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-RESEARCH ARTICLE-

RUSSIA'S INTERVENTION IN UKRAINE FROM THE PERSPECTIVE OF LEGALITY AND LEGITIMACY DILEMMA[1]

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"Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time."
(Louis Henkin, 1968: 42)

"Between equal rights, force decides."
(Marx, 2010: 232)

Abstract

On 24 February 2022, Vladimir Putin, the President of the Russian Federation, announced to the world that a "military operation" would be carried out against Ukraine upon the call of the Donbas republics, which he had decided to officially recognize on 21 February. The military operation that started afterwards has created great debates not only in terms of international politics but also in terms of international law. In his speech, Putin referred to the legality and legitimacy discourses that Western States, particularly the United States, have been using in various military operations since the end of the Cold War and used them for Russia's operations. In this Article, regarding Putin's statements, Russia's justifications for the military operation are analyzed in the context of the relationship between legality and legitimacy, which is one of the ancient issues of legal philosophy. The main argument of the study is that due to the non-objective nature of international law, each sovereign can find the legal arguments that will suit its interests among the sources of international law and legitimize its actions within this legal discourse. In other words, international law is determined through international politics, shaped according to the balances of international politics and its effectiveness is dependent on international politics. When states have the power and capacity to take the action required by their interests, they do not hesitate to violate international law, and they also weave a supra-legal legitimacy cover for their actions. In this context, between equal rights, international law has to turn to the favor of political power.

Keywords: *Russia, Ukraine, aggression, use of force, United Nations*
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YASALLIK VE MEŞRUİYET İKİLEMİ AÇISINDAN RUSYA'NIN UKRAYNA MÜDAHALESİ[4]

Öz

24 Şubat 2022 tarihinde Rusya Federasyonu Devlet Başkanı Vladimir Putin, henüz 21 Şubat günü resmi olarak tanıma kararı aldığı Donbas cumhuriyetlerinin çağrısı üzerine Ukrayna'ya yönelik "bir askeri operasyon" yürütüleceğini dünyaya ilan etmiştir. Akabinde başlayan askerî harekât, uluslararası politika açısından olduğu kadar uluslararası hukuk açısından da büyük tartışmalar yaratmıştır. Putin yapmış olduğu konuşmada, başta ABD olmak üzere Batı devletlerinin Soğuk Savaş'ın sona ermesinden bu yana çeşitli askeri operasyonlarda kullanageldiği yasallık ve meşruiyet söylemlerine referans vermekte ve bunları Rusya'nın operasyonu için de kullanmaktadır. Bu çalışmada Putin'in söz konusu açıklamaları referans alınarak, Rusya'nın askeri operasyon için öne sürdüğü gerekçeler hukuk felsefesinin kadim meselelerinden olan yasallık ve meşruiyet arasındaki ilişki bağlamında analiz edilmeye çalışılmaktadır. Çalışmanın temel savı ise uluslararası hukukun nesnel olmayan yapısı gereği, her bir egemenin kendi çıkarına uygun olacak hukuksal argümanları, uluslararası hukukun kaynakları arasında bulabileceği ve yapıp ettiklerini bu hukuksal söylem içinde meşrulaştırabileceğidir. Bir diğer ifadeyle uluslararası hukuk, uluslararası politika aracılığıyla belirlenen, uluslararası politikanın dengelerine göre şekillenen ve etkinliği de yine uluslararası politikaya bağımlı olan bir yapıdadır. Devletler çıkarlarının gerektirdiği eylemi gerçekleştirme güç ve kapasitesine sahip olduklarında uluslararası hukuku ihlal etmekten çekinmedikleri gibi eylemlerine yasa-üstü bir meşruiyet kılıfı da örmektedirler. Bu bağlamda eşit haklar arasında uluslararası hukuk, siyasal güç lehine dönmek durumundadır.

Anahtar Kelimeler: *Rusya, Ukrayna, saldırı, kuvvet kullanımı, Birleşmiş Milletler*
JEL Kodları: *Kod1, Kod2.*

"Bu çalışma Araştırma ve Yayın Etiğine uygun olarak hazırlanmıştır."

1. INTRODUCTION

Violence[5] is a political act inherent in the international system. Today, as much as in the past, violence forms an inseparable part of inter-State relations. However, it can be said that the international community has tried to prohibit violence theoretically and that the United Nations Charter has put this into practice. However, in essence, this did not mean the complete exclusion of violence from the system, in other words, externalization, but rather its monopoly or consensus of certain States in the international system created by the victorious States after World War II. Therefore,

[4] Genişletilmiş Türkçe Özet, makalenin sonunda yer almaktadır.
[5] The term violence is a generalised concept used throughout this study to describe different forms of the use of force, in particular the use of military force.

the prohibition of resorting to “threat or use of force” established by the United Nations (UN) Charter (UN Charter, 1945) did not prevent States from resorting to violence; it put the system in a situation full of dilemmas and turned international law into an inconsistent doctrine, at least concerning the use of force. The latest example of the deadlock in the system is the Russian Federation's military intervention in Ukraine. This intervention is the most recent of many instances in which opposing parties have tried to obtain different grounds of legitimacy by using the same rules and referring to the same international law. The statement made before the attempted use of military force against Ukraine is vital to concretise this claim.

On Thursday, 24 February 2022, Aljazeera News Agency reported that "*Before launching the biggest attack by one State against another in Europe since World War II, Putin addressed his nation*" and considered Putin's speech as a declaration of war (Aljazeera, 2022). Indeed, the Russian leader's speech played a significant role in portraying the Ukraine operation as, inter alia, a moment of historic rupture compared to Russia's military intervention in Georgia in 2008 and Crimea in 2014. The points Putin emphasized in his speech (as will be discussed in the following section of this paper) can paradoxically be seen as a reformulation by Russia of the rhetoric used by its biggest competitor, the United States and NATO, in the military operations they have participated in - or initiated themselves - over the last three decades. This, in itself, raises questions about the structure of international law.

The present study aims to analyze the justifications for the aggression launched by President Putin against Ukraine. These justifications can be listed as intervention by invitation, right to self-determination, right to self-defence (pre-emptive self-defence), humanitarian intervention and responsibility to protect. In this study, all legitimizing discourses put forward by Putin will be discussed and subjected to a critical reading. The main argument of the study is that due to the non-objective nature of international law, each sovereign can find the legal arguments that will suit its interests among the sources of international law and legitimize its actions within this legal discourse. In other words, international law is determined through international politics, shaped according to the balances of international politics and its effectiveness is dependent on international politics. When states have the power and capacity to take the action required by their interests, they do not hesitate to violate international law, and they also weave a supra-legal legitimacy cover for their actions. In this context, between equal rights, international law has to turn to the favor of political power.

2. EXAMINING THE DILEMMA OF LEGALITY AND LEGITIMACY IN INTERNATIONAL LAW THROUGH THE USE OF FORCE

Some international lawyers tend to reach direct and similar consequences on issues related to normative problem areas when there are similar cases. In other words, the idea that the law is deterministic, prevails. According to this view, the rule is self-evident, and, naturally, similar results will emerge when applied to similar cases. Thus, in addition to certainty of the outcomes, it is also argued that law takes place on an apolitical plane. In other words, law is a kind of antithesis of politics. An understanding of law free from politics also brings along a formalist understanding.

As a result, the expectation is that the law will always show the truth and that this truth will ensure justice, which can be defined as optimism at best, especially for a branch of law that is expected to function in a system formed by sovereign States. This is because, as Jacques Derrida (Derrida, 2005: 81; Derrida, Ricciardi, & Yu, 2004) aptly points out, the concept of sovereignty has always been associated with the word "majestas", which means the supreme. As a matter of fact, J. Bodin, the inventor of the majestas concept, derived the word from the concept "superanus" (Ağaoğulları, 2015). Undoubtedly, the most fundamental power that sovereignty grants to the sovereign is the monopoly of rule-making, i.e., legislative monopoly. Therefore, the view that law is just, universal, certain and consistent in a system in which all States exist as legislative wills as majestas or superanus, is quite ambiguous. This line of thought largely ignores the profound impact of sovereignty, which is the guiding principle of the international system of States, and the struggle between sovereigns and equals shaped around this principle, on the international system and thus on international law.

The traditional/modern international relations associated with Westphalian Peace take place within a system in which each State defines itself as sovereign and thus recognizes no authority superior to itself within its borders (jurisdiction) and asserts that it is equal to and independent of other sovereigns in its external relations. The clear implication of this is that, at the theoretical level, there is no superior authority and/or transcendent principle that is positioned over State sovereignty and dictates what is lawful and what is unlawful. In this context, international law corresponds to a legal field that is not externalized to international politics, but rather internal to it and even determined through it (Karaman, 2021: 423). Therefore, the behavior of States in conformity with existing international law, as well as their behavior in violation of it, is a natural consequence of the fact that they are also constructive agents of international law (Shaw, 2017).

As Martti Koskenniemi has ably argued, in legitimizing their behavior, States either refer to transcendent principles such as human rights (the descending approach) or privilege sovereign will (the ascending approach) (Koskenniemi, 2006: 59). Especially when it comes to the so-called "extreme political" right to resort to war, the relationship between legality and legitimacy has to be emphasized more strongly. This is because sovereignty, as it is often emphasized, is a concept that has two sides and, as such, harbors serious contradictions. According to Wendy Brown, in this respect, sovereignty is "both law from top to bottom and lawlessness" (Brown, 2011). For, while the same sovereignty gives the State the supreme power of command, in another aspect it aims to limit this power. In the context of the use of force, the same sovereignty monopolizes the State in the use of violence, while in another aspect it aims to eliminate or limit this power. To summaries, when it comes to the right to resort to war and when this right is obstructed by any normative framework, States attempt to justify their actions by shifting from the legal ground to the ground of legitimacy. In Koskenniemi's formulation above, this entails a continuous oscillation from descending to ascending approaches. In short, as far as war is concerned, States can use different discourses of legitimation as a basis for their actions. Historically

speaking, this claim can be said to have been firmly entrenched in the system by the second half of the 19th century (Polat, 1999: 95). Then, the primacy of the consent is only possible with the disappearance of the transcendental law that is positioned above it. To reformulate our question: Is war -a foreign policy act- resorted to by the sovereign will as a consequence of its sovereignty?

The doctrine of "just war" reflects the historical acceptance of war as a necessary evil between communities/peoples/nations/States, and thus the acceptance of war as a way of achieving justice when based on certain reasons (Demirbaş, 2017; Güneş, 2021). For example, when 16th century Spain is taken into consideration, it will be seen that the only rule for a war to be justified is its compliance with secularized natural law. In other words, war is a political method that can only be resorted to within the framework set forth by natural law. In this way, European societies would explain their presence in the newly discovered places and the justification of any war to be waged with the peoples of these places with the violation of natural law by the indigenous peoples. In this period, the most important principle put forward by natural law was accepted as *the right to trade*, and the violation of this right provided European societies with a justifiable reason for war (Anghie, 2004: 251).

In the course of history - roughly in the second half of the 19th century - *the sovereign will/sovereignty* would emerge as the sole constitutive principle with the exclusion of natural law from the system as a transcendental principle positioned above the will and restricting its decision-making (Polat, 1999: 95). Developments in this context will result in steps that will transform *just war* (bellum justum) into what Hans Köchler calls "legal war" (bellum legale) (Köchler, 2005: 422). First of all, the emerging "sovereign will" no longer needs a transcendent principle that is positioned above it and to which it has to hierarchically conform -or in other words, to which it has to claim its legal validity or legitimacy- when taking the decision to resort to war.

War is a natural element of foreign policy, and States naturally embrace the right to resort to war when their interests require it. The fact that the right to resort to war is considered as a natural right arising from the will, that it is accepted as an integral part of foreign policy and that this situation is not questioned, started to change with World War I. With the League of Nations, the understanding that war is an action that can only be resorted to within certain rules will come to the agenda, and with the Kellog-Briand Pact, it will be witnessed that some States will show the will to remove war from being an instrument of their national politics among Contracting Parties (The Kellogg-Briand Pact, 1928). In the aftermath of World War II, the UN Charter prohibited the resort to war - the use of force in the technical term of the Charter - with certain exceptions.

Article 2 of the UN Charter lists the principles that the UN follows (or will follow) in pursuit of its objectives. These principles are based on the sovereign equality of States. The understanding of sovereign equality brings with it the principle of non-interference, or non-interference in internal affairs, as an obligation of States. As formulated in Article 2(4) of the UN 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". The main element that draws attention here is that in addition to the prohibition of the use of force, the threat to use of force is also prohibited. There are two main exceptions to this prohibition: The first one is the right of "self-defence" under Article 51 of the UN Charter, and the second one is the coercive measures to be taken by the UN Security Council (UNSC) under Chapter VII of the UN Charter for the maintenance of international peace and security.

Although the transition from legitimate/justified war to legal warfare with the regulations introduced by the UN Charter means limiting war in a way, it does not actually mean an absolute prohibition. Self-defence, which constitutes the first of the exceptions (although it is frequently abused by States), is a natural exception considering that self-defence has always been historically accepted as an acceptable justification. On the other hand, the UNSC's exceptional privilege, which was formed based on the balance of power at the time, has created a controversial structure that gives a small minority the right to circumvent the prohibition and be insulated from the use of force against them. The consensus or conflict of the permanent members has become the ultimate criterion for determining what threatens international peace and security and what does not, and thus for determining when the use of force is necessary. But the problem goes beyond this. Because States have never been satisfied with this prohibition and its exceptions and have always wished to circumvent it. It is precisely at this point that the doctrine of legitimate interventionism or just war, which was pushed out of the system by legal developments, regains its position in international relations. It would be appropriate to read Russia's intervention in Ukraine and Putin's Statements in this context.

3. PUTIN, WAR AND INTERNATIONAL LAW: NOTES ON DISCOURSE

These contradictions are clearly visible in Putin's resounding Statements on 24 February (al Jazeera, 2022). Indeed, Putin's Statements can be perceived as a reference to Western exceptionalism rather than an effort to conform the Russian invasion to international law. In fact, by frequently referring to various examples of the use of force by Western States/organizations, particularly the US and NATO, since the collapse of the USSR, Putin implicitly acknowledges that Russia's own action would be as much a violation of international law if only the previous actions taken by the Western block, would be counted as violations. Although Putin makes claims about the legality of the intervention by referring to various sources of international law, it can be said that they are mostly used in an ironic sense. In essence, Putin's Statement emphasizes realism and boldly asserts that Russia's national interests and security are of paramount importance. On the other hand, in order to prevent criticism of Russia's action on the grounds of violation of international law, Putin is trying to gain legitimacy by referring to examples of flagrant violations of international law by the West, and especially by the United States, and by bringing up many claims such as human rights violations, humanitarian intervention, responsibility to protect, pre-emptive self-defense, which are put forward as legitimate justifications by the relevant

Western States in these examples. In a way, he wants to signal the era of Pax-Russica (Russian Peace), just as the US has been trying to do with the Pax-Americana (American Peace) discourse since 2001 (Aljazeera, 2022):[6]

> "After the collapse of the USSR, the redivision of the world actually began, and the norms of international law (and *the key, basic ones that* had been adopted at the end of World War II and had been largely consolidated by its consequences*)* began to *interfere* with those who declared themselves the winner in the Cold War." [emphasis added by the authors]

As can be seen, Putin first emphasizes that since the end of the Cold War, Western States have started to violate the most fundamental rules of international law. By "the key and basic rules", Putin undoubtedly means the principles of non-use of force or non-interference, which are a requirement of the concepts of "sovereignty" and "sovereign-equality". Putin goes on to mention the most important examples of these violations:

> "You don't have to look far for examples. First, *without any sanction from the UN Security Council*, they carried out a bloody military operation against Belgrade, using aircraft and missiles right in the very center of Europe. Then came the turn of Iraq, Libya, Syria. The *illegitimate use of military force* against Libya, the perversion of all decisions of the UN Security Council on the Libyan issue led to the complete destruction of the State, to the emergence of a huge hotbed of international terrorism, to the fact that the country plunged into a humanitarian catastrophe that has not stopped for many years. civil war. The tragedy, which doomed hundreds of thousands, millions of people not only in Libya, but throughout this region, gave rise to a massive migration exodus from North Africa and the Middle East to Europe… A similar fate was prepared for Syria. The fighting of the Western coalition on the territory of this country *without the consent of the Syrian government and the sanction of the UN Security Council* is nothing but aggression, intervention. However, a special place in this series is occupied, of course, by the invasion of Iraq, also *without any legal grounds*. As a pretext, they chose reliable information allegedly available to the United States about the presence of weapons of mass destruction in Iraq… In general, one gets the impression that practically everywhere, in many regions of the world, where the West comes to establish its own order, the result is bloody, unhealed wounds, ulcers of international terrorism and extremism. All that I have said is the most egregious, but *by no means the only examples of disregard for international law*."

Putin points to the cases of Kosovo (1999), Iraq (2003), Libya (2011) and Syria and emphasizes the illegality and illegitimacy of the interventions in these cases. As is well known, in the cases of Kosovo, Iraq and Syria, military means of intervention

[6] All the citations about the Putin's speech in the article was made from this source.

were deployed without the authorization of the UNSC.[7] In the case of Libya, the intervention, authorized by UNSC Resolution 1973 with the abstention of Russia and China, exceeded the limits of its mandate and led to the overthrow of the Gaddafi regime and the transformation of Libya into a chaotic State, as Putin emphasized in his Statement. As stated above, Putin's strong emphasis on violations of international law tacitly reflects an acceptance that Russia's military action against Ukraine will be as much a violation of international law as these violations.

After these remarks, Putin then sets forth the legitimate justifications and international law bases for Russia's intervention:

> "It was simply impossible to endure all this. It was necessary to immediately stop this nightmare: *the genocide* against the millions of people living there, who rely only on Russia, hope only on us. It was these aspirations, feelings, pain of people that were for us the main motive for making a decision to recognize the people's republics of Donbass… The leading NATO countries, in order to achieve their own goals, support extreme nationalists and neo-Nazis in Ukraine in everything, who, in turn, will never forgive the Crimeans and Sevastopol residents for their free choice: reunification with Russia... *The people's republics of Donbass turned to Russia with a request for help…* In this regard, *in accordance with Article 51* of Part 7 of the UN Charter, with the sanction of the Federation Council of Russia and *in pursuance of the treaties of friendship and mutual assistance* ratified by the Federal Assembly on 22 February this year with the Donetsk People's Republic and the Luhansk People's Republic, I decided to conduct a special military operation."

Although Putin's statement contains many claims of legitimacy and legality, the most fundamental claim here is a form of intervention known as intervention by invitation, which, although controversial, can be accepted as legal under international law.[8] It would be legal for another State or States to intervene militarily on the territory of the country at the invitation of the government concerned, for example, to suppress an uprising (Shaw, 2017). Putin claims that military operations were launched following a call for help from the Donetsk People's Republic and the Luhansk People's Republic, the Donbas republics whose independence are recognized by the Russian Federation (Litvinova et.al, 2022). However, Russia's intervention cannot be considered as an invited intervention in at least two respects. The first is that the regions in question are part of Ukraine and therefore such an intervention can only be carried out at the invitation of the Ukrainian State. Secondly, and more importantly, Russia's military

[7] In particular, NATO's intervention in Kosovo in 1999 was an intervention that was illegal due to the lack of UNSC authorisation but claimed to be legitimate due to its justification on humanitarian grounds. In this context, the problematic relationship between legality and legitimacy in international law has been intensely debated.

[8] The main reason why intervention by invitation is sometimes controversial is that invitations are made when the official government is uncertain. A recent example of this was the intervention in Yemen in 2015 by the Gulf Cooperation Organisation led by Saudi Arabia.

intervention/intervention has gone beyond these regions and turned into an attack on the entire country.[9]

Allen Weiner, Professor of International Law at Stanford University, also stated in an interview that Russia's recognition of the separatist Donetsk People's Republic and the Luhansk People's Republic and their governments is unlawful because, given the established rules of international law, the criteria of Statehood and recognition do not apply in these two cases (Driscoll, 2022). Therefore, these two republics cannot be recognized as States under international law, and the recognition of these two entities as States would constitute unlawful interference in Ukraine's internal affairs. Thus, it is not possible for these two entities to summon the Russian army by invitation.

However, Putin goes beyond this basic claim of legality and tries to legitimize Russia's intervention by accusing the Kiev regime of genocidal activities:

> "Its goal is to protect people who have been *subjected to bullying and genocide by the Kiev regime* for eight years. And for this we will strive for the demilitarization and denazification of Ukraine, as well as bringing to *justice* those who committed numerous, bloody crimes against civilians, including citizens of the Russian Federation."

As it can be seen, Putin justifies the intervention by claiming that it is justified by such objectives as protecting people subjected to genocide and tyranny; and for the purpose of cleansing the country from neo-Nazis, in other words, he relies on the just war argument.[10] These concepts are undoubtedly used by Putin within the framework of humanitarian intervention, which has become one of the most important debates in international law, especially after the end of the Cold War, and the responsibility to protect, which is a developed form of this concept. Since the 1990s, the argument that interventions have been carried out on humanitarian grounds has been used, especially by Western States, in many cases where the legitimacy of the interventions has been claimed and especially in many cases where legality has not been found. The concept of "illegal but legitimate", which was adopted in the case of Kosovo and which Putin has underlined should be recalled at this point. In this case, when an authorization from the UNSC could not be obtained due to Russia's veto, the military intervention through NATO was presented as an illegal but legitimate intervention because it was carried out to protect human rights [For details of the operations see Acer, 2004; Bağbaşlıoğlu, 2018; Bayıllıoğlu, 2016)].

[9] Russia's claims have been rejected by the UN General Assembly in its 11th Emergency Special Session, calling for Russia and international community to respect Ukraine's internationally recognized territory. See, (UN General Assembly, 2022).

[10] Neo-nazis or far right movements in Ukraine mushroomed after the annextation of Crimea by the Russian Federation in 2014 and clashes between Donbas Republics and Ukrainian government started. Most well known neo-nazi group is Azov Battellion, which has fought in the Eastern part of the Ukraine against Russia and Russian back groups. For further information on the beginning of the protest and the rise of far-right movements regarding Donbas Republics and Crimea, see (Marples, 2022).

The concept of humanitarian intervention is a form of intervention in countries where there are intense and mass deaths, serious violations of human rights or humanitarian law, which can enable the production of a ground of "legitimacy that can transcend the legal".[11]

In 2001, a study was carried out in order to overcome the concern of States, which are firmly committed to the principles of sovereignty, that their sovereignty would be undermined by humanitarian intervention, and the "Responsibility to Protect Doctrine" was put forward (ICISS, 2001). According to this doctrine, States are obliged to protect their citizens because they are sovereign. In addition, States cannot commit war crimes, genocide, crimes against humanity, etc. against their citizens.[12] The existence of such a situation means that States fail to fulfil their responsibility to protect their citizens and the responsibility passes (under certain conditions) to the international community. The legal basis of the recent operations against Libya, which were carried out in accordance with the resolutions of the UN Security Council (Resolutions S/RES/1970 (2011) and S/RES/1973 (2011), including the use of force), was shaped within the framework of the "Responsibility to Protect Doctrine".

However, it should be noted immediately that neither humanitarian intervention nor the responsibility to protect has been given a legal basis until today. The UN World Summit in 2005, which was one of the important steps in terms of the responsibility to protect, made the implementation of the responsibility to protect subject to the authorization of the UNSC. Therefore, claiming any intervention in the context of humanitarian ground or responsibility to protect doctrine without the authorization of the UNSC will not create a legal basis for the intervention. The main point here is the legitimacy claims rather than legality. As stated above, Putin, with reference to the examples of his Western predecessors, is trying to clothe the intervention with similar arguments and legitimacy. Indeed, Putin put forward the Responsibility to Protect argument during the 2008 intervention in Ossetia (Evans, 2008) and justified the need to protect the Crimean people during the 2014 invasion and annexation of Crimea (Myers and Barry, 2014).

Putin's other argument for the legality and legitimacy of military intervention is the right to self-determination:

> "The results of the Second World War, as well as the sacrifices made by our people on the altar of victory over Nazism, are sacred. But this … does not cancel the right of nations to *self-determination*, enshrined in Article 1 of the UN Charter. Let me remind you that neither during the creation of the USSR, nor after the Second World War, people living in certain territories that are

[11] Of course, the concept of "humanitarian intervention" could not find the consent of the vast majority of the members of the system of States and could not become a rule of positive law due to concerns that it reminded the colonial past and could provide legal cover for the unilateral use of force by the great powers within the system.

[12] See Paragraph 138 of the World Summit of 2005: "138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity…"

> part of modern Ukraine, no one ever asked how they themselves want to arrange their lives. Our policy is based on freedom, the freedom of choice for everyone to independently determine their own future and the future of their children. And we consider it important that this right – the right to choose – could be used by all the peoples living on the territory of today's Ukraine, by everyone who wants it".

As mentioned above, Russia raises the right to self-determination of the Donetsk and Luhansk Republics, whose independence Russia recognized on 21 February 2022 (News, 2022), and implies that the peoples of these republics can unite with the Russian Federation, as in the case of Crimea. Again, as mentioned above, it puts forward the arguments of intervention by invitation or humanitarian intervention upon the call of these republics.

As Harvard International Law Professors G. Blum and N. K. Modirzadeh point out, since the right to self-determination is one of the fundamental rights under international law, it is possible for any ethnic minority in Ukraine to decide its own political status (Neal, 2022). However, the main problem here is that international law recognizes a general prohibition on the unilateral exercise of this right, in other words, the creation of another State by seceding from one State. On the contrary, international law protects the territorial integrity of States. On the other hand, according to Blum and Modirzadeh, international law recognizes "remedial secession", which "can only be used in extreme cases where the minority concerned is subjected to ongoing oppression and subjugation" and there is no other option but "internal self-determination". Despite Putin's genocide allegations, the fact that no such data on the region can be verified makes these allegations skeptical and unfounded for the time being.

On the other hand, the example of Kosovo, which Putin particularly emphasized, is noteworthy in terms of showing contradictions. In his discourse on Kosovo, which gained its independence with a unilateral declaration in 2008, Russia said that the acceptance of independence could create a precedent and that such movements could increase in different geographies of the world. Because one of the established rules of international law is the principle of "territorial integrity of States". Kosovo's unilateral independence violates this principle and carries with it the possibility of igniting an unavoidable process. The advisory opinion of the International Court of Justice on the situation in question is also important. Kosovo's unilateral declaration of independence in 2008 was not declared illegal by the advisory opinion of the International Court of Justice in 2010. On the contrary, this decision gave the impression that the issue was circumvented in order not to offend sovereign States. In its judgement, the Court held that there is no established rule that unilateral declarations of independence violate international law: "The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law…" (ICJ Report, 2010).

This attitude led the US and its allies to argue that this independence would not create a precedent and that it was a *sui generis* example in the successor to the concerns raised by Russia over Kosovo's independence (Council, 2008). In 2008, Russia and the United States were in different camps in terms of legal arguments, but in 2022 - paradoxically- they seem to be clinging to their opposing discourses of 2008. Undoubtedly, this example constitutes another important example of the structure of international law that is dependent on international politics rather than rules.

Another noteworthy point in Putin's speech, which should be emphasized, is that it concerns the "right to self-defence":

> "…We are talking about what causes us particular concern and anxiety, about those fundamental threats that year after year, step by step, are rudely and unceremoniously created by irresponsible politicians in the West in relation to our country. I mean the expansion of the NATO bloc to the east, bringing its military infrastructure closer to Russian borders.
>
> It is well known that for 30 years we have persistently and patiently tried to reach an agreement with the leading NATO countries on the principles of equal and indivisible security in Europe. In response to our proposals, we constantly faced either cynical deception and lies, or attempts to pressure and blackmail, while the North Atlantic Alliance, in the meantime, despite all our protests and concerns, is steadily expanding. The military machine is moving and, I repeat, is coming close to our borders… our plans do not include the occupation of Ukrainian territories. … I repeat, our actions are *self-defence against the threats posed to us and from an even greater disaster than what is happening today*".

With these statements, Putin underlines that he is not committing an illegal act of aggression, but a legitimate act of self-defence. However, the emphasis here is not on the legal framework outlined in the UN Charter, as will be discussed in a moment, but on the right to "pre-emptive self-defence", which the US, in particular, put forward with the Bush Doctrine after 9/11.[13] At this point, it is useful to first remind the right to self-defence. According to Article 51 of the UN Charter; "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The first element that draws attention to the text of the Article is the fact that an "armed attack" must occur in order to exercise the right of self-defence. The State subjected to an armed attack may legally and legitimately respond to the State that has committed the armed attack. So, what is an armed attack? For this purpose, it is useful to refer to the 1974 UN General Assembly Resolution "Definition of Aggression"

[13] The US doctrine is that a pre-emptive attack is included in legitimate defence. In fact, what is meant to be emphasised is that while pre-emptive legitimate defence is legitimate defence, it is the unlawful preventive attack that is intended to be carried out. For detailed discussion, see (Denk, 2015, p. 237).

(Definition of Aggression, A/RES/3314, 1974). According to the first Article of the resolution "Aggression is 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, as set out in this Definition." Article 3 of the relevant resolution lists the acts of aggression by stating that "any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression". In what circumstances does a State violate the act of aggression and thus the prohibition of the use of force? More importantly, in what circumstances does the act of aggression constitute a basis for that State to exercise its right of "self-defence"? The answer (without prejudice to the tests applied by the International Court of Justice in the relevant cases) can be found in the subparagraphs of Article 3. For example, according to Art. 3/a, "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;" is the first and perhaps the most important definition of an act of aggression. However, there is another point that has escaped attention. This is Article 3/f of the relevant document. This Article may play an important role in determining the legal responsibilities of States other than Russia and Ukraine in the ongoing conflict.

The relevant Article defines the act of aggression as follows: "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State". This brings to mind Belarus. This is because Belarus (Mut, 2002) allows its country to be used for attacks against Ukraine, a third State, in the operations carried out by Russia. Thus, Belarus commits the act of aggression and Ukraine's right of self-defence against Belarus arises. So, how should Putin's statement in question be evaluated?

States occasionally assert that they can exercise their right of self-defence even before an armed attack is committed against them. Indeed, the literature, with reference to *the Caroline incident*, recognizes the existence of such a right, albeit limited (Miller, 1934).[14] "It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" (Miller, 1934: 1836-1846). However, George W. Bush, in his war against terrorism after the events of 11 September, touted the doctrine of "preventive strike", which has no place in the literature, as "pre-emptive self-defence" and tried to legitimize the unilateral use of force by the USA. As for the Bush: "The gravest danger of our Nation lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are

[14] "… In casu, British troops conducted an attack in American territorial waters against a merchant vessel used by Canadian rebels and their American supporters in attacks against Canada. The sinking of the ship led to a furious reaction by the US, which demanded that Britain showed a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. This formula, also known as the 'Webster formula' (after the US Secretary of State), was subsequently accepted by the UK Foreign Minister as the appropriate standard to test the lawfulness of the incursion." See, (Ruys, 2010: 256).

doing so with determination. The [US] will not allow these efforts to succeed America… will act against such emerging threats before they are fully formed" (Ruys, 2010: 307). Russia's embrace of similar arguments, when considered in the context of recent events, should reveal the contradictory nature of international legal theory.

CONCLUSION

In general terms, Putin's pointing to violations of international law by the United States and the West in general will not, of course, create a legal or legitimate basis for Russia to commit the same violations. This is because compliance with international law should be assessed within the framework of the prohibition on the use of force in the relevant sources of international law, and legitimacy claims should be assessed in the context of the fact that resorting to war causes human death, destruction and suffering. However, the reactions of the international community to Russia's flagrant violations of international law, including in the case of Crimea, should not overshadow the fact that the West's interventions, especially since the 1990s, are/will be violations of international law.

In particular, the creation of artificial distinctions such as authoritarian/totalitarian East vs. democratic/humanitarian West, and the demonization of Eastern interventionism while giving moral/humanitarian cover to Western interventionism is a serious contradiction and poses serious dangers for the international system and the *jus cogens* rules that constitute its fundamental pillars. As seen in the current example we have analyzed, legitimate interventionism claims, which can be positioned on the legality adopted by the West especially after the collapse of the USSR, can also be used by Russia. More importantly, there is no international legal mechanism to prevent other States that can afford and dare to do so from doing so. In its current form, international law is determined by international politics, shaped according to the balances of international politics and its effectiveness is dependent on international politics. When States have the power and capacity to take the action required by their interests, they do not hesitate to violate international law, and they also provide a cover of supra-legal legitimacy to their actions.

The conclusion to be drawn from all these writings must be the flexibility of law. This is because positive legal rules can be interpreted in different ways by different States, bypassed in certain ways and the law can be molded in different ways. Therefore; certainty, consistency and predictability in law cannot always be a realistic expectation. This is largely due to the fact that the principle of "sovereignty" is still the highest regulatory principle. Thus, while pursuing the truth, it will be important to keep in mind that the theory of international law is based on contradictions and binary oppositions for healthy results. Of course, this should not lead us to a kind of nihilism. It is only necessary to put forward the following fact with all its purity: In a branch of law where national interests are so critical, it is not possible to make definitive judgements on the superiority of law or the rule of law. Because in disputes between sovereign and equal States in the context of equality of rights, the result is the absolute victory of political power [for a detailed analysis, see (Polat, 1999)]. This victory will

also determine the current and legitimate interpretation of what legal is. In conclusion, the "sovereign rights" of States can be seen as both the disease and the cure of the system. It is the cure because the UN system has been sustained since World War II, despite all its flaws and shortcomings. The only guarantee for its further sustainability is that States at least comply with the most basic rules of international law, which are the pillars of this system, namely the prohibition of the use of force and the principle of non-interference. It is a disease; because where the sovereign power is positioned, law is nothing but a reflection of the will of the sovereign.

YASALLIK VE MEŞRUİYET İKİLEMİ AÇISINDAN RUSYA'NIN UKRAYNA MÜDAHALESİ

1. GİRİŞ

Rusya Federasyonu'nun Ukrayna'ya karşı gerçekleştirdiği askeri müdahale, tüm dünyanın ilgisinin bölgeye çekilmesine sebebiyet vererek, ilgili eylemin hukuksal boyutlarını tartışmaya açtı. Uluslararası hukuk, devletlerin birbirlerine karşı kuvvete başvurmasını ya da kuvvet kullanma tehdidinde bulunmalarını yasaklamaktadır. Birleşmiş Milletler Şartı'nın 2/4'üncü maddesi, söz konusu yasağı net bir şekilde hüküm altına almaktadır. Bu yasağın cari uluslararası hukukta iki temel istisnası bulunmaktadır. Bu istisnalardan ilki, BM Şartı'nın 51'inci maddesinde formüle edilen devletlerin doğal olan meşru müdafaa hakkıdır. Diğer istisna ise BM Güvenlik Konseyi'nin BM Şartı'nın yedinci bölümü uyarınca alacağı zorlama tedbirlerdir. Bu genel çerçevenin dışında devletlerin kuvvete başvurmaları mümkün müdür? Bu soruya verilecek cevaplar çeşitlenebilir. Ancak eldeki çalışma, söz konusu soruya Rusya Federasyonu Devlet Başkanı Vladimir Putin'in öne sürdüğü söylemler uyarınca cevap aramaktadır.

2. YÖNTEM

Eldeki çalışma, Rusya Federasyonu Devlet Başkanı Putin'in, Ukrayna'ya karşı başlattığı saldırı fiilinin gerekçelerini masaya yatırmak gayesindedir. Bu gerekçeler; davetle müdahale, self-determinasyon hakkı, meşru müdafaa (ön alıcı meşru müdafaa) hakkı, insancıl müdahale ve koruma sorumluluğu olarak sıralanabilir. Bu çalışmada Putin'in ortaya koymuş olduğu tüm meşrulaştırıcı söylemler ele alınarak, eleştirel bir okumaya tabi tutulmuştur. Söz konusu amaca ulaşmak için çalışma, V. Putin'in 24 Şubat 2022 tarihinde gerçekleştirdiği ve çeşitli basın ve medya organlarında geniş yer verilen konuşmasının analizini yapmaktadır. Putin'in yasallık ve meşruluk arasında gidip-gelen ve Rusya'nın eylemini bir şekilde olumlayan söz konusu konuşma, eleştirel hukuk çalışmalarının kuramsal yaklaşımları uyarınca eleştirel bir okumanın konusu yapılmıştır.

3. BULGULAR

Şiddet, uluslararası sisteme içkin politik bir eylemdir. Günümüzde de geçmişte olduğu kadar şiddet, devletler arası ilişkilerin ayrı düşünülemeyecek bir parçasını

oluşturmaktadır. Ancak uluslararası toplumun şiddeti -en azından kuramsal olarak- yasaklamaya çalıştığı ve Birleşmiş Milletler Antlaşması ile de bunu hayata geçirdiği söylenebilir. Ne var ki bu durum, özü itibariyle şiddetin tamamen sistemin dışına çıkarılması, bir diğer ifadeyle dışsallaştırılması değil; II. Dünya Savaşı sonrası galip devletler eliyle yaratılan uluslararası sistemde belirli devletlerin tekeline ve-veya oydaşmasına bırakılması anlamına gelmiştir. Dolayısıyla Birleşmiş Milletler (BM) (UN Charter, 1945) Şartı ile oluşturulan kuvvet kullanma ve tehdidine başvurmanın yasaklanması, devletlerin şiddete başvurmasını engellememiş, sistemi açmazlar ile dolu bir duruma sokarak, uluslararası hukuku -en azından kuvvet kullanımı konusunda- tutarsız bir öğreti haline getirmiştir. Sistemin açmaza düştüğü son örnek ise Rusya Federasyonu'nun, Ukrayna'ya başlattığı askeri kuvvet kullanma girişimidir. Zira bu müdahale, karşıt tarafların, aynı kuralları kullanarak ve aynı uluslararası hukuka atıf yaparak farklı meşruiyet zeminleri elde etmeye çalıştıkları birçok örnekten yalnızca en güncel olanıdır.

4. TARTIŞMA

Putin ilk olarak, Soğuk Savaş'ın sona ermesinden bugüne Batı devletlerinin özellikle en temel uluslararası hukuk kurallarını ihlal etmeye başladığını vurgulamaktadır. Putin'in "en temel ve en önemli kurallardan" kastı şüphesiz "egemenlik" ve "egemen-eşitlik" kavramlarının bir gereği olan kuvvet kullanmama ya da karışmama ilkeleridir. Putin, Kosova (1999), Irak (2003), Libya (2011) ve Suriye örneklerine işaret etmekte ve bu örneklerde gerçekleştirilen müdahalelerin yasadışılığını ve gayrı-meşruluğunu özellikle vurgulamaktadır. Putin, bağımsızlıkları Rusya Federasyonu tarafından tanınan Donbas cumhuriyetleri olarak anılan Donetsk Halk Cumhuriyeti ve Luhansk Halk Cumhuriyeti'nin yardım çağrısı üzerine askeri operasyonlara başlandığını iddia etmektedir. Putin, müdahaleyi soykırım ve zorbalığa maruz bırakılan insanları korumak ve ülkeyi Nazilerden temizlemek gibi amaçlar öne sürerek meşru gerekçelerle donatmakta, bir diğer ifadeyle haklı savaş argümanına yaslanmaktadır. Rusya henüz 21 Şubat 2022 tarihinde bağımsızlıklarını tanıdığı Donetsk ve Luhansk cumhuriyetlerinin self-determinasyon hakkını gündeme getirmekte ve buradan yola çıkarak, tıpkı Kırım örneğinde yaşandığı gibi, bu cumhuriyetlerin halklarının Rusya Federasyonu ile birleşebileceklerini ima etmektedir. Putin'in konuşmasında dikkat çeken ve önemle üzerinde durulması gereken bir başka husus ise "meşru müdafaa hakkına" dair olanlardır. Putin yasal olmayan saldırı fiilini değil, meşru olan savunma fiilini işlediğinin altını çizmektedir. Fakat buradaki meşru-savunma vurgusu BM Şartı'nda sınırları çizilen yasal çerçeveye değil, özellikle ABD'nin 11 Eylül sonrası Bush Doktrini ile öne sürdüğü "ön-alıcı meşru müdafaa" (*pre-emptive self-defence)* hakkı çerçevesindedir.

SONUÇ

Genel olarak değerlendirmek gerekirse, şüphesiz, Putin'in, ABD ve genel olarak Batı'nın uluslararası hukuk ihlallerini işaret etmesi, Rusya'nın da aynı ihlalleri gerçekleştirmesine yasal ya da meşru bir zemin yaratmayacaktır. Zira uluslararası hukuka uygunluk ilgili uluslararası hukuk kaynaklarının kuvvet kullanımına ilişkin

yasağı çerçevesinde; meşruiyet iddiaları ise savaşa başvurmanın insan ölümlerine, yıkıma ve acılara yol açması bağlamında değerlendirilmelidir. Fakat Rusya'nın Kırım örneği dahil olmak üzere aleni uluslararası hukuk ihlallerine yönelik uluslararası toplum tepkileri, Batı'nın özellikle 1990'lı yıllardan bu yana gerçekleştirdiği ve bundan sonrasında gerçekleştirebileceği müdahalelerin de uluslararası hukuk ihlali olduğu/olacağı gerçeğini gölgelememelidir.

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