

What is War?

Ukraine and the legal definition of war

Carina Lamont

The situation in Ukraine has been labelled a crisis, aggression and an assault. Few have put it as it is – war. The ambiguity in terminology has caused uncertainty as to how to define a situation such as that in Ukraine. If that is not war, what is? At the same time, the term “war” is used in several different contexts, such as the “war on terrorism”, further confusing the characterisation of what war actually is. The aim here is to answer the question from an international legal perspective.

The legal definition of war can be found in the Geneva Conventions of 1949. They identify two categories of armed conflicts (or wars) – international and non-international. Thus, terrorism is not war. Terrorism is a method that can amount to war if the prescribed legal criteria for war are fulfilled. It is first important to note that a declaration of war is not required for an armed conflict to arise in the legal sense. Neither do the actors engaged need to recognise or admit to their involvement in an armed conflict. In the case of both international and non-international armed conflicts, it is the factual conditions, and what actually happens on the ground, that determine whether or not an armed conflict exists. In other words, it is the situation on the ground that determines the legal definition of the situation, as well as who the parties to any armed conflict are.

The existence of an armed conflict is determined based on a legally defined set of conditions, but the criteria for determining the existence of a non-international armed conflict differ from those of an international armed conflict. A non-international armed conflict is one that takes place between a state and organised armed groups, or between such groups. There are two fundamental legal requirements for a situation to amount to a non-international armed

conflict. First, the violence must reach a certain level of intensity. Since an armed conflict activates the applicability of the law of armed conflict (International Humanitarian Law, IHL), which enables forms of force and force under other circumstances than international human rights do, the intensity requirement is central. Therefore, the distinction between what constitutes a non-international armed conflict and what comprises other forms of internal disturbance is essential. Second, non-state actors engaged in the non-international armed conflict must possess a capability for organised armed force. This entails organisational and command structures, as well as a capacity for the use of military force. The “pro-Russian separatists” have repeatedly shown that they possess both. There can thus be little doubt that the situation in Ukraine can amount to a non-international armed conflict.

Given the reports on Russian involvement in Ukraine, however, it may be more likely that the ongoing armed conflict on Ukrainian territory amounts to an international armed conflict as defined in common article 2 of the Geneva Conventions, which holds that an armed conflict may arise between two or more of the high contracting parties (which today means states). Notably, the first prerequisite is that armed force is used between two or more states. The actual involvement of Russia in the hostilities in Ukraine is thus central in identifying the situation as an international armed conflict. Furthermore, and as opposed to the criteria for determining the existence of a non-international armed conflict, there is no requirement of a certain intensity of force for a situation to amount to an international armed conflict. The criterion is merely the use of armed force. Thereby, a mere crossing of a national border by armed forces can amount to an international armed conflict,

and it can consequently arise without any firing of arms. There have been several reports on the presence of Russian tanks in rebel-controlled areas, indicating that Russia is directly involved in the hostilities, either through direct participation or through logistical support. Similarly, an international armed conflict can arise as a result of a total or partial occupation, even if such occupation is not met with armed resistance. The occupation, and the subsequent illegal Russian annexation of Crimea, consequently, continues to constitute an occupation, and as a result, both IHL and the law of occupation apply.

Another essential aspect to consider is the state responsibility that can follow from any involvement of state actors in an armed conflict. International law stipulates that the conduct of any state organ shall be considered an act of that state under international law. An organ includes any person or entity which has that status in the internal law of the state. Military actors undoubtedly constitute an organ of the state, and any acts by Russian military actors on Ukrainian territory are therefore attributable to Russia. Moreover, the responsibility for the conduct of state organs falls upon the state even if the act exceeds their authority or contravenes instructions given. On 26 August 2014, Ukrainian authorities released a video of Russian paratroopers captured inside Ukraine. Russia continues to deny direct involvement, and claims that the paratroopers had entered Ukraine by mistake. Notably, however, the mere presence of Russian military actors, and most definitely any direct participation, would give rise to Russian state responsibility, whether or not Russia admitted their presence or participation.

But the responsibility of states does not end there. States are also responsible for acts committed by persons or entities which they have empowered, under their internal law, to exercise elements of governmental authority. In other words, acts by persons who are not officially organs of the state, but who are empowered by national law to exercise governmental authority, are also considered acts of the state. International law also holds the state responsible for wrongful acts by such individuals if they act on the

instruction of, or under the direction or control of, the state. Thereby, to the extent that pro-Russian rebels in Ukraine receive instructions from, or are controlled by, Russian state organs, any wrongful acts committed by the rebels are also attributable to Russia.

In conclusion, there is no doubt that the situation in Ukraine amounts to an armed conflict. The jury is still out, however, on whether the conflict is of an international or a non-international nature. Although it is probable, it is difficult at this time to establish with absolute certainty that the extent and form of Russian involvement is such that the conflict can be confirmed as being of an international character. However, determining that the situation in Ukraine amounts to an armed conflict alone creates important legal parameters for any political engagement in the solution of the conflict. Consequently, it is of the essence that any assessment of international conflicts or crises is both capable and willing to take law into account when creating road maps for political responses. Under rule of law principles, whether in national or international contexts, law is the framework within which politics is to operate. Law and politics must therefore go hand in hand when addressing security-related concerns on the international arena. Stating it as it is in Ukraine, namely war, consequently gives the parameters both for actions in response and for the design of sustainable solutions.

Carina Lamont
Analyst