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The Crisis in Crimea and the Principle of Non-Intervention

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Abstract

During the civil unrest in Ukraine in early 2014 Russia began supplying rebel groups in Crimea with military equipment, deployed military forces into Crimea and encouraged and supported Crimea's secession from Ukraine. This article claims that Russia's conduct between February and March 2014 constitutes unlawful intervention and not a use of force. It reaches this conclusion by, first, exploring the meaning and content of the principles of non-intervention and the non-use of force and then, second, by examining Russia's justifications namely, that it intervened at the request of Ukraine's competent authorities, to protect endangered Russian citizens and to support Crimea's claim to self-determination. The overall aim of this article is to highlight the content and meaning as well as the legal boundaries of the principle of (non)intervention as an international legal norm distinct from the prohibition against the use of force.

1. Introduction

Since independence in 1991 political life in Ukraine has been dominated by tensions between pro-Western and pro-Russian parties. After a period of relative stability, tensions resurged in November 2013 when Ukrainian President Viktor Yanukovych reneged on his promise to sign an Association Agreement with the European Union (EU) and instead decided to forge closer cooperation with Russia.[1] His decision sparked protests on the streets of Ukraine's capital Kiev and by mid-February 2014 the situation had escalated considerably, resulting in violent clashes between protesters and police which left over 100 people dead and many more injured.[2] In an attempt to end the political crisis, an agreement brokered by the EU was signed by President Yanukovych and opposition leaders on 21 February 2014. The agreement provided for a return to the 2004 Constitution, limitations on presidential powers, the formation of a coalition government and early presidential elections.[3] This deal failed to ease tensions and on 22 February 2014 President Yanukovych fled Ukraine claiming threats to his life. On the same day, the Ukrainian Parliament dismissed him from office.[4]

In early March 2014 'unidentified armed men'[5] arrived in Crimea, an autonomous region of Ukraine which was part of Russia until 1954 and home to a large population of ethnic Russians. Russian President Vladimir Putin claimed that these were 'local self-defence units'

[1] Keesing's (2013) 53023-24, 53080.
[2] Keesing's (2014) 53187.
[3] Ibid.
[4] Keesing's (2014) 53187-8.
[5] UN Deputy Secretary-General, UNSC Verbatim Record (1 March) UN Doc S/PV.7124, 2.

that had been established in order to protect the ethnic Russians in Crimea from violence.[6] It was reported that these units were 'spotted using professional Russian military equipment and military vehicles registered for the Russian Black Sea Fleet in Crimea',[7] giving rise to allegations that they were being supplied with military equipment by Russia.[8] It was also claimed that Russian military personnel had been deployed into Crimea to operate alongside these so-called local self-defence groups, exceeding the terms of the 1997 Black Sea Fleet Agreement which allows Russia to maintain naval bases and station troops in Crimea [9] Although initially Russia denied all involvement in Crimea, President Putin later conceded that Russia 'did back the Crimean self-defence forces' by providing them with military equipment and by deploying Russian military personnel into Crimea to support them.[10] After deployment and in conjunction with the local self-defence units, Russian troops quickly established 'full operational control in the Crimea'.[11]

Following the arrival of military forces in Crimea, the Parliament of the Autonomous Republic of Crimea announced that it would hold a referendum to determine whether Crimea should remain part of Ukraine or join Russia. On 16 March 2014 a referendum was

[6] Vladimir Putin, 'Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine' (4 March 2014) http://eng.kremlin.ru/news/6763.
[7] Christian Marxsen, 'The Crisis in Crimea: An International Law Perspective' (2014) 74 *Heidelberg Journal of International Law* 367, 370.
[8] BBC News, 'Little Green Men or Russian Invaders?' (11 March 2014) http://www.bbc.co.uk/news/world-europe-26532154.
[9] Reuters, 'OSCE Team Say Crimea Roadblock Gunmen Threatened to Shoot at Them' (12 March 2014) http://www.reuters.com/article/us-ukraine-crisis-osce-idUSBREA2B1C120140312.
[10] Annual Special Direct Line interview with Putin, broadcast on many TV channels and radio stations, 17 April 2014, http://eng.kremlin.ru/news/7034; Huffington Post, 'Putin Admits Russian Soldiers Were in Crimea, Slams West's for Role in Ukraine Crisis' (17 April 2014) http://www.huffingtonpost.com/2014/04/17/putin-ukraine_n_5165913.html.
[11] William Hague, 'UK's Response to the Situation in Ukraine' (4 March 2014) https://www.gov.uk/government/speeches/uks-response-to-the-situation-in-ukraine.

held and Crimea voted overwhelmingly in favour of acceding to Russia.[12] A Security Council resolution declaring the referendum unlawful was vetoed by Russia, with China abstaining. The Ukrainian Government declared the referendum illegal and the Ukrainian Parliament dissolved the Crimean Parliament. On 17 March 2014 the Crimean Parliament declared independence and voted in favour of accession to Russia. On the same day, Russia recognized Crimea as 'an independent and sovereign country'.[13] On 18 March 2014 Russia and Crimea signed a treaty that absorbed Crimea into Russia.[14] The General Assembly adopted a resolution declaring that the accession constituted a violation of international law and should not be recognised.[15] Indeed, the EU and US imposed sanctions against individuals in Ukraine and Russia, with the objective of rescinding Crimea's accession to Russia and restoring the *status quo ante*.[16]

Russia's actions were denounced by states and international organisations as a violation of the principle of sovereignty or more generally as a violation of international law[17] but without identifying which specific international norm(s) Russia had transgressed.[18] Legal commentators instead opined that Russia's actions violated Article 2(4) of the United

[12] Keesing's (2014) 53241.
[13] Ibid, 53241-2.
[14] Ibid.
[15] GA Res 262 (2014).
[16] Keesing's (2014) 53241-2. On the extent of the sanctions regime see BBC News, 'How Far do EU and US Sanctions on Russia Go?' (15 September 2014) http://www.bbc.co.uk/news/world-europe-28400218.
[17] For the EU's condemnation of Russia's conduct see 'The Council of the EU's Conclusions on Ukraine' (3 March 2014) http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141291.pdf. See also the statements made by various Security Council members in UN Doc S/PV.7124 (1 March 2014) and UN Doc S/PV.7125 (3 March 2014).
[18] For example the European Council explained that '[w]e strongly condemn the unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation and call upon the Russian Federation to immediately withdraw its armed forces'; 'Statement of the Heads of State or Government on Ukraine' (6 March 2014) http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141372.pdf. See generally the statements of the members of the Security Council; UNSC 7124th Meeting (1 March 2014) UN Doc S/PV.7124.

Nations (UN) Charter, which prohibits the use of force in international relations.[19] Other commentators claimed that Russia's actions amounted to an armed attack within the meaning of Article 51 of the UN Charter or that they may qualify as an act of aggression.[20] Russia however maintained that its conduct was lawful under international law because troops were deployed: at the request of the legitimate President of Ukraine (Mr Yanukovych); in order to protect the large number of Russian citizens in Crimea against threats to their lives;[21] and because it was in support of Crimea's right to self-determination.[22]

The objective of this article is to examine the legality of Russia's conduct during the early stage of the crisis that is, from February to March 2014. More specifically, this article will deal with three issues: 1) Russia's provision of military equipment to rebel groups in Crimea; 2) Russia's deployment of military forces into Crimea; and 3) Russia's support for and subsequent recognition of Crimean statehood.

[19] Mary-Ellen O'Connell, 'Ukraine Insta-Symposium: Ukraine under International Law' (7 March 2014) *Opinio Juris* http://opiniojuris.org/2014/03/07/ukraine-insta-symposium-ukraine-international-law/; Daniel Wisehart, 'The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention' (4 March 2014) EJIL: *Talk!* http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/; James Green, 'The Annexation of Crimea' (2014) 1 *Journal of the Use of Force and International Law* 3; Marxsen (n 7); Antonello Tancredi, 'The Russian Annexation of the Crimea: Questions Relating to the Use of Force' (2014) *Questions in International Law* 5, 8.

[20] Thomas Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (Palgrave, 2015) chapter 2.

[21] Putin (n 6). See further the remarks of the Russian Foreign Minister to the Security Council: UN S/PV.7134 (13 March 2014).

[22] According to the Russian Ambassador to the UN, 'Crimean people had a right to determine their future, as well as an equal right to self-determination — principles enshrined in the United Nations Charter. The Russian Federation was not disputing the principle of territorial integrity, but when it became impossible to enjoy such rights within a single State, people could seek the right to self-determination, which is the case in Crimea now': UN SC/11319 (15 March 2014).

The article is structured as follows. Section 2 examines the scope and content of the principles of (non)intervention and the non-use of force. These two principles are often employed interchangeably as if synonymous but this article demonstrates that despite their common origins they differ normatively as well as ontologically. On that basis, this article contends that Russia's conduct falls within the scope of the principle of (non) intervention. Section 3 then goes on to assess whether Russia's actions constitute permissible intervention because they were either consented to by Ukraine's lawful authorities or because they were designed to protect Russian nationals who were threatened with violence. Section 4 appraises the legality of Russia's claim that it supported Crimea's claim to self-determination. This article concludes that Russia's conduct cannot be justified and constitutes unlawful intervention.

2. The Principle of Non-Intervention

The principle of non-intervention commands a long pedigree in international law[23] even if its content remains somehow under-explained.[24] For example, Article 8 of the 1933 Montevideo Convention on the Rights and Duties of States declares that 'no state has the

[23] In the *Nicaragua* case Sir Robert Jennings noted that the principle of non-intervention 'is very much older than any of the multilateral treaty regimes in question [i.e. the UN Charter regime relating to force]'; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 paras 534-535.

[24] '[T]here is probably no branch of international law which is so calculated to encourage the sceptic as that mass of contradictory precedents, dogmatic assertions, and vague principles which are collected under the common head of "intervention"'; Robert Jennings, 'The Caroline and Mcleod Cases' (1938) 32 *AJIL* 82. Percy Winfield, 'The History of Intervention in International Law' (1922–23) 3 *British Yearbook of International Law* 130, 130 ('A reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland').

right to intervene in the internal or external affairs of another'. The principle of non-intervention has also been included in a number of legal instruments, although not in the UN Charter. However, it has been the subject of a number of General Assembly resolutions; resolution 2131(XX) on the Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of the Independence and Sovereignty; resolution 2625 (XXV) on Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which specifically affirms the 'duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter';[25] and resolution 36/103 on Declaration on the Inadmissibility of Intervention and Interference in the Internal affairs of States.[26] These resolutions together with the other instruments mentioning this principle[27] including juridical opinions were relied upon by the ICJ in the *Nicaragua case* to affirm the customary law status of the principle of non-intervention.[28]

2.1 The Concept of (Non)Intervention

[25] GA Res 2625 (1970), Principle 3.
[26] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (21 December 1965) UN Doc A/RES/20/2131; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Principle C, (1970) UN Doc A/RES/25/2625; Declaration on the Inadmissibility of Intervention and Interference in the Internal affairs of States (1981) UN Doc A/RES/36/103.
[27] For example Article 19, Charter of Organisation of American States 1948.
[28] *Nicaragua* (n 23) para 202, 204.

What, then, is intervention? In Oppenheim's often quoted formulation, intervention is 'dictatorial interference **...** in the affairs of another State for the purpose of maintaining or altering the actual condition of things'.[29] According to the ICJ:

> the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely … Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention is particularly obvious in the case of an intervention which uses force.[30]

From these definitions one can glean the two main components of the concept of intervention: coercion and sovereignty. The first component describes the type of interference that is required whereas the second describes the domain within which such interference needs to take place in order to amount to intervention.

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[29] Lassa Lauterpacht, *Oppenheim, International Law: Volume I* (1955) 305. For Jennings and Watts, 'the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question'; Robert Jennings and Adam Watts, *Oppenheim's International Law* (1996) 432.

[30] *Nicaragua* (n 23) para 205.

It is important then to explain the meaning and content of these two elements. Coercion denotes 'imperative pressure' which manipulates the will of a state in order to extract some advantage or concession.[31] Put differently, coercion involves actions or behaviours that compromise the free will of the state and force the affected state to do something or to abstain from doing something against its will. It is not the means and methods used to exert coercion that matter but the purpose for which they are employed namely, to compromise or subordinate the will of the other state. Means and methods may vary and include military, political or economic means, they may be physical or non-physical such as cyber ones and they may be direct or indirect as the ICJ noted in the *Nicaragua case*.[32] The Friendly Relations Declaration defined indirect intervention as the organizing, assisting, fomenting, financing, inciting or tolerating subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state or interference in civil strife in another state[33] and the ICJ opined that financial support, training, supplying arms and the provision of intelligence and logistical support to rebel groups falls within the non-intervention principle.[34]

The second component - that of sovereignty - refers to the domain within which such interference is exerted. According to the ICJ, it should target the sovereign prerogatives of a state in its external and internal affairs. However it is difficult to determine the totality of sovereign prerogatives that may be affected by intervention because, as the PCIJ opined in a

[31] Myres S McDougal and Feliciano P Feliciano, 'International Coercion and World Public Order: The General Principles of the Law of War' (1958) 67 *Yale Law Journal* 771, 779; W Michael Reisman, *Nullity and Revision* (1971) 839-40; Philip Kunig, 'Intervention, Prohibition of' (2008) *Max Planck Encyclopaedia of Public International Law*, paras 25-6.
[32] Ibid, 205.
[33] Friendly Relations Declaration (n 26).
[34] *Nicaragua* (n 23) para 242.

different context, what remains within a state's sovereign prerogative depends on the development of international relations.[35] The ICJ has offered examples of matters that fall within a state's sovereign prerogative such as the choice of political, economic, social and cultural system and the formulation of foreign policy but they are not exhaustive.[36] Put in simple terms, intervention is the crossing of physical, political, economic or other borders as defined by sovereignty.

All the above reveal the close relationship between the principle of (non)intervention and sovereignty: intervention is defined through the prism of sovereignty and, conversely, sovereignty is defined through the prism of intervention. To explain, if sovereignty is 'the right of every sovereign State to conduct its affairs without outside interference',[37] non-intervention as the absence of interference in the sovereign authority and structures of the state is its substantiation and manifestation. Conversely, intervention denotes the usurpation of a state's sovereignty either by limiting its authority in relation to issues that fall under its sovereign prerogatives or by displacing its authority.[38] As the ICJ put it, the non-intervention principle is protecting the 'political integrity' of a state.[39]

[35] *Nationality Decrees in Tunis and Morocco*, PCIJ Rep Series B No. 4 (1923) 23.
[36] *Nicaragua* (n 23) para 205. According to the Friendly Relations Declaration '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State;' Friendly Relations Declaration (n 26).
[37] *Nicaragua* (n 23) para 202.
[38] Pitman B Potter, 'L'Intervention en Droit International Moderne' (1933) 32 *Hague Academy of International Law* 616. See also Robert J Vincent, *Non-Intervention and International Order* (1974) 325.
[39] *Nicaragua* (n 23) para 202.

2.2 Distinguishing Intervention from the Use of Force

If intervention is an elastic concept that describes forms of coercive interference into a state's sovereign prerogatives, the use of force is the most extreme or perhaps most effective means of exercising such interference. Inevitably, this state of affairs has caused confusion. Often intervention is used interchangeably with the use of force or the same facts are used to signify both intervention and the use of force. In the *Nicaragua* case for example the ICJ opined that a violation of the non-intervention principle is 'particularly obvious in the case of an intervention which uses force'.[40] The Court also determined that acts which breach the principle of non-intervention 'will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations'.[41] Similarly, the Court characterised the presence of Ugandan troops on DRC territory and the support Uganda provided to rebels as violations of both the non-use of force and the non-intervention norm but, finally, it concluded that the '[t]he unlawful military intervention by Uganda was of such magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter'.[42]

[40] Ibid, para 205.
[41] Ibid, para 209.
[42] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Rep para 165.

It is important then to explain the differences between the concepts of intervention and use of force. Although intervention and the use of force share common origins in that they both derive from and are attached to the principle of state sovereignty, gradually they separated from each other. First, ontologically, intervention has been constructed around the notion of coercion whereas the use of force has been constructed around the concept of 'violence' in the sense of physical destruction or human loss and injury.[43] Secondly, normatively, intervention and the use of force acquired their own legal formulation and became independent legal postulates.

An excursion into the development of the norm prohibiting the use of force is instructive in this respect. This norm - currently enshrined in Article 2(4) of the UN Charter - is the result of a long process of legal and political endeavours to limit or prohibit war in inter-state relations.[44] War, according to Clausewitz's traditional definition, 'is an act of violence to compel our opponent to fulfil our will'.[45] Although it is evident from this definition that intervention and war share the element of coercion, they also differ in that central to war and constitutive of war is the act of violence. The act of violence not only differentiated war from intervention ontologically but also stigmatised war because of its direct, immediate and destructive effects.[46] As a result, in political and legal thinking war was treated as a

[43] For Dinstein, '[i]t does not matter what specific means – kinetic or electronic – are used to bring it about but the end result must be that violence occurs or is threatened'; Yoram Dinstein, *War, Aggression and Self-Defence* (2011) 88. For Shaw, Article 2(4) UN Charter 'covers situations in which violence is employed which fall short of the technical requirements of the state of war'; Malcolm Shaw, *International Law* (2014) 815.
[44] See Article 10-13 Covenant of the League of Nations; Article 1 of the Pact of Paris (1928). See further Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *International and Comparative Law Quarterly* 283, 301*ff*.
[45] Carl von Clausewitz, *On War* http://www.clausewitz.com/readings/OnWar1873/BK1ch01.html.
[46] Edward Keene, 'International Hierarchy and the Origins of the Modern Practice of Intervention' (2013) 39 *Review of International Studies* 1077; Brendan Simms, 'A false principle in the Law of Nations', in B Simms and DJB Trim (eds), *Humanitarian Intervention* (2013) 89.

separate phenomenon leading to its normative separation from intervention as the persistent efforts to regulate or abolish war demonstrate. Even if the term 'war' was substituted by the more inclusive term 'use of force', a use of force is defined as such by the element of violence. This is exemplified in Article 2(4) of the UN Charter. What this Article prohibits is violence namely, the infliction of deprivations upon a state in the form of 'destruction to life and property' through the use of the military or equivalent instruments.[47] It is interesting to note in this respect that a Brazilian proposal to also include within the definition of Article 2(4) '*the threat or use of economic measures* in any manner inconsistent with the purposes of the Organization' was rejected by the drafting committee[48] because it tried to link intervention with the use of force.[49] If Article 2(4) is defined by violence, all other interference that is coercive and targets the sovereign domain of a state falls outside this Article and under the concept of intervention. As Vincent observed, intervention has become 'a word used to describe the sorts of behaviour not covered by Article 2(4) and hence non-intervention a rule not to be found there'.[50]

This reveals another feature of their normative decoupling in that the prohibition of the use of force is codified whereas the prohibition of intervention is not codified[51] although it has been mentioned on numerous occasions in General Assembly resolutions. Still, the General

[47] Ian Brownlie, *International Law and the Use of Force by States* (1963) 362. For similar approaches see Bruno Simma, Daniel -Erasmus Khan, Greg Nolte and Andreas Paulus (ed), *The Charter of the United Nations: A Commentary* (2012) 208-10; Lauterpacht (n 29) 202; Oscar Schachter, *International Law in Theory and Practice* (1982) 100-111.Oliver Dörr, 'Use of Force, Prohibition of' (2012) *Max Planck Encyclopaedia of Public International Law*, paras 18-19.
[48] UNCIO VI, 334, 609 (our emphasis); Simma *et al*, ibid, 208-9.
[49] UNCIO VI, 563, 558-9. Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States A/5746 (1964), para 56.
[50] Vincent (n 38) 234.
[51] Nicaragua (n 23) para 202. Article 2(7) of the UN Charter is about the allocation of comptecnes between the UN and member states and it is not about intervnetion in the sense used here.

Assembly treated the principles of non-intervention and non-use of force in separate resolutions whereas the Friendly Relations Declaration - which declares the main principles that should inform inter-state relations - treats the non-use of force and non-intervention prohibitions as distinct and independent postulates.[52] Furthermore and notwithstanding the lack of clarity that may exist,[53] a comparison between the acts falling under the principle of the non-use of force and those falling under the principle of non-intervention indicates that the meaning of the term 'force' was reserved only to armed force whereas non-intervention involves non-forcible acts.[54] For instance, the General Assembly views the act of organizing, assisting, fomenting, financing, inciting or tolerating subversive, terrorist or armed activities as a use of force when the ensuing acts involve armed violence[55] but as intervention when they do not involve armed violence. Similarly, the General Assembly's Definition of Aggression defines aggression 'as the use of armed force' and not as intervention.[56]

Further indication of the distinctiveness of the two norms is provided by the fact that, for many, the prohibition of the use of force is a *jus cogens* norm[57] whereas the principle of non-intervention is not generally regarded as having attained this status.[58]

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[52] GA Res 1815(XVII) para 3.

[53] As Lowe observed, '[i]t achieved doctrinal coherence and purity at the expense of accuracy and compliance'; Vaughan Lowe, 'The Principle of Non-intervention: Use of Force', in Colin Warbrick and Vaughan Lowe eds *The United Nations and Principles of International Law: Essays in Honor of Michael Akehurst* (1994) 66, 73.

[54] Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65 *AJIL* 713, 724-725; Dino Kritsiotis, 'Topographies of Force', in M Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultiness: Essays in Honour of Yoram Dinstein* (2007) 68. See also UN Doc A/6799 (1967).

[55] 'Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.'

[56] GA Res 3314 (1974) Article 1 ('Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition').

[57] See references at footnote 19.

The ICJ's interpretation of the principle of non-intervention and the non-use of force is also instructive in this regard. Although the ICJ has occasionally and on a conceptual level used the notions of intervention and use of force interchangeably,[59] when it was required to assess the international legality of specific factual scenarios it regarded the notions of intervention and use of force as appertaining to distinct legal principles. This is clearly illustrated in the *Corfu Channel* case where the ICJ determined that Britain's unauthorized deployment of warships into Albanian's territorial sea was regarded as intervention against the will of the Albanian government, rather than an unlawful use of force.[60] Even in the *Nicaragua* case where the ICJ's confusion of the concepts of intervention and the use of force was at its most pronounced, as the Court moved away from this conceptual discussion and focused upon the particulars of the case in hand, it tried to match facts and situations with either the norm on the use of force or the norm on intervention,[61] thereby treating these principles as complementary, concluding that those measures adopted by the US which did not involve the use of force (for example economic measures or support to armed bands which do not subsequently use force) were unlawful according to the non-intervention principle.[62]

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[58] Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22 *Leiden Journal of International Law* 345.
[59] See text accompanying footnote 40.
[60] *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 35. Although the ICJ explained that Britain's conduct constituted 'a manifestation of a policy of force' (p 7), the Court did not adjudicate on the basis of Article 2(4); see Theodore Christakis, 'Intervention and Self-Help', in K Bannelier, T Christakis and S Heathcote (ed), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (2012) 219-220.
[61] *Nicaragua* (n 23) para 201.
[62] ibid paras 241-2, 245

What transpires from the preceding discussion is that intervention and the use of force are part and parcel of a multi-faceted legal framework established in international law to protect state sovereignty in its various facets [63] but where each legal principle has its own separate content and normative standing and describe different phenomena impacting upon state sovereignty.[64]

2.3 Assessing Russia's Conduct

Russia's actions towards Ukraine thus need to be considered against this background. It is widely acknowledged that Russia wanted to prevent closer ties between Ukraine and the EU and to cancel the Association Agreement. For this reason, Russia imposed a number of economic measures against Ukraine.[65] Since the aim of those measures was to influence the

[63] Jennings and Watts (n 29) 382.

[64] As Oppenheim explains, '[w]hile customary rules of international law relating to intervention have now to a considerable extent to be considered alongside the more general prohibition on the use of force, intervention is still a distinct concept'; Jennings and Watts, *ibid*, 429; Derek W Bowett, *Self-Defence in International Law* (1958) 44-51; Kritsiotis (n 54) 64. Similarly, Jamnejad and Wood assert that 'nowadays the international law on the use of force is not generally thought of in terms of non-intervention but as a self-standing chapter of international law'; Jamnejad and Wood (n 58) 359.

[65] It was stated that '[f]rom August 2013, Russia undertook a policy of coercive economic diplomacy aimed at changing the political calculations of President Yanukovych'. Furthermore, Dr Lilia Shevtsova, Senior Associate, Moscow Center, Carnegie Endowment for International Peace, said that Russia started the 'August trade war with Ukraine, trying to force the former President Yanukovych to reject the Association Agreement with Brussels.' His Excellency Andrii Kuzmenko, Ukrainian Acting Ambassador to the UK, spoke of a 'number of different 'wars'—a customs war, a gas war, a milk war, a meat war, cheese war, a chocolate war", which "the Russians started against Ukraine with the solemn purpose of pursuing us to postpone and then refuse European integration'; quotations from European Union Committee - Sixth Report The EU and Russia: before and beyond the crisis in Ukraine, House of Lords (10 February 2015) http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/115/11502.htm para 179.

external relations of Ukraine and to coerce Ukraine into adopting a different course of action, they constitute unlawful intervention.[66]

Russia's Upper House of Parliament also approved the Russian President's request '[i]n connection with the extraordinary situation that has developed in Ukraine and the threat to citizens of the Russian Federation … to use the Armed Forces of the Russian Federation on the territory of Ukraine until the social and political situation in that country is normalised'.[67] The word 'use' may signify a whole range of actions but the mere deployment of troops or the threat of deploying troops falls under the prohibition of intervention; it is only if the deployment of troops is accompanied with the use of force or the threat of force that it violates Article 2(4) of the UN Charter on the non-use of force. At that stage, the resolution amounted to unlawful intervention since its purpose was to coerce Ukraine into adopting a certain course of conduct. Indeed, as the Security Council debates reveal, Security Council members did not characterise Russia's conduct as a threat of force but instead as a threat to the sovereignty, independence and territorial integrity of Ukraine.[68]

Regarding the provision of military equipment to local self-defence units, this action did not amount to an indirect use of force because the equipment was not used to perpetrate acts

[66] *Nicaragua* (n 23) para 205. According to the Friendly Relations Declaration '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State;' Friendly Relations Declaration (n 26).
[67] http://en.kremlin.ru/events/president/news/20353
[68] UN Doc S/PV.7124 (1 March 2014). See in particular the interventions of the representatives of the United States, United Kingdom and France.

of violence according to the General Assembly's definition of indirect use of force.[69] The supply of weapons constituted instead a violation of the non-intervention principle because it emboldened the material capabilities of the rebel group *vis-à-vis* Kiev and thus undermined the capacity of the central government to regulate and organise its domestic, sovereign affairs. It is interesting to note that there is a subtle yet important difference between the ICJ's and the General Assembly's definition of indirect use of force. For the ICJ, the provision of military equipment is an indirect use of force,[70] regardless of how it is used by the rebel groups, whereas according to the General Assembly's resolution an indirect use of force occurs only where those weapons are used by rebel groups to commit acts that involve the threat or use of force. It is very difficult to decipher the reasons for such differentiation but if the Court's view that the Friendly Relations Declaration constitutes customary law is taken into account as well as the limitation of the non-use of force principle in the Declaration to that of armed violence, the Declaration's interpretation as to what amounts to an indirect use of force is more consistent with the rationale of the Declaration.

In relation to the entry and presence of Russian military personnel on Ukrainian territory without its authorisation - whether as part of the local self-defence forces or the entry and presence of Russian military itself – it amounts to unlawful intervention.[71] According to the Friendly Relations Declaration, one type of prohibited intervention is an 'armed intervention' but this provision needs to be interpreted in conjunction with the principle of the non-use of

[69] Friendly Relations Declaration (n 26) Principle C, para 2.
[70] *Nicaragua* (n 23) para 228.
[71] UN Doc A/5746 (1965) para 45.

force included in the same resolution. An armed intervention may signify a whole range of activities from the entry and presence of military personnel to the actual use of force by them. For this reason, the critical question is whether the dispatch of military personnel involves the use of force in the sense of armed violence. In the case at hand, the military personnel that established operational control over Crimea did so without the use of violence.[72] As President Putin stated, 'I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties.'[73] Consequently, Russia's deployment of military personnel into Crimea must be characterised as intervention insofar as it adversely impacted upon the authority structures of Ukraine.[74] More specifically, Russia's deployment of troops into Crimea prevented Ukraine from exercising its authority over that region and in general usurped its authority.

There were reports of an incident on 7 March 2014 where Russian military personnel stormed a Ukrainian command post near Sevastopol, 'ramm[ing] the gates' and forcing entry into the base.[75] Although this was reportedly done without any violent confrontation between the Russian and the Ukrainian troops guarding the base,[76] one could say that the damage to the base amounted to violence within the meaning of Article 2(4) of the UN Charter. However, there is a near consensus that Article 2(4) embraces a *de minimis*

[72] It is important to reiterate that our analysis extends only to the initial deployment of Russian troops into Crimea in early March 2014 until Crimea's declaration of independence as a sovereign state on 17 March 2014.
[73] Address by President of the Russian Federation (18 March 2014) http://eng.kremlin.ru/news/6889.
[74] In the same vein, according to Weller 'Russia's actions have created space for the pro-Russian local authorities in Crimea to displace the lawful public authorities of Ukraine. Legally, this clearly amounts to a significant act of intervention - indeed, as Russian military units are involved, it is a case of armed intervention.' Marc Weller, 'Analysis: Why Russia's Crimea move Fails Legal Test', BBC News (7 March 2014) http://www.bbc.co.uk/news/world-europe-26481423.
[75] BBC News, Ukraine Crisis: Russia warns US against 'hasty' sanctions (8 March 2014) http://www.bbc.co.uk/news/world-europe-26492053#TWEET1065567.
[76] ibid.

threshold namely, that if the violence is minimal, it falls outside this article.[77] Consequently, minimal uses of force fall within the definition of intervention.

To the extent that Russia's aforementioned conduct did not amount to a use of force it cannot be an armed attack as the Ukraine Association of International law opined[78] because, per the ICJ in the *Nicaragua* case, the definition of an armed attack extends only to 'the most grave forms of the use of force'.[79] Likewise, Russia's actions cannot amount to an act of aggression.[80] It has been claimed that the use of Russian forces stationed in Ukraine in contravention of the 1997 Black Sea Fleet Agreement is an act of aggression according Article 3(e) of the 1974 General Assembly resolution on the Definition of Aggression.[81] As Article 1 of the Definition of Aggression explains, 'aggression is the use of armed force' and

[77] Mary-Ellen O'Connell, ''The Prohibition on the Use of Force', in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (2013) 102. For a similar approach see Oliver Corten, *The Law against War* (Hart 2010) 55 ('there is a threshold below which the use of force in international relations, while it may be contrary to certain rules of international law, cannot violate article 2(4)'). For the alterative view that Article 2(4) does not embrace a *de minimis* threshold see Tom Ruys, 'The Meaning of 'Force' and the Boundaries of the *Jus ad Bellum* – Are 'Minimal' Uses of Forces Excluded from UN Charter 2(4)?' (2014) 108 *AJIL* 159.

[78] 'Therefore, the actions of the Russian Federation provide legal grounds for Ukraine to have recourse to its inherent right to individual or collective self-defense, as set out in Article 51 of the UN Charter'; The Appeal of the Ukrainian Association of International Law (2014) http://www.ejiltalk.org/appeal-from-the-ukrainian-association-of-international-law/.

[79] *Nicaragua* (n 23) para 191.

[80] See the Statement of the Ambassador of the Ukraine of the Security Council; UN Doc S/PV.7124 (1 March 2014). US Secretary of State John Kerry referred to Russia's conduct as a 'brazen act of aggression'; BBC News, 'John Kerry: Russian action a 'brazen act of aggression'' (2 March 2014), http://www.bbc.co.uk/news/world-europe-26409401. The North-Baltic 8 also considered it an act of aggression; 'The Foreign Minister of the Nordic, Baltic and Visegrad countries met in Narva on 6-7 March 2014 and issued a joint statement regarding the situation in Ukraine', Estonian Ministry of Foreign Affairs (6-7 March 2014).

[81] According to Article 3(e) of General Assembly Resolution 3314 (XXIX) on the Definition of Aggression (1974) an act of aggression constitutes 'The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.' See Aurel Sari, 'Ukraine Insta-Symposium: When does the Breach of a Status of Forces Agreement amount to an Act of Aggression: the Case of Ukraine and the Black Sea Fleet SOFA' (7 March 2014) *Opinio Juris* http://opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/. Also see Ukrainian Association of International Law http://www.ejiltalk.org/appeal-from-the-ukrainian-association-of-international-law/.

as it states in the preamble it is 'the most serious and dangerous form of the illegal use of force'.[82] This means that the phrase 'use of armed forces' in Article 3(e) should involve the use of grave force to constitute aggression. To the extent that Russian forces were deployed in contravention of the agreement but they did not use force in the sense of armed violence causing death, injury or destruction, that action falls below the use of force threshold and consequently does not constitute aggression. It constitutes instead unlawful intervention since the aim was to coerce the Ukrainian government in addition to being a breach of the referent treaty.

In conclusion, Russia's actions amounted to intervention but the immediate question is whether there are any grounds according to which they can be justified.

3. **Permissible Intervention**

Russia maintained that its actions were justified because they were consented to by the legitimate authorities in Ukraine and that they were designed to protect its nationals. For this reason, in this section we examine the legality of Russia's claims in turn in order to ascertain whether its actions were permissible under international law.[83]

3.1 Intervention by Invitation

[82] GA Res 3314 (1974).
[83] For a discussion of justified interventions see Jennings and Watts (n 29) 439–47.

Russia's Ambassador to the UN Mr Churkin produced a letter dated 1 March 2014 and signed by Mr Yanukovych in which he called on the President of Russia 'to use the armed forces of the Russian Federation to establish legitimacy, peace, law and order, and stability and to defend the people of Ukraine.'[84]

International law has accepted interventions (military or otherwise) at the invitation of the host government because the invitation is an expression of the state's sovereign will. [85] State practice is quite rich in this regard[86] with recent incidents including the US action in Iraq against ISIL at the request of the Iraqi government[87] or the French and Chadian intervention in Mali in 2012-2013 to support the Malian government in its fight against Islamist groups.[88]

[84] UN S/PV.7125 (3 March 2014) 4.
[85] *Nicaragua* (n 23) para 246; Article 20, Articles on State Responsibility For Internationally Wrongful Acts (2001).
[86] 'UK Materials on International Law' (1986) 57 *BYIL* 616. See also the summary of the UK government's legal position on military action in Iraq against ISIL at https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil; Jennings and Watts (n 29) 435; Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *BYIL* 189.
[87] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council S/2014/691 (22 September 2014), according to which '[i]t is for these reasons that we, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.'
[88] Identical letters date 11th January 2013 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council; UN Doc S/2013/17 (14 January 2013) and for Chad see UN Doc S/PV.6905 (2 January 2013), 12. See also Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26 *LJIL* 855.

In order for consent to play such a role it should be valid, free, precede the action and be specific. Consent is valid if it is granted by an authority that can express the will of the state for international law purposes. This does not necessarily mean that consent should be given by the person or the organ that is constitutionally empowered to give such consent. This is a domestic constitutional law question which international law does not have the authority or the means to determine. Instead, what is critical for international law is for the consent to be issued by a person or an organ that represents the state for international law purposes. In the *Eastern Greenland* case for example the PCIJ held that a statement by the Norwegian Foreign Minister bound his country even if it was made without authority.[89] The requirement that the request should be issued by an organ representing the state is different from the institution of attribution in the law of state responsibility. For example, whereas the conduct of regional authorities can be attributed to a state for purposes of state responsibility,[90] regional authorities do not represent the state when it comes to inviting foreign troops as will be seen later.

That said, in times of constitutional crisis or political unrest the question is whether the authority that issues the request is competent to do so under the circumstances prevailing at the time. It is in such cases that the internal situation may be taken into consideration. As the International Law Commission opined, determination will be made on the basis of 'the rules of international law relating to the expression of the will of the State, not to mention the constitutional rules to which, in certain cases, international law may refer'.[91]

[89] *Legal Status of Eastern Greenland* Judgment of 5 April 1933, PCIJ Series A/B, 21, 71.
[90] Article 4, ASR (2001).
[91] ILC Yearbook (1979) Vol. II, Part Two, 112.

In situations of constitutional turmoil, international law has traditionally given prominence to the factual criterion of effective control.[92] In other words, only the government or authority that exercises effective control over a state's territory and people can issue such a request regardless of its representative or democratic character. However international practice gradually moved away from the effective control test not only because the internal constellation of power may not always be clear-cut but also because of changing political attitudes towards states and governments placing more weight on their legitimacy and, in particular, their democratic legitimacy.[93] For example, during Apartheid the government of South Africa was not allowed to invite foreign states because of its internal political system even though it exercised effective control over the territory.[94] Conversely, the government of Mali was deemed competent to issue an invitation as the internationally recognised democratic (and so legitimate) government of Mali even though it had lost control over a large part of its territory and, actually, invited foreign troops in order to re-establish such control.[95] It therefore transpires that variables other than effective control are now being used in order to determine who can issue such request.

With regard to the case at hand, the question of whether Mr Yanukovych had the power to issue such a request was settled when the Ukrainian Parliament voted to remove Mr

[92] Article 1, Montevideo Convention on Rights and Duties of States 1933. See further Brad Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 *Melbourne Journal of International Law* 393.
[93] Jennings and Watts (n 29) 437.
[94] Greg Nolte, *Intervention by Invitation, Max Planck Encyclopaedia on Public International Law* (online edition, 2010) para17.
[95] SC Res 2085 (2012).

Yanukovych from office.[96] First, he did not exercise effective control over the country, having left for Moscow.[97] Second, despite Mr Yanukovych's protestations that he remained the legitimate President of Ukraine because the vote to remove him from office violated the Ukrainian constitution, he was not deemed to be the legitimate President by many states and international organisations that recognised instead the new government. In light of the above, it can be said with reason that Mr Yanukovych was not the right authority to issue such a request. If this is correct, the other qualifications attached to consent – that it should be expressed, be prior to the action and be specific - become redundant.

If, for the sake of argument, Mr Yanukovych was still the lawful President, the fact that he fled to Russia from where he issued the request casts doubt as to whether his consent was given freely. It should be noted in this regard that his letter was not circulated in the UN as an official document. Finally, Mr Yanukovych's consent was not specific. His invitation to Russian troops to establish legitimacy, peace, law and order, stability and defend the people of Ukraine is too broad and indeterminate.

Be that as it may, there is another overarching question in play namely, whether interventions by invitation are circumscribed by the right to self-determination in situations where the government and groups within a state struggle for political power.[98] It has been

[96] In a letter by the Permanent Representative of Ukraine to the UN it is stated that Mr Yanukovych is not the legitimate President of Ukraine, having been voted out of office by the Parliament and that 'the request of Mr. Viktor Yanukovych addressed to the President of the Russian Federation to use its military forces in Ukraine may not be regarded as an official request of Ukraine'; UN S/2014/152 (5 March 2014).
[97] Marxsen (n 7) 379.
[98] With self-determination we mean the right of people to determine freely their political destiny rather than the traditional right of a 'people' to exercise self-determination.

claimed that the principle of self-determination does not sanction interventions whose aim it to weigh in the power struggle and perhaps decide its outcome, something which is analogous to international law's neutral disposition towards parties fighting a civil war.[99] Consequently, invitations even by the legitimate government may amount to unlawful intervention if the purpose of the invited intervention is to shift the balance of power in the internal conflict. In the case at hand, one could say that even if the situation in Ukraine had not reached the level of civil war, the power struggle between Mr Yanukovych and his opponents divided the country sharply into opposing camps and thus Mr Yanukovych's invitation of foreign troops with the purpose of deciding the internal power struggle would have been unlawful. It should be recalled that Mr Yanukovych invited Russian troops to restore legitimacy when both Russia and himself claimed that he remained the legitimate President of Ukraine something that was disputed by the opposition. The argument later shifted into claiming that Russia's aim was not to return Mr Yanukovych to power but to have the Agreement of 21 February on constitutional reforms respected. In this case, one could say that the invitation of foreign troops would not affect the internal power competition but it is at the same time difficult to accept that the presence of troops from a country that so openly and robustly supported one side of the power struggle would not affect the implementation of this agreement and the power share it contained.

Finally, the Russian Representative to the Security Council, Mr Churkin, also claimed that the invitation of Russian troops was solicited by the Crimean authorities.[100] In international law there is broad agreement that no authority other than the government has the right to

[99] Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (1993) 23.
[100] UN S/PV.7124 (1 March 2014) 5.

invite foreign forces. The ICJ in the *Nicaragua* case castigated the supposed right of an opposition to invite troops because 'that would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition.'[101]

The Court's reasoning against such invitations can equally apply to sub-state authorities but the main reason why sub-state authorities cannot invite foreign troops is because they do not represent the will of the state. It is for this reason that Mr Churkin mentioned in the same breath Mr Yanukovych's invitation.

In sum, Russia's claim that it was invited into Ukraine by the deposed but legitimate President of Ukraine or by local authorities does not stand in international law.

3.2 Intervention to Protect Nationals Abroad

The second justification offered by Russia is that the deployment of its troops was for the protection of its citizens in Crimea against threats to their life and property. The protection of Russian citizens is enshrined in the Russian constitution. According to Article 61 (2) of the Russian constitution '[t]he Russian Federation shall guarantee its citizens defense and

[101] *Nicaragua* (n 23) para 246. Similarly, see *Congo* (n 42) paras 162-165.

patronage beyond its boundaries.'[102] To that, Article 14.5 of the Russian Federal Law on the State Policy in Regard to the Fellow Citizens Residing Abroad should be mentioned according to which 'if a foreign state violates recognized norms of international law and human rights in regard to Russian expatriates, the Russian Federation shall undertake efforts authorized by international law to defend their interests'.[103] Regardless of domestic law provisions, intervention to protect nationals abroad must comply with international law in order to be lawful.

Interventions to rescue nationals threatened with injury or loss of life due to the actions of the host government or of groups in the host country have a long history.[104] Their legality is premised on two alternative grounds: (i) host state consent or (ii) self-defence in the absence of such consent. [105] This is confirmed in the guidelines for 'Non-Combatant Evacuation Operations' adopted by a number of states. According to the UK doctrine, the UK may launch a rescue operation with the consent of the host government but in the absence of consent such an operation can be justified on grounds of self-defence.[106]

[102] Available at http://www.departments.bucknell.edu/russian/const/ch2.html.
[103] The Law Library of Congress, *Russian Federation: Legal Aspects of War in Georgia*, available at http://www.loc.gov/law/help/russian-georgia-war.php#f41.
[104] Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928).
[105] Derek W Bowett, 'The Use of Force for the Protection of Nationals Abroad' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (1986) 39; Tom Ruys, 'The "Protection of Nationals" Doctrine Revisited' (2008) 13 *Journal of Conflict and Security Law* 233.
[106] UK Ministry of Defence, 'Joint Doctrine Publication 3-51, Non-Combatant Evacuation Operations Joint Doctrine Publication 3-51' (February 2013) Annex 3B, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142584/20130301-jdp3_51_ed3_neo.pdf.

Since we have already discussed the legal issues surrounding consensual intervention,[107] we will move to the next justificatory ground: self-defence. This justification is based on certain readings of self-defence that are often used interchangeably. The first reading relies on the customary law of self-defence which, according to its proponents, has been preserved in the post-Charter period in the word 'inherent' contained in Article 51 of the UN Charter.[108] Even if in the pre-Charter era states did not always justify their actions to protect nationals under the self-defence rubric, gradually self-defence became the sole legal basis upon which such operations were justified[109] and this is definitely the case in the post-Charter period.[110] For example, Israel relied on self-defence to justify its operation to free Israeli nationals held hostage at Entebbe[111] and, similarly, the US relied on self-defence to justify its failed operation to free the US hostages from Tehran. In his message to Congress, President Carter stated '[i]n carrying out this operation, the United States is acting wholly within its right in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them'.[112]

The second reading of the self-defence justification relies on the requirement of an 'armed attack' and contends that an attack on a national is an attack on the state, a construction

[107] See also Rex Zedalis, 'Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?' (1990) 25 *Texas Journal of International Law* 209, 221.
[108] *Nicaragua* (n 23) para 176.
[109] See generally Offutt (n 114).
[110] For state practice see Natalino Ronzitti, *Rescuing National Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985).
[111] See the statement by the Israeli Ambassador to the UN, UN Doc S/PV 1939, (9/7/1976), 57, 59-60.
[112] US Department of State Bulletin (1980) No. 2039, 42-43.

based on social contract theories.[113] According to this reading, there is no threshold on the gravity of the attack neither is a physical attack required but the deprivation of human rights would suffice.[114]

In addition to consent and self-defence there is a third line of justification which suggests that rescuing nationals abroad does not violate the prohibition of the use of force because such operations are surgical intrusions that are not against the territorial integrity of the state or its political independence and, moreover, they reaffirm the UN purpose of protecting human rights.[115] This line of argument places rescue operations outside the use of force paradigm.

Although the legal status of such interventions has been questioned by certain legal commentators,[116] 'the argument can be made that a rule of customary international law is by now established'[117] permitting such interventions. However, they are subject to certain conditions: first, there must be an imminent threat of injury to nationals; second, the host

[113] Bowett (n 64) 91 *ff*; C Greenwood, 'Self Defence' (2011) *Max Planck Encyclopaedia of Public International Law* 103, para 108.
[114] Often it forms part of the proportionality calculus; Bowett (n 64) 93. As for the threshold see *Nicaragua* (n 23) paras 191-195.
[115] Rosalyn Higgins, *Problems and Processes. International Law and How we Use it* (OUP, 1994) 220-1.
[116] 'In state practice, none of the arguments advanced by states in order to justify military interventions in favour of their nationals has been accepted by the entire community of states'; Independent International Fact-Finding Mission on the Conflict in Georgia, Vol II, September 2009, 286. See also reactions to Article 2 of Draft Articles on Diplomatic Protection: Special Rapporteur John Dugard, 'First Report on Diplomatic Protection', 7 March 2000, UN Doc. A/CN.4/506, para 46 and UNGA, 55th Session, 6th Committee, 15th to 24th meetings, 24 October – 3 November 2000, UN Docs. A/C.6/55/SR.15-A/C.6/55/SR.24. Also see Ronzitti (n 110) 62-72, 89-113; Simma *et al* (n 47) 226-228.
[117] Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 *Hague Academy of International Law* 467. See also Simma *et al* (n 47) 227; Dörr (n 47) 616-7; Dinstein (n 43) 255-6.

state should have failed or be unable to protect foreign nationals; and third, the operation should be proportional and serve no ulterior purpose.[118]

With regard to Russia's claim and on the basis of the available information, we contend that none of the aforementioned conditions were satisfied. Even if certain groups had threatened Russian citizens or Russian officials, there was no indication that the danger was grave and imminent.[119] During the debates in the Security Council, most representatives questioned the verity of Russian claims but not the existence of such a right.[120] Moreover, although a large proportion of the Ukrainian population are ethnic Russians, that does not make them Russian citizens even if Russia was engaged in a process of issuing them with Russian passports. In this case, the genuineness of the Russian claim may be contested as it was contested in the case of Georgia.[121] Finally, Russia's action does not seem to be proportional to any alleged threat.

4. Russia's Support of Crimea's claim to Self-determination

As was said at the beginning, Russia also claimed that its troops were deployed into Crimea to support Crimea's right to self-determination.[122] There is no doubt that self-determination

[118] Simma *et al* (n 47) 228; Dörr (n 47) 617.
[119] Report on the human rights situation in Ukraine, Office of the United Nations High Commissioner for Human Rights (15 April 2014) www.humanrightshouse.org/noop/file.php?id=20168. Russia claimed that there were violations. See *Russian Foreign Ministry Presents White Book on Human Rights Abuses in Ukraine,* http://tass.ru/en/russia/730463.
[120] UN Doc S/PV.7125 (3 March 2014).
[121] Simma *et al* (n 47) 617.
[122] According to the Russian Ambassador to the UN, 'Crimean people had a right to determine their future, as well as an equal right to self-determination — principles enshrined in the United Nations Charter. The Russian

is 'one of the essential principles of international law' and the ICJ held that it is an *erga omnes* obligation.[123] The right to self-determination entitles a people living within a certain territory to determine the political and legal status of that territory by remaining within the existing state under a status of relative autonomy (internal self-determination), by becoming part of another state (integration) or by seceding from a state and creating a new state (external self-determination).[124]

In order to determine the legality of Russia's action, the first question one needs to ask is whether the Crimeans constituted a self-determination unit that is, a 'people'. The meaning of the term 'people' is 'somewhat uncertain'[125] but according to a UNESCO report, a number of characteristics are 'inherent in a description (but not a definition) of a people'.[126] These include: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life. The report also notes that 'the group must be of a certain number', that the 'group as a whole must have the will to be identified as a people or the consciousness of being a people' and that the group must have 'institutions or other means of expressing its common characteristics and will for identity'.[127] If these criteria are applied to the case in hand, there can be little doubt that the Crimeans constitute a 'people' for self-determination purposes

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Federation was not disputing the principle of territorial integrity, but when it became impossible to enjoy such rights within a single State, people could seek the right to self-determination, which was the case in Crimea now': UN SC/11319 (15 March 2014).

[123] *East Timor* (Portugal v Australia), June 30 (1995) ICJ Rep 90, 102. See also Articles 1(2) and 55 UN Charter, Article 1, International Covenant on Civil and Political Rights (1966) and International Covenant on Social, Cultural and Economic Rights (1966).

[124] GA Res 2625 (1970).

[125] Secession of Quebec [1998] 2 SCR 217, para 123.

[126] UNESCO 'International Meeting of Experts on further study of the concept of the rights of peoples' (22 February 1990) SHS-89/CONF.602/7 para 22.

[127] Ibid. See also Simma *et al* (n 47) paras 23-27.

because they are a defined population made up mainly of ethnic Russians living within a distinct territory and sharing a common language, culture and traditions. [128] Moreover, Crimea was recognised as an autonomous Republic within Ukraine.[129]

If Crimeans constitute a 'people', the next question is whether they can exercise their right to self-determination. As was said above, self-determination can be realised in different ways but, because self-determination in the form of secession can destabilise states and endanger international peace and security,[130] in the post-colonial era more emphasis is placed upon internal self-determination. Internal self-determination is about the protection of a people's identity and their full participation in the political process and often takes the form of autonomy within the existing state. [131] It has been claimed however that when a people is subjected to 'gross human rights violations' and its very existence is threatened, 'this may justify a deviation from the no-secession rule'[132] and the people can opt for external self-determination by seceding from the state.[133] This is called remedial self-determination but the legal status of this rule is not accepted by all.

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[128] Although for the view that Crimeans are not a 'people' see Christopher Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' (2015) 91 *International Law Studies* 216, 227.

[129] Robert McCorquodale, 'Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law' (2014) *Opinio Juris*, http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/.

[130] See for example GA Res 1514 (XV) (1960) para 6. According to Shany, '[t]he no-secession rule, which protects the territorial integrity and political unity of existing states, offers a neat formula for both reconciling the rights of peoples to self-determination and maintaining the stability of the existing international system'; Yuval Shany, 'Does International Law Grant the People of Crimea and Donetsk a Right to Secede? Revisiting Self-Determination in Light of the 2014 Events in Ukraine' (2014) 21 *Brown Journal of World Affairs* 233, 237.

[131] Simma *et al* (n 47) paras 28-31.

[132] Shany (n 130) 238.

[133] *Reference Re Secession of Quebec* (1998) 2 SCR 217, para 126-138. See generally James Crawford, 'State Practice and International Law in Relation to Secession' (1998) 69 *BYIL* 87. See also Russia's written pleadings in the Kosovo Proceedings: 'international law allows for secession of a part of a State against the latter's will only as a matter of self-determination of peoples, and only in extreme circumstances, when the people concerned is continuously subjected to most severe forms of oppression that endangers the very existence of the people'; *Accordance with International Law of the Unilateral Declaration of Independence by the*

Regarding Crimea, it was an autonomous republic within Ukraine; in other words, it had achieved internal self-determination. There was also no suggestion that the people of Crimea were being subject to severe human rights abuses. Instead, 'it appears that the main motivation behind the move to secede was the long-held desire by many Crimean residents – perhaps the majority of the peninsula's population – to rejoin Russia'.[134] In such circumstances unilateral secession cannot be justified according to the theory of remedial self-determination.[135]

That being said, it is also true that international law neither prohibits nor authorises secession which is a political act and as the ICJ said in its *Kosovo Advisory Opinion* international law does not prohibit declarations of independence.[136] This means that neither the declaration of independence nor the preceding referendum were illegal under international law although they may be illegal under domestic law. International law can only deal with the legal consequences of secession by recognising the new entity or by declaring the act of secession illegal and by calling upon states not to recognise the new entity if it emerged by violating norms of *jus cogens*.[137] Indeed, the General Assembly passed a resolution which affirmed the 'sovereignty, political independence, unity and territorial integrity of Ukraine'; called upon 'all States to desist and refrain from actions

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Provisional Institutions of Self-Government of Kosovo, Written Statement by the Russia Federation (2009) 39-40.

[134] Shany (n 130) 240.

[135] *Quebec* (n 133) para 91.

[136] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion) 22 July 2010, paras. 79-84.

[137] Ibid, para 81.

aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means'; said 'that the referendum … [has] no validity' and, finally, called upon 'all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.'[138]

What is interesting to note is that the General Assembly did not qualify the secession and annexation of Crimea as illegal; neither did it say that the secession violated international law. Also, when it said that the referendum had no validity it did not specify whether this refers to legal validity according national and/or international law as opposed to moral or political validity. Moreover, invalidity is about legal defects whereas voidance is about illegality. The difference becomes evident if this resolution is compared to Security Council resolution 662 (1990) which declared the annexation of Kuwait by Iraq 'null and void' and called upon all states not to recognise the annexation.[139] Finally, the General Assembly resolution calls upon states to refrain from recognising the 'altered' status of Crimea but does not qualify it as unlawful.

[138] GA Res 262 (2014).
[139] SC Res 662 (1990).

Be that as it may, we are going to assess whether Russia's actions in relation to Crimea's claim to self-determination violated international law, which is the focus of this article.

Russia galvanised secessionist feelings and moves by repeated claims that Crimea was historically, culturally and linguistically part of Russia and by declaring that Crimea would be permitted to accede to Russia if this was the outcome of the referendum.[140] Russia's utterances and actions in this respect can be regarded as unlawful intervention because it challenged Ukraine's sovereign authority over its territory and people and fettered its capacity to deal with this internal matter. For example, it destroyed the chances of holding meaningful negotiations with the Crimean authorities to perhaps further the internal self-determination of Crimeans. This is a matter for the state and regional authorities to resolve and international law does not recognize any right of external actors to provide support or assistance in the exercise of the right to internal self-determination.[141]

It should be noted in this regard that secessionist claims are often dependent on some form of external assistance in order to attain their objectives.[142] It is for this reason that in international law states 'are under an obligation not to engage in propaganda, official utterances or legislative action with the intent or likelihood of inciting sedition or revolt

[140] Reuters, 'Russia Defends Crimea Referendum, Agrees to more Observers' (16 March 2014) http://www.reuters.com/article/2014/03/16/ukraine-crisis-putin-merkel-idUSL6N0MD0IV20140316.
[141] EU Independent Fact-Finding Mission on the Conflict in Georgia (September 2009) 279-280. More generally see Christine Gray, *International Law and the Use of Force* (2008) 59 *ff*.
[142] Mikulas Fabry, 'International Involvement in Secessionist Conflict: From the 16th Century to The Present', in A Pavkovic and P Radan (eds), *Ashgate Research Companion to Secession* (2011) 251.

against the governments of other states.'[143] This has been reaffirmed in a host of General Assembly resolutions.[144] Principle V of the Declaration on Friendly Relations which represents customary law is relevant here because it instructs states not to engage in any activity that compromises the territorial integrity or political unity of a state in assisting peoples to realise their right to self-determination provided that the parent state conducts itself in conformity with the principle of self-determination.[145]

Regarding Russia's recognition of Crimea as an independent state, it is submitted that recognition of a secessionist entity can be an act of intervention because the recognising state, by establishing legal and political relations with the secessionist entity, denies the sovereign authority of the parent state over such territory and people and affects the power structures within the parent state. The critical question is at which point recognition can constitute unlawful intervention. Recognition is unlawful when it is premature; that is, when the parent state has not politically, legally and factually conceded to secession but is still engaged in a 'substantial struggle' to maintain its territorial integrity and prevent that entity from seceding.[146] Although Ukraine did not mount a military struggle to retain Crimea due to its relative weakness *vis-à-vis* Russia, it did mount a political and legal struggle to retain Crimea, frequently denouncing Crimea's secession as unlawful and politically illegitimate and brokering international support for this position.

[143] Quincy Wright, 'Subversive Intervention' (1960) 54 *AJIL* 521, 523.
[144] See for example GA Res 2625 (1970) and GA Res 36/103 (1981).
[145] Friendly Relations Declaration (n 26) Principle V, paras 7 and 8.
[146] Restatement (Third) of Foreign Relations Law, sec. 202, comm. d (1987). See further Hersch Lauterpacht, *Recognition in International Law* (1947) 92 and John Dugard, 'Recognition of States and Governments' (2013) 357 *Hague Academy of International Law* 29.

In conclusion, Russia's support to Crimea and the premature recognition of Crimea constituted unlawful intervention.

5. Conclusion

This article has assessed the legality of Russia's conduct in Crimea from the moment it began providing support to separatists in Crimea until the moment it recognised Crimea's secession from Ukraine. Its main contention is that Russia's actions of supporting rebels, deploying troops and supporting and encouraging Crimea's secession from Ukraine constituted unlawful intervention and not an unlawful use of force as many commentators claim.

The thrust of the argument is that intervention and the use of force are ontologically and normatively separate principles. They both derive from and protect the sovereignty of states but they protect different aspects of state sovereignty against different types of intrusion. Whereas the non-intervention principle refers to the political integrity of states protecting state sovereignty against external coercion, the non-use of force protects the physical integrity of states by protecting sovereignty against physical harm.

Although there exists a complex network of international law principles and norms that protect state sovereignty and these are designed to capture different types of infraction of state sovereignty, the prohibition on the use of force has dominated legal debates at the expense of other principles and norms. In reaction to this, this article has brought to light the enduring relevance of the principle of non-intervention by explaining its meaning, content and scope against the current state of legal neglect that characterises the treatment of this principle.