CURRENT DEVELOPMENTS

ANNEXATION OF CRIMEA

*By Thomas D. Grant**

The Russian Federation, by a municipal law act dated March 21, 2014, annexed Crimea, an area of Ukraine.[1] This act followed armed intervention by forces of the Russian Federation, a referendum, and a declaration of independence in Crimea. Outside the context of decolonization, few claims of annexation following the use of force have been made during the United Nations era; this is the first by a permanent member of the Security Council against a United Nations member. The present article examines the annexation of Crimea in view of the legal arguments that the Russian Federation has articulated in defense of its actions. It then considers the international response and the possible consequences of nonrecognition.

I. ACTS IN TWO MUNICIPAL LEGAL ORDERS

For a territory to separate from one state and join another entails, at a minimum, acts in two municipal legal orders. Russia characterized the separation of Crimea from Ukraine as the result of a referendum taking place in the Crimean area of Ukraine, and its annexation as the result of a treaty between an independent Crimea and Russia. While Russia thus treated these transactions as involving not two but three states (Ukraine, Russia, and Crimea), for purposes of analysis it is useful to begin with the legal acts of the two existing states involved (Ukraine and Russia).

The Putative Emergence of a New State in Ukraine

On March 6, 2014, the local legislative organ in Crimea adopted a decree *On the All-Crimean Referendum*.[2] The resolution presented two options: "(1) Do you support the reunification of the Crimea with Russia as a subject of the Russian Federation? (2) Do you support the restoration of the Constitution of the Republic of Crimea of 1992 and the status of the

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[1] *See* President of Russia Press Release, Laws on Admitting Crimea and Sevastopol to the Russian Federation (Mar. 21, 2014), *available at* http://en.kremlin.ru/acts/news/20625.

[2] Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14, On Holding of the All-Crimean Referendum (Mar. 6, 2014); *see also Illegal Referendum Is Being Held in Crimea*, UKR. CRISIS MEDIA CTR., Mar. 16, 2014, *at* http://uacrisis.org/v-krimu.

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Crimea as a part of Ukraine?"[3] A declaration of independence of the Republic of Crimea was adopted on March 11, 2014.[4] The questions in the March 6 resolution were put to voters in Crimea in a referendum on March 16, 2014. The Russian Federation Presidential Council for Civil Society and Human Rights briefly posted an analysis on its website indicating that not more than 60 percent of votes were in favor of annexation and possibly as few as 50 percent and that voter turnout was as low as 30 percent and not higher than 50 percent.[5] However, the result as finally reported was 96.77 percent for the first option, with 83.1 percent of eligible inhabitants, not including the city of Sevastopol, casting votes.[6] Section II below, considering Russia's position that a Crimean people separated from Ukraine under a right of self-determination, further addresses the circumstances in Crimea at the time of the referendum.

On March 7, 2014, the acting president of Ukraine suspended the Crimean decree that had called the referendum.[7] In addition, a question was submitted to the Constitutional Court of Ukraine as to the decree's accordance with the Ukrainian Constitution. On March 14, 2014, the Constitutional Court indicated that only under an all-Ukrainian referendum could a proposed change to Ukraine's territory be lawfully addressed and that only the parliament of Ukraine has the authority to call such a referendum.[8] In consequence, the Constitutional Court mandated that the Crimean authorities repeal the referendum decree.[9] On March 21, 2014, the Venice Commission of the Council of Europe (Venice Commission) agreed that the referendum was in contravention of the Ukrainian Constitution.[10] The chairman of the Organization for Security and Co-operation in Europe (OSCE) expressed

[3] Ministry of Foreign Affairs of Ukraine, Judgment of the Constitutional Court of Ukraine on All-Crimean Referendum: News from Ukraine's Diplomatic Missions (Mar. 15, 2014), *available at* http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu (providing unofficial translation of the referendum dated March 6, 2014). Volume 6(3) of the *Journal of Eurasian Law* (2014) includes "Documents of Note" relating to the annexation of Crimea.

[4] *Crimea Parliament Declares Independence from Ukraine Ahead of Referendum*, RT NEWS, Mar. 13, 2014, *at* http://rt.com/news/crimea-parliament-independence-ukraine-086.

[5] Paul Roderick Gregory, *Putin's 'Human Rights Council' Accidentally Posts Real Crimean Election Results*, FORBES, May 5, 2014, *at* http://www.forbes.com/sites/paulroderickgregory/2014/05/05/putins-human-rights-council-accidentally-posts-real-crimean-election-results-only-15-voted-for-annexation.

[6] *With 100% Ballots Counted, 96.77% of Crimeans Vote to Re-unite with Russia—Crimean Election Chief*, VOICE OF RUSSIA, Mar. 17, 2014, *at* http://voiceofrussia.com/2014_03_17/With-100-of-ballots-counted-96-77-of-Crimeans-who-came-to-polls-on-Sunday-voted-to-re-united-with-Russia-Crimean-election-chief-1708.

[7] UN Security Council, Letter Dated 15 March 2014 from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council, UN Doc. S/2014/193 (Mar. 17, 2014). UN documents are generally available online at http://documents.un.org/simple.asp.

[8] Ministry of Foreign Affairs of Ukraine, Judgment of the Constitutional Court of Ukraine on All-Crimean Referendum (Mar. 14, 2014), *available at* http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu (unofficial translation of Decision No. 2-rp/2014).

[9] *Id.*

[10] European Commission for Democracy Through Law (Venice Commission), Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution Is Compatible with Constitutional Principles," Doc. No. CDL-AD(2014)002, para. 15 (Mar. 21, 2014), *available at* http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e (based on comments by Honorary President Peter Paczolay (Hungary), and Members Hanna Suchocka (Poland), Evgeni Tanchev (Bulgaria), and Kaarlo Tuori (Finland)) [hereinafter Venice Commission Opinion].

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a similar view.[11] The referendum in Crimea thus differed from plebiscitary exercises elsewhere (as in certain colonial settings) that were affirmed by international actors or that took place with the consent of the central authorities of the state.[12]

The situations in which a state has emerged through unilateral acts against the opposition of an existing state almost necessarily entail breaches of municipal law. In some instances, they involve the whole disruption of the legal order of the state.[13] Thus, to say that Crimea's referendum and declaration of independence were unlawful as a matter of Ukrainian law does not in itself settle the question. States well may regard domestic illegality as relevant when they consider how to respond to an act of secession,[14] and how states respond almost inevitably affects whether the act succeeds or fails. Moreover, international law may be involved in the procedures by which self-determination is implemented in practice. These points are addressed further below. But international law does not categorically forbid the emergence of a new state against the legal order of an existing state.[15]

Annexation in the Russian Legal Order

On March 17, 2014, the day after the referendum, the president of the Russian Federation signed an executive order *On Recognising Republic of Crimea*.[16] He indicated to the Government of the Russian Federation, the State Duma, and the Federation Council on March 18, 2014, that local Crimean institutions had proposed joining the Russian Federation.[17] The same day, Russia and the local institutions signed an agreement on the admission of the Republic of Crimea into the Russian Federation.[18]

[11] Organization for Security and Co-operation in Europe (OSCE), OSCE Chair [Didier Burkhalter] Says Crimean Referendum in Its Current Form Is Illegal and Calls for Alternative Ways to Address the Crimean Issue (Mar. 11, 2014), *at* http://www.osce.org/cio/116313.

[12] *See, e.g.*, Scotland Act 1998 (Modification of Schedule 5) Order 2013, No. 242 (Feb. 12, 2013), *available at* http://www.legislation.gov.uk/uksi/2013/242/pdfs/uksi_20130242_en.pdf.

[13] *See* Conference on Yugoslavia, Arbitration Commission, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Opinion No. 8, 92 ILR 199, 202 (1991), 31 ILM 1521, 1523 (1992).

[14] "'Secession' is the process by which a group seeks to separate itself from the state to which it belongs and to create a new state on part of that state's territory. It is essentially a unilateral process." JAMES CRAWFORD & ALAN BOYLE, REFERENDUM ON THE INDEPENDENCE OF SCOTLAND—INTERNATIONAL LAW ASPECTS 72, para. 22.1 (Dec. 10, 2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf.

[15] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ REP. 403, paras. 56, 79 (July 22) [hereinafter Kosovo Advisory Opinion].

[16] President of Russia Press Release, Executive Order on Recognising Republic of Crimea (Mar. 17, 2014), *available at* http://en.kremlin.ru/acts/news/20596.

[17] President of Russia Press Release, The President Has Notified the Government, the State Duma and the Federation Council of Proposals by the Crimean State Council and the Sevastopol Legislative Assembly Regarding Their Admission to the RF and the Formation of New Constituent Territories (Mar. 18, 2014), *available at* http://en.kremlin.ru/acts/news/20599.

[18] President of Russia Press Release, Treaty Between the Russian Federation and the Republic of Crimea on the Adoption of the Russian Federation of the Republic of Crimea and Admission in the Russian Federation of New Subjects (Mar. 18, 2014), *available at* http://www.kremlin.ru/news/20605 (unofficial translation); *see also* President of Russia Press Release, Executive Order on Executing Agreement on Admission of Republic of Crimea into the Russian Federation (Mar. 18, 2014), *available at* http://en.kremlin.ru/acts/news/20600.

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As noted above, the annexation of Crimea to the Russian Federation was formalized for purposes of Russian law in the Federal Constitutional Law of March 21, 2014. Annexation was accompanied by a celebratory gun salute in Moscow, Simferopol, and Sevastopol.[19]

On March 18, 2014, three days before adoption of the Federal Constitutional Law, the Russian president transmitted the *Request to Verify Compliance of Agreement on Accession of Republic of Crimea to the Russian Federation with the Constitution* to the Constitutional Court of the Russian Federation.[20] On March 19 (the day following the request), the Constitutional Court adopted a judgment in which it concluded that the agreement "cannot be regarded as breaking the Constitution of the Russian Federation as to the procedure of signing, conclusion and entry into force."[21] The judgment referred to the agreement of March 18 as an "international treaty."[22] A treaty being an agreement between subjects of international law,[23] the Constitutional Court thus presumably understood both parties to have been subjects of international law. To say that Crimea entered into an "international treaty" is not in itself to say that Crimea was an independent state. An entity that does not possess general or plenary competence under international law may possess competence to make treaties for specific and limited purposes.[24] A treaty of cession or annexation, however, entails the transfer of full (or "plenary") competence in respect of the territory being ceded or annexed. For Crimea to have transferred such competence to the Russian Federation, Crimea would have had to have held such competence. Under Ukrainian law, it did not; under Russian law in places beyond Russia's borders, no such power existed to allocate it. Acts or judgments in one state's legal system, absent something more, do not change the law in the territory of another state.

Annexation necessarily involves major issues of international law, so an account that considers only municipal law acts is necessarily incomplete. In section II below, the Russian Federation's main argument under modern international law is considered—namely, that the separation of Crimea was an act of external self-determination by a subject "people," who exercised an international law right. Section III examines the legality of, and the legal consequences of, the use of force by which Crimea's separation was established in fact. Section IV deals with responses of other states to the annexation and the legal consequences of nonrecognition. Section V concludes.

II. Self-Determination and Secession

If Crimea had a right under international law to separate unilaterally from Ukraine under the circumstances existing in March 2014, then Ukraine would not have avoided its correlative

[19] *See* President of Russia Press Release, Executive Order on Holding a Celebratory Gun Salute in Moscow, Simferopol and Sevastopol (Mar. 21, 2014), *available at* http://en.kremlin.ru/acts/news/20628.

[20] President of Russia Press Release, Request to Verify Compliance of Agreement on Accession of Republic of Crimea to the Russian Federation with the Constitution (Mar. 18, 2014), *available at* http://en.kremlin.ru/acts/news/20614.

[21] *See* Constitutional Court of the Russian Federation, Summary of Judgment No. 6-II/2014, Appraisal of Constitutionality of the International Treaty Between the Russian Federation and the Republic of Crimea (Mar. 19, 2014), *available at* http://www.ksrf.ru/en/Decision/Judgments/Documents/Resume19032014.pdf.

[22] *Id.*

[23] *See* Vienna Convention on the Law of Treaties, Arts. 2(1)(a), 3(c), May 23, 1969, 1155 UNTS 331.

[24] *See* Tom Grant, *Who Can Make Treaties? Other Subjects of International Law*, *in* THE OXFORD GUIDE TO TREATIES 125 (Duncan B. Hollis ed., 2012).

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obligation by adopting national law acts denying the right.[25] But this consideration is relevant only if the putative international law right exists. The national law acts of Ukraine in 2014 assumed that no such right exists.

International law undoubtedly contains a right to self-determination. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, for example, provide for it.[26] The difficulty is in identifying the precise meaning of the right and its scope of application. As noted above, it is widely understood that international law contains no prohibition against secession as such. More controversial is the question whether the right to self-determination entails a right to secession—and, if so, by whom and in what circumstances.

In respect of non-self-governing territories, self-determination entails a right on the part of the people of the territory to choose independence as their final disposition, whether or not the administering power assents. Non-self-governing territories are colonial territories, understood as such under Chapter XI of the UN Charter. The application of self-determination to non-self-governing territories was developed through the practice of the UN General Assembly,[27] including its findings that certain territories are non-self-governing in the Chapter XI sense.[28] Crimea was never treated as a non-self-governing territory, and no state or international organization ever indicated that it ought to have been. So if Crimea had a right unilaterally to choose independence, then the right would have been on some other basis.

Remedial Secession and Human Rights in Crimea

It has been posited that the right to self-determination outside the colonial situation entails a right to secession, provided that certain conditions exist and procedural prerequisites are met.[29] In the *Kosovo* advisory proceedings, the concept of remedial secession, notably, was not invoked by some of the main states that made submissions in favor of Kosovo.[30] Russia, which vigorously opposed the independence of Kosovo, at the time rejected that a remedial right to

[25] *See* Responsibility of States for Internationally Wrongful Acts, Art. 3, GA Res. 56/83, annex (Dec. 12, 2001), *available at* http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

[26] International Covenant on Civil and Political Rights, Art. 1(1), Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Art. 1(1), Dec 16, 1966, 993 UNTS 3 [hereinafter ICESCR]. Ukraine signed the ICCPR and ICESCR on March 20, 1968, and ratified them on November 12, 1973. The Union of Soviet Socialist Republics (USSR) signed on March 18, 1968, and ratified on October 16, 1973; *see also* Reference re Secession of Quebec, [1998] 2 SCR 217, paras. 114–21 (Can.), *available at* http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do [hereinafter Quebec Secession].

[27] GA Res. 1514 (XV) (Dec. 14, 1960); GA Res. 1541 (XV) (Dec. 15, 1960); *see also* Kosovo Advisory Opinion, *supra* note 15, para. 79.

[28] *E.g.*, GA Res. 41/41A, para. 1 (Dec. 2, 1986) (considering that "New Caledonia is a Non-Self-Governing Territory within the meaning of the Charter").

[29] *See, e.g.*, JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW 119–28 (2d ed. 2006); ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 271 (2004); *cf.* Peter Radan, *International Law and the Right of Unilateral Secession*, *in* THE ASHGATE RESEARCH COMPANION TO SECESSION 321, 330 (Aleksandar Pavković & Peter Radan eds., 2011).

[30] *See, e.g.*, Request for an Advisory Opinion of the International Court of Justice on the Question "Is The Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in Accordance with International Law?," Written Statement of the United Kingdom, paras. 5.30–5.32 (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15638.pdf; Request for an Advisory Opinion of the International Court

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secession exists in modern international law, except in "truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question."[31] Russia currently takes the position that the conditions of the Russian ethnic population in Crimea supported the exercise of self-determination by means of secession.[32]

If a human rights problem in Crimea had been serious enough to justify secession, then the problem would have necessarily affected a large part of the population; it is unclear how "the very existence of the people" could have been threatened if only a small number were involved. Nobody claimed that the part of the population of Crimea of Ukrainian ethnic origin—approximately 25 percent of the whole—faced systematic deprivation of human rights. Inhabitants of Russian ethnic origin comprise the largest part of the population of Crimea—approximately 60 percent. But, to the extent that a systemic human rights problem presented itself in Crimea, it did not involve a deprivation of the rights of the inhabitants of Russian ethnic origin either.

As reflected in Ukraine's Sixth Periodic Report under the International Covenant on Economic, Social and Cultural Rights, the central human rights question in Crimea in recent years has been the treatment of the Crimean Tatars.[33] The Crimean Tatars are one of the ethnic groups that the Union of Soviet Socialist Republics (USSR) in the time of Joseph Stalin forcibly deported to Central Asia and Siberia on the grounds that they had collaborated with Germany. A large part of the Crimean Tatar population perished at that time.[34] Part of the Crimean Tatar population since the end of the USSR have returned to Crimea.[35] It was estimated (in 2001) that Crimean Tatars comprised 12.1 percent of the population of Crimea.[36] How the views of such a minority are taken into account when the decision is reached to secede, and how its members are treated after secession, have been identified as relevant to the exercise of self-determination;[37] the situation of the Crimean Tatars since Crimea's annexation are considered further below and in part III.

of Justice on the Question "Is The Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in Accordance with International Law?," Written Comments of the United Kingdom, para. 10 (July 15, 2009), *available at* http://www.icj-cij.org/docket/files/141/15702.pdf.

[31] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the Russian Federation, para. 88 (Apr. 16, 2009), *available at* http://www.icj-cij.org/docket/files/141/15628.pdf.

[32] *See* UN Security Council, Annex to Letter Dated 19 March 2014 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, at 5, UN Doc. A/68/803–S/2014/202 (Mar. 20, 2014) (speech of President Vladimir Putin to Duma on March 18, 2014) [hereinafter Putin Speech].

[33] UN Economic and Social Council, Implementation of the International Covenant on Economic, Social and Cultural Rights: Consideration of the Sixth Periodic Reports of States Parties Under Articles 16 and 17 of the Covenant, Ukraine, paras. 393–410, UN Doc. E/C.12/UKR6 (Dec. 27, 2012 & Apr. 1, 2014).

[34] *See generally* ALAN W. FISHER, THE CRIMEAN TATARS (1978); ROBERT CONQUEST, THE NATION KILLERS: THE SOVIET DEPORTATION OF NATIONALITIES 13–15, 64–66, 105–07, 160–62, 185–87, 202–09 (1970); *see also* Committee on the Elimination of Racial Discrimination (CERD), Summary Record of the First Part (Public) of the 2099th Meeting, paras. 59–75, UN Doc. CERD/C/SR.2099 (Aug. 19, 2011) (noting the "very strong claims" and critical overview by Daisuke Shirane of the International Movement Against All Forms of Discrimination and Racism, Geneva Office) [hereinafter CERD 2099th Meeting Summary].

[35] OREST SUBTELNY, UKRAINE: A HISTORY 609, 632 (4th ed. 2009).

[36] State Statistics Committee of Ukraine, All Ukrainian Population Census 2001 (2003–04), *at* http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea.

[37] *See* Quebec Secession, *supra* note 26, para. 139; *see also* ALEXANDRA ZANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 141–46, 166–69 (2007).

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Before the annexation, ethnic incidents in Crimea were reported to have been mainly against this minority.[38] Systematic deprivations of rights in practice, too—for example, denial of access to education—principally concerned the Crimean Tatars.[39] In the Human Rights Council, reference was made in connection with the Universal Periodic Review (UPR) for Ukraine in 2012 to the "situation of the Crimean Tatars."[40] The UPR Working Group included the following recommendations in its report:

> 97.140. That no effort be spared for the improvement of the current status and living conditions of the Crimean Tatars along with the other minorities (Turkey);
> 97.141. [That Ukraine] [t]ake further action in ensuring and preserving the political, economic, social and cultural rights of the Crimean Tatars, which would also be conducive to better inter-communal relations (Turkey).[41]

While recommendation 97.140 referred to "other minorities," it did not specifically refer to the Russian majority (in Crimea) or minority (in Ukraine as a whole). No other recommendation in the Working Group report mentioned the Russian ethnic population.[42]

In the report, the Russian Federation, for its part, restricted its observations to

> welcom[ing] the progress made in reforming legislation, the judiciary, law enforcement and the penitentiary system, as well as the work done to combat all forms of intolerance, xenophobia and racial discrimination. It welcomed the creation of the Ombudsman for children under the Office of the President. The Russian Federation noted the improvement in conditions of detention centres.[43]

In the practice of the Human Rights Council, these observations were mild, even complimentary. The strongest words that Russia had at that time for Ukraine were those recommending that Ukraine "[c]ontinue strengthening tolerance in the Ukrainian society and take measures to prevent integration of nationalistic ideas in the political platforms of the public associations."[44] Again, the report did not indicate that the Russian minority was subject to maltreatment. In February 2014, when Russia asserted that a crisis had erupted in which the ethnic

[38] *See, e.g.*, Committee Against Torture, Sixth Periodic Reports of States Parties Due in 2011, Ukraine, para. 346, UN Doc. CAT/C/UKR/6 (Mar. 4, 2013) (noting desecration of Tatar Crimean graves).

[39] *See, e.g.*, Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Ukraine, para. 90, UN Doc. CRC/C/UKR/CO/3-4 (Apr. 21, 2011) (noting that the Committee urged Ukraine to "intensify efforts to ensure the right to education for all children belonging to minorities, focusing on Roma and Crimean Tatar children"); *see also, e.g.*, CERD, Summary Record of the 2104th Meeting, para. 15, UN Doc. CERD/C/SR.2104 (Dec. 30, 2011) (statement of Cedric Thornberry, Ukraine country rapporteur); CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination, para. 17, UN Doc. CERD/C/UKR/CO/19-21 (Sept. 14, 2011); Committee on Economic, Social and Cultural Rights, Summary Record of the 38th Meeting, Fifth Periodic Report of Ukraine, para. 22, UN Doc. E/C.12/2007/SR.38 (Dec. 5, 2007); Human Rights Committee, Summary Record of the 2408th Meeting, para. 45, UN Doc. CCPR/C/SR.2408 (Oct. 31, 2006) (statement of Ruth Wedgwood, Ukraine country rapporteur).

[40] *See, e.g.*, Human Rights Council (HRC), Report of the Working Group on the Universal Periodic Review, Ukraine, para. 46, UN Doc. A/HRC/22/7 (Dec. 20, 2012) [hereinafter HRC Working Group Report].

[41] *Id.*, para. 97 (listing recommendations of Turkey).

[42] *Cf.* CERD 2099th Meeting Summary, *supra* note 34, paras. 59–81 (referring to the Crimean Tatars but raising no questions as to the ethnic Russian population of Crimea or of Ukraine as a whole); Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Follow-up Information Provided by Ukraine to the Concluding Observations, para. 51, UN Doc. CAT/C/UKR/CO/5/Add.1 (Apr. 15, 2011) (indicating that Uzbek nationals might be tortured if deported to Uzbekistan but raising no questions as to the treatment of the Russian ethnic population).

[43] HRC Working Group Report, *supra* note 40, para. 28.

[44] *Id.*, para. 97.68.

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Russian population of Crimea was in peril, this statement was an auto-appreciation shared by no other international actor; it was not in accord with Russia's own recent practice in this main international human rights organ.[45]

The Office of the High Commissioner for Human Rights (OHCHR) concluded in April 2014 after visiting areas in Ukraine, including Crimea, that the alleged violations of the rights of ethnic Russians seemed to be "neither widespread nor systemic."[46] There was "no evidence of harassment or attacks on ethnic Russians ahead of the [secession] referendum."[47] It was "widely assessed that Russian-speakers have not been subject to threats in Crimea."[48] The OSCE high commissioner on national minorities, on the basis of a visit to Crimea from March 4–6, 2014, reported no human rights problem affecting the ethnic Russian population.[49]

Certain individual complaints from members of the ethnic Russian (local) majority in Crimea were largely addressed under existing international law procedures.[50] The complaints were minor in comparison to the systemic collapse of public order and gross abuses that had presaged unilateral separations elsewhere (e.g., Kosovo and Bangladesh).[51]

[45] A White Book circulated by the Ministry of Foreign Affairs of the Russian Federation on May 5, 2014, contained extensive allegations of political extremism in Ukraine. Even accepting the factual allegations in the White Book, political unrest over the course of several months is not a basis in modern international law for the partition of the state. Moreover, evidence generated only after a dispute has arisen is unlikely to be received as credible; it even may be rejected as inadmissible. Where the evidence contradicts earlier practice, it is likely to be questioned all the more. Ministry of Foreign Affairs of the Russian Federation, White Book on Violations of Human Rights and the Rule of Law in Ukraine (July–November 2014) (Nov. 2014), *available at* http://www.mid.ru/bdomp/ns-dgpch.nsf/03c344d01162d351442579510044415b/38fa8597760acc2144257ccf002beeb8/$FILE/White%20Book%2007.2014-11.2014.pdf; *cf.* Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 ICJ REP. 661, para. 117 (Oct. 8) (relating to the concept of "critical date" as applied by the International Court of Justice).

[46] OHCHR, Report on the Human Rights Situation in Ukraine, para. 73 (Apr. 15, 2014) [hereinafter OHCHR April 2014 Report], *in* Report of the Office of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Ukraine, UN Doc. A/HRC/27/75, annex (Sept. 19, 2014) [hereinafter OHCHR Summary Report].

[47] OHCHR April 2014 Report, *supra* note 46, para. 89.

[48] *Id.*

[49] *See* OSCE Press Release, Statement by Astrid Thors, OSCE High Commissioner on National Minorities, on Her Recent Visits to Ukraine (Apr. 4, 2014), *at* http://www.osce.org/hcnm/117175; *see also* HRC, Note Verbale Dated 19 March 2014 from the Permanent Mission of Ukraine to the United Nations Office and Other International Organizations in Geneva Addressed to the Secretariat of the Human Rights Council, at 2, UN Doc. A/HRC/25/G/19, annex (Mar. 20, 2014).

[50] *See, e.g.*, Bulgakov v. Ukraine, Communication No. 1803/2008, UN Doc. CCPR/C/106/D/1803/2008, annex (May 23, 2008); Bulgakov v. Ukraine, App. No. 59894/00, paras. 53–54 (Eur. Ct. H.R. Sept. 11, 2007) (finding no violation of Article 8 of the European Convention on Human Rights); *id.*, paras. 58–59 (finding no violation of Article 14).

[51] *See, e.g.*, GA Res. 53/164, para. 8 (Dec. 9, 1998) (noting, inter alia, "summary executions, indiscriminate and widespread attacks on civilians, indiscriminate and widespread destruction of property, mass forced displacement of civilians"); REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS, Art. 98, para. 48 (Supp. 5 1970–78), *available at* http://www.un.org/law/repertory (the secretary-general identifying the need as of March 1971 for "international assistance on an unprecedented scale"); *id.*, Art. 99, para. 16 (noting secretary-general's statement of July 20, 1971, that the situation posed "a potential threat to peace and security"). India's intervention began on December 3, 1971, following airstrikes by Pakistan on Indian airbases: the loss of life from Pakistan's attempted suppression of Bangladeshi independence before intervention has been estimated at three million. RUDOLPH J. RUMMEL, STATISTICS OF DEMOCIDE: GENOCIDE AND MASS MURDER SINCE 1900, at 157–58, tbl. 8.1 (1998).

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Procedural Conditions for Secession

Secession, even in a "truly extreme" case, would be "an *ultimum remedium*,"[52] not a measure available in the early or intermediate stages of a crisis. A procedural condition is entailed here: "all effective remedies [short of secession] must have been exhausted to achieve a settlement" before the aggrieved community could exercise the remedial right.[53] Attempts to resolve the crisis would need to have been made within the existing legal order. If secession is available at all as a remedy outside the colonial setting, then it "may only come into question as a last resort."[54] The Canadian Supreme Court, the main national judicial authority to have considered the question of remedial secession (in *Quebec Secession Reference*), was skeptical overall but indicated, in line with the general understanding, that if a remedial right of this character exists it is limited to extreme cases, subject to good-faith efforts to resolve the crisis within the existing national legal order.[55]

Even where a right to unilateral separation exists—that is, in the context of decolonization under Chapter XI—a procedural prerequisite has entered the practice to a degree. A colony in the UN Charter sense has the right, by virtue of being a colony in the UN Charter sense, to freely elect its final status, including, if it wishes, by electing independence. General Assembly practice did not at first specify the characteristics of the act of free election, which is sometimes called an "act of self-determination."[56] From the start, the practice did suggest that the act has procedural content; it must, for example, be "the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."[57] Further practice has affirmed that the act of free election, to be valid, must reflect a real choice. The General Assembly and other UN organs have gone so far as to monitor the self-determination act in particular colonial territories; prominent examples include the referenda in northern Cameroon,[58] West Irian,[59] and East Timor.[60] Thus, though prescribing no precise form

[52] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Written Statement of the Kingdom of the Netherlands, para. 3.6 (Apr. 17, 2009), *available at* http://www.icj-cij.org/docket/files/141/15652.pdf.

[53] *Id.*, para. 3.11.

[54] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Written Statement of the Republic of Poland, para. 6.7 (Apr. 2009), *available at* http://www.icj-cij.org/docket/files/141/15632.pdf.

[55] Quebec Secession, *supra* note 26, paras. 112, 135, 138. A not greatly dissimilar position has been expressed under the African human rights system. *See* Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AJIL 60, 66–71 (2011).

[56] *See, e.g.*, Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Report of the United Nations Mission to New Caledonia, 2014, para. 6, UN Doc. A/AC.109/2014/20/Rev.1 (June 18, 2014); *cf.* East Timor (Port. v. Austl.), 1995 ICJ REP. 90, 194 (June 30) (Diss. Op. Weeramantry, J.); Frontier Dispute (Burkina Faso/Mali), 1986 ICJ REP. 554, 653 (Dec. 22) (Sep. Op. Luchaire, J. *ad hoc*).

[57] GA Res. 1541 (XV), annex, princ. VII (Dec. 15, 1960); *cf. id.*, princ. IX(b) (further requiring "universal adult suffrage" if integration is elected).

[58] GA Res. 1350 (XIII), paras. 2, 6–7 (Mar. 13, 1959); GA Res. 1473 (XIV), para. 3 (Dec. 12, 1959). For the report of the plebiscite commissioner, see UN Doc. A/4727, *noted in* GA Res. 1608 (XV) (Apr. 21, 1961); Northern Cameroons (Cameroon v. UK), Preliminary Objections, 1963 ICJ REP. 15, 32 (Dec. 2).

[59] GA Res. 2504 (XXIV) (Nov. 19, 1969); *see also* Thomas D. Musgrave, *An Analysis of the 1969 Act of Free Choice in West Papua*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 209 (Christine Chinkin & Freya Baetens eds., 2015).

[60] GA Res. 54/194 (Dec. 17, 1999).

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for a self-determination act to follow, international law has concerned itself with the act's overall validity, and procedural safeguards have been applied to ascertain its validity. These considerations would seem, a fortiori, to apply in noncolonial cases where UN practice otherwise furnishes little, if any, guidance and therefore where a procedural control would be the more warranted.

These considerations suggest an initial defect in the purported act of self-determination in Crimea in March 2014. As noted above, the referendum in Crimea on March 16, 2014, was widely impugned. It was not like the final status referenda monitored by the United Nations. Nor did it satisfy basic regional standards for the conduct of popular consultations.

A further problem was the timing. The rules of remedial secession (as posited) envisage the self-determination act to be the last resort after efforts of long duration have at last proven fruitless. In Ukraine, no effort was made to resolve the purported crisis in Crimea. No negotiation preceded the separation and annexation of Crimea, a fact that the Venice Commission considered particularly salient.[61] Attempts to engage multilateral processes in the situation were frustrated from the start. No proposal was aired that would have preserved the existing territorial unit (i.e., Ukraine). Thus, even if a problem had existed in Crimea of a type justifying remedial secession, the situation was not ripe for secession in March 2014.

III. Crimea and the Use of Force

The prohibition against use or threat of force under international law is not absolute; the existence of qualifications is reflected in Article 51 of the UN Charter, which allows "self-defence if an armed attack occurs against a Member of the United Nations."[62] The prohibition against acquisition of territory by threat or use of force, however, is not subject to qualification. For example, Article 5, paragraph 3, in the General Assembly's 1974 Definition of Aggression specifically requires that a purported acquisition of territory resulting from aggression not be recognized as lawful.[63] Similarly, the Security Council in Resolution 242 did not merely say that "acquisition of territory by war" is to be rejected on its merits but "emphasiz[ed] [its] inadmissibility."[64]

The privilege that international law accords to settled boundaries[65] presents serious difficulty for Russia's claimed justifications for use of force and annexation of Crimea. Justifications for an armed intervention, even if accepted, are not justifications for the forcible acquisition of territory. The arguments that Russia has articulated as defenses for the use of force against Ukraine, therefore, do not, as such, justify the annexation of Crimea. The use of force, however, forms the backdrop against which annexation took place; the arguments for use of force are arguments that Russia made—evidently in earnest—and so each of them is now considered in turn.

[61] Venice Commission Opinion, *supra* note 10, paras. 25–26.

[62] UN Charter, Art. 51.

[63] GA Res. 3314 (XXIX), annex (Dec. 14, 1974).

[64] SC Res. 242 (Nov. 22, 1967) (concerning the situation in the Middle East).

[65] *See* Thomas D. Grant, Aggression Against Ukraine: Territory, Responsibility, and International Law 103–31 (2015).

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The Black Sea Fleet Agreements

The president of the Russian Federation, addressing the Duma, indicated that the Russian armed forces in Crimea "were there already in line with an international agreement."[66] The "international agreement" to which the president referred was comprised of a series of bilateral treaties between the Russian Federation and Ukraine. The treaties addressed the former Soviet naval fleet in the Black Sea and the arrangements for basing it in Ukrainian ports (as the Black Sea fleet of the Russian Federation). The framework for the presence and operations of the fleet had been initially set out in three treaties adopted in 1997.[67] A subsequent treaty, enacted in Kharkiv, Ukraine, in 2010, renewed and continued the framework for a further period.[68]

In the framework as adopted in 1997 and renewed in 2010, Ukraine, as the receiving state, consented to a Russian presence in Crimea in specific, and limited, terms. Title and jurisdiction over Crimea were not affected. Ukrainian legislation in large part applied to Russian forces. For example, the movement of Russian vessels through Ukrainian ports was subject to Ukrainian legislation,[69] as was the movement of troops and their materiel.[70] The receiving state's law remained applicable to the sending state's forces.[71] Ukraine did not cede territory to Russia under the basing agreements; it leased land and infrastructure to Russia at Sevastopol and Feodosia.[72] The properties designated in the lease arrangement were identified as "land and infrastructure," not territory.[73] Under such terms, the sending state, as would be expected, is in the position of a leaseholder or similar beneficiary of limited specified rights; it is not the territorial sovereign. Broadly, the terms resembled those found in status-of-forces agreements, though in some respects more onerous on the sending state.[74] In addition, the framework was subject to the existing obligations of the Russian Federation in the matter of conventional arms control.[75]

[66] Putin Speech, *supra* note 32, at 5.

[67] Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, Russ.-Ukr., May 28, 1997 [hereinafter Black Sea Fleet's Stay Agreement]; Agreement Between the Russian Federation and Ukraine on the Parameters for the Division of the Black Sea Fleet, Russ.-Ukr., May 28, 1997 [hereinafter Black Sea Division Parameters Agreement]; Agreement Between the Russian Federation Government and the Government of Ukraine on Clearing Operations Associated with the Division of the Black Sea Fleet and the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, Russ.-Ukr., May 28, 1997 [hereinafter Black Sea Clearing Operations Agreement]. None of the agreements appears to have been registered in accordance with Article 102 of the UN Charter, and they are not widely available in Western languages. The first of the three as listed here appears in English translation in 1 RUSSIA & EURASIA DOCUMENTS ANNUAL 1997, at 129 (J. L. Black ed., 1998). The agreements appear in French translation in Ministère des Affaires Étrangères, 16 DOCUMENTS D'ACTUALITÉ INTERNATIONALE (DAI) 577–82 (Aug. 15, 1997). As to the three 1997 instruments and the transactions leading to their adoption, see HÉLÈNE HAMANT, DÉMEMBREMENT DE L'URSS ET PROBLÈMES DE SUCCESSION D'ÉTATS 385–88, 407 (2007).

[68] Agreement Between Ukraine and Russia on the Black Sea Fleet in Ukraine, Russ.-Ukr., Apr. 21, 2010, *available at* http://www.pravda.com.ua/articles/2010/04/22/4956018 [hereinafter Kharkiv Agreement].

[69] Black Sea Fleet's Stay Agreement, *supra* note 67, Art. 15(4).

[70] *Id.*, Art. 15(1).

[71] *See also id.*, Arts. 6(1), 19(1); Black Sea Division Parameters Agreement, *supra* note 67, Art. 1(2); Black Sea Clearing Operations Agreement, *supra* note 67, Art. 2.

[72] Black Sea Clearing Operations Agreement, *supra* note 67, Art. 2.

[73] *Id.*

[74] *See, e.g.*, Black Sea Fleet's Stay Agreement, *supra* note 67, Art. 3 (notification of personnel appointments).

[75] *See* Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, 30 ILM 1 (1991), *available at* http://www.state.gov/t/avc/trty/108185.htm#text (referring to preexisting obligatory ceilings). Concerns were raised that the introduction of additional Russian forces in Crimea constituted a breach of the Treaty. *See* UN Security Council, Letter Dated 17 September 2014 from the Permanent Representative of Ukraine to the United Nations

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The framework as adopted in 1997 was to have remained in force for twenty years. After that, it would have extended automatically for additional five-year periods subject to a unilateral right of termination by Ukraine.[76] The incorporation of a fixed term in such a basing arrangement is consistent with its object and purpose: it is not a permanent conferral of territorial rights on the sending state.

The agreement that renewed and continued the arrangement was adopted on April 21, 2010.[77] The Agreement on the Presence of the Russian Federation Black Sea Fleet on the Territory of Ukraine (Kharkiv Agreement) extended the 1997 agreements "for 25 years from 28 May 2017 with successive automatic five-year periods, unless either Party notifies the other Party in writing not less than a year in advance of the completion of the term."[78] The Kharkiv Agreement stipulated a "rental fee" to be paid by Russia to Ukraine.[79]

The Black Sea fleet arrangement may further be considered in comparison to other concessions involving armed forces. Under the Guantanamo Bay lease, "Cuba retains 'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control.'"[80] Under the Sovereign Base Area arrangements in Cyprus, the United Kingdom maintains permanent sovereignty pursuant to the constitutional settlement.[81] As far-reaching as such arrangements may be, they entail no general right of intervention, which, in any event, would be hard to reconcile with the continued independence of a contracting state. A fortiori, the Black Sea fleet arrangement did not furnish Russia a legal basis for intervention in Ukraine. Whatever "uncertainty" some basing treaties might entail over "their exact downstream distributional consequences,"[82] under the Black Sea fleet arrangement "legal sovereignty over the Crimea . . . unambiguously came to reside with Ukraine."[83] The treaties reaffirmed nonintervention and took for granted Russia's recognition of Ukraine's borders at the time of independence.[84] In this light, whether or not Russian forces in Crimea were in excess of

Addressed to the President of the Security Council, UN Doc. S/2014/677 (Sept. 18, 2014) (The Ukrainian protest refers to "a 'grey zone' in part of the sovereign territory of Ukraine, which de facto is currently not covered by any multilateral arrangements in the sphere of arms control.").

[76] Black Sea Division Parameters Agreement, *supra* note 67, Art. 10.

[77] Kharkiv Agreement, *supra* note 68.

[78] *Id.*, Art. 1. The author thanks Lora Soroka and Maciej Siekierski for the English translation.

[79] *Id.*, Art. 2.

[80] *See* Boumediene v. Bush, 553 U.S. 723, 753 (2008).

[81] *See* Treaty Concerning the Establishment of the Republic of Cyprus, Art. 1 & Annex A, Aug. 16, 1960, T.S. No. 4 (1961), 382 UNTS 10, 16–20; Treaty of Guarantee, Art. III, Aug. 16, 1960, T.S. No. 5 (1961), 382 UNTS 3, 4; *see also* UK Ministry of Defence, SBA Administration, Sovereign Base Areas (undated), *at* http://www.sbaadministration.org.

[82] ALEXANDER COOLEY & HENDRIK SPRUYT, CONTRACTING STATES: SOVEREIGN TRANSFERS IN INTERNATIONAL RELATIONS 3 (2009).

[83] *Id.* at 87.

[84] *Cf.* Agreement Between Ukraine and the Russian Federation on Further Development of Interstate Legal Relations, Russ.-Ukr., para. 9, June 23, 1992, 2382 UNTS 13, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%202382/v2382.pdf; Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation, Art. 3, May 31, 1997, UN Doc. A/52/174, Annex I (June 9, 1997) [hereinafter Treaty on Friendship]; Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, Art. 2 & Appx. 2, Jan. 28, 2003, *available at* http://archive.kremlin.ru/text/docs/2003/01/30632.shtml; *see also* Lauri Mälksoo, *Crimea and (the Lack of) Continuity in Russian Approaches to International Law*, EJIL: TALK! (Mar. 28, 2014), *at* http://www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law (citing PETR P. KREMNEV, RASPAD SSSR: MEZHDUNARODNO-PRAVOVYE PROBLEMY [Disintegration of the USSR: International legal problems] 68–91 (2005)).

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numerical limits stipulated in the treaties is not material to the existence of the more serious breach.[85] To have exceeded a treaty limit would have constituted a further breach of the treaty, but to have used armed forces, whatever their numbers, to disrupt the territorial integrity of the host state constituted a breach under general international law, as well as under the applicable conventional rules that had affirmed the existing borders.

Shortly after the Russian Federation began to deploy forces throughout the territory of Crimea, Ukraine circulated a nonpaper indicating that the deployments entailed a breach of Russia's international obligations.[86] The nonpaper noted, inter alia, that the deployments were in breach of the Treaty on Friendship, Cooperation and Partnership of May 31, 1997,[87] and the Black Sea fleet basing arrangement.[88] Reference was made in particular to Article 6 of the Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, stipulating respect for the sovereignty of Ukraine.[89]

On April 2, 2014, following the annexation of Crimea, the Russian Federation unilaterally declared the four treaties terminated.[90]

Protection of Nationals and/or Co-ethnics Abroad

The Russian Federation indicated that persons of Russian ethnicity in Crimea were "in distress" and that "[t]hose who opposed the coup in Maidan were immediately threatened with repression."[91] Russia referred to these developments as grounds for intervention.[92]

Writers have addressed the use of force for the protection of nationals abroad,[93] including Russia's intervention in Ukraine.[94] A right of protective intervention is controversial as such. For example, the intervention in Grenada, which the United States referred to as a protective measure,[95] was

[85] The Russian president said that "we did not exceed the personnel limit of our Armed Forces in Crimea . . . because there was no need to do so." Putin Speech, *supra* note 32, at 5.

[86] Nonpaper on Violations of Ukraine's Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine, UN Doc. CD/1976, annex (Mar. 10, 2014) [hereinafter Ukraine Nonpaper].

[87] Treaty on Friendship, *supra* note 84, Art. 3.

[88] *See* Ukraine Nonpaper, *supra* note 86, para. 2.

[89] *Id.*, para. 5 (citing Black Sea Fleet's Stay Agreement, *supra* note 67, Art. 6); *see also id.*, para. 7 (referring, inter alia, to breach of Article 30 of the UN Convention on the Law of the Sea).

[90] President of Russia Press Release, Termination of Agreements on the Presence of Russia's Black Sea Fleet in Ukraine (Apr. 2, 2014), *available at* http://en.kremlin.ru/acts/news/20673.

[91] Putin Speech, *supra* note 32, at 5; *see also* UN GAOR, 68th Sess., 80th plen. mtg., at 3, UN Doc. A/68/PV.80 (Mar. 27, 2014) (statement by Vitaly Churkin) [hereinafter Churkin Statement].

[92] *Id.*; *see also* Military Doctrine of the Russian Federation, para. 20 (Feb. 5, 2010), *available at* http://carnegieendowment.org/files/2010russia_military_doctrine.pdf.

[93] *See, e.g.*, C. H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 455, 467 (1952 II); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 754 (8th ed. 2012); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 218 (5th ed. 2011); Christine Gray, *The Use of Force and the International Legal Order*, *in* INTERNATIONAL LAW 615, 627 (Malcolm D. Evans ed., 3d ed. 2010).

[94] *See* Daniel Wisehart, *The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?*, EJIL: TALK! (Mar. 4, 2014), *at* http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention.

[95] UN SCOR, 38th Sess., 2487th mtg., paras. 189–96, UN Doc. S/PV.2487 (Oct. 25, 1983) (statement of U.S. Ambassador Jeane Kirkpatrick) [hereinafter Kirkpatrick Statement].

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rejected by the General Assembly as unlawful.[96] The United States' interventions consisting of targeted and episodic strikes in Yemen, Pakistan, and elsewhere[97] have drawn criticism as well.[98] Nevertheless, in 2014, President Barack Obama reserved a unilateral discretion to use force "when our people are threatened."[99] Such a discretion would seem mainly to concern missions to protect sojourners holding U.S. nationality. Such missions presumably would be brief, and the persons protected would be limited to those who already held U.S. nationality at the time that the putative threat arose. This possible use of force is not the same as protecting settled communities upon whom the state's nationality was conferred at the time of intervention or who, lacking that nationality, are connected to the state only by historical affinity or past territorial dispositions. Brief incursions or targeted strikes also differ materially from the introduction of long-term military and administrative control to the territory that the protected persons inhabit. Russia's intervention was not mainly pleaded as an aid for holders of Russian nationality (even very new Russian nationality);[100] Russia relied instead largely on historical considerations. To extend the protective principle on such a legally indeterminate basis would have far-reaching effects, a point considered below in section IV.

Regional Stability

The Russian Federation indicated that the maintenance of regional stability was a factor in its intervention in Ukraine.[101] International organizations, such as the Security Council, have considered on occasion that events in one place jeopardize the stability of the region to which the place belongs.[102] The view was not widely held among states that regional stability was at stake in connection with events in Crimea prior to intervention, and no international organization has determined it to have been so.

Invitation

By a statement of March 3, 2014, Viktor F. Yanukovych, indicating that he was acting as president of Ukraine, appealed to Russia "to use the armed forces of the Russian Federation

[96] GA Res. 38/7, para. 1 (Nov. 2, 1983).

[97] *See* Tom Ruys, *The Meaning of "Force" and the Boundaries of the* Jus Ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AJIL 159 (2014).

[98] *See, e.g.*, David Rohde, *The Obama Doctrine: How the President's Drone War Is Backfiring*, FOREIGN POL'Y, Feb. 27, 2012, *at* http://foreignpolicy.com/2012/02/27/the-obama-doctrine.

[99] *Full Transcript of President Obama's Commencement Address at West Point*, WASH. POST, May 28, 2014, *at* http://www.washingtonpost.com/politics/full-text-of-president-obamas-commencement-address-at-west-point/2014/05/28/cfbcdcaa-e670-11e3-afc6-a1dd9407abcf_story.html.

[100] *See* Valery Zorkin, *To Walk the Razor's Edge: Peace Enforcement and Human Rights*, ROSSIYSKAYA GAZETA, Aug. 13, 2008, *at* http://www.rg.ru/2008/08/13/zorkin.html (noting the Georgia intervention, which Zorkin, the chairman of the Constitutional Court of the Russian Federation, said was justified as a measure to protect Russian Federation nationals). The author thanks Michael Reynolds, Princeton University, for the translation.

[101] Putin Speech, *supra* note 32, at 9.

[102] SC Res. 1239 (May 14, 1999).

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to restore law and order, peace and stability and to protect the people of Ukraine."[103] The troubles in Ukraine, he alleged, were the result of the "influence of Western countries."[104] On April 2, 2014, Yanukovych retracted his March 3 statement.[105]

A state may consent to foreign assistance in a time of civil disturbance or rebellion in its territory.[106] The indication of consent, however, must be clear, and it is unlikely to be open-ended.[107] Ascertaining whether the state has consented may present difficulties when the state has entered a period of convulsion that throws the basic operations of government into doubt. For example, Grenada in 1983 had entered such a period following the detention and murder of the prime minister and members of the cabinet, and its governor-general had requested foreign intervention.[108] In Grenada, there was no doubt that the person who invited foreign intervention really held the office of governor-general at the time.[109] States that referred to the governor-general's invitation were sharply criticized nevertheless,[110] suggesting that invitation, as such, may not suffice as a legal basis for intervention.

The validity of Yanukovych's invitation relies, inter alia, on the assertion that Ukraine was in constitutional disarray and that the only government with which to deal was the one supposedly embodied in Yanukovych. Ukraine in 2014, however, was not Grenada in 1983. Outside Russia, it was not generally accepted that Yanukovych remained head of state, and the central government of Ukraine largely continued to function.[111] Relevant here is that states did not maintain any prolonged suspension of governmental contacts with the central authorities. Most continued to deal with Ukraine through the interim government and accepted that it had a sound basis to govern. The Parliamentary Assembly of the Council of Europe, for example, noted the interim government's "legitimacy . . . and legality."[112] By the standards that have been applied when questions of governmental authority arise in time of unrest,[113] the disturbances in Ukraine, serious as they

[103] UN Security Council, Letter Dated 3 March 2014 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, UN Doc. S/2014/146, annex (2014) (statement of V. F. Yanukovych).

[104] *Id.*

[105] *Yanukovich Regrets 'Mistakes' on Crimea*, ALJAZEERA, Apr. 3, 2014, *at* http://www.aljazeera.com/news/europe/2014/04/yanukovich-regrets-mistakes-crimea-2014421989300891.html.

[106] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, paras. 49–54 (Dec. 19).

[107] *Id.*, para. 52.

[108] *See* Kirkpatrick Statement, *supra* note 95, paras. 191–95 (but not invoking invitation as a legal ground).

[109] John Norton Moore, *Grenada and the International Double Standard*, 78 AJIL 145, 159–61 (1984).

[110] *See* UN SCOR, 38th Sess., 2489th mtg., para. 9, UN Doc. S/PV.2489 (Oct. 26, 1983) (statement of Eugenia Charles (Dominica)); *id.*, para. 146 (statement of Luc de la Barre de Nanteuil (France)).

[111] For that government's determination that Yanukovych had abdicated and thus no longer held office, see *On Self-Withdrawal of the President of Ukraine from Performing His Constitutional Duties and Setting Early Elections of the President of Ukraine,* VERKHOVNA RADA OF UKRAINE, No. 757-VII, Feb. 22, 2014, *available at* http://iportal.rada.gov.ua/en/news/News/News/88138.html.

[112] Parliamentary Assembly of the Council of Europe (PACE), Res. 1988, para. 3 (Apr. 9, 2014), *available at* http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20873&lang=EN.

[113] Somalia v. Woodhouse Drake & Carey (Suisse) S.A., [1993] Q.B. 54, 68; Benedict Kingsbury, *Judicial Determination of Foreign "Government" Status*, 109 L. Q. REV. 377, 382 (1993). For application of the *Woodhouse Drake* criteria to Ukraine, see Thomas D. Grant, *The Yanukovych Letter: Intervention and Authority to Invite in International Law*, 2 INDON. J. INT'L & COMP. L. (forthcoming 2015).

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were, did not justify bypassing the organs of government that continued to function in Kyiv and most of the country.[114]

A subsidiary point here is that the events that brought an end to Yanukovych's presidency and led to the instatement of an interim government did not create a basis for foreign intervention. Those events,[115] notwithstanding questions that they may have raised under Ukrainian constitutional law,[116] had nothing to do with a foreign (that is, Western) intervention. Exploratory discussions about possible foreign mediation (such as were held before Yanukovych left office)[117] and even mediation actually carried out do not constitute intervention in a legally relevant sense. When foreign intervention has been alleged as a justification for counterintervention, the standard for judging the allegation has been onerous.[118] Such a standard was certainly not met in Ukraine.

Use of Force in Aid of Self-Determination

Section II above considered the difficulties in applying the law of self-determination to Crimea. Even where a territory is entitled to exercise a right of self-determination by establishing itself as a separate state, the use of force by another state in aid of self-determination gives rise to legal problems.

The General Assembly suggested in the Friendly Relations Declaration (1970) that, where a colonial country or people is forcibly denied the exercise of the right to external self-determination, some qualification to the general rule of noninterference may apply.[119] In particular,

[114] *See also* OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 240–43, 288–310 (Christopher Sutcliffe trans., 2010); GEORG NOLTE, EINGREIFEN AUF EINLADUNG. ZUR VÖLKERRECHTLICHEN ZULÄSSSIGKEIT DES EINSATZES FREMDER TRUPPEN IM INTERNEN KONFLIKT AUF EINLADUNG DER REGIERUNG 261–68 (1999); Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 1985 BRIT. Y.B. INT'L L. 189.

[115] As to the events ending Yanukovych's presidency, see PACE, The Functioning of Democratic Institutions in Ukraine, Exploratory Memorandum by Ms Reps and Ms de Pourbaix-Lundin, Co-rapporteurs, paras. 1–7, 9, 17–30, Doc. 13405 (Jan. 28, 2014), *available at* http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20426&Language=EN (presented by co-Rapporteurs Mailis Reps (Estonia) and Marietta de Pourbaix-Lundin (Sweden)); OHCHR, Report on the Human Rights Situation in Ukraine, para. 60 (Dec. 15, 2014), *available at* http://www.ohchr.org/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf.

[116] Such questions include those by Yanukovych in his suit against the Council of the European Union to challenge restrictive measures adopted against him. *See* Case T-347/14, Yanukovych v. Council, Pleas in Law and Main Arguments, Aug. 4, 2014, 2014 O.J. (C 253/53) 39, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014TN0347&from=EN (noting action brought on May 14, 2014, alleging, inter alia, that the Council "wrongly assert[ed], and act[ed] on the basis that, the legitimate democratically elected President of Ukraine, President Yanukovych, was a 'former President'").

[117] Damien McElroy, *Ukraine Opposition Asks EU to Intervene in Talks as Viktor Yanukovych 'Wastes Time*,*'* TELEGRAPH, Feb. 5, 2014, *at* http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10618880/Ukraine-opposition-asks-EU-to-intervene-in-talks-as-Viktor-Yanukovych-wastes-time.html.

[118] El Salvador's request for permission to participate in *Nicaragua* v. *United States*, notwithstanding substantial evidence of Nicaraguan intervention in El Salvador, was rejected, and the United States' arguments of counterintervention as an act of collective self-defense failed. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Oct. 4); *id.*, Judgment (Merits), 1986 ICJ REP. 14, paras. 126–60 (June 27) [hereinafter *Military and Paramilitary Activities*, Judgment (Merits)].

[119] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970) (noting "[t]he principle of equal rights and self-determination of peoples").

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where a state has taken "forcible action" to prevent the exercise of self-determination, the people may have rights against the state that has committed the breach.[120] The rights of the people would appear to include (1) a right to undertake "actions against, and resistance to," the state that has breached the principle; and (2) a right to receive "support" from other states.[121] The Friendly Relations Declaration, however, affirms the pacific principle: "States shall settle their international disputes by peaceful means" and "shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any State."[122] These rules take precedence, at least in drafting order, over self-determination.

Whether or not the drafting order entails a legal hierarchy, it would significantly reorder the international system if force were permitted in a self-determination dispute, especially if the permissive rule included a right on the part of another state to intervene by force simply on its own appreciation that the incumbent state had not addressed the dispute in a satisfactory fashion. Writers and jurists have doubted whether the right to self-determination entails a right to use force—even by the people who are pursuing self-determination.[123] When the matter of a right of the people to use force arose in the General Assembly, it exposed sharp divisions between the Western states and recently decolonized states.[124] A putative right by other states to use force in aid of self-determination merits all the more skepticism.

A plausible minimum requirement for the use of force would be that (1) a bona fide self-determination movement exists representing a people; (2) the people is denied the right of self-determination by the existing national legal order; (3) following protracted efforts, no remedy has been achieved within the national legal order; (4) the use of force by the incumbent state has escalated to the point where the subject people faces an existential crisis; and (5) the need for armed assistance and the characteristics of the situation overall are ascertained by at least one multilateral organ.[125] The circumstances that existed in 1999 upon the commencement of intervention in Kosovo by the North Atlantic Treaty Organization (NATO) would have met the requirements indicated in these terms. Even there, however, the rule, such as it had evolved, did not entail the separation of the territory from the incumbent state by action of the armed intervenors, and it was not for the purpose of separating the territory that they carried out their intervention. No intervening state justified the action in Kosovo as a defense of self-determination. Kosovo remained part of Serbia for nearly a decade more, subject to an international monitoring and administrative process. Kosovo's later emergence under a declaration of independence involved local processes of constitutional change. The separation between those processes and armed intervention was both temporal and material.[126]

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *E.g.*, *Military and Paramilitary Activities*, Judgment (Merits), *supra* note 118, Diss. Op. Schwebel, J., para. 180.

[124] *See, e.g.*, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA Res. 36/103 (Dec. 9, 1981).

[125] This compilation transposes the criteria suggested by states in the *Kosovo* proceedings that espoused a (largely limited) rule of remedial secession. In view of the legal values at stake, it is hard to see how less stringent criteria could apply when considering the question of intervention.

[126] As to the distinction between NATO's intervention and the establishment of Kosovo's independence, see Roland Tricot & Barrie Sander, *Recent Developments: The Broader Consequences of the International Court of Justice's*

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The use of force in aid of self-determination also would seem to entail a basic test of proportionality, notwithstanding open questions as to how international humanitarian law is to apply in struggles for self-determination.[127] The UN era has seen humanitarian crises on the largest scale (as in Bangladesh where vast numbers of people were killed, and in Kosovo where many were killed and vast numbers forcibly displaced); it has also seen a range of lesser violations of human rights (such as the many that litigants have resolved by taking their cases to the regional human rights courts). If and to the extent that an international right of self-determination existed in Crimea, Ukraine did not resist it by force. Nothing about the situation invited an armed takeover of the territory by another state.

A further difficulty is the effect of the declared and covert Russian military presence across Crimea on the referendum. The referendum was organized and carried out in a situation of armed emergency.[128] At the heart of the right to self-determination is the freedom of the people in their territory to decide the fate of the territory. It is difficult to say whether the people have in truth reached a decision freely when a state has exercised such force and threat as to overwhelm the situation. Whether the exercise of force is by the incumbent state or an intervening state, a serious question arises whether an act of self-determination has taken place. That the General Assembly has involved itself in several self-determination referenda illustrates the concern that the situation be right for such an act.[129] In any event, the international practice in respect of monitoring such procedures is now highly developed;[130] if anything were to have been gained from a referendum in Crimea, there is no obvious legal reason to have conducted it in haste, in a period of public crisis, and in the absence of third-party observation. These circumstances expose a further problem with the use of force in Crimea: it obscured the basic evidence surrounding the putative self-determination act and thus made the validation of that act all but impossible.[131]

Finally, in any case, for use of force to be valid under a principle of aid to self-determination, international law would entail a basic measure of good faith.[132] Good faith surely applies when changing the borders of a state. The good faith of the intervening state is not obvious where intervention led immediately to the incorporation of the territory in question into the intervening state—and all the more so when the intervening state identified the territory as having

Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo, 49 COLUM. J. TRANSNAT'L L. 321, 344–45 (2011).

[127] JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 121–22 (2004).

[128] *See, e.g.*, Council of the European Union, Conclusions on Ukraine, para. 1 (Mar. 17, 2014), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141601.pdf; Venice Commission Opinion, *supra* note 10, para. 22.

[129] *See* GA Res. 1350 (XIII), *supra* note 58; GA Res. 1473 (XIV), *supra* note 58; GA Res. 2504 (XXIV), *supra* note 59; GA Res. 54/194, *supra* note 60.

[130] *See* YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994).

[131] Anne Peters, *The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, *in* HERAUSFORDERUNGEN AN STAAT UND VERFASSUNG, VÖLKERRECHT—EUROPARECHT-MENSCHENRECHTE, LIBER AMICORUM FÜR TORSTEN STEIN ZUM 70. GEBURTSTAG 278 (Christian Calliess ed., 2015).

[132] *See, e.g.*, Lake Lanoux (Fr. v. Spain), 12 R.I.A.A. 281, para. 13 (1957), 24 ILR 101 (1957); Treatment of Polish Nationals, Advisory Opinion, 1932 PCIJ (ser. A/B), No. 44, at 28 (Feb. 4); Minority Schools in Albania, Advisory Opinion, 1935 PCIJ (ser. A/B), No. 64, at 19–20 (Apr. 6).

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strategic importance.[133] The timing of events is relevant in this regard. A change in the constitutional structure of the Russian Federation and putative creation and extinction of an independent state took place in under a fortnight, starting with a declaration of independence on March 11, followed by a referendum on March 16, and concluding with a formal annexation act on March 21. The United Nations era has seen short-lived states,[134] but none as short-lived as the supposedly independent Crimea and none summoned into being following an armed invasion and extinguished by annexation to the country that sent the intervening force. When Russia asserted that it employed armed force in aid of self-determination, the circumstances raise doubts whether the assertion was in good faith.

Further doubts arise from the treatment of the Crimean Tatars after annexation.[135] According to the UN assistant secretary-general for human rights, an "overall climate of uncertainty, including human rights and protection concerns," had led people—"predominantly Tatars and ethnic Ukrainians"—to leave the area.[136] Some three thousand Crimean Tatars were reported (as of mid-April 2014) to have left (mostly for western Ukraine and Turkey).[137] In May 2014, the Human Rights Monitoring Mission in Ukraine (HRMMU) noted "increasing reports of on-going harassment towards Crimean Tatars" and "reported cases of Crimean Tatars facing obstruction to their freedom of movement."[138] An attack on the Crimean Tatar parliament building also took place.[139] Reports emerged that Tatars holding posts in law enforcement and other areas of public administration were being put under pressure to resign.[140] The OHCHR reported that as of April 29, 2014, there were over seven thousand internally displaced persons, the majority of them Tatars.[141] By August 17, 2014, the number had risen to sixteen thousand.[142]

[133] Putin Speech, *supra* note 32, at 9.

[134] Zanzibar had acceded to independence from the United Kingdom as of December 10, 1963. Zanzibar Act, 1963 c. 55, §1(1), *available at* http://www.legislation.gov.uk/ukpga/1963/55/pdfs/ukpga_19630055_en.pdf. As of April 25, 1964, it entered into a union with Tanganyika to form the Union of Tanganyika and Zanzibar, which was shortly afterward renamed United Republic of Tanzania. Act to Ratify the Articles of Union Between Tanganyika and Zanzibar Act, Act No. 22, 1964. In between, Zanzibar was admitted as a member state to the United Nations. SC Res. 184 (Dec. 16, 1963). For the international law transactions that are involved in the proper execution of such a union, see International Law Commission, Fifth Report on Succession in Respect of Treaties, [1972] 2 Y.B. INT'L L. COMM'N 1, UN Doc. A/CN.4/256 & Add.1–4 (1972), *available at* http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1972_v2_e.pdf (defining *union of states*) (prepared by Special Rapporteur Humphrey Waldock). The Mali Federation lasted two months (June 20, 1960, to late August 1960), following which its parts separated. None was annexed or otherwise became part of a preexisting state. *See* Alain Gandolfi, *Naissance et mort sur le plan international d'un état éphémère: La fédération du Mali*, 1960 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 881. The attitude of the former colonial administering power remained one of "*prudente circonspection et neutralité*." *Id.* at 899.

[135] OHCHR April 2014 Report, *supra* note 46, paras. 88–92.

[136] *Id.*, para. 92.

[137] *Id.*

[138] OHCHR, Report on the Human Rights Situation in Ukraine, para. 5(iii) (May 15, 2014), *available at* http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15May2014.pdf [hereinafter OHCHR May 2014 Report].

[139] *Id.*

[140] *Id.*, para. 154 n.34.

[141] *Id.*, paras. 73, 119.

[142] OHCHR, Report on the Human Rights Situation in Ukraine (Aug. 17, 2014), *available at* http://www.ohchr.org/Documents/Countries/UA/UkraineReport28August2014.pdf [hereinafter OHCHR Ukraine Report]; *see also* OHCHR Summary Report, *supra* note 46 (including the OHCHR Ukraine Report). Concerns were expressed in the Security Council, PACE, and Organisation for the Islamic Conference (OIC). PACE Res. 1988, para. 12 (Apr.

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Russian policies after annexation seemed to place persons not wishing to acquire Russian nationality at risk of becoming stateless.[143] The HRMMU received reports that persons who did not elect Russian citizenship "are facing harassment and intimidation."[144] The conduct of the Russian authorities raised questions in respect of language rights as well—Ukrainian language instruction, for example, having ceased in the schools.[145] An armed action under color of self-determination is open to further scrutiny if its effect on the rights of the various groups in the territory is so broadly prejudicial.

Invalidity of Claims to Territory Based on Force

Modern international law is clear that, even where a valid case can be made that use of force was itself lawful, use of force is not a basis for title; it is not even the basis for a claim to title.[146] This rule presents a further difficulty with Russia's position: even if Russia's resort to force against Ukraine were lawful, force could not lawfully have changed Ukraine's boundaries.[147]

IV. THE INTERNATIONAL RESPONSE TO ANNEXATION

The referendum of March 16, 2014, in Crimea, attracted widespread reaction. The act of annexation of March 21 led to further response, including a resolution of the General Assembly[148] and suspension of the voting rights of the delegates of the Russian Federation in the Council of Europe. A minority of states did not formally associate themselves with the view that the referendum and annexation were invalid and are to be denied legal effect; their positions, as well as the position more widely taken, are considered below.

State Practice

Nonrecognition. Many states indicated that they would not recognize the Crimean independence referendum or subsequent annexation. The United States made its views known in multiple forums.[149] France, the United Kingdom, and Germany did so as well,[150] including as part

9, 2014), *available at* http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20873&lang=EN; OIC Calls for Respecting the Rights of Muslims in Crimea (Mar. 25, 2014), *at* http://www.oic-oci.org/oicv2/topic/?t_id=8947&ref=3592&lan=en&x_key=Crimea; UN SCOR, 69th Sess., 7144th mtg., at 11, UN Doc. S/PV.7144 (Mar. 19, 2014) (statement of Octavio Errázuriz (Chile)).

[143] OHCHR April 2014 Report, *supra* note 46, para. 100.

[144] OHCHR May 2014 Report, *supra* note 139, para. 129.

[145] Michael Birnbaum, *Eight Months After Russia Annexed Crimea from Ukraine, a Complicated Transition*, WASH. POST, Nov. 27, 2014, *at* http://www.washingtonpost.com/world/europe/eight-months-after-russia-annexed-crimea-from-ukraine-a-complicated-transition/2014/11/27/d42bcf82-69b3-11e4-bafd-6598192a448d_story.html.

[146] *See* SC Res. 242 (Nov. 22, 1967).

[147] *But see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), Further Requests for Provisional Measures, Sep. Op. Lauterpacht, J. *ad hoc*, 1993 ICJ REP. 325, 434, para. 81 (Sept. 13) ("It is beyond question that territory cannot lawfully be acquired by the *aggressive* use of force. . . ." (emphasis added)).

[148] GA Res. 68/262 (Mar. 27, 2014).

[149] *See* Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 802, 803–05 (2014).

[150] Ukraine—Communiqué Issued by François Hollande, President of the Republic (Mar.18, 2014), *available at* http://www.diplomatie.gouv.fr/en/country-files/ukraine/events-7684/article/ukraine-communique-issued-by;

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of the European Council that acted as a whole in rejecting the referendum and annexation.[151] Japan invoked the municipal illegality of the referendum and the premature character of Russia's recognition of Crimea's putative independence and suggested that changes to the territorial status quo brought about by force are inadmissible.[152] Still other states with outstanding territorial disputes or secessionist movements were particularly concerned to reject the putative act of independence.[153]

As a legal policy widely adopted by states, nonrecognition of the separation of Crimea from Ukraine accords with the position adopted earlier in respect of attempted separations of territory from Russia. In particular, when the Russian Federation undertook armed actions to suppress the attempted secession of Chechnya, states were clear that Chechnya is part of Russia.[154]

Legal policies other than nonrecognition. Several states, though not expressly recognizing the separation and annexation of Crimea, refrained from stating that they did not recognize the situation as such. China, for example, neither rejected nor approved the Crimean referendum or annexation. China called for "restraint" and suggested that the "Crimean issue . . . be

UN Doc. S/PV.7144, *supra* note 142, at 20 (statement of Gérard Araud); *id.* at 14–15 (statement of Mark Lyall Grant); David Cameron, PM Statement on President Putin's Actions on Crimea (Mar. 18, 2014), *available at* https://www.gov.uk/government/news/pm-statement-on-president-putins-actions-on-crimea; Office of the Federal Government of Germany Press Release, German Government Condemns Referendum (Mar. 17, 2014), *available at* http://www.bundesregierung.de/Content/EN/Artikel/2014/03/2014-03-17-krim-statement-sts.html?nn=709674 (statement of Steffen Seibert); Office of Federal Government of Germany Press Release, Russia Violates International Law (Mar. 19, 2014), *available at* http://www.bundesregierung.de/Content/EN/Artikel/2014/03/2014-03-19-ukraine-abkommen.html?nn=709674 (statement of Steffen Seibert).

[151] European Council, Statement of the Heads of State or Government on Ukraine, para. 2 (Mar. 6, 2014), *available at* https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141372.pdf; *see also* European Council, Conclusions, para. 28 (Mar. 21, 2014), *available at* https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141749.pdf.

[152] Ministry of Foreign Affairs of Japan, Statement by the Minister for Foreign Affairs of Japan on the Measures Against Russia over the Crimea Referendum (Mar. 18, 2014), *at* http://www.mofa.go.jp/press/release/press4e_000239.html.

[153] *See, e.g.*, UN Doc. S/PV.7144, *supra* note 142 (statement of Oh Joon (Republic of Korea)); UN SCOR, 69th Sess., 7138th mtg., at 8, UN Doc. S/PV.7138 (Mar. 15, 2014) (statement of Octavio Errázuriz (Chile)); UN Doc. A/68/PV.80, *supra* note 91, at 18–19 (statement of Joy Ogwu (Nigeria)); *Indonesia Respects Ukraine's Sovereignty Concerning Crimea Issue*, ANTARA NEWS, Mar. 21, 2014, *at* http://www.antaranews.com/en/news/93293/indonesia-respects-ukraines-sovereignty-concerning-crimea-issue (statement of Marty Natalegawa (Indonesia)); UN Doc. A/68/PV.80, *supra* note 91, at 19 (statement of María Perceval (Argentina)); *Crimea Vote as Worthless as Falklands Poll: Argentina President*, REUTERS, Mar. 19, 2014, *at* http://www.reuters.com/article/2014/03/19/us-ukraine-crisis-falklands-idUSBREA2I1GG20140319; *see also* Permanent Delegation of the Republic of Moldova to the OSCE, Statement by the Republic of Moldova on the Situation in Ukraine (Mar. 13, 2014), Doc. No. PC.DEL/287/14 (Mar. 14, 2014), *available at* http://www.osce.org/pc/116774?download=true; Georgia Does Not Recognize Crimea Vote, AGENDA.GE, Mar. 17, 2014, *at* http://agenda.ge/news/10655/eng.

[154] *See, e.g.*, Statement of the Foreign Minister of France on Chechnya (Feb. 9, 1995), *reprinted in* 1995 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 852, 911–12; 563 PARL. DEB., H.L. (Apr. 18, 1995) 476 (UK), *available at* http://hansard.millbanksystems.com/lords/1995/apr/18/chechnya (statement of Richard Inglewood); *see also* Geoffrey Marston, *United Kingdom Materials on International Law*, 1995 BRIT. Y.B. INT'L L. 621, 683; Statement of Deputy Secretary of State Strobe Talbott, Supporting Democracy and Economic Reform in the New Independent States: Statement Before the Subcommittee on Foreign Operations of the Senate Appropriations Committee, 6(8) DEP'T OF STATE DISPATCH 119–21 (Feb. 20, 1995), *available at* http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1995/html/Dispatchv6no08.html. Regional organizations adopted the same position. *See, e.g.*, NATO, Ministerial Meeting of the North Atlantic Council, Final Communiqué (May 29, 2001), *available at* http://www.nato.int/cps/en/natohq/official_texts_18892.htm?selectedLocale=en (affirming "Russia's right to preserve its territorial integrity").

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resolved politically under a framework of law and order."[155] China abstained on March 27, 2014, when the General Assembly adopted Resolution 68/262. China drew attention to the processes for settlement and "call[ed] on the international community to make constructive efforts, including through good offices, to ease the situation in Ukraine . . . [and] the early establishment and implementation of an international coordination mechanism."[156] The position that China has taken in respect of Ukraine is not entirely consistent with China's existing practice. For example, in relation to its maritime and territorial disputes in East Asia, China has maintained that bilateral negotiation is the only appropriate mechanism; presented with a notification instituting UN Convention on the Law of the Sea (UNCLOS) Annex VII arbitration, China rejected that mechanism in very plain terms.[157] For its own disputes, China thus has not favored multilateral approaches. China's view on Crimea also suggests a shift on the substantive issues. In 2009, China had categorically rejected the separation of Kosovo from Serbia.[158] Yet China has indicated that it "respect[s] the choice of cooperation" made by Chinese companies working in Crimea under the Russian administration,[159] a more permissive approach than might be expected if China were to place its full weight against the annexation.

Some states that abstained from Resolution 68/262 nevertheless made clear that they did not support the separation and annexation of Crimea. For example, Saint Vincent and the Grenadines criticized the "would-be imperial Powers" for "manipulat[ing] or selectively accept[ing]" referenda; it associated itself with the statement of the Caribbean Community (CARICOM) calling for preservation of Ukraine's territorial integrity.[160] Uruguay said that acts in breach of Ukraine's constitution "cannot alter the internationally recognized borders."[161] Ecuador said that "a local referendum is not sufficient to justify a change in the territorial integrity of a State."[162] Botswana took a similar position, indicating that it "does not support the dismemberment of sovereign nations, either through unilateral

[155] Shannon Tiezzi, *China Reacts to the Crimea Referendum*, DIPLOMAT, Mar. 18, 2014, *at* http://thediplomat.com/2014/03/china-reacts-to-the-crimea-referendum (noting statement of Foreign Ministry spokesperson Hong Lei (China)).

[156] UN Doc. A/68/PV.80, *supra* note 91, at 10–11 (statement of Liu Jieyi (China)).

[157] China, by means of a note verbale to the Philippines, "rejected and returned" the Philippines' notification. Permanent Court of Arbitration, Summary of the Republic of the Philippines v. The People's Republic of China (2014), *at* http://www.pca-cpa.org/showpage.asp?pag_id=1529; *see also* Ministry of Foreign Affairs of the People's Republic of China, Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, paras. 30–56 (Dec. 7, 2014), *at* http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

[158] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo, at 1–3 (Apr. 16, 2009), *available at* http://www.icj-cij.org/docket/files/141/15611.pdf.

[159] Ministry of Foreign Affairs, the People's Republic of China Press Statement, Foreign Ministry Spokesperson Hong Lei's Regular Press Conference (June 3, 2014), *at* http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1161810.shtml.

[160] UN Doc. A/68/PV.80, *supra* note 91, at 15 (statement of Ingha Rhonda King (Saint Vincent and the Grenadines)).

[161] *Id.* at 16 (statement of Cristina Carrión (Uruguay)).

[162] *Id.* at 25 (statement of Julio Xavier Lasso Mendoza (Ecuador)).

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declarations of independence or through coercion by external forces."[163] Other states evidently shared that position.[164]

States that voted against nonrecognition were by no means supportive of the annexation itself. For example, Bolivia refrained from "tak[ing] a position on the referendum that took place in Crimea [and] on the territorial situation of that region."[165]

General Assembly Resolution 68/262

On March 27, 2014, the General Assembly adopted Resolution 68/262, entitled "Territorial Integrity of Ukraine."[166] Resolution 68/262 affirmed the commitment of the General Assembly "to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders."[167] The resolution also called upon "all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means."[168] The phrase "or other unlawful means" is not found in the many other adopted UN texts concerning armed aggression; Resolution 68/262 seems to be the first General Assembly resolution to have used this catchall provision. It suggests not only that the resolution is concerned with acts falling under a minimalist understanding of "threat or use of force" but also that the General Assembly's purpose is to address *any* unlawful means that might be used to disrupt Ukraine's national unity and territorial integrity.

The operative paragraph of Resolution 68/262, paragraph 6, has a two-part formulation indicating a broad requirement of nonrecognition. The first part is the direction "not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum." Thus, the first part is concerned with nonrecognition as such: it calls upon every state to refrain from conduct that intentionally communicates a state's acceptance of the situation.[169]

The further direction—the second part of paragraph 6—concerns a wider category of conduct. The second part requires states "to refrain from any action or dealing that might be interpreted as recognizing any such altered status."[170] That is to say, states are called upon not only to refrain from conduct intended to recognize the situation; they also are called upon to refrain from any conduct "that might be interpreted" as recognizing the situation. The extensiveness

[163] *Id.* at 26 (statement of Charles Thembani Ntwaagae (Botswana)).

[164] *See, e.g.*, *id.* at 24 (statement of Shorna-Kay Richards (Jamaica)); *id.* at 25 (statement of Sabri Boukadoum (Algeria)).

[165] *Id.* at 13 (statement of Sacha Sergio Llorentty Soliz (Bolivia)).

[166] Territorial Integrity of Ukraine, UN Doc. A/68/L.39 (Mar. 24, 2014). The sponsors of the draft resolution were Canada, Costa Rica, Germany, Lithuania, Poland, and Ukraine.

[167] GA Res. 68/262, *supra* note 148, para. 1.

[168] *Id.*, para. 2.

[169] As to the element of intent in the act of recognition, see Institut de droit international, La reconnaissance des nouveaux états et des nouveaux gouvernements, Art. 4 (1936), *available at* http://www.idi-iil.org/idiF/resolutionsF/1936_brux_01_fr.pdf. As to opposability, see Sixth Report on Unilateral Acts of States, para. 67, UN Doc. A/CN.4/534 (May 30, 2003) (prepared by Special Rapporteur Victor Rodríguez Cedeño); *see also* Tom Grant, *How to Recognise a State (and Not): Some Practical Considerations*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY, *supra* note 59, at 192, 198–204.

[170] GA Res. 68/262, *supra* note 148, para. 6.

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of the category of conduct denoted by the words "action or dealing" is clear in view of the descriptive phrase "*that might be interpreted*" as recognizing any such altered status. A similar drafting approach was taken following Iraq's putative annexation of Kuwait.[171]

Resolution 68/262 was adopted with 100 votes in favor to 11 against with 58 abstentions.[172] Of states casting votes, a large majority thus voted in favor of the resolution. It is true that 93 states, which is a sizeable number of states—somewhat fewer than half the 193 members—did not cast votes or did not cast votes in favor. As noted above, some states that abstained nevertheless affirmed the centrality of the protection of territorial integrity in international law; others seemed to have had concerns as to procedure or competence, rather than any doubt that the annexation was unlawful. The few states that cast negative votes would seem unlikely to constitute a serious bloc in opposition to nonrecognition. Russia has amended its municipal law to effectuate the annexation, but it is the validity of annexation as an international act that nonrecognition denies; one national legal system acting alone, even when imposing facts on the ground, will not cure the invalidity.[173] As to states taking an ambiguous position—among which China arguably may be numbered—their practice over time will be more material in establishing (or frustrating) the effectiveness of Resolution 68/262.

This resolution, however, is a collective application of the rule of nonrecognition. That rule is embodied, inter alia, in Article 41 of the Articles on State Responsibility:[174] General Assembly practice in respect of nonrecognition does not exist in isolation of general international law.[175] Moreover, states (including abstaining states) are not the only international actors likely to be called upon to implement nonrecognition. The resolution is addressed to "all States, international organizations and specialized agencies";[176] though the rules of state responsibility are specific to states,[177] the rule of nonrecognition inevitably will be closely regarded by other international actors, including dispute settlement organs before which matters concerning Crimea arise.[178]

Consequences of Nonrecognition of the Annexation of Crimea

Nonrecognition by the international community as a whole has been rightly described as "an essential legal weapon in the fight against grave breaches of the basic rules of international

[171] SC Res. 662, para. 2 (Aug. 9, 1990).

[172] UN Doc. A/68/PV.80, *supra* note 91, at 17. Negative votes were cast by eleven states: Armenia, Belarus, Bolivia, Cuba, Nicaragua, North Korea, the Russian Federation, Sudan, Syria, Venezuela, and Zimbabwe.

[173] YAËL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW 4–6 (2011) (noting the nullity of the purported legal effects).

[174] Responsibility of States for Internationally Wrongful Acts, *supra* note 25, Art. 41.

[175] *See* Thomas D. Grant, *Doctrines (Monroe, Hallstein, Brezhnev, Stimson)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, paras. 8–15 (Rüdiger Wolfrum ed., Mar. 2014); Martin Dawidowicz, *The Obligation of Non-recognition of an Unlawful Situation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 677 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

[176] GA Res. 68/262, *supra* note 148, para. 6.

[177] For the proposed analogue to Article 41 in the context of the responsibility of international organizations, see Responsibility of International Organizations, Art. 42, GA Res. 66/100, annex (Dec. 9, 2011).

[178] As to dispute settlement, the China-Ukraine bilateral investment treaty, to take one example, provides, inter alia, for the settlement of interstate disputes in accordance with "the universally recognized principles of international law." China-Ukraine Agreement for the Promotion and Reciprocal Protection of Investments, Art. 9(5), Oct. 31, 1992, 1849 UNTS 81, 100 (entered into force May 29, 1993).

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law."[179] The precise consequences of nonrecognition, including its effectiveness in reversing the breaches, depend on the degree of solidarity that the community maintains over time. At an early stage of the nonrecognition of the annexation of Crimea, some brief observations may be made.

Nonrecognition in practice has entailed a range of particular measures. The adopted response to South Africa's unlawful presence in Namibia involved diplomatic isolation: states were to refrain from dealings that expressed or implied an acceptance of South Africa's presence. The measures also included withholding financial support to enterprises in the territory and taking steps to discourage investment there.[180] Similar measures would seem applicable in connection with the nonrecognition of Crimea.

Nonrecognition does not institute a regime of total isolation; considerations of human rights temper the effects.[181] Yet the consequences of nonrecognition are not limited to the high politics of international relations; nonrecognition may affect routine transactions—and in significant ways. Thus, for example, transactions attempting to transfer land and other assets in Crimea may be challenged; the experience of Cyprus suggests the objections that such transactions may attract and the extent to which the objections may affect seemingly routine aspects of life in the territory.[182] Though conscious of the desirability of reducing statelessness,[183] states may find it necessary to refuse to give legal effect to the purported conferral of Russian nationality on the inhabitants of Crimea, at least to the extent that such "passportisation" is a strategy in furtherance of the annexation.[184] An overarching effect of nonrecognition is that the claim that a succession of states has taken place in respect of the territory is heavily impugned, which, in turn, affects claims to associated rights such as maritime jurisdiction and holdings of state property.[185] A forcible change of boundaries, understood as such, does not

[179] Christian Tomuschat, *International Crimes by States: An Endangered Species?*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 254, 259 (Karel C. Wellens ed., 1998), *quoted in* ILC Commentaries, Art. 41, cmt. 5, n.652, [2001] 2(2) Y.B. INT'L L. COMM'N 114 (corr.), *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[180] *See* SC Res. 283 (July 29, 1970).

[181] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, para. 125 (June 21).

[182] *See, e.g.*, Xenides-Arestis v. Turkey, App. No. 46347/99, Judgment (Merits), paras. 27–32, operative para. 5 (Eur. Ct. H.R. Dec. 22, 2005) (requiring a legal mechanism in Cyprus to address the unlawful character of similar land transfers); *id.*, Judgment (Just Satisfaction), para. 37, operative para. 1 (Dec. 7, 2006) (affirming that the required legal mechanism is in operation and indicating substantial compensation for the land transfer addressed in the case); Case No. C-420/07, Apostolides v. Orams, 2009 ECR 1-3571, paras. 19, 26, operative paras. 2, 3 (Apr. 28, 2009) (Grand Chamber), *available at* http://curia.europa.eu/juris/liste.jsf?language=en&num=C-420/07 (ECLI:EU:C:2009:271) (determination in a court of the Republic of Cyprus of the invalidity of a putative property transfer in Northern Cyprus is not to be refused recognition and enforcement in courts of other EU member states).

[183] *See, e.g.*, Draft Convention on the Elimination of Future Statelessness, pmbl., [1954] 2 Y.B. INT'L L. COMM'N 143. *See generally* WILLIAM E. CONKLIN, STATELESSNESS: THE ENIGMA OF THE INTERNATIONAL COMMUNITY (2014).

[184] For criticism of the strategy in Georgia, see 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA REPORT 19 (Sept. 2009), *available at* http://rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf.

[185] *See* Eur. Parl. Legal Serv., Re: Fisheries Partnership Agreement Between the European Community and the Kingdom of Morocco—Declaration by the Saharawi Arab Democratic Republic (SADR) of 21 January 2009 of Jurisdiction over an Exclusive Economic Zone of 200 Nautical Miles off the Western Sahara—Catches Taken by EU-Flagged Vessels Fishing in the Waters off the Western Sahara, Doc. No. SJ-0269/09EU (July 13, 2009), *available at* http://www.wsrw.org/a105x1346; Eur. Parl. Legal Serv., Re: Protocol Between the European Union and the

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furnish a basis for succession of states under the modern law, and so the annexing state cannot expect to gain ready acceptance that it is now the beneficiary of the rights connected with the territory annexed. These considerations, too, are applicable to Crimea.

As succession in favor of Russia has not been established, Ukraine retains international responsibility for all of Ukraine's territory.[186] The implementation of Ukraine's responsibility in practice, however, is affected by the presence of the Russian Federation in Crimea. The relation between Moldova and the Russian Federation in respect of Moldova's territory of Transdniestria[187] and the relation between Cyprus and Turkey in respect of Northern Cyprus are instructive here.[188] The unlawful presence of the other state did not displace the territorial state's responsibility. It did, however, attract responsibility to the other state for its conduct in the places that it occupied, and the territorial state's responsibility was to be implemented in view of the circumstances on the ground. Ukraine's responsibility in Crimea in practice is likely to be qualified in a similar way: Russia attracts responsibility for its presence in the territory, and a court or tribunal would take the fact of that presence into account when applying the rules of responsibility to Ukraine. The consequences of responsibility for Ukraine likely would be moderated accordingly. The annexation thus may be expected to impose some of the main obligations of territorial power on Russia without transferring the main rights; those rights remain where they had been—that is to say, with Ukraine.

V. Conclusion

In March 2014, the Russian Federation maintained that a right of remedial secession exists in international law and that circumstances justified the exercise of the right in Crimea. External self-determination for integral territories, however, has attracted only limited support among states, and only in relation to peoples suffering *in extremis*. Even if a right of remedial secession took solid root in international law, procedural prerequisites would operate wherever a group sought to exercise the right. In respect of Crimea, no national legal procedures under Ukrainian law had been instituted to seek a remedy for alleged wrongs, no negotiation had taken place, and no time had elapsed in which other solutions might have been tried. The secession referendum was organized with no time for public discussion; it took place under conditions of public emergency after a large foreign military force had taken hold of the territory; states and international organizations widely condemned it as unrepresentative. As to the merger with Russia, it was not the result of deliberation or consultation: the putative state of Crimea lasted only hours before being "returned" to Russia.

Kingdom of Morocco Setting out the Fishing Opportunities and Financial Contribution Provided for in the Fisheries Partnership Agreement in Force Between the Two Parties, Doc. No. SJ-0665/13, at 4 (Nov. 4, 2013), *available at* http://www.sadr-emb-au.net/legal-opinion-by-21-jurists-and-lawyers-from-8-countries-qualifies-eu-fish-agreement-that-include-western-sahara-as-illegal; Letter Dated 29 January 2002 from [Hans Corell,] the Under-Secretary-General for Legal Affairs, the Legal Counsel, Addressed to the President of the Security Council, para. 25, UN Doc. S/2002/161 (Feb. 12, 2002).

[186] This position is visible in UN human rights organs. *E.g.*, OHCHR April 2014 Report, *supra* note 46, paras. 12, 99; *see also* OHCHR Ukraine Report, *supra* note 142, paras. 6–8.

[187] Ilaşcu v. Moldova and Russia, App. No. 48787/99, para. 330 (Eur. Ct. H.R. July 8, 2004) (Grand Chamber).

[188] Loizidou v. Turkey, App. No. 15318/89, 1996-VI Eur. Ct. H.R. 2216, para. 52 (Dec. 18, 1996) (citing *Loizidou*, Preliminary Objections, para. 62 (Eur. Ct. H.R. Mar. 23, 1995)); Cyprus v. Turkey, App. No. 25781/94, Just Satisfaction, para. 41 (Eur. Ct. H.R. May 12, 2014) (Grand Chamber).

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The claim that Crimea separated from Ukraine under a right of remedial secession has manifest weaknesses of substance as well. The threshold for secession under title of a remedial right would be high, but no state beside Russia was aware that a human rights problem existed in Crimea of anything like the gross and systemic character that might have justified the remedy. No international organization thought that such a problem existed either. Although Russia had made observations about human rights in Ukraine a short while before the annexation, it expressed no concern as to the rights of ethnic Russians in Crimea. Evidence that the human rights situation in Crimea has deteriorated since the annexation casts further doubt on the Russian position that secession and annexation were justified for the protection of human rights. In particular, the treatment of the most vulnerable major ethnic group in Crimea, the Tatars, raises questions; since annexation, Crimean Tatars have been displaced in significant numbers.

The claim that Russia had received an invitation to intervene by the lawful government of Ukraine, in any event, could only go so far. Even if the invitation had been a valid unilateral act of the state, it was not an invitation to annex Ukrainian territory. As to the protection of nationals abroad, this claim again, even if allowed the widest application, would not furnish the basis for annexation. Furthermore, a naval basing agreement certainly does not confer a right to overthrow the national legal order and to annex territory from the host state. The arguments that Russia has made under these headings (with greater or lesser earnestness) at least have the virtue that they sound in modern international law. Such law includes rules concerning self-determination (whatever their precise content); international agreements can have a range of results (including a change of responsibility for territory where an agreement validly concluded expressly provides for it); and states sometimes use force to protect their nationals who have fallen into harm's way (though the scope of such a protective right is contested).

Raising more fundamental problems are Russia's historicist claims. The president of the Russian Federation, when announcing its new policy on Crimea, invoked Russia's past.[189] The foreign minister referred to "a historical mission . . . respond[ing] to the request of the overwhelming majority of Crimeans, who spoke in favour of their reconnection with the Russian Federation by expressing their free will."[190] Not every utterance of a public official expresses a legal policy of the state, but the analysis here would be incomplete if it did not have regard for the invocations of history. Russia may have sought to ground its act, inter alia, on the modern law of self-determination—"the request of the overwhelming majority" calls that law to mind—but, taken in context, this was the idea of ethnic solidarity, an argument to privilege claimed affinities over existing borders. A revisionist proposition inheres in this perspective, which, if generalized, would undermine the modern territorial settlement.[191]

[189] President of Russia Press Release, Address by President of the Russian Federation (Mar. 18, 2014), *available at* http://en.kremlin.ru/events/president/news/20603.

[190] Ministry of Foreign Affairs of the Russian Federation, Speech by the Russian Foreign Minister, Sergey Lavrov, and His Answers to Questions from the Mass Media During the Joint Press Conference with the Minister of Foreign Affairs of Turkey, Ahmet Davutoğlu, Summarising the Results of the IV Session of the Russian-Turkish Joint Strategic Planning Group, Moscow (May 27, 2014), *available at* http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/14d01e4c3955748c44257ce70063a8ee!OpenDocument; *see also* Churkin Statement, *supra* note 91, at 3.

[191] *See, e.g.*, UN Security Council, Letter Dated 2 May 2014 from the High Representative for Bosnia and Herzegovina Addressed to the Secretary-General, UN Doc. S/2014/314, annex, at 9 n.3 (quoting Republika Srpska President Milorad Dodik, VOICE OF RUSSIA, Mar. 10, 2014).

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The post-1945 legal order, whatever its deficiencies, has been associated with a certain stability in the relations among states. Under that legal order, constraints have limited territorial claims and the methods by which states pursue them. International law and its institutions do not provide support for the separation of Crimea from Ukraine or its annexation to Russia. Whether the international legal order will prove over time to operate as a constraint on the consolidation or durability of these acts remains to be tested.

THE CHAPEAU OF THE GENERAL EXCEPTIONS IN THE WTO GATT AND GATS AGREEMENTS: A RECONSTRUCTION

*By Lorand Bartels**

One of the most important issues in the law of the World Trade Organization is the right of WTO members to adopt measures for nontrade purposes. In the WTO's General Agreement on Tariffs and Trade (GATT 1994) and General Agreement on Trade in Services (GATS), this right is secured in general exceptions provisions,[1] which permit WTO members to adopt measures to achieve certain objectives, notwithstanding any other provisions of these agreements and also, in some cases, other WTO agreements.[2] These objectives include, most importantly, the protection of public morals, the maintenance of public order,[3] the protection of human, animal, or plant life or health, the enforcement of certain domestic laws, and the conservation of exhaustible natural resources.[4]

The right to adopt measures for these purposes is subject to various conditions, some of which are specific to the objective at issue. For example, a measure for conserving exhaustible natural resources needs to "relate to" that objective and be "made effective in conjunction with domestic restrictions on production or consumption of those resources,"[5] whereas a measure

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[1] General Agreement on Tariffs and Trade 1994, Art. XX, Apr. 15, 1994 [hereinafter GATT 1994], Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, 1867 UNTS 187; General Agreement on Trade in Services, Art. XIV, Apr. 15, 1994, WTO Agreement, *supra*, Annex 1B, 1869 UNTS 183 [hereinafter GATS]. WTO legal texts are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm and reprinted in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 1999).

[2] The general exceptions also apply to obligations in related WTO agreements, sometimes expressly, as in the Agreement on Trade-Related Investment Measures, Art. 3, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, 1868 UNTS 186, and the Agreement on Trade Facilitation, Art. 24(7), WTO Doc. WT/L/931 (July 15, 2014) (not yet in force), and sometimes by implication, as in relation to certain obligations in accession protocols. *See*, *e.g.*, Appellate Body Report, China—Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, para. 415, WT/DS363/AB/R (adopted Jan. 19, 2010). Documents for WTO disputes are available at https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes.

[3] This exception is not included in GATT 1994, *supra* note 1, Art. XX.

[4] This last exception is not included in GATS, *supra* note 1, Art. XIV.

[5] GATT 1994, *supra* note 1, Art. XX(g).

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