The Ukraine Crisis: An International Law Perspective

Dr Roy Allison
University of Oxford

Dr Thomas Grant
University of Cambridge; 2013-2014, National Fellow, Hoover Institute, Stanford University

Professor Philip Leach
Middlesex University

Chair: Elizabeth Wilmshurst, CMG
Associate Fellow, International Law Programme, Chatham House

11 July 2014
Introduction

This is a summary of an event organized jointly by the International Law Programme and the Russia and Eurasia Programme at Chatham House to analyse the international law issues that have arisen throughout the current Ukraine crisis. This summary outlines the main strands of discussion and analysis from the meeting.¹

The meeting was not held under the Chatham House rule. However, the comments expressed by each speaker were made in their own personal capacity and in no way reflect the views of their respective institutions or employers.

Russia and the politics of international law

The meeting began by approaching the topic from an understanding of the politics of international law. It was suggested that this might serve as a good starting point for both lawyers and non-lawyers alike, before moving on to analyse the legal issues which have arisen throughout the current crisis in Ukraine. It might lead to a better appreciation of how political the international legal arena can be, especially concerning matters of contention between major states.

Russia is one of these major states and even if, since the 1990s, some may view it as one of the weaker actors among them, it may now feel that it has acquired a more secure position in the international arena, and therefore deserves to wield stronger influence upon the development and interpretation of international law. The positions taken, and justifications given, by Russia in recent years, concerning the use of force and intervention were presented in order to provide a background to the legal arguments arising from the current crisis.

During the 1990s, the justifications being put forward by Russia for the use of force including the interventions in the Commonwealth of Independent States (CIS) were generally based on principles of international law and the United Nations Charter. For example, former president of the Russian Federation Boris Yeltsin did not base his justifications for the interventions in the CIS on the protection of Russian citizens or ethnic Russians. The justifications brought forward were based on self-defence claims and, with regard to the Tajikistan intervention, collective defence and the invitation from the Tajik government.

It was explained that Russia’s opposition to the intervention of the North Atlantic Treaty Organization (NATO) in Kosovo in 1999 was again in alignment with generally accepted principles of international law concerning the use of force. At that time, and still to this day, military humanitarian intervention without Security Council authorization was not unequivocally permissible under international law. In relation to the emerging notion of the responsibility to protect (R2P), it could be argued that Russia has adopted a centrist position among major powers. Russia, like some others, was reluctant to agree to decisive commitments on R2P, since this would constrain its decision-making powers, including in the Security Council.

In relation to the Russia–Georgia war, Russia presented several legal arguments in order to justify its actions, which under close legal scrutiny are inadequate. A European Union special investigation committee rebuffed each argument,² leaving Russia with a sole possible justification based on self-

¹ This summary was prepared by Carl Lewis.
defence on the understanding that the Russian peacekeeping base in South Ossetia represented the Russian state. This justification revolved around two Russian peacekeepers, seen as representatives of the Russian state, who were killed in the initial attack on Tskhinvali. Yet, it was argued, chaos would ensue in international crises that required peacekeeping operations should troop-contributing states see it as lawful to send substantial military units in response to the deaths of individual peacekeepers from their country. It was asserted that Russia’s attempt to put forward a group of arguments in this case represented a scattershot approach to justification, looking for what would be accepted among different audiences. The aim of this might have been factual, distracting criticism for long enough for the attention of the international community to move on; or strategic, in an effort to induce a reinterpretation of basic principles of international law. The crisis in Ukraine, it was said, might well bring this approach to strategic justification back into the spotlight.

It was noted that a recent statement by the President of Russia, Vladimir Putin, had criticized the domination of alleged ‘Western’ interpretations of international law. The Deputy Secretary for Russia’s Security Council had even suggested that a global conference be organized in order to rewrite international law.

**Russia’s legal arguments with regard to Crimea**

It was stated that it was difficult to find a legal basis justifying Russia’s actions in Crimea.

First, there was the possible justification of self-defence. However, a threat to Russian forces could not be shown and there was no identifiable threat to Russian citizens. Therefore the arguments presented which claimed self-defence were indefensible on a factual basis. The suggestion that the 1997 Partition Treaty on the Status and Conditions of the Black Sea Fleet with Ukraine would allow for the movements carried out by Russian troops was seen as questionable. The action would at least have required prior Ukrainian consent and approval. Additionally, the increase in military contingents and their actions would suggest a threat to Ukraine, contrary to the principles of the treaty.

A second suggested justification for Russia’s actions was reliance on the invitation of former Ukrainian President Viktor Yanukovych who, Russia claimed, was still the head of state since the constitutional requirements for the transition to the new president had not been met. Yet it could be argued strongly that a leader giving consent to entry into territory should be one who retains effective control over the state. Former President Yanukovych could be seen to have been in effective control or command in Ukraine and this argument was therefore unpersuasive among much of the international community. There have of course been situations where multiple authorities claim power over a state, and such situations may raise questions of recognition among the international community. However, in the case of Yanukovych, it was a matter of a president departing, which in turn resulted in an almost immediate transition to a new government. Furthermore, in spite of the disruption that was occurring in the east of Ukraine, and specifically in Crimea, this new government had maintained effective control over the territory of the Ukraine.

A third suggested justification for Russian action was support for the principle of self-determination. On this issue, international law recognizes both internal and external self-determination: the former entails the right of a group to participate in the constitutional system of an existing state; the latter entails a right

---


to secede from a state. The latter right, it was explained, was undoubtedly recognized for colonies and non-self-governing territories, but beyond those situations the position in international law was controversial. There was some support for so-called remedial secession, where the territorial state has persecuted the group in question. But even if there was such a right to secede in these circumstances, the factual situation did not exist in Crimea to justify it.

It should be noted that no state (except Russia) recognized the independence of Crimea before it was joined to Russia.

International law recognizes that if a state uses force against another state, and that use of force results in the changing of the territorial boundaries of the latter without its consent, the international community is obliged to withhold recognition of this change of boundaries:

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States’... in which it emphasized that ‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal’. As the Court stated in its Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the principles as to the use of force incorporated in the Charter reflect customary international law (see I.C.J Reports 1986, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.5

It was clarified that the use of force is not an option for those states seeking to alter the territorial boundaries of another state. A state in occupation of the territory of another state, even following a lawful armed conflict, has no right to annex that territory. Therefore, even if, hypothetically, one were to entertain the multiple justifications put forward by Russia as to why the intervention into Ukraine might have been lawful, the international community would still be obliged not to recognize the changes to the territorial boundaries of Ukraine.

A comparison was drawn between the NATO intervention in Kosovo and the Russian activities in Ukraine. The logic, simplified, would seem to argue, ‘Why are we (Russia) not allowed to act in the same way NATO did in Kosovo?’ However, even if it were to be assumed that the intervention in Kosovo was a breach of international law, the argument that Russia could therefore commit such a breach was not a legal argument, but a political one.

In any case, it was explained, there were differences between the two situations. First, the situation in Kosovo, which pointed to serious violations of humanitarian law, had been determined and recognized by both General Assembly and Security Council resolutions with Russian participation. The intervention had been brought to an end with another Security Council resolution, which again involved Russian participation. There was also a long period of attempted settlement: Kosovo’s eventual declaration of independence did not come at the same time as armed external intervention but, instead, after a long train of developments, including bona fide efforts to negotiate a solution respecting the boundaries of the existing state of which Kosovo was part.

5 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, at 171, para. 87.
Human rights considerations

What developments may be expected from the European Court of Human Rights (ECtHR) in relation to the crisis in Ukraine?

There is an interstate case process available in Strasbourg under Art. 33 of the European Convention on Human Rights and Ukraine instigated such proceedings against Russia in March 2014. Interim measures were issued under Rule 39 of the Rules of Court, which although legally binding is a rule marred by a recent history of non-compliance. The interim measures state:

> Considering that the current situation gives rise to a continuing risk of serious violations of the European Convention, the President of the Third Section has decided to apply Rule 39 of the Rules of Court. With a view to preventing such violations and pursuant to Rule 39, the President calls upon both Contracting Parties concerned to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment).

At present, it was explained, there was no indication of a broader interstate case emerging. But it was not impossible. For example, the Netherlands and multiple Scandinavian states had brought various interstate cases in relation to the situation of Greece in the 1960s, without having any direct interest in doing so. It was observed that such cases were not common, yet considering the reports that were emanating from the situation in Ukraine, there might well be arguments for states to take advantage of this avenue.

Two interstate cases brought by Georgia against Russia were of interest. In the decision on the Merits of Georgia I, which regarded the expulsion of Georgians in autumn 2006, the court found collective expulsion to be an administrative practice, and therefore translatable to coordinated state policy. It was noted that such a finding of administrative practice was rare, yet one of the consequences was the non-necessity to exhaust domestic remedies, which might prove an interesting avenue in the context of the Ukrainian crisis.

The case of Georgia v. Russia II would be important because it raises the issue of Russian responsibility for the Ossetia militia. Here, the court might have to look closely at the Tadic judgment from the International Criminal Tribunal for the former Yugoslavia and the test used by that tribunal to establish state control. The question as to which state was responsible for the acts of 'non-state' actors would be an important issue that the court would need to address.

---

9 Georgia v Russia (I) App No. 13255/07 (Merits) (ECHR, 3 July 2014).
10 Ibid., 159.
11 Georgia v Russia (II) App. No 38262/08 (ECtHR, Pending).
The second potentially interesting interstate case was *Cyprus v Turkey*,\(^{13}\) where it was very recently determined that the ECtHR can award as just satisfaction compensation in an interstate case,\(^{14}\) and where the court awarded €90 million in total to the Cypriot government\(^{15}\) for the benefit of the individual victims concerned.\(^{16}\)

Another important question is that of jurisdiction. In accordance with Article 1 of the ECHR, jurisdiction is presumed across the territory of a state. Looking at the *Assanidze v. Georgia* case, concerning the detention of a former mayor of the Ajarian Autonomous Republic (situated in Georgia) by the Ajarian authorities, the court held that Georgia was responsible under international law as Ajaria was an integral part of Georgia and, therefore, within its territory.\(^{17}\)

As regards Ukraine’s lack of control over part of its territory, including Crimea, it was asked whether the presumption of jurisdiction could be rebutted where a state is prevented from exercising control in parts of its territory. In *Ilaşcu & Others v. Moldova & Russia*,\(^{18}\) which concerned the detention of politicians in Transdniestria by Transdniestrian separatist authorities, both Russia and Moldova were held responsible. Russia was held responsible owing to the support it was providing to the Transdniestrian authorities. Moldova was faced with the issue of the imposition of positive obligations: even when a state is not able to exercise control in parts of its territory, there may still be positive obligations for the state to do what it can to secure for its citizens their convention rights.\(^{19}\)

Disappearances are another area of importance, with hundreds of alleged cases being reported in eastern Ukraine. It was noted that the question of Russian responsibility would be crucial, but Ukrainian responsibility might also need to be considered when looking at how far-reaching positive obligations are. This might prove to be especially sensitive with regard to hostage returns; criticisms have been made that the attention Ukraine has been directing towards its military has been disproportionate in relation to that given to its journalists.

The ECtHR is experienced in dealing with cases of forced disappearances. However, it may be said that the court has yet to show progress in ordering a state to carry out effective investigations which would offer, in part, redress to victims. The dissenting and concurring opinions in *Medova v. Russia*\(^{20}\) and *Varnava v. Turkey*\(^{21}\) raise this point.\(^{22}\) However, in *Aslakhanova v. Russia*,\(^{23}\) it was noted that a new approach was developing, whereby the court is treating forced disappearances, as well as the failure to investigate, as a systemic problem, setting out steps which should be undertaken by the Russian authorities. This approach might be used in the future in relation to the crisis in Ukraine.

---

14. Ibid., para 43.
15. Ibid., para. 47.
16. Ibid., para. 58.
17. *Assanidze v Georgia* App No. 71503/01 (ECtHR, 8 April 2004).
18. *Ilaşcu & Others v Moldova & Russia* App No. 48787/99 (ECtHR, 8 July 2004).
19. Ibid., para 331.
21. *Varnava and Others v Turkey* App Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009).
22. See *Medova v Russia* App No. 25385/04 (ECtHR, 15 January 2009), Partly Dissenting Opinion of Judge Spielmann; see also *Varnava and Others v Turkey* App Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), Concurring Opinion of Judge Spielmann Joined by Judges Ziemele and Kalaydjieva.
23. *Aslakhanova v Russia* App Nos 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (ECtHR, 18 December 2012).
The cases of Sirenko v. Ukraine\(^{24}\) and Derevyanko v. Ukraine,\(^ {25}\) brought to the court by pro-Maidan protestors, were interesting because of the speed with which they were communicated to the government. Within days of the applications being received by the court, they had been communicated to the government. It was remarked that such a fast transition was rare and was evidence of a possibly more proactive stance by the court.

One concern raised was that states like Russia pay the fines for the decisions that have gone against them in human rights courts, but fail to take any further action against those responsible for the abuse. One position advanced to explain this was the possible lack of evidence, and it was acknowledged that many states, when dealing with the issue of a duty to investigate, contest that too many years have gone by after the event for any investigation to succeed. However, this had been addressed in the case of Abuyeva and Others v. Russia where the court, considering the difficulty in restoring the situation before the breach, still believed an effective investigation to be possible many years after the event took place.\(^ {26}\)

There seemed to be no real doubt regarding Russia’s responsibility for events such as the termination of methadone treatment in Crimea.\(^ {27}\) This might represent some rejection of human rights as a reflection of Western ideologies. Where there is confusion as to which state should be held responsible for human rights abuses in a certain territory, the ECtHR is unlikely to accept a legal vacuum, and will have to determine which state will be responsible. It was important to note, however, that among various UN human rights organs, Crimea was still considered Ukrainian territory and therefore human rights oversight would remain the responsibility of Ukraine.

**Oil and gas**

It was observed that there was a major question of how the annexation of Crimea might affect both transit and developmental factors in relation to oil and gas. Currently, it was noted, operational development in Crimea in relation to both was tiny, compared with what both Ukraine and Russia hoped to gain from future offshore developments. It came as no surprise that the issue of maritime zones was of great interest to both countries.

Yet, as already mentioned, the attempted acquisition of territory by one state, whether lawful or unlawful, through the use of force, does not change the territorial boundaries of another state. Maritime delimitations are entirely dependent on the territorial sovereignty of a state. Therefore, taking into account the legal obligation not to recognize any change to the territorial boundaries of Ukraine, and the rights that go along with territorial sovereignty, Ukraine will retain its pre-existing maritime rights. The International Court of Justice, in the *Maritime Delimitation in the Black Sea* decision of 2009,\(^ {28}\) adjudicated the maritime boundaries between Romania and Ukraine, so no question should be raised as to Ukraine’s rights on its side of the line delimiting its maritime boundaries within the Black Sea.

---

\(^{24}\) Sirenko v Ukraine App No. 9078/14 (Communicated to the Ukrainian Government on 1 February 2014).

\(^{25}\) Derevyanko v Ukraine App No. 7684/14 (Communicated to the Ukrainian government on 20 February 2014).

\(^{26}\) Abuyeva and Others v Russia App No. 27065/05 (ECtHR, 2 December 2010), paras 240–43.
