

# UKRAINE: ANALYZING THE REVOLUTION AND NATO ACTION IN LIGHT OF THE U.N. CHARTER AND *NICARAGUA*

## ABSTRACT

*Ukraine has been in a precarious position since its independence in 1991. It has been in the midst of an identity crisis. The eastern part of the country is partial to Russia, while the western half of the country prefers to be politically aligned with Europe. Since 2014, Ukraine has been wrought with a political coup, civil unrest in the Donbass region, and subject to Russian aggression. The current Ukrainian government established in wake of the coup is attempting to quell the uprisings from dissenters and Russian forces in the eastern part of the country, and NATO has diplomatically supported the current Ukrainian government. However, Ukraine is not a member of NATO, thus the country cannot avail itself of collective defense as set out in Article 5 of the NATO Treaty. This Comment argues that any assistance from NATO countries to the current Ukrainian government would violate the International Court of Justice's decision in *Nicaragua v. United States* because the current government is illegitimate.*

## INTRODUCTION

Ukraine is in the midst of a tug of war and has been since 1991. European influence pulls the country in one direction, while Russian influence pulls it in the opposite direction. Throughout 2014, Ukraine was divided by political revolution and was placed under political and military pressure by Russia. Russia has annexed the Crimean peninsula and there is some evidence that it has fomented rebellion in eastern Ukraine.<sup>1</sup> These events have resulted in the highest tensions between Russia and the West since the height of the Cold War. The North Atlantic Treaty Organization (NATO), one of the most formidable collective defense organizations in the world, has held special sessions addressing Ukraine, fearful of Russia's advancing and escalating aggression toward NATO members, and the United States has decided to place embargos on Russia.<sup>2</sup>

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> See, e.g., Doug Schoen, *New U.S. Sanctions on Russia Go Further Than Ever Before*, FORBES (July 17, 2014), <http://www.forbes.com/sites/dougschoen/2014/07/17/new-us-sanctions-against-russia-go-further-than-ever->

Furthermore, the United States and other NATO members have supplied Ukraine with weapons in an effort to thwart Russia's advances.<sup>3</sup> Article 5 of the North Atlantic Treaty permits NATO to engage in collective military defense on behalf of its members, but since Ukraine is not a member, NATO may not intervene militarily on behalf of the country.<sup>4</sup> Ukraine is already internally divided as a result of former President Viktor Yanukovich's ouster and the subsequent establishment of a new governmental regime.<sup>5</sup> Additionally, Russia's incursions and annexation of Ukrainian territory marked the first time since World War II that a country has invaded sovereign territory in Eastern Europe.<sup>6</sup> NATO allies are fearful that Russian aggression will ultimately divide the Ukrainian state, resulting in a revival of Cold War tensions. NATO is hesitant to sit on its hands as Russia encroaches on its members, and it will look to support Ukraine as best it can. The world is watching NATO and Russia, as it is the next great geopolitical chess game to invoke the legal limits of a collective defense organization's resort to force. This is the situational crisis the West never hoped to see.

Prior to examining the legal ramifications of this crisis, it is imperative to set the historical and political stage. To approach the current Ukrainian crisis, Ukraine-Russian relations, and the interplay of NATO action, Part I of this Comment begins with a historical analysis of Ukraine and its connection to Russia. In order to fully understand where we are and where we are going, we must understand how we got here. While that expression is somewhat cliché, it exhibits unwavering truth. Part II of this Comment provides a brief historical analysis that will elucidate why Russians feel so strongly about Ukraine and portrays how the events that unfolded over the past several years are symptoms of deeper historical tensions between the two countries. After examining Ukraine's historical inception, this Comment analyzes the events that unfolded in Ukraine over the final months of 2013 and all of 2014.

Part III of this Comment examines what NATO countries may do to defend a non-NATO country, especially when its fall is of crucial consequence to

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before/; see also *NATO Summit to Highlight Unity Against Russia*, AL JAZEERA (Sept. 4, 2014), <http://www.aljazeera.com/news/europe/2014/09/nato-summit-highlight-unity-against-russia-20149445948732370.html>.

<sup>3</sup> *NATO Members 'start arms deliveries to Ukraine'*, BBC NEWS (Sept. 14, 2014), <http://www.bbc.com/news/world-europe-29198497>.

<sup>4</sup> North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> Will Englund, *Kremlin Says Crimea Is Now Officially Part of Russia After Treaty Signing, Putin Speech*, WASH. POST (Mar. 18, 2014), [http://www.washingtonpost.com/world/russia-putin-prepares-to-annex-crimea/2014/03/18/933183b2-654e-45ce-920e-4d18c0ffec73\\_story.html](http://www.washingtonpost.com/world/russia-putin-prepares-to-annex-crimea/2014/03/18/933183b2-654e-45ce-920e-4d18c0ffec73_story.html).

nearby NATO countries. In other words, how much may NATO intervene on behalf of a non-NATO country? Part IV of this Comment examines the various legal issues involved in this crisis. It first examines the justifications for the use of force and then analyzes NATO's actions and purported justifications with respect to the use of force in Kosovo in 1999. It then examines whether the new Ukrainian government, established in the wake of the 2014 revolution, is legitimate.

The question of legitimacy has profound implications for whether NATO countries may provide the current Ukrainian government with weapons to secure its power and legitimacy over the eastern part of the country.<sup>7</sup> If the government is not legitimate, then the United States and other NATO countries, in the contribution of arms and training of soldiers to and for the current Ukrainian government, would be in violation of the International Court of Justice's (ICJ) decision in *Nicaragua v. United States*.<sup>8</sup> Part V of this Comment examines whether eastern Ukraine is being denied the right of self-determination and can thus engage in external self-determination to unite with Russia, a country with which it has closer ethnic, cultural, and political ties.

As a general proposition, *Nicaragua* stipulates that it is illegal for a state to intervene on behalf of a rebel group for the purpose of overthrowing a legitimate state government unless it is a war of national liberation.<sup>9</sup> A war of national liberation is generally seen as legitimate because it is closely connected to the right of self-determination.<sup>10</sup> In terms of Ukraine, the issue is whether the United States and other NATO countries may be violating *Nicaragua* by intervening on behalf of a government that is not legitimate. The current Ukrainian government is not what one would usually think of as rebels, but it was placed into power as a result of a revolution. Western Ukrainians vehemently rebelled against the prior government's political decisions, and the protests quickly developed into revolution and ouster of the President.<sup>11</sup> There was an immediate change of power with little regard for due process, and there

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<sup>7</sup> See generally *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14 (June 27).

<sup>8</sup> See *id.* ¶¶ 239–45 (explaining that the United States intended to overthrow the government of Nicaragua by way of supporting and assisting rebels whose purpose was to overthrow its government, which amounts to an intervention that constitutes a clear breach of the principle of non-intervention firmly rooted in international law).

<sup>9</sup> See *id.*; see also PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 336 (Routledge, 7th ed. 1997).

<sup>10</sup> *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 239–45.

<sup>11</sup> See *infra* Part II.A.

was little justification for a revolution of such scale.<sup>12</sup> The current government is trying to take control over the entirety of the country, mainly through suppressing dissenters in eastern Ukraine.<sup>13</sup> Although the current government is already in power and NATO did not assist in overthrowing the prior regime, NATO is attempting to help assert and establish the current government's legitimacy. In short, the West wants this current government in power for political reasons and weapons are being given to suppress the protesters in eastern Ukraine.

## I. HISTORICAL, CULTURAL, AND POLITICAL DEVELOPMENT OF UKRAINE

### A. *Historical Development of Ukraine*

The Ukrainian Supreme Soviet declared Ukraine to be independent from the Soviet Union on August 24, 1991, by a vote of 346 to one.<sup>14</sup> The Declaration of Independence of Ukraine was put to a referendum a few months later and received overwhelming support.<sup>15</sup> Later that same month, the Soviet Union officially dissolved, and Ukraine became an independent state.<sup>16</sup> Previously, Ukraine had asserted independence during the Ukrainian Revolution in 1917,<sup>17</sup> but that was short-lived because the country was overtaken by the Soviet Union in 1920.<sup>18</sup>

The Treaty of Riga, formalized in March 1921, officially established the Ukrainian Socialist Soviet Republic ("Uk SSR"),<sup>19</sup> but also conceded much of current day western Ukraine (western Volhynia) to Poland.<sup>20</sup> During World War II, Soviet forces invaded Poland and annexed western Ukraine in an attempt to reunify the Soviet satellite country.<sup>21</sup> After World War II, the Soviet

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<sup>12</sup> See *infra* Part IV.D.

<sup>13</sup> See *infra* Part II.D.

<sup>14</sup> PAUL KUBICEK, *THE HISTORY OF UKRAINE* 136 (2008).

<sup>15</sup> SERHY YEKELCHYK, *UKRAINE: BIRTH OF A MODERN NATION* 191 (2007). The Declaration was put to a referendum on December 1, 1991, and of the 84.2% that voted, 90.3% voted in favor of independence. *Id.*

<sup>16</sup> KUBICEK, *supra* note 14, at 138.

<sup>17</sup> YEKELCHYK, *supra* note 15, at 67–68 (explaining that the collapse of the Russian and Austro-Hungarian empires and the political events culminating after World War I created an opportunity for Ukrainian Nationalists to establish Ukraine as a nation).

<sup>18</sup> KUBICEK, *supra* note 14, at 90 (explaining that the Bolsheviks, in conjunction with Russian support, took over much of Ukraine and established Russian rule); see also YEKELCHYK, *supra* note 14, at 83 (explaining the collapse of the short lived independent Ukraine in 1920).

<sup>19</sup> KUBICEK, *supra* note 14, at 98.

<sup>20</sup> YEKELCHYK, *supra* note 15, at 83.

<sup>21</sup> KUBICEK, *supra* note 14, at 107.

Union seized more land from Poland, Romania, and Czechoslovakia, and annexed it to the Uk SSR.<sup>22</sup> From the independence movement that unfolded in 1991, it is evident the idea of an independent Ukraine was never extinct, but only dormant.

### *B. Cultural Underpinnings of Ukraine*

Russia has always had an interest in and felt a strong connection to Ukraine. Russian tsars viewed Ukraine as subordinate to Russian rule to such an extent that they often referred to Ukrainians as “Little Russians.”<sup>23</sup> Much of Russia’s fondness for Ukraine stems from both historical notions<sup>24</sup> and the fact that they are closely related culturally and linguistically.<sup>25</sup> Additionally, eastern Ukraine has abundant resources for the steel and agriculture industries,<sup>26</sup> providing an economic incentive for Russia to seize control of the country. Ukraine is a diverse country, with over one hundred different national or ethnic groups.<sup>27</sup> Ethnic Ukrainians make up approximately 78.8% of the population, but there is a sizeable minority of 17.3% ethnic Russians.<sup>28</sup> Furthermore, while the official language of the country is Ukrainian, with 67.5% claiming it as their native language, nearly thirty percent of the population claims Russian as their native language.<sup>29</sup> As a result of their common heritage, history, and proximity, the political affairs of Ukraine are inevitably intertwined with Russian interests.

Eastern Ukraine contains more ethnic Russians and therefore has a more pro-Russian or Eastern sentiment.<sup>30</sup> Western Ukraine is more interested in

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<sup>22</sup> *Id.* at 111.

<sup>23</sup> *Id.* at 45.

<sup>24</sup> Theunis Bates, *Ukraine’s Fraught Relationship With Russia: A Brief History*, WEEK (Mar. 8, 2014), <http://theweek.com/article/index/257616/ukraines-fraught-relationship-with-russia-a-brief-history> (explaining that both Russia and Ukraine trace their roots back to the founding of the first eastern Slavic state, the Kievan Rus, which existed from the ninth to the thirteenth centuries); *see also* KUBICEK, *supra* note 14, at 27–29 (examining the various Russian and Ukrainian claims to the heritage of the Kievan Rus and how these different claims led to the ideas of Russians seeing Ukraine as theirs and Ukrainians seeing themselves as having an independent ethnic identity, separate from that of Russians).

<sup>25</sup> KUBICEK, *supra* note 14, at 45.

<sup>26</sup> Ed Dolan, *Ukraine’s Heavy Industry: Glittering Prize or White Elephant?*, ECONOMIC MONITOR: ED DOLAN’S ECON BLOG (May 5, 2014), <http://www.economonitor.com/dolanecon/2014/05/05/ukraines-heavy-industry-glittering-prize-or-white-elephant/>.

<sup>27</sup> KUBICEK, *supra* note 14, at 4.

<sup>28</sup> *The World Factbook: Ukraine*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/up.html> (last updated June 23, 2014).

<sup>29</sup> KUBICEK, *supra* note 14, at 5.

<sup>30</sup> *Id.* at 8.

Westernization and favors closer ties to the European Union (EU), NATO, and the United States.<sup>31</sup> Furthermore, the percentage of Ukrainians who identify Russian as their primary language is starkly more dramatic in the eastern part of the country when compared to the western part of the country.<sup>32</sup> The eastern provinces of Ukraine have a much higher percentage of people who identify Russian as their primary language as compared to the western part of the country.<sup>33</sup> For example in the eastern provinces, the numbers are often in the upper sixtieth and seventieth percentiles, while the numbers in most of the western provinces fall well below ten percent.<sup>34</sup> This divide results in the country having certain political alliances based upon ethnicity.

### C. *Political Developments in Ukraine*

In November 2004, Viktor Yanukovich ran for President against Viktor Yushchenko in a run-off election.<sup>35</sup> Exit polls indicated that Yushchenko had a sizeable lead on Yanukovich, and he was expected to win the election.<sup>36</sup> However, the election results showed that Yanukovich had won the majority of the votes.<sup>37</sup> Ukrainians began accusing Yanukovich of election fraud.<sup>38</sup> Polls in Donetsk, an eastern district of Ukraine, reported one hundred percent voter turnout, and was just one of the many districts that had inflated turnout rates.<sup>39</sup> More interestingly, Russian President Vladimir Putin congratulated Yanukovich on his victory two days before the election results were released.<sup>40</sup>

Thousands of Ukrainians began to rally in Independence Square (“the Maidan”) to protest the fraudulent election results.<sup>41</sup> In December 2004, the Ukrainian Supreme Court demanded a recount, and in January 2005, the

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<sup>31</sup> *Id.*

<sup>32</sup> See Amy Mantravadi, *The Ukraine Crisis Explained in a Series of Maps*, CHURCH & STATE (Mar. 6, 2014), <http://amymantravadi.com/2014/03/06/ukraine-crisis-explained-series-maps/>.

<sup>33</sup> See *id.*

<sup>34</sup> *Id.*

<sup>35</sup> KUBICEK, *supra* note 14, at 169.

<sup>36</sup> *Id.*

<sup>37</sup> YEKELCHYK, *supra* note 15, at 216. Yanukovich had 49.5% of the vote while Yushchenko had 46.9%. *Id.*

<sup>38</sup> *Id.* at 217 (explaining that Yushchenko and his election advisors had evidence of phone calls made and received by Yanukovich’s election advisors revealing election fraud).

<sup>39</sup> KUBICEK, *supra* note 14, at 169.

<sup>40</sup> *Id.* at 170.

<sup>41</sup> YEKELCHYK, *supra* note 15, at 217.

Central Electoral Commission declared Yuschenko the victor.<sup>42</sup> This would later become known as the Orange Revolution.<sup>43</sup> It seemed to have tainted Yanukovich's political career in Ukraine, but there was another election opportunity in 2010.

Given the historical development and cultural underpinnings of Ukraine, the presidential election in 2010 was a pivotal point in the country's history and set the stage for the 2014 Ukrainian revolution. In February 2010, Viktor Yanukovich was elected the President of Ukraine, winning 48.95% of the vote.<sup>44</sup> Yanukovich's victory was surprising, given his former history of suppressing the democratic process in Ukraine. Yanukovich was widely despised in western Ukraine, but had strong support in his native Russian-speaking eastern and southern Ukraine.<sup>45</sup> His presidential platform garnished strong support from those parts of the country because they favor closer political ties with Russia.<sup>46</sup> The 2010 election portrayed Ukraine's ethnic regional divide in political terms and only reaffirmed the notion that the country has a split political identity.<sup>47</sup> The majority of Yanukovich's backers were from eastern Ukraine.<sup>48</sup> The election of Yanukovich, and more specifically, his political favor toward Russia, was a major catalyst that ostensibly led to the Ukrainian revolution in 2014.

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<sup>42</sup> KUBICEK, *supra* note 14, at 173.

<sup>43</sup> YEKELCHYK, *supra* note 15, at 216.

<sup>44</sup> *Final Tally Shows Yanukovich Wins Ukraine Election*, CNN (Feb. 10, 2010, 6:22 AM), <http://www.cnn.com/2010/WORLD/europe/02/10/ukraine.elections/> (explaining that Yanukovich defeated incumbent Prime Minister Yulia Tymoshenko).

<sup>45</sup> Vladimir Isachenkov & Maria Danilova, *Roots and Consequence of Ukraine's Violence*, ASSOCIATED PRESS: THE BIG STORY (Feb. 20, 2014, 3:58 PM), <http://bigstory.ap.org/article/roots-and-consequences-ukraines-violence>.

<sup>46</sup> Olexiy Haran & Dmytro Prokopchuk, *The Drama of Ukraine's 2010 Presidential Election*, PONARS EURASIA POL'Y MEMO NO. 89, at 1, 4 (Univ. of Kyiv-Mohyla Academy, Mar. 2010), [https://www.gwu.edu/~ieresgwu/assets/docs/pepm\\_089.pdf](https://www.gwu.edu/~ieresgwu/assets/docs/pepm_089.pdf) ("Yanukovich's presidential campaign team settled on slogans from the 2004 election as still the best ones for mobilizing their regional electorate: anti-NATO sentiment, promises to make Russian the second official state language, and insistence on the absence of a falsified vote in 2004.").

<sup>47</sup> See Max Fisher, *Ukraine's Protests Are Back. Here's Why*, WASH. POST (Jan. 21, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/01/21/ukraines-protests-are-back-heres-why/>.

<sup>48</sup> KUBICEK, *supra* note 14, at 171.

## II. HISTORICAL EVOLUTION OF THE 2014 UKRAINIAN REVOLUTION

### A. *Stepping Toward Russia and Political Rejection*

The Ukrainian revolution, which was primarily fueled by matters of political difference, led to the ouster of President Yanukovich, and also made Ukraine vulnerable to rebellion in the eastern part of the country. In November 2013, Yanukovich suspended talks to form a trade deal with the European Union.<sup>49</sup> The suspension came in the wake of strong pressure from Russia not to sign the deal.<sup>50</sup> Yanukovich later accepted an economic deal with Russia.<sup>51</sup> Later that same month, Ukrainian unrest, mainly in the western region of the country, began as a response to the rejection of the deal.<sup>52</sup> In addition, Ukrainians were also calling for a restoration of Ukraine's 2004 Constitution because of Yanukovich's efforts to strengthen his power.<sup>53</sup> The protestors saw Yanukovich's actions as contrary to national interests, submissive toward Russian interests, and demanded that he change his decision.<sup>54</sup> Thousands of Ukrainians occupied the Maidan in central Kiev for peaceful protest.<sup>55</sup> Western Ukrainians were eager to integrate Ukraine with Europe and they viewed Yanukovich's actions as contrary to the overarching goal of moving closer to Europe.<sup>56</sup> The rallies were peaceful, but violence quickly erupted in January after the Parliament passed restrictive laws in order to quell the protests.<sup>57</sup>

On February 20, 2014, seventy-seven people were killed in the Maidan over a two-day period as fighting broke out between the protestors and police.<sup>58</sup> As a result of the violence and Yanukovich's political decisions, protestors eventually demanded for Yanukovich's resignation from the

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<sup>49</sup> *Ukraine Suspends Preparations for EU Trade Agreement*, BBC NEWS: EUR. (Nov. 21, 2013), <http://www.bbc.com/news/world-europe-25032275>.

<sup>50</sup> *Id.* Russia, as alluded to previously, has been motivated to draw Ukraine closer politically and culturally, away from Westernization. *See supra* Part I.B.

<sup>51</sup> Fisher, *supra* note 47. Russia offered Ukraine an economic stimulus of \$15 billion and a thirty-three percent discount on Russian gas. *Id.*

<sup>52</sup> Isachenkov & Danilova, *supra* note 45.

<sup>53</sup> Paul D. Shinkman, *Ukrainian Government Signs Peace Deal*, U.S. NEWS (Feb. 21, 2014, 4:27 PM), <http://www.usnews.com/news/articles/2014/02/21/ukrainian-government-signs-peace-deal>. The restoration of the 2004 Constitution would have shifted powers from the President to the Parliament. *Id.*

<sup>54</sup> *See* Isachenkov & Danilova, *supra* note 45.

<sup>55</sup> *Why is Ukraine in Turmoil?*, BBC NEWS (Feb. 22, 2014), <http://www.bbc.com/news/world-europe-25182823>.

<sup>56</sup> *See id.*

<sup>57</sup> Isachenkov & Danilova, *supra* note 45.

<sup>58</sup> *Why is Ukraine in Turmoil?*, *supra* note 55.



presidency.<sup>59</sup> On February 22nd, the Ukrainian Parliament (Verkhovna Rada)<sup>60</sup> voted to dismiss Yanukovich from office.<sup>61</sup> Of the 450 Ukrainian lawmakers, 328 voted to remove Yanukovich from the presidency on the basis that he had abandoned his office and the fact that more than eighty protestors died in the Maidan.<sup>62</sup> Yanukovich later appeared on television in an interview saying, “I am not planning to leave the country. I am the legitimate president, and I am not going to resign.”<sup>63</sup> Yanukovich had fled the country prior to when the vote was taken, and claimed that he was forced to leave due to a threat on his life.<sup>64</sup> The Verkhovna Rada next voted to free Ukraine’s former Prime Minister, Yulia Tymoshenko, from prison.<sup>65</sup> At a speech in the Maidan, she referred to the former government as “a cancer.”<sup>66</sup> Olexander Turchynov was appointed interim President of Ukraine.<sup>67</sup>

The interim government, believing it had acted pursuant to constitutional authority, held a new election in May 2014 for the purpose of moving the country forward.<sup>68</sup> Petro Poroshenko won that election with more than fifty-five percent of the popular vote.<sup>69</sup> Most importantly, the revolution in western Ukraine created an equal and opposite reaction in eastern Ukraine.<sup>70</sup> Those in

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<sup>59</sup> Isachenkov & Danilova, *supra* note 45.

<sup>60</sup> KUBICEK, *supra* note 14, at 10.

<sup>61</sup> William Booth, *Ukraine’s Parliament Votes to Oust President; Former Prime Minister is Freed from Prison*, WASH. POST (Feb. 22, 2014), [http://www.washingtonpost.com/world/europe/ukraines-yanukovich-missing-as-protesters-take-control-of-presidential-residence-in-kyiv/2014/02/22/802f7c6c-9bd2-11e3-ad71-e03637a299c0\\_story.html](http://www.washingtonpost.com/world/europe/ukraines-yanukovich-missing-as-protesters-take-control-of-presidential-residence-in-kyiv/2014/02/22/802f7c6c-9bd2-11e3-ad71-e03637a299c0_story.html).

<sup>62</sup> Daisy Sindelar, *Was Yanukovich’s Ouster Constitutional?*, RADIO FREE EUR. RADIO LIBERTY (Feb. 23, 2014), <http://www.rferl.org/content/was-yanukovichs-ouster-constitutional/25274346.html>.

<sup>63</sup> Booth, *supra* note 61. Yanukovich called the oppositional members of Parliament “bandits” and referred to their actions as “illegal.” *Id.*

<sup>64</sup> Don Mackay & Nick Sommerlad, *Russia Invades Crimea to ‘protect its Black Sea naval fleet’ as Ukraine Tensions Soar*, MIRROR (Feb. 28, 2014, 9:13 PM), <http://www.mirror.co.uk/news/world-news/ukraine-news-russia-invades-crimea-3194129>.

<sup>65</sup> Booth, *supra* note 61.

<sup>66</sup> *Id.*

<sup>67</sup> Harriet Salem, *Who Exactly is Governing Ukraine?*, GUARDIAN (Mar. 4, 2014), <http://www.theguardian.com/world/2014/mar/04/who-governing-ukraine-olexander-turchynov>.

<sup>68</sup> Eric Herron, *Is Ukraine Ready to Vote?*, WASH. POST (May 18, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/05/18/is-ukraine-ready-to-vote/>.

<sup>69</sup> *Petro Poroshenko Claims Ukraine Presidency*, BBC NEWS (May 25, 2014), <http://www.bbc.com/news/world-europe-27569057>.

<sup>70</sup> Tom Kutsch, *Ukrainians in the South and East Oppose Pro-Western Leadership*, AL JAZEERA AM. (Feb. 27, 2014, 10:03 AM), <http://america.aljazeera.com/articles/2014/2/27/in-ukraine-s-eastdivision-notdissolution.html>.

eastern Ukraine viewed western Ukraine as not having their interest at heart in the decision to oust the former President.<sup>71</sup>

### B. *Russia Closes in on Crimea*

The protests in western Ukraine were wrought with tension and caused rallies among pro-Russian supporters in eastern Ukraine.<sup>72</sup> The rallies were especially strong in eastern Ukraine's Crimean peninsula, where there is a strong Russian heritage and connection.<sup>73</sup> Soon after the interim government was appointed, a group of pro-Russian activists seized government buildings in Crimea and raised a Russian flag to challenge the ousting of Yanukovich.<sup>74</sup> The Ukrainian government suspected the pro-Russian activists were being supported by Russia in an effort to "undermin[e] national sovereignty."<sup>75</sup> Russia escalated tensions in Ukraine by invading Crimea.<sup>76</sup>

During this invasive measure, Russian troops seized control over the international airport in the Crimean capital.<sup>77</sup> In March 2014, the Kremlin officially announced that Crimea had been annexed to Russia.<sup>78</sup> The announcement was monumental because it marked the first time since World War II that a European country seized land from another.<sup>79</sup> The United States condemned Russia's act of aggression with President Barack Obama saying "[t]hat is not how international law is supposed to operate."<sup>80</sup> Russia's invasion and annexation of Crimea, while important to understanding the Ukrainian

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<sup>71</sup> *See id.*

<sup>72</sup> *Id.* (noting that the protests were inspired by the ousting of Yanukovich and imposition of the new pro-western government).

<sup>73</sup> *See* Howard Amos, *Ukraine Crisis Fuels Secession Calls in Pro-Russian South*, *GUARDIAN* (Feb. 23, 2014, 2:01 PM), <http://www.theguardian.com/world/2014/feb/23/ukraine-crisis-secession-russian-crimea>. In a rally in the Sevastopol in Crimea, there were talks of secession and pledges of allegiance to Russia. The Crimean peninsula had previously been a part of Russia for sixty years. *Id.*

<sup>74</sup> *Ukraine Appoints New PM as Armed Men Seize Govt Buildings in Crimea*, *AL JAZEERA AM.* (Feb. 27, 2014), <http://america.aljazeera.com/articles/2014/2/27/armed-men-seize-governmentbuildingsincrimea.html>.

<sup>75</sup> Mark Adomanis, *Did Russia Just Invade Crimea?*, *FORBES* (Feb. 28, 2014, 8:04 AM), <http://www.forbes.com/sites/markadomanis/2014/02/28/did-russia-just-invade-crimea/> (internal quotations omitted).

<sup>76</sup> Mackay & Sommerlad, *supra* note 64 ("Moscow insisted its soldiers were on a mission to 'protect Black Sea Fleet's positions.'").

<sup>77</sup> *Id.*

<sup>78</sup> Englund, *supra* note 6. President Putin put forth a couple of justifications for the annexation of Crimea. One was to protect Russians in eastern Ukraine from abuse by Ukrainian nationalists and the other was to assure that the Black Sea Naval Base stayed in Russian territory in the event that Ukraine joined NATO. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Ukraine Crisis: US Condemns Russian 'aggression,'* *BBC NEWS* (Mar. 4, 2014), <http://www.bbc.com/news/world-europe-26441698>.

crisis, is not a central aspect of this Comment. It is a well-established principle of customary international law that the taking of territory through force or threat of force is a violation of international law.<sup>81</sup> The annexation of Crimea was important, however, because it foreshadowed that Russia was willing to extend its reach further into eastern Ukraine.

### C. *Russia Eyes Eastern Ukraine*

In early March 2014, the Russian Parliament approved President Putin's request to potentially use force in Ukraine to protect Russian interests.<sup>82</sup> Later that month, President Obama suggested that Russia "move back its troops" located near the eastern Ukrainian border in order to ease tensions.<sup>83</sup> Russia sent troops near the eastern Ukrainian border to protect the pro-Russian separatists, who had taken control of government buildings in the Donetsk region.<sup>84</sup> On April 7th, the separatists once again seized control of government buildings in the Donetsk region with the intention of passing a referendum of independence from Ukraine.<sup>85</sup> The referendum was successful and Moscow recognized the results, but western Ukraine denounced the results as fraudulent.<sup>86</sup>

As the riots and protests in the eastern side of the country escalated, Ukraine's then acting President Olexander Turchynov instituted an "anti-terror operation."<sup>87</sup> The operation was unsuccessful, however, as pro-Russian

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<sup>81</sup> See U.N. Charter art. 2, ¶ 4 ("All members shall refrain 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."); *id.* ¶ 6 (applying this principle to states that are not members of the United Nations); see also Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796; Elihu Root, *The Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law*, 10 AM. J. INT'L L. 211, 212–13 (1916) ("Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.").

<sup>82</sup> *Ukraine Crisis: Timeline*, BBC NEWS, <http://www.bbc.com/news/world-middle-east-26248275> (last updated Nov. 13, 2014).

<sup>83</sup> *Id.*

<sup>84</sup> Charlie D'Agata, *Ukrainian City of Donetsk Epitomizes Country's Crisis*, CBS NEWS (Mar. 6, 2014), <http://www.cbsnews.com/news/ukrainian-city-of-donetsk-epitomizes-countrys-crisis/>.

<sup>85</sup> *Pro-Russian Protesters Seize Gov't Buildings in Ukraine's Donetsk, Lugansk and Kharkov*, RT (Apr. 7, 2014), <http://rt.com/news/ukraine-donetsk-protest-russia-733/>.

<sup>86</sup> *Ukraine Crisis: Will the Donetsk Referendum Matter?*, BBC NEWS (May 12, 2014), <http://www.bbc.com/news/world-europe-27344412>. Kiev responded by calling the referendum a violation of international law and said the voting standards were not transparent, containing massive irregularities. *Id.*

<sup>87</sup> *Ukraine Says Donetsk 'anti-terror operation' Under Way*, BBC NEWS (Apr. 15, 2014), <http://www.bbc.com/news/world-europe-27035196>. The aim of the operation was to protect "Ukrainian citizens, to stop the terror, to stop the crime, to stop the attempts to tear our country apart." *Id.*

militants seized six of the armored vehicles sent to stop the terror in the region.<sup>88</sup> Amidst the violence and escalating tensions, an agreement was made between Russia, Ukraine, the United States and the European Union to de-escalate the crisis.<sup>89</sup> As part of the agreement, illegitimate military groups in Ukraine were to disband, government buildings seized by the protestors were to be vacated, and the pro-Russian separatists were to be granted amnesty.<sup>90</sup> The agreement did not come to fruition, however, because the Russian separatists refused to vacate the government buildings.<sup>91</sup>

#### D. *A Long, Hot Summer*

In mid-May 2014, NATO announced that there was no evidence that Russia had withdrawn any of their troops from the eastern border of Ukraine.<sup>92</sup> For much of the summer months, violent clashes between the Ukrainian government and Russian separatists in eastern Ukraine remained the norm.<sup>93</sup> By June 2014, the United Nations (U.N.) estimated that over 400 people had been killed in the hostile territory.<sup>94</sup> In June, the rebels agreed to a ceasefire, but it was short-lived, as the rebels made it clear they had no intention of surrendering.<sup>95</sup>

In late June, key developments garnered international attention. First, President Putin delayed a resolution in Parliament that would have authorized Russia to use military force in Ukraine.<sup>96</sup> U.S. Secretary of State John Kerry

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<sup>88</sup> *Ukraine Crisis: Military Column 'seized' in Kramatorsk*, BBC NEWS (Apr. 16, 2014), <http://www.bbc.com/news/world-europe-27053500>.

<sup>89</sup> *Ukraine Crisis: Deal to 'de-escalate' Agreed in Geneva*, BBC NEWS, <http://www.bbc.com/news/world-europe-27072351> (last updated Apr. 16, 2014).

<sup>90</sup> *Id.*

<sup>91</sup> *Ukraine's Geneva Agreement Falters*, EURACTIV (Apr. 22, 2014), <http://www.euractiv.com/sections/global-europe/ukraines-geneva-agreement-falters-301668>.

<sup>92</sup> *Ukraine Crisis: No Sign of Russia Withdrawal, Says NATO*, BBC NEWS (May 19, 2014), <http://www.bbc.com/news/world-europe-27476172>. It was estimated there were approximately 40,000 troops near the border, and NATO announced, contrary to Russia's assertion, that there was no evidence that the troops have withdrawn—a serious move that would de-escalate the crisis. *Id.*

<sup>93</sup> See *Ukraine Crisis: Donetsk Sees Deadliest Attack on Troops*, BBC NEWS (May 22, 2014), <http://www.bbc.com/news/world-europe-27515514>. Pro-Russian separatists killed fourteen people when they shot down a military helicopter and took control of two military bases in eastern Ukraine. *Ukraine Crisis: Timeline*, *supra* note 82.

<sup>94</sup> *Ukraine Fighting: West Warns Russia of Sanctions*, BBC NEWS (June 25, 2014), <http://www.bbc.com/news/world-europe-28011179>.

<sup>95</sup> David Herszenhorn, *Ukrainian President Ends Cease-Fire With Rebels*, N.Y. TIMES (June 20, 2014), <http://www.nytimes.com/2014/07/01/world/europe/ukrainian-president-ends-cess-fire-with-rebels.html>.

<sup>96</sup> *Ukraine Fighting: West Warns Russia of Sanctions*, *supra* note 94.

was pleased by the decision but called on Russia to take more action to stop the transfer of arms to separatists in the region.<sup>97</sup> The United States deemed Putin's decision to delay the resolution a step in the right direction to de-escalate the crisis. Second, in a zealous attempt to become more allied with the West, Ukraine, among other countries, signed a partnership agreement with the European Union.<sup>98</sup> The signing of the partnership agreement was a blow to Russia, which was worried about the extending sphere of Western influence and the impending economic repercussions of having Ukraine favoring Western products.<sup>99</sup> President Poroshenko described that day as the most important in Ukraine's history since it received its independence in 1991.<sup>100</sup>

On July 17, 2014, Malaysian Airlines Flight MH17 was shot down over the region, killing 298 people.<sup>101</sup> There were reports that the plane was shot down by pro-Russian rebels.<sup>102</sup> Eyewitnesses said they had seen rebels with a BUK missile launcher not far from where the plane was shot down.<sup>103</sup> In fact, one of the eyewitnesses claimed the accents and mannerisms of the individuals with the missile launcher were much more like that of Russian soldiers than Ukrainian rebels.<sup>104</sup> This event grabbed the world's attention and only furthered speculation that Russia was supporting and supplying the rebellion. The United States and the European Union imposed sanctions on Russia's energy, banking, and defense industries as a result.<sup>105</sup> In reaction to the imposed sanctions from the West, Putin counter-measured by implementing a full embargo against the United States and the European Union on fruit, vegetables, and dairy products.<sup>106</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *EU Signs Pacts with Ukraine, Georgia and Moldova*, BBC NEWS (June 27, 2014), <http://www.bbc.com/news/world-europe-28052645>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *MH17 Crash: Dutch Experts Say Numerous Objects Hit the Plane*, BBC NEWS (Sept. 9, 2014), <http://www.bbc.com/news/world-europe-29119024>.

<sup>102</sup> *Id.*

<sup>103</sup> John Sweeney, *MH17 Disaster: Russians 'controlled BUK missile system,'* BBC NEWS (Sept. 8, 2014), <http://www.bbc.com/news/world-europe-29109398>.

<sup>104</sup> *Id.*

<sup>105</sup> Justyna Pawlak & Eric Beech, *EU and U.S. Announce New Sanctions on Russia over Ukraine*, REUTERS (July 29, 2014), <http://www.reuters.com/article/2014/07/29/us-ukraine-crisis-east-idUSKBN0FY0OX20140729>.

<sup>106</sup> *Ukraine Crisis: Timeline*, *supra* note 82.

### *E. Russia Invades Ukraine and NATO Responds*

Russia invaded Ukraine in August 2014. After the invasion, there was a swarming dialogue of culpability between Russia, Ukraine, and the United States.<sup>107</sup> Many countries officially condemned the invasion, and much of the world's leaders were skeptical of Russia's assertions that it was not sending troops to fight alongside the rebels.<sup>108</sup> Prior to the August invasion, multiple reports surfaced that three Russian tanks invaded Ukraine in June.<sup>109</sup> On August 28th, the Russian Presidential Human Rights Council reported that one hundred Russians were killed in the Donetsk province on August 13th while they were driving an ammunition truck.<sup>110</sup> Both of these reports confirmed the world's suspicions that Russia was operating in Ukraine. On August 22nd, NATO announced that the Russian military moved artillery units manned by Russian soldiers onto Ukrainian soil.<sup>111</sup> Furthermore, Ukraine's army released a statement indicating that "up to 100" Russian tanks, army vehicles, and rocket launchers were seen traveling in eastern Ukraine.<sup>112</sup>

In another invasive measure, Russia sent five "armored personnel carriers" to Ukraine in support of the pro-Russian separatists in the Donetsk and Luhansk provinces.<sup>113</sup> A Ukrainian officer labeled the incursion as a "full-scale invasion" and a U.S. official said approximately 1,000 Russian soldiers

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<sup>107</sup> See Uri Friedman, *Russia's Slow-Motion Invasion of Ukraine*, ATLANTIC (Aug. 29, 2014), <http://www.theatlantic.com/international/archive/2014/08/russias-stealthy-slow-motion-invasion-of-ukraine/379312/>. Russia denies any incursion, Ukraine confirms there is an invasion, and the United States, for diplomatic reasons, has decided to label Russia's actions as a "pattern of escalating aggression." *Id.*

<sup>108</sup> Laura Smith-Spark, Matthew Chance & Michael Martinez, *Obama Skeptical of Ceasefire Talks Between Russia and Ukraine*, CNN (Sept. 3, 2014), <http://www.cnn.com/2014/09/03/world/europe/ukraine-crisis/>; see also *Merkel Skeptical About Russia's Pledge to Pull Back Troops From Ukraine Border*, MOSCOW TIMES (Oct. 13, 2014), <http://www.themoscowtimes.com/news/article/merkel-sceptical-about-russia-s-pledge-to-pull-back-troops-from-ukraine-border/509342.html>.

<sup>109</sup> *Ukraine Says 'Russian Tank Incursion' Unacceptable*, BBC NEWS (June 12, 2014), <http://www.bbc.com/news/world-europe-27815441>. President Petro Poroshenko told President Putin that the incursion was unacceptable, but Russia denied any involvement in such an invasive measure. *Id.*

<sup>110</sup> Thomas Grove, *Over 100 Russian Soldiers Killed in Single Ukraine Battle - Russian Rights Activists*, REUTERS (Aug. 28, 2014), <http://uk.reuters.com/article/2014/08/28/uk-ukraine-crisis-russia-casualties-idUKKBN0GS20H20140828>. Three hundred more soldiers were wounded. *Id.*

<sup>111</sup> Michael Gordon, *Russia Moves Artillery Units into Ukraine, NATO Says*, N.Y. TIMES (Aug. 22, 2014), <http://www.nytimes.com/2014/08/23/world/europe/russia-moves-artillery-units-into-ukraine-nato-says.html>.

<sup>112</sup> *Ukraine Conflict: Russian Soldiers Seen With "up to 100" Military Vehicles in Ukrainian Villages*, ABC NEWS, <http://www.abc.net.au/news/2014-08-28/russians-soldiers-seen-with-military-vehicles-in-ukraine/5701894> (last updated Aug. 27, 2014).

<sup>113</sup> Andrew Kramer & Michael Gordon, *Ukraine Reports Russian Invasion on a New Front*, N.Y. TIMES (Aug. 27, 2014), <http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novoazovsk-crimea.html>.

invaded the southern border to assist the pro-Russian separatists.<sup>114</sup> Additionally, NATO said there were approximately 20,000 Russian troops stationed at the eastern Ukrainian border.<sup>115</sup> Conditions in eastern Ukraine further deteriorated when ten Russian paratroopers were captured by Ukrainian forces and were exchanged for sixty-three Ukrainian soldiers.<sup>116</sup> President Putin called for talks of statehood in eastern Ukraine, and the European Union warned of further sanctions against Russia if it did not de-escalate the crisis.<sup>117</sup>

This invasion sparked international outrage, and the NATO Secretary-General accused Russia of committing a “blatant violation” of Ukraine’s sovereignty by engaging in direct military operations to support pro-Russian rebels.<sup>118</sup> NATO condemned Russia by saying its troops “illegally crossed the border” in an attempt to destabilize the country.<sup>119</sup> Russia denied the allegations, but NATO released satellite imagery revealing a vast number of Russian troops in Ukraine.<sup>120</sup> British Prime Minister David Cameron stated Russia’s actions in eastern Ukraine “must cease immediately.”<sup>121</sup> NATO and the United States vowed to strengthen economic sanctions against Russia if it did not “step back.”<sup>122</sup>

Due to Russia’s unwillingness to comply with these NATO and U.S. demands, NATO created a readiness force of potentially up to 3,000-5,000 troops to deal with Russia.<sup>123</sup> The soldiers would be able to respond to any crisis within a matter of days.<sup>124</sup> This countermeasure was done in the event

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<sup>114</sup> Victoria Butenko, Laura Smith-Spark & Diana Magnay, *U.S. Official Says 1,000 Russian Troops Have Entered Ukraine*, CNN, <http://www.cnn.com/2014/08/28/world/europe/ukraine-crisis/> (last updated Aug. 29, 2014).

<sup>115</sup> *NATO Members ‘start arms deliveries to Ukraine,’ supra* note 3.

<sup>116</sup> *Ukraine and Russia Exchange Captured Troops*, BBC NEWS, <http://www.bbc.com/news/world-europe-29002147> (last updated Aug. 31, 2014).

<sup>117</sup> *Putin ‘urges talks on statehood for east Ukraine,’* BBC NEWS (Aug. 31, 2014), <http://www.bbc.com/news/world-europe-29003116>.

<sup>118</sup> Doug Stanglin, *NATO Accuses Russia of Violating Ukraine’s Sovereignty*, USA TODAY (Aug. 29, 2014), <http://www.usatoday.com/story/news/world/2014/08/29/ukraine-russia-friday/14785073/>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; *see also* Stanglin, *supra* note 118.

<sup>121</sup> Butenko, Smith-Spark & Magnay, *supra* note 114.

<sup>122</sup> Carol Morello, *NATO Official Warns of More Sanctions if Russia Does Not ‘step back from the brink,’* WASH. POST (Aug. 7, 2014), [https://www.washingtonpost.com/world/russia-detains-ukrainian-military-officers-who-fled-attacks-by-pro-moscow-rebels/2014/08/07/8613c994-1e27-11e4-ab7b-696c295ddf1\\_story.html](https://www.washingtonpost.com/world/russia-detains-ukrainian-military-officers-who-fled-attacks-by-pro-moscow-rebels/2014/08/07/8613c994-1e27-11e4-ab7b-696c295ddf1_story.html).

<sup>123</sup> Adrian Croft, *NATO to Create New ‘spearhead’ Force to Respond to Crises*, REUTERS (Sept. 1, 2014, 1:38 PM), <http://www.reuters.com/article/2014/09/01/us-ukraine-crisis-nato-military-idUSKBN0GW2SP20140901>.

<sup>124</sup> *Id.*

that Russia invaded a NATO territory, like Poland or the Baltics.<sup>125</sup> NATO also sent more fighter aircrafts to the Baltic region and increased military exercises in Eastern Europe.<sup>126</sup> Russia responded by threatening to send more troops to Crimea.<sup>127</sup> The goal of NATO's exercises was to show Russia that NATO countries have a serious commitment to one another, and that if one is attacked or under threat of aggression, then all would come to the aid of their ally.<sup>128</sup>

In mid-September 2014, Ukrainian Colonel General Valery Heletey announced that NATO members had started providing arms to the Ukrainian government to help them fight the pro-Russian separatists.<sup>129</sup> The names of the countries that delivered the weapons had been withheld, as had the types of weapons provided.<sup>130</sup> Other members denied the statement, but this denial was expected.<sup>131</sup> Ukraine's Prime Minister said that NATO was the only major line of defense to protect the country from Russian aggression.<sup>132</sup> Although NATO and the United States have not formally intervened in the conflict in a military sense, they have taken a stand to support the current Ukrainian government.<sup>133</sup>

Later that month, there were ceasefire agreements between Ukraine and the rebels, but these agreements did not last long,<sup>134</sup> and many believe the ceasefires will never bring permanent peace to the region.<sup>135</sup> Tensions between the West and Russia are the highest they have been since the end of the Cold War. Russia is still supporting the pro-Russian separatists through training and

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Russia Threatens to Send More Troops to Crimea over NATO Military Exercise, Ukraine Ratifies EU Deal*, ABC NEWS, <http://www.abc.net.au/news/2014-09-17/russia-threatens-more-troops-in-retaliation-to-nato-exercise/5748878> (last updated Sept. 16, 2014).

<sup>128</sup> Croft, *supra* note 123.

<sup>129</sup> See *NATO Members 'start arms deliveries to Ukraine,' supra* note 3.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *NATO Arming Ukraine with Soviet Weapons – Deputy PM Rogozin*, RT (July 4, 2014, 10:23 AM), <http://rt.com/news/170388-rogozin-ukraine-arms-europe/>.

<sup>134</sup> See Andrei Makhovsky, *Ukraine, Pro-Russian Rebels Reach Ceasefire Deal*, REUTERS (Sept. 5, 2014, 6:40 PM), <http://www.reuters.com/article/2014/09/05/us-ukraine-crisis-idUSKBN0GZ18D20140905>; see also Laura Smith-Spark & Christine Theodorou, *Report: Ukraine, Pro-Russia Rebels Agree to New Ceasefire Deal*, CNN (Sept. 22, 2014), <http://www.cnn.com/2014/09/20/world/europe/ukraine-crisis/>; Shaun Walker, *Ukraine Ceasefire Breached in Donetsk and Mariupol*, GUARDIAN (Sept. 7, 2014), <http://www.theguardian.com/world/2014/sep/06/eastern-ukraine-ceasefire-russia>.

<sup>135</sup> See James Marson, *Truce in Ukraine Spawns Hope, Doubt in West; Ukraine, Russia-Backed Rebels Agree, But U.S. Europe Keep Sanctions Pressure on Moscow*, WALL ST. J. (Sept. 5, 2014), <http://www.wsj.com/articles/russia-ukraine-and-rebels-meeting-in-minsk-for-talks-on-cease-fire-1409913376>.



by supplying them with ammunitions.<sup>136</sup> As of November 4, 2014, Russian troops had moved closer to the eastern border, and more than 4,000 people had died in the face of the conflict.<sup>137</sup>

### III. NATO'S PURPOSE AND SYSTEMATIC LIMITATIONS

In order to understand NATO, it is best to analyze its main purpose and its historical development. Specifically, it is best to know NATO's operational constraints and limitations. Knowing how NATO works in the face of conflict is important for understanding the recent developments in Ukraine.

On April 4, 1989, the North Atlantic Treaty was signed and NATO was formed.<sup>138</sup> The main purpose of NATO is to "safeguard the freedom and security of its members through political and military means."<sup>139</sup> It was founded to deter Soviet expansion into Western Europe and to promote European integration after the destruction of World War II,<sup>140</sup> it currently has twenty-eight members.<sup>141</sup> It serves as the main defense structure in Western Europe, and the preservation of Ukraine's independence has been of special interest to it.<sup>142</sup> NATO's interest in Ukraine makes political and practical sense considering Ukraine essentially acts as a buffer between Russia and Europe.

Article 5 of the North Atlantic Treaty empowers NATO to act.<sup>143</sup> It permits collective military defense among each NATO member and considers an attack on one member to be an attack on all members.<sup>144</sup> NATO is being tested in a way it never hoped to be. Ukraine is still not a member of NATO,<sup>145</sup> and it

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<sup>136</sup> Butenko, Smith-Spark & Magnay, *supra* note 114.

<sup>137</sup> Croft, *supra* note 123.

<sup>138</sup> *A Short History of NATO*, NATO, [www.nato.int/history/nato-history.html](http://www.nato.int/history/nato-history.html) (last visited Sept. 29, 2015).

<sup>139</sup> *NATO's Purpose*, NATO, [http://www.nato.int/cps/en/natohq/topics\\_68144.htm](http://www.nato.int/cps/en/natohq/topics_68144.htm) (last updated Oct. 13, 2015).

<sup>140</sup> *See A Short History of NATO*, *supra* note 138.

<sup>141</sup> *Member Countries*, NATO, [www.nato.int/cps/en/natolive/topics\\_52044.htm](http://www.nato.int/cps/en/natolive/topics_52044.htm) (last updated Aug. 20, 2013). The current NATO members are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and the United States. *Id.*

<sup>142</sup> LEONID POLYAKOV, UKRAINE-NATO RELATIONS AND NEW PROSPECTS FOR PEACEKEEPING 72 (2003).

<sup>143</sup> North Atlantic Treaty, *supra* note 4, art. 5.

<sup>144</sup> *Id.*

<sup>145</sup> *Ukraine to Hold Nato Vote When Membership Criteria Are Met*, BBC NEWS (Nov. 24, 2014), <http://www.bbc.com/news/world-europe-30176256>; *see also* POLYAKOV, *supra* note 142, at 6, 9. The country does partner with the alliance in the partnership for peace program, but that provides no support for military

does not appear that it will become a member in the near future.<sup>146</sup> As a result, NATO cannot militarily engage Russia. However, if Russia takes over Ukraine, there is a strong and impending danger that Russia will try to overtake more NATO countries in Europe. This leaves NATO in the precarious position to either help Ukraine or let the fire spread closer to Western Europe.

#### IV. INTERNATIONAL LAW

##### A. *Introduction to Legal Issues*

This Part will first examine what NATO may legally do to assist non-member states by referring to the accepted uses of force in both the U.N. and NATO Charters. It will then focus on the Kosovo bombing campaign as a case study. Next, it will examine whether the current Ukrainian government is legitimate. Eastern Ukraine has rejected and revolted against the current government in Kiev, resulting in Ukraine being more divided than ever. The question of legitimacy has profound implications for whether NATO may provide military assistance of any form to the Ukrainian government so it can secure its legitimacy over the eastern part of the country without violating international law.<sup>147</sup> If the government is not legitimate, then the United States and other NATO countries, in the contribution of arms to the current Ukrainian government, are violating customary international law and the ICJ's decision in *Nicaragua v. United States*.<sup>148</sup> In Part V, this Comment touches on the right of self-determination. More specifically, it will examine whether eastern Ukraine may engage in external self-determination to unite with Russia, a country with which it has closer ethnic, cultural, and political ties.

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intervention. Additionally, there is not been overwhelming popular support among Ukrainians to formally join the alliance. *Id.*

<sup>146</sup> Johannes Wamberg Anderson, *NATO Deepening Cooperation with Ukraine, But Membership Far Away*, KYIV POST (Sept. 25, 2015), <http://www.kyivpost.com/content/kyiv-post-plus/nato-deepening-cooperation-with-ukraine-but-membership-far-away-398628.html>; POLYAKOV, *supra* note 142, at 18–19. Ukraine may not be able to comply with NATO membership criteria. Furthermore the country would probably lag behind other NATO members in terms of GDP and defense expenditures. POLYAKOV, *supra* note 142, at 18–19.

<sup>147</sup> See *infra* Part IV.D.

<sup>148</sup> See generally *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14 (June 27).

*B. Articles 2(4) and 2(7) of the U.N. Charter and Article 5 of the NATO Charter*

NATO is constrained by the U.N. Charter for when it may resort to force. Article 2(4) of the U.N. Charter provides that the use of force against another state is prohibited, unless an exception applies.<sup>149</sup> The United Nations, which is charged with the goal of preventing aggressive wars and maintaining international peace, has carved out two exceptions in its Charter for when the use of force or threat of force may be invoked. First, Article 51 of the U.N. Charter recognizes a country's right to self-defense in the event of an armed attack.<sup>150</sup> Second, the U.N. Security Council may vote to engage in the use of force against a state, so long as nine votes are received from the fifteen-member chamber, with unanimous consent from the five permanent members (China, Britain, Russia, the United States, and France).<sup>151</sup> The authority for this latter measure comes from Chapter VII of the U.N. Charter and is best known as "collective security."<sup>152</sup> There are two articles in the U.N. Charter that provide measures for how the United Nations may engage in the "collective security" measure. Article 42 authorizes the Security Council to take action by "air, sea, or land forces" should measures provided in Article 41 be inadequate to accomplish the stated goal.<sup>153</sup> The purpose of these two exceptions is to preserve "existing territorial and political arrangements," not to transform them or acquire new territory.<sup>154</sup>

An additional method by which state intervention may be justified is if a state consents to another state intervening in its affairs.<sup>155</sup> Although this method is not referenced in the U.N. Charter, it has been accepted as a

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<sup>149</sup> See U.N. Charter art. 2, ¶ 4.

<sup>150</sup> U.N. Charter art. 51 (establishing that self-defense is an "inherent right" in the event an armed attack occurs).

<sup>151</sup> DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 235 (3d ed. 2010).

<sup>152</sup> CORNELIU BJOLA, *LEGITIMISING THE USE OF FORCE IN INTERNATIONAL POLITICS: KOSOVO, IRAQ AND THE ETHICS OF INTERVENTIONS* 48–49 (2009).

<sup>153</sup> Compare U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."), with U.N. Charter art. 41 ("These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.").

<sup>154</sup> BJOLA, *supra* note 152, at 48.

<sup>155</sup> Louis Henkin, *Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT'L L. 824, 824 (1999); see also BEDERMAN, *supra* note 151, at 229.

normative standard in customary international law.<sup>156</sup> To summarize, the following are justifications for the use of force of one state against another state: Article 51 of the U.N. Charter, a valid U.N. Security Council vote to engage in collective security, and the customary international law norm of a state's consent to intervention.<sup>157</sup>

It is highly unlikely the U.N. Charter would be of any assistance to NATO or the United States in coming to Ukraine's aid.<sup>158</sup> Although Article 51 permits Ukraine to use force by way of self-defense, it does not permit NATO to act. Furthermore, a vote by the U.N. Security Council would be a practical impossibility because Russia would never vote for intervention on behalf of Ukraine. Russia could (and likely would) veto any action taken by the Security Council because it is a permanent member. Additionally, since seizing control of Ukraine is in Russia's economic and political interest, it would not vote for intervention.<sup>159</sup>

Consent is another means by which Ukraine may allow the United States or NATO and its members to intervene. Although Ukraine has given consent for NATO to intervene,<sup>160</sup> consent is not a valid justification in this situation. This Comment argues that the current Ukrainian government is illegitimate and does not have effective control of the territory it purports to govern.<sup>161</sup> Consent may only be given by a legitimate government that has "effective control of most [if not all] of the state."<sup>162</sup>

Since the U.N. Charter is a roadblock to NATO action, Article 5 of the NATO Charter must provide the legal basis. NATO, as a collective self-defense organization, may be able to use Article 5 to justify the use of force, but only if the force is used in the face of state aggression. Article 5 of NATO

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<sup>156</sup> David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 209 (1996).

<sup>157</sup> This consent is meaningless and invalid if the Ukrainian government is deemed illegitimate. *See infra* Part IV.D.

<sup>158</sup> Article 2(7) of the U.N. Charter is another important provision. It essentially prohibits U.N. members from interfering in the internal affairs of other states. The dissenters protesting in eastern Ukraine is an internal affair of Ukraine. According to Article 2(7), NATO must not intervene in Ukraine. This Comment argues that NATO is intervening with the supply of weapons, thus violating Article 2(7) and using force in violation of Article 2(4) of the U.N. Charter. U.N. Charter art. 2, ¶¶ 4, 7.

<sup>159</sup> *See supra* Part II.C.

<sup>160</sup> Vasudevan Sridharan, *Ukraine Asks Nato to Intervene in the Face of Russian Invasion Threat*, INT'L BUS. TIMES (Mar. 2, 2014), <http://www.ibtimes.co.uk/ukraine-asks-nato-intervene-face-russian-invasion-threat-1438523>.

<sup>161</sup> *See infra* Part IV.D.

<sup>162</sup> Wippman, *supra* note 156, at 209.

is based on the principles set forth in Article 51 of the U.N. Charter. It expands the right of self-defense by imposing an obligation on each member to come to the defense of an attacked member. However, NATO must still seek U.N. approval if it hopes to use force on behalf of a nation that is not a member of NATO.<sup>163</sup> As with any treaty, only members to the North Atlantic Treaty may rely on Article 5.<sup>164</sup> Article 5 has a dual function by acting as a requirement and a restriction. It posits an obligation among each NATO member to take up arms for any other member that is attacked and at the same time limits that obligation to its members.

The question then becomes: what options does NATO have in using force to preserve Ukraine's sovereignty? NATO members are obliged to take up arms and defend only other members who are attacked or under threat of attack.<sup>165</sup> Ukraine is not a member of the alliance and thus Article 5, the building block of NATO, cannot be a justification for intervening on behalf of the country.<sup>166</sup> NATO must provide some alternative justification for any type of intervention. There is historical precedent with respect to NATO acting on behalf of non-NATO members, with Kosovo being the most prominent example. This example implicates the past problems NATO has had in searching for justifications that excuses their intervention in the affairs of a non-member state, and also shows the options NATO may be able utilize with respect to Ukraine.

### C. *The Intervention in Kosovo*

NATO's intervention in Kosovo was largely motivated by a moral and ethical imperative, which had scant or menial legal justifications and was comprised of humanitarian intervention and the maintenance of security in Europe.

Historically, ethnic Albanians living in Kosovo had been oppressed by the Serbian population.<sup>167</sup> In the late 1990s, Serbian forces, under the leadership of Yugoslavian President Slobodan Milošević, began committing massacres

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<sup>163</sup> Marjorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, in LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION 121, 131 (Aleksandar Jokic ed., 2003).

<sup>164</sup> See North Atlantic Treaty, *supra* note 4, art. 5.

<sup>165</sup> See *supra* Part III.

<sup>166</sup> *Id.*

<sup>167</sup> ELLEN HALLAMS, THE UNITED STATES AND NATO SINCE 9/11: THE TRANSATLANTIC ALLIANCE RENEWED 36 (2010).

against Albanians living in Kosovo to drive them out of the area.<sup>168</sup> NATO was fearful that the fighting between the Kosovo Liberation Army and the Yugoslav army would develop into a systematic ethnic cleansing of the Albanian minority.<sup>169</sup> In 1999, NATO began bombing Serbian targets in Kosovo without U.N. authorization, with the intention of forcing Milošević to withdraw his armed forces from Kosovo.<sup>170</sup> U.N. authorization for the mission was not sought because it was a foregone conclusion that two of the five permanent members of the Security Council, Russia and China, would veto any vote to intervene in Kosovo.<sup>171</sup> The air campaign lasted seventy-eight days, Milošević withdrew his forces, and, in the end, NATO prevailed.<sup>172</sup>

NATO's decision to intervene on behalf of Kosovo against Yugoslavia was, and has remained, controversial. The decision remains controversial because no NATO country was attacked or under the threat of attack, yet NATO acted anyway. The thrust behind the intervention seemed to come from the eagerness of NATO countries to "avert a moral, humanitarian catastrophe."<sup>173</sup> Another reason for NATO's action stemmed from the idea of asserting NATO's dominance in the post-Cold War era.<sup>174</sup> In short, NATO's action against Yugoslavia stemmed more from a higher ethical and moral imperative than any legal basis or treaty obligation.

### *1. NATO's Legal Justifications for Intervention in Kosovo*

Notwithstanding NATO's ethical and moral motivations to act in Kosovo, the action could only be legal if NATO acted within the parameters established by the U.N. or NATO Charters. The U.N. Charter provides no legal justification for NATO's use of force, and the NATO Charter also fails to provide any legal justification for NATO's actions in Kosovo. NATO gave two reasons for intervening in Kosovo: humanitarian intervention and a "risk to regional stability."

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<sup>168</sup> IVO DAALDER & MICHAEL O'HANLON, WINNING UGLY: NATO'S WAR TO SAVE KOSOVO 1-3 (2000).

<sup>169</sup> Adam Roberts, *NATO's 'Humanitarian War' Over Kosovo*, 41 SURVIVAL 102, 104 (1999).

<sup>170</sup> HALLAMS, *supra* note 167, at 40.

<sup>171</sup> Richard Falk, *Humanitarian Intervention After Kosovo*, in LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION 31, 35 (Aleksandar Jokic ed., 2003).

<sup>172</sup> DAALDER & O'HANLON, *supra* note 168, at 3.

<sup>173</sup> HALLAMS, *supra* note 167, at 38-39 ("UK Defence Minister George Robertson cited the need to 'reduce the Serbs capacity to repress the Albanian population and thus avert a humanitarian disaster.'). U.S. Secretary of State Madeleine Albright said, "[w]e are not going to stand by and watch Serb authorities do in Kosovo what they can no longer get away with doing in Bosnia," that being ethnic cleansing. *Id.*

<sup>174</sup> Falk, *supra* note 171, at 35.

a. *Article 5 of the U.N. and NATO Charters*

NATO did not seek a U.N. Security Council vote to authorize the intervention because Russia and China would have inevitably rejected the request.<sup>175</sup> Moreover, Article 53 of the U.N. Charter<sup>176</sup> posed an additional obstacle to NATO. Article 53 prohibits “regional enforcement actions” taken by “regional organizations” without a U.N. Security Council vote.<sup>177</sup> Article 53 does not prohibit NATO from acting on behalf of another NATO country; Article 51 provides an independent basis for that action.<sup>178</sup> NATO claimed that Article 53 did not restrain its ability to act collectively because it was an “alliance” and not a “regional organization.”<sup>179</sup> However, this interpretation is unreasonable because it would allow NATO to circumvent U.N. Security Council authorization at any time.<sup>180</sup> As such, the United Nations considers NATO to be a “regional organization” constrained by Article 53.<sup>181</sup>

Since the U.N. Charter provided no legal basis for intervening, the legal justification had to derive from Article 5 of the NATO Charter. However, Article 5 of the NATO Charter was inapplicable to the situation in Kosovo because the country was not a member of NATO. Article 5 obligates the signatories to collective self-defense and could not be used in favor of Kosovo. Furthermore, no NATO country was under the threat of attack. Given the limited number of legal bases available to NATO in the decision to intervene in Kosovo, there was a scramble among NATO members and the international community to find some legal justification for the intervention.

b. *Humanitarian Intervention*

Although NATO countries could not base their decision to intervene on the NATO Charter,<sup>182</sup> Germany and Belgium were the only two NATO countries to give humanitarian intervention as the official legal basis for the Kosovo

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<sup>175</sup> See *supra* Part IV.B.

<sup>176</sup> See U.N. Charter art. 53, ¶ 1 (“The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .”).

<sup>177</sup> Falk, *supra* note 171, at 36.

<sup>178</sup> *Id.* at 50.

<sup>179</sup> See *id.* at 36.

<sup>180</sup> The anti-interventionists rejected this argument. *Id.*

<sup>181</sup> Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 4 (1999).

<sup>182</sup> No NATO member was attacked or under threat of attack. See *infra* Part IV.C.1.a.

bombings.<sup>183</sup> Humanitarian intervention is, perhaps, the most legitimate reason for acting in Kosovo. Even then, humanitarian intervention straddles the line of legitimacy and basks in a twilight zone, at least with respect to intervention and the U.N. Charter.<sup>184</sup> Even though the actions of NATO were condemned, it was given some form of ratification by the U.N. Security Council.<sup>185</sup> Kosovo serves as an example of an emerging form of intervention. NATO is not likely to engage in this sort of action with Ukraine, however, because the humanitarian reasons to do so are rather weak, and it would receive great scrutiny from the international community as another circumvention of the United Nations. The issue in Kosovo was ethnic cleansing, but the issue in Ukraine is primarily one of political and territorial integrity. These are different issues and humanitarian intervention in Ukraine would be an insufficient reason to intervene.

The ICJ spoke on the issue of humanitarian intervention when Yugoslavia sued NATO countries because of the bombing.<sup>186</sup> The Court had to dismiss the case on a jurisdictional basis, but did say “[t]he Court is profoundly concerned with the use of force in Yugoslavia and that it raised very serious questions of international law.”<sup>187</sup> The only time the Court came close to prescribing a legal standard on humanitarian intervention was in *Nicaragua v. United States*, discussed later in this Comment, where the Court prescribed that the excessive use of force by the United States could not be the “appropriate means” to ensure respect for human rights.<sup>188</sup>

### *c. Regional Instability Argument*

NATO countries gave another reason for the bombing campaign. As mentioned earlier, only two NATO countries, Germany and Belgium, gave humanitarian intervention as the reason for the campaign.<sup>189</sup> Other NATO countries said that there was a “need to bring stability to the region” and

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<sup>183</sup> JOHAN D. VAN DER VYVER, IMPLEMENTATION OF INTERNATIONAL LAW IN THE UNITED STATES 233 (2010).

<sup>184</sup> Cohn, *supra* note 163, at 136.

<sup>185</sup> VAN DER VYVER, *supra* note 183, at 233–34.

<sup>186</sup> Cohn, *supra* note 163, at 136.

<sup>187</sup> *Id.*

<sup>188</sup> The ICJ said that an attack must be compatible with the aim of humanitarian intervention. *Id.* at 136–37.

<sup>189</sup> See *supra* Part IV.C.1.b.



“prevent instability spreading in the region.”<sup>190</sup> However, while Article 2 of the NATO Charter mentions “promoting conditions of stability and well-being,”<sup>191</sup> the nature of that broad objective is limited to NATO parties. It provides no legal approach to justify intervention against a non-NATO member and therefore lends no credence to the regional instability argument.

## 2. *NATO’s Kosovo Campaign and its Effect on Ukraine*

NATO’s intervention in Kosovo was the most recent example of NATO flexing its muscles for the purpose of stabilizing peace and security in Europe. NATO could proffer an ethical and moral argument for the actions it took in Kosovo, but it would not be able to support the argument with a legitimate legal basis. Article 5 was inapplicable, Article 51 was inapplicable, and the United Nations gave no authorization under Chapter VII.<sup>192</sup> It stretched legal parameters thin in search for a justification, and the intervention was condemned as an international travesty. The circumstances of ethnic cleansing or genocide may cause NATO to act in this way in the future, but no such justification can be used to intervene on behalf of Ukraine. While there have been deaths in Ukraine, it does not rise to the level of ethnic cleansing or justify any such use of the phrase “humanitarian intervention.”<sup>193</sup>

Kosovo’s intervention is inapposite to intervention in Ukraine because of the lack of a humanitarian crisis. If NATO wants to legitimately intervene in Ukraine, then it must get U.N. approval. However, seeking approval would be futile, considering Russia would veto any such self-condemning measure. NATO’s hopes to intervene, even with Kosovo looming in the background as precedent for intervention on behalf of a non-NATO member, are not likely to be fulfilled because U.N. approval is not available and humanitarian

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<sup>190</sup> Nina Graeger & Alexandra Novosseloff, *The Role of the OSCE and the EU, in THE UNITED NATIONS AND REGIONAL SECURITY* 75, 87 (Michael Pugh & Waheguru P. Singh Sidhu eds., 2003).

<sup>191</sup> North Atlantic Treaty, *supra* note 4, art. 2.

<sup>192</sup> BJOLA, *supra* note 152, at 104. Although the Security Council did not give express authorization for NATO to act, it did give them some blessings by enacting Resolutions 1160 and 1203, which called for violence to stop in Kosovo and expressed concern about the situation in Kosovo as a threat to the “peace and security” in the region, respectively. *Id.*

<sup>193</sup> Compare BJOLA, *supra* note 152, at 58 (explaining that the number of refugees in Kosovo was north of 800,000 and at least 10,500 Kosovar Albanians had been killed by the Serbs when Milošević capitulated, and there had been a long history of animus among the Serbians for the Kosovar Albanians), and Brendan Stone, *The U.S.-NATO Military Intervention in Kosovo: Triggering Ethnic Conflict as a Pretext for Intervention*, GLOBAL RES. (Dec. 29, 2005), <http://www.globalresearch.ca/the-u-s-nato-military-intervention-in-kosovo/1666> (explaining that prior to the intervention, 1,500 Kosovar Albanians were killed and more than 400,000 were removed from their homes), with Croft, *supra* note 123.

justifications are weak. NATO cannot look to Kosovo as a justification to intervene in Ukraine, barring the occurrence of some drastic humanitarian event.

Notwithstanding these conclusions, NATO has decided to assist Ukraine in more than one aspect. Although the intervention is not based on direct military engagement, it does positively affect Ukraine's ability to thwart off Russian aggression, even if it is a slight effect. Multiple reports have stated that NATO countries have begun sending non-lethal military weapons to the Ukrainian government to assist in suppressing the dissenters in eastern Ukraine, although some NATO countries have either (expectedly) denied this report or declined to comment.<sup>194</sup> President Obama made it clear that NATO needed to make "concrete commitments" to help Ukraine modernize and strengthen its military forces.<sup>195</sup> Furthermore, NATO surveillance planes have given information to Ukraine that the country may not have obtained otherwise.<sup>196</sup> In early February 2015, there were serious discussions between the United States and NATO to assist the Ukrainian government in obtaining lethal weapons.<sup>197</sup>

Providing lethal weapons to Ukraine is a patent violation of international law according to *Nicaragua*.<sup>198</sup> Providing non-lethal weapons may not appear to be as patent a violation; however, this Comment argues that they constitute a use of force for two reasons. First, the U.S. Department of Defense (DOD) defined non-lethal weapons as weapons that are "designed and primarily employed to incapacitate personnel or materiel immediately, while minimizing fatalities . . . ."<sup>199</sup> By definition, the DOD admits that fatalities may occur as a result of non-lethal weapons, and there is no reason to preclude non-lethal

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<sup>194</sup> See *NATO Members 'start arms deliveries to Ukraine,' supra* note 3; see also Stephen Lendman, *U.S.-NATO Delivering Arms to Ukraine. The Planning of Aggression Against Russia*, GLOBAL RES. (Dec. 14, 2015), <http://www.globalresearch.ca/us-nato-delivering-arms-to-ukraine-the-planning-of-aggression-against-russia/5419850>; *NATO Countries Have Begun Arms Deliveries to Ukraine: Defense Minister*, REUTERS, <http://www.reuters.com/article/2014/09/14/us-ukraine-crisis-helety-idUSKBN0H90PP20140914> (last updated Sept. 14, 2014).

<sup>195</sup> *Obama Says NATO Should Help Strengthen Ukraine's Army*, RADIO FREE EUR. RADIO LIBERTY (Sept. 3, 2015), <http://www.rferl.org/content/obama-estonia-nato-ukraine-russia/26565158.html>.

<sup>196</sup> Nate Rawlings, *NATO Deploys Planes to Monitor Ukraine Border*, TIME (Mar. 12, 2014), <http://time.com/21114/nato-deploys-planes-to-monitor-ukraine-border/>.

<sup>197</sup> See Julian Barnes, *U.S. Weapons to Ukraine Could Take Months, Officials Say*, WALL ST. J. (Feb. 11, 2015), <http://www.wsj.com/articles/u-s-weapons-to-ukraine-could-take-months-officials-say-1423693717>; see also Michael Gordon & Eric Schmitt, *U.S. Considers Supplying Arms to Ukraine Forces, Officials Say*, N. Y. TIMES (Feb. 1, 2015), <http://www.nytimes.com/2015/02/02/world/us-taking-a-fresh-look-at-arming-ukraine-forces.html>.

<sup>198</sup> See *infra* Part IV.E.2.

<sup>199</sup> Policy for Non-Lethal Weapons, U.S. Dep't of Def. Directive No. 3000.3, ¶ C (July 9, 1996).

weapons from the guise of Article (2)(4). Second, it is conceivable to say that non-lethal weapons could be seen as using force against the dissenters in eastern Ukraine.<sup>200</sup> Use of force need not always be lethal. The ICJ envisioned scenarios that involved the use of force that may not rise to the level of lethal or armed attacks.<sup>201</sup> This Comment adopts the view that non-lethal weapons constitute “use of force” under the U.N. Charter.<sup>202</sup>

#### *D. Ukraine’s Current Government and its Legitimacy*

NATO responded to Russia’s invasion of Crimea by strengthening their forces in Eastern Europe, imposing sanctions on Russia, and delivering arms to the Ukrainian government.<sup>203</sup> By intervening in this conflict, NATO is providing arms to an illegitimate government. The current government in Kiev was placed into power with little regard for due process and was not established legally. Specifically, the Verkhovna Rada’s removal of President Yanukovich was unconstitutional.<sup>204</sup> The interim government had no authority to establish the elections subsequent to the ouster. In addition, the current government, which would not be in power but for Ukraine’s unconstitutional ouster, does not have effective control over Ukraine.

##### *1. Legitimacy Requirements of a Government*

As a political matter, many states no longer weigh in on the legitimacy of foreign governments.<sup>205</sup> This abstention from making validity judgments stems from what is known as the Estrada Doctrine and is premised on the idea of a state not interfering with, or sitting in judgment of, another state’s internal affairs.<sup>206</sup> Regardless of the political decisions countries make, there is a legal test that a government must meet in order to be considered legitimate. Three cases set forth the criteria for a government to be considered legitimate: *Republic of Somalia v. Woodhouse Drake & Carey*,<sup>207</sup> *Great Britain v. Costa*

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<sup>200</sup> See David Fidler, *The International Legal Implications of “Non-Lethal” Weapons*, 21 MICH. J. INT’L L. 51, 79 (1999).

<sup>201</sup> See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, ¶ 247 (June 27).

<sup>202</sup> See U.N. Charter art. 2, ¶ 4.

<sup>203</sup> See *supra* Parts II.D–E.

<sup>204</sup> Sindelar, *supra* note 62.

<sup>205</sup> STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 3 (1998).

<sup>206</sup> See Phillip C. Jessup, *The Estrada Doctrine*, 25 AM. J. INT’L L. 719, 723 (1931).

<sup>207</sup> *Republic of Somalia v. Woodhouse Drake & Carey*, [1993] Q.B. 54 (Eng.).

*Rica* (“*Tinoco Arbitration*”),<sup>208</sup> and *Autocephalous Greek Orthodox Church of Cyprus v. Feldman* (“*Northern Cyprus*”).<sup>209</sup> *Somalia* sets forth the basic criteria for governmental legitimacy,<sup>210</sup> while the latter two cases primarily focus on a single factor of the basic criteria.<sup>211</sup>

*Somalia* establishes four legal factors for determining whether a government is legitimate.<sup>212</sup> It was presented to the Queen’s Bench Division, which is one of the three divisions of the High Court of Justice of England and Wales (the “High Court”).<sup>213</sup> At the time Judge Hobhouse heard the case, the United Kingdom embraced the Estrada Doctrine by promulgating the following declaration:

We have conducted a re-examination of British policy and practice concerning the recognition of governments. This has included a comparison with the practice of our partners and allies. On the basis of this review, we have decided that we shall no longer accord recognition to governments . . . . Like them, we shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.<sup>214</sup>

Nevertheless, the High Court felt this was unhelpful and decided to provide a legal test to determine whether the *Somalia* government was legitimate.<sup>215</sup> The basic facts of *Somalia* are as follows. In 1991, the Republic of Somalia purchased a cargo of rice, but it was never delivered because the master of the ship considered the port dangerous due to fighting in the country.<sup>216</sup> The rice was sold and the proceeds were placed in a court in London.<sup>217</sup> *Somalia* demanded the proceeds to be delivered to the government, but the High Court

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<sup>208</sup> *Gr. Brit. v. Costa Rica*, 1 U.N. Rep. Int’l Arb. Awards 369, 371 (1923).

<sup>209</sup> *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg* (*Northern Cyprus*), 917 F.2d 278 (7th Cir. 1990).

<sup>210</sup> *Somalia*, Q.B. 54 at 68.

<sup>211</sup> *Gr. Brit.*, 1 R.I.A.A. at 382; *see also Northern Cyprus*, 917 F.2d at 293 (quoting *Williams v. Bruffy*, 96 U.S. 176, 24 L. Ed. 716 (1878)).

<sup>212</sup> *Somalia*, Q.B. 54 at 68.

<sup>213</sup> *Queen’s Bench Division*, JUSTICE (Mar. 26, 2015), <https://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench>.

<sup>214</sup> *Somalia*, Q.B. 54 at 62.

<sup>215</sup> *Id.* at 63.

<sup>216</sup> Benedict Kingsbury, *Judicial Determination of Foreign “Government” Status*, 109 L.Q. REV. 377, 377 (1993). The former President of Somalia, Siad Barre, was ousted and various political factions resulted in a civil war, with many entities claiming to be the legitimate government of the region. *Id.*

<sup>217</sup> *Id.*

rejected the demand because there was doubt as to whether the representative making the demand had the appropriate authority to do so.<sup>218</sup> Somalia was under an interim government at the time of the demand due to civil war.<sup>219</sup> Judge Hobhouse set forth the following legal analysis for assessing whether a government could indeed be deemed legitimate:

(a) [W]hether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's Government has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.<sup>220</sup>

The High Court ruled that on the first three factors, the government making the demand was illegitimate, and thus had no authority to make such a demand for the proceeds.<sup>221</sup> The High Court did not analyze the fourth factor since the government failed the first three factors.

The test in *Somalia* provides the courts with clear guidance when assessing whether a government is legitimate. A government can be legitimate either de jure or de facto. If the government is established de jure, then there should be an automatic presumption of validity. However, if the government that purports to exist is not derived by lawful means, then it is a de facto government. Generally, a de facto government will be accorded legitimacy only if it maintains effective control over the territory it purports to govern.<sup>222</sup> The “effective control” test is a method for testing the legitimacy of a government, but this Comment argues that the test from *Somalia* is more complete, as it encompasses a more holistic view in asserting whether a government is legitimate. This test will demonstrate more strongly than the effective control test why the Ukrainian government is illegitimate.

The factor of effective control is appropriately elaborated in *Tinoco Arbitration*<sup>223</sup> and *Northern Cyprus*.<sup>224</sup> In *Tinoco Arbitration*, the Tinoco

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<sup>218</sup> *Id.* at 377–78.

<sup>219</sup> *Id.* at 377.

<sup>220</sup> *Somalia*, Q.B. 54 at 68.

<sup>221</sup> *Id.*

<sup>222</sup> *Gr. Brit. v. Costa Rica*, 1 U.N. Rep. Int'l Arb. Awards 369, 371, 382 (1923); *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg* (*Northern Cyprus*), 917 F.2d 278, 293 (7th Cir. 1990).

<sup>223</sup> *Gr. Brit.*, 1 R.I.A.A. at 371.

<sup>224</sup> *Northern Cyprus*, 917 F.2d at 278.

regime overthrew the previous government to come to power.<sup>225</sup> Great Britain tried to enforce agreements entered into by the Tinoco regime, but Costa Rica denied the enforcement of the agreements because the Tinoco regime was not a de facto or de jure government.<sup>226</sup> The Tinoco regime was rather peaceful and no other entity claimed to be the rightful government of the country.<sup>227</sup> The case hinged on whether the government “established itself in such a way that all within its influence recognize[d] its control, and that there [was] no opposing force assuming to be a government in its place.”<sup>228</sup> In *Tinoco Arbitration*, the arbitrators were concerned about whether the government had the acquiescence of the people it governed.<sup>229</sup> The panel found that people accepted the government and that there was no other government claiming to be the actual legitimate government.<sup>230</sup> Thus, a de facto government existed.<sup>231</sup>

Furthermore, *Northern Cyprus* reiterates the notion that a de facto government must show control. The principles of this case maintain that territorial control of a government is a key factor in establishing whether the de facto government has enough effective control for it to become a government.<sup>232</sup> The court stated, “[t]he Turkish forces, despite their best efforts, did not completely supplant the Republic nor its officers . . . [it] only acceded to the control of the northern portion of Cyprus.”<sup>233</sup> This implies that in addition to acquiescence, courts can generally look to territorial control. Thus, in finding the existence of effective control the court should look to acquiescence of the State’s population, the lack of an opposing entity claiming to be the legitimate government, and territorial control over the entirety of the country, as opposed to just a portion of it.

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<sup>225</sup> *Gr. Brit.*, 1 R.I.A.A. at 376.

<sup>226</sup> *Id.* at 377.

<sup>227</sup> *Id.* at 379.

<sup>228</sup> *Id.* at 382.

<sup>229</sup> *See id.* at 379.

<sup>230</sup> *See id.*

<sup>231</sup> *Id.* at 381.

<sup>232</sup> *See Autocephalous Greek Orthodox Church of Cyprus v. Goldberg (Northern Cyprus)*, 917 F.2d 278, 293–94 (7th Cir. 1990).

<sup>233</sup> *Id.* at 293.

## 2. *Applying the Law of Legitimacy to Ukraine's Government*

### a. *Ukraine's Unconstitutional Ouster*

The first factor of the *Somalia* test asks whether the current Ukrainian government arrived to power out of the procedural manners set forth in Ukraine's Constitution.<sup>234</sup> Essentially, if the government did not come into power by operation of law, that being the Constitution, then it would fail to satisfy the first factor. Upon analyzing the facts in Ukraine, this Comment argues that there was no legal basis for the ouster of former President Yanukovich and the implementation of the new government. It was a revolutionary play that held no regard for Constitutional authority.

Ukraine may have an issue as to which Constitution controls the country, however, both Constitutions are similar and require the same analysis in determining the legitimacy of the current government.<sup>235</sup> In February 2014, President Yanukovich was supposed to reinstate the 2004 Constitution, pursuant to a peace deal with the European Union.<sup>236</sup> The reinstatement would have weakened Presidential authority.<sup>237</sup> However, President Yanukovich never reinstated the 2004 Constitution.<sup>238</sup> Regardless of the applicability of either Constitution, both contain identical impeachment procedures in Article 111 and grant the Verkhovna Rada the power to commence an impeachment proceeding in Article 85.<sup>239</sup> Additionally, both Constitutions give the Verkhovna Rada the right to commence an impeachment procedure against the President "if he commits treason or other crime."<sup>240</sup>

Furthermore, both Constitutions require three-quarters of the "constitutional composition" of the Verkhovna Rada to vote in favor of impeachment to remove the President.<sup>241</sup> Of 450 members, 328 voted to oust President Yanukovich.<sup>242</sup> This did not meet the three-quarters requirement of

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<sup>234</sup> See generally CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 111.

<sup>235</sup> See Sindelar, *supra* note 62.

<sup>236</sup> *Id.*

<sup>237</sup> See *id.*

<sup>238</sup> *Id.*

<sup>239</sup> See CONSTITUTION OF UKRAINE Dec. 8, 2004, arts. 85, 111; CONSTITUTION OF UKRAINE Dec. 1, 1991, arts. 85, 111.

<sup>240</sup> Sindelar, *supra* note 62.

<sup>241</sup> See CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 111; CONSTITUTION OF UKRAINE Dec. 1, 1991, art. 111; see also Ashley Deeks, *Russia in Ukraine: A Reader Responds*, LAWFARE BLOG (Mar. 5, 2014, 1:30 PM), <http://www.lawfareblog.com/2014/03/russia-in-ukraine-a-reader-responds/>.

<sup>242</sup> Sindelar, *supra* note 62.

337 votes.<sup>243</sup> On the textual basis of the Constitution, the ouster was not legal or in accordance within any Constitutional procedure. There was no legal basis for the ouster and it appears to be nothing more than a political rejection of Russian integration.

The Verkhovna Rada may cite to Yanukovych's abandoning the office of the Presidency as support for the legitimacy of the ouster, or they may even cite the deaths that occurred during the protests in the Maidan.<sup>244</sup> However, these reasons do not support inculpation of treason or that he was guilty of some crime. It is difficult to show Yanukovych was the sole person responsible or even was a conspirator in the deaths of those at the Maidan and the evidence does not support him being guilty of a crime.

Even still, if one were to accept these rather weak reasons, the fact remains that the votes needed to impeach Yanukovych were not obtained. Furthermore, an investigation and judgment from the Constitutional Court must occur before a Ukrainian president can be impeached, and neither of these happened.<sup>245</sup> The appointed interim government was not legitimate, and the current government that was established by the interim government is not legitimate. Since the current government is unconstitutional, it cannot be considered a government that is *de jure* or established by law. To be legitimized, it would have to show that it has effective control over the territory, as a *de facto* government would.<sup>246</sup>

#### *b. Ukraine's Lack of Control*

The current Ukrainian government must show that it has administrative control over the territory if it hopes to be classified as legitimate. In applying the law of *Tinoco Arbitration* and *Northern Cyprus* to the facts in Ukraine, the current government cannot be said to have effective control. Thus, it does not meet the second factor of the *Somalia* test. The current government maintains effective control over the western half of the country, but not the eastern half. It has lost Crimea to Russia, the eastern territory is having referendums to

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<sup>243</sup> Deeks, *supra* note 241.

<sup>244</sup> Sindelar, *supra* note 62.

<sup>245</sup> Ronan Keenan, *The US Should Stop Calling Ukraine's New Government 'Legitimate,'* GEOPOLITICAL MONITOR (Mar. 30, 2014), <http://www.geopoliticalmonitor.com/the-us-should-stop-calling-ukraines-new-government-legitimate-4955/>.

<sup>246</sup> See *Republic of Somalia v. Woodhouse Drake & Carey*, [1993] Q.B. 54, 67 (Eng.). The High Court noted the "effective control" factor was critical in establishing whether a *de facto* government can be labeled legitimate. *Id.*



secede, and the fighting and bloodshed has not stopped between the government and the dissenters in the eastern part of the country.<sup>247</sup>

When assessing this factor with respect to Ukraine, the current government of Ukraine has little control over the eastern territory. In March 2014, Interim President Turchynov stated that the government had “practically lost control of the east of the country” and described his security forces as “helpless” when it comes to fighting the pro-Russian dissenters.<sup>248</sup> Given the voting on secession referendums in eastern Ukraine, as well as the inability to control the pro-Russian dissenters,<sup>249</sup> the government has little control over a sizeable portion of the country. The eastern part of the country still believes that Yanukovich is the rightful President of Ukraine, views the ouster as unconstitutional, and rejects the current government.<sup>250</sup> This claim has strong merit.

The current government cannot be said to have taken power with support from a substantial number of the individuals in Ukraine. The eastern part of the country is still rebelling and calling for separation, all while claiming the illegitimacy of the current government.<sup>251</sup> Furthermore, the western half of the country is not under the current government’s control, as the pro-Russian dissenters have control of at least 193 square miles of eastern Ukrainian territory.<sup>252</sup> The eastern and western parts of Ukraine could not be more at odds with one another. The factor of effective control is not fulfilled, and the current government is not legitimate.

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<sup>247</sup> See *supra* Parts II.B–D.

<sup>248</sup> Luke Harding, *Ukraine’s Government Has Lost Control of East, Says Acting President*, GUARDIAN (Apr. 30, 2014), <http://www.theguardian.com/world/2014/apr/30/ukraine-government-lost-control-east-acting-president>.

<sup>249</sup> See *supra* Part II.C.

<sup>250</sup> Tom Kutch, *Ukrainians in the South and East Oppose Pro-Western Leadership*, AL JAZEERA AM. (Feb. 27, 2014), <http://america.aljazeera.com/articles/2014/2/27/in-ukraine-s-eastdivisionnotdissolution.html>.

<sup>251</sup> *Id.* As of 2009, the four most eastern Ukrainian provinces (Luhansk, Donetsk, Zaporizhzhia, and Kherson), excluding Crimea, represented approximately twenty percent of the country’s population, with a little over nine million people. See State Statistics Comm. of Ukr., *All Ukrainian Population Census ‘2001* (Mar. 12, 2010), <http://www.ukrcensus.gov.ua/eng/news/article:891/> [<http://web.archive.org/web/20100312174321/>] (citing state statistics from 2009).

<sup>252</sup> Gordon & Schmitt, *supra* note 197. Ukraine as a country is approximately 233,000 square miles. Matthew Guariglia, *Donetsk People’s Republic: 5 Fun Facts You Need to Know*, HEAVY (July 17, 2014, 4:14 PM), <http://heavy.com/news/2014/07/donetsk-peoples-republic-ukraine-russia-malaysia-flight-shot-down-americans/>. In July 2014, the rebels controlled 10,000 square miles, a territory approximately the size of Maryland. *Id.* The Crimean peninsula is approximately 10,000 square miles. Marc Lallanilla, *5 Key Facts About Crimea*, LIVESCIENCE (Mar. 3, 2014, 5:29 PM), <http://www.livescience.com/43815-facts-about-crimea-ukraine-russia.html>.

c. *Ability to Deal with Other Governments*

In contrast, the current Ukrainian government has been regarded as legitimate by NATO and the United States.<sup>253</sup> NATO has dealt with the current government as if it is the legitimate government of the country through supplying arms to extinguish the rebellion in the eastern half of the country.<sup>254</sup> Even if Ukraine were to show they are still entering into negotiations and relations with other governments, this is not a strong enough factor by itself to make the government legal and legitimate.

d. *The Extent of International Recognition of the Entity as the Government of the State in Question*

This factor need not be analyzed because the court in *Somalia* held, “where an unconstitutional entity exercised little or no effective control, no amount of recognition could entitle it to claim state property in an English court.”<sup>255</sup> As has been established earlier in this Comment, the current Ukrainian government has little effective control over the country, and its power is not derived from the Constitution.

E. *NATO’s Intervention in Ukraine: A Violation of International Law?*

NATO members intervened in the conflict by supplying weapons to the Ukrainian government.<sup>256</sup> Ukraine’s Defense Minister, Valery Heletey, said, “I have no right to disclose any specific country we reached that agreement with. But the fact is that those weapons are already on the way to us - that’s absolutely true, I can officially tell you.”<sup>257</sup> Based on the statements from Ukraine’s Defense Minister, it is evident that some NATO countries have provided arms to fight against the dissenters in the eastern half of the

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<sup>253</sup> Keenan, *supra* note 245; *see supra* Part II.E; *see also* *Russia’s Accusations - Setting the Record Straight*, NATO (July 16, 2014), [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2014\\_07/20140716\\_140716-Factsheet\\_Russia\\_en.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2014_07/20140716_140716-Factsheet_Russia_en.pdf).

<sup>254</sup> *See supra* Part II.E.

<sup>255</sup> Kingsbury, *supra* note 216, at 380.

<sup>256</sup> *See NATO Members ‘start arms deliveries to Ukraine,’ supra* note 3.

<sup>257</sup> Richard Balmforth, *NATO Countries Have Begun Arms Deliveries to Ukraine: Defense Minister*, REUTERS (Sept. 14, 2014, 6:24 PM), <http://www.reuters.com/article/2014/09/14/us-ukraine-crisis-heletey-idUSKBN0H90PP20140914>.

country.<sup>258</sup> NATO has not deployed soldiers to the region, but its Secretary-General, Anders Fogh Rasmussen, has not precluded the possibility.<sup>259</sup>

The United States has provided assistance to Ukraine, but has limited the assistance to supplying night vision goggles, body armor, and communications equipment.<sup>260</sup> The United States is also planning to deploy military soldiers to Ukraine for training purposes.<sup>261</sup> As of early February 2015, the United States had strongly considered sending arms to Ukraine.<sup>262</sup> Additionally, the United States Congress passed the Ukraine Freedom Support Act, which authorized President Obama to use lethal and non-lethal aid to support Ukraine.<sup>263</sup> NATO members and the United States have intervened with non-lethal aid, and seemed poised to act with lethal aid.<sup>264</sup> If either NATO or the United States were to aid Ukraine with weapons and train its soldiers, then it would violate a fundamental principle of the ICJ's decision in the *Nicaragua* case described below. Additionally, NATO would be acting outside the confines of Article 5 of the NATO Charter, since Ukraine is not a NATO member.

### 1. *Military and Paramilitary Activities in and Against Nicaragua*

The facts of the *Nicaragua* case are as follows. The United States armed and trained rebels (known as the *contras*) in the hopes they would overthrow the existing Sandinista government.<sup>265</sup> The *contras* would come from nearby nations and try to instigate rebellion in Nicaragua to destabilize the government.<sup>266</sup> Nicaragua filed suit against the United States in the ICJ for arming and training the *contras*.<sup>267</sup> Nicaragua alleged that the United States violated the general prohibition against the use of force as found in Article 2(4)

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<sup>258</sup> *Id.*

<sup>259</sup> Croft, *supra* note 123.

<sup>260</sup> Chuck Vinch, *US Sending Advisors, Gear to Ukraine*, USA TODAY (June 5, 2014, 10:37 PM), <http://www.usatoday.com/story/news/nation/2014/06/05/us-sending-advisers-gear-to-ukraine-/10046845/>.

<sup>261</sup> Niles Williamson, *US Announces Plan to Deploy Military Advisers to Ukraine*, GLOBAL RES. (Jan. 23, 2015), <http://www.globalresearch.ca/us-announces-plans-to-deploy-military-advisers-to-ukraine/5426477>.

<sup>262</sup> Gordon & Schmitt, *supra* note 197.

<sup>263</sup> Stephen Lendman, *US-NATO Delivering Arms to Ukraine. The Planning of Aggression Against Russia*, GLOBAL RES. (Dec. 15, 2014), <http://www.globalresearch.ca/us-nato-delivering-arms-to-ukraine-the-planning-of-aggression-against-russia/5419850>.

<sup>264</sup> See Gordon & Schmitt, *supra* note 197; see also Brianna Lee, *Ukraine Crisis: US, European Officials Split Over Sending Arms To Ukraine*, INT'L BUS. TIMES (Feb. 5, 2015), <http://www.ibtimes.com/ukraine-crisis-us-european-officials-split-over-sending-arms-ukraine-1807116>.

<sup>265</sup> BEDERMAN, *supra* note 151, at 233.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

of the U.N. Charter and unlawfully intervened in the affairs of Nicaragua, prohibited by Article 2(7) of the U.N. Charter.<sup>268</sup> The United States counterclaimed that Nicaragua was arming groups in El Salvador and was engaged in “trans-border military incursions,”<sup>269</sup> and asserted that arming the *contras* was collective self-defense.<sup>270</sup> The Court found that the evidence of Nicaragua supplying arms to groups in El Salvador was rather weak.<sup>271</sup> The Court looked to Article 38 of the ICJ Statute, which prescribes generally the sources of international law, to establish the governing law.<sup>272</sup>

The Court put forth a number of basic legal propositions in rendering its decision, all of which will form a legal basis for addressing the current situation in Ukraine. The basic propositions are more pertinent to this Comment than the actual outcome in the *Nicaragua* case because they will provide the basis for the argument that NATO is violating the ICJ’s decision. First, the Court found that the parties to the case, Nicaragua and the United States, accepted that prohibitions on the “use of force” and the “exceptions to the use of force” in the U.N. Charter as a part of customary international law.<sup>273</sup> Second, the Court stipulated that self-defense may only be justified by an armed attack, and arming and assisting rebels does not rise to the level of an armed attack.<sup>274</sup> However, the Court did find that assisting and arming rebels could breach the “non-use of force” and non-interventionists principles found in Articles 2(4) and 2(7) of the U.N. Charter, respectively.<sup>275</sup> More specifically, the Court stated that the supply of arms or other “such activities” would be considered a use of force in violation of international law.<sup>276</sup>

Thus, if State A commits an armed attack against State B, then State B would be permitted to use force against State A on the basis of self-defense. If State A uses force against State B, or intervenes in State B’s affairs, then State A would be in violation of international law. However, that does not

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<sup>268</sup> Michael Schmitt, *Legitimacy Versus Legality Redux: Arming the Syrian Rebels*, 7 J. NAT’L SECURITY L. & POL’Y 139, 141 (2014).

<sup>269</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, ¶¶ 160, 164 (June 27).

<sup>270</sup> *Id.* ¶ 165.

<sup>271</sup> *Id.* ¶ 153.

<sup>272</sup> *Id.* ¶ 172; see Statute of the International Court of Justice art. 38, ¶ 1, Apr. 18, 1946, 59 Stat. 1055, T.S. No. 993. Article 38 of the ICJ Statute looks to treaties, customary international law, general principles of law, judicial decisions, and highly qualified publicists in establishing the governing law. *Id.*

<sup>273</sup> *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 187–88.

<sup>274</sup> *Id.* ¶ 195.

<sup>275</sup> *Id.* ¶ 247.

<sup>276</sup> *See id.*

necessarily permit State B to use force against State A in the name of self-defense since it was not an armed attack. Additionally, the Court found that the principle of non-intervention found in Article 2(7) of the U.N. Charter is customary international law and “forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states.”<sup>277</sup>

In this case, the Court ruled that the United States had no right to intervene because Nicaragua’s aid to the rebels in El Salvador did not rise to the level of an armed attack.<sup>278</sup> Hence, the United States violated international law by aiding the rebels and supplying them with arms and training, which constituted a “use of force” and had unjustifiably intervened, for the purpose of toppling a legitimate government.<sup>279</sup> The United States had no right to take any defensive measures since there was no evidence of an armed attack. The basic principles from this case will be helpful in elucidating and providing an analogy as to why NATO is violating *Nicaragua* in Ukraine.

## 2. Applying the *Nicaragua* Analysis to Ukraine

While the conflicts at issue in *Nicaragua* and Ukraine are dissimilar, the fundamental principles of the case can serve as a useful guide in evaluating the legality of NATO’s actions. Providing weapons (lethal or non-lethal) and training exercises to Ukraine’s illegitimate government for the purpose of suppressing protesters in eastern Ukraine violates basic principles of international law and the ICJ’s decision in *Nicaragua*.

Much like in *Nicaragua*, a regional organization of governments (NATO), primarily led by the United States, is sending weapons to an illegitimate and illegal entity for the purpose of establishing and attaining its legitimacy. The current Ukrainian government unconstitutionally ousted a legitimate government on the basis that its political leanings were not in accordance with those residing in the western part of the country. It is an illegitimate body that is receiving military support from NATO members in the form of weapons, joint military exercises, and advice.<sup>280</sup> This is much like the United States aiding the rebels in Nicaragua because both entities are illegitimate.

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<sup>277</sup> *Id.* ¶¶ 202–05.

<sup>278</sup> *Id.* ¶ 195; BEDERMAN, *supra* note 151, at 234.

<sup>279</sup> *Nicar. v. U.S.*, 1986 I.C.J. ¶ 195.

<sup>280</sup> See *NATO Members 'start arms deliveries to Ukraine,' supra* note 3; see also Tim Shipman & Ian Drury, *Ukraine to Hold Joint Military Exercises with U.S. and Britain After Announcing Troop Withdrawal from Crimea*, DAILY MAIL (Mar. 20, 2015), <http://www.dailymail.co.uk/news/article-2584693/Ukraine-hold-joint-military-exercises-U-S-Britain-announcing-troop-withdrawal-Crimea.html>; Maggie Ybarra, *Obama*

NATO is permitting and encouraging its members to supply this illegitimate government with weapons in order to seize the eastern part of the country.<sup>281</sup> In *Nicaragua*, the United States was trying to tear down a legitimate government, but in Ukraine, the United States, along with other NATO members, is attempting to build and foment an illegitimate government by aiding it with weapons so it can secure its power and have “effective control” over the territory in eastern Ukraine. By arguing the inverse of *Nicaragua*, the ICJ could very well find that the same legal principles from *Nicaragua* could easily render NATO members in clear violation of the U.N. Charter. NATO members are violating Article 2(4) of the U.N. Charter by using force (as defined in *Nicaragua*), and Article 2(7) by intervening in the internal affairs of Ukraine because Ukraine is not a NATO member.

Although this government may not take the form of rebels, it stems from unlawful activity and is no more legitimate than a coup. Ukrainians in the eastern half of the country reject it and protest against the destructive behavior of those who established it. NATO’s duties do not legally encapsulate the building of an illegitimate government for the sake of political purposes and NATO should restrict its members from engaging in this situation.

## V. PROPOSED SOLUTIONS

Current reports have indicated that the United States is willing to offer lethal arms to support the Ukrainian government.<sup>282</sup> Not only would this action patently violate international law and strengthen the gravity of the violation,<sup>283</sup> it would be a profound moral mistake. The aim of this Comment is to steer the current conflict away from violence and avoid the use of force. Benjamin Ferencz, the last remaining prosecutor from the Nuremberg trials, is a strong advocate of avoiding war and limiting the use of force. He has said, “[y]ou

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*Orders Pentagon Advisers to Ukraine to Fend Off Putin-Backed Rebels*, WASH. TIMES (July 22, 2014), <http://www.washingtontimes.com/news/2014/jul/22/pentagon-team-dispatched-to-ukraine-amid-crisis-wi/?page=all>.

<sup>281</sup> See *NATO Members ‘start arms deliveries to Ukraine,’ supra* note 3; see also *NATO Countries Have Begun Arms Deliveries to Ukraine: Defense Minister*, REUTERS (Sept. 14, 2014), <http://www.reuters.com/article/2014/09/14/us-ukraine-crisis-heletey-idUSKBN0H90PP20140914>; *Obama Says NATO Should Help Strengthen Ukraine’s Army, supra* note 195.

<sup>282</sup> See Gordon & Schmitt, *supra* note 197; *NATO Members ‘start arms deliveries to Ukraine,’ supra* note 3.

<sup>283</sup> See *supra* Part III.E.2.

cannot kill an ideology with a gun, you only create more enemies.”<sup>284</sup> This is an insightful statement that provides a normative, moral guide in terms of how countries should view the use of force. NATO and the United States should avoid using force in Ukraine through the supplying of weapons. In diplomatic terms, supplying Ukraine with weapons to quell the protests in eastern Ukraine would only further foment hostile tensions between the West and Russia.

In lieu of supplying weapons, NATO and the United States should foster a dialogue centered around either moral condemnation or diplomacy. Some concessions must be made for the sake of limiting violence and force. More specifically, the western half of Ukraine should consider the possibility of letting eastern Ukraine secede.

International law is generally hostile to secession. It allows for it in only two situations: (1) the entire population of the country—not just inhabitants of the seceding region—votes in favor of secession by substantial majority; or (2) following an armed conflict, distinct territories of an existing state agree to part ways under a peace treaty and boundaries are redrawn under that treaty.<sup>285</sup> Either of these situations may give rise to secession in eastern Ukraine, but the first is preferred because it does not require an armed conflict. Ideally, the entire population of Ukraine would vote in favor of secession in eastern Ukraine,<sup>286</sup> especially since the country is so divided politically, culturally, and linguistically.<sup>287</sup>

The basis for secession could potentially be made on the right to self-determination.<sup>288</sup> Self-determination is the principle that “the rights of peoples and distinct nationalities to have a State that is representative of their national aspirations.”<sup>289</sup> More specifically, external self-determination would permit

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<sup>284</sup> *Nuremberg Tribunals Prosecutor Ferencz Encourages Students to Think Along Humanitarian Lines*, EMORY U. SCH. L. (Jan. 29, 2015), <http://law.emory.edu/news-center/releases/2015/01/nuremberg-tribunals-prosecutor-ben-ferencz.html#VpR5HcArJcw>. Benjamin Ferencz gave a lecture on his life experiences and thoughts on use of force, law, and international crimes against humanity. This author had the pleasure of attending the event and was captivated by this quote. *Id.*

<sup>285</sup> Johan van der Vyver, *Self-Determination of the Peoples of Quebec Under International Law*, 10 J. TRANSNAT’L L. & POL’Y 1, 26 (1992).

<sup>286</sup> CONSTITUTION OF UKRAINE Dec. 8, 2004, art. 73. Ukraine has adopted the notion that any referendum for secession must be put to a vote by all the people of Ukraine.

<sup>287</sup> See *supra* Parts I.B–C.

<sup>288</sup> Photini Pazatzis, *Secession and International Law: The European Dimension*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 355, 356 (Marcelo Kohen ed., 2006).

<sup>289</sup> BEDERMAN, *supra* note 151, at 56.

people to secede and form their own country.<sup>290</sup> The government in the western part of the country is pro-West and the dissenters in the eastern part of the country are pro-Russian. Protests inspired the ouster of Ukraine's rightful president and the establishment of an illegitimate government, which is now trying to suppress the reactions in the eastern half of the country. The current Ukrainian government is not advocating for or representing the interests of the people from the eastern part of the country, and this denial of the right to self-determination could provide the basis for secession. However, it should be noted that self-determination does not necessarily include a right to unilateral secession and may have to include a vote of the citizens of western Ukraine.<sup>291</sup>

As discussed above, a war of national liberation is generally seen as legitimate because it is closely connected to the right of self-determination.<sup>292</sup> Perhaps the United States, along with other NATO members, could collectively act to help the dissenters in eastern Ukraine, since there could be an argument for self-determination. While the focus of this Comment is not on the circumstances that would legally justify secession based on external self-determination, secession is potentially one option for Ukraine to end this conflict. Violence and armed conflict will not produce any long-term winners in this situation, as they will only create more enemies at an international level and further alienate the Eastern and Western powers of the world.

#### CONCLUSION

In conclusion, the United States and NATO are violating international law by supplying weapons and aid to Ukraine. Article 2(4) of the U.N. Charter prohibits the use of force. It provides two exceptions to the use of force: self-defense and a U.N. Security Council vote. NATO has not secured a valid U.N. Security Council vote to use force in Ukraine, and it cannot rely on self-defense because no NATO members have been attacked. Article 5 of the NATO Treaty also provides no justification for collective self-defense. Therefore, NATO is violating the general prohibition against the use of force.

Article 2(7) of the U.N. Charter acts as an additional restraint on NATO because it expressly forbids states from intervening in the internal affairs of

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<sup>290</sup> John Dugard & David Raic, *The Role of Recognition in the Law and Practice of Secession*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 94, 104–05 (Marcelo Kohen ed., 2006).

<sup>291</sup> *Id.*; van der Vyver, *supra* note 285, at 11–12.

<sup>292</sup> Dugard & Raic, *supra* note 290.



other states. NATO is not complying with this Article.<sup>293</sup> Nothing from the U.N. Charter or the NATO Treaty permits the intervention or flow of weapons into Ukraine. Also, NATO may not rely on Ukraine's consent because the current Ukrainian government is illegitimate.<sup>294</sup> The current Ukrainian government is illegitimate because it was established as the result of an ouster, has not been established by constitutional methods, and does not have effective control of the territory.<sup>295</sup> NATO members are also violating the ICJ's decision in *Nicaragua* by providing weapons to Ukraine's illegitimate government. NATO members are trying to build up an illegitimate and illegal government so it can secure its power and have effective control over the country.

NATO members, led by the United States, are violating international law and are at the forefront of a potential escalation of violence. The situation in Ukraine needs fewer guns, not more. International law exists for that very reason—regulating the relationships between states. One can only hope that NATO chooses the legal and higher moral ground in combating the ice-cold tensions of the past in order to help foster a dialogue based on the idea that the West and the East can have better relations.

MATTHEW EMERY\*

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<sup>293</sup> See *supra* Part IV.E.2.

<sup>294</sup> See *supra* Part IV.D.2.

<sup>295</sup> See *supra* Part IV.D.

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