15 Crimean Secession in International Law

William R. Slomanson[*]

15.1 Crimea in Historical Perspective

Kievan Rus (now Ukraine) exercised regional hegemony before the first millennium's Mongol invasions. Eastern Ukraine fell under Russian imperial rule by the late 17th century, much sooner than western Ukraine. Western Ukraine spent centuries under the alternating control of European powers like Poland and the Austro-Hungarian Empire. The western third of Ukraine was part of Poland for several years leading up to World War II.[1]

The Tatars held the Crimean Peninsula from the 13th Century until the Russian takeover in the 18th Century. The City of Sevastopol has been the heart of the Russian Black Sea naval fleet since 1783, thus providing access to the Mediterranean Sea. The Soviet Union created the Crimean Autonomous Soviet Socialist Republic (SSR) in 1921. The Crimean SSR was dissolved in 1945 – when it was incorporated into the Russian SSR. The Soviet Union then ceded Crimea to the Ukrainian SSR in 1954. In 1991, Crimea morphed into the Autonomous Republic of Crimea, but still within Ukraine.

This timeline necessarily incorporates the 1994 Budapest Memorandum on Security Assurances in Ukraine.[2] It was designed to avoid threats against the sovereignty and territorial integrity of Ukraine. A central objective was to place Ukrainian nuclear weapons under the operational control of Russia. The Budapest Memorandum specifically provides that Russia, the United States, and the United Kingdom all support Ukraine becoming a

---

* Professor of Law, Thomas Jefferson School of Law (USA); Visiting Professor, Pristina University (Kosovo). This is a revised version of his June 2015 presentations at the Debrecen University Doctoral School of Legal Studies, and at the Hungarian Academy of Sciences, sponsored by the International Law Association (ILA). Professor Slomanson thanks Debrecen University Professor Sandor Szemesi, Catholic University Professor Tamás Ádány, and the ILA Hungarian Branch President, Professor Wanda Lamm, for their invitations. Slomanson also thanks Dominique Williams (TJSL '16), for her speech transcription and cite checking assistance. He further thanks Professor Gayane Davidyan, Moscow State University Faculty of Law, for her review and comments on an earlier draft. All arguments and conclusions remain attributable solely to the author.

1 Eve Conant, *How History, Geography Help Explain Ukraine's Political Crisis: The country rests precariously between East and West*, National Geographic (Jan. 31, 2014). http://news.nationalgeographic.com/news/2014/01/140129-protests-ukraine-russia-geography-history.

2 *The Presidents of Ukraine, Russia, United States, and the Prime Minister of the United Kingdom signed memorandums with the accession of Ukraine to the* Treaty on the Non-Proliferation of Nuclear Weapons. These understandings *gave limited national security assurances to Belarus, Kazakhstan, and Ukraine. See joint UNGA & UNSC Doc. A/49/765 & C/1994/1399 (1994). <www.un.org/en/ga/search/view_doc.asp?symbol=A/49/765>.*

member of the Nuclear Non-proliferation Treaty. All parties envision immediate UN Security Council action to provide assistance to Ukraine – but only 'if Ukraine should become a victim of an act … or threat of aggression in which nuclear weapons are *used*.'[3]

The Budapest Memorandum is a political document. It is not a formal treaty. Neither the Bush nor Clinton presidential administrations were prepared to give a comprehensive security commitment to Ukraine. They did not believe that the US Senate would ratify a treaty on this subject. Unlike NATO's collective intervention guarantee,[4] the Budapest Memorandum did not yield a broadly-based military protection guarantee for Ukraine.

At this moment, Russia may reasonably argue that the Budapest Memorandum was not triggered by the Ukrainian crisis. There has been no threat, nor any use, of nuclear weapons against Ukraine. On the other hand, if Ukraine acquires the missile defense shield it now seeks, President Putin has threatened to place nuclear weapons in Crimea. The question would then become whether that insertion of nuclear weapons would violate the Budapest Memorandum, because of the implicit threat against Ukraine. Russia would likely respond that it is merely moving its nuclear weapons from one part of Russia to what is now another.[5]

One may now fast forward to November, 2013. The prior Ukrainian government then disavowed Ukraine's association agreement with the European Union. That reversal sparked months of protest by the Ukraine populace. In early 2014, there were continuing protests against the democratically elected president – who shifted his allegiance toward Moscow, instead of the European Union. Viktor Yanukovych was deposed, after which he fled to Russia.[6] He reportedly regretted his presidential request for Russian assistance.[7]

---

3 Id., Ann. I, para. 4 [italics added].

4 As the NATO member State umbrella provides: 'an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them … will assist the Party or Parties so attacked by taking forthwith … such action as it deems necessary, *including the use of armed force*, to restore and maintain the security of the North Atlantic area' [italics added]. North Atlantic Treaty, Art. 5, para. 1 (1949).

5 A claimed violation would have less validity, for any nuclear weapons still in Ukraine and under Russia's operational control. One may presume, however, that all of Ukraine's nuclear weapons were removed from Ukraine to Russia, as a result of the Budapest Memo. See *generally* Blake Fleetwood, *Too Bad Ukraine Didn't Keep Its 2,000 Nuclear Weapons*, Huffington Post Politics Blog. www.huffingtonpost.com/blake-fleetwood/too-bad-ukraine-didnt-kee_b_5235374.html.

6 A Russian view of the coup's factual background is available in Vladislav Tolstykh, *Reunification of Crimea with Russia: A Russian Perspective*, 13 Chinese J.I.L. 879 (2013), at paras. 2-4, *hereinafter Russian Perspective*. The western view is reflected in Andrew Higgins & Andrew E. Kramer, *Archrival Is Freed as Ukraine Leader Flees*, New York Times (Feb. 22, 2014). www.nytimes.com/2014/02/23/world/europe/ukraine.html?_r=0. One can glean a first-hand sense of these events via the filmed documentary entitled *Maidan*. See Atoms & Void, *Maidan* (2014), on Netflix.

7 Marina Koren, *Deposed Ukrainian President: 'I Was Wrong' to Ask Russia for Help – Yanukovych, living in exile in Moscow, believes Crimea's annexation was a mistake,* National Journal (Apr. 2, 2014). www.nationaljournal.com/politics/deposed-ukrainian-president-i-was-wrong-to-ask-russia-for-help-20140402.

At the ensuing February 2014 meeting of the Russian security service chiefs, President Putin reportedly said:

> We were forced to start working on returning Crimea to Russia because we could not abandon this territory and the people who live there to the mercy of fate, to be crushed by [pro-western] nationalists. … [W]e must start working on returning Crimea to Russia.[8]

Crimea abruptly became the center of pro-Russian demonstrations and the ubiquitous presence of non-Crimean Russian volunteers. By mid-March, 2014, there was: an independence referendum; de facto Statehood; a unilateral secession from Ukraine; the annexation of Crimea as a special Russian federal district; and the annexation of Sevastopol as a special Russian federal city.

15.2 Contemporary Expansion of Russian Influence

The western press has done an incomplete job of framing the contemporary conflict between Russia and Ukraine. One should incorporate President Ronald Reagan's 1987 exhortation: 'Mr. Gorbachev, tear down this [Berlin] wall.'[9] That wall came down. But the United States did not keep its often overlooked promise. Reagan's Secretary of State then said that NATO would respond by not moving one inch eastward.[10] It did – all the way to Russia's borders.[11]

One who is not a sound-bite journalist must acknowledge Russia's geopolitical posture. In 1997, Ukraine – which shares a 2,000 kilometer border with Russia – became the first Commonwealth of Independent States member to join the NATO Partnership for Peace Program. The 2002 NATO-Ukraine Action Plan was also of great concern to Russia.[12] In

8 Anna Malpas, *Russia could not 'abandon' Crimea: Putin*, Yahoo! News (Mar. 9, 2015). http://news.yahoo.com/russia-could-not-abandon-crimea-putin-221302319.html.

9 Associated details are available at U.S. Dep't of State Diplomacy Center, Voice of U.S. Diplomacy and the Berlin Wall. http://diplomacy.state.gov/berlinwall/www/exhibitions/tear-down-this-wall.html.

10 In Howard Baker's words, on Feb. 9, 1990 at the Kremlin, there would be 'no extension of NATO's jurisdiction for forces of NATO one inch to the east,' provided the Soviets agreed to the NATO membership for a unified Germany. Gorbachev said he would think about it; but 'any extension of the zone of NATO is unacceptable.' See Uwe Klußmann, Matthias Schepp, and Klaus Wiegrefe, *NATO's Eastward Expansion: Did the West Break Its Promise to Moscow?*, Spiegel Online International (Nov. 26, 2009). <www.spiegel.de/international/world/nato-s-eastward-expansion-did-the-west-break-its-promise-to-moscow-a-663315-2.html.

11 NATO members Estonia and Latvia share borders with Russia. NATO's subsequent eastward expansion also included: Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Lithuania, Poland, Romania, Slovakia, and Slovenia.

12 Partnership for Peace purpose: to reflect 'Ukraine's intention as a European non-block state to continue constructive partnership with NATO.' Distinctive Partnership Between Ukraine and NATO, webpage of

early 2015, Ukraine's current president announced that Ukraine would become a European Union member by 2020.

Russia has a fresh missile defense shield concern as well. When President Obama took office in 2008, he scrapped the US/NATO plan by disavowing the prior administration's plan for a missile defense shield to be assembled in Poland and the Czech Republic. By early 2015, however, Poland and the Baltic States inquired about a NATO missile defense system against Russia. Ukraine followed suit in June, 2015. It announced a renewed intent to seek a nuclear missile shield as well. Russia's response was that if Ukraine obtains that shield, Russia would place nuclear weapons in Crimea.[13] Should this Clash of Titans actually materialize, it will no doubt signal their entrenchment in Cold War II.

In late June 2015, President Putin announced that Russia will bulk up its nuclear arsenal with intercontinental ballistic missiles – in order to penetrate any anti-missile defense. US Secretary of State John Kerry responded that this nuclear expansion was a step backward toward 'a kind of Cold War status.' NATO's Secretary-General condemned the Russian reaction in these terms: 'This nuclear saber-rattling of Russia is unjustified, it's destabilizing, and it's dangerous.'[14] But one cannot ignore the 1962 US reaction, when it discovered the planned presence of Russian missiles in Cuba.

The contemporary expansion of Russia's influence over former Soviet turf surfaced well before the 2014 Ukrainian crisis. After the USSR collapsed, one of Moscow's key foreign policy goals was to expand Russian influence within some former Soviet territories. As of 2002, Moscow began to issue Russian passports to ethnic Russians in Georgia's South-

---

the Ministry of Foreign Affairs of Ukraine, online at: <http://mfa.gov.ua/en/about-ukraine/euroatlantic-cooperation/ukraine-nato>. Action Plan purpose: 'to identify clearly Ukraine's strategic objectives and priorities in pursuit of its aspirations towards full integration into Euro-Atlantic security structures and to provide a strategic framework for existing and future NATO-Ukraine cooperation under the Charter.' NATO-Ukraine Action Plan. www.nato.int/cps/en/natohq/official_texts_19547.htm?.

13 Ukraine's request: Karoun Demirjian, Ukraine says it wants a missile shield to protect against Russian aggression, Wash. Post (May 20, 2015). <https://www.washingtonpost.com/world/europe/ukraine-says-it-wants-a-missile-shield-to-protect-against-russian-aggression/2015/05/20/bcaf74f2-feec-11e4-8c77-bf274685e1df_story.html>. Ukrainian Shield – Moscow Times, *Ukraine Open to Hosting Anti-Russian NuclearMissile Shield* (May 20, 2015). www.themoscowtimes.com/news/article/ukraine-open-to-hosting-anti-russian-nuclear-missile-shield/521871.html. Crimean Nukes – Kremlin media spokesman Dmitry Peskov: '*Concerning Ukraine's plan to house anti-missile systems in its territory, we can only perceive it negatively … [b]ecause it will be a threat to the Russian Federation. In case there are missile defense systems stationed in Ukraine, Russia will have to take retaliatory measures to ensure its own safety.' In March 2015*, the Director of the Russian Foreign Ministry's department of non-proliferation and arms control had said that Moscow had the right to station nuclear weapons in Crimea, since the peninsula is Russian territory since the 2014 referendum and its reunification with Russia. P*rior to the May 2015 Ukrainian shield request, th*e Russian Director said that there are no plans to put any nuclear weapons in Crimea. RT News, *Moscow says it will retaliate if Ukraine hosts US anti-missile defenses* (May 20, 2015). http://rt.com/news/260425-russia-retaliate-ukraine-amd. Russian riposte: See Sharon Squassoni, *Nuclear midnight ticks closer in wake of Russia's Crimea threats*, Reuters (Mar. 23, 2015).

14 *The world at a glance*, The Week 7 (magazine, June 26, 2015).

Ossetia and Abkhazia provinces.[15] Their dormant separatist conflicts flared up in August of 2008. Russia entered Georgia to launch its 'peacekeeping' operation to protect its 'Russian citizens' in Georgia.[16]

Russian protection of citizens abroad is not a novel claim limited to the 21st Century. Crimea's inhabitants have likewise been 'beneficiaries' of such protective measures. Russia battled the British, French, Ottoman Turks (and others) in the 1853-1856 Crimean War – in the name of protecting ethnic Russian Orthodox subjects of the Ottoman Sultan.[17]

To develop the premise for the secessionist thrust of this chapter, one must briefly consider the contemporary paths to Statehood.

15.3 Paths to Statehood[18]

The UN Charter is the oft-cited backdrop for staking out modern claims to Statehood. Under Article 2.4, a State must refrain from using force against the territorial integrity or the political independence of another State. Cross-border force – not embraced by the Article 51 self-defense exception – is, of course, a prime 'territorial integrity' violation. The scope of the territorial integrity limitation is generally confined to the sphere of relations between States. The 'political independence' proviso is violated, to the extent that one nation stokes secessionist flames in another. Of course, one might characterize compliance with this prime Charter article has been rather ephemeral.[19]

---

15 As the Soviet Union neared collapse, Georgia revoked their autonomist status, followed by their essentially unrecognized 1991 declarations of independence.

16 See, e.g., Vincent M. Artman, *Passportization and Territory* (chap. 5), in *'Passport Politics': Passportization and Territoriality in the De Facto States of Georgia*, at 102 (Univ. Oregon thesis, 2011), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/11506/Artman_Vincent_M_ma2011sp.pdf?sequence=1. Georgia is not unique. Russia has also provided its passports to ethnic Russians in Transnistria, which declared its (unrecognized) independence from Moldova in 1990.

17 A less altruistic purpose was to expand its access to the Middle East. Orlando Figes, The Crimean War: A History (Henry Holt Pub, 2012).

18 State practice has spawned three potential paths to Statehood. They are: succession, secession, and self-determination. Succession typically occurs when one State overruns another. Secession is the second of the three sub-topics in this whirlwind overview of the paths of Statehood. *Unilateral* secession will be the primary focus of this chapter. Self-determination is the evolving third channel for navigating the territorial waters associated with Statehood.

19 As urged by many realists, its contours are too uncertain to be broadly applicable to State practice. As noted by a prominent group of scholars: 'The prohibition of the use of force in contemporary international law is burdened with uncertainties resulting from the … ambiguous [ ] wording of the relevant provisions of the UN Charter…. These ambiguities leave room for individual States to interpret the Charter provisions in accordance with their particular political interests.' Brunno Simma, et al. (ed.), *Article 2(4)*, in 1 The Charter of the United Nations: A Commentary 112, at 135 (2d ed, Oxford Univ. Press, 2002). That proviso was similarly characterized by an iconic publicist in the following terms: 'For the first time, nations tried to bring within the realm of law those ultimate political tensions and interest that had long been deemed beyond control by law. … But [t]his most political of norms has been the target of 'realists' from the beginning.'

Beyond Charter Article 73's colonial context,[20] the Charter is silent regarding secessionist conflicts. It was not equipped for analyzing scenarios like South Ossetia, Abkhazia, Nagorno Karabakh, Kosovo, Transnistrea, and Crimea. They grew beyond the *intra*state context, by serving as proxy wars on behalf of other member States. Under Charter Article 2.7, the organization itself is prohibited from interfering in matters within the domestic jurisdiction of its member States. So the UN and its members are expected to honor international borders. But they can cross more than one line, when meddling in an otherwise self-contained secessionist conflict.

The early 1990s witnessed a splintering of Statehood in the aftermath after the Cold War. The USSR peacefully dissolved into fifteen independent republics. The former Yugoslavia violently erupted into a half-dozen states. If today's ubiquitous separatist groups could have their way, the number of States, and the size of the international community of nations, would significantly increase – as those movements pursue their claimed rights to secede from their mother States.[21]

Notwithstanding centuries of secessionist conflict,[22] there is no treaty on unilateral secessions. Participation in such a treaty would be political suicide. States would never attend a conference designed to formulate a positive law basis for such secessions. Would you attend a meeting in your neighborhood, for which the group objective is to decide which neighbor gets your child? Or, that your child would be free to decide that he or she is no longer in your family?

Self-determination offers another, and challenging, path to Statehood. Contrary to the secessionist movement du jour, it is not synonymous with Statehood. Its undefined contours did not blossom until the 1960s, when the United Nations was facilitating the decolonization process in Africa.[23] Self-determination under decolonization was quite distinct from today's *mis*application of the term 'self-determination'. Separatists typically, but inappropriately,

---

Louis Henkin, *Law and Force: The United Nations Charter* (chap. 7), in How Nations Behave: Law and Foreign Policy (2d ed, Council on Foreign Relations, 1979), at 137.

20 See *UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960), UN Doc. A/4684 (1960), www.un.org/en/decolonization/declaration.shtml, hereinafter UNGA Reso. 1514 & Joshua Castellino, *The UN Principle of Self-Determination and Secession from Decolonized States: Katanga and Biafra* (chap. 6), in Aleksandar Pavkovic & Peter Radan (ed.), The Ashgate Companion to Secession, at 117 (Ashgate, 2011), *hereinafter* Companion to Secession.

21 The familiar movements include: the Kurds at the intersection of Iraq, Turkey, and Iran; the Chechens; ISIS in Iraq and Syria; the people of Tibet; and formerly (if current agreements hold), Spain's Basque and Northern Ireland's Irish Republican Army campaigns.

22 Per the ICJ's Kosovo opinion: 'During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep. 2010, p. 403, para. 79, www.icj-cij.org/docket/files/141/15987.pdf, *hereinafter ICJ Kosovo* case.

23 See UNGA Reso. 1514, *above* n. 20.

claim self-determination as the basis for justifying their secessions. But they routinely fail to observe the post-decolonization distinction between *internal* and *external* self-determination. All peoples of all States enjoy at least the theoretical right to determine their own internal political status. But the inviolability of international borders generally precludes the extension of self-determination to facilitate external political change via unilateral secession.[24]

A more nuanced argument – for expanding the scope of self-determination to facilitate secessionist objectives – resonates from the wording of the UN General Assembly's 1970 *Friendly Relations Declaration*. One of Resolution 2625's objectives was to promote good international relations. Another appeared to promote a wider application of self-determination, beyond the colonial context's 1960s heyday. As that Declaration provides:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with* the principle of *equal rights and self-determination of peoples* as described above and *thus possessed of a government* representing the whole people belonging to the territory *without distinction as to race, creed or colour*.[25]

The italicized language could be interpreted to trigger a remedial secession, when the offending State fails to comply with a People's right of self-determination. That interpretation flows from the evolving norm that '[w]here a territorially concentrated group is systematically excluded, secession is a potential remedy of last resort, in cases of serious human rights abuses against members of this group.'[26] This evolving remedy would be triggered 'if peoples cannot exercise their right to self-determination *internally* because their government oppresses them or does not represent them, then they may exercise that right *externally* through secession.'[27]

---

24 See Antonio Cassese, *The Emergence of Customary Rules: Internal Self-determination* (chap. 5), in Self-determination of Peoples: A Legal Reappraisal, at 101 (Cambridge, 1995), hereinafter Legal Reappraisal & David Raic, *The Post-Colonial Era: Internal and External Self-Determination* (chap. 6), in Statehood and the Law of Self-Determination, at 226 (Kluwer, 2002).

25 The principle of equal rights and self-determination of peoples, Ann. para. 1, in *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, (Annex to Resolution) 2625 (XXV), UN Doc. A/8018 (1970) [italics added], www.un-documents.net/a25r2625.htm, *hereinafter* UNGA Reso. 2625.

26 Steven Wheatley, The 'saving clause', in *Self-Determination of Peoples* (chap. 2), at 95, in Democracy, Minorities and International Law (Cambridge, 2005).

27 Peter Roethke, *The Right to Secede under International Law: The Case of Somaliland*, *Amer. Univ. J. Int'l Service* (2006), p. 40, https://www.american.edu/sis/jis/upload/3RoethkeF11.pdf [italics added].

The ample girth of 'self-determination' claims often misshapes its appropriate contours. Europe's Roma, for example, have a right to self-determination. Hungary played a leading role in their quest. Two years ago, it aided the self-determination of the Roma minority. The perpetrators of the serial murderers of Roma were arrested and prosecuted in Debrecen.[28] The Roma do not intend to create a Gypsy State. Their self-determination objective is to migrate throughout Europe, without discrimination based on their culture or ethnicity.

Russia's 2008 border crossing into South Ossetia and Abkhazia, was undertaken in the name of the self-determination of Georgia's ethnic Russians. Russia claimed that it was a peacekeeper, merely trying to mediate between Georgia and its provincial ethnic Russians, allegedly denied their right of self-determination. Russia asserted that this incursion was necessary, to stem the flow of ethnic Russian blood at the hands of the Georgian government. Whether the Georgian and Crimean sagas were appropriate 'humanitarian' interventions is addressed in the next section of this chapter.

15.4 Unilateral Secession – Steep Path to Legitimacy

15.4.1 Tension between Territorial Integrity and Remedial Secession

Unilateral secession from a mother State is the focus of this chapter. One may articulate the evolving default rules are as follows: International Law does not *permit* secession. Nor does International Law *prohibit* secession. But there is a very clear bias against it.[29] That bias is often articulated in terms of preserving the territorial integrity of existing States – especially when State X has a hand in State Y's supposedly internal secessionist conflict.[30] X's taking part in any

28 This prosecution is the subject of the wrenching documentary *Judgment in Hungary: The Trial of Serial Killers of Roma* (2015), <https://vimeo.com/ondemand/judgmentinhungary/119741581> (including English subtitles).

29 One view is that territorial integrity is the vanguard for stable State-to-State relations. It in no way purports to regulate *internal* affairs, such as a unilateral secession. Georges Abi-Saab, *Conclusion*, in Marcelo Kohen (ed.), Secession: International Law Perspectives, at 473 (Cambridge, 2006), *hereinafter* Secession Perspectives. Other scholars claim that the territorial integrity principle directly applies – via its prohibition of secession. James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, in Anne Bayefsky (ed.), Self-Determination in International Law: Quebec and Lessons Learned, at 60 (Kluwer, 2000), *hereinafter* Quebec and Lessons Learned. Others embrace a comparatively neutral not-permitted-not-prohibited-but-bias formulation. See Thomas Franck, *Opinion Directed at Question 2 of the Reference*, in Quebec and Lessons Learned, id., at 83.

30 Numerous international instruments confirm the inviolability of internationally recognized borders. See, e.g., Resolution adopted by the General Assembly on 27 March 2014, UNGA Reso. 68/262, on the Territorial Integrity of Ukraine, *hereinafter* UNGA Reso. 68/262, www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262. The 1975 Helsinki Final Act is another key 'inviolability' instrument. See *Declaration on Principles Guiding Relations between Participating States* (Part 1a), in Conference On Security And Co-Operation In Europe Final Act, www.osce.org/mc/39501?download=true.

> partial or total disruption of the national unity and territorial integrity of a State [Y] or … [of[its political independence is incompatible with the purposes and principles of the [UN] Charter.[31]

Remedial secession may thus be articulated as an equitable remedy – to ameliorate the harshness of the anti-secession bias.[32] It is a pragmatic device, designed to soften the rigidity of a relatively inflexible legal regime.

One must acknowledge, however, the existential debate about remedial secession. As one commentator riles against its very existence, in no uncertain terms:

Remedial secession is a legal myth: secession is not a remedy recognized in international law for violations committed by a State. Its existence in international law is questionable, as evidenced by the positions adopted by States before the International Court of Justice in the [Kosovo case]…. Its very purpose is uncertain…. Rather than providing a 'remedy', remedial secession constitutes an acknowledgement of the inability of the international community to prevent extreme ethnic violence, and its invocation as a 'last resort' amounts to a renunciation of the utility of human rights and other international legal rules in such situations.[33]

Another academic analyst asserts that

> secessionist claims must actually be grounded [instead] … on valid claims to territory … [which] does not change hands simply because the people … want to secede. … [O]f greater relevance is a legal assessment of the arguments that secessionists marshal in support of their conviction that their territory does not belong to the larger state but to the secessionists themselves.

A Russian perspective in this camp offers the justification for a 'right' of secession, premised upon a People's right to self-determination. Yet another publicist proposes a revised International Law framework that could merge similar values in law and politics. On the other hand, others argue for the preservation of supposed *existing* bright line rules. Thus, if

31 UNGA Reso. 2625 *above* n. 25, Annex, Preamble.

32 Proponents of this theory assume that International Law provides a right to secession for peoples who are subjected to extreme persecution, and thus unable to embrace their *internal* right to self-determination. See, e.g., Lee Buchheit, Secession: The Legitimacy of Self-Determination, at 220 (Yale University Press (1978) & Antonello Tancredi, *A Normative 'Due Process; in the Creation of States through Secession*, in Secession Perspectives, *above* n. 29, at 176.

33 Introduction, Katherine Del Mar, *The myth of remedial secession* (chap. 3), at 79, in Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law (Cambridge, 2013).

> the global system forsakes traditional norms in favor of more nuanced and value-laden approaches to international involvement in internal conflict, it will end up grounding its foundational norms in the very principles that are inconclusively contested. Legal condemnation will thus be indistinguishable from mere political condemnation.[34]

One need not look far for positive law evidence of the bias against unilateral secession. In Soviet times, Article 72 of the Soviet Constitution extended the 'right freely to secede' only to the fifteen Soviet Socialist Republics. That right did not include their political subdivisions. Georgia thus had a Constitutional right to secede from the Soviet Union when it did (1991) – but not its South Ossetia and Abkhazia oblasts.

Upon the demise of the Soviet Union, the European Council issued its 1991 Guidelines on the Recognition of New States of Eastern Europe and in the Soviet Union:

> [We] adopt a common position on the process of recognizing these new States, which requires … [r]espect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement … [and the c]ommitment to settle by agreement … all questions concerning State succession and regional disputes.[35]

By the time of the 2008 Georgia-Russia conflict, the 1991 South Ossetia and Abkhazia secessions were recognized by only a handful of other nations – further evidence of the bias against secession.[36] Crimea, as well, acquired only a limited number of recognitions. This pariah-like, diminutive recognition status illustrates that remedial secession: (1) does not enjoy robust support as a widely accepted normative legal principle; and (2) its wobbly theoretical posture lacks a solid legal (or political) foundation. The ensuing lack of *collective* recognition, in the form of UN membership, is further evidence against the validity of the many post-Cold War unilateral secessions addressed in this chapter.

---

34 *Territory*: Lea Brilmayer, *Secession and the Two Types of Territorial Claims*, 21 ILSA J. Int'l & Comp. L. 325, at 325-326 (2015). *Russian perspective*: *above* n. 6, para. 1. *Framework*: Milena Sterio, Self-Determination and Secession Under International Law: The New Framework, 21 ILSA J. Int'l & Comp. L. 293, at 3-5-306 (2015). *Bright line*: Brad R. Roth, *The Neglected Virtues of Bright Lines*: *International Law in the 2014 Ukraine Crises*, 21 ILSA J. Int'l & Comp. L. 317, at 323 (2015).

35 Transmitted to the UN General Assembly as UNGA Doc. A/232, www.icj-cij.org/docket/files/141/15048.pdf, *hereinafter* European Recognition Guidelines.

36 But one should not assume that today's *110* recognitions of Kosovo equate to the validity of its secession. Otherwise, Kosovo would have achieved UN membership by now. William R. Slomanson, *Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule*, 6 Miskolc J.I.L. 1 (Miskolc Univ, 2009), www.uni-miskolc.hu/~wwwdrint/mjil14/20092slomanson1.pdf, *hereinafter Violations in Search of A Rule*.

15.4.2 Judicial Perspectives on Remedial Secession

Absent a multilateral secession treaty, one should resort to State practice to ascertain the content of International Law. The US and Russia both claimed that the secessions of Kosovo, South Ossetia, and Abkhazia – which they respectively sired – were all 'sui generis.'[37] Their legally unadorned argument was that none could serve as a precedent for future secessions. But as one may rationally respond,

> the problem with the notion of politics [thus] taking over the role of law … is the sheer inconsistency and hypocrisy visible across many … cases revolving around the question of secession. The excuse which occasionally appears, proclaiming that each case is *sui generis*, is quite absurd.[38]

Another legal wrinkle is that a secession – even if it achieves de facto Statehood – does not bootstrap that secession into the realm of *inter*-State relations. It retains its *intra*-State character. Yet, as is often the case, State X is busy, covertly, if not overtly, supporting State Y's separatist movement.

When the ebb and flow of opinio juris is unclear, Article 38.1.d of the Statute of the International Court of Justice offers a recognized list of alternative resources. Decision makers can thereby resort to the decisions of national and international courts for guidance on the content of International Law.[39]

15.4.2.1 ICJ Kosovo Case

In 2010, secessionist aficionados would have expected the International Court of Justice to authoritatively articulate the ground rules for remedial secession. The Kosovo independence case presented the opportunity to bring clarity to this evolving feature of Customary International Law. Serbia had convinced the UN General Assembly to seek an advisory opinion, regarding the legitimacy of the Kosovo Assembly's 2008 unilateral declaration of independence from Serbia.

---

37 Former US Secretary of State Condoleezza Rice, and Russia's Foreign Minister Sergei Lavrov, both made widely publicized official statements regarding these 'sui generis' secessions. Another Russian view, however, embraces the 'methodological value of the Kosovo precedent' for Crimea. See *Russian Perspective*, *above* n. 6, at para. 6.

38 Asam Sucur, *Observing the Questions of Self-Determination and Secession in the Wake of Recent Events in Kosovo, Abkhazia, South Ossetia and Crimea*, 21 ILSA J. Int'l & Comp. Law 273 (2015), *hereinafter Observing the Questions.*

39 The Statute is available at www.icj-cij.org/documents/?p1=4&p2=2, *hereinafter* ICJ Statute.

Serbia's Minister for Foreign Affairs, Vuk Jeremić, was presumably mindful of the careful wording needed for the General Assembly to approve such a request, and the ICJ to accept it.[40] Jeremić submitted Serbia's request with the hope that it

> would prevent the Kosovo crisis from serving as a deeply problematic precedent in any part of the globe where secessionist ambitions are harboured. An advisory opinion would provide politically neutral and judicially authoritative guidance to many countries still deliberating how to approach such unilateral declarations of independence in line with international law.

He surmised that the draft General Assembly resolution was non-controversial; thus representing the lowest common denominator of the position of the Member States on the question of unilateral secession. Jeremić was presumably confident that the World Court would, in his words, 'know how to act.'[41]

The UNGA framed the issue for the ICJ as a

> Request for an advisory opinion of the International Court of Justice on whether the declaration of independence of Kosovo is *in accordance with* international law' [italics added]. In separate opinions, some judges scolded the majority for its 'adjustment' of the question actually posed by the General Assembly. The Court's reformulation of the question moved from whether the independence declaration was 'in accordance with' International Law to whether it was 'adopted' in violation of international law.[42]

The ICJ ultimately held that 'the adoption of the declaration of independence of 17 February 2008 did not violate general [or any specific] international law….'[43] Kosovo's lawyers left the Hague claiming victory. But the ICJ was glaringly careful *not* to make any pronouncement about the legal applicability of remedial secession, or the legality of Kosovo's claim to legitimate Statehood. It answered, instead, the discrete question of whether the independence *declaration* itself was valid. Like one who resists the advances of a would-be suitor, the Court's response dashed all hope of its embracing the surrounding offer:

---

40 The Court has the discretion *not* to render an advisory opinion. Id., Art. 65.1.

41 See UN Press Release, *Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo's Independence* (Oct. 8, 2008), www.un.org/press/en/2008/ga10764.doc.htm.

42 *ICJ Kosovo* case, *above* n. 22, para. 59. For further detail, see Sienho Yee, *Notes on the International Court of Justice (Part 4): The* Kosovo *Advisory Opinion*, 9 Chinese J.I.L. 763 (2010).

43 *ICJ Kosovo* case, *above* n. 22, para. 122.

> the question … asks [only] for the Court's opinion on whether or not the Declaration of Independence is in accordance with international law. It does *not* ask about the legal consequences of that declaration of independence. In particular, it does not ask whether or not Kosovo has achieved Statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court notes that, in past requests for advisory opinions, the General Assembly and the Security Council, *when they have wanted the Court's opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated*. Accordingly, the Court does not consider it necessary to address whether or not the declaration has led to creation of a legitimate State or the status of the acts of recognition in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.[44]

One might argue that the Court dodged the opportunity to answer the broader question of the validity of Kosovo's claim to Statehood. As bemoaned in Judge Yusuf's Separate Opinion:

> The Court had a unique opportunity to assess, in a specific and concrete situation, the legal conditions to be met for such a right of self-determination to materialize and give legitimacy to a claim of separation. It has unfortunately failed to … clarify the scope and normative content of the right to external self-determination, … and thus to contribute … to the prevention of unjustified claims to independence which may lead to instability and conflict in various parts of the world.[45]

On the other hand, the ICJ

> cannot legislate and cannot be called on to do so. Its task is rather to engage its normal judicial function of ascertaining … principles and rules' applicable to *the question asked*. … [U]nder the constraints placed upon it as a judicial

44 *ICJ Kosovo* case, *above* n. 22, para. 51 [italics added].

45 *ICJ Kosovo* case, Judge Yusuf Separate Opinion, *above* n. 22, para. 17, www.icj-cij.org/docket/files/141/16005.pdf. This is not a new criticism. Others have criticized the Court for prior cases that failed to germinate enough legal reasoning fodder to reconcile territoriality, self-determination, and political independence issues. See, e.g., Legal Reappraisal, *above* n. 24, at 218 (Cassesse, regarding the Court's *Western Sahara* case).

> organ it may not be able to give a complete answer to the [advisory] question asked of it.[46]

Thus, the *ICJ Kosovo* majority seems to have faithfully executed its judicial function, by not expanding its analysis beyond the General Assembly's 'lowest common denominator' issue statement – whether the *declaration* of independence was lawful. One could fault the Court for its arguably manipulative adjustment of the question as originally posed. In any event, the ICJ thus chose not to address the elements of remedial secession, and whether Kosovo met them. The Court likely sensed that it should not answer a question (supposedly) not expressly asked – especially when the contours of remedial secession are in flux.[47]

What the Kosovo case majority opinion did do was to confirm that, after centuries of secessionist conflict: 'In no case … does the practice of States as a whole suggest that the [mere] act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence.' That articulation is thus consistent with the view that International Law neither prohibits, nor permits, unilateral declarations of secession.[48]

15.4.2.2 Quebec Secession Case

The *ICJ Kosovo* case neither embraced nor disavowed remedial secession. But the Canadian Supreme Court's 1998 *Quebec Secession* case did. After the razor thin defeat of the (second) referendum in 1995, the Canadian Supreme Court addressed the potential for Quebec,[49] being unsuccessful at the polls, to nevertheless secede. The key framework issue was whether there is 'a right to self-determination under international law that would give the … government of Quebec the right to effect the secession of Quebec from Canada unilaterally?'[50]

---

46 Jochen Frowein & Karin Oellers-Frahm, *Advisory Opinions* (chap. 6), in Andreas Zimmerman et al. (ed.), The Statute of the International Court of Justice: A Commentary, at 1409 (Oxford, 2006) (italics added). The authors therein cite para. 15 of the Court's *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Rep. (1996-I), wherein it was: 'necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The *purpose* of the advisory function is *not to settle* – at least directly – *disputes between States*, but to offer legal advice to the organs and institutions requesting the opinion' [italics added].

47 Peter Radan, *International Law and the Right of Unilateral Secession* (chap. 17), in Companion to Secession, *above* n. 20, at 321.

48 *Declaration itself*: *ICJ Kosovo* case, *above* n. 22, at para. 122. *Not prohibit/permit*: Franck, Quebec and Lessons Learned, *above* n. 29.

49 A succinct but informative history of the province is available in *Testing international law – some particularly controversial issues* (chap. 9), Legal Reappraisal, *above* n. 24, at 248-254 (Quebec).

50 *Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada* [1998], paragraph entitled B. *Question 2*, inserted between Paras. 108 and 109, 2 Supreme Court Reporter 217, 161 Dominion Law Reports (4th) 385, 115 International Law Reports 536, http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do, *hereinafter Quebec Secession*.

Quebec Secession disavowed the possibility that a local referendum could trump the Canadian constitution's federated framework. (This uncontestable finding negates the validity of Crimea's locally grown referendum.) On the other hand, the court acknowledged the impact of a secession referendum: it should spawn a robust dialogue about the underlying reasons, and the need for a subsequently *negotiated* resolution. (The Crimean referendum's utter disregard of the rest of Ukraine is addressed in the next section of this chapter.) As the court thus held: Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. *Nor, however, can the reverse proposition be accepted.* The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.[51]

Quebec Secession is, at present, the leading judicial assessment of the elements for a valid unilateral declaration of independence. It erected the legal architecture for a blueprint on provincial demands for secession.[52] The Court's analysis was rooted in three primary elements. First, there must be a distinct People. Second, there must be gross human rights violations. Third, there must be no alternative but secession.

Element One: A 'People'[53]

Common Article 1.1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights asserts: 'All peoples have

51 *Quebec Secession, above* n. 50, para. 151 [italics added].

52 In addition to numerous scholarly commentaries and citations, even the *ICJ Kosovo* case noted that 'many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada….', *ICJ Kosovo* case, *above* n. 22, para. 55.

53 Finland's 1917 secession from Russia offers a comparatively obvious exemplar. Its ancestors immigrated from the Urals to Finland some 2,000 years ago. The Finnish people later evolved, as a result of successive waves of immigration from virtually all points on the compass. Finland was a part of the Kingdom Sweden

the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' One might argue that the term 'Peoples' is embraced by that portion of the General Assembly's *Friendly Relations Declaration* regarding: 'independent States … possessed of a government representing the whole people belonging to the territory *without distinction as to race, creed or colour*.'[54] But the meaning of the term 'People' is hotly debated.

Nagorno Karabakh (NK) presents one of the many enigmatic puzzles on how to piece together what constitutes a 'People'. Ninety-five percent of the population is Christian Armenian. They would not be a distinct people if NK is in Armenia. They would be a distinct people, if NK were part of the Muslim nation of Azerbaijan. One of the many complicated features of this debate is the following conundrum: '*Where* is Nagorno Karabakh?' The answer depends upon whom you ask! This mysterious state of affairs emanates from the three answers to this deceptively simple question. NK was assigned to Azerbaijan after WWI. The Western position is that it is *still* an Azeri province. In 1989, the Armenian SSR declared the unification of NK with Armenia. Two years later, NK announced its unilateral declaration of independence. It has not been recognized by any nation, nor is it a member of the UN – common characteristics of today's seceded orphans.[55]

Who are the 'People' of Crimea? Per the 2001 Ukrainian census, there were (and are) some 125 nationalities and ethnic groups represented in Crimea's population. The three most common are ethnic Russians (58.5%), Ukrainians (24.4%), and Tatars (12.1%).[56] Ethnic Russians are Crimea's majority ethnic group. But unlike Kosovo's 95% Albanian population, one cannot conveniently speak of a single group as equating to the collective ethnic and cultural identity of Crimea.

Russia would, of course, dispute this conclusion. But Stalin's ethnic cleansing campaigns against the Tatars, on a peninsula geographically separated from Russia by Ukraine – and merged politically with Ukraine by the Soviet Union (1954) – both tilt heavily against the moral and geographical compasses of Russia's claim to Crimea.

---

until 1809, when it was ceded to the Russian Empire. But the Finnish People did not lose their distinct character or language. In 1917, the Bolsheviks declared a general right of self-determination that arguably included a right of secession for all Peoples of Russia. On the same day, the Finnish Parliament issued own declaration, conveniently assuming that the then Finnish province could thus declare its own independence. See *Finnish Nationalism*, 2 Encyclopedia of Nationalism, www.scribd.com/doc/155794139/0122272307#scribd.

54 See UNGA Reso. 2625 [italics added], in the text accompanying *above* n. 25.

55 William R. Slomanson, *Nagorno Karabakh: An Alternative Legal Approach to its Quest for Legitimacy*, 9 Miskolc J.I.L. 69 (2012), online SSRN, http://ssrn.com/abstract=2168071, reprinted revision in 35 Thomas Jefferson L.R. 29 (2013).

56 State Statistics Committee of Ukraine Census, http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea. The Tatar population would be significantly greater, but for Stalin perpetrating multiple ethnic cleansing campaigns against the Tatar population in Crimea – during, and after, WWII.

Element Two: Gross Human Rights Violations

Whatever its pedigree in Customary International Law, remedial secession is most appealing to the international community when the majority population, or the government of a country, renders a minority unable to develop its identity within the framework of the existing State. An internationally recognized need for humanitarian intervention, or the verifiable perpetration of the crime of genocide, would of course qualify as 'gross' human rights violations. But in the secession context, both disgraces are often imitated but rarely duplicated. Few would disagree that 'the concept of human rights is a blessing to the world. Nevertheless, the deliberate misinterpretation of it tends to turn it into a curse to the peace and security of the world.'[57] For example, international law frowns upon a unilaterally-generated border crossing in the name of humanitarian intervention. The UN's 2005 human rights initiative, R2P (Responsibility to Protect),[58] does not envision a unilateral humanitarian intervention by one country – but rather a multilateral process for reacting to another nation's human rights problems.

A popular Russian perspective is that the Crimean secession resulted from the genocidal tendencies of the Ukrainian government.[59] Yet, genocide is easy to claim but hard to prove. The three main reasons are: (1) a failure to distinguish between ethnic cleansing and genocide; (2) that liability for genocide requires the *specific* intent to eradicate a group or a people as such; and (3) there must be credible witnesses and trustworthy documentation to prove that it has occurred.[60]

Crimean separatists would have to acknowledge an insurmountable problem with this particular element for a valid unilateral succession. There was no credible evidence of attacks on, or intimidation of, the (majority) ethnic Russian population of Crimea. As noted by the European Parliament's assessment of Ukraine's alleged mistreatment of Crimea's ethnic Russians:

> the arguments presented by the Russian leadership to support this aggression are utterly unfounded and out of touch with the realities on the ground, as

57 *Russian Perspective*, *above* n. 6, at 228.

58 As the relevant pillar provides: 'The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.' Office of the Special [UN] Advisor on the Prevention of Genocide, The Responsibility to Protect, www.un.org/en/preventgenocide/adviser/responsibility.shtml. A number of related R2P documents are available at this website.

59 See *Russian Perspective*, *above* n. 6, at paras. 8-9.

60 The term *genocide* was – as is common to so many separatist conflicts – thrust into the Georgia-Russia 2008 war rhetoric. Both sides claimed genocide had been perpetrated by the other. But neither was able to elicit credible evidence of its existence.

> there have been no instances whatsoever of attacks on or intimidation of Russian or ethnic Russian citizens in Crimea….[61]

The *Quebec Secession* elements have thus hurled two of the three pitches needed for a valid strikeout: (1) Crimea's ethnic Russians are not a 'People' for the purposes of remedial secession; and (2) the lack of gross human rights violations – by the Ukrainian population, or by the government, against Crimea's ethnic Russian population. And now for strike three.

Element 3: No Alternative but Secession

This element for a valid remedial secession is the hardest to establish. There are multiple end games for changing internationally recognized borders (other than secession). A detachable province might associate with a recognized state. Kosovo, for example, might have associated with Albania – rather than unilaterally seceding from Serbia. Reunification of a divided East and West Germany restored Germany's sovereignty, after its Cold War disjointing. The flip side of this coin features a peaceful breakup, such as Czechoslovakia's Velvet Divorce. There may also be a constitutional right to independence, supplemented by valid referendum legislation – which thus justified Montenegro's separation from Serbia.

Europe's post-Cold War recognition guidelines otherwise authorize changes in international borders only by 'common agreement.'[62] The disqualifier in Crimea was the separatists' failure to negotiate their local demands with Kiev's central government. At the time of Crimea's 2014 independence referendum, Russia was militarily embedded in Crimea. The separatist movement was thus all too eager to avoid any Russification strategy – other than Crimea's secession from Ukraine.[63]

15.5 Crimea's Secession Referendum[64]

As of March 2014, Crimea was roughly 58% ethnic Russian, 24% Ukrainian, and 12% Tatars. Many Ukrainians, including the Tatar minority, boycotted the referendum. So it is no surprise that the majority of voters, reportedly some 97%, thus voted to join the

61 European Parliament, Resolution of 13 March 2014 on the Invasion of Ukraine by Russia, Point C, www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0248&language=EN.

62 See European Recognition Guidelines, *above* n. 35.

63 By comparison, the UN Special Representative in Kosovo spent years negotiating with Serbia, before declaring that there was no alternative but for Kosovo to secede from Serbia. That particular assessment is by no means self-evident. See *Violations in Search of a Rule, above* n. 36.

64 Ballot questions: '1. Are you in favour of the Autonomous Republic of Crimea reuniting with Russia as a constituent part of the Russian Federation? [versus] 2. Are you in favour of restoring the Constitution of the Republic of Crimea of 1992 and of Crimea's status as part of Ukraine?' *Is Crimea's referendum legal?* BBC News (Mar. 13, 2014), www.bbc.com/news/world-europe-26546133.

Russian Federation.[65] That boycott arguably explains the gap between the near unanimous secession vote – and the combined 36% of ethnic Ukrainians and Tatars who would have presumably voted against that outcome.

Crimea's referendum rules did not state whether there was a threshold minimum number, or percentage, of votes that would be required for the result to be ratified or to take effect. One could argue that so stating was unnecessary, because the result was apparently preordained – given the sudden deluge of Russian troops. The Crimean peninsula, and (its city of) Sevastopol, which were then discrete subdivisions of Ukraine, united as the Republic of Crimea. The new republic claimed to be a sovereign State. Shortly thereafter, Russia annexed both Crimean entities.

The Crimean Referendum was unconstitutional under Ukrainian law. Article 73 of the Constitution, and a 2012 Ukrainian statute, both provide that the Ukrainians can conduct referendums (all day long) on local matters; but they cannot change international borders. The West's position is that this referendum was not valid, for a variety of reasons, including that the area was effectively under Russian military occupation.[66]

The European Commission for Democracy Through Law features a sub-entity known as the Venice Commission. It is an advisory body to the Council of Europe. It was created in 1990, after the fall of the Berlin wall – when there was an urgent need for constitutional drafting assistance in the former central and east European Soviet Socialist Republics. The Venice Commission declared that the Crimea referendum was illegal under both the Ukrainian and Crimean Constitutions, as well as violating international election standards.[67]

First, *all* citizens of a nation (or their provincial representatives) should participate in the ultimate resolution of such existential matters – not just the geopolitical fraction of Ukrainian citizens in Crimea.[68] Second, there were a number of voting irregularities during this referendum. As concluded by the Venice Commission:

> The Constitution of Ukraine, like other constitutions of Council of Europe member states, provides for the indivisibility of the country and does not allow

65 *Crimea profile – Overview*, BBC News (Mar. 13, 2015), www.bbc.com/news/world-europe-18287223. This process was comparable to the 2006 Transnistria (Moldova) Referendum, with its plan of ultimately joining the Russian Federation. What occurred there may be the reason that former Georgian President Sakasvili is now the governor of Ukraine's Odessa region – seated roughly midway between Transnistria and Crimea.

66 There were thousands of Russian military troops in Crimea at the time of the referendum (now reportedly some 29,000). Radio Free Europe, *U.S. Commander Says Some 12,000 Russian Soldiers In Eastern Ukraine*, (Mar. 3, 2015), www.rferl.org/content/ukraine-us-commander-hodges-12000-russian-troops/26880574.html.

67 Council of Europe Venice Commission Opinion No. 762/2014, *On 'Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Princi*ples', paras. 27-28 (Mar. 21, 2014), www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e.

68 See text accompanying *above* n. 51 (quoting *Quebec Secession* case, para. 151).

> the holding of any local referendum on secession from Ukraine. … []Moreover, circumstances in Crimea did not allow the holding of a referendum [not] in line with European democratic standards. Any referendum on the status of a territory should have been preceded by serious negotiations among all stakeholders. Such negotiations did not take place.[69]

Russian state-owned media and referendum organizers, on the other hand, claimed that somewhere between 70 and 135 international observers were present to monitor the referendum. They reported that there were no violations.[70] That report raises a bright red flag. There is normally at least some minor violation in most elections, especially in one that is hastily arranged.[71]

The de facto Prime Minister of Crimea invited the Organization for Security Cooperation in Europe to observe. The OSCE declined, however. The Crimean oblast does not have the authority to invite an international organization to monitor a referendum. Because Crimea is not a State, it was incapable of requesting the services provided exclusively to OSCE member States. The OSCE chair, Switzerland's Foreign Minister Burkhalter, later declared the referendum unconstitutional.[72]

15.6 International Reaction to Crimea's Status

15.6.1 Regional Reactions

The European Union and the US threatened, and then enacted, a number of crushing economic sanctions against Russia. Both encouraged Russia to withdraw from Crimea.

---

69 *Quebec Secession*, *above* n. 50, at paras. 27-28.

70 But a journalist from Russia stated that she was allowed to vote, notwithstanding her temporary presence in Crimea. This 'is illegal. I am a foreign citizen. How can I decide the destiny of the Crimean Autonomous Republic of Ukraine?' *Declaring victory, Crimean and Russian officials pledge fast integration*, KyivPost, (Mar. 17, 2014), www.kyivpost.com/content/ukraine/voting-in-crimean-referendum-starts-even-as-ukraine-government-declares-it-illegitimate-339523.html.

71 For one interested in an intriguing example, consider a prominent US professor's review of *Bush v. Gore*, the US Supreme Court case that effectively determined who would be the President of the United States in the 2000 election. Erwin Chemerinsky, The Case Against the Supreme Court (Viking, 2014). Thus: '[T]he uncounted ballots never were tallied in Florida, and no one will ever know who [actually] won that state' and thus, the election. Id., at 234 & 238.

72 *Invitation rejection*: Crimea invites OSCE observers for referendum on joining Russia (Mar. 10, 2014), Reuters (Moscow), www.reuters.com/article/2014/03/10/ukraine-crisis-referendum-osce-idUSL6N0M73AP20140310. *Results rejection*: Crimea referendum illegal, no OSCE monitoring – Swiss, Reuters (Vienna), www.firstpost.com/world/crimea-referendum-illegal-no-osce-monitoring-swiss-1429931.html.

The Visegrád Group is an alliance of Hungary, Czech Republic, Poland, and Slovakia. It issued a joint statement, urging Russia to respect the territorial integrity of Ukraine. The members of the Visegrád Group were

> appalled to witness a military intervention in 21st century Europe that is akin to their own experiences in 1956 [Hungary], 1968 [Czechoslovakia], and 1981 [imposition of martial law in Poland].[73]

The Organization of Islamic Cooperation (OIC) expressed its concern about the security and well being of Crimea's Muslim Tatars. In 1944, Stalin – the guru of ethnic cleansing – deported a sizeable segment of the Tatar population to Central Asia. Shortly after WWII, he executed yet another mass deportation of Tatars from Crimea. As the OIC recently pronounced: 'any recurrence of the past suffering of the Crimean Tatars who were expelled from their homeland in the 20th Century should not be allowed.' Russia obviously ignored the OIC's admonition. The Tatars, claiming a continuing pattern of discrimination, oppose Russia's annexation of the Crimean peninsula. In April 2015, Russia shut down the last independent T.V. station serving the Crimean Tatars.[74]

15.6.2 Global Reaction

The Organization for the Economic Cooperation Development (OECD) suspended Russia's accession process. Instead, it began to strengthen OECD ties with non-member Ukraine.[75]

On March 15, 2014, thirteen of the fifteen UN Security Council members voted in favor of a US-sponsored resolution. It would have declared the Crimean referendum invalid. No one could feign surprise when that resolution was trumped by the Russian veto. The Security Council, once again, was rendered impotent by a single permanent member's 'no' vote.[76] As noted by a frustrated Bolivian representative in the ensuing General Assembly debate:

---

73 Statement of the Prime Ministers of the Visegrad Group Countries on Ukraine (Mar. 4, 2014), www.visegradgroup.eu/statement-of-the-prime.

74 OIC warning: OnIslam News Agency, *Crimean Muslim Tatars Want Their Own Vote*, www.onislam.net/english/news/europe/470615-crimean-muslim-tatars-want-their-own-vote.html. Media shutdown: Neil Macfarquhar, *Russia Shuts Down TV Station Serving Crimean Tatars*, New York Times (Europe: Apr. 1, 2015), www.nytimes.com/2015/04/02/world/europe/russia-shuts-down-tv-station-serving-crimean-tatars.html?_r=0.)

75 William Horobin, *OECD Puts Russia's Accession Process on Hold Paris-Based Club of Nations Says It Will Strengthen Cooperation With Ukraine*, Wall Street Journal (Mar. 13, 2014), www.wsj.com/articles/SB10001424052702304914904579436773511599980.

76 Perhaps the best insights on this recurring scenario are available in Anjali V. Patil, The UN Veto in World Affairs 1946-1990: A Complete Record and Case Histories of the Security Council's Veto (UNIFO & Mansell

> The fact that the Assembly has been convened to deal with an issue that could not be resolved in the Security Council shows once again the ossified and anachronistic ways in which the Organization works.[77]

China cast the lone and predictable Security Council abstention. Its disclosed position favored creation of an international coordination mechanism to explore possibilities of a political settlement. China also urged all parties to refrain from escalation, as well as imploring international financial institutions to help restore economic and financial stability in Ukraine.[78] Its undisclosed position is that it likely abstained, so as not to be perceived as either: (a) supporting a provincial request for effective self-determination (a la Tibet and Taiwan) – if China had cast a 'yes' vote against Russia; or (b) supporting external control over a secessionist movement – if a 'no' vote, essentially favoring Russia's Crimean takeover.

Akin to its Uniting for Peace Cold War reaction to Security Council impotence,[79] the UN General Assembly debated Resolution 68/262 on March 27, 2014.[80] The Assembly's resolution called on States, international organizations, and their specialized agencies not to recognize any change in the status of Crimea or Sevastopal. All States were to refrain from actions that could disrupt Ukraine's national unity and territorial integrity. The Russian representative's comments were especially poignant. His noteworthy contribution to the debate is as follows:

> Historical justice had been vindicated. Crimea was an integral part of our country for several centuries. It shares with our country a common history, culture and, most important, a common people. Only when an arbitrary decision by the leadership of the former Soviet Union in 1954 to transfer the Crimean Sevastopol to the Ukrainian republic in the framework of a single State was that natural state of affairs upset.[81]

Pub, 1992) & David L. Bosco, Five to Rule Them All: The UN Security Council and the Making of the Modern World (Oxford, 2009).

77 *Prevention of armed conflict*, Agenda item 33, UNGA 68th Session, 80th Plenary Meeting (Mar. 27, 2014), www.un.org/en/ga/search/view_doc.asp?symbol=A/68/PV.80, at 13, *hereinafter* UNGA Crimea debate.

78 See *US-sponsored UNSC resolution on Crimea could aggravate crisis – China*, RT News, (Mar. 16, 2014), http://rt.com/news/china-un-resolution-crimea-174.

79 The 1950 Uniting for Peace raison d'être is triggered when the Security Council's lack of unanimity (among the five permanent members) fails to exercise its primary Charter responsibility – the maintenance of international peace and security – the General Assembly shall seize itself of the matter. UNGA Reso. 377, UN Doc. A/RES/377(V). Further details are available in Christian Tomuschat, *Uniting for Peace*, United Nations Audiovisual Library of International Law, online summary at: http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf.

80 UNGA Crimea debate, *above* n. 77.

81 UNGA Crimea debate, *above* n. 77, at 3. Ironically, Crimea was Tatar territory for longer than the 'several centuries' mentioned by the Russian representative.

Under that reasoning, one might have facetiously posed the following rhetorical question to the Russian representative: 'Is Alaska next?'[82] The Soviet's 1954 shift – which united Crimea and Ukraine – provided direct geographical symmetry to the region. It thereby restored the 'natural state of affairs.' It was, instead, Russia's 2014 annexation of Crimea that upset the 'natural' topographical state of affairs – by physically separating Crimea from Ukraine, as a non-contiguous Russian province.

During the General Assembly's debate, North Korea attributed the crisis in Ukraine to interference by the US and other Western countries. Its representative claimed that Crimea's reunification with the Russian Federation was conducted legitimately, through a referendum and in accordance with the UN Charter.[83] North Korea seemingly asserted that the UN Charter is similar to the Bible or the Koran – where the same words mean different things to different people.

One must acknowledge the appeal of the Bolivian representative's accusatory point – given the overthrow of Ukraine's prior democratically-elected president:

> Bolivia is a pacifist country that respects international law and actively contributes to the maintenance of international peace and security. … []Respectful of democratic principles and the principle of sovereign equality of States, Bolivia cannot remain silent in the light of the interruption of a constitutional process, in the light of a legitimately elected Government being overthrown. The phrase 'regime change' can be heard in many parts of our planet. The same words and some of the same methods have been used for several decades to overthrow democratic Governments on all continents. Democratically elected Governments are stifled in the name of democracy. Wars are begun in the name of peace. Poverty is brought into being in the name of prosperity. That is the logic of the double standard – the double standard that a few insist on imposing on others.[84]

An experienced debater could question the application of the referenced double standard to a secession-annexation debate. But to the extent that this Bolivian perspective rings true, it communicates the dim prospects for a linear dialogue within any group of international actors.

Nicaragua asserted that the Crimean referendum was a peaceful and legitimate exercise of self-determination through ballot box. Nicaragua expressly rejected 'unilateral methods.'

---

82 This hypothetical question refers to the 1867 US acquisition of Alaska from Russia. Perhaps the counterpoint may be that, like Crimea and Russia Proper, Alaska is similarly separated from the US – by an even greater distance than between Crimea and Russia.

83 UNGA Crimea debate, *above* n. 77, at 20.

84 UNGA Crimea debate, *above* n. 77, at 13.

It criticized the various national and organizational political and economic sanctions against the Russian Federation. Nicaragua has a point. International sanctions are supposed to be meted out by the Security Council, under the Charter's Chapter VII powers. It is true that it was not Russia that initiated economic sanctions. Nor was it first to impose a travel ban on selected politicians. One cannot ignore, however, that Nicaragua's finger pointing – about the west's sanctions unilateralism – conveniently ignored the unilateral nature of Crimea's declaration of independence from Ukraine.

There were a large number of General Assembly abstentions: 58. However, the General Assembly's procedural rules provide that 'Members which abstain from voting are considered as not voting.'[85] The representative abstention rationales nevertheless yield some useful national perspectives. China, for example, said that all parties should refrain from actions that could exacerbate the situation. They should, instead, work through diplomatic means to resolve the problem at hand.[86] This perspective dovetails with the *Quebec Secession* case theme: that a localized secession referendum is a means – not an end – to the ultimate resolution of a secessionist movement.[87]

One can glean a useful legal dynamic from this charged political environment. That is the *weight* to be accorded to a UN General Assembly resolution. The ICJ Statute's list of International Law sources does not include General Assembly resolutions.[88] But the absence of UNGA resolutions from that list does not mean that they can never have any legal effect. In a key passage from an opinion by one of the most respected judges of the ICJ:

> A Resolution recommending … a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision.[89]

85 Rule 87, Rules of Procedure of the General Assembly, UNGA Doc. A/520/Rev.17, at 23, www.un.org/depts/DGACM/Uploaded%20docs/rules%20of%20procedure%20of%20ga.pdf.

86 Regarding China's *Security Council* abstention argument, see text accompanying *above* n. 78.

87 See text accompanying *above* n. 51.

88 Art. 38.d.1, ICJ Statute, *above* n. 39.

89 *Majority opinion*: Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion of June 7th, 1955, ICJ Rep. 1955, Majority Opinion, www.icj-cij.org/docket/files/24/2143.pdf. *Separate Opinion*: Judge Lauterpacht, at 118-119, www.icj-cij.org/docket/files/24/2151.pdf. Further details are available in Blain Sloan, *The Nature and Function of United Nations General Assembly Resolutions* (chap. 1), in United Nations General Assembly Resolutions in Our Changing World 28 (Legal Effects) (Transnational, 1991).

So what is the overall UN agency report card regarding Crimea? The Security Council was unable to resolve this matter, when it had its turn. The UN's judicial branch did not address the burning secession issue, lurking immediately below the surface of its *ICJ Kosovo* opinion. So at present, the UN General Assembly's 100-11 vote is the best game in town for assessing the international community's reaction to Crimea's secession and Russia's annexation. Russia thus has the indisputable duty – in Judge Lauterpacht's above oft-quoted words – to give this General Assembly resolution 'due consideration in good faith.' The impact of not doing so is addressed in the next section of this chapter.

15.7 Crimea: Another Frozen Conflict

Numerous unresolved conflicts further splintered the international community – beyond the Soviet Union and the former Yugoslavian *uti possidetis* districts.[90] The Realpolitik of these de facto States rebels against the likelihood of any near-term resolution of their underlying conflicts – and no authoritative determination of the validity of their unilateral secessions. Chaos abounds in a number of regions that unfortunately host one or more of these non-negotiated secessions. The ISIS Caliphate, for example, is just getting started. It has splintered Iraq and Syria. Libya and Yemen may be next. The half-dozen provincial genies that previously popped up in Russia's backyard – South Ossetia, Abkhazia, Nagorno Karabakh, Kosovo, Crimea, and Transnistria – are not likely to be squeezed back into their prior geopolitical bottles.

This chapter has explored the legal frontiers of Crimea's secession. But the political reality is this: What would be gained by forcing the people of Crimea back into Ukraine, if that were possible? For now, Crimea is yet another frozen conflict, not likely to be resolved in our lifetimes. One could characterize the majority of these modern secessions as cannon fodder for international proxy wars. Cold War Lite is thus brewing.[91] This downward spiral is inversely proportional to the rise in anti-Russian sentiment in the West, and the meteoric rise in President Putin's post-Crimean annexation popularity in Russia.[92]

---

90 See *generally* Enver Hasani, *1. The Concept and Function of the Uti Possedetis Principle* (chap. 2), in Self-determination, Territorial Integrity and International Stability: The Case of Yugoslavia, at 19 (2002) & Steven Ratner, *Drawing a Better Line:* Uti Possedetis *and the Borders of New States*, 90 Amer. J.I.L. 590 (1996).

91 The term 'Lite' intends the analogy regarding 'lite' beer, as in Budweiser Lite. See, e.g., Ivan Tsvetkov, *After Ukraine, Russia and US are engaged in a Cold War Lite*, Russia Direct (Feb. 19, 2015), www.russia-direct.org/opinion/after-ukraine-russia-and-us-are-engaged-cold-war-lite. See also Ivan Tsvetkov, *History repeats itself in how US and Russia view each other*, Russia Direct (Dec. 10, 2014), www.russia-direct.org/opinion/history-repeats-itself-how-us-and-russia-view-each-other.

92 Michael Birnbaum, *Putin's approval ratings hit 89 percent, the highest they've ever been*, Wash. Post (June 24, 2015), www.washingtonpost.com/blogs/worldviews/wp/2015/06/24/putins-approval-ratings-hit-89-percent-the-highest-theyve-ever-been.

Budapest's Political Capital Institute first documented Russia's program of embracing East Europe's far-right political parties. As of March 2015, Moscow's sphere of influence has expanded to fifteen such parties. They are now committed to Russian-backed initiatives. The presumable goals may include fracturing NATO – given Russia's well-founded perspective that the West reneged on its promise not to expand NATO eastward (once a unified Germany entered NATO, and the Warsaw Pact was disbanded).[93]

Russia, the EU, and the US have now shaken the order that prevailed for some years after World War II. Russia recently withdrew from consultations that are required under the 1990 Conventional Forces in Europe Treaty. As part of a war-game exercise, Russia will send advanced missiles to its Baltic enclave of Kaliningrad – and nuclear-capable bombers to Crimea. Russia has now balked at discussing any additional cuts in nuclear weapons, as envisioned in the once-planned expansion of the 2010 New START treaty.[94]

Under the February 2015 Minsk Agreement,[95] Russia was supposed to withdraw troops and weapons from Ukraine. There are now reports that Russia is doing just the opposite. It is pouring troops into Ukraine. Russia has also matched the European Union's individual travel bans against selected politicians. Putin has already threatened to put nuclear weapons in Crimea. His red line will be crossed if Ukraine obtains a NATO-backed nuclear missile defense system – for a country that shares a 2,000 kilometer border with Russia.

The US is considering an Eastern European missile defense system (again). In April 2015, the U.S. sent 300 military advisors to Ukraine. The presumptive next Chairman of the US military's Joint Chiefs of Staff recently branded Russia as the greatest threat to US national security.[96] The US is, no doubt, Number One on Russia's list as well.

The related topics addressed in this chapter, associated with unilateral declarations of independence, are all 'riddled with vagueness, inconsistencies and hypocrisy … [and it] is debatable if any customary law has been formed.'[97] For the indefinite future, the associated

93 Institute analysis: *Russia seeks to sow division in the West*, Int'l New York Times 1, at 5 (June 8, 2015). Breached promise: see text accompanying notes 9-14 *above*.

94 David Ignatius, *Back to the future in Putin's Europe*, Wash. Post (Mar. 17, 2015), www.washingtonpost.com/opinions/back-to-the-future-in-putins-europe/2015/03/17/6c8dbb94-cce9-11e4-8c54-ffb5ba6f2f69_story.html.

95 Full text of the Minsk agreement, London Financial Times (Feb. 12, 2015), www.ft.com/cms/s/0/21b8f98e-b2a5-11e4-b234-00144feab7de.html#axzz3eUAFWHTU.

96 As stated in his congressional testimony: 'If you want to talk about a nation that could pose an existential threat to the United States, I'd have to point to Russia. And if you look at their behavior, it's nothing short of alarming. … My assessment today … is that Russia presents the greatest threat to our national security. From a military perspective, I think it's reasonable that we provide that support to the Ukrainians. … And frankly, without that kind of support, they're not going to be able to protect themselves against Russian aggression.' Deb Riechmann, Russia is biggest threat to US national security, Joint Chiefs nominee tells Congress, US News & World Report (July 9, 2015), www.usnews.com/news/politics/articles/2015/07/09/joint-chiefs-nominee-says-he-will-assess-strategy-against-is.

97 *Observing the Questions*, *above* n. 38, at 297.

legal void will be occupied (not filled) by the International-Law-does-not-permit-does-not-prohibit description attributable to the so called law of Remedial Secession.

Of all post-Cold War secessionist conflicts, Crimea has proved to be the most inflammatory. One reason is that core power politics has frozen conflicted areas, like Crimea, into geopolitical Twilight Zones. There is no broadly-based secession Rule of Law. That is not likely to change. It is likely to spawn more splintering of States – with the next 'Crimeas' occurring in the Middle East and Africa.

The results are that these secessionist regimes will share the following ill-fated characteristics. They will be: economically stagnant; subject to military occupation; not UN member States; in legal limbo; proxy war orphans for the indefinite future; and pawns in an international chess match between competing kings.

They say it's hard to predict, especially when it's about the future. But it is *not* hard to predict what will come to pass, if Ukraine gets its desired nuclear missile defense shield – and President Putin counters by actually placing Russian nuclear weapons in Crimea. We can remove the restrictive word 'Lite' from the phrase Cold War Lite. Then, you, me, and our children, will bear witnesses to the already evolving Cold War Two.[98]

98 As stated at the close of the June 2015 oral presentation of this writing in Debrecen and Budapest: 'It is my hope that the leaders – and future leaders in this room – will continue to shine your academic light on the decision makers who will hopefully live up to the familiar adage that "With great power comes great responsibility".'