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## Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea

*Christopher J. Borgen*

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# Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea

Christopher J. Borgen\*

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*Crimea is routinely described as “pro-Russian,” given that an estimated 58 percent of the population of two million is ethnic Russian, with another 24 percent Ukrainian and 12 percent Crimean Tatar. Many of its inhabitants, regardless of ethnicity, are actually Russian citizens or dual-passport holders. But the picture is even more complicated. A vital naval base run by another country, a community of patriotic military retirees, a multiethnic patchwork, a weak state and competing national mythologies—that mixture is why a Crimean conflict has long been the nightmare scenario in the former Soviet Union and now represents the gravest crisis in Europe since the end of the Cold War.*

Professor Charles King<sup>1</sup>

*Crimea had been reunified with the Russian Federation. “We call on everyone to respect that voluntary choice,” he said, adding that his Government could not refuse Crimeans their right to self-determination. Historical justice had been vindicated, he noted, recalling that for many years, Crimea had been part of the Russian Federation, sharing a common history, culture and people. An arbitrary decision in 1954 had transferred the region to the Ukrainian Republic, upsetting the natural state of affairs and cutting Crimea off from Russia.*

Summary of comments of Ambassador Anatoly Churkin of the Russian Federation before the UN General Assembly, March 27, 2014<sup>2</sup>

## I. INTRODUCTION

On March 16, 2014 the residents of Crimea woke up in Ukraine, as they had every morning since the dissolution of the USSR at the end of 1991. That evening they went to sleep in what claimed to be the independent Republic of Crimea. They lived in that putative country for the next day. On

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1. Charles King, *Ukraine’s Breakaway Region is Becoming a de facto Country*, WASHINGTON POST (Sept. 16, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/16/ukraines-breakaway-region-is-becoming-a-de-facto-country/>.

2. Press Release, General Assembly Adopts Resolution Calling upon States Not To Recognize Changes in Status of Crimea Region, U.N. Press Release GA/11493 (Mar. 27, 2014), available at <http://www.un.org/press/en/2014/ga11493.doc.htm> [hereinafter General Assembly Adopts Resolution].

March 18, the leaders of Crimea signed a treaty merging their day-old country into Russia.

Much had taken place before these three days in March 2014. There were arguments about Ukraine associating with the European Union (EU) or joining a Russian-led Eurasian Economic Union. There were warnings by Russia. Ukraine's President Victor Yanukovich surprised his fellow citizens and the European Union when he declared, a few days prior to the signing ceremony, that Ukraine would not sign the association treaty with the EU, after all. There were protests in the Maidan, in other areas of Kiev, and then across most of Ukraine. Troops fired on protesters and people died. Yanukovich fled or was ousted. Separatists fought for control of government buildings in Crimea and eastern Ukraine. Almost before anyone realized what was happening, Crimea was held by separatists aided by "polite men" with military expertise and foreign accents.

And much else has taken place after those three days in March. Unrest spread across eastern Ukraine. Separatists declared one republic after another: the Donetsk People's Republic, the Luhansk People's Republic, the Kharkiv People's Republic, the federal state of Novorossiia.<sup>3</sup> These self-styled new republics had leadership from the old guard of previous secessionist conflicts in the former Soviet Union.<sup>4</sup> Fighting between separatist militias and the Ukrainian Army grew in ferocity. New weaponry, including artillery and anti-aircraft missiles, were deployed by the separatists. A civilian airliner was destroyed, killing all on board. Russian troops invaded Ukraine and intervened on behalf of the separatists. The government of Russia denied this. Average Russian soldiers posted on social media pictures of themselves in Ukraine. Ukraine signed the association agreement with the EU. Vladimir Putin called for talks to determine the statehood of eastern Ukraine.<sup>5</sup> Negotiations among Ukraine,

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3. *The People's Republics of Ukraine*, GEOGRAPHIC TRAVELS (June 2, 2014), <http://www.geographictravels.com/2014/06/the-peoples-republics-of-ukraine.htmls>.

4. Philip Shishkin & Lukas I. Alpert, *Pro-Russia Rebels Defiant as Ukraine Military Advances Toward Donetsk*, WALL STREET JOURNAL (July 10, 2014), <http://online.wsj.com/articles/ukraine-forces-take-another-rebel-held-town-1404996939>; Irena Chalupa, *Needing Better Control in Ukraine War, Moscow Sends in an Old KGB Hand*, ATLANTIC COUNCIL (July 17, 2014), <http://www.atlanticcouncil.org/blogs/new-atlanticist/needing-better-control-in-ukraine-war-moscow-sends-in-an-old-kgb-hand>.

5. *The Interpreter*, a website that translates and analyzes Russian media reports, states that in an interview on Russian television Putin said:

Russia, and the EU began. Ukraine and the EU suspended implementation of part of their association agreement. A ceasefire was announced. The fighting persists. Negotiations continue.

Some commentators note that Vladimir Putin is an avid chess player; and, consequently, they liken the events in Ukraine to a game between him and the West. But the conflict over Crimea and eastern Ukraine is not a single chess game (or two games, for that matter). It is more accurately described as multiple simultaneous games with different combinations of players in which the strategies and outcomes of each game can affect those of other games. There is one game concerning Russia, Ukraine, and the European Union: what will be Ukraine's future relationship with the EU? There is another game about the status of the ethnic Russian populations in the former Soviet States (countries that are sometimes called the Russian "Near Abroad"). Yet another concerning Russia's standing in relation to the United States. And, as will be discussed below, there are many other games taking place as well.

This article will consider one gambit across multiple games: the use of international legal arguments concerning self-determination in Ukraine. I have previously addressed similar issues pertaining to international legal arguments and conflicts in Russia's Near Abroad.<sup>6</sup> Those articles noted a

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We must immediately get down to a substantial, substantive negotiations [sic], and not on technical questions, but on the questions of the political organization of society and statehood in the south-east of Ukraine with the purpose of unconditional provision of the lawful interests of people who live there.

*Putin Calls for Negotiations for "Statehood" for Southeast Ukraine*, THE INTERPRETER (Aug. 31, 2014), [http://pressimus.com/Interpreter\\_Mag/press/4062](http://pressimus.com/Interpreter_Mag/press/4062) (translation by website *The Interpreter*).

6. In particular, I discussed the evolution and application of the law of self-determination as one of the members of the New York City Bar's mission to Moldova in Special Committee on European Affairs, *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 61 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 196 (2006). I have also written about these issues in Christopher J. Borgen, *Public International Law and the Conflict Over Transnistria*, in MANAGING INTRACTABLE CONFLICTS: LESSONS FROM MOLDOVA AND CYPRUS 83 (Mensur Akgün ed., 2013) and Christopher J. Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"*,<sup>9</sup> OREGON REVIEW OF INTERNATIONAL LAW 477 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1345846](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345846). I consider how great powers utilize the legal rhetoric of self-determination, particularly in the cases of South Ossetia and Kosovo in Christopher J. Borgen, *Great Powers, Small States, and the Rhetoric of Self-Determination: The Cases of Kosovo and South Ossetia*, 10 CHICAGO JOURNAL OF INTERNATIONAL LAW 1 (2009), available at <http://papers.ssrn.com/sol3/papers.cfm?abs>

change over time in Russia's rhetoric. Crimea, however, represents a disjuncture with Russia's previous approach to contested territories in its Near Abroad. It also may show a shift in *why* Russia uses the language of international law as part of its diplomatic strategy.

Part II will review the law of self-determination and examine whether it is in tension with the territorial integrity of States. Part III will consider Russia's rhetorical moves concerning self-determination and territorial integrity over a series of cases: the separatist crises in Serbia over Kosovo, in Georgia over South Ossetia and Abkhazia, and in Ukraine over Crimea and eastern Ukraine. In part, this will be about whether Russia has shifted its argument away from self-determination, and is re-imagining an old rhetoric of ethnicity, culture and the righting of historical wrongs. This section will consider how the language of international law is used as the rhetoric of diplomacy. Part IV will address how these legal arguments play a part in the strategies that Russia has over the multiple simultaneous games in play. It will look at how the rhetoric of international legal argument is used with different audiences in mind.

These three sections will show the intertwined relationships of international law, diplomatic rhetoric and politico-military strategy. State interest will remain the primary determinant of how States act, but each of these factors—law, rhetoric and strategy—help decide which path a State will attempt to take towards a particular goal. These three factors affect each other, sometimes as a constraint and sometimes presenting opportunities for maneuver.

## II. LAW: THE GORDIAN KNOT OF SELF-DETERMINATION, TERRITORIAL INTEGRITY AND SECESSION

Although the self-determination of peoples is mentioned in the UN Charter, jurists as recently as the wave of State formation in the mid-1990s found that “international law as it currently stands does not spell out all the implications of the right to self-determination.”<sup>7</sup> The ambiguity of the

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tract\_id=1472068. Also, I analyze issues related to great power competition and normative regionalism in Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE JOURNAL OF INTERNATIONAL LAW 331 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=989984](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989984).

7. Conference on Yugoslavia Arbitration Commission, Opinion No. 2, 31 INTERNATIONAL LEGAL MATERIALS 1497 (1992) [hereinafter Badinter Commission, Opinion

concept was the source of an ongoing debate over the meaning of self-determination and its implications for the territorial integrity of States. This Part will consider the two main interpretations of the relationship of self-determination to territorial integrity.

*A. The Promise and the Peril of Self-Determination*

In a recent panel discussion on self-determination, one leading international lawyer repeatedly asked why States are so afraid of self-determination. Implicit in his query was the sense that self-determination was a concept imbued with so much hope and promise that it was strange that it also could be the cause of so much anxiety.

But self-determination has been a source of anxiety for at least a century. While Woodrow Wilson included in his Fourteen Points that “all nations had a right to self-determination,” he later said in an address to Congress: “When I gave utterance to those words, I said them without the knowledge that nationalities existed, which are coming to us day after day.”<sup>8</sup>

Whether a source of anxiety or not, self-determination has evolved since Wilson’s day from political rhetoric into a legal right expressed in treaties and customary international law. The first article of the Charter of the United Nations states that: “The Purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”<sup>9</sup>

Moreover, the foundational treaties of the modern human rights system, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both

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No. 2]. The Badinter Commission was organized by what was then the European Community to sort through the legal issues concerning the status of Yugoslavia and its possible successor States.

8. MARGARET MACMILLAN, *PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD* 12 (2002). Self-determination could not be squared with several of Wilson’s other goals, such as ensuring Poland’s access to the sea and the modification of Italy’s frontiers; in these cases he did not refer to self-determination at all. HENRY KISSINGER, *DIPLOMACY* 225 (1994). Kissinger pointed to the willingness to drop the language of self-determination in these cases as “the first flaws in the moral symmetry of Wilson’s design.” *Id.*

9. U.N. Charter art. 1. The UN reiterated its commitment to self-determination in Article 55.



have the same text in their first articles: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>10</sup>

In 1970, upon the twenty-fifth anniversary of the founding of the UN, the General Assembly passed Resolution 2625, the “Friendly Relations Declaration,” which reaffirmed the key principles of the UN system, including:

*The Principle of Equal Rights and Self-determination of Peoples*

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.<sup>11</sup>

The International Court of Justice (ICJ) further contributed to the “legalization” of self-determination. In 1975, the *Western Sahara Advisory Opinion* affirmed “the validity of the principle of self-determination” under international law.<sup>12</sup> Twenty years later, in the *East Timor* case, the ICJ not only reiterated that self-determination is “one of the essential principles of contemporary international law,” but also held that it is an *erga omnes* obligation.<sup>13</sup>

Two questions remain unresolved. First: what, precisely, is a “people”? How do we know who or what holds this right of self-determination? And, second: what does a right of self-determination actually bring? For many, this second question can be restated as a fear: “does self-determination

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10. International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3.

11. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), annex, U.N. Doc. A/8082 (Oct. 24, 1970).

12. *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 31–33 (Oct. 16). *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia, *Advisory Opinion*, 1971 I.C.J. 16, 31 (June 21).

13. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 102 (June 30). *See also* JOHN DUGARD, *THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO* 28 (2013).

mean that a ‘people’ can dismember a ‘State?’” “Are ‘self-determination’ and ‘secession’ synonyms?”

While the UN Charter and subsequent international law developed a right of self-determination, territorial integrity is a cornerstone of the UN system and of modern international law.<sup>14</sup> How do self-determination and territorial integrity interact?<sup>15</sup>

For Russia, that fear has a name: “Kosovo.” In 2008, Vladimir Putin said that the States supporting Kosovo’s declaration of independence “have not thought through the results of what they are doing. At the end of the day it is a two-ended stick and the second end will come back and hit them in the face.”<sup>16</sup>

That second end of the stick was South Ossetia and Abkhazia. But, before returning to the ins-and-outs of Russia’s arguments, let us first turn to the consensus interpretation and the leading minority view of the law of self-determination.

#### B. *The Consensus Interpretation: No Right to Secession*

The debate over self-determination is essentially an argument over language: what does “self-determination” mean and how does it relate to other concepts, such as “secession”? This becomes essentially two

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14. The territorial integrity of States is ensured in UN Charter Article 2(4) which states in part:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

....

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

15. As Thomas Franck put it, *uti possidetis* and self-determination are both specific products of another time and place, yet both are used frequently and freely in the debate about the most important political legal issue of our time: what should be the attitude of the international community towards a post-modern neo-tribal population inhabiting part of a recognized state which seeks to break away either to form a separate, new state or to join another state?

THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 146 (1995). I will discuss the *uti possidetis* aspect of territorial integrity *infra* Part III.C.

16. *Kosovo Independence Terrible Precedent: Putin*, AL ARABIYA NEWS (Feb. 23, 2008), <http://www.alarabiya.net/articles/2008/02/23/46011.html>.

questions: who or what has a right of self-determination (“what is a ‘people?’”) and what remedies can one claim if that right is denied?

### 1. What is a “People”?

As the Canadian Supreme Court put it in *Secession of Quebec*, its advisory opinion concerning self-determination, the meaning of “peoples” is “somewhat uncertain.”<sup>17</sup> At various points in international legal history, the term “people” has been used to signify citizens of a nation-State, the inhabitants in a specific territory being decolonized by a foreign power or an ethnic group.<sup>18</sup>

Equating the term “people” with “nation” has been criticized by some for being too restrictive, as it is difficult to show that a group is the near totality of an ethnic nation. But defining “people” based on ethnicity could be destabilizing to multi-ethnic States. During decolonization, many States denied that there was a right of self-determination to ethnic groups *within* colonial territories.<sup>19</sup> According to Antonio Cassese, the “UN has remained silent in response to claims” by ethnic groups such as the Kurds or the Basques seeking self-determination.<sup>20</sup>

In the post-colonial era, instead of returning to the older ethnographic definition, various commentators have attempted to reframe the analysis by defining the idea of “the self-determination of peoples” in non-ethnographic terms. Professor James Crawford of Cambridge argues that

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17. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 123 (Can.) [hereinafter Canadian Supreme Court Advisory Opinion].

18. See, e.g., PATRICIA CARLEY, SELF-DETERMINATION: SOVEREIGNTY, TERRITORIAL INTEGRITY, AND THE RIGHT TO SECESSION: REPORT FROM A ROUNDTABLE HELD IN CONJUNCTION WITH THE U.S. DEPARTMENT OF STATE’S POLICY PLANNING STAFF 4 (1996), available at <http://www.usip.org/sites/default/files/pwks7.pdf> (noting Professor Hurst Hannum’s argument that the idea of self-determination during the era of decolonization was *not that all peoples* had a right to self-determination but rather that *all colonies* had a right to be independent). But see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 51 (1995) (stating that by the time the self-determination language of Article 1 of the International Covenant on Civil and Political Rights was adopted in 1955, few States argued that the principle only applied to colonial rule).

19. See CASSESE, *supra* note 18, at 73.

20. *Id.* at 103.

the “units” to which the principle of self-determination applies can be best understood by not focusing on the term “people.” Rather,

[t]he units to which the principle applies are in general those territories established and recognized as separate political units; in particular it applies to the following:

- (a) trust and mandated territories, and territories treated as non-self-governing under Chapter XI of the [UN] Charter;
- (b) States, excluding for the purposes of the self-determination rule those parts of States which are themselves self-determination units as defined;
- (c) other territories forming distinct political-geographical areas, whose inhabitants are arbitrarily excluded from any share in the government either of the region or of the State to which they belong, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing; and
- (d) any other territories or situations to which self-determination is applied by the parties as an appropriate solution.<sup>21</sup>

In this analysis, category (a) essentially refers to former colonies and, as such, is not of interest regarding Crimea or eastern Ukraine. Category (b) concerns how the total citizenry of a State is itself a self-determination unit.

Category (d) would apply only if the parties involved (for example, Ukraine and the Crimean separatists) agreed that the group in question (the population of Crimea) was a separate self-determination unit. The problem here, of course, is that the parties have not agreed upon this issue. While Crimea did have autonomy within Ukraine, it is not at all clear that the Ukrainian government viewed the population as a separate self-determination unit from the total population of Ukraine. To the contrary the Crimean Constitution states in Article 1: “The Autonomous Republic of Crimea shall be an integral part of Ukraine and it shall solve, within the powers conferred upon it by the Constitution of Ukraine, any and all

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21. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 127 (2d ed. 2006).

matters coming within its terms of reference.”<sup>22</sup> Moreover, Article 73 of the Ukrainian Constitution requires any referendum concerning territorial change to be a referendum of all the citizens of the country,<sup>23</sup> casting doubt on the idea that the population of Crimea is (in the view of the Ukrainian government) a separate self-determination unit, thus making category (d) inapplicable.

The remaining option would be whether Crimea is a self-determination unit as described in category (c): “territory becomes in effect, with respect to the remainder of the State, non-self-governing.” This is usually discussed regarding areas in which the inhabitants have no say in how they may govern their own lives. The citizens of Crimea, by contrast, had autonomy: their own constitution, particularized local laws that they enacted via a Crimean Parliament and enforced through a locally elected executive.

While the total citizenry of Ukraine is a self-determination unit, it is difficult to make the argument that inhabitants just of Crimea or of eastern Ukraine constitute separate self-determination units under international law.

## 2. Is Self-Determination a Right to Secession?

While the definition of “self-determination” is contested, “secession” is a term that is relatively clear: “Secession is the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter.”<sup>24</sup>

The consensus view is that there is no right to secession under international law. “Secession,” legally speaking, is not a synonym for “self-determination.” The drafting committee for the UN Charter noted that “the principle [of self-determination] conformed to the purposes of the

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22. КОНСТИТУЦІЯ АВТОНОМНОЇ РЕСПУБЛІКИ КРИМ KONSTYTUTSIYA AVTONOMNOYI RESPUBLIKY KRYM [CONSTITUTION] Jan. 12, 1999, art. 1 (Autonomous Republic of Crimea) [hereinafter Constitution of Autonomous Republic of Crimea].

23. KONSTYTUTSIYA UKRAYINY [CONSTITUTION] June 28, 1996, art. 73 (Ukr.) [hereinafter Constitution of Ukraine].

24. Marcelo Kohen, *Introduction to SECESSION: INTERNATIONAL LAW PERSPECTIVES* 3 (Marcelo Kohen ed., 2006). *See also* DUGARD, *supra* note 13, at 20. There have been debates over the application of the term “secession,” most notably over the question as to whether it should apply to the formation of new States after the dissolution of a pre-existing State. The question of how to describe the process of dissolution of the Socialist Federal Republic of Yugoslavia is an example of such a debate.

UN Charter only insofar as it implied the right of self-government of peoples and not the right of secession.”<sup>25</sup> Interpreting secession as a remedy that can be invoked as an operation of law would have clashed with the territorial integrity of States.

The Québec Commission, a group of experts convened by a committee of the National Assembly of Québec to provide advice concerning the legal issues implicated by a hypothetical secession of Québec, considered this question. The Commission found that the right to self-determination is context-dependent, that different definitions of “peoples” lead to different applications of the right to self-determination and that secession is only recognized as a remedy in the case of decolonization.<sup>26</sup> In cases other than decolonization, there is no right to such “remedial” secession.<sup>27</sup>

As long as a State allows a minority group the right to speak its language, practice its culture in a meaningful way and participate effectively in the political and economic life of its community, then that group is said to have *internal* self-determination. If the requirements for internal self-determination are not met, then the remedies would be through the processes of human rights law: judicialized dispute resolution, adjustments made to local laws and regulations, multilateral monitoring and sanctioning, and so on. Rather than turning self-determination issues into high-level political crises involving the dismemberment of States, the consensus view breaks self-determination down into questions and issues that should be able to be addressed via the human rights system.

However, two results of this interpretation bear emphasis. First, simply because it is hoped that a self-determination conflict should be able to be reframed and solved via human rights mechanisms does not mean that it actually can or will be. And, second, while there is no right to secession

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25. 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS 296 (1945), as quoted in CASSESE, *supra* note 18, at 40. See also CASSESE, *id.* at 42 (stating that self-determination does not mean a right to secede).

26. Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw & Christian Tomuschat, *The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty*, in SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED 241, ¶ 3.07 (Anne F. Bayefsky ed., 2000).

27. See, e.g., CRAWFORD, *supra* note 21, at 247; *id.* at 248, 279–80 (stating that secession is only recognized as a remedy in the case of decolonization); CASSESE, *supra* note 18, at 40 (stating that self-determination does not mean a right to secede). *But see* MALCOLM N. SHAW, INTERNATIONAL LAW 271 n.140 (5th ed. 2003) (stating that a posited right of remedial secession is “the subject of much debate”).

under the consensus view, secession is not illegal, either.<sup>28</sup> If anything, international law is largely silent regarding secession, and attempted secessions are, first and foremost, assessed under domestic law.<sup>29</sup> A separatist group may secede and in doing so it does not contravene international law by the simple act of secession. Secession is neither a right under, nor a breach of, international law. International law treats secession as a fact. As a matter of modern diplomatic practice, though, secession is strongly disfavored.

*C. The Leading Minority View: Remedial Secession in Extreme Circumstances*

This consensus view may be the majority interpretation, but it is not the only one. Some would ask: “What about the cases where human rights mechanisms are inadequate, or where the people in question truly want their own State, not just a basket of rights in someone else’s country?” The 1970 Friendly Relations Declaration is perhaps the most-cited source for evidence of an emergent rule of customary international law granting a right of remedial secession. Besides its general statement in support of the right of self-determination noted above in Part II.A, the Declaration also contains the so-called “Safeguard Clause”:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and

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28. A 1996 U.S. Institute of Peace/U.S. State Department Policy Planning Staff Roundtable stated that:

The United States should . . . make absolutely clear that secession has not been universally recognized as an international right. It may choose, on the basis of other interests, to support the secessionist claims of a self-determination movement, but not because the group is exercising its *right* to secession, since no such right exists in international law. At the same time, an absolute rejection of secession in every case is unsound, because the United States should not be willing to tolerate another state’s repression or genocide in the name of territorial integrity. Secession can be a legitimate aim of some self-determination movements, particularly in response to gross and systematic violations of human rights and when the entity is potentially politically and economically viable.

CARLEY, *supra* note 18, at vii.

29. Concerning the silence of international law, see, e.g., NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 526, ¶ 344 no. 1 (2002) (“la sécession n’est pas prise en compte en elle-même par le droit international,” that is, “secession in itself is not taken into account by international law”).

independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>30</sup>

This wording was reiterated in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.<sup>31</sup>

This concept was considered in *re Secession of Quebec*, the advisory opinion issued by the Supreme Court of Canada. The Canadian court found that “[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances . . . .”<sup>32</sup>

More recently, in the wake of the *Kosovo Advisory Opinion*, some commentators have claimed that the ICJ’s opinion recognized the existence of remedial secession by not finding Kosovo’s unilateral declaration of independence to be illegal. I will consider this, and similar arguments, next.

#### D. *Why a General Right to Remedial Secession Does Not (Currently) Exist*

The consensus view and the “extreme circumstances” argument that I describe above are generalizations aggregating a range of views held by different States around the world. Some of the differences in perspective and interpretation can be mapped geographically.

Stanislav Chernichenko and Vladimir Kotliar describe three conferences that took place in 2000–2001, convening lawyers from the

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30. G.A. Res. 2625 (XXV), *supra* note 11; James Crawford wrote that: “At least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete peoples within a State, and that the ‘safeguard clauses’ in the Friendly Relations Declaration and the Vienna Declaration recognize this, even if indirectly.” CRAWFORD, *supra* note 21, at 119.

31. Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (July 12, 1993), available at <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

32. Canadian Supreme Court Advisory Opinion, *supra* note 17, ¶ 123.



United States, Europe, Russia.<sup>33</sup> In general, Chernichenko and Kotliar found that self-determination and secession were treated as two separate concepts by Western lawyers, although there were gradations of views.<sup>34</sup> They described the summary document of the U.S. conference as “rather firmly stat[ing] that the maintenance of a people’s identity does not necessarily require secession but may be achieved through other means of internal self-determination such as devolution of power, administrative and cultural autonomy, creation of local government, etc.”<sup>35</sup> However, European lawyers contended there is a “presumption in contemporary international law against secession and against recognition of new States” established in a contested secession.<sup>36</sup>

By contrast to these Western views, Russian lawyers framed secession as the ultimate expression of self-determination.<sup>37</sup> Theoretically, then, Russian international lawyers would be the most amenable to the “extreme circumstances” view. As will be described below, though, the manner in which they interpret the extreme circumstances necessary to give rise to remedial secession has been so severe (well, “extreme”) as to make the possibility of remedial secession a very narrow case.

Taken together, these views show that while there are international lawyers who argue in favor of interpreting self-determination to include a right to secession, such a framework does not as of yet exist as positive international law.<sup>38</sup>

Consider the counter-factual: if there was a *right* to remedial secession outside of the colonial context, then it would have to have been created either by treaty or by customary international law. Yet no such treaty exists.

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33. Stanislav V. Chernichenko & Vladimir S. Kotliar, *Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends*, in SECESSION AND INTERNATIONAL LAW: CONFLICT AND AVOIDANCE – REGIONAL APPRAISALS 76 (Julie Dahlitz ed., 2003).

34. *Id.* at 83.

35. *Id.* at 82.

36. *Id.* at 83. *See also* FRANCK, FAIRNESS, *supra* note 15, at 151–52 (noting a preference of the international community for territorial integrity over self-determination leading to separation).

37. Chernichenko & Kotliar, *supra* note 33, at 83. For a discussion of the concept of comparative international law, see Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOKLYN JOURNAL OF INTERNATIONAL LAW 385 (2011).

38. For another discussion of this topic, see Katherine Del Mar, *The Myth of Remedial Secession*, in STATEHOOD AND SELF DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 79 (Duncan French ed., 2013).

What of a customary right to remedial secession? For that to be the case there would need to be State practice based on a sense of legal obligation.

State practice does not support a customary right of secession. Time and again we find great powers and small States speaking of the importance of territorial integrity as a cornerstone of the international system. Of course, secessions happen, but the rules of the State system (including rules of recognition, international organization membership and so on) are stacked against aspirant States that come into being by seceding. That does not make secession illegal under international law, just politically disfavored by the members of the international system. Secession is probably *less* politically disfavored in some situations, but that does not mean it has become generally accepted as a right.

Even where we do see new States coming into being, such as in the former Yugoslavia, including Kosovo, almost no State said these new countries came into existence by operation of a *right to remedial secession*. (To the contrary, the Conference on Yugoslavia Arbitration Commission (Badinter Commission) took pains *not* to say that and disfavored the arguments of entities that tried to claim such a right.)

Considering secessionist conflicts since the end of World War II, there are (depending on one's criteria) perhaps between one and three examples of secessions *contested by the pre-existing States* that were both successful "on the ground" and were also accepted and recognized by a significant portion of the international community: Bangladesh, and possibly Kosovo and South Sudan.<sup>39</sup> By contrast, in that period there have been *at least twenty* (as

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39. *But see* CRAWFORD *supra* note 21, at 415 (stating that only Bangladesh was a successful secession). Crawford disqualifies Eritrea because the Transitional Government of Ethiopia supported Eritrean independence after a plebiscite. Others view this as a successful secession because the overthrow of the previous Ethiopian government and the installation of the Transitional Government can be viewed as part of the overall conflict. Instances of secession outside of the colonial context since the Second World War include: Senegal (1960); Singapore (1965); Bangladesh (1971); Latvia, Lithuania and Estonia (1991); the eleven successor States of the USSR (1991); the five successor States of Yugoslavia (1990s); the Czech Republic and Slovakia (1993); and Eritrea (1993). Crawford did not include Kosovo (as the Kosovar declaration had not yet occurred). However, Crawford notes that in the cases of Senegal, Singapore, the Czech Republic and Slovakia, each was separated pursuant to separation agreements or operations of their domestic constitutions. Moreover, the USSR capitulated on the secession of the Baltic States (Latvia, Lithuania and Estonia) and as of September 6, 1991 no longer contested their departure. The successor States of the USSR and those of Yugoslavia were formed due to dissolution of the pre-existing States, not secession. *Id.* at 392–402.

yet) attempted secessions that have not been accepted by the international community.<sup>40</sup>

In sum, there is very little, if any, State practice to support remedial secession outside of the colonial context.

Nor are there clear statements of *opinio juris*, even regarding cases of oppression. The Safeguard Clause of the Friendly Relations Declaration is not good evidence of *opinio juris*. Since the Declaration, States, in their official pronouncements have backed away from the remedial secession language as a matter of right. If *opinio juris* supporting a right to remedial secession existed, then the ICJ would not have written the following in the *Kosovo Advisory Opinion*:

Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.<sup>41</sup>

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I list Kosovo only as a “maybe” because although 110 UN member States recognize it, it is not a member of the UN. (Although in comparison to other examples it is very successful in having secured recognition from most of the key States in its region, as well as the United States and others.) South Sudan is also listed as a “maybe” since South Sudan’s separation was based on operation of the provisions of a peace agreement.

40. Nagorno-Karabakh (Azerbaijan); Republika Srpska (Bosnia-Herzegovina); The Karen and Shan States (Burma); Tibet (China); Katanga (Congo); Turkish Federal Republic of Northern Cyprus (Cyprus); Abkhazia (Georgia); South Ossetia (Georgia); East Punjab (India); Kashmir (India); Kurdistan (Iraq/Turkey); Anjouan (Islamic Republic of the Comoros); Gagauzia (Moldova); Transnistria (Moldova); Biafra (Nigeria); Bougainville (Papua New Guinea); Chechnya (Russian Federation); Somaliland (Somalia); Tamil Elam (Sri Lanka); and Democratic Republic of Yemen (Yemen). This original version of this list is from CRAWFORD, *supra* note 21, at 403; I have made some changes due to subsequent history and my own analysis of the situations.

41. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 82 (July 22) [hereinafter *Kosovo Advisory Opinion*].

Based on this, there is neither adequate State practice nor *opinio juris* to claim a right of remedial secession under customary international law. Within this context of law as it is at this time, how we should understand Russian arguments concerning self-determination and secession?

### III. RHETORIC: THE EVOLUTION OF RUSSIAN ARGUMENTS FROM KOSOVO TO CRIMEA, FROM TERRITORIAL INTEGRITY TO TERRITORIAL IRREDENTISM

#### A. Overview

For President Putin, the situation in Crimea has its roots in Kosovo. Kremlin watchers have argued that the loss of Kosovo was a traumatic experience for President Putin and Foreign Minister Sergei Lavrov. In his speech of March 18 declaring that Crimea was “reuniting” with Russia, President Putin revisited the disagreements over Kosovo’s declaration of independence:

I do not like to resort to quotes, but in this case, I cannot help it. Here is a quote from . . . [an] official document: the Written Statement of the United States America of April 17, 2009, submitted to the same UN International Court in connection with the hearings on Kosovo. Again, I quote: “Declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law.” End of quote. They wrote this, disseminated it all over the world, had everyone agree and now they are outraged. Over what? The actions of Crimean people completely fit in with these instructions, as it were. For some reason, things that Kosovo Albanians (and we have full respect for them) were permitted to do, Russians, Ukrainians and Crimean Tatars in Crimea are not allowed. Again, one wonders why.<sup>42</sup>

Putin was not the only one to echo the Kosovo debate. In what was likely a reference to the arguments by the United States, the United Kingdom and others that Kosovo’s situation was a “special case,”<sup>43</sup>

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42. Vladimir Putin, President, Russian Federation, Address Before the State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin (Mar. 18, 2014) (transcript *available at* <http://eng.kremlin.ru/transcripts/6889>) [hereinafter Putin, Crimea Address].

43. Then-Secretary of State Condoleezza Rice explained:

Russian Foreign Minister Sergey Lavrov said in an interview in September 2014, he believes “that Crimea was a very special case, a unique case from all points of view. Historically, geopolitically, and patriotically, if you wish.”<sup>44</sup>

Such rhetorical mirroring could be intended to make it difficult for the United States to condemn Russian actions, understanding that the legal fine points of distinguishing the cases of Kosovo and Crimea would be lost in the rough sport of political argument. It could also be an example of a tit-for-tat diplomatic strategy, in which Russia is signaling to the United States that interpretive moves made by the United States will be used by Russia as well, thus incentivizing constrained interpretations by the United States.<sup>45</sup> In any case, Russia’s shift in rhetoric can be legally significant as it builds State practice for particular interpretations of the concepts of self-determination and secession.

As Nico Krisch has explained, in some cases “powerful states tend to use international law as a means of regulation as well as of pacification and stabilization of their dominance”; in others, “faced with the hurdles of equality and stability that international law erects, they withdraw from it.”<sup>46</sup> Dominant States do not usually maintain static approaches to international law, but rather “oscillate” between instrumentalization and withdrawal.<sup>47</sup> For Russia, that oscillation is couched as an evolving understanding of international law. While Russia may be oscillating away from the consensus

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The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia’s breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.

Press Release, Secretary of State Condoleezza Rice, U.S. Recognizes Kosovo as Independent State (Feb. 18, 2008), *available at* <http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>.

44. Interview with Sergey Lavrov, Russian Foreign Minister (Sept. 11, 2014) (transcript *available at* *Sergey Lavrov: Throwing Russia Off Balance is Ultimate Aim*, ITAR-TASS (Sept. 11, 2014.), <http://en.itar-tass.com/russia/748935>) [hereinafter Lavrov Interview].

45. Regarding “tit-for-tat” as a diplomatic strategy, see generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

46. Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 369, 371 (2005).

47. *Id.* at 379.

view of international law, rather than withdrawal from legal rhetoric, it is constructing its own “legal” framework.

This Part will chart how Russia’s interpretation of self-determination has changed over the last decade. In Part IV, I will consider the strategic uses of Russia’s changing arguments.

*B. Russia’s Rhetoric of Self-Determination: Ad Hoc Justifications or Evolving Theory?*

In assessing Russia’s shifting arguments concerning self-determination and territorial integrity, a fundamental question is whether arguments deployed regarding Kosovo, South Ossetia and Crimea are different due to an evolving theory of self-determination or are simply tactical justifications to fit the situation.

Before assuming one or the other answer too quickly, one needs to keep in mind what has been relatively consistent in Russia’s statements concerning self-determination. Although Russia has tried to maintain room for its own maneuver by exploiting the ambiguous nature of self-determination, up through the debate over Kosovo status it has primarily used a rhetoric based on territorial integrity and sovereignty. This led to critiques of hypocrisy in the cases of Russia’s support for separatists in Transnistria (Moldova), Nagorno-Karabakh (Azerbaijan) and pre-Kosovo independence South Ossetia and Abkhazia (Georgia). However, prior to Kosovo’s independence, despite the significant political, military, economic and logistical support it supplied to these separatists, Russia paid lip-service to the sovereignty of the pre-existing States and did not formally recognize any of the separatist regimes. After Kosovo, Russia altered how it described the legal issues concerning these situations and its diplomatic approach shifted as well.

This section will consider this period of change though the optic of Russian official statements in public fora such as speeches by the Russian President and Foreign Minister, statements made before the United Nations General Assembly and Security Council, and positions taken in proceedings before the ICJ. Such statements are attempts to frame justifications for various audiences, including the Russian public, the publics and political elites of the Russian Near Abroad, the United States, EU member States and key partners such as China. The use of legal language can also deter other States who are not directly involved from intervening.

I will also consider analyses by notable Russian legal academics, particularly those that are addressing a broader audience, such as the professional community of international lawyers around the world. Tarja Långström has argued that “scholarship of international law is still closely intertwined with the state” and that “‘official political thinking’ plays a far more dominant role in Russian international law scholarship, than, say, in the United States where academic lawyers perceive their role more as critics of government than its advocates.”<sup>48</sup> In the post-Stalin years, when the inevitability of war with capitalist States was no longer an ideological given, Soviet international law scholars could assume there was a single international legal system for all States.<sup>49</sup> Their arguments often turned on showing how the West violated the norms of that system. In the era of perestroika, the State-centric view began to be set aside for a new cosmopolitan humanism.<sup>50</sup> However, the Western-oriented policies that were adopted soon after the end of the USSR were then overtaken by a new assertiveness of Russian prerogatives and Russian conceptions of legality.<sup>51</sup> Anton Moiseienko wrote in September 2014 that “so far Russian academics and practitioners have largely remained in the shade, at least on the international arena, while Russian State officials felt free to interpret international law up to the point of redesigning it.”<sup>52</sup>

In order to assess Russia’s arguments, I will first turn to how Russia has answered (if at all) the questions of “what is a people?” and “does self-determination entail a right to secession?” in the cases of Kosovo and/or South Ossetia, and then move forward to current statements regarding Crimea. I will also consider two other related issues that have figured prominently in Russia’s rhetoric: the role of referenda and the norms of recognition of new States. Since Kosovo’s declaration of independence, Russia has further de-emphasized sovereignty and territorial integrity in talking about the countries of its Near Abroad. In Part C, which follows, I

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48. TARJA LÅNGSTRÖM, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW 169 (2003).

49. *Id.* at 167.

50. *Id.* at 108.

51. *Id.* at 120.

52. Anton Moiseienko, *Guest Post: What do Russian Lawyers Say about Crimea?*, OPINIO JURIS (Sept. 24, 2014), <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/>. I am a co-founder and editor of Opinio Juris.

will discuss how Russia has started a new argument based on what it perceives as righting historical injustices.

1. Are the Populations of Crimea and Eastern Ukraine Self-Determination Units?

In its written submission to the ICJ during the proceedings concerning the *Kosovo Advisory Opinion*, Russia provided a definition of people emphasizing that “[i]t is widely accepted that a population of a trust or mandated territory, of a non-self-governing territory, or an existing State, taken as a whole, undisputedly qualifies as a people entitled to self-determination.”<sup>53</sup> Without clearly defining what meaning “non-self-governing territory” would have outside of the colonial context, the point of emphasis was that the population of a State “taken as a whole” is clearly a self-determination unit. This statement was immediately followed by: “Whether, and under which conditions an ethnic or other group within an existing State may qualify as a people, is subject to extensive debates.”<sup>54</sup> This undercuts claims by sub-national groups that they are self-determination units.

In the oral proceedings Russia continued with this interpretation: “the words ‘the will of the people’ do not necessarily refer to the population of Kosovo only and could very well encompass the whole population of the country concerned, or else reflect the general notion of ‘popular will’ as a principle of democracy.”<sup>55</sup>

Considering Russia’s interpretation of the term “will of the people” in later years, it is interesting to note that here Russia argued that the term should refer to the will of all the citizens of Serbia (including Kosovo), not just those located in Kosovo.

Russia’s explanation in the oral proceedings also argued that whether or not a group is a “people” cannot be based on the fact of administrative autonomy within an existing State. The group claiming to be a self-determination unit needs to be a people based on its own characteristics, as opposed to the administrative structure of the pre-existing State:

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53. Written Statement of the Russian Federation, *Kosovo Advisory Opinion*, *supra* note 41, ¶ 81 (Apr. 16, 2009).

54. *Id.*

55. Oral Statement by Russian Federation, *Kosovo Advisory Opinion*, *supra* note 41, ¶ 16 (Dec. 8, 2009).



[T]he authors of the UDI and their supporters have spent considerable efforts to show that the population of Kosovo should be regarded as a people for the purposes of self-determination due to the particularities of the federal structure of the Socialist Federal Republic of Yugoslavia. The main points have been made about the scope of competences of Kosovo and the fact that it was directly represented at the federal level. But that is hardly relevant. What matters is the legal qualification of a given population as of a people. And that is something that is obviously lacking from the successive Constitutions of Socialist Yugoslavia.<sup>56</sup>

In sum, according to Russia, “[t]he population of Kosovo has never been recognized as a self-determination unit.”<sup>57</sup>

Regarding Crimea and eastern Ukraine, the Russian Federation government and legal elites closely tied with the government have simply stated that the population of Crimea is a “people,” without any further explanation. Anatoly Kapustin, the President of the Russian Association of International Law wrote in a June 2014 open letter to the members of the International Law Association that “the leaders of the USA and the EU opposed in rigid tones the expressed will of [the] Crimea people by means of a referendum and against realization by [the] Crimea people of the principle of self-determination of peoples.”<sup>58</sup>

In his presidential speech on Crimea, Putin underscored not the uniqueness of the Crimean people, but rather their ties to Russia: “Everything in Crimea speaks of our shared history and pride.”<sup>59</sup> He further emphasized that Crimea is similar to Russia by its multi-ethnicity: “Crimea is a unique blend of different peoples’ cultures and traditions. This makes it similar to Russia as a whole, where not a single ethnic group has been lost over the centuries.”<sup>60</sup>

Certain Russian international law academics did set out arguments for the population of Crimea being a self-determination unit. Anton Moiseienko wrote: “With regard to international law, several participants of

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56. *Id.*, ¶ 10.

57. *Id.*, ¶ 24.

58. Letter from Anatoly Kapustin, President of the Russian Association of International Law, to Executive Council, International Law Association (June 2014), available at <http://www.mgimo.ru/study/faculty/mp/kmp/news/n252984.phtml> [hereinafter Kapustin Letter].

59. Putin, Crimea Address, *supra* note 42.

60. *Id.*

the April 2014 conference grappled with the issue of whether Crimea's population is a 'nation' for the purposes of the right to self-determination. In their view, the predominantly Russian population of the peninsula ought to qualify as a separate 'nation.'<sup>61</sup> How this would be able to be squared with Russia's arguments against, for example, the people of Kosovo being a self-determination unit remains unclear.

Russian statements instead focus on the "coup" against Ukrainian President Yanukovich as frustrating the political will of the population of Crimea. Russian rhetoric also emphasizes that the people or peoples of Crimea have long historical ties to Russia. Both of these arguments imply that the population of Crimea is a separate self-determination unit from the citizens of Ukraine as a whole, but neither explains why that would be the case.

Kapustin argued in his open letter that the "Russian-speaking population of the southeastern regions of Ukraine demands the respect for their rights, traditions, culture and language."<sup>62</sup> While it is one thing to note that the population of southeastern Ukraine has a language (Russian) and culture that is different from the majority of Ukrainians, that does not make them a separate people. If this were true, then every ethnic or linguistic enclave in the world would be a different self-determination unit. Such an interpretation would neither conform to State practice in general nor with Russia's pointed arguments from the Kosovo proceedings about what makes a self-determination unit.

The question that needs to be answered is whether the Ukrainian citizens in eastern Ukraine are actually a separate people, a "self-determination unit" distinct from the rest of Ukraine's citizens. While Kapustin does not actually set out a rigorous argument in terms of whether the population of eastern Ukraine is a separate self-determination unit, he does make some impressionistic sketches of an argument, noting shared history and culture of eastern Ukraine and Russia, as well as Crimea's autonomous status:

**Ethnic Russians in Ukraine, particularly in the south-eastern regions, are not a minority. The territory that has been an independent state of Ukraine since 1991 previously was a part of the**

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61. Moiseienko, *supra* note 52.

62. Kapustin Letter, *supra* note 58 (boldface in original).

USSR, and even earlier—**for** centuries—**it was** a part of the Russian Empire. This is a historic **evidence** [sic].<sup>63</sup>

Keep in mind that Russia argued in the Kosovo proceedings that administrative facts, such as a status of autonomy, are irrelevant in determining whether or not an entity is a self-determination unit. Kapustin's argument seems to be less about making a technical claim that eastern Ukraine is a self-determination unit and more about fashioning a persuasive rhetoric based on shared history, as if this somehow lessens Ukraine's sovereign rights over the territory. The idea of shared culture and history between all of Ukraine (and especially eastern Ukraine) and Russia is a theme that has been consistently emphasized in Russian statements.<sup>64</sup>

What is surprising about this is *who* made the argument and *to whom* it was being made. Kapustin is one of Russia's most prominent living public international lawyers. His letter was to other public international lawyers around the globe. And yet his argument set aside what had been the more-or-less common approach to defining a self-determination unit (let alone Russia's approach) and simply painted in broad strokes. It is as if the Russian leadership realized that it would be on shaky ground if it tried to build anything like a classic argument based on self-determination; so, instead, it began a parallel construction based on history and cultural affinity. As I will explain in Part IV, this is a new form of argument that may assuage the concerns of certain audiences, particularly China, but may prove alarming to the leaders of countries in the Russian Near Abroad that have large ethnic Russian populations.

In any case, the idea of eastern Ukraine as part of Russian history, and especially how this may relate to its separation from Ukraine, is underlined by the return of the idea of "Novorossiya," described in *Foreign Policy* as the

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63. *Id.* (boldface in original).

64. *Id.* Concerning Ukraine's affinity with Russia more generally, he wrote:

**Many people in Ukraine speak Russian as a first language and consider Russia a closely related country rather than a foreign one.** Russian-speaking people in Ukraine **are not immigrants.** They were born there. This **is the land** of their parents and **ancestors.** Ukraine is their **Slavic** motherland. Russian culture and history **are their native.** There are **many family linked people in** Russia and Ukraine.

*Id.* (boldface in original).

rebirth of a forgotten geopolitical term.<sup>65</sup> Anne Applebaum wrote in *Slate* magazine on August 29, 2014:

In the past few days, Russian troops bearing the flag of a previously unknown country, Novorossiya, have marched across the border of southeastern Ukraine. The Russian Academy of Sciences recently announced it will publish a history of Novorossiya this autumn, presumably tracing its origins back to Catherine the Great. Various maps of Novorossiya are said to be circulating in Moscow. Some include Kharkov and Dnipropetrovsk, cities that are still hundreds of miles away from the fighting. Some place Novorossiya along the coast, so that it connects Russia to Crimea and eventually to Transnistria, the Russian-occupied province of Moldova.<sup>66</sup>

Applebaum is describing constructing a historical narrative in order to form a national identity, where perhaps none existed before. Legal rhetoric of who is or is not a “people” can play a part in constructing an identity.

However, although statements by Russian political leaders and international lawyers gave a general sense of the populations of Crimea and eastern Ukraine being different from the rest of Ukraine, they did not clearly state that either population met the formal criteria of being a self-determination unit. The closest that some of the analyses came to this was in implying that the ouster of Yanukovich frustrated the internal self-determination of the population of Crimea (and possibly eastern Ukraine), as he was politically popular in these parts of the country.<sup>67</sup>

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65. Christian Caryl, *Novorossiya is Back from the Dead*, FOREIGN POLICY (Apr. 17, 2014), <http://foreignpolicy.com/2014/04/17/novorossiya-is-back-from-the-dead/>.

66. Anne Applebaum, *War in Europe*, SLATE (Aug. 29, 2014), [http://www.slate.com/articles/news\\_and\\_politics/foreigners/2014/08/vladimir\\_putin\\_s\\_troops\\_have\\_invaded\\_ukraine\\_should\\_we\\_prepare\\_for\\_war\\_with.html](http://www.slate.com/articles/news_and_politics/foreigners/2014/08/vladimir_putin_s_troops_have_invaded_ukraine_should_we_prepare_for_war_with.html).

67. Moiseienko described Russian academic international lawyers at an April 2014 conference as arguing that “no internal self-determination was possible for the residents of Crimea in ‘pro-fascist’ Ukraine.” Moiseienko, *supra* note 52. The claim that Yanukovich’s leaving office was the result of an anti-democratic coup relates to another ongoing theme in Russian arguments concerning the Near Abroad: that the “color revolutions” of the 2000s were Western-sponsored covert operations meant to encircle Russia. Lavrov argued that the “color revolutions” were not examples of average citizens yearning for democracy:

The operations to change regimes in sovereign states and the foreign-orchestrated ‘color revolutions’ of different brands produce obvious damage to the international stability. The attempts to impose one’s own designs for internal reforms on other peoples, which don’t

But this places the cart before the horse by assuming these populations had separate rights of internal self-determination. Perhaps this argument was meant to be a stand-in for saying that Crimea and eastern Ukraine were non-self governing territories. But, given that Crimea actually had autonomous status with its own parliament and local political leadership, it is difficult to make this claim sound credible.

## 2. What is the Remedy?

Assuming, for the sake of argument, that the populations of Crimea and of eastern Ukraine are self-determination units, how have Russian lawyers and political leaders answered the question whether there was a right to secession?

One leading Russian treatise that addresses self-determination is *International Law—A Russian Introduction*, edited by Valerii Kuznetsov and Bakhtiiar Tuzmukhamedov of the Diplomatic Academy of the Russian Ministry of Foreign Affairs.<sup>68</sup> The English edition, with a forward by Foreign Minister Lavrov, was published in the wake of NATO's Kosovo campaign in 1999, but prior to Russia's 2008 war in Georgia. It emphasized the importance and broad nature of territorial integrity and inviolability. Territorial integrity "is the protection of the territory of a State against any infringement from without."<sup>69</sup> The importance of the protection of a

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take into account national characteristics, to 'export democracy', impact destructively international relations and multiplies the number of flashpoints on the world map.

See *West's Expansion to the East Ruins Historic Chance at Unification—Lavrov*, RUSSIA TODAY (May 23, 2014), <http://rt.com/news/160940-lavrov-security-west-expansion/>. For a longer analysis of the "color revolutions," see LINCOLN A. MITCHELL, *THE COLOR REVOLUTIONS* (2012).

68. It is actually a collective work, with about nineteen authors. VALERII I. KUZNETSOV & BAKHTIAR R. TUZMUKHAMEDOV, *INTERNATIONAL LAW—A RUSSIAN INTRODUCTION* xix (William E. Butler ed. & trans., 2009).

69. *Id.* at 140. In full, the quote reads (emphasis added):

*Territorial integrity* is the protection of the territory of a State against any infringement from without; no one should make [an] attempt against the territory of a State for the purposes of full or partial occupation thereof or penetrate into its land, underground, maritime, or airspace against the will of the authorities of the particular State.

The authors also explained that Russia's views of territorial inviolability went beyond just territorial integrity. While the unsanctioned intrusion of a foreign aircraft may not violate territorial integrity, it "would be a violation of territorial inviolability." *Id.* at 140. The authors go on to note, that: "[t]he transit, for example, of any means of transport

State's territory also plays a part in their analysis of the Friendly Relations Declaration, noting that "[a]ccording to the 1970 Declaration, the use of references to self-determination to undermine the unity of a State is inadmissible."<sup>70</sup> The authors go on to quote the second half of the Savings Clause and explain that the right of self-determination may lead "to a disruption of territorial integrity, but only in those States where the principle of equality and self-determination of peoples is not observed, the entire people are not represented in agencies of power, and individual ethno-territorial parts of the State are subject to discrimination."<sup>71</sup>

Although this does allow for the possibility of remedial secession, it sets the bar high. The treatise also struck a note of caution concerning the use of the rhetoric of self-determination:

One cannot fail to note that in recent years the threat of abusing this principle has arisen and become a reality. Political, nationalist, separatist, criminal, and other factors often are becoming the driving force for using the principle for mercenary purposes. For many States a real threat to territorial integrity has been created. Therefore, the realization of this principle should not lead to the destruction of existing States.<sup>72</sup>

The authors concluded by emphasizing the rights of States as well as the interests of other peoples geographically close to the people in question:

[T]he realization by a people of its right to self-determination must be effectuated only in accordance with the freely-expressed will of the respective State(s), taking into account the legal rights and interests of other peoples residing on this or neighboring territories, and also with due regard to other basic principles of contemporary international law.<sup>73</sup>

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across foreign territory without the authorization of authorities of the particular State is a violation of the inviolability not only of the boundaries, but also of the territory since it is being used in transit." *Id.* at 142. Russia will take a different view of territorial inviolability when it begins sending convoys into eastern Ukraine in support of the separatists.

70. *Id.* at 150.

71. *Id.*

72. *Id.* at 150–51.

73. *Id.* at 151.

This mode of analysis considers the goals of the people in question in light of the rights of the pre-existing State and (in a formulation that is not seen as often) in relation to the rights of other peoples in the region. Such complex balancing would make claims of a right to secede relatively difficult to maintain.

In the 1990s Russia was concerned about its own restive nationalities, Chechnya in particular. The Russian concern with secessionism was reflected in its domestic jurisprudence. According to James Summers, the Friendly Relations Declaration was

considered by the First and Second Russian Constitutional Courts in the *Tatarstan* (1993) and *Chechnya* (1995) cases. In *Tatarstan*, the Russian Constitutional Court, referring to the Declaration, considered that it emphasized, “the impermissibility of making reference to the principle of self-determination in order to jeopardize state and national unity.” In the *Chechnya* case the Russian state was assumed to be representative, despite a violent secessionist struggle that was taking place in Chechnya at the time. All this supports a relatively restrictive interpretation of the provision.<sup>74</sup>

In its written submission to the ICJ in the *Kosovo* proceedings, Russia interpreted the Safeguard Clause of the Friendly Relations Declaration in a similar manner as the treatise, stating that

[T]he Russian Federation is of the view that the primary purpose of the “safeguard clause” is to serve as a guarantee of territorial integrity of States. It is also true that the clause may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent State and the ethnic community concerned within the framework of the existing State.<sup>75</sup>

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74. James Summers, *Russia and Competing Spheres of Influence: The Case of Georgia, Abkhazia and South Ossetia*, in *INTERNATIONAL LAW IN A MULTIPOLAR WORLD* 109 (Matthew Happold ed., 2012) (citations omitted).

75. Written Statement of the Russian Federation, *supra* note 53, ¶ 88.

Once again, Russia minimized recourse to remedial secession, noting that “the very existence” of the people in question must be at issue.

In 2008, Russian Foreign Minister Lavrov called Kosovo’s potential separation from Serbia a “subversion of all the foundations of international law, . . . [a] subversion of those principles which, at huge effort, and at the cost of Europe’s pain, sacrifice and bloodletting have been earned and laid down as a basis of its existence.”<sup>76</sup> In Russia’s view, even action by the Security Council could not legalize secession against the wishes of the pre-existing State. This position of the Russian Federation, which it held since the Kosovo issue arose on the Security Council agenda, was based on general principles of international law—it was unacceptable for the Security Council to encourage or authorize any action that would dismember a sovereign State.<sup>77</sup>

But, less than a year later, when discussing Russia’s invasion of Georgia, Foreign Minister Lavrov shifted from an argument based on territorial integrity to a one based on the protection of co-nationals or co-ethnics:

We can’t understand why those who are talking about the responsibility to protect and about security of the person at every turn, forgot it when it came to the part of the former Soviet space where the authorities began to kill innocent people, appealing to sovereignty and territorial integrity. For us, the issue in South Ossetia was to protect our citizens directly on the borders of Russia, not in the Falkland Islands.<sup>78</sup>

This idea of protecting Russians, who were once all part of the USSR but are now separated from Russia by these new 1992 boundaries became a recurring theme in Russian public diplomacy.

In addition to the protection of ethnic Russians, in his March 18 speech concerning Crimea President Putin also considered his interpretation of historical wrongs. There was nothing about remedial secession directly. Rather, he spent the opening sections of his speech

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76. Paul Reynolds, *Legal Furore over Kosovo Recognition*, BBC (Feb. 16, 2008), <http://news.bbc.co.uk/2/hi/europe/7244538.stm>.

77. Oral Statement by Russian Federation, *supra* note 56, ¶ 30.

78. Sergey Lavrov, *Russian Foreign Policy and a New Quality of the Geopolitical Situation*, DIPLOMATIC YEARBOOK 2008 (Ministry of Foreign Affairs of the Russian Federation), available at [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/bc2150e49dad6a04c325752e0036e93f?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/bc2150e49dad6a04c325752e0036e93f?OpenDocument) [hereinafter Lavrov, YEARBOOK].



decrying the historical mistake of Khrushchev handing Crimea over to Ukraine “like a sack of potatoes.”<sup>79</sup>

While (Serbia’s) sovereignty and territorial integrity were the focus of Russian diplomacy concerning Kosovo, there was little talk about protecting Ukraine’s sovereignty. “It is also obvious that there is no legitimate executive authority in Ukraine now, nobody to talk to.”<sup>80</sup> And then, as Putin described the situation, “the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and their lives.”<sup>81</sup> Once again, this is an argument based on the protection of co-ethnics and on territorial irredentism. Borders and sovereignty can become rather wispy and insubstantial when you hear the call of people of the same ethnicity or who speak the same language as you do. Until recently many were not even Russian citizens, but they had recently become holders of Russian Federation passports through a process of “passportization” of ethnic Russians in the Near Abroad.<sup>82</sup>

### 3. The Role of Referenda

Perhaps due to the difficulty of building a persuasive argument for Crimea seceding *as a matter of right*, either under the consensus interpretation or under Russia’s previous interpretations of the law of self-determination, much of the rhetoric of Russian officials has revolved around the importance of referenda. The *process* of the referendum becomes a substitute for the *substantive law* of self-determination. Vladimir Putin said in August that: “We did not annex [Crimea], we did not seize it, we gave people the opportunity to express themselves and make a decision and we treated that decision with respect.”<sup>83</sup> In a September 2014 interview replying to critics of Russian policy, Foreign Minister Lavrov contrasted the situation in Crimea to that of Kosovo:

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79. Putin, Crimea Address, *supra* note 42.

80. *Id.*

81. *Id.*

82. Regarding passportization in Crimea, see Justin A. Evison, *Migs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination*, 220 MILITARY LAW REVIEW 90, 121 (2014).

83. Vladimir Putin, President of Russia, Comments at Seliger 2014 National Youth Forum (Aug. 29, 2014) (transcript available at <http://eng.news.kremlin.ru/news/22864>) [hereinafter Putin, August Comments].

Crimea saw a referendum and it could not be staged. A lot of journalists, including foreign ones, who were doing their job in the peninsula at that moment acknowledged this. . . .

In response to reproaches from our western partners we tell them that in Kosovo their policy was quite different. There was no referendum, as well as there had been no crisis before part of Serbia was declared independent. There were no threats to Kosovo's people.<sup>84</sup>

Russia maintained that one of the key differences between Kosovo and Crimea was the fact that a referendum was held in the latter in March 2014 (with no mention of issues of procedural flaws). Following suit, the leaders of the separatist-held areas in eastern Ukraine conducted their own referendum on May 11, 2014, largely modeled on the Crimean referendum. They announced a result in favor of unification with Russia. However, Russia was notably muted in its response, with the Kremlin's press office stating, "Moscow respects the will of the people in Donetsk and Luhansk and hopes that the practical realization of the outcome of the referendums will be carried out in a civilized manner."<sup>85</sup>

Referenda and plebiscites are emblematic of democracy and public participation. But they can also be used as a mask for territorial expansion. Wilhelm Grewe noted that Napoleonic France used the language of self-determination and the process of referenda "to disguise an unrestrained policy of expansion." The 1795 plebiscite in Austrian Netherlands (which became Belgium) was later called a "bitter comedy."<sup>86</sup>

Referenda in separatist enclaves are nothing new. Transnistria has repeatedly attempted to use plebiscites to claim independence from

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84. Lavrov Interview, *supra* note 44.

85. *Moscow in No Rush to Respond to Donetsk People's Republic Plea for Accession*, RUSSIA TODAY (May 12, 2014), <http://rt.com/op-edge/158528-russia-response-ukraine-donetsk/>. The motivation behind the restrained response is a topic of speculation. As will be discussed below, one possible reason is that forcibly separating these regions from Ukraine would not serve a useful foreign policy goal, while putting their political future in play—and thus the subject of ongoing mediation with Ukraine and the EU—would likely be more effective.

86. WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 421 (Michael Byers trans., 2000), *quoting* ROBERT REDSLOB, *HISTOIRE DES GRANDS PRINCIPLES DU DROIT DES GENS* 320 (1923).

Moldova and possible unification with Russia.<sup>87</sup> They have received no support from the international community (and, as of this writing, Russia has not endorsed Transnistria's unification with the Russian Federation). South Ossetia and Abkhazia also used referenda in their bids for independence; Russia did reference those referenda in its statement recognizing each as new States.<sup>88</sup>

International law does not confer any special status on referenda and, as a matter of practice, the international community has not given much weight to referenda that do not have the backing of the pre-existing State. Back in the interwar period, the Aaland Islands attempted to use a referendum to secede from Finland. The International Commission of Jurists that assessed the situation for the League of Nations found that there was no right of national groups to separate by the simple expression of a wish.<sup>89</sup>

Of particular relevance to Crimea and eastern Ukraine, the ability to choose secession by plebiscite must be granted by the State itself, in this case, Ukraine.<sup>90</sup> The role of referenda is not a question of international law, but of domestic law. Assuming there is no right of remedial secession, it is only the Ukrainian Constitution that could confer a right to Crimea to leave by referendum. Title X of the Ukrainian Constitution concerns the Autonomous Republic of Crimea; there is no mention of secession by act of regional parliament or by local referendum. Moreover, Article 73 of the Ukrainian Constitution requires any referendum concerning territorial

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87. I discuss the 2006 Transnistrian referendum in Chris Borgen, *Secession by Referendum?*, OPINIO JURIS (Sept. 17, 2006), <http://opiniojuris.org/2006/09/17/secession-by-referendum/>.

88. President Medvedev said: "Considering the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments . . ." Statement, President of Russia Dmitry Medvedev (Aug. 26, 2008), available at [http://archive.kremlin.ru/eng/text/speeches/2008/08/26/1543\\_type82912\\_205752.shtml](http://archive.kremlin.ru/eng/text/speeches/2008/08/26/1543_type82912_205752.shtml).

89. See the Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations Off. J. Spec. Supp. No. 3, at 5–10 (1920).

90. To take two examples from the European Union, consider the different receptions of the referendum in Scotland, which was sanctioned by London, and the referendum concerning Catalonia, which was not viewed as legal by Madrid.

change to be a referendum of all the citizens of the country.<sup>91</sup> Even the Constitution of the Autonomous Republic of Crimea defers to the Ukrainian Constitution. Article 1 of the Crimean Constitution states: “The Autonomous Republic of Crimea shall be an integral part of Ukraine and it shall solve, within the powers conferred upon it by the Constitution of Ukraine, any and all matters coming within its terms of reference.”<sup>92</sup>

Consequently, when Vladimir Putin declared in his speech of March 18 that “[a] referendum was held in Crimea on March 16 in full compliance with democratic procedures and international norms,”<sup>93</sup> he was wrong. More importantly, he had deployed a rhetorical style that would make a negotiated resolution, or an undoing of the annexation of Crimea, more difficult. By implying that under international law a referendum confers upon the population of Crimea a right to secede, then anything less than secession will be seen by some as bargaining away one’s rights. This makes a negotiated solution difficult and can contribute to the intractability of the conflict.<sup>94</sup> It may be a savvy strategy to cement one particular outcome—the absorption of Crimea in Russia—but it is dangerous in terms of later effects. Much in the same way as Putin said of Western leaders that they did not fully realize what they were doing with Kosovo, and that “the second end of the stick” may hit them, one may say the same here of Putin.

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91. Constitution of Ukraine, *supra* note 23, art. 73.

92. Constitution of the Autonomous Republic of Crimea, *supra* note 22, art. 1.

93. Putin, Crimea Address, *supra* note 42.

94. For an example of the rhetoric, consider this report from CNN:

[L]awmakers in Crimea voted in favor of leaving the country for Russia and putting it to a regional vote in 10 days.

It’s an act that drew widespread condemnation, with Ukrainian interim Prime Minister Arseniy Yatsenyuk calling the effort to hold such a referendum “an illegitimate decision.”

“Crimea was, is and will be an integral part of Ukraine,” he said.

Chelsea J. Carter, Laura Smith-Spark & Michael Holmes, *Ukraine PM: Crimea “Was, Is and Will Be an Integral Part of Ukraine,”* CNN (Mar. 7, 2014), [http://www.cnn.com/2014/03/06/world/europe/ukraine-russia-tensions/index.html?hpt=hp\\_t1](http://www.cnn.com/2014/03/06/world/europe/ukraine-russia-tensions/index.html?hpt=hp_t1).

#### 4. Recognition (But of What?)

Protracted arguments over secession typically transform into debates over recognition and non-recognition.<sup>95</sup> There are different types of recognition: the recognition of statehood, of a government, of a belligerency and of territorial change. Most secessionist conflicts become questions of recognition of statehood. In the case of Crimea, at issue is whether Crimea deserved to be recognized as a State, whether Russia's recognition of Crimea was illegal and the legal effects of Russia's recognition.

States generally view the decision to recognize or not recognize an entity as a State as a political decision, albeit one that exists within an international legal framework. That legal framework is in part the norms defining statehood. The standard view in international law is that a State must have (a) a permanent population, (b) a defined territory, (c) a government and (d) the capacity to enter into relations with other States.<sup>96</sup>

While entities that claim statehood often try to do a quick "check the box" summary of these criteria and maintain they have all the requirements of statehood, the actual assessment is meant to be more rigorous than a sound bite. At the time that Crimea declared independence, its territory was completely contested—this was not an issue of where the border between Crimea and Ukraine should be, but a dispute over the whole of Crimea. Moreover, it was very much in doubt whether Crimea had a functional government or the capacity to enter into international relations: Crimea as a supposedly independent entity would not exist but for Russian military intervention. And the control of Crimean territory seemed to be more under the command of the Russian President than the Crimean authorities.

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95. Daniel Thürer, *Self-Determination*, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364, 371 (Rudolf Bernhardt ed., 2000) ("Rather than formally recognizing a right of secession . . . international law only became subsequently relevant within the context of recognition.").

96. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 19. One example of a national interpretation is Section 201 of the *Restatement (Third) of Foreign Relations Law*: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

What does the law of recognition have to say when it is doubtful that Crimea even meets the basic requirements of statehood? Can Russia nonetheless legally recognize Crimea as a State? While recognition is a political act, it does not ignore legality. In the edition of James Brierly's treatise edited by Humphrey Waldock, the text states that

[i]t is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.<sup>97</sup>

Sir Hersch Lauterpacht wrote in his 1947 treatise *Recognition in International Law* that non-recognition “is the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong.”<sup>98</sup> The International Law Association's Committee of Recognition and Non-Recognition wrote in their 2014 Interim Report:

One possible reason for not recognizing an entity as a state is that it was formed through a territorial change from a use of force by one existing State against another. Some have argued that “[t]hird States . . . may be prevented from according recognition as long as the injured state does not waive its rights since such a unilateral action would infringe the rights of the latter State,” or that the lack of independence of an aspirant entity in relation to some other State is cause for non-recognition.<sup>99</sup>

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97. JAMES BRIERLY, *The Law of Nations* 138 (Sir Humphrey Waldock ed., 6th ed. 1963).

98. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 431 (1947).

99. International Law Association Committee on Recognition and Non-recognition, *Interim Report 3* (Mar. 2014) (Christopher Borgen & Aziz Tuffi Saliba, co-rapporteurs), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1032>; then follow Conference Report 2014 Washington hyperlink [hereinafter ILA Recognition Committee Interim Report], with internal citations to Karl Doehring, *Effectiveness*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 43, 47 (Rudolph Bernhardt ed., 1995) and Jochen A. Frowein, *Recognition*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 33 (Rudolph Bernhardt ed., 2000). As co-rapporteur I participated in the drafting of, and deliberation over, the quoted text.

However, State practice has not given clear evidence of a general obligation of non-recognition.<sup>100</sup> Nonetheless, there is evidence of States arguing that in particular circumstances recognition would be a violation of international law. Most commonly noted are instances where secessionist entities (a) have not met the criteria for statehood and/or (b) would be against the views of the pre-existing State.<sup>101</sup>

Based on such criteria, Russia's recognition of Crimea may have been a breach of international law. First, as mentioned above, Crimea probably did not meet the standards of statehood. Moreover, the facts that made Crimea's move towards independence possible were Russia's stealthy (and still unadmitted) intervention. Thus, the recognition would prolong another illegality—a violation of the UN Charter norm of non-intervention in domestic affairs. These were the types of argument that Russia itself made against the recognition of Kosovo. In early 2009, Russian Foreign Minister Lavrov had referred to the “the unilateral—contrary to

100. ILA Recognition Committee Interim Report, *supra* note 99, at 4–6.

101. *See id.* at 5–7. Concerning U.S. practice, see, e.g., *Russia Recognises Georgian Rebels*, BBC (Aug. 26, 2008), [http://news.bbc.co.uk/2/hi/in\\_depth/7582181.stm](http://news.bbc.co.uk/2/hi/in_depth/7582181.stm) (“Late on Monday [August 25, 2008], the U.S. State Department had warned that recognition of the two provinces’ independence would be ‘a violation of Georgian territorial integrity’ and ‘inconsistent with international law.’ In a statement, it said President George W Bush had called on Russia’s leadership to ‘meet its commitments and not recognise these separatist regions.’”). *Id.* *See also* Press Statement, Embassy of the United States to Georgia, Acting Deputy Spokesman, Mark C. Toner, Visit by Russian Officials to Abkhazia and South Ossetia (Apr. 30, 2011), *available at* [http://georgia.usembassy.gov/latest-news/official-statements-2011/russian\\_officials\\_abkhasia\\_s\\_ossetia.html](http://georgia.usembassy.gov/latest-news/official-statements-2011/russian_officials_abkhasia_s_ossetia.html) (stating “Russia’s recent efforts to conclude formal state-to-state agreements with the ‘de facto’ authorities in Abkhazia and South Ossetia during a visit this week to those separatist regions are inconsistent with the principle of territorial integrity and Georgia’s internationally recognized borders.”). *West Rejects Treaty Between Russia and Abkhazia*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 24, 2014), <http://www.rferl.org/content/russia-abkhazia-nato-european-union-united-states-/26708819.html>.

Certain European States are especially critical of secession and also argued that the recognition would be a violation of international law. For example, the Cypriot Foreign Minister warned against the EU “breaking international law” by recognizing Kosovo. Harry de Quetteville & Bruno Waterfield, *EU-US Showdown with Russia over Kosovo*, TELEGRAPH (London) (Dec. 11, 2007), <http://www.telegraph.co.uk/news/worldnews/1572229/EU-US-showdown-with-Russia-over-Kosovo.html>. And, on the day following Kosovo’s declaration of independence, Spain’s Foreign Minister Miguel Angel Moratinos said, “We will not recognise [Kosovo] because we consider . . . this does not respect international law.” Ingrid Melander, *Spain Says Won’t Recognize Kosovo Independence*, REUTERS (Feb. 18, 2008), <http://www.reuters.com/article/2008/02/18/idUSL18645227>.

international law—recognition of Kosovo’s independence” by certain States.<sup>102</sup>

In any case, regardless of whether they view such recognition as formally illegal, if other States perceive the recognition of an aspirant State as premature, then they will likely withhold recognition. South Ossetia and Abkhazia have each been recognized by four States: Russia, Venezuela, Nicaragua and Vanuatu (Nauru and Tuvalu have withdrawn previous statements of recognition). Other secessionist entities are in similar twilight zones. No UN member States have recognized Transnistria or Nagorno-Karabakh. Northern Cyprus is recognized only by Turkey. Such twilight regimes are unable to join the UN, or receive assistance from the World Bank, or the International Monetary Fund. They do not participate in the World Trade Organization. Each becomes the supplicant of whatever State is most directly supporting them—Turkey, in the case of Northern Cyprus, Armenia for Nagorno-Karabakh and Russia for South Ossetia, Abkhazia, and Transnistria. By contrast Kosovo, which Russia has portrayed as a prime example of illegal recognition, has been recognized—as of this writing—by 110 States.<sup>103</sup>

But, unlike these other cases, Crimea never even started the game of courting international recognition. Crimea began instead with a declaration of independence that would automatically take effect upon a referendum for independence. This was followed by a declaration of recognition by Russia right after the referendum. And just over a day later Russia and Crimea signed a treaty of merger. The recognition of Crimea by Russia was the legal fig leaf which allowed Russia to say that it did not annex Crimea from Ukraine, rather the Republic of Crimea exercised its sovereign powers in seeking a merge with Russia.<sup>104</sup>

At issue now is not the non-recognition of an aspirant State, but rather non-recognition of the territorial change of Russia. This alters the calculus

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102. Russian Minister of Foreign Affairs Sergey Lavrov, Remarks and Response to Questions at Press Conference on 2008 Foreign Policy Outcomes at MFA (Ministry of Foreign Affairs of the Russian Federation) (Jan. 16, 2009) (transcript *available at* [http://www.mid.ru/brp\\_4.nsf/0/AF09FEECD4A871A8C3257540005AECE3](http://www.mid.ru/brp_4.nsf/0/AF09FEECD4A871A8C3257540005AECE3)).

103. I undertake a longer comparison of the cases of Kosovo, South Ossetia, and Abkhazia, in Borgen, *Great Powers, Small States, and the Rhetoric of Self-Determination*, *supra* note 6.

104. Regarding mergers, see 1 LASSA OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW § 62 at 210 (“Absorption or merger”) (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM’S (NINTH)].



of power: there are many levers of power that one can use against an aspirant State such as South Ossetia. Denying an aspirant State the benefits of membership in the international community comes at little to no cost to existing States. However, in the case of non-recognition of territorial change, one would need to sanction the (already existing) State that has undertaken this territorial change. While sanctioning an aspirant State may be costly to the aspirant, sanctioning a powerful State may be costly to the norm-enforcing States.

Thus, by quickly recognizing and then signing a treaty of merger with Crimea, Russia accomplished three things: (a) it provided a veneer of legality to its annexation of part of Ukraine, dubbing it a “reunification”; (b) it avoided the costs of the non-recognition of Crimea as a State; and (c) it increased the cost of enforcement by making Russia itself the party against whom enforcement would need to be sought. At times the use of legal language is an attempt to give other States a credible excuse *not* to act, *not* to enforce legal norms when an argument can be made either that there was no violation or that the situation is too complex to warrant precipitous action.

Just as the experience of South Ossetia and Abkhazia provided a lesson to Russia in how to manage the situation in Crimea,<sup>105</sup> there are indications that the experience in Crimea may have provided a lesson for Russia regarding Abkhazia. After years of neglect there are indications that Russia may now be moving towards annexing Abkhazia through a series of treaties.<sup>106</sup>

### C. *A New Theory: Righting Historical Wrongs?*

What may be most striking is the new direction of Russia’s argumentation in the Crimean case. Russia only made passing reference to the language of self-determination and instead used a rhetoric of history and ethnicity that harkens back to pre-UN Charter norms. It remains to be seen whether

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105. See, e.g., Michael Cecire, *South Ossetia and Abkhazia Analysis*, sidebar to Patrick Jackson, *Ukraine Crisis: “Frozen Conflicts” and the Kremlin*, BBC (Sept. 9, 2014), <http://www.bbc.com/news/world-europe-29078541>? (stating “Russia’s recognition of Abkhazia and South Ossetia was in many ways self-defeating. One suspects the errors of this strategy at least partially motivated the Russian decision to opt for direct annexation of Crimea rather than ‘recognise’ yet another rump statelet.”).

106. See *West Rejects Treaty Between Russia and Abkhazia*, *supra* note 101.

Russia will continue to apply this line of reasoning in other cases in the Near Abroad or if this truly is a “special case” and an anomaly. This shift in rhetoric has not gone unnoticed by Russian international lawyers. According to Anton Moiseienko, at a recent conference Professor Stanislav Chernichenko “referred to the restoration of Russia’s ‘historic rights’ rather than to Crimea’s self-determination (although he did not discard the latter either). Indeed, he noted that Russia’s reliance on Kosovo’s precedent was inconsistent with Russia’s own position on Kosovo.”<sup>107</sup>

This shift to an argument based on historical grievance was apparent in the UN Press Office summary of Ambassador Churkin’s remarks in the General Assembly’s March 27th debate on the resolution against Russia’s annexation of Crimea:

Crimea had been reunified with the Russian Federation. “We call on everyone to respect that voluntary choice,” he said, adding that his Government could not refuse Crimeans their right to self-determination. Historical justice had been vindicated, he noted, recalling that for many years, Crimea had been part of the Russian Federation, sharing a common history, culture and people. An arbitrary decision in 1954 had transferred the region to the Ukrainian Republic, upsetting the natural state of affairs and cutting Crimea off from Russia.<sup>108</sup>

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107. Moiseienko, *supra* note 52. Chrenichenko is one of the co-authors of the article in note 33 that included a comparison taken from a series of conferences in 2001 of Russian, American and European views on self-determination.

108. General Assembly Adopts Resolution, *supra* note 2. In his March 18 speech, President Putin said:

In people’s hearts and minds, Crimea has always been an inseparable part of Russia. This firm conviction is based on truth and justice and was passed from generation to generation, over time, under any circumstances, despite all the dramatic changes our country went through during the entire 20th century.

Putin, Crimea Address, *supra* note 42. One month later, Putin also made some brief allusions to territorial irredentism regarding eastern Ukraine as well:

[O]n April 17, Russian President Vladimir Putin . . . suddenly began using the word [Novorossiia] during his annual televised question-and-answer sessions with the nation. “Under the tsars, this region was called Novorossiia,” he said. “These territories were passed on to Ukraine in the 1920s. Why the Soviet government did that, may God judge them.”

Caryl, *supra* note 65. *But see* Patricia Herlihy, Op-Ed., *What Vladimir Putin Chooses not to Know about Russian History*, LOS ANGELES TIMES (May 1, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-herlihy-russia-ukraine-odessa-20140501-story.html>.

What had once seemed definite—Ukraine’s border—was now open to question. Gone were the bright lines that Russia had said existed at the time of the Kosovo debates: that inasmuch as Serbia did not consent to an alteration of its territory and borders, there could be no legal recognition of Kosovar independence. Gone was the talk of obligations of non-recognition. Now we hear about returning things to their “natural state of affairs.” But natural to whom? Russian positivist arguments were replaced with notions of right based on history and ethnicity that verged on the mystical.<sup>109</sup>

In the face of these historical yearnings and increasingly quasi-mystical language is a tradition of black-letter law supporting territorial integrity. The basic principle of the non-use of force and the respect of territorial integrity is set out in Article 2(4) of the UN Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

After the dissolution of the USSR, the 1991 Agreement Establishing the Commonwealth of Independent States stated that Russia and other CIS member States would respect “the inviolability of existing borders within the Commonwealth.”<sup>110</sup> Within two years, the Charter of the Commonwealth of Independent States was completed and signed and stated that its members shall build their relation upon, among other things, “the recognition of existing borders and the rejection of unlawful territorial

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109. Putin said in his meeting with young historians in November 2014:

[F]or ethnic Russians (I mean that particular segment of our multi-ethnic peoples—ethnic, Orthodox Russians), Crimea has a kind of sacred significance. After all, it was in Crimea, in Hersonissos, that Prince Vladimir was baptised, subsequently baptising Rus. The first, initial font of Russia’s Baptism is there.

And what is Hersonissos? It is Sevastopol. You can see the connection between the spiritual source and state component, meaning the fight for Crimea overall and for Sevastopol, for Hersonissos. In essence, the Russian people have been fighting for many years to gain a firm foothold in its historical font. This is extremely important.

Vladimir Putin, President of Russia, Remarks Meeting with Young Academics and History Teachers (Nov. 5, 2014) (transcript *available at* <http://en.kremlin.ru/events/president/news/46951>).

110. Agreement Establishing the Commonwealth of Independent States art. 5, Dec. 8, 1991, 31 INTERNATIONAL LEGAL MATERIALS 143, 144 (1992); Summers, *supra* note 74, at 111.

annexations.”<sup>111</sup> In addition, upon Ukraine’s joining the non-proliferation treaty and transferring the nuclear weapons on its territory, Russia, the United States and the United Kingdom signed, along with Ukraine, a security agreement known as “the Budapest Memorandum,” which stated that the parties “reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE Final Act, to respect the Independence and Sovereignty and the existing borders of Ukraine.”<sup>112</sup>

These treaty commitments further underscore customary international law obligations to respect territorial integrity and the non-violability of borders. Also relevant is the more specific concept *uti possidetis juris*.<sup>113</sup> Originally used in the decolonization of Latin America in the nineteenth century, *uti possidetis* meant that borders of former colonies that achieved independence would mirror their previous colonial boundaries. This principle was subsequently applied in the decolonizations of the twentieth century, and, with greater controversy, to the newly independent States after the end of the Cold War. In this last case, the Badinter Commission found that the exercise of self-determination “must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”<sup>114</sup> This is reiterated in Opinion 3, which notes that *uti possidetis* has become recognized as a “general principle” of international law.<sup>115</sup> The Helsinki Final Act also provided for inviolability of borders and forbade the acquisition of another

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111. Charter of the Commonwealth of Independent States art. 3, Jan. 22, 1993, 1819 U.N.T.S. 58, reprinted in 34 INTERNATIONAL LEGAL MATERIALS 1279, 1283–84 (1995). See also Summers, *supra* note 74, at 111.

112. Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, reprinted in A/49/765, S/1994/1399, annex I (Dec. 19, 1994), available at [http://en.wikisource.org/wiki/Ukraine\\_Memorandum\\_on\\_Security\\_Assurances](http://en.wikisource.org/wiki/Ukraine_Memorandum_on_Security_Assurances).

113. See generally OPPENHEIM’S (NINTH), *supra* note 104, §235 at 669–70 (“*Uti possidetis*”). For a detailed discussion of the history of *uti possidetis*, see Evison, *supra* note 82, at 92–99.

114. Badinter Commission, Opinion No. 2, *supra* note 7.

115. Badinter Commission, Opinion No. 3, 31 INTERNATIONAL LEGAL MATERIALS 1499 (1992). The ICJ had also written in *Burkina Faso v. Mali* that *uti possidetis* “is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.” Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, ¶ 20 (Dec. 22).

State's territory through the threat or the actual use of "direct or indirect measures of force in contravention of international law."<sup>116</sup>

As the USSR dissolved in the closing days of 1991, it was replaced by fifteen new States, all former Union republics.<sup>117</sup> As new States they were entitled to territorial integrity. But, of course, there is the possibility of dispute over what should be the relevant borders. The principle of *uti possidetis* is of use in such situations by delimiting the relevant State borders as being those of the pre-existing colony or (based on the Badinter Commission's extension of the principle) pre-existing administrative boundary. Consequently, in addition to treaty-based obligations, Russia has the obligation under customary international law to respect the pre-existing boundaries of Ukraine. Due to *uti possidetis* (as well as the numerous treaties it had signed) this would include Crimea (and, of course, all of eastern Ukraine).

Russia's new emphasis on irredentist rhetoric does not reflect the actual substance of international law. One country cannot unravel another country's internationally recognized statehood with some vague references to a preferred historical "natural state of affairs." To the contrary, international legal doctrines of sovereignty, effective dates of boundaries and non-intervention deliberately do not give weight to such historical grievances because almost every country can point to some past wrong and some previous territorial distribution that they believe is more just. International law is not an invitation to troll through history and unilaterally change whatever territorial distribution you think is wrong.

Despite the weight of treaty law and customary international law, looking back on the 1990's President Putin explained, "Russia *seemed* to have recognized Crimea as part of Ukraine, but there were no negotiations

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116. Conference on Security and Co-operation in Europe Final Act princ. 3, 4, Aug. 1, 1975, 14 INTERNATIONAL LEGAL MATERIALS 1292, 1294 (1975), available at <http://www.osce.org/mc/39501>.

117. Under the Soviet Constitution, there were differing levels of administrative order. "Union republics" had the highest form of sovereignty within the USSR. When the USSR dissolved, the Union republics such as Russia, Moldova, Georgia, Azerbaijan and Ukraine became new sovereign States. "Autonomous republics" such as Abkhazia (in Georgia), North Ossetia and the Chechen-Ingush Republic (both in Russia), did not have that level of sovereignty; they were subsidiary entities. "Oblasts" or regions, included South Ossetia and Adjara (both in Georgia) and similarly had a lower level of rights than Union republics. See generally Summers, *supra* note 74, at 92.

to limit borders.”<sup>118</sup> Regardless as to whether or not there were protracted negotiations, Russia signed multiple treaties with obligations to respect those borders. As the ICJ wrote in its *Temple of Preah Vihear* decision: “In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, on the basis of a continuously available process, be called into question.”<sup>119</sup> U.S. Ambassador to the UN Samantha Power captured this sense when she stated: “We also stand with international law and norms and the fundamental principle that borders are not suggestions.”<sup>120</sup>

Given these obligations, it is of little surprise that Russia decided to adopt a completely different framing of the issues in its annexation of Crimea. This disjuncture with much international legal discourse does not mean that Russia’s recent arguments should be ignored:

This kind of ethnic mysticism is difficult for Westerners to understand. Complacently confident of the universality of Western liberal values, they regard such thinking as the product of a benighted age. [Canadian] Prime Minister Stephen Harper, for instance, referred to the Russian leader as a “throwback” to the era of 19th century imperialism following the Crimean annexation. U.S. Secretary of State John Kerry declared Putin to be on the “wrong side of history.” But arguably it is Harper and Kerry whose comprehension of history is out of whack. They, like other Western leaders, continue to assume the end of the Cold War ensure[s] the coming-to-be of a new world order that would eventually see liberal democracy and Western values encircle the globe.<sup>121</sup>

Russia’s irredentist rhetoric is popular both within Russia and in certain other separatist regions in its Near Abroad.<sup>122</sup> The West needs to remember that it is not the only one listening to what Russia is saying. The

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118. Putin, Crimea Address, *supra* note 42. (emphasis added).

119. *Temple of Preah Vihear (Cambodia v. Thai)*, 1962 I.C.J. 6, 34 (June 15). *See also* FRANCK, FAIRNESS, *supra* note 15, at 153.

120. Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, Remarks at a Security Council Meeting on Ukraine (Apr. 13, 2014) (transcript available at <http://usun.state.gov/briefing/statements/224764.htm>).

121. Robert Sibley, *The Expansionist Behind Putin*, OTTAWA CITIZEN (May 2, 2014), <http://ottawacitizen.com/news/the-expansionist-behind-putin>.

122. *See, e.g., Moldova’s Trans-Dniester Region Pleads to Join Russia*, BBC (Mar. 18, 2014), <http://www.bbc.com/news/world-europe-26627236>.

West may not even be the primary audience to whom Russia is speaking. And Russia's rhetoric can frame expectations about what is or is not acceptable under international law.

#### IV. STRATEGY: THE UKRAINE CRISIS AND THE USES OF LEGAL RHETORIC

Part II considered the current state of the law of self-determination. With the law as background, Part III examined how Russia uses rhetoric that claims to be based on international law in its public statements about Crimea. Comparing Russia's arguments in the six years between Kosovo and Crimea, it analyzed the shifts in Russia's arguments from case to case. Part IV will suggest possible reasons why Russia has changed its legal rhetoric.

##### *A. Explaining Russia's Use of Legal Argument*

Considering Russia's statements regarding Kosovo, South Ossetia and Abkhazia, and Crimea, a few themes are apparent in how Russia's rhetoric about self-determination and sovereignty has changed.

*Sovereignty becomes ephemeral.* The most significant change in Russia's shifting rhetoric is that State sovereignty loses its central place. This has two related aspects in Russia's arguments concerning self-determination and secession. The first is that sovereignty moved from being the core value that was protected by international law, to simply a fact that may or may not come into play in a particular circumstance.

*The "will of the people" is redefined.* The second aspect is Russia's pivot away from focusing on sovereign rights and towards a specific understanding of the phrase "will of the people." Russia reconceptualized "will of the people" from being the preferences of the total population of the pre-existing State (Serbia, in the case of the Kosovo crisis) to just that of the population of the separatist enclave. This new interpretation became evident in Russia's arguments justifying its intervention in Georgia in support of the separatists.

*A new emphasis on correcting historical wrongs.* In the Kosovo crisis, Russia's argument was an explanation why self-determination does not lead to a right of secession. It was an argument that had much support in terms of general State practice, but which did not sit easily with Russia's direct assistance to separatist militias in conflict with the governments of

Georgia, Moldova and Azerbaijan. Russia's rhetoric regarding Crimea is not about territorial integrity but territorial irredentism.

*Embracing the "special case" terminology.* After sharply criticizing the United States and certain European countries for repeatedly arguing that Kosovo does not set a precedent because it is a "special case,"<sup>123</sup> Russia adopted this rhetoric itself, regarding Crimea.<sup>124</sup>

These new arguments mark a break with Russia's earlier statements and State practice. From 1991–2008, Russia supported certain separatist movements in its Near Abroad but did not grant recognition to any of these entities. Since Kosovo's declaration, Russia has recognized three: South Ossetia, Abkhazia and Crimea. However, this is not merely a case of "turnabout is fair play." Russia continues to attempt to clothe its arguments in legalistic language, even though, according to Lauri Mälksoo,

the annexation of Crimea by the Russian Federation goes against pretty much everything that has been written in Russia over the last twenty years (plus during the Soviet period) on the legality of the use of military force and the right of peoples to self-determination in international law in non-colonial contexts.<sup>125</sup>

The Russian Ministry of Foreign affairs had previously argued against novel legal arguments:

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123. For example, Vladimir Putin said in his March 18th speech concerning Crimea: We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties. Is this a legal argument? The ruling of the International Court says nothing about this. This is not even double standards; this is amazing, primitive, blunt cynicism. One should not try so crudely to make everything suit their interests, calling the same thing white today and black tomorrow. According to this logic, we have to make sure every conflict leads to human losses.

Putin, Crimea Address, *supra* note 42.

124. Lavrov said in a September 2014 interview: "I believe that Crimea was a very special case, a unique case from all points of view. Historically, geopolitically, and patriotically, if you wish. The situation in the southeast of Ukraine is different. There is nothing like the unity we saw in Crimea." Lavrov Interview, *supra* note 44.

125. Lauri Mälksoo, *Crimea and (the Lack of) Continuity in Russian Approaches to International Law*, EJIL: TALK! (Mar. 28, 2014), <http://www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law/>.



[A]ttempts to represent violations of international law as its “creative” application are dangerous. It is unacceptable that military interventions and other forms of interference from without which undermine the foundations of international law based on the principle of sovereign equality of states, be carried out on the pretext of implementing the concept of “responsibility to protect.”<sup>126</sup>

So why use the language of international law? International law is the vocabulary of modern diplomacy; it is the *lingua franca*. International law defines the common terms of discourse. Some terms, such as a “place in the sun” or “sphere of influence” used to be part of the accepted vocabulary of international relations. No longer. Now States must make arguments based on common concepts such as “self-determination” and “territorial integrity.”

Additionally, beyond defining the language of diplomacy, international law sets the rules for which words make sense when used together and which do not. It is a grammar of international relations.<sup>127</sup> States do not talk about the “right” to commit “aggression” or the “remedy” of piracy. These sentences do not make sense when the words are used in conjunction with each other.

The long debate over self-determination and secession is about defining these terms (especially self-determination) and coming to a consensus as to their grammatical relationship. Russia went from saying that they were only weakly related (at least up through the Kosovo debates), to claiming that they are more strongly related and almost synonymous (South Ossetia) to all but discarding these terms and bringing in a whole new vocabulary when talking about Crimea.

Diplomatic arguments are a means to an end. They are part of a strategy. Russia’s ultimate goal in its Near Abroad seems to be to maintain the image, if not the reality, of great power status. Ulrich Speck of Carnegie Europe put it this way:

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126. Ministry of Foreign Affairs of the Russian Federation, *Concept of the Foreign Policy of the Russian Federation* ¶ 31(b) (Feb. 13, 2013), available at [http://www.mid.ru/brp\\_4.nsf/0/76389FEC168189ED44257B2E0039B16D](http://www.mid.ru/brp_4.nsf/0/76389FEC168189ED44257B2E0039B16D).

127. Martti Koskenniemi has described the grammar of international law as “the system of production of good legal arguments.” MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 568 (Cambridge Univ. Press 2005) (1989).

Seeing itself as a classical great power, Russia wants to maximize its sovereignty and freedom to act. It does not compare itself to countries like Japan, India, Germany or France, which have integrated into the global system by accepting U.S. leadership. Instead, Russia, even with very limited power resources (besides nuclear weapons) takes the United States as the benchmark of its position in the international system. Moscow does not seek deep engagement with international institutions and international rules, it looks at them merely as instruments to aggrandize its power. What counts is power in an archaic sense: the ability to force others to do what one wants. The strong can command, the weak must obey.<sup>128</sup>

Western analysts contend that Russia's ultimate goal is reflected in policies and intermediate goals such as:

- attempting to halt the “expansion” of Western institutions in eastern Europe;
- supporting construction of Moscow-led institutions;
- maintaining a certain level of control over the foreign policies of the former Soviet countries in its Near Abroad; and,
- acting as a guarantor for the millions of ethnic Russians who reside in former Soviet republics.

The language of international law, and especially of self-determination, can be instrumental in pursuing these intermediate goals. Consequently, strategic shifts in emphasis among these intermediate goals may drive the changing rhetoric in international legal arguments.

#### *B. International Legal Argument as an Instrument of Foreign Policy*

##### 1. Self-Determination Crises as a Means to Hamper an Accession to Western International Institutions

The 1990s and early 2000s were a time of international institution building and expansion, especially in Europe. The EU added new members from eastern Europe and NATO expanded eastward as well, admitting former

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128. Ulrich Speck, *Russia and Germany: The Antipodes in the International System*, EURASIA OUTLOOK (Nov. 25, 2014), <http://carnegie.ru/eurasiaoutlook/?fa=57311>.

members of the Warsaw Pact. There was optimistic talk in the West of European institutions one day reaching from the Atlantic to the Urals, if not the Pacific, with Russia as a member.

But there was little celebration among certain political leaders in Moscow. Anger and frustration over the expansion of NATO into eastern Europe became a key theme in Russian foreign policy. It was one that Putin reiterated in various statements and it was even part of his speech on Crimea:

[T]hey [Western countries] have lied to us many times, made decisions behind our backs, placed us before an accomplished fact. This happened with NATO's expansion to the East, as well as the deployment of military infrastructure at our borders. They kept telling us the same thing: "Well, this does not concern you." That's easy to say.<sup>129</sup>

As President Putin's chief spokesperson put it in November 2014, "[w]e have our red lines."<sup>130</sup>

European leaders maintained that accession to a treaty is an issue only between the acceding country and the current parties to the treaty. Consequently, as a matter of international law, Russia does not have veto power over another sovereign State joining a treaty regime to which Russia is not already a party.

While this is correct as a matter of law, as a matter of power projection Russia has the ability to affect the political situation within these States seeking admission to Western institutions. In the run-up to the European Union's summit in Vilnius in November 2013, when Ukraine was originally supposed to sign its association agreement with the EU, Russian politicians issued warnings that if Ukraine did not reject the EU treaty, Ukraine would run the risk of Russia supporting the partitioning of Ukraine to protect ethnic Russians residing there.<sup>131</sup> Civil unrest was not an issue at the time, only Ukraine agreeing to sign the association agreement.

Russia's leadership apparently thought that a self-determination dispute could slow Ukraine's integration into Western international institutions.

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129. Putin, Crimea Address, *supra* note 42.

130. *We have our Red Lines*, BBC (Nov. 19, 2014), <http://www.bbc.com/news/world-europe-30113821>.

131. *Russia Threatens to Back Ukraine Split*, TIMES (London) (Sept. 23, 2013), <http://www.thetimes.co.uk/tto/news/world/europe/article3876103.ece>.

The specter of a secessionist crisis, arising from attempts to further integrate with Western institutions, may have dampened the enthusiasm in the Ukrainian citizenry for such integration. Regardless as to whether secessionism would change Ukrainian public opinion, there was also the possibility that neither NATO nor the EU would have the political will to accept a country embroiled in a secessionist conflict. Although the association agreement was not the same as accession, there was clearly the concern on Russia's part (and the hope on the part of many Ukrainians) that association would be an important step on a road to accession. Both the EU treaty and the NATO Charter require unanimous approval for a State to join as a new member. A conflict in Ukraine could make it more difficult to garner the required votes should accession to either of these organizations ever become an issue.

It was also in Russia's interest to frame the conflict as a self-determination crisis within Ukraine as opposed to a Russia objecting to Ukraine's closer association with the EU and NATO. European institutions have evolved a practice for addressing self-determination disputes in countries in the former USSR, other than in Russia. This is an example of an intervention strategy called "norm setting," which "involves the setting of 'rules of the game' in which the standards by which the legitimacy of self-determination claims, and ultimately state recognition, are spelled out by the international community and thereafter enforced in some way."<sup>132</sup> Ideally, norm-setting is a multilateral activity defining the rules of the relevant community of states.<sup>133</sup>

However, Russia is according itself the central role as the norm definer and interpreter for its Near Abroad. Russia is (or was) a stakeholder in the mediations over Nagorno-Karabakh, Transnistria and Georgia. And it is now part of mediation over the future of eastern Ukraine. By being a mediator as well as having "boots on the ground" in most of these

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132. Eileen F. Babbitt, *Self-Determination as a Component of Conflict Intractability: Implications for Negotiation*, in NEGOTIATING SELF DETERMINATION 115, 118 (Hurst Hannum & Eileen F. Babbitt eds., 2006).

133. Eileen Babbitt wrote, "[t]he benefits of . . . normative interventions [such as UN General Assembly Resolution 1514 and the work of the Badinter Commission] are potentially very great. At best, they can create the standard against which self-determination claims, and States' responses to them, are evaluated by the international community." *Id.* at 118–19.

conflicts,<sup>134</sup> Russia is able to exert significant structural power in framing possible endgames, including issues related to the foreign policies of the pre-existing States.

This would not be possible to the same extent if Russia annexed the territory. There needs to be an ongoing conflict requiring mediation. Consequently, once Crimea was annexed the viability (and credibility) of any mediation regime decreased. As one commentator put it: “When the Kremlin gave in to the temptation to annex Crimea, it became necessary to replace it with another conflict, in the east. It is against the Kremlin’s interests to annex territory because an unresolved dispute gives it the opportunity to influence the country involved.”<sup>135</sup>

And thus we now have Russia’s call for a mediation process for eastern Ukraine, which was explicitly linked to broader security issues. President Putin said in August 2014:

There need to be negotiations of substance. [Foreign Minister] Lavrov was here, and the diplomats love this term. Negotiations need to work out in substance what rights the people in Donbass, Lugansk and the entire southeast of Ukraine will have. Their lawful rights and interests must be formulated and guaranteed within the framework of modern civilised rules. These are the issues that need to be discussed. From there I am sure it will be relatively easy to settle matters concerning the border, guaranteeing security and so on. But the problem is that they do not really want to talk.<sup>136</sup>

Thus, fostering self-determination conflicts in its Near Abroad, could be a gambit to slow integration of these countries into Western institutions. Framing these disputes as questions of self-determination led to a response that gave Russia a “seat at the table,” when previously it had none. If anything, Russia moved from being an outsider to a necessary party in regards to the future foreign relations of these countries. And, with the region, if not the world, as its audience, responding to these conflicts gave Russia the opportunity to use the persuasive rhetoric of self-determination

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134. DOV LYNCH, ENGAGING EURASIA’S SEPARATIST STATES: UNRESOLVED CONFLICTS AND DE FACTO STATES 21 (2004) (referring to Russia as a “mediator-cum-supporter-cum-combatant”).

135. Jackson, *supra* note 105.

136. Putin, August Comments, *supra* note 83.

to frame its perspective of what was and was not allowed under international law.

## 2. Legal Arguments as a Means to Support Hybrid Warfare

Russia's strategy in Crimea and eastern Ukraine has been an amalgamation of stealth invasion and quasi-legal rhetoric. The "stealth" part of the invasion was to maintain a fig-leaf of deniability and to make the uprising in eastern Ukraine seem homegrown, as opposed to Russian-led. This strategy of stealth interlocks with Russia's rhetoric, a quasi-legal/nationalist amalgamation that attempts to persuade those who can be persuaded and befuddle those who cannot. The rhetoric of self-determination cloaks a covert operation. Russia has used such "hybrid warfare" to foster intractable conflicts elsewhere in its Near Abroad.<sup>137</sup>

One commentator described the combination of covert and clandestine activities involved in hybrid warfare:

Leading this defense [of Russia's "ideological and physical sovereignty"] are the elite Spetsnaz and GRU intelligence officers that, as NYU Professor Mark Galeotti noted, "The GRU has also shown the rest of the world how Russia expects to fight its future wars: with a mix of stealth, deniability, subversion, and surgical violence." The confusing nature of low intensity conflicts and the pliability of truth mean that these soldiers and operatives are the ideal force for these conflicts. These are the men who are trained and equipped to navigate the shifting alliances, battle lines and publicly deniable spaces in furtherance of Russia's political objectives.<sup>138</sup>

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137. One recent press report states:

For Michael Cecire, the unorthodox and varied methods Russia has used in eastern Ukraine, described as "hybrid warfare," have been deployed before "across the Russian periphery."

"In Georgia, Moldova and even Azerbaijan, Moscow has helped cultivate conditions to foment vocal sentiments favouring separatism even in situations where the population is far from a consensus, as polls in Ukraine have shown," he says.

Jackson, *supra* note 105.

138. Andrew Bowen, *The Vanguard of Russia's New Foreign Policy*, THE INTERPRETER (Aug. 14, 2014), <http://www.interpretermag.com/the-vanguard-of-russias-new-foreign-policy/> (internal link/citation omitted).

Hybrid warfare is part of a broader strategy of “reflexive control,” which “convey[s] to a partner or an opponent specially prepared information to incline him to voluntarily make the predetermined decision desired by the initiator of the action.”<sup>139</sup> Part of this is a matter of deception and disinformation, but it goes well beyond that. The development of reflexive control theory in Soviet military literature dates back to the 1960s.<sup>140</sup> Some of its precursors are decades older. The Russian military established a school on deception in 1904, which was disbanded in 1929.<sup>141</sup> Today reflexive control is emphasized by instructors at Russia’s General Staff Academy and it is even the subject of a new journal founded in 2001.<sup>142</sup> As Timothy Thomas put it, “[i]n a war in which reflexive control is being employed, the side with the highest degree of reflex (the side best able to imitate the other side’s thoughts or predict its behavior) will have the best chances of winning.”<sup>143</sup>

Consider this like defining your opponent’s path without them even realizing it: you will know where they will end up, perhaps even before they do. International legal arguments can frame issues such that there is increasing predictability as to how other parties will react. As described above, European powers had a particular way of approaching self-determination crises. By framing a conflict in this manner, Russia could anticipate the likely responses (multilateral mediation, for example).

Moreover, defining the legal framework can play an important role in the actual substantive outcome. Martti Koskenniemi wrote that “[a]bstract standards (such as self-determination) justify recognition policies that create the reality they purport to reflect” such that sometimes it is a general adherence to a norm that does more to bring about statehood than effective control of territory.<sup>144</sup>

The use of international legal rhetoric in general, and framing an issue as a self-determination struggle in particular, can put other actors, such as the United States and the EU, on the wrong foot, making it difficult to

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139. Timothy Thomas, *Russia’s Reflexive Control Theory and the Military*, 17 JOURNAL OF SLAVIC MILITARY STUDIES 237, 237 (2004). My thanks to Major John J. Merriam of the U.S. Naval War College for introducing me to the concept of “reflexive control” and suggesting how it could be applicable to my analysis.

140. *Id.* at 238.

141. *Id.* at 239.

142. *Id.* at 237, 239.

143. *Id.* at 242.

144. KOSKENNIEMI, *supra* note 127, at 576.

marshal an effective response. According to a study produced for the National Defense Academy of Latvia, one aspect of the “new generation warfare” strategies used by Russia is “strongly adhering to legalism.”<sup>145</sup> The study explains:

Without discussing the legal merit of Russian actions, they were all backed by some form of legal act. Putin asked the Russian parliament for authorization to use military power in the Ukraine if necessary. Naturally, it was granted. Russia uses this fact together with the argument that it never used military power in Crimea as a sign of its peaceful intentions. Third, Russia denies the idea of it having militarily occupied Crimea, since the troops there were local self-defense forces. In addition, that although it is true that the number of troops stationed there increased, this is still within the limits of the bilateral agreement between Russia and Ukraine.<sup>146</sup>

The use of the rhetoric of self-determination can be used to befuddle and confuse treaty obligations and military strategy. The Latvian National Defense Academy paper notes that NATO member State obligations of collective self-defense are predicated on an “armed attack” on a member State. But legal rhetoric can be used to sow seeds of doubt as to whether there even was an armed attack:

Supposing a Crimea-like situation occurs in Narva, Estonia, for example. Can Article 5 be called on if there is no armed attack, but instead, what Russia would call a “democratic right of self-determination of the same nature as Kosovo and Crimea”? How should this issue be managed: militarily or politically?<sup>147</sup>

Besides making it difficult for opponents to organize a response, defining a conflict through the optic of self-determination can rally local populations. While in some cases (Abkhazia and Nagorno-Karabakh, for example), these conflicts had deep local roots that predated Russian involvement, the heating up and boiling over of Crimea seems to have

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145. Jānis Bērziņš, *Russia's New Generation Warfare in Ukraine: Implications for Latvian Defense Policy* 3, National Defence Academy of Latvia, Center for Security and Strategic Research Policy Paper No. 2 (Apr. 2014).

146. *Id.*

147. *Id.* at 8.



been because Russia was manning the stove. In either scenario, couching a conflict as a struggle for self-determination, including a right to secession, can bolster support within local populations.

Certain separatists undoubtedly have honest aspirations for statehood and a desire to defend what they understand to be their rights flowing from self-determination. But they were coaxed by a rhetoric that distorted what self-determination actually means. The language of self-determination thus assists hybrid warfare by rallying local forces, cloaking their actions in a language of rights and democracy, and providing cover for Russia to intervene both as a belligerent and as a mediator.

For a sense of the pairing of hybrid warfare with offers of mediation, consider this description of conflict in Georgia:

In order to be able to deny the invasion of Russian troops, it was first stated that some villages on the Georgian frontier had revolted, embittered by the tyranny of the Georgians. . . . Simultaneously, Abkhazia had risen in the extreme northwest, close to the Russian border.

It is a remarkable fact that the rebellions broke out precisely in those places . . . where large and constantly increasing masses of Russian troops had been quartered since November. . . .

The Russian Government stated it had endeavored, out of love of peace and benevolence, to help the threatened Georgian regime, and offered its mediation between the Georgians and the Armenians. It could not help it if Georgia contemptuously rejected this mediation.<sup>148</sup>

Pause for a moment to consider that this was *not* written about the Russian intervention of 2008. It was written about the Red Army's intervention in 1921.

*C. The Multiple Audiences of International Legal Arguments in the Ukraine Crisis*

One of the reasons the intractable conflicts of the Russian Near Abroad are complex is the multiple parties involved in each conflict. There are the secessionists, the pre-existing State, EU member States, the United States

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148. *Georgia: 1921*, DISSENT (Aug. 16, 2008), [http://www.dissentmagazine.org/online\\_articles/georgia-1921](http://www.dissentmagazine.org/online_articles/georgia-1921) (excerpting KARL KAUTSKY, *GEORGIA: A SOCIAL-DEMOCRATIC PEASANT REPUBLIC, IMPRESSIONS AND OBSERVATIONS* (1921)).

and, of course, Russia. There are also key Russian allies, such as Kazakhstan and China who are interested in either the conflict itself or, at least, how Russia acts in relation to the conflict. And there is the Russian public. Consequently, when Russia uses legal rhetoric, it is in part speaking to one or more international audiences, but the arguments also serve a purpose in the domestic political game.<sup>149</sup>

### 1. International Legal Argument and Domestic Politics: Addressing Russia's Citizens

Putin has noted repeatedly the domestic popularity of Russian policy vis-à-vis Crimea. In his August 2014 speech, after noting that the people of Crimea expressed their will in a referendum, Putin continued: "I feel we protected [the Crimeans]. And all this has truly greatly united us, including the opposition parties that are fairly critical of the authorities in power, critically assessing the actions of the authorities with regard to politics and the economy."<sup>150</sup>

This is part of a broader political dialogue in Russia that emphasizes Russian cultural exceptionalism and, really, a heroic place for Russia in world affairs.<sup>151</sup> National leaders always want to portray their country not only as strong, but also as just. Vladimir Putin is no different. As he pursued what he seemingly believed to be in Russia's strategic interest by annexing Crimea and fostering unrest in eastern Ukraine, he explained to the Russian citizenry why these are actions not only of a great power, but of a moral power. He contrasted this with what he described as the hypocrisy and cynicism of the West. Rather than oscillating away from

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149. Concerning two-level games, see generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INTERNATIONAL ORGANIZATION 427 (1988).

150. Putin, August Comments, *supra* 83.

151. Mark Galeotti and Andrew S. Bowen wrote:

Perhaps the world should have paid more attention when Putin made 2014 Russia's "Year of Culture." This was to be when the country celebrated its unique identity—a year of "emphasis on our cultural roots, patriotism, values, and ethics." It was nothing less than a recipe for a new Russian exceptionalism, one that Putin himself would craft and impose. Seen in those terms, the turmoil in Ukraine did not merely allow him to step in—it demanded it.

Mark Galeotti & Andrew S. Bowen, *Putin's Empire of the Mind*, FOREIGN POLICY (Apr. 21, 2014), <http://foreignpolicy.com/2014/04/21/putins-empire-of-the-mind/>.

international law, Putin claims that Russia is actually supporting the United Nations and international legality (as President Bush claimed when the United States invaded Iraq in 2003).

Sovereignty itself becomes redefined in such a way that aggrandizes the scope of Russian sovereignty while minimizing sovereignty claims of post-Soviet States. In effect, the sovereignty of the countries of the Near Abroad are subject to Russia's interests:

This ideological Putin is also a more forceful iteration that is increasingly comfortable using Russia's military to massage, intimidate and even outright invade its neighbors to re-assert its dominance and to defend Putin's conception of Russia's exceptionalism, and most importantly, its sovereignty.

Yet this sovereignty is not just of Russia's borders, it is also the Russian identity, free from the perversions and influence of the West. It is a celebration and a call to defend what makes Russia different and unique.<sup>152</sup>

This, in turn, reinforces a sense of difference in Russians' view of what is, or is not, part of international law. In this way, Russia's reconceptualization of international law is used not only to rally separatists in Ukraine, but also its own citizens in Russia.

## 2. Addressing the Near Abroad

Besides frustration with expanding Western institutions, another recurring theme is the concern over Russian populations who, in the wake of the dissolution of the USSR, are now ethnic minorities in newly independent States. The historian Timothy Garton Ash recounts the following:

In 1994, I was half asleep at a round table in St. Petersburg, Russia, when a short, thickset man with a rather ratlike face—apparently a sidekick of the city's mayor—suddenly piped up. Russia, he said, had voluntarily given up “huge territories” to the former republics of the Soviet Union, including areas “which historically have always belonged to Russia.” He

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152. Andrew Bowen, *The Vanguard of Russia's New Foreign Policy*, THE INTERPRETER (Aug. 14, 2014), <http://www.interpretermag.com/the-vanguard-of-russias-new-foreign-policy/>.

was thinking “not only about Crimea and northern Kazakhstan, but also for example about the Kaliningrad area.” Russia could not simply abandon to their fate those “25 million Russians” who now lived abroad. The world had to respect the interests of the Russian state “and of the Russian people as a great nation.”

The name of this irritating little man was—you guessed it—Vladimir V. Putin . . . .<sup>153</sup>

This rhetoric has been elevated from comments at conferences to diplomatic arguments in Security Council debates. Ambassador Anatoly Churkin explained to the Council that “[h]istorically, Russia was the guarantor of the security of the people of the Caucasus, and it will remain so.”<sup>154</sup> Foreign Minister Lavrov wrote in 2009 that “[w]e cannot regard people as an ‘adjunct’ of whoever’s territory that may arbitrarily, without their consent, pass under the sovereignty of a State in breach of the principles of international law . . . .”<sup>155</sup>

Such a sense of prerogatives implies the existence of a Russian sphere of influence in its Near Abroad.<sup>156</sup> Russia, however, argues that it is upholding popular democracy in the face of encroaching Western interests through expanding institutions, corporate power and fake “color revolutions.” In practice, the rhetoric of Russia as regional protector means that Russia jealously guards its own sovereign prerogatives, while simultaneously exercising a policy as if the States in its Near Abroad had “only a diminished sovereignty.”<sup>157</sup>

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153. Timothy Garton Ash, *Putin’s Deadly Doctrine: “Protecting” Russians in Ukraine Has Fatal Consequences*, NEW YORK TIMES (July 18, 2014), [http://mobile.nytimes.com/2014/07/20/opinion/sunday/protecting-russians-in-ukraine-has-deadly-consequences.html?referer=&\\_r=0](http://mobile.nytimes.com/2014/07/20/opinion/sunday/protecting-russians-in-ukraine-has-deadly-consequences.html?referer=&_r=0).

154. Summers, *supra* note 74, at 92 (quoting U.N. SCOR, 63rd Sess., 5952 mtg. at 5, U.N. Doc. S/PV.5952 (Aug. 2, 2008). *See also* U.N. SCOR, 63rd Sess., 5969th mtg. at 17, U.N. Doc. S/PV.5969 (Aug. 28, 2008).

155. Lavrov, YEARBOOK, *supra* note 78.

156. “Sphere of influence” is not part of the modern grammar of international law.

157. Stephen Blank, *American Grand Strategy and the Transcaucasian Region*, 163 WORLD AFFAIRS 65, 66 (2000). This in turn has led to States openly discussing leaving the CIS and also to the establishment of new subgroupings to counterbalance the CIS, such as GUAM, made up of Georgia, Ukraine, Azerbaijan, and Moldova.

Although this language may comfort Russian populations in the Near Abroad, it can be a source of anxiety for the leaders of those countries. The president of Kazakhstan said that:

If the rules set forth in the agreement are not followed, Kazakhstan has a right to withdraw from the Eurasian Economic Union. I have said this before and I am saying this again. Kazakhstan will not be part of organizations that pose a threat to our independence. Our independence is our dearest treasure, which our grandfathers fought for. First of all, we will never surrender it to someone, and secondly, we will do our best to protect it . . . .<sup>158</sup>

### 3. Addressing Allies: China

This sense of “diminished sovereignty” is an issue that was of particular concern to China. China is a crucial partner in Moscow’s hope to build the Shanghai Cooperation Organization (SCO) into a Eurasian counterweight to the “Atlanticist” power of Western Europe and the United States.<sup>159</sup> Consequently, Russia does not want to take positions that would drive a wedge into its relationship China. This makes the rhetoric of self-determination a delicate issue.

China has no interest in supporting secessionism. To the contrary, part of the SCO’s mission statement is actually to counter separatism.<sup>160</sup> China has even provided “political cover” for smaller States in the region to reaffirm the law of territorial integrity in the face of Russian calls for support for South Ossetian and Abkhazian independence.<sup>161</sup>

This may further explain why in the Crimean case Russia shifted away from the language of self-determination and secession and towards a history-based argument emphasizing deep local linkages, calling Crimea “a

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158. Assel Satubaldina, *Kazakhstan May Leave EEU if its Interests are Infringed: Nazarbayev*, TENGRI NEWS (Aug. 27, 2014), [http://en.tengrinews.kz/politics\\_sub/Kazakhstan-may-leave-EEU-if-its-interests-are-infringed-Nazarbayev-255722/](http://en.tengrinews.kz/politics_sub/Kazakhstan-may-leave-EEU-if-its-interests-are-infringed-Nazarbayev-255722/).

159. Regarding Russia’s relationships to its partners in the Shanghai Cooperation organization, see ALEXANDER COOLEY, *GREAT GAMES, LOCAL RULES* 74–96 (2012).

160. *Id.* at 83.

161. *Id.* See also Rima Tkatova, *Post-Soviet States and International Law in a Multipolar World*, in *INTERNATIONAL LAW IN A MULTIPOLAR WORLD*, *supra* note 74, at 256 (stating the SCO was cautious on the recognition of South Ossetia, “without condemning or approving the actions of Russia.”).

very special case.”<sup>162</sup> Such historically-contingent arguments could be an attempt to assuage China’s concerns about separatism and to signal that Russia’s rhetoric should not affect China’s interests. Putin specifically mentioned China in his speech on Crimea:

At the same time, we are grateful to all those who understood our actions in Crimea; we are grateful to the people of China, whose leaders have always considered the situation in Ukraine and Crimea taking into account the full historical and political context, and greatly appreciate India’s reserve and objectivity.<sup>163</sup>

This may have been an effective rhetorical balm regarding Crimea. However, a return to the rhetoric of secession and self-determination regarding eastern Ukraine may worry China’s leaders:

Chinese media commentary has become more cautious since Putin moved on from Crimea to stirring the pot in eastern Ukraine. China’s nationalist paper *Global Times*, which last month spoke of “Crimea’s return to Russia,” now warns: “Ukraine’s eastern region is different from the Crimea. Secession of the region from Ukraine strikes a direct blow to territorial integrity guaranteed by international law.”<sup>164</sup>

Moreover, Russia’s “very special case” rhetoric may suffer from the same “second end of the stick” problem for which it criticized the West’s “special case” arguments concerning Kosovo. Once arguments are made in diplomatic fora, they can take on a life of their own. Other groups, movements and States may adopt such rhetoric and use it for their own purposes, much as Russia did with the West’s justifications for Kosovo. As Grewe noted, the arguments of great powers have a way of shaping the effective international law of the time. This is one reason why Russia’s rhetoric concerning international law is important. If arguments that decrease the threshold for intervention and military force go unanswered, then other States and non-State actors may start to act accordingly.

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162. Lavrov Interview, *supra* note 44.

163. Putin, Crimea Address, *supra* note 42.

164. Ash, Protecting Russians, *supra* note 153.

#### 4. The “Farther Away”

With the traditional focus on how legal rhetoric affects those in Russia’s Near Abroad, we perhaps forget that it can also play a role in addressing those States that either are not geographically near the conflict or do not have a particular political interest in relation to it. Rather than the “Near Abroad,” consider them the “Farther Away.”

The rhetoric of international law can possibly persuade some States, or public opinion in foreign countries that a particular party is simply defending its rights. For example: “why shouldn’t the people of Crimea have a chance to start their own State if the Kosovars did?” Garton Ash observes that “[i]t turns out that Vladimir Putin has more admirers around the world than you might expect for someone using a neo-Soviet combination of violence and the big lie to dismember a neighbouring sovereign state.”<sup>165</sup>

At the very least, using legalistic rhetoric can muddy the waters, even when the legal argument is doctrinally weak. As noted above, the use of legal rhetoric can give policymakers in other States an excuse not to become involved.

### V. CONCLUSION

After all this talk of misuse of legal argument, obfuscation, frustration and covert operations, is international law no more than an excuse, a cloak of respectability covering up the ugly truths of power? Some say that all this talk of laws and rights is worse than irrelevant: it obscures the real issues. The American political scientist John Mearsheimer wrote:

One also hears the claim that Ukraine has the right to determine whom it wants to ally with and the Russians have no right to prevent Kiev from joining the West. This is a dangerous way for Ukraine to think about its foreign policy choices. The sad truth is that might often makes right when great-power politics are at play. Abstract rights such as self-determination are largely meaningless when powerful states get into brawls with weaker states. Did Cuba have the right to form a military

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165. Timothy Garton Ash, *Putin has More Admirers than the West Might Think*, THE GUARDIAN (Apr. 16, 2014), <http://www.theguardian.com/commentisfree/2014/apr/17/vladimir-putin-admirers-india-china-ukraine>.

alliance with the Soviet Union during the Cold War? The United States certainly did not think so, and the Russians think the same way about Ukraine joining the West. It is in Ukraine's interest to understand these facts of life and tread carefully when dealing with its more powerful neighbor.<sup>166</sup>

It *is* important to be clearheaded about how States can project power and the likely efficacy of legal arguments, as well as other strategies, in any given situation. But this would mean considering that Russia may be effectively using legal arguments to frame the issues, anticipating likely responses, fostering support (or at least frustrate opposition), rallying its domestic electorate and placing itself at the bargaining table. Russia uses legal rhetoric as a component of its strategies in a variety of related games such as the game to slow or prevent the expansion of Western institutions, the game to maintain great power status in the former Soviet space, the game to support Russian ethnic populations in its Near Abroad, the game to build cooperative relations with China and the game to shore-up domestic support in the midst of economic troubles.

To simply ignore legal argument is to cede a strategy, to concede multiple positions.

If the EU and the United States do not want another South Ossetia or Transnistria in eastern Ukraine, then they will have to actively engage Russia's arguments over what is "right." Consider this statement by Putin from late August 2014, explaining why the events in eastern Ukraine confirm that Russia was correct in its actions in Crimea:

Now, I think, it is clear to everyone—when we look at the events in Donbass, Lugansk and Odessa—it is now clear to everyone what would have happened to Crimea, if we had not taken corresponding measures to ensure that people could freely express their will. We did not annex it, we did not seize it, we gave people the opportunity to express themselves and make a decision and we treated that decision with respect.

I feel we protected them.<sup>167</sup>

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166. John J. Mearsheimer, *Why the Ukraine Crisis is the West's Fault*, FOREIGN AFFAIRS (Sept./Oct. 2014), <https://www.foreignaffairs.com/articles/russia-fsu/2014-08-18/why-ukraine-crisis-west-s-fault>.

167. Putin, August Comments, *supra* note 83.



Russia's use of "law talk" is especially striking because it uses quasi-legal rhetoric so often, even when it has rather weak arguments. While Russia deploys legal language, increasingly they are not the concepts of international law as generally accepted. Rather, Russia is building a revisionist conception of international law to serve its foreign policy needs.

While the law of self-determination has evolved to foster rights and political participation within multi-ethnic States, Russia (although also supporting the idea of multi-ethnic States) has returned to the rhetoric of ethnic identity and territorial irredentism. *Because* it is not the state of the law, as a matter of strategy the West should not ignore Russia's rhetoric.

The use of terms like "self-determination," "right" and even "international law" in speeches by presidents, foreign ministers and diplomats may be shunted aside by some as "mere" political speech, much as certain international relations theorists set aside mere "law talk." But both of these moves would be short-sighted. The pluralist nature of international law means that in most cases there is no final interpreter of what law is. Although the rhetoric of international law is not always in synchrony with the *current* state of international law, it can still affect the *future* shape of the law. More so than the ICJ, the most important interpreters of international law are the States themselves. Their interpretations are in part based on their short-term interests, but also on their long-term concerns.

In the wake of Kosovo's declaration of independence, Russia shifted from emphasizing sovereignty and territorial integrity in relation to self-determination, to a rhetoric based on the will of the people in secessionist enclaves. It was a rhetorical shift that may have been to support one or more strategies. Russia's rhetoric regarding its intervention in Georgia in 2008 in support of south Ossetia and Abkhazia could be interpreted as an example of tit-for-tat gamesmanship, warning the United States to refrain from further actions that Russia viewed as unilateral. It could also have been a message to ethnic Russians in the Near Abroad, as well as the governments of those countries. That message would have been that Russian ethnics in these newly independent States have a right to self-determination—meaning, possibly, secession—if the government of those States did not respond to their interests. And, moreover, Moscow had a right to protect the interests of its co-ethnics. These arguments set off hopes and aspirations in Russian ethnic enclaves in Transnistria and elsewhere in the Near Abroad. The legal rhetoric over South Ossetia played

a part not only in the game over Georgian territorial integrity, but it also changed strategies in other games across the Near Abroad.

Then came Crimea. While Russia had made a shift in its argument between Kosovo and South Ossetia, it attempted a different legal theory in Crimea. Although Russia continued to note the importance of self-determination for the people of Crimea, it emphasized the importance of righting the historical wrong of Crimea's transfer by Nikita Khrushchev from Russia to Ukraine. The arguments served multiple purposes. The self-determination issue played a part in muddying the waters and gave some countries an excuse to just stay out of the whole situation. The avoidance of the rhetoric of secessionism also responded to the concerns of China, a country that Russia could not afford to offend. However, this emphasis of historical rights also invigorated Russian enclaves in the Near Abroad in the hopes that they might be the next Crimea.

In each of these instances, Russia's rhetoric was framed by its strategic interests, as well as by what could realistically be said within the framework of international law. Its use of legal rhetoric, in turn, shaped the expectations of States and their populations. Russia's legalistic rhetoric affected international relations.

International law has become a consensual vocabulary and grammar for how States talk about international relations. How States talk about terms like "self-determination" and "territorial integrity" can affect the legal substance of what "self-determination" and "territorial integrity" are. Legal rhetoric can frame policy options and policy outcomes.

But legal rhetoric can also destabilize international law. Even if Russia does not take one more meter of another country's territory, the effects of its legal arguments can be serious.

The words and phrases of great powers resonate. At times, they channel the evolution of international law. Others may adopt similar modes of argumentation, similar interpretations, and similar practices. Hopefully, Russia's revisionist justifications concerning Crimea will not have this effect.