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.¹ 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.²

¹ See infra Part II.
Furthermore, the United States and other NATO members have supplied Ukraine with weapons in an effort to thwart Russia’s advances.³ 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.⁴ Ukraine is already internally divided as a result of former President Viktor Yanukovych’s ouster and the subsequent establishment of a new governmental regime.⁵ 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.⁶ 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


⁵ See infra Part II.A.

2016] ANALYZING THE REVOLUTION AND NATO ACTION 435

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.\(^7\) 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*.\(^8\) 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.\(^9\) A war of national liberation is generally seen as legitimate because it is closely connected to the right of self-determination.\(^10\) 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.\(^11\) There was an immediate change of power with little regard for due process, and there

---

8 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).
9 See id.; see also Peter Malanczuk, Akehurst’s Modern Introduction to International Law 336 (Routledge, 7th ed. 1997).
11 See infra Part II.A.
was little justification for a revolution of such scale.\textsuperscript{12} The current government is trying to take control over the entirety of the country, mainly through suppressing dissenters in eastern Ukraine.\textsuperscript{13} 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.\textsuperscript{14} The Declaration of Independence of Ukraine was put to a referendum a few months later and received overwhelming support.\textsuperscript{15} Later that same month, the Soviet Union officially dissolved, and Ukraine became an independent state.\textsuperscript{16} Previously, Ukraine had asserted independence during the Ukrainian Revolution in 1917,\textsuperscript{17} but that was short-lived because the country was overtaken by the Soviet Union in 1920.\textsuperscript{18}

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

\textsuperscript{12} See infra Part IV.D.
\textsuperscript{13} See infra Part II.D.
\textsuperscript{14} Paul Kubiczek, The History of Ukraine 136 (2008).
\textsuperscript{15} Serhiy 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.
\textsuperscript{16} Kubiczek, supra note 14, at 138.
\textsuperscript{17} 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).
\textsuperscript{18} Kubiczek, 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).
\textsuperscript{19} Kubiczek, supra note 14, at 98.
\textsuperscript{20} Yekelchyk, supra note 15, at 83.
\textsuperscript{21} Kubiczek, supra note 14, at 107.
Union seized more land from Poland, Romania, and Czechoslovakia, and annexed it to the Uk SSR. 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.” Much of Russia’s fondness for Ukraine stems from both historical notions and the fact that they are closely related culturally and linguistically. Additionally, eastern Ukraine has abundant resources for the steel and agriculture industries, 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. Ethnic Ukrainians make up approximately 78.8% of the population, but there is a sizeable minority of 17.3% ethnic Russians. Furthermore, while the official language of the country is Ukrainian, with nearly thirty percent of the population claims Russian as their native language. 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. Western Ukraine is more interested in

---

22 Id. at 111.
23 Id. at 45.
24 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).
25 KUBICEK, supra note 14, at 45.
26 Ed Dolan, Ukraine’s Heavy Industry: Glittering Prize or White Elephant?, ECONOMONITOR: ED DOLAN’S ECON BLOG (May 5, 2014), http://www.economonitor.com/dolanecon/2014/05/05/ukraines-heavy-industry-glittering-prize-or-white-elephant/.
27 KUBICEK, supra note 14, at 4.
29 KUBICEK, supra note 14, at 5.
30 Id. at 8.
Westernization and favors closer ties to the European Union (EU), NATO, and the United States. 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. 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. 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. This divide results in the country having certain political alliances based upon ethnicity.

C. Political Developments in Ukraine

In November 2004, Viktor Yanukovych ran for President against Viktor Yuschenko in a run-off election. Exit polls indicated that Yuschenko had a sizeable lead on Yanukovych, and he was expected to win the election. However, the election results showed that Yanukovych had won the majority of the votes. Ukrainians began accusing Yanukovych of election fraud. 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. More interestingly, Russian President Vladimir Putin congratulated Yanukovych on his victory two days before the election results were released.

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

31 Id.
33 See id.
34 Id.
35 Kubicek, supra note 14, at 169.
36 Id.
37 Yekelchyk, supra note 15, at 216. Yanukovych had 49.5% of the vote while Yuschenko had 46.9%.
38 Id. at 217 (explaining that Yuschenko and his election advisors had evidence of phone calls made and received by Yanukovych’s election advisors revealing election fraud).
39 Kubicek, supra note 14, at 169.
40 Id. at 170.
41 Yekelchyk, supra note 15, at 217.
Central Electoral Commission declared Yuschenko the victor. This would later become known as the Orange Revolution. It seemed to have tainted Yanukovych’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 Yanukovych was elected the President of Ukraine, winning 48.95% of the vote. Yanukovych’s victory was surprising, given his former history of suppressing the democratic process in Ukraine. Yanukovych was widely despised in western Ukraine, but had strong support in his native Russian-speaking eastern and southern Ukraine. His presidential platform garnished strong support from those parts of the country because they favor closer political ties with Russia. 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. The majority of Yanukovych’s backers were from eastern Ukraine. The election of Yanukovych, and more specifically, his political favor toward Russia, was a major catalyst that ostensibly led to the Ukrainian revolution in 2014.

42 KUBICEK, supra note 14, at 173.
43 YEKELCHYK, supra note 15, at 216.
46 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 (“Yanukovych’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.”).
48 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 Yanukovych, and also made Ukraine vulnerable to rebellion in the eastern part of the country. In November 2013, Yanukovych suspended talks to form a trade deal with the European Union.49 The suspension came in the wake of strong pressure from Russia not to sign the deal.50 Yanukovych later accepted an economic deal with Russia.51 Later that same month, Ukrainian unrest, mainly in the western region of the country, began as a response to the rejection of the deal.52 In addition, Ukrainians were also calling for a restoration of Ukraine’s 2004 Constitution because of Yanukovych’s efforts to strengthen his power.53 The protestors saw Yanukovych’s actions as contrary to national interests, submissive toward Russian interests, and demanded that he change his decision.54 Thousands of Ukrainians occupied the Maidan in central Kiev for peaceful protest.55 Western Ukrainians were eager to integrate Ukraine with Europe and they viewed Yanukovych’s actions as contrary to the overarching goal of moving closer to Europe.56 The rallies were peaceful, but violence quickly erupted in January after the Parliament passed restrictive laws in order to quell the protests.57

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.58 As a result of the violence and Yanukovych’s political decisions, protestors eventually demanded for Yanukovych’s resignation from the

50 Id. Russia, as alluded to previously, has been motivated to draw Ukraine closer politically and culturally, away from Westernization. See supra Part I.B.
51 Fisher, supra note 47. Russia offered Ukraine an economic stimulus of $15 billion and a thirty-three percent discount on Russian gas. Id.
52 Isachenkov & Danilova, supra note 45.
54 See Isachenkov & Danilova, supra note 45.
56 See id.
57 Isachenkov & Danilova, supra note 45.
58 Why is Ukraine in Turmoil?, supra note 55.
On February 22nd, the Ukrainian Parliament (Verkhovna Rada) voted to dismiss Yanukovych from office. Of the 450 Ukrainian lawmakers, 328 voted to remove Yanukovych from the presidency on the basis that he had abandoned his office and the fact that more than eighty protestors died in the Maidan. Yanukovych 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.” Yanukovych 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. The Verkhovna Rada next voted to free Ukraine’s former Prime Minister, Yulia Tymoshenko, from prison. At a speech in the Maidan, she referred to the former government as “a cancer.” Olexander Turchynov was appointed interim President of Ukraine.

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. Petro Poroshenko won that election with more than fifty-five percent of the popular vote. Most importantly, the revolution in western Ukraine created an equal and opposite reaction in eastern Ukraine. Those in

---

59 Isachenkov & Danilova, supra note 45.
60 KUBICEK, supra note 14, at 10.
61 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-yanukovych-missing-as-protesters-take-control-of-presidential-residence-in-kiev/2014/02/22/802f7c6c-9bd2-11e3-ad71-e03637a299c0_story.html.
62 Daisy Sindelar, Was Yanukovych’s Ouster Constitutional?, RADIO FREE EUR. RADIO LIBERTY (Feb. 23, 2014), http://www.rferl.org/content/was-yanukovychs-ouster-constitutional/25274346.html.
63 Booth, supra note 61. Yanukovych called the oppositional members of Parliament “bandits” and referred to their actions as “illegal.” Id.
65 Booth, supra note 61.
66 Id.
eastern Ukraine viewed western Ukraine as not having their interest at heart in the decision to oust the former President.\footnote{See id.}

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.\footnote{Id. (noting that the protests were inspired by the ousting of Yanukovych and imposition of the new pro-western government).} The rallies were especially strong in eastern Ukraine’s Crimean peninsula, where there is a strong Russian heritage and connection.\footnote{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.} 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 Yanukovych.\footnote{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.} The Ukrainian government suspected the pro-Russian activists were being supported by Russia in an effort to “undermin[e] national sovereignty.”\footnote{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).} Russia escalated tensions in Ukraine by invading Crimea.\footnote{Mackay & Sommerlad, supra note 64 (“Moscow insisted its soldiers were on a mission to ‘protect Black Sea Fleet’s positions.’”).}

During this invasive measure, Russian troops seized control over the international airport in the Crimean capital.\footnote{Id.} In March 2014, the Kremlin officially announced that Crimea had been annexed to Russia.\footnote{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.} The announcement was monumental because it marked the first time since World War II that a European country seized land from another.\footnote{Id.} 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.”\footnote{Ukraine Crisis: US Condemns Russian ‘aggression,’ BBC NEWS (Mar. 4, 2014), http://www.bbc.com/news/world-europe-26441698.} Russia’s invasion and annexation of Crimea, while important to understanding the Ukrainian
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.81 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.82 Later that month, President Obama suggested that Russia “move back its troops” located near the eastern Ukrainian border in order to ease tensions.83 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.84 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.85 The referendum was successful and Moscow recognized the results, but western Ukraine denounced the results as fraudulent.86

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.”87 The operation was unsuccessful, however, as pro-Russian

81 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.”).
83 Id.
86 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.
87 Ukraine Says Donetsk’s ‘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.88 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.89 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.90 The agreement did not come to fruition, however, because the Russian separatists refused to vacate the government buildings.91

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.92 For much of the summer months, violent clashes between the Ukrainian government and Russian separatists in eastern Ukraine remained the norm.93 By June 2014, the United Nations (U.N.) estimated that over 400 people had been killed in the hostile territory.94 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.95

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.96 U.S. Secretary of State John Kerry

90 Id.
92 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.
96 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.97 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.98 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.99 President Poroshenko described that day as the most important in Ukraine’s history since it received its independence in 1991.100

On July 17, 2014, Malaysian Airlines Flight MH17 was shot down over the region, killing 298 people.101 There were reports that the plane was shot down by pro-Russian rebels.102 Eyewitnesses said they had seen rebels with a BUK missile launcher not far from where the plane was shot down.103 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.104 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.105 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.106

---

97 Id.
99 Id.
100 Id.
102 Id.
104 Id.
106 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.107 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.108 Prior to the August invasion, multiple reports surfaced that three Russian tanks invaded Ukraine in June.109 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.110 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.111 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.112

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.113 A Ukrainian officer labeled the incursion as a “full-scale invasion” and a U.S. official said approximately 1,000 Russian soldiers

---

107 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.


109 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.


invaded the southern border to assist the pro-Russian separatists. Additionally, NATO said there were approximately 20,000 Russian troops stationed at the eastern Ukrainian border. Conditions in eastern Ukraine further deteriorated when ten Russian paratroopers were captured by Ukrainian forces and were exchanged for sixty-three Ukrainian soldiers. 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. 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. NATO condemned Russia by saying its troops “illegally crossed the border” in an attempt to destabilize the country. Russia denied the allegations, but NATO released satellite imagery revealing a vast number of Russian troops in Ukraine. British Prime Minister David Cameron stated Russia’s actions in eastern Ukraine “must cease immediately.” NATO and the United States vowed to strengthen economic sanctions against Russia if it did not “step back.”

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. The soldiers would be able to respond to any crisis within a matter of days.

---

115 NATO Members ‘start arms deliveries to Ukraine,’ supra note 3.
119 Id.
120 Id.; see also Stanglin, supra note 118.
121 Butenko, Smith-Spark & Magnay, supra note 114.
124 Id.
that Russia invaded a NATO territory, like Poland or the Baltics.\textsuperscript{125} NATO also sent more fighter aircrafts to the Baltic region and increased military exercises in Eastern Europe.\textsuperscript{126} Russia responded by threatening to send more troops to Crimea.\textsuperscript{127} 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.\textsuperscript{128}

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.\textsuperscript{129} The names of the countries that delivered the weapons had been withheld, as had the types of weapons provided.\textsuperscript{130} Other members denied the statement, but this denial was expected.\textsuperscript{131} Ukraine’s Prime Minister said that NATO was the only major line of defense to protect the country from Russian aggression.\textsuperscript{132} 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.\textsuperscript{133}

Later that month, there were ceasefire agreements between Ukraine and the rebels, but these agreements did not last long,\textsuperscript{134} and many believe the ceasefires will never bring permanent peace to the region.\textsuperscript{135} 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
by supplying them with ammunitions.\(^{136}\) 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.\(^{137}\)

### 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.\(^{138}\) The main purpose of NATO is to “safeguard the freedom and
security of its members through political and military means.”\(^{139}\) It was
founded to deter Soviet expansion into Western Europe and to promote
European integration after the destruction of World War II;\(^{140}\) it currently has
twenty-eight members.\(^{141}\) It serves as the main defense structure in Western
Europe, and the preservation of Ukraine’s independence has been of special
interest to it.\(^{142}\) 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.\(^{143}\) It permits
collective military defense among each NATO member and considers an attack
on one member to be an attack on all members.\(^{144}\) NATO is being tested in a
way it never hoped to be. Ukraine is still not a member of NATO,\(^{145}\) and it

---


\(^{137}\) Croft, *supra* note 123.


\(^{140}\) See *A Short History of NATO*, supra note 138.

\(^{141}\) *Member Countries*, NATO, 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.*

\(^{142}\) *Leonid Polyakov, Ukraine-NATO Relations and New Prospects for Peacekeeping* 72 (2003).

\(^{143}\) North Atlantic Treaty, *supra* note 4, art. 5.

\(^{144}\) *Id.*

\(^{145}\) *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
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. 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*. 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.

---

146 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.

147 See infra Part IV.D.

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.149 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.150 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).151 The authority for this latter measure comes from Chapter VII of the U.N. Charter and is best known as “collective security.”152 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.153 The purpose of these two exceptions is to preserve “existing territorial and political arrangements,” not to transform them or acquire new territory.154

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

150 U.N. Charter art. 51 (establishing that self-defense is an “inherent right” in the event an armed attack occurs).
151 DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 235 (3d ed. 2010).
153 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.”).
154 BOLA, supra note 152, at 48.
155 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. 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.

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. 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.

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, 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. Consent may only be given by a legitimate government that has “effective control of most [if not all] of the state.”

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

157 This consent is meaningless and invalid if the Ukrainian government is deemed illegitimate. See infra Part IV.D.
158 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.
159 See supra Part II.C.
161 See infra Part IV.D.
162 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. As with any treaty, only members to the North Atlantic Treaty may rely on Article 5. 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. 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. 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. In the late 1990s, Serbian forces, under the leadership of Yugoslavian President Slobodan Milošević, began committing massacres

---

164 See North Atlantic Treaty, supra note 4, art. 5.
165 See supra Part III.
166 Id.
against Albanians living in Kosovo to drive them out of the area.168 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.169 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.170 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.171 The air campaign lasted seventy-eight days, Milošević withdrew his forces, and, in the end, NATO prevailed.172

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.”173 Another reason for NATO’s action stemmed from the idea of asserting NATO’s dominance in the post-Cold War era.174 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.”

168 IVO DAALDER & MICHAEL O’HANLON, WINNING UGLY: NATO’S WAR TO SAVE KOSOVO 1–3 (2000).
169 Adam Roberts, NATO’s ‘Humanitarian War’ Over Kosovo, 41 SURVIVAL 102, 104 (1999).
170 HALLAMS, supra note 167, at 40.
172 DAALDER & O’HANLON, supra note 168, at 3.
173 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.
174 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. Moreover, Article 53 of the U.N. Charter posed an additional obstacle to NATO. Article 53 prohibits “regional enforcement actions” taken by “regional organizations” without a U.N. Security Council vote. Article 53 does not prohibit NATO from acting on behalf of another NATO country; Article 51 provides an independent basis for that action. NATO claimed that Article 53 did not restrain its ability to act collectively because it was an “alliance” and not a “regional organization.” However, this interpretation is unreasonable because it would allow NATO to circumvent U.N. Security Council authorization at any time. As such, the United Nations considers NATO to be a “regional organization” constrained by Article 53.

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, Germany and Belgium were the only two NATO countries to give humanitarian intervention as the official legal basis for the Kosovo

---

175 See supra Part IV.B.
176 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 . . . .”).
177 Falk, supra note 171, at 36.
178 Id. at 50.
179 See id. at 36.
180 The anti-interventionists rejected this argument. Id.
181 Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects, 10 EUR. J. INT’L L. 1, 4 (1999).
182 No NATO member was attacked or under threat of attack. See infra Part IV.C.1.a.
bombings.\textsuperscript{183} 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.\textsuperscript{184} Even though the actions of NATO were condemned, it was given some form of ratification by the U.N. Security Council.\textsuperscript{185} 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.\textsuperscript{186} 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.”\textsuperscript{187} The only time the Court came close to prescribing a legal standard on humanitarian intervention was in \textit{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.\textsuperscript{188}

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.\textsuperscript{189} Other NATO countries said that there was a “need to bring stability to the region” and

\begin{footnotesize}
\begin{itemize}
\item[183]\textsc{Johan D. van der Vyver, Implementation of International Law in the United States} 233 (2010).
\item[184]\textsc{Cohn, supra note 163, at 136.}
\item[185]\textsc{Van der Vyver, supra note 183, at 233–34.}
\item[186]\textsc{Cohn, supra note 163, at 136.}
\item[187]\textsc{Id.}
\item[188]\textsc{Id.}
\item[189]\textsc{The ICJ said that an attack must be compatible with the aim of humanitarian intervention. Id. at 136–37.}
\item[189]\textsc{See supra Part IV.C.1.b.}
\end{itemize}
\end{footnotesize}
“prevent instability spreading in the region.” However, while Article 2 of the NATO Charter mentions “promoting conditions of stability and well-being,” 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. 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.”

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

191 North Atlantic Treaty, supra note 4, art. 2.
192 B JOLA, 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.
193 Compare B JOLA, 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. 194 President Obama made it clear that NATO needed to make “concrete commitments” to help Ukraine modernize and strengthen its military forces. 195 Furthermore, NATO surveillance planes have given information to Ukraine that the country may not have obtained otherwise. 196 In early February 2015, there were serious discussions between the United States and NATO to assist the Ukrainian government in obtaining lethal weapons. 197

Providing lethal weapons to Ukraine is a patent violation of international law according to Nicaragua. 198 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 . . . .” 199 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


198 See infra Part IV.E.2.

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. 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. This Comment adopts the view that non-lethal weapons constitute “use of force” under the U.N. Charter.

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. 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 Yanukovych was unconstitutional. 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. 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. 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, Great Britain v. Costa.

203 See supra Parts II.D–E.
204 Sindelar, supra note 62.
205 STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 3 (1998).
Rica ("Tinoco Arbitration"),208 and Autocephalous Greek Orthodox Church of Cyprus v. Feldman ("Northern Cyprus").209 Somalia sets forth the basic criteria for governmental legitimacy,210 while the latter two cases primarily focus on a single factor of the basic criteria.211

Somalia establishes four legal factors for determining whether a government is legitimate.212 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”).213 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.214

Nevertheless, the High Court felt this was unhelpful and decided to provide a legal test to determine whether the Somalia government was legitimate.215 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.216 The rice was sold and the proceeds were placed in a court in London.217 Somalia demanded the proceeds to be delivered to the government, but the High Court

209 Autocephalous Greek Orthodox Church of Cyprus v. Goldberg (Northern Cyprus), 917 F.2d 278 (7th Cir. 1990).
210 Somalia, Q.B. 54 at 68.
211 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)).
212 Somalia, Q.B. 54 at 68.
214 Somalia, Q.B. 54 at 62.
215 Id. at 63.
216 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.
217 Id.
rejected the demand because there was doubt as to whether the representative making the demand had the appropriate authority to do so.\textsuperscript{218} Somalia was under an interim government at the time of the demand due to civil war.\textsuperscript{219} Judge Hobhouse set forth the following legal analysis for assessing whether a government could indeed be deemed legitimate:

(a) [W]ether 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.\textsuperscript{220}

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.\textsuperscript{221} The High Court did not analyze the fourth factor since the government failed the first three factors.

The test in \textit{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.\textsuperscript{222} The “effective control” test is a method for testing the legitimacy of a government, but this Comment argues that the test from \textit{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 \textit{Tinoco Arbitration}\textsuperscript{223} and \textit{Northern Cyprus}.\textsuperscript{224} In \textit{Tinoco Arbitration}, the Tinoco

\textsuperscript{218} \textit{Id.} at 377–78.
\textsuperscript{219} \textit{Id.} at 377.
\textsuperscript{220} \textit{Somalia}, Q.B. 54 at 68.
\textsuperscript{221} \textit{Id.}
\textsuperscript{223} \textit{Gr. Brit.}, 1 R.I.A.A. at 371.
\textsuperscript{224} \textit{Northern Cyprus}, 917 F.2d at 278.
regime overthrew the previous government to come to power. The Tinoco regime was rather peaceful and no other entity claimed to be the rightful government of the country. 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." In Tinoco Arbitration, the arbitrators were concerned about whether the government had the acquiescence of the people it governed. The panel found that people accepted the government and that there was no other government claiming to be the actual legitimate government. Thus, a de facto government existed.

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. 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." 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.

---

226 Id. at 377.
227 Id. at 379.
228 Id. at 382.
229 See id. at 379.
230 See id.
231 Id. at 381.
232 See Autocephalous Greek Orthodox Church of Cyprus v. Goldberg (Northern Cyprus), 917 F.2d 278, 293–94 (7th Cir. 1990).
233 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. 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 Yanukovych 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. In February 2014, President Yanukovych was supposed to reinstate the 2004 Constitution, pursuant to a peace deal with the European Union. The reinstatement would have weakened Presidential authority. However, President Yanukovych never reinstated the 2004 Constitution. 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. Additionally, both Constitutions give the Verkhovna Rada the right to commence an impeachment procedure against the President “if he commits treason or other crime.”

Furthermore, both Constitutions require three-quarters of the “constitutional composition” of the Verkhovna Rada to vote in favor of impeachment to remove the President. Of 450 members, 328 voted to oust President Yanukovych. This did not meet the three-quarters requirement of

---

235 See Sindelar, supra note 62.
236 Id.
237 See id.
238 Id.
240 Sindelar, supra note 62.
242 Sindelar, supra note 62.
337 votes. 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. 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. 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.

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

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. 248 Given the voting on secession referendums in eastern Ukraine, as well as the inability to control the pro-Russian dissenters, 249 the government has little control over a sizeable portion of the country. The eastern part of the country still believes that Yanukovych is the rightful President of Ukraine, views the ouster as unconstitutional, and rejects the current government. 250 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. 251 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. 252 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.

247 See supra Parts II.B–D.
249 See supra Part II.C.
c. Ability to Deal with Other Governments

In contrast, the current Ukrainian government has been regarded as legitimate by NATO and the United States.\textsuperscript{253} 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.\textsuperscript{254} 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.”\textsuperscript{255} 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.\textsuperscript{256} 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.”\textsuperscript{257} 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

\textsuperscript{253} 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.

\textsuperscript{254} See supra Part II.E.

\textsuperscript{255} Kingsbury, supra note 216, at 380.

\textsuperscript{256} See NATO Members ‘start arms deliveries to Ukraine,’ supra note 3.

The United States has provided assistance to Ukraine, but has limited the assistance to supplying night vision goggles, body armor, and communications equipment. The United States is also planning to deploy military soldiers to Ukraine for training purposes. As of early February 2015, the United States had strongly considered sending arms to Ukraine. 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. NATO members and the United States have intervened with non-lethal aid, and seemed poised to act with lethal aid. 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. The contras would come from nearby nations and try to instigate rebellion in Nicaragua to destabilize the government. Nicaragua filed suit against the United States in the ICJ for arming and training the contras. Nicaragua alleged that the United States violated the general prohibition against the use of force as found in Article 2(4)
of the U.N. Charter and unlawfully intervened in the affairs of Nicaragua, prohibited by Article 2(7) of the U.N. Charter. 268 The United States counterclaimed that Nicaragua was arming groups in El Salvador and was engaged in “trans-border military incursions,” 269 and asserted that arming the _contras_ was collective self-defense. 270 The Court found that the evidence of Nicaragua supplying arms to groups in El Salvador was rather weak. 271 The Court looked to Article 38 of the ICJ Statute, which prescribes generally the sources of international law, to establish the governing law. 272

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. 273 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. 274 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. 275 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. 276

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

270 Id. ¶ 165.
271 Id. ¶ 153
272 _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 qualifies publicists in establishing the governing law. _Id._
274 _Id._ ¶ 195.
275 _Id._ ¶ 247.
276 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.”

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. 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. 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. This is much like the United States
aiding the rebels in Nicaragua because both entities are illegitimate.

277 Id. ¶¶ 202–05.
278 Id. ¶ 195; Biderman, supra note 151, at 234.
280 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. 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. Not only would this action patently violate international law and strengthen the gravity of the violation, 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
cannot kill an ideology with a gun, you only create more enemies.”284 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.285 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,286 especially since the country is so divided politically, culturally, and linguistically.287

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

---

284 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.


286 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.

287 See supra Parts I.B–C.


289 BEDERMAN, supra note 151, at 56.
people to secede and form their own country. 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.

As discussed above, a war of national liberation is generally seen as legitimate because it is closely connected to the right of self-determination. 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

291 Id.; van der Vyver, supra note 285, at 11–12.
292 Dugard & Raic, supra note 290.
other states. NATO is not complying with this Article.\textsuperscript{293} 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.\textsuperscript{294} 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.\textsuperscript{295} NATO members are also violating the ICJ’s decision in \textit{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.

\textbf{MATTHEW EMERY}\textsuperscript{*}  

\textsuperscript{293} See supra Part IV.E.2.  
\textsuperscript{294} See supra Part IV.D.2.  
\textsuperscript{295} See supra Part IV.D.  

\textsuperscript{*} Notes and Comments Editor, \textit{Emory International Law Review}; J.D. Candidate, Emory University School of Law (2016); B.A., \textit{cum laude}, University of Central Florida (2013). Matthew would like to thank his parents, Annette and Donald Emery, and his siblings, Kristy, Jessica, Laura, and Danielle, for their constant love and support. Matthew would like to thank Professor Lesley Carroll for advising and providing constant feedback throughout the comment process.