

EDITORIAL COMMENT

THE ANNEXATION OF CRIMEA: RUSSIA, PASSPORTIZATION AND THE PROTECTION OF NATIONALS REVISITED

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In 2010, I co-edited a book with Christopher Waters on the August 2008 Russia-Georgia conflict.¹ My own chapter contribution to that collection considered the Russian claim of self-defence, on the basis that it was protecting its nationals within Georgia.² Like most commentators, I strongly criticised that claim, although I did so not because of a wholesale rejection of the right of self-defence being extended to protect nationals abroad – something that I tentatively subscribe to, subject to stringent conditions – but because of the *application* of that extension of the right by Russia in relation to its intervention into the territory of a neighbouring sovereign state.

Most importantly, the use of force by Russia was clearly disproportionate to any attacks (actual and threatened) against Russian citizens in the breakaway Georgian region of South Ossetia.³ It will be recalled that the August 2008 intervention was not limited to the South Ossetia region, but went well beyond into Abkhazia (another breakaway region) and Georgia proper. The patent disproportionality of the action in itself undoubtedly meant that the Russian use of force was not a lawful act of self-defence.

Nonetheless, I spent as much of my chapter discussing another key aspect of the Russian claim to be protecting its nationals in Georgia: its policy of ‘passportization’. The

¹ James A. Green and Christopher P.M. Waters (eds), *Conflict in the Caucasus: Implications for International Legal Order* (Palgrave Macmillan, 2010).

² James A. Green, ‘Passportization, Peacekeepers and Proportionality: The Russian Claim Of The Protection Of Nationals Abroad in Self-Defence’ in Green and Waters, *ibid*, 54.

³ *Ibid*, 68-70.

widespread distribution of Russian passports, especially to Ossetian residents, meant that Russia was able to ‘manufacture’ a population of nationals in Georgia that it then claimed to be defending.⁴ Leaving aside the 500 or so Russian peacekeepers in Georgia in 2008, the vast majority of the ‘citizens’ that were avowedly being protected had gained their Russian citizenship within the 18 months preceding the intervention.

The protection of nationals abroad version of self-defence has always been somewhat controversial: just consider its clear use as a pretext by the United States in both Grenada and Panama in the 1980s (and the overwhelmingly negative international reaction to both of those interventions).⁵ A policy of passportization of the sort adopted by Russia in 2008 is also, in itself, legally problematic. While international law allows for states to bestow nationality upon whomsoever they wish,⁶ this is with the caveat that for an individual’s citizenship to be enforceable at the international level there is a requirement of ‘real and effective’ nationality: states must show that there is a meaningful connection to the ‘national’ in question.⁷ One may of course debate whether such a connection was present between Russia and the relevant individuals in South Ossetia in 2008, but it may at least be said that this was far from self-evident.

⁴ *Ibid*, 64-68.

⁵ The General Assembly determined that the United States intervention in Grenada was ‘a flagrant violation of international law’, General Assembly Resolution 38/7, 1983. In an almost identical statement six years later, the General Assembly also saw the Panama intervention of 1989 as a breach of article 2(4), General Assembly Resolution 44/240, 1989. On the protection of nationals abroad extension of the right of self-defence in general, see Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on the Grounds of Humanity* (Martinus Nijhoff, 1985); and Tom Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (2008) 13 *Journal of Conflict and Security Law* 233.

⁶ Green (n 2), 67.

⁷ See, for example, *Nottebohm (Liechtenstein v Guatemala)* (merits) [1955] ICJ Reports 4, 22–24.

Russia therefore coupled two already rather controversial legal claims in 2008 – the protection of nationals and passportization – in a manner not before done. Russia’s policy of passportization, based on what were contentious assertions of national ‘proximity’, when employed to underpin a protection of nationals abroad justification for the international use of force, set alarm bells ringing for a number of commenters. The fundamental legitimacy of the Russian claim was seen as being extremely suspect at the time. As the Report of the *Independent International Fact-Finding Mission on the Conflict in Georgia* put it in 2009, in relation this ‘group of “new” Russians, it seem[ed] abusive to rely on their need for protection as a reason for intervention, because Russia itself created this reason for intervention through its own policy’.⁸ Moreover, as some of us noted, this avowed justification had potential implications beyond the August 2008 war, extending to the scope of the norms of the *jus ad bellum* more generally.

I would like to be able to claim that I was the first to point out the extension of Russia’s passportization policy to Crimea – and therefore the likely consequent danger of a Russian use of force in the region supported by another dubious protection of nationals argument – but actually Rein Müllerson beat me to it by some distance. Just weeks after the Russia-Georgia conflict, in September 2008, he argued that Russia’s novel legal argument would ‘stoke up unrest in pro-Russian parts of the Ukraine...[notably] the Crimean peninsula

⁸ The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) (30 September 2009), www.ceiig.ch/Report.html (accessed 31 March 2014), volume II, 288–289. Admittedly, this may be viewed as a somewhat hyperbolic statement on the part of the IIFFMCG. Perhaps it is more accurate to say that Russia did not ‘create’ the reason for the intervention *per se*, which was arguably brought about by the treatment of the breakaway regions and their people by Georgia: instead, Russia’s passportization policy created the *possibility* for intervention when compatible factual circumstances – aggressive internal Georgian action – arose.

and especially Sevastopol'.⁹ Müllerson's warning is, of course, depressingly prescient when read in 2014. My own take on this in my 2010 chapter appears, today, comparatively naïve; I seemingly noted the possibility and then dismissed it as being relatively unlikely:

Reports indicate that Russia has begun to employ a policy of distributing Russian passports to individuals in the Ukrainian city [of Sevastopol], many of the residents of which have historic ties with Russia. Admittedly, it seems unlikely that this would, or could, be used as the basis for any kind of forcible intervention into the Ukraine. Nonetheless, the fact that Russia has expanded its policy of distributing passports to individuals in pro-Russian regions in other states – given that this *did* form the key justification for its use of force in Georgia – has implications for the security of numerous states in what would once have been called the “Soviet sphere of influence”.¹⁰

Fast forward to the spring of 2014 and the Crimean peninsula. As is well known, following some covert military movement on 28 February 2014, over the weekend of 1 and 2 of March, Russian forces ‘swarmed the major thoroughfares of Crimea...encircled government buildings, closed the main airport and seized communication hubs.’¹¹ It was soon clear – even before the hastily arranged 16 March ‘referendum’ – that Crimea had, *de facto*, been annexed by Russia.

One might perhaps argue, however, that that this annexation is not in fact a ‘use of force’ under international law, given that the presence of Russian troops in Crimea has not

⁹ Rein Müllerson, ‘The World after the Russia-Georgia War’, *Open Democracy* (15 September 2008), www.opendemocracy.net/article/the-world-after-the-russia-georgia-war (accessed 31 March 2014).

¹⁰ Green (n 2), 72.

¹¹ Alison Smale and Steven Erlanger, ‘Ukraine Mobilizes Reserve Troops, Threatening War’ *New York Times* (1 March 2014), www.nytimes.com/2014/03/02/world/europe/ukraine.html?hp&_r=2 (accessed 3 March 2014).

been met with any notable military resistance.¹² Yet irrespective of the fact that by and large no shots have been fired, the Russian action represents a *prima facie* violation of the fundamental prohibition of the use of force: the transfer of one state's armed forces into another state in significant numbers without consent falls foul of Article 2(4) of the UN Charter, whether large-scale death and destruction ensues or not.

Russia admittedly has the right, under a 1997 treaty with Ukraine,¹³ to station up to 25,000 troops in Crimea, at Black Sea naval facilities. However, on 1 March at least 6,000 of these troops were moved in a manner that went well beyond the terms of the treaty. The 1974 Definition of Aggression makes it clear that where troops of one state are deployed in another by lawful agreement, any use of those forces *beyond the terms of that agreement* turns that lawful deployment into an unlawful act of aggression.¹⁴ The mere presence of Russian forces beyond designated areas in Crimea is therefore of itself a use of force in breach of Article 2(4).¹⁵ The issue, then, is whether there is a lawful justification precluding the wrongfulness of Russia's *prima facie* breach. As Marc Weller has noted, Russia has 'oscillated somewhat in its legal arguments' concerning the intervention into, and annexation of, Crimea.¹⁶

One key claim advanced by Russia has been that there was additional valid consent for this military action in Ukraine: both by virtue of a letter from the displaced Ukrainian

¹² Marc Weller, 'The Shadow of the Gun' (2014) 164 (7599) *New Law Journal* (noting, but not subscribing to this possible argument).

¹³ Partition Treaty on the Status and Conditions of the Black Sea Fleet, signed 28 May 1997.

¹⁴ Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), 1974, article 3(e).

¹⁵ Mary Ellen O'Connell, 'Ukraine Insta-Symposium: Ukraine under International Law' *Opinio Juris* (7 March 2014), opiniojuris.org/2014/03/07/ukraine-insta-symposium-ukraine-international-law/ (accessed 31 March 2014).

¹⁶ Weller (n 12).

President, Viktor Yanukovich,¹⁷ and/or by virtue of a request by Sergiy Aksyonov, the new ‘Prime Minister of Crimea’.¹⁸ For any such consent to legitimate the use of force, however, it must be genuine and must come from the state itself.¹⁹ It is highly questionable whether the invitation by either the former President of Ukraine or the new Prime Minister of Crimea was sufficient in this regard.

The validity of the Russian claim that Yanukovich could request military aid is dependant upon whether he was still able to represent the state of Ukraine in providing such consent. Admittedly, his removal from office was likely unconstitutional, in that Article 111 of the Ukrainian constitution provides that the President can only be impeached by a Verkhovna Rada quorum of no less than three quarters of seated members (which would have been 337 votes). This number was not achieved at the 22 February parliamentary vote, meaning that one could certainly argue that Yanukovich remains the legitimate President of Ukraine.²⁰

Nonetheless, whatever the lawfulness of Yanukovich’s removal from office, it is hard to argue that he had either the required legitimacy (*inter alia*, given that, despite the Rada vote not reaching the magic constitutional number of 377, there were still 328 votes in favour of his removal and none against) or the factual control over the state to invite foreign

¹⁷ See Security Council, 7125th meeting (3 March 2014), UN Doc. S/PV.7125, 3-4 (directly quoting from this letter).

¹⁸ Mark Lowen, ‘Ukraine Crisis: Crimea Leader Appeals to Putin for Help’ *BBC News* (1 March 2014), www.bbc.co.uk/news/world-europe-26397323 (accessed 6 March 2014).

¹⁹ See generally Louise Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’ (1985) 56(1) *British Yearbook of International Law* 189.

²⁰ Ashley Deeks, ‘Russia in Ukraine: A Reader Responds’ *Lawfare* (5 March 2014), <http://www.lawfareblog.com/2014/03/russia-in-ukraine-a-reader-responds> (accessed 23 April 2014).

intervention. *De facto* at least, Yanukovich ‘no longer had authority to represent Ukraine in relation to the use of force.’²¹ Simply put, any consent he might have provided for the Russian action is unlikely to have been valid because he was no longer effectively acting as President of Ukraine.²²

It is difficult to see the legitimating consent as coming from *Crimea stans solus* either. First, Crimea’s new ‘Prime Minister’ was not confirmed by the President of Ukraine as required by the Ukrainian constitution.²³ More importantly, Crimea is not the state in question: Ukraine is. International law does not allow non-state entities or regions within states to invite military intervention: if it did, this would mean that, for example, France could invade Canada at the invitation of Quebec. There can have been no genuine state consent legitimating the Russian action coming from Crimea alone.

Leaving aside the consent question, the primary argument advanced by Russia, at least initially, was based on the protection of its nationals in Ukraine. The Russian foreign minister argued that the action was designed to protect ‘citizens of the Russian Federation located on the territory of Ukraine’,²⁴ while President Putin told President Obama that there

²¹ Weller (n 12).

²² It is also notable that by April the former President was expressing clear regret over his decision to request Russian military support, which somewhat undermines the credibility of that request as a basis for continued military occupation. See ‘Yanukovich Regrets “Mistakes” on Crimea’ *Al Jazeera* (3 April 2014), <http://www.aljazeera.com/news/europe/2014/04/yanukovich-regrets-mistakes-crimea-2014421989300891.html> (accessed 23 April 2014).

²³ Deeks (n 20).

²⁴ ‘Lavrov: Troops in Crimea Protecting Russian Citizens’ *Voice of America: World News* (3 March 2014), www.voanews.com/content/lavrov-troops-in-crimea-protecting-russian-citizens/1863103.html (accessed 31 March 2014).

was a ‘real threat’ to the lives and health of Russian citizens currently on Ukrainian territory.²⁵

While there are of course Russians stationed in Crimea under the 1997 treaty, the bulk of the nationals avowedly being ‘protected’ are people who were recently handed a passport by Russia. As noted above, citizenship bestowed by such a passportization policy can only be enforceable internationally if there is a genuine and effective link between the new passport holders and the state in question.²⁶ As was the case in South Ossetia in 2008, it is far from clear whether sufficient links exist between the people of Crimea now in possession of Russian passports and the Russian state, although this could be perhaps be argued given the predominant Russian ethnicity in the region.

In any event, what is clear is that Russia has been laying the groundwork for its protection of nationals claim for some while. The large-scale Russian passportization of Crimea began in 2008,²⁷ so the warnings have been in place since the Georgia conflict. Having said that, the process was significantly stepped up after Yanukovich was ousted, with Russia issuing an estimated 143,000 Russian passports to Ukrainians on the peninsula in the last two weeks of February 2014.²⁸

Just as was the case in 2008, Russia’s justification of the protection of nationals abroad is extremely difficult to reconcile with the rules of the *jus ad bellum* in relation to

²⁵ ‘Telephone Conversation with US President Barack Obama’ *President of Russia website* (2 March 2014), <http://eng.kremlin.ru/news/6752> (accessed 31 March 2014)

²⁶ See n 6-7 and accompanying text.

²⁷ Adrian Blomfield, ‘Russia Distributing Passports in the Crimea’, *The Telegraph* (17 August 2008), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/2575421/Russia-distributing-passports-in-the-Crimea.html> (accessed 31 March 2014).

²⁸ Katie Stallard, ‘Russia Stands with Putin over Ukraine Gamble’ *Sky News* (2 March 2014), news.sky.com/story/1219532/russia-stands-with-putin-over-ukraine-gamble (accessed 6 March 2014).

Crimea – even if one is to accept that a suitable ‘connection’ exists between Russia and its new citizens within Ukraine. First, for self-defence to be lawful there must of course be an ‘armed attack’,²⁹ which, as the International Court of Justice has made clear, is ‘the most grave form of the use of force’.³⁰ In the context of protection of nationals claims this means that there needs to be an armed attack (or, perhaps, the threat of an imminent armed attack) against the nationals in question. In 2008, there was undoubtedly significant military action undertaken by Georgia, internally, against its breakaway regions: an arguable armed attack. In 2014, there has been no use of force at all (let alone of the gravest sort) against ethnic Russians, people with Russian passports or, indeed, *anyone else* in Crimea.³¹ Nor has there been any credible or imminent threat of such an attack, despite some vague indications to the contrary by President Putin in his rather strange armchair news conference on 4 March.³²

Secondly, self-defence actions also need to comply with the customary international law criteria of necessity and proportionality.³³ In terms of necessity, it is difficult to see Russia’s military action as a ‘last resort’ to protect its nationals in Crimea, partly because

²⁹ UN Charter, article 51.

³⁰ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Reports 14, para 191; and *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (merits) [2003] ICJ Reports 161, para 51.

³¹ Ashley Deeks, ‘Here’s What International Law Says about Russia’s Intervention in Ukraine’ *New Republic* (2 March 2014), www.newrepublic.com/article/116819/international-law-russias-ukraine-intervention (accessed 3 March 2014).

³² See Steven L. Myers, ‘Putin, Flashing Disdain, Defends Action in Crimea’ *New York Times* (4 March 2014), www.nytimes.com/2014/03/05/world/europe/putin-flashing-disdain-defends-action-in-crimea.html (accessed 31 March 2014).

³³ See, for example, Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004), particularly at 6 and 11 (pointing out how ubiquitous these criteria are).

diplomatic communication with the interim Ukrainian leadership was not explored³⁴ but, more pertinently, because *there was no threat to Russian nationals* – making any and all military action in ‘self-defence’ inherently unnecessary. As Daniel Wisheart has noted, it is hard to ‘understand how actions like the surrounding of Ukrainian military bases in Crimea should contribute protecting Russian nationals, given that there are no claims that they have been threatened by Ukrainian forces.’³⁵

As noted above, Russia’s action in 2008 was most clearly rendered unlawful by virtue of the fact that it was disproportionate to any attack on its nationals within Georgian territory.³⁶ In Crimea in 2014, the question of proportionality is not just problematic, it is moot. Proportionality is a relative criterion: states must do no more than is necessary to secure against the armed attack being responded to.³⁷ To what can a ‘defensive’ use of force be ‘proportional’, when there is no attack to defend? As there was no armed attack – actual or threatened – against Russians in Ukraine, there is nothing against which any response can be measured.

Russia’s self-defence claim thus collapses before one even considers the fact that the nationals being defended (from *nothing*, remember), are for the most part recently

³⁴ Sina Etezazian, ‘Ukraine Insta-Symposium: The Crisis in Crimea –The Protection of Nationals Abroad and the Legality of Ukraine’s Possible Use of Force in Self-Defense’ *Opinio Juris* (9 March 2010), opiniojuris.org/2014/03/09/ukraine-insta-symposium-crisis-crimea-protection-nationals-abroad-legality-ukraines-possible-use-force-self-defense/ (accessed 31 March 2014).

³⁵ Daniel Wisheart, ‘The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?’ *EJIL:Talk!* (4 March 2014), www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/ (accessed 31 March 2014).

³⁶ Green (n 2), 68-70.

³⁷ James A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009), 86-96.

passportized citizens. There are three primary criteria that all must be met for lawful self-defence: the occurrence of an armed attack; the necessity to respond to that attack; and the proportionality of the response, measured against the defensive goal to be achieved. The Russian action in Ukraine meets none of these.

The annexation of Crimea represents a crisis in many respects, but for international law it is not only a patent violation of the *jus ad bellum*, but one that represents a further misuse of an already problematic extension of the protection of nationals claim: ‘[i]n short, these purported threats to Russian citizens in Crimea seem thin and nebulous, and the issuance of Russian passports further supports the idea that the defense of nationals claim is pretextual.’³⁸ Perhaps this is ultimately why Russia has moved to distance itself further and further from its original protection of nationals claim, preferring to edge towards a justification based on consent. Not, as we have seen, that such a claim fares all that much better.

I hope, when I read these brief thoughts back to myself in the future, to do so without feeling the same concerning sense of *déjà vu* that I did when I reopened our edited book in the first week of March this year. I suspect, however, that we will encounter a claim featuring this mixture of passportization and self-defence again.

³⁸ Deeks (n 31).