

The Use of Force by the Russian Federation in Crimea

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Abstract

This paper addresses the use of force by the Russian Federation in Crimea.¹ In the first section, it shows that the two reported instances of the use of force (the use of units deployed in Crimea under the agreements with Ukraine and the presence of so-called “little green men”) both qualify as *prima facie* violations of the prohibition of the use of force as well as acts of aggression and, when assessed in combination, an armed attack. In the second section, the paper discusses legal grounds that the Russian Federation has, albeit usually implicitly, put forward to justify these *prima facie* violations (self-defence, intervention by invitation, the use of force in support of self-determination, protection of nationals/humanitarian intervention), concluding that none of them is truly convincing.

The paper comes with certain limitations. First, it deals with the topic only from the *jus ad bellum* perspective. It thus discusses whether, and under

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¹ See also A. Tancredi, The Russian Annexation of the Crimea: Questions Relating to the Use of Force, *Quest. Int'l L.* 1 (2014), 5 et seq.; T. Christakis, Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international, *J.D.I.* 3 (2014), 23 et seq.

what conditions, the Russian Federation was entitled to use force in Crimea. It does not consider what rules of international humanitarian law, if any, were applicable in Crimea, i.e. it does not adopt the *jus in bello* perspective.² Secondly, the paper solely assesses the events which took place in Crimea in spring 2014. It does not evaluate the subsequent developments in the Eastern Ukraine as they do not fall under the overall theme of the Heidelberg workshop. The last limitation does not relate to the scope of this paper but to the facts assessed in it. Information coming from Crimea in spring 2014 was ambiguous, with different sources giving different and often contradictory accounts of the events.³ Since there is no objective means for me to verify which accounts are true, I simply take no position in this respect. I note what has been reported and analyse these reports without claiming that they necessarily reflect the reality.

I. Legal Framework of the Use of Force under Current International Law

Before coming to the legal analysis of the events in Crimea, it might be useful to recall briefly the legal framework of the use of force which exists under current international law.⁴ The central tenet of this framework is the prohibition of the use (and threat) of force, which is enshrined in Art. 2 para. 4 of the United Nations (UN) Charter. Under this provision, “*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*”. The prohibition of the use of force is also of a customary nature⁵ and is commonly ranked among the peremptory norms of international law (*jus cogens*) and the fundamental principles of international law.⁶ All instances of

² See *R. Jorritsma*, Ukraine Insta-Symposium: Certain (Para-)Military Activities in the Crimea: Legal Consequences for the Application of International Humanitarian Law, *Opinio Juris*, 9.3.2014.

³ See *K. Jovanovski*, Crimea’s Information War, *Al-Jazeera*, 15.3.2014.

⁴ The literature on this topic is very rich, see, for instance, *I. Brownlie*, *International Law and the Use of Force by States*, 1963; *T. Franck*, *Recourse to Force: State Action against Threats and Armed Attacks*, 2002; *C. Gray*, *International Law and the Use of Force*, 3rd ed., 2008; or *T. Gazzini*, *The Changing Rules on the Use of Force in International Law*, 2005.

⁵ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, 27.6.1986, para. 34.

⁶ UN General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24.10.1970.

the use of force by one State against another, regardless of gravity or aims, constitute a violation of the prohibition on the use of force, with the exceptions set in the United Nations (UN) Charter and/or customary international law (self-defence, collective actions authorised by the UN Security Council). There is a wide consensus that the reference to territorial integrity, political independence and the purposes of the UN were included in Art. 2 para. 4 not to qualify the prohibition but, on the contrary, to show its absolute nature.⁷

The UN Charter and customary international law know two more concepts which are of relevance for this analysis. These are – act of aggression and armed attack. An *act of aggression* is invoked in Art. 39 of the UN Charter, which stipulates that “*the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security* (emphasis added)”. Thus, an act of aggression is one of the factors which may trigger the mechanism of the collective security under Chapter VII of the UN Charter. At the same time, it may also give rise to individual criminal responsibility under international criminal law⁸ but this aspect is left out of this text. An act of aggression is not defined in any legally binding instrument. Yet, UN General Assembly Resolution 3314 (1974), although merely declaratory in nature, contains a working definition of the term which is largely seen as reflecting customary international law.⁹ Only some instances of unlawful use of force amount to an act of aggression under Resolution 3314. The latter concept is thus narrower.

An *armed attack* is invoked in Art. 51 of the UN Charter which confirms “*the inherent right of collective or individual self-defence if an armed attack occurs against a member of the United Nations*”. An armed attack thus serves as a trigger for the other exception to the prohibition of the use of force, self-defence. There is, again, no definition of armed attack in any legally binding instrument. This time, moreover, the term is not defined in any non-binding document enjoying wide acceptance.¹⁰ The International Court of Justice dealt with the concept of armed attack in several decisions (*Nicaragua*, *Oil Platforms*,¹¹ *DRC v. Uganda*,¹² *Wall Advisory opinion*¹³).

⁷ See D. W. Bowett, *Self-Defence in International Law*, 1958, 151.

⁸ See L. May, *Aggression and Crimes Against Peace*, 2008.

⁹ UN Doc. A/RES/3314 (XXIX), Definition of Aggression, 14.12.1974.

¹⁰ See T. Ruyss, “Armed Attack” and Article 51 of the UN Charter Evolutions in Customary Law and Practice, 2013.

¹¹ ICJ, *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Merits, 6.11.2003, para. 51.

In the famous – or infamous – passage of the *Nicaragua* judgment, the Court introduced the distinction between “the most grave forms of the use of force (those constituting an armed attack)” and “other less grave forms”.¹⁴ Although this statement does not go uncontested,¹⁵ most States and scholars seem to accept that any use of force needs “to reach a certain level of gravity before it constitutes an armed attack”¹⁶ and that the concept is thus even narrower than that of act of aggression.

II. Reported Instances of the Use of Force by the Russian Federation in Crimea

There are two main instances of the reported use of force by the Russian Federation in the territory of Crimea. One relates to the use of the Russian units deployed in Crimea and in the city of Sevastopol under the treaties concluded in 1997 between the Russian Federation and Ukraine. The other relates to the presence, within the local pro-Russian militias, of Russian servicemen, operating in the uniforms of local militias or in indistinguishable green uniforms (so-called “little green men”). The two instances yields different legal questions and they will therefore be assessed separately.

For the sake of completeness, it is good to recall that on 1.3.2014, the Federation Council of the Russian Federation, at the request of President *Putin*, authorised the use of the Russian armed forces in the territory of Ukraine “until the normalisation of socio-economic situation in this country”.¹⁷ Although the permission was never officially used in practice and it was revoked, again at the request of President *Putin*, on 25.6.2014,¹⁸ its mere adoption could probably be qualified as an act of unlawful threat of

¹² ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, 19.12.2005, para. 142-143.

¹³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9.7.2004, para. 139.

¹⁴ ICJ, *Nicaragua Case* (note 5), para. 191.

¹⁵ See, for instance, *Y. Dinstein*, *War, Aggression and Self-Defence*, 5th ed. 2011, 205 et seq.

¹⁶ *C. Gray* (note 4), 148.

¹⁷ Постановление Совета Федерации Федерального собрания Российской Федерации No. 48-СФ об использовании Вооруженных Сил Российской Федерации на территории Украины, 1 марта 2014, para. 1.

¹⁸ Постановление Совета Федерации Федерального Собрания Российской Федерации No. 296-СФ об отмене постановления Совета Федерации Федерального Собрания Российской Федерации No. 48-СФ "Об использовании Вооруженных Сил Российской Федерации на территории Украины", 25 июня 2014.

force, which is equally prohibited by Art. 2 para. 4 of the UN Charter and by customary international law.¹⁹ Yet, since the focus of this paper lies with the instances of the actual use of force rather than of its “mere” threat, this issue is not discussed in detail here.

1. The Use of the Russian Units Deployed in Crimea

In May 1997, the Russian Federation and Ukraine concluded a series of treaties relating to the division of the Black Sea Fleet and the deployment of the Russian part (82 %) in Crimea and in the city of Sevastopol.²⁰ The treaties specified the conditions under which the Russian armed forces were allowed to stay in the territory of Ukraine and the maximum number of soldiers, military techniques and military installations, they could have there. They also fixed the annual payment due to Ukraine from the Russian Federation for the long-term lease of the military bases. The treaties were originally to remain in force until 2017. In April 2010, Ukraine, ruled then by *Victor Yanukovich*, agreed to extend their validity, in exchange for substantive economic assistance (30 % discount on Russian natural gas), until 2042, with an additional five year renewal option.²¹ After the annexation of Crimea, in March 2014, the Russian Federation unilaterally terminated all these treaties under Arts. 61 and 62 of the Vienna Convention on the Law of Treaties (the supervening impossibility of performance and the fundamental change of circumstances).²²

Under the 1997 Treaty on the Status and Conditions of the Black Sea Fleet in the Territory of Ukraine, the Russian Federation had the authority to locate its military units (amounting up to 25,000 personnel, 22 airplanes,

¹⁹ For more on the prohibition of the threat of force see *N. Stürchler*, *The Threat of Force in International Law*, 2009.

²⁰ See *Соглашения между Российской Федерацией и Украиной о параметрах раздела Черноморского флота*, Киев, 28 мая 1997 года; *Соглашение между Российской Федерацией и Украиной о статусе и условиях пребывания Черноморского флота Российской Федерации на территории Украины*, Киев, 28 мая 1997; and *Соглашение между Правительством Российской Федерации и Правительством Украины о взаиморасчетах, связанных с разделом Черноморского флота и пребыванием Черноморского флота Российской Федерации на территории Украины*, Киев, 28 мая 1997.

²¹ *Соглашение между Российской Федерацией и Украиной по вопросам пребывания Черноморского флота Российской Федерации на территории Украины*, Харьков, 21 апреля 2010.

²² *Федеральный закон Российской Федерации No. 38-ФЗ "О прекращении действия соглашений, касающихся пребывания Черноморского флота Российской Федерации на территории Украины"*, 2 апреля 2014 г.

24 artillery complexes, and 132 armoured trucks) on its bases in Crimea and to move them between these bases and Russian territory. Movements associated with the activities of military units outside their area of deployment had to be “*carried out after coordination with the competent authorities of Ukraine*” (Art. 15 para. 5). The military units were to “*operate in place of deployment, in accordance with the legislation of the Russian Federation, respect the sovereignty of Ukraine, observe its legislation and do not allow interference into the internal affairs of Ukraine*” (Art. 6 para.1). There are reports indicating that the Russian units deployed in Crimea did not fully abide by these terms. The Russian servicemen allegedly operated outside their bases, taking part in the occupation of certain Ukrainian military installations, blocking the ports on the Black Sea and generally backing the local pro-Russian militias.²³

Such a use of Russian troops, despite the low-level scale of the armed clashes between them and the Ukrainian forces, would amount to a *prima facie* violation of Art. 2 para. 4 of the UN Charter. It would also constitute an act of aggression provided that under the UN General Assembly Resolution 3314 (1974), “*the use of 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 in the agreement*” (Art. 3 para. e)) qualifies as an act of aggression.²⁴ This provision has not been interpreted in a uniform way and its legal status as part of customary law has also occasionally been questioned. With its text being now included in the definition of the crime of aggression under the International Criminal Court (ICC) Statute,²⁵ the controversy over the latter aspect seems to be more or less over. The scope of the provision might still give rise to disagreements, especially in cases of minor and/or unintentional transgressions of Status of Force agreements. Such transgressions would most probably not qualify as acts of aggression due to the lack of gravity and/or of hostile intent.²⁶

²³ A. Aratunyan, Crimea Crisis: Role of Russia’s Black Sea Fleet, The Moscow News, 3.3.2014; F. Dabl, OSCE Team Say Crimea Roadblock Gunmen Threatened to Shoot at Them, Reuters, 12.3.2014.

²⁴ Since the Black Sea Fleet forces allegedly blocked, on 4.3.2014, the port of Sevastopol and several other ports at the Black Sea Coast, Art. 3 para. c) of the Resolution 3314 (1974), under which “*the blockade of the ports or coasts of a State by the armed forces of another State*” constitutes an act of aggression, is also *prima facie* applicable in the case at hand.

²⁵ See Kampala Conference, Resolution RC/Res.6, The Crime of Aggression, Art. 8bis, 11.6.2000, para. 2(e).

²⁶ As A. Sari suggests, “*a simple violation of an agreement governing the conditions of the presence of foreign armed forces does not, in and of itself, automatically amount to an act of aggression under Article 3(e) of the Definition of Aggression*”. A. Sari, Ukraine Intra-

The requirements of gravity and hostile intent are not explicitly mentioned in Art. 3 para. e) of the Resolution 3314 (1974). Yet, they certainly should play a role in the application of this provision. This is clear from Art. 2 of the Resolution which states that the Security Council may conclude that “*a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity*”. Thus, as *Aurel Sari* claims, “*despite the strict terms of Article 3(e), it seems that context is everything*”.²⁷ He is also right in pointing out that the use of forces invoked in Art. 3 para. e) has to be interpreted as actual military use of such forces in the territory of a foreign country rather than their mere passive presence there (for instance presence over time).²⁸

There can be little doubt that the use of the forces of the Russian Black Sea Fleet, as described in the reports, constitutes an act of aggression in the sense of Art. 3 para. e) of the Resolution 3314 (1974). The forces were “within the territory of another State”, that is within the territory of Ukraine. They were there “with the agreement of the receiving State”, that is by virtue of the 1997 Treaties between the Russian Federation and Ukraine. They were, according to the reports, used “in contravention of the conditions provided in the agreement”, because they operated outside their bases engaging in, and supporting, actions which violated the Ukrainian domestic legislation and interfered in the internal affairs of this country (in contravention of Arts. 6 para. 1) and 15 para. 5) of the 1997 Treaty). Taking into account the aims that the Russian forces were pursuing – the incorporation of Crimea into the Russian Federation – it would be difficult to deny that there was a hostile intent in their use.

Whether the requirement of gravity was met might give rise to doubt, due to the low-level scale of hostilities in Crimea. That is also what President *Putin* was alluding to, when he declared in the aftermath of the annexation of Crimea: “*I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties*.”²⁹ Yet, gravity does not need to be measured solely by the intensity of fighting and the number of victims. The intentions of the aggressor and the consequences that the improper use of its forces deployed in the territory of another State could have, or indeed have had in this case, are also important factors

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, *Opinio Juris*, 6.3.2014.

²⁷ *A. Sari* (note 26).

²⁸ *A. Sari* (note 26).

²⁹ Address by President of the Russian Federation, President of Russia (online), 18.3.2014.

to consider. In this case, these consequences consist of a breach of the territorial integrity of Ukraine, the loss of one part of its territory and its annexation by the Russian Federation. It would again be difficult to deny that a use of force with such serious consequences for the territorial State is not of sufficient gravity so as to constitute an act of aggression.

It is less clear whether the use of the Russian units deployed in Crimea in violation of the 1997 Treaties could also amount to an armed attack. On the one hand, it seems that the Black Sea Fleet had a relatively limited role in the Crimean events when compared to other armed forces operating in the area. Thus, in itself, its engagement would probably fail to meet the threshold of gravity required for an armed attack. On the other hand, these units were just one military force intervening in Crimea, alongside the local pro-Russian militias and the disguised Russian servicemen (“little green men”). In this situation, it is more appropriate, in order to determine whether an armed attack took place, to assess the military involvement by the Russian Federation in Crimea as a whole. This will be done at the end of the next section.

2. The Presence of the Russian Military Servicemen (“Little Green Men”)

The second instance of the reported use of force by the Russian Federation in Crimea relates to the alleged presence, in the territory of the peninsula, of Russian servicemen operating in the uniforms of the local pro-Russian militias or in green uniforms similar to those worn by the Russian soldiers – so-called “little green men”. Information about these groups spread in March 2014, when they started to take an active part in military operations, blocking roads, effectuating security checks and taking over Ukrainian military installations and public institutions, including the Supreme Council of Crimea.³⁰ The Russian Federation at first denied any link with the “little green men” claiming that they were members of the local self-defence groups who had bought their uniforms and weapons in a shop.³¹ In April 2014, however, President *Putin* officially acknowledged that at least some of the “little green men” were in fact Russian servicemen deployed in Crimea to support the local pro-Russian forces.³² Whereas the

³⁰ RPT-INSIGHT, How the Separatists Delivered Crimea to Moscow, Reuters, 13.3.2014.

³¹ See V. *Shevchenko*, “Little Green Men” or “Russian Invaders”?, BBC, 11.3.2014.

³² “Of course, the Russian servicemen did back the Crimean self-defence forces. /.../ one cannot apply harsh epithets to the people who have made a substantial, if not the decisive, con-

exact number of those servicemen remains uncertain, their involvement in the takeover in Crimea seems now, after the statement by President *Putin*, well established.

The use of the “little green men” in the territory of Ukraine amounts to a *prima facie* violation of Art. 2 para. 4 of the UN Charter and to an act of aggression.³³ This time, it is Art. 3 para. a) of the Resolution 3314 (1974) which is primarily at stake. This provision qualifies, as an act of aggression, “*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*”. The active participation of the Russian servicemen in military operations aimed at disrupting the territorial integrity of Ukraine constitutes “*the invasion /.../ by the armed forces of a State of the territory of another State*”. The ensuing incorporation of Crimea into the Russian Federation, followed by the increase in the Russian military presence in the area, constitutes “*a military occupation /.../ resulting from such invasion*” as well as “*an annexation by the use of force of the part of the territory of another State*”.

During the debates relating to the situation in Ukraine, held in the UN Security Council³⁴ on 1.-3.3.2014, the representative of Ukraine stated that the “*Russian troops /had/ illegally entered the territory of Ukraine in the Crimean peninsula*” and qualified this act as “*an act of aggression against the State of Ukraine*”.³⁵ The view was shared by the representatives of Australia,³⁶ the United Kingdom,³⁷ and the USA.³⁸ During the UN General As-

tribution to enabling the people of Crimea to express their will. They are our servicemen.” Direct Line with *Vladimir Putin*, President of Russia (online), 17.4.2014.

³³ The covered invasion and the annexation of Crimea also constituted a breach of the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, signed on 31.5.1997, in which the two countries pledged to “*respect each other’s territorial integrity and /.../ the inviolability of the borders existing between them*” (Art. 2). In addition, these acts violated several non-binding instruments, including the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki on 1.8.1975, the Alma-Ata Declaration, adopted on 21.12.1991, and the Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum), signed on 5.12.1994.

³⁴ The draft resolution, which was vetoed by the Russian Federation, refrained from qualifying the Russian involvement in Crimea as an act of aggression, solely reaffirming “*the/ commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders*”. UN Doc. S/2014/189, 15.3.2014, para. 1.

³⁵ UN Doc. S/PV.7124, 1.3.2014, 3.

³⁶ “*/U/nprovoked aggression should have no place in our world.*” UN Doc. S/PV.7125, 3.3.2014, 10.

³⁷ “*We condemn any act of aggression against Ukraine.*” UN Doc. S/PV.7125, 1.3.2014, 6.

³⁸ “*It is an act of aggression. It must stop.*” UN Doc. S/PV.7125, 3.3.2014, 5.

sembly debate on the issue, which took place at the end of March 2014, the representative of Canada also spoke about “an act of aggression”.³⁹ On 3.3.2014, the Council of the European Union condemned “the clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression by the Russian Federation”.⁴⁰ Ten days later, the European Parliament declared that “Russia’s act of aggression in invading Crimea is a violation of the sovereignty and territorial integrity of Ukraine and is against international law”.⁴¹ The Russian military engagement in Crimea has also been described as an act of aggression in the scholarly literature.⁴²

Constituting an act of aggression, does the use of the “little green men” – or the Russian military involvement in Crimea taken as a whole – also amount to an armed attack, thus triggering the right to self-defence? As mentioned above, according to the International Court of Justice (ICJ), only the most grave forms of the use of force qualify as an armed attack, the concept being narrower than that of the use of force and, most likely, of an act of aggression.⁴³ The gravity criterion is however not very clear. Should the gravity be assessed based on the intensity of armed struggle? Or should the intentions of the intervening State and the consequences of its action be taken into account? The questions are obviously not solely of an academic interest but have important practical implications, as the events in Crimea reveal.

If the factor of intensity is the decisive one, then the Russian involvement in Crimea, even with the two instances of the reported use of force assessed together, would probably fail to meet the threshold of an armed attack. De-

³⁹ GA/11493, General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region, 27.3.2014. The UN General Assembly Resolution 68/262, Territorial Integrity of Ukraine, adopted on 27.3.2014, adopts the same approach as the draft resolution of the UN Security Council. The two instruments were meant to be of conciliatory nature.

⁴⁰ Council of the European Union, Council Conclusions on Ukraine, 3.3.2014, para. 1.

⁴¹ European Parliament, Resolution 2014/2627(RSP), on the invasion of Ukraine by Russia, 13.3.2014, para. A of the preamble.

⁴² See *A. Tancredi* (note 1), 18 et seq. See also Appeal from the Ukrainian Association of International Law, EJILTalk, 5.3.2014. Some scholars (see *A. Tancredi* [note 1], 20 et seq.) also discuss whether the Russian Federation could be held responsible for an act of aggression (“indirect aggression”) on the basis of its support for the local separatist forces, under Art. 3 para. g) of the Resolution 3314 (1974). The question is interesting, yet since the Russian Federation can be held accountable for “direct aggression”, it does not seem necessary to discuss it here.

⁴³ The gravity criterion is sometimes criticised as narrowing the concept of armed attack too much, thus depriving the victim State of the possibility to lawfully defend itself against an external intervention. See *Y. Dinstein* (note 15), 205 et seq.

spite the massive presence of the Russian units,⁴⁴ the hostilities between them and the Ukrainian armed forces were limited, with the number of victims not exceeding a dozen people. Yet, to rely solely on the intensity of fighting would clearly play against smaller States, which might be either unable to mount defence actions or unwilling to do so out of fear that such actions would have harsh consequences for them. Thus, it seems appropriate to consider the other factors – the attacker’s intentions and the consequences of the action – as well. Viewed from that perspective, the events in Crimea – aimed at and resulting in the separation of one region from Ukraine and its annexation into the Russian Federation, could not but qualify as an armed attack. After all, no State can be expected to do nothing but wait, while another State seeks to disrupt its territorial integrity by deploying armed forces (openly or in disguise) on its territory.

III. Potential Justifications for the Reported Instances of the Use of Force by the Russian Federation in Crimea

The previous section established that the two instances of the reported use of force by the Russian Federation in Crimea (the use of the Russian units deployed in Crimea under the agreements with Ukraine and the presence of the “little green men”) both qualify as *prima facie* violations of the prohibition of the use of force as well as acts of aggression and, when assessed in combination, as an armed attack. This section discusses whether these *prima facie* violations could be justified on any sound legal grounds. The section discusses four legal grounds that the Russian Federation has, explicitly or implicitly, invoked with respect to the events in Crimea. These grounds are self-defence, intervention by invitation, the use of force in support of self-determination, and the protection of nationals/humanitarian intervention.

⁴⁴ The scale of the deployment could in itself be one of the factors determining the intensity, as a massive presence of an intervening force might discourage the attacked State from resorting to armed self-defence.

1. Self-Defence

Self-defence, in its individual or collective form, is one of the two generally accepted exceptions to the prohibition of the use of force.⁴⁵ It can be exercised “*if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security*” (Art. 51). The Russian Federation did not, and could not, invoke the right to use force in response to an armed attack by Ukraine. No such armed attack had, quite clearly, taken place. Yet, it has repeatedly – albeit usually without framing it as an exercise of the right to self-defence – referred to the right to protect its citizens present in the territory of Ukraine, whose lives were allegedly threatened by the new Ukrainian authorities. In his request for an authorisation to use force in Ukraine, President *Putin* invoked “*the threat to the lives of citizens of the Russian Federation, our compatriots, the personnel of the military contingent of the Armed Forces of the Russian Federation deployed in the territory of Ukraine (Autonomous Republic of Crimea) in accordance with an international treaty*”.⁴⁶ Similar references were made by the representatives of the Russian Federation during the debates in the UN organs.⁴⁷

These statements can be read in one of two ways. On the one hand, they may relate to the use of force in defence of *armed forces* of a State attacked on the territory of another State. It is well established that “*an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State*”,⁴⁸ regardless of whether this attack occurs in the territory of the latter State or not,⁴⁹ constitutes a violation of the prohibition of the use of force as well as an act of aggression under the Resolution 3314 (1974). Yet, for such an attack to amount to an armed attack, triggering the right to self-defence, the gravity threshold would need to be met. Moreover, it has

⁴⁵ The other exception is that of collective actions authorised by the UN Security Council under Chapter VII of the UN Charter. The Russian Federation did not, and could not, rely on this legal ground, because there was clearly no UN Security Council resolution authorising it to use force in Ukraine available or forthcoming.

⁴⁶ *Putin*’s letter on use of Russian army in Ukraine goes to upper house, TASS, 1.3.2014. It is worth noting that the letter expressly describes the Autonomous Republic of Crimea as part of the territory of Ukraine.

⁴⁷ See, for instance, UN Doc. S/PV.7124, 1..3.2014, 3 et seq.

⁴⁸ UN Doc. A/RES/3314 (XXIX) (note 9), para. 3, para. d).

⁴⁹ In the *Oil Platforms Case*, the ICJ did not exclude that the mining of a single US military vessel, operating in the Persian Gulf (clearly outside the US territory), “*might be sufficient to bring into play the ‘inherent right of self-defence’*”. ICJ, *Case Concerning Oil Platforms* (note 11), para. 72.

to be “an attack by the armed forces of a State”, i.e. it has to be mounted by the military forces of the other State.

There are no reports indicating that the Russian military forces lawfully deployed in the territory of Ukraine – that is the Black Sea Fleet mentioned above – became, in spring 2014, the object of armed attacks by the military forces of Ukraine. In fact, the letter by President *Putin*, as well as the declarations at the UN, speak about “threat to the personnel of the military contingent” rather than an actual attack upon personnel. The Russian Federation, it seems, thus indicated its readiness to use of force in defence of its armed forces deployed in Crimea if those armed forces were attacked by the Ukrainian military forces. It did not claim that such an attack had occurred and that it was using force to stop and repel it.

On the other hand, the statements by the Russian Federation may relate to the use of force aimed at *protecting nationals* abroad. Ever since the adoption of the UN Charter, States and scholars have argued whether the use of force to protect nationals abroad is, or is not, lawful⁵⁰ and whether it falls under self-defence or stands as an independent, third exception to the prohibition of the use of force.⁵¹ In his recent treatment of the topic, *Tom Ruys* concludes that “it is virtually impossible to deduce from customary practice to what extent attacks or possible attacks against nationals abroad may trigger the right to self-defence”.⁵² Taking into account that the Russian Federation, while invoking the right to protect its nationals, did not relate this right to self-defence, it seems sensible to discuss protection of nationals outside the self-defence framework. With this approach in mind, it is possible to conclude that the Russian Federation could not rely on “the inherent right of /.../ self-defence” to justify its military involvement in Crimea, since neither its territory, nor its Russian Black Sea Fleet deployed in Crimea, had been attacked by the armed forces of Ukraine.

2. Intervention by Invitation

Intervention by invitation is “a military intervention by foreign troops in an internal armed conflict at the invitation of the government of the State

⁵⁰ See *T. Ruys*, The “Protection of Nationals” Doctrine Revisited, *Journal of Conflict & Security Law* 13 (2008), 233 et seq.

⁵¹ See *A. Randelzhofer*, Article 51, in: *B. Simma et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. I, 2002, 798 et seq.

⁵² *T. Ruys* (note 50), 270 et seq.

concerned”.⁵³ Such intervention is generally considered lawful under current international law, on the condition that it complies with certain requirements set by customary international law.⁵⁴ The invitation (consent) has to be clear, given in advance and of free will, and has to come from a legitimate authority.⁵⁵ The intervention itself has to abide by the terms of the invitation. The Russian Federation first invoked an invitation issued by the Prime Minister of Crimea, Mr. *Aksyonov*, who, on 1.3.2014, requested the Russian Federation to “lend support in ensuring peace and calm in the territory of the Autonomous Republic of Crimea”.⁵⁶ Several days later, President *Putin* referred to “a direct appeal from the incumbent and /.../ legitimate President of Ukraine, Mr. *Yanukovych*, asking us to use the Armed Forces to protect the lives, freedom and health of the citizens of Ukraine”.⁵⁷ Mr. *Yanukovych* later admitted having invited the Russian Federation to intervene in Crimea, though expressing regret about this.⁵⁸

Could either of the invitations provide a sound legal ground for the Russian military involvement in Crimea? The answer is negative, for two reasons – one pertaining to the authority issuing the invitation, the other to the scope of the invitation and/or of the military action. As already stated, a valid invitation must be issued by the legitimate authority. In case of an invitation relating to such an important issue as a foreign military involvement, this authority “must be the highest available State organ”.⁵⁹ This disqualifies Mr. *Aksyonov*, who in his capacity of the head of the government of a regional entity within Ukraine was clearly not entitled to give consent to a foreign military intervention in the territory of Ukraine. As the representative of the USA rightly put it during the debate in the Security Coun-

⁵³ G. Nolte, Intervention by Invitation, in: R. Wolfrum (ed.), MPEPIL, 2012, online edition.

⁵⁴ See L. Doswald-Beck, The Legal Validity of Military Intervention by Invitation of the Government, BYIL 56 (1985), 189 et seq.; and G. H. Fox, Intervention by Invitation, Wayne State University Law School Legal Studies Research Paper Series, No. 2014-04.

⁵⁵ See also Article 20 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts which states: “Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.” In UN Doc. A/56/10, Report of the International Law Commission, 53rd Session (23.4.-1.6. and 2.7.-10.8.2001), New York: United Nations, 2001, 72.

⁵⁶ Премьер Крыма попросил Путина обеспечить мир на полуострове, Вести, 1 марта 2014.

⁵⁷ Vladimir Putin answered journalists’ questions on the situation in Ukraine, President of Russia (online), 3.3.2014.

⁵⁸ Ousted Ukrainian president Viktor Yanukovych: I was wrong to invite Russia into Crimea, Sydney Morning Herald, 3.4.2014.

⁵⁹ G. Nolte (note 53).

cil, “the prohibition on the use of force would be rendered moot were subnational authorities able to unilaterally invite military intervention by a neighbouring state”.⁶⁰ This view is shared by several scholars commenting on the topic.⁶¹

The situation is more complicated with respect to the invitation issued by Mr. *Yanukovych*. In 2010-2014, Mr. *Yanukovych* held the post of the President of Ukraine. On 22.2.2014, after several weeks of demonstrations against his rule, he was removed from office by the Ukrainian Parliament (Verkhovna Rada).⁶² The impeachment procedure did not comply with the procedural requirements set in Art. 111 of the 1996 Constitution of Ukraine,⁶³ but its outcomes were nevertheless accepted by a vast majority of States. The Russian Federation was one of the few countries which recognised Mr. *Yanukovych* as the legitimate President of Ukraine even after he had been ousted and fled to exile in the Russian territory. Yet, as *Stefan Talmon* observes, “recognition by the intervening State alone usually cannot suffice to legalize or justify an intervention”.⁶⁴

Moreover, under Art. 85 of the 1996 Constitution of Ukraine, the competence to “approve decisions on admitting units of armed forces of other states on to the territory of Ukraine” (para. 23) lay with the Verkhovna Rada, not with the President. In its commentary to the Draft Articles on the Responsibility of States, the UN International Law Commission indicates that the validity of a consent depends on factors such as “whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State)”.⁶⁵ Mr. *Yanukovych*, even assuming he was still President of Ukraine, was clearly not authorised to give consent to any for-

⁶⁰ UN Doc. S/PV.7125, 3.3.2014, 5.

⁶¹ See *A. Tancredi* (note 1), 13 et seq.; *D. Wisehard*, *The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?*, *EJILTalk*, 4.3.2014.

⁶² Ukrainian MPs vote to oust President *Yanukovych*, *BBC*, 22.2.2014.

⁶³ Under Article 111 of the Constitution, the president could only be removed from office by the vote of no less than three-quarters of the members of the Verkhovna Rada. Prior to voting, the Verkhovna Rada was required to consider the conclusions and proposals of a special temporary investigatory commission, established by the Verkhovna Rada to investigate whether the president had committed high treason or another crime. The vote also had to be preceded by a review of the case by the Constitutional Court and the Supreme Court. To the best of my knowledge, there was no investigation by a special commission, the two courts were not consulted and the impeachment proposal did not obtain the required qualified majority.

⁶⁴ *S. Talmon*, *Recognition of Governments in International Law*, 1998, 149.

⁶⁵ UN Doc. A/56/10 (note 55), 73.

eign military intervention and the lack of his authority must have been known to the Russian Federation.

In addition, many scholars doubt whether a valid consent to a foreign military invitation can be provided by governments *in exile* and/or governments lacking an effective control in their own State. *Stefan Talmon* argues that the absence of an effective control can only be compensated for by a large-scale recognition of the government-in-exile or if the government *in situ* has an internationally unlawful origin.⁶⁶ Neither of these hypotheses applies here – Mr. *Yanukovych*, while in exile, did not enjoy any significant international recognition and the new Ukrainian authorities, despite certain controversial measures they resorted to, did not come to power in violation of international law.⁶⁷

Furthermore, even assuming for the sake of the argument that Mr. *Yanukovych* was the legitimate authority to invite a foreign military intervention, the other factor, pertaining to *the scope* of the invitation and/or of the Russian military action, would become relevant. It is hard to imagine that any government-in-exile, or any government at all, would be entitled to give a consent to a foreign State to intervene in its territory with the aim of annexing one of its regions. Mr. *Yanukovych* allegedly requested the Russian Federation “to use the Armed Forces to protect the lives, freedom and health of the citizens of Ukraine”. Either the request was meant to encompass the break-up of the territorial integrity of Ukraine and the annexation of Crimea – in which case Mr. *Yanukovych*, even as a President of Ukraine, would be acting *ultra vires*. Or the request was not meant to encompass these actions – in which case the Russian Federation, even if it used force in Ukraine upon the invitation of a legitimate authority, would have acted outside the limits of the consent. In either case, the invitation provided by Mr. *Yanukovych*, similarly as that provided by Mr. *Aksyonov* cannot serve as a sound legal ground for the use of force by the Russian Federation in Crimea.

⁶⁶ See *S. Talmon*, Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law, in: G. Goodwin-Gill/S. Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie*, 1999, 499 et seq.

⁶⁷ For more details on these aspects, see *A. Tancredi* (note 1), 14 et seq.

3. The Use of Force in Support of Self-Determination

During the debates on Crimea, the Russian Federation also invoked, albeit implicitly,⁶⁸ the use of force in support of self-determination. Unlike self-defence and intervention by invitation, this ground is not generally accepted as lawful. The 1970 Friendly Relations Declaration, while stressing that “every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples”,⁶⁹ does not recognise that military action in support of this principle would be lawful. In fact, it is silent on this issue exactly because there was no agreement on it.⁷⁰ At the same time, the Declaration affirms that “every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State”.⁷¹

The uncertainty as to the legality of the use of force in support of self-determination is reflected in State practice. For instance, when discussing the Indian intervention in the Portuguese colonies in 1961, the US representative in the UN Security Council held that Resolution 1514 (XV)⁷² “does not authorize the use of force for its implementation. /.../ Resolution 1514(XV) does not and cannot overrule the Charter injunctions against the use of armed force”.⁷³ In his dissenting opinion to the *Nicaragua* judgment, the US Judge *Schwabel* wrote: “/I/ it is lawful for a foreign State or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion.”⁷⁴

The legality of the use of force in support of self-determination has become even more controversial in the recent period, when the right to self-determination is discussed outside the traditional colonial context.⁷⁵ First,

⁶⁸ The right to self-determination of the inhabitants of Crimea was repeatedly invoked by President *Putin* and Mr. *Churkin*. Yet, they did not explicitly link this right to the (potential) use of force by the Russian Federation.

⁶⁹ UN General Assembly Resolution 2625 (XXV) (note 6).

⁷⁰ Similarly, Resolution 3314 (1974) provides that nothing in it could “prejudice the right to self-determination /.../; nor the right of these people to struggle to that end and to seek and receive support” (Article 7) but it falls short of declaring that it would be lawful for States to support that struggle by using military force.

⁷¹ Resolution 3314 (note 9).

⁷² Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 14.12.1960.

⁷³ Cit. in *M. Pomerance*, *Self-Determination in Law and Practice*, 1982, 49.

⁷⁴ ICJ, *Nicaragua Case* (note 5), Dissenting Opinion of Judge *Schwabel*, para. 180.

⁷⁵ See *A. Cassese*, *Self-Determination of Peoples: A Legal Reappraisal*, 1995.

some scholars believe that the right to self-determination no longer applies.⁷⁶ If this is the case, then, obviously, no use of force in support of self-determination can be lawful. Secondly, for scholars who do not exclude the application of the right to self-determination in the new conditions, this right has acquired a different meaning to its previous one.⁷⁷ It is more oriented towards the need to protect members of ethnical, national and other groups from serious and massive violation of their human rights. The right of these groups to secede from the original state (remedial secession) as well as the legality of the use of force in support of such a right remain disputed.⁷⁸ The debate, moreover, is now closely linked to that on humanitarian intervention.

The *Russian Federation* has embraced the new approach to self-determination. In its written statement submitted to the ICJ in 2008,⁷⁹ it described the right to self-determination as a right belonging to peoples, rather than ethnic or other groups, to freely determine their political organisation and their economic, social and cultural development. In usual conditions, the right should yield to the principle of territorial integrity, with the right to remedial secession reserved “*to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of people in question*”.⁸⁰ The statement is silent on the use of force in support of self-determination. Yet, in its 2013 Concept of the Foreign Policy, the Russian Federation speaks in favour of “*reducing the role of the use of force in international relations*” and warns against “*arbitrary and politically motivated interpretation of fundamental international legal norms and principles such as non-use of force, /.../ respect for sovereignty and territorial integrity of states, right of peoples to self-determination*”.⁸¹ Similar views have been expressed by Russian scholars.⁸²

⁷⁶ See *Theodore Christakis* in this volume.

⁷⁷ See *J. Vidmar*, Remedial Secession in International Law: Theory and (Lack of) Practice, *St. Antony's International Review* 6 (2010), 37 et seq.

⁷⁸ “*The right of self-determination does not of itself give rise to a legal right for a state to intervene in the territory of another state, whether directly or through private actors.*” *K. Hausler/R. McCorquodale*, Ukraine Insta-Symposium: Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law, *Opinio Juris*, 10.3.2014.

⁷⁹ ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), Written Statement by the Russian Federation, 16.4.2009.

⁸⁰ ICJ (Statement of Russia) (note 79), para. 88.

⁸¹ Concept of the Foreign Policy of the Russian Federation, Approved by President of the Russian Federation *V. Putin*, 12.2.2013, paras. 31 and 32.

⁸² See *L. Mälksoo*, Crimea and (the Lack of) Continuity in Russian Approaches to International Law, *EJILTalk*, 28.3.2014.

In this situation, it is difficult to see how the use of force in Crimea could be justified by a support for self-determination. First, although the people in Crimea most likely has “*a distinct identity and territory, created over centuries and fostered by decisions of the USSR, Russia and Ukraine*”,⁸³ it could be questioned whether it constitutes a “people” or – in the terminology of the Russian statement – merely “an ethnic or other group”. Secondly, even assuming that the inhabitants of Crimea constitute a people, and are hence entitled to self-determination, nothing indicates that they were, in spring 2014, exposed to “truly extreme circumstances” activating the right to remedial secession. Whereas the new Ukrainian authorities took, or sought to take, certain ill-considered steps, such as that of revoking the Law on Languages, these steps could hardly amount to “an outright armed attack by the parent State, threatening the very existence of people”. That entails that there was no right to self-determination, or, at least, to remedial secession.

Moreover, even if this right was applicable, the legality of the use of force in its support would remain controversial. Arguing in its favour would require a new interpretation of several fundamental principles of international law. Yet, as the 2013 Concept puts it, such new interpretations could “*pose particular danger to international peace, law and order*”.⁸⁴ As a country with foreign policy “*aimed at creating a stable and sustainable system of international relations based on international law*”,⁸⁵ the Russian Federation would certainly be reluctant to take such a risk. This reluctance might in fact explain, why, despite numerous references to the right of the inhabitants of Crimea to self-determination, the Russian Federation did not explicitly invoke its right to use force in their support. Rightly so, as this argument would fall apart on both factual and legal grounds.

4. Protection of Nationals/Humanitarian Intervention

The last argument put forward, this time explicitly, by the Russian Federation to justify its (potential) use of force in Crimea, relates to the protection of nationals/humanitarian intervention.⁸⁶ The two grounds are put to-

⁸³ K. Hausler/R. McCorquodale (note 78).

⁸⁴ Concept of the Foreign Policy (note 81), para. 31(b).

⁸⁵ Concept of the Foreign Policy (note 81), para. 28.

⁸⁶ The double-side argument of the protection of nationals/humanitarian intervention was previously invoked by the Russian Federation in its conflict with Georgia in 2008. The Russian Federation argued it intervened to protect the inhabitants of the two separatist Georgian regions, Abkhazia and Southern Ossetia, to whom it had granted its citizenship. The argu-

gether here, because the Russian Federation in its statement often invoked them without a clear distinction. Thus, in his letter requesting the authorisation to use force in Ukraine, President *Putin* spoke about “*the threat to the lives of citizens of the Russian Federation, our compatriots, the personnel of the military contingent of the Armed Forces of the Russian Federation /.../*”.⁸⁷ Commenting upon this request in the UN Security Council, Mr. *Churkin*, said that “*the issue is one of defending our citizens and compatriots, as well as the most important human right – the right to life*”, referring also to “*the extraordinary situation, in which /.../ the lives and security of the inhabitants of Crimea /.../ are under genuine threat*”.⁸⁸ Moreover, the concepts are closely related due to the fact that the Russian Federation tends to be, from time to time, generous in granting its citizenship to Russian-speaking persons living beyond its borders.⁸⁹ On 4.4.2014, the Duma approved an amendment to the Law on Citizenship, allowing Russian-language speakers living abroad to gain Russian citizenship under simplified rules.⁹⁰ Despite these interconnections, the two legal grounds differ and they will therefore be treated separately in this paper.

The use of force in *protection of nationals* is, as noted above, viewed either as a form of self-defence or as an autonomous exception to the prohibition of the use of force. In either case, its status under international law is controversial. Since 1945, several States (Belgium, France, Israel, the United Kingdom, the USA, etc.) have invoked this ground to justify their military intervention in foreign countries. Yet, in most cases, the legality of their action was disputed.⁹¹ Some of the States and scholars criticising the actions denied the legality of the use of force to protect nationals abroad. Others, while not rejecting out the legal ground as such, contested that the conditions for its use were met in the cases at hand. In most instances, the pro-

ment was not found convincing. See Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume I, September 2009, 24 et seq.

⁸⁷ *Putin's* Letter on Use of Russian Army in Ukraine Goes to Upper House, TASS, 1.3.2014.

⁸⁸ UN Doc. S/PV.7125, 3.3.2014, 3 et seq.

⁸⁹ See *P. Spiro*, Russia's Citizenship Power-Play in Ukraine is Pretty Weak. *Opinio Juris*, 7.3.2014. Under Art. 61 para. 2 of its Constitution, the Russian Federation “*shall guarantee to its citizens protection and patronage abroad*”.

⁹⁰ Госдума упростила процедуру получения гражданства РФ для русскоязычных соотечественников, ТАСС, 4 апреля 2014.

⁹¹ For a survey of the international practice, see *T. Franck* (note 4), 76 et seq. *Franck* himself believes that “*in a broader interpretation of practice, the system may be said to have adapted the concept of self-defence /.../ to include a right to use force in response to an attack against nationals, providing there is clear evidence of extreme necessity and the means chosen are proportionate*” (*T. Franck* [note 4], 96).

portionality and the scope of the intervention were at stake. It is accepted that should the intervention to protect nationals be lawful, it would need to be “*limited in scope and duration and exclusively focused on rescuing and evacuating nationals*”.⁹²

The use of force by the Russian Federation in Crimea is hardly compatible with this legal framework. First, the very need for an intervention to protect nationals in Crimea is open to question. There are no reports indicating that the lives of Russian citizens living or staying in the region would have been put in any serious jeopardy, especially not by the Ukrainian armed forces. In fact, quite early on in the series of events, the Ukrainian authorities lost control over the region. This control was subsequently taken over by the pro-Russian groups and the Russian armed forces. Secondly, even assuming that there was, as Mr. *Churkin* put it, “*a situation of ongoing threats of violence /.../ against the security, lives and legitimate interests of Russians and all Russian-speaking peoples*”,⁹³ for instance as a result of this loss of control over the region by the Ukrainian authorities, the scope of the military involvement and its aims would be problematic.

The military involvement, although limited in terms of armed clashes and the number of victims, did not take on the form of a surgical operation aimed at rescuing and evacuating (or at least protecting *in situ*) Russian nationals – be they the members of the Black Sea Fleet or Russian civilians present in Crimea. The involvement was offensive, rather than defensive, aimed at separating Crimea from Ukraine rather than restoring order and safety in the region. It might be claimed that the most lasting measure to protect citizens consists in incorporating the territories in which they live or stay into their homeland. Such a claim, however, is at odds with fundamental principles of international law and is dangerously reminiscent of the rhetoric used before the World War II.⁹⁴ Thus, it is possible to extend to the events in Crimea the conclusions that the Independent International Fact-Finding Mission reached with respect to Southern Ossetia, namely that “*the action was not solely and exclusively focused on rescuing and evacuating Russian citizens, but largely surpassed this threshold /.../. Consequently, it /.../ was essentially conducted in violation of international law*”.⁹⁵

Humanitarian intervention does not offer a solid legal ground permitting justification of Russian military involvement in Crimea either. First, human-

⁹² *T. Franck* (note 4), 96.

⁹³ UN Doc. S/PV.7125, 3.3.2014, 3.

⁹⁴ Nazi Germany used the argument of the protection of German-speaking minorities living abroad to destroy Czechoslovakia and to annex its territory into the German Reich.

⁹⁵ Independent International Fact-Finding Mission on the Conflict in Georgia (note 86), 25.

itarian intervention, defined as “*a military intervention with the goal of protecting the lives and welfare of foreign civilians*”,⁹⁶ is legally controversial. It is undeniable that the protection of human rights has become over the past decades an issue of international concern, which no longer falls into the internal affairs of individual States. Yet, the right to use force in a unilateral way, without the authorisation of the UN Security Council, to prevent or stop massive violations of human rights in a foreign country has never been generally accepted. Rather, as *Sean D. Murphy* recalls, there is “*a striking willingness of state to forego unilateral humanitarian intervention in favour of Security Council authorization, thereby reinforcing the views of those that regard unilateral humanitarian intervention as unlawful*”.⁹⁷

The Russian Federation has traditionally adopted a critical stance towards humanitarian intervention.⁹⁸ In 2000, before his election to the presidential post, *Vladimir Putin* stated: “*it is inadmissible, under the slogan of so called humanitarian intervention, to cross out such basic principles of international law as sovereignty and the territorial integrity of states*”.⁹⁹ By the same token, the 2013 Concept of the Foreign Policy declares that “*it is unacceptable that military interventions /.../ which undermine the foundations of international law based on the principle of sovereign equality of states, be carried out on the pretext of implementing the concept of ‘responsibility to protect’*”.¹⁰⁰ The Russian Federation opposed the NATO military intervention in the Federal Republic of Yugoslavia in 1999, describing it as a flagrant violation of international law and of the UN Charter.¹⁰¹ It has also shown reticence with respect to other interventions justified by the protection of human rights (Libya 2011, etc.). From that perspective, it would be somewhat inconsistent for the Russian Federation to rely on a doctrine whose legality it has always contested.

Some scholars believe that humanitarian intervention “*is not rejected /by the Russian Federation/ as such, but only so far as it challenges the principles of sovereignty and territorial integrity of states*”.¹⁰² Even assuming that this is true and that this view is shared by other States, the use of force in Cri-

⁹⁶ *M. Finnemore*, Constructing Norms of Humanitarian Intervention, in: P. Z. Katzenstein (ed.), *The Culture of National Security: Norms and Identities in World Politics*, 1996, 154.

⁹⁷ *S. D. Murphy*, Humanitarian Intervention. The United Nations in a Evolving World Order, 1996, 393.

⁹⁸ See *V. Baranovsky*, Humanitarian Intervention: Russian Perspectives, *Pugwash Occasional Papers*, January 2001, Vol. 2, No. 1.

⁹⁹ Cit. in *V. Baranovsky* (note 98), 17.

¹⁰⁰ Concept of the Foreign Policy (note 81), para. 31(b).

¹⁰¹ *V. Baranovsky* (note 98), 10 et seq.

¹⁰² *V. Baranovsky* (note 98), 17.

mea could still hardly be justified on these accounts. No massive and large-scale violations of human rights took place in Crimea in spring 2014. Yet, under the doctrine of humanitarian intervention, such violations are necessary to trigger the right of third states to act on behalf of the local population. Moreover, the scope of the Russian military involvement and its outcome, the incorporation of Crimea into the Russian Federation, is incompatible with the limits that any State intervening for humanitarian purposes would have to respect.

IV. Concluding Remarks

The conclusions of this paper are clear-cut. The two reported instances of the use of force (the use of the Russian units deployed in Crimea under the agreements with Ukraine and the presence of the “little green men”) both amounted to *prima facie* violations of the prohibition of the use of force as well as to acts of aggression and, if assessed in combination, to an armed attack. The Russian Federation cannot justify these *prima facie* violations by any sound legal arguments because all the legal grounds that the Russian Federation has presented, or could potentially present (self-defence, intervention by invitation, the use of force in support of self-determination, protection of nationals/humanitarian intervention) either have an unclear status under international law or the conditions for their application were not met in Crimea.

The absence of the legal ground for the use of force by the Russian Federation in Crimea is one factor to consider. During the debates on Crimea, the Russian representatives repeatedly referred to the Kosovo case, requesting for their country the same right to “create /.../ a precedent”.¹⁰³ Whether the Kosovo case was similar to that of Crimea is open to discussion. Yet, if there is something to learn from Kosovo, it is the fact that once certain States feel entitled to temporarily suspend the ordinary legal regulation and decide on an exception, this can in itself set a precedent that other States may be tempted to follow. As a country which “pursues independent foreign policy /.../ based on unconditional respect for international law”,¹⁰⁴ the Russian Federation should certainly abhor the idea that its own action could from now on be used in support of a behaviour which, as its Concept of

¹⁰³ Address by President of the Russian Federation, President of Russia (online), 18.3.2014.

¹⁰⁴ Concept of the Foreign Policy (note 81), para. 24.

Foreign Policy rightly puts it, constitutes a “*particular danger to international peace, law and order*”.¹⁰⁵

¹⁰⁵ Concept of the Foreign Policy (note 81), para. 31(b).