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Robert J. Delahunty

University of St. Thomas School of Law, rjdelahunty@stthomas.edu

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The Crimean Crisis

R.J. DELAHUNTY

Russia’s armed intervention in Crimea late last winter, the purported secession of Crimea from Ukraine, and the ensuing Russian annexation of Crimea are events that ought to be of keen interest to students of international law. The world witnessed the forcible seizure of part of an established European state and the redrawing of its international boundaries—events that call into question the continuing viability of the “Long Peace” that has characterized European affairs since the end of the Second World War. Yet the international institutions created since 1945 to maintain or restore peace or to criminalize and punish aggression proved worthless in dealing with the Crimean Crisis. This essay argues that Russia’s infractions of contemporary international use-of-force rules were clear; that Russia’s legal defenses were unconvincing; that both the secession and subsequent annexation of Crimea were unlawful; but that even the mature and developed body of international law intended to address situations like this provide neither prevention nor significant relief.

The Crimean Crisis came and went in the blink of an eye. And already it seems as if the issue has been forgotten. Few outside Ukraine would now consider challenging Russia’s absorption of Crimea. Some go so far as to blame the United States (U.S.), the European Union (E.U.), and the North Atlantic Treaty Organization (NATO) for Russia’s armed intervention.1 And even though Russia has compounded its aggressiveness, for instance by providing assistance to the Ukrainian separatists who shot down a Malaysia Airlines passenger aircraft last July causing 298 deaths,2 the


international community has done little to punish Russia for its actions in Crimea or elsewhere in Ukraine. This indifference may be due to the sense that a belated challenge would be either futile or dangerous; to the aversion on the West’s part to the renewal of the Cold War; to Ukraine’s relatively unimportant place in the global economy and its perceived strategic unimportance to the U.S.; to the belief that Crimea is, in some sense, legitimately part of Russia; to the vote in the Crimean referendum in favor of unification with Russia; to more pressing matters like ISIS; to the desire to avoid driving Russia and China even closer together; or to some combination of these factors. Yet the Crimean Crisis of February and March 2014 should hold our attention and cause us concern. The world witnessed the forcible seizure of part of an established State—a State, moreover, that was a founding member of the United Nations—and the redrawing of its international boundaries. Other than in Kosovo, no similar episode has occurred in post-1945 Europe.

Furthermore, Russia’s continuing encroachment on Ukraine threatens to change the strategic situation in Europe in fundamental ways. Former National Security Adviser Zbigniew Brzezinski wrote in 1998 that, “Ukraine, a new and important space on the Eurasian chessboard, is a geopolitical pivot because its very existence as an independent country helps to transform Russia. Without Ukraine, Russia ceases to be a Eurasian empire.” Ukraine, if only because it is a kind of “buffer State” between Russia and the E.U. (rather as Germany was in the Cold War), is at risk of being overrun by a more powerful neighbor. Unless it is neutralized (and perhaps not even then) a Ukraine that the West will not defend and that lacks the means to defend itself will be a likely prey to further Russian aggression—with unpredictable consequences for international peace. We should not forget that, not very long ago, Ukraine fell squarely within the “Bloodlands” of Europe.

Students both of international law and of international relations have long been, and ought to remain, deeply occupied with the question of how to construct international institutions that will maintain or restore peace and punish acts of aggression. For them, the Crimean Crisis raises two,
Three, broad issues of concern. First, the worthlessness of the Security Council in preventing aggression, especially by a Great Power, has been demonstrated beyond dispute. Of course it has been obvious almost from the beginnings of the United Nations that the Council was a failure in providing a functioning collective security system. The fact that NATO—which was indeed a successful collective security system—had to be created only four years after the inception of the U.N. Charter attests to that. But now, after NATO’s 1999 intervention in Kosovo, the 2003 Second Gulf War, and the 2008 Russian invasion of Georgia—none of which was expressly authorized by the Council, and all of which were hammer blows to its prestige and credibility—the Crimean intervention reveals the uselessness of the Council even at mobilizing international concern over, and disapproval of, aggression.\(^8\) The Council certainly is not and never has been an effective international policeman; but it is not even a very influential international jury. If international lawyers are concerned (as they should be) with devising and institutionalizing arrangements that may offer a realistic chance of promoting international peace and preventing aggression, they should be focusing on alternatives to the Charter scheme.

Second and more generally, the Crimean episode is powerful evidence of the incapacity of non-Charter international law (including international criminal law) to curb aggression and promote peace, at least when Great Power politics are involved.

Third, we now have (another) test case of the effectiveness of economic sanctions in preventing, punishing or rolling back aggression.\(^9\) Undoubtedly, the sanctions that the U.S. and the E.U. imposed on Russia since the Crimean intervention have had some bite. But will they prove strong enough to force Russia to disgorge Crimea, or even to deter further Russian depredations against Ukraine?\(^10\) How effective are economic sanctions—the Liberal alternative to war—at restraining wrongful uses of force in the (apparently favorable) environment of a highly integrated,
globalized economy? We shall see.

In this paper, I propose to study the application of international public law—and more particularly, contemporary jus ad bellum rules—to the Russian intervention in, and ensuing annexation of, Crimea. The analysis falls into three main parts, roughly: liability; defenses; and remedies.

In Part I, I shall consider three main legal questions:

I. Was Russia’s intervention in Ukraine an illegal use of force?
II. Was Crimea’s secession legal?
III. Was Russia’s annexation of Crimea legal?

These questions are of course interrelated, but each poses distinct issues of its own.

In Part II, I will consider certain defenses that Russia offered for its conduct. I shall pay particularly close attention to Russian President Vladimir Putin’s speech of March 18, 2014 which lays out such defenses, not only of a political nature, but also under international law. To be sure, President Putin’s speech is not an academic address. It is not even a memorandum of law prepared by the Russian Federation’s Foreign Ministry or its legal advisers. But it is nonetheless legally sophisticated. It also demonstrates in a very practical way how the language of international law has become a vital ingredient of contemporary statecraft and strategy.

In Part III, I shall review the possible remedies, both non-criminal and criminal, for Russia’s wrongdoing that appear to be afforded by international law.

**PART I: LIABILITY**

**Factual Background**

First, then, let me briefly outline the most important facts required for our legal analysis. Some claims, to be sure, are contested, and some material facts are unknown. Moreover, different governments and media outlets may provide very different versions of the factual record. Here I rely in large part on the British Broadcasting Company’s (BBC) News’ updated Ukraine crisis timeline.

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The Crimean Crisis

It is undisputed that the Ukraine parliament declared independence from the disintegrating U.S.S.R. in August, 1991. In a nationwide referendum, 90% of the Ukrainian population voted for independence. (In Crimea, 54% of voters supported independence.) Ukraine subsequently achieved recognition from the international community, including Russia, as an independent State. Although a part of the Soviet Union, Ukraine had been a separate Member State of the United Nations since 1945, and it remained so after seceding from the Soviet Union in 1991.

In December 1994, in exchange for Ukraine’s abandonment of the nuclear arsenal it inherited after the collapse of the former Soviet Union and its promise to join the Nuclear Non-Proliferation Treaty, Ukraine, Russia, the United States, and the United Kingdom all entered into the “Budapest Memorandum,” which in part “confirm[ed]” that

the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine. (emphasis added).

Ukraine fulfilled all of the obligations it assumed under the Budapest Memorandum.

17. Previously, on December 21, 1991, Russia and Ukraine, together with all the other former Soviet republics—except Georgia—had signed the Alma-Ata Declaration, formally dissolving the Soviet Union and bringing the Commonwealth of Independent States (CIS) into existence. The Declaration’s Preamble stated that the signatories “recogniz[ed] and respect[ed] each other’s territorial integrity and the inviolability of existing borders.” See THE ALMA-ATA DECLARATION (Dec. 21, 1991), available at http://lcweb2.loc.gov/frd/cs/belarus/by_appnc.html. The Alma-Ata Declaration itself endorsed the “aims and principles” of the “Belavezha Accords,” which had been signed on December 8, 1991 by the leaders of three Soviet republics—Russian President Yeltsin, Ukrainian President Kravchuk and Belarussian Parliament Chairman Shushkevich. For a translation, see http://lcweb2.loc.gov/frd/cs/belarus/by_appnb.html. The Belavezha Accords had purported to provide for the dissolution of the Soviet Union and the creation of the CIS. Any doubt as to the legal effectiveness of the Belavezha Accords was apparently erased by the Alma-Ata Declaration. Article 5 of the Belavezha Accords had stated that “[t]he high contracting parties recognize and respect one another’s territorial integrity and the inviolability of existing borders within the Commonwealth.” Thus, Russia twice agreed in 1991 to respect Ukraine’s “existing” borders, which included Crimea.
The "existing borders of Ukraine" in 1994 included Crimea. Crimea had long been part of Russia and remains predominantly ethnically Russian, but was incorporated into Ukraine, then a Soviet Republic, in 1954. In 1991, in connection with the independence of Ukraine, Crimea became part of Ukraine as an "Autonomous Republic."  

In May 1997, Russia and Ukraine signed the "Partition Treaty on the Status and Conditions of the Black Sea Fleet." Under this Treaty, the two nations established independent navies and divided bases and armaments between them. Russia retained the right to use the port of Sevastopol in Crimea until 2017, and to maintain up to 24,000 troops on the Crimean peninsula. President Putin alludes to this Treaty in the address we shall consider. The 2010 "Kharkiv Pact" between Russia and Ukraine extended the Russian lease on Sevastopol.

The current Ukraine Crisis can be said to have begun in November 2013 when the Ukraine government under then-President Viktor Yanukovych abandoned its agreement to form closer trade ties with the E.U. and announced that it would seek co-operation with Russia instead. These decisions triggered protests in Ukraine that grew rapidly asked youin size: in December 2013, at least 800,000 people attended a demonstration in Kiev. By February, Kiev saw its worst day of violence in seventy years. In late February, the Ukraine Parliament designated its Speaker as interim President and issued an arrest warrant for Mr. Yanukovych. Immediately thereafter, pro-Russian gunmen seized key buildings in the Crimean capital, Simferopol, and gunmen in combat uniforms appeared outside Crimea’s main airports.

On March 1, President Putin asked for and received the approval of the upper house of the Russian Parliament to use Russian forces anywhere in Ukraine’s territory, without the Ukraine’s consent, because of an alleged

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18. For a valuable and detailed account of the legal relationship at various times between Ukraine and Crimea, see J. Gordon Hylton, Understanding the Constitutional Situation in Crimea, MARQ. U. L. SCH. FAC. BLOG. (last visited Feb. 11, 2015), http://law.marquette.edu/facultyblog/2014/03/16/understanding-the-constitutional-situation-in-crimea/. Although the status of Crimea within Ukraine was contested after Ukraine became independent in 1991, the Crimean Constitution was amended in 1992 to identify Crimea as part of Ukraine.


22. BBC TIMELINE, supra note 13.
threat to the lives of Russian citizens.\textsuperscript{23} Also on that date, Western media reported that Russian troops seized control of vital installations across Crimea.\textsuperscript{24} On March 2, Ukraine’s interim Prime Minister stated that Russia had in effect declared war on Ukraine, and the United States claimed that Russia was in control of Crimea. On March 4, President Putin claimed that unidentified bands of heavily-armed men making an appearance in Crimea were not Russian troops, but local self-defense forces.\textsuperscript{25} However, based on the analysis of photographs of these bands, a Finnish military expert identified them as Russian high readiness forces.\textsuperscript{26} On March 11, BBC News reported that most reporters on the scene considered the heavily armed bands described by Putin as “self-defenses forces”\textsuperscript{27} (elsewhere called the “little green men” because of the color of their uniforms) were in fact Russian troops.\textsuperscript{28}

According to a speech to the UK Parliament on March 4 by Foreign Minister William Hague, “Russian forces in Crimea [have] take[n] control of Ukrainian military sites, including in Belbek, Balaclava and Kerch, and . . . establish[ed] full operational control in the Crimea. Helicopters and planes have been deployed.”\textsuperscript{29} Hague further stated that “Russia has also argued that Russian-speaking minorities in Ukraine are in danger, but no evidence of that threat has been presented.” Finally, Hague noted that

[I]nternational diplomatic mechanisms exist to provide assurance on the situations of national minorities, including within the Organisation for Security and Cooperation in Europe and the Council of Europe. These mechanisms are the way to secure assurances of protection of the rights of minorities, not the breaking

\begin{footnotes}


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of international agreements and the use of armed force.\textsuperscript{30}

On March 6, the Crimean parliament voted to secede from Ukraine and join Russia. It scheduled a referendum for March 16.\textsuperscript{31} The next day, President Putin announced that Russia would support Crimea if it decided to secede.\textsuperscript{32}

On March 14, the Constitutional Court of Ukraine ruled the Crimean parliament’s call for the referendum to be unconstitutional.\textsuperscript{33}

The referendum took place as scheduled on March 16. Official results showed that 97\% of those voting supported the proposal to join Russia.\textsuperscript{34} Other observers contended that only 50-60\% of the voters supported the proposal.\textsuperscript{35} On March 18, President Putin addressed the Russian parliament in the speech we shall soon consider. He also signed a bill to annex Crimea into the Russian Federation.\textsuperscript{36} These actions were condemned by the U.S. and the E.U.\textsuperscript{37}

On March 22, Russian troops stormed the Ukrainian military airbase at Balbek in Crimea, forcing the surrender of the Ukrainian soldiers stationed there, and Russian troops, joined by Crimean “self-defense” forces, seized a Ukrainian warship, the \textit{Slavutych}.\textsuperscript{38}

On March 28, President Putin asked the Russian Parliament to terminate the 1997 Partition Treaty with Ukraine.\textsuperscript{39} The Parliament unanimously terminated the treaty on March 31.\textsuperscript{40}

On April 17, Putin appeared to admit that the “little green men” were,

\textsuperscript{30} \textit{Id.}
\textsuperscript{34} Fast Facts, \textit{supra note} 31.
\textsuperscript{36} Fast Facts, \textit{supra note} 31.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} Fast Facts, \textit{supra note} 31.
\textsuperscript{40} State Duma approves denunciation of Russia-Ukrainian agreements on Black Sea Fleet, INFORMATION TELEGRAPH AGENCY OF RUSSIA (Mar. 31, 2014), http://itartass.com/en/russia/725964.
in fact, troops that Russia sent into Crimea in unmarked uniforms.41

In July, 2014, Russian Foreign Minister Sergei Lavrov appeared to warn Ukraine that Russia would use nuclear weapons if Ukraine sought to retake Crimea.42

In his December, 2014 State of the Union Address, President Putin said that “Crimea, the ancient Korsun or Chersonesus, and Sevastopol have invaluable civilisational and even sacral importance for Russia, like the Temple Mount in Jerusalem for the followers of Islam and Judaism.”43

**Actions By the United Nations**

On March 15, Russia vetoed a draft Security Council Resolution, proposed by the United States, that would have deemed the Crimean secession invalid. Only Russia opposed the draft resolution; China abstained. All thirteen remaining members of the Council voted in favor of the draft.44

On March 24, Ukraine submitted a draft resolution to the General Assembly on the Crimean issue.45 Ukraine’s draft was similar to the draft that Russia had vetoed in the Security Council. The General Assembly adopted that resolution on March 27.46 Of the 193 nations in the Assembly, 100 voted in favor and 11 against, with 58 abstentions.47 The resolution dismisses Crimea’s vote as “having no validity, (and) cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of

41. Direct Line with Vladimir Putin, PRESIDENT OF RUSSIA WEBSITE (Apr. 17, 2014), available at http://eng.kremlin.ru/news/7034, where Putin was asked about the “little green men,” Putin replied: “in my conversations with my foreign colleagues I did not hide the fact that our goal was to ensure proper conditions for the people of Crimea to be able to freely express their will. And so we had to take the necessary measures in order to prevent the situation in Crimea unfolding the way it is now unfolding in southeastern Ukraine. We didn’t want any tanks, any nationalist combat units or people with extreme views armed with automatic weapons. Of course, the Russian servicemen did back the Crimean self-defence forces. They acted in a civil but a decisive and professional manner, as I’ve already said.”general Avedis Hadjian, Back in the USSR, LE MONDE DIPLOMATIQUE (Eng. ed., June 1, 2014), available at http://mondediplo.com/2014/06/01ukrain.


46. Id.

47. Id.
the City of Sevastopol."^{48} The resolution, which does not mention Russia by name, says the General Assembly "calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status" of Crimea and Sevastopol.^{49}

A. Russia's Prima Facie Legal Liability

Did Russia commit aggression or otherwise violate jus ad bellum rules?

Two questions must be addressed in considering Russia's liability for violating current use of force rules.^{50} The first question is whether Russia's actions in Crimea amounted to an "armed attack" within the meaning of U.N. Charter Art. 51, which concerns the inherent right of self-defense against such attacks. The second question is whether Russia's actions amounted to "aggression" within the meaning of U.N. General Assembly Resolution 3314, the "Definition of Aggression."^{51} A brief explanation of the terms "armed attack" and "aggression" is therefore essential.

Armed Attacks

What is an "armed attack" under Art. 51? The International Court of Justice (I.C.J.) has generally understood an "armed attack" in terms of the gravity of force that is used.^{52} Thus, a cross-border raid by a hostile army would likely be considered an armed attack, while occasional and episodic exchanges of fire across a contested international border (as in Kashmir) would not be. Indeed, the Eritrea-Ethiopia Claims Commission opined that

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49. Id.

50. Both questions presuppose that Russia was not authorized to intervene by the Security Council acting under Chapter VII of the Charter (which is uncontroversial) and that Russia was not acting in lawful self-defense under Article 51 against an actual or imminent armed attack by Ukraine. The latter assumption will be defended later in this paper.


52. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), INT'L CT. JUST. at ¶ 195: [I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.
"[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter."  

Although it enjoys some judicial and arbitral support, the I.C.J.'s "gravity of harm" test seems to create perverse incentives. As a former U.S. State Department Legal Adviser has written, to define an armed attack in terms of gravity

[W]ould encourage States to engage in a series of small-scale military attacks, in the hope that they could not do so without being subject to defensive responses. Moreover, if States were required to wait until attacks reached a high level of gravity before responding with force, their eventual response would likely be much greater, making it more difficult to prevent disputes from escalating into full-scale military conflicts.

Thus, some international law experts reject the "gravity" test. For instance, the authors of the *Chatham House Principles of International Law on Use of Force in Self-Defence*, a group of leading British diplomats, legal advisers, scholars and barristers, wrote:

An armed attack means any use of armed force, and does not need to cross some threshold of intensity. Any requirement that a use of force must attain a certain gravity and that frontier incidents, for example, are excluded is relevant only in so far as the minor nature of an attack is *prima facie* evidence of absence of intention to attack or honest mistake. It may also be relevant to the issues of necessity and proportionality.

According to these authorities, the test used by the I.C.J. is not generally accepted.

**The General Assembly's 1974 Definition of Aggression**

After protracted consideration, the United Nations General Assembly

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55. To read results on the matter, copy this link: https://www.google.com/search?q=chatham+house+principles+on+international+law+on+use+of+force&rls=com.microsoft:en-US&ie=UTF-8&oe=UTF-8&start=0&client=chromeb理性 assistan&source=lnms&tbm=sch&sa=X&ved=2ahUKEwjR0qWZ9XxUAhXiqaQIHXrgA44Q_AUoAXoECAYQAw#searches=chatham+house+principles+on+international+law+on+use+of+force&cd=1&hl=en&ct=clnk&gl=us& Bio理性 assistan&source=lnms&tbm=sch&sa=X&ved=2ahUKEwjR0qWZ9XxUAhXiqaQIHXrgA44Q_AUoAXoECAYQAw#searches=chatham+house+principles+on+international+law+on+use+of+force&cd=1&hl=en&ct=clnk&gl=us&
promulgated a definition of "aggression" in General Assembly Resolution (GA Res.) 3314. This definition has understandably become very influential. Moreover, it has become a component of the definition of the crime of "aggression" proposed in 2010 Kampala amendments as Article 8bis (2) of the 1998 Rome Statute, which established the International Criminal Court (I.C.C.) and determined its jurisdiction. Although it was not originally framed as part of the definition of an international crime, GA Res. 3314 can be and has been adapted to that purpose. Moreover, the General Assembly's definition of "aggression" has contributed to the understanding of the crime of "aggression" that has evolved in customary law since the Nuremberg Trials.

What is the force of GA Res. 3314? Under the U.N. Charter, the General Assembly is not a legislative or law-making body. The powers and functions of the General Assembly are set forth in Chapter V of the Charter. These provisions make plain that the General Assembly is a forum for debate and deliberation. It may conduct studies, express opinions, and submit recommendations to the Security Council. It may also seek Advisory Opinions from the I.C.J.. The General Assembly has no general power to make rules of international law, however.

Nonetheless, General Assembly actions, especially well-considered prescriptive statements such as GA Res. 3314, are not without legal effect.

56. Article 5(1) of the 1998 Rome Statute, which specified the crimes within the I.C.C.'s jurisdiction, included among them "the crime of aggression." But the original Statute itself did not define the crime of aggression nor attempt to enumerate its elements. Instead, Article 5(2) stated: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." That conscious omission will be filled if and when the amendments to the Rome Statute proposed in 2010 at Kampala enter into force. The proposed definition of "aggression" refers to and incorporates GA Res. 3314 in its explanation of the term "act of aggression." See Resolution RC/Res.6, The crime of aggression (June 11, 2010), available at http://www.icc-cpi.int/iccedocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf; Rome Statute of the International Criminal Court, XVII.10 (July 17, 1998), available at http://www.icc-cpi.int/iccedocs/asp_docs/R2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf; Tom Ruys, Defining the Crime of Aggression: The Kampala Consensus 15-17, Working Paper No. 57, January 2011, https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp51-60/wp57.pdf.


58. The Resolution does, however, observe that aggression is an international crime.


For one thing, they may serve as interpretations (or be “declaratory”) of international law; for another, they can constitute evidence of customary international law. Further, in the 1996 Nuclear Weapons Case, the I.C.J. attributed “normative value” to some of them. There the Court wrote that “General Assembly resolutions, even if they are not binding, may sometimes have normative value.” They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. There are several ambiguities in the I.C.J.’s formulation. Do General Assembly Resolutions have “normative value” distinct from being “evidence” of customary law? Or does their “normative value” consist in their being such “evidence”? And do they constitute (or evidence) a rule of customary law both as state practice and as opinio juris, or only as opinio juris?

Later pronouncements by the I.C.J. leave these questions still undecided. In an opinion from 2005, Congo v. Uganda, the I.C.J. specifically cited and relied on Article 3(g) of GA Res. 3314 in deciding whether Congo had “sent” armed groups against Uganda, and that reliance might suggest that the Court regarded the Resolution as stating (rather than merely evidencing) a legal rule. But elsewhere in the Congo case, the I.C.J. held that another General Assembly Resolution, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, was “declaratory of customary international law.” So perhaps the Court would say only that Resolution 3314 “declared,” but did not create or contribute to creating, customary law.

In the present instance, however, it may not matter. If the General Assembly’s definition of “aggression” is eventually codified in the Rome Statute, it will become positive, treaty law.

GA Res. 3314 carefully and cautiously notes that “the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case.” Accordingly, it attempts only “to formulate basic principles as guidance for such determination.” These “basic principles” are very broad. In the abstract, “[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent

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62. Id.
64. Id. at ¶¶ 162-63.
with the Charter of the United Nations.” That understanding is then explained by listing, in Article 3, a variety of acts that, regardless of whether a declaration of war has been issued, qualify as “act[s] of aggression”:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.66

Of critical importance, Article 5(1) states: No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. However, this sweeping statement may be qualified by Article 7:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and

66. Resolution 3314, supra note 49.
Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.\textsuperscript{67}

\textit{Application to Russia’s Intervention}

In applying these legal concepts to Russia’s action in Crimea, we must bear in mind that in the period from 1991 to 2014, Russia unambiguously recognized the sovereignty of Ukraine and the integrity of its international borders, including its sovereignty over Crimea. Russia “reaffirmed” the “existing borders” of Ukraine in the Budapest memorandum of 1994, and implicitly reaffirmed that Crimea was under Ukrainian sovereignty in the 1997 Partition Treaty and the 2010 Kharkiv Pact. Furthermore, Ukraine’s territorial borders, including Crimea, are internationally recognized, as was reflected in the Budapest memorandum, to which the U.S. and the U.K. were also parties, and by the General Assembly Resolution of March 2014.\textsuperscript{68}

The clear preponderance of opinion within the international community of States, as demonstrated by the majority votes of both the Security Council and the General Assembly, is that Russia violated international law of war regarding the use of force by its military activities in Crimea. There appear to be at least three ways in which Russia has done so.

First, it seems undisputed that Russian military forces actually attacked the Ukrainian military in Crimea on March 22.\textsuperscript{69} True, these incidents happened in Crimean territory, and by March 22, Crimea had purported to secede. But if that secession was invalid (as the General Assembly and most

\textsuperscript{67.} Resolution 3314, supra note 49, at art.7.

\textsuperscript{68.} Even accepting Mr. Putin's claim that the ouster of Ukrainian President Yanukovych was “an unconstitutional coup, an armed seizure of power,” \textit{Direct Line with Vladimir Putin, President of Russia Website} (Apr. 17, 2014), http://eng.kremlin.ru/news/7034; it would not follow that that change in government terminated Russia’s pre-existing treaties with Ukraine—and certainly not that it terminated the land boundaries fixed by those treaties. Even a revolutionary change of government in one of the parties does not automatically terminate a bilateral treaty. \textit{See The Sapphire}, 78 U.S. 164, 168 (1876) (“The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. . . . On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor or national assembly or other actual person or party in power is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. . . . A . . . treaty with a sovereign as such ensures to his successors in the government of the country.”); see also Note, \textit{Revolutions, Treaties, and State Succession}, 76 YALE L.J. 1669 (1967).

\textsuperscript{69.} \textit{Fast Facts}, supra note 31.
of the Security Council considered it to be), then Russia was attacking Ukraine on Ukrainian soil. This is tantamount to a military invasion and an “armed attack” for purposes of the U.N. Charter. It would also constitute an “act of aggression” under GA Res. 3314.\(^70\)

Furthermore, according to the U.K. Foreign Minister and Western media, Russia had both deployed helicopters and planes into Ukraine and taken control of Ukrainian military bases in Crimea, \textit{even before the referendum on secession}. And if in that period Russia had deployed military personnel whose presence in parts of Crimea was authorized by the Partition Treaty \textit{outside} the areas where they were allowed, that very act could also constitute an illegal invasion of Ukraine, \textit{even if} (as President Putin alleged) those forces had committed no acts of violence.

Putin made that claim in his address of March 16 to the Russia Parliament, which we shall examine in detail later. But that part of his speech merits some attention now. Putin said:

\begin{quote}
[W]hat exactly are we violating? True, the President of the Russian Federation received permission from the Upper House of Parliament to use the Armed Forces in Ukraine. However, strictly speaking, nobody has acted on this permission yet. Russia’s Armed Forces never entered Crimea; they were there already in line with an international agreement. True, we did enhance our forces there; however — this is something I would like everyone to hear and know — we did not exceed the personnel limit of our Armed Forces in Crimea, which is set at 25,000, because there was no need to do so. . . . Other thoughts come to mind in this connection. They keep talking of some Russian intervention in Crimea, some sort of aggression. This is strange to hear. I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties.\(^71\)
\end{quote}

It is true, as Putin argues, that Russian forces were lawfully present

\(^70\) See Namibia (S.W. Africa), Advisory Opinion (June 21) [1971] ICJ Reports 16, Separate Opinion of Ammoun, J., p. 89 at ¶ 12 (“An armed force which violates the frontiers of a country undoubtedly commits aggression”) (referring to South Africa’s military occupation, in breach of terms of U.N. Mandate, of Namibia). The very idea of State sovereignty entails that one sovereign may not enter into another’s territory without the latter’s consent: as Chief Justice John Marshall affirmed as long ago as 1812, “[o]ne sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.” The Exchange v. McFadden, 11 U.S. 116, 137 (1812).

\(^71\) Putin Address, \textit{supra} note 12.
within the parts of Crimea that Russia had leased from Ukraine under the Partition Treaty and the Kharkiv Pact. But if Russia moved any of those forces into any other part of Crimea without Ukraine’s consent, whether before or after the referendum on secession, then that would constitute an unlawful act of aggression, even if the Russian troops did not open fire and even if no casualties resulted from the troop movement.72

It is astonishing that Putin should claim that he could not recall a single bloodless invasion: the Soviet-led intervention of 200,000 Warsaw Pact troops in Czechoslovakia in 1968 was bloodless, or virtually so.73 The Nazi takeover of the Czech lands of Bohemia and Moravia in March, 1939 was resisted only by citizens of Prague hurling snowballs.74 Although the Danish military offered limited resistance to the Nazi invaders of that nation in 1940, the fighting consisted mostly of skirmishes and casualties were apparently low.75 These troop movements were unmistakably invasions and, in the case of the Soviet invasion of Czechoslovakia, violations of Charter law.76 Low numbers of casualties, or even the absence of any casualties, does not entail that the hostile movement of troops across an international boundary is not an act of aggression.

There is in fact judicial authority to this effect. In its 2007 decision in Karins v. Parliament of Latvia, the Constitutional Court of Latvia considered whether the peaceful deployment of Soviet troops into Latvia in June 1940, to which the Latvian Parliament had consented only under duress, was an act of aggression. The Court held (at ¶ 25.6) that it was, on the grounds that the lack of resistance to the invasion of another State does not necessarily mean that no invasion has taken place:

Deployment of armed forces in the territory of another State is one of the many concepts of international law that are in principle unlawful but that can be consented to by States. A valid consent by one State to an act by another State precludes the wrongfulness of

72. Art. 3(e) of GA Res. 3314 includes as an act of aggression “[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.”
74. Chad Bryant, PRAGUE IN BLACK 1 (2007).
76. The Soviet Union and its allies defended the legality of the invasion of Czechoslovakia by arguing that the Czech government or people had “invited” the intervention, or alternatively had “ratified” it after it occurred. The United States seems to have refuted those arguments. See Legality of Czechoslovak Invasion Questioned in U.N. Special Committee on Principles of International Law, 7 ILM 1317 (1968), available at http://www.jstor.org/stable/pdfplus/20690433.pdf?acceptTC=true&jsdConfirm=true.
that act in relation to the former State to the extent that the act remains within the limits of that consent. . .

If a State has not given consent or if the given consent is not internationally valid due to some reason (invalidity of the international treaty, consent due to duress, consent given by de facto non-existent government), deployment of armed forces in the territory of another State is a breach of rules of international law. 77

Russia’s actions were such a breach. They clearly were not authorized by the Security Council pursuant to its Chapter VII authorities under the Charter. Nor were they justifiable as self-defense under Article 51 as a lawful and proportionate act of self-defense against a prior or anticipated Ukrainian attack. There appears to be no evidence indicating that the Ukrainian military, on the Russian naval base at Sevastopol, elsewhere in Crimea, or in any other part of Ukraine, had previously attacked, or was even preparing to attack, Russia forces. If Ukraine’s forces had engaged in an armed attack upon Russian forces other than in response to prior Russian attacks, the burden of proof of those Ukrainian attacks would lie, under I.C.J. rulings, on Russia. 78 Moreover, the Ukrainian military was badly outnumbered and outclassed by the Russian forces. It is therefore extremely unlikely that Ukraine attacked first, or was poised to do so. 79

Second, Russian forces in Crimea, operating without uniforms or other recognizable signs of their combatant status, participated in armed attacks on Ukraine both in the run-up to the March 16 referendum and after it. President Putin reportedly conceded that some of the non-uniformed masked men operating in Crimea were regular Russian troops. 80

Third, Russia may have “sent” armed bands of ethnically Russian, pro-secessionist forces of Ukrainian nationals to combat the Ukrainian military
in Crimea. If so, that could well be an act of aggression within the meaning of GA Res. 3314 and an armed attack under the I.C.J.’s decision in Nicaragua. And even if Russia did not “send” these bands, but only provided them with weaponry and logistical support, those actions too would seem to have violated international law, as declared in the Congo and Nicaragua cases and the General Assembly’s definition of aggression.

B. Was Crimea’s Secession Valid Under International Law?

The legality of secession under international law cannot be regarded as a finally settled question. Unfortunately, in its 2010 advisory opinion on the legality of Kosovo’s declaration of independence from Serbia, the I.C.J. declined to take the occasion to explain the international law of (remedial) secession. However, in general, secession other than as a remedy for severe and prolonged human rights abuses is strongly disfavored in international law, even if a majority of the voters in the seceding region favor it, unless the nation of which they are a part consents to the secession. Under that rule, the purported secession of Crimea, even if supported by the Crimean parliament and by a decisive majority of Crimea

81. To cite the relevant language from Nicaragua again, [1986] I.C.J. Rep. at ¶ 195: [I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein”.

82. See Nicaragua, (1986) I.C.J. Rep. at ¶ 195 (“assistance to rebels in the form of the provision of weapons or logistical or other support. . . . may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.”). Under the I.C.J.’s “gravity” test, these violations would not constitute “armed attacks.”

83. The leading scholar James Crawford defines “secession” as “the creation of a State by the use or threat of force without the consent of the former sovereign.” JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 375 (2d ed. 2006). Under this definition, secession is inherently non-consensual. To be clear, however, consensual secession is a different matter. Thus, Slovakia lawfully seceded from Czechoslovakia with the latter’s consent, and Scotland might have seceded peaceably and lawfully from the U.K. had the voters in its September 2014 referendum so decided. Crawford distinguishes between “secession within a metropolitan State” and “the secession of a self-determination unit and, in particular, of a non-self-governing territory.” Id. at 383. In other words, he distinguishes “salt water colonialism” from the kind of secession at issue in Crimea. See Lea Brilmayer, Commentaries on Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 25 YALE J. INT’L L. 283 (2000). Examples of post-World War II “secessions” of the former kind are the successful case of Bangladesh, the unsuccessful cases of Katanga and Biafra, and the contested cases of Northern Cyprus and Chechnya. Examples of secession from “salt water colonialism” include the successful post-War efforts of many former European colonies in Africa and Asia, such as Algeria and Vietnam, to break away from the overseas powers that controlled them.


85. See, e.g., ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE 415 (2013)
voters in the referendum of independence, is legally invalid. And so the General Assembly concluded.

Although international law is unquestionably committed to "the principle of . . . self-determination of peoples," U.N. Charter art. 1(2), it by no means follows that any national or ethnic minority may secede at will from an existing State and declare itself an independent State. The very statement in the U.N. Charter that recognizes the principle of self-determination of "peoples" subordinates that principle to the end of "develop[ing] friendly relations among nations." Furthermore, art. 2(4) of the Charter prohibits Member States "from the threat or use of force against the territorial integrity . . . of any state," and art. 2(7) shelters from U.N. intervention "matters which are essentially within the domestic jurisdiction of any state." States will nearly always resist their own forcible dismemberment, whether at the hands of internal insurgents or at those of outside powers or, as in Crimea, of both. Because forcible secession will therefore ordinarily pose a threat to international stability and peace, the policy of international law is to disfavor it when the State from which secession is sought does not consent to it. To put it bluntly, Woodrow Wilson's statement that "[n]o people must be forced under sovereignty under which it does not wish to live" is not now, and has never been, the law.

Rather, what has been and is still the general rule of law was stated in 1920 by a Committee of Jurists appointed by the Council of the League of Nations to render an opinion on the claim of the ethnically Swedish population of the Aaland Islands to secede from Finland and become a part of Sweden. The Committee said:

[I]n the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of


the sovereignty of every state. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation.89

More recently, we may consider the exact and careful statement of current international law from the Supreme Court of Canada in its 1998 opinion *Reference re: Secession of Québec*.90 While acknowledging that “the right of a people to self-determination” is “now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law,” nonetheless “international law expects that the right . . . will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”91 Leading publicists affirm that state practice in the Charter world accords with this understanding of the law.92

Also relevant is the opinion of the African Commission on Human and Peoples’ Rights in *Katangese People’s Congress v. Zaire* (2000).93 There

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91. *Québec*, 2 S.C.R. 217 ¶¶ 113-14, ¶122. More fully, the Court said: “The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination – a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination . . . arises only in the most extreme of cases and, even then, under carefully defined circumstances . . . The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international instruments that support the existence of a people’s right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state’s territorial integrity or the stability of relations between sovereign states . . . There is no necessary incompatibility between the maintenance of the territorial integrity of existing states . . . and the right of a “people” to achieve a full measure of self-determination.” *Id.* ¶¶ 126-27; ¶ 130.
the Commission stated (at ¶ 4) that:

self-determination may be exercised in any of the following ways - independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people, but is fully cognisant of other recognised principles such as sovereignty and territorial integrity.

Because the Commission found no “concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter,” it upheld the territorial integrity of Zaire, denied that Katanga had a right to independence and ruled that “Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire” (id. at ¶ 6).

Russia itself has stoutly defended this legal framework, in which secession is disfavored except in an extreme case. In its Written Statement of October 17, 2008 to the ICJ in the Kosovo Declaration of Independence Case, Russia affirmed that:

[A] State that respects the rights of peoples living in its territory, is protected by the principle of territorial integrity from the implementation of the right to self-determination in the form of secession (“external self-determination”). As stated by the Supreme Court of Canada in the Quebec secession case, “the international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states’. {Footnote omitted}. Many authors discussing self-determination point out either that the post-colonial system does not recognize a right to secession at all, or that, at least, a presumption or a strong preference exists in favour of territorial integrity.[94]

To be sure, secession may be lawful where the population of the seceding entity has suffered a long train of serious human rights abuses at the hands of the larger State of which it has been part, and there is little or

(ACHPR 2009) at ¶ 199.
no realistic chance that the latter will reform its conduct. Thus, in the Quèbec case, the Supreme Court of Canada noted that a “clear case where a right to external self-determination [i.e., secession]” exists when “a people is subject to alien subjugation, domination or exploitation outside a colonial context.”\(^95\) Furthermore, the Court noted the opinion of some scholars that “the right to self-determination may ground a [remedial] right to unilateral secession . . . when a people is blocked from the meaningful exercise of its right to self-determination internally.”\(^96\) One or both of these exceptions applied to Kosovo, where the ethnic Albanian population of that Serbia province, which formed the overwhelming majority of its inhabitants, had undergone severe and prolonged abuses at the hands of Serbia. It may also be the case that one or both exceptions applies to the Kurdish population of Iraq, which may eventually opt to secede from that country, even if the Iraqi government does not consent. But it plainly could not be said of the ethnic Russian population of Crimea.\(^97\) Accordingly, Crimea was not a case in which international law would have recognized a right to secession and independence.

Moreover, the fact that the Crimean secession resulted, not only from the activities of local Crimean forces, but also from Russia’s external military intervention, strengthens the argument that the secession was void. In 1983, Security Council Resolution 541 condemned Turkey’s recognition of the purported Republic of North Cyprus. The North Cyprus case bears some resemblance to the Crimean situation. In both instances, an outside power intervened militarily in order to protect an ethnic minority from the (asserted) risk of persecution at the hands of an established government, supported that minority’s efforts at secession, and sought unilaterally to redraw recognized international frontiers.

\(^{95}\) Qudbec, 2 S.C.R. ¶ 133. The Court pointed out that the exception for that case is rooted in (among other things) the landmark Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (Oct. 24, 1970). After reaffirming the right of self-determination of peoples, Resolution 2625 stated:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, color or creed.

\(^{96}\) Qudbec, supra, at ¶ 134.

\(^{97}\) In its written statement to the I.C.J. in the Kosovo Declaration of Independence case, Russia insisted that the right to “remedial” unilateral secession existed “only in extreme conditions, where violent acts of discrimination are continuously committed against the people in question and all possibilities for a resolution of the problem within the existing State have been exhausted. Seccession has been described as a measure of last resort, where the very existence of the people, or its characteristic features, are in danger.” Written statement of Russia, supra, at ¶ 87. Nothing approximating to those conditions existed for ethnic Russians in Crimea.
The fact that Crimea, acting under the authority of its local government, held a plebiscite in which a majority voted for secession does not matter under either Ukrainian or international law. To be clear: I am not contending that the presence of Russian troops in Crimea during the referendum, or the boycott of the referendum by some non-Russian groups, tainted the outcome. However hasty and irregular the vote was, I am prepared to assume that the outcome reflected the wishes at the time of the majority those who chose to participate in the vote. But it is insufficient

98. The use of a referendum to buttress the legitimacy of a claim of right to secede has not been uncommon since the people of the Papal territory of Avignon voted to secede and join revolutionary France in 1791. See Theodore S. Woolsey, Self-Determination, 13 Am. J. Int'l L. 302 (1919) (reviewing cases). Referenda are still used for that purpose when the government in place consents to abide by a vote in favor of separate Statehood. This happened, e.g., in the 1993 Eritrean plebiscite to secede from Ethiopia. See Eritrea Ethiopia Claims Commission, Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23, & 27-32 at ¶¶ 6-7 (2004), available at http://www.pca-cpa.org/upload/files/ER%20Partial%20Award%20Dec%202004.pdf

But the outcomes of such plebiscites have by no means been generally accepted when the existing government has not agreed to accept them. The American States of Texas, Virginia and Tennessee submitted the question of secession from the Union to their citizens at the start of the Civil War, and majorities voted to secede. Obviously the Lincoln Administration did not consider itself legally bound by the outcome of those referenda. See MATT QVORTRUP, REFERENDUMS AND ETHNIC CONFLICT 16-30 (2014) (reviewing cases). Likewise, a Joint Select Committee of the British Parliament refused to accept the outcome of a two-thirds majority vote in favor of the secession of Western Australia in a referendum held in that province in April 1933, concluding that the British Parliament had no jurisdiction to facilitate such a secession. See Thomas Musgrave, The Western Australian Secessionist Movement, 3 Macquarrie L. J. 95 (2003). “...”


In general, then, “for important issues such as independence of the territory... it may be important, or even essential, to consult the whole electorate.” Yves Beigbeder, Referendum, at ¶ 64, in Oxford Public International Law, available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1088.

99. It does not follow, and it may not be true, that the outcome of the plebiscite reflected the considered and deliberate will of the “people” (if they can be so characterized) of Crimea. According to a Canadian political scientist, Canada’s Clarity Act, which is designed to provide for the lawful secession of a province through the vote of a “clear majority,” does not permit the break-up of Canada merely “by a one-vote majority in a provincial referendum.” See Tom Flanagan, Clarifying the Clarity Act, in The Globe and Mail (July 8, 2011), available at http://www.theglobeandmail.com/globe-debate/clarifying-the-clarity-act/article586395/. The extent of the turn-out for the referendum, and perhaps also the size of the majority in favor of secession, must also be considered. Further, a fair opportunity to debate the proposed secession
that the Crimea gave their consent to the secession; it is necessary that Ukraine have consented. And Ukraine did not and does not consent to the loss of Crimea. “International law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part. . . . Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is unlikely to accept that conclusion subject to the right of peoples to self-determination.”

C. Was Russia’s annexation of Crimea Valid?

Given that the secession of Crimea was invalid, it follows directly that Russia’s annexation of the peninsula was also illegal and invalid. Nonetheless, a brief exposition of international law regarding annexation may be useful.

As with secession, the annexation (perhaps it is better to say, the merger) of one State or territory by another State can be lawful when both parties freely consent to it. Thus, the 1997 transfer of sovereignty over Hong Kong from the UK to China was internationally lawful. The reunification of the two Germanies in 1990 was also consensual and is recognized as lawful by the international community. The short-lived United Arab Republic (1958-1961), a union formed by the merger of Egypt and Syria, was also legally valid.

Moreover, in the post-1945 period, there have been many actual or attempted annexations. The international law scholar Eugene Kontorovich recently listed several such cases. His list includes Turkey’s de facto annexation of North Cyprus in 1974, Morocco’s annexation of Western Sahara, North Vietnam’s incorporation of South Vietnam in 1975, Indonesia’s annexation of East Timor, Armenia’s de facto annexation of parts of Azerbaijan, and Russia’s own de facto annexation of parts of

must have been afforded, and the polling must not have been tainted by irregularities or a coercive atmosphere. It is doubtful whether the Crimean referendum met comparable standards.

100. The Crimean referendum was void and without effect, not only as a matter of general international law, but also as a matter of Ukraine’s own constitutional law. As noted above, the Constitutional Court of Ukraine ruled the Crimean resolution calling for the referendum to be unconstitutional. See Judgment of the Constitutional Court of Ukraine on all-Crimean Referendum (March 14, 2014), English trans. available at http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu.


102. Québec, supra, at ¶ 112.

Georgia in 2008.\textsuperscript{104} Other post-War cases include Israel’s annexation of East Jerusalem, the Ethiopian annexation of Eritrea (1961) and India’s annexation of Portuguese Goa (also 1961). Not all of these annexations have been considered illegal (though some, such as that of East Timor, undoubtedly were).\textsuperscript{105} The international community recognizes Vietnam (including both the former North and South Vietnams) as a unitary sovereign State. India’s conquest of Goa was perhaps considered a legitimate or excusable act of decolonization.\textsuperscript{106}

As a general rule, however, forcible annexations are unlawful and stand condemned by the international community.\textsuperscript{107} The outstanding post-War example, of course, is the Security Council’s condemnation of Iraq in Resolution 662 (1990), in which the Council decided that Iraq’s annexation of Kuwait “has no legal validity” and was “null and void.”\textsuperscript{108} Subsequently in Resolution 678 (1990), the Council, acting under its Chapter VII authority, authorized the United States and other allies of Kuwait to enforce Resolution 662 and to undo the Iraqi annexation.\textsuperscript{109} Those actions by the Council stand as important precedents for finding forcible annexations to be illegal. Likewise, Security Council Resolution 267 (1969), among others, condemned the Israeli annexation of East Jerusalem.\textsuperscript{110} These Resolutions reinforce the norm against forcible annexation. Indeed, that norm can be traced back at least to the “Stimson doctrine” (1932), named for then-U.S. Secretary of State Henry Stimson, which declared that the United States considered that the Japanese conquest and acquisition of Manchuria to have brought about no change in China’s legal title to that territory.\textsuperscript{111} Whether or not the Stimson doctrine had become customary law by 1945, “[t]he position now prevailing and fully accepted in international law is that the use of force is unlawful and, by itself, ineffective to bring about a change of title.”\textsuperscript{112} Indeed, the Trial Chamber of the International Criminal Tribunal

\textsuperscript{104} Id.


\textsuperscript{106} Cf. Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960, p. 6, p. 45.

\textsuperscript{107} Indeed, when annexation is (as here) the outcome of aggression, it aggravates the illegality of that aggression. See Namibia (S.W. Africa), supra, separate opinion of Ammoun, J., ¶ 12 at p. 90 (“The aggression committed by South Africa with regard to Namibia is the more serious in that . . . it has turned into a veritable annexation”).


\textsuperscript{109} S.C. Res. 678 (Nov. 29, 1990).

\textsuperscript{110} See, e.g., S.C. Res. 252 (May 21, 1968); see also S.C. Res. 497 (Dec. 17, 1981) (Golan Heights).

\textsuperscript{111} See Quincy Wright, The Legal Foundation of the Stimson Doctrine, 8 PACIFIC AFFAIRS 439 (1935).

\textsuperscript{112} Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001, p. 40 (separate opinion of Judge Fortier ¶ 37).
for the Former Yugoslavia declared in 1998 that “the acquisition of territory by force” was forbidden by a *jus cogens* norm of international law, expressly placing it together with the prohibitions on genocide, torture and slavery.113

True, the Russian annexation of Crimea might be argued to have been “non-forcible” in that 1) it was supported by secessionist Crimea and 2) any armed conflict between Russian and Ukrainian forces was limited to non-existent. But these considerations do not change the legal analysis. In the *Karins* case, noted above, the Latvian Constitutional Court recalled the holding of the International Military Tribunal at Nuremberg (the IMT) and other Nuremberg military courts to the effect that Nazi Germany’s annexation of Austria—the *Anschluss*—was illegal and criminal, despite being bloodless and despite having the support of the majority of the Austrian people.114 As *Karins* says, the IMT had found that “[t]hese matters, even if true, are really immaterial for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance were encountered.” The same is true of the Russian annexation of Crimea.

**PART II: RUSSIA’S LEGAL DEFENSES**

*Putin’s Speech*

Before we can confidently conclude that Russia violated international legal standards, however, we must carefully examine Russia’s legal defenses. These can be found in several places. However, it is reasonable to concentrate on President Putin’s extremely interesting speech of March 18 to the Russian Parliament.115 That speech sets out Russia’s legal defenses in a straightforward but sophisticated way. It obviously benefited from the advice of the legal experts at Russia’s Foreign Ministry. And, coming from the head of the Russian State, it has a unique authority. Moreover, although Mr. Putin’s speech covers several topics, it is threaded throughout with references to international law.116 It does not give much attention to the legality of Russia’s annexation—an event that was still in the future when Mr. Putin spoke. But he does offer interesting arguments on the legality of Russia’s actions under international use of force rules and of the validity of

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116. *Id.*
the Crimean referendum, which had happened two days earlier.

We can identify at least four interwoven but distinct legal arguments in Mr. Putin’s remarks. These are:

1. Crimea belongs to Russia;
2. Russia was acting in defense of endangered nationals and ethnic kin living in Crimea;
3. Russia was enabling the Crimean people to exercise their right to self-determination; and
4. The 1999 NATO military intervention in Kosovo created a precedent for Russia’s actions.

Does Crimea belong to Russia?

Mr. Putin’s lead argument, not surprisingly given his audience, is that Crimea belongs to Russia. To show this, he demonstrates the close historical and current ties that bind Crimea to Russia. (“In people’s hearts and minds, Crimea has always been an inseparable part of Russia.”) He notes that “the total population of the Crimean Peninsula today is 2.2 million people, of whom almost 1.5 million are Russians, 350,000 are Ukrainians who predominantly consider Russian their native language, and about 290,000-300,000 are Crimean Tatars, who, as the referendum has shown, also lean towards Russia.” And he argues that the transfer of Crimea in 1954 from the Russian Soviet Republic to the Ukrainian Soviet Republic was arbitrary, unconstitutional, and made without reference to the wishes of the Crimean people:

[In 1954, a decision was made to transfer Crimean Region to Ukraine, along with Sevastopol, despite the fact that it was a federal city. This was the personal initiative of the Communist Party head Nikita Khrushchev. What stood behind this decision of his – a desire to win the support of the Ukrainian political establishment or to atone for the mass repressions of the 1930’s in Ukraine – is for historians to figure out.]

What matters now is that this decision was made in clear violation of the constitutional norms that were in place even then. The decision was made behind the scenes. Naturally, in a totalitarian state nobody bothered to ask the citizens of Crimea and Sevastopol. They were faced with the fact. People, of course, wondered why all of a sudden Crimea became part of Ukraine. But on the whole – and

117. Id.
118. Id.
we must state this clearly, we all know it – this decision was treated as a formality of sorts because the territory was transferred within the boundaries of a single state. Back then, it was impossible to imagine that Ukraine and Russia may split up and become two separate states. However, this has happened.\textsuperscript{119}

Moreover, Putin contended, Crimea was handed over to Ukraine in 1991 in a similar way, without reference to the wishes of the (mainly Russian) inhabitants of Crimea:

[W]e have to admit that by launching the sovereignty parade Russia itself aided in the collapse of the Soviet Union. And as this collapse was legalised, everyone forgot about Crimea and Sevastopol – the main base of the Black Sea Fleet. Millions of people went to bed in one country and awoke in different ones, overnight becoming ethnic minorities in former Union republics, while the Russian nation became one of the biggest, if not the biggest ethnic group in the world to be divided by borders.

Now, many years later, I heard residents of Crimea say that back in 1991 they were handed over like a sack of potatoes. This is hard to disagree with. And what about the Russian state? What about Russia? It humbly accepted the situation. This country was going through such hard times then that realistically it was incapable of protecting its interests. However, the people could not reconcile themselves to this outrageous historical injustice. All these years, citizens and many public figures came back to this issue, saying that Crimea is historically Russian land and Sevastopol is a Russian city.\textsuperscript{120}

Putin’s arguments, however resonant they might be with his Russian audience, prove nothing as a matter of international law.\textsuperscript{121} The unconstitutionality of the transfer of Crimea to Ukraine under Soviet law (assuming that it was unconstitutional\textsuperscript{122}) does not invalidate it under international law. The general rule in international law—applied during the dissolution of the former Yugoslavia—is that the internal boundaries between the major units of a federal system become international.

\textsuperscript{119} Id.  
\textsuperscript{120} Putin, supra note 71.  
\textsuperscript{121} Id.  
\textsuperscript{122} The USSR Constitution of 1977 might be interpreted to have ratified the Crimea cession.
boundaries in the event of the federation’s dissolution. Moreover, in the Yugoslavian case, this was held to be true regardless of the wishes of the ethnic groups that unexpectedly found themselves to be minorities in the new situation. The same rules would apply to the case of the dissolution of the USSR.

Furthermore, although the rights of national minorities to exist, to enjoy equal rights with national majorities, and even to determine their own condition are established, existing international law by no means affirms that they also have a right to separate statehood and territory. Indeed, the principle that pre-existing borders become international borders upon independence is well established in the I.C.J.’s case law. In the Western Sahara and Namibia cases, the I.C.J. affirmed the principle of self-determination; but it ruled the principle to be applicable to territories within former colonial systems, and not (except insofar as they were residents of the territory) to peoples. Likewise, in the Burkina Faso case, an I.C.J. Chamber found that the principle of uti possidetis, which “freezes the territorial title” of a former colony at the moment it achieves independence to “the territorial base and boundaries left to it by the colonial power,” took priority in the event of any conflict with the principle of self-determination because of what the Chamber saw as an overriding need “to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.” Thus, under the I.C.J.’s decolonization

123. For discussion and critique of this principle as applied in the Yugoslavian context, see R.J. Delahunty & Antonio F. Perez, The Kosovo Crisis: A Dostoevskian Dialogue on International Law, Statecraft and Soulcraft, 42 VANDERBILT J. TRANSNAT’L L. 15, 73-86 (2005).

124. Moreover, even if the transfer of Crimea to Ukraine was illegal under Soviet law, Russia can be said to have ratified it by later treaties.

125. See Malcolm N. Shaw, Peoples, Territorialism and Boundaries, 3 EURO. J. INT’L L. 478, 488-89 (1997) (“It cannot . . . be maintained that the current conception of minority rights in international law includes the right as such to territorial autonomy. Whatever the rights afforded under international law to individuals, groups, minorities or peoples, these cannot be interpreted to include rights either to territorial autonomy or sovereignty, without the express consent of the relevant state. . . . International law is quite clear with regard to the predominance of the need to respect international boundaries.”).


127. Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, ¶ 161 (finding self-determination extended to the “population” of Western Sahara); id. ¶ 162 (right lay in the “free and genuine expression of the will of the peoples of the Territory”).


129. Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554, ¶ 20, ¶ 30. The I.C.J. subsequently declared that the formulation of the uti possidetis principle in the Burkina-Faso case was “authoritatively stated.” Case Concerning Land, Island and Maritime Frontier Dispute (El
cases, “the principle of self-determination of peoples was territorially defined... Self-determination... did not operate... as a means whereby each group within the territory had the right in international law to determine its own political future.”

Finally, Russia did not object to Ukrainian sovereignty over Crimea in 1991, and it affirmed Ukrainian sovereignty over Crimea several times thereafter in formal legal documents. Putin makes no reference whatsoever to those inconvenient facts. Indeed, he seems to acknowledge that during negotiations with Ukraine in the early 2000s, Russia acknowledged, or was willing to acknowledge, that Crimea belonged to Ukraine. Taking some liberties with the historical record, he said:

The then President of Ukraine Mr Kuchma asked me to expedite the process of delimiting the Russian-Ukrainian border. At that time, the process was practically at a standstill. *Russia seemed to have recognised Crimea as part of Ukraine*, but there were no negotiations on delimiting the borders. Despite the complexity of the situation, I immediately issued instructions to Russian government agencies to speed up their work to document the borders, *so that everyone had a clear understanding that by agreeing to delimit the border we admitted de facto and de jure that Crimea was Ukrainian territory, thereby closing the issue.*

We accommodated Ukraine not only regarding Crimea, but also on such a complicated matter as the maritime boundary in the Sea of Azov and the Kerch Strait. What we proceeded from back then was that good relations with Ukraine matter most for us and they should not fall hostage to deadlock territorial disputes. However, we expected Ukraine to remain our good neighbour, we hoped that Russian citizens and Russian speakers in Ukraine, especially its southeast and Crimea, would live in a friendly, democratic and civilised state that would protect their rights in line with the norms of international law. (emphasis added)

Here we can see the argument that “Crimea belongs to Russia” melting into a second and distinct argument: that Russian intervention in Crimea is justified by the need to protect “Russian citizens and Russian speakers”—a type of self-defense argument.

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130. Shaw, Peoples, Territorialism and Boundaries, supra note 72, at 481.
131. Putin, supra note 71.
Was Russian intervention lawful as a measure to protect endangered Russians?

Putin’s speech raises the question of the legality of armed intervention on behalf of the nationals of the intervening State who were held hostage—or otherwise in grave danger—in a State that was unwilling or unable to protect them. Putin argued that that was, effectively, the situation of Russian nationals in Crimea. Indeed he even suggested that the Ukrainian government did not merely stand by as private groups threatened the Russians of Crimea, but that that government itself actively persecuted those people:

Time and time again attempts were made to deprive Russians of their historical memory, even of their language and to subject them to forced assimilation. Moreover, Russians, just as other citizens of Ukraine are suffering from the constant political and state crisis that has been rocking the country for over 20 years. . .

I would like to reiterate that I understand those who came out on Maidan with peaceful slogans against corruption, inefficient state management and poverty. The right to peaceful protest, democratic procedures and elections exist for the sole purpose of replacing the authorities that do not satisfy the people. However, those who stood behind the latest events in Ukraine had a different agenda: they were preparing yet another government takeover; they wanted to seize power and would stop short of nothing. They resorted to terror, murder and riots. Nationalists, neo-Nazis, Russophobes and anti-Semites executed this coup. They continue to set the tone in Ukraine to this day.

The new so-called authorities began by introducing a draft law to revise the language policy, which was a direct infringement on the rights of ethnic minorities. However, they were immediately ‘disciplined’ by the foreign sponsors of these so-called politicians. One has to admit that the mentors of these current authorities are smart and know well what such attempts to build a purely Ukrainian state may lead to. The draft law was set aside, but clearly reserved for the future. Hardly any mention is made of this attempt now, probably on the presumption that people have a short memory. Nevertheless, we can all clearly see the intentions of these ideological heirs of Bandera, Hitler’s accomplice during World War II. . .
Those who opposed the coup were immediately threatened with repression. Naturally, the first in line here was Crimea, the Russian-speaking Crimea. In view of this, the residents of Crimea and Sevastopol turned to Russia for help in defending their rights and lives, in preventing the events that were unfolding and are still underway in Kiev, Donetsk, Kharkov and other Ukrainian cities. Naturally, we could not leave this plea unheeded; we could not abandon Crimea and its residents in distress. This would have been betrayal on our part.132

Again, however, the argument is unconvincing. First, Putin lumps together three distinct categories of people who have different statuses under international law: Russian citizens; ethnic Russians who are citizens of Ukraine; and Russian speakers. At most, international law would permit a limited armed intervention by Russia to protect its own nationals, including, it may be, those who were dual nationals of Russia and Ukraine.133 But international law, most assuredly, does not permit intervention on behalf of ethnic kindred who are non-nationals of the intervening Power (let alone those who merely speak its language), even if they are endangered.

As the British legal scholar D.W. Bowett—a staunch defender of the right of protective intervention—admitted

[C]itizenship affords the basis of the state’s right to protection. In the absence of this nexus of nationality or citizenship it is difficult to see how protection can be brought within the concept of self-defence, for it is because of their nationality that persons can be regarded as a part of the state and, therefore, their protection be undertaken by the state as self-protection.134

Bowett also requires that legitimate protective intervention be designed to meet an “actual or imminent danger” (which is generally true of any legitimate form of self-defense).135 On that requirement, Mr. Putin’s reference to a draft language law—which, as he noted, was not passed—is simply irrelevant, since whatever “danger” that law might have imposed (if

132. Id.
133. Caution is required here, however. Having a particular nationality under the domestic law of a State does not automatically entail having the same nationality for every purpose of international law, including the right to be protected by that State. See Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955, p. 4, p. 21.
134. Bowett, supra, at 119.
135. Bowett, supra, at 120.
Is it generally lawful to intervene militarily to rescue endangered nationals abroad?

Furthermore, the legality of armed intervention even to protect one’s own endangered nationals abroad has long been disputed. In the Don Pacifico Affair of 1850, the British Foreign Minister Lord Palmerston sent a squadron of the Royal Navy to seize property in Athens in compensation for the damage done by a Greek mob to the home of one Don Pacifico while local police looked on. Don Pacifico was the Portuguese consul in Athens but had been born in Gibraltar and was therefore a British subject. Don Pacifico had been unable to secure justice from the Greek government and appealed to Britain for help. In the debate in Parliament over his actions, Palmerston said: “a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.” But Palmerston’s doctrine, which seemed high-handed even in the age of “gunboat diplomacy,” is hardly the recognized rule of international law today.

How should we evaluate the armed intervention by one State into the territory of another for the sole purpose of rescuing innocent, non-combatant nationals of the intervening State who are being held hostage in the other State, and that State, though not itself the hostage-taker, is unable or unwilling to rescue them from their captivity? Should this be considered a lawful form of self-defense under Article 51 of the U.N. Charter, or otherwise authorized by international law? Or an unlawful act of aggression, as is arguably the case under GA Res. 3314? Or does it, perhaps, fall under some third category?

136. Putin also neglected to mention that under a 2012 Ukrainian law, regions in Ukraine with significant Russian populations are allowed to use Russian to conduct official government business. The attempt in the early days following President Yanukovych’s removal from office to repeal the law, to which Putin referred, was unsuccessful. These facts hardly show official discrimination against Russian speakers; rather the opposite.

137. For accounts of the affair, see Geoffrey Hicks, Don Pacifico, Democracy, and Danger: The Protectionist Party Critique of British Foreign Policy, 1850–1852, 26 INT’L HIST. REV., 515 (2004); Dolphus Whitten, Jr., The Don Pacifico Affair, 48 The Historian 255 (1986).


139. Note that the Resolution says that “territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter.” If rescue operations are permissible self-defense under Art. 51, they would be consistent with the Charter, and hence not necessarily acts of aggression.

140. For an excellent overview of the debate, see Tom Ruys, The ‘Protection of Nationals’ Doctrine Revisited, 13 J. CONFLICT SECURITY LAW 233 (2008). A valuable earlier contribution, arguing for a limited right of intervention to protect endangered nationals abroad, is Sir Humphrey Waldock, The Regulation of the Use of Force by Individual States in International Law, (1952-II) 81 RECEUIL DES COURS 451, 467.
Consider the case of the hostage rescue operation that Israeli armed forces carried out in 1976 at Entebbe Airport in Uganda.\footnote{For contrasting analyses, compare Leonard M. Salter, Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression?, 11 INT’L LAW. 331 (1977) with Adeoye A. Akinsanya, The Entebbe Rescue Mission: A Case of Aggression, 34 PAKISTAN HORIZON 12 (1981). See also Eleanor C. McDowell, United Nations: Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport, 15 INT’L LEGAL MATERIALS 1224 (1976).} A group of hijackers acting for the Popular Front for the Liberation of Palestine captured an Air France plane bound from Israeli to France and forced it to land down (eventually) at Entebbe, where they held some 104 Israeli nationals, including crew and passengers, as hostages, threatening to kill them unless Israel and other Western countries released some 153 terrorists held in prison. The government of Uganda under President Idi Amin apparently did nothing to rescue the hostages or to prevent their captors from carrying out their threat. An Israeli commando group forced its way into the Entebbe Airport, rescuing nearly all of the hostages and returning them to safety in Israel. In the exchange of fire, several Ugandan troops, hijackers, and hostages were killed.

The Security Council debated the legality of the Israeli commando operation. Two draft resolutions were put before the Council, both of them condemning Israel’s action. One draft was offered by the U.S. and the U.K., the other by three African States. The Chairman of the Organization of African Unity condemned Israel’s operation as an “act of aggression.”

Interestingly, however, the Security Council adopted neither the U.S.-U.K. draft resolution nor the alternative African draft. Member States seemed to have been torn between two conflicting impulses. One was to condemn Israel for violating Uganda’s territorial integrity. The other was to accept that a State had the right to use military force if that was absolutely necessary to rescue its own innocent, non-combatant nationals from a life-threatening hostage situation, at least when the invaded State was unwilling to make its own rescue attempt or was cooperating with the hostage-takers, provided that the rescue operation was designed to keep casualties to a minimum and did not result in even the temporary occupation of the invaded State.

A more recent case is the United States’ abortive military effort in 1980 to rescue American diplomatic personnel held hostage for months by Iranian militants surrounding the U.S. Embassy in Tehran.\footnote{United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3.} The I.C.J. commented on this intervention in its 1980 opinion in The Tehran Embassy Case. While insisting on the gravity of Iran’s breach of international law in failing to protect the Embassy and its staff (diplomatic personnel enjoy a
heightened right to protection by the host State), the Court also expressed its “concern” over the American “incursion” into Iranian territory.\textsuperscript{143} However, the Court also pointed out that “neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court.”\textsuperscript{144} Accordingly the Court did not review the legality of the U.S. rescue operation.\textsuperscript{145}

The legality of both the Israeli commando operation at Entebbe and the American rescue attempt in Tehran thus remain clouded. But Israel reasonably interpreted the failure of a condemnatory resolution to pass as a vindication. Moreover, since the attacks of September 11, 2001, the United States and other nations have become more inclined to support protective military operations against terrorists on behalf of their own nationals. Should we consider actions like the Entebbe incident to be “acts of aggression”? Or would that be taking the side of the stronger, Western nations in a longstanding dispute they have had with the weaker nations of the global South?\textsuperscript{146}

The debate in the Security Council over Israel’s rescue operation at Entebbe airport indicated that the question is still open. But Israel’s operation was limited to rescuing Israeli nationals from an immediate, life-threatening danger. It did not result in any further military operations in Uganda, nor in the acquisition of any Uganda territory. Russia’s

\textsuperscript{143} Id.
\textsuperscript{145} An older but similar intervention is also interesting. That is the Western intervention during the Boxer Rebellion in 1900, which occurred in this very city. That too was a military intervention for the purpose of rescuing endangered nationals abroad when the host government was unable or unwilling to protect them. An expeditionary force of British, German, Russian, American, Italian, French, Austro-Hungarian and Japanese troops lifted a 55-day siege of Beijing’s legation quarter and rescued their diplomatic personnel within it. The expeditionary forces then engaged in violence and looting against Chinese people and property. The Chinese cultural memory is far more critical of these incidents from the prevailing Western one, and rightly so. See \textit{Remembering the Boxer Uprising: A Righteous Fist}, THE ECONOMIST (Dec. 16, 2010), http://www.economist.com/node/17723014?.
\textsuperscript{146} C.f. \textit{The Corfu Channel Case}, Judgment of April 9\textsuperscript{th}, 1949: I.C.J. Reports 1949, p. 4, p. 35 (“The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.”).
intervention in Crimea, by contrast, resulted in the annexation of the entirety of that territory. If the legality of Israel’s intervention was debatable, therefore, that of Russia’s intervention is less so. Moreover, even accepting the characterization of Russia’s intervention as a form of “self-defense,” it did not meet the requirement of proportionality that attaches, legally, to any valid self-defense. Russia could simply have evacuated any endangered Russian nationals (as Israel did at Entebbe), or thrown a protective cordon sanitaire around them until the immediate danger had passed. Instead it forcibly occupied, and then annexed, the entire territory. But, as legal scholar Tom Ruys has shown, over the course of several decades “debates in the Security Council unequivocally certify that that, unless the host State consents or the Security Council authorizes the operation, attacks against nationals abroad or threats thereof can never justify a prolonged or very large-scale military presence.”

Is military intervention to protect non-citizens who are ethnic kin lawful?

Consider also the consequences if international law permitted armed intervention to protect, not the intervener’s nationals, but its ethnic kindred, if the latter were at risk of persecution or violence. On that understanding, it is hard to see why Hitler’s interventions to protect the ethnic German inhabitants of the Sudetenland in Czechoslovakia or of Poland were wrongful, especially since at least some of their claims that they had suffered official discrimination were plausible. In the contemporary

150. See Rights of Minorities in Upper Silesia (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26), at ¶ 128 (“The Court considers that a generally hostile attitude on the part of the authorities in regard to minority schools, an attitude manifested by more or less arbitrary action, is not compatible with the principle laid down in Article 68. The Court, moreover, has found nothing in the documents and statements submitted in the course of the proceedings which would show that Poland questions, as not well founded, Germany’s contention that any measure singling out the minority schools to their detriment is incompatible with the equal treatment guaranteed by Article 68. On the other hand, the Court does not intend to express an opinion on the question whether the attitude of the authorities has, in fact, been discriminatory, for it has not been asked for a decision in regard to any concrete measure alleged to be of this character.”)
world, many large ethnic diasporas exist, and several of them have suffered persecution or violence in the countries of which they are now nationals – Russians in Estonia\textsuperscript{151}, Chinese in Indonesia (late 1990s)\textsuperscript{152} and, recently, Vietnam (2014)\textsuperscript{153}; and (before their expulsion in 1972) Indians in Uganda.\textsuperscript{154} Are we to agree that Russia therefore has a legal right to invade Estonia and China to invade Vietnam, or that India might have lawfully invaded Idi Amin’s Uganda? The precedent that the Russian invasion of Crimea has set is highly destabilizing, and might readily be emulated by other major powers, not least China.\textsuperscript{155}

Moreover, as UK Foreign Minister Hague pointed out, Russia did not avail itself of the peaceful methods for the protection of minority populations that were available to it under various international agreements. Russia’s failure to invoke those procedures undercuts Putin’s argument that armed intervention was needed to avert the danger to Russian nationals.

\textit{Was there an imminent risk to Russians in Crimea?}

Putin also seems to have greatly exaggerated both the gravity and the imminence of any danger to Russian nationals, ethnic Russians, or Russian speakers in Crimea. By and large, relations between Ukrainians and Russians, both in Crimea and elsewhere in Ukraine, have been characterized by good will and mutual toleration since at least 1991.\textsuperscript{156} While a significant number, albeit still a minority, of the ethnic Russians in Ukraine might indeed prefer to live under Russian rather than Ukrainian rule,\textsuperscript{157} many or most of these separatists seem to be influenced primarily by

\begin{itemize}
  \item \textsuperscript{152} \textit{Jemma Purdey, Anti-Chinese Violence in Indonesia, 1996–1999} (2006).
  \item \textsuperscript{154} \textit{See Vishnu D. Sharma and F. Wooldridge, Some Legal Questions Arising from the Expulsion of the Ugandan Asians, 23 INT’L & COMP. L.Q 397} (1974).
  \item \textsuperscript{155} “Potential targets for such an initiative would include Malaysia and Indonesia, where there are sizeable Chinese minority communities and a history of discrimination . . . . One reason China advanced for its 1979 invasion of Vietnam was the ill-treatment of the ethnic Chinese minority.” \textit{Timothy Beardson, Stumbling Giant: The Threats to China’s Future} 265 (2013).
  \item \textsuperscript{156} Thus, according to a 2007 survey, only 0.5% of the respondents describe themselves as belonging to a group that faces discrimination by language. \textit{See Evhen Golovakha, Andriy Gorbachyk, Natalia Panina, “Ukraine and Europe: Outcomes of International Comparative Sociological Survey”}, Kiev, Institute of Sociology of NAS of Ukraine, 2007, ISBN 978-966-02-4352-1, pp. 133–135 in Section: “9. Social discrimination and migration” (pdf) – [Note: I am not sure a citation is needed. This one comes from the wiki article Russians in Ukraine. I have not been able to verify the survey cited. RJD]
  \item \textsuperscript{157} According to a survey by the Pew Institute, “A broad majority of Ukrainians say their country should remain a unified state (77%). Fewer than two-in-ten (14%) believe that regions that want to leave should be allowed to secede. Support for maintaining Ukraine’s borders is
economic considerations. Russian citizenship provides pensions and other governmental benefits that Ukraine currently cannot afford. Nostalgia for life under the Soviet Union seems to be another important factor influencing ethnic Russian separatists. But neither of these influences equates to fear of oppression by the Ukrainian government or Ukrainian nationalists.

For Russia to be in a position to justify its intervention as a permissible exercise of the right of self-defense, however, it would have to show that nothing short of force could have afforded its “endangered” nationals protection. The use of force, in other words, would had to have been a last resort. So, e.g., the Chatham House Principles on the Use of Force in Self-Defence declares that “[f]orce may be used in self-defence only when this is necessary to bring an attack to an end, or to avert an imminent attack. There must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack.” But when Russia intervened militarily in Crimea, it deliberately choose not to use the diplomatic methods that seemed available to it, and likely to be effective, in resolving its dispute with Ukraine.

Was the Russian intervention a permissible means of assisting the Crimean people to achieve self-determination?

Also woven into Mr. Putin’s argument is the claim that Russia was acting lawfully in order to promote the Crimean people’s right of self-determination. He said:

First, we had to help create conditions so that the residents of Crimea for the first time in history were able to peacefully express their free will regarding their own future. However, what do we hear from our colleagues in Western Europe and North America? They say we are violating norms of international law. Firstly, it’s a good thing that they at least remember that there exists such a thing as international law – better late than never.

Secondly, and most importantly – what exactly are we violating?

especially widespread in the country’s west (93%). A majority of east Ukraine also wants to be one country (70%), including nearly six-in-ten Russian-only speakers (58%). Still, a significant minority of Russian-only speakers in the east support allowing regions to secede (27%).” Pew Research Center, Ukraine: Desire for Unity Amid Worries about Political Leadership, Ethnic Conflict (May 8, 2014), http://www.pewglobal.org/2014/05/08/chapter-1-ukraine-desire-for-unity-amid-worries-about-political-leadership-ethnic-conflict/.

True, the President of the Russian Federation received permission from the Upper House of Parliament to use the Armed Forces in Ukraine. However, strictly speaking, nobody has acted on this permission yet. Russia’s Armed Forces never entered Crimea; they were there already in line with an international agreement. True, we did enhance our forces there; however – this is something I would like everyone to hear and know – we did not exceed the personnel limit of our Armed Forces in Crimea, which is set at 25,000, because there was no need to do so.

Next. As it declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination. Incidentally, I would like to remind you that when Ukraine seceded from the USSR it did exactly the same thing, almost word for word. Ukraine used this right, yet the residents of Crimea are denied it. Why is that?159

We have seen earlier that the General Assembly definition of “aggression” arguably includes a carve-out for those armed interventions intended to liberate an oppressed people from colonialist or racist régimes. But the apparent carve-out is much more limited, however, because it requires that any such intervention accord with the United Nations Charter, which in turn means that it must be authorized under Chapter VII by the Security Council. Thus, Russia cannot find legal coverage for its intervention under that article of Resolution 3314.

Moreover, the I.C.J. rulings we have examined establish that it is a Charter violation (of Article 2(4)) for a State to intervene militarily against a State on behalf of insurgent or rebel groups. These rulings appear to extend even to cases in which the insurgents or rebels are seeking national independence from a colonial power. Hence, even if Ukraine were—implausibly—regarded as a “colonial power” in relation to the Crimeans, that would not create a legal right for Russia to intervene on their behalf.

Was Kosovo a “Precedent”?159

Finally, Mr. Putin referred several times to what he called “the Kosovo precedent” – meaning by that, the events beginning with the NATO air war against Serbia in 1999 (which was not authorized by the Security Council), the subsequent occupation of Kosovo by NATO forces after the Serbian surrender (which was authorized by Security Council Resolution 1244 of

159. Putin, supra note 71.
1999), and the secession and declaration of independence of Kosovo from Serbia in 2008, which was strongly supported by NATO and the EU, and resisted, unsuccessfully, by Russia and Serbia.\textsuperscript{160} Thus, Putin spoke of:

[T]he well-known Kosovo precedent – a precedent our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country’s central authorities. Pursuant to Article 2, Chapter 1 of the United Nations Charter, the UN International Court agreed with this approach and made the following comment in its ruling of July 22, 2010, and I quote: “No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence,” and “General international law contains no prohibition on declarations of independence.” Crystal clear, as they say.

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

We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties. Is this a legal argument? The ruling of the International Court says nothing about this. This is not even double standards; this is amazing, primitive, blunt cynicism. One should not try so crudely to make everything

suit their interests, calling the same thing white today and black tomorrow. According to this logic, we have to make sure every conflict leads to human losses.\textsuperscript{161}

To begin with, let us note that Serbia brought suit in 1999 in the I.C.J. against the NATO States that were involved in the Kosovo campaign to challenge the legality of NATO's use of force against it.\textsuperscript{162} The I.C.J. declined to reach the merits of Serbia's lawsuit on jurisdictional grounds (by finding, essentially, that Serbia was not a member of the United Nations at the time of filing suit, and thus not qualified under the I.C.J. Statute to bring it).\textsuperscript{163} Consequently, we do not have a formal holding from the I.C.J. that the NATO intervention violated international use of force rules.\textsuperscript{164} (Likewise, in Bancovic \textit{v.} Belgium (2001), the Grand Chamber European Court of Human Rights refused, on jurisdictional grounds, to entertain a private lawsuit against some of the European NATO members involved in the Kosovo campaign.)\textsuperscript{165} Nonetheless, I believe that Mr. Putin is correct in thinking that the NATO intervention violated current international law, including the Charter.

But that stipulation does nothing to help Putin's legal argument. Certainly, "Kosovo" is not a "precedent" for the \textit{legality} of any later intervention: by Mr. Putin's own lights, the Kosovo intervention was illegal. Nor does "Kosovo" establish, by State practice, a new norm of "humanitarian intervention" in customary international law: most NATO members, including the United States, have not made any such claim. (As Putin says, they regard "Kosovo" as "unique" – which is to say, they do not regard it as precedent-setting.)\textsuperscript{166} Nor has Russia ever argued that "Kosovo" created a new customary norm in international law: to repeat, Putin considers the Western intervention in Kosovo to have been illegal.

Furthermore, even if "Kosovo" \textit{were} a legal "precedent," it would be a readily distinguishable one. NATO's intervention took place against a background of extremely violent human rights violations by the Serbian government against the ethnic Albanian population of Kosovo (a Serbian province), including mass displacements of those Albanians from their homes and work places.\textsuperscript{167} By contrast, there was no remotely comparable

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161. \textit{Address by President of the Russian Federation} (March 2014).
163. \textit{Id.}
166. Putin, \textit{supra} note 71.
167. See Delahunty & Perez, \textit{supra} note 70, at 31-2, 91-2.
}
pattern of human rights abuses by Ukraine against Crimea's ethnic Russians. While the purpose of NATO's intervention falls far short of showing its legality, it would certainly be reasonable to consider NATO's legal violations in Kosovo much less gross than Russia's in Crimea.

Putin's invocation of the I.C.J.'s opinion in the Kosovo Declaration of Independence Case is also off point. In that opinion, the I.C.J. severely restricted the scope of its answer to the question the General Assembly had put to it: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The Court left unresolved the more fascinating issues posed by the case and argued in the briefs, including the questions of the scope of the principle of the self-determination of peoples and the legality of remedial secession. Nor did the Court take the opportunity to affirm that the question of Kosovo's declaration of independence was somehow sui generis, not governed by general international law and therefore to be decided pragmatically. Instead the Court merely affirmed that general international law allows for declarations of independence (as it manifestly does). That limited holding has no bearing whatsoever on the legality of Russia's intervention in Crimea, a little bearing on the legality of Crimea's purported secession.

In essence, Putin's use of the "Kosovo precedent" amounts to what is called a Tu quoque argument: that a State is justified or excused in doing an otherwise illegal or criminal act if its adversary has done the same kind of act. Put simply: the pot has the right to call the kettle black. But the illegality of NATO's intervention in Kosovo does nothing to show the legality of Russia's actions in Crimea. If anything, the illegality of NATO's conduct confirms the illegality of Russia's.

International courts have been very clear that the illegality of one State's action does not justify or excuse illegal action by another. For instance, in the Tehran Embassy Case, the I.C.J., after noting the possible illegality of the failed U.S. rescue attempt, went on to say that that question had "no bearing on the evaluation" of the Iranian government's conduct that was the subject of the suit. And in its 2000 decision in the Kupreskic Case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia wrote:

[A]lthough tu quoque was raised as a defence in war crimes trials

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169. Id. at 407.
170. See Arp, supra.
171. I set apart the special question of "reprisals." For a succinct analysis, see Frits Kalshoven, Reprisal, Crimes of War, http://www.crimesofwar.org/a-z-guide/reprisal/.
172. Tehran Embassy Case, supra note 84, at ¶ 94.
following the Second World War, it was universally rejected. The US Military Tribunal in the High Command trial, for instance, categorically stated that under general principles of law, an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused. Indeed, there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defence.  

Even Putin is right in claiming that the Western States have been hypocritical—and they have—Russia is no less hypocritical. If Russia truly believed in the right of peoples to declare their independence, secede from a larger union, and form their own State, then why has Russia particularly under Putin—obstinately resisted Chechnya’s demand for independence from the Russian Federation? In 2007, Mr. Putin charged Chechnyan President Ramzan Kadyrov with the task of ending the insurgency in that region. Thereafter, according to a report in 2009 in The New York Times,

Mr. Kadyrov moved with speed and brutality, killing rebel leaders while also granting amnesty to separatist fighters in exchange for their loyalty. Human rights groups have accused his government of employing kidnapping, torture and extrajudicial executions to meet these ends.

I have devoted considerable attention to Mr. Putin’s address to the Duma, partly because it raises several difficult and fascinating questions of international law, partly because the events it discusses are so fresh in our minds, partly because it comes from such a prominent authority, and partly because it shows how the language of international law locks into the grand strategy—military, diplomatic, economic as well as legal—of a contemporary Great Power. However, considering Putin’s remarks simply as an extended legal argument, I must conclude that it is a failure.

Finally, let me observe that the Russian intervention in Crimea and its annexation of that peninsula provides a clear instance of preventive war. Mr. Putin all but admits this. He said:


175. *Id.*
We have already heard declarations from Kiev about Ukraine soon joining NATO. What would this have meant for Crimea and Sevastopol in the future? It would have meant that NATO’s navy would be right there in this city of Russia’s military glory, and this would create not an illusory but a perfectly real threat to the whole of southern Russia. These are things that could have become reality were it not for the choice the Crimean people made.\textsuperscript{176}

Sevastopol, remember, is the base for Russia’s Black Sea fleet. Fearing Ukraine’s admission into NATO—which would have meant that Sevastopol was on the soil of a NATO member and that the Russian base would have been surrounded by NATO forces—Putin struck preemptively to take Crimea and, with it, Sevastopol. Now preventive wars are still with us; they may indeed be as common as they ever were. But, \textit{de jure}, they are widely considered illegal.

The conclusion seems inescapable: Russia’s course of conduct in the Crimea flagrantly violated international law. Ironically, however, both before and after the Crimean Crisis, Mr. Putin has repeatedly emphasized the importance of international law to his conception of the emerging world order. In a notable address to the Valdai Club on October 25, 2014 he stated:

\begin{quote}
The Cold War ended, but it did not end with the signing of a peace treaty with clear and transparent agreements on respecting existing rules or creating new rules and standards. This created the impression that the so-called ‘victors’ in the Cold War had decided to pressure events and reshape the world to suit their own needs and interests. If the existing system of international relations, international law and the checks and balances in place got in the way of these aims, this system was declared worthless, outdated and in need of immediate demolition. . . .
\end{quote}

We have entered a period of differing interpretations and deliberate silences in world politics. International law has been forced to retreat over and over by the onslaught of legal nihilism. Objectivity and justice have been sacrificed on the altar of political expediency. Arbitrary interpretations and biased assessments have replaced legal norms. At the same time, total control of the global mass media has made it possible when desired to portray white as black

\textsuperscript{176} President Vladimir Putin, Address by President of the Russian Federation (Mar. 18, 2014).
and black as white. . . .

I will add that international relations must be based on international law, which itself should rest on moral principles such as justice, equality and truth. ¹⁷⁷

Surely no commentary on these remarks is necessary.

PART III: WHAT REMEDIES ARE AVAILABLE?

Many people would naturally assume that our mature and many-sided legal régime for regulating and criminalizing interstate acts of aggression must include provisions for remediying aggression when it occurs. It must be designed, they might think, to deter or to punish aggression, not only to prevent it. And you will be right: international law provides a variety of means by which to respond to acts of aggression. But are these means effective? At least in a case like Russia’s invasion, conquest, and annexation of Crimea, they are not. And that conclusion invites a very pessimistic view of the usefulness of international law as a method for securing world peace.

We can identify at least four ways in which the international legal system provides for lawful responses to Russia’s acts of aggression. The first is political and military; the other three are judicial.

Let us consider them in turn.

Political-military remedies

Individual or collective self-defense

Article 51 of the United Nations Charter permits a State that has been the object of an “armed attack” to defend itself. ¹⁷⁸ Not all cross-border incursions of foreign troops rise to the level of an “armed attack,” but in light of what we have seen, one would be fully justified in finding that Russia’s intervention in Crimea—which involved, not merely, troop movements across the Ukrainian border, but also the use or threat of using those troops to attack Ukrainian military forces in Crimea—constituted an “armed attack” that Ukraine would have been entitled to repel in a counterattack. To be sure, any countermeasures taken by Ukraine would have had to be “proportionate” to Russian attack; and Ukraine might have been obliged to desist from its self-defense once the Security Council, in the


language of Article 51, had "taken measures necessary to maintain international peace and security." 179 But of course no self-defensive counterattack happened, for the simple reason that the military forces at Ukraine’s disposal were much weaker than their Russian opponents, less numerous, less well-equipped, and thoroughly demoralized. 180 Ukraine’s legal right to individual self-defense was empty.

Article 51 also permits collective self-defense. 181 Thus, it would have been lawful for an ally, or coalition of allies, of Ukraine to have intervened in her self-defense. NATO or other Western forces, e.g., might have been deployed into Crimea to protect it against the Russian invasion. The U.S.-led intervention in Kuwait in 1991 is a recent precedent for such an operation. But collective self-defense also did not occur.

There were at least two kinds of reasons for the West’s non-intervention: legal and non-legal.

Legally, the West was not bound to defend Crimea. Ukraine is not a party to the NATO Treaty, although its admission into NATO (as Mr. Putin emphasized) was being considered. Furthermore, although both the U.S. and the U.K. had extended security assurances to Ukraine in the 1994 Budapest memorandums, they had not legally committed themselves to the defense of Ukraine whenever it was the victim of aggression or "armed attacks" by another State.

Non-legally, neither the U.S. nor the E.U. had much incentive to defend Crimea. First, the E.U. has substantial ties to Russia in terms of trade, investment, finance, and energy policy. London, one of the world’s leading financial centers, is heavily dependent on Russian capital. And Germany, among other E.U. nations, depends on Russian energy supplies. Second, both the U.S. and the E.U. have still not recovered from the financial crisis of 2008. Given their still fragile economies, neither the U.S. nor the EU wanted to undertake the costs of war with Russia. Even more, the costs of defending the whole of Ukraine from Russia, eliminating any pro-Russian insurgencies there, and administering Ukraine for an indefinite period (as NATO and the E.U. had done for Kosovo) would have been staggering.

179. Id.
180. "[N]otwithstanding President Obama’s references to Russia’s weakness, Russia has an impressive superiority in conventional forces vis-à-vis Ukraine and in Central Europe and a roughly ten-to-one superiority in tactical nuclear weapons, of which it has an estimated two thousand, compared to about two hundred deployed in Europe for the United States. Russian military planners consider tactical nuclear weapons an important component in the overall balance of forces and are preparing integrated war plans that include nuclear options. Even more dangerous, Russian generals might assume that NATO would recognize this imbalance and would therefore not dare to escalate.” Dmitri K. Simes, How Obama is Driving Russia and China Together, THE NATIONAL INTEREST (July-August, 2014), http://nationalinterest.org/feature/how-obama-driving-russia-china-together-10735.
181. Supra note 120.
Third, the U.S. appears to consider Ukraine to be of marginal strategic importance—as lying within Russia’s “sphere of influence.” The U.S. made a similar calculation when Russia invaded Georgia in 2008. On the other hand, for Russia, Ukraine is “the single most strategically, economically, historically and emotionally significant area on [its] borders.” Further, the U.S. is seeking Russia’s cooperation on a variety of fronts, including Syria and Iran. Rather than risk sacrificing Russian goodwill, the U.S. apparently decided to write off the annexation of Crimea. Fourth, the U.S. and the U.K. are still war-weary after the Second Gulf War. The idealism that (arguably) motivated the intervention in Iraq has given way, as often happens after a war, to disappointment and disillusion. The current U.S. Administration also firmly intends, for domestic political reasons, to avoid major engagement in another war. Thus, the U.S. military intervention in Libya was limited; the U.S. eventually decided not to send forces into Syria; and even in the critical emergency in Iraq, the U.S. military response has been muted. Finally, of course, a military confrontation with Russia could have escalated into a nuclear war. Russia is not Iraq, and deploying Western troops to prevent the seizure of Crimea would have been far more dangerous than deploying them to protect Kuwait. The stakes for Mr. Putin were extraordinarily high, both domestically and internationally, and it is by no means inconceivable that a Western intervention on Ukraine’s behalf would have led to their use.

To be sure, other European States have powerful interests in deterring Russia from extending its borders: Poland, the three Baltic States, Romania, Moldova. But even if these States were willing to co-operate militarily with Ukraine, they would hardly have been a match for Russia.

Realistically, therefore, neither individual nor collective self-defense was available as an effective remedy for Russia’s illegal acts.

United Nations Action.

In Chapter VII, the Charter also authorizes the Security Council to take a variety of counter-measures, of progressively greater degrees of violence, against international aggression. But those powers cannot be exercised over the veto of a permanent (P5) member of the Council, one of which of

184. Simes, supra note 103.
The Crimean Crisis

course is Russia. Russia exercised its veto to block even the mild condemnation in the draft resolution on Crimea tabled by the US. It would obviously oppose anything stronger. Faced with aggression by a P5 member, the Council is powerless.

The General Assembly did pass a resolution on Crimea. But the Assembly has no legal power neither to deploy military forces or to authorize their deployment. It is also powerless in the face of international aggression.

Judicial remedies

Criminal prosecution

Could a criminal prosecution of President Putin on a charge of aggression be a remedy? There are at least two possible forms one might envisage: a prosecution under the Rome Statute and a prosecution in a national court in a State that asserted universal jurisdiction over the international crime of aggression. But, again, both the legal and non-legal obstacles are, realistically, insuperable.

Practical obstacles

First, as a purely practical matter, Russia is obviously far too powerful to allow either the International Criminal Court (ICC) or any national prosecutor to arrest its sitting Head of State and subject him to standing trial on a criminal charge. Indeed, the very attempt to arrest Putin would be an international incident that would unquestionably provoke a massive Russian response. Attacks on heads of state (or on other state officials of high rank) can easily lead to war: the assassination of the heir to the Austro-Hungarian throne by a Serbian terrorist led, a century ago, to the outbreak of the First World War. Even efforts to subject the high-ranking officials of powerful foreign States to the risk of legal liability have been crushed by those States: U.S. Secretary of Defense Donald Rumsfeld warned Belgium in 2003 that the U.S. would force NATO to remove its headquarters from Brussels unless Belgium repealed a law exposing high-ranking foreign officials to prosecution for war crimes committed anywhere, and Belgium repealed its law. 187

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187. See Amnesty International, Belgium: Universal Jurisdiction Law Repealed (Aug., 2003), http://www.hrw.org/news/2003/08/01.belgium-universal-jurisdiction-law-repealed. As if to demonstrate that such laws will be enforced against weaker nations, however, the terms of the repeal allowed on-going Belgian investigations concerning Rwanda, Guatemala and Chad to continue.
Legal objections

Legally, moreover, the objections to prosecuting Mr. Putin on a charge of criminal aggression, whether before the I.C.C. or a national court, are also very compelling.

Prosecution under the Rome Statute

A prosecution before the I.C.C. on a charge of aggression under the Rome Statute simply could not occur. To begin with, Russia has not ratified the Rome Statute, although it has signed it. As a mere signatory, Russia has an international legal obligation not to defeat the object and purpose of that treaty. But Russia’s leadership is not legally subject to the ICC’s jurisdiction.

Furthermore, the 2010 Kampala amendments adding the crime of aggression to the ICC’s jurisdiction are not yet in effect. By their own terms, these amendments only come into effect one year after they have been ratified by thirty State parties; and only fourteen States (not including Russia) have ratified the amendments thus far. 188

It is true that in 2009 and 2010, the Pre-Trial Chamber of the I.C.C. issued arrest warrants for President Bashir of Sudan, despite the fact that Sudan was not a party to the Rome Statute. In that case, however, the I.C.C. concluded that a prosecution could go forward because the Security Council in Resolution 1593 189 had expressly referred the situation in Darfur (Sudan) to the I.C.C. prosecutor. 190 Such a referral is of course inconceivable in


189. Under operative ¶ 2 of that Resolution, the Council “[d]ecides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.”

Putin’s case.

**Prosecution in a foreign domestic court**

Alternatively, one might raise the question whether Putin could be prosecuted and tried in a particular national jurisdiction (say, Spain).¹⁹¹ Recent years have seen a number of attempts to prosecute ranking foreign State officials for international crimes in national courts. But, as documented in an excellent “Briefing Paper” by Chatham House, these attempts “have generally ended in failure.”¹⁹² Let us consider why.

Although not involving the prosecution of a foreign official, the House of Lords’ Jones decision illustrates some of the legal pitfalls.¹⁹³ Jones determined that the criminality of aggression has become established as a matter of customary international law. But under Jones, no prosecution could go forward in the U.K. under that charge, because that rule of customary law had not been codified as domestic criminal law in that country. Only if a State incorporates customary international law into its national criminal law either automatically (which the U.K. does not) or by virtue of an implementing act of its national legislature (which the U.K. Parliament had not done) would a prosecution based on customary law be legally possible. National legal systems that were similar in these respects to the U.K.’s could therefore not provide a forum for prosecuting Putin.

There could also be significant *jurisdictional* problems in the prosecution of Mr. Putin in a domestic foreign court. This is so despite the (purported) emergence of “universal jurisdiction” over certain categories of offenses. Universal jurisdiction, both criminal and civil, has indeed become more common in the current legal environment, especially with regard to certain international crimes, *viz.*, genocide, crimes against humanity and war crimes.¹⁹⁴ But many national systems do not incorporate universal

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¹⁹¹. See note 205, infra.
¹⁹³. Cite back to Jones, fn. 59.
¹⁹⁴. See, *e.g.*, Robert Cryer, *Prosecuting International Crimes: Selectivity and the*
jurisdiction or allow for the prosecution of foreign nationals for crimes against other foreign nationals committed abroad, unless such prosecutions are specifically authorized by local statutory law. In these systems, there must be a traditional jurisdictional nexus between the crime and the forum State: for example, either the defendant must be a national of the forum State, or a victim of the crime must have been a forum national; or the crime must have had some link to the forum’s territory, or the effects of the crime must have been felt there. An attempted prosecution of Putin under the customary international law of aggression would be unfeasible in many jurisdictions for these reasons.

Sitting Head of State immunity

There is yet another, still more formidable legal obstacle to prosecuting Mr. Putin in a foreign national court: the international legal rule of “Head of State immunity.” Under this rule, foreign Heads of State (and other foreign government officials of high rank, such as Prime Ministers and Foreign Ministers) enjoy a broad personal immunity during their tenure of office from the jurisdiction of foreign domestic courts, including immunity from being prosecuted for international customary law crimes. “National courts and prosecutors have consistently rejected cases against sitting heads of state.”

The doctrine of (sitting) Head of State immunity is firmly entrenched in customary international law. The I.C.J. affirmed its continuing vitality in the (2002) Arrest Warrant Case, saying, in relation to an incumbent Foreign Minister:

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International Criminal Law Regime 84-95 (2003); Donald Francis Donovan & Anthea Roberts, The Emerging Recognition of Universal Civil Jurisdiction, 100 Am. J. Int’l L. 142 (2006). For legal justification of this practice in criminal cases, see, e.g., Georg Schwarzenberger, The Eichmann Judgment: An Essay in Censorial Jurisprudence, 15 Current Legal Probs. 248, 256 (1962) (“It would . . . be hard to point to evidence of a rule of international law prohibiting the assumption of [national] criminal jurisdiction against an accused actually present in the territory of a sovereign State for crimes he is accused of having committed against foreign nationals abroad. . . . In particular, this applies if other States with as close a link, or an even closer link, with the crimes committed, are not able or willing to shoulder the task.”).

195. The last of these jurisdictional linkages, known as the principle of objective territoriality, was traditionally the most problematic. Even then, however, there was judicial support for it. Thus, the PCIJ’s decision in The Case of S.S. Lotus (France v. Turkey), (1927) P.C.I.J. Ser. A, No 10, available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm, stated that “offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. For a thorough review of the English historical precedents (which embraced, albeit hesitatingly and only in some cases, objective territoriality jurisdiction), see Libman v. The Queen, [1985] 2 S.C.R. 178 at ¶¶ 13-27.

Throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability... In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private capacity,” or, for that matter, between acts performed before the person concerned assumed office... and acts committed during the period of office.197

Likewise, the French Cour de Cassation ruled in the 2001 Ghaddafi Case, that Colonel Mouammar Ghaddafi, then the serving Head of State of Libya, enjoyed immunity against criminal prosecution for his alleged complicity in acts of terrorism that included the murder of French nationals and the destruction of a civilian passenger aircraft.198

Recently, on January 14, 2014, a Chamber of the European Court of Human Rights (ECHR) affirmed the general rule of Head of State immunity and applied the rule to a case brought in the U.K. in which private plaintiffs in a civil action sought relief from alleged acts of torture committed by officials of Saudi Arabia acting on behalf of the Saudi government.199 The ECHR Chamber said (at ¶ 204) that “[t]he weight of authority at international and national level... appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself.”200 Moreover, the ECHR Chamber ruled (at ¶ 213, 215) that this immunity was not abrogated because the defendants in the case were alleged to have committed acts of torture, which concededly is an egregious offense under international law:

[W]hile there is in the Court’s view some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the bulk of the authority is... to the effect that the

200. Id. at ¶ 204.
State’s right to immunity may not be circumvented by suing its servants or agents instead. Taking the applicants’ arguments at their strongest, there is evidence of recent debate surrounding the understanding of the definition of torture in the Convention against Torture; the interaction between State immunity and the rules on attribution in the Draft Articles on State Responsibility; and the scope of Article 14 of the Convention against Torture. . . . However, State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity ratione materiae in such cases. . . . International opinion on the question may be said to be beginning to evolve, as demonstrated recently by the discussions around the work of the International Law Commission in the criminal sphere. This work is ongoing and further developments can be expected. . . . In these circumstances, the Court is satisfied that the grant of immunity to the State officials in the present case reflected generally recognised rules of public international law. 201

The ECHR Chamber’s decision may be appealed to the Grand Chamber, and the opinion itself makes clear that international opinion on the question of immunity for acts such as torture is “beginning to evolve.” 202 Moreover, the holding applies to a civil action, not a criminal case. Nonetheless, it reinforces the conclusion that a sitting Head of State like Putin could not be prosecuted criminally (nor sued civilly) in a foreign domestic court.

Former Head of State immunity.

There is precedent permitting the criminal prosecution of a former Head of State for grave international crimes, most importantly the U.K. House of Lords Pinochet decision. 203 But in general, national courts and prosecutors have extended “functional” immunity to former heads of State (and other high ranking officials). 204 (“Functional” immunity is immunity for public

after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

201. Id. at ¶¶ 213, 215.
202. Id.
204. This is suggested by language in paragraph 61 of the I.C.J.’s Arrest Warrant Case, supra.
acts performed while in office.) For example, a group of international human rights organizations filed a complaint in 2007 in France against former U.S. Secretary of Defense Donald Rumsfeld for acts of torture (an international crime). The Paris Prosecutor declined to prosecute the case, saying:

The services of the [French] Ministry of Foreign Affairs indicated that in application of the rules of customary international law established by the International Court of Justice, immunity from criminal jurisdiction for Heads of State and Government and Ministers of Foreign Affairs continues to apply after termination of their functions, for acts carried out during their time of office and hence, as former Secretary of Defense, Mr. Rumsfeld, by extension should benefit from this same immunity for acts carried out in the exercise of his functions.205

We should note, however, that a few national systems do permit prosecutions to be brought against former governmental leaders for certain violations of international law. “There have been relatively few cases, but Spain has continued to lead the way with the issue of arrest warrants in respect of several former heads of state, including two former presidents of Guatemala, Rios Montt and Oscar Mejia Victores, for genocide, torture and other related crimes.”206

See also Wuerth, supra note 113 at 741.I.C.J.


At most, therefore, Mr. Putin might be subject to criminal prosecution for acts of aggression in an (outlier) jurisdiction like Spain, but only after he leaves office—and perhaps not even then.

**Litigation in the I.C.J.**

Over the decades, organs of the United Nations, joined by jurists and legal scholars, have expressed the hope that the I.C.J. would serve as a powerful instrument for achieving peace through law. And these lectures have often referred to I.C.J. decisions clarifying international use of force rules, including the decisions in *Congo*, *Oil Platforms*, *Nicaragua v. U.S.*, and *Corfu Channel*. Could Ukraine bring suit against Russia in the I.C.J. and, if so, what relief might a favorable judgment afford?

**Contentious Cases**

It is very doubtful that Ukraine could bring a suit against Russia in the I.C.J. or obtain meaningful relief from it.

I.C.J. decisions are of two kinds: *contentious cases* and *advisory opinions*. Were Ukraine to seek to bring suit directly against Russia, that litigation would fall in the category of contentious cases.

Only States may institute contentious cases before the I.C.J., and only States may be sued. It is a bedrock principle of the I.C.J.'s jurisprudence that a State can be sued only with its consent. This principle is an aspect or consequence of the idea of State sovereignty.

In general, a State’s consent to be sued can be given through a “special agreement” or “compromis.” Alternatively and more often, the Court can decide disputes between States with binding force (i.e., its “compulsory jurisdiction” arises) on the basis of treaties in which jurisdiction over disputes between the parties is conferred on the Court (I.C.J. Statute Art. 36(1)) or on the basis of the “optional clause” which provides that States “may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court. . . .” The Court enforces these jurisdictional prerequisites stringently, often dividing contentious cases into


208. *Supra* note 39.


211. *Supra* note 96.


213. *Id.* at 36(2).
a jurisdictional phase and, when appropriate, a merits phase.

Together with all the other P5 powers (except the U.K.), Russia has rejected the compulsory jurisdiction of the I.C.J. 214 So have most other U.N. Member States. “States are generally reluctant to settle international conflicts by means of the I.C.J. This is especially the case with politically important issues.”215 Thus, where one State seeks a merits decision in the I.C.J. in a dispute with another State over the latter’s use of force, the suing State will be all but forced to argue that the Court has jurisdiction based on a “compromissory clause” in a bilateral or multilateral treaty to which both it and the intended defendant are State parties.216

Compromissory clauses are found in many treaties, and typically confer jurisdiction to resolve a dispute over the interpretation or application of the treaty upon the I.C.J. Sometimes, however, the compromissory clause will provide for a referral of the dispute on the I.C.J. only after other efforts to settle the dispute have failed. For instance, Article 32(2) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides for mediation and other dispute-resolution options, but also states that “[a]ny such dispute which cannot be settled . . . shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision.”217 As we shall soon see, the contingency of a referral to the I.C.J. may be decisive in preventing the Court from taking jurisdiction.

Unfortunately for plaintiff States seeking judicial relief for another State’s acts of aggression, there may well be no compromissory clause in a treaty relating to armed conflict to which it and the intended defendant State are both parties. In practice, therefore, States seek to bring suit on the basis of “compromissory” clauses in treaties that are primarily dedicated to other matters of concern to both the plaintiff and defendant State, and in which the use of force is only a peripheral concern. In other words, plaintiff States seek to find a jurisdictional “hook” in a treaty unrelated to the use of force that will enable them to bring the intended defendant before the Court, in the hopes that the Court will then address the merits of the use of force questions that are the true substance of the dispute.

The I.C.J. will sometimes fall in line with this strategy, finding that

214. Id. at 817 n.12, 850 n.240.
216. I.C.J. jurisdiction could also arise under Article 36(1) through a “special agreement” under which the State disputants expressly agreed to the Court’s resolution of their dispute. “Relatively few cases are ever instituted through Special Agreement.” Llamzon, supra note 121, at 818. Russia would obviously be most unlikely to give such express consent here.I.C.J.
jurisdiction exists under Art. 36(1) of its Statute and the relevant compromissory clause, and then going on to decide the merits of the disputes over the use of force despite the fact that they are peripheral to the jurisdiction-conferring treaty. For example, in the 1996 Oil Platform case, Iran successfully invoked a compulsory jurisdiction clause in its 1955 Treaty of Friendship, Commerce and Navigation with the United States to get its dispute over the U.S.' use of force before the Court, even though the U.S. argued that that treaty was unrelated to Iran's use of force claims against its use of force.

Could Ukraine sue Russia on the basis of a treaty to which both were parties and which included a compulsory jurisdiction clause and so have its claims against Russia decided on the merits, even if the subject matter of the treaty with Russia was largely unrelated to the use of force? Georgia tried such a strategy in its attempt to have the I.C.J. adjudicate its use of force claims against Russia for Russia's invasion of Georgia in 2008. The I.C.J. rejected Georgia's jurisdictional argument, and it seems to me unlikely that Ukraine would fare any better.

Georgia filed suit against Russia on the basis of Russia's alleged violations of the rights of ethnic Georgians under Articles 2 and 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which both Russia and Georgia had ratified. Plainly, these clauses of the CERD were not primarily directed to State parties' conduct of wartime operations. However, Article 22 of the CERD was a jurisdictional provision that referred any "dispute" between the parties over the interpretation or application of the CERD to the I.C.J. if that dispute "is not settled by negotiation or by the procedures expressly provided in" the CERD. Georgia alleged that its disagreements with Russia over the legality of Russia's conduct in the invasion included a "dispute" over CERD's "interpretation or application" that had not been "settled by negotiation" and could thus be referred to the Court even over Russia's protest. The I.C.J. rejected this argument, finding that Georgia had not attempted to settle the dispute by prior "negotiation." The Court's reasoning was highly formalistic.

In essence, however, the I.C.J. seemed to be saying that it would not let itself be manipulated into deciding the merits of major legal disputes over the use of force on the basis of

221. See Okawa, supra.
compulsory jurisdiction clauses in treaties to which such disputes are peripheral.

Viewing Oil Platforms and Georgia together, we must feel some uncertainty. It is simply unclear whether there is a treaty between Russia and Ukraine that 1) includes a compulsory jurisdiction clause that permits a referral to the I.C.J. of 2) a dispute between the two States over use of force issues 3) but without a prerequisite to that referral that the Court would conclude had not been satisfied.

Finally, even if Ukraine somehow managed to persuade the I.C.J. to assume jurisdiction in a suit against Russia and to find Russia in violation of the *jus ad bellum*, what substantive relief could the Court provide? Russia could simply refuse to comply with any I.C.J. Order that provided Ukraine with substantive relief. The U.N. Charter addresses the possibility of non-compliance with an I.C.J. 222 That Article provides that

[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.223

Obviously, reliance on the Security Council to bring a P5 Member like Russia into compliance would be futile. Indeed, even without a Russian veto, the Security Council, in its discretion, might simply decide not to act on Ukraine’s request for enforcement.

**I.C.J. Advisory Opinions**

Alternatively, Ukraine might seek to have the I.C.J. declare Russia’s conduct to have been illegal by means of an “advisory opinion” from the Court. The I.C.J. has addressed important war-related issues in opinions of this kind as well as in contentious cases: two notable instances are its opinions in the *Wall Case*224 (on the legality of the barrier Israel constructed in part of the territories under its belligerent occupation) and in the *Nuclear Weapons Case* (on the legality of the use or threat of use of nuclear weapons).

But here too Ukraine would encounter substantial legal difficulties in obtaining substantive relief. First, Ukraine cannot obtain an I.C.J. advisory opinion on its own. The I.C.J. will render advisory opinions only at the

222. I.C.J. Acts & Docs. 94(2).
223. Id.
request of organs of the United Nations (and not all of those). Most likely, Ukraine would have to persuade a majority of the General Assembly to seek such an opinion from the Court. (Both the Wall Case and the Nuclear Weapons Case were advisory opinions rendered at the General Assembly’s request.) And persuading the General Assembly would not necessarily be easy. Second, an advisory opinion is not legally binding; only a decision in a contentious case is. Ukraine’s “relief” would consist, at most, in the I.C.J.’s declaration that Russia’s conduct had been illegal and that Russia was therefore under an obligation to take certain measures, possibly including reparation.\(^{225}\) While an I.C.J. declaration of Russia’s legal liabilities could provide Ukraine with useful leverage in future bargaining with Russia, the declaration is obviously not self-executing. Third, even if the General Assembly requested an advisory opinion, the I.C.J. has the discretion to decline that request (though such a refusal would be unlikely).\(^{226}\)

I conclude, then, that Ukraine would be unlikely to receive meaningful relief from the I.C.J. either in a contentious case or even through an advisory opinion.

**Litigation in the European Court of Human Rights**

In light of a recent precedent decided on May 12, 2014, by the Grand Chamber of the ECHR, the most promising form of judicial relief available to Ukraine may lie in a demand before that forum “just satisfaction” of the damages caused by the Russian intervention.\(^{227}\)

The ECHR Grand Chamber decision in question is *Cyprus v. Turkey*.\(^{228}\) The case arose out of Turkey’s invasion of Cyprus in 1974, and its subsequent de facto annexation of the ethnically Turkish, northern part of that island.\(^{229}\) In a Grand Chamber judgment of May, 2001, the ECHR had found that Turkey had committed numerous violations of the European Convention on Human Rights arising out of the invasion and annexation.\(^{230}\) At that time, however, the Court ruled that consideration of the issue of just

\(^{225}\) Id. at ¶¶ 149-52.

\(^{226}\) Id. at ¶ 44. See Nuclear Weapons Case, supra note 35 at ¶ 14.


\(^{229}\) Id.

\(^{230}\) Id.
satisfaction was untimely. In 2007, Cyprus notified the Court that it intended to resubmit the question of just satisfaction and, in 2010, it did so, asking for just satisfaction for the missing persons as to whom the Court had previously found Turkish violations. (These included violations of the rights to life, liberty and security and of the prohibition on torture or degrading treatment.) Cyprus sought compensation for these injuries, not on behalf of the State itself, but for the benefit of the individual victims or their relatives. In May of this year, the Grand Chamber held that the passage of time since the principal judgment of 2001 did not preclude it from considering Cyprus’ claim. It ruled that Turkey was to pay a total of 90 million to Cyprus in just satisfaction.

Some legal scholars see Cyprus v. Turkey as a precedent for a similar lawsuit by Ukraine against Russia before the ECHR for violations of the European Convention on Human Rights. They may well be right, since the factual pattern of the Russian invasion of 2014 corresponds in some respects to that of the Turkish invasion of 2014. To my knowledge, however, Russia, unlike Turkey, caused no mass displacements of the local population, nor have large numbers of the inhabitants gone missing, nor did Russia seize private property.

Note the severe limitations in this approach, however. First, the relief ordered was only monetary. The Court did not order an end to Turkey’s presence in northern Cyprus (30,000 Turkish troops remain stationed there) nor the restoration of the Turkish-administered territory to Cyprus’ sovereignty. Responsibility for the execution of the Court’s 2001 judgment against Turkey still lies with an executive body, the EU Committee of Ministers, under Article 46 of the European Convention. Second, although the overall amount awarded was substantial, recovery went to individuals and families, not to the State of Cyprus. (Each

231. Id.
232. Id.
233. Id.
236. However, individual suits based on alleged abductions and other European Convention violations have already been filed with the ECHR. See Court in Strasbourg to consider Russian liability for abduction in Ukraine, Human Rights in Ukraine (March 13, 2014), http://khpg.org/en/index.php?id=1394655465.
237. Cyprus, supra note 160.
238. See Can’t get no just satisfaction? The Cyprus v. Turkey judgment of the European Court of Human Rights, CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (May 23, 2014), http://cjicl.org.uk/2014/05/23/cant-get-just-satisfaction-cyprus-v-turkey-
individual beneficiary will receive about 20,000 euros.) Third, the compensation was long delayed. The invasion and division of Cyprus had occurred forty years ago. The Court had declined to consider just satisfaction in 2001. The award came thirteen years later. Finally, Turkey’s Foreign Minister has indicated that Turkey will not pay the award.\(^{239}\) (It appears that Russia does pay compensation ordered by the ECHR.\(^{240}\)

Bear in mind also that the European Convention on Human Rights is only a regional treaty. It happens that Russia and Ukraine are both parties to it,\(^{241}\) and Ukraine can sue Russia in the ECHR for violating it. Any precedent adverse to Russia could not be applied to non-European States that were not subject to that Convention.

"Atoms (bombs) for peace"?

We seem forced to conclude that the international law of armed conflict does little, perhaps nothing, to help Ukraine, and that it would also do little or nothing to help other small States in similar confrontations with an aggressive Great Power. Only if the Great Power in question is willing to submit to legal processes and to abide by their results will a substantive judicial remedy be assured. Only if another Great Power rallies to its aid will its right of self-defense be meaningful.

What should Ukraine have done? The answer, I think, is plain: it should not have given up its nuclear arsenal under the Budapest memorandums of 1994. (The International Relations scholar John Mearsheimer argued that at the time.\(^{242}\)) Under that agreement, Ukraine relinquished the nuclear capability it had inherited from the former Soviet Union and agreed to join the Nuclear Non-proliferation Treaty. But Ukraine did not receive a promise from the U.S. and the U.K., which had persuaded it to take those steps, that they would defend it in the event of a Russian attack. It took nothing to the bank except Western goodwill.

Thus, Ukraine stripped itself of its most effective means of self-defense against Russian aggression. If Ukraine had retained its nuclear capacity, Russia would probably have been deterred from invading and annexing Crimea twenty years later. Nuclear weapons are the great equalizer between


\(^{241}\) For a list of the parties to the Convention is available at the Council of Europe website, see generally Council of Europe, http://human-rights-convention.org/.

aggressive Great Powers and smaller States. Israel recognized this fact decades ago. So, after the U.S. intervention in Iraq in 2003, did Iran and North Korea. Poland and Finland may realize it next, even though Poland is shielded by the NATO Alliance. And who can say that South Korea or Vietnam or Saudi Arabia will not, in the years ahead?

This scenario may not be as terrifying as it seems. Paradoxically, it might even be benign. The International Relations theorist Kenneth Waltz made the argument in several fascinating papers. He contended that the progressive spread of nuclear weaponry through the world will make it a more, not less, peaceful and stable place. He may be right; I leave that for others to judge.

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