

Some thoughts on the Russian use of armed force in Ukraine

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The ongoing Russian military activities on the Crimean peninsula are in violation of the general prohibition on the use of force under international law and none of the well-agreed upon exceptions to that prohibition would seem to apply. Instead, the Russian activities constitute an armed attack on Ukraine.

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Particularly from late February onwards, tension has risen strongly in Ukraine. After President Viktor Yanukovich's escape from Kiev, Russia has increased her involvement in the uprising by, *inter alia*, *de facto* occupation of the Crimean peninsula, and by keeping Ukrainian military personnel in their camps through the threat of using armed force. In addition to activities by Russian troops, it would also seem that Russia controls groups of ex-military personnel of Ukrainian citizenship which serve as an extended arm of Moscow. How is this to be understood in legal terms?

Obviously, the initial Russian presence on the Crimean peninsula was legal under the agreements of 1997 and 2010 regarding its naval and air bases located there. However, it would seem strange if those agreements allowed for her current use of military force in Ukraine.

It is unclear what degree of control Russia holds over her Ukrainian "militias", but this is of less importance as Russia has clearly deployed her own forces onto the peninsula. This uninvited movement of Russian military personnel into the peninsula constitutes a use of armed force in violation of the United Nations (UN) Charter Art. 2 paragraph 4, since it cannot be seen as anything but the use of

armed force “against the territorial integrity or political independence of any state” or “in any other manner inconsistent with the Purposes of the United Nations.”

If the new Russian military presence then constitutes a violation of the general prohibition of the use of force, it must be assessed whether it is nevertheless covered by any of the well-agreed upon exceptions to that prohibition. Obviously, Russia lacks a UN Security Council mandate for her operations, but do any of the other exceptions to the general prohibition on the use of force apply?

The new Russian military presence can hardly claim to have been validly invited by the Ukrainian government. Admittedly, former President Yanukovich still claims to be president of Ukraine and he has indeed issued an invitation. But as a president ousted by popular demand and therefore currently not in control of the government, his invitation is not recognized by international law as a valid invitation. That the new government may have come to power in violation of the Ukrainian constitution does not suffice to have the ousted president authorize an intervention. Although it may be said that the new temporary government is not, as such, in control of the whole of the internationally recognized Ukrainian territory, former president Yanukovich is even less in control of it.

The Russian ambassador to Australia, Vladimir Morozov, has on the other hand argued that the new Russian presence is legal due to an invitation by the new local government on the Crimean peninsula. However, even if this entity could be said to be in effective control of the relevant area, international law only considers invitations given by the central government of a state as valid exceptions to the general prohibition on the use of force.

Normally, the right to self-defense under UN Charter Art. 51 covers an armed attack on the territory of the state responding in self-defense. To a certain extent, an attack on representatives of that state abroad may also constitute an attack on that state. Examples of potentially protectable representatives in this situation are Russian naval vessels, military planes or troops located abroad. However, it is not generally accepted that an attack on the citizens of a state living abroad, and even less people merely sharing language or ethnic links with that state, would constitute an armed attack on the “self-defending” state. Admittedly, Russia has argued in earlier cases for a right to act in self-defense of its citizens abroad if they are attacked. This seems to be part of the rationale for the Russian military involvement in Georgia in 2008. Nevertheless, such an expanded right to self-defense is definitively a minority view, and the international reactions to Russian activities in Ukraine would seem to underline this. Especially since the Russian troops are not merely evacuating Russian nationals back to Russia.

Here, it would rather seem as if Russia argues for a right to humanitarian intervention for the benefit of ethnic Russians living in Ukraine, but who are not

Russian citizens. Humanitarian intervention is normally understood as a unilateral military intervention on the territory of another state, without the invitation of the territorial state or an authorization of the UN Security Council, in order to hinder serious humanitarian violations of the rights of persons who are not citizens of the intervening state. Whether humanitarian intervention is seen as not covered by the prohibition of the use of force in UN Charter Art. 2(4), or rather as an exception to that prohibition, is a question we may put aside here. The important question is rather: Where are the facts of systematic gross violations of human rights pertaining to these people? Moreover, as the legality of the use of armed force for such purposes is hardly recognized by any states these days, an exception being made for the United Kingdom which argued last year for the legality of a humanitarian intervention in Syria, Russia would be in violation of its obligations under international law if she seeks to rely on humanitarian intervention as a legal justification for her activities.

It would therefore seem as if the current Russian military involvement in Ukraine is illegal under the UN Charter, and it is submitted that the corresponding regulation on the use of armed force under international customary law does not open up additional avenues for the use of armed force in the current situation. Actually, although the use of weapons seem so far to have been limited to warning shots, the *de facto* occupation of the Crimean peninsula can hardly be seen as something other than an armed attack on Ukraine under UN Charter Art. 51.

Moreover, the UN General Assembly's Definition of Aggression resolution defines a *prima facie* case of aggression as, *inter alia*, "[t]he 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." As most of the Russian forces currently involved seem to have been sent to the peninsula after the crisis broke out, their movements instead resemble other parts of the resolution: "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof", and "[t]he blockade of the ports or coasts of a State by the armed forces of another State". As is well known, the International Court of Justice relied heavily on this declaration in the Nicaragua case when it considered the term "armed attack" in UN Charter Art. 51. If Ukraine finds herself to be under an armed attack and issues an invitation to foreign states to come to her support, a coalition of the willing may then legally use armed force against Russia. The consequences of such an escalation are naturally most troublesome. As the parties are now at the negotiating table, it is nevertheless prudent for Ukraine to

abstain from responding militarily until the negotiations fail, unless Russia takes control over more territory or her military makes use of their weapons.

Another relevant issue relates to the consequences which Russia's involvement might have on the minorities living within Russia. The Russian endeavor might lead to the Crimean peninsula and other pro-Russian parts of Ukraine breaking away from Ukraine and being recognized as sovereign states by Russia, or even included in the Russian Federation. This would to some extent be comparable to the breakaway parts of Georgia later recognized by Russia as sovereign states. This would then supply ammunition to those who criticize Russia for applying double standards as regards its crackdown on separatist movements in her own southern administrative regions. In the end, the current Russian action might make it harder for her, in the future, to argue convincingly against a breakup of *inter alia* her soft Caucasus underbelly.