

CONFERENCE REVIEW NOTES

THE CASE OF CRIMEA IN THE LIGHT OF INTERNATIONAL LAW: ITS NATURE AND IMPLICATIONS¹

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In March 2015, the Polish Academy of Science, the Institute of Law Studies, and the Centre for Polish-Russian Dialogue held a conference entitled *The Case of Crimea in the Light of International Law: Its Nature and Implications*. The conference took place against the backdrop of the first anniversary of Crimea's 'annexation' / 'reunification'² by Russia, providing an opportunity for international legal scholars to discuss the legality of these events.

Over two days, the conference saw around 35 presented papers on issues following five general themes: self-determination and secession; use of force, aggression and armed attack; the international community's response to the situation in Crimea; non-recognition of unlawful situations; and international state and individual responsibility in the case of Crimea.

The invited academics and practitioners who spoke at the conference came from Austria, Belarus, Bulgaria, France, Germany, Italy, Japan, Poland, Russia, Switzerland, The Netherlands, Ukraine, UK and USA.

This review will explore selected presentations on the key issues of self-determination, secession, use of force and State responsibility.

1. Factual Background to the Situation in Crimea

The facts founding the basis for discussion at the conference were those taking place in Crimea between February 21, 2014, and March 21, 2014, – the period between Ukrainian President, Victor Yanukovich's flight from the country and the

¹ The views expressed by the author in this article is her own, and do not reflect the opinion of *Threefold Legal Advisors LLC* or its clients.

² The term used by Russia with respect to the Crimean situation.

annexation / incorporation of Crimea into the Russian Federation. They encompassed a motion in the Verkhovna Rada to repeal the Ukrainian Law No. 5029-VI of July 3, 2012, 'On the Principles of State Language Policy' on February 23, seizure of the Crimean Parliament by the then identified³ gunmen on February 27, the seizure of Simferopol and Sevastopol airports on February 28, and the blockade of Balaklava Harbour from the same day. Panelists also addressed subsequent discussions at the UN Security Council [hereinafter UNSC] and the imposition of sanctions on Russia by individual states and international organizations in the course of 2014 and 2015.

Various public statements made about the Crimean situation by the Russian ambassador to the United Nations, the Russian President and Russia's Ministry of Foreign Affairs in 2014 and 2015 were also addressed, including statements by President Putin on March 18 and April 17, 2014, as well as statements by Ukraine.

Reference was also made to the Maidan period preceding February 21, 2014, by a number of Russian participants.

2. Legal Background to the Situation

Discussion between conference panelists was grounded in a number of bilateral and multilateral agreements involving Russia and Ukraine, as applicable to the Crimean situation and its consequences, as well as to applicable rules of customary international law and general principles of law.

Of the Russia / Ukraine bilateral agreements referred to, principal focus was placed on the 1997 Treaty of Friendship, Cooperation and Partnership and the 1997 Agreement on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory.

The multilateral agreements invoked by discussants included: the 1945 United Nations Charter; the 1975 Final Act of the Conference on Security and Cooperation in Europe; the Protocol to the Commonwealth Pact, signed in Alma-Ata on December 21, 1991; and the 1994 Memorandum on Security Assurances, signed in Budapest between Russia, the United Kingdom and the United States, entered into in connection with Ukraine's accession to the 1968 Nuclear Non-Proliferation Treaty.

This body of treaty law was mainly invoked by discussants to outline Russia's obligations with respect to the sovereignty, territorial integrity and independence of the Ukraine. The obligations not to use force were also interpreted in light of the 1974 United Nations Definition of Aggression (UNGA Resolution 3314 (XXIX) of December 14, 1974) [hereinafter Definition of Aggression].

As part of discussion on the applicable principles of self-determination, panelists applied those principles stated in the 1970 United National Friendly Relations Declaration (UNGA Resolution 2625 (XXV) of October 24, 1970) [hereinafter Friendly

³ Later admitted by President Putin to be Russian soldiers in his address dated April 17, 2014.

Relations Declaration], addressing their application in state practice and by national and international courts and tribunals, as well as their interpretation in international legal scholarship.

Discussants also relied on Russia's prior legal position on the issues of territorial integrity and self-determination, in particular, its written and oral pleadings in the Kosovo proceedings at the International Court of Justice [hereinafter ICJ] in 2009.

3. Self-Determination, Secession and Use of Force

The central question to feature in most presentations⁴ was whether the use of military force in Crimea took the issue of the peninsula's lawful self-determination off the table in its entirety under international law. However, the grounds for self-determination were also discussed in detail.

Panelists generally agreed that in order to receive the right to secede from a parent state, the population of a given territory must qualify as a self-determined unit – that is, a people. Here, it was felt whilst there are a variety of definitions of a 'people,' none are likely to be applicable to the Crimean population.

As state practice and *opinio juris* play a crucial role in the formation of international law, *Chris Borgen* (*St. John's University, New York, USA*) drew attention to the fact that in the 2009 Kosovo proceedings before the ICJ Russia had expressed a position on the definition of the 'will of the people' that was in clear contradiction of its current position on Crimea. In the Kosovo proceedings, Russia had specifically stated that

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.⁵

In practical terms, if applied to the situation in Crimea, this earlier Russian reading of international law would have required the holding of a Ukrainian-wide referendum on Crimea's secession.

Alexander Zadorozhny (*Taras Shevchenko University, Kyiv, Ukraine*) questioned the consistency of Russia's position on self-determination, citing Russia's Constitutional Court in Rulings No. 10-P of June 7, 2000, and No. 92-O of June 27, 2000. Under these rulings, peoples residing in certain Russian regions do not enjoy the right of external self-determination. Professor Zadorozhny also noted that for 23 years Crimea had enjoyed broad autonomy within the Ukraine, and was thus granted internal self-

⁴ With the exception of Professor Tolstykh (Novosibirsk State University, Russia), who took the official Russian position concerning the legality of Russia's intervention in the Crimea due to the danger presented by the Maidan revolution.

⁵ ICJ Verbatim Record, CR 2009/30, at 43 (Dec. 8, 2009), at <<http://www.icj-cij.org/docket/files/141/15726.pdf>> (accessed Jul. 29, 2015).

determination. No discussion on broadening such internal self-determination had occurred prior to proceeding with external self-determination, though there had been no obstacles to engaging in such dialogue. Professor Zadorozhny also critically assessed the argument made by Russian commentators that after the Maidan Crimea had been 'excluded from Ukrainian national dialogue,' noting that no Crimean had been excluded from the Verkhovna Rada by the time of Crimea's separation.

Theodore Christakis (University of Grenoble, France) prefaced his speech with an introductory remark about prior flagrant international law violations by Western states, highlighting that this did not, however, entitle subsequent violations of international law by Russia. He proceeded to give a very insightful presentation on whether a positive right to external self-determination exists under international law outside the colonial context. The self-determination principle was first introduced into international law through the UN Charter in 1945, and, as far as the United Nations is concerned, it has always applied solely to the process of decolonization. Professor Christakis also addressed the self-determination paradox by which secession is neither prohibited nor permitted as such, though the principle of territorial integrity creates a strong presumption in international law against secession, in favour of the home state. This absence of any prohibition is reflected, *inter alia*, in the often-quoted passage of the ICJ in the Kosovo Advisory Opinion that 'general international law contains no . . . prohibition of the declarations of independence.'⁶ However, it does not automatically give rise to an enforceable *right* to secede.

As regards remedial secession, both Christakis and Borgen agreed that lack of consistent state practice and the radically different *opinio juris* of States, mean that no right to remedial secession has thus far emerged under positive international law.

The absence of both a prohibition or permission on secession under international law does not mean that the 'effective' secession of Crimea is allowed under international law, given Russia's armed involvement in the conflict. Professor Christakis particularly noted Russia's main argument, which has evolved to support the use of force to guarantee the exercise of self-determination. While holding a referendum as such is not a violation of international law, external intervention to pursue to holding of such a referendum is. The Friendly Relations Declaration allows the promotion of the right to self-determination. Here, people fighting for self-determination are allowed 'to seek and to receive support' only in accordance with the provisions of the UN Charter, which includes provisions on the prohibition of the use of force. Furthermore, according to the Friendly Relations Declaration support may be sought and received against a forcible action in pursuit of the exercise of their right to self-determination, which makes this provision essentially inapplicable to Crimea.

During the *second panel discussion on the use of force*, panelists held a legal discussion on the official Russian position on this matter, as reflected, *inter alia*, in the

⁶ Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010 I.C.J. 403, 438, available at <<http://www.icj-cij.org/docket/files/141/15987.pdf>> (accessed Jul. 29, 2015).

statement by President Putin of March 18, 2014, where it was asserted that ‘without a single shot being fired and without casualties, there has not been an aggression.’⁷ The Russian Ministry of Foreign Affairs went even further than this⁸ to state that, as no shots had been fired, the use of force had not taken place at all.

On the latter point, *Patrycja Grzebyk* (*University of Warsaw, Poland*) and *Antonello Tancredi* (*University of Palermo, Italy*) noted that under international law aggression can occur both against people and territory, as well as sovereign rights. Thus, even in the absence of any loss of life or massive destruction, a military operation resulting in the forcible taking of another State’s territory amounts to aggression.

Panelists also highlighted that common Art. 2 of the Geneva Conventions defines as an international armed conflict situations excluding military resistance. *Paul Eden* (*University of Sussex, United Kingdom*) pointed out that the Russian Federation Council’s authorization of the use of armed force in the Ukraine amounts to a threat of the use of force.

Christian Henderson (*University of Liverpool, United Kingdom*) discussed a ‘cascading relationship’ between coercion that went through political, economic, military, *etc.* intervention and various forms⁹ of the use of force, of which an armed attack is the gravest. The legal qualification of certain actions as an ‘armed attack’ gives an attacked State the right of self-defense, which in the case of Crimea was never used by Ukraine.¹⁰

In the Crimean context, the language employed by Ukraine and at the UNSC was that of ‘aggression.’ Antonello Tancredi noted a degree of confusion to the extent that claims were based on ‘aggression,’ rather than the ‘armed attack’ that would allow the Ukraine to claim its right of self-defense. Patrycja Grzebyk cited scholarship according to which in referring to ‘aggression’ the Definition of Aggression defines various forms of an armed attack. She referred to the fact that, for example, invasion (para. 3(a) of the Definition of Aggression or armed blockade of the ports or coasts (para. 3(c) of the Definition of Aggression) do constitute an armed attack sufficient to trigger the right to self-defense.

At the same time, the panel generally agreed that qualifying Russia’s actions as ‘aggression’ may be even more significant in the circumstances in light of the fact that it would give rise to the application of Art. 5 of the Definition of Aggression,

⁷ *Address by President of the Russian Federation*, President of Russia (Mar. 18, 2014), <<http://en.kremlin.ru/events/president/news/20603>> (accessed Jul. 29, 2015).

⁸ *Foreign Ministry Spokesman Alexander Lukashevich Answers a Media Question about the Situation around the Budapest Memorandum*, <http://www.mid.ru/BDOMP/Brp_4.nsf/arh/CC1C845CAA26D5A043257E07004BF6EB?OpenDocument> (accessed Jul. 29, 2015).

⁹ An armed attack within the meaning of Art. 51 of the UN Charter or an act of aggression within the meaning of the Definition of Aggression.

¹⁰ The right of self-defense was mentioned by Ukraine only once, in the address of the Ukrainian parliament to the United Nations of March 13, 2014, where Russia’s actions, however, were called an ‘unprovoked act of aggression.’ However, in practice Ukraine did not invoke the right of self-defense in response to the taking of the Crimea. An ‘armed attack’ was not discussed at all either at the UNSC or elsewhere with respect to the Crimean situation.

which prohibits any territorial acquisitions or special advantages resulting from aggression. In addressing the customary nature of this provision, some panelists referred to the Nuremberg judgment under which the annexations of Czechoslovakia and Austria were considered acts of aggression.

The official Russian position was presented by *Evgeny Voronin (MGIMO University, Moscow, Russia)*. He posited that Russia had the right to deploy military personnel in Crimea under the 1997 Agreement between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory, pointing out that the number of troops permitted under that Agreement were in no case exceeded in 2014. Unfortunately, this position failed to address Russia's obligation not to use its military personnel to violate Ukrainian territorial sovereignty and political independence under Art. 6(1) of that Agreement.

Additionally, Professor Voronin, together with another speaker from Russia – *Alexander Salenko (Immanuel Kant Baltic Federal University, Kaliningrad, Russia)* – argued that due to the illegality of the transfer of Crimea in 1954, and the lack of a referendum in 1991 when Crimea became part of the Ukraine, an unlawful situation has emerged in which the Ukraine had not secured legal title to Crimea. However, this line of argumentation seems to forget that according to the Russian position expressed before the ICJ in its oral submissions in 2009,¹¹ lack of discussion on the status of a territory during a country's disintegration, such as happened in SFRY in 1992 or the USSR in 1991, breaks the link between subsequent secession and the initial process of dissolution.

Professor Voronin supported his arguments with reference to the reunification of Northern Schleswig with Denmark in 1921 through plebiscite. Nevertheless, that situation of almost 100 years ago involved extensive negotiations and at least a two-year preparation – a backdrop dramatically different from the Crimean referendum, which was announced and held within less than three weeks.

The general conclusion of the first two panels was that, notwithstanding any possible arguments in favour of self-determination under international law and while the holding of a referendum as such is not a violation of international law, external military intervention in support of a referendum is a grave violation of preemptory norms of international law and should entail State and individual responsibility.

4. Responsibility and Sanctions

Sanctions imposed on Russia are the practical implementation of State responsibility as codified by the International Law Commission [hereinafter ILC] in its Draft Articles on Responsibility of States for Internationally Wrongful Acts¹² [hereinafter Draft Articles].

¹¹ See *supra* n. 5.

¹² *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), reprinted in 2 Y.B. Int'l L. Comm'n 20 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1, at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (accessed Jul. 29, 2015).

Anatoly Kapustin (*Institute of Legislation and Comparative Law, Moscow, Russia*) asserted that sanctions can only be lawful when imposed within the framework of an international organization. However, this view does not find support in either state practice or the Draft Articles – a point highlighted by other participants of the panel. Furthermore, neither is the argument consistent with Russia's approach with respect to Georgia when in 2006, Russia unilaterally imposed bans on the import of certain Georgian goods into Russia, and interrupted all aerial, road, maritime, railway, postal and financial links with Georgia¹³ – a matter not addressed in Professor Kapustin's presentation.

In the current state of international law, there is an open question as to whether and to what extent non-recognition is mandatory. However, the right not to recognize a situation in case of its illegality is not disputed.

According to the Draft Articles, State responsibility arises in the case of an international wrongful act committed by a State. In the event that such an act concerns obligations *erga omnes* – obligations owed to the international community as a whole – the responsibility of such a State can be invoked not only by the immediate victim State, but also by other States, either acting individually or through international organizations.

According to Professor Kapustin's view, votes on Resolution 68/262 in the UN General Assembly show that the international community 'as a whole' had not recognized reunification of Crimea as illegal.

Enrico Milano (*University of Verona, Italy*) noted that while the international community does not have a lawfully delegated authority to decide on a situation with legally binding effect (beyond the UNSC, which can be blocked from determining legality and imposing measures by the permanent member veto), each State must decide whether a violation of an *erga omnes* obligation has occurred.

Maurizio Arcari (*University of Milano-Bicocca, Italy*) alluded to the relevant provisions of the Draft Articles. Under Art. 41, States have certain obligations in the event of a breach of an obligation *erga omnes*. These include cooperating to bring to an end the breach through lawful means, non-recognition as lawful of a situation entailing such a breach, and not rendering any aid or assistance to maintain that situation. In addition, States are entitled under Art. 48 to invoke the responsibility of the State committing the violation of a *ius cogens* norm by claiming from the responsible State cessation of the internationally wrongful act, as well as assurances and guarantees of non-repetition; and performance of the obligation of reparation in the interest of the injured State or the beneficiaries of the obligation breached. Moreover, by using the language of 'lawful measures' Art. 54 covers both retortions (generally lawful measures under international law) and counter-measures (measures that are contrary to international law but that can be justified when taken in response

¹³ *Georgia v. Russia*, ¶ 22, no. 13255/07 (Eur. Ct. H.R., Jul. 3, 2014), at <<http://www.civil.ge/files/files/2014/ECHR-GEORGIAv.RUSSIA-I.pdf>> (accessed Jul. 29, 2015).

to the violation).¹⁴ However, the ILC noted in 2001 that state practice was too sparse to establish a rule of general application with respect to counter-measures taken in the general or collective interest of the international community as a whole.

Speakers noted the consistent invocation of the general interest of the international community and significant practice regarding the non-recognition of Crimea's annexation by countries and international organizations, like the OSCE, EU and NATO. They concluded that this is likely to add to the development of international law in the area of collective counter-measures – a question hereto left unresolved by the ILC.

Speakers agreed that any economic sanctions, as measures to applied by a state or a group of states to achieve changes in the internal or foreign policy of another country, come into tension with WTO law, the primary purpose of which is to liberalize international trade. However, the so-called security exception in Art. XXI¹⁵ of the GATT and similar GATS and TRIPS provisions potentially prevent any legal conflicts in this area. Indeed, *Łukasz Gruszczyński* (*Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland*) and *Matthias Hartwig* (*Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany*) surmised that, if assessed by a WTO panel, the application of, would mean that such sanctions would be unlikely to be found in violation of WTO law.

5. Non-Recognition

A separate panel of the conference was devoted to non-recognition as a legal obligation stemming from Art. 41 of the Draft Articles.

The discussion proceeded with a very detailed account of the particular measures that should be adopted by States as the consequence of their non-recognition policy with regard to the Crimean situation.

Among such measures is the ban on imports of goods originating from Crimea and not certified by Ukrainian authorities (such as Council Regulation (EU) No. 692/2014 of June 23, 2014) – a typical measure that has also been applied, *inter alia*, with regard to Northern Cyprus, Transnistria, and other regions with contested status. As part of non-recognition policy, states are not supposed to recognize the current Crimean authorities. *Przemysław Saganek* (*Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland*) added in this regard, that according to Polish law, judgments of Russian courts based in Crimea will not be recognized in Poland. Furthermore, States are not supposed to enter into agreements with Russia that

¹⁴ According to professor Arcari, the third phase of sanctions against Russia in December 2014 fell under the framework of counter-measures.

¹⁵ Prohibiting to 'prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations . . .'

implicitly recognize Russia's sovereignty over Crimea (with one humanitarian exception). Such consequences of non-recognition were discussed by the ICJ in its 1971 Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa).

According to *Stefan Oeter (University of Hamburg, Germany)*, in practical terms, this duty means an absence of any demarcation treaties, including on exclusive economic zones [hereinafter EEZ], and in particular, no joint exploitation agreements with respect to the Black Sea territory adjacent to Crimea and claimed by Russia. It also means the non-applicability of treaties with relevant territorial clauses of application, such as double taxation treaties, extradition or investment treaties, etc. In particular, a foreign investor may not rely on investment protection if doing business in the occupied territories, as it is not an investment in the territory of the State concerned. In the latter case, even if an investment tribunal accepts the case for consideration and delivers an award in favour of the investor, states adhering to non-recognition policy would not be allowed to enforce such a ruling as it would imply recognition of the contested territory. Under the UN Convention on the Law of the Sea, Russia is not recognized as a coastal state and, as a result, cannot enjoy the rights of a coastal state, such as the right to arrest or inspect vessels or crew, exploit resources of the EEZ, etc.

However, according to the established humanitarian exception rule, certain actions with respect to contested territories are allowed to benefit their populations, without entailing recognition of such territories. For example, under the ICJ's 1971 Namibia Advisory Opinion and the European Court of Human Rights case of *Louizidou v. Turkey*,¹⁶ certain transactions and acts by third states, such as the registration of various civic acts (marriages, births and deaths), without which the inhabitants of the territory would be negatively affected, are lawful and not treated as recognition of such contested territories.

6. Conclusion

The situation in Crimea is highly challenging, and a legal solution is almost impossible without the mobilization of further political will. As noted during the panels, similar situations have occurred in the past, in localities such as Northern Cyprus, South Rhodesia, Palestine, etc. Such situations have always inhaled enormous tension between facts and law, wherein a *de facto* situation remains legally unrecognized. This is not the first time a permanent five UN Security Council

¹⁶ See, e.g.: Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 56, at <<http://www.icj-cij.org/docket/files/53/5595.pdf>> (accessed Jul. 29, 2015); *Loizidou v. Turkey*, ¶ 45, no. 15318/89 (Eur. Ct. H.R., Dec. 18, 1996), at <<http://www.hri.org/news/special/loizidou/onmerits.html>> (accessed Jul. 29, 2015).

member has been involved in a military operation that has not been authorized by the UNSC itself. As always, the direct involvement of such a member – this time, Russia – undoubtedly adds to the gravity of the situation.

One of the most notable aspects of the Warsaw Conference was a complete breakdown in effective communication between speakers from Russian universities and those from other localities. Although everyone spoke about international law and seemingly interpreted the same applicable treaties, Russian argumentation structures appeared to be based on entirely different premises to those of the rest of the audience. Also notably, the presentations made by the four Russian speakers were mostly limited to presenting the official Russian position on the Crimean situation, often restating it to the letter. In so doing, some of the speakers from Russia did not perceive a problem with Russia applying an entirely different reading of particular rules of international law.

Whilst this stance may in some way prove to be of utility to Russia in the context of a conference or any other scientific event, it would definitely be a losing strategy before an international court.

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