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I. Introduction

The 'Kursk Operation' marks a pivotal moment in the War in Ukraine, shifting the dynamics of this conflict and raising some legal questions regarding the Ukrainian incursion into Russian Territory. This paper will examine the context that prompts what might be the third phase of the Ukrainian counteroffensive, examining the legal arguments that make this act lawful and compliant with Article 51 of the UN Charter, which grants States the right to self-defence.

By analysing the right to self-defence, alongside the principles of proportionality and necessity, this paper argues that the Kursk Operation can be lawfully considered an act of self-defence. Lastly, it examines the definition of "occupation" to clarify the legal distinctions relevant to this operation.

II. The Kursk Incursion in the context of the war between Russia and Ukraine.

In March 2014, the international community witnessed the annexation of Crimea by the Russian Federation through a municipal act, followed by the 'armed intervention', a referendum, and the territory's declaration of independence (Grant, 2015). Although it was initially declared 'unconstitutional' by the Ukrainian Constitutional Court, the 'Annexation of Crimea' prompted the response from the Ukrainian forces to defend its sovereignty (Grant, 2015). This action is contemplated in Article 51 of the UN Charter, which allows "individual or collective self-defence if an armed attack occurs against a Member of the United Nations", until the Security Council has taken the measures necessary to maintain international peace and security" (UN, 1945) which the Security Council has failed to do in Ukraine.

In March 2022, the Russian Federation escalated the 8-year-long conflict with the declaration of independence of the territories of Donetsk and Luhansk and the unilateral declaration of war that preceded the full-scale invasion of Ukraine (Pelliconi, 2024). This declaration followed the so-called 'special military operation' and directed Russian forces to Kyiv with the aim to capture the Ukrainian capital (Muradov, 2023). Despite the initial belief that 'Ukraine would fall in three days', Russian forces failed to subdue the Ukrainian army, which proved incredibly resilient and effective in countering Russian aggression (Muradov, 2023). This unforeseen defensive capacity forced Russian forces to change tactics and instead centre their offensive in taking control of Luhansk, Donetsk, and the southern regions (Muradov, 2023). By the summer of 2022, six months after the start of the full-scale invasion, Ukraine had reportedly been successful in stopping Russia's advance along the frontline (Muradov, 2023).

After securing most of its territory, Ukraine started its counteroffensive operations in June 2023 (Financial Times, 2023). These have been officially categorised by academics in two major phases (Muradov, 2023), to which it is worthy to include the Kursk Operation as the third phase. The first phase of Ukraine's counteroffensive encompassed the Battle of Kyiv, the Battle of Kharkiv, and the Battle of Kherson (Muradov, 2023). The Ukrainian army defeated the Russian military and forced it to withdraw from the Kyiv, Chernihiv, and Sumy oblasts by the end of March (Muradov, 2023). These actions were followed by the liberation of Kharkiv and Kherson just after the 'fake Russian referendum' was celebrated in the city (Muradov, 2023). The second phase was constituted by the push for the lines in the Zaporizhian and Donetsk fronts, which remains ongoing. In fact, as of 26th September the front line goes past the Sumy Oblast and expands to Sudzha, Malaya and Lyubimovka in Russia (Mappes, 2024).

In this paper, the Kursk Operation is acknowledged as the 'third phase' of the Ukrainian counteroffensive, even though it has yet to be labelled as such. It is important to categorise this as a distinct event, as this is the Ukrainian forces' first incursion and counteroffensive in Russian territory. From a legal lens, it could be argued that this action oversteps the 'collective self-defence' foreseen in Article 51 and might be considered an act of aggression in accordance with Article 3(a) of the United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression (UNGA, 1974). This article will present the legal basis to argue against this idea.

III. The Right to Self-defence

This section outlines the principles of proportionality and necessity in relation to the Kursk Operation, as well as the reasons why this operation does not fall into the definition of occupation. The first part delves into the principal legal consideration: the right of self-defence.

Enshrined in Article 51 of the UN Charter, this article allows States to exercise their right of self-defence in case of an attack. However, Article 51 does not determine the scope of said self-defence in temporal terms and leaves open to interpretation the matter of pre-emptive use of force (Badalič, 2021). There are two possible interpretations of pre-emptive attacks. The first one suggests that Article 51's intent is to limit the use of force in self-defence exclusively to those circumstances in which an armed attack has already occurred, making a pre-emptive attack unlawful (Arend, 2003). The second interpretation proposes that the intent is not to restrict the pre-existing customary right of anticipatory self-defence, as it does not explicitly convey in the text the limitation of self-defence solely in the case in which an armed attack has already occurred (Arend, 2003). Despite this open interpretation, state practice has leaned towards more support for the pre-emptive use of force when

undertaken in anticipatory self-defence, as long as it meets the criteria of proportionality and necessity (Arend, 2003). These criteria originate from the “Caroline Doctrine”, and it is considered customary law, as it is not codified in any treaty (Arend, 2003).

Regardless, both interpretations coincide in the fact that self-defence is lawful as long as there is an attack. In the context of an ongoing war, the element of ‘imminent threat’ is permanent, so this requirement is met. Subsequently, by examining the principles of proportionality and necessity through the lens of customary law, this paper assesses the measures taken during the Kursk Operation. The next step of the analysis, applying customary law, is the examination of the proportionality and necessity of the measures taken.

A. Necessity

Necessity refers to the “capacity of a measure to serve the desired purpose and the search for the least onerous means” (Maroonian, 2022). More precisely, military necessity allows a belligerent party to apply any amount and kind of force to achieve victory as long as it is done with the least possible expenditure of time, human lives and resources (Wilhelm case at Nuremberg Trial, as cited in Schmitt, 2010). Evidently, the belligerent parties are still subject to the laws of the war, yet still military necessity allows them to act against lawful objectives, such as combatants or military objects (Wilhelm case at Nuremberg Trial, as cited in Medecins Sans Frontiers, n.d.). What this principle refers to is the permission to carry out the necessary acts to defeat the enemy within the limits of the law and by using the least damaging means possible.

Regarding necessity, Ukraine has manifested that “it has been limited in its ability to carry out strikes into Russian territory in order to target the source of long-range attacks against targets in Ukraine” (O’Meara, 2024). Kyiv’s chief commander, Oleksandr Syrskyi, reported that Russia had been shelling territories from Kursk. In response to this threat, the Kursk operation was launched to stop the attacks and create a ‘security zone’ to protect the Ukrainian civilian population. Thus, the Kursk operation was launched as a response to a threat (Politico, 2024a). In this sense, the attack on Russian territory is a necessary means to achieve a defensive and security aim (O’Meara, 2024).

b. Proportionality

When referring to proportionality, it is essential to distinguish between proportionality as a fundamental principle of International Humanitarian Law (IHL) and proportionality as a codified rule. The first one addresses proportionality as a source of law, which, along with the principles of humanity and distinction, is a general principle that serves to guide actions

and to cover the gaps in conventional and customary law (Maroonian, 2022). As such, it also has a limiting role in demarcating the targeting, the choice of weapons, and the precautionary measures that ought to be taken (Maroonian, 2022). The second one, proportionality as a rule, is a codified norm and therefore enshrined in many clauses of IHL, such as the Additional Protocol (I) to the Geneva Conventions (hereby API I), including article 51(5)(b), regarding the protection of the civilian population; 57(2)(a)(iii) and 57(2)(b), regarding precautions to be taken during attacks (API I, 1977).

In any case, proportionality is a principle that refers to the correlation between the means invested and the objectives to be achieved (Maroonian, 2022). As a codified rule, proportionality has a specific scope consisting of the subject, namely civilians and their protection, and object, which is the conflict (Maroonian, 2022). This scope refers to the 'balance of interests', which requires calculating the 'interests to be achieved' and the 'anticipated losses', including human life and damage to civilian objects, protected under IHL as illegitimate targets (Maroonian, 2022). Taking into account proportionality as a guiding principle means that the actions taken need a prior calculation of the values at conflict. For example, self-defence against Russian sovereignty, in the Ukrainian case — and a balance between the invested means and the objectives to be achieved, in this case, victory against Russia.

As mentioned above, Article 51 of the UN Charter allows for a proportionate response to conflicts as long as it is necessary to achieve victory and defeat the enemy. The military decision-makers of Ukraine seem to have calculated that a buffer zone (Mills et al. 2024; Barry, 2024) is necessary to achieve military victory, and so far, the means chosen to carry out this operation seem to be proportional (if not far disproportionate considering the violence and threat of the Russian aggression), making this response lawful (O'Meara, 2024).

In fact, compliance with IHL is a priority for Ukraine in conducting the Kursk Operation, but more broadly, the way it wages war. President Zelenskyy declared that: "It is important for us not to be like those who brought war with looting and rape to us. I am very proud of our soldiers, that we don't have anything like that," partly because "it also affects the attitude of the international community to the incursion" (POLITICOB, 2024). To exemplify this narrative and conduct this 'good behaviour', Ukrainian troops have posted videos interacting with Russian civilians and providing them with food and water (POLITICOB, 2024).

To summarise, the examination of these two criteria requires attention to the facts at hand. For proportionality, it is necessary to understand the objective to be achieved and to assess its correlation with the invested means. Academics and experts suggest that Ukraine's intention with the Kursk Operation is to create a buffer zone that separates Ukrainian territories from Russia (O'Meara, 2024; Mills et al. 2024; Barry, 2024). As for necessity,

met after the Kursk Operation, as Ukrainian troops became present in Russian territory.

This becomes less clear-cut for the second and third requirements (Meier, 2024). On the one hand, the International Court of Justice (ICJ) determined in the Armed Activities case that an occupation required the foreign forces to exercise actual authority, not merely the possibility to exercise said authority (Meier, 2024). Other interpretations propose that following the criteria of the ICJ is problematic, as an occupier could simply not exercise authority to avoid being seen as such (Meier, 2024). Additionally, there is a question of the degree to which the occupying power must exclude the authority of the 'displaced sovereign' (Meier, 2024). A middle ground between these two perspectives is the one that contemplates the possibility of the authority being shared (Ferraro, 2012).

The International Criminal Tribunal for the former Yugoslavia (ICTY) established in the Prosecutor v. Naletilic & Martinovic case the guiding principles to determine the effective authority of an occupying power. First, the occupying power must be able to substitute with its own authority the one of the occupied authorities, which must have been rendered incapable of functioning publicly (ICTY, 2003). Second, the enemy's forces must have either surrendered, been defeated or withdrawn (in this respect, battle areas may not be considered as occupied territory and sporadic local resistance, even successful, does not affect the reality of occupation) (ICTY, 2003). Third, the occupying power ought to have a sufficient force present or the capacity to send troops within a reasonable time to make the authority of the occupying power tangible (ICTY, 2003). Fourth, a temporary administration must have been established over the territory (ICTY, 2003). Lastly, the occupying power issued and enforced directions to the civilian population (ICTY, 2003).

Therefore, in accordance with the ICTY guidelines, Ukraine has not established effective control as it is not 'in a position to substitute [Russian] authority', or a 'temporary administration has been established over the territory'. Furthermore, experts argue that because this an active battle zone with significant Russian opposition, it is not yet possible to make a complete a final assessment on the level of effective control (Meier, 2024).

V. Conclusion

This paper has analysed the legal arguments to support the lawfulness of the Kursk Operation as an act of self-defence compliant with jus ad bellum, based on the principles of necessity and proportionality. By analysing these two criteria, the article argues that Ukraine has launched the third phase of its counter-offense under the umbrella of Article 51 of the UN Charter. In its first section, the article presented an overview of the context of the ongoing conflict, arguing that the Kursk Operation begins the third phase of the Ukrainian counteroffensive. Next, it analysed the operation's legitimacy through the lenses of the use

of force — examining whether or not this is a case of the controversial pre-emptive attack and dismissing this notion — and examined the customary law criteria of proportionality and necessity, which Ukraine complies with. Lastly, it considered the possibility of the Kursk incursion as an act of occupation, arguing against this idea and explaining how, as per the ICTY guidelines, Ukraine has not established effective control over Kursk and therefore is not occupying the territory. This analysis underscores the operation's compliance with international law, affirming Ukraine's right to protect its sovereignty and defend itself from Russian aggression.

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