

IS INTERNATIONAL LAW EFFECTIVE? THE CASE OF RUSSIA AND UKRAINE

This panel was convened at 3:30 pm, Wednesday, April 9, by its moderator, Lori Fisler Damrosch of Columbia Law School, who introduced the panelists: Simon Chesterman of the National University of Singapore; Anatoly Kapustin of the Institute of Legislation and Comparative Law Research, Russia; Nina Khrushcheva of the New School; and Peter M. Olson, former NATO Legal Adviser.*

REMARKS BY SIMON CHESTERMAN†

Two weeks ago, Crimea literally changed its time. Crimean clocks were advanced two hours forward to synchronize them with Moscow. Only a handful of states recognize Russia's annexation or "reintegration" of the former semi-autonomous republic of Ukraine, but given the current focus on the east of that country, it appears clear that if President Putin limits himself to acquiring Crimea there will be a collective sigh of relief.

In my remarks, I will focus on the first two questions posed for the panel. But because I can deal with those fairly swiftly, I will also address the last question. In brief, my responses will be as follows:

- I. Is the UN Charter's collective security system powerless in the face of the determined action of a member of the P5? — Yes
- II. Do EU and U.S. economic sanctions offer an effective alternative response to what many consider Russia's illegal actions in Crimea? — No
- III. How should we evaluate President Vladimir Putin's reference to events in Kosovo, Iraq, and Libya as precedents for Russia's actions in Crimea? — Skeptically, but with some contrition.

I. IS THE UN'S COLLECTIVE SECURITY SYSTEM POWERLESS AGAINST A DETERMINED MEMBER OF THE P5?

Of course it is. That's how it was designed. And that's how the P5—especially the United States—like it, so it is disingenuous to suggest otherwise. That said, it has been interesting to watch how Russia has tried to invoke a variety of legal arguments: invitation, self-determination, humanitarian intervention, protection of nationals abroad, and historic claims to territory.

Western states and commentators, for their part, have been overblown in their criticism. It is not clear, for example, that the annexation amounts to aggression or that Crimea's vote itself was unlawful as a matter of international law. Some troops were present lawfully under an arrangement to station Russia's Black Sea Fleet there, but movements or increase in numbers required consent of the Ukrainian government that was clearly not given. The referendum appears to have violated Ukraine's constitution, but as the Kosovo Advisory Opinion has shown us, unilateral declarations of independence may not of themselves violate international law.

* Professors Kapustin and Khrushcheva did not contribute remarks for the *Proceedings*.

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President Putin initially claimed—implausibly—that the armed actors that took control of Crimea were merely “local self-defense forces.” That pretense has now been dropped. There have been some suggestions that Russian troops were invited into Crimea, but if such an invitation was given, it was by the ousted President Yanukovich (who later said it had been a mistake).

In any case, the annexation of Crimea appears to be a clear violation of the Charter’s Article 2(4) prohibition on threat or use of force.

What is to be done? Not much. Russia has already vetoed a Security Council resolution—from which, interestingly, China abstained. And Russia will ignore the General Assembly resolution adopted on March 27, 2014, despite 100 countries voting in favor of it.

II. SANCTIONS

So is there any another way to influence Russia through economic sanctions? Not really, it seems. President Obama understandably made it clear that the United States was not considering the use of military force, although he did recently underline that the Baltic states of Estonia, Latvia, and Lithuania come under the NATO umbrella, meaning that any attack on them would be treated as an attack on the United States.

In the absence of military force, the main alternative would be economic sanctions. Here, however, there is a risk of cutting off one’s nose to spite one’s face. Within Europe in particular there has been considerable anxiety, because pressure on Russia also imposes costs locally. Financial sanctions would hit Britain, defense restrictions would impact France, and the greatest point of leverage—energy sanctions—would adversely affect Germany and Italy among others.

President Obama eventually declared sanctions against 11 Ukrainian and Russian officials. In a tit-for-tat move, Russia declared travel bans on 11 U.S. officials, prompting John McCain to quip that “spring break in Siberia is off.” The EU later published a list of 21 individuals—including the acting prime minister of Crimea, the speaker of Crimea’s parliament, three senior Russian commanders, and several senior Russian parliamentary officials.

There is ongoing talk about expanding these sanctions, but it is tempered by wariness that overly aggressive sanctions might upset the modest global economic recovery. It is possible that these targeted sanctions will undermine President Putin among those whose support he requires. This is tied to the symbolic sanctions intended to affect Russian prestige. On March 24, 2014, Russia was essentially ejected from the Group of 8. In addition, the massive investment in the 2014 Sochi Olympics—estimated to have cost more than all previous Winter Olympics combined—was intended to re-introduce Russia to the world as a modern country. Much of that investment has gone up in smoke.

At present, President Putin maintains high popularity within Russia, but these economic and symbolic sanctions may start to bite. One indicator is the evidence of large capital outflows as many Russians convert their rubles to dollars and move those out of the country. But it is too soon to tell.

III. COMPARISONS WITH KOSOVO AND IRAQ

Russia, for its part, has cited the 1999 NATO intervention in Kosovo as precedent for its actions. This is awkward for the United States, which at the time bypassed the United Nations—against Russian opposition—to liberate an ethnically distinct region from a country that group considered hostile. The United States and its allies tried to argue that Kosovo

was unique and “*sui generis*.” Taken seriously, it was an assertion that NATO could act as it did but that no one else could follow suit.

That never made much sense. Even so, the comparison with Kosovo is strained. Kiev’s rule is not as brutal as Belgrade’s, and the United States did not seek to acquire the territory of Kosovo for itself.

Russia has, however, invoked these arguments before. It was during another Olympics—the 2008 summer games in Beijing—that Russia “liberated” South Ossetia and Abkhazia from Georgia. Virtually no states have recognized the new entities other than Russia, to which they are attached as client-states. Nevertheless, after some muted criticism, the Obama administration announced a “reset” in relations with Russia, and life went on.

IV. SO HOW SHOULD WE UNDERSTAND CRIMEA?

First, it is important to understand the Russian viewpoint: Kievan Rus’ was once at the center of what we now call Russia, before the center of power moved to Moscow in the 13th century. Even Aleksandr Solzhenitsyn, while in exile in Vermont, argued that the USSR should indeed be disbanded, but that Ukraine and Belarus were integral parts of Russia.

Suffice it to say that many Russians—and about a quarter of Ukrainians, and the vast majority of those who live in Crimea—do identify with Russia. (Note that this leaves many others, in particular the Crimean Tartars, who feel quite differently.) Indeed, the word “Ukraine” means “border.” And NATO was butting up against that border, and threatening to transgress it.

None of this justifies Russia’s actions, of course. But in retrospect it should have made Putin’s actions less surprising.

V. CONCLUSION

Let me offer two points by way of conclusion.

First, taken seriously, Russia is articulating a vision of spheres of influence. President Putin in 2005 called the collapse of the Soviet Union one of the greatest geopolitical catastrophes of the twentieth century, among other things because it left tens of millions of what he called our “co-citizens and co-patriots” outside of Russian territory. Interesting comparisons could be made here with the way in which China is articulating its maritime claims in the South China and East China Seas.

Second, for the United States this case should make it very clear what many of us have argued all along: meretricious legal arguments that are politically expedient can also be used by other states. Kosovo could never be truly *sui generis*, for example, and the Iraq war undermined the prohibition on the use of force. As we look at what the United States is doing with drone technology and surveillance—something that only it can do, at least for the time being—this should give us pause.

REMARKS BY PETER M. OLSON*

The situation in Ukraine, in particular relating to Crimea, is not merely a part of a larger NATO-Russia rivalry, and is decidedly not a *NATO-Russia* crisis. Recent events underscore why some former Soviet and former Warsaw Pact states eagerly supported NATO’s expansion and sought to join the alliance. Think what one may of NATO policy since the dissolution

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