Ukrainian Sovereignty and Territorial Integrity – Has it Been Breached?

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In November 2013 the Euromaidan protests swept Kiev and brought violence to the streets. President Yanukovych had chosen closer economic ties to the Russian Federation over the European Union and in February he was ousted and an acting-President appointed by Ukrainian Parliament. The crisis escalated when unmarked forces seized the Crimean peninsula and penned Ukrainian forces into their bases. Furthermore, Eastern Ukraine saw increased pro-Russian protests against the Government and in the subsequent twelve months the rebel groups that seized control have attempted to create break away from Ukraine. The rebel groups have been supported by Russia by provisions of weapons, armour and logistics but the full extent of Russia’s involvement is unclear. This article locates the breaches of international law with regards to Russia’s actions in Ukraine and addresses the extent to which the sovereignty of Ukraine has been violated. The use of force and potential acts of aggression are examined and the right to self-determination of the Ukrainian people.

**Keywords:** International Law, Ukraine Crisis, Russia, Use of Force, Sovereignty, Self-Determination

1. **Introduction**

Civil unrest had been on going for months when President Yanukovych was ousted to Russia in February 2014. Russian troops began to seize control of the Crimean peninsula, Ukrainian territory since 1954, and Crimea was

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subjugated from the Ukrainian mainland.\textsuperscript{2} Shortly after the Crimean crisis, fighting broke out in Eastern Ukraine that has resulted in attempts by rebel groups, allegedly supplied by Russia, to gain independence from Ukraine.\textsuperscript{3} The legal status of Ukraine as a state is not in doubt and the international community have condemned the breaches of the sovereignty and territorial integrity of Ukraine. The crisis bears some resemblance to that of the Georgian conflict in 2008.\textsuperscript{4} Similarly in this crisis, Russia justified its actions by claiming intervention by invitation and protection of its nationals.

It is regarded by Jean-Claude Juncker that, “What the Russian leadership has done in Crimea is in clear contravention of international law.”\textsuperscript{5} With that statement in mind, firstly, the concepts and rights of sovereignty will be analysed. Secondly, the specific obligations of Russia under various treaties that enshrine cooperation in that sovereignty must be examined. Thirdly, Russia has arguably used force in contravention of international law and has suggested a number of defences as reasoning for its actions. Lastly, what role does self-determination have in those actions?

2. RELEVANT INTERNATIONAL LAW AND PRINCIPLES

As is the situation with many international crises the legal issues blend with political considerations but there remains underlying legal principles, which must be adhered to. In the words of President Putin himself, “[we] believe that preserving law and order in today’s complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not.”\textsuperscript{6} Firstly, all states are sovereign and equal which comes from the maxim par in parem non habet imperium that stipulates one sovereign power cannot exercise jurisdiction over another.\textsuperscript{7} Ukraine has sovereignty over its territory, which is the “capacity as the entity entitled to exercise control over its territory and its

\begin{itemize}
\item \textsuperscript{3} \textit{Ibid}.
\item \textsuperscript{5} Christian Ignatzi, ‘Crimea: A breach of international law’ (Deutsche Welle, 8 March 2014) < http://dw.de/p/1BMEj> accessed 2 February 2015.
\item \textsuperscript{7} James Crawford, \textit{Brownlie’s Principles of International Law} (8th edn, OUP, 2012)245.
\end{itemize}
 Sovereign states have a wider obligation of non-intervention in the jurisdiction of other states and must adhere to treaties it has signed and customary law. Russia and Ukraine have multiple treaties that were signed after the dissolution of the Soviet Union, the first of which is the Budapest Memorandum on Security Assurances. It stipulates that Russia, the UK and the USA will respect the independence and sovereignty of Ukraine’s borders. The second treaty is the Treaty of Friendship, Cooperation, and Partnership between Ukraine and Russia. Article 2 states they will have “respect for each other’s territorial integrity, and confirm the inviolability of the borders existing between them.” These treaties emphasise the sovereignty and independence of Ukraine, which had only been created in its current form a few years earlier. Due to the close alignment of the former Soviet Bloc the two countries signed the Agreement on the Presence of the Black Sea Fleet (BSFA). The agreement arose from the fleet being divided between the two nations. Russia wished to keep its warm water port to access the Mediterranean but the prominent Ukrainian politician Chomovil foresaw the problem with allowing a Russian port on Ukrainian territory when he said, “to leave the Russian Black Sea Fleet [in Sevastopol] for 20 years is to force a pervasive and permanent atmosphere of agitation and strain not only in the Crimea, but in Ukraine.” The treaty notably instructs “Russian forces to respect the sovereignty and legislation of Ukraine and to refrain from interfering in its internal affairs; [and] Article 8(2), which restricts Russian forces to carrying out maneuvers and exercises within the areas agreed to by the Ukrainian authorities…” The three key regional and international treaties provide the framework that solidify the status of Ukraine as a nation free to decide its own destiny and in which Russia’s actions must be judged.

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8 Ibid., 244.
9 Ibid., 245.
10 Budapest Memorandum on Security Assurances (adopted 5 December 1994) UN Doc A/49/765
11 Ibid., Art. 1.
Russia has undoubtedly used a level of aggression and force in Ukraine through various methods. The prohibition on the use of force is in Art. 2(4) of the UN Charter which states, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Not using armed force is also customary law and if no defences to make the action legal can be successfully argued, the use of force is a violation of a rule of *jus cogens* and constitutes aggression. As members of the UN, Ukraine and Russia are both bound by these obligations. Under the 1974 Definition of Aggression, Art. 3 provides guidance which is important in the current crisis. Article 3(a) states aggression is the invasion or attack of one state on another; 3(e) prohibits troops stationed in another state to go beyond the agreement of their presence (for example, BSFA); and 3(g) prohibits the use of mercenaries to carry out acts of armed force against another state. Article 3(g) is recognised in *Nicaragua v USA* but the court found that “the concept of ‘armed attack’ [does not include] … assistance to rebels in the form of the provision of weapons or logistical or other support.” In this case the USA was found to have intervened in the affairs of Nicaragua by equipping and financing the rebel Contras, which in turn also violated Nicaragua’s sovereignty. That being said, for the USA to be held solely responsible the rebel groups had to be under the direct control of the USA, which was not the case. More problematic is the definition of an ‘armed attack’. ‘Armed attack’ is important because, “State practice seems to reveal that ‘governments have been virtually unanimous in rejecting any right to use force except in response to an armed attack’.” Furthermore the, “Chatham House Principles … take the view that ‘[a]n armed attack means any use of armed force, and does not need to cross some threshold of intensity’.” Chatham House are an influential, respected, think-tank, providing research on international current affairs. Following Chatham House and the 1974 Declaration, “a good case can indeed be made that their presence and conduct fits the archetypical example of aggression…” Russia committed an armed attack in Crimea by stationing its troops outside the

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23 Sari (n 14).
agreed bases but presence of an attack by Russia in Eastern Ukraine is less clear due to the lack of evidence if the rebels also include serving Russian military.

3. The Russian Defences

Where does Russia fall in its use of force and can it defend those actions? The presence of illegal force is clear where Russian troops, even without insignia, violated the sovereignty of Ukraine by breaking the BSFA and committed an act of aggression in Crimea, clarified by Malcolm Shaw QC.24 The difficulty arises when discussing the situation in Eastern Ukraine. The level of Russian cooperation and support in facilitating the Ukrainian rebels is unclear but at a minimum the provisions of weapons and logistics falls under Nicaragua and is a gross violation of Ukrainian sovereignty even if the support does not amount to the use of force by Russia. Furthermore, it can be submitted that, “if a third state military intervenes in such a situation [civil war], it is ‘using military force to curtail the political independence of the State and therefore it is an action that contravenes article 2(4)’.”25 Considering the Eastern Ukraine crisis as civil war and the reported crossings of Russian troops and armoured units into Ukraine, if true, it seems clearer that the sovereignty and territorial integrity of Ukraine has been violated on both fronts and Ukraine can take countermeasures to combat the attack.26

Nevertheless, Russia has claimed defences in its use of force and these form the main legal argument. Defences recognised in international law are self-defence, invitation by the lawful government, humanitarian intervention and action permitted by the UN Security Council.27 First claimed by Russia is self-defence under Article 51 which states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”28 This is valid until the Security Council takes its own measures to ensure international peace and any use of the defence must be immediately reported.29 The defence has its origins in The Caroline where, “it has long been accepted that, for it to be invoked or justified, the necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation.”30 Furthermore, “For Russia to rely on self-defence though, it needs to

25 Khayre (n 20)224.
26 Lott (n 3)11
27 Khayre (n 20)211.
28 UN Charter (n 15) Art. 51.
29 Ibid.
demonstrate that an armed attack has taken place against it or that such an attack is imminent, that its use of force was necessary to end or prevent the attack, and that the force used was proportionate to that need.\textsuperscript{31} This concept of necessity and proportionality originates from the \textit{Oil Platforms Case}.\textsuperscript{32} For self-defence to be successfully used the military personnel in Crimea must have been subject to an attack by Ukraine and this simply “did not occur and cannot be invoked in order to justify the Russian resort to armed force.”\textsuperscript{33} Wisehart further concludes that Russia bears the burden of proof in this situation under the \textit{Oil Platform Case} and must “show that Ukrainian acts against Russian military personnel are of such a gravity to constitute an ‘armed attack’.”\textsuperscript{34} This is clearly not the case in Crimea since Russian troops, in violation of the BSFA, penned in Ukrainian bases and no attack by Ukraine is apparent. With regards to the stationing of troops on Ukrainian territory the case of \textit{Re Karins}\textsuperscript{35} may be mentioned to highlight that the stationing of Soviet troops in Latvia was an act of aggression. By going beyond the BSFA the troops committed acts of aggression and due to the fact there was not an apparent attack on Russian forces the aggression could not be argued to be in self-defence.

The second defence raised by Russia is the protection of nationals. The concept was first introduced in 1952 with regards to a state’s own nationals in a second state where Sir Humphrey Waldock laid down three rules for intervention.\textsuperscript{36} Russia claims it wishes to protect ethnic Russians, which implies some of the ethnic Russians will be both Ukrainian and Russian nationals. The Russian Duma stated this when the use of force was authorised.\textsuperscript{37} Vladimir Putin claimed “his country’s role in Ukraine [is] safeguarding ethnic Russians worried by lawlessness spreading east from the capital.”\textsuperscript{38} In addition, the Russian Foreign Minister said, “it was not in

\begin{thebibliography}{9}
\bibitem{31} Ruma Mandal, ‘Russia, Ukraine and International Law’ (Chatham House, The Royal Institute of International Affairs, 7 March 2014) \url{<https://www.chathamhouse.org/media/comment/view/198003#>} accessed 2 February 2015.
\bibitem{32} Oil Platforms (Islamic Republic of Iran v. United States of America) [2003] ICJ 4.
\bibitem{34} Wisehart (n 32).
\bibitem{35} \textit{Re Karins and others v Parliament of Latvia and Cabinet of Ministers of Latvia} [2007] Case No. 2007-10-0102 (Latvian Constitutional Court) (OUP Ref. ILDC 884 (LV 2007)).
\bibitem{36} Wisehart (n 32).
\end{thebibliography}
Russia's interests for Ukraine to break up, but that Moscow wanted all citizens of the country to be given equal treatment by Kiev.\(^{39}\) Under the ‘responsibility to protect’, “it is intended to permit (and even require) international action in the face of the most serious human rights abuses or international crimes, in cases where a state fails in its duty to protect its own citizens.”\(^{40}\) In 2001 the concept was expanded to include protection of another state’s nationals and is said to be an emerging norm of international law.\(^{41}\) It was suggested in the 2001 Report of the International Commission on Intervention and State Sovereignty\(^{42}\) a state may act, “(a) when a particular state is clearly unwilling or unable to fulfil its responsibility to protect; (b) where a particular state is itself the perpetrator of crimes or atrocities; or (c) where people living outside a particular state are directly threatened by actions taking place there.”\(^{43}\) The Entebbe hostage incident in 1976 and the Russian invasion of Georgia in 2008 are cited as examples of state practice of protecting nationals but it must be shown the nationals were indeed in danger.\(^{44}\) There is considerable dispute in academia with regards to protecting nationals mentioned by both Wisehart and Talmon.\(^{45}\) It is argued the provisions are in place to protect civilians from crimes against humanity and to avoid situations where states must “stand idly by whilst millions of human beings are massacred just because in the Security Council a permanent member holds its protective hands over the culprit.”\(^{46}\) “However, no evidence shows that Russians have been under a real physical threat; there was no humanitarian or human rights crisis. Russia could in no way invoke a doctrine of humanitarian intervention in order to justify its intervention.”\(^{47}\) Russia cannot demonstrate that civil strife in the form of protests and the Ukrainian change of law regarding use of the Russian language amounted to a human rights crisis and therefore, the ‘responsibility to protect’ cannot be used as a defence for actions in Crimea. It is reported that in Eastern Ukraine the civilian population are being attacked and killed but reports on the


\(^{40}\) Crawford (n 6), 755.

\(^{41}\) *Ibid.*, 756.


\(^{43}\) Crawford (n 6), 756.

\(^{44}\) Wisehart (n 32); Lott (n 3).

\(^{45}\) Wisehart (n 32); Ignatzi (n 4).

\(^{46}\) Crawford (n 6), 757.

\(^{47}\) Norwegian Helsinki Committee (n 36), 4.
responsibility of states and groups involved are unclear. Although Kotlyar claims the shooting in Eastern Ukraine is due to the Ukrainian military, another consideration is that the Ukrainian military are attempting to reclaim territory which is legally part of Ukraine and has been seized by rebels with the support of a foreign power.\textsuperscript{48} To determine if a humanitarian crisis exists, and if Russia acted to create the crisis or alleviate it, will be a matter for debate within the Security Council and General Assembly of the UN.

Lastly, the third defence submitted by Russia is an invitation to intervene. Such a request would mean that Article 2(4) prohibition would not apply.\textsuperscript{49} Russia claims, “[the] Prime Minister of Crimea, went to the President of Russia with a request for assistance to restore peace in Crimea. According to available information, the appeal was also supported by Mr. Yanukovych, whose removal from office, we believe, was illegal.”\textsuperscript{50} The argument over the status of Yanukovych roots from Putin claiming, “Yanukovych is still \textit{de jure} President of Ukraine (even if \textit{de facto} ousted).”\textsuperscript{51} Two theories exist for the lawful use of invitation to intervene, one of which supports the acting-President at the time, Turchynov, and the second supports Russian claims of Yanukovych’s legitimacy. Firstly, “Under the effective control theory, the sole authority entitled to speak on behalf of a state is the one which has permanent \textit{de facto} control over that state’s territory and population.” The acting-President had \textit{de facto} control of Ukraine as per his appointment by Ukrainian Parliament. Secondly, “Under the popular sovereignty theory the loss of effective control does not affect the continued legitimacy of a democratically elected (and unconstitutionally overthrown) government.”\textsuperscript{52} It can be evidenced by practice in 1979 that the international community has previously denied Russian use of a questionable invitation to intervene where the Prime Minister of Afghanistan, “crowned” by the Soviet Union, invited military intervention that was deemed illegal.\textsuperscript{53} The acting-President must be granted legitimacy by the fact of his appointment by democratically elected MPs in a time of national emergency. As a result, the invitation of intervention by former President Yanukovych must be invalid.

\textsuperscript{49} \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)} [1986] ICJ Rep 14 [246].
\textsuperscript{50} United Nations Security Council, 7124\textsuperscript{th} Meeting (1 March 2014) UN Doc S/PV.7124, 5.
\textsuperscript{52} Vaypan (n 50).
\textsuperscript{53} Khayre (n 20), 228.
4. INTERNATIONAL OPINION

The international opinion on the Ukraine crisis is united under General Assembly Resolution 2625 which, “affirms its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders.” The Resolution specifically calls for states to refrain from using force to modify the borders of Ukraine. Furthermore, the body that can make binding decisions is the UN Security Council that often has political constraints when tackling crises due to splits in the policies of the permanent members. A proposed binding Resolution would have made any territorial gains by Russia illegal by use of force and declared the Crimean referendum as invalid. Due to Russia’s belief of the actions being legal they used their veto to prevent the Security Council taking measures to denounce the conflict. This prompted a strong response from the UK Ambassador among others, “Russia alone is prepared to violate international law, disregard the UN Charter, and tear up its bilateral treaties.” It is an unfortunate caveat of the UN Security Council to be denied the ability to take action because of the politics of diplomacy but as Sir Mark Lyall Grant correctly says, “This message will be heard well beyond the walls of this chamber.” The Secretary-General called for, “the full respect for and preservation of the independence, sovereignty and territorial integrity of Ukraine.”

The concerns of the international community are not only limited to the illegal use of force, the UN Ambassador for Jordan states, “There have been increasing numbers of crimes against citizens, including forced displacement, torture and forced labour, and the deprivation of the right of citizens to stability and security,” and “Ukrainian pilot Nadia Savchenko … was taken by separatists in mid-June. She is now being held — where? — in a prison in Voronezh, Russia.” The illegal detention of a Ukrainian pilot by Russia is an indication to what extent the rebels are being assisted and perhaps acting on

55 Ibid.
56 Khayre (n 20), 219.
59 Ibid., 5.
60 UN Security Council (n 49), 2.
the orders of Russia. This cannot be allowed to continue and the root cause of this instability is the use of force by Russia to violate Ukrainian sovereignty.

Furthermore the Council of the European Union has joined the UN in denouncing the actions of Russia. They have stated, “Any unilateral military actions on the part of the Russian Federation in Ukraine under any pretext, including humanitarian, will be considered by the European Union as a blatant violation of international law.”

In particular Russia are urged to sever their support of the rebels and withdraw its forces from the region. The EU wishes to open dialogue between the parties and six months after the Council’s conclusions a ceasefire was negotiated by Chancellor Merkel, unfortunately the Russian response to this ceasefire was increased military exercises and a rush to send armour over the border to Ukraine before the deadline.

5. The Right of Self-Determination

It must be examined if the peoples’ exercise of self-determination harms the sovereignty of Ukraine. It is said that, “The importance of the principle of territorial integrity is a severe limitation to the exercise in practice of the right of self-determination, and has indeed in many instances outweighed any claim to self-determination.”

On the other hand, it is stated in Article 1 of the ICCPR that, “All peoples have the right of self-determination.” Under the Quebec requirements a people are allowed self-determination where they are part of a colonial empire; where they are subject to alien subjugation, domination or exploitation; or where the people are denied the exercise of their rights within the state.

Dixon notes that it is unclear if the Quebec requirements reflect customary law and more recently the right to self-determination has been recognised as an, “inalienable, permanent and unqualified right.” Nevertheless, Dixon argues for a balance to “be struck between protecting human rights of peoples and preserving the

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63 Council of the European Union, ‘Council conclusions on Ukraine’ (Press EN, Brussels, 15 August 2014)
64 Ibid.
Considering that viewpoint, Ukraine did not abuse the human rights of the people of Crimea and the referendum increased tensions perhaps harming the fabric of international society. Furthermore, European Parliament supports this view where, “It is recognized that the application of the principle of self-determination is possible only if the central government does not meet the requirements of the territory, which it wants, to give to this territory the territorial or national autonomy.”

Kotlyar claims the people of Crimea were allowed self-determination from a government who wanted to repeal a law that allowed the Russian language to be used when speaking to Ukrainian authorities. The Ukrainian government was not given the chance to meet the requirements of the territory before the Crimean people exercised self-determination. Tolstykh argues the sovereignty of Ukraine was not undermined by the Crimean referendum because the political forces in power had already undermined the constitution and that Ukraine had been divided into two smaller states, one which supported the Government from the coup and one which did not. He also claims the military presence of Russian troops is not of concern because other referendums have occurred in that fashion. This is contrasted by the conclusion of the EU that, “Plebiscite, held under the condition of the foreign occupation of the region, will not be recognized by the international community, and its results will be viewed as legally void.”

The Ukraine has responded to the statement of Russia concerning Crimean independence “on the Declaration of independence of the Autonomous Republic of Crimea and Sevastopol to be a direct and undisguised interference of the Russian Federation in internal affairs of Ukraine, which is in odds with the fundamental principles of International Law and generally recognized principles of states coexistence.” The principles mentioned are found in the 1970 Declaration on Principles of International Law concerning Friendly Relations which lays down that a state cannot interfere with the “territorial integrity or political unity of

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70 Dixon (n 67), 173.
72 Benjamin (n 47), 37.
74 Ibid., 882.
75 European Parliament (n 70).
76 Ibid.
sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples.”

Under the ICJ’s *Advisory Opinion on Kosovo* it was found that a declaration of independence did not violate international law but, in context, resulted from repeated denial of recognition by Serbia and a bloody conflict. The people of Crimea and Eastern Ukraine first needed to explore all avenues of political recourse as part of Ukraine and if Ukraine deny that opportunity the territories would in all likelihood be given international support to be independent. It must be noted that Russia does not recognise Kosovo as a state even though its declaration had been held to be legal. Crimea’s referendum has been deemed illegal as the Crimean Parliament breached the Ukrainian Constitution and it is not clear the central government had not met the needs of Crimea. The Government of Ukraine pledged to hold elections, which took place in May, but many Eastern Ukrainians were not represented due to the conflict. Under those elections, the groups seeking self-determination would have been able to vote for candidates who supported independence or Russian integration. If, after the elections, the groups seeking self-determination were aggrieved by the results then a declaration of independence would not contravene international law and would be granted considerable weight if the international community could judge that those citizens were not sufficiently represented.

6. CONCLUSION

It is clear from the definitions in international law that Ukraine is a sovereign nation whose territorial integrity has been infringed by Russia. This has occurred due to the use of force in stationing Russian troops outside the agreed military bases in Crimea in contravention of the BSFA and the infringement of sovereignty by assisting rebels. Crimea was subjugated and whilst it declared itself a Russian federal state following a referendum, that referendum that has been deemed by the UN to be invalid. Russia as a permanent member paralysed the Security Council and the lack of a binding decision has led to the continued violation of Ukraine’s sovereignty. The subjugation of Crimea and the status of rebels in East Ukraine would hold more credibility if all constitutional efforts had been explored in seeking self-determination and the interference of Russia cannot be justified. Russia can have no defence to its violation of Article 2(4) and the aforementioned regional treaties because no attack took place on its nationals, military or

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78 Ibid., 7.
territory; and former President Yanukovych was no longer in control of Ukraine when he asked for assistance and had been replaced by the democratic effort of appointing a new president by parliamentary vote.

On-going peaceful methods of resolution will hopefully bring an end to both the continued use of armed force and the gross violation of Ukraine’s sovereignty. If civilian casualties persist a humanitarian crisis may result and the Security Council must attempt to re-establish international peace. Due to the aforementioned political constraints it is doubtful the Security Council would ever be able to pass a resolution under Articles 41 or 42 of the UN Charter for collective security measures. In the meantime, the international community must feel a “…sense of duty and responsibility to put pressure on Russia, in any way available, to show that it truly respects the principle of the rule of law, clearly and unambiguously.”80 Once Russian involvement ceases to be a factor, Ukraine will be free to decide its own destiny as a sovereign nation with the full support of the international community and the UN.

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