How to Uphold the Territorial Integrity of Ukraine

By Mikulas Fabry[*]

Abstract

Russia's absorption of Crimea violated the norm of territorial integrity, which protects states against involuntary loss of territory to other states. This article addresses two different arguments on how to deal with this violation: (1) That Ukraine lost Crimea for good and that this should be acknowledged, both politically and legally, if one seeks to forestall forcible change of interstate boundaries elsewhere; and (2) that third party countermeasures against Russia can roll back its territorial gains in Ukraine, but only if they are much more materially robust than they have been so far. While mutually incompatible, the arguments raise an important issue—how to uphold international legal norms in particular situations—an issue to which scholars of international law do not pay much detailed attention. Yet doing so is important because international legal norms leave governments with wider decision-making discretion than is commonly presumed, and different ways of upholding a norm are predisposed to generate different effects, including legal effects. Having examined the two approaches, the article argues that the best way to uphold the territorial integrity of Ukraine is by staking a middle ground between them, placing emphasis on the policy of non-recognition.

A. Introduction

Russia's absorption of the "Republic of Crimea" into its federal structure on 18 March 2014 constituted the first forcible incorporation of a territory across interstate boundaries in Europe since the end of World War II. It is, therefore, not surprising that many foreign governments, along with various segments of their population, reacted with alarm to this move. They saw it as a grave violation of one of the cardinal norms of international relations and law—that of territorial integrity—which protects states against involuntary loss of territory to other states.[1] Strong public denunciations and diplomatic and economic sanctions that followed have not, however, made the Russian government reconsider its decision. Indeed, Russia subsequently intervened in other regions of Ukraine, two of which—Donetsk and Luhansk—declared their independence and desire to integrate with

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[1] *See generally* Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215 (2001) (enumerating the norm of territorial integrity).

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

Russia in April. The inability to stop and reverse Russian exploits in Ukraine has generated a torrent of commentary. Two different arguments made by observers are addressed here: (1) That Ukraine lost Crimea for good, irrespective of any conceivable action third parties may choose to undertake, and that this must be acknowledged, both politically and legally, if one seeks to forestall forcible change of interstate boundaries elsewhere; and (2) that third party countermeasures against Russia can roll back Russia's territorial gains in Ukraine, but to be effective they must be much more materially robust than they have been so far.

While mutually incompatible, both arguments are concerned with preserving the norm of territorial integrity as such. Consciously or not, their proponents raise an important issue: How to uphold international legal norms in particular situations. Scholars of international law tend not to pay detailed attention to this issue, even in cases of serious violations by powerful states; they are often content to limit case analysis to ascertaining the substance of the pertinent norms. Yet doing so is important because international legal norms leave governments with wider decision-making discretion than is commonly presumed, and different ways of upholding a norm are predisposed to generate different effects—including legal effects—within, and on, the rule-based international system.

This article examines the question of how to uphold the norm of territorial integrity in the Ukrainian case. It argues that the best way to do so is by staking a middle ground between the accommodationist and hawkish approaches towards Russia. Specifically, I highlight the importance of non-recognition, one of the countermeasures widely adopted in the Crimean case, which entails the refusal to admit the lawfulness of an actual or projected alteration in legal status, capacity, or rights. Both approaches presume ineffectiveness of this diplomatic instrument. Yet, I demonstrate that non-recognition of illegally acquired territories, for all its inherent limitations, actually has a respectable history. Since 1945—with the relatively minor exception of colonial "enclaves"—no such acquisition has been consolidated into an internationally valid title, even when engineered by a great power. For that reason the accommodationist contention that Crimea is permanently Russian is highly premature. Against the hawkish position, this article suggests that more forceful sanctions do not necessarily lead to desired outcomes. In fact, limited sanctions, even non-recognition alone, have sometimes been sufficient in effecting a reversal of illegal territorial situations, albeit usually over a lengthy period of time. Whereas particular sanction designs are bound to generate disagreements and controversies, the guiding principle ought to be a prudent balance in upholding a multiplicity of state responsibilities, both international and national. This is all the more necessary when a great power such as Russia is the target.

B. Russia's Forcible Incorporation of Crimea

The facts of what occurred in Ukraine in February and March 2014 are less disputed today than they were at the time of their occurrence. Following a highly contested change of government in Kiev on 22 February, Russia's military forces, as later admitted publicly by President Putin on several occasions, deployed to take control over military, governmental, and transportation installations throughout the Crimean peninsula. New authorities in Kiev denounced this action, which began on 27 February, as an "illegal entry."[2] With Russian troops surrounding the autonomous parliament and other key public buildings, politicians of a pro-Russian party captured control of the Crimean autonomous government, and hastily organized a declaration of Crimean independence from Ukraine and unification with Russia on 11 March.[3] The politicians held a referendum to approve the move on 16 March. On 17 March, following the 96.8% approval of the unilateral secession, Russia recognized the "Republic of Crimea"[4] as an independent state.[5] Having agreed to the petition for accession to the Russian Federation, the Russian government then, equally swiftly, signed an "interstate treaty" with the "Republic of Crimea" to that effect on 18 March.[6] The upper chamber of the Russian legislature ratified the treaty on 21 March.

Russia employed several arguments to justify its actions. It defended its involvement in Crimea, and later in eastern Ukraine, by the need to protect human rights of Russian citizens and "compatriots" in the wake of what it considered an anti-constitutional seizure of power by anti-Russian groups in Kiev. Russia alluded to the right to protect a state's nationals abroad and invoked the 1983 United States' military intervention in Grenada.[7] It claimed to have received invitations to intervene by President Yanukovich—whose legitimacy it continued to recognize, and whose letter it produced at the United Nations

[2] *See* U.N. SCOR, 69th Sess., 7124th mtg. at 3, U.N. Doc. S/PV.7124 (Mar. 1, 2014) (statement of Ukraine).

[3] *See Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol*, THE STATE COUNCIL OF THE REPUBLIC OF CRIMEA (Mar. 11, 2014), http://www.rada.crimea.ua/news/11_03_2014_1 (declaring Crimean independence from Ukraine and unification with Russia).

[4] This entity was proclaimed in the March 11 declaration as consisting of the Autonomous Republic of Crimea and the city of Sevastopol, which had a separate status in Ukraine.

[5] *See Executive Order on Recognizing Republic of Crimea*, PRESIDENT OF RUSSIA (Mar. 17, 2014), http://en.kremlin.ru/events/president/news/20596.

[6] *See Agreement on the Accession of the Republic of Crimea to the Russian Federation Signed*, PRESIDENT OF RUSSIA (Mar. 18, 2014), http://en.kremlin.ru/events/president/news/20604.

[7] *See* U.N. SCOR, 69th Sess., 7125th mtg. at 3 and 10, U.N. Doc. S/PV.7125 (Mar. 3, 2014) (statements of the Russian Federation).

Security Council (UNSC)[8]—and by the newly installed Crimean leadership.[9] Once Ukrainian authority on the peninsula was effectively quelled, Russia supported the notion of Crimean independence as a justifiable, albeit "extraordinary," response to the "legal vacuum" created by the "violent coup" in Kiev,[10] and then declared the 16 March referendum and the request for accession to Russia to be a valid exercise of the right to self-determination in international law.[11] In support of its embrace of Crimea's unilateral secession, Russia also invoked: (1) The precedent of U.S.-led recognition of Kosovo's unilateral secession—just as it had done when it recognized Abkhazia and South Ossetia in 2008—and (2) the *Kosovo* (2010) advisory opinion of the International Court of Justice, which concluded that unilateral declarations of independence do not, as such, violate international law.[12]

While individual states always justify their actions by claiming adherence to existing international norms—asserting either that (1) there is a compatibility with a previous construction and relevant precedents of a norm, or (2) that there are compelling reasons for an innovative interpretation based on the new, unique, or unusual circumstances of the case or other pertinent moral and legal considerations—the authoritative judgment whether this is so can hardly be theirs alone. Other states governed by these norms must accept these justifications. Despite Russia's attempts to make a plausible case, no state openly endorsed its military intervention, and only a handful of countries publicly accepted the 16 March referendum as a valid exercise of popular will,[13] or formally recognized Crimea's incorporation into Russia.[14] Most public reactions to Russia's assertions were markedly negative: States and numerous international organizations—the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE), the Group of Eight,

[8] *See* Statement by the President of Ukraine, *in* Permanent Representative of the Russian Federation, Letter dated Mar. 3, 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/146 (Mar. 3, 2014).

[9] *See* S/PV.7124, *supra* note 2, at 5 (statement of the Russian Federation).

[10] *See* U.N. SCOR, 69th Sess., 7134th mtg. at 15, U.N. Doc. S/PV.7134 (Mar. 13, 2014) (statement of the Russian Federation).

[11] *See* Address by President of the Russian Federation, in Permanent Representative of the Russian Federation, Letter dated Mar. 19, 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, annexed to U.N. Doc. A/68/803–S/2014/202 (Mar. 19 2014).

[12] *See Statement by the Russian Ministry of Foreign Affairs Regarding the Adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED'N (Mar. 11, 2014), http://www.mid.ru/brp_4.nsf/0/4751D80FE6F93D0344257C990062A08A. In the UNSC debate on March 13, 2014, Russia also invoked the case of Mayotte, an island affirmed by the UNGA to be part of the Comoros in 1975, but where France, as the withdrawing colonial power, nevertheless organized a referendum in 1976 in which the residents voted to remain part of France. *See* S/PV.7134, *supra* note 10, at 16.

[13] Afghanistan, Armenia, Kazakhstan, Kyrgyzstan, Nicaragua, and North Korea.

[14] Afghanistan, Nicaragua, Syria, and Venezuela.

the North Atlantic Treaty Organization, and the Visegrad Group—rejected Russia's use of force, the Crimean referendum, and Crimea's absorption into Russia. Outsiders, including the United Nations (UN) and OSCE human rights representatives on the ground,[15] denied that there was, anywhere in Ukraine, any systematic or widespread persecution of the Russian minority or speakers. As such, the protection and welfare of this group, consisting overwhelmingly of Ukrainian citizens, was the responsibility of the Ukrainian, not Russian, state. Critics of Russia pointed that the only body constitutionally authorized to invite foreign troops onto Ukrainian territory was the country's parliament, and not its president or autonomous entity.[16] They construed the referendum in, and the transfer of, Crimea to have been the result of invalid external military force by Ukraine's eastern neighbor[17] rather than genuine internal self-determination by the people of the peninsula, as Russia claimed.[18] They considered the transfer to be, in fact if not in formal designation, an "annexation"[19] and, as such, a grave violation of the norm of territorial integrity.

Following the sole negative vote by Russia that vetoed the UNSC draft resolution reaffirming Ukraine's internationally recognized boundaries,[20] the UN General Assembly (UNGA) adopted the almost identical Resolution 68/262, titled "Territorial Integrity of

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[15] *See* U.N. SCOR, 69th Sess., 7144th mtg. at 3–5, U.N. Doc. S/PV.7144 (Mar. 19, 2014) (statement by Ivan Šimonović, Assistant Secretary-General for Human Rights).

[16] *See* S/PV.7125, *supra* note 7, at 5 (statement of the United States of America).

[17] *See* S/PV.7134, *supra* note 10, at 7–8 (statement of the United Kingdom).

[18] *See Statement by the Russian Ministry of Foreign Affairs Regarding Accusations of Russia's Violation of its Obligations Under the Budapest Memorandum of 5 December 1994*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED'N (Apr. 1, 2014), http://www.mid.ru/brp_4.nsf/0/B173CC77483EDEB944257CAF004E64C1. Ironically, during the *Kosovo* proceedings before the International Court of Justice, Russia argued that sub-state groups cannot break away unilaterally from their parent states, including by invoking the right to self-determination, except in conditions justifying remedial secession. These conditions should be:

> [L]imited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of people in question. Otherwise all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the framework of the existence state.

By Russia's own publicly articulated standards, the conditions for a justifiable unilateral secession of Crimea from Ukraine were not met. *See* Written Statement of the Russian Federation (Kosovo) 2009 I.C.J. 31–32, ¶ 88 (Apr. 17, 2009).

[19] *See* U.N. SCOR, 69th Sess., 7138th mtg. at 4, U.N. Doc. S/PV.7138 (Mar. 15, 2014) (statement of the United States of America); *see Council Conclusions on Ukraine*, COUNCIL OF THE EUROPEAN UNION (Mar. 17, 2014), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/141601.pdf; *see also* S/PV.7144, *supra* note 15, at 6, 10–11, 13 and 15–17 (statements of Australia, France, Jordan, Lithuania, the Republic of Korea, and the United Kingdom).

[20] S.C. Draft Res., U.N. Doc. S/2014/189 (Mar. 15, 2014).

Ukraine."[21] The preamble recalled: Article 2 of the UN Charter, which obligates the UN member states to refrain from threatening or using force against the territorial integrity and political independence of any state and to settle any dispute peacefully; UNGA Resolution 2625 (XXV), which stipulates that the territory of a state shall not be the object of forcible acquisition by another state; the Helsinki Final Act (1975), in which Russia guaranteed to respect the borders of other states in Europe; and the Budapest Memorandum (1994), the Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine (1997), and the Alma-Ata Declaration (1991), in which Russia formally acknowledged the former Soviet boundaries of Ukraine, with Crimea included. In the operative section the resolution affirmed the internationally recognized boundaries of Ukraine,[22] declared the 16 March referendum to have no validity and to constitute no basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol,[23] and called upon all states, international organizations, and specialized agencies not to recognize any such alteration and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[24]

Resolution 68/262 was adopted by one hundred votes to eleven, with fifty-eight abstentions, but these numbers do not fully capture the extent of agreement with the principles in the text. During the UNGA discussion on the resolution's draft,[25] several delegations—Argentina, Botswana, Ecuador, Jamaica, Saint Vincent and the Grenadines, and Uruguay—explicitly endorsed the resolution's key stipulations but chose abstention for other reasons. Indeed, Argentina, along with fellow abstainer Rwanda, voted for the UNSC draft resolution twelve days earlier. Additionally, China and Algeria abstained, but voiced their general support for the territorial integrity of Ukraine.[26] In any case, with the sole exception of North Korea, no statement made in the UNGA session on Resolution 68/262 openly supported Russian actions or their justifications. Intriguingly, Belarus, which voted against the text and whose president initially appeared to support Russia, later voiced disapproval of the Russian takeover of Crimea.

Public rebukes and widespread support for non-recognition of Crimea's altered status were coupled with an evolving regime of diplomatic and economic sanctions against Russia by individual states and international organizations, including the United States, Canada,

[21] G.A. Res. 68/262, U.N. doc. A/RES/68/262 (Mar. 27, 2014).

[22] *Id.* at ¶1.

[23] *Id.* at ¶5.

[24] *Id.* at ¶6.

[25] *See* U.N. GAOR, 68th Sess., 80th plen. mtg. at 1, U.N. Doc. A/68/PV.80 (Mar. 27, 2014).

[26] China also did so on several occasions in UNSC debates. *See* S/PV.7138, *supra* note 19, at 7 (statement of China); *see also* S/PV. 7144, *supra* note 15, at 14 (statement of China).

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

Australia, Japan, and the EU. Despite this broadly negative reaction to its actions, however, the Russian leadership showed no inclination to retreat from Crimea. In fact, it shortly opted for active backing of pro-Russian separatists in eastern Ukraine's Donetsk and Luhansk regions, all the while continuing to insist—as it had done with respect to Crimea only to later admit otherwise—that it had no direct or indirect military involvement in those areas.

The outside inability to promptly affect Russian conduct *vis-à-vis* Ukraine's territory has spawned a debate about long-term policy towards Crimea and eastern Ukraine. Some observers have concluded that, given what the outside world has done—and is conceivably prepared to do—for Ukraine, it is difficult to envision how Russia can be dislodged from Crimea. In such circumstances, an international settlement that would allocate Russia, whether directly[27] or following a newly negotiated referendum with external monitors,[28] the evidently heavily pro-Russian peninsula would satisfy Russia and keep it from engaging in further legally and politically dubious actions in the former Soviet space. William Burke-White puts it bluntly: "Crimea is Russia's."[29] He argues that "Russia has not only secured the territory on its own," but also its legal arguments concerning territorial integrity, self-determination, and the use of force "set a precedent of lasting significance."[30] In his view, external actors can, at most, seek to check the precedential impact of Russia's legal interpretations for other situations, not least for those who voted against, abstained, or did not vote on UNGA Resolution 68/262.[31] Concentrating more on the future of former Soviet republics than the international legal system, Stephen Kotkin proposes—in light of the sanctions that have not compelled Russia to fundamentally reverse its course[32]—negotiations, the goal of which would be, "first, to exchange international recognition of Russia's annexation of Crimea for an end to all the frozen conflicts in which Russia is an accomplice and, second, to disincentivize such behavior in the future."[33] It should be emphasized that while views advocating acceptance of the annexation of Crimea differ in focus—and they have been expressed or implied not just by academics but also by some current and former European leaders, including those in Germany, Czech Republic, Slovakia, and Hungary—they are at least partly motivated by a wish to avert circumstances

[27] Stephen Kotkin, *The Resistible Rise of Vladimir Putin*, 94 FOREIGN AFFAIRS 140, 152 (2015).

[28] Michael O'Hanlon & Jeremy Shapiro, *Crafting a Win-Win-Win for Russia, Ukraine and the West*, WASH. POST (Dec. 7, 2014), http://www.washingtonpost.com/opinions/crafting-a-win-win-win-for-russia-ukraine-and-the-west/2014/12/05/727d6c92-7be1-11e4-9a27-6fdbc612bff8_story.html.

[29] William W. Burke-White, *Crimea and the International Legal Order*, 56 SURVIVAL 65, 65 (2014).

[30] *Id.* at 74.

[31] *Id.* at 74–78.

[32] *See* Kotkin, *supra* note 27, at 153.

[33] *Id.* at 152.

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

leading to Crimea-like developments in the future. They do not advocate an abandonment of the norm of territorial integrity as such; on the contrary, they clearly hope that their approach to the Ukrainian case would help preserve it beyond that case.[34]

A more common belief is that the territorial fruits of Russia's intervention in Ukraine can be reversed, but only if more forceful policies against Russia are applied. This view has been voiced by a variety of individuals, ranging from neoconservative and liberal internationalist commentators, such as Jeremy Rabkin,[35] Eliot Cohen,[36] and Stewart Patrick,[37] to policymakers such as John McCain and Ukrainian, Polish, and Baltic political leaders and analysts. Its proponents have worried that in the absence of vigorous opposition to Russia, Russia's and other revisionist governments may feel encouraged to replicate the Ukrainian scenario elsewhere. Among the feared consequences of a weak posture *vis-à-vis* Russia have been a global weakening of the norms guiding the use of military force; the prohibition of forcible acquisition of foreign territory; the inviolability of legally binding treaties setting interstate boundaries; and, given that Ukraine relinquished the nuclear weapons on its territory in exchange for great power security and boundary assurances in the Budapest Memorandum of 1994, the nuclear non-proliferation and disarmament regime. Proposed countermeasures have included wholesale energy, banking, and other sectoral sanctions; major military assistance, including weapons supplies, to the Ukrainian armed forces; and the establishment of new permanent NATO bases in NATO member states bordering Russia or other former Soviet republics.

This article agrees with both the accommodationist argument, that removing Russia from Crimea is a tall order, and with the hawkish position that, if left uncontested, Russian actions may have a host of harmful legal and political consequences, both regionally and globally. Yet, there is a middle ground between formally conceding Crimea as part of Russia and resorting to ever more forceful countermeasures in the hope that they will make Russia leave Crimea and cease propping up the "Donetsk Peoples' Republic" and the "Luhansk People's Republic." This third approach emphasizes non-recognition, a policy which the two approaches assume either ignores reality or is woefully insufficient as a

[34] This is not to suggest that there have been, in the wake of Crimea, no views questioning the norm as such. For a skeptical view, *see* Erik Voeten, *What is so Great About 'Territorial Integrity' Anyway?*, WASHINGTON POST (Mar. 17, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/17/what-is-so-great-about-territorial-integrity-anyway/.

[35] Jeremy Rabkin, *A More Dangerous World*, 14 CLAREMONT REVIEW OF BOOKS 2 (2014), *available at http://www.claremont.org/article/a-more-dangerous-world/#.VXZVn1xViko*.

[36] Eliot Cohen, *The 'Kind of Thing' Crisis*, 10 THE AMERICAN INTEREST 3 (2015), *available at* http://www.the-american-interest.com/2014/12/10/the-kind-of-thing-crisis/.

[37] Stewart M. Patrick, *Crimea: Stop Citing International Law and Start Condemning Russian Expansionism*, THE INTERNATIONALIST (Mar. 17, 2014), http://blogs.cfr.org/patrick/2014/03/17/crimea-stop-citing-international-law-and-start-condemning-russian-expansionism/.

response to a major violation of international law. As will be shown, given its historical record, a steadfast policy of non-recognition of the altered status of Crimea and of possibly other parts of Ukraine provides the surest, though protracted, path to a future restoration of Ukraine's territorial integrity. While this third approach rejects that such a restoration can only be achieved by employing increasing coercive pressure on Russia, it is not against combining non-recognition with other sanctions that directly reinforce it.

C. Non-Recognition of a Claimed Territorial Title in International Practice

Although there were attempts to institutionalize non-recognition of territorial acquisitions by force prior to the 20th century, especially by states and jurists in the Americas, a fully-fledged legal foundation for its systematization arose only with the legal prohibition of forcible territorial change across interstate boundaries in the League of Nations Covenant (1919). In Article 10 of the treaty establishing the first collective security organization, the signatories undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League."[38] Almost immediately, a controversy arose over both the exact scope of the provision and the content of third party obligations should a violation occur.[39] This controversy was not settled in 1919, though Woodrow Wilson, the chief proponent of Article 10 as well as the League as a whole, insisted that "territorial integrity is not destroyed by armed intervention; it is destroyed by retention of territory, by taking territory away from [a state]."[40]

What might not have been clear from the broad wording in the text of the Covenant became clarified over time in governmental responses to actual situations.[41] There can be no question that Article 10 was seen as being violated when external force brought about an altered status of a League member territory. The first significant case arose when Japan forcibly occupied the Chinese province of Manchuria in 1931 and then an independent "State of Manchukuo" was declared on that territory in 1932. The League of Nations, as well as the United States, rejected the Japanese assertions that Manchukuo was the product of authentic internal self-determination and that its use of force and occupation was an unrelated act of enforcing Japan's treaty rights in Manchuria.[42] The response first

[38] League of Nations Covenant, art. 10.

[39] *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 62–64 (1963).

[40] *A Conversation with Members of the Senate Foreign Relations Committee: August 19, 1919*, *in* 62 THE PAPERS OF WOODROW WILSON 392 (Arthur S. Link ed., 1990).

[41] *See generally* Joseph O'Mahoney, *Rule Tensions and the Dynamics of Institutional Change: From "To Victors Go the Spoils" to the Stimson Doctrine*, 20 EUR. J. INT'L REL. 834 (2014).

[42] *See* MIKULAS FABRY, RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776 135 (2010).

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

adopted by the U.S., and then by the League, later became known as the Stimson Doctrine.[43] In identical letters sent to China and Japan following Japan's seizure of Manchuria in 1931, U.S. Secretary of State Henry Stimson announced that the United States did not "intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of 27 August 1928, to which treaty both China and Japan, as well as the United States, are parties."[44] As the United States had not become a League member, it could not embed its policy in Article 10. Instead, its basis was the widely ratified Pact of Paris, better known as the Kellogg-Briand Pact, a multilateral treaty that renounced war as a legitimate instrument in national policies of its signatories and committed them to settling their disagreements by peaceful means, thus indirectly strengthening the legal proscription of forcible territorial revisionism. In a matter of weeks, however, the League of Nations Council adopted the American position, added a reference to Article 10, and made non-recognition a policy that all League members "ought" to follow.[45] The League's Assembly then passed a resolution that made the policy "incumbent" upon its members.[46] After a fact-finding investigation by a specially appointed commission, the Assembly affirmed Chinese sovereignty over Manchuria and denied the legitimacy of the Japanese-controlled "State of Manchukuo" declared in that territory in 1932.[47]

The instrument of non-recognition was designed to prevent effective control of a territory acquired in violation of international law from producing a legally valid title. Between 1932 and 1938 two inter-American treaties, the Rio Anti-War Treaty of Non-Aggression and Conciliation (1933) and the Montevideo Convention on the Rights and Duties of States (1933), bolstered the policy of non-recognition by making it an explicit legal obligation. In addition to Manchukuo, the League also invoked non-recognition in the Chaco and Leticia conflicts in South America and Italy's conquest of Abyssinia. It was rejected only by Japan, Germany, and Italy—the future Axis allies intent on forcible expansionism. In 1938 this consensus suffered a blow when several League members—seeing that even economic sanctions did not lead to the restoration of a member state, and unwilling to put in place further coercive measures—recognized Italy's sovereignty over Abyssinia. Thereafter,

[43] *See id.* at 137.

[44] *Identical Notes from the US Secretary of State to the Chinese and Japanese Governments, January 8, 1932*, *in* DOCUMENTS ON INTERNATIONAL AFFAIRS 262 (John W. Wheeler-Bennett ed., 1933).

[45] *Note by Members of the Council of the League of Nations Other Than China and Japan to Japan, February 16, 1932*, 12 MONTHLY SUMMARY OF THE LEAGUE OF NATIONS 45 (1932).

[46] *See Resolution Adopted by the Assembly on March 11, 1932*, 12 MONTHLY SUMMARY OF THE LEAGUE OF NATIONS 106 (1932).

[47] *See Extracts from the Report of the Committee of Nineteen to the Assembly of the League of Nations, February 15, 1933* and *Resolutions Adopted by the League Special Assembly on February 24, 1933*, *in* DOCUMENTS ON INTERNATIONAL AFFAIRS 384–91 (1933).

Britain and France each legally acknowledged Italy's conquest as well. The express purpose of this exceptional measure was to keep the general peace.[48] The Franco-British hope was to steer Italy away from further forcible territorial revisionism and from its alliance with Germany, but the act had an opposite effect. Rather than being pacified, the offender grew emboldened to embark on further conquests, invading Albania in April 1939. Similarly, the Franco-British attempts in 1938 to appease Hitler by acknowledging Germany's forcible annexation of Austria and by consenting to Germany's demand at the Munich conference that Czechoslovakia give up Sudetenland, made under the threat of force, merely encouraged territorial aggression, starting with the destruction of the rest of Czechoslovakia in March 1939.

Following these fiascos, Britain and France returned to the policy of non-recognition. It was primarily other Axis powers and their small neutral neighbors that recognized the annexation of Bohemia and Moravia, the proclamation of an independent "Slovak Republic," and Axis annexations after the eruption of the world war in September 1939. Non-recognition was the normative basis upon which governments-in-exile—mostly in London—were established: They were the legal representatives of their illegally conquered countries. In addition, Britain and the United States, which applied the policy most consistently, refused to recognize the forcible annexations undertaken by the Soviet Union between the signing of the Molotov-Ribbentrop Pact in August 1939 and the German invasion of the Soviet Union in June 1941: Those of the Baltic republics and parts of Poland, Romania, and Finland.[49]

From 1941 on, a central purpose of the anti-Axis alliance—which was organized outside of the framework of the League of Nations, defunct since 1940—was to overturn the Axis conquests. This was achieved with respect to "Manchukuo," the "Slovak Republic," and all the other territories, except those seized by the Soviet Union. As the Kellogg-Briand Pact contained no provision comparable to Article 10 of the Covenant implying the obligation to respect the territorial integrity of parties violating it,[50] there were no objections to the Soviet Union keeping the seized territories of the enemy states—Romania, Finland, Germany, and Japan—as an indemnity for wartime losses and a security buffer, in line with pre-1919 justifications of defensive conquest. The case of the loss of eastern Poland to the

[48] *See Statement by the Representative of the United Kingdom With Regard to the Anglo-Italian Agreement of April 16, 1938, May 10, 1938*, 18 MONTHLY SUMMARY OF THE LEAGUE OF NATIONS 102–03 (1938). Hersch Lauterpacht writes that it was on the basis of Italy's failure to maintain the peace that Britain, in 1940, withdrew its recognition of Italian annexation and declared itself in favor of the restoration of Ethiopia's independence and its king. *See* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 356 (1947).

[49] For a detailed overview of non-recognition practice between 1932 and 1941, *see* ROBERT LANGER, SEIZURE OF TERRITORY: THE STIMSON DOCTRINE AND RELATED PRINCIPLES IN LEGAL THEORY AND DIPLOMATIC PRACTICE 123–254 (1947).

[50] *See* SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 199 (1996).

Soviet Union was far more controversial, as Poland was an ally and its government-in-exile opposed it. Despite their initial preference for the restoration of Poland in its pre-World War II borders, the United States and Britain accepted, at the 1945 Yalta conference, the Soviet claims to Poland's pre-1939 east, while territorially compensating Poland at the expense of Germany. In contrast, the U.S., the U.K., and other predominantly Western states maintained their non-recognition of the forcible incorporation of the three Baltic republics consistently until their restoration in 1991.

Whatever the shortcomings of the League of Nations, the United Nations founding conference in 1945 more or less reproduced the League's provision on territorial integrity. Article 2(4) of the UN Charter stipulated: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[51] Similar provisions found their way into the founding and other binding documents of regional organizations such as the Arab League (1945), the Organization of American States (1948), and later the Organization of African Unity (1963), the Association of Southeast Asian Nations (1967), and the Conference for Security and Cooperation in Europe (1975). At the global level, numerous UN resolutions subsequently reiterated inadmissibility of forcible territorial change. Important UN General Assembly Resolutions 2625 (XXV) on Friendly Relations and Cooperation Among States and 3314 (XXIX) on the Definition of Aggression declared that no such change shall be recognized as legal.[52]

By any measure, the post-1945 order has been very successful at suppressing the use of interstate force for territorial gain. The reason has not been the more compact collective security machinery of the United Nations—the UNSC has been for most of its existence deeply divided, and UN members have displayed only marginally more willingness to risk blood and treasure against forcible territorial revisionism than League members—but a decline in clear-cut attempts at armed territorial revisionism as such. To the extent it has occurred, it has, in most cases, met with international non-recognition. The UNSC or the UNGA resolutions called for, or implied, non-recognition in the cases of Western Sahara (1975), East Timor (1976), East Jerusalem (1980), the Golan Heights (1981), Northern Cyprus (1983), and Bosnia and Herzegovina (1992).[53] The only internationally legitimized forcible acquisition of title over sovereign territory followed India's takeover of the Portuguese colonial domain of Goa (1961) and Dahomey's (today Benin) annexation of the Portuguese colonial coastal city of São João Baptista de Ajudá (1961). While most Western

[51] U.N. Charter art. 2, para. 4.

[52] *See* G.A. Res. 2625 (XXV), Annex, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); *see also* G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

[53] Non-recognition was also called for in the cases of Southwest Africa (Namibia), Rhodesia, and South African Bantustans. These involved territorial claims that were nearly universally seen to have violated the right to colonial self-determination.

countries condemned these resorts to force, others acquiesced to them, seeing force as a tolerable response to the Portuguese defiance of the general decolonization consensus, which envisioned that tiny colonial enclaves abutting newly independent countries would be transferred to them.[54]

D. An Assessment of the Policy of Non-Recognition Prior to Crimea

Since its introduction in 1932, non-recognition has been a target of substantial criticism, above all for its impotence to materially reverse the violations of territorial integrity. The conquests of Manchuria, Abyssinia, and other territories, the argument went, showed that League members did not regard themselves as earnestly obligated to fulfill their pledge to preserve the territorial integrity of fellow member states; instead they reconciled themselves to those conquests. Under those circumstances a frank recognition of *de facto* situations was preferable to a pretense that, in the eyes of international law, nothing changed.[55] Law had to follow facts on the ground or face irrelevance: There was not much point, as one author deftly put it, in "closing the barn door after the horse has escaped."[56] Non-recognition was at best an ineffective resort to legal fictions, and at worst a downright risk to peaceful relations with the castigated country.[57]

As the critics suggest, and as the actual practice has demonstrated, there can be no question that non-recognition is an imperfect substitute for a system of collective security in which every declared breach of the norm of territorial integrity would be readily met with the willingness to use all means necessary to restore the legal status quo. In the absence of such a system, however, non-recognition has proved a rather effective long-term instrument of opposition to forcible territorial change. Apart from upholding the fundamental integrity of the rule of international law by denying that a serious breach of law can metamorphose into a lawful outcome (*ex injuria jus non oritur*), the practice has had real practical effects. By insisting on the pre-existing legal rights, non-recognition has made the *de facto* holding of a territory continually problematic and insecure. It has been entirely dependent on the holder's physical ability to control the territory. But akin to title to property in domestic society, title to territory in international society denotes not actual possession but a socially validated right to possess.[58] If the objective is permanent, stable,

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[54] *See* Quincy Wright, *The Goa Incident*, 56 AM. J. INT'L L. 617–32 (1962).

[55] *See* Herbert W. Briggs, *Non-Recognition of Title by Conquest and Limitations on the Doctrine*, 34 AM. SOC'Y OF INT'L LAW PROCEEDINGS 79–82 (1940).

[56] *Id.* at 81.

[57] *See* Edwin M. Borchard & Phoebe Morrison, *The Doctrine of Non-Recognition*, *in* LEGAL PROBLEMS IN THE FAR EAST CONFLICT 157 (Quincy Wright ed., 1941).

[58] During the UNSC debate following Russia's *de facto* annexation of Crimea, Samantha Power, the US ambassador to the UN, captured the idea thus: "The national and international legal status of Crimea has not changed. A thief can steal property, but that does not confer the right of ownership on the thief." S/PV.7144, *supra* note 15, at 11.

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

and secure possession internationally, *de facto* possession is necessarily deficient; rightful possession hinges on external legitimacy. Already, the end of World War II demonstrated that a sharp decline or collapse in the physical ability to control an illegitimate possession leads to the loss of that possession.

Non-recognition's abiding legitimization of legally valid claims has several practical manifestations. At the diplomatic level, these claims have become integral to proposed frameworks to settle outstanding conflicts, whether efforts to mediate disputes over Western Sahara, East Timor, Northern Cyprus, East Jerusalem, the Golan Heights, or Bosnia and Herzegovina. This has been the case not only in relation to diplomatic schemes put forward shortly after non-recognition was announced—as in the case of Mauritania's 1979 withdrawal from the portion of Western Sahara it laid claim to and occupied in 1976—but also decades later. For example, according to published reports, Israel found itself unable to offer peace settlements to Syria and the Palestinians in the late 1990s and 2000s without giving up East Jerusalem and the Golan Heights, an outcome that would likely not have occurred if outsiders simply accepted East Jerusalem and the Golan Heights as Israeli territories when the Israeli parliament decided, in 1980 and 1981 respectively, that each would be governed by Israeli law. Non-recognition, of course, has also served as the first step to, and a necessary justificatory basis for, other sanctions. The long-standing non-recognition, as well as diplomatic and economic isolation, led the population of the "Turkish Republic of Northern Cyprus" to vote in 2004 for the UN-mediated proposal to reunify the entity with the Republic of Cyprus, as the latter existed prior to Turkey's invasion of the island in 1974.[59] The direct Iraqi annexation of Kuwait as an Iraqi province in 1990 was followed, after a period of gradually escalating sanctions, by an overwhelmingly supported UNSC-authorized military action to restore Kuwaiti sovereignty and territorial integrity.

E. Upholding the Territorial Integrity of Ukraine

Given that non-recognition has been employed on its own as well as in conjunction with a wide array of other countermeasures, the question is: What precisely should be done when a state asserts a title to territory seized by force from another state, thus breaching the norm of territorial integrity? It should be noted that even non-recognition, though relied on extensively since 1932, has not been universally accepted as a general legal obligation of states. Both governments and scholars have argued that non-recognition is obligatory only if mandated by treaties or legally binding decisions of the UNSC.[60] By the

[59] Non-recognition and diplomatic and economic sanctions had the domestic effect of helping turn the bulk of the population against the unlawful status in the cases of Rhodesia and South African Bantustans as well.

[60] *See generally* Alison Pert, *The "Duty" of Non-Recognition in Contemporary International Law: Issues and Uncertainties*, SYDNEY LAW SCHOOL: LEGAL STUDIES RESEARCH PAPER NO. 13/196 48–71 (2013); *see also* Counter-Memorial of the Government of Australia, East Timor (Port. v. Austl.), 1991 I.C.J. Pleadings 9, ¶ 365 (June 1, 1992). *But see* Stefan Talmon, *The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or*

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

same token, there is no agreement on the exact requirements of non-recognition,[61] although the ICJ *Namibia* (1971) advisory opinion, as well as a number of country-specific UNSC and UNGA resolutions, do list several components. At any rate, as a matter of practice, states have not given up their discretion on when to employ non-recognition, what to include in it, and whether to combine it with other countermeasures.

If states do not wish to give legitimacy to forcible change of interstate boundaries—and international legal acceptance of the *de facto* annexation of Crimea, as the aftermath of recognition of Italy's sovereignty over Abyssinia attests, will likely encourage that—a minimum response has to include the non-acceptance of the new claim of title and the avoidance of actions implying legitimization of that claim. This policy denies the very establishment of an international legal precedent that Burke-White worries the Crimean case already accomplished.[62] Beyond that, the response ought to factor in the genesis and the severity of the violation, as well as broad interests and responsibilities of third parties, both with respect to their populations and to the outside world. For instance, Israel's extensions of its law to East Jerusalem and the Golan Heights were preceded by UNSC Resolution 242 (1967), which implicitly legitimized the military occupation of these and other territories seized by Israel during the Six-Day War until Israel's right to exist in peace and secure borders were realized.[63] In 1980–1981, only Egypt had acknowledged that right in a peace treaty, and Israel had been in the process of returning the occupied Sinai to the former belligerent. In contrast, Israel claimed its parliament acted to widen Israeli law to the Golan Heights in response to persistent rejections by Syria to consider negotiating a peace treaty with Israel. In the case of Cyprus, Turkey justified its use of force and occupation of Northern Cyprus in 1974, which preceded the 1983 proclamation of the "Turkish Republic of Northern Cyprus," as a response to violations of the 1960 treaties establishing Cypriot independence, of which it was one of the guarantors. In 1990 Iraq invaded and occupied Kuwait, suddenly and without any apparent proximate cause, invoking a claim to the country its government had formally relinquished in 1963. This was immediately followed by the annexation of the entire Kuwaiti territory and the assumption of control over Kuwait's vast crude oil production. It is only natural that these intricacies, along with Israel's and Turkey's standing as Western allies and Kuwait's role in the global energy economy, shaped any discretionary response to Israel, Turkey/Northern Cyprus, and Iraq beyond non-recognition of territorial changes resulting from the use of force.

Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND ERGA OMNES OBLIGATIONS (Christian Tomuschat & J.M. Thouvenin eds., 2006) (stating a contrary view that non-recognition of forcible territorial acquisition is a general legal obligation); *see also* Martin Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford et al. eds., 2010).

[61] *See* Talmon, *supra* note 60, at 103–25; Dawidowicz, *supra* note 60, at 679, 684–86.

[62] *See* Burke-White, *supra* note 29, at 74.

[63] S.C. Res. 242, para. 1, U.N. Doc. S/RES/242 (Nov. 22, 1967).

Where does Russia's incorporation of Crimea fit? Its actions might not have been as brazen as Iraq's in 1990—Russia neither overtly used military force nor did it directly annex Crimea—but they were brazen enough. Russia reacted to a disputed change of government in a neighboring state by an armed takeover of a territory of that state under false pretenses, by backing in it an abruptly staged secession referendum which did not conform to the international standards of free and fair voting, and by resorting to an immediate absorption of that territory upon Crimea's proclamation as an "independent republic," notwithstanding all the previous legally binding affirmations of the boundaries of the neighboring state. These moves were extraordinary not least because, after 1945, first the Soviet Union and then Russia had been consistent, and often outspoken, defenders of the norm of territorial integrity.

A resolute stand against Russian conduct by announcing non-recognition of the altered status of Crimea and by imposing a variety of diplomatic and economic countermeasures — some of which were expanded or intensified following Russia's pro-separatist intervention in eastern Ukraine—is entirely justified. At the same time, great caution is necessary in crafting policy towards Russia's engagements in Ukraine. While concerns of the defenders of a more forceful approach about potential political and legal consequences of Russia's actions are valid, the application of methods they advocate may drastically worsen mutual relations with that great power—including in the UNSC where Russia's permanent membership requires cooperation in addressing most serious global security problems — while not achieving the desired reversals in Ukraine. Economic sanctions are best at politically demonstrating the earnestness of opposition not only to the targeted country and its citizens but also to a variety of external actors, both public and private, who have relations with it. The effect of sanctions is often indirect and long-term, as in Northern Cyprus where, after more than twenty years, they helped convince the majority of the population to back a reunified Cyprus. They are far less successful as a direct intergovernmental instrument for eliciting policy changes,[64] not least when the target is a determined great power, and when sanctioning countries are themselves likely to suffer significant economic harm, as at least some EU members are. Accordingly, sanctions should not be aimed at wrecking the Russian economy, but rather at fortifying the policy of non-recognition, thus principally targeting Crimea[65] and any other territory where Russia displaced, directly or indirectly, Ukrainian rule.

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[64] One of the most optimistic studies on the effectiveness of economic sanctions found that they were "at least partially successful" in only thirty-four percent of cases. *See* GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 158 (3d ed. 2007).

[65] *See* Enrico Milano, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, 1 QUESTIONS OF INT'L LAW 35, 52 (2014) (listing diplomatic and economic sanctions that flow from non-recognition of Crimea).

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

The danger of blanket, crippling economic sanctions—not to mention major military countermeasures—*vis-à-vis* a military power such as Russia is that they can lead to unpredictable escalation.[66] That escalation is likely to play out in, and be most detrimental to, Ukraine itself, as Russia not only enjoys a marked geographical advantage for maneuvering there, but also has more vital interests in the country than any other major power. The Russian leadership can expect that, at the end of the day, no third party is willing to take as much risk, or bear as much cost, for Ukraine as is Russia. Be that as it may, advocates of a more forceful approach to Russia have not indicated what should happen if their preferred countermeasures—however much they may serve the cause of international legality—do not achieve the intended effect.

Ultimately, upholding the territorial integrity of Ukraine requires a long-term and patient approach that prioritizes mitigation of violence within Ukraine's recognized borders and the strengthening of the Ukrainian state over ever intensifying coercive pressure on Russia. As in the cases of Bantustans, the Baltic republics, or East Timor—the latter two of which elicited not much more than sporadic declarations of non-recognition—the best hope for a reversal in Ukraine rests with an internally generated governmental change in Russia, and not directly with external actions. This may not be the quickest or most morally satisfying approach, but it is the most balanced one. It takes into account both the international legal and political interest in resisting forcible territorial change and Ukraine's interest in a peaceful re-integration of its territory.

F. Conclusion

This article argued that when it comes to contested international situations it is important not only to clarify pertinent legal norms and obligations, but also to reflect on how they can be upheld. This is because upholding them frequently allows more than one course of action, each with at least potentially different political and legal consequences. In these cases, legal assessments cannot be made in isolation from political assessments. While there is widespread agreement that territorial integrity—one of the most venerable international norms after 1945—needs to be safeguarded, there is disagreement on how to do so in the Ukrainian case, where the culprit is a neighboring great power. Two arguments were presented here: (1) That the norm cannot be upheld in regards to Crimea, as Russia cannot be removed from there, but if diplomacy with Russia is handled deftly, it can be preserved for the future; and (2) that the norm can be upheld in regards to Crimea and other Ukrainian territories, but only if Russia is faced with substantially more potent economic and military countermeasures. This article was skeptical of both of these positions and offered a middle-of-the-road argument on how to uphold the norm of territorial integrity in Ukraine. The way forward is neither to accept Russia's *de facto*

[66] *See* Roy Allison, *Russian "Deniable" Intervention in Ukraine: How and Why Russia Broke the Rules*, 90 INT'L AFF. 1255, 1297 (2014).

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press

annexation of Crimea nor to resort to ever increasing coercive pressure on Russia. It is to maintain firmly the policy of non-recognition of the altered status of Crimea—and possibly of other Ukrainian territories—and to buttress it with sanctions intended to manifest the rejection of that altered status.

https://doi.org/10.1017/S2071832200020927 Published online by Cambridge University Press