

Crimea's Independence from Ukraine and Incorporation into Russia: The Unlawfulness of Russia's Use of Force*

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Abstract

Crimea's independence from Ukraine and merging with Russia is an incident of great geopolitical significance after the Cold War, which took place against the background of the long-term geopolitical struggle. Russia used force in the incident, which Russia tried to justify mainly with grounds of protecting its nationals and having been invited by both president Yanukovich and the local government of Crimea. But the grounds cannot prove that Russia's use of force accords with the exceptions to the principle of prohibition of the use of force addressed in the UN Charter or conforms to the already disputed relevant principles of "intervention by invitation" and so Russia's use of force is illegal. This article presents a comprehensive and deep analysis of the illegality of Russia's use of force in the event and therefore, will not only provide convincing legal grounds for the illegality of Crimea's independence from Ukraine and incorporation into Russia, but also be helpful for assessing the future development of strategic relations between Russia and the west in particular and even between powers in general.

Keywords

Crimea, Russia, Ukraine, Use of Force

1. Introduction

Crimea's independence from Ukraine and incorporation into Russia was a major event of the Ukraine crisis which has profound and lasting influence on European geopolitics and international pattern. It has also given

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rise to such international law issues as principles of national self-determination and national territorial integrity, the legality and validity of the referendum. Russia played an important role in this event, whose activities are studied in not only the perspective of politics but also the international law. In terms of the second perspective, Russia's use of force in the development has been a focus. This article first summarizes background of the event and then demonstrates briefly that Russia indeed used force in it, and based on this, analyzes in detail the illegality of Russia's use of force.

2. Background of Crimea's Independence from Ukraine and Incorporation into Russia

Crimea's independence from Ukraine and incorporation into Russia took place against the background of the West-Russia geopolitical conflict since the end of the cold war focused on NATO eastward expansion. After suffering a chain of geopolitical losses, Russia at last gave the west a heavy blow through the Russia-Georgia war in 2008. In spite of this, the west didn't stop its activities to squeeze Russia and only took some new strategies. In 2009, the EU formally started its Eastern Partnership program to replace the existing policies toward eastern neighbors under the European Neighborhood Policy. To this, Russia responded with a hostile attitude, and speeded up the Eurasian integration process led by itself. On January 1, 2010, Russia, Belarus and Kazakhstan decided to set up customs union under the framework of the Eurasian Economic Community, and to realize common external tariff in July of the same year (Yang & Wang, 2014). No doubt that Russia wanted Ukraine and other former Soviet Union republics to join it too. But Russia's integration plan was faced with great challenges when in March 2012, Ukraine successfully initialed the EU Association Agreement and predetermined to formally sign the agreement with EU in the Vilnius partnership summit meeting scheduled for November 2013. But on November 21, 2013, the then Ukraine president Yanukovich decided not to sign the Association Agreement, and Russia therefore rewarded Ukraine with a series of economic benefits it was in great need of (Larsen, 2014). The decision for Yanukovich to suspend signing the Association Agreement was at first regarded as Russia's victory but the decision soon aroused pro-EU protests in Kiev and other major cities of Ukraine.

On January 28, 2014, thousands of Ukraine people got together in the independent square in Kiev, protesting the government's decision. Yanukovich was forced to sign the president order to remove the prime minister from office and to dissolve the government. Though the president made other concessions, the opposition groups were insatiable, and on February 22, he was compelled to leave the capital for security reasons and soon after impeached by the parliament. The same day, the opposition began to control the parliament and take over the regime. The parliament also passed quite a few resolutions including those to remove Yanukovich from office, release the former prime minister Tymoshenko, and announced to hold ahead of schedule presidential elections on May 25. The next day, the parliament passed a resolution for the new speaker Turchinov to fulfill temporarily the presidential duty. On February 24, the deputy interior minister of Ukraine Avakov declared that Yanukovich had been wanted by the police. On February 27, the new interim government in Kiev announced that it intended to call off Yanukovich's decision and to join the Deep and Comprehensive Free Trade Agreement. The same day, dozens of pro-Russian armed men took up the parliament and government buildings of Crimean autonomous republic and the Russian foreign ministry said Russia "was resolute in defending the rights of the Crimean compatriots". On February 28, Yanukovich appeared in Russia and stressed in a press conference there that he was still the legitimate president of Ukraine. On March 1, prime minister of Crimea Aksenov issued a statement, asking president Putin to help maintain peace in Crimea and the Russian parliament endorsed the request raised by Putin for using Russia's military forces in Crimea (Wang, 2014).

On March 2, what the west called little green men controlled Crimea militarily. Shortly after this, the European Commission promised to provide 15 billion dollars in the form of loans and grants for the new government in Kiev facing bankruptcy (Larsen, 2014). On March 3, a Ukraine air base in Crimea declared its allegiance to the pro-Russian Crimean government, formally independent of Ukraine's leadership. On March 6, the parliament of the autonomous Crimea republic decided by vote to become part of the Russian Federation and to hold in advance a referendum on March 16. On March 11, Crimean parliament passed a resolution approving the declaration about the independence of the Crimea republic and the city of Sevastopol. On March 15, the Ukraine parliament passed a resolution to end in advance the power of the current Crimean parliament. The same day, the UNSC voted on the draft resolution by the US about the Ukraine issue which failed to pass due to Russia's

veto.¹ On March 16, the autonomous Crimean republic of Ukraine held a referendum on its status, with 96.6% of the voters supporting Crimea's independence and reincorporation into Russia. The parliament of the autonomous Crimea republic then decided that Crimea became the independent sovereignty of Crimea republic and joined the Russian Federation. On March 18, Russia and Crimea signed a treaty on Crimea's incorporation into Russia. After the successive ratification by the Russian state Duma and the Federation Council of the treaty on the incorporation into Russian Federation of Crimea and Sevastopol, Putin signed the bill on the incorporation into Russian Federation of Crimea and Sevastopol on March 21, accepting the incorporation of Crimea into Russian Federation legally (Sun, 2014). On April 22, Russia introduced a new Constitution, adding Crimea into the "main body of the nation", and thus completing preliminarily the process of Crimea's incorporation into Russia.

3. Legal Demonstration of Russia's Use of Force

Before deciding whether Russia has used force in Crimea, it is necessary to discuss the meaning of "force" in international law. Article 2(4) of the UN Charter stipulates "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". Force, here, refers to that in international relations, and that is to say, use of force commonly happens between states, and so prohibition of the use of force can only generally be understood as prohibiting one state from using force against another (Li, 2010). The action of one state using force against its civilians is governed by its domestic law, but can also be restrained by treaties about human rights and rights of national minorities and the existing UNSC resolutions. There are also disputes over interpretation of force. For example, there two different views of whether force should include political or economic coercion. The narrow understanding of it holds that it is limited to only armed forces. The opposite view argues that the meaning of force should not exclude political or economic compulsion, since the Charter doesn't draw a distinction between armed forces and other forms of forces. But in practice, most states haven't regarded political or economic coercion by other states as force.² It is true that several resolutions passed by the UNSC condemned economic coercion as breaking state sovereignty. Another dimension of the definitional problem posed by Article 2(4) is whether "force" includes indirect force used by a state against another state, for example where a state allows its territory to be used by troops fighting in another country, or in cases of indirect aggression, where a state lends military or other assistance to one or the other side in time of war. The weight of opinion tends to be that force embraces both direct and indirect force used against another state (Azubuike, 2011). Use of force includes use of any weapon of one state against another. The Charter doesn't suggest the requirements for the force to reach a certain level, so any slight violation of the force boundary is prohibited.³ The notions of "threat" and "use" of force under Article 2, paragraph 4 of the Charter stand together in the sense that if the use of force itself in a given case is illegal-for whatever reason-the threat to use such force will likewise be illegal (Azubuike, 2011).

On March 1, 2014, when the UNSC held a meeting discussing the Crimea crisis, at the beginning of the meeting the UN Deputy secretary-general told the Security Council that "since Assistant Secretary-General Fernandez-Taranco's briefing to this Council yesterday, there have been reports of continued serious developments in Ukraine. In Crimea, key sites such as airports, communications and public buildings, including the regional parliament, reportedly continue to be blocked by unidentified armed men".⁴ As it was still unclear who the unidentified men were, it was still hard to say whether the above mentioned activities belonged to the use of force prohibited in international relations. It was reported that "Russia has also recently blockaded Crimea with warships. Russian sailors sunk decommissioned Russian warships at the entrance of Lake Donuzlav, barring Ukrainian ships from entering Ukraine's territorial waters. Russian gunmen have blocked the Ukrainian military from accessing to its military airport at Belbek".⁵ This is suffice to show that even the Russian army didn't fire,

¹"Timeline of the Ukraine Crisis," *World Affairs*, No. 6, 2014, p. 21.

²Sebastian Heselhaus, "International Law and the Use of Force," <http://www.eolss.net/sample-chapters/c14/e1-36-01-02.pdf>.

³Sebastian Heselhaus, "International Law and the Use of Force," <http://www.eolss.net/sample-chapters/c14/e1-36-01-02.pdf>.

⁴New York, 1 March 2014—Deputy Secretary-General's Briefing to the Security Council Meeting on Ukraine, <http://www.un.org/sg/dsg/statements/index.asp?nid=497>.

⁵Siobhan Clifford, "What is the Meaning of Russia's Belligerence?"

http://www.ajurialawyers.com.au/uploads/56412/ufiles/Use_of_force_in_Ukraine_-_What_is_the_meaning_of_Russia's_belligerence.docx.pdf.

it undermined Ukraine's sovereignty and territorial integrity by means of military coercion.

Who on earth were what the UN Deputy Secretary General called the "unidentified armed men", that is, what the western medium called the "little green men"? Putin said they were "self-defense groups" organized by the locals who bought all their uniforms and hardware in a shop. But there were many photographs and videos showing armed men in Crimea "who look like members of the Russian military. Their guns are the same as those used by the Russian army, their lorries have Russian number plates and they speak in Russian accents" (Shevchenko, 2014). Later Putin acknowledged that those well-equipped unidentified armed men were Russians. He seemed unhappy with describing them as "little green men", and asked people to avoid calling them it. One month after Russia formally annexed Crimea, Putin said that army was necessary to guarantee the referendum orderly that led to Crimea's incorporation into Russia (Berry, 2014). Putin acknowledged that he undoubtedly deployed troops in Crimea (Stallard, 2015).

Based on the above discussion on the questions about "force" and the use of it, and taking into consideration a series of known facts, it can be said legally that since the late of February of 2014, Russia had carried out direct military intervention, violating the independence and territorial integrity of Ukraine. This intervention was launched by the Russian military forces already stationed in Crimea and the additional Russian troops deployed in that region. As the threat or use of force in international relations is clearly prohibited under Article 2(4) of the UN Charter, and also in terms of Russia's use of force in Ukraine, restrained by the related bilateral and multilateral treaties, it was necessary for Russia to provide promptly some grounds for its military action in Crimea and consequently it turned to such excuses as government invitation, protection of its overseas nationals. In doing so, Russia in fact proved itself that it had used force in international relations. But can the reasons given by Russia for its use of force be sustained? Or did Russia legally use its force? This is what follows in the article.

4. Russia's Use of Force Not Belong to Individual Self Defense

There are exceptions to the prohibition on the use of force in the UN Charter. After the World War 2, the international community united to prohibit the use of force in international relations. The UN Charter became the formal codification of many rules controlling the use of force. According to the Charter, war is no longer the prerogative of the sovereign state. States can use force only under two conditions: when as a collective security measure and when as a way of self-defense. Any use of force beyond the two exceptions is generally regarded as violation of international law.

Ukraine is a sovereignty. A member of the UN, Russia is restricted by the prohibition of use of force in the UN Charter. But does Russia's use of force belong to the exceptions? It's obvious that Russia's use of force hadn't had the authorization of the UNSC, so it doesn't belong to the collective security measure stipulated in article 42 of the UN Charter. Article 51 of the UN Charter is a recognized exception to the prohibition of the use of force, which permits a state to use force against armed attacks. In this article, "armed attack" is an important concept. The definition of armed attack doesn't appear in the Charter or any law of treaties. Since there isn't an agreement on what constitutes an armed attack, states involved in the process of self-defense will have to, at least before the Security Council takes measures to restore peace, decide by themselves whether an armed attack has happened (Alexandrov, 1996). But here is another problem: How to determine "happen" or not. The occurrence of an incidence means that it has happened or is happening at present. At any rate, it is unrealistic to expect a state to fold its hands for capture when it has been aware of its enemy's preparation for a large-scale armed attack. But what is also obvious is that a state may fabricate an impending armed attack to cover up his purpose of invading other states or it may really mistake its neighboring country's military action as an impending attack. In view of this, the majority argue that the obvious impending armed attack which can be verified objectively is in the meaning of Article 51 of the UN Charter. Therefore, "occur" includes the obvious imminence but not the only possible threat to attack sometime in the future (Zemanek, 2013). In fact, the study of what is "an armed attack has occurred" led to the distinction between the following two terms: anticipatory self defense (an armed attack is only predictable) and interceptive self defense (an armed attack is impending and unavoidable). It is generally acknowledged that the former is illegal and the latter legal.

Thereby, in terms of Russia's use of force in Crimea, the first thing that we should consider is whether there was indeed an armed attack against Russia. It's obvious that Ukraine's forces never attacked Russia's mainland, nor did it deploy any troops on Russia's soil. But Russia asserted that its military personnels and citizens in

Crimea had been threatened and on this ground invoked the concept of self defense to justify its use of force. When asking the parliament for authorization of the use of force in Ukraine, Putin mentioned the threat to the lives of Russian citizens and members of contingent of the Russian armed forces deployed on Ukraine territory under the international treaty.⁶ It is true that the UN Resolution 3314 on the definition of aggression indicates that “armed attack” isn’t only related to the mainland of the country attacked. Article 3(4) of the resolution shows that a state can be an object of an armed attack outside the mainland of it. Such beyond-territory attacks as those of armed forces of one state against the land, sea and air forces or the sea and air fleet of another all belong to aggression.⁷ The armed attack that triggers the right to self defense is different from the use of force. The fact that self defense is triggered by armed attacks not the use of force makes it clear that only the use of force that is of the most serious nature can constitute an armed attack, otherwise it cannot be regarded as an armed attack (Yu, 2004).

Russia, therefore, would have to show that action by Ukraine against Russian military personnels was so severe that it constituted an armed attack. Although the president of the Ukraine interim government warned in a statement that Russian troops in Crimea must stay at the place where they were permitted to move, and ordered Ukraine’s law enforcement agencies to arrest criminals and remove the obstacles from around the parliament building of Crimea,⁸ there had been no reports of Russia’s fleet stationed at Crimea becoming target of violence before Putin was authorized to use force in Ukraine. The armed attack on Russia’s military personnel in Crimea had never occurred, and accordingly Russia has no justification for its use of force.

It is said that “the vast majority of writers agree that an armed attack by a non-state actor on a state, its embassies, its military, or other nationals abroad can trigger the right of self-defense addressed in Article 51 of the United Nations Charter, even if selective responsive force directed against a non-state actor occurs within a foreign country” (Paust, 2010). But there had been no armed attacks by a non-state actor from Ukraine on Russia’s territory, embassies, military, or other nationals abroad.

Russia seemed to be more concerned with the security of its nationals living in Crimea. It’s debatable whether it is self defense to use force against other countries on the pretext of protecting nationals abroad. Some countries including US, UK, Israel hold that even if the territory, military, or government hasn’t been attacked, the right to self defense with force includes the right to protect overseas nationals in danger (Saul, 2014). In practice, there have been indeed several cases in which the military intervention to protect nationals abroad was clarified as self defense. Most scholars have argued that to rescue nationals is an excise of the right to self defense, not a kind of humanitarian intervention, because population is part of a country and attacks on nationals of a country can be regarded as attacks on the state (Eichensehr, 2008). Some even claim that since 1960, rescue action has become features of modern states’ practice (Defensor-Santiago, 2013), and the intervention initially limited only to western countries has now become general, and also in most cases, those interventions have faced not the challenges based on principles but only those based on the excuse of facts or proportionality (Gray, 2010). But some scholars think that the security of a country is not threatened when its nationals abroad was under an armed attack, so the existence of such a right would be likely to blur any stipulation of self defense, and lead to similar state action (Crawford, 2012), and thus cause the evil consequence contradicting with the purpose of international peace and security. Others go even further saying even since 1989, there has been no decisive precedent where it is universally accepted to invoke those reasons, and stressing that it has never been used as an independent reason to protect overseas nationals (Corten, 2010). In most cases where self defense was put forward by states to protect their nationals abroad, neither the UNSC nor the UN Assembly was in support of such action (Azubuike, 2011).

Sir. Humphrey Waldock’s view of protecting nationals abroad by force is quoted by many states and scholars. He argued that a state is entitled to protecting by force its nationals abroad under three conditions: There must be an approaching menace of injury to nationals; a failure or inability on the part of the territorial sovereign to protect them, and; the action of the intervening State must be strictly confined to the object of protecting its nationals against injury (Ruys, 2008). Assuming that the disputes above don’t exist, and accepting Waldock’s view, in

⁶UN Doc S/PV.7124 (1 March 2014),

http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7124.pdf.

⁷“Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX),”

<https://www1.umn.edu/humanrts/instree/GAres331>.

⁸“Any Movement of Russia’s Black Sea Fleet Personnel in Crimea will be Interpreted as Military Aggression against Ukraine,” February 27, 2014, <http://tass.ru/en/world/721161>.

terms of the case of Crimea, the three conditions for Russia to excise the assumed right were far from being met. On March 6, 2014, Astrid Thors, the high commissioner for minority problems of the Organization for Security and Cooperation in Europe said after visiting Kiev and Crimea, that “there are no proofs found of violating or threatening the rights of Russian speaking populace”.⁹ On April 15, 2014, UN Office of the High Commissioner for Human Rights (OHCHR) issued *Report on the Human Rights Situation in Ukraine*, expressing the same position that those Russian speaking population in Crimea were not threatened (Dronova, 2014). It was true that on February 23, 2014, the new ruling coalition in the Ukraine parliament tried to abolish the Law on the Principles of State Language Policy (Sun, 2014), which soon caused protests by people in southeast Ukraine and Crimea who speak Russian. But on March 3, prime minister of the Ukraine interim government declared that the proposal to abolish the Law on the Principles of State Language Policy hadn’t passed in the parliament. Even if the proposal had passed, it’s still hard to say that there was impending threat of injury to Russian nationals. The Ukraine speaker Turtschinow said that the parliament would on March 4 form a working group to draft a new language law giving expression to the interests of all groups (Sun, 2014). Because there had been no imminent threat of injury to the Russian nationals in Ukraine, there was no such problem as whether the territory sovereign was confronted with its failure or inability to protect them. Now let’s see the third condition: the action of the intervening state must be strictly confined to the objective of protecting its nationals against injury. It’s hard to say that such action as Russian troops encircling the Ukraine military installations was to protect Russian nationals, as none of them said they were threatened by the Ukraine military forces, and withdrawing Russian nationals to Russia was only a small part of Russian military action there.

In short, Ukraine never launched armed attacks against Russian nationals and even if there had been humanitarian problems or whatever other problems with the Russian nationals in Ukraine’s Crimean region, the legality for Russia to intervene militarily on this account would still be very controversial. Even if Russia’s use of force was to excise the legal right to self defense, the self defense exceeded the principle of necessity and violated the principle of proportionality. And the so called anticipatory self defense is not recognized by the international community.

5. Russia’s Use of Force Not Belong to Collective Self Defense

The discussion above on the grounds of protecting its overseas nationals given by Russia for its use of force mainly concerns individual self defense, while Russia’s statement of military intervention by invitation involves collective self defense. A state can take action to help a victim state in the form of collective self defense, regardless of whether there is treaty obligation between the two states, on condition that there exists armed attacks on the protected state, and the victim state has invited it to assist (Azubuike, 2011). On March 4, 2014, Churkin, Russia’s permanent representative to the UN, showed the UNSC a photocopy of a letter said to have Yanukovich’s signature on, dated March 1, 2014. The letter asks Russia to intervene Ukraine militarily to reinstate law and order.¹⁰ What should be made clear here is whether Yanukovich really invited Russia to intervene militarily. After all, the inviting letter itself has never been publicized or examined by the public. Yanukovich himself has never admitted to have written the letter or asked Russia to invade Crimea (Balouziyeh, 2014). Can the reason of being invited put forward by Russia be enough for Russia to invoke the right to collective self defense for its use of force, even if Yanukovich really presented an invitation? This still involves relevant facts and legal basis. Like individual self defense, one prerequisite to excise the right to collective self defense is the occurrence of an armed attack, and here the victim state of an armed attack but not the rescue state must openly declare that it has been attacked (Azubuike, 2011).

But as mentioned above, there was no armed attack against Ukraine or its Crimea region by other countries. Granted, action taken by armed groups, armed bands, or irregular forces, or mercenary can also amount to an armed attack, if only the scale of effects of their action is equivalent to an actual armed attack and the action can be contributed to a state.¹¹ Some even regard some action taken by non-state actors that have no direct relations with a state as armed attacks that can trigger the excise of the right of self defense. Their research conclusion is

⁹“Developing Situation in Crimea Alarming, Says OSCE High Commissioner on National Minorities,” 6 March 2014, <http://www.osce.org/node/116180>.

¹⁰“Ukraine’s Yanukovich Asked for Troops, Russia Tells UN,” BBC News Europe, 4 March 2014, <http://www.bbc.com/news/world-europe-26427848>.

¹¹Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I. C. J. Reports 1986, p. 103.

that “nothing suggests that an armed attack can only be launched by a state or that the right of self-defense would, consequently, only be available against inter-state attacks. The view of the Court is rather the consequence of the specific conceptual construction of international law as law between States and some entities created by them, a conception which is still shared by many, but increasingly criticized by others” (Zemanek, 2013). “Most of the relevant incidents since 9/11 clearly point toward the recognition of a right of self-defense in cases of non-state armed attacks. The reason for this is fairly obvious: governments not just of the ‘West’ have come to appreciate that not only a foreign aggressor state, but also highly destructive transnational non-state actors may pose a horrendous threat to the populations that these governments are to protect.” (Kreß, 2015) But Ukraine has neither been attacked by armed bands or irregular forces instigated by other states, nor attacked by armed groups whose relative action is independent of any state. As there were no external armed attacks, there was no victim state, let alone victim state’s open declaration that it was attacked. Russia, therefore, cannot justify its use of force in Ukraine with the excuse of excising the right of collective self defense.

6. Russia’s Use of Force Not Belong to Intervention by Invitation in Internal Armed Conflicts

Russia’s use of force in Crimea may belong to “intervention by invitation in internal armed conflicts”. The term of internal armed conflicts mainly refers to violent disputes in the territory of a country. This kind of conflicts break out in the form of continuous, large-scale violence, and are not sporadic, unorganized, non-political violent confrontations. Military intervention in the internal armed conflicts at the invitation or consent of a besieged government is regarded as an exception to the prohibition of the use of force addressed in Article 2(4) of the UN Charter (Lieblich, 2012). That is to say that the military intervention in the internal armed conflict at the invitation of one side of internal conflict of a country is likely to be in accordance with international law.¹² If a targeted country has the right to opposing foreign intervention and gives up the right through assenting to the presence of foreign troops on its territory, then no one will claim that the right to opposing foreign intervention has been violated. This practice of reducing the unlawfulness through consent is in conformity with principles about national exemption, which stipulate that “when a state in an effective way consents for another state to carry out a specific conduct inconsistent with its obligations, this conduct under this condition will not be thought of as unlawful, but the relevant action should be confined to the conditions of consent” (Shao, 2008). Can Russia then incorporate its use of force into this exception?

First, what should be clear is whether there had been internal armed conflicts in Ukraine before Russia was invited. As mentioned above, this type of internal conflict breaks out generally in the form of continuous, large-scale violence. Based on this, and linked to the relevant discussions in the second and third parts, it is hard to say that there had been internal armed conflicts in Ukraine before Russia used force. That is to say, Russia’s “intervention by invitation” seems to lack a necessary factual condition. Even if we assume that the factual condition had existed, Russia’s “intervention by invitation” would still be problematic.

In the field of international law, two sets of questions from intervention and consent have emerged: the question of substantive consent and the question of procedural consent. The former concerns the qualification of the parties in an internal conflict. The analysis of this question requires taking into account such complicated legal questions as which side has the right to invite or consent to an external intervention. The latter, however, has nothing to do with the interior legality of the expressed consent, with little regard to the substantive features of all sides. For example, one basic question with procedural consent is whether the consent has been really expressed without any exterior pressure (Lieblich, 2011).

It should be certain that the invitation given to Russia to intervene militarily was not the result of the illegal threat or use of force, by Russia, and therefore has no question of procedural consent. But when the qualification

¹²There are also scholars who believe that no stipulation in international law prohibiting or permitting the military intervention in internal armed conflicts even at the invitation of the government. The participation of a foreign country in the civil war at an invitation is contradictory to the principles of non-intervention and national self-determination. “International practices show the danger of this approach. On the one hand, frequent internal disorder and the struggle for control power cannot clearly show who will become the legal governor and on the other hand, the urgency for a government to ask a foreign country for military support makes the legitimacy of the government under suspicion.” See Lai Zhigang, “The Legal Status of Intervention by Invitation of a Government,” *Law Science Magazine*, No. 1, 2002. “The limited discussion from governments and academic circles on the use of force by consent (invitation) in international law has given rise to disputes and uncertainty. In a modern context, the assertion that consent can make lawful an otherwise unlawful use of force is at best insufficiently justified and at worst wrong.” Ashley S. Deeks, “Consent to the Use of Force and International Law Supremacy,” *Harvard International Law Journal*, Volume 54, Number 1, Winter 2013, pp. 15-16.

for consent is taken into consideration, the so called question of substantive consent will appear.

In terms of intervention by invitation, the International Court of Justice stated clearly in the judgment of the Nicaragua case that “it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition”.¹³ As the state has the right to oppose foreign intervention, the invitation issued by a rebel group cannot mitigate the illegality of intervention which is opposed to the representative of a country—the government (Fox, 2014). It then can be concluded that as a general rule, invitations from a government provide a legal basis for intervention, while invitations from rebel groups or a local government of a country cannot provide a legal basis to intervention. “The request from the Chairman of the Council of Ministers for the Autonomous Republic of Crimea also does not constitute a legal basis for intervention, as Crimea derives its legal foundation as an autonomous republic from the Ukrainian Constitution and Ukrainian law, which also specifically provides that Crimea is within the administrative and territorial structure of Ukraine.”¹⁴ As the local authority of Crimea is not qualified for consenting for Russia to intervene militarily, Russia’s military intervention, if based on this, is illegal.

But it would be much more complicated to discuss the invitation, if there was one, for military intervention given by Yanukovich when he went into exile in Russia. Though there is no objective standard to evaluate the legality of a government, the legal status of a government is often seen as equal to territorial effectiveness (Jennings & Watts, 1992). Some scholars hold that the government also takes as source of its legitimacy the degree to which it takes power through participatory political institution or the internal procedure of a country (Franck, 1992). It’s thus obvious that if a government is effectively replaced by another government through legal means, the new government can represent the country in international law, because it both complies with the test standard of territorial effectiveness and the standard of political participation. If a government represents a country without controversy, it will be regarded as having the right to invite external help, when facing internal rebellion, to maintain its authority. But when a government’s representative capacity is doubted, problems will come about. Some scholars came up with the concept of effective control, thinking that if, at some point, the control of a regime over territory and population lessened, the qualification of it to give an invitation will disappear (Fox, 2014). International law goes on attaching importance to effective control, referring to it as indicator of the authority with which a government takes action representing a country (Wippman, 1996). Firstly, “effective control” conforms to the Montevideo criteria according to which international personality exists in a political community of a coherent territory under the long-term effective control of an independent government (Roth, 2010). Secondly, the legitimacy that makes it possible for an effective government to act in international arena derives from its ability to fulfill international obligations.¹⁵ Also, “in times of turmoil and upheaval with competing claims for legitimacy, effective control would seem the sole factor that can be determined and verified objectively” (Wisehart, 2014). Given all that, Yanukovich, a Ukraine president in exile, who had lost political power and thereby lost the control over territory and population, had no qualification to invite Russia to intervene militarily. “The case illustrates a common dilemma that arises in international law, when a ‘legal’ government no longer seems ‘legitimate’ because it has lost the confidence of (most) of its people. International law’s answer is eventually a pragmatic one: the international community usually recognises, or deals with, whichever domestic political entity has managed to firmly establish its authority.” (Saul, 2014) What needs paying attention to is that effectiveness of a government is not the sufficient condition for the government to rightfully ask foreign intervention in line with international law. It’s also important whether the government is legal or not. “The illegal act cannot become the source of the interest or the right of the offender” is a widely accepted general legal principle. The legality of regime change lies in the domestic law of the country. It follows that under the circumstances of two governments (one is effective, the other legal), neither the effective government nor the legal one is sufficiently qualified for inviting a foreign country to intervene.

There are also scholars who believe that a government in exile may under some limited circumstances legally invite foreign troops to use force in the territory of its country, though it has been deprived of effective control

¹³Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I. C. J. Reports 1986, p. 126.

¹⁴The International Bar Association, “IBA Calls for Independent Investigation into Russia’s Military Intervention in Crimea Amid Violation of the UN Charter,” March 5, 2014, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=32489a5b-a540-40aa-90c9-c511520e27be>.

¹⁵“Legal Aspects of Problems of Representation in the United Nations,” Memorandum Prepared for the Secretary-General, February 1950, U.N. Doc. S/1466.

over its country (Talmon, 1998). During the Gulf War, the international community didn't regard the Kuwait government in exile as having been robbed of the special right to invite foreign assistance against the Iraqi invasion. International judicial practices make it clear that when the problem of representative arises, international recognition will play a decisive role. For example, the ousted but internationally recognized elected president of Haiti Aristide successfully invited in 1994 the international intervention to overthrow the domestic military regime.

But the case of Yanukovich is wholly different from the two cases mentioned above. The inaugural interim government in Kiev was not an imposed one by external forces, or a government of racism or minority, nor did it have the record of a serious and continuous violation of human rights or the rights of minority. In terms of international recognition, it's obvious that Yanukovich's declaration that he was still the legal president of Ukraine was in essence based on Russia's recognition, while Russia was exactly the country that intervened Ukraine militarily. Other countries and the UN regard the interim government in Kiev as the legal government representing Ukraine. In the case of this kind, the recognition of only the intervening state is far from legalizing or legitimizing the intervention. On December 20, 1989, the US invaded Panama and overthrew the Noriega regime. Then the opposition leader Enda who had won in the general election in May of the same year, took up the post of the new president of Panama (Zhou, 1998). Before then, Enda had fled to the military base of the US in Panama, and only the US recognized him to be the legal president of Panama. The America claimed that its military intervention in Panama had been invited by this president in exile,¹⁶ but no country thought Enda's invitation was legally effective (Wippman, 1996). The UN General Assembly passed a resolution on December 29, 1989, opposing the intervention by the US in Panama, and regarding the conduct as a flagrant violation of international law. Besides this, the view that under certain circumstances an exiled and effectiveness-lost government has the right to invite foreign military intervention is still debatable. In the cases of Kuwait and Haiti, the foreign interventions were in fact not based on invitation itself, but on the resolutions (Resolution 687, 1990 and Resolution 940, 1994 respectively) passed by the UNSC authorizing the use of force. In resolution 940, when the UNSC authorized its member states to make use of all necessary means to force the military leader to leave Haiti and to promote the swift return of the legal president elected to Haiti, it took notice of the letters from the "legally elected president of Haiti" and the permanent representative of Haiti to the UN, and also Haiti's particularity that needs specific response. As for Kuwait, the consent was tantamount to the request to defense collectively according to Article 51 of the UN Charter, only this kind of request needs the authorization from the UNSC to be implemented.

So the above cases about Kuwait and Haiti seem not to falsify this fact that effectiveness is still a necessary element to establish the international representativeness of a government. International recognition, together with effectiveness, also plays an important role. That is to say, though there are such precedents as the two cases of Kuwait and Haiti where an exiled leader invited the international community to intervene militarily, their invitation didn't constitute the main foundations of military intervention. The specificity of the two cases not only makes it impossible for them to negate the important role played by effectiveness in establishing the international representativeness of a government, but also further highlights the role international recognition has played. Yanukovich not only had lost his effective control over Ukraine but also hadn't gained far-ranging international recognition, and as a result, his consent for Russia to intervene militarily is illegal and so is Russia's use of force.

It should be pointed out that to make the invitation legally issued, it must be done by a special organ authorized to do so on behalf of the country concerned. As far as Ukraine is concerned, Article 85(23) of its constitution stipulates the only organ that has the right to decide the entry of foreign troops into Ukraine is the parliament. For that matter, Yanukovich obviously didn't have the qualification to do the thing, even if he had remained the president of Ukraine. And granted that there had been indeed an invitation for military intervention, and that the invitation had been legal, there are limitations to the intervention by the invitation to intervene militarily. Russia thereby was required to ensure peace, law and order. The limitation has obviously been broken by Russia, since no one would have authorized Russia to annex Crimea.

¹⁶Some say it's uncertain whether he had explicitly invited the US to overthrow Noriega. See Cedric Ryngaert, "Pro-democratic Intervention in International Law," *Working Paper*, No.53, Institute for International Law K.U. Leuven, April 2004, p.10. Also, some say he had never invited the US to intervene. See Gregory H Fox, "Regime Change," January 2013 (last updated), Oxford Public International Law, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1707>.

7. Conclusion

Crimea's independence from Ukraine and incorporation into Russia is, in large measure, the result of the intense geopolitical struggle centered on the NATO eastern expansion between Russia and the west after the cold war. From the angle of realism which takes national interests as supreme, in the event of Crimea's independence from Ukraine and incorporation into Russia, Russia's use of force is quite reasonable but when seen from the angle of international law, Russia's use of force here is unlawful.

Article 2(4) of the UN Charter prohibits states from using force in international relations, but there are two exceptions: one is the collective measures led by the UNSC addressed in Article 42 of the UN Charter; the other is self defense addressed in Article 51 of the Charter. Russia's use of force in the event obviously doesn't belong to the first exception, as its military intervention was not under the authorization of the UNSC. Russia's use of force doesn't belong to the second exception either, as there was no armed attack against Russia by Ukraine or armed attack against Russia's mainland, or embassies, or overseas nationals by non-state actors from Ukraine. To be sure, Russia also put forward such grounds as "protection of overseas nationals", "being invited". But in Ukraine there had not been an armed attack targeted on Russian ethnic residents and even if there had been such attacks there, the legality of Russia's intervention on the pretext of this is very controversial, and hardly belongs to self defense. Even if Russia's use of force is the exercise of the legal right of self defense, its action of self defense was beyond the limit of the principle of necessity as well as proportionality. And the so called anticipatory self defense is not recognized by the international community. As for the argument of being invited by Yanukovich and the local authority of Crimea, it first concerns collective self defense. But there had been no armed attack targeted on Ukraine and its Crimean region by other states or by armed groups or irregular troops directed by other countries, or by armed groups whose action is independent of any country. Russia's justification of collective self defense for its use of force, therefore, can't be sustained. Granted, the argument of "being invited" may be related to the circumstance of military intervention by invitation in the internal armed conflicts of a state, but there had been no armed conflict in Ukraine, and therefore "intervention by invitation" here is groundless. Assuming there were internal armed conflicts in Ukraine, and the "intervention by invitation" whose legality is debatable is indeed legal, in terms of this armed intervention of Russia's, it is also related to such questions as the qualification of the inviter. The local authority of Crimea was undoubtedly not qualified for inviting Russia to intervene militarily. Yanukovich, as a president illegally deposed and exiled to Russia, had lost effective control over Ukraine and had not got extensive recognition from the international community, and accordingly had no qualification to invite Russia to intervene militarily. So Russia's "intervention by invitation" is also illegal. Russia can't justify its use of force with the theory of humanitarian intervention either. To sum up, Russia's use of force in the process of Crimea's independence from Ukraine and incorporation into Russia is a violation of international law.

Russia's illegal use of force made illegal Crimea's independence from Ukraine and incorporation into Russia, and therefore, would greatly intensify and prolong the already intense and long-lasting geopolitical conflict between Russia and the west.

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