



**HAL**  
open science

## The Russian annexation of the Crimea: questions relating to the use of force

Antonello Tancredi

► **To cite this version:**

Antonello Tancredi. The Russian annexation of the Crimea: questions relating to the use of force. Questions of International Law, 2014, I, pp.5-34. hal-02421190

**HAL Id: hal-02421190**

**<https://hal.science/hal-02421190>**

Submitted on 24 Mar 2020

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

## The Russian annexation of the Crimea: questions relating to the use of force

*Antonello Tancredi* \*

### 1. Introduction

According to the principle concerning the non-use of force in international relations, as elaborated in the United Nations General Assembly Res 2625 (XXV) (containing the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*), ‘The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force’. In the same document, it is also emphasized that ‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal’, corollary recognized by the International Court of Justice as reflecting customary international law,<sup>1</sup> as well as the remaining text of Res 2625 (XXV) concerning the prohibition of the threat or use of force.<sup>2</sup> The relevant parts of this Declaration have been recalled in the preamble of UN General Assembly Res 68/262, whereby, on 27 March 2014, the General Assembly has underscored that the referendum favorable to the accession of the Autono-

\* Professor of International Law, University of Palermo. The author wishes to thank Dr Marco Pertile for research support and valuable comments. The usual disclaimer applies.

<sup>1</sup> See the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para 87. Also according to art 5(3) of the UN General Assembly’s Res 3314 (XXIX) on the *Definition of Aggression* ‘No territorial acquisition... resulting from aggression is or shall be recognized as lawful’.

<sup>2</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, para 191.



mous Republic of Crimea and the City of Sevastopol to the Russian Federation ‘...having no legal validity, cannot form the basis for any alteration of the status’ of these entities. In addition, the commitment to ‘respect the independence and sovereignty and the existing borders of Ukraine’, ‘to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine’, and finally to ‘respect each other’s territorial integrity, and confirm the inviolability of the borders existing between them’ was also laid down in multilateral or bilateral treaties to which the Russian Federation is a party (respectively, in Articles 1 and 2 of the *Memorandum on Security Assurances in connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons*,<sup>3</sup> signed at Budapest, on 5 December 1994, by Ukraine, The United States, the United Kingdom and the Russian Federation, and Article 2 of the *Treaty of Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation*, executed in Kiev on 31 May 1997).<sup>4</sup>

## 2. *A direct threat/use of force in international relations*

Let us start from the beginning. On March 1, 2014, at the opening of one of the several meetings devoted by the UN Security Council to the discussion of the crisis in Crimea, the UN Deputy Secretary-General informed the Council that in the previous days ‘key sites such airports, communications and public buildings, including the regional parliament, reportedly continue to be blocked by unidentified armed men’.<sup>5</sup> At that time, at the beginning of the crisis, it was not even clear whether the acts in question represented a prohibited use of force in international relations, also because it was unclear who the unidentified armed men were. As the days went by, and in particular after the imposition, starting from March 4, of a naval blockade against the port of Sevastopol and further along the Black Sea Coast by military units belonging to

<sup>3</sup> For the text, see Annex to UN Doc A/49/765-S/1994/1399.

<sup>4</sup> Text available at < [www.dtic.mil/dtic/tr/fulltext/u2/a341002.pdf](http://www.dtic.mil/dtic/tr/fulltext/u2/a341002.pdf)>, 69 ff.

<sup>5</sup> UNSC Verbatim Record (1 March 2014) UN Doc S/PV.7124, 2.



the Russian Black Sea Fleet,<sup>6</sup> along with the siege, seizure or blocking of a growing number of Ukrainian military bases ‘by Russian troops’,<sup>7</sup> and the forceful taking over of border posts, it became increasingly clear that military coercion *against* the sovereignty and territorial integrity of Ukraine was abundantly employed even without opening fire. In this regard, the most reliable evidence of the occurrence of use of force in international relations, in addition to the classification given by Ukraine and other States, probably lies in the fact that Russia found it necessary to immediately provide a justification of the military operations carried out by its troops in the Crimea, resorting to classical arguments such as the consent of the local authorities and the necessity to protect its citizens abroad. This is interesting because, according to a first strand of legal scholarship,<sup>8</sup> the internationally prohibited use of force requires the ‘actual use’ of military weapons, otherwise an armed intrusion or the exercise of coercion would be more likely to be considered as a violation of sovereignty or the territorial authority of another State than as prohibited use of force. On the other hand, other authors take a more eclectic approach, believing it impossible to determine strict criteria, and highlighting how in practice the threshold of the prohibited use of force can be determined by a number of factors (such as the place, the author, the target, the context, the scope etc.) which must be evaluated, and carefully balanced, on a case-by-case basis.<sup>9</sup>

It must also be noted that the authorization to deploy armed forces of the Russian Federation on the territory of Ukraine given by the Russian upper house of Parliament, on 1 March 2014, upon the request of

<sup>6</sup> ‘Russian fleet at heart of Ukraine crisis is central to Putin’, <<http://uk.reuters.com/assets/print?aid=UKBREA260YX20140307>> accessed 3 May 2014.

<sup>7</sup> Thus the UN Assistant Secretary-General for Political Affairs in his briefing before the UN Security Council, UNSC Verbatim Record (3 March 2014) UN Doc S/PV.7125, 2.

<sup>8</sup> See O Dörr, ‘Use of force, Prohibition of’, Max Planck Encyclopedia of Public International Law (OUP online edn) paras 18-19.

<sup>9</sup> Thus O Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 91-92, according to whom ‘The greater the means used, the more the State in whose territory the action takes place will be affected... even if...there is no fighting between its armed forces and those of the intervening State’ (ibid 92).



President Putin, was characterized by some States as a ‘*threat* to the sovereignty, independence and territorial integrity of Ukraine’.<sup>10</sup>

Having said that, the second problem persisted. Who were those ‘little green men’ reported as the authors of many of the acts mentioned by the UN Deputy Secretary-General on March 1? According to Moscow, they were local ‘self-defense groups’.<sup>11</sup> However, the international media reported that their guns were the same as those used by the Russian army, and that their lorries had Russian number plates, besides the fact that they spoke with Russian accents.<sup>12</sup> An OSCE observer team invited by the Ukrainian authorities, team that had been denied access to the Crimea by armed men who threatened to shoot at them, observed in a report leaked to the press that ‘significant evidence of equipment consistent with the presence of Russian Federation military personnel in the vicinity of the various roadblocks encountered’ had been collected during the March 5-8 period.<sup>13</sup> In the end, the mystery seemed to have been resolved to some extent. On 17 April 2014, in a nationally televised call-in program, Russian President Putin, in answering a direct question on who the ‘little green men’ were, stated ‘We didn’t want any tanks, *any nationalist combat units* or people with extreme views armed with automatic weapons. Of course, the Russian servicemen did back the Crimean self-defense forces’ (emphasis added).<sup>14</sup> He also seemed annoyed by the use of the words ‘little green men’, and thus observed ‘... one cannot apply harsh epithets to the people who have made a substantial, if not *the decisive*, contribution to enabling the people of Crimea to express their will. *They are our servicemen*’ (emphasis added). These public statements are important for two reasons. Firstly, President Putin admitted that Russian troops had their ‘boots on the ground’. Secondly, he acknowledged that at least part of the irregular armed forces operat-

<sup>10</sup> See UN Doc S/PV.7124 (n 5), for the intervention of the representative of the United Kingdom (6) (emphasis added). See also the intervention of France (*ibid* 7).

<sup>11</sup> See the statement issued by the Minister for Foreign Affairs of Russia, quoted *ibid* 5.

<sup>12</sup> See “‘Little Green Men’ or ‘Russian Invaders?’” <[www.bbc.com/news/world-europe-26532154?print=true](http://www.bbc.com/news/world-europe-26532154?print=true)> accessed 3 May 2014, and ‘Ukraine’s “little green men” carefully mask their identity’ <[www.ft.com/intl/cms/s/0/05e1d8ca-c57a-11e3-a7d4-00144feabdc0.htm](http://www.ft.com/intl/cms/s/0/05e1d8ca-c57a-11e3-a7d4-00144feabdc0.htm)> accessed 18 April 2014.

<sup>13</sup> See ‘Osce Team Say Crimea Roadblock Gunmen Threatened to Shoot at Them’ <[www.reuters.com/assets/print?aid=USBREA2B1C120140312](http://www.reuters.com/assets/print?aid=USBREA2B1C120140312)> accessed 3 May 2014.

<sup>14</sup> At <<http://eng.kremlin.ru/news/7034>> accessed 3 May 2014.



ing in the Crimea were not Crimean. Among them, in a percentage that is not possible to specify with the available information, there were Russian servicemen in a position which enabled them to prevent tanks or automatic weapons from falling into the hands of nationalist units, and also prevented 'nationalist combat units' from acting, presumably outside Russian control. In legal terms, this implies that beyond all the possible nuances of an *indirect* use of force (never easy to prove) based on the different kinds and degrees of assistance provided to local paramilitary troops (conduct proscribed by Res 2625 (XXV), which is recognized on this specific point as declaratory of customary international law by the ICJ,<sup>15</sup> and likely to be characterized as 'indirect aggression' if amenable within the more selective limits set by Article 3 (g) of the UN General Assembly's Res 3314 (XXIX) on the *Definition of Aggression*), as of the end of February 2014, there has been a *direct* armed intervention of Russia in breach of the sovereignty and territorial integrity of Ukraine. This intervention took place through the use of Russian forces already stationed in the Crimea, but also through the 'deployment of additional Russian troops and armoured vehicles to Crimea'<sup>16</sup> (a deployment of additional troops whose legality depends on whether it was authorized or not under the terms of the Russian Black Sea Fleet's stationing agreement with Ukraine). Concerning, then, the relationship between the Russian armed servicemen, with or without official insignia, and the local paramilitaries, it may be conjectured on the basis of the information available that it was of substantial integration, a circumstance that may recall the category of the *de facto* organ, provided that the existence of a unified command structure is proven.<sup>17</sup> The following

<sup>15</sup> Cf. the ICJ's judgment on the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, para 162.

<sup>16</sup> Thus the UN Deputy Secretary-General in his briefing to the Security Council, UN Doc S/PV.7124 (n 5) 2.

<sup>17</sup> In the *Armed Activities* case (n 15), the Republic of Uganda in its counter-memorial affirmed that paramilitary groups had been 'incorporated' in the Congolese army 'and its command structure' (vol. I, 37-38, para 47). In this regard, during the oral pleadings, Brownlie, counsel for Uganda, affirmed that the 'armed bands formed part of a command structure which involved the central Government of Congo' (ICJ Verbatim record, CR 2005/7, para 35). The Democratic Republic of the Congo considered this view as a reference to the category of the *de facto* organ, since this thesis enabled Uganda 'to impute to the Congo all subsequent acts by these rebel forces, who are consid-



pages will try to offer a legal classification of this direct military intervention which resulted in the annexation of Crimea by Russia.

3. *An assessment of the arguments put forward by Russia to justify the direct use of force in Crimea: the protection of nationals abroad*

During the relevant debates held in the UN Security Council, Russia invoked two grounds of justification for its armed intervention in the Crimea. Firstly, as affirmed by President Putin in his request for authorization to use force in Ukraine addressed to the Federation Council ‘.. threats against the lives of Russian citizens... and members of the military contingent of the armed forces of the Russian Federation deployed in conformity with international agreements on the territory of Ukraine’,<sup>18</sup> and secondly, a double request of ‘assistance’ received from Mr. Aksyonov, Prime Minister of Crimea (who asked to restore peace and calm),<sup>19</sup> and, on 1 March 2014, from the ‘ousted’ Ukrainian President Yanukovich, at that moment in exile in Russia, asking ‘to restore law and order, peace and stability and to protect the people of Ukraine’.<sup>20</sup>

The assessment of the validity of these claims is not only important to determine whether the use of force was justifiable or not, but also whether it can be characterized as an act of aggression. Indeed, according to Article 2 of the UN General Assembly’s *Definition of Aggression*, aggression consists in the ‘use of armed force by a State in contravention of the Charter’, while according to its Article 6, a military action undertaken in self-defence under Article 51 of the UN Charter does not constitute an act of aggression. And indeed, in the practice, there are cases in which military intervention to protect nationals abroad has been classified as a form of self-defence pursuant to Article 51 of the

ered to have become *de facto* agents, as it were, of the Democratic Republic of the Congo’ (ICJ Verbatim Record, CR 2005/11, para 29).

<sup>18</sup> The text of the request was quoted by the Russian representative during a debate held at the UN Security Council (see UN Doc S/PV.7124 (n 5) 5).

<sup>19</sup> See UN Doc S/PV.7124 (n 5) 5, and UN Doc S/PV.7125 (n 7) 3.

<sup>20</sup> For the text, see UN Doc S/2014/146.



UN Charter.<sup>21</sup> According to some authors, in fact ‘it is perfectly possible to treat an attack on a State’s nationals as an attack on the State, since population is an essential ingredient of the State’.<sup>22</sup> On the other hand, however, it remains very controversial whether in these cases there is, as *lex lata*, a written or unwritten exception to the prohibition of the use of force. Some claim that rescue operations have been a regular element of modern State practice since 1960; that a practice of interventions originally circumscribed to Western countries has subsequently been ‘generalized’;<sup>23</sup> and that in the majority of cases these interventions have not been challenged on grounds of principle, but only of fact or proportionality.<sup>24</sup> Others deny the existence, even after 1989, of decisive precedents in which the invocation of this justification has been widely accepted, and, in any case, emphasize that the protection of citizens abroad has hardly been ever invoked as an autonomous justification.<sup>25</sup> Be that as it may, even among the authors who admit the possibility of invoking this justification, many speak of an *unwritten* customary exception to the prohibition of the use of force, not covered by self-defence and Article 51 of the UN Charter. To support this contention, it has been pointed out that nationals abroad cannot be considered external positions of their State; that often the territorial State whose sovereignty is violated cannot be held internationally responsible for the dangers to life and integrity to which foreign nationals are exposed; that this justification does not even require an attack, but only an imminent threat to life and integrity;<sup>26</sup> and that the territorial element required for

<sup>21</sup> For a reconstruction of this practice and for the underlying thesis, see T Franck, *Recourse to Force* (CUP 2002) 76 ff.; Y Dinstein, *War, Aggression and Self-Defence* (4th edn, CUP 2005) 231 ff.

<sup>22</sup> D Bowett, ‘The Use of Force for the Protection of Nationals Abroad’ in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff 1986) 41.

<sup>23</sup> N Ronzitti, *Diritto internazionale dei conflitti armati* (4th edn, Giappichelli 2011) 47.

<sup>24</sup> N Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff 1985) 67. See also C Gray, ‘The Use of Force and the International Legal Order’ in M D Evans (ed), *International Law* (3rd edn, OUP 2010) 627, with reference to the Russian intervention in Georgia to protect its nationals.

<sup>25</sup> Corten (n 9) 534-536 and 546-548.

<sup>26</sup> Ronzitti, *Rescuing* (n 24) 11 ff.





an armed attack is absent.<sup>27</sup> In any event, even assuming, without conceding, that today a justification of this type exists in customary international law or even under Article 51 of the UN Charter (provision which, at any rate, was not expressly invoked by Russia in the situation under review), in the case of Crimea the conditions for its exercise are far from being satisfied.<sup>28</sup> In fact, as pointed out also by several States intervening before the Security Council (that, however, did not question the legality of the operation on grounds of principle), the threat of injuries to Russian-speaking persons in Crimea was ‘imaginary’,<sup>29</sup> or a ‘pretext’.<sup>30</sup> This position is corroborated by a statement issued on 6 March 2016 by the OSCE High Commissioner on National Minorities, Astrid Thors, who, after a visit to Kiev and Crimea stated that she had ‘found no evidence of violations or threats to the rights of Russian speakers’.<sup>31</sup> The same position was later reiterated in the *Report on the Human Rights Situation in Ukraine* issued on 15 April 2014 by the Office of the United Nations High Commissioner for Human Rights (hereinafter ‘the OHCHR Report’), according to which ‘... Russian speakers have not been subject to threats in Crimea’.<sup>32</sup> It is true that the new ruling coalition in the Ukrainian Parliament on 23 February 2014, attempted to repeal the *Law on the Principles of State Language Policy* and thus make Ukrainian the sole State language at all levels, something which was seen as a hostile move against the Russian-speaking minority. However, acting president Turchynov declined to sign it or approve the Parliament’s decision to repeal the law, on 2 March 2014, proposing instead the drafting of a new language legislation in line with the international

<sup>27</sup> Dörr (n 8) para 43.

<sup>28</sup> For a description of these conditions see H Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’ (1952-II) 81 *Recueil des Cours de l’Académie de Droit International* 467. See also the memorandum prepared by the US Department of State with reference to the Israeli raid in Entebbe, ‘Contemporary Practice of the United States Relating to International Law’ (1979) 73 *American Journal of International Law* 123.

<sup>29</sup> Thus, the representative of the United States before the UN Security Council, UN Doc S/PV.7125 (n 7) 4. Along the same lines, see the interventions of France and the United Kingdom at that same meeting (respectively, 6 and 7).

<sup>30</sup> Thus France, UNSC Verbatim Record (15 March 2014) UN Doc S/PV.7138, 5.

<sup>31</sup> Text at <[www.osce.org/hcnm/116180](http://www.osce.org/hcnm/116180)> accessed 3 May 2014.

<sup>32</sup> Text at <[www.ohchr.org/Documents/Countries/UA/Ukraine\\_Report\\_15April2014.doc](http://www.ohchr.org/Documents/Countries/UA/Ukraine_Report_15April2014.doc)> accessed 3 May 2014, 31.



standards on the protection of minorities.<sup>33</sup> This means that Ukrainian institutions, on the whole, did not show a total lack of willingness or ability to eliminate this particular cause of concern, which, additionally, could have been more simply and effectively addressed by setting in motion the specific mechanisms on the protection of minorities provided for by the UN, the OSCE and the Council of Europe. Finally, Russian use of force certainly cannot be described as limited in scope, time and space so as to remain ‘strictly confined to the object of protecting them [nationals] against injury’.<sup>34</sup>

4. (*sequitur*): *The double request for assistance issued by Crimean authorities and ‘ousted’ President Yanukovich*

Also seemingly lacking a legal foundation is the other justification invoked by Russia, i.e., the double consent given by the authorities of the Crimea and by the man that Moscow still recognizes as the legitimate Ukrainian President, illegally ousted by a *coup*, Viktor Yanukovich.

Indeed, with regard to the request of the Crimean authorities, suffices it to recall what was observed by the International Court of Justice in its *Nicaragua* judgment ‘... 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’.<sup>35</sup> In addition to that, it must be considered that in order to preclude wrongfulness, consent must be attributable to the State.<sup>36</sup> When the object of the request is the intervention of foreign troops, practice shows that regional governments have scarcely been considered as being legitimized to issue an invitation.<sup>37</sup> In these cases, in fact ‘The author of an invitation...must

<sup>33</sup> *ibid* 3.

<sup>34</sup> Waldock (n 28) 467.

<sup>35</sup> *Nicaragua* (n 2) para 246.

<sup>36</sup> See the International Law Commission’s commentary to art 20 ARSIWA, UN Doc A/56/10, 175, para 5.

<sup>37</sup> *ibid* paras 5-6, recalling the case of the dispatch of Belgian troops to the Republic of Congo in 1960. On that occasion, during the debate held at the UN Security Council, the representative of Tunisia, for instance, maintained that the Belgian intervention

be the highest available State organ in order to ensure that the state speaks with one voice'.<sup>38</sup> The same point has been reiterated by the United States before the UN Security Council with reference to the situation in Crimea.<sup>39</sup>

As regards, then, the invitation made by former President Yanukovich during his exile in Russia,<sup>40</sup> the issue is slightly more complex. According to some authors, governments *in exile* could in some limited circumstances validly invite foreign troops onto the territory of their State (possibly also to use force against the effective government *in situ*) despite having been deprived of effective control.<sup>41</sup> This could happen, for instance, when the government *in situ* has an *internationally* illegal origin (which, however, would *not* depend on possible violations of the democratic principle),<sup>42</sup> as shown by the fact that the 'legitimate'<sup>43</sup> Government of Kuwait, while in exile, was not considered deprived of its prerogative to request foreign assistance against the Iraqi aggressor. A second case in point would be that of a government-in-exile still recognized by the vast majority of the international community, and in particular by international organizations such as the UN, as the legitimate representative of its country. International judicial practice, shows, in

could not be justified by a request 'made by a regional authority' (UNSC Verbatim Record (13-14 July 1960) UN Doc S/PV.873, 38), and the same Belgian representative proved to be aware of the fact that 'authorization should have been given by the Central Government, not by the provincial government' (ibid 35).

<sup>38</sup> G Nolte, 'Intervention by Invitation', Max Planck Encyclopedia of Public International Law (OUP online edn) para 23. See also A B Mansour, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent' in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 443.

<sup>39</sup> See UN Doc S/PV.7125 (n 7) 5.

<sup>40</sup> After fleeing Kiev, Yanukovich publicly 'reappeared' in the Russian city of Rostov-on-Don on 28 February 2014 (<<http://uk.reuters.com/article/2014/02/28/uk-ukraine-idUKBREA1H0EM20140228>> accessed 3 May).

<sup>41</sup> See S Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 1998) 147-149.

<sup>42</sup> 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* (OUP 1999) 534.

<sup>43</sup> In UNSC Res 661 (2 August 1990) UN Doc S/RES/661, para 9, the Security Council after affirming the inherent right to individual and collective self-defense, decided that '... nothing in the present resolution shall prohibit assistance to the legitimate Government of Kuwait'.



effect, that international recognition often plays a decisive role when the question of representativeness arises.<sup>44</sup> The case of the international intervention in Haiti, requested by the ousted but internationally recognized and democratically elected President Aristide in order to overthrow a rival domestic authority,<sup>45</sup> could prove this second hypothesis.

Now, even assuming the validity of the above argument, the situation under review does not fall into either of these two hypotheses. The transitional government that took office in Kiev was not forcefully imposed by an outside power, nor is it a racist or a minority government, nor does it seem to have seriously or persistently violated human and minority rights. On the other hand, the OHCHR Report contains accusations of 'serious human rights violations' including the Maidan protests, resulting in the death of 121 individuals and reports of torture and ill-treatment of protesters by the 'Berkut' riot police, at the time of Yanukovich's Presidency.<sup>46</sup>

As for international recognition, then, it is clear that Yanukovich's claim to remain the legitimate president of Ukraine rests essentially on the recognition of the State that intervened militarily in the country, Russia, while the rest of the international community, including the United Nations, considers and treats the representatives of the Transitional Government of Kiev authorized to represent Ukraine. In this type of situation, it has been observed that 'Recognition by the intervening

<sup>44</sup> In the framework of the European Convention on Human Rights, in one of the early interstate *Cyprus v Turkey* cases (App no 8007/77), Turkey argued that the Greek Cypriot government was not entitled to represent the State of Cyprus. The European Commission of Human Rights dismissed Turkey's objection observing that '... the applicant Government have been, and continue to be, recognised internationally as the Government of the Republic of Cyprus and that their representation and acts are accepted accordingly in a number of contexts of diplomatic and treaty relations and of the working of international organisations', referring then to the practice of both the Council of Europe and the United Nations (Commission Decision, 10 July 1978, para 8). Furthermore, the International Court of Justice, in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, para 44, held that Mr. Alija Izetbegovic – who authorized the application to the ICJ and who, according to Serbia, at that time was not the President of Bosnia – 'was recognized, in particular by the United Nations, as the Head of State of Bosnia and Herzegovina'.

<sup>45</sup> For the letter of request of President Aristide, see Annex to UN Doc S/1994/905.

<sup>46</sup> *Report on the Human Rights Situation in Ukraine* (n 32), 3 and 14.



State alone usually cannot suffice to legalize or justify an intervention'.<sup>47</sup> This is aptly illustrated by the disapproval expressed by the UN General Assembly in Resolution 44/240, adopted on 29 December 1989, against the US intervention in Panama, deplored as a 'flagrant violation of international law'. On that occasion, the United States tried, rather reluctantly,<sup>48</sup> to justify their invasion invoking also the tacit consent of Mr Guillermo Endara, whom the US alone recognized as the legitimate President of Panama, and who was in internal exile on a US military base in Panama. However, besides these considerations, the thesis that governments in exile (a circumstance which was missing in cases, such as Liberia and Sierra Leone, in which a foreign military intervention also took place by invitation of governmental authorities that had lost control of the country or had been the victim of a *coup*), despite having lost effectiveness, are entitled in certain circumstances to invite foreign troops remains open to discussion. In the two examples given above (Kuwait and Haiti), in fact, foreign intervention took place on the basis of the authorization to use force given by the UN Security Council with Res 687 (1990) and Res 940 (1994), respectively, and not on the basis of consent *per se*. In Res 940 (1994), the Security Council, while 'Taking note' of the letters from the 'legitimately elected President of Haiti' and the Permanent Representative of Haiti to the United Nations,<sup>49</sup> in authorizing 'Member States...to use all necessary means to facilitate the departure from Haiti of the military leadership', and 'the prompt return of the legitimate elected President', also recognized 'the unique character' of the situation in Haiti 'requiring an exceptional response'.<sup>50</sup> In the case of Kuwait, furthermore, consent was none other than a request for

<sup>47</sup> Talmon, *Recognition* (n 41) 149.

<sup>48</sup> Thus, C Gray, *International Law and the Use of Force* (2nd edn, OUP 2004) 77 ('the reluctance to rely on invitation may indicate a new caution about using invitation by a "legitimate" rather than an effective government').

<sup>49</sup> UN Doc S/1994/910. For the letter of President Aristide see n 45.

<sup>50</sup> Following the adoption of UNSC Res 841 (1993) UN Doc S/RES/841, making universal economic sanctions against the government *in situ* in Haiti at the request of the Aristide government, the President of the Security Council had already stated that 'the adoption of this resolution is warranted by the unique and exceptional situation in Haiti and should not be regarded as constituting a precedent' (UNSC Verbatim Record (16 June 1993) UN Doc S/PV.3238, 9).



collective self-defence pursuant to Article 51 of the UN Charter,<sup>51</sup> interpreted as such by third party States,<sup>52</sup> a request that nonetheless required the authorization of the UN Security Council to be enforced. Consequently, the practice under review does not seem to disprove the fact that effectiveness remains a necessary, though not sufficient, element to found the international representativeness of a government. Together with effectiveness, international recognition also plays a central role.<sup>53</sup> Finally, as regards the argument of the persisting constitutional legitimacy of President Yanukovich (and the correspondent illegitimacy of the new transitional government *in situ*) – argument based on the fact that the Ukrainian Parliament’s vote of 22 February whereby Yanukovich was removed from office did not follow the impeachment procedure regulated by the Ukrainian Constitution, failing *inter alia* (by ten votes, seemingly) to meet the three-fourths majority required –<sup>54</sup> it is true that occasionally the possibility of attributing consent to a State has been related to questions of legitimacy.<sup>55</sup> However, it must be remembered that, firstly, as already mentioned, practice (Libya included, to a large extent)<sup>56</sup> shows that respect for a democratic principle whose status remains very controversial under international law<sup>57</sup> does not normally represent a decisive factor in the attribution of governmental status (undemocratic governments often continue to be considered *de jure*

<sup>51</sup> By a letter dated 12 August 1990 (UN Doc S/21498), the representative of Kuwait informed the President of the Security Council that ‘In the exercise of its inherent right of individual and collective self-defense and pursuant to Article 51 of the Charter of the United Nations’, his country had ‘requested some nations to take such military or other steps to ensure the effective and prompt implementation of Security Council resolution 661 (1990)’.

<sup>52</sup> See the statement by the Press Secretary of US President Bush on 12 August 1990 (New York Times, 13 August 1990, Sec. A, 11),

<sup>53</sup> See, in this sense, Corten (n 9) 284-286.

<sup>54</sup> See, on this, ‘Was Yanukovich’s Ouster Constitutional?’, available at <[www.rferl.org/content/was-yanukovichs-ouster-constitutional/25274346.html](http://www.rferl.org/content/was-yanukovichs-ouster-constitutional/25274346.html)> accessed 8 May 2014.

<sup>55</sup> See the International Law Commission’s commentary to art 20 ARSIWA (n 36) 175, para 5.

<sup>56</sup> S Talmon, ‘Recognition of the Libyan National Transitional Council’ [2011] ASIL Insights, issue 16, at <[www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council](http://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council)> accessed 9 May 2014.

<sup>57</sup> J d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks’ (2011) 22 Eur J Intl L 549.



representatives of their countries).<sup>58</sup> Secondly, the legitimacy of Yanukovich must also be assessed against the background of the ‘serious violations of human rights’ that, according to the OHCHR Report, had been committed under his presidency.

Moreover, it must be remembered that to be validly given, consent must be issued by a competent body ‘authorized to do so on behalf of the State’.<sup>59</sup> In the case of Ukraine, according to Article 85 of the Constitution, the only body competent to decide the admission of foreign military forces is the Parliament (Rada), a circumstance which Ukraine brought officially to the attention of the Security Council and its members.<sup>60</sup> Consequently, in this case, the incompetence of Yanukovich can be said to be ‘manifest’ (pursuant to Article 46 of the Vienna Convention on the Law of Treaties), in the sense that it ‘was known or ought to have been known to the acting State’.<sup>61</sup> Finally, the limits laid down in the two requests for intervention – whereby Russia had been asked to ensure peace, law and order – have been clearly exceeded (nobody has or could have authorized an annexation), while the act consented to, in order to be justified, according to Article 15 ARSIWA, must remain ‘within the limits of the consent’.

##### 5. *Russian intervention as an act of aggression.*

As we have seen, Russia is responsible for a threat and direct use of force against the sovereignty and territorial integrity of Ukraine, conduct that is not justified by any of the grounds ostensibly relied upon. The next question to be addressed is the exact legal characterization of this conduct: mere use of force, act of aggression or armed attack? As is well known, the UN Charter distinguishes between these three hypotheses,<sup>62</sup> although the exact line of demarcation between them is not always easy to be drawn. Having said that, it should be noted that

<sup>58</sup> See Talmon, ‘Who Is’ (n 42) 534.

<sup>59</sup> See again the International Law Commission’s commentary to art 20 ARSIWA (n 36) 175, para 4.

<sup>60</sup> See UN Doc S/2014/152.

<sup>61</sup> ILC’s commentary to art 20 ARSIWA (n 36), 174, para 4.

<sup>62</sup> J Fawcett, ‘Intervention in International Law. A Study of Some Recent Cases’ (1961-II) 103 *Recueil des Cours de l’Académie de Droit International* 361.





Ukraine has claimed to be the victim of an ‘act of aggression’ by Russia since the early days of the crisis.<sup>63</sup> The Council of the European Union, on 3 March 2014, also condemned ‘the clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression by the Russian armed forces’.<sup>64</sup> Several of the States intervening during the UN Security Council’s meetings spoke either of an act of aggression,<sup>65</sup> or made reference to some of the individual behaviors that, according to Article 3 of General Assembly Res 3314 (XXX), constitute examples of acts of aggression. The same Declaration on the *Definition of Aggression* – that despite not having binding legal effect in itself has already been recognized as corresponding to customary international law in some of its provisions<sup>66</sup> and is widely used in diplomatic and judicial practice as a reference text in this field (as evidenced by the fact that the conducts referred to in its Article 3 have been then confirmed in Article 8 *bis* of the Rome Statute of the International Criminal Court) – was expressly referred to.<sup>67</sup>

Concerning individual examples of aggression invoked during the Security Council’s meetings, we are spoiled for choice. One of the most often evoked hypotheses<sup>68</sup> is the violation of the 1997 Agreement between Ukraine and Russia regulating the Black Sea Fleet’s presence in the Crimea, an agreement whose term had been extended to 2042 (by way of the 2010 Kharkiv Pact, denounced by Russia on 2 April 2014). In effect, according to Article 3 (*e*) of Res 3314 (XXIX) ‘The use of armed forces of one State which are within the territory of another State with the agreement of the receiving state, in contravention of the conditions provided for in the agreement...’ qualifies as an act of aggression. According to some States, the 1997 ‘Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian

<sup>63</sup> See UN Doc S/PV.7124 (n 5), 3. See also UN Doc S/2014/139.

<sup>64</sup> See ‘Council Conclusions on Ukraine’, 3 March 2014, text at <[www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/141291.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141291.pdf)> accessed 3 May 2014.

<sup>65</sup> See UN Doc S/PV.7124 (n 5), for the interventions of the United States (5), and Australia (10).

<sup>66</sup> See the ICJ’s ruling in the *Nicaragua* case (n 2) para 195.

<sup>67</sup> See the intervention of Jordan, UN Doc S/PV.7125 (n 7) 9.

<sup>68</sup> See the interventions of the United Kingdom (*ibid* 7 and 19); Lithuania (*ibid* 8); Jordan (*ibid* 9); Luxembourg (*ibid* 12).



Federation Black Sea Fleet's Stay on Ukrainian Territory',<sup>69</sup> had been breached in several respects: the number of Russian troops in Crimea was higher than the 11.000 units last notified by Moscow to the Government of Kiev in December 2013 (while, on the other hand, Moscow maintained to have the right to increase the number of its troops in Crimea up to 25.000);<sup>70</sup> the 1997 Agreement did not allow Russian troops to move freely within the territory of Ukraine; and above all, Russian servicemen had violated the obligations laid down in Article 6 of the Agreement, according to which Russian military formations had the duty to 'respect Ukraine's sovereignty, abide by its legislation, and [do] not allow interference in Ukraine's internal affairs'.<sup>71</sup>

A second hypothesis of aggression clearly recurring in the case under review is the one laid down in Article 3 (c) of Res 3314 (XXIX): the aforementioned military naval blockade.

And what about the invasion by regular troops, one of the hypotheses contemplated in Article 3 (a) and also invoked by a number of States?<sup>72</sup> Ukraine has accused Russia of deploying 16.000 troops 'from the neighbouring territory of the Russian Federation' from 24 February without any title or authorization.<sup>73</sup> Some reference to 'additional' troops has been made also by the UN Deputy Secretary-General.<sup>74</sup> On the other hand, as already said, according to Russia under the 1997 Agreement on the Black Sea Fleet, Moscow retained the right to bring the number of its servicemen in Crimea up to a maximum of 25.000.

In addition, before the Security Council Jordan spoke of the 'deployment of irregular armed groups in order to perform military acts in another State',<sup>75</sup> clearly evoking one of the hypotheses of 'indirect aggression' laid down in Article 3 (g) of Res 3314 (XXIX). As seen above, a percentage of the troops without insignia or identification marks were not really irregular, being in fact Russian servicemen. *A fortiori*, then,

<sup>69</sup> An English translation of some key provisions of the 1997 Agreement can be found at <<http://ericposner.com/the-1997-black-sea-fleet-agreement-between-russia-and-ukraine>> accessed 3 May 2014.

<sup>70</sup> See UN Doc S/PV.7125 (n 7) 16.

<sup>71</sup> *ibid.*

<sup>72</sup> See, for instance, Lithuania (*ibid* 8).

<sup>73</sup> See *ibid* 13.

<sup>74</sup> See UN Doc S/PV.7124 (n 5) 2.

<sup>75</sup> *ibid* 9.



one may be induced to share the more general view whereby, in such cases, one should speak prevalently of ‘direct aggression’.<sup>76</sup>

## 6. Occupation?

However, the hypothesis of aggression which attracts more interest, especially for the possible consequences, also in terms of *ius in bello*, is occupation, also provided for in Article 3 (a) of Res 3314 (XXIX). It is important to speak of the consequences because, for example, if one could consider Russia as an occupying power in Crimea already from the end of February 2014, it might be concluded that by giving ‘the decisive’ contribution, as stated by President Putin on 17 April 2014, to the creation of the conditions for carrying out the referendum on annexation of 16 March, Russia violated its obligation to do everything in its power to prevent changes to the legal status of the occupied territory, as required by Article 4 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I, to which the Russian Federation is a State party), of 8 June 1977, according to which the occupation of a territory shall not ‘affect the legal status of the territory in question’.<sup>77</sup> The rule that occupation ‘cannot imply any right whatsoever to dispose of territory’<sup>78</sup> also underlies Article 47 of the *IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (to which the Russian Federation is a State party too), so that ‘Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention...by any annexation by the latter [the Occupying Power] of the whole or part of the occupied territory’. One could also add a violation

<sup>76</sup> P Lamberti Zanardi, ‘Indirect Military Aggression’ in A Cassese (ed), *The Current Legal Regulation* (n 22) 112.

<sup>77</sup> The Y Sandoz, C Swinarski, B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 73, highlights how this is ‘an uncontested principle of international law which was, moreover, underlying both the Hague Regulations and the Fourth Convention. Nowadays it follows from the inadmissibility of the use of force...’.

<sup>78</sup> See J Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 275.

of the obligation to ‘respect, unless absolutely prevented, the laws in force in the country’ (most notably the Constitution of Ukraine, whose Article 73 required an All-Ukrainian referendum for any question changing the territory of the country),<sup>79</sup> as required by Article 43 of the Hague Regulations of 1907. Indeed, none of the hypotheses that could justify failure to comply with this latter duty, of a non-absolute character, seem to occur in the present case.<sup>80</sup>

Furthermore, and independently of any title to *direct* responsibility for the acts of its *de jure* organs, new scenarios about the possibility of attributing to Russia the acts carried out by the Crimean authorities (for instance, with reference to the unilateral declaration of independence of Crimea of 11 March, the referendum, or the violations of human rights highlighted in the OHCHR Report, which states that there have been ‘credible allegations of harassment, arbitrary arrest, and torture targeting activists and journalists who did not support the referendum’),<sup>81</sup> could also be envisaged. As already pointed out by Weckel, in fact, in the case at hand there are some elements that lead to considering Russia responsible for the entire chain of events that resulted into the *de facto* annexation of Crimea (at least those having an unlawful character *per se*, so not necessarily all of them), as required by the category of the composite unlawful codified in Article 15 ARSIWA.<sup>82</sup> Indeed, should one retain the hypothesis of occupation, it might be at least *presumed*, according to a well-established maxim of experience, that local authori-

<sup>79</sup> As pointed out in a letter from the Permanent Representative of Ukraine addressed to the President of the Security Council (UN Doc S/2014/193).

<sup>80</sup> Derogations from existing legislation during the period of occupation are considered admissible in legal scholarship, if they are essential for the security of the occupying power and its forces; the implementation of international humanitarian law and international human rights law (as far as the local legislation is contrary to such international law, which cannot be said for art 73 of the Ukrainian Constitution which is fully in line with the rule that self-determination belongs to the *whole* people of a State); the purpose of restoring and maintaining public order and civil life, or enhancing civil life during long-lasting occupations, or where explicitly authorized under UN Security Council’s resolutions (thus M Sassoli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 *Eur J Intl L* 673-682).

<sup>81</sup> *Report on the Human Rights Situation in Ukraine* (n 32) 4.

<sup>82</sup> Thus P Weckel, ‘Le conflit entre la Russie et l’Ukraine: la Russie organise un référendum en Crimée préalable à l’annexion’, [2014] 383 *Sentinelles* <[http://www.sentinelles-droit-international.fr/bulletins/a2014/20140316\\_bull\\_383/bulletin\\_sentinelle\\_383.php](http://www.sentinelles-droit-international.fr/bulletins/a2014/20140316_bull_383/bulletin_sentinelle_383.php)> accessed 3 May 2014.



ties set in place as a result of a foreign military intervention giving rise to occupation will not, in effect, be independent,<sup>83</sup> and that therefore these authorities may be qualified as a ‘puppet’ government or a subordinate local administration. Consequently, Russia could be regarded as internationally responsible for the sum total of the acts carried out by the local Crimean authorities either on the basis of the ‘effective general control’ test devised by the European Court of Human Rights in the *Loizidou* case<sup>84</sup>, or – should one consider this as a *special* test to be used exclusively in order to avoid ‘a regrettable vacuum in the system of human-rights protection in the territory in question’ –<sup>85</sup> by using the *general* criterion of attribution of the *de facto* organ codified in Article 4 ARSIWA. In fact, according to the definition of organ contained in paragraph 2 of Article 4 ARSIWA, to the *travaux* of the International Law Commission,<sup>86</sup> to the *ratio* identified by the ICJ,<sup>87</sup> and to some au-

<sup>83</sup> For this presumption, see K Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Droz 1968) 113; J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 80.

<sup>84</sup> Where it was held that ‘It is not necessary whether Turkey actually exercises detailed control over the policies and actions of the authorities of the “TRNC”. It is obvious from the large number of troops engaged in active duties in northern Cyprus... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the “TRNC”’ (*Loizidou v Turkey* ECHR 1996-VI 2235-2236, para 56). The Court also held ‘in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration’ (ibid 2234-2235, para 52).

<sup>85</sup> *Cyprus v Turkey* ECHR 2001-IV para 78.

<sup>86</sup> References to ‘puppet entities’ – such as the South Africa’s Bantustans and the Turkish Republic of Northern Cyprus – as situations potentially covered by the notion of the *de facto* organ were made by some members of the International Law Commission during the *travaux*, see (1998) I YBILC 238-239 (for the intervention of Mr Dugard); and ibid 241 (for the intervention of Mr Economides). Special Rapporteur Crawford answered that ‘as in the case of Bantustans, when the entity did not acquire independence and remained a territorial governmental entity, the state which had established it remained responsible for its conduct’ (ibid 239).

<sup>87</sup> See the ICJ’s judgment in the *Bosnian Genocide* case (n 44) para 392 (‘... it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to

thors,<sup>88</sup> ‘strict control’ might find useful implementation precisely in the case of puppet governments, ‘lacking any real autonomy’,<sup>89</sup> that end up being an instrument of the occupant,<sup>90</sup> and thus a *de facto* organ.<sup>91</sup> Interestingly, another consequence of finding lack of independence of the Crimean authorities would be that the Treaty of Accession of the Republic of Crimea and Sebastopol to the Russian Federation, of 18 March 2014, should be considered not null and void, but inexistent for want of an essential element, i.e., the presence of two international subjects as contracting parties.

According to the customary definition of occupation ‘as reflected’<sup>92</sup> in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907, *territory* is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the *territory* where such authority has been established and can be exercised. In essence, the criterion around which this definition revolves, is that of effective control. It has been argued that this criterion is met only if three conditions are jointly satisfied, i.e., a sufficient unconsented-to military presence of foreign forces in the territory concerned (or at least, for some portions of the territory, ‘the capacity to send troops within a reasonable time to make the authority of the occupying power felt’),<sup>93</sup> the foreign forces’ ability to exercise authority over that territory

escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious’).

<sup>88</sup> See A De Hoog, ‘Article 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia’ [2001] 72 *British YB Intl L* 290; P Palchetti, *L’organo di fatto dello Stato nell’illecito internazionale* (Giuffrè 2007) 72 ff.

<sup>89</sup> See the ICJ’s judgment in the *Bosnian Genocide* case (n 44) para 394.

<sup>90</sup> *ibid.*

<sup>91</sup> However, it must be remembered that, according to the ICJ, occupation does not automatically entail responsibility for the acts of ‘other actors present in the occupied territory, including rebel groups acting *on their own account*’ (thus, the *Armed Activities* judgment (n 15) para 179), which, evidently, is not the case when they are *not* acting on their own account.

<sup>92</sup> See the ICJ’s Advisory Opinion on the *Legality of a Wall* (n 1) para 78, and the judgment on the *Armed Activities* case (n 15) para 172.

<sup>93</sup> *Prosecutor v Naletilic and Martinovic* (Judgment) IT-98-34-T (31 March 2003) para 217. According to the judgment rendered in Nuremberg by the US Military Tribunal in the matter of *The United States of America against Wilhelm List et al. (the Hostage Case)*, in *Law Reports of Trials of War Criminals* (vol. VIII, HMSO 1949) Case n 47, 56,



in lieu of the local government, and the related potential inability of the local government to exert its authority in the territory in question.<sup>94</sup> There seems to be little doubt about the possibility of meeting the first and the third of these criteria in the case of Crimea. The second, however, deserves some further reflection.

In fact, it is well known<sup>95</sup> that according to a first strand of case-law – including a somewhat ambiguous passage of the judgment rendered by an ICTY's Trial Chamber in the *Naletilic* case,<sup>96</sup> and the Supreme Court of Israel's relevant jurisprudence –<sup>97</sup> the regime of occupation would be triggered when a foreign power exercises *potential* control, in the sense that the occupier, having established its control on the *territory*, should at least find itself *in the position*, or *be able*, also to exercise governmental functions over the local population without necessarily having to do so.<sup>98</sup> On the other hand, the ICJ in its case-law seems to require evidence of an *actual* control,<sup>99</sup> in the sense that the occupier must have actually substituted its own authority for that of the sovereign government.<sup>100</sup> However, it should be recalled that also according to the ICJ, it is not relevant for the purposes of establishing a situation of occupation whether a foreign power has 'established a structured

it is not necessary that effective control extends to the entire territory for the purposes of establishing a situation of occupation, provided that foreign forces can assume physical control of any party of the territory in question, at any time they wish.

<sup>94</sup> T Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' [2012] 94 Intl Rev of the Red Cross 163.

<sup>95</sup> For a reconstruction of the relevant debate, see R Kolb, S Vité, *Le droit de l'occupation militaire* (Bruylant 2009) 137-150.

<sup>96</sup> *Prosecutor v Naletilic* (n 93) para 217.

<sup>97</sup> *A and B v State of Israel*, 11 June 2008, para 11 ('...The State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner', text available at <[www.cicr.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/fbcbdd16717ba7f99c1257544004afbc8?openDocument](http://www.cicr.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/fbcbdd16717ba7f99c1257544004afbc8?openDocument)>).

<sup>98</sup> In legal scholarship, see Y Shany, 'Faraway so Close: The Legal Status of Gaza after Israel's Disengagement' (2005) 8 YB Intl Humanitarian L 374 ff.; M Zwanenburg, 'The Law of Occupation Revisited: The Beginning of an Occupation' (2007) 10 YB Intl Humanitarian L 110; V Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Pedone 2010) 47 ff.; E Benvenisti, *The International Law of Occupation* (OUP 2012) 47-51.

<sup>99</sup> See G Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (The University of Minnesota Press 1957) 28.

<sup>100</sup> See the ICJ's judgment in the *Armed Activities* case (n 15) para 173.



military administration of the territory occupied' or not.<sup>101</sup> This opens up the possibility that all or part of the governmental functions be left by the foreign power in the hands of a local administration without this affecting the establishment of an occupation. To confirm this, according to Article 56 of Geneva Convention IV, the occupying power may resort to 'the cooperation of national and local authorities' in fulfilling its duties concerning hygiene and public health; while according to Article 64 of the same text 'the tribunals of the occupied territory shall continue to function...'. Indeed, the text of Article 42 of the Hague Regulations seems essentially to place emphasis on the *territorial* element of control, while the direct exercise of governmental functions seems to be more a *consequence* of the applicability of the occupation regime than a condition for its triggering. Moreover, occupation may also be 'indirect' or 'by proxy' – a category acknowledged in the case-law of both the ICTY,<sup>102</sup> and the ICJ –<sup>103</sup> provided that local authorities control and administer the area in question and that their behaviour is attributable to the foreign power. On the basis of which criterion? In *Blaškić*, a Trial Chamber of the ICTY resorted to the 'overall control' test.<sup>104</sup> In the subsequent *Naletilic* case, however, the same Chamber affirmed that the overall control test 'is not applicable to the determination of the existence of an occupation' and that for this purpose 'A further degree of control is required'.<sup>105</sup> This 'further' degree of control might well be represented by the strict control to which a 'puppet' local administration is at least presumed to be submitted to when established subsequent to foreign 'illegal intervention or to the threat or use of force'.<sup>106</sup> In this regard, it should also be recalled that under Article 2.2 common to the four Geneva Convention of 1949, occupation does not require the foreign power to have met armed resistance.

Finally, the issue of the *ratione materiae* applicability of the law of occupation is complicated not only by the different interpretations of Article 42 of the Hague Regulations, but also by the fact that it is still

<sup>101</sup> *ibid.*

<sup>102</sup> *Prosecutor v. Dusko Tadic*, Trial Chamber (Judgment) IT-94-1-T (7 May 1997) para 584. See also *Prosecutor v Blaskic* (Judgment) IT-95-14 (3 March 2000) para 149.

<sup>103</sup> *Armed Activities* (n 15) para 177.

<sup>104</sup> *Prosecutor v Blaskic* (Judgment) (n 102) para 149.

<sup>105</sup> *Prosecutor v Naletilic* (n 93) para 214.

<sup>106</sup> See Crawford, *The Creation* (n 83) 80, and Talmon, 'Who Is' (n 42) 530.





open to debate whether or not there are distinct thresholds for the Hague Regulations and Geneva Convention IV.<sup>107</sup> In this regard, for example, it has been maintained that the emergence of the obligation to comply with the relevant provisions of the Geneva Convention IV and Protocol Additional I would commence in the invasion phase and would not depend on whether or not an army *actually* exercises public authority on a foreign territory.<sup>108</sup>

Coming now to Ukraine, during the UN Security Council's and General Assembly's meetings devoted to the crisis in Crimea, apart from Ukraine itself<sup>109</sup> (whose Parliament also passed a bill on 15 April 2015 declaring the southern Crimea peninsula as a 'territory temporarily occupied by the Russian Federation'),<sup>110</sup> some States characterized the Russian military presence in the peninsula as 'occupation',<sup>111</sup> or 'control'.<sup>112</sup> In this regard, the taking over of strategic infrastructures and assets in Crimea (such as ports, airports, inland communication, administrative border posts between Crimea and the rest of Ukraine, transmissions, mass-media, and institutional buildings), together with the assumption of the task of ensuring the maintenance of law and order (as requested by the Crimean authorities), and the neutralization of the Ukrainian military forces present in the peninsula, seem to confirm that through its armed forces (under Article 43 of the 1977 Protocol I, it is immaterial whether they are regular or irregular, and also the fact of 'Wearing or not of a uniform or outfit is not a decisive criterion for the status')<sup>113</sup>, Russia acquired control *on the territory*, while probably –

<sup>107</sup> Supporting the idea of the existence of different thresholds, see Benvenisti (n 98) 51-53; Kolb, Vité (n 95) 137-149; Koutroulis (n 98) 44-74.

<sup>108</sup> Benvenisti (n 98) 52.

<sup>109</sup> UN Doc S/PV.7125 (n 7) 13.

<sup>110</sup> See <[http://news.xinhuanet.com/english/world/2014-04/15/c\\_133264948.htm](http://news.xinhuanet.com/english/world/2014-04/15/c_133264948.htm)> accessed 5 May 2014.

<sup>111</sup> See UN Doc S/PV.7125 (n 7) for the intervention of France (6). See also UNGA Verbatim Record (27 March 2014) UN Doc A/68/PV.80, for the intervention of Canada (9).

<sup>112</sup> See the intervention of the United Kingdom, UN Doc S/PV.7125 (n 7) 6. See also UN Doc S/PV.7134 (n 5), 7 ('Russian-occupied Crimea'); and UN Doc A/68/PV.80 (n 111), 12, for the intervention of Iceland ('Russian forces were in complete control of Crimea').

<sup>113</sup> See the Sandoz, Swinarski, Zimmermann (eds), *Commentary* (n 77) 512, *sub* art 43 of Protocol Additional I. See also T Pfanner, 'Military Uniforms and the Law of War' (2004) 86 *Intl Rev of the Red Cross* 93. Concerning the case of the Crimea, it



pending further information – leaving to the local Crimean authorities the exercise of the remaining governmental functions *vis-à-vis* the local population. In order to assess the relationship between these local authorities and Russia, it is of relevance that, as pointed out in the OHCHR Report, on 27 February 2014 ‘in a contested situation *including the presence of armed persons* around its building, the Parliament of the Autonomous Republic of Crimea dismissed the former local government and appointed Mr Sergey Aksyonov as “prime minister”,<sup>114</sup> and that on the same day it was also decided to hold a referendum on 25 May on the future status of Crimea (then brought forward to 16 March). These indications seem quite in line with the UK’s statement made in the UN Security Council that the local government had been ‘installed by an armed putsch accompanied by Russian military intervention’.<sup>115</sup> In fact, how else can one explain the sudden seizing of power in the Crimea on the part of the leader of a party which had received 4 per cent of the votes in the local elections?<sup>116</sup> In this regard, drawing on the relevant ICJ case-law,<sup>117</sup> it may be said that the fact that a local armed group, secessionist entity, or *de facto* authority has been conceived and created, or its political leaders have been installed, by a foreign power,<sup>118</sup> are all elements to be taken into account in order to assess whether these entities are ‘completely dependent on the outside power’ and thus nothing more ‘then its instrument or agent’.<sup>119</sup> This is also true when the local group receives multifarious forms of assistance from an outside power which are crucial to the pursuit of its activities (i.e., *sine qua* those activities would be discontinued).<sup>120</sup> At the end of the day, the crucial question is probably whether the local government

would be relevant to determine whether insignia can be considered as part of the uniform or not.

<sup>114</sup> See *Report on the Human Rights Situation in Ukraine* (n 32) para 19 (emphasis added).

<sup>115</sup> UN Doc S/PV.7134 (n 5), 7.

<sup>116</sup> Thus the intervention of France *ibid* 8.

<sup>117</sup> See the *Nicaragua* judgment (n 2) paras 93, 94, 108. In the *Armed Activities* case (n 15) para 160, the ICJ also examined the question whether the Congo Liberation Movement had been ‘created’ by Uganda.

<sup>118</sup> J Crawford, *State Responsibility. The General Part* (CUP 2013) 125.

<sup>119</sup> S Talmon, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 ICLQ 501.

<sup>120</sup> See again the ICJ’s *Nicaragua* judgment (n 2) paras 109-111.



would have ever been in the position to assume autonomous control over the territory without the Russian armed presence, and whether they could have ever been in the position to discontinue, or ask to discontinue, that armed presence. It is also to be remembered that ‘a de facto annexation...will also signify a state of complete dependence’.<sup>121</sup> In sum, the present case certainly fulfils the requirements of the potential control test, presumptively supplemented by an indirect exercise of authority through the acts of a local subordinate administration (provided that, and insofar as this local administration was actually exercising governmental functions in Crimea).

### 7. *An armed attack?*

To the best of our knowledge, the only reference to ‘the right of self-defense, acknowledged by the United Nations Charter (Article 51)’ made in the 20 days or so of the Crimean crisis, is contained in an address of the Verkhovna Rada (Parliament) of Ukraine to the United Nations, adopted on 13 March 2014.<sup>122</sup> However, in this address too, Russia was accused ‘of an unprovoked act of aggression’, rather than an openly stated ‘armed attack’. For the rest, these two words have remained absent from the debates held at the UN Security Council, nor do they appear to have been used in other contexts. Is one to believe that the difference between the two expressions was not clear (with aggression being obviously a notion broader than armed attack),<sup>123</sup> and that, for instance, the Ukrainian Parliament inadvertently used the wrong one, while it meant to refer to an armed attack? And should one think the same for the many times that the word ‘aggression’ is echoed in the hall of the Security Council, with no subsequent reference to Article 51 of the UN Charter and/or to the right of self-defence? And if not, why so cautious?

The question is also relevant because, according to some authors, many of the behaviors contained in Article 3 of Res 3314 (XXIX)

<sup>121</sup> Talmon, ‘Who Is’ (n 42) 500.

<sup>122</sup> Annex to UN Doc S/2014/186.

<sup>123</sup> J Combacau, ‘The Exception of Self-Defence in the United Nations Practice’ in Cassese (ed) *The Current Legal Regulation* (n 22) 22.



on the *Definition of Aggression* – and some of these acts, as we have seen, took place in the context of the Russian intervention in Crimea – may, under certain conditions (normally related to the concept of gravity, that despite not being specifically laid down in Article 51 of the UN Charter, may be considered as in-built in the notion of armed attack, as maintained by the ICJ's relevant case-law),<sup>124</sup> also configure the different hypothesis of an armed attack. This can be said of invasion (provided that the military actions are 'on a certain scale and have a major effect, and are thus not to be considered mere frontier incidents'),<sup>125</sup> naval blockade (but only 'if maintained effectively'),<sup>126</sup> and the breach of stationing agreements (if it 'has the effect of an actual invasion or occupation')<sup>127</sup>. In addition, as famously stated by the ICJ in the *Nicaragua* judgment,<sup>128</sup> also the sending of armed bands (or the substantial involvement therein) by a State is liable to amount to an armed attack provided that they are committing acts of armed force against another State, the gravity of which can be equated to the acts enlisted in Article 3 of Res 3314 (XXIX). So, again, why so much reluctance? Obviously, political reasons relating to the fear of triggering a wider military confrontation have played a major role. In this regard, it should be noted that no duty to automatically intervene in collective self-defense may be drawn from Article 4 of the 1994 Memorandum of Budapest, which provides only the commitment of the three guarantor powers (US, UK, and Russia) 'to seek immediate United Nations Security Council action to provide assistance to Ukraine...if Ukraine should become a victim of

<sup>124</sup> See the judgment rendered in the *Nicaragua* case (n 2) para 191 (arguably only with reference to the hypothesis of an indirect armed attack), subsequently reaffirmed with a more general scope in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [2003] ICJ Rep 161, para 51. The element of 'sufficient gravity' is mentioned also in art 2 of the *Definition of Aggression* contained in UNGA Res 3314 (XXIX). In that case, however, it is essentially related to the power of the Security Council to assess whether an aggression has been carried out for the purposes of art 39 of the UN Charter.

<sup>125</sup> G Nolte, A Randelzhofer, 'Article 51' in B Simma, D-E Khan, G Nolte, A Paulus (eds), *The Charter of the United Nations: A Commentary*, vol. II (3rd edn, OUP 2012) 1410.

<sup>126</sup> *ibid* 1410-1411. In this sense, see also E Sciso, 'L'aggressione indiretta nella definizione dell'Assemblea generale delle Nazioni Unite' (1983) 66 *Rivista di diritto internazionale* 275.

<sup>127</sup> Nolte, Randelzhofer (n 125) 1413; and Sciso, *L'aggressione* (n 126) 275.

<sup>128</sup> *Nicaragua* case (n 2) para 196.



an act of aggression or an object of a threat of aggression in which nuclear weapons are used’.

Is it also possible to think of legal reasons? In this respect, a non-trivial point has been raised by President Putin in the address he delivered at the Kremlin, on 18 March 2014 before, *inter alia*, State Duma deputies, and Federation Council members. In one passage, in fact, Putin stated ‘I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties’.<sup>129</sup> He also made reference to the absence of military confrontation in Crimea. Now, regardless of whether these statements are absolutely accurate (the media have reported news of some dead and some clashes),<sup>130</sup> it can be conceded – at least on the basis of the information available at the moment of writing – that the effects of the Russian military intervention, if measured in terms of human casualties and material destruction, have remained circumscribed. This is relevant because according to the line of thought espoused by some authors, the notion of armed attack would require ‘the infliction of substantial destruction’,<sup>131</sup> and thus ‘a considerable loss of life and extensive destruction of property’.<sup>132</sup> Does this authorize one to think that Crimea is the case that finally explains how to draw the line between an act of aggression and an armed attack? It might well be. However, in this regard, two comments are in order. Firstly, if one looks at international judicial practice, it may be noted that the threshold of gravity in-built in the notion of armed attack (which helps to differentiate it from uses of force of lesser gravity that do not authorize the invocation of self-defense under Article 51 of the UN Charter)<sup>133</sup> is not very high.<sup>134</sup> In the *Nicaragua* case, in order to give an example of what does *not* constitute an armed attack, the ICJ men-

<sup>129</sup> For the text, see Annex to UN Doc A/68/803-S/2014/202, 6.

<sup>130</sup> See ‘Crimea crisis: Fears of War Grow as Ukrainian is Killed at Military Base in Simferopol’, <[www.independent.co.uk/news/world/europe/crimea-crisis-fears-of-war-grow-after-ukrainian-officer-is-killed-at-military-base-in-simferopol-9200203.html](http://www.independent.co.uk/news/world/europe/crimea-crisis-fears-of-war-grow-after-ukrainian-officer-is-killed-at-military-base-in-simferopol-9200203.html)> accessed 8 May 2014.

<sup>131</sup> See A Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Sakkoulas 2000) 63-64.

<sup>132</sup> K Zemanek, ‘Armed Attack’, Max Planck Encyclopedia of Public International Law (OUP online edn) para 10.

<sup>133</sup> As affirmed by the ICJ in the *Nicaragua* case (n 2) para 191.

<sup>134</sup> J L Hargrove, ‘The Nicaragua Judgment and the Future of the Law of Force and Self-Defense’ (1987) 81 AJIL 139.



tioned the case of a frontier incident,<sup>135</sup> an example substantially reiterated by the *Eritrea Ethiopia Claims Commission*. In this latter case, however, the Commission considered that ‘localized border encounters between small infantry units, *even those involving the loss of life*, do not constitute an armed attack’.<sup>136</sup> Apparently, then, the loss of life seems not to be the decisive element in determining the recurrence or not of an armed attack. In the *Oil Platforms* case, the ICJ did not exclude ‘the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence”’.<sup>137</sup> In the *Diplomatic and Consular Staff* judgment, the ICJ went so far as to speak of ‘armed attack’ (though seemingly not for the purpose of self-defence) with reference to the seizing of the American embassy in Tehran by Islamic militants on 9 November 1979.<sup>138</sup>

Secondly, the possibility that a State be held responsible for an armed attack even without opening fire is not totally ruled out in legal scholarship. For instance, according to Dinstein, ‘In many instances, the opening of fire is an unreliable test of responsibility for an armed attack... An invasion constitutes the foremost case of aggression’<sup>139</sup> and can start without the firing of weapons. Accordingly ‘When a country sends an armed formation across an international frontier, without the consent of the local government, it must be deemed to have triggered an armed attack’.<sup>140</sup> Another example, wholly relevant to the present case, is armed blockade. For some, it could constitute an armed attack even prior to the firing of any weapons.<sup>141</sup> A further, indirect, element of confirmation of this view – although one should always be wary of using rules of *ius in bello* for the purposes of *ius ad bellum* – might perhaps be inferred from Article 2 (2) common to the Four Geneva Conventions of 1949, provided that it is interpreted in the sense that there can be

<sup>135</sup> *Nicaragua* case (n 2) para 195.

<sup>136</sup> Partial Award-*Jus Ad Bellum*, Ethiopia’s claims 1-8, *Federal Democratic Republic of Ethiopia v State of Eritrea*, 19 December 2005, 135 Intl L Rep 485 (emphasis added).

<sup>137</sup> *Oil Platforms* case (n 124) para 72.

<sup>138</sup> *United States Diplomatic and Consular Staff in Teberan (United States of America v Iran)* [1980] ICJ Rep 3, para 57.

<sup>139</sup> Dinstein (n 21) 188-189. See also J Paust, ‘Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self-Defense?’ (2014) 45 *Georgetown J Intl L* 430-431.

<sup>140</sup> Dinstein (n 21) 189.

<sup>141</sup> Cf Nolte, *Randelzhofer* (n 125) 1411.



armed conflict resulting in occupation also without hostilities or armed resistance, as it would seem to be suggested by a passage from the ICJ's Advisory Opinion in the *Legality of the Wall* case,<sup>142</sup> and has been argued, more or less directly, by some authors.<sup>143</sup>

As a consequence, an armed territorial intrusion, if connected with other acts of aggression and aimed at annexing part of another States' territory, may be held to produce (or is liable to produce) *per se* consequences which might be deemed sufficiently serious as to meet the threshold of gravity in-built in the notion of armed attack, even when no considerable destruction or high number of human casualties has been produced. This could be true *a fortiori* when annexation has been accomplished,<sup>144</sup> and leads us to raise one last question: should Ukraine, in the future, hypothetically decide to resort to force in order to take again possession of the territory illegally annexed by Russia, could it be entitled to invoke self-defence as a justification? Also in this case, a balance between conflicting considerations is necessary. On the one hand, with time passing and the consolidation of the Russian occupation, the requisite of immediacy in the armed reaction would be missing. On the other hand, a completely negative response would ultimately justify the *fait accompli* forcefully imposed by the aggressor. A balanced solution, as pointed out by one author,<sup>145</sup> necessarily requires the prior exhaustion of the peaceful means of dispute settlement, a condition which should be fulfilled also in order to meet the test of necessity. However, the fact remains that once the Security Council has been blocked by the veto of one of its Permanent Members – as happened in the situation under review –<sup>146</sup> and the use of force in self-defence is not deemed an option (or is not considered legally justified), the only real reaction that

<sup>142</sup> *Legality of a Wall* (n 1) para 95, where it is said that art 2 is 'directed simply to making it clear that, even if occupation effected *during the conflict* met no armed resistance, the Convention is applicable' (emphasis added).

<sup>143</sup> See Koutroulis (n 98) 26-29 (citing as support also Brownlie's *First Report on the Effects of Armed Conflicts on Treaties*, UN Doc A/CN.4/552 (21 April 2005) para 19); and, more between the lines, Kolb, Vité (n 95) 176. *Contra* A Roberts, 'What is a Military Occupation?' (1984) 55 *British YB Intl L* 274-276 ('forcible peacetime occupation').

<sup>144</sup> See P Gargiulo, 'Usò della forza (diritto internazionale)', *Enciclopedia del diritto Annali V* (Giuffrè 2012) 1393.

<sup>145</sup> Ronzitti, *Diritto* (n 23) 41.

<sup>146</sup> UN Doc. S/PV.7138 (n 30) 2.

the international community can put in place to reverse (or at least to create the conditions to reverse) a fact which results from a ‘serious’ (as aggression by forced annexation inherently is)<sup>147</sup> breach of an obligation arising under a peremptory norm of general international law (which is certainly the case of the prohibition of aggression) consists in the *effective* observance of the general obligation of non-recognition of the situation created by such a serious breach, i.e., ‘the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality...a continuous challenge to a legal wrong’.<sup>148</sup> This obligation was recalled by the UN General Assembly in its Res 68/262 on the *Territorial Integrity of Ukraine*.

<sup>147</sup> See the International Law Commission’s commentary to art 40 ARSIWA (n 36), 285, para 8. In legal scholarship, see P Gaeta, ‘The Character of the Breach’ in J Crawford, A Pellet, S Olleson (eds) *The Law* (n 38) 425.

<sup>148</sup> H Lauterpacht, *Recognition in International Law* (CUP 1947) 431.

