Annexation Of Crimea By Russia: Critical Analysis

Introduction

Following the horror of two world wars, the Charter of the United Nations was introduced in 1945 encouraging the pacific settlement of disputes and banning unilateral uses of force. As a result of this ban, in theory, there are only two instances where a use of force is lawful, namely with prior authorisation as part of the UN's collective security system or in self-defence. However, in practice, states continue to contravene the jus ad bellum. The alleged annexation of Crimea in 2014 by the Russian Federation is a prime example of such contravention. Deemed the most serious standoff between Russia and the West since the Cold War, determining the legality of events in Crimea is complex due to the conflicting accounts given by each side. In order to provide a fair analysis, both Western and Russian points of view will be referred to throughout. Furthermore, while there are a number of justifications which could be implied from events – such as humanitarian intervention and in support of self-determination – the scope of this essay is limited to the justifications directly expressly by the Russian Federation in attempting to legitimise their military intervention in Ukraine. Accordingly, through an assessment of the controversial 'protection of nationals' and 'invitation to intervene' justifications, this essay will determine whether Russia's military intervention in Crimea constituted a lawful use of force or an act of aggression in contravention of the Charter.

Establishing a Threat/Use of Force

Ukraine's intentions to build relations with the West were clear with the ousting of pro-Russian President Yanukovych on 21 February 2014 and the signing of an Association Agreement with the European Union. Against this backdrop, on 28 February 2014, Russia began covert military operations in the former Soviet region of Crimea. In determining whether this intervention was lawful, the Charter lists three types of force, namely a mere use of force, an act of aggression or an armed attack. From the outset, Ukraine used the term "act of aggression" highlighting that not only was the intervention a gross violation of their territorial integrity, Russia was also breaching its duties under the Budapest Memorandum and Russia-Ukraine Treaty of Friendship. Western states agreed with Ukraine, for example the Council of the European Union declared the intervention was a "clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression. As highlighted during the UN Security Council's meetings, the most evident act of aggression was Russia's deployment of troops into Crimea contrary to the 1997 Agreement. This agreement allowed Russia to harbour its Black Sea Fleet in the city of Sevastopol. In defending its actions, Russia stated that it was entitled to station up to 25,000 troops in Crimea and claim that this figure was not exceeded. However, this entitlement was on the condition that the Russian military must respect Ukraine's sovereignty, abide by their laws and not refrain from interfering in the internal affairs of the country. Consequently, the blockading of naval ports, airports, communication hubs, and public buildings such as the regional parliament by Russian armed forces concealing their identities – referred to by the media and locals as the "Little Green Men" – was a clear contravention of the 1997 Agreement. Furthermore, reports of the moving of 6,000 troops beyond the allocated naval bases during a period of revolt in Kiev entitled Ukraine to terminate the agreement thereby rendering the Russian military presence illegal. Under the UN General Assembly's Resolution on the

Definition of Aggression, where the armed forces of one State are based in the territory of another on the basis of an agreement, any contravention of that agreement constitutes an act of aggression. Applying this to the present case, these actions are clear acts of aggression by the Russian Federation against the territorial integrity of Ukraine.

‘Protecting Nationals Abroad’ – A Stretch too Far?

In attempting to justify the use of force as lawful rather than an act of aggression, Russia invoked the exception of self-defence. The right of self-defence is recognised in customary international law as well as in the Charter and allows for individual/collective defence in response to an armed attack until the UN can step in. When requesting the Council’s authorisation to use force, President Putin cited the “threat to citizens” and “personnel of the… Russian Federation Armed Forces”. Accordingly, it is relevant to consider whether self-defence can be extended to protect nationals abroad. Despite the UN’s Definition on Aggression providing that a state can be the victim of an armed attack outside its territory, this extension remains controversial. Many academics believe that self-defence is only lawful in response to attacks occurring within the borders of that state. For example, Iqbal and Hassan identify that as Article 51 expressly stipulates “territory”, a black letter approach does not allow for extraterritorial extension. On the other hand, Humphrey Waldock advocates use of the extension where three criteria are met, namely where an imminent threat of injury to the nationals exists; the foreign state has failed to protect them; and the scope of the intervention is limited to protection only.

In considering state practice, the condemnation of the protection of nationals abroad justification in the US invasions of Grenada and Panama cause many legal commentators to conclude that self-defence cannot be claimed extraterritorially. However, going against this, Green believes that protecting nationals extraterritorially is not an unreasonable stretch seems cogent. This is supported by the fact that people are a fundamental element of a State and thus it is not a far stretch from Article 51. Green highlights that condemnations are actually on account of the specific events not meeting the criteria for self-defence, rather than an issue with the extension itself. For example, in 2008 when Russia conducted a strikingly similar intervention in South Ossetia, it was not the protection of nationals that was condemned but the abusive system of passportisation adopted by Russia to effectively “manufacture” nationals, solidifying their claim under Article 51. The same system of passportisation was used in Crimea, thus the conclusions drawn from the Russia-Georgia conflict are instructive. The Independent Fact-Finding Mission on the conflict in Georgia held that abuse of the protecting nationals abroad extension is “heightened through the dangerous principle that a state can manufacture a group of nationals and then use force to defend them”. In light of this, it seems that the protection of nationals abroad is a valid legal justification provided that the requirements of necessity and proportionality are met to act as safeguards against abuse, restricting use of the doctrine to instances where there is a genuine need to defend nationals abroad through use of force.

Proceeding on the basis that the protection of nationals abroad is a legally valid use of the self-defence exception, the burden of proof would remain with Russia to prove that its use of force was proportionate to the defensive goal. Returning to the examples Grenada and Panama, it was not the protection of nationals abroad which was specifically condemned but the proportionality of the US’ response in the rescue. In both cases, 7,000 and 10,000 troops were deployed respectively to protect only a few hundred nationals. Furthermore, in both cases, the

forces remained following the rescue of the nationals to oversee the installation of new governments. These facts combined resulted in the interventions being declared “flagrant violations of international law”. In contrast, the storming of Entebbe airport by Israeli forces to rescue hostages was met with international acquiescence as the action was proportionate to the defensive goal. Accordingly, it appears that customary international law requires use of this defence meeting armed attack, necessity and proportionality: the same as traditional self-defence would require. Applying this to the Russian intervention in Crimea, Russia claimed that their nationals were under threat but cannot show concretely how the transitional Ukrainian government is harming them. . Furthermore, the surrounding of military bases, annexing the territory and not giving it back are not proportionate to recusing nationals and thus Russia’s actions cannot be justified under the claim of protecting nationals. Thus, the Russian use of force cannot be justified under Article 51 self-defence.

Intervention by Invitation

With the protection of nationals abroad failing to justify Russia’s use of force, a new justification was offered: intervention by invitation. Intervention by invitation is lawful where the customary international law requirements are satisfied; namely, the terms of the invite must be clear and not open ended, given of free will and in advance by a legitimate authority. The case for this justification was argued twofold: firstly, invitation by the Government of the newly independent State of Crimea and secondly, by the President of Ukraine. As discussed below, the events surrounding both invitations are uncertain. This uncertainty hampers Russia’s ability to rely on this justification as, where an invitation is made, there can be no uncertainty around the request. However, for arguments sake, both invitations will be analysed to determine is either sufficiently justify Russia’s intervention.

Invitation from the Government of the Newly Independent State of Crimea

On 1st March 2014, Mr Aksyonov, Prime Minister of Crimea asked Russia to restore peace and calm in the region. However, in order for an invitation to be legally valid, Nolte states that the author of the invitation must be the “highest available State organ in order to ensure that the state speaks with one voice”. Accordingly, as no state denied that Crimea was a part of Ukraine, not even Russia, Crimea, as a federal entity of a state, was not the highest authority, the central government of Ukraine was. The USA, supported by the customary principle in the Nicaragua Case, highlighted that the prohibition on the use of force would be “rendered moot” if substantial authorities could unilaterally invite military action by a neighbouring state. Furthermore, contrary to the Ukrainian Constitution, Aksyonov was not confirmed as the Prime Minister by the President of Ukraine. Accordingly, in an attempt to bypass both the Constitution the problem pertaining to Russia’s inability to intervene on account of the invitation of local government, Crimea pursued a claim of self-determination.

The validity of this invitation is thus reliant on the outcome of Crimea’s independence referendum. Citing the International Court of Justice’s Advisory Opinion in response to Kosovo’s declaration of independence of 2008, Crimea relied on the principle that international law does not prohibit declarations of independence by secessionist units. Putin publicly supported this move, stating that the people of Crimea should be afforded the same right as the Kosovars to determine their own future. While admittedly there is some academic support of this

view, the majority of literature is in consensus that the right to remedial self-determination does exist for regions which have suffered prolonged and severe oppression but, in order to be valid, all alternative remedies must be exhausted. In considering whether Crimea qualifies on these grounds, as there were no credible reports that Russian nationals were threatened by the Ukrainian government and the speed at which the region was absorbed into the Russian Federation without any dialogue or mediation with Ukraine, the UNGA passed a resolution declaring that that the referendum was invalid and imposed a duty of non-recognition on all Members in relation to the change in power. Accordingly, Russia are unable to rely on this invitation to justify their use of force.

Invitation from the President of Ukraine in Exile

The second invitation came from President Yanukovych in which he requested Russian assistance to restore law and order and protect the Ukrainian people. This was the strongest possible justification available to Russia as state practice accepts that military intervention is permissible when used to support a legitimate government, even where that government lacks effective control. Such interventions are permitted in two situations: firstly, where the new government has an illegal origin such as in Kuwait where military intervention was deemed acceptable in support of the government in exile due to the internationally illegal origins of the Iraqi aggressor. The second situation is where the government in exile has international recognition such as during international intervention in Haiti where the overthrown President Aristide was able to invite the intervention as he had international recognition from the United Nations as the legitimate leader. However, neither of these instances apply to Yanukovych as firstly, the illegal conduct, such as the torturing and killing of protestors during Euromaidan, actually occurred during his presidency, not his successor's. Furthermore, while Russia continued to recognise Yanukovych as the legitimate President of Ukraine claiming he was overthrown in an illegal Coup d'État by Russophobes and his subsequent removal on 22 February 2014 by the Rada Verkhova was unconstitutional as the requisite quorum for his impeachment was not achieved, it is regarded as a general rule that recognition of the intervening state alone is not sufficient to justify the intervention. Furthermore, in the commentary on the Draft Articles on the Responsibility of States, the International Law Commission state that the validity of an invitation depends on "whether the agent or person who gave consent was authorised to do so on behalf of the State (and if not, whether that lack of authority was known or ought to have been known to the acting State). Given that the Ukrainian constitution expressly states that only the Rada (Parliament, not the President) is authorised to approve decisions on admitting units of armed forces of other states on to the territory of Ukraine, Russia knew or ought to have known that Yanukovych was not authorised to invite their intervention. Accordingly, neither of the acceptable situations apply to Yanukovych.

Flaws Affecting Both Invitations

Finally, in relation to both invitations, the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts states that any action occurring as a result of an invitation to intervene must remain within the limits of the invitation. In both invitations, the consent was limited to the restoration of peace, law and order. To annexe the region of Crimea and Sevastopol exceeded the terms of both invitations and violates 1970 Declaration on Friendly Relations as you cannot acquire territory through use of force. In acting in this way, Russia

committed a serious breach of a peremptory norm of international law and in line with the ILC’s 2001 Articles on State Responsibility, the United Nations were correct to impose a duty of non-recognition.