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Legal Basis for Reintegration of Crimea into Ukraine

*Prepared by the
Public International Law & Policy Group
and
Ropes & Gray LLP*



Memorandum:
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Crimea into Ukraine**

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2023

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LEGAL BASIS FOR REINTEGRATION OF CRIMEA INTO UKRAINE

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LEGAL BASIS FOR REINTEGRATION OF CRIMEA INTO UKRAINE

I. STATEMENT OF PURPOSE

For the past 9 years, the Russian Federation has illegally occupied Crimea infringing upon Ukraine's territorial integrity. During this period, Russia has been aggressively pushing unfounded arguments claiming that it has a legal right to Crimea.

The experience of the Public International Law & Policy Group suggests that even weak arguments can gain traction among the international community if not debunked in a timely manner. To avoid harming Ukraine's position during possible negotiations with Russia to end the Russian war of aggression, it is important to understand that international law is clear in supporting Ukraine's right to sovereignty and territorial integrity with respect to Crimea.

This memorandum sets forth a legal basis for the de-occupation and return of Crimea to Ukraine. Specifically, it describes the application of the principle of territorial integrity to the current situation in Crimea, examines the legal status of Crimea under international law, and offers a rebuttal of Russian arguments against Crimean reintegration with Ukraine.¹

¹ The historical context and legal analysis set forth in this memorandum are in many ways related to the Russian annexation of the Donbas. However, in order to present a clear examination of the legal status of Crimea, this memorandum does not provide an assessment of the legal status of the Donbas.

II. EXECUTIVE SUMMARY

The Russian-led referendum in Crimea in 2014 (“**2014 Referendum**”) and Russia’s subsequent annexation of Crimea violated Ukraine’s right to territorial integrity and ran afoul of numerous Russian and international agreements safeguarding Ukraine’s borders.

Despite the various legal rationales asserted by Russia, the 2014 Referendum was, and any subsequent referenda and/or incorporation of Crimea into the Russian Soviet Federative Socialist Republic (“**Russian SFSR**” or “**Russian Federation**”) will be, illegitimate and of no legal effect. The Russian government has promulgated four primary arguments under customary international law with respect to the 2014 annexation of Crimea and Russia’s subsequent occupations of other Ukrainian territories:

1. The 1954 transfer of Crimea from the Russian republic to the Ukrainian republic within the Union of Soviet Socialist Republics (“**USSR**”) was illegitimate and void and thus the reintegration was a return of Crimea to its rightful government;
2. The 2014 Referendum was a valid exercise of self-determination and remedial secession by the Crimean people and that Russia’s subsequent annexation of Crimea reflected the will of the Crimean people;
3. Its use of military force against Ukrainian territories in 2014 and the full-scale invasion occurring thereafter were acts of collective self-defense²; and
4. Any Ukrainian claim to Crimea is now barred under principles of waiver, acquiescence, and extinctive prescription, due to the lengthy passage of time since Russia’s 2014 occupation of these territories.

Russian officials, including President Vladimir Putin, rely on these arguments to justify Russia’s actions to the global community (though there has been limited public discussion of the fourth argument).

These arguments have been met with minimal support within the international community and are not supported by customary international law;

² U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

however, the Russian government continues to promote these arguments and to cite arguments made in unrelated contexts (such as in the case of Kosovo) by governments that oppose Russia's current conduct. Each of the four Russian arguments is considered below, along with counterarguments that may be effectively utilized by Ukraine in discussions regarding Crimea.

III. BACKGROUND

A. *History of Control of Crimea*

Prior to 1945, the territory of Crimea was controlled by the Russian Empire and then the Soviet Union for more than two hundred years, starting in 1783 when the Russian Empire annexed the Crimean Khanate. From then until the collapse of the Russian Empire in 1917, Crimea was a part of various Russian governorates. From 1917 through 1921, during the Russian Revolution and Civil War, Crimea was a part of multiple entities that had varying affiliation with and against communist forces, including briefly being considered the Crimean People's Republic (from December 1917 to January 1918) and later being part of the Ukrainian People's Republic from May to June 1918. On October 18, 1921, Crimea became part of the Russian Socialist Federative Soviet Republic of the USSR (which was later renamed the Russian SFSR), and was given the status of an autonomous republic. From 1921 through 1945, Crimea was treated as an administrative unit within the USSR possessing a lower status and degree of political autonomy than the constituent union republics of the USSR (such as the Russian SFSR and the Ukrainian SSR), but more autonomy than the oblasts. On June 30, 1945, a decree of the Presidium of the Supreme Soviet of the Soviet Union stripped Crimea of its autonomous status and converted it into the Crimean Oblast of the Russian SFSR.

A decade later, in 1954, the USSR transferred Crimea from the Russian SFSR to the Ukrainian SSR.³ Documents published in the Soviet press at the time and transcriptions of declassified documents from former Soviet archives detail the process by which the transfer took place. On January 25, 1954, the Presidium of the Communist Party of the Soviet Union approved Crimea's transfer from Russia

³ *Id.* Declassified documents reveal the two official rationales behind the transfer of Crimea: (1) the cession of Crimea was a "noble act on the part of the Russian people" to commemorate the 300th anniversary of the "reunification of Ukraine with Russia" (a reference to the Treaty of Pereyaslav signed in 1654 by representatives of the Ukrainian Cossack Hetmanate and Tsar Aleksei I of Muscovy) and to "evince the boundless trust and love the Russian people feel toward the Ukrainian people"; and (2) the transfer was a natural outgrowth of the "territorial proximity of Crimea to Ukraine, the commonalities of their economies, and the close agricultural and cultural ties between the Crimean oblast and the UkrSSS. Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago*, WILSON CENTER, CWIHP e-Dossier No. 47, available at <https://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago>.

to Ukraine.⁴ Several weeks later, on 19 February 1954, the Presidium of the USSR Supreme Soviet issued a decree transferring the Crimean Oblast from the Russian SFSR to the Ukrainian SSR.⁵ Meeting minutes from the proceeding in which the transfer was approved indicate that the parliaments of the Russian SFSR and the Ukrainian SSR each authorized and requested that the transfer take place.⁶ Eight days later, on 27 February 1954, the transfer was announced in *Pravda*, the official Soviet newspaper.⁷

On July 16, 1990, Ukraine declared State sovereignty from Russia.⁸ Months after Ukraine's declaration of independence, the Crimean Parliament called upon the Russian SFSR to nullify the 1945 decision that had stripped Crimea of autonomous status.⁹ Then on May 5, 1992, Crimea's parliament declared total independence and passed the first Crimean constitution, contingent on further approval by a referendum to be held later that year.¹⁰ However, shortly thereafter, the Ukrainian parliament convened to declare the Crimean declaration of independence unconstitutional and gave Crimea an ultimatum to rescind its independence.¹¹ A compromise between Crimea and Ukraine was established which instilled greater autonomy in Crimea by granting it a special economic status within Ukraine.¹² This compromise hung on Crimea's revision of its constitution to align with Ukraine's own constitution, and the complete annulment of the independence referendum scheduled for later in the year.¹³ When Crimea ultimately violated the terms of the compromise by reviving the referendum in 1994, the results indicated a strong preference among Crimeans for autonomy from Ukraine; however, the Ukrainian electoral commission and President again found that the Crimean government had overstepped its constitutional authority in holding the referendum and that the results were therefore invalid.¹⁴

⁴ Kramer, *supra* note 3.

⁵ *Meeting of the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics*, WILSON CENTER (Feb. 19, 1954), available at <https://digitalarchive.wilsoncenter.org/document/119638>.

⁶ Kramer, *supra* note 3.

⁷ Krishnadev Calamur, *Crimea: A Gift to Ukraine Becomes a Political Flash Point*, NPR, Feb. 27, 2014, <https://www.npr.org/sections/parallels/2014/02/27/283481587/crimea-a-gift-to-ukraine-becomes-a-political-flash-point>.

⁸ Vincent J. Schodolski, *July 16, 1990: Ukraine declares sovereignty*, Chicago Tribune (Jul 17, 1990), available at <https://www.chicagotribune.com/news/ct-ukraine-declares-sovereignty-1990-20220224-adaevolxoid35j45qwqngs56v4-story.html>.

⁹ *Minorities at Risk Project*, CHRONOLOGY FOR CRIMEAN RUSSIANS IN UKRAINE (2004), available at <https://www.refworld.org/docid/469f38ec2.html>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 78.4% of voters supported greater autonomy from Ukraine and 82.8% supported allowing dual Russian-Ukrainian citizenship. See *Crimea referendum: Voters 'back Russian union'*, BBC (Mar. 16, 2014), <https://www.bbc.com/news/world-europe-26606097>. See Yaniv Roznai & Silvia Suteu, *The Eternal Territory? The*

Since Ukraine's independence from the Soviet Union, Russian officials have questioned the legitimacy of the 1954 transfer of Crimea to Ukraine. On May 22, 1992, shortly after the Crimean parliament's declaration of independence, the Russian Parliament declared that the transfer was unconstitutional and void and decided that Crimea's status should be settled through negotiations between Russia and Ukraine "with the participation of representative bodies of Crimea on the basis of the will exercised by its people."¹⁵ On July 9, 1993, the Russian Parliament adopted a decree that proclaimed "Russian federal status for the city of Sevastopol within the administrative and territorial borders of the city district as of December 1991,"¹⁶ and a 2009 Pravda article claimed that the meeting of the Presidium of the Supreme Council granting the original transfer did not constitute a quorum because only 13 of 27 members were present.¹⁷

B. *The Annexation of Crimea; the 2014 Referendum*

In November of 2013, Viktor Yanukovich, Ukraine's pro-Russian president, as a result of continued pressure from Russia to re-establish Russian influence in Ukraine post-USSR, refused to sign an association agreement expected to advance ties with the European Union.¹⁸ In the following months, anti-government protests sparked by Yanukovich's decision to terminate Ukraine's integration with the west culminated in violence and bloodshed when, on February 27, 2014, uniformed men without insignia seized control over the government administration buildings, raised Russian flags, and took control of the Parliament of Crimea.¹⁹ President Putin had dispatched the Russian army to Ukraine's borders for an "unexpected military exercise," and proceeded to invade and effectively annex Crimea despite warnings issued by Ukraine's acting president, Oleksandr Turchynov, for Russia

Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle, 16 GER. L. J. 542, 557 (2015) (citing MARK CLARENCE WALKER, *THE STRATEGIC USE OF REFERENDUMS: POWER, LEGITIMACY, AND DEMOCRACY* 108 (2003)).

¹⁵ *Id.*

¹⁶ *Letter dated July 16, 1993 from the Permanent Representative of Ukraine of the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/26100 (July 16, 1993), available at <https://digitallibrary.un.org/record/170500?ln=ru>.

¹⁷ Dmitry Sudakov, *USSR's Nikita Khrushchev gave Russia's Crimea away to Ukraine in only 15 minutes*, Pravda, Feb. 19, 2009, https://english.pravda.ru/history/107129-ussr_crimea_ukraine/.

¹⁸ Steven Pifer, *Why Did Ukraine's Yanukovich Give in to Russian Pressure on EU Deal?*, BROOKINGS INSTITUTE (Dec. 2, 2013),

<https://www.brookings.edu/on-the-record/why-did-ukraines-yanukovich-give-in-to-russian-pressure-on-eu-deal/>.

¹⁹ Maria Danilova & Yuras Karmanau, *Massive anti-government rally in Ukraine turns violent*, NBC NEWS (Dec. 1, 2013), available at <https://www.nbc.com/2013/12/01/massive-anti-government-rally-in-ukraine-turns-violent.html>; Matt Clinch, *How Russia invaded Ukraine in 2014. And how the markets tanked*, CNBC.ORG (Jan. 27, 2022), <https://www.cnbc.com/2022/01/27/how-russia-invaded-ukraine-in-2014-and-how-the-markets-tanked.html>.

not to intervene.²⁰ After the attack on the Crimean parliament, Russian soldiers were quickly mobilized to Crimea, to stand guard at a Ukrainian military base on the periphery of Crimea.²¹ On March 11, 2014, the Parliaments of Crimea and Sevastopol adopted a joint Declaration of Independence stating that Crimea and Sevastopol would unite to form an independent State - the “Republic of Crimea.”²²

Several days later, on March 16, 2014, pro-Russian authorities in Crimea held the 2014 Referendum to “confirm” that most voters in Crimea endorsed political independence from Ukraine and annexation by Russia.²³ The ballots called for voters to choose between broadening autonomy under Ukraine or becoming a part of Russia. Pro-Ukrainian activists inside Crimea had urged a boycott of the 2014 Referendum, arguing that the referendum was called prematurely and devoid of debate.²⁴ However, a large population of the Crimean Peninsula identified predominantly as ethnic Russian residents. Russia argued that they would face oppression at the hand of the interim Ukrainian government, which was installed after President Viktor Yanukovich.²⁵ Russia’s state news agency reported that after 50 percent of the votes had been processed, more than 95 percent of the processed votes were in favor of Crimea joining Russia.²⁶

²⁰ Clinch, *supra* note 19 (noting that Crimean airports were controlled by Russia approximately two days after the seizure of government buildings); Harriet Salem, Shaun Walker & Luke Harding, *Crimean parliament seized by unknown pro-Russian gunmen*, THE GUARDIAN (Feb. 27, 2014),

<https://www.theguardian.com/world/2014/feb/27/crimean-parliament-seized-by-unknown-pro-russian-gunmen>.

Specifically, acting President Turchynov appealed to the military leadership of the Russian Black Sea fleet to not become involved, stating that “[a]ny military movements, the more so if they are with weapons, beyond the boundaries of this territory [the base] will be seen by us as military aggression.” *Id.*

²¹ Clinch, *supra* note 19 (citing Katie Stallard-Blanchette, *Putin Comes Clean On Crimea's Little Green Men*, SKYNEWS (Mar. 10, 2015), <https://news.sky.com/story/putin-comes-clean-on-crimeas-little-green-men-10368423>).

²² M. Memmott, *Crimean Parliament Passes ‘Declaration of Independence,’* NPR.ORG (Mar. 11, 2014), available at <https://www.npr.org/sections/thetwo-way/2014/03/11/288980634/crimean-parliament-passes-declaration-of-independence>.

²³ *Crimea referendum: What does the ballot paper say?*, BBC NEWS (Mar. 10, 2014),

<https://www.bbc.com/news/world-europe-26514797>; Alan Yuhas & Raya Jalabi, *Crimea's referendum to leave*

Ukraine: how did we get here?, THE GUARDIAN (last visited Nov. 11, 2022),

<https://www.theguardian.com/world/2014/mar/13/crimea-referendum-explainer-ukraine-russia>.

²⁴ Bill Chappell & L. Carol Ritchie, *Crimea Overwhelmingly Supports Split From Ukraine To Join Russia*, NPR.ORG (Mar. 16, 2014), available at

<https://www.npr.org/sections/thetwo-way/2014/03/16/290525623/crimeans-vote-on-splitting-from-ukraine-to-join-russia>.

²⁵ Based on a 2001 Ukrainian census, the population of the Crimean peninsula was 2.4 million, of which approximately 60% identified as ethnic Russians. Rostyslav Khotin, Rustem Khalilov & Robert Coalson, *Shifting Loyalty: Moscow Accused Of Reshaping Annexed Crimea's Demographics*, RADIOFREEEUROPE RADIOLIBERTY (May 31, 2018),

<https://www.rferl.org/a/russia-accused-of-reshaping-annexed-crimea-demographics-ukraine/29262130.html>. Later, a 2014 Russian census put the population at 2.285 million, with 65% identifying as Russian. *Id.*

²⁶ *Id.*

Pro-Russian officials immediately proceeded as though the referendum had passed, even before final counts for the 2014 Referendum were released.²⁷ The day after the referendum, on March 17, 2014, Crimea declared its independence from Ukraine, and on March 18, 2014, the Republic of Crimea and the Russian Federation signed the *Treaty on the Accession of the Republic of Crimea to Russia* (the “**Russo-Crimean Treaty**”), effectively annexing the peninsula into the Russian Federation.²⁸ Shortly after the invasion and annexation of Crimea, the separatist rebels²⁹ began invading other eastern Ukraine regions, including both Donetsk and Luhansk.³⁰ Pro-Russian officials were appointed to official municipal and regional leadership roles within the parts of Ukraine under Russian control and Ukrainian laws in these regions were replaced with laws of the Russian Federation.³¹

C. *The Current Legal Status of Crimea*

The vast majority of the international community has outwardly refused to accept the 2014 Referendum and subsequent annexation of Crimea and has found that Russia’s actions in Crimea violate international law.³² Territorial integrity—which preserves respect for a State’s territorial boundaries and territorial sovereignty—is a foundational principle enshrined as a pillar of international legal order under the U.N. Charter. Article 2, paragraph 4 of the U.N. Charter states that “[a]ll Members shall refrain in their international relations from the threat or use of

²⁷ *Id.*

²⁸ See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. & Russ.), 2017 I.C.J. 166, ¶13 (Jan. 16), available at <https://www.icj-cij.org/public/files/case-related/166/166-20170116-APP-01-00-EN.pdf> [hereinafter *2017 ICJ Case*]. Note, 2014 was not the first time Russia engaged in such tactics. In 2006, Russia engaged the same strategy with respect to Abkhazia and South Ossetia (so-called breakaway regions in Georgia). Russia’s Occupation of Georgia and the Erosion of the International Order, COMM’N ON SEC. AND COOP. IN EUR. (Jul. 17, 2018), available at

<https://www.csce.gov/international-impact/events/russias-occupation-georgia-and-erosion-international-order>.

²⁹ N. Vorobyov, *Ukraine crisis: Who are the Russia-backed separatists?*, ALJAZEERA.COM (Feb. 4, 2022), available at <https://www.aljazeera.com/news/2022/2/4/ukraine-crisis-who-are-the-russia-backed-separatists>. Separatist rebels of the Donbas areas are alleged to be proxies for Russian interests, if not simply Russian soldiers in disguise. *Id.* Because there is lack of belief that these separatist rebels truly represent the Ukrainian people, and a general awareness that there are a significant number of Russian soldiers that are not from Ukraine that are mixed into this population, the war between Ukraine and Russia across most global news platforms, as opposed to a civil war. *Id.*

³⁰ S. Westfall & C. Parker, *Why is Ukraine’s Donbas region a target for Russian forces?* (May 2, 2022), available at <https://www.washingtonpost.com/world/2022/02/21/what-is-donbas-donetsk-luhansk-conflict/>.

³¹ The replacement of Ukrainian law with laws of the Russian Federation violated the obligation under international humanitarian law to respect the existing law of an occupied territory.

³² Reaffirming U.S. Commitment to a Sovereign and Whole Ukraine on the Third Anniversary of Russia’s Crimean “Referendum”, Statement by Mark Toner, Acting Spokesperson, U.S. Dept. of State (Mar. 16, 2017), <https://ua.usembassy.gov/reaffirming-u-s-commitment-sovereign-whole-ukraine-third-anniversary-russias-crimean-referendum/>.

force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”³³ Despite this obligation, Russia has continued to use force in Ukrainian territory, and has thus violated Ukrainian territorial integrity, in violation of Article 2(4) of the UN Charter and in violation of customary law.

The United Nations Security Council (the “UNSC”) is the only organ of the United Nations that has the power to pass legally binding resolutions on its members without their consent.³⁴ As a permanent member of the UNSC, the Russian Federation has a veto power over proposed resolutions and has the capability of blocking resolutions that are otherwise supported by a majority of UNSC members.³⁵ Nonetheless, a consensus among a majority of members of the UNSC with respect to an issue is a powerful indication to the international community on how that issue should be viewed. On March 15, 2014, the UNSC voted on a resolution that would have reaffirmed Ukraine’s “sovereignty, independence, unity and territorial integrity” and would have declared the 2014 Referendum to have no validity.³⁶ Thirteen of the Council’s 15 members voted in favor of the draft text, Russia voted against and vetoed the resolution, and China abstained.³⁷ In discussions around this proposed resolution, Russia’s permanent representative to the U.N. maintained that Crimea expressed its right to self-determination in the 2014 Referendum and Russia planned to respect the Crimean people’s decision.³⁸

Similarly, on February 25, 2022, the Russian Federation vetoed another UNSC draft resolution regarding Russian activity in Crimea.³⁹ This proposed resolution, drafted and co-sponsored by 83 U.N. Member States in response to

³³ U.N. Charter art. 2, ¶4. As concepts within international law often go, the concept of “statehood” has been notoriously difficult to define but, in essence, a State must have (a) a permanent population, (b) a defined territory, (c) a government, and (d) capacity to enter into relations with other states. Once established, statehood must be carefully protected. See Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PENN. L. REV. 1127, 1168 (1961), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6971&context=penn_law_review.

³⁴ U.N. Charter art. 25.

³⁵ U.N. Charter arts. 27, ¶3. It is worth noting that Russia was granted its seat on the UNSC following the dissolution of the USSR, when Russia became the USSR’s successor state as part of a settlement that required Russia to honor Ukraine’s borders.

³⁶ Press Release, Security Council, UN Security Council action on Crimea referendum blocked, UN Press Release (Mar. 15, 2014), <https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Russia blocks Security Council action on Ukraine*, UN NEWS (Feb. 26, 2022), available at <https://news.un.org/en/story/2022/02/1112802>.

Russia's 2022 invasion of Ukraine,⁴⁰ would have obligated Russia to "immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine [defined by Ukraine's] internationally-recognized borders."⁴¹ Only ten member States of the United Nations recognized the annexation of Crimea while a United Nations General Assembly ("UNGA") Resolution that reaffirmed the territorial integrity of Ukraine and denounced the 2014 Referendum as illegitimate was adopted by 100 votes to 11 (with 58 abstentions) ("**Resolution 68/262**").⁴²

After each act of Russian aggression in Crimea, despite overwhelming international support for legally-binding resolutions that would obligate Russia to change its course of behavior with respect to Ukraine, Russia was able to use its veto power to block the entry of any such resolutions. Nevertheless, the overwhelming majority of UNSC members clearly support respecting Ukraine's territorial integrity and Ukraine's borders as demarcated immediately after the USSR's dissolution which would necessarily entail Crimea's integration into Ukraine.

Since the 2014 Referendum, the international community continues to widely reject the Crimean Annexation.⁴³ The U.N. General Assembly has continued to periodically reaffirm its support for the territorial integrity of Ukraine and the non-recognition of the Russian annexation of Crimea.⁴⁴ Several States have imposed and continue to maintain economic sanctions against Russia tied to

⁴⁰ Press Release, Security Council, Russia Blocks Security Council action on Ukraine (Feb. 26, 2022), <https://news.un.org/en/story/2022/02/1112802>.

⁴¹ *Id.*

⁴² Backing Ukraine's territorial integrity, UN Assembly declares Crimea referendum invalid, UN News (Mar. 27, 2014), available at <https://news.un.org/en/story/2014/03/464812>. See G.A. Res. 68/262 (Mar. 27, 2014) [hereinafter *Resolution 68/262*]; K. Matthews, *From A to Z: These are the 10 countries backing Putin's annexation of Crimea*, GLOBAL NEWS (Mar. 28, 2014), available at <https://globalnews.ca/news/1237010/from-a-to-z-these-are-the-ten-countries-backing-putins-annexation-of-crimea/>. The 10 States that are recognized to support the annexation of Crimea are: Armenia, Belarus, Bolivia, Cuba, Nicaragua, North Korea, Sudan, Syria, Venezuela, and Zimbabwe. *Id.* Note that these are also the countries that voted to against Resolution 68/262. *Resolution 68/262, supra*.

⁴³ Steven Pifer, *Five years after Crimea's illegal annexation, the issue is no closer to resolution*, BROOKINGS INSTITUTE (Mar. 18, 2019), available at <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/>. On February 26, 2023, the U.S. Department of State issued a press release reaffirming its position that "The United States does not and never will recognize Russia's purported annexation of the peninsula. Crimea is Ukraine." Press Release, U.S. Department of State, Crimea is Ukraine (Feb. 26, 2023), available at <https://www.state.gov/crimea-is-ukraine-2/>.

⁴⁴ See Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, Rep. of the Sec-Gen on its Seventy-Sixth Session, U.N. Doc. A/76/260 (2022).

the illegal annexation, and because of the annexation, Russia was expelled from the G8 intergovernmental organization.⁴⁵

The Venice Commission similarly concluded that the 2014 Referendum was illegal under Ukrainian law.⁴⁶ The Venice Commission was organized by the Council of Europe to examine issues concerning democratic procedure and the rule of law, and was tasked with independently examining the legality of the 2014 Referendum, and more specifically, “whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 Constitution is compatible with constitutional principles.”⁴⁷ Its report on this matter stated, “[i]n order for the referendum to be constitutional and legal, it would be required that the issues put before the voters be issues which can be the object of a local referendum under the Constitutions of Ukraine and the Autonomous Republic of Crimea. The Constitution of Ukraine enjoys supremacy over the Constitution of Crimea as an autonomous republic.”⁴⁸

According to the Venice Commission, the 2014 Referendum failed to meet European standards as established by its Code of Good Practice on Referenda.⁴⁹ Among other issues, the Venice Commission noted that the 2014 Referendum was worded imprecisely, was conducted in the presence of military occupation, and had been given a short lead time prior to the vote.⁵⁰ The Venice Commission also had concerns about freedom of expression in Crimea during the 2014 Referendum.⁵¹ Additionally, no negotiation preceded the separation and annexation of Crimea, a fact that the Venice Commission considered particularly salient.⁵²

⁴⁵ *Tracking sanctions against Russia*, REUTERS (last updated Jul. 7, 2022), available at <https://graphics.reuters.com/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/>; Jim Acosta, *U.S., other powers kick Russia out of G8*, CNN POLITICS (Mar. 24, 2014), available at <https://www.cnn.com/2014/03/24/politics/obama-europe-trip/index.html>.

⁴⁶ *Id.* at ¶¶7, 27-28 (“In order for the referendum to be constitutional and legal, it would be required that the issues put before the voters be issues which can be the object of a local referendum under the Constitutions of Ukraine and the Autonomous Republic of Crimea. The Constitution of Ukraine enjoys supremacy over the Constitution of Crimea as an autonomous republic.”).

⁴⁷ *For democracy through law*, COUNCIL OF EUROPE (last visited Nov. 11, 2022), https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN. See Eur. Consult. Ass., *Whether the Decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea’s 1992 Constitution is Compatible with Constitutional Principles*, 98th sess. 762 (Mr. 21, 2014), available at [https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)002-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)002-e) [hereinafter *Venice Commission Opinion*].

⁴⁸ *Id.* at ¶7.

⁴⁹ *Id.* at ¶ 24.

⁵⁰ *Id.* at ¶ 22-26.

⁵¹ *Id.* at ¶ 22.

⁵² *Id.* at ¶¶ 26, 28.

IV. RUSSIA’S ARGUMENTS JUSTIFYING ANNEXATION OF CRIMEA

Despite overwhelming international support for the return of Crimea to Ukraine, Russia continues to assert arguments that its annexation of Crimea is legitimate. This section examines each of these arguments and demonstrates that each has no legal or factual basis.

A. *Russia Claims that the Transfer of Crimea to Ukraine was Illegitimate and that Crimea was Never Rightfully Part of Ukraine*

Russia consistently argues that the 1954 transfer of Crimea within the USSR from the Russian SFSR to the Ukrainian SSR was not carried out in accordance with the USSR constitution and is therefore illegitimate and void. Russian President Vladimir Putin has presented the annexation of Crimea as a restoration of Russia’s historic rights. In a speech to various Russian officials, Putin maintained that:

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

Notwithstanding Russia’s arguments that the 1954 transfer of Crimea was illegitimate, Russia has entered into various multinational and binational treaties that directly or indirectly give Russia’s consent to the transfer.

1. Ukraine’s Right Over Crimea is Evident in International Treaties That Were Agreed Upon by Russia

International treaties establish a clear and continuous record of international recognition of Ukraine’s territorial integrity, and Russia is party to several agreements in which it has agreed to respect Ukrainian sovereignty over Crimea. Prior to and following the dissolution of the USSR, Russia signed binding and non-binding agreements that both explicitly and implicitly accepted Ukrainian territorial sovereignty over these areas. Some of these agreements contain broad and prescriptive language calling for general respect for territorial sovereignty, where others specifically petition for upholding the integrity of the borders of Ukraine.

(a) The 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (the “**Helsinki Final Act**”)

The Helsinki Final Act was signed in Helsinki at the conclusion of the Conference on Security and Cooperation in Europe, a summit between the Soviet Union and the West.⁵³ Although the Helsinki Final Act does not meet the requirements of a treaty and is not considered to be legally binding in international law, many consider it to be a foundational document for promoting peace and security across Europe.⁵⁴ The Helsinki Final Act sets forth two principles: (1) the sovereign equality of all European States, which includes the right to territorial integrity and (2) the requirement to refrain from threatening or using force [against other States].⁵⁵ In accordance with these principles, State borders may only be changed by peaceful means and by agreement of the States involved.⁵⁶ While this agreement was signed by the USSR (consisting of the Ukrainian Soviet Socialist Republic (“**Ukrainian SSR**”) and Russian SFSR), since its dissolution, Russia is widely recognized as the successor State to the USSR. Although Russia has not explicitly adopted the Helsinki Final Act, many in the international community consider it to be among the commitments inherited by Russia upon the dissolution of the USSR.⁵⁷

(b) The 1991 Belovezh Accords and Alma-Ata Protocol

Upon the USSR’s dissolution in 1991, several former soviet nations – including Ukraine and the Russian Federation – signed the *Belovezh Accords* and *Alma-Ata Protocol* (collectively, the “**CIS Agreement**”), which together established the Commonwealth of Independent States (the “**CIS**”).⁵⁸ The CIS was created to form a common economic space grounded on free movement of goods,

⁵³ *Conference on Security and Co-Operation in Europe Final Act*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Aug. 1, 1975), available at <https://www.osce.org/files/f/documents/5/c/39501.pdf> [hereinafter *Helsinki Final Act*]; *Conference on Security and Cooperation in Europe*, Official Transcript, COMM’N ON SEC. AND COOPERATION IN EUR. (May 6, 1975), available at <https://www.csce.gov/sites/helsinkicommission.house.gov/files/1975-05-06%20HIRC%20hearing%20on%20the%20CSCE.pdf>.

⁵⁴ E. Lamce, *Why the 1975 OSCE Helsinki Final Act Still Matters*, SECURITY AND HUMAN RIGHTS (last visited January 23, 2023), <https://www.shrmonitor.org/why-the-the-1975-helsinki-final-act-still-matters/>.

⁵⁵ *Helsinki Final Act*, *supra* note 53, at 4.

⁵⁶ *Id.*

⁵⁷ *A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Union of Soviet Socialist Republics (USSR)*, OFF. OF THE HISTORIAN (last visited Nov. 11, 2022), <https://history.state.gov/countries/soviet-union#:~:text=With%20the%20dissolution%20of%20the,successor%20state%20of%20the%20USSR.>

⁵⁸ Agreements establishing the Commonwealth of Independent States, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW art. 5 (Sept. 8, 1994), available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(1994\)054-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(1994)054-e) [hereinafter *Belovezh Accords*].

services, labor force, and capital to promote political, military, economic, and socio-cultural cooperation between the independent post-Soviet States.⁵⁹ The preamble of the CIS Agreement stresses the parties' intent to respect the doctrine of non-intervention⁶⁰ and Article 5 guarantees respect for the territorial integrity of all signing parties.⁶¹ Although Ukraine was a signatory to the CIS Agreement and a participant in various CIS initiatives, it did not ratify the subsequent Charter to become a member state.⁶² In 2018, Ukrainian President Petro Poroshenko signed a decree to cut ties with the CIS in response to Russia's aggression against Ukraine and as a shift towards integration with the European economy.⁶³

(c) The 1994 Budapest Memorandum of Security Assurances of Ukraine (the “**Budapest Memorandum**”)

Ukraine, Russia, the United States and the United Kingdom entered the *Budapest Memorandum of Security Assurances of Ukraine* in 1994.⁶⁴ Under this memorandum, in recognition of Ukraine becoming party to the Treaty on the Non-Proliferation of Nuclear Weapons and abandoning its nuclear arsenal to Russia, the participating States confirmed that they would respect Ukrainian independence and sovereignty within Ukraine's existing borders which included Crimea. The participating States also agreed to refrain from the threat or use of military force against Ukraine. Though the Budapest Memorandum is not a legally binding treaty, in connection with its execution, then-Russian President Boris Yeltsin insisted that Ukraine's territorial integrity would be respected and that there would be no revision of the state boundaries that had been drawn after the collapse of the Soviet Union.⁶⁵

⁵⁹ *Commonwealth of Independent States*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (last visited Nov. 11, 2022), <https://stats.oecd.org/glossary/detail.asp?ID=392>; Kanat Makhanov, *The Commonwealth of Independent States and Three Decades of Regional Cooperation in the Post-Soviet Space*, EURASIAN RESEARCH INSTITUTE (last visited Nov. 11, 2022), <https://www.eurasian-research.org/publication/the-commonwealth-of-independent-states-and-three-decades-of-regional-cooperation-in-the-post-soviet-space/>.

⁶⁰ *Id.* at Preamble.

⁶¹ *Id.* at art. 5.

⁶² Makhanov, *supra* note 59; *Ukraine withdraws all envoys from CIS bodies*, KYIV POST (May 19, 2018), available at <https://www.kyivpost.com/ukraine-politics/ukraine-withdraws-envoys-cis-bodies.html>; *Ukraine withdraws from CIS agreement on cooperation in customs affairs*, RUSSIAN NEWS AGENCY (last accessed Oct. 28, 2022), available at <https://tass.com/world/1481407>.

<https://euroweeklynews.com/2022/10/18/ukraine-withdraws-from-another-cis-agreement/>

⁶³ *Id.*

⁶⁴ *Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons* (Dec. 5, 1994), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/v3007.pdf>.

⁶⁵ S. Pifer, *Why care about Ukraine and the Budapest Memorandum*, BROOKINGS (last visited Jan. 23, 2023), available at <https://www.brookings.edu/blog/order-from-chaos/2019/12/05/why-care-about-ukraine-and-the-budapest-memorandum/>.

(d) The 1997 Treaty on Friendship, Cooperation and Partnership between Ukraine and Russia (the “1997 Treaty”)

In 1997, Ukraine and Russia entered a new *Treaty on Friendship, Cooperation and Partnership between Ukraine and Russia* that superseded a similar treaty that had been signed in 1990. The 1997 treaty, more commonly known as the “Big Treaty,” implied an end to Russia’s claims to Ukrainian territory when the parties agreed in Article 2 to “respect each other’s territorial integrity and confirm the inviolability of their common borders.”⁶⁶

(e) The 1997 Black Sea Fleet Agreements

Also in 1997, Russia and Ukraine entered a series of bilateral treaties called the Black Sea Fleet Agreements concerning the former Soviet naval fleet in the Black Sea and its bases in Ukrainian ports including in Crimea.⁶⁷ In the Black Sea Fleet Agreements, Ukraine agreed to continue certain of Russia’s leases in the region and consented to Russia having a naval presence in Crimea as long as Russia recognized Ukrainian sovereignty and Ukraine’s jurisdiction over Crimea. The leases were limited to specific tracts of land and pieces of infrastructure in Sevastopol and Feodosia, and were predicated on the implicit Russian recognition of Crimea as Ukrainian territory. Ukraine did not cede territory to Russia under these agreements. On April 2, 2014 – following Russia’s annexation of Crimea in blatant violation of these agreements – the Russian Federation exercised their authority to unilaterally terminate the Black Sea Fleet Agreements.⁶⁸

Russia’s annexation of Crimea is a breach of Russia’s commitments within several international treaties to which Russia is a signatory and violates Russia’s obligation to respect Ukraine’s territorial integrity under international law.⁶⁹ Ukraine’s right to sovereignty over Crimea is unmistakably acknowledged by the international community, and more importantly, Russia itself, within many multilateral and bilateral international treaties including the foregoing. For example, in the 1991 Belovezh Accords, Russia agreed to “acknowledge and

⁶⁶ *Id.* at Article 2, <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/v3007.pdf>.

⁶⁷ S. Kimball, *Bound by Treaty*, DW.COM (Mar. 11, 2014), available at <https://www.dw.com/en/bound-by-treaty-russia-ukraine-and-crimea/a-17487632>

⁶⁸ *Russia; Ukraine: Legislature Adopts Law on Dissolution of Black Sea Fleet Treaties*, Library of Congress (April. 3 2014), available at <https://www.loc.gov/item/global-legal-monitor/2014-04-03/russia-ukraine-legislature-adopts-law-on-dissolution-of-black-sea-fleet-treaties/>.

⁶⁹ International law is a set of rules and normative guidelines that govern the relationship and interaction between States. Sources of international law include treaties, authorities (e.g., binding decisions and nonbinding resolutions) from the principal organs of the United Nations, and court decisions from the ICJ.

respect [Ukraine’s] territorial integrity and the inviolability of [its] existing borders”⁷⁰ and under the 1975 Helsinki Final Act, Russia committed to respecting the territorial integrity of each of the participating States including Ukraine.⁷¹ Under the 1994 Budapest Memorandum, Russia implicitly acknowledged the transfer of Crimea to Ukraine by “reaffirm[ing] [Russia’s] commitment to respect the independence and sovereignty and the existing borders of Ukraine”⁷² and “reaffirm[ing] [its] obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine.”⁷³ Under this agreement, Russia further agreed that “none of [its] weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations.”⁷⁴

More recently, pursuant to the Treaty on Friendship, Cooperation and Partnership, Russia (i) agreed to “respect [Ukraine’s] territorial integrity”, (ii) confirmed “the inviolability of [Russia and Ukraine’s] common borders”⁷⁵ and (iii) agreed to “base [its] relations with [Ukraine] on the principles of mutual respect, sovereign equality, territorial integrity, the inviolability of borders, the peaceful settlement of disputes, [and] the non-use of force or threat of force.”⁷⁶ In the 1997 Black Sea Fleet Agreements, in exchange for Ukraine’s consent to Russia having a naval presence in Crimea, Russia explicitly agreed to recognize Ukrainian sovereignty and Ukraine’s jurisdiction over Crimea.

In agreeing to such terms within its international treaties, Russia is publicly representing to the international community that it consents to respecting the borders of Ukraine (which include Crimea). Russian officials continually assert that the Annexation of Crimea is the result of “complex international processes” that are entirely unrelated to any existing obligation Russia holds under the Budapest Memorandum and the 1997 Treaty on Friendship, Cooperation and Partnership between Ukraine and Russia, but each invasion of Ukraine since 2014

⁷⁰ *Belovezh Accords*, *supra* note 58.

⁷¹ *See Helsinki Final Act*, *supra* note 53.

⁷² Memorandum on security assurances in connection with Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons ¶ 1, Dec. 5, 1994, 3007 U.N.T.S. I-52231 *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52241.pdf> [hereinafter *1994 Budapest Memorandum*].

⁷³ *Id.* at ¶ 2.

⁷⁴ *Id.*

⁷⁵ Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, Ukr.-Russ., May 31, 1997, 3007 U.N.T.S. I52240 art. 2, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52240.pdf> [hereinafter *Treaty on Friendship, Cooperation and Partnership*].

⁷⁶ *Id.* at art. 3.

clearly violates Russia’s commitment to honor the borders of Ukraine under those treaties.

Furthermore, the argument that Russia does not accept that Crimea was ever part of Ukraine is not factually supported. In addition to the many public acknowledgements made by Russia, archival documents prove that the 1954 transfer of Crimea was authorized by the parliaments of each of the two republics and therefore was carried out pursuant to the then-operative constitution of the USSR. The 1936 Constitution, which was in effect in 1954, granted the Russian and Ukrainian Republics equal rights, and provided that the territory of neither could be altered without its consent. Based on the current documentary record, both the Russian SFSR and the Ukrainian SSR gave such consent via their republic parliaments in accordance with the constitution. Regardless of whether the acknowledgement of Ukraine’s borders was direct or indirect, Russia has repeatedly agreed by treaty and through non-binding agreement to honor Ukraine’s territorial integrity. Though the non-binding agreements do not create a legal obligation, they serve to demonstrate the Russian government’s view that Crimea is part of Ukraine. Both the treaties and non-binding agreements effectively preclude Russia from validly disputing Ukraine’s borders and annexing Ukrainian territory.

2. Ukraine Has a Right to Sovereignty Over Crimea Because its Borders Are Vested Under Uti Possidetis

As discussed above, the borders of Ukraine were memorialized in a series of bilateral and multilateral treaties to which both Ukraine and Russia were party, and prior to Russia’s invasion, Ukraine had consistently exercised every form of authority over Crimea since 1991. Russia’s acknowledgment of the borders of Ukraine under several international treaties in effect since the time of Ukraine’s independence vests Ukraine with the territorial boundaries described in such treaties.

In determining territorial boundaries, the principle of *Uti Possidetis*, “a principle originating in Roman law that territory and other property remains with its possessor at the end of a period of change, unless otherwise provided by agreement” is generally accepted as customary international law.⁷⁷ The concept of *Uti Possidetis* developed rapidly in the 20th century in response to the wave of decolonization across much of Asia and Africa. In this context, application of *Uti Possidetis* led to the inheritance of colonial administrative boundaries by the successor States of such colonies to avoid creation of “no man’s land” territories

⁷⁷ Case Concerning the Frontier Dispute (Burkina Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 20 (Dec. 22) [hereinafter *Frontier Case*].

vulnerable to claims of ownership by foreign powers. While originally applied to determine the boundaries of post-colonial States, the scope of *Uti Possidetis* jurisprudence as applied by the International Court of Justice (“ICJ”) has since expanded in scope and now serves as the rule for adjudicating any border disputes for newly independent States. Although advisory opinions of the ICJ are non-binding and do not have the authority to compel any action by the parties,⁷⁸ because of the ICJ’s authority and prestige, an advisory opinion is often accepted by the international community as if it were sanctioned by international law.

The ICJ has described the scope of *Uti Possidetis* as not solely pertaining to one specific system of international law, but rather as “a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.”⁷⁹ The Badinter Commission noted that the ICJ’s interpretation rendered *Uti Possidetis* a universal principle rather than a regional custom of the Americas and Africa.⁸⁰ In applying the principal of *Uti Possidetis* in the context of the former Yugoslavia, the Badinter Commission elevated the status of the former Yugoslav republics’ internal borders to frontiers protected by international law.⁸¹

When applying *Uti Possidetis*, the ICJ first determines the pre-independence boundaries (if any) of the newly-independent State.⁸² Evidence of sub-national administrative boundaries, such as provincial or State boundaries, as well as any treaties before or after independence are used to support the establishment of discernible borders. When no pre-independence boundaries are discernible, the ICJ has looked to post-independence facts to settle disputes. In these cases, the ICJ has based decisions on boundaries and territorial distinctions on *de facto* administration of such areas through policing and regulation, for example based on oversight responsibility of immigration or control of recreational activity in the area. Even a “modest but real display of authority” over a disputed area can be sufficient to establish national sovereignty absent other historical evidence to support such a claim.⁸³

⁷⁸ How the Court Works, International Court of Justice (last accessed Oct. 28, 2022), available at <https://www.icj-cij.org/en/how-the-court-works>. A case may only be submitted to the ICJ if all relevant parties have, in some form, agreed to allow ICJ jurisdiction over the matter. ICJ opinions and jurisprudence are considered expressive of customary international law and treated as if they were sanctioned by international law. *Id.*

⁷⁹ *Id.* (emphasis added).

⁸⁰ Conference on Yugoslavia Arbitration Commission Opinion No. 3 (Jan. 11, 1992), 31 I.L.M. 1499, 3 E.J.I.L. 184 (1992).

⁸¹ *Id.*

⁸² Frontier Case, *supra* note 77, ¶ 20.

⁸³ Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, 2007 I.C.J. 659, ¶ 208 (Oct. 8) [hereinafter *Nicaragua*].

Under the principle of *Uti Possidetis* as applied by the ICJ, in the present-day border dispute between Ukraine and Russia, Crimea would be considered Ukrainian territory. As discussed above, Ukraine has well-established pre-independence borders that include Crimea and had asserted complete authority over the region until Russia's illegal invasion.

B. Russia Claims that the 2014 Referendum was a Valid Exercise of Self-Determination and Remedial Secession by Crimea

Despite Russia's obligation to honor territorial integrity under multiple international treaties, Russia argues that Ukraine does not have any right to sovereignty over Crimea, and Crimea's right to self-determination must be recognized. According to Russia, Crimea legitimately exercised its right to self-determination when the Crimean people overwhelmingly voted to join Russia in 2014. However, as explained below, this argument lacks legal and factual support.

1. Changing Borders under Self-Determination

In limited circumstances, a State's borders can be altered through the exercise of self-determination. In the U.N. Charter, the organizational purpose of the U.N. specifically includes "[developing] friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, and to take other appropriate measures to strengthen universal peace," (emphasis added) and that the U.N.'s actions shall be based on "respect for the principle of equal rights and *self-determination of peoples*"(emphasis added).⁸⁴

Modern application of self-determination distinguishes between a right to internal self-determination and a right to external self-determination, and these rights are not equal under customary international law. There is little debate around the right to internal self-determination, described as a group's right to preserve its cultural, religious, and political autonomy within the framework of an existing State.

External self-determination on the other hand is characterized by the attempt of a distinct group of people within a State to secede to be free of "alien

⁸⁴ U.N. Charter arts. 1 ¶2, 55. Despite its historical recognition as a concept essential to individual liberty, it was not until the 20th century, after the end of the First World War, that the principle of self-determination was formally documented as a fundamental principle in the context of international relations. *See id.*

subjugation, domination and exploitation” and is more controversial.⁸⁵ International law generally requires external self-determination to be a last resort from extreme oppression, and nearly always requires the consent of the parent State. Customary international law has recognized the effort of colonized States to seek independence as a form of self-determination, but outside of this context of decolonization, the legal boundaries of external self-determination are ill-defined.⁸⁶ As discussed in greater detail below, the Supreme Court of Canada reinforced this narrow view of the right to external self-determination under international law by enumerating just two instances in which the right to external self-determination exists as an established standard under international law: (1) colonial peoples breaking away from imperial powers and (2) non-colonial peoples subject to alien subjugation, domination or exploitation.⁸⁷ The Supreme Court of Canada references a third situation that might give rise to the right of external self-determination, in which a people is blocked from the meaningful exercise of its right to self-determination, but suggests that it is unclear whether this situation reflects established international law.

The analysis of whether a group of people has a right to external self-determination begins with defining the relevant “people” which is then followed by a two-prong test. The first prong examines the extent of commonalities shared by the people (*e.g.*, racial background, ethnicity, language, religion, history, and cultural heritage) and considers whether the people have a distinct claim for territorial integrity outside of the parent State. The second prong examines the people’s independent perception of themselves collectively and whether they can form a sustainable government body.⁸⁸ Satisfaction of these prongs is not sufficient to establish an unfettered right to external self-determination without the consent of the parent State. Instead, for such a right to be established, the subject group of people must not be able to obtain internal self-determination by other means. For example, a sizable, self-defined minority group that faces a pattern of systemic discrimination or exploitation and for which the central government has rejected a compromise solution, might qualify as these

⁸⁵ G.A. Res. 1514 (XV), ¶1 (Dec. 14, 1960); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, INTERNATIONAL COURT OF JUSTICE, 22 July 2010, ¶ 82 [hereinafter *Kosovo Advisory Opinion*].

⁸⁶ G.A. Res. 1514 (XV), ¶1 (Dec. 14, 1960); *see also* S. F. van der Driest, *Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, 329 NETH INT LAW REV 62, 335 (2015).

⁸⁷ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, 285 (S.C.C.) [hereinafter *Quebec Secession (Supreme Court of Canada)*].

⁸⁸ Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT’L L. & POL’Y 373, 379 (2003) (noting the different forms of self-determination available to a people, which include autonomy, self government, free association, and ultimately, secession).

conditions effectively deprive members the group of their fundamental human rights.

When applied to a particular group, the test will produce varied proposals for the group's treatment, ranging from self-government within a State at one end of the spectrum and total independence from the parent State at the other end of the spectrum. The group of people asserting a claim of self-determination must demonstrate the viability and legal basis of their claim. Customary international law defers to *jus cogens* and other precedent to assess whether such a claim falls within the bounds of the prominent and accepted circumstances that give rise to self-determination, and if so, to what extent and in what way the claim should be recognized.

In most cases, peoples that wish to do so can successfully seek and obtain internal self-determination through various forms of communal or regional autonomy within the boundaries of the existing State. That is, they can receive redress within the State. Independence is only a remedy of last resort if no internally agreed-upon remedy can be attained, and fundamental human rights have been systemically thwarted. These extreme cases are limited to decolonization, foreign occupation, or violent oppression of a defined group by the parent State.⁸⁹

Notably, Russia has previously submitted a written statement to the ICJ arguing in favor of an even more narrow application of the right to external self-determination, claiming that “those conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the 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 existing State.”⁹⁰ This set of conditions is clearly not met with respect to the treatment of the Crimean people in Ukraine. The Russian government's claims of Ukrainian oppression of ethnic Russians in Crimea are greatly overstated and certainly do not satisfy the high bar Russia itself views as necessary for a valid exercise of the right to external self-determination, which makes Russia's argument that it feels compelled to honor the Crimean people's efforts at self-determination disingenuous at best.

A legitimate exercise of a right to external self-determination does not sanction the forced removal of territory from one State and its appendage to a different State. While military interventions on humanitarian grounds may be

⁸⁹ *Quebec Secession (Supreme Court of Canada)*, *supra* note 87, at 287.

⁹⁰ Written Statement by the Russian Federation, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, April 16, 2009, ¶ 88.

initiated to support independence movements, such as the international involvement that was mobilized in Kosovo, such intervention does not warrant subsequent annexation of territory by another State. The right to self-determination belongs to the group of people that have been denied fundamental human rights and is meant to address that deprivation. It is not, and has never been, recognized as a platform for an aggressor State to acquire the territory of another State.

(a) Quebec Case – No Unilateral Right to Secession

The Quebec sovereignty movement was most active in the late 20th century and led to two failed referenda on the independence of the province. In contrast to other examples of self-determination, Quebec’s sovereignty movement has focused on nonviolent, democratic, and legal means of gaining independence. In 1998, the Supreme Court of Canada reviewed whether the National Assembly, legislature or government of Quebec had the appropriate authority to unilaterally secede Quebec from Canada.⁹¹ In examining the relationship between the Canadian constitution and the principles of democracy and self-determination, the Supreme Court of Canada found that while the principles of federalism and territorial integrity would prevent the unilateral secession of Quebec by referendum or through a unilateral declaration of the provincial assembly, the competing principles of democracy and self-determination under both the Canadian constitution and international law would create an obligation for the federal government of Canada to consider secession proposals from Quebec, within the parameters of the Canadian constitution.

In its published judicial opinion, The Supreme Court of Canada emphasized that “[t]he recognized sources of international law establish that the right to self-determination of a people is ordinarily fulfilled through internal self-determination – a people’s pursuit of its political economic, social and cultural development within the framework of an existing State.”⁹² While ultimately concluding that no right to unilateral secession existed in Canadian law, the Court declared that the right may arise under international law in cases of (i) colonialism, (ii) “subjugation, domination or exploitation” and, possibly, (iii) where people are denied “meaningful exercise” of self-determination within the framework of their existing State.”⁹³

⁹¹ In the Matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council, [1998] 2 S.C.R. 217 (Can.), *available at* <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1643/1/document.do>

⁹² *Quebec Secession (Supreme Court of Canada)*, *supra* note 87, at 280-281.

⁹³ *Quebec Secession (Supreme Court of Canada)*, *supra* note 87, at 295-296.

(b) Scotland Case – Extensive Right to Vote and Consensual Agreement with the UK Government

Scotland held a referendum on its independence in 2014,⁹⁴ after the governments of Scotland and the United Kingdom entered into an agreement pursuant to which they agreed on the terms of the referendum and granted constitutional legitimacy to the process. At the time, the Scottish government was not advocating for a unilateral act proclaiming independence, but rather asserted that a positive vote for independence would have moral and political force, giving a clear mandate to the Scottish government to negotiate the secession of Scotland through an act of the UK parliament. Importantly, almost everyone living in Scotland on the day of the referendum that was 16 years old or older was able to vote.⁹⁵ The referendum resulted in a 84.5% turnout, with the majority of electors choosing to reject the proposition of independence.⁹⁶

Kosovo Case – Legality of Declaration of Independence

The ethnic Albanians of Kosovo suffered a long history of systemic discrimination which rapidly escalated in the late-1990s with the dissolution of the Federal Republic of Yugoslavia. Over a period of years, proposed compromises were rejected by the Serbian government, including a proposal to return Kosovo to an autonomous region within Serbia. In response to atrocity crimes against the ethnic Albanians, the international community launched a NATO-led humanitarian intervention and the U.N. Security Council adopted Resolution 1244 setting out the path for international supervision of the Kosovo. This led to the creation of the U.N. Mission in Kosovo which spent nearly a decade managing Kosovo's democratic development and its transition to independence.

In 2008, the Assembly of Kosovo unilaterally adopted a declaration of independence proclaiming the Republic of Kosovo to be independent from Serbia. In 2010, following a referral from the UNGA, the ICJ was asked to produce an advisory opinion (the “**Kosovo Advisory Opinion**”) determining whether the unilateral declaration of independence by Kosovo was in accordance with international law.⁹⁷ The ICJ determined that that no rule of international law

⁹⁴ Scottish Independence Referendum, Gov.UK (last visited Nov. 13, 2022), available at <https://www.gov.uk/government/topical-events/scottish-independence-referendum/about>.

⁹⁵ Laura Smith-Spark, *Scotland's vote on independence: What you need to know*, CNN, Sept. 18, 2014, available at <https://www.cnn.com/2014/09/09/world/europe/scottish-referendum-explainer/index.html>.

⁹⁶ *Scottish Independence Referendum 2014*, UK PARLIAMENT HOUSE OF COMMONS LIBRARY (last visited Jan. 24, 2023), <https://commonslibrary.parliament.uk/research-briefings/rp14-50/>.

⁹⁷ *Kosovo Advisory Opinion*, *supra* note 85, at ¶ 1.

prohibited such a declaration,⁹⁸ but failed to address whether the declaration was a proper exercise of Kosovo’s right to self-determination or right to “remedial secession.”⁹⁹ Therefore, the legal effects of the unilateral declaration in international law remain unresolved. Notably, at the time the Kosovo Advisory Opinion was issued, most of the international community, with the notable exception of Russia, accepted Kosovo’s declaration of independence and recognized Kosovo as a sovereign State.¹⁰⁰

As a corollary to self-determination (in fact, often seen as the most extreme form of self-determination), remedial secession is a legally neutral act that is neither accepted nor prohibited by international law.¹⁰¹ Remedial secession is intended to address wrongs being perpetrated against the seceding people, namely that their right to internal self-determination is being violated and they have no other available remedy. As the doctrine of last resort, remedial secession is not an absolute “right,” and exists only where self-determination has been frustrated, or where flagrant human rights violations and other discrimination are being perpetrated.¹⁰²

2. Kosovo Case is Distinguishable

Russia argues that Crimea exercised its internationally recognized right to self-determination and remedial secession in 2014 when it held the 2014 Referendum pursuant to which the Crimean people overwhelmingly voted to join Russia. While ignoring more relevant and applicable precedent, Russia looks to Kosovo’s independence as an example of authorized external self-determination and has cited the Kosovo Advisory Opinion as proof that a people’s declaration of independence does not violate international law.¹⁰³ Attention must be called to the hypocrisy of Russia’s reliance on the Kosovo example and the Kosovo Advisory Opinion as, back in 2008, Russia had openly supported limiting a State’s right to external self-determination in opposition to Kosovar independence from Russian-allied Serbia. A cynical move on Russia’s part, Russia now adopts

⁹⁸ *Id.* at ¶¶ 56, 79.

⁹⁹ *Id.* at ¶¶ 82-83.

¹⁰⁰ See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ REP. 403, ¶¶ 56, 79 (July 22). To date, over 100 countries have recognized Kosovo, including all G-7 states and over three-quarters of European Union member states. Countries that Recognize Kosovo 2022, WORLD POPULATION REVIEW (last visited Nov. 13, 2022), <https://worldpopulationreview.com/country-rankings/countries-that-recognize-kosovo>.

¹⁰¹ See James Crawford, *The Creation of States in International Law* (OUP 2006); Jure Vidmar, *Explaining the Legal Effects of Recognition*, ICLQ 61 (2012); Simone F. van den Driest, *Crimea’s Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, NETH. INT. LAW REV. 62 (2015); *Quebec Secession (Supreme Court of Canada)*, *supra* note 87, at 277-278.

¹⁰² van der Driest, *supra* note 86, at 341.

¹⁰³ See generally Anton Bebler, *Crimea and the Russian-Ukraine Conflict*, 15 ROMANIAN J. INT’L L. 35, 46 (2015).

arguments that it had diametrically opposed when utilized by the U.S. and U.K. in the Kosovo proceedings.

The attempted secession of Crimea can be distinguished from Kosovo's secession because there has not been any period since Ukrainian independence from the USSR during which the Ukrainian government has violently repressed ethnic Russians or Russian culture, nor has there been any history of crimes against ethnic Russians that has resulted in U.N. administration of the territory. In fact, Crimea was granted special economic status within Ukraine.¹⁰⁴

In April 2014, after visiting Ukraine and Crimea, the Office of the High Commissioner for Human Rights concluded that the alleged violations of the rights of ethnic Russians seemed to be "neither widespread nor systemic."¹⁰⁵ There was "no evidence of harassment or attacks on ethnic Russians ahead of the [secession] referendum."¹⁰⁶ It was "widely assessed that Russian-speakers have not been subject to threats in Crimea."¹⁰⁷ The OSCE high commissioner on national minorities, on the basis of a visit to Crimea from March 4-6, 2014, reported no human rights problem affecting the ethnic Russian population.¹⁰⁸

In contrast to Kosovo, the Quebec and Scotland cases are applicable and relevant to an analysis of Crimea's exercise of self-determination. The *Quebec Case* illustrates that self-determination can be achieved and should first be pursued without seeking independence from a parent State. To the extent they are entitled to self-determination, the people of Crimea have an obligation to seek internal self-determination first within the framework of Ukrainian law and are not entitled under international law to secede from Ukraine until all other avenues of redress are exhausted. The Crimean people have not sought such relief and have not pursued an internal, nonviolent, transparent, and democratic process to create a new State through legal means and therefore any purported secession is invalid as a matter of international law.

The *Scotland Case* offers an example of a legitimate process of referendum and organized independence. Unlike in Crimea, the governments of Scotland and the United Kingdom entered into an agreement prior to the referendum to determine its terms and to grant constitutional legitimacy to the process. Additionally, eligibility to vote in the 2014 Referendum in Crimea was far less

¹⁰⁴ Schodolski, *supra* note 8.

¹⁰⁵ Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in Ukraine, 15 April 2014 ("U.N. Report"), at ¶¶ 7, 73.

¹⁰⁶ *Id.*, at ¶ 89.

¹⁰⁷ *Id.*, at ¶ 89.

¹⁰⁸ *Id.*, at ¶¶ 1-13.

open compared to such eligibility in the *Scotland Case*. In fact, there is significant uncertainty as to which Ukrainian citizens were available and able to exercise their right to vote. Crimean leadership, under Russian influence, has made no effort to work with the Ukrainian government to develop a peaceful and legitimate process through which the Crimean people's issues could be addressed.

Secession, even in response to truly extreme circumstances, would be “an ultimatum remedium,” not a solution available in the early or intermediate stages of a crisis. If there were such a crisis in Crimea (which there is not), a procedural condition is entailed here: “all effective remedies [short of secession] must have been exhausted to achieve a settlement” before Crimea could exercise the remedial right. Attempts to resolve the crisis would need to have been made within the existing legal order.

C. Russia Claims That Its Use of Force in Ukraine is Justified as an Exercise of Individual And Collective Self-Defense

On February 24, 2022, the day that Russia launched its invasion of Ukraine, Russia's Article 51 report to the U.N. Security Council claimed that Russia was exercising its right to self-defense.¹⁰⁹ This claim is illogical at best because Russia was not attacked by Crimea or Ukraine, and Russia did not face any threat of force by, or related to, Crimea. In fact, the “self-defense” argument has been largely rejected by the international community and finds little support in international law.¹¹⁰

1. Defining “Armed Attack” through International Law

The prohibition against the threat or use of force among States is a customary norm of international law and is a fundamental principle of international relations.¹¹¹ This principle is enshrined in Article 2(4) of the U.N. Charter, which prohibits Member States 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.”¹¹² Self-defense is also a well-established right under international law and when properly invoked may justify a State's use of armed force in response to an “armed attack” by another State. Article 51 of the

¹⁰⁹ *The Law of War and the Russian Invasion of Ukraine*, CONGRESSIONAL RESEARCH SERVICE (Mar. 16, 2022), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10710>.

¹¹⁰ *Id.* R. Martin, *Putin describes the attack on Ukraine as an act of self-defense*, NPR (Feb. 24, 2022), available at <https://www.npr.org/2022/02/24/1082736117/putin-describes-the-attack-on-ukraine-as-an-act-of-self-defense>.

¹¹¹ *Nicaragua*, *supra* note 83, at ¶ 190.

¹¹² U.N. Charter art. 2 ¶ 4.

U.N. Charter recognizes this right as an “inherent” one,¹¹³ and as the Charter’s drafting history makes clear, “[t]he use of arms in legitimate self-defense remains admitted and unimpaired.”¹¹⁴

What constitutes an “armed attack” justifying the exercise of the right of self-defense is a topic of debate. In the seminal *Military and Paramilitary Activities* case concerning Nicaragua’s alleged incursions into, and support of armed groups operating in, neighboring countries, the ICJ explained that not all forms of the use of force constitute an “armed attack” that would give rise to the right of self-defense; rather, “it [is] necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”¹¹⁵ In the Nicaragua case, the ICJ found that the concept of “armed attack” does not include “assistance to rebels in the form of the provision of weapons or logistical or other support.”¹¹⁶ The Court determined that Nicaragua had not committed armed attacks, even though it has been established “that certain transborder military incursions into the territory of Honduras and Costa Rica [were] imputable to the Government of Nicaragua.”¹¹⁷ Despite this finding, the court held that “these incursions . . . may [not] be relied on as justifying the exercise of the right of collective self-defense.”¹¹⁸

While some international law scholars agree with this restrictive view of self-defense and contend that a State may not use force in self-defense unless and until it has suffered an armed attack¹¹⁹ (making it unlawful for a State to engage in any kind of pre-emptive action),¹²⁰ even these scholars concede that in some

¹¹³ *Nicaragua*, *supra* note 83, at ¶¶ 176, 193; U.N. Charter art. 51 provides in full:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

¹¹⁴ Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent, 3 *Wy. L. Rev.* 664, n. 278 (2003) (*citing* Restricted Doc. 944, 1/1/34 (1), 6 U.N.C.I.O. Docs. 447, 459 (1945)).

¹¹⁵ *Nicaragua*, *supra* note 83, at ¶ 191.

¹¹⁶ *Id.* at ¶ 195.

¹¹⁷ *Id.* at ¶ 164.

¹¹⁸ *Id.* at ¶¶ 231, 234.

¹¹⁹ MARC WELLER, *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 664 (2015).; Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 *The Wash. Q.* 89, 93 (2003).

¹²⁰ Arend, *supra* note 119, at 93.

circumstances a potential victim of armed aggression may use force against operations that have not yet resulted in an attack.¹²¹

2. The Use of Self-Defense Outside of the Context of an Armed Attack

The U.N. Charter and customary international law have indicated that exercise of the right of self-defense may be justified outside of an armed attack in cases where self-defense is anticipatory, preemptive or preventative.¹²² These terms describe use of force on a temporal continuum, with anticipatory self-defense being closest to the manifestation of an armed attack and preventive self-defense furthest away.¹²³

(a) Anticipatory Self-Defense

“Anticipatory” self-defense describes the use of force when the need to act is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” This formulation of anticipatory self-defense was articulated in the 1837 *Caroline* case, which involved a pre-emptive attack by British forces based in Canada against an American ship, the *Caroline*, that was docked on the American side of the Niagara River and had been providing assistance to rebels in Canada.¹²⁴ Though diplomatic negotiations following the *Caroline* incident led to the Webster-Ashburton Treaty of 1842, the *Caroline* incident is better known in the international community for indoctrinating the use of self defense in “imminent” circumstances.¹²⁵ The *Caroline* test establishes that a State exercising anticipatory self-defense needs to show that the use of force by an opponent was imminent and that there was essentially nothing but forcible action that would forestall such an attack.¹²⁶ Because the concept of anticipatory self-defense predates the U.N. Charter, some experts and scholars contend that the “inherent right” to self-defense

¹²¹ See, e.g., Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 368 (“Thus a naval force of a State which had stated its intention to attack, approaching territorial waters, might be regarded as offensive and intercepted on the high seas”).

¹²² In the Nicaragua case, the ICJ noted that “[t]he possible lawfulness of a response to the imminent threat of an armed attack which as not yet taken place has not been raised.” *Nicaragua*, *supra* note 83, at ¶ 35.

¹²³ WELLER, *supra* note 119, at 662.

¹²⁴ See Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493 (1990).

¹²⁵ Matthew Waxman, *The 'Caroline' Affair in the Evolving International Law of Self-Defense*, LAWFARE (Aug. 28, 2018), available at <https://www.lawfareblog.com/caroline-affair>.

¹²⁶ Arend, *supra* note 119, at 91.

expressed in Article 51 includes the right to anticipatory self-defense.¹²⁷ For example, United Kingdom Attorney General Lord Goldsmith declared:

*It is argued by some that the language of Article 51 provides for a right of self-defence only in response to an actual armed attack. However, it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent. It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the “Caroline” incident in 1837. . . . It is not a new invention. The charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack.*¹²⁸

The U.N. has likewise recognized the right to anticipatory self-defense, noting that “a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate”¹²⁹ and “[i]mmminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack.”¹³⁰

States and scholars have articulated various circumstances that would give rise to the justified use of force in anticipatory self-defense. In reviewing whether an armed attack could be considered “imminent”, Sir Daniel Bethlehem QC, a former Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom discussed such circumstances and stated,

Whether an armed attack may be regarded as “imminent” will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an

¹²⁷ *Supra* note 123, at 663.

¹²⁸ See Daniel Bethlehem, *Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, *The American Journal of International Law* (2012) at 2–3.

¹²⁹ A more secure world: Our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change ¶ 188, U.N. High-Level Panel on Threats, Challenges and Change (2004), available at https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/hlp_more_secure_world.pdf [hereinafter *U.N. High-Level Panel on Threats, Challenges and Change*].

¹³⁰ Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, ¶ 124.

*attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.*¹³¹

(b) Pre-emptive Self-Defense

The term “pre-emptive self-defense” is used to describe the use of force to halt a particular course of action that the potential victim State perceives will shortly evolve into armed attack against it.¹³² It is a broader interpretation of the right of self-defense, developed in response to arguments that limiting the use of self-defense to cases of anticipatory self-defense is too restrictive and does not comport with States’ historical right to use force to protect themselves. Under this doctrine, the use of self-defense is lawful if it takes place at the last window of opportunity in which a State may effectively act to defend itself against an entity that has both the intent and capacity to attack.¹³³ For example, following the attacks on the United States on September 11, 2001, based on a perceived continued threat from Iraq, the Bush administration promulgated a new national security strategy that considered pre-emptive self defense as “necessary . . . under long-standing principles of self defense . . . [to] use force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack.”¹³⁴ According to the Bush administration, “[t]he greater the threat, the greater . . . the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves.”¹³⁵ The doctrine of pre-emption has particular salience in the context of modern, contemporary threats, such as weapons of mass destruction and international terrorism. Australia, Japan, and the U.K. have also defended their right to use force in certain situations to prevent threats from materializing,¹³⁶ but there are mixed views on this type of self-defense, and the U.N.’s High-Level

¹³¹ Bethlehem at 6–7; *see also* Brandis.

¹³² WELLER, *supra* note 123, at 662.

¹³³ WELLER, *supra* note 123, at 666.

¹³⁴ The White House, National Security Strategy 2002, <https://georgewbush-whitehouse.archives.gov/nsc/nss/2006/sectionV.html>.

¹³⁵ *Id.*

¹³⁶ WELLER, *supra* note 119, at 667. But the U.K. has also indicated that pre-emptive self-defense is contrary to international law. *See* Bethlehem at 3 (quoting Goldsmith: “It is therefore the Government’s view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.”).

Panel on Threats, Challenges and Change noted that the issue lies in determining whether a threat that is not imminent is real.¹³⁷

(c) Preventive Self-Defense

Preventive self-defense is when force is used to halt the future threat of an armed attack in the absence of precise information of when or where the attack may occur or evidence that the opponent has the capacity or intent to attack.¹³⁸ This is the broadest interpretation of the right to self-defense and as such is the most controversial. It is worth noting that the U.N. Security Council is empowered to allow States to take forcible measures against a “threat to the peace” and the U.N.’s High-Level Panel on Threats, Challenges and Change has stated that, rather than unilateral action by a State under a claim of preventive self-defense, “if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”¹³⁹ In addition to this authorized use of force, some States and scholars support an understanding of self-defense that includes the use of preventive self-defense under certain conditions. For example, the United States has asserted a right to use force in the face of perceived threats, such as those posed by weapons of mass destruction, “even if uncertainty remains as to the time and place of the enemy’s attack.”¹⁴⁰

The ICJ has found that “the [U.N.] Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content.”¹⁴¹ Rather, the application of Article 51 and customary international law regarding the use of force as self-defense, is determined by “the actual practice and *opinio juris* of States.”¹⁴²

In the paradigmatic scenario (and as expressly stated in Article 51), the right of self-defense is triggered by an “armed attack” against a State.¹⁴³ Once this right is triggered, ICJ has articulated that any use of self-defense must be necessary and proportional. As the ICJ has explained, “[t]he submission of the exercise of the

¹³⁷ U.N. High-Level Panel on Threats, Challenges and Change, *supra* note 129, at ¶ 188.

¹³⁸ WELLER, *supra* note 119, at 663.

¹³⁹ U.N. High-Level Panel on Threats, Challenges and Change, *supra* note 129, at ¶ 190.

¹⁴⁰ National Security Strategy 2002.

¹⁴¹ *Nicaragua*, *supra* note 83, at ¶ 176. “For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” *Id.*

¹⁴² *Nicaragua*, 83, at ¶¶ 176–77, 183.

¹⁴³ *Id.* at ¶ 191; U.N. Charter art. 51.

right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”¹⁴⁴ In other words, *first*, a State invoking the right of self-defense “has to show that attacks have been made upon it for which [another State] was responsible; and that those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force”; and *second*, a State invoking the right of self-defense must be able to show that the measures it has taken in self-defense are proportional to the armed attack.¹⁴⁵

There is little question that self-defense in cases of imminent attack is recognized under customary international law and Article 51, but significant debate surrounds the extent to which that recognition extends to self-defense exercised in circumstances where an armed attack is not imminent. Regardless of the temporal proximity of an attack, all authorities agree that for the use of self-defense to be legitimate, it must be predicated on a real threat to the State taking defensive action.

3. Individual vs. Collective Right to Self-Defense

The right of self-defense may sometimes be collective in nature,¹⁴⁶ meaning that in certain circumstances a State has the right to defend *other States*.¹⁴⁷ However, action taken in defense of non-State entities is controversial. Non-State entities are not U.N. Member States and therefore are not granted international legal personality under the U.N. Charter entitling them to an inherent right to self-defense.¹⁴⁸ Nevertheless, some States argue that it may be proper to invoke collective self-defense to justify coming to the aid of non-State actors. The United States has invoked such a right on multiple occasions, for instance to justify military strikes against Syrian Democratic Forces (“SDF”) in June 2017¹⁴⁹ and

¹⁴⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 41 (Jul. 8).

¹⁴⁵ *Nicaragua*, *supra* note 83, at ¶ 194.

¹⁴⁶ *Nicaragua*, *supra* note 83, at ¶ 193.

¹⁴⁷ *Nicaragua*, *supra* note 83, at ¶ 195.

¹⁴⁸ See Elvina Pothelet, *U.S. Military’s “Collective Self-Defense” of Non-State Partner Forces: What Does International Law Say?*, Oct. 26, 2018, <https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/> (“[T]he Art. 51 right to collective self-defense is only a right to defend other States, not non-State entities. This flows from the nature of the UN Charter which is a treaty amongst States. This reading of Art. 51 is uncontroversial in academic commentary.”).

¹⁴⁹ U.S. Dep’t of Defense, Mar. 7, 2016, <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1217892/coalition-defends-partner-forces-from-syrian-fighter-jet-attack/>.

against Syrian pro-regime forces in February 2018.¹⁵⁰ The ICJ also seems supportive of a right to collective self-defense and has gone as far as to state that when it comes to invoking the right of collective self-defense, “[t]he existence of an additional motive, other than that officially proclaimed by the [State claiming the right], could not deprive [it] of its right to resort to collective self-defence.”¹⁵¹

4. Failure of Principles of Collective-Self Defense to Serve as Justification to Russia’s Actions in Crimea

Russia’s claims of individual and collective self-defense to justify its actions in Crimea fail both factual and legal analysis. Ukraine has not carried out any armed attacks against Russia that would give rise to a right to exercise individual self-defense under international law or within the meaning of Article 51. Nor has Ukraine engaged in a course of conduct leading to an imminent threat of attack such that a claim of anticipatory self-defense would be justified, or conduct resulting in a last window of opportunity for Russia to defend itself such that a claim of pre-emptive self defense would be valid. Russia has also failed to articulate how annexing Crimea can be justified on the basis of its self-defense claim. In an address to Russian officials on March 18, 2014, after the results of the 2014 Referendum were published, President Putin stated that “[t]here was not a single armed confrontation in Crimea and no casualties” because the Ukrainian military “refrained from bloodshed” and respected “the will of the people.”¹⁵² This statement completely undermines any claimed need for individual or collective self-defense.

D. *Russia Asserts that Ukraine’s Claims With Respect to Crimea are Time-Barred Under Theories of Waiver, Acquiescence, And Extinctive Prescription*

Russia attempts to invoke the principles of waiver, acquiescence, and extinctive prescription as defenses against Ukraine’s claims to Crimea. Because the success of these defenses is predicated on Ukraine’s conduct in accepting such occupation for a period of time, they have little to no applicability to the territories captured by Russia in its full-scale invasion of Ukraine on February 24, 2022.

¹⁵⁰ U.S. Central Command, Feb. 7, 2018, <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1435188/unprovoked-attack-by-syrian-pro-regime-forces-prompts-coalition-defensive-strik/>.

¹⁵¹ *Nicaragua*, *supra* note 83, at ¶ 127.

¹⁵² President of Russia, Mar. 18, 2014, <http://en.kremlin.ru/events/president/news/20603>; <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>

While doctrinally distinct, application of each of these principles would result in the same consequence: Ukraine’s loss of claim to Crimea.

Waiver, acquiescence, and extinctive prescription are related concepts insofar as they lead to the loss of a State’s right or claim against another State to compel certain actions, such as cessation of specific conduct, guarantees or assurances of non-repetition of specific conduct, or reparations for harm caused by the conduct of an offending State.¹⁵³ The U.N.’s International Law Commission (the “**ILC**”) has addressed two of these principles—waiver and acquiescence—in its Articles on Responsibility of States for Internationally Wrongful Acts and the related commentary (the “**Articles on Responsibility for Internationally Wrongful Acts**”).¹⁵⁴ Under Article 45 of the Articles on Responsibility for Internationally Wrongful Acts, a State may not be found responsible for its acts if (a) the injured State has validly waived the claim; or (b) the injured State is considered to have, by reason of its conduct, acquiesced in the lapse of the claim.¹⁵⁵

1. Waiver

Waiver of claims is based on the principle of consent and is well-established in international law.¹⁵⁶ The ILC and international law scholars have identified several facts that are relevant to an analysis of whether waiver has taken place.

First, the injured State must have unequivocally declared its willingness to renounce the claim, regardless of whether such a declaration may be express or implied by the State’s conduct.¹⁵⁷ For example, in the *Case Concerning Certain Phosphate Lands in Nauru*, the ICJ rejected Australia’s argument that Nauru had waived claims for a rehabilitation of the island because various statements made at the time of independence, while conspicuously silent on the possibility of such

¹⁵³ CHRISTIAN J. TAMS, WAIVER, ACQUIESCENCE AND EXTINGTIVE PRESCRIPTION 1 (2010); *See also* THE LAW OF INTERNATIONAL RESPONSIBILITY 1035–49 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010); Ashraf Ray Ibrahim, *The Doctrine of Laches in International Law*, 83 Va. L. Rev. 647, 653 (1997).

¹⁵⁴ *Responsibility of States for Internationally Wrongful Acts*, U.N. GEN. ASSEMBLY (Jan. 28, 2002), available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [hereinafter *Resolution 56/83*]. The text was adopted by the Commission at its fifty-third session in 2001 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). The General Assembly took notes of the articles and commended them to the attention of Governments without prejudice to the question of their future adoption. *Resolution 56/83, supra*.

¹⁵⁵ *Resolution 56/83, supra* note 154, at art. 45.

¹⁵⁶ TAMS, *supra* note 153, at 3.

¹⁵⁷ *Id.* at 5; ARNOLD PRONTO & MICHAEL WOOD, THE INTERNATIONAL LAW COMMISSION 1999-2009 317 (2010) (“Although it may be possible to infer a waiver from the conduct of the states concerned or from a unilateral statement, the conduct or statement must be unequivocal.”) [hereinafter *ILC*].

rehabilitation, “did not at any time effect a clear and unequivocal waiver.”¹⁵⁸ Second, a waiver must be made by persons authorized to act on behalf of the State concerned in the particular matter.¹⁵⁹ Third, a waiver can only affect the rights of the State making the declaration.¹⁶⁰ Fourth, the declaration must be made after the breach of international law has occurred.¹⁶¹ Lastly, a waiver is only effective if it is freely and validly given; in other words, the declaration must be free from any recognized ground of invalidity such as coercion of a State or its representative or a misrepresentation by the responsible State of material facts of the matter.¹⁶²

It is an open question whether a waiver is valid if given by an injured State in response to a breach of an obligation arising from a peremptory norm of general international law.¹⁶³ According to the ILC, since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude other States from expressing that interest in order to ensure a settlement in conformity with international law.”¹⁶⁴

2. Acquiescence

Whether a State has acquiesced in the lapse of a claim is a fact-specific inquiry that depends on the given circumstances, but international law scholars have identified several guiding principles.¹⁶⁵ First, the claimant State must have failed to assert its claim, such as through passivity or silence, but also through active conduct.¹⁶⁶ For example, in the *Temple of Preah Vihear* case brought before the ICJ, Thailand’s claim to sovereignty over a piece of territory failed because, among other things, Thailand had accepted and used, without protest, certain boundary maps that contradicted its claim and did not object to the invalidity of the

¹⁵⁸ Case Concerning Certain Phosphate Lands in Nauru, (Nauru v. Austl.), 1992 ICJ Rep. 240, 250, ¶¶ 13, 20 (Jun. 26) [hereinafter *Nauru*].

¹⁵⁹ TAMS, *supra* note 153, at 6.

¹⁶⁰ *Id.* at 6–7.

¹⁶¹ *Id.* at 10.

¹⁶² *Id.* at 10; ILC, *supra* note 157, at 317; Vienna Convention on the Law of Treaties, Articles 48–52 (error, fraud, corruption of a representative of a state, coercion of a representative of a state, coercion of a state by the threat or use of force).

¹⁶³ TAMS, *supra* note 153, at 11; ILC, *supra* note 157, at 317; *see also* ILC, *supra* note 157, at 244 (referring to the 1969 Vienna Convention on the Law of Treaties Art. 53, which defines a peremptory norm of general international law as “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

¹⁶⁴ *Id.*

¹⁶⁵ TAMS, *supra* note 153, at 13.

¹⁶⁶ *Id.*

maps before an international tribunal until decades later.¹⁶⁷ Second, the failure to assert a claim must have extended over a period of time, and the longer the period of inaction, the easier to establish that the claimant State has given up the claim.¹⁶⁸ For example, in the *Grisbadarna Case*, which involved conflicting claims to territory between Norway and Sweden, the Permanent Court of Arbitration found that Norway's obvious failure to protest against a clear display of sovereign authority by Sweden amounted to acquiescence, although the period in question was rather short.¹⁶⁹ Third, a State must have failed to assert claims in circumstances that would have required action.¹⁷⁰

3. Extinctive Prescription (“Laches”)

Extinctive prescription is found to exist where a State does not present its claim within a given period. As a result, such State permanently loses its right to bring the claim, even where it has not consented to the claim's extinction¹⁷¹ and regardless of the merits of the claim.¹⁷² While the ILC rejects the idea that lapse of time alone may entail the loss of a claim,¹⁷³ the doctrine of extinctive prescription is widely recognized in international law by scholars, arbitral tribunals and the ICJ as a separate and independent ground for the loss of claims.¹⁷⁴ In the *Nauru* case, for example, the ICJ stated that “even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible.”¹⁷⁵ The Iran-U.S. Claims Tribunal also affirmed that “extinctive prescription is an established principle of public international law which has been applied by international tribunals.”¹⁷⁶

¹⁶⁷ Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6 (Jun. 15).

¹⁶⁸ TAMS, *supra* note 153, at 14.

¹⁶⁹ *Grisbadarna Case*, (1961) 11 *R.I.A.A.*, at p. 161–62.

¹⁷⁰ TAMS, *supra* note 153, at 14.

¹⁷¹ *Id.* at 17.

¹⁷² Ibrahim, *supra* note 153, at 651.

¹⁷³ ILC, *supra* note 157, at 317 (“[Acquiescence] emphasizes conduct of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.”).

¹⁷⁴ In a 1958 report to the UN International Law Commission, the Special Rapporteur of the Draft Articles on State Responsibility observed that “writers on international law have stated that the principle of the [extinctive] prescription of claims is recognized by international law and has been applied by arbitral tribunals in a number of cases.” F.V. Garcia Amador (Special Rapporteur), *Third Rep. on International Responsibility*, U.N. Doc. A/CN.4/111, 67, ¶ 27 (1958), available at https://legal.un.org/ilc/documentation/english/a_cn4_111.pdf.

¹⁷⁵ *Nauru*, *supra* note 158, at ¶ 32.

¹⁷⁶ 17 Iran-U.S. Cl. Trib. Rep. 187, 190 (1987) (citing Ian Brownlie, *Principles of Public International Law* 505-06 (3rd ed. 1979)).

There are two important considerations to the principle – the amount of time that has lapsed and prejudice to the opposing party. The ICJ has indicated that international law does not lay down any specific time-limit for claims.¹⁷⁷ Thus, whether the passage of time renders extinctive prescription applicable is determined on a case-by-case basis by analyzing the relevant facts.¹⁷⁸ Extinctive prescription has also been found to exist where the lapse of time prejudices the opposing party.¹⁷⁹ In the *Gentini* arbitration decision,¹⁸⁰ it was found that “[t]he principle of prescription finds its foundation in the highest equity – the avoidance of possible injustice to the defendant.”¹⁸¹ Defendants may be at a disadvantage where delay in bringing a claim “produce[s] certain inevitable results, among which are the destruction or obscuration of evidence by which the equality of parties is disturbed or destroyed.”¹⁸² Conversely, where there is no risk of injustice, claims are admissible even after long delays,¹⁸³ such as in the *Tagliaferro* arbitration, where the arbitrators found that “the responsible . . . authorities knew at all times of the wrongdoing [forming the basis for the claim],” such that “[w]hen the reason for the rule of prescription ceases, the rule ceases.”¹⁸⁴

Russia’s arguments under these principles would have little force, however, since Ukraine has done little to indicate the abandonment of its claims to these territories, but instead has promptly and repeatedly pressed for their return, including at the U.N. General Assembly and before the ICJ.

For example, Resolution 68/262 noted that the 2014 Referendum was not authorized by Ukraine and affirmed the U.N.’s commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders by calling upon all States to refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine’s borders through the threat or use of force or other unlawful means.¹⁸⁵ Resolution 68/262 was adopted with the support of 100 Member States.¹⁸⁶ At Ukraine’s urging, the U.N. Security Council convened seven sessions on the situation in Ukraine, and then at the eighth

¹⁷⁷ *Nauru*, *supra* note 158, at ¶ 32.

¹⁷⁸ TAMS, *supra* note 153 at 19; Ibrahim, *supra* note 153, at 676–79.

¹⁷⁹ TAMS, *supra* note 153, at 20; Ibrahim, *supra* note 153, at 681–82.

¹⁸⁰ TAMS, *supra* note 153, at 20.

¹⁸¹ *Gentini Case* (1960) 10 R.I.A.A. 551, 558.

¹⁸² *Loretta G. Barberie Case*, 10 R.I.A.A. 593

¹⁸³ TAMS, *supra* note 153, at 20–21.

¹⁸⁴ *Tagliaferro Case* (1902) 10 R.I.A.A. 592, 593.

¹⁸⁵ *Resolution 68/262*, *supra* note 42.

¹⁸⁶ *Id.*

U.N. Security Council Meeting, Russia blocked any action by the U.N. Security Council when Russia voted against a draft resolution that would have urged countries not to recognize the results of the 2014 Referendum.¹⁸⁷

Subsequently, Ukraine instituted proceedings against Russia before the ICJ under the International Convention for the Suppression of the Financing of Terrorism (“**Terrorism Financing Convention**”) and the International Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”).¹⁸⁸ In its application to the court, Ukraine set forth its grievances regarding Crimea and Eastern Ukraine.¹⁸⁹ Specifically, Ukraine contended that “[i]n the Autonomous Republic of Crimea and City of Sevastopol, the Russian Federation brazenly defied the United Nations Charter, seizing a part of Ukraine’s sovereign territory by military force” and that “[i]n an attempt to legitimize its act of aggression, the Russian Federation engineered an illegal ‘referendum’, which it rushed to implement amid a climate of violence and intimidation against non- Russian ethnic groups.”¹⁹⁰ Ukraine sought to establish Russia’s international responsibility under the Terrorism Financing Convention and the CERD and to seek redress for Ukrainians who had suffered the consequences of Russia’s illegal behavior.¹⁹¹

In Ukraine’s latest ICJ proceedings against Russia (filed on February 26, 2022), Ukraine contended that Russia “falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic,’ and then declared and implemented a ‘special military operation’ against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact.”¹⁹² In an emergency session on March 2, 2022, the General Assembly adopted a resolution (“**Resolution ES-11/1**”) that condemned Russia’s declaration of a “special military operation” in Ukraine, reaffirmed that no territorial acquisition resulting from the threat or use of force would be recognized as legal, and found Russia’s aggression against Ukraine to be

¹⁸⁷ *UN Security Council action on Crimea referendum blocked*, U.N. NEWS (Mar. 15, 2014), <https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>.

¹⁸⁸ *2017 ICJ Case*, *supra* note 28, at ¶5. See also G.A. Res. 54/109 (Dec. 9, 1999), available at <https://www.un.org/law/cod/finterr.htm>; G.A. Res. 2106 (XX) (Dec. 21, 1965), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

¹⁸⁹ *2017 ICJ Case*, *supra* note 28, at ¶5.

¹⁹⁰ *Id.* at ¶5 and ¶133.

¹⁹¹ *Id.* at ¶6.

¹⁹² *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. & Russ.)*, 2022 I.C.J. 182 (Feb. 26), available at <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf> [hereinafter *2022 ICJ Case*].

in violation of Article 2(4) of the Charter.¹⁹³ The General Assembly went on to demand (i) the cessation of Russia's use of force against Ukraine and the immediate, complete, and unconditional withdrawal of all of Russia's forces from the territory of Ukraine within its internationally recognized borders, and (ii) Russia's reversal of its decision to recognize the self-declared People's Republics of Donetsk and Luhansk. Resolution ES-11/1 was supported by 140 Member States, including Ukraine. With no evidence of the cessation of Russia's aggression, the General Assembly, with Ukraine's support, passed another resolution that demanded immediate cessation of Russia's hostilities against Ukraine.¹⁹⁴

Any argument that Ukraine has waived, or acquiesced in the lapse of, its claim to Crimea, or that extinctive prescription applies to such claim, is unsupported by facts. Ukraine unequivocally asserted its claim to Crimea and the occupied territories of Donetsk and Luhansk promptly upon the commencement of each major phase of Russia's use of force, and has on multiple occasions proposed and supported U.N. resolutions that uphold Ukraine's territorial integrity and condemn Russia's territorial encroachments of Ukraine. Ukraine has also asserted its rights by instituting proceedings against Russia in the ICJ initially for Russia's seizure of Crimea and the eastern Ukrainian territories, and separately to establish that Russia's allegation of genocide in Luhansk and Donetsk is false and that Russia has no lawful grounds to take action in or against Ukraine on the basis of such allegations.

V. CONCLUSION

The 2014 Referendum and Russia's subsequent annexation of Crimea into the Russian Federation are illegitimate and have no legal effect. Russia's actions to annex Crimea violated Ukraine's fundamental right to territorial integrity and violated numerous treaties pursuant to which Russia agreed to honor Ukraine's borders which are inclusive of Crimea. Further, while the ethnic Russians in Crimea may arguably have a right to self-determination, such a right must first be exercised within the framework of Ukrainian law, and does not permit Crimea to unilaterally secede from Ukraine in order to join Russia. Allowing Russia to annex Crimea would only reward Russia for its illegal behavior and misuse of force in violation of international law. Such a result sets a dangerous precedent and should be rejected by the international community.

¹⁹³ *Resolution adopted by the General Assembly on 2 March 2022*, U.N. GEN. ASSEMBLY (Mar. 2, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement>.

¹⁹⁴ *Id.*

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