

## The use of force in international law- justification or abuse?

**PhD. candidate Elena LAZĂR**

University of Bucharest, Faculty of Law, Romania

*lazar\_elena2@yahoo.com*

### **Abstract:**

*This article aims to treat one of the most controversial and debated subjects in the international community of states- the use of force- both from the theoretical and practical point of view. Thus the study is divided in two parts, the first one approaching the international instruments and the customary law, while the second part is presenting the situation in Ukraine with regard to this topic. The question we are trying to provide an answer to, is- when is the use of force justified and when it constitutes an abuse, how do we draw the line?*

**Keywords:** *use of force, self-defence, UN Charter, humanitarian intervention, Ukraine;*

### **Introduction**

Nowadays the use of force is an extremely debated subject. States tend to resort to the use of force in different situations invoking various reasons that most often prove themselves to lead to abuses. It is thus extremely difficult to draw the line between justification and abuse. When is the use of force justified and when it's not? This is the question we will try to answer through this article.

The use of force by states is controlled by both customary international law and by treaty law. International law is created through the consent of states. States express this consent by two basic methods: treaties and custom. Treaties are written agreements between states; in effect, they are the international equivalent of contracts. Customary international law is different. Unlike treaties, customary international law is not created by what states put down in writing but, rather, by what states do in practice.

To begin with, we will first approach the provisions of treaties and the international case law, to further continue with the presentation of the situation in Ukraine, from the point of view of the use of force.

### **A. The use of force –provisions of international treaties and applicable case law**

The United Nations Charter states in its Article 2(4) that “[a]ll 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”. In essence, the provision refers to the general rule that the threat or use of force is prohibited in international law.[1] Although the prohibition does not expressly give any reference to what constitutes force, some of the elements of the rule could help in identifying what is understood by force, taking into account the purpose of its use: against the territorial integrity of states, their political independence or in any manner that is inconsistent with the purposes of the United Nations.

Other provisions of the charter could also assist in determining what is covered by force. For example, the preamble of the United Nations Charter or its Article 51 specifically refer to “armed force” (emphasis added), which could lead to the conclusion that the element of force necessarily includes the use of arms.

Treaties previous to the United Nations Charter have been drafted around the same central purpose, that of creating a general rule on the prohibition on the threat or use of force, without leaving many clues as to what is exactly meant by “force” [2].

United Nations General Assembly Resolution 2625(XXV) [3], also known as the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations” recalls in its preamble “the duty of States to refrain in their international relations from military, political, economic or any other form of coercion” (emphasis added). Although this provision may seem to extend the meaning of force to other forms of “coercion”, it is in fact just a substantiation of the principle that states have a duty not to intervene in matters within the domestic jurisdiction of any State. This is made clear by the travaux préparatoires of the Resolution, when it was made clear that force does not “include all forms of pressure, including those of a political or economic character, which have the effect of threatening the territorial integrity or political independence of any state” [4].

Despite the above conclusion, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations does provide a number of details on what is prohibited under the “The principle that States 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”.

Another relevant instrument frequently used by the international community [5] in relation to the use of force is United Nations General Assembly Resolution 3314(XXIX) on the Definition of Aggression [6].

The definition is very much inspired from the two Conventions for the Definition of Aggression, however, the novelty resides in that Resolution 3314 focuses on the acts that constitute aggression rather than the perpetrator of the acts.

As to the case law, we appreciate that the most important decision on the use of force is represented by the Case concerning Military and Paramilitary Activities in and against Nicaragua, of the International Court of Justice.

Without going into detail on the various elements considered by the Court in relation to the prohibition and exceptions to the prohibition on the threat or use of force, the Court noted that “the laying of mines in Nicaraguan internal or territorial waters” [7] constitutes a breach of the principle, therefore laying mines can be considered a use of force.

The Court also concluded that the United States of America had “committed a prima facie violation of that principle by its assistance to the contras in Nicaragua, by “organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State”, and “participating in acts of civil strife . . . in another State”, in the terms of General Assembly resolution 2625 (XXV)” [8]. The Court explained its assertion, showing that there was a breach of the principle as far as the assistance took the form of “arming and training of the contras”, while the supply of funds was not [9].

Another relevant jurisprudence worth mentioning here is represented by the conclusion taken by the International Criminal Tribunal for the former Yugoslavia. In Prosecutor v. Duško Tadić, the Appeals Chamber considered that “there undisputedly emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts”[10] . This is relevant in relation to possible assertions that “force” necessarily implies a kinetic effect. The Court’s most important decision regarding the status of threats in international law is the Nuclear Weapons advisory opinion of 1996, in which it considered whether the threat or use of nuclear weapons was “permitted” under international law. The ICJ

recognized that “states sometimes signal that they possess certain weapons to use in self-defense against any state violating their territorial integrity or political independence [11]”. One issue before the Court, therefore, was whether such a “signaled intention” constituted a threat within the ambit of Article 2(4): Whether a signaled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4 . . . [equally] if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter [12]. This statement clearly establishes that a threat to use force can constitute a lawful action, and, moreover, that the lawfulness of any threat of force is contingent upon the prospective lawfulness of the force threatened.

The use of force also poses problems nowadays, states trying to justify it by using different reasons such as self-defence or invitation to intervene. This was the case in Ukraine, in Crimea.

### **B. The use of force in Ukraine by the Russian Federation**

On the 1st of March 2013 the President of the Russian Federation has submitted an appeal to the Council of the Russian Federation for authorization to use armed force in connection with the extraordinary situation that has developed in Ukraine and the threat to citizens of the Russian Federation. Thus, the personnel of the military contingent of the Russian Federation Armed Forces deployed on the territory of Ukraine. The same day the Council granted authorization to the Russian President to deploy forces in the Ukraine. In addition we will discuss two possibilities mentioned above that could be invoked to justify Russian deployment of force despite of the general prohibition to use force under Article 2 (4) of the Charter.

#### **Self-defense exception according to the UN Charter**

It is more than obvious that Russia lacks a UN Security Council mandate for her operations, but we ask ourselves if any of the other exceptions to the general prohibition on the use of force apply in this case.

One of the recognized exceptions to the prohibition of the use of force is the Art. 51 of the Charter, allowing a State to use force in response to an armed attack. “Nothing

in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”.

Ukraine considered that Russian actions were acts of aggression against the Ukrainian state, a serious violation of international law, sovereignty and territorial integrity of Ukraine and an impairment of peace and stability in the region. In support of the above, Ukraine argued that the Russian Federation had not complied with its obligations under the Memorandum of Budapest, to refrain from the threat or use of force to undermine the territorial integrity of Ukraine and that in addition it breached the fundamental principles of the UN Charter.

The first question that has to be assessed is whether an armed attack has occurred against Russia. What is clear is that there has been no deployment of Ukrainian troops whatsoever on Russian territory. However, the Russian Federation seems to seek to legitimize its authorization of force on the concept of self-defense, invoking that Russian military personnel and Russian citizens on the Crimea were threatened. The legal question here is whether a state may refer to the concept of self-defense in order to protect its citizens and military personnel outside its proper territory.

The UNGA Resolution 3314 [13] on the Definition of Aggression that we mentioned earlier in our presentation, shows that the concept of armed attack is not exclusively linked to the territory of the attacked State. Art. 1(d) of UNGA Res. 3314 reveals that a state can be object of an armed attack occurring outside its proper territory – i.e. an ‘extra-territorial armed attack’, including as an ‘act of aggression’ “[a]n attack by the armed forces of a State on land, sea or air forces, or marine and air fleets of another State”.

Russia as the State invoking the right of self-defense bears the burden of proof here – as was rightly stated in the Oil Platform Case (para. 57) to show that Ukrainian acts against Russian military personnel are of such a gravity to constitute an ‘armed attack’. Bearing in mind that there are currently no reports whatsoever that the Russian fleet stationed in Crimea had been the object violent acts before the President of the Russian Federation was authorized to deploy force in the Ukraine [14], we appreciate that an armed attack against Russian military personnel in Crimea did not occur and cannot be invoked in order to justify the Russian resort to armed force.

Russia seems to be more concerned, however, about the safety of its citizens in Crimea. It is disputed in the international community whether there exists a right to invoke the concept of an armed attack regarding the protection of nationals residing extra-territorially. Sir Humphrey Waldock in his *General Course at The Hague* from 1952 on 'The Regulation of the Use of Force by Individual States in International Law' stated that States had a right to use force to protect their citizens abroad under three conditions: "There must be (1) an imminent threat of injury to nationals, (2) a failure or an inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury".

We strongly believe that the existence of such a right since the security of the attacked state is not threatened when its citizens are attacked outside its borders, would have the potential of 'blurring [...] any contours of the right of self-defense [15]' and would lead to similar state practice. Furthermore, Russian actions would also have to comply with the requirements of necessity and proportionality in order to be lawful under Article 51 of the Charter. One fails to understand, how actions like the surrounding of Ukrainian military bases in Crimea, should contribute protecting Russian nationals, given that there are no claims that they have been threatened by Ukrainian forces. Furthermore we find it important here to mention that the Russian troops are not merely evacuating Russian nationals back to Russia.

## **2. The exception of intervention upon Invitation**

Another exception to the general prohibition of the use of force in international law is the so called 'intervention upon invitation'. What does 'intervention upon invitation' mean? This expression is mostly used as a shorthand for military intervention by foreign troops in an internal armed conflict at the invitation of the government of the State concerned.

Thus we ask ourselves if the statement of the new Prime Minister of the autonomous region of Crimea requesting Russian assistance in order to restore peace and calm, could legitimize Russian action. We will therefore discuss whether Mr. Yanukovich or the Prime Minister of Crimea could validly invite Russia to intervene in the Ukraine and thereby justify Russian use of force.

Russian Federation stated that the legitimate authorities of the Autonomous Republic of Crimea, and more specifically the Prime Minister M. Aksyonov was the one who asked Russia to help restore peace in the Crimea, and such assistance is considered to be in conformity with Russian legislation, having view of the extraordinary situation in Ukraine and threats against the life of Russian citizens against the Russian fleet in the Black Sea. Russian Federation stressed out that his actions were taken only to protect citizens and that they did nothing else than to protect the most important human right, the right to life.

The ICJ has in the Nicaragua case also pointed out the importance of governmental consent to intervention by noting: “As the Court has stated, the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State – supposing such a request to have actually been made by an opposition to the régime in Nicaragua in this instance.” (ICJ Nicaragua, para. 246)

Thus, the question at hand is whether Mr. Yanukovich still represents the Ukrainian government, given that the Ukrainian parliament adopted a resolution on the 22nd of February 2014 requesting Mr. Yanukovich to resign and elected Mr. Turchinov as his successor the next day. Despite this fact, the former President Yanukovych still claimed to be president of Ukraine and he has indeed issued an invitation. But as an ousted president by popular demand and therefore currently not in control of the government, his invitation should not be recognized by international law as a valid invitation. In addition, the fact that the new government may have come to power in violation of the Ukrainian constitution does not suffice to have the ousted president authorize an intervention. We thus believe one might simply deny the validity of Mr. Yanukovich's consent for the lack of effective control of the situation in the Ukraine. Effective authority would seem to be of primordial importance in determining who is entitled to validly speak out an invitation [16].

As for the Prime Minister of Crimea, the author of an invitation to intervene must be the highest state organ available. Or in this situation we cannot see how the head of a federal entity of a State could issue such a declaration. A valid invitation should have

emanated from the central government. Thus Russia cannot claim that use of force in Crimea can be justified by the invitation of the local government.

Therefore, we conclude that the Russian use of force in Crimea is illegal under international law. Even if we were to consider a Humanitarian Intervention, whose recognition by positive International Law remains doubtful [17], this would not change this result because Russia has so far not invoked this concept. In addition this only applies in situations where a civil population is subjected to crimes against humanity or genocide that a third state might be entitled to act on the behalf of the civilian population. In this case there is no evidence that such acts having been carried out against the Russian population in Crimea or elsewhere on the Ukrainian territory.

### **Conclusions**

It results from those presented above that at the level of the international community there is a general prohibition of the use of force by different instruments binding or not, and like every rule has its exceptions, there are also some exceptions that allow states to justify the use of force, such as self-defense, invitation to intervene and the humanitarian intervention. The problem is that most of the times states tend to abuse and use these exceptions in unjustified situations and for the wrong reasons, like it was the case in the most recent intervention of Russia in Ukraine, which of course proved to be unlawful, taking into consideration that both the international instruments and customary law do not draw a precise line with regard to this aspect.

As for the annexation of the Crimea by the Russian Federation, we believe that the Declaration of Independence of the Republic of Crimea was the direct consequence of the use of force or threat of use of force by the Russian Federation against Ukraine and the propaganda campaign led by Russian Federation to discredit the legitimate authorities of Ukraine and to create false public opinion that Russian intervention is an operation designed to contribute to peace in the region and to protect citizens like claimed.

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[9] *Ibidem*

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