

# Concepts of Self Defence - Ukraine's Incursion into Kursk

*Anthony Paphiti*

17 November 2024

(Updated 22 November and 29 November)



(c) <https://www.ar15.com/>

## Overview

The Russian invasion of Ukraine in February 2022, in spite of the background of many years of NATO provocation, was an act of aggression. As Ukraine's fortunes in the war have faltered, the US recently authorised the use of ATACMS to attack targets inside Russia - specifically, the region of Kursk which has been seized by Ukrainian forces. While it is emphasised by its supporters that Ukraine is defending itself and that those who are in the wrong may not rely on self defence, how does this impact the Ukrainian incursion into Kursk, on 6 August 2024, more than two and a half years after the illegal Russian invasion of Ukraine, and the alleged use by Russia of North Korean allied troops to defend its (Russia's) territory in order to expel Ukrainian forces? It has been argued that Ukraine's invasion of Russian territory is 'a lawful act of self-defense under international law'. Nevertheless, the right of self-defence is not absolute. But, the issue addressed in this paper is whether, at this stage of armed conflict, concepts of self defence are still relevant, or whether, more appropriately, it is the Law of Armed Conflict (*jus in bello*).

---

In her article in the December 2008 edition of the ICRC Review, *Jasmine Moussa* argues that separating the *jus ad bellum* and *jus in bello*, is "the antithesis of the so-called 'just war' theory, which subordinates *jus in bello* to *jus ad bellum* considerations. This principle of separation provides that international humanitarian law binds all belligerents, regardless of who is the

aggressor... The paper [also addresses] how the conflation of the principles of proportionality and necessity under *jus ad bellum* and *jus in bello* and the confusion of the concepts of 'self-defence', 'necessity', 'emergency' and 'military necessity' have further blurred the distinction between these two bodies of law."<sup>i</sup>

*Moussa* points out that "the only conduct justified by the principle of self-defence is that which is taken in response to violations of Article 2(4) of the UN Charter and is within the legal limits of necessity and proportionality." [*Moussa, op cit*]

How does this impact the Ukrainian incursion into Kursk, on 6 August 2024, more than two and a half years after the illegal Russian invasion of Ukraine, and the alleged use by Russia of North Korean allied troops to defend its (Russia's) territory in order to expel Ukrainian forces? It has been argued that Ukraine's invasion of Russian territory is 'a lawful act of self-defense under international law'.<sup>ii</sup> Nevertheless, the right of self-defense is not absolute. See, for example, Chris O'Meara who states:

"[I]nternational law does not provide a *carte blanche* to States that are victims of violence, even the most egregious violence. States are not permitted to do whatever they like to protect their territory and citizens. A State's right of self-defense is not absolute and is not a superior prerogative that automatically trumps other legal rights, even those of an aggressor like Russia..."<sup>iii</sup>

But the *jus ad bellum* concept of self defence relies on imminence of attack. Using self defence as a justification for acting would therefore be unduly restrictive for a "victim state". Self defence would be more readily envisaged, as O'Meara points out, were the fighting to be restricted to Ukrainian soil. *A fortiori*, one might question whether *jus ad bellum* terminology of self-defence should still be applied, after 2½ years of war, where the defender pushes forward into the territory of the aggressor, seizing and occupying land. For Ukraine's incursion to be a lawful act of war, it must be assessed according the *jus in bello* to have been militarily necessary and a proportionate use of force to achieve the removal of Russian forces from Ukraine.

This question (which is for practical purposes, largely academic) of whether Ukraine is acting in self defence is, perhaps, finally put to bed by the announcement made on 17<sup>th</sup> November by President Biden that the US will allow Ukraine to use ATACMS<sup>iv</sup> inside Russia (Kursk) to attack Russian targets. While the US has previously provided Ukraine with ATACMS, they were fired at Russian targets inside Ukraine. This recent announcement has moved the dial forward and has an additional consequence I would suggest. These systems rely on US targeting data and are operated by US personnel.<sup>v</sup> It means that the United States has crossed the Rubicon and can be said to be now directly engaged in a war with Russia. *A fortiori*, were the missiles to be launched from within Russia.<sup>vi</sup> This is a dangerous escalation in the war, made two months before President Trump – who, we understand, is committed to a peace deal – takes office.<sup>vii</sup> As O'Meara has said, "A State's right of self-defense is not absolute".<sup>viii</sup>

Moreover, as both Ukraine and Russia are, in fact, belligerents, is Russia not entitled to defend its territory and citizens as a matter of military necessity, once it is in a state of war with

Ukraine, despite the fact that it started the conflict, as Ukraine's forces have moved outside their own territory? It could be argued that it is not a disproportionate response to defend its people and territory from the Ukrainian incursion into Kursk. The Russians are hardly likely to cede their own territory from Ukrainian attack, especially one so redolent with memories of bitter fighting in the last World War.<sup>ix</sup>

While it is accepted that those who are in the wrong may not rely on self defence,<sup>x</sup> this principal has not stopped the US troops illegally based in Syria from defending themselves from attack from militia groups in Syria. The United States has used a similar argument (self defence by an illegal occupier) to justify its use of force in defence from attacks by Syrian government forces on its personnel *illegally* based inside Syria, at Al Tanf, without Syrian government consent, and without a UNSC authorisation under Chapter VII. The US also shot down a Syrian air force jet lawfully operating within Syria, claiming it acted "in collective self-defence" of Syrian Democratic Forces (SDF)<sup>xi</sup> - an organisation which Turkey claims has direct links to the PKK, which it recognizes as a terrorist group.<sup>xii</sup>

The *jus in bello* applies equally between all belligerents. It seems to follow that, once a state of war exists, there is nothing to actually prevent allies from providing assistance to a party engaged in the conflict, especially in defence of its own territory. Treaty provisions may specifically apply. Of course, the degree of that assistance will determine the extent to which they may be themselves regarded as parties to the conflict. That is a question of relevance to those assisting each party - and is why NATO has been at pains to say that it is not at war with Russia.<sup>xiii</sup> All the same, it is a mystery why the USA has decided to act on principle now, when it was aware of Chechen forces that were operating inside Ukraine early on in the war when they were involved in the brutal fighting against Azov forces in Mariupol and then used in Bakhmut.

*Moussa* cites

"In the Justice Trial, for instance, the [Nuremberg] Tribunal dismissed the view that 'by reason of the fact that the war was a criminal war of aggression, every act which would have been legal in a defensive war was illegal in this one'. It proceeded to state that, under such reasoning, 'the rules of land warfare upon which the prosecution has relied would not be the measure of conduct, and the pronouncement of guilt in any case would become a mere formality'. [*ibid* p.982]

She also refers to the *Hostages* Trial where "the Tribunal emphatically rejected the view that Germany could not invoke the law of belligerent occupation since the occupation was based on an illegal use of force." It was alleged that "Germany's war against Yugoslavia and Greece were aggressive wars, the German occupation troops were there unlawfully." The Court considered, notwithstanding, that it did not follow that every act by the German occupation forces against person or property is a crime and pointed out that

"...international law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in the occupied territory. There is no reciprocal connection between the manner of the

military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

‘ Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other; and as between the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Law... Military necessity or expediency do not justify a violation of positive rules.”<sup>xiv</sup>

In other words, the court was concerned with the reality of the circumstances ie being one of the occupation.

Commons sense would (to me, at least) dictate that the Ukrainian incursion into Russia seems to have moved the needle beyond acts of self defence by Ukraine, as it was a deliberate (lawful) decision to take the war to Russia on their ground. Thus, once a war has begun, regardless of who started it, the *de jure* state of conflict means, to my mind, that it is solely governed by the *jus in bello* and that discussions purely about self defence are unhelpful and no longer entirely relevant. Each side is fighting for victory, however that is defined. The most relevant questions then come down to the methods and means of warfare employed to that end. In any event, the argument is now, it seems to me, academic as the USA has effectively joined the war and is engaged in assisting Ukraine to attack Russian forces from inside Russia.

[Update: 29 November 2024: Since the initial publication of these thoughts, the United Kingdom has also authorised Ukraine to fire UK-supplied Storm Shadow missiles at Russian targets inside Russia. This is also direct participation by UK in the war, for the same reasons as articulated above concerning US authorisation of ATACMS.<sup>xv</sup>]

#conflict #jusadbellum #jusinbello #humanitarianlaw #war #ukraine #selfdefence #kursk

---

<sup>i</sup> “Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law”, Jasmine Moussa, *ICRC Review*, Volume 90 Number 872 December 2008

[https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/irrc-872-Moussa .pdf](https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/irrc-872-Moussa.pdf)

<sup>ii</sup> “Ukraine’s incursion into Russia’s Kursk region is legitimate, says NATO’s Stoltenberg”, *Reuters*, August 31, 2024: <https://www.reuters.com/world/europe/ukraines-incursion-into-russias-kursk-region-is-legitimate-says-natos-2024-08-31/>

<sup>iii</sup> <https://www.justsecurity.org/98847/kursk-incursion-international-law/> [Chris O’Meara, August 23, 2024]

<sup>iv</sup> “The MGM-140/-164/-168 Army Tactical Missile System (ATACMS) is a series of short-range, road-mobile, solid-propellant fueled, surface-to-surface ballistic missiles developed in the United States.” CSIS Missile Defense Project, April 23, 2024: <https://missilethreat.csis.org/missile/atacms/>

<sup>v</sup> “Western long-range precision weapons can only be used with intelligence data from Nato satellites and flight assignments entered by Nato military personnel”, *The Independent*, 18 November 2024:

---

<https://www.independent.co.uk/news/world/europe/atacms-ukraine-long-range-missiles-storm-shadow-biden-b2648790.html>

- vi “The weapons are likely to be used in response to North Korea's decision to send thousands of troops to Russia in support of Russian President Vladimir Putin's invasion of Ukraine... Around 10,000 soldiers from the communist regime have joined the fight to reclaim Kursk, which Ukraine seized in a daring counter offensive last August.” Daily Mail, 17 November 2024: <https://www.dailymail.co.uk/news/article-14093445/Biden-gives-Zelensky-green-light-fire-long-range-American-missiles-Russia-time-raising-chance-UK-follow-suit-eyes-Putins-response.html>  
“The weapons are likely to be initially employed against Russian and North Korean troops in defense of Ukrainian forces in the Kursk region of western Russia, the officials said.” *New York Times*, 18 November 2024 <https://www.nytimes.com/2024/11/17/us/politics/biden-ukraine-russia-atacms-missiles.html>
- vii “Biden’s green light for Ukraine to use ATACMS in Russia just raised the stakes in a war Trump will inherit”, *CNN*, November 17, 2024 <https://edition.cnn.com/2024/11/17/europe/analysis-biden-atacms-ukraine-intl-latam/index.html>
- viii *Op cit*, FNiii
- ix The Battle of Kursk, 1943: <https://www.britannica.com/event/Battle-of-Kursk>
- x The *Ministries Case* (1949), [transcript, p. 329]: “he who initiates aggressive war loses the right to claim self-defense against those who seek to enforce [the Kellogg-Briand Pact prohibiting aggressive war]. This was merely the embodiment in international law of a long-established principle of criminal law : \* \* \* \* there can be no selfdefense against self-defense.”
- xi Tess Bridgeman, *Just Security*, June 15, 2017: [ <https://www.justsecurity.org/42183/deconfliction-zone-syria-united-states-firm-domestic-international-legal-footing/>. See also, in relation to the UK, For a criticism of the UK position, see “The Legality of the UK’s Air Strikes on the Assad Government in Syria”, *Opinion* of Professor Dapo Akande, 16 April 2018: [https://d3n8a8pro7vhmx.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande Opinion UK Government's Legal Position on Syria Strike April 2018.pdf](https://d3n8a8pro7vhmx.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande%20Opinion%20UK%20Government's%20Legal%20Position%20on%20Syria%20Strike%20April%202018.pdf)  
Chris O’Meara: “February 2021 American airstrikes in Syria: necessary and proportionate acts of self-defence or unlawful armed reprisals?”, *Taylor Francis Online*, 18 Jan 2022: <https://www.tandfonline.com/doi/full/10.1080/20531702.2022.2029021#d1e148>  
“Self-Defense Against Self-Defense, In Syria And Beyond”, Adil Ahmad Haque, *Just Security*, May 31, 2018: <https://www.justsecurity.org/57223/self-defense-self-defense-syria/>
- xii “Who are the Syrian Democratic Forces?”, *Al Jazeera*, 15 Oct 2019 <https://www.aljazeera.com/news/2019/10/15/who-are-the-syrian-democratic-forces/>
- xiii [https://www.nato.int/cps/en/natohq/topics\\_50090.htm](https://www.nato.int/cps/en/natohq/topics_50090.htm) NATO, “Relations with Russia”, Last updated: 05 Aug. 2024
- xiv *ibid* p.982; See also, *The Hostages Trial*, at p.59, 60 and 67: <https://www.legal-tools.org/doc/b62664/pdf>
- xv “Ukraine fires UK-supplied Storm Shadow missiles at Russia for first time”, BBC, 20 November 2024, <https://www.bbc.co.uk/news/articles/c4g704g051go>