

# WHY THE CONFLICT IN UKRAINE IS A REAL WAR, AND HOW IT RELATES TO INTERNATIONAL LAW.

## IS THE WAR IN UKRAINE INDEED A WAR?

The definition of “war” or armed conflicts can be found in the 1949 Geneva Conventions<sup>1</sup> (“Geneva Conventions”) - a principal instrument of international humanitarian law. The Geneva Conventions distinguish two categories of armed conflicts (or wars) – international and non-international.

There have been several [reports](#) on Russian involvement in Ukraine indicating that Russia is *directly involved in the hostilities*, either through direct participation or through logistical support. This,

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<sup>1</sup> The 1949 Geneva Conventions comprise four treaties, and three additional protocols, that establish the standards of international law for the humanitarian treatment of war. It must be noted that Russia and Ukraine are both the parties to the Geneva Conventions. The full text of the Geneva Conventions can be accessed online: <https://www.icrc.org/ihl/INTRO/365?OpenDocument>.



among others, includes the presence of Russian military forces, tanks, weapons in rebel-controlled areas along with other indicators.

Thus, the ongoing armed conflict on Ukrainian territory may well amount to an international armed conflict according to Common Article 2 of the Geneva Conventions. Importantly, a mere crossing of a national border by military forces without the consent of the neighboring state, *as it was the case of Crimean occupation*, can amount to an international armed conflict regardless of the circumstances, motive or intent behind the operation.

### **WHY INTERNATIONAL LAW APPLIES TO THE RUSSIA - UKRAINE CONFLICT AT ALL?**

The law of armed conflict applied to the situation in Crimea from the moment Russian forces entered Ukrainian territory without Ukraine's consent. Common Article 2 to the Geneva Conventions stipulates that the Conventions "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."<sup>2</sup>

In other words, any hostilities between the armed forces of two states constitute an international armed conflict, even if one or both states deny there is a conflict. Similarly, an international armed conflict can arise as a result of partial or total occupation and triggers the Geneva Conventions, even if such occupation is not met with armed resistance or the occupying state denies the occupation.

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<sup>2</sup> Common Article 2 to the Geneva Conventions of 1949 states that: "*In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance*".



Given the above, the occupation, the subsequent illegal Russian annexation of Crimea and the crossing of Ukraine's borders by Russian tanks and combat forces engaged in military operations inside the sovereign territory of Ukraine may well constitute an international armed conflict, and as a result, International Humanitarian Law apply.

## **THE BUDAPEST MEMORANDUM AND BREACH OF SECURITY OBLIGATIONS**

With the dissolution of the Soviet Union in 1991, Ukraine became independent and appeared to be the **third largest nuclear power in the world**,<sup>3</sup> after the United States and Russia. Following much persuasion from western countries, in 1994 Ukraine undertook the commitments under the *Treaty on the Non-Proliferation of Nuclear Weapons*<sup>4</sup> and eliminated all nuclear weapons from its territory. By a twist of a fate, the Ukrainian missiles were either transported to Russia or destroyed.

In return, **Ukraine was reassured by the leaders of the Russia, United States, and the United Kingdom of its security, sovereignty, and the inviolability of its borders.** These political agreements were declared in the Budapest Memorandum on Security Assurances<sup>5</sup> signed on 5 December, 1994

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<sup>3</sup> There is a range of informational sources unanimously stating that Ukraine has been the world's third-largest nuclear power since the breakup of the Soviet Union. Among others, this point was stressed by Anders Aslund, Senior Fellow of the Peter G. Peterson Institute of International Economics. See A. Aslund, *How Ukraine Became a Market Economy and Democracy* (Peterson Institute for International Economics, 2009) at p. 39.

<sup>4</sup> The 1968 Treaty on the Non-Proliferation of Nuclear Weapons, commonly known as the Non-Proliferation Treaty or NPT, is an international treaty whose objective is to prevent the spread of nuclear weapons and weapons technology, to promote cooperation in the peaceful uses of nuclear energy, and to further the goal of achieving nuclear disarmament and general and complete disarmament. The Treaty represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States. Available online: <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml>.

<sup>5</sup> Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) signed on , available online:



in Budapest at the summit of the Organization for Security and Cooperation in Europe (“Budapest Memorandum”). In particular, the Budapest Memorandum provides that:

*“The Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations.”*

Notwithstanding these obligations, both Ukraine's sovereignty and territorial integrity have been violated. Russia has invaded and annexed Crimea, soon after Russia has been involved in the conflict in eastern Ukraine. This precedent of breaking the promises made by Russia under the Budapest Memorandum may well spark growing concerns about grave implications for global security.

## **RUSSIA’S HUMANITARIAN CONVOY IN UKRAINE**

According to the Observer Mission of the Organisation for Security and Cooperation in Europe (OSCE) which monitoring and reporting on the Donetsk Border Crossing Point, a total of 134 trucks crossed the border into Ukraine *without state consent or ICRC escort*. It also said that only 34 of the trucks that crossed the border had been inspected by Ukraine.

US, EU and NATO [condemned](#) the entry of Russian convoy into Ukraine. NATO has termed Russia’s actions as a blatant breach of international commitments. Russia [denied](#) all the arguments insisting

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[https://www.msz.gov.pl/en/p/wiedenobwe\\_at\\_s\\_en/news/memorandum\\_on\\_security\\_assurances\\_in\\_connection\\_with\\_ukraine\\_s\\_accession\\_to\\_the\\_treaty\\_on\\_the\\_npt?printMode=true](https://www.msz.gov.pl/en/p/wiedenobwe_at_s_en/news/memorandum_on_security_assurances_in_connection_with_ukraine_s_accession_to_the_treaty_on_the_npt?printMode=true).



that it is a “purely humanitarian mission”. The Ukrainian government have made clear that this convoy would constitute a humanitarian mission only if expressly agreed to by the Ukrainian government and only if the aid was inspected, escorted and distributed by the International Committee of the Red Cross (ICRC).

On practice, international humanitarian law provides rules to regulate humanitarian aid in armed conflict. Different legal rules may apply to different situations (i.e. occupation, international or non-international armed conflict, etc.). However, what unites the legal rules regarding the delivery of humanitarian aid is the requirement of state consent: without consent, humanitarian actors cannot provide relief to the population in need. According to international law, Russia cannot send any humanitarian convoy to the zone of conflict without prior consent of Ukraine.

Furthermore, international law requires that relief operations be of an “exclusively humanitarian and impartial nature.” In order to ensure this the party of the conflict has the right to inspect relief convoys before permitting them access to the enemy.<sup>6</sup>

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<sup>6</sup> In particular, Article 70 of the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (“the Protocol”) stipulates:

“1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69 [ Link ] , relief actions which are **humanitarian and impartial in character** and conducted without any adverse distinction shall be undertaken, **subject to the agreement** of the Parties concerned in such relief actions.”

Moreover, the Protocol provides that the Parties to the conflict, which allow the passage of relief consignments, equipment and personnel, have the right to prescribe the technical arrangements, including search, under which such passage is permitted. See the full text of The Protocol online: <https://www.icrc.org/ihl/WebART/470-750089?OpenDocument>.



The two resolutions of the UN General Assembly also stipulate the general humanitarian principles such as humanity, neutrality, impartiality and operational independence.<sup>7</sup> Two of these principles particularly require that:

- humanitarian actors must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature, and
- humanitarian action must be autonomous from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented.

It should be also stressed that there is an obligation to accept international assistance when a civilian population is lacking the supplies essential for its survival and again, when such assistance is “humanitarian and impartial.” However, taking that Russia is clearly far from being neutral in the Russia – Ukraine conflict as well as the Russia’s humanitarian convoy directed to eastern Ukraine without its consent is far from being autonomous and impartial, the Russia’s humanitarian efforts may be considered as violation of international humanitarian law.

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<sup>7</sup> The first three principles are endorsed in General Assembly Resolution 46/182, which was passed in 1991. The fourth principle was added in 2004 under Resolution 58/114.

