics of the United

¹² *Ukraine Crisis: UN Political Affairs Chief Calls for ‘Maximum Restraint’*, UN NEWS (Feb. 17, 2022), <https://news.un.org/en/story/2022/02/1112202> [https://perma.cc/JGF3-FTWQ].

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Id.*

Nations and Security Council, NATO's role and position in international relations takes a different form. It is important to note that although neither Russia nor Ukraine are NATO member states, the organization took a stance on relations between the two, stating that NATO's purpose "is to guarantee the freedom and security of its members through political and military means."¹⁶ Politically, "NATO promotes democratic values and enables members to consult and cooperate on defence and security-related issues to solve problems, build trust and, in the long run, prevent conflict."¹⁷

As for NATO military matters, "[i]f diplomatic efforts fail, [NATO] has the military power to undertake crisis-management operations. These are carried out under the collective defence clause of NATO's founding treaty – Article 5 of the Washington Treaty or under a United Nations mandate, alone or in cooperation with other countries and international organisations."¹⁸ Collective defence is a foundational element of NATO. As described by the Organization, "[t]he principle of collective defence is at the very heart of NATO's founding treaty. It remains a unique and enduring principle that binds its members together, committing them to protect each other and setting a spirit of solidarity within the Alliance."¹⁹ Furthermore, "[c]ollective defence means that an attack against one Ally is considered as an attack against all Allies."²⁰ Additionally, "NATO has taken collective defence measures on several occasions, including in response to the situation in Syria and the Russian invasion of Ukraine."²¹

The fact that NATO took collective defense measures in the Russo-Ukrainian conflict before the invasion in February 2022 is noteworthy, particularly when contrasted with the lack of collective defense measures by the United Nations. However, it is important to note that the measures NATO took before the invasion were more political than military in nature. In a statement on February 24, 2022, NATO explained:

¹⁶ *What is NATO?*, N. ATL. TREATY ORG., <https://www.nato.int/nato-welcome/index.html> [<https://perma.cc/NPR3-6WR2>] (last visited Feb. 23, 2022).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Collective Defence and Article 5*, N. ATL. TREATY ORG. (Sept. 20, 2022), https://www.nato.int/cps/en/natohq/topics_110496.htm [<https://perma.cc/V9Z9-5MZL>].

²⁰ *Id.*

²¹ *Id.*

Russia's actions pose a serious threat to Euro-Atlantic security, and they will have geostrategic consequences. NATO will continue to take all necessary measures to ensure the security and defence of all Allies. We are deploying additional defensive land and air forces to the eastern part of the Alliance, as well as additional maritime assets. We have increased the readiness of our forces to respond to all contingencies.²²

It is clear that the measures taken at that point were not focused on deterrence and were non-military in nature. However, since the invasion of Ukraine, NATO assistance of the country has become more concrete in the form of sanctions and providing strategic advice. As described by NATO:

Since Russia's full-scale invasion of Ukraine in February 2022, Allies have imposed severe sanctions on Russia to help starve the Kremlin's war machine of resources. Allies continue to refine these sanctions in order to increase the pressure on Moscow. These efforts will make it harder for Russia to rebuild its tanks, manufacture missiles and finance its war. [. . .] NATO Allies have significantly stepped up their bilateral support and provision of weapons and equipment, helping Ukraine to uphold its right of self-defence, which is enshrined in the United Nations Charter. Allies are also providing substantial financial and humanitarian aid, including by hosting millions of refugees in countries all across the Alliance. NATO Allies have agreed to step up and sustain their support for as long as necessary, so that Ukraine prevails.²³

These statements are strong and convey the message that NATO is ready to escalate its methods in response to an escalation of the conflict; it "has standing forces on active duty that contribute to the Alliance's collective defence efforts on a permanent basis."²⁴ It is important to acknowledge that NATO continually refers to its allies when speaking about providing concrete military and financial aid,

²² *Statement by the North Atlantic Council on Russia's Attack on Ukraine*, N. ATL. TREATY ORG. (Feb. 24, 2022), https://www.nato.int/cps/en/natohq/official_texts_192404.htm?utm_source=twitter&utm_medium=smc&utm_id=20224%2Bukraine%2Bnac%2Bstatement [https://perma.cc/FW66-PZ8Z].

²³ N. ATL. TREATY ORG., *Relations with Ukraine* (Oct. 28, 2022), https://www.nato.int/cps/en/natohq/topics_37750.htm? [https://perma.cc/X65H-8H5F].

²⁴ N. ATL. TREATY ORG., *Collective Defence and Article 5* (Sept. 20, 2022), https://www.nato.int/cps/en/natohq/topics_110496.htm#:~:text=NATO%20has%20standing%20forces%20on,efforts%20on%20a%20permanent%20basis [https://perma.cc/2AWG-F4VK].

as seen in the previous quote. These forms of assistance do not derive from the Organization itself; however, NATO does provide a forum for military and political cooperation and the ability for Ukraine allies – the United States included – to display unity and force.

In conclusion, NATO can step in militarily to respond to an escalation in the Russo-Ukrainian conflict under the collective defense doctrine. This evokes the underlying question of this Note: when would military force against Russia be authorized, and does Russian mobilization near the border allow Ukraine – or an ally, such as NATO member nations – to use preemptive force?

Part III: Background Law

To accurately comprehend the Russo-Ukrainian conflict, one must first understand the governing background law. The relevant legal doctrines stem from both international law and the law of armed conflict. This section will focus on the following principle of governing law: anticipatory self-defense.

First, it is critical to establish the applicability of international armed conflict law to the Russo-Ukrainian conflict. Armed conflict “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²⁵ Armed violence has occurred throughout the conflict between Russia and Ukraine, even before the full-scale invasion of Ukraine.²⁶

Additionally, there is no minimum standard for the length or scale of the conflict to qualify as an armed conflict. “Common Article 2 [of the Geneva Convention] applies to any conflict between two states involving their armed forces, no matter how minor or short-lived, even if one or both states deny the existence

²⁵ LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR, CONCISE SECOND EDITION 69 (Wolters Kluwer, 2021).

²⁶ See *The Overview of the Current Social and Humanitarian Situation in the Territory of the Donetsk People’s Republic as a Result of Hostilities Between 23 and 29 January 2021*, HUM. RTS. OMBUDSMAN IN THE DONETSK PEOPLE’S REPUBLIC (Jan. 29, 2021), <http://eng.ombudsman-dnr.ru/the-overview-of-the-current-social-and-humanitarian-situation-in-the-territory-of-the-donetsk-peoples-republic-as-a-result-of-hostilities-between-23-and-29-january-2021/> [https://perma.cc/GGZ4-EXUA].

of the conflict.”²⁷ This characterization is important, as there are different norms for different types of conflicts. Examples of other conflicts include civil wars and conflicts between non-state actors of different states. However, the military forces of both Russia and the Ukraine are indisputably involved in this conflict, and since both are states, the Russo-Ukrainian War is characterized as an international armed conflict, and the following international armed conflict laws and customs apply.

A. Jus in bello and jus ad bellum

Two foundational legal principles that govern the actions of Ukraine and Russia in this conflict are jus in bello and jus ad bellum. The meanings of these concepts are as follows:

Jus in bello is the Latin term for the law of armed conflict, the law governing the conduct of hostilities and the protection of persons in times of conflict.²⁸ *Jus ad bellum* is the Latin term for the law governing the resort to force; that is, when a state may lawfully use force on the territory of another state.²⁹

Use of force is generally prohibited in international law, but jus ad bellum exists to govern the conduct of nations when force must be resorted to.³⁰ On the other hand, jus in bello is relevant when studying ongoing conflicts. Since this Note concerns the resort to force and near-border mobilization in the period before the eventual Russian invasion of Ukraine, jus ad bellum is the more relevant topic of the two here.

Jus ad bellum is an overarching concept of this conflict. More specific and applicable themes, such as military necessity and imminence, will be discussed next.

B. Military necessity

Military necessity, in addition to anticipatory self-defense, is a foundational principle in international armed conflict law.³¹ The principle of military necessity “recognizes that a military has the right to use any measures not forbidden by the law of war ‘which are indispensable for securing the complete submission of the

²⁷ BLANK & NOONE, *supra* note 25, at 69.

²⁸ See *id.*

²⁹ See *id.* at 13.

³⁰ See *id.*

³¹ See *id.* at 30.

enemy as soon as possible.”³² One such measure that is allowed by the law of armed conflict – and relevant to the Russo-Ukrainian conflict – is self-defense as a whole, as outlined in Article 51 of the United Nations Charter:

“Under Article 51 and the historical right to self-defense . . . a state can use force in self-defense in response to an armed attack as long as the force used comports with the requirements of necessity, proportionality, and immediacy in repelling the attack or ending the grievance.”³³ Article 51 refers to the respective article of the United Nations Charter, a primary authority in international law. It is important to note that “Article 51 does not specify [. . .] that the right of self-defense is only available in response to a threat or use of force by another state.”³⁴

A critical question that arises from this principle is: what constitutes a threat that qualifies a state to use self-defense, and could near-border mobilization be characterized as such? The answer to this question is unclear.

The situation near the border of Ukraine likely did not meet the requirement of immediacy before the invasion of February 2022 took place; however, after the invasion, the immediacy requirement was met. The necessity requirement asks “whether there are adequate non-forceful options to deter or defeat the attack, such as diplomatic avenues to halt any further attacks or reparations for injuries caused.”³⁵ In the conflict at hand, it is clear that diplomatic avenues – the Minsk agreements, United Nations, NATO, and bilateral diplomatic efforts – had been used and promoted since the annexation of Crimea in 2014, to little avail.³⁶ Tensions continued to rise, and Russia continued to mobilize near the Ukrainian border before ultimately invading.³⁷ Thus, the necessity requirement would likely be satisfied here. The non-forceful options were proven ineffective in preventing an armed conflict between Russia and

³² *Id.*

³³ *Id.* at 16.

³⁴ BLANK & Noone, *supra* note 25, at 15.

³⁵ *Id.* at 17.

³⁶ See *Factbox: What are the Minsk Agreements on the Ukraine Conflict?*, REUTERS (Feb. 21, 2022) <https://www.reuters.com/world/europe/what-are-minsk-agreements-ukraine-conflict-2022-02-21/> [<https://perma.cc/TFT3-KK6L>].

³⁷ See *id.*

Ukraine, as evidenced by the eventual invasion thereof.

The proportionality requirement “focuses not on some measure of symmetry between the original attack and the use of force in response, but on whether the measure of counterforce used is proportionate to the needs and goals of *repelling* or *detering* the original attack.”³⁸ It is vital to note that the proportionality requirement was not yet relevant when Russia was mobilizing near the Ukrainian border, because Ukraine had not yet taken action in self-defense. However, once Russia did eventually invade, proportionality became relevant to the conflict. Now that the two states are engaged in war, it is expected that both nations will adhere to the principle of proportionality by taking legally appropriate action when engaging with military force.

C. Imminence

The most relevant legal principle in this Note is the imminence requirement. “Immediacy considerations . . . arise when a state uses force in self-defense in advance of an attack or long after an attack is over.”³⁹ The requirement that an attack be imminent evokes the topic of anticipatory self-defense. Anticipatory self-defense is “the use of force to prevent an imminent attack and the death and damage it will cause.”⁴⁰ As its title suggests, it is important to note that “[a] state need not wait until it is the victim of aggression to an act in self-defense.”⁴¹

The Caroline requirement is another foundational legal doctrine in customary international law. Its namesake is derived from a steamer used in 1837 by Canadians rebelling against the British, bringing “men and supplies across the Niagara River from the American side to the British side. The British discovered the rebels’ use of the *Caroline* and attacked it while it was moored to American soil”⁴² in an act of what was characterized as anticipatory self-defense. While the Caroline doctrine is not codified, it laid the foundation for modern imminency requirements. According to the

³⁸ BLANK & NOONE, *supra* note 25, at 17.

³⁹ *Id.* at 18.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Maria Benvenuta Ocelli, “Sinking” the *Caroline*: Why the Caroline Doctrine’s Restrictions on Self-Defense Should Not Be Regarded as Customary International Law, 4 SAN DIEGO INT’L L.J. 467, 468 (2003).

modern Caroline-derived imminency requirement, “an imminent attack [must] be ‘instant, overwhelming, [and] leaving . . . no moment for deliberation.’”⁴³ This is where the legal aspects of the Russo-Ukrainian War at the mobilization stage in the conflict become significant, and where the underlying question of this Note comes to light.

Part IV: Analysis

Considering whether the Russian military’s mobilization near the border of Ukraine constitutes a threat requiring anticipatory self-defense evokes the application of the previously described background law to the facts of the case. This Note will conclude that the near-border mobilization of Russian troops and supplies did not constitute an imminent threat, and therefore Ukraine was not able to commit an act of anticipatory self-defense when Russian forces were mobilizing (prior to the invasion of Ukraine).

Violence in international armed conflict is generally discouraged in customary international law, as supported by the aforementioned concepts of necessity and imminence (in addition to the focus of international organizations on diplomacy and non-violent sanctions). However, there are several exceptions that allow states to use force in international armed conflict, including Chapter VII authorization, Article 51 authorization, and consent by the host country to use force.⁴⁴

As previously noted, use of force is prohibited in international law. This is explained in Article 2(4) of the United Nations Charter: All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.⁴⁵

Thus, the aforementioned exceptions are generally accepted and are not considered inconsistent with the United Nations Charter, as long as they are properly applied.

In the case of near-border mobilization by Russia near the Ukrainian border, the relevant exceptions were Article 51 authorization or consent by Ukraine. The likelihood of Article 42

⁴³ Ocelli, *supra* note 42, at 474; BLANK & NOONE, *supra* note 25, at 18.

⁴⁴ See BLANK & NOONE, *supra* note 25, at 13.

⁴⁵ U.N. Charter art. 2(4), <https://www.icj-cij.org/en/charter-of-the-United-nations#Chapter1> [<https://perma.cc/HD2W-6R8Q>].

authorization was virtually impossible, since Russia has veto power on the Security Council and would very likely strike down any attempt thereof to act against it.

Next, the topics of self-defense and armed attacks will be expanded upon.

A. Self-defense

Self-defense is a highly important concept of international law, and it may be performed individually or collectively. As Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."⁴⁶

There are several aspects of Article 51 that are to be applied when analyzing near-border mobilization that occurred at the pre-invasion stage of the Russo-Ukrainian War. The most significant one is the definition of armed attack; as dictated by Article 51, the occurrence of an armed attack by one state against another allows self-defense measures – either individual or collective – to be taken.⁴⁷ This begs the question: did an armed attack against Ukraine take place, thereby allowing Ukraine to act in individual or collective self-defense against Russia?

However, Russia simply mobilizing troops and equipment near the Ukrainian border was not necessarily an armed attack, since Russia did not enact coordinated violence against Ukraine at that point. In determining what defines an armed attack, the International Court of Justice generally considers the scale and effects of an action directed at a state to see if it rises to the level of an armed attack.⁴⁸ Thus, the definition of armed attack provided by the United Nations is not black-and-white, and interpretation is required.

B. Armed attacks

As previously mentioned, it is critical to examine whether the

⁴⁶ BLANK & NOONE, *supra* note 25, at 15.

⁴⁷ See *id.*

⁴⁸ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, at 93 (June 1986).

mobilization of Russian troops and equipment near the Ukrainian border – before the invasion of Ukraine in February 2022 – qualified as an armed attack. If it did, then Article 51 self-defense measures would likely have been permitted.

On its face, the mere mobilization and stationing of a military near a shared border is not necessarily peaceful nor violent. However, it is critical to note that the pre-invasion mobilization stage of the Russia-Ukraine war was not without violence. Large numbers of Russian troops amassed at various border locations beginning in 2014.⁴⁹ For example, in one highly publicized incident on February 17, 2022, Russian forces shelled a Ukrainian kindergarten. Although there were no fatalities, this could be characterized as an armed attack, since the shell was presumably not shot in self-defense, as there was no indication that a Ukrainian armed attack immediately preceded it.⁵⁰ United Kingdom Prime Minister Boris Johnson labelled the shelling as a “false-flag operation,” stating “a kindergarten was shelled in what [they] are taking to be – well, we know – was a false-flag operation designed to discredit the Ukrainians, designed to create a pretext, a spurious provocation for Russian action.”⁵¹ The secretary-general of NATO agreed with the “false-flag” label, stating “that shelling across the border indicated Moscow was carrying out ‘false-flag operations’, though he did not point specifically to this specific nursery shelling.”⁵²

Though a large-scale invasion had not occurred, these smaller violent skirmishes and attacks had continually occurred since 2014. Were these characterized as armed attacks under customary international law, Ukraine would have been authorized to use force in self-defense under Article 51. However, they were not. There are several factors – both political and legal – to consider when

⁴⁹ For a depiction of such a location, please refer to Figures 1 and 2 at the end of this Note.

⁵⁰ See Nathan Hodge, *Russian-US Diplomacy Stalls, with a Shelled Ukrainian Kindergarten a Stark Reminder of the Lives at Stake*, CNN (Feb. 18, 2022), <https://www.cnn.com/2022/02/17/europe/russia-us-diplomacy-ukraine-analysis-intl/index.html> [https://perma.cc/R45J-VNKP].

⁵¹ Heather Stewart et al., *Boris Johnson: Ukraine Kindergarten Shelling is False-flag Operation*, THE GUARDIAN (Feb. 17, 2022), <https://www.theguardian.com/world/2022/feb/17/boris-johnson-ukraine-kindergarten-shelling-is-false-flag-operation> [https://perma.cc/48MB-QWAH].

⁵² *Id.*

analyzing why Ukraine did not commit an action in self-defense at this state of the conflict.

First and foremost, it could be argued that the scale and effects of border skirmishes do not rise to the level of an armed attack as described by the International Court of Justice.⁵³ They do not appear largely coordinated, and their small-scale nature did not appear to rise to the scale of an armed attack. Furthermore, the effects of these skirmishes did not resemble the effects of armed attacks. While such actions were undoubtedly devastated for the affected communities, such as the aforementioned kindergarten, Ukraine did not experience large-scale, widespread effects from them.

Additionally, Ukraine could have been hesitant to strike Russian forces, since Russia would then be authorized to retaliate with military force. There are multiple reasons why Ukraine would want to avoid this, including uncertainty about Russia's military strength, numbers of weapons and troops, and methods of fighting. Furthermore, Ukraine may have preferred to partake in collective self-defense with allies such as NATO and the United States, waiting until all allies were in position before attacking Russian forces. In conclusion, an armed attack is required by Article 51 of the United Nations Charter to invoke self-defense, and Russian near-border mobilization and small-scale skirmishes thus far likely do not rise to the level of armed attack that is reasonable to invoke Article 51. An act of aggression in the form of anticipatory self-defense could have been strategically unwise for Ukraine.

When Russia did commit what can reasonably be characterized as an armed attack against Ukraine, by invading the country, Ukraine was able to invoke Article 51 and begin individual or collective self-defense measures.⁵⁴ The three factors of self-defense, however, still need to be considered throughout the process: necessity, proportionality, and immediacy.⁵⁵

Furthermore, as a supplement to the aforementioned foundational principles of customary international law, the United States military describes three objectives of self-defense actions: "1) protection of a nation's territorial integrity; 2) protection of a nation's political independence; and 3) protection of nationals and

⁵³ *Supra* note 46

⁵⁴ See BLANK & NOONE, *supra* note 25, at 14.

⁵⁵ BLANK & NOONE, *supra* note 25, at 16.

their property located abroad.”⁵⁶ All three of these were at risk when Russia committed an armed attack against Ukraine, particularly in the form of an invasion. However, in the mobilization stage of the conflict, this was not the case; the border skirmishes were ominous, but did not gravely endanger the territorial integrity, political independence, or nationals abroad.

Part V: Conclusion

The tensions between Russia and Ukraine in the Russo-Ukrainian War in the period between the annexation of Crimea in 2014 and the invasion of Ukraine in 2022 were largely characterized by Russia’s mobilization of troops and equipment near the Ukrainian border. In February 2022, shortly before the eventual invasion of Ukraine by Russian forces, there were an estimated 150,000 Russian troops stationed near the Ukrainian border.⁵⁷ Particularly following the annexation of Crimea, this raised alarm bells amongst the international community. These mobilizations, along with small-scale border skirmishes, prompted both world leaders and organizations such as the United Nations and NATO to comment on the situation.

However, the exchange of words and attempts at diplomacy proved not to be enough to prevent a full-scale invasion of Ukraine and the war that followed. The world watched as Russia launched its invasion in February 2022, and the war continues to rage at the publication date of this note. This begs the question: could this war have been avoided, after proof of near-border mobilization of the Russian military was indisputable for years?

The answer lies in customary international law. Perhaps due to its international nature, armed conflict law is not codified in one place, not every country agrees on what it entails, and nobody has the absolute power to enforce it. Thus, it is already relatively abstract. However, largely thanks to post-World War II efforts (such as the Geneva Conventions) to prevent future conflicts, there exist foundational principles that are commonly viewed as customary.

According to these concepts, an act of self-defense in

⁵⁶ RYAN B. DOWDY ET AL., U.S. ARMY JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., *LAW OF ARMED CONFLICT DESKBOOK*, 36 (Rachel S. Mages et al., eds., 2016).

⁵⁷ See Paul Kirby, *Why is Russia Ordering Troops into Ukraine and what does Putin want?*, BBC NEWS (Feb. 23, 2022), <https://www.bbc.com/news/world-europe-56720589> [<https://perma.cc/SZE8-GEXH>].

anticipation of an attack would not have been lawful. This is due to the commonly held requirement that in order to act in self-defense, an attack from another nation must be an imminent armed attack. However, the act of mobilizing troops near a border is not reasonably characterized as an armed attack, and thus, in accordance with Article 51 of the United Nations Charter, it does not rise to a level where Ukraine could have legally engaged in individual or collective self-defense measures. Even small border skirmishes likely do not qualify as armed attacks. Only when Russia committed an act that qualified as an armed attack – the invasion of Ukraine – was Ukraine legally able to act in an individual or collective self-defense capacity.

When Russia was amassing troops at the Ukrainian border, it was reasonably clear that there existed plans to eventually attack Ukraine. This was supported by the annexation of Crimea, which had taken place in 2014. However, the world could only watch as the number of troops and equipment at the border continued to increase. The customary concepts that prevented Ukraine from attacking these encampments may be called into question. Ultimately, the goal of these doctrines is to prevent armed conflict until it is absolutely necessary. Thus, acts of anticipatory self-defense were not justified under the common notions of armed conflict law.

Part VI: Appendix



Figure 1⁵⁸

⁵⁸ Jones & Wasielewski, *supra* note 7.



Figure 2⁵⁹

⁵⁹ *Id.*