On 3 May 2022, British Prime Minister Boris Johnson addressed Ukraine’s parliament – the Verkhovna Rada – over video link. The members of the Verkhovna Rada gathered in person to hear Johnson’s remarks. The appearance was one of normality: a head of government addressing a national parliament which had physically gathered to hear his remarks, albeit delivered remotely from abroad.

However, nothing could be further from the truth. Ukraine is under a sustained armed attack from Russia. Russia’s original goals were to “demilitarize and de-Nazify Ukraine” and “ensuring its neutral status”. Those goals have now shifted toward the seizure of the Donbas – i.e., the eastern regions of Luhansk and Donetsk. The seizure of the Donbas may be followed by an illegal referendum and annexation, as occurred in the Crimea in 2014. In addition, Russia may seek to cut off Ukraine from the Black Sea entirely and establish a land corridor to connect Donbas to Transnistria, a breakaway region of Moldova with Russian troops.

The Centrality of the Verkhovna Rada

Russia has attacked Ukraine’s sovereignty, territorial integrity, and political independence. But its armed attack is also an assault on the Ukrainian constitutional order. Ukraine is a constitutional democracy governed by the rule of law. Russia is using armed force to make unconstitutional changes to Ukrainian territory outside the rules, institutions and procedures set out in the Constitution of Ukraine. Moreover, it seeks to effect changes in Ukrainian foreign policy under armed duress.

To defend Ukraine is to defend constitutional democracy and the rule of law. But the defence of Ukraine must occur through constitutional democracy and the rule of law. Ukraine’s self-defence, of course, has occurred through recourse to armed force. But how armed force is deployed – and other measures taken in the defence of Ukraine – must take place through constitutional means.

The Verkhovna Rada is a central institution in the Ukrainian constitutional order. Ukraine has a semi-presidential system of government, which combines a directly elected President with a Prime Minister that commands the confidence of the Verkhovna Rada. Under the Constitution of Ukraine, sole legislative power is vested in the Verkhovna Rada under Art. 75 (also see Article 85(3)). The Verkhovna Rada’s legislative authority continues to exist during armed conflict and states of emergency. Indeed, the Verkhovna Rada plays a vital role in such situations.

For example, if the President declares a state of emergency or martial law, under Article 83, §3 the Verkhovna Rada must meet within two days. In addition, while the President has the authority to issue a decree declaring martial law or a state of emergency under Art. 106(20), the Verkhovna Rada must approve any such decree.
within two days under Art. 85(31). If the Verkhovna Rada does not meet within the specified timeframe, and does not approve the Presidential decree, the state of emergency of declaration of martial law would immediately expire.

Of fundamental constitutional significance is that the Verkhovna Rada’s legislative authority continues to exist during martial law and states of emergency – that is, the Constitution does not delegate legislative powers to the President under these circumstances. According to the Speaker of Ukraine’s Parliament, Ruslan Stefanchuk, since the beginning of the full-scale Russian invasion of Ukraine on 24 February 2022, the Verkhovna Rada has held seven plenary meetings and adopted 13 resolutions, and 88 laws. Moreover, 18 draft laws are currently at the first reading stage.

The centrality of the Verkhovna Rada during wartime is reinforced by Article 83, §3, which provides that if the term of the Verkhovna Rada expires, it continues in office until a new Verkhovna Rada is elected after the cancellation of martial law or the state of emergency – for example, as opposed to vesting legislative powers from the end of the Verkhovna Rada’s term in the President.

Furthermore, the Verkhovna Rada has a constitutionally mandated quorum of two-thirds under Article 82, §2, which continues during martial law and states of emergency. So too does the requirement that the Verkhovna Rada take decisions exclusively at plenary meetings by votes under Article 84, §2.

Four Issues of Concern

These constitutional provisions regarding the Verkhovna Rada have been complied with – even though Kyiv has come under attack. However, the routine operations of the Verkhovna Rada in these extraordinary circumstances have been very challenging. Those challenges are very likely to continue, as the Russian invasion shows no signs of abating.

There are currently four issues of concern.

First, the Rules of Procedure of the Verkhovna Rada do not set out special procedures for an accelerated or “fast track” legislative process during martial law. In particular, there is no fast track legislative process to consider legislation on national security issues after martial law has been declared. Rather, there is only a single legislative process, which applies both during peacetime and wartime, and to all legislation during wartime. Such difficulties in the decision-making process under the extreme pressure of war must be urgently solved, to ensure an ongoing commitment to the rule of law. A legislative process that is flexible and can be adapted to wartime conditions is one that the executive will continue to have recourse to make necessary legislative changes. Conversely, if the legislative process is unwieldy and slow, the executive will have greater incentives to exercise executive powers. But at the same time, a “fast track” legislative process must include the “basic structure” or “essential features” of such a process in a constitutional democracy.
Second, the Rules of Procedure do not set out special mechanisms for its members to meet. These meetings occur in different institutional forms and functions. As a legislative body, the Verkhovna Rada must meet in plenary, as must its parliamentary committees. In addition, the Verkhovna Rada provides a crucial platform for debates about Ukraine’s response to the Russian invasion, in which both government and opposition legislators participate. In addition, the Verkhovna Rada has a crucial oversight or scrutiny function, through temporary special and investigative commissions. The oversight function of the Verkhovna Rada does not cease during wartime. On the contrary, as the Russian invasion continues, oversight has never been more important. Indeed, engaging in oversight and debate are how the Verkhovna Rada affirms its commitment to constitutional democracy. Despite the significant security risks, Ukrainian MPs have continued to meet. However, the Rules of Procedure do not set out any alternative approaches for the safe and continuous work of the Verkhovna Rada as the sole legislature in Ukraine.

Third, should there be a procedure to replace members of the Verkhovna Rada who died during the Russian invasion – for example, as a casualty of a military operation? It is fortunate that this tragedy has not occurred. But if it did, no parliamentary elections could be held to replace them, since as a practical matter, elections cannot occur while martial law is in effect. Should there be a mechanism to appoint acting members of the Verkhovna Rada, especially in the situation when doing so is necessary to meet quorum? What should the role of the various political parties be in this process?

Fourth, it is challenging for the Verkhovna Rada to ensure the transparency of its activities. As we set out above, the Verkhovna Rada has been extremely active during wartime. However, most of its decisions have been taken under the cloak of secrecy, for reasons of national security. National security is at stake in the issues under debate, the debates themselves, and the facts of the meetings – which make the Verkhovna Rada a military target. The Ukrainian people only received information about these meetings, and the decisions taken after the fact. How can the Rules of Procedure balance the need for national security with transparency? There is no easy answer to this question.

The Russian invasion of Ukraine provides constitutional scholars with new challenges on the operation of constitutional democracies at wartime to reflect on. What is clear is that Ukraine’s commitment to constitutional democracy and the rule of law must continue, not matter how brazen the efforts to undermine it. For example, on 28 April 2022, Russia launched a missile attack on Kyiv during a visit by United Nations Secretary General António Guterres – which is nothing less than a brazen repudiation of the core principle under Article 2(4) of the United Nations Charter that “Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”. The continued operation of the Verkhovna Rada is a decisive – and defiant – assertion of Ukraine’s political independence.