
INTERNATIONAL LAW STUDIES

— *Published Since 1895* —

U.S. NAVAL WAR COLLEGE



Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind

Robin Geiß

91 INT'L L. STUD. 425 (2015)

Volume 91

2015

Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind

*Robin Geiß**

CONTENTS

I. Introduction	426
II. Crimea’s Status after Ukrainian Independence in 1991	428
III. Attempts at Status Alteration in the Aftermath of the Ukrainian Revolution of 2014.....	429
IV. Crimea’s Status under International Law.....	431
A. Russia’s Unlawful Intervention	431
B. The Inseparability of the Link between Russia’s Unlawful Use of Force and the Purported Territorial Status Alteration of Crimea..	432
C. Remedial Secession or Restoration of Historic Rights?	437
1. Crimea’s “Secession” as a Case of Remedial Secession?	438
2. The Takeover of Crimea as a Restoration of Russia’s “Historic Rights”?.....	441
D. Crimea’s Current Status as an Occupied Territory	443
V. Legal Consequences and Legal Options for the Way Ahead	447

* Professor of International Law and Security, University of Glasgow.

The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the Naval War College.

I. INTRODUCTION

With the success and future of the “Minsk II” Agreement¹ still uncertain, world attention is currently centered on the armed conflict in southeastern Ukraine. This conflict has brought about the most serious post-Cold War security crisis between the Russian Federation and the West to date. In contrast, the situation of Crimea rarely makes headlines these days.² But notwithstanding current security priorities in eastern Ukraine, Crimea is, of course, an integral part of the current crisis and a key element and decisive bargaining chip in attempts to broker a peace for Ukraine.

From the perspective of international law, accepting Russia’s “absorption” of Crimea is wholly inconceivable. It would severely, perhaps even fatally, undermine Article 2(4) of the UN Charter and the international legal security architecture as a whole. And it would thereby set a dangerous precedent, especially if President Putin should continue to turn his Soviet Union (USSR) nostalgia into action. However, from a political perspective and if peace in Ukraine is to remain a realistic prospect, *somehow* accepting Crimea’s incorporation into the Russian Federation, albeit highly undesirable, to some observers seems almost inevitable.³ According to them it may be the price to pay for unheeding NATO enlargement and eastward European Union (EU) expansion in disregard of realpolitik considerations.⁴ It appears that at least tacitly—and in some cases explicitly—some Western

1. The February 11, 2015 agreement between the leaders of Ukraine, Russia, France and Germany was also signed by pro-Russian separatists. For an English translation, see *Minsk Agreement on Ukraine Crisis: Text in Full*, THE TELEGRAPH (Feb. 12, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html>.

2. See Tom Cohen, *Is Crimea Gone? Annexation No Longer the Focus of Ukraine Crisis*, CNN (Apr. 1, 2014), <http://edition.cnn.com/2014/03/31/politics/crimea-explainer/>.

3. See remarks by Dianne Feinstein in Brett Logiurato, *Putin has Already Successfully Moved the Goalposts on Crimea*, BUSINESS INSIDER (Mar. 31, 2014), <http://www.businessinsider.com/crimea-putin-won-in-ukraine-obama-2014-3?IR=T>. See also former Secretary of Defense Robert Gates in John D. Stuster, *Gates: Crimea is Already Gone*, FOREIGN POLICY (Mar. 9, 2014), <http://foreignpolicy.com/2014/03/09/gates-crimea-is-already-gone-updated/> (“I do not think that Crimea will slip out of Russia’s hand”); Elmar Brok, *Die Krim Geht Nicht Zurück*, ZEIT ONLINE (Mar. 26, 2014), <http://www.zeit.de/politik/ausland/2014-03/krim-ukraine-brok-jazenjuk>.

4. John J. Mearsheimer, *Why the Ukraine Crisis is the West’s Fault*, FOREIGN AFFAIRS, Sept.–Oct. 2014, at 77, available at <http://www.foreignaffairs.com/articles/141769/john-j-mearsheimer/why-the-ukraine-crisis-is-the-west-s-fault>.

politicians have accepted as much.⁵ What, if any, are the (legal) options to achieving this balancing act between the legally inconceivable and politically possibly inevitable acceptance of Crimea's altered status? Or is it all a question of endurance and determinedness and confidence that time will tell? Chancellor Angela Merkel in her speech at the Munich Security Conference in February 2015 unwaveringly said, "Europe's borders are and will remain unalterable."⁶ Similarly, the EU's Foreign Affairs Council, meeting on November 17–18, 2014, reiterated that the EU condemns and will not recognize the illegal annexation of Crimea and Sevastopol.⁷ And, indeed, State practice since 1945 shows that in the long run unlawful annexations are difficult to uphold and that a collective strategy of non-recognition is likely to pay off over time. As is well-known, Albania, Austria, the Baltic States, Czechoslovakia and Ethiopia were all resurrected as the same States that had existed prior to their annexation, which, ergo, had no enduring legal nor status-altering effect.⁸ The mills of international law grind slowly but they do grind.

For the time being the international community and Western States in particular are committed to resisting any legal status alteration of Crimea with the same stamina and tenacity with which they resisted such alterations in relation to the Baltic States during Soviet occupation. But there is at least one marked difference between the situation of the Baltic States and that of Crimea, which, in addition to Russia's uncompromising strategic interest in the peninsula, may lower the long-term prospects of a coordinated non-recognition strategy. Unlike in the case of the Baltic States—and notwithstanding the flaws of the referendum held on March 16, 2014—at least for the time being the majority of the Crimean population appears genuinely to support Crimea's "accession" to the Russian Federation.

Against this backdrop, the present analysis considers the attempts to alter Crimea's territorial status in March 2014 and analyzes its resultant cur-

5. See Cohen, *supra* note 2.

6. Federal Chancellor Angela Merkel, Speech on the Occasion of the 51st Munich Security Conference, (Feb. 7, 2015) (transcript available at http://www.bundesregierung.de/Content/EN/Reden/2015/2015-02-07-merkel-sicherheitskonferenz_en.html).

7. Council Regulation 1351/2014, Amending Regulation (EU) No 692/2014 Concerning Restrictive Measures in Response to the Illegal Annexation of Crimea and Sevastopol, 2014 O.J. (L 365) 46 (EU).

8. JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW 140 (2d ed. 2007).

rent status under international law, with a view to the possible future course of events.

II. CRIMEA'S STATUS AFTER UKRAINIAN INDEPENDENCE IN 1991

The Crimea crisis of 2014 was only the latest escalation of intermittent post-Soviet tensions over the political status of Crimea and control of the Black Sea Fleet stationed at Sevastopol. In 1954 the Crimean oblast, until then part of the Russian Soviet Federative Socialist Republic, was transferred and incorporated into the Ukrainian Soviet Socialist Republic by decree.⁹ In 1992, post Ukrainian independence, the Supreme Soviet of the Russian Federation tried to annul this decree.¹⁰ Moreover, the Supreme Soviet of the Russian Federation cited "Russian federal status for the city of Sevastopol within the administrative and territorial borders of the city district as of December 1991" and entrusted the Russian government with the task of working out a State program to ensure the status of Sevastopol.¹¹ Before the UN Security Council, the Ukrainian representative described the decree as "a time bomb."¹² In a presidential statement, the Security Council recalled that "in the Treaty between the Russian Federation and Ukraine, signed at Kiev on 19 November 1990, the High Contracting Parties committed themselves to respect each other's territorial integrity within their currently existing frontiers" and that "[t]he Decree of the Supreme Soviet of the Russian Federation is incompatible with this commitment as well as with the purposes and principles of the Charter, and without effect."¹³ Only after lengthy negotiations was a compromise confirming the status quo finally reached in the Treaty on Friendship, Cooperation and Partnership

9. Angelika Nußberger, *Russia*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 43 (Oct. 2009).

10. Serge Schmemmann, *Russia Votes to Void Cession of Crimea to Ukraine*, NEW YORK TIMES, May 22, 1992, at A8, available at <http://www.nytimes.com/1992/05/22/world/russia-votes-to-void-cession-of-crimea-to-ukraine.html>.

11. Security Council, Letter dated July 16, 1993 from the Permanent Representative of Ukraine of the United Nations Addressed to the President of the Security Council, U.N. Doc. S/26100 (July 20, 1993).

12. U.N. SCOR, 3256th mtg. at 10, U.N. Doc. S/PV.3256 (July 20, 1993).

13. Security Council, Note by the President of the Security Council, U.N. Doc. S/26118 (July 20, 1993).

between Ukraine and the Russian Federation of May 31, 1997.¹⁴ Under Article 2, the two neighbors agreed to “respect each other’s territorial integrity, and confirm the inviolability of the borders existing between them.”¹⁵

III. ATTEMPTS AT STATUS ALTERATION IN THE AFTERMATH OF THE UKRAINIAN REVOLUTION OF 2014

In the aftermath of the 2014 Ukrainian revolution Russian and Crimean authorities quickly seized control over Crimea and installed the pro-Russian Aksyonov government. In a puzzlingly rapid and dense sequence of events, the Supreme National Council of the Autonomous Republic of Crimea declared on March 11 that the Republic of Crimea would become independent in the case of a “Yes” vote in a subsequent referendum on independence;¹⁶ such a result was achieved on March 16.¹⁷ The Supreme Council of the Autonomous Republic of Crimea adopted, in an extraordinary session on March 17, a resolution “[o]n the independence of Crimea.”¹⁸ Russia’s formal recognition of Crimea as a sovereign and independent State as of March 17 followed,¹⁹ and a “treaty” of accession of the Republic of Crimea

14. Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, Russ. Fed.-Ukr., May 31, 1997, U.N. Doc. A/52/174, Annex I (1997), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=a/52/174.

15. *Id.*

16. *Crimea Declares Independence and Seeks Accession to Russia*, PRAVDA.RU (Mar. 17, 2014), http://english.pravda.ru/news/russia/17-03-2014/127124-crimea_russia_independence-0/.

17. Chris Morris, *Crimea Referendum: Voters “Back Russia Union,”* BBC (Mar. 16, 2014), <http://www.bbc.com/news/world-europe-26606097>.

18. The Resolution states:

The Supreme Council of the Autonomous Republic of the Crimea, on the basis of direct will of the peoples of the Crimea expressed at the referendum of 16 March 2014, which showed that the people of the Crimea want to join Russia, and, consequently, separate from Ukraine and create an independent state, guided by the Declaration of Independence of the Republic of Crimea, adopted at an extraordinary plenary session of the Supreme Council of the Autonomous Republic of Crimea on March 11, 2014, and the extraordinary plenary session of Sevastopol City Council on March 11, 2014, decides: to proclaim the Crimea an independent sovereign state - the Republic of the Crimea, in which the city of Sevastopol has a special status.

Crimea Declares Independence and Seeks Accession to Russia, *supra* note 16.

19. *Executive Order on Recognizing Republic of Crimea*, PRESIDENT OF RUSSIA (Mar. 17, 2014), <http://eng.kremlin.ru/news/6884>. The Executive Order reads in the relevant part: “Given the declaration of will by the Crimean people in a nationwide referendum held on

to the Russian Federation was signed on March 18, providing for the incorporation of the Republic of Crimea and Sevastopol as federal subjects of the Russian Federation.²⁰

According to the Russian narrative, the Republic of Crimea thereby became an independent State and, by virtue of its immediate accession to and incorporation into the Russian Federation—something which President Putin in a far-fetched comparison has likened to German Reunification and the German Democratic Republic's accession to the Federal Republic of Germany²¹—now exists only as a federal entity of the Russian Federation and not as a subject of international law in its own right.²² In the treaty of accession signed by the Russian and Crimean governments on March 18, 2014, the status of the peninsula—formerly an “autonomous republic” of Ukraine—was changed to that of a “republic,”²³ with Crimea joining the twenty-one other “republics” of the Russian Federation and the city of Sevastopol added to the now eighty-five “federal subjects.”

However, the UN General Assembly, in Resolution 68/262 adopted on March 27, 2014—with one hundred States voting in favor, eleven against, fifty-eight abstentions and twenty-four absentees²⁴—underscored that “the

March 16, 2014, the Russian Federation is to recognize the Republic of Crimea as a sovereign and independent state, whose city of Sevastopol has a special status.”

20. *Ukraine Crisis: Putin Signs Russian-Crimea Treaty*, BBC (Mar. 18, 2014), <http://www.bbc.com/news/world-europe-26630062>. For the full text in Russian, see *Договор между Российской Федерацией и Республикой Крым о Присоединении к Российской Федерации Республики Крым и Образовании в Составе Российской Федерации Новых Субъектов*, ПРЕЗИДЕНТ РОССИИ (Mar. 18, 2014), <http://www.kremlin.ru/news/20605>. For a “rough translation,” see Gregory H. Fox, *Guest Post: The Russia-Crimea Treaty*, OPINIO JURIS (Mar. 20, 2014), <http://opiniojuris.org/2014/03/20/guest-post-russia-crimea-treaty/>.

21. President of the Russian Federation Vladimir Putin, Address at the Kremlin (Mar. 18, 2014) (transcript available at <http://eng.kremlin.ru/news/6889>) [hereinafter Kremlin Address] (“I am confident that you have not forgotten this, and I expect that the citizens of Germany will also support the aspiration of the Russians, of historical Russia, to restore unity.”). With regard to the accepted legal consequences of German reunification, see Letter from the German Foreign Minister to the United Nations Secretary-General, Federal Republic of Germany-German Democratic Republic: Treaty on the Establishment of German Unity (Oct. 3, 1990), 30 INTERNATIONAL LEGAL MATERIALS 457 (1991).

22. Kremlin Address, *supra* note 21.

23. Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago?*, WILSON CENTER, <http://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago> (last visited Mar. 26, 2015).

24. Ryan Goodman, *How “Overwhelming” was the UN General Assembly Vote on Crimea?*, JUST SECURITY (Apr. 24, 2014), <http://justsecurity.org/9809/overwhelming-general-assembly-vote-crimea/>.

referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol” and called

upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.²⁵

IV. CRIMEA’S STATUS UNDER INTERNATIONAL LAW

Under international law the purported status alteration of Crimea was unsuccessful, i.e., Crimea remains *de jure* part of Ukraine. This is so because even if there had been a legal basis for a territorial status alteration of Crimea, the fact that it was brought about by, and is inseparably linked to, an unlawful use of force renders it null and void.²⁶ Without Russia’s involvement, Crimea’s quest for independence and accession to Russia may have remained forever ineffective; because of Russia’s unlawful involvement it will remain forever legally tainted.

A. Russia’s Unlawful Intervention

Controversy about certain facts remains, but it is by now—particularly considering that President Putin himself has meanwhile publicly admitted as much²⁷—beyond any doubt that Russia forcibly intervened in Crimea in the spring of 2014.²⁸ Russia’s attempts to justify its use of force on the basis

25. G.A. Res. 68/262, ¶¶ 5–6, U.N. Doc. A/RES/68/262 (Mar. 27, 2014).

26. Reiner Hofmann, *Annexation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 28 (Feb. 2013).

27. *Putin Acknowledges Russian Military Servicemen were in Crimea*, RT (Apr. 17, 2014), <http://rt.com/news/crimea-defense-russian-soldiers-108/> (“Crimean self-defense forces were of course backed by Russian servicemen,” Putin said. “They acted very appropriately, but as I’ve already said decisively and professionally.”) (emphasis in original). See also Peter Maxwell, *Putin Über Einsatz in der Ukraine: “Schwere Maschinengewehre, Nicht Viel Reden,”* SPIEGEL ONLINE (Mar. 9, 2015), <http://www.spiegel.de/politik/ausland/ukraine-putin-ueber-krim-annexion-und-janukow-ytsch-flucht-a-1022466.html>.

28. Secretary of State for Foreign and Commonwealth Affairs William Hague, Oral Statement to Parliament on the UK’s Response to the Situation in Ukraine (Mar. 4, 2014), (transcript available at <https://www.gov.uk/government/speeches/uks-response-to-the>

of the alleged protection of Russian nationals and an invitation issued by the former Ukrainian government have already been dealt with and plausibly rejected elsewhere. For the purposes of the present article they need not be revisited.²⁹ Leaving aside the violations of the so-called Budapest Memorandum of 1994³⁰ and the above-mentioned bilateral Treaty of Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation of 1997, Russia's use of force in spring 2014 was unlawful and the violation of the Black Sea Fleet stationing agreements in the run up to the referendum was a paradigmatic example of aggression.³¹

B. The Inseparability of the Link between Russia's Unlawful Use of Force and the Purported Territorial Status Alteration of Crimea

More important for the purposes of the present article is the fact that this unlawful use of force is inseparably connected to the purported subsequent status alteration of Crimea. Whereas under classical international law conquest and annexation were still regarded as valid derivative titles of territorial acquisition,³² it is beyond any doubt that under modern international

situation-in-ukraine) ("Russian forces in Crimea went on to take control of Ukrainian military sites, including in Belbek, Balaclava and Kerch, and to establish full operational control in the Crimea.").

29. See Christian Marxsen, *The Crimea Crisis—An International Law Perspective*, 74 HEIDELBERG JOURNAL OF INTERNATIONAL LAW 367, 372–74 (2014). See also Daniel Wischart, *The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?*, EJIL: TALK (Mar. 4, 2014), <http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/>.

30. Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Letter dated Dec. 7, 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations to the Secretary-General, Annex I, U.N. Doc. A/49/765, S/1994/1399 (Dec. 19, 1994).

31. See Definition of Aggression, G.A. Res. 3314 (XXIX) art. 3(e), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

32. Conquest as defined in *Legal Status of Eastern Greenland* is a derivative title of acquisition of territorial sovereignty: "a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State." *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 47 (Apr. 5). On annexation, see Hofmann, *supra* note 26.

law forcible acquisitions of territory are prohibited.³³ Even in cases where the self-defense provisions of Article 51 of the UN Charter apply, forcible status alterations cannot be justified.³⁴ In such instances, upholding the prohibition of the use of force is considered sufficiently important that it outweighs the principle of effectiveness.³⁵

Even under classical international law—the typical examples cited in this context are the Austro-Hungarian Empire’s annexation of Bosnia-Herzegovina in 1908 and the Italian annexation of Ethiopia in 1936, neither of which was recognized by the major powers of the time³⁶—it was doubtful whether a victorious State could unilaterally acquire sovereignty over enemy territory simply by virtue of annexation, i.e., merely through factual seizure of the territory in question.³⁷ And while it remains debatable at which exact point in time prior to World War II the prohibition of annexation of territory through force materialized (especially as a matter of customary international law), today, in light of Article 2(4) of the UN Charter and Article 52 of the Vienna Convention on the Law of Treaties (VCLT),³⁸ it is beyond any doubt that forcible acquisitions of territory, whether treaty-based or not, are illegal and without effect under international law.³⁹ Since the adoption of the UN Charter this position has been reconfirmed time and again, *inter alia*, in the Friendly Relations Declaration of 1970, stipulating that “[t]he territory of a State shall not be the object of

33. As Judge Philip Jessup pointed out in his dissenting opinion in *South West Africa Cases (Second Phase)* in 1966, “[i]t is a commonplace that international law does not recognize military conquest as a source of title.” *South West Africa Cases (Second Phase)* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 418 (July 18) (Jessup, J. dissenting).

34. Marcelo G. Kohen, *Conquest*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 12 (June 2009).

35. CRAWFORD, *supra* note 8, at 140; Hofmann, *supra* note 26; Kohen, *supra* note 34, ¶ 12.

36. Kohen, *supra* note 34, ¶ 8. See also James W. Garner, Editorial Comment, *Non-Recognition of Illegal Territorial Annexations and Claims to Sovereignty*, 30 AMERICAN JOURNAL OF INTERNATIONAL LAW 679 (1936).

37. Hence, conquest in contradistinction to annexation was understood to require the fulfillment of additional conditions, namely the conclusion of a peace treaty, which in turn led some authors to doubt whether conquest as such was distinct from cession and therefore whether it constituted a distinct title of acquisition at all. See Kohen, *supra* note 34.

38. Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331. According to Article 52 Vienna Convention on the Law of the Treaties, “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

39. Hofmann, *supra* note 26, ¶ 21.

acquisition by another State resulting from the threat or use of force,”⁴⁰ as well as in the 1974 General Assembly Resolution 3314 (XXIX) on the definition of aggression.⁴¹ Similarly, the Security Council has repeatedly emphasized the “inadmissibility of the acquisition of territory by war.”⁴² In the case of Iraq’s annexation of Kuwait, Resolution 662 (1990) unanimously declared the annexation to be null and void and called upon States and institutions not to recognize the annexation and to refrain from any action that might be interpreted as an indirect recognition of it.⁴³ Similarly, with respect to the annexation of the Golan Heights by Israel, the Security Council decided in Resolution 497 (1981) that the “Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect.”⁴⁴

Under modern international law, what distinguishes prohibited annexation that must not be recognized under any circumstances,⁴⁵ from other attempts at status alteration that may or may not be recognized by other States,⁴⁶ is the nexus of the attempted status alteration to a prior unlawful

40. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/8082 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

41. Article 5(3) G.A. Res. 3314 (XXIX) declares that “[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.” Definition of Aggression, *supra* note 31.

42. S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967). *See also* S.C. Res. 859, U.N. Doc. S/RES/859 (Aug. 24, 1993); S.C. Res. 874, U.N. Doc. S/RES/874 (Oct. 14, 1993); S.C. Res. 896, U.N. Doc. S/RES/896 (Jan. 31, 1994).

43. S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990).

44. S.C. Res. 497, ¶ 1, U.N. Doc. S/RES/497 (Dec. 17, 1981). A similar view was taken by the General Assembly in its Resolution on the situation in the occupied Arab territories. G.A. Res. ES-9/1, U.N. Doc. A/RES/ES-9/1 (Feb. 5, 1982).

45. Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 41, Report of the International Law Commission, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

46. According to the Supreme Court of Canada:

Although there is no right, under the Constitution or at international law, to unilateral secession . . . this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such

use of force. As the International Court of Justice's (ICJ) *Kosovo* advisory opinion implies,⁴⁷ if there is such a nexus even a declaration of independence—which according to the ICJ would not otherwise be considered to violate international law—may breach international law. Thus, the ICJ held that:

[T]he illegality attached to [some other] declarations of independence . . . stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, *connected* with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).⁴⁸

It must be conceded that in some circumstances it may not be fully clear whether there is such a connection, whether it can and has been validly interrupted by subsequent events and what exactly are the current criteria for the determination of such a nexus or a valid disruption thereof. A structurally similar problem arises with regard to Article 52 VCLT and the determination whether the conclusion of a treaty “has been procured by the [illegal] threat or use of force.”⁴⁹

Clearly, mere passage of time cannot “heal” the unlawfulness of a territorial status alteration effected by force.⁵⁰ On the other hand it is clear that just because a territory has at some point in the past been the victim of an unlawful use of force, this does not automatically bar all future attempts at territorial status alteration. Thus, with the uninfluenced, free consent of the parent State, a territorial status alteration, disconnected from a preceding unlawful use of force, could be effected. In this case the status alteration

recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 155 (Can.).

47. Jure Vidmar, *Crimea's Referendum and Secession: Why it Resembles Northern Cyprus More than Kosovo*, EJIL: TALK (Mar. 20, 2014), <http://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/>.

48. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 81 (July 22) (emphasis added).

49. 2 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 1211–13 (Oliver Corten & Pierre Klein eds., 2011).

50. See Thomas D. Grant, *Crimea After Cyprus v. Turkey: Just Satisfaction for Unlawful Annexation?*, EJIL: TALK (May 19, 2014), <http://www.ejiltalk.org/crimea-after-cyprus-v-turkey-just-satisfaction-for-unlawful-annexation/>; *Ilaşcu and Others v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179; *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967 (2001).

would no longer be based on the use of force but on the free-will decision of the relevant right-holder. The challenge in such situations is a factual one, i.e., establishing that indeed a free-will decision, uninfluenced by the preceding use of force or continuing threats resulting therefrom, has been taken. Thus, hypothetically, if Ukraine at some point in the future freely decided to cede the territory of Crimea to the Russian Federation, a valid territorial status alteration could be effected. However, in light of the circumstances currently prevailing on the ground and explicit statements from the Ukrainian government calling for Crimea's "return" to Ukraine,⁵¹ such a decision, uninfluenced by coercion, seems farfetched and unrealistic.

But leaving aside this hypothetical clear-cut scenario, in practice it may be more difficult to establish whether the connection between an unlawful use of force and a subsequent status alteration has been disrupted. In the case of Kosovo the ICJ's advisory opinion assumed, at least implicitly, that in spite of NATO's unlawful use of force in 1999, Kosovo's declaration of independence in 2008 was no longer linked to the events of 1999.⁵² The ICJ did not specify nor provide an explicit explanation as to how exactly the connection had been disrupted. In the absence of any plausible alternative, it must have been the Chapter VII-based Security Council Resolution 1244 (1999), which subsequent to NATO's forcible intervention with the agreement of the Federal Republic of Yugoslavia and by a vote of fourteen to none (and an abstention by China), authorized the presence of international forces in Kosovo.⁵³ While it remains controversial whether Kosovo had indeed a "right" to secede based on the controversial doctrine of re-

51. *Poroschenko Gibt Krim Nicht Verloren*, FRANKFURTER ALLGEMEINE (Feb. 23, 2015), <http://www.faz.net/aktuell/politik/ausland/europa/petro-poroschenko-gibt-ukraine-halbinsel-krim-nicht-verloren-13444789.html>.

52. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *supra* note 48, ¶ 81. Otherwise, on the basis of its own explicit reasoning in paragraph 81, the Court would have had to find Kosovo's declaration of independence in violation of international law.

53. The Security Council:

Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences;

...

Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfill its responsibilities under paragraph 9 below.

S.C. Res. 1244, ¶¶ 5, 7, U.N. Doc. S/RES/1244 (June 10, 1999). *See also id.* ¶ 9.

medial secession,⁵⁴ it follows that because of the interrupted connection between NATO's unlawful use of force in 1999 and Kosovo's declaration of independence in 2008, States are free either to recognize Kosovo as an independent State or to withhold recognition.⁵⁵ After all, international law treats differently a situation in which an entity attempts to secede without having a right to do so from a situation in which such an attempt is backed by an unlawful use of force. In the former case international law remains neutral. As Crawford points out, "the position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."⁵⁶ Conversely, in the latter case, i.e., if there is a connection to an unlawful use of force, any legal effects are rendered null and void from the outset and recognition is prohibited.

C. Remedial Secession or Restoration of Historic Rights?

Obviously, the case of Crimea differs from the example of Kosovo because—among other things—nothing remotely similar to the adoption of Resolution 1244 occurred. There are thus only two possible—albeit in this case utterly unconvincing—ways to argue that Crimea's purported status alteration in 2014 was not, or was no longer, linked to the preceding unlawful use of force.

First, it has been argued that Crimea actually had a right to secede based on remedial secession and that Russia's forcible intervention, intending to support this allegedly legitimate secession, was therefore lawful. On this basis it could—as a variant of the above-mentioned justifications invoked by Russia—hypothetically be argued that Russia's use of force, because it supported a remedial secession, was lawful. Alternatively, and irrespective of the legal qualification of Russia's use of force, the subsequent status alteration could potentially be depicted as having been based on a

54. In the case of Kosovo, in addition to the general controversy surrounding the notion of remedial secession, it could be questioned whether the events that disrupted the link between the unlawful use of force in 1999 and the declaration of independence in 2008 did not also disrupt the connection between the large-scale human rights violations that triggered the right to remedial secession and the situation of Kosovo in 2008.

55. The Republic of Kosovo has stated that it is recognized by 108 countries. U.N. SCOR, 69th Sess., 7257th mtg. at 11, U.N. Doc. S/PV.7257 (Aug. 29, 2014).

56. CRAWFORD, *supra* note 8, at 390.

separate, valid ground for secession, arguing that it was therefore sufficiently disconnected from the preceding use of force.

Secondly, Russian officials have depicted events in Crimea as a restoration of Russia's historic rights.⁵⁷ Thus, in his speech of March 2014 Vladimir Putin stated that “[i]n People’s hearts and minds, Crimea has always been an inseparable part of Russia.”⁵⁸ Admittedly, the exact line of argument is difficult to decipher. But it seems that in as far as this is a legal argument, it is meant to imply that, because of some unspecified irremediable defects regarding Crimea’s transfer to Ukraine in 1954, Crimea actually never validly became part of Ukraine in the first place.

1. Crimea’s “Secession” as a Case of Remedial Secession?

The year 2014 saw in Scotland a prominent—albeit unsuccessful—attempt at secession through plebiscite. Apart from its unsuccessfulness,⁵⁹ this attempt had nothing in common with Crimea’s purported secession.⁶⁰ To the

57. See Anton Moiseienko, *What Do Russian Lawyers Say About Crimea?*, OPINIO JURIS (Sept. 24, 2014), <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/>.

58. Kremlin Address, *supra* note 21; John Cassidy, *Putin’s Crimean History Lesson*, THE NEW YORKER (Mar. 18, 2014), <http://www.newyorker.com/news/john-cassidy/putins-crimean-history-lesson>.

59. The Scottish referendum for independence was voted down; a Spanish court banned the holding of a referendum in Catalonia. See *Scottish Referendum: Scotland Votes “No” to Independence*, BBC (Sept. 19, 2014), <http://www.bbc.com/news/uk-scotland-29270441>; S.T.C., Apr. 10, 2014 (B.O.E., No. 87, p. 66) (Spain), available at <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=20993>.

60. Coincidentally, both referenda had the potential for far-reaching nuclear implications. The Scottish referendum in case of success would have rendered a blow to the British nuclear program, given that the British nuclear submarine fleet is located at Faslane, Scotland, with no obvious alternative location elsewhere. Conversely, in the case of Ukraine and in light of Russia’s breach of the Budapest Memorandum of 1994 there were initially significant concerns that Ukraine might opt to leave the Non-Proliferation Treaty and resume its nuclear program. The G7 therefore were relieved by Ukraine’s statement at the 2014 Non-Proliferation Treaty Preparatory Committee where Ukraine declared that it remains committed to the provisions of the Treaty:

We deplore the recent and ongoing breaches of the commitments given to Ukraine by the Russian Federation in the Budapest Memorandum. In this Memorandum, the Russian Federation, United Kingdom and the United States reaffirmed their commitment to respect Ukraine’s independence and sovereignty and existing borders; reaffirmed their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United

contrary, they differed on almost every account. On September 18 Scotland held a referendum on Scottish independence and secession from the United Kingdom. On March 16 a referendum was held on the status of Crimea.⁶¹ But whereas the Scottish referendum was carried out *comme-il-faut* and, most importantly from the perspective of international law, with the consent of the mother State,⁶² the Crimean referendum—albeit successful on paper—had significant procedural flaws and was undertaken against the clear and explicit will of Ukraine.

As a general rule, outside the colonial context international law does not grant a right to secession.⁶³ Leaving aside consensual secessions as in the case of South Sudan or Montenegro, self-determination is to be achieved from within, i.e., through participation in a State's political system.⁶⁴ Whether international law can, in extreme cases, grant an exceptional right to secession remains highly controversial.⁶⁵ In the Aaland Islands case the International Committee of Jurists left the door open for such a right of remedial secession, stating that absent “a manifest and continued abuse of sovereign power to the detriment of a section of population” there was

Nations, and reaffirmed their commitment to Ukraine to refrain from economic coercion. We consider that Ukraine's historic decisions in 1994 were significant steps in promoting its own and wider regional and international security. We also welcome Ukraine's statement at the 2014 Non-Proliferation Treaty Preparatory Committee that Ukraine remains committed to the provisions of the NPT.

G-7 Declaration on Non-Proliferation and Disarmament for 2014, ¶ 6, IHP DIGITAL (June 5, 2014), <http://iipdigital.usembassy.gov/st/english/texttrans/2014/06/20140610301019.html#ixzz3OuzcIHT3>.

61. See Noah Sneider, *2 Choices in Crimea Referendum, but Neither is “No,”* NEW YORK TIMES (Mar. 14, 2014), http://www.nytimes.com/2014/03/15/world/europe/crimea-vote-does-not-offer-choice-of-status-quo.html?_r=0.

62. Yves Beigbeder, *Referendum*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 46–50 (June 2011).

63. As stated by the Commission of Jurists appointed by the League of Nations to examine the Aaland Islands situation, “Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish.” *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 O.J. Spec. Supp. 3, at 3 (1920) [hereinafter *Aaland Islands Question Report*]. See also *id.* at 5–10.

64. CRAWFORD, *supra* note 8, at 417.

65. See Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST ANTHONY'S INTERNATIONAL REVIEW 37 (2010); Peter Hilpold, *The Kosovo Case and International Law: Looking for Applicable Theories*, 8 CHINESE JOURNAL OF INTERNATIONAL LAW 47, 55 (2009).

no right to secede.⁶⁶ The Supreme Court of Canada was even more explicit, holding that “[a] right to external self-determination arises only in the most extreme cases and, even then, under carefully defined circumstances.”⁶⁷ Notably, Russia—wary of Chechnya’s quest for independence and for a long time adamantly opposed to the concept of remedial secession—in the course of the Kosovo proceedings submitted a written statement according to which the so-called “safeguard clause” “may be construed as authorizing secession under certain conditions.”⁶⁸ The statement went on to specify that

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.⁶⁹

Indeed, still more proponents of a right to remedial secession agree that the threshold for such a right—which compromises a State’s territorial integrity—is very high.⁷⁰ Thus, even conceding that in the case of Crimea some facts remain controversial, it is clear that this threshold was not met.⁷¹ As has been pointed out elsewhere, in light of the multi-ethnic composition of the people of Crimea it is already doubtful whether a holder of the col-

66. Aaland Islands Question Report, *supra* note 63, at 5–10.

67. Reference re Secession of Quebec, *supra* note 46, ¶ 123.

68. Written Statement of the Russian Federation, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Apr. 16, 2009), *available at* <http://www.icj-cij.org/docket/files/141/15628.pdf>.

The so-called “safeguard-clause” can be found in the Friendly Relations Declaration in the rubric dealing with the principle of equal rights and self-determination of peoples, it reads:

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 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.

Friendly Relations Declaration, *supra* note 40.

69. Written Statement of the Russian Federation, *supra* note 68, ¶ 88.

70. On the discussion, see Chris Borgen, *Can Crimea Secede by Referendum?*, OPINIO JURIS (Mar. 6, 2014), <http://opiniojuris.org/2014/03/06/can-crimea-secede-referendum/>.

71. *Id.*

lective right to self-determination exists.⁷² But even if that was the case, it is clear that the main and most widely agreed upon criteria for a right to remedial secession, namely the existence of egregious, widespread violations of human rights and a persistent denial of any relevant internal self-determination, were not met.⁷³ As noted previously, Crimea had been given the status of an “autonomous republic” within Ukraine.⁷⁴ And even though the implementation of regional autonomy may not have been perfect, it was nowhere near a persistent denial of internal self-determination. Similarly, while breaches of human rights have clearly occurred in Crimea, there simply is no evidence of widespread and egregious human rights violations.⁷⁵ Finally, neither the hypothetical future human rights violations invoked by Russia as a justification for its “humanitarian intervention” nor the mere holding of a referendum suffice to compensate for the lack of the central criteria for a remedial secession. Thus, it cannot be argued either that Russia’s use of force was justified because it supported “the Crimeans” in their rightful quest to secede, or that the referendum gave expression to a self-standing right of remedial secession, such as to disrupt the link between the preceding unlawful use of force and Crimea’s status alteration.

2. The Takeover of Crimea as a Restoration of Russia’s “Historic Rights”?

Russia’s invocation of ostensible historic rights over Crimea is not new and is reminiscent, at least to some extent, of China’s reasoning vis-à-vis Tibet.⁷⁶ As mentioned above, throughout the 1990s Ukraine and the Russian Federation repeatedly clashed over the status of Crimea and Sevastopol. In 1954 the transfer of Crimea from the Russian Soviet Federation of Socialist Republics to the Ukrainian Soviet Socialist Republic (UKrSS), by a decree of the Presidium of the Supreme Soviet of the USSR on February 19, 1954, was officially explained (only) by reference to the commemoration of the

72. See Anne Peters, *Crimea: Does “The West” Now Pay the Price for Kosovo?*, EJIL: TALK (Apr. 22, 2014), <http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/>.

73. With respect to additional (procedural) criteria typically required for a remedial secession to become effective, *see id.*

74. ROMAN SOLCHANYK, *UKRAINE AND RUSSIA: THE POST-SOVIET TRANSITION*, 162–66 (2001).

75. Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Ukraine*, U.N. Doc. A/HRC/27/75 (Sept. 19, 2014).

76. Hofmann, *supra* note 26, ¶ 36.

300th anniversary of the Treaty of Pereyaslav and the “territorial proximity of Crimea to Ukraine, the commonalities of their economies and close agricultural and cultural ties between the Crimean oblast and the UKrSS.”⁷⁷ Discussion over the “true” reasons for Crimea’s transfer continues to date.⁷⁸

Putin in his March 18, 2014 speech said that:

What matters now is that this decision was made in clear violation of the constitutional norms that were in place even then. The decision was made behind the scenes. Naturally, in a totalitarian state nobody bothered to ask the citizens of Crimea and Sevastopol. They were faced with the fact. People, of course, wondered why all of a sudden Crimea became part of Ukraine. But on the whole—and we must state this clearly, we all know it—this decision was treated as a formality of sorts because the territory was transferred within the boundaries of a single state. Back then, it was impossible to imagine that Ukraine and Russia may split up and become two separate states. However, this has happened.⁷⁹

Thus, Crimea’s 1954 transfer to Ukraine is depicted as an erratic act of then-Russian Premier Nikita Khrushchev who ordered the transfer in violation of the constitution, absent any consultation with the people, and who allegedly operated under the presumption of the continuing (everlasting?) unity of the USSR as a single State. Whether the transfer was indeed unconstitutional remains controversial.⁸⁰ But even if it were, this would be without any effect on the international level.⁸¹ Similarly, assuming that Khrushchev acted under the assumption of continuing unity of the USSR, this still would not alter the legal assessment. Because even if the USSR’s dissolution in 1991 could, by way of analogy, be compared to an unexpected, fundamental change of circumstances in the sense of Article 62 of the VCLT, Article 62(2)(a) provides that a fundamental change of circumstances may not be invoked to alter a State’s treaty obligations where State boundaries are concerned.⁸² In such a case, stability in international relations takes precedence over the protection of other legitimate motives and

77. Kramer, *supra* note 23.

78. *Id.*

79. Kremlin Address, *supra* note 21.

80. Kramer, *supra* note 23.

81. *See generally* ANDREAS VON ARNAULD, VÖLKERRECHT ¶ 235 (2d ed. 2014).

82. 2 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 49, at 1421–24.

interests. This reasoning holds true irrespective of whether State boundaries were established by virtue of a treaty or unilaterally by decree. Moreover, post-Soviet practice—apart from the 1992 attempt to annul the 1954 decree—clearly confirms that Crimea belongs to Ukraine. After the dissolution of the USSR, the *uti possidetis* doctrine was applied between the Russian Federation and Ukraine as is confirmed, *inter alia*, by the 1997 Treaty of Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, in which the parties agreed to “respect each other’s territorial integrity, and confirm the inviolability of the borders between them.”⁸³

D. Crimea’s Current Status as an Occupied Territory

Whereas the purported annexation of Crimea has not brought about a territorial status alteration under international law, it has led to a situation of occupation that continues to date and that may endure for many years to come. Northern Cyprus has been occupied since 1974 in spite of its proclaimed independence as the Turkish Republic of Northern Cyprus in 1983.⁸⁴ As is well known, Article 42 of the 1907 Hague Regulations provides that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.”⁸⁵ Since the Russian Federation considers Crimea to form part of its own (sovereign) territory, it is *a fortiori* exercising direct, effective control over the territory in question and hence qualifies as the occupier of Crimea.

The assessment as to precisely when, prior to Crimea’s purported accession to the Russian Federation, this part of Ukraine’s territory began to

83. Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, *supra* note 14, art. 2; Nußberger, *supra* note 9, ¶ 43; Treaty on Friendship, Good Neighbourliness and Cooperation, Russian Soviet Federative Socialist Republic-Ukrainian Soviet Socialist Republic, Nov. 19, 1990, 1641 U.N.T.S. 219; Giuseppe Nesi, *Uti Possidetis Doctrine*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 6 (Jan. 2011). In the territory of the former USSR republics the international borders between the new States coincided with the borders between the former federated republics. Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BRITISH YEARBOOK OF INTERNATIONAL LAW 75 (1996).

84. The U.N. General Assembly declared that “part of the territory of the Republic of Cyprus is still occupied by foreign forces.” G.A. Res. 37/253, *pmb.*, U.N. Doc. A/RES/37/253 (May 13, 1983).

85. Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539. *See generally* Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 133 (2012).

be occupied is more intricate and ultimately hinges on the facts on the ground. Leaving aside the discussion of whether, in addition to Article 42 of the Hague Regulations, a different legal basis for the determination of the existence of a state of occupation exists,⁸⁶ it is clear that as events were unfolding in March 2014 the central Ukrainian government in Kiev was no longer capable of exercising its authority in Crimea. The difficult question is whether and, if so, *how* Russia was exercising effective control over Crimea during the initial period. In this regard it could be argued that Russia exercised direct and effective control, or at least had potential control, over Crimea given that at all times it had the possibility to send in more troops within reasonable time.⁸⁷ Alternatively it could be argued that Russia exercised indirect effective control in the sense that it had overall control over local authorities that exercised effective control over Crimea (“occupation by proxy”). The ICJ in the *Armed Activities* case endorsed the possibility of such an occupation by proxy.⁸⁸ But without going into the details of these different options—especially with hindsight and in light of President Putin’s increasingly straightforward public acknowledgments of Russian involvement in the events on the ground—it seems that a strong case can be made for the most straightforward option, namely that Russia itself was exercising direct, effective control over Crimea prior to the referendum in March 2014. In terms of the quality of control required, there is, of course, no mathematical benchmark to determine how much control is needed to qualify as “effective control” in the sense of Article 42 of the Hague Regulations.⁸⁹ The determination whether there is “effective control” is circumstantial. Thus, as the U.S. Army’s Field Manual, the Law of Land Warfare, confirms, “[t]he number of troops necessary to maintain effective occupation will depend on various considerations such as the disposition of the inhabitants, the number and density of the population, the nature of the terrain,

86. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2d ed. 2012).

87. *United States v. List*, 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 757, 1242–44 (1950). *But see* Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli–Palestinian Agreements*, 28 ISRAEL LAW REVIEW 297, 308–9 (1994).

88. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 177 (Dec. 19). *See also* Ferraro, *supra* note 85, at 158–59.

89. YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 43–45 (2009).

and similar factors.”⁹⁰ In the present case and given that in any case “effective control” does not mean full or total control over every square inch of territory, it could be argued that once the terms of the stationing agreement were no longer abided by, the presence of over twenty-five thousand soldiers in a strategic position in the small territory of Crimea sufficed for Russia to directly exercise “effective control.” The fact that the Russian military presence on the territory of Ukraine did not meet with any armed resistance is irrelevant.⁹¹ It was clearly coercive in the sense that it was an unconsented to military presence. Obviously, consent from regional authorities and/or the local population of the region in question or the ousted Yanukovich government that had lost effective control is immaterial. What matters is the consent from the central government in Kiev.

Notably, in the particular case of Crimea, labeling the situation as one of occupation may be more important than actually rendering applicable substantive provisions of the law of occupation. After all, the label “occupation” denotes that there has not been any legal status alteration. This is not to say that the protective regime of the law of occupation, for example the prohibition of discrimination laid out in Article 27 of the Fourth Geneva Convention (GC IV), does not matter in the case of Crimea.⁹² To the contrary, especially the Crimean Tartars and those opposing the Russian presence in Crimea are at risk of significant human rights abuses.⁹³ In this regard the application of the law of occupation—alongside Russia’s human rights obligations⁹⁴—is highly significant and remains unaffected by the fact that Russia does not consider Crimea to qualify as occupied territory.⁹⁵

90. Department of the Army, FM 27-10, *The Law of Land Warfare* 139 (1956), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf (emphasis added).

91. *See, e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2(2), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

92. *Id.*, art. 27.

93. ANDRII KLYMENKO, HUMAN RIGHTS ABUSES IN RUSSIAN-OCCUPIED CRIMEA, (2015), available at https://freedomhouse.org/sites/default/files/CrimeaReport_FINAL.pdf.

94. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

95. The ICRC *Commentary* emphasizes the general rule that “an Occupying Power continues to be bound to apply the *Convention as a whole* even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory.” COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 276 (Jean Pictet ed., 1958) [hereinafter GC IV COMMENTARY] (emphasis added). Article 47 GC IV provides:

These protections—according to Article 3(b) of Additional Protocol I⁹⁶ (to which both the Russian Federation and Ukraine are parties)—will remain in place until the occupation is terminated.⁹⁷

Russia does not act as a hostile occupier vis-à-vis the majority of Crimeans, who seem to be genuinely welcoming the Russian presence, but rather as an unusually benign occupier. The legal regime on occupation is hybrid, i.e., it entails two dimensions of legal consequences. On the one hand, it grants important protections on the individual level for those persons who are subject to the authority of a foreign (hostile) occupier. On the other hand, it has implications on the inter-State level in that it signifies there has not been any change in or transfer of territorial sovereignty, and that the situation is temporary and exceptional.⁹⁸ To this end, the legal regime of occupation contains a number of safeguards that prevent the occupier from consolidating the situation and from introducing overly far-reaching changes into the institutions and State structure of the occupied territory. Article 43 Hague Regulations and Article 47 GC IV both attest to

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

GC IV, *supra* note 91, art. 47. *See also On the Legal Regime of the Temporary Occupied Territory of Crimea*, EMBASSY OF UKRAINE IN THE UNITED STATES OF AMERICA, http://usa.mfa.gov.ua/en/legal_aspects (last visited Mar. 30, 2015). The United Nations General Assembly considers Crimea and Sevastopol still to be part of Ukraine. G.A. Res. 68/262, *supra* note 25.

96. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

97. According to the ICRC *Commentary*, Article 3(b) “replaces [Article 6(3) GC IV] and its main effect is to extend the application in occupied territory beyond what is laid down in the fourth Convention.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 151 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

98. As is pointed out in the ICRC *Commentary*,

[T]he occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights. That is what distinguishes occupation from annexation, whereby the Occupying Power acquires all or part of the occupied territory and incorporates it in its own territory.

Id. at 275.

this dual character of occupation. An occupying authority is merely to be considered as a temporary, de facto administrator.

V. LEGAL CONSEQUENCES AND LEGAL OPTIONS FOR THE WAY AHEAD

Whether territorial changes are successful or unsuccessful typically depends on their recognition. State practice since 1945 shows that—with the exception of the unique case of Bangladesh—a territorial status alteration against the will of the parent State is unlikely to succeed.⁹⁹ Secessionist entities such as the Turkish Republic of Northern Cyprus, Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh have existed for relatively long periods of time, but have only received a very limited number of recognitions from other States.¹⁰⁰

In the case of Crimea, however, because of the way in which the status alteration was brought about, namely by virtue of Russia's unlawful use of force, the issue of recognition does not even arise. In order to avoid any consolidation of such an unlawful status alteration, any recognition thereof—explicit or implicit—must be prevented. Significant inconsistencies regarding the practice of recognition notwithstanding, the principle of non-recognition as spelled out in Article 41(2) of the ILC Draft Articles on State Responsibility remains valid and is widely accepted. Since the formulation of the so-called Stimson Doctrine in the course of the Manchurian crisis of 1931–32, it has been reconfirmed on numerous occasions,¹⁰¹ *inter alia*, in the Friendly Relations Declaration, as well as in relevant Security Council resolutions adopted in response to Iraq's invasion of Kuwait in 1990,¹⁰² Israel's annexation of the Golan Heights¹⁰³ and the proclamation of the Republic of Northern Cyprus in 1983.¹⁰⁴

99. CRAWFORD, *supra* note 8, at 415.

100. *See* Borgen, *supra* note 70.

101. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES art. 41, ¶¶ 6–7 (2002).

102. S.C. Res. 662, *supra* note 43.

103. S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

104. As evidenced by the adoption of Resolutions 541 and 550 and by the Council of Europe's Committee of Ministers of its Resolution of 24 November 1983. S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983); S.C. Res. 550, U.N. Doc. S/RES/550 (May 11, 1984); Parliamentary Assembly of the Council of Europe, Situation in Cyprus, Res. 816 (1984), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta84/ERES816.htm>.

Of course, due to Crimea's and Sevastopol's swift "incorporation" into the Russian Federation, Crimea is factually not as dependent on recognition as a self-standing entity like Kosovo. But nonetheless, legally speaking, recognition of Crimea's purported short-time independence and its subsequent "incorporation" into the Russian Federation must be withheld. As the commentary on the Draft Articles on State Responsibility clarifies, "[t]he obligation applies to 'situations' created by these breaches."¹⁰⁵ The UN General Assembly has therefore called upon

all States, international organizations and specialized agencies not to recognize *any alteration* of the status of the Autonomous Republic of Crimea and the city of Sevastopol *on the basis* of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.¹⁰⁶

Indeed, in case of violation of a peremptory norm of international law—in this case Article 2(4) of the UN Charter—Article 41 ILC Articles on State Responsibility stipulates a duty of abstention.¹⁰⁷ This duty of abstention—because it concerns the international community as a whole—extends even to Ukraine itself, which is therefore barred from retroactively recognizing or acquiescing in Crimea's status alteration.¹⁰⁸ Similarly, Russia's recognition of the independent Republic of Crimea amounted to a violation of international law. Collective non-recognition is a form of soft-sanction and as Lauterpacht wrote, "the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong."¹⁰⁹ In addition, Article 41(1) stipulates a positive obligation to cooperate to bring to an end a situation resulting from a serious breach of a peremptory norm of international law. This is an obligation of conduct and as such it is to be fulfilled by exercising due diligence. Its precise content depends on the circumstances of each specific case and it allows States to take into consideration a broad range of considerations. For the time being, Western States have responded with increasingly severe economic sanctions.¹¹⁰ But Western leaders currently remain divided over

105. CRAWFORD, *supra* note 101, art. 41, ¶ 5.

106. G.A. Res. 68/262, *supra* note 25 (emphasis added).

107. CRAWFORD, *supra* note 101, art. 43, ¶ 9.

108. *Id.*

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

110. Council Regulation 692/2014, 2014 O.J. (L 183) 9 (EU); Statement by the President of the European Council Herman Van Rompuy and the President of the European

the question whether arming Ukraine's forces is a must or a no-go.¹¹¹ And while in this author's view there are good reasons to consider arms deliveries a no-go, explicitly excluding them and thereby limiting one's options from the outset seems unwise.

All of this does not mean that the injured State, i.e., Ukraine could never consent to a territorial status alteration of the territory in question. However, as the wording of General Assembly Resolution 68/262, which calls upon States not to recognize "any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol *on the basis of the . . . referendum*,"¹¹² indicates, any valid status alteration could only be brought about if it is based on a different ground and clearly disconnected from the preceding unlawful use of force. Only under such circumstances could the (new) "situation" be qualified as not having been created by a serious breach of a peremptory norm of international law.

Commission (July 29, 2014), *available at* <http://www.consilium.europa.eu/en/press/press-releases/2014/07/pdf/statement-by-the-president-of-the-european-council-herman-van-rompuy-and-the-president-of-the-european-commission-in-the-name-of-the-european-union-on-the-agreed-additional-restrictive-measures-against/>; Exec. Order No. 13685, 79 Fed. Reg. 247 (Dec. 24, 2014).

111. *See* Merkel, *supra* note 6.

112. G.A. Res. 68/262, *supra* note 25, ¶ 6 (emphasis added).