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# A New Imperialism? Evaluating Russia's Acquisition of Crimea in the Context of National and International Law

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# A New Imperialism? Evaluating Russia's Acquisition of Crimea in the Context of National and International Law

## I. INTRODUCTION

In November 2013, after some progress toward greater economic union between Ukraine and the European Union, then-current President Yanukovich suspended Ukraine's preparations for a trade deal with the European Union, instead choosing closer ties with Russia.<sup>1</sup> During the following three months, a variety of protests took place with some physical confrontations also occurring.<sup>2</sup> On February 18, 2014, the confrontations between protestors and police officers reached their bloodiest day yet, leading to the deaths of at least eighteen people, with casualties on both sides.<sup>3</sup> In the aftermath of the violence, President Yanukovich fled from the country and was replaced by an interim leader, Oleksandr Turchynov, who acted as president until elections were held in May.<sup>4</sup> Hours after Yanukovich fled, he was impeached by Ukraine's parliament for abusing his powers.<sup>5</sup> Russia sent forces to the Crimea region of Ukraine, despite repeated claims by Putin that there were "no Russian units in eastern Ukraine . . . . All this is being done by the local residents."<sup>6</sup> According to Putin, the presence of soldiers in Ukraine had been required so that the Crimeans could choose in a

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1. Marta Shokalo, *Ukraine Crisis: Police Storm Main Kiev 'Maidan' Protest Camp*, BBC (Feb. 19, 2014), <http://www.bbc.com/news/world-europe-26249330>.

2. *Id.*

3. *Id.*

4. Daisy Sindelar, *Was Yanukovich's Ouster Constitutional?*, RADIO FREE EUR. RADIO LIBERTY (Feb. 23, 2014), <http://www.rferl.org/content/was-yanukovichs-ouster-constitutional/25274346.html>.

5. *Ukraine President Yanukovich Impeached*, AL JAZEERA (Feb. 22, 2014, 7:12 PM GMT), <http://www.aljazeera.com/news/europe/2014/02/ukraine-parliament-ousts-president-yanukovich-2014222152035601620.html>.

6. Kathy Lally, *Putin's Remarks Raise Fears of Future Moves Against Ukraine*, WASH. POST (Apr. 17, 2014), [http://www.washingtonpost.com/world/putin-changes-course-admits-russian-troops-were-in-crimea-before-vote/2014/04/17/b3300a54-c617-11e3-bf7a-be01a9b69cf1\\_story.html](http://www.washingtonpost.com/world/putin-changes-course-admits-russian-troops-were-in-crimea-before-vote/2014/04/17/b3300a54-c617-11e3-bf7a-be01a9b69cf1_story.html).

referendum whether to remain with Ukraine or join Russia.<sup>7</sup> However, there are reports that President Putin had authorized the invasion of Ukraine even before the government collapsed.<sup>8</sup> Prior to the referendum, Russia significantly increased its military presence in Crimea by increasing the number of troops on the peninsula to around twenty-two thousand.<sup>9</sup> The results of the referendum were incredibly in favor of joining Russia, with over ninety-five percent of the voters choosing reunification.<sup>10</sup> Crimean election officials declared that participation in the vote exceeded eighty-three percent.<sup>11</sup>

Western governments and the interim Ukrainian prime minister Yatsenyuk rejected the referendum, with the prime minister declaring the vote a “circus” with Moscow as the “stage direct[or].”<sup>12</sup> Indeed, Russia’s significant military presence was cited as one of the reasons that the United States and Western nations would not recognize the results of the referendum as legitimate.<sup>13</sup> Though the United States acknowledged that it expected the ethnic Russian population to vote in favor of joining Russia, it took issue with the process that had been used: the United States claimed the process violated the Ukrainian Constitution, “occurred under duress of Russian military intervention,” and was “administered under threats of violence and intimidation from a Russian military intervention that violates

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7. *Id.*

8. Matthew Schofield, *Russian News Report: Putin Approved Ukraine Invasion Before Kiev Government Collapsed*, MCCLATCHYDC (Feb. 21, 2015, 6:08 AM), <http://www.mcclatchydc.com/2015/02/21/257386/russian-news-report-ukraine-invasion.html>. Novaya Gazeta, a relatively independent investigative newspaper in Russia, supposedly gained access to documents detailing the strategy for invading Ukraine planned weeks before the government collapsed. *Id.*

9. Carol Morello, Will Englund & Griff Witte, *Crimea’s Parliament Votes to Join Russia*, WASH. POST (Mar. 17, 2014), [http://www.washingtonpost.com/world/crimeas-parliament-votes-to-join-russia/2014/03/17/5c3b96ca-adba-11e3-9627-c65021d6d572\\_story.html](http://www.washingtonpost.com/world/crimeas-parliament-votes-to-join-russia/2014/03/17/5c3b96ca-adba-11e3-9627-c65021d6d572_story.html).

10. Carol Morello, Pamela Constable & Anthony Faiola, *Crimeans Vote to Break Away from Ukraine, Join Russia*, WASH. POST (Mar. 16, 2014), [http://www.washingtonpost.com/world/2014/03/16/cc2132-acd4-11e3-a06a-e3230a43d6cb\\_story.html](http://www.washingtonpost.com/world/2014/03/16/cc2132-acd4-11e3-a06a-e3230a43d6cb_story.html).

11. Morello, Englund & Witte, *supra* note 9.

12. *Id.*

13. *Id.*

international law.”<sup>14</sup> In addition, Yatsenyuk claimed the actual vote allowed individuals with foreign passports to vote, lacked proper monitoring, and was occurring in the presence of armed men.<sup>15</sup> CNN photographers captured at least one instance of a voter dropping two papers into the ballot box.<sup>16</sup>

President Putin recognized Crimea’s independence the day following the referendum, despite the significant sanctions that had been imposed on Russia by the West.<sup>17</sup> The Supreme Rada of Crimea, the region’s parliament, held a session declaring independence, although “[m]asked men in body armor” blocked journalists’ access to the meeting.<sup>18</sup> The Crimean Supreme Rada nationalized Ukrainian state property and requested recognition from the United Nations.<sup>19</sup> On March 21, the Russian parliament approved the annexation of Crimea,<sup>20</sup> and President Putin signed the bill completing the annexation shortly thereafter.<sup>21</sup> The United Nations, unable to pass a Security Council resolution<sup>22</sup> due to Russia’s veto power,<sup>23</sup> resorted to a General Assembly resolution

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14. Press Release, The White House, Statement by the Press Secretary on Ukraine (Mar. 16, 2014), <https://www.whitehouse.gov/the-press-office/2014/03/16/statement-press-secretary-ukraine>; Laura Smith-Spark, Diana Magnay & Nick Paton Walsh, *Ukraine Crisis: Early Results Show Crimea Votes to Join Russia*, CNN (Mar. 16, 2014, 7:52 PM ET), <http://www.cnn.com/2014/03/16/world/europe/ukraine-crisis/>.

15. Smith-Spark, Magnay & Walsh, *supra* note 14.

16. *Id.*

17. Jim Heintz, *Crimea Parliament Declares Independence from Ukraine After Referendum*, HUFFINGTON POST (May 17, 2014), [http://www.huffingtonpost.com/2014/03/17/crimea-parliament-declares-independence\\_n\\_4977584.html](http://www.huffingtonpost.com/2014/03/17/crimea-parliament-declares-independence_n_4977584.html). Recognition of Crimea occurred “just hours after the United States and the European Union announced asset freezes and other sanctions against Russian and Ukrainian officials involved” in Crimea. *Id.*

18. *Id.*

19. *Id.*

20. *Russia Officially Annexes Crimea away from Ukraine with Signature from Vladimir Putin*, CBSNEWS (Mar. 21, 2014, 8:13 AM), <http://www.cbsnews.com/news/russia-annexes-crimea-away-from-ukraine-with-signature-from-vladimir-putin/>.

21. Timothy Heritage & Darya Korsunskaya, *Russia Rules out Handing back Crimea, Expands War Games*, REUTERS (Mar. 17, 2015, 1:29 PM EDT), <http://www.reuters.com/article/us-ukraine-crisis-crimea-russia-idUSKBN0MD0Z220150317>.

22. S.C. Draft Res. S/2014/189, U.N. Doc. S/2014/189 (Mar. 15, 2014). The draft resolution specifically reaffirmed Ukraine’s sovereignty and territorial borders and declared that the referendum was not valid and should not be recognized by any nation. *Id.* at ¶¶ 1, 5.

23. U.N. SCOR, 69th Sess., 7138th mtg. at 3, U.N. Doc. S/PV/7138 (Mar. 15, 2014). The final vote was thirteen votes to one with one abstention but because Russia is a permanent member of the council, the resolution was not adopted. *Id.*

calling upon states not to recognize a change in Crimea's status after the referendum.<sup>24</sup>

The actions of Russia in Crimea, including its military presence on the peninsula and its encouragement of the referendum, violated Ukrainian domestic law, Russia's international obligations under the U.N. Charter, and Russia's obligations under treaties with Ukraine. Furthermore, the process did not conform to the requirements of Russia's own Federal Constitutional Law on the Acceptance of New Territories into the Russian Federation. Kosovo is an example of recent precedent for unilateral declarations of independence. However, the situation in Ukraine was not analogous to Kosovo and does not support the legality of the referendum held in Crimea, contrary to the claims made by President Putin and the Russian government.

Part II of this paper will examine the historical means that have been recognized by nations as methods of acquiring new territory. Part III will examine the rights and abilities of parts of nations to unilaterally declare their independence and examine whether the process used in Crimea and Sevastopol conformed to both Ukrainian domestic law and international law. Part IV will discuss whether Russia's acquisition of Crimea complies with its international legal obligations, both as a member of the United Nations and with regards to its treaties. Part V will consider Russian domestic law to determine if the process used by Russia complied with its own domestic legal requirements. Part VI will conclude.

## II. INTERNATIONAL PRECEDENT ON TERRITORIAL ACQUISITION

International law recognizes several different methods of acquiring title to territory. While some of the methods are no longer very applicable to modern claims for territory, there remain many controversies regarding who the sovereign controller is over islands, land subject to border disputes, and the arctic and Antarctic regions.<sup>25</sup> Disputes over ownership of territory have frequently led to armed conflict in the past, while settlement of these disagreements

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24. G.A. Res. 68/262, ¶ 6 (Mar. 27, 2014). The resolution was passed with 100 votes to 11 with 58 abstentions. U.N. GAOR, 68th Sess., 80th plen. mtg. at 17, U.N. Doc. A/68/PV.80 (Mar. 27, 2014).

25. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 376 (5th ed. 2009).

based on international law can lead to peaceful negotiations and solutions.<sup>26</sup> Indeed, international proceedings, in both courts and arbitration, frequently resolve disputes concerning boundaries and title to land and islands.<sup>27</sup> The main methods of acquiring territory differ depending on the source cited—for the purposes of this discussion, occupation, accretion, cession, conquest, and prescription will be described below.<sup>28</sup>

### *A. Occupation*

Occupation refers to the act of acquiring territory that is not under the sovereignty of another state—it is one of the original modes of acquisition because title is not derived from another state.<sup>29</sup> During the colonization of North America, the European naval powers relied on the Roman concept of *terra nullius* (nobody's land) to claim vast swathes of land on the new continent.<sup>30</sup> In general, occupation requires both that the territory be *terra nullius* and that the appropriation of territory be real or effective.<sup>31</sup> Real or effective possession generally requires an “announced intention to acquire[] and actual settlement or occupation with the assertion of governmental authority.”<sup>32</sup> Thus, the act must be a state act or an act

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26. *Id.* at 376–77.

27. JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 215 (8th ed. 2012); see also Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779 (2004) (detailing a variety of cases that the International Court of Justice has heard on territorial and boundary disputes and various theories the Court has applied in its decision-making).

28. Compare CRAWFORD, *supra* note 27, at 240 (accretion), with DAMROSCH ET AL., *supra* note 25, at 382 (succession). A state can also establish title to territory by demonstrating that it is a successor to the prior state that held title to the territory but that has dissolved or disappeared or from which the state seceded. *Id.* While other issues related to succession are more complex, such as assumption of debts and assets and other international obligations, it is important to note that succession does not alter the borders that existed between the now-defunct state and neighboring countries—the title of all of the succeeding states cannot exceed the title that the defunct state held. *Id.* at 382–83. Brownlie also acknowledges judicial adjudication as a possible mode of acquisition, although it would likely also fit under the cession umbrella. CRAWFORD, *supra* note 27, at 229.

29. 1 OPPENHEIM'S INTERNATIONAL LAW 686 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

30. DAMROSCH ET AL., *supra* note 25, at 377.

31. NORMAN HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 146 (1945).

32. *Id.* at 147.

acknowledged by a state—the acts of individuals do not confer territory to a state.<sup>33</sup> The European powers did not require that the land not be inhabited, instead *terra nullius* referred to territory that was yet unclaimed by European states.<sup>34</sup> In modern times, the vast majority of the planet, particularly the areas in which humans can live, has fallen under the sovereignty of a nation, so it is unlikely that discovery of *terra nullius* will be used in any circumstances except for minor islands of the sea or for claims to parts of Antarctica.<sup>35</sup> However, modern cases relating to a prior claim of occupation or discovery can still arise and require a court to investigate events that potentially occurred centuries prior.<sup>36</sup> In an advisory opinion, the International Court of Justice deemed that *terra nullius*, both as used in modern times and as used in the period of colonization, could only refer to lands that were not “inhabited by tribes or peoples having a social and political organization.”<sup>37</sup> Even other periods of discovery or occupation often included agreements with local rulers regarding cession of territory.<sup>38</sup> The modern U.S. view is that discovery alone does not give title to land—it must be accompanied by some form of effective occupation.<sup>39</sup>

### B. Accretion

Accretion refers to natural geological processes that increase territory—sedimentary deposits on a shoreline or volcanic eruptions on islands (potentially creating new islands).<sup>40</sup> Accretion also includes gradual changes in the flow of rivers but not sudden acts that alter the course of a river, such as avulsion.<sup>41</sup> Accretion also, however,

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33. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 29, at 687.

34. DAMROSCH ET AL., *supra* note 25, at 377.

35. *Id.*

36. CRAWFORD, *supra* note 27, at 215.

37. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 39 ¶ 80 (Oct. 16).

38. *Id.*

39. CRAWFORD, *supra* note 27, at 223.

40. *Id.* at 240. If such islands are in the high seas, they do not belong to any state and may be acquired through occupation. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 29, at 698.

41. HILL, *supra* note 31, at 162–63. In this context, avulsion refers to the sudden removal of land or soil by floods or changes in the course of a river. *Avulsion Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/avulsion> (last visited Oct. 17, 2015).

includes artificial formations such as embankments, dykes, and similar constructs.<sup>42</sup>

### *C. Cession*

It seems that the preferred modern method of acquiring territory is through treaties with the prior owner of title to the territory in question. Prior cessions of territory were frequently part of the peace treaty that a defeated country was forced to sign—while such treaties were valid in the past, modern treaties are illegitimate if they are procured under the threat or use of force.<sup>43</sup> Title to territory is often granted by means of purchase or in exchange for other benefits.<sup>44</sup> Indeed, this method also has significant history in the United States, through the purchases of Louisiana from France, southern Arizona from Mexico, and Alaska from Russia and through the Adams-Onís Treaty with Spain granting Florida and the Oregon Treaty with Great Britain fixing the northern border of the United States.<sup>45</sup> Treaties dividing territory have also been argued in front of the International Court of Justice regarding Libya and Chad,<sup>46</sup> Botswana and Namibia,<sup>47</sup> and Indonesia and Malaysia.<sup>48</sup> Access to the International Court of Justice in settling territorial disputes directly coincides with the U.N. mandate to settle disputes by peaceful means.<sup>49</sup> Central to the idea of cession is the principle that a state cannot transfer more territory than it possesses: *nemo dat quod non habet*.<sup>50</sup>

### *D. Conquest*

Prior to general prohibitions on the use of force, conquest frequently resulted in changes to title to territory.<sup>51</sup> Early in the

42. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 29, at 696.

43. *Id.* at 681.

44. DAMROSCH ET AL., *supra* note 25, at 365.

45. *Id.*

46. Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6 (Feb. 3).

47. Kasikili/Sedudu Island (Bots. v. Namib.), Judgment, 1999 I.C.J. 1045 (Dec. 13).

48. Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. 625 (Dec. 17).

49. U.N. Charter art. 1, ¶¶ 1–2.

50. CRAWFORD, *supra* note 27, at 227.

51. DAMROSCH ET AL., *supra* note 25, at 379.

twentieth century, the Kellogg-Briand Pact and the Stimson Doctrine strongly opposed both war as a tool of national policy and recognition of territorial transfers occurring as a result of war.<sup>52</sup> Following the introduction of the U.N. Charter and its general prohibition on the use of force,<sup>53</sup> the ability to rely on military conquest to gain title to territory has effectively ended. This prohibition on conquest was made even clearer in the *Declaration on Principles of International Law concerning Friendly Relationships and Co-operation among States in accordance with the Charter of the United Nations*.<sup>54</sup> In the declaration, the General Assembly affirmed the duty of each state to “refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State . . . . Such a threat or use of force constitutes a violation of international law.”<sup>55</sup> In particular, the declaration noted that the proscription against the use of force included using it in “territorial disputes and problems concerning frontiers of States.”<sup>56</sup> Finally, the declaration states that:

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The Territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.<sup>57</sup>

Thus, while conquest was once an accepted manner of acquiring new territory,<sup>58</sup> it no longer fits under the legal regime established by the United Nations and other doctrines of the twentieth century.

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52. HILL, *supra* note 31, at 162.

53. U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”).

54. G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625 (XXV) (Oct. 24, 1970).

55. *Id.*

56. *Id.*

57. *Id.*

58. *See, e.g.,* United States v. Huckabee, 83 U.S. (16 Wall.) 414, 434–35 (1873) (“Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined, but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror. Complete conquest, by

*E. Prescription*

Similar to common law principles of adverse possession, international law recognizes prescription, or the transfer of title after a second state effectively and peacefully administers the territory.<sup>59</sup> This was affirmed in a dispute between the United States and the Netherlands.<sup>60</sup> The Court of Arbitration examined the history of the Island of Palmas and determined that prior to the grant of the island to the United States by Spain, title had passed to the Netherlands because of the long, continuous, and peaceful period of sovereignty that the Netherlands Indian Government exercised and displayed with regard to the island.<sup>61</sup> The general requirements of prescription are: (1) displays of state authority without recognition of other state sovereignty; (2) public, peaceful, and uninterrupted possession; and (3) persisting possession (that is, over a period of many years).<sup>62</sup> In addition, the original title holder must acquiesce to the possession by the new state: this acquiescence can be both positive (an express declaration that the state believes the new state holds title) or negative (an absence of activity by the former title holder in the area and a lack of protesting against the purported new owner).<sup>63</sup>

### III. SELF-DETERMINATION AND UNILATERAL DECLARATIONS OF INDEPENDENCE

One of the key questions regarding the events that occurred in Crimea is the legality of Crimea's declaration of independence from Ukraine. The starting point in analyzing the referendum that occurred in Crimea and the subsequent declaration of independence by the Crimean legislature is the Constitution of Ukraine. However, international law recognizes that there are times when unilateral

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whatever mode it may be perfected, carries with it all the rights of the former government, or in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property." (internal citations omitted).

59. DAMROSCH ET AL., *supra* note 25, at 383.

60. Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

61. *Id.* at 866–71.

62. CRAWFORD, *supra* note 27, at 231.

63. *Id.* at 232.

declarations of independence may be legal despite domestic law. In analyzing these events, two cases are of prime importance—the Canadian Supreme Court’s analysis of the situation in Quebec in 1998<sup>64</sup> and the International Court of Justice’s analysis of the Kosovo situation in 2010.<sup>65</sup> Both of these cases help to show the current international law framework regarding the unilateral declaration of independence of a portion of a country against the country’s wishes.

### *A. Ukrainian Law*

The Constitution of Ukraine provides that the Autonomous Republic of Crimea has the authority to “organise and hold [] local referendums”<sup>66</sup> and recognizes that referendums are an expression of the will of the populace.<sup>67</sup> In accordance with this, the Constitution of the Autonomous Republic of Crimea grants the Supreme Rada of Crimea the power to “mak[e] . . . a decision about holding a republican (local) referendum”<sup>68</sup> and “set[] up and hold[] . . . republican (local) referendums concerning questions left to the direction of the Autonomous Republic of Crimea.”<sup>69</sup> For the referendum to be legal, it would need to address a matter that is authorized to Crimea under the Constitution of Ukraine.<sup>70</sup> Furthermore, the Constitution of Ukraine is supreme over the Constitution of Crimea and acts of the Supreme Rada of Crimea.<sup>71</sup> The Constitution of Ukraine states that “Ukraine shall be a unitary state”; that the “territory of Ukraine within its present borders shall

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

65. Accordance with Int’l Law of the Unilateral Declaration of Indep. in Respect of Kos., Advisory Opinion, 2010 I.C.J. 403 (July 22).

66. KONSTYTUTSIIA UKRAINY [KONST. UKR.] [CONSTITUTION] art. 138(2) (Ukr.), [http://www.kmu.gov.ua/document/110977042/Constitution\\_eng.doc](http://www.kmu.gov.ua/document/110977042/Constitution_eng.doc) (official translation).

67. *Id.* art. 69.

68. KONSTITUTSIIA AVTONOMNOI RESPUBLIKI KRYM [KONST. ARK] [CONSTITUTION] art. 26(2)(3) (Crimea), [http://www.rada.crimea.ua/constitution/soder\\_constit.html](http://www.rada.crimea.ua/constitution/soder_constit.html) (translation by author).

69. *Id.* art. 18(1)(7) (translation by author).

70. KONST. UKR. art. 134.

71. *Id.* art. 135; *see also* KONST. ARK art. 28 (“The regulatory-legal acts of the Supreme Rada of the Autonomous Republic of Crimea . . . concerning matters . . . shall be made in accordance with the Constitution of Ukraine and Ukrainian laws, the acts of the President of Ukraine, and the Cabinet of Ministers of Ukraine . . .”).

be indivisible and inviolable”;<sup>72</sup> and that the “territorial structure of Ukraine shall be based on the principles of unity and integrity of the State territory [and] the combination of centralization and decentralization in the exercise of the state power.”<sup>73</sup> Crimea is an important part of Ukraine’s territory and is described as “an integral constituent part of Ukraine.”<sup>74</sup> In addition, the Ukrainian Constitution directly addresses potential changes in its territorial boundaries: “[a]lterations to the territory of Ukraine shall be resolved *exclusively by the All-Ukrainian referendum*.”<sup>75</sup> Finally, any changes to the Crimean Constitution must be approved by the Supreme Rada of Ukraine.<sup>76</sup>

### *B. Quebec*

The Canadian Supreme Court had the opportunity to address three questions with regard to Quebec: (1) whether Quebec could unilaterally secede from Canada under the Constitution of Canada; (2) whether international law and the right to self-determination allow Quebec to unilaterally secede from Canada; (3) if there is a conflict between domestic and international law on the right of Quebec to unilaterally secede from Canada, whether domestic or international law takes precedence in Canada.<sup>77</sup> Because the Court found no conflict between domestic and international law regarding Quebec’s right to secede, the Court did not address the third question.<sup>78</sup> While the determination of the Court regarding Canadian law is not entirely relevant to the present discussion, the analysis of international law provided is quite beneficial in determining the status of Crimea’s actions. One point from its discussion of Canadian law is quite relevant to the situation in Ukraine—even a clear majority of Quebecers voting in favor of secession would not change the legality of the action under Canadian

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72. KONST. UKR. art. 2.

73. *Id.* art. 132.

74. *Id.* art. 134.

75. *Id.* art. 73 (emphasis added).

76. *Id.* art. 135.

77. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 218 (Can.).

78. *Id.* at 223.

domestic law.<sup>79</sup> This is so regardless of the strength of the majority voting in favor of secession.<sup>80</sup> However, a clear majority voting in favor of secession would need to be addressed by negotiations among the provinces of Canada in order to allow Quebec to secede, if it could do so while still respecting the rights of others and finding a proper reconciliation of the majority of the population of Quebec and the majority of the population of Canada.<sup>81</sup> “The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.”<sup>82</sup> Quebec could suggest secession and then seek to obtain it through a process of negotiations with the other provinces of Canada.<sup>83</sup>

The Canadian Supreme Court determined that unilateral secession is only applicable in international law “where ‘a people’ is governed as part of a colonial empire; where ‘a people’ is subject to alien subjugation, domination[, ] or exploitation; and possibly where ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.”<sup>84</sup> If none of these apply, “peoples are expected to achieve self-determination within the framework of their existing state.”<sup>85</sup> If the government of a state “represents [all] of the people . . . within its territory . . . equal[ly] and without discrimination,” it “is entitled to maintain its territorial integrity” and expect that other states will recognize that integrity.<sup>86</sup> While an unconstitutional declaration of secession could possibly lead to a *de facto* secession, the viability of that secession would require recognition by the international community.<sup>87</sup>

In addressing the second question, the Court notes that “international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their

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79. *See id.* at 220–21.

80. *Id.* at 221.

81. *Id.*

82. *Id.* at 267.

83. *Id.* at 268.

84. *Id.* at 222.

85. *Id.*

86. *Id.*

87. *Id.* at 222–23.

‘parent’ state.”<sup>88</sup> Because international law does not specifically grant a right of unilateral secession nor explicitly deny the right, it seems to defer to domestic law for determination of the circumstances in which an entity could secede from a state.<sup>89</sup> Self-determination poses a notable exception to this general principle in certain circumstances.<sup>90</sup> However, the general rule is that self-determination must be exercised in accordance with the sovereignty of existing states and their territorial integrity.<sup>91</sup>

When the right of self-determination is pursued through internal means (within the existing state), there is, in general, no conflict. External self-determination, however, can be exercised “in only the most extreme of cases and, even then, under carefully defined circumstances.”<sup>92</sup> In particular, the right to self-determination does not “authoriz[e] or encourag[e]” actions “that would dismember or impair . . . the territorial integrity or political unity” of an existing independent state.<sup>93</sup> The main exceptions to the prohibition on external self-determination are colonial and oppressed peoples (including those subject to alien subjugation).<sup>94</sup> A third potential avenue for asserting a right to external self-determination relates to the prior two in that people may be “blocked from the meaningful exercise of [their] right to self-determination internally.”<sup>95</sup> While the Canadian Supreme Court did not determine whether this third circumstance actually created a right to unilateral secession, it found that the situation in Quebec clearly did not approach the threshold: Quebecers were not being attacked physically or suffering violations of their fundamental rights.<sup>96</sup> Furthermore, Quebecers had served as the Prime Minister of Canada for eighty percent of the prior fifty years and held significant positions at all levels of government and were adequately represented in all branches of government.<sup>97</sup>

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88. *Id.* at 277.

89. *Id.* at 277–78.

90. *Id.* at 278.

91. *Id.* at 280–81.

92. *Id.* at 282.

93. *Id.* at 283.

94. *Id.* at 284–85.

95. *Id.* at 285.

96. *Id.* at 286.

97. *Id.* at 286–87.

Because Quebec was not “denied meaningful access to government to pursue [its] political, economic, social[,] and cultural development,” it had no “right, under international law, to secede unilaterally from Canada.”<sup>98</sup>

Finally, the Court acknowledged that a region may illegally secede, but then achieve legitimacy through international recognition.<sup>99</sup> While international law could adapt to recognize the new political and factual reality, this would not affect the legality of the actions taken by the region in unilaterally seceding.<sup>100</sup> The fact that an act may eventually be legally recognized does not grant a right to engage in the act initially.<sup>101</sup>

### C. Kosovo

The International Court of Justice received a request from the General Assembly of the United Nations to rule on whether Kosovo’s unilateral declaration of independence from Serbia in February 2008 was in accordance with international law.<sup>102</sup> Prior to the declaration, the Security Council had passed resolutions and regulations regarding the United Nations Mission in Kosovo.<sup>103</sup> Security Council Resolution 1244 was adopted to end the humanitarian issues that had been identified and the armed conflict that was occurring in Kosovo.<sup>104</sup> Of note, the resolution enabled the “Secretary-General to establish an international civil presence in Kosovo,” which would help with the establishment of self-governing institutions.<sup>105</sup> The resolution attempted to end the violence and repression that were occurring in Kosovo at the hands of Yugoslavia and required the withdrawal of military and police forces from Kosovo.<sup>106</sup> Furthermore, the international civil presence was tasked with “[p]romoting the . . . autonomy and self-government in

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98. *Id.* at 287.

99. *Id.* at 288.

100. *Id.*

101. *Id.* at 291.

102. Accordance with Int’l Law of the Unilateral Declaration of Indep. in Respect of Kos., Advisory Opinion, 2010 I.C.J. 407 (July 22).

103. *Id.* at 426, ¶ 57.

104. *Id.* at 426, ¶ 58.

105. *Id.*

106. *Id.*

Kosovo.”<sup>107</sup> Starting in 2005, the Secretary-General and the Security Council decided that the final status of Kosovo should be determined.<sup>108</sup> In the ensuing months, “delegations of Serbia and Kosovo addressed . . . Kosovo’s governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights,” but were not close to agreement on most of the issues.<sup>109</sup> Despite additional sessions, the two groups were not able to progress in the negotiations.<sup>110</sup> Because of the inability of the parties to come to a bilateral agreement, the Secretary-General and his Special Envoy decided “that the only viable option for Kosovo [was] independence, to be supervised . . . by the international community,” and drafted a procedure by which the Kosovo Constitution could be created.<sup>111</sup> Despite the support of the Special Envoy and the Secretary-General, the Security Council was unable to come to a consensus on the future disposition of Kosovo.<sup>112</sup> In February 2008, the Assembly of Kosovo adopted a declaration of independence,<sup>113</sup> making reference to the recommendations of the Special Envoy.<sup>114</sup> Serbia did not recognize the declaration and stated that the declaration was unlawful.<sup>115</sup>

In ascertaining the legality of the declaration of independence, the International Court of Justice applied both general international law and Security Council resolution 1244.<sup>116</sup> During the early periods of modern statehood, from the eighteenth century through the early twentieth century, there were many instances of regions declaring independence from a parent state, with no evidence that such a practice was considered contrary to international law.<sup>117</sup> Furthermore, with the creation of the United Nations, the principle of self-determination was given a more prominent role, particularly

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107. *Id.* at 427, ¶ 59.

108. *Id.* at 430, ¶ 64.

109. *Id.* at 431, ¶ 67.

110. *Id.* at 431, ¶ 68.

111. *Id.* at 432, ¶¶ 69–70.

112. *Id.* at 433, ¶ 71.

113. *Id.* at 434, ¶ 74.

114. *Id.* at 434, ¶ 75.

115. *Id.* at 435, ¶ 77.

116. *Id.* at 436, ¶ 78.

117. *Id.* at 436, ¶ 79.

as it related to the right of independence for people in colonial territories and those “subject to alien subjugation, domination[,] and exploitation.”<sup>118</sup> And, while the Security Council had at various times condemned declarations of independence, those declarations were made regarding specific conditions that existed at the time of the declaration.<sup>119</sup> Because there is no general prohibition of declarations of independence, the Court held that Kosovo’s declaration was in accordance with international law.<sup>120</sup>

Looking to Security Council Resolution 1244, the Court noted that the international civil and security presence superseded the legal system in place in Kosovo at the time, instead setting up an international administration.<sup>121</sup> This legal regime was designed to help the development of local self-governance in Kosovo and specifically was not intended to serve as a permanent governmental institution, although it did supersede the Serbian legal system in place at the time of its introduction.<sup>122</sup> Because the resolution only contained provisions relating to the interim status of Kosovo and not its final status, the Court reasoned that the resolution did not restrict the ability of Kosovo to become independent—in part because only nineteen days after adopting resolution 1244, the Security Council used specific language in resolution 1251 to set the conditions relating to the final status of Cyprus.<sup>123</sup>

#### *D. Crimea’s Referendum*

When applying both domestic and international law to the referendum and referendum process in Crimea, several problems are apparent. The actual referendum itself is flawed for several reasons. The substance of the referendum was not a valid topic for Crimea to vote on. The referendum allowed two options: vote in favor of joining Russia as a new subject of the Russian Federation or restore the Constitution of the Republic of Crimea of 1992 and remain a

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118. *Id.*

119. *Id.* at 437, ¶ 81.

120. *Id.* at 438–39, ¶ 84.

121. *Id.* at 443, ¶ 97.

122. *Id.* at 443–44, ¶¶ 98–100.

123. *Id.* at 449, ¶ 114.

part of Ukraine.<sup>124</sup> Joining Russia would necessarily involve seceding from Ukraine. As noted above, the Ukrainian Constitution states that the territorial integrity of the country, including Crimea as an integral part, is a fundamental principle of the country. Because the Ukrainian Constitution is supreme over the Crimean Constitution and acts of the Supreme Rada of Crimea, a referendum that could result in a violation of the Ukrainian Constitution could not be valid. Even more on point, the Ukrainian Constitution specifically states that changes to its territory must be resolved by a pan-Ukrainian referendum, not a referendum in the area that wishes to break away. Because the referendum could alter the territory of Ukraine, it was only the proper subject of an All-Ukrainian referendum, not an All-Crimean referendum. The second option in the referendum, resulting in a return to the 1992 Constitution, does not suffer the same constitutional problems as does the first choice. However, based on the Constitution of Ukraine, changes to the Constitution of Crimea must be approved by Supreme Rada of Ukraine—the referendum vote would not change the Constitution of Crimea until approved by the central government of Ukraine. Thus, the referendum in Crimea did not comply with Ukrainian law.

However, as noted by both the Supreme Court of Canada and the International Court of Justice, a declaration of independence that does not comport with domestic law may still be valid under international law. The facts of this situation, however, do not fit the criteria of either court. Under the reasoning of the Canadian Supreme Court, Crimea would only be able to secede if the citizens were being denied their right to exercise self-determination within Ukraine. This simply is not evidenced by the situation in Crimea. Indeed, Crimea in general had *more* autonomy than did other regions of Ukraine because of its special status as an Autonomous Republic.<sup>125</sup> Using the same analysis as the Canadian Supreme Court, Crimeans were not, despite Russia's assertions, suffering human

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124. Biulleten' dlia golosovaniia na obshchekrymskom referendume 16 marta 2014 goda [Bulletin for the Vote on the all-Crimean Referendum of March 16, 2014], Verkhovnaia Rada Avtonomnoi Respubliki Krym, [https://upload.wikimedia.org/wikipedia/commons/9/94/2014\\_Crimean\\_referendum\\_ballot.png](https://upload.wikimedia.org/wikipedia/commons/9/94/2014_Crimean_referendum_ballot.png).

125. See KONST. UKR. arts. 134–39 (detailing the powers and authority granted to Crimea and its ability to enact regulation in a wide field of areas).

rights violations.<sup>126</sup> While Crimeans have not had the same political representation as Quebecers (that is, Prime Minister for eighty percent of the prior fifty years), there is nothing to suggest that they do not receive proportional representation in Ukraine's governmental bodies. Crimeans had access both to their local government and to the Ukrainian government—there was no systematic repression of the Crimean people.<sup>127</sup>

The ruling of the International Court of Justice provides a more compelling case for Russia. President Putin cited Kosovo as the inspiration behind the Crimean referendum.<sup>128</sup> There are several glaring distinctions between the two scenarios. The actions taken in Kosovo were multilateral in nature: the U.N., NATO, and other organizations all worked towards the Kosovo secession.<sup>129</sup> Because Russia initially blocked any Security Council action against Serbia, NATO acted alone to counter Milosevic's ethnic cleansing.<sup>130</sup> The U.N. Security Council brought Kosovo under its supervision with

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126. Rep. of the U.N. High Comm'r for Human Rights on the situation of human rights in Ukr., U.N. Doc. A/HRC/27/75 (Sept. 19, 2014), at Report on the human rights situation in Ukraine, Apr. 15, 2014, 19, 21–22 [hereinafter *Situation of Human Rights in Ukraine*]; see also U.N. SCOR, 69th Sess., 7138th mtg., *supra* note 23, at 5 (comments of the French delegate, noting the lack of any violence against the Russian minorities, despite Russia's claims otherwise).

127. *Situation of Human Rights in Ukraine*, *supra* note 126, at Report on the Human Rights Situation in Ukraine, Apr. 15, 2014, 4 (noting that there were some attacks against ethnic Russians, but “these were neither systematic nor widespread”).

128. Ilya Somin, *Why the Kosovo “Precedent” Does Not Justify Russia’s Annexation of Crimea*, WASH. POST (Mar. 24, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/crimea-kosovo-and-false-moral-equivalency/>. One cannot help but see some perverse humor in the “Kosovo precedent” cited by President Putin, considering that Russia immediately recognized Crimea's independence but still refuses to recognize Kosovo. *Putin Compares Kosovo’s 2008 Independence to Russia’s Annexation of Crimea; Others Disagree*, FOX NEWS (Mar. 19, 2014), <http://www.foxnews.com/world/2014/03/19/putin-compares-kosovo-2008-independence-to-russia-annexation-crimea-others/> (noting that despite using Kosovo as a precedent, Serbian officials believe Russia will never recognize Kosovo and will continue blocking it from becoming a member of the U.N.); Stephen Wilson, *IOC Grants Full Olympic Recognition to Kosovo*, YAHOO! NEWS (Dec. 9, 2014, 9:13 AM), <http://news.yahoo.com/ioc-grants-full-olympic-recognition-kosovo-104150520.html> (noting that more than one hundred nations have recognized Kosovo but Russia has not).

129. *Experts: Crimea Isn’t Comparable to Kosovo*, ANADOLU AGENCY (Mar. 17, 2014, 18:16), <http://www.aa.com.tr/en/politics/302263--experts-crimea-isnt-comparable-to-kosovo>.

130. Valentina Pop, *Merkel: Comparing Crimea to Kosovo is ‘Shameful,’* EUOBSERVER (Mar. 13, 2014, 11:34 AM), <https://euobserver.com/foreign/123454>.

the passage of Security Council Resolution 1244 because of the crisis occurring there, including the acts committed by Serbia against the Albanians.<sup>131</sup> In contrast, the actions taken in Crimea have been unilaterally the actions of Russia. Furthermore, Kosovo was undergoing a humanitarian crisis—no evidence of a similar crisis with respect to ethnic Russians or Russian-speakers has been found in Crimea.<sup>132</sup> Kosovo was experiencing “extensive and systematic discrimination and violation of human rights,” while in Crimea “there really [was] no humanitarian crisis” despite Russia’s insistence that Russian-speakers were in danger.<sup>133</sup> Indeed, there may be evidence to the contrary.<sup>134</sup> The eventual independence of Kosovo was the product of nearly a decade of negotiation and international oversight: the process in Crimea was dominated by Russia and completed in a matter of weeks. Finally, the Security Council has deemed various declarations of independence invalid on the basis of

131. Interview by Jonathan Masters with John B. Bellinger III, Adjunct Senior Fellow for Int’l & Nat’l Sec. Law, *Why the Crimean Referendum Is Illegitimate*, COUNCIL FOREIGN REL. (Mar. 16, 2014), <http://www.cfr.org/ukraine/why-crimean-referendum-illegitimate/p32594>.

132. *Experts: Crimea isn’t comparable to Kosovo*, *supra* note 129.

133. *Id.* (quoting Neil Melvin from the Stockholm International Peace Institute).

134. Situation of Human Rights in Ukraine, *supra* note 126, at 8 (noting that residents in Crimea known for being “pro-Ukrainian” face intimidation and discrimination, Crimean Tatar leaders have been banned from entering Crimea, and there has been a deterioration with respect to freedom of expression, among other rights); *see also* Evgenii Bobrov, *Problemy zhitelei Kryma* [*The Problems of the Inhabitants of Crimea*], Sovet pri Prezidente Rossiiskoi Federatsii po razvitiu grazhdanskogo obshchestva i pravam cheloveka [Council of the President of the Russian Federation on the Development of Civil Society and Human Rights] (Apr. 22, 2014), [http://president-sovet.ru/members/blogs/bobrov\\_e\\_a/problemy-zhiteley-kryma/](http://president-sovet.ru/members/blogs/bobrov_e_a/problemy-zhiteley-kryma/) (detailing how in the aftermath of the referendum, the only Ukrainian language high school in Simferopol was being changed to a Russian language school, the only Ukrainian-Tatar philology department at a federal university was being closed, the relationships between Ukrainians and Russians had turned more severe, the government decided to liquidate the Kiev Orthodox Church, and the government reclassified Islam from a church to a protest ideology because some literature that was allowed in Ukraine is considered “extremist” in Russia). More recently, a Crimean Tatar TV station was pulled from the air after applying four times to re-register with Russia’s media regulator. Richard Balmforth & Pavel Polityuk, *Silencing of Crimean Tatar TV Sparks Outcry from Rights Bodies, Ukraine, Turkey*, REUTERS (Apr. 3, 2015, 7:17 AM EDT), <http://www.reuters.com/article/2015/04/03/us-ukraine-crisis-crimea-idUSKBN0MU0R520150403>. Each time the license application was turned down for alleged mistakes, but Tatars view the refusal as retaliation for their critical stance against Russian rule. *Id.* Human rights organizations have claimed that this is just the latest in a series of moves to stifle Crimean Tatar media outlets and pro-Ukrainian media, with several journalists critical of the authorities being subject to raids, harassment, and detainment. *Id.*

the specific conditions that existed at the time of the declaration. This necessitates looking to the conditions that existed during the referendum to see if there is any reason to doubt the validity of Crimea's declaration of independence.

Prior to the referendum, Russia unilaterally entered Crimea with its military force, with thousands of Russian troops occupying the peninsula.<sup>135</sup> In addition, an independent newspaper in Russia, *Novaya Gazeta*, published what it purported to be a strategic Russian document from prior to Yanukovich's loss of power.<sup>136</sup> The purported report claims that Russia "risks losing, not simply the Ukrainian market for the supply of energy, but, what is much more dangerous, even indirect control over the gas transportation system in Ukraine."<sup>137</sup> This would harm the position of Gazprom and significantly hurt the economy of Russia.<sup>138</sup> The document further mentions that, because of the current conditions in Kiev and the impending failure of Yanukovich, the Russian government needed to reinforce the goals of those who are seeking to join Russia, particularly in the eastern regions (including Crimea) to encourage them to initiate a reunification with Russia.<sup>139</sup> In addition, the document claims that Russia needed to create conditions in Crimea and the east that would give the process political legitimacy and a moral justification, and it needed to create a PR campaign to stress the reactionary nature of Russia's actions.<sup>140</sup> Finally, the report details the necessity of preparing conditions in Crimea and Kharkiv for holding referenda about greater self-governance and eventual opportunities to join Russia.<sup>141</sup> Noticeably absent from the document are any justifications for Russia's actions on the basis of historical ties

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135. David M. Herszenhorn, *Crimea Votes to Secede from Ukraine as Russian Troops Keep Watch*, N.Y. TIMES (Mar. 16, 2014), [http://www.nytimes.com/2014/03/17/world/europe/crimea-ukraine-secession-vote-referendum.html?\\_r=0](http://www.nytimes.com/2014/03/17/world/europe/crimea-ukraine-secession-vote-referendum.html?_r=0).

136. See Andrei Lipskii, Editorial, *Predstavliaetsia pravil'nym initsirovat' prisodinenie vostochnykh oblastei Ukrainy k Rossii* [*It is Right to Initiate the Accession of the Eastern Regions of Ukraine to Russia*], NOVAYA GAZETA (Feb. 24, 2015, 15:56:00), <http://www.novayagazeta.ru/politics/67389.html>.

137. *Id.* (translation by author).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

or the protection of ethnic Russians.<sup>142</sup> Putin has admitted that he “ordered special forces, marines and paratroopers to be deployed ‘under the guise of reinforcing our military facilities in Crimea.’”<sup>143</sup> This seems to indicate that the impetus for annexation was not driven by Crimea, but rather by Russia.<sup>144</sup>

For at least a week prior to the referendum, Ukrainian television stations were no longer accessible to Crimeans—Crimeans were limited to Russian stations that strongly criticized the “nationalists” and “bandits” in Kiev.<sup>145</sup> In addition, the election “observers” from European right-wing parties seemed to turn a blind eye to signs of irregularity in the voting process: despite clear evidence of the military in the streets and one-sided advertising on the billboards, some claimed that they could not “see any evidence of pressure, propaganda[,] or military influence.”<sup>146</sup> The Levada Center, which conducts polling in Ukraine and Russia, found that “[t]he two-week-long propaganda and disinformation campaign . . . has had a powerful effect. . . . All alternative, non-official or independent sources of information and interpretation of the developments have been completely shut down.”<sup>147</sup> In addition, it seems that Russia may have sent in professional agitators to stir up tensions in eastern Ukraine.<sup>148</sup>

Although Crimean officials had invited the Organization for Security and Cooperation in Europe to observe the referendum, the

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142. *Id.*

143. Michael Birnbaum, *Putin Was Surprised at How Easily Russia Took Control of Crimea*, WASH. POST (Mar. 15, 2015), [http://www.washingtonpost.com/world/europe/putin-was-surprised-at-how-easily-russia-took-control-of-crimea/2015/03/15/94b7c82e-c9c1-11e4-bea5-b893e7ac3fb3\\_story.html](http://www.washingtonpost.com/world/europe/putin-was-surprised-at-how-easily-russia-took-control-of-crimea/2015/03/15/94b7c82e-c9c1-11e4-bea5-b893e7ac3fb3_story.html).

144. *Id.*

145. Andreas Brenner, *Referendum Day in Crimea's Simferopol*, DEUTSCHE WELLE (Mar. 16, 2014), <http://www.dw.de/referendum-day-in-crimeas-simferopol/a-17500378>.

146. *Id.* (quoting Johann Gudenus, a member of parliament in Vienna who was invited to observe the referendum).

147. Interview by Kathy Lally with Sergei Markedonov, Assoc. Professor of Reg'l Studies & Foreign Policy, Russian State Univ. for the Humanities, *Crimean Independence Vote and Russian Annexation: A Primer*, WASH. POST (Mar. 15, 2014), [http://www.washingtonpost.com/world/crimean-independence-vote-and-russian-annexation-a-primer/2014/03/14/22efa5cd-fbd6-4d3a-bebd-a85847c5fdec\\_story.html](http://www.washingtonpost.com/world/crimean-independence-vote-and-russian-annexation-a-primer/2014/03/14/22efa5cd-fbd6-4d3a-bebd-a85847c5fdec_story.html).

148. Luke Harding & Shaun Walker, *Crimea Applies to Be Part of Russian Federation After Vote to Leave Ukraine*, GUARDIAN (Mar. 17, 2014, 8:06 EDT), <http://www.theguardian.com/world/2014/mar/17/ukraine-crimea-russia-referendum-complain-result>.

group declined to do so because the security and human rights organization deemed the referendum illegal.<sup>149</sup> The chair of the OSCE noted that the referendum contradicted both Ukrainian law and international law and thus was not valid—“the basic criteria for a decision in a constitutional framework were not met.”<sup>150</sup> This followed several unsuccessful attempts by OSCE military observers to enter to investigate the alleged human rights abuses being perpetrated in the area.<sup>151</sup> During the referendum, Russian troops, rather than a neutral, multinational force such as that present in Kosovo, monitored the situation.<sup>152</sup> The Venice Commission in particular noted “the massive public presence of (para)military forces,” OSCE concerns regarding “freedom of expression,” the short time period “between the decision to call the referendum and the referendum itself,” doubts about the “neutrality of the authorities” (they passed a declaration of independence five days prior to the referendum), and the phrasing of the referendum question, which was not neutral, as being counter to European democratic standards.<sup>153</sup> Every ballot sheet led with the option of joining Russia, which has been shown to inflate vote totals even in legitimate elections.<sup>154</sup> Furthermore, in at least one instance, a

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149. Fredrik Dahl, *Crimea Referendum Illegal, No OSCE Monitoring - Swiss*, FIRSTPOST (Mar. 12, 2014, 1:45 IST), <http://www.firstpost.com/world/crimea-referendum-illegal-no-osce-monitoring-swiss-1429931.html>.

150. *Id.*

151. *Id.*; Peter Graff, *Warning Shots Fired as OSCE Mission Turned away from Crimea*, REUTERS (Mar. 8, 2014, 9:47 AM EST), <http://www.reuters.com/article/2014/03/08/us-osce-shots-idUSBREA270HJ20140308>; *Thwarted Crimea Mission of OSCE Observers*, EURONEWS (Mar. 15, 2014, 00:21 CET), <http://www.euronews.com/2014/03/15/thwarted-crimea-mission-of-osce-observers/>.

152. *Experts: Crimea isn't comparable to Kosovo*, *supra* note 129.

153. Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles, Opinion, European Commission for Democracy Through Law (Venice Commission), 98th Plen. Sess., at 5, Opinion No. 762/2014 (Mar. 21, 2014).

154. Carl Bialik, *Many Signs Pointed to Crimea Independence Vote—But Polls Didn't*, FIVETHIRTYEIGHT (Mar. 17, 2014, 5:38 AM), <http://fivethirtyeight.com/features/many-signs-pointed-to-crimea-independence-vote-but-polls-didnt/>.

journalist engaged in an activity that might be seen as pro-Ukrainian faced pressure from “local defense squads.”<sup>155</sup>

While official sources indicate that approval for the referendum initiative joining Crimea with Russia was over ninety-nine percent,<sup>156</sup> some internal Russian sources express doubt about the validity of the numbers.<sup>157</sup> For example, a website post on the official page of the Council of the President of the Russian Federation on the Development of Civil Society and Human Rights, which contains a lengthy disclaimer from the Council indicating that the post reflects only the author’s views (and opinions of those he interviewed) and not the official views of the Council, and whose author travelled to Crimea about a month after the referendum, expresses serious doubt concerning the official results of the election.<sup>158</sup> The opinion of “almost all respondent[] experts and citizens” was that most people in Sevastopol voted in favor of joining Russia (fifty-to-eighty percent).<sup>159</sup> However, only about fifty-to-sixty percent of voters in Crimea as a whole were in favor of joining Russia with an overall participation rate of between thirty and fifty percent.<sup>160</sup> These numbers are significantly lower than those officially reported numbers of greater than ninety-five percent approval and eighty percent participation.<sup>161</sup> In addition, it appears that Crimeans voted for an end to the “corrupt lawlessness and thieving dominance of the Donetsk stooges,” rather than for joining Russia.<sup>162</sup>

Other sources within Crimea seem to support the findings of inappropriate activities with regards to the voting procedures: one report indicates that Sevastopol experienced over one hundred

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155. Charles McPhedran & Anna Arutunyan, *Crimea Votes to Join Russia; Ukrainians Prepare for War*, USA TODAY (Mar. 17, 2014, 6:37 AM EDT), <http://www.usatoday.com/story/news/world/2014/03/16/crimea-referendum-ukraine-russia/6484251/>.

156. Morello, Constable & Faiola, *supra* note 10.

157. Bobrov, *supra* note 134.

158. *Id.*

159. *Id.*

160. *Id.*

161. *See supra* text accompanying notes 10–11.

162. Bobrov, *supra* note 134 (translation by author). However, once again Sevastopol differs from Crimea as a whole—the residents voted specifically for unification with Russia. *Id.*

percent voter turnout<sup>163</sup> while another indicates that the actual overall turnout in Crimea could not have exceeded thirty percent.<sup>164</sup> This also seems to comport with the experiences of some of the minority groups in Crimea: many citizens opposed to the vote, notably Crimean Tatars who make up about twelve percent of the population, chose “to stay home rather than participate in what they called a rigged vote.”<sup>165</sup> In addition, many Crimeans loyal to Ukraine did not vote in the referendum,<sup>166</sup> most likely, at least in part, because choosing to maintain the status quo with Ukraine was not even an option.<sup>167</sup> Furthermore, it seems as though many ethnic Ukrainians chose not to vote in the election.<sup>168</sup> Some potential voters who wished to remain with Crimea chose not to vote because they believed that the referendum did not give them a “choice to vote against joining the KGB-run government” and because they did not feel safe voting surrounded by Russian troops.<sup>169</sup>

That is not to say that Russia is not correct on several fronts. While Putin’s “claim[] that the Russian-speaking population in Crimea was being terrorized by rampant ultranationalist and radical groups”<sup>170</sup> was false, there were attempts by the legislature in Kiev to undo the law protecting regional languages (that is, Russian in Crimea).<sup>171</sup> Although the law was ultimately not signed, the attempts further alienated and incensed the relationships between Ukrainians and Russians in Crimea.<sup>172</sup>

Furthermore, the ouster of president Yanukovich likely did not comply with the Ukrainian Constitution. Both Russia and former

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163. *Over 123% of Sevastopol Residents Vote to Join Russia!*, EUROMAIDAN (Mar. 17, 2014), <https://euromaidanpr.wordpress.com/2014/03/17/over-123-of-sevastopol-residents-vote-to-join-russia/>.

164. *Tatar Leader Says Crimean Tatars Boycotted “Referendum,”* EUROMAIDAN (Mar. 17, 2014), <http://euromaidanpress.com/2014/03/17/tatar-leader-says-crimean-tatars-boycotted-phony-referendum/>.

165. Herszenhorn, *supra* note 135.

166. *Crimea Exit Poll: About 93% Back Russia Union*, BBC (Mar. 16, 2014), <http://www.bbc.com/news/world-europe-26598832>.

167. Herszenhorn, *supra* note 135.

168. Smith-Spark, Magnay & Walsh, *supra* note 14.

169. McPhedran & Arutunyan, *supra* note 155.

170. Herszenhorn, *supra* note 135.

171. *Crimean Independence Vote and Russian Annexation: A Primer*, *supra* note 147.

172. *Id.*

president Yanukovich considered the actions resulting in his departure from Ukraine as a coup and expressed concerns that the new leadership in Ukraine was “fascist-minded and likely to crack down on Ukraine’s ethnic Russian population.”<sup>173</sup> The Ukrainian Constitution provides that the term of the president will only end early in the event of resignation, inability to fulfill the duties due to health reasons, removal from office by impeachment, or death.<sup>174</sup> Resignation must be personally announced at a meeting of the Supreme Rada,<sup>175</sup> and impeachment is only applicable if the president commits treason or another crime.<sup>176</sup> The process of impeachment requires several steps, including an investigating commission, a three-quarters vote to remove the president from office, and an opinion by the Supreme Court of Ukraine stating that the acts of which the president is accused are treason or another crime.<sup>177</sup> Even assuming that the quick process used by the legislature had the necessary investigating commission and an opinion by the Supreme Court, the legislature clearly lacked the three-quarters vote with only 328 out of 447 members (seventy-three percent) voting to impeach.<sup>178</sup> However, even this complaint ignores the similarly suspect coup that led to Sergey Aksyonov, a former crime boss, coming to power in Crimea.<sup>179</sup> Russia acted at least partially on the basis of Aksyonov’s request, despite his status as an unofficial leader of Crimea.<sup>180</sup> Furthermore, even acknowledging Yanukovich as the legitimate president of Ukraine does not substantially help Russia’s argument—he specifically did not request that Russia dismember

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173. Heintz, *supra* note 17.

174. KONST. UKR. art. 108.

175. *Id.* art. 109.

176. *Id.* art. 111.

177. *Id.*

178. John Balouziyeh, *Russia’s Annexation of Crimea: An Analysis under the Principles of Jus ad Bellum*, LEXISNEXIS: INT’L L. BLOG (Apr. 14, 2014, 08:09 AM), <http://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2014/04/14/russia-s-annexation-of-crimea-an-analysis-under-the-principles-of-jus-ad-bellum.aspx>.

179. Ilya Somin, *Crimea and the Morality of Secession*, WASH. POST: VOLOKH CONSPIRACY (Mar. 7, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/07/crimea-and-the-morality-of-secession/>.

180. *Ukraine Crisis: Crimea Leader Appeals to Putin for Help*, BBC (Mar. 1, 2014), <http://www.bbc.com/news/world-europe-26397323> (noting that Russia would “not leave unnoticed” Aksyonov’s request).

Ukraine and annex Crimea, but instead considered it a “major tragedy.”<sup>181</sup>

Considering Ukrainian domestic law and the standards of *Reference re Secession of Quebec* and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Crimea’s unilateral secession is not justified by either domestic law or by international law. The referendum and Russia’s influence on the process make the declaration of independence highly suspect—there were no valid reasons to ram the process through in such a quick manner.

#### IV. ANALYSIS OF RUSSIA’S ACQUISITION UNDER INTERNATIONAL LAW

International law derived from a variety of sources points against the legality of Russia’s actions with respect to Ukraine and Crimea. Importantly, the United Nations Charter and General Assembly Resolutions, several treaties between Russia and Ukraine, and the Budapest Memorandum all present Russia with obligations to respect the territorial boundaries of Ukraine.

##### A. *The United Nations*

One of the main purposes of the United Nations is “[t]he “develop[ment of] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”<sup>182</sup> and promoting higher standards of living, human rights, and full employment “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>183</sup> This idea was further stated in Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which states that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their

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181. *Ukraine Crisis: Viktor Yanukovich Decries Crimea ‘Tragedy,’* BBC (Apr. 2, 2014), <http://www.bbc.com/news/world-europe-26857734> (noting that “had [Yanukovich] remained in power, he would have tried to prevent the referendum”).

182. U.N. Charter art. 1, ¶ 2.

183. *Id.* art. 55.

political status and freely pursue their economic, social[,] and cultural development.”<sup>184</sup> However, the United Nations has also recognized limits to the right of self-determination:

[The right of self-determination] shall not be construed as authorizing or encouraging any action that 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 and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.<sup>185</sup>

Furthermore, as already noted above, General Assembly Resolution 2625 (XXV) essentially confirmed the status of conquest as an illegitimate method of acquiring land, in particular stating that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal” and that attempts to disrupt national and territorial unity or to interfere in the domestic affairs of another nation are incompatible with the Charter of the United Nations.<sup>186</sup>

The illegitimacy of conquest as a method for acquiring land was further affirmed in the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe.<sup>187</sup> The participating states, including the Soviet Union, agreed to “respect each other’s sovereign equality . . . including . . . the right . . . to territorial integrity,”<sup>188</sup> “refrain from any acts constituting a threat of force or direct or indirect use of force,”<sup>189</sup> “regard as inviolable all one another’s frontiers” and “refrain from any demand for, or act of, seizure and usurpation of part . . . of the territory of any participating State,”<sup>190</sup> “respect the territorial integrity of each of the participating States,” “refrain from making each other’s territory the

184. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

185. G.A. Res. 50/6, at 3 (Nov. 9, 1995).

186. G.A. Res. 2625 (XXV), *supra* note 54.

187. Final Act Conference on Security and Co-operation in Europe, Organization for Security and Co-operation in Europe, Helsinki, Aug. 1, 1975.

188. *Id.* at (I)(a)(I).

189. *Id.* at (II).

190. *Id.* at (III).

object of military occupation,”<sup>191</sup> and “refrain from any intervention . . . in the internal . . . affairs falling within the domestic jurisdiction of another participating State.”<sup>192</sup>

The United Nations Charter is founded upon peaceable resolution of disputes.<sup>193</sup> One of the key elements of maintaining peace is the respect that each state is required to have for the territorial integrity of other states.<sup>194</sup> The attempted response of the Security Council<sup>195</sup> and the actual response of the General Assembly<sup>196</sup> to Russia’s intervention in Ukraine indicate the overall view of international law, and particularly the view of the United Nations: while self-determination is a valid interest of peoples, it is not *carte blanche* to intervene in the affairs of another state, recognize the secession of part of that state, and then annex the newly “independent” state.

### *B. Treaties between Russia and Ukraine*

Following the collapse of the Soviet Union, Russia and Ukraine signed several treaties regarding their relationship to each other and the conditions for Russia’s continued use of its naval bases in Sevastopol. Two treaties in particular detail Russia’s obligations towards Ukraine with respect to its territorial integrity and sovereignty: the Treaty on Friendship, Cooperation, and Partnership between the Russian Federation and Ukraine, and the Partition Treaty on the Status and Conditions of the Black Sea Fleet (extended by the Kharkiv Pact).

The Treaty on Friendship, Cooperation, and Partnership between the Russian Federation and Ukraine was signed in May 1997, ratified in March 1999, and entered into force the next month.<sup>197</sup> Of

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191. *Id.* at (IV.).

192. *Id.* at (VI.).

193. U.N. Charter art. 1, ¶ 3.

194. *Id.* art. 2, ¶ 4.

195. S.C. Draft Res. S/2014/189, *supra* note 22.

196. G.A. Res. 68/262, *supra* note 24.

197. Dogovor o druzhbe, sotrudnichestve i partnerstve mezhdru Rossiiskoi Federatsiei i Ukrainoi [Treaty on Friendship, Cooperation, and Partnership between the Russian Federation and Ukraine], Russ.-Ukr., May 31, 1997, BIULLETEN’ MEZH DUNARODNYKH DOGOVOROV (Bulletin of International Treaties) 1999, No. 7 (Russ.). Interestingly, Ukraine registered the treaty with the U.N. on October 2, 2014. Treaty on Friendship, Cooperation and Partnership

particular note, the treaty states that the two countries will “honour each other’s territorial integrity and . . . acknowledge the inviolability of the borders existing between them”<sup>198</sup> and that the relationship between the two countries is founded “on the principles of mutual respect; sovereign equality; territorial integrity; inviolability of borders; peaceful settlement of dispute; non-use of force or threat of force; . . . [and] non-interference in internal affairs [of the other country].”<sup>199</sup> Furthermore, the countries agreed to abstain from taking part in or supporting any actions directed against the other country and from “enter[ing] into any agreement with third countries that is directed against the other.”<sup>200</sup> While the treaty originally had a duration of ten years, it automatically renewed unless one of the two contracting states notified the other of its desire to end the treaty.<sup>201</sup>

The two countries also agreed to the Partition Treaty on the Status and Conditions of the Black Sea Fleet to establish Russia’s ability to use Sevastopol and other military bases in Crimea. It was similarly agreed to in May 1997 and entered into force in July 1999.<sup>202</sup> Once again, Russia agreed to “respect the sovereignty of Ukraine, obey its laws, and not allow interference in the internal business of Ukraine.”<sup>203</sup> Furthermore, keeping the fleet in the Black Sea “must not contradict the laws of Ukraine,”<sup>204</sup> and the military units that Ukraine has allowed on its territory should only conduct exercises within the areas that have been specifically set aside for Russian troops.<sup>205</sup> This treaty had a term of twenty years,<sup>206</sup> but it was

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between Ukraine and the Russian Federation (Russ.-Ukr.), May 31, 1997, U.N.T.S. Registration Number I-52240. Although no U.N.T.S. volume number has been established for the treaty, the text in the translation as provided in the U.N. documentation under registration number I-52240 will be used throughout this paper.

198. *Id.* art. 2.

199. *Id.* art. 3.

200. *Id.* art. 6.

201. *Id.* art. 40.

202. Soglashenie mezhdru Rossiiskoi Federatsiei i Ukrainoi o statuse i usloviakh prebyvaniia Chernomorskogo flota Rossiiskoi Federatsii na territorii Ukrainy [Partition Treaty on the Status and Conditions of the Black Sea Fleet], Russ.-Ukr., May 28, 1997, BIULLETEN’ MEZHDUNARODNYKH DOGOVOROV (Bulletin of International Treaties) 1999, No. 10 (Russ.).

203. *Id.* art. 6, ¶ 1 (translation by author).

204. *Id.* art. 6, ¶ 2 (translation by author).

205. *Id.* art. 8, ¶ 2.

206. *Id.* art. 25.

explicitly extended in April 2010 for an additional twenty-five years.<sup>207</sup> The Kharkiv Pact included in its introduction that the “Russian Federation and Ukraine, developing their relationships on the foundation of the principle of strategic partnership, fixed in the Treaty on Friendship, Cooperation, and Partnership between the Russian Federation and Ukraine” had decided to conclude the treaty extending the terms of the prior Partition Treaty.<sup>208</sup> Following Russia’s annexation of Crimea, Russian legislators unilaterally ended the various Black Sea treaties it had concluded with Ukraine.<sup>209</sup>

### *C. Budapest Memorandum on Security Assurances*

Following the collapse of the Soviet Union, there were still significant numbers of nuclear weapons in Ukrainian territory.<sup>210</sup> In an effort to placate Ukraine that its nuclear weapons would not be needed to defend itself against possible intrusions by other countries, the United States, Great Britain, Russia, and Ukraine came together and created the Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons.<sup>211</sup> Because of the accession of Ukraine to the nuclear non-proliferation treaty and its commitment to eliminate all

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207. Soglashenie mezhdru Rossiiskoi Federatsiei i Ukrainoi po voprosam prebyvaniia Chernomorskogo flota Rossiiskoi Federatsii na territorii Ukrainy [Agreement Between the Russian Federation and Ukraine on the Topic of Maintaining the Black Sea Fleet of the Russian Federation on the Territory of Ukraine], Russ.-Ukr., art. 1, Apr. 21, 2010, BIULLETEN’ MEZHDUNARODNYKH DOGOVOROV (Bulletin of International Treaties) 2010, No. 10 (Russ.) [hereinafter Kharkiv Pact].

208. *Id.* intro. (translation by author).

209. *See* Federal’nyi Zakon RF o prekrashchenii deistviia soglashenii, kasaiushchikhsia prebyvaniia Chernomorskogo flota Rossiiskoi Federatsii na territorii Ukrainy [Federal Law of the Russian Federation on the Termination of the Action of Agreements Relating to Maintaining the Black Sea Fleet of the Russian Federation on the Territory of Ukraine], SOBRANIE ZAKONODATEL’SIVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2014, No. 14, Item 1530.

210. Steven Pifer, *The Budapest Memorandum and U.S. Obligations*, BROOKINGS INST. (Dec. 4, 2014, 3:57 PM), <http://www.brookings.edu/blogs/up-front/posts/2014/12/04-budapest-memorandum-us-obligations-pifer>.

211. *See* Permanent Reps. of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland & the United States of America, 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 addressed to the Secretary-General, U.N. Doc. A/49/765-S/1994/1399 (Dec. 19, 1994) [hereinafter Budapest Memorandum].

nuclear weapons from its territory, Russia, the United Kingdom, and the United States “reaffirm[ed] their commitment to Ukraine . . . to respect the independence and sovereignty and the existing borders of Ukraine.”<sup>212</sup> Furthermore, the three nations “reaffirm[ed] 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 Nations.”<sup>213</sup> It would seem that one of the key elements necessary to secure Ukraine’s cooperation in eliminating its nuclear arsenal was the security assurances provided by Russia and the other nations.<sup>214</sup>

The United States and Russia further cemented their commitment to Ukraine in a joint statement concerning the expiration of the Treaty on the Reduction and Limitation of Strategic Offensive Arms.<sup>215</sup> In the statement, the two countries recognized the value of Belarus, Kazakhstan, and Ukraine to the success of the START Treaty and “confirm[ed] that the assurances recorded in the Budapest Memoranda will remain in effect after December 4, 2009.”<sup>216</sup> Following Russia’s actions in Crimea, the United States and Ukraine issued a joint statement in which the U.S. affirmed its commitment to Ukraine and condemned Russia for not keeping its commitments to Ukraine through its military actions on the peninsula;<sup>217</sup> however, it is important to note that the United States has in the past stated that “the Memorandum is not legally binding” although it “take[s] [the Memorandum’s] political commitments seriously.”<sup>218</sup>

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212. *Id.* at Annex I, ¶ 1.

213. *Id.* at Annex I, ¶ 2.

214. Pifer, *supra* note 210.

215. BUREAU OF PUBLIC AFFAIRS, OFFICE OF THE SPOKESMAN, PRN: 2009/1230, U.S.-RUSSIA JOINT STATEMENT ON EXPIRATION OF THE START TREATY (2009).

216. *Id.*

217. *Joint Statement by the United States and Ukraine*, EMBASSY OF UKRAINE IN HUNGARY, Mar. 25, 2014, <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/20572-spilyna-zajava-ukrajini-ta-spoluchenih-shtativ-ameriki>.

218. Press Release, Belarus: Budapest Memorandum, U.S. Embassy in Minsk (Apr. 12, 2013), [http://minsk.usembassy.gov/budapest\\_memorandum.html](http://minsk.usembassy.gov/budapest_memorandum.html) (addressing the Budapest Memorandum in connection with U.S. sanctions directed towards securing the human rights of Belarusians, not advantages for the United States).

*D. Application to Russia's Actions in Ukraine and Its Acquisition of Crimea*

It is hard to see any justification under international law for Russia's actions with respect to Crimea. Its obligations to respect Ukraine's independence, sovereignty, and borders were enshrined repeatedly in the U.N. Charter, in its treaties with Ukraine, and in the Budapest Memorandum. Russia had an obligation to respect Ukraine's territorial integrity and its existing borders. Furthermore, it had pledged not to interfere in Ukraine's domestic affairs.

By entering Ukraine under the false pretenses of solving a humanitarian crisis and by further blockading Ukrainian troops inside military bases, Russia violated Ukraine's sovereignty.<sup>219</sup> Furthermore, by recognizing the Crimean referendum and then absorbing Crimea into itself, Russia did not respect the existing borders of Ukraine; it instead intentionally modified the borders. Moreover, while Russia was allowed to have soldiers on Crimea, they were limited to specific areas and could not be used against Ukraine's wishes.<sup>220</sup> Ukraine noted the use of military force in a manner not consistent with the approved locations or Ukraine's wishes.<sup>221</sup>

Russia's strongest arguments that it did not violate the prohibitions against the use of force and interference in the affairs of Ukraine are not entirely without merit, but they are ultimately unpersuasive. President Putin claimed that Russian troops were necessary to protect the ethnic Russian population from Ukrainian nationalists.<sup>222</sup> Humanitarian intervention and the responsibility to

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219. Embassy of Ukraine to Japan, *On Violations of Ukraine's Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine*, MINISTRY FOREIGN AFF. UKR. (Mar. 3, 2014, 03:57), <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shhodo-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinsyko-rosijsykih-ugod-viysykovimi-formuvannyami-chf-rf-na-teritoriji-ukrajini>.

220. *Id.*

221. *Id.* (noting a variety of circumstances in which Ukrainian forces were blocked by servicemen and vessels of the Russian Federation and in which Russian servicemen were located in areas that had not been approved).

222. Vladimir Putin, *Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine*, PRESIDENT RUSS. (Mar. 4, 2014, 15:40), <http://en.kremlin.ru/events/president/news/20366> [hereinafter Putin, *Situation in Ukraine*]. It is interesting to see Russia's arguments in light of President Putin's remarks concerning Syria. Vladimir V. Putin, Editorial,

protect might provide some credence to Russia's legal argument that it not only had the right to intervene, but also had the obligation to do so;<sup>223</sup> however, the assertion that Russians were in danger is simply not supported by the facts evidenced by any non-Russian sponsored news agencies or humanitarian organizations.<sup>224</sup> Even Russian agencies do not necessarily support Russia's assertions that ethnic Russians were under attack or in danger.<sup>225</sup>

Russia has also argued that it had the permission of President Yanukovich to enter the country to protect the citizens.<sup>226</sup> There is some validity to this argument. As mentioned above, the impeachment and removal from office of Yanukovich likely did not comply with the Ukrainian Constitution.<sup>227</sup> However, even if he were still ostensibly the head of the Ukrainian government, he likely could not unilaterally invite in the Russian army for the protection of Crimeans—at a minimum it would have required the acquiescence of the legislative body.<sup>228</sup> In addition, after Yanukovich abdicated his responsibilities and fled, he lost his legitimacy as the president of Ukraine, which occurred prior to Yanukovich requesting assistance

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*A Plea for Caution from Russia*, N.Y. TIMES (Sept. 11, 2013), [http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?\\_r=2](http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?_r=2) (“[F]orce is permitted only in self-defense or by the decision of the Security Council. Anything else is unacceptable under the United Nations Charter and would constitute an act of aggression. . . . It is alarming that military intervention in internal conflicts in foreign countries has become commonplace for the United States.”).

223. See, e.g., Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703 (2006).

224. See, e.g., *Crimea: Attacks, 'Disappearances' by Illegal Forces*, HUMAN RTS. WATCH (Mar. 14, 2014), <http://www.hrw.org/news/2014/03/14/crimea-attacks-disappearances-illegal-forces> (detailing episodes in which pro-Crimean independence forces are attacking and abducting those in favor of Ukraine, including an incident in which one of the perpetrators admitted to being a member of Russian security forces); Situation of Human Rights in Ukraine, *supra* note 126, at Report on the Human Rights Situation in Ukraine, Apr. 15, 2014 (noting that while there were attacks against ethnic Russians, they were not widespread nor systematic, but noting that there were credible allegations of harassment, arrest, and torture against those who did not support the referendum). Furthermore, one of the human rights missions to Crimea was turned back by the authorities until March 14. *Id.* at Report on the Human Rights Situation in Ukraine, Apr. 15, 2014, 9.

225. See Bobrov, *supra* note 134.

226. Putin, *Situation in Ukraine*, *supra* note 222.

227. See *supra* text accompanying notes 174–75.

228. Balouziyeh, *supra* note 178 (quoting a partner of an international law firm in Kiev).

from the Russian government.<sup>229</sup> The Ukrainian parliament adopted this view, declaring that Yanukovich “self-abdicated,” requiring it to instate an interim government.<sup>230</sup> Regardless, Russia’s actions in Ukraine overstepped even what Yanukovich would have allowed—there was no invitation to monitor a referendum to decide whether Crimea should depart from Ukraine and join Russia nor was there an invitation to annex Crimea.

None of Russia’s arguments address its other fundamental obligation to Ukraine—respect for its territorial integrity and its borders. Russia’s Ministry of Foreign Affairs claimed that it did not breach the Budapest Memorandum obligations because “Ukraine’s loss of its territorial integrity was a result of complicated internal processes” in which Russia had no part.<sup>231</sup> This is neglecting the significant part Russia had in “monitoring” the elections, spreading misinformation about the dangers posed by Ukraine to ethnic Russians, and the further damage it did to Ukraine by acknowledging the results of the referendum. In essence, Russia claims that Ukraine’s territorial integrity was lost by the referendum, not by its acknowledgement of the referendum or subsequent annexation of Crimea. By acknowledging the referendum in the face of overwhelming opposition from most nations of the world and then voting to absorb Crimea, Russia violated its obligations under the U.N. Charter, its treaties with Ukraine, and the Budapest Memorandum.

#### V. ANALYSIS OF RUSSIA’S ACQUISITION UNDER DOMESTIC LAW

In analyzing Russia’s domestic law, one initial point should be noted. According to the Russian Constitution, “[generally] recognized [principles and] norms of international law and international treaties . . . of the Russian Federation [are an integral]

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229. Jen Psaki, Daily Press Briefing, Washington, D.C. (Feb. 28, 2014), <http://www.state.gov/r/pa/prs/dpb/2014/02/222750.htm>.

230. Balouziyeh, *supra* note 178.

231. Statement by the Russian Ministry of Foreign Affairs Regarding Accusations of Russia’s Violation of Its Obligations Under the Budapest Memorandum of 5 December 1994, MINISTRY FOREIGN AFFAIRS RUSS. FED’N (Apr. 1, 2014), [http://mid.ru/bdomp/brp\\_4.nsf/arh/b173cc77483edeb944257caf004e64c1?open](http://mid.ru/bdomp/brp_4.nsf/arh/b173cc77483edeb944257caf004e64c1?open).

part of its legal system.”<sup>232</sup> In the event of a conflict between international treaties and Russian domestic law, the international treaties govern.<sup>233</sup> Thus, the prior section on Russia’s international treaty obligations applies equally to its obligations under domestic law.

#### *A. Russian Federal Constitutional Law*

The admission of new territory into the Russian Federation is governed by the Russian Constitution, article 65.<sup>234</sup> Article 65(1) lists the constituent entities of the Russian Federation and is altered as necessary through a method prescribed by federal constitutional laws.<sup>235</sup> Article 65(2) notes that “admission to the Russian Federation and the creation in it of a new subject shall be carried out according to the rules established by the federal constitutional law.”<sup>236</sup> In accordance with this constitutional provision, a federal constitutional law was passed in 2001 to prescribe the method for admitting new territory into Russia.<sup>237</sup> The law establishes the procedure by which foreign states or parts of foreign states can unite with the Russian Federation.<sup>238</sup> Any admission of a new subject must take place in accordance with the Russian Constitution, international treaties, and federal constitutional law.<sup>239</sup> One of the foundational principles of acceptance into the Russian Federation is free will.<sup>240</sup> In order for a foreign state *or a part of a foreign state* to join the Russian Federation, there must be mutual agreement or a treaty between the

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232. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4) (Russ.) (translation by author).

233. *Id.*

234. *Id.* art. 65.

235. *Id.*

236. *Id.* art. 65(2) (translation by author).

237. Federal’nyi Konstitutsionnyi Zakon RF o poriadke priniatii v Rossiiskuiu Federatsiiu i obrazovaniia v ee sostave novogo sub’ekta Rossiiskoi Federatsii [Federal Constitutional Law of the Russian Federation on the Method of Acceptance into the Russian Federation and the Formation of a New Subject in the Russian Federation], SOBRANIE ZAKONODATEL’SIVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2001, No. 52, Item 4916 [hereinafter Method of Acceptance].

238. *Id.* art. 1(1).

239. *Id.* art. 2(1).

240. *Id.* art. 3(1).

Russian Federation and *the foreign state*.<sup>241</sup> Thus, by the terms of the federal constitutional law of 2001, a subdivision or part of a foreign nation cannot be admitted to Russia without the consent of the foreign nation—the consent of the subdivision is irrelevant.<sup>242</sup> Furthermore, the initiator of any offer must be the foreign government, not Russia or subdivisions of the foreign government.<sup>243</sup>

This law was amended in 2005 to clarify that any proposals for admittance into the Russian Federation must come from both the legislative, or representative, body and the highest executive body of the potential subjects<sup>244</sup> and that the request must contain the

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241. *Id.* art. 4(2) (emphasis added).

242. In the weeks leading up to Russia's annexation of Crimea, Russian legislators were presented with a problem. As mentioned above, Ukraine would need to initiate any conversations about ceding Crimea to Russia, which clearly would not happen. To overcome this problem, Sergei Mironov, along with other legislators, proposed a federal constitutional law amending the procedure for admission to the Russian Federation, particularly article four. Draft Federal Constitutional Law On Amending the Federal Constitutional Law on the Procedure of Admission to the Russian Federation and Creation of a New Subject of the Russian Federation in its Composition of the Russian Federation, European Commission for Democracy Through Law (Venice Commission), Opinion No. 763/2014 at 1 (Mar. 10, 2014), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2014\)011-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)011-e). Instead of requiring the acquiescence of the foreign government, an additional point would be added which would allow the admission of a portion of a state with the agreement of the portion "when it is not possible to conclude an international treaty because of the absence of efficient sovereign state government in the foreign state," *id.*, and the sub-unit of the foreign state would be allowed to initiate proposals for admittance to the Russian Federation. *Id.* at 2. In explaining its rationale for proposing the modifications, Russia stressed its responsibility to prevent acts of violence in Ukraine, its long historical ties with Ukraine, the illegitimacy of the Maidan uprising, and the fact that the proposed draft was in accordance with both the Russian Constitution and universally recognized principles of international law. *Id.* at 3–4. The issue soon became moot because, as discussed above, Crimea declared its independence from Ukraine following the referendum. *Supra* Part I. The creators of the draft law requested its withdrawal following the referendum and the draft law was removed a few days later. Whether Draft Federal Constitutional Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject Within the Russian Federation Is Compatible with International Law, Opinion, European Commission for Democracy Through Law (Venice Commission), Opinion No. 763/2014 at 12 (Mar. 21, 2014), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)004-e).

243. Method of Acceptance art. 6(1).

244. Federal'nyi Konstitutsionnyi Zakon RF o vnenenii izmenenii v stat'i 10 i 11 Federal'nogo konstitutsionnogo zakona "O poriadke priniatii v Rossiiskuiu Federatsiiu i obrazovaniia v ee sostave novogo sub"ekta Rossiiskoi Federatsii" [Federal Constitutional Law of the Russian Federation on Introduction of Amendments to Articles 10 and 11 of Federal Constitutional Law "On the Method of Acceptance into the Russian Federation and the Formation of a New Subject in the Russian Federation"] art. 1(1), SOBRANIE

agreed-upon wording for the question that will be put to a referendum to the potential subjects of the Russian Federation.<sup>245</sup> Furthermore, the amendment made a variety of clarifications to the process for having a referendum in the interested region, specifically requiring a consultation with the president of Russia and affirming that the initiative regarding the referendum belongs to the leaders of the executive body of the potential subjects, the executive and legislative leaders are allowed to participate in efforts in support of the referendum but cannot use the advantages of their positions, and if in some of the potential areas the referendum is held invalid, the referendum could be repeated within the next forty-five days.<sup>246</sup> After the international agreements have been signed, the President of Russia seeks a determination from the Constitutional Court that the agreement satisfies the Russian Constitution.<sup>247</sup> If the Court finds the agreement satisfactory, the Duma is presented with the agreement for ratification and passes a federal constitutional law accepting the new area into the Russian Federation.<sup>248</sup> Both a federal law ratifying the agreement and the federal constitutional law must be passed in both houses of the legislature<sup>249</sup> and Article 65(1) of the Russian Constitution must be modified to include the admitted areas.<sup>250</sup>

*B. Analysis of Russia's Actions in the Context of Its Domestic Law*

Seemingly, Russia followed its domestic process in admitting Crimea and Sevastopol. Crimea held a referendum regarding whether it should join Russia and declared its independence after which President Putin recognized Crimea as an “independent and sovereign country.”<sup>251</sup> With Crimea ostensibly its own legal nation, Russia was free to negotiate with it regarding its admission into the Russian Federation in accordance with domestic law without

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ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2005, No. 45, Item 4581 (modifying Method of Acceptance art. 10(2)).

245. *Id.* (modifying Method of Acceptance art. 10(2)(d)).

246. *Id.* art. 1(2) (modifying Method of Acceptance art. 11(1) and adding Method of Acceptance art. 11(1-1), 11(1-2), and 11(1-3)).

247. Method of Acceptance art. 7(4).

248. *Id.* art. 8(1)–8(2).

249. *Id.* art. 9(1)–9(2).

250. *Id.* art. 9(4).

251. Heintz, *supra* note 17.

engaging in any talks with Ukraine. On March 18, leaders from Crimea and Sevastopol met with President Putin in Moscow and signed a treaty<sup>252</sup> that, together with another federal constitutional law passed by the legislature, brought the two areas into the Russian Federation.<sup>253</sup> The Constitutional Court determined that the agreement between the Russian Federation and Crimea satisfied the requirements of the Russian Constitution.<sup>254</sup> The Court does not, in its own words, “evaluate the political expediency of entering into an international treaty.”<sup>255</sup> In performing its review, the Court examined the various provisions of the treaty and compared them to the requirements of the Russian Constitution.<sup>256</sup> While the Court did examine the enactment of the treaty on the Russian side, it did not examine the legal authority of the Crimean political body to enter into a treaty nor the legality of the referendum held in Crimea.<sup>257</sup>

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252. Dogovor mezhdu Rossiiskoi Federatsiei i Respublikoi Krym o priniatii v Rossiiskuiu Federatsiiu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub”ektov [Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Formation in the Russian Federation of New Subjects], Russ.-Rep. Crimea, Mar. 18, 2014, BIULLETEN’ MEZHDUNARODNYKH DOGOVOROV (Bulletin of International Treaties) 2014, No. 6 (Russ.).

253. Federal’nyi Konstitutsionnyi Zakon RF O priniatii v Rossiiskuiu Federatsiiu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub”ektov - Respubliki Krym i goroda federal’nogo znachenii Sevastopolia [Federal Constitutional Law of the Russian Federation on Acceptance of the Republic of Crimea into the Russian Federation and the Formation in the Russian Federation of New Subjects—the Republic of Crimea and the Federal City of Sevastopol], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2014, No. 12, Item 1201.

254. Postanovleniia Konstitutsionnogo Suda RF “Po delu o proverke konstitutsionnosti ne vstupivshego v silu mezhdunarodnogo dogovora mezhdu Rossiiskoi Federatsiei i Respublikoi Krym o priniatii v Rossiiskuiu Federatsiiu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub”ektov” [Ruling of the Constitutional Court of the Russian Federation “Verifying the Constitutionality of the Pending International Treaty Between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and the Creation Within the Russian Federation of New Subjects”], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2014, No. 13, Item 1527.

255. *Id.* (translation by the author).

256. *Id.*

257. *Id.* (noting that the treaty was signed by the President of the Russian Federation, who has power over the basic direction of both internal and external political decisions from the Russian Constitution, who represents Russia both inside the country and in international relations as the head of state, and who leads the external politics of the country, particularly negotiations and international agreements). No such analysis is performed of the authority of

Thus, all steps in Russia's domestic process were followed in admitting Crimea and Sevastopol *assuming, as the court did, that the referendum in Crimea was valid.*

There were, however, a few problems with the process Russia used. As noted above, admitting new subjects must be accomplished in accordance with international treaties of the Russian Federation. The ways that Russia has violated its treaty obligations, both with Ukraine and as a member of the United Nations, have already been addressed.<sup>258</sup> Because the treaties are also an explicit part of its method of acquiring new subjects, Russia did not follow the domestic requirements, even if it did follow the overall procedure set out in its constitutional law. In addition, the referendum, which is required under the federal constitutional law, must be valid. Russian law does not seem to clarify who determines the validity of a referendum seeking to alter international borders. However, because of the international ramifications of such an act, widespread international acceptance seems to be an appropriate standard. While Russia acknowledged the validity of the referendum, international bodies including the U.N. and the E.U. did not recognize it.<sup>259</sup> Because the referendum was not valid, Russian law requires that a second referendum be held within forty-five days of the referendum that was deemed invalid. Finally, if the allegations made by *Novaya Gazeta* are true regarding Russia's intentions to enter Crimea and agitate the population into seeking to join the Russian Federation,<sup>260</sup> it is possible to consider Russia's actions to be in violation of the domestic law as the population of Crimea did not act of its own free will and did not initiate the negotiations regarding joining Russia, which is another requirement of Russia's constitutional law.

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the corresponding signers from Crimea and Sevastopol or of the legality of entering into an agreement with them.

258. *See supra* Section IV.D.

259. G.A. Res. 68/262, *supra* note 24, at ¶ 4 (noting that the referendum had no validity and could not be the basis for any change in status of Crimea); Harding & Walker, *supra* note 148 (noting that President Obama told President Putin that the referendum "would never be recognised" and noting that Herman Van Rompuy, president of the European Council, and José Manuel Barroso, European Commission president, declared that "the referendum is illegal and illegitimate and its outcome will not be recognised").

260. *See supra* text accompanying notes 136–42.

## VI. CONCLUSION

The most crucial aspect in ascertaining whether Russia's actions complied with international law is determining the legality of the Crimean referendum on independence. Crimea's referendum did not comply with Ukrainian domestic law and did not comply with international law, largely due to the significant influence that Russia wielded in the process and the oddities associated with the referendum. However, even assuming that the referendum was valid and that there was no undue influence from Russia during the polling process, Russia had treaty obligations and a general obligation under the Budapest Memorandum to respect the sovereignty and territorial integrity of Ukraine.

In addition, Russia's significant influence on the referendum process tainted the acquisition even from the point of view of Russian domestic law. Considering the purported evidence of Russia's plans to invade Ukraine prior to the February events that ousted Yanukovich, it is hard to see much support for Russia's assertion that Crimea, not Russia itself, had taken the initiative to request admittance to the Russian Federation. Furthermore, Russia's constitutional law requires that the process occur by the free will of the country that is to join the Russian Federation.<sup>261</sup> The presence of Russian troops monitoring a vote to decide if Crimea would join Russia could hardly be described as a process where the citizens were able to express their own free will.

While Russia's actions in acquiring Crimea were not in accordance with law, there was widespread support for the referendum in Crimea and Sevastopol.<sup>262</sup> Even outside of Crimea, eastern Ukrainian cities saw demonstrations in support of Crimea and Russia, with thousands of demonstrators rallying in Donetsk, Kharkiv, and Odessa.<sup>263</sup> In Crimea, tens of thousands of people celebrated the preliminary vote totals with fireworks, the Russian national anthem, and parties in the city squares.<sup>264</sup> Many Crimeans see Russia as a source of new rights and opportunities—a new system

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261. In the Federal Constitutional Law, the Russian word *dobrovol'no* is used, which means voluntarily, of one's own free will, of one's own accord.

262. Morello, Englund & Witte, *supra* note 9.

263. *Id.*

264. *Id.*

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in which Crimea will be able to develop.<sup>265</sup> In Simferopol, Crimea's capital, a concert was held and thousands danced to live music.<sup>266</sup> Despite the illegality of Russia's acts, it is hard to see a peaceful return of Crimea to Ukraine—for either the ethnic Russians in Crimea or for the Russian government.

*Trevor McDougal\**

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265. Smith-Spark, Magnay & Walsh, *supra* note 14. One voter noted that he wanted “to join Russia, and live like Russians, with all their rights,” another commented that “Russia is an opportunity for our Crimea to develop, to bloom. And I believe that it will be so.” *Id.*

266. McPhedran & Arutunyan, *supra* note 155.  
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