EASTERN AND SOUTHERN UKRAINE'S RIGHT TO SECEDE AND JOIN THE RUSSIAN FEDERATION

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This article answers a multi-faceted question: do the people occupying the region of Eastern and Southern Ukraine have the right to secede from Ukraine and merge with the Russian Federation? It also evaluates the legal status of the economic sanctions imposed upon the Russian Federation for its alleged interference in the internal affairs of Ukraine.

The argument proceeds from the assumption that the international legal system does not repose on a foundation of empirical validity, but rather upon sets of authoritative statements, insusceptible of verification. In this context, the article constructs an argument based upon relevant public international law texts, interpreted according to contemporary jurisprudential thought and principles of statutory construction partially embodied in the Vienna Convention on the Law of Treaties of 1969, the implied right of secession contained in the UN General Assembly's Declaration on Friendly Relations of 1970, and the need to achieve pragmatic results to legal questions. The argument thus avoids traditional doctrinal analysis and the mud of history.

In short, the people occupying the region of Eastern and Southern Ukraine have the right to secede from Ukraine and merge with the Russian Federation, and the economic sanctions imposed against the Russian Federation for its presumed interference in the internal affairs of Ukraine are illegal under the United Nations Charter and the World Trade Organisation.

Keywords: Ukraine; secession; public international law; economic sanctions; Russian Federation; self-determination.

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Except for the Donetsk People's Republic [hereinafter DPR] and Lugansk People's Republic [hereinafter LPR] that have ruled out political union with Ukraine, and held elections on November 2, 2014, to select a President and Parliament,[1] separatists in other regions of Eastern and Southern Ukraine arguably have not stated their ultimate goal: 1) autonomy within Ukraine under the form of a federated government; 2) complete secession; or 3) secession combined with the objective to join the Russian Federation. This obfuscation introduces an obstacle in speaking of a right of secession for Eastern and Southern Ukraine. In spite of these constraints, the authors speculate that, given eight months of civil war, the 'Odessa Massacre,' and the increasing anti-separatist polemics of the Kiev government, including threats of a Great Patriotic War, 'separatists' are unlikely to accept anything less than total separation from Ukraine. Consequently, this article, written on shifting sands of facts, assumes for purposes of argument, that the political objective of the 'separatists' is secession from Ukraine and ultimate integration with the Russian Federation.

Except for the 'Minsk Protocol' of September 5, 2014, organised by the Russian Federation, Ukraine, and the Organisation for Security and Co-operation in Europe, the role of third party states has not been established with any degree of reliability.[2] The 'Minsk Protocol,' signed by representatives of DPR and LPR, comprised twelve points, principally the imposition of an immediate ceasefire and commitment to continue an 'inclusive national dialogue.' Nevertheless, the signatories have honoured the 'Minsk Protocol' more in the breach than in the observance, as fighting continues in the Donbass region, and the DPR and LPR seek political independence from Kyiv. In the absence of proof, the United States / European Union alliance maintains that the Russian Federation has intervened, politically and militarily, in the dispute.[3] This perception purportedly justifies the imposition of economic sanctions against the Russian Federation with the purpose of causing a change in its foreign policy. The problem inheres in the definition of 'fact.' If 'fact' is defined as something empirically verifiable, then, with few exceptions, recent events in Ukraine leave 'fact' to perception and debate. Likewise problematic is sourcing of information due to conflicting reports,

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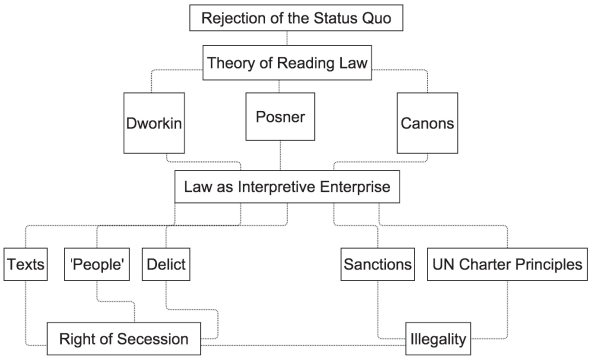
1 *Donetsk and Luhansk Republics Call on KIEV to Acknowledge 'Special Status' – Statement*, Sputnik International (Sep. 2, 2014), <http://en.ria.ru/politics/20140901/192536603/Donetsk-Luhansk-Republics-Call-on-Kiev-to-Acknowledge-Special.html> (accessed Mar. 7, 2015); *Ukraine's People's Republics Rule out Political Union with Kiev: Reports*, Sputnik International (Sep. 30, 2014), <http://en.ria.ru/politics/20140930/193446344/Ukraines-Peoples-Republics-Rule-Out-Political-Union-With-Kiev.html> (accessed Mar. 7, 2015).

2 *Minsk Protocol*, Wikipedia, <http://en.wikipedia.org/wiki/Minsk_Protocol> (accessed Mar. 7, 2015).

3 *E.g.*, *The Economist* states: 'Russia never admitted that it was in the conflict, which it fanned and *fought* both directly and through proxies, so has not celebrated victory as it did after the annexation of Crimea.' *Ukraine and Russia: Win Some, Loss More*, The Economist (Sep. 20, 2014), at <http://www.economist.com/news/europe/21618840-all-celebrations-kiev-over-ratifying-trade-deal-europe-it-russians-who> (accessed Mar. 7, 2015) (emphasis added). Remarkable is the absence of any support cited in *The Economist* for the claim that Russia *fought* in Eastern and Southern Ukraine.

inconsistent results of 'polls,' and differences between mainstream and alternative media.[4] *RIA Novosti* is the Russian state-controlled news media. While state-control permits censorship, *RIA Novosti*, in the authors' view, provides information more accurate and balanced than well-established news journals.

Flow Chart of Argument



1. The Non-Existent Law on the 'Right of Secession' and the Borgen Report

Many scholars have written on secession, self-determination, and sovereignty.[5] However, the publications repose upon declarative statement, mainly of 'experts,' dead or alive, non-definitive decisions of the International Court of Justice [hereinafter ICJ], and references to unsettled state practice or norms. This article uses Christopher J. Borgen's Report 'Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova'[6] [hereinafter Borgen Report], as the 'citadel' to assail since

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[4] *E.g.*, *2014 Pro-Russian Unrest in Ukraine*, Wikipedia, <http://en.wikipedia.org/wiki/2014_pro-Russian_unrest_in_Ukraine> (accessed Mar. 7, 2015) (providing ambiguous data on 'polls' taken by different organisations as to preferences for closer ties to the Russian Federation or to the European Union).

[5] Professor Mancini provides an excellent overview of the right of secession, parsed into sundry theories: 1) 'primary rights theorists' advocating secession as a fundamental, though qualified, right, and 2) 'remedial rights theorists' advocating secession as a derivative right when the mother State commits a delict. She also distinguishes between 'external self-determination' where secession is limited to 'colonial peoples' and 'internal self-determination' where secession is available to 'peoples' within an existing Nation State. Susanna Mancini, *Secession and Self-Determination*, in The Oxford Handbook of Comparative Constitutional Law ch. 23 (Michel Rosenfeld & András Sajó, eds.) (Oxford University Press 2012), available at <http://papers.ssrn.com/abstract_id=2140457> (accessed Mar. 8, 2015). Twenty-one papers on Ukraine, most dealing with secession, are published on the *Social Science Research Network*: <http://www.ssrn.com/en/>.

[6] Christopher J. Borgen, *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova: A Report from the Association of the Bar of the City of New York* (St. John's University, Legal Studies Research Paper

the publication represents a substantial work and a purported accurate statement of public international law on the 'right of secession.' The Borgen Report examined the conflict between the Government of Moldova and the Transnistrian Moldovan Republic [hereinafter TMR] located between the Dniestr River and the border of Ukraine. The Borgen Report concluded that the TMR lacked a right to secession. Four fissures in the Borgen Report cast doubt upon its argument and conclusion.

First, the analysis of the Borgen Report is cabined within well-established norms of public international law contained in the United Nations Charter: all states are sovereign and equal; no state has the right to intervene in the internal affairs of another state; and frictions within a state are domestic matters within the exclusive competence of the state to resolve.[7] These starting premises not surprisingly make the road to secession a difficult odyssey. While the Borgen Report acknowledges that public international law is virtually silent on the right of secession, the implications of 'silence' are not fully delineated in the Borgen Report.

Second, the historical discussion of Moldova is insufficient to support the Borgen Report's assumption that Moldova qualifies as a sovereign state. While the Borgen Report deconstructs in detail the *de facto* regime of the TMR, the Borgen Report glosses over the source of sovereignty of the Republic of Moldova that is assumed to possess all attributes of a state.[8] However, Moldova did not exist as a state throughout centuries of European history and first came into existence in 1924 as a province called the Moldavian Autonomous Soviet Socialist Republic (MASSR) within the Ukrainian Soviet Socialist Republic. This was primarily to achieve Stalin's territorial expansion.

In 1940, after Germany and the USSR executed the Molotov-Ribbentrop Pact, Stalin created the fifteenth republic of the USSR – the Moldavian Soviet Socialist Republic. The question arises as to the source of sovereignty of Moldova to clothe it in the dress of a state as defined in the Montevideo Convention on the Rights and Duties of States of 1933.[9] The Borgen Report admits Moldova existed only as a 'state'

#06-0045), at <http://papers.ssrn.com/abstract_id=920151> (accessed Mar. 7, 2015). Five persons representing the New York City Bar Association engaged in pronouncing judgment on the relationship between Moldova and Transnistria. While the Committee had access to officials and legal documents, its stylized analysis strikes a hollow note. Efforts are made to avoid the 'straw man' fallacy.

7 U.N. Charter Art. 2, para. 1, Art. 2, para. 4, and Art. 2, para. 7.

8 Recognising that the TMR is *de facto* a regime implies that it is *de facto* a State, though not *de jure*, since the TMR lacks recognition. However, this point raises two questions: 1) the Montevideo Convention does not require recognition as a State requirement, and 2) illustrates that secession is a factual event and not a juridical act. The authors thank Flora Vern, student at Sciences Po University (Paris, France), for clarifying this point.

9 Convention on Rights and Duties of States, December 26, 1933, 49 Stat. 3097 [hereinafter Montevideo Convention]. Article 1 provides: 'The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.' Article 3 provides: '*The political existence of the state is independent of recognition by the other states*. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to

by artificial construction of the declaration of USSR Leader Stalin. The question arises: why did the collapse of the USSR result in the creation of Moldova arising solely out of an artificial creation by a political leader bent on aspirations of territorial expansion?[10] By contrast, Transnistria is lost in the quagmire of history, though it has a territory, a population, and a political infrastructure thereby meeting the requirements of the Montevideo Convention. The Borgen Report simply denounces Transnistria as an occupying power, while the latter and Moldova share similar questionable grounds to assert 'sovereignty.'

Third, the sources of law consist of thin layers of authoritative statements, non-dispositive opinions of the ICJ and the Canadian Supreme Court, as well as historical instances of secessions lacking statistical foundation to advance the case of state practice. The primary expert is Hurst Hannam of the Fletcher School of Law and Diplomacy. In 1966, Hannam explained at a roundtable organized by the US Department of State that 'self-determination during this time was not that all peoples had a right to self-determination but rather that all colonies had a right to be independent.'[11] The legal authority of this statement is unidentified and contradicts explicit terms contained in two International Covenants that do not qualify the 'right of self-determination' to colonies.[12]

In addition, the Borgen Report incorporates statements from the Badinter Commission, formally known as the 'Conference on Yugoslavia Arbitration Commission,' to maintain that the exercise of self-determination may not result in frontier boundary redrawing, based on the principle of 'inviolability of borders' under customary international law.[13] The Borgen Report also invokes statements of a Commission of Jurists of the League of Nations, organized to evaluate the case of *Åland Islands (1921)*, to limit the exercise of the right of self-determination to extreme cases of when a mother state 'brutally' violates basic human rights.[14] The

organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.' (emphasis added). The refusal of the United States and the European Union to 'recognise' the DPR or LPR does not deprive the two Republics of the legal status of 'States,' though potentially raising economic and financial problems for the two Republics.

10 The most persuasive answer is that the post-Soviet Union 'super powers:' the US and the EU found it politically suitable. *See* Mancini, *supra* n. 5, at 491 (stating '[t]he European Union developed its "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union"' and noting that '[t]he United States produces analogous policy documents').

11 Borgen, *supra* n. 6, at 34.

12 This appeal to authority permeates the law where select 'authorities' form a 'priesthood' to inform others how to interpret legal texts. While this appeal to authority arguably does not violate the fallacy of *argumentum ad verecundiam*, nevertheless, experts disagree, and reliance upon inside information is no way to interpret a treaty. *See* Irving M. Copi & Carl Cohen, Introduction to Logic 145 (12th ed., Pearson Education, Inc. 2008).

13 Borgen, *supra* n. 6, at 37.

14 *Åland Islands*, Wikipedia, <http://en.wikipedia.org/wiki/%C3%85land_Islands> (accessed Mar. 7, 2015).

reference to the *Åland Islands* case is misfit, since Finland neither persecuted nor harmed any person in the Åland Islands, prior to the latter achieving autonomy. Further, the Borgen Report cites historical instances of secessions to establish state practice for the purpose of demonstrating its narrow reading of the right of self-determination.

Based upon its cursory discussion of Moldovan history and its reliance upon razor thin law, the Borgen Report constructs a 'three-prong' legal test that permits the exercise of secession under exceptional circumstances and that bears similarities to the principle of 'remedial sovereignty.' The three-prong test comprises: 1) 'secessionists' must constitute a 'people;' 2) the state of which they are currently a part brutally violates human rights; and 3) there are no other effective remedies under either domestic or international law.[15] Applying this test to the TMR, the report concludes that the TMR fails to meet the three-prong test and therefore lacks a right of secession.

Fourth, noteworthy is the failure of the Borgen Report to define the term 'brutally violate' and to indicate the time of its occurrence. Unclear is whether 'brutality' is limited to physical, economic, or psychological harm. Equally unclear is the timing of the acts of brutality that give rise to a colorable claim of secession. For example, in the case of Ukraine, the response to the separatist movement is evidently brutal – acts of war. However, preceding what may be called the 'civil war' were the acts of the government in Kiev sufficiently 'brutal' to justify secession. Would language genocide constitute a brutal act of a mother State? The lack of clarity of the second prong dooms the test to failure.

Consequently, the Borgen Report is built largely upon statements of unelected officials, Commissions appointed by a league that no longer exists, and the European Community that lacked control of Yugoslavia, in addition to anecdotal evidence from history. This methodology consists of law by *fiat*. The legal rules contained in the Borgen Report are products of declarative statements of select authorities; none of whom surprisingly are drawn from the territories seeking to exercise the right of 'self-determination.' That omission 'silences the lambs.'

2. Relevant Public International Law Documents Related to Right of Secession

The United Nations Charter was produced after World War II, primarily to avoid World War III, as its main function is to uphold 'international peace and security.' On its founding effective date, there were fifty nation states. Now arguably there are close to 200. With the exception of the Palestinian Liberation Organization (PLO), the UN Charter governs states and threats to international peace. This aspect has led certain scholars to conclude that it does not govern secession or rights of self-

[15] Borgen, *supra* n. 6, at 38.

determination.[16] Nevertheless, even conceding that the primary objective of the UN Charter is to protect the integrity of states and to avoid future international armed conflict, it does not follow that the UN Charter implicitly disregards the rights of individuals or 'peoples.' Nor does it follow that the Charter sanctions the wholesale slaughter of a 'people' within a state when 'people' exercise their human rights.[17] The maxim *expressio unius est exclusio alterius* applies with force to interpretation of the UN Charter. Those matters not specifically mentioned in the Charter are outside its ambit.[18] Since the Charter does not mention secession, its supposed exclusive ambit of state sovereignty is stretched thin.[19]

Two international conventions deal with rights of 'self-determination of peoples,' a precondition for secession: 1) the 1966 International Covenant on Civil and Political Rights [hereinafter ICCPR], and 2) the 1966 International Covenant on Economic Social, and Cultural Rights [hereinafter ICESCR]. Both conventions contain an identical article germane to the question posed in this text. The English version of Art. 1(1) of the ICCPR and Art. 1(1) of the ICESCR state:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> The identical article of the French text provides:
>
> Tous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils determinant librement leur statut politique et assurent librement leur développement économique, social, et culturel.

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16 *E.g.*, Théodore Christakis, Les conflits de secession en Crimée et dans l'est de l'Ukraine et le droit international, 2014(3) Journal du droit international (Clunet).

17 U.N. Charter, Art. 2, para. 7: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

18 The U.N. Charter technically is not subject to the interpretive framework of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), at <https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf> (accessed Mar. 7, 2015) [hereinafter Vienna Convention], as the latter is inapplicable retrospectively. However, the Vienna Convention states nothing extraordinary. It incorporates traditional canons of statutory interpretation.

19 *E.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 1, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed Mar. 7, 2015); and International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 1, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967), at <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed Mar. 7, 2015).

The identical article of the Russian text provides:

> Все народы имеют право на самоопределение. В силу этого права они свободно устанавливают свой политический статус и свободно обеспечивают свое экономическое, социальное и культурное развитие.

In addition, nothing in Art. 1(3) of the ICCPR, in all three versions, restricts this right of self-determination to colonies.

The Preamble to the ICCPR provides that '[t]he State Parties to the present Covenant' recognize: 1) the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; 2) these rights derive from the inherent dignity of the human person; and 3) consistent with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Moreover, the obligations imposed upon Nation States are equally telling. Articles 2(1) and (2) of the ICCPR provide:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[20]

Further, Art. 2 (1) of the ICCPR imposes affirmative obligations upon 'State Parties' to enact legislation to make certain that 'people' («les peuples» / «все народы») may effectuate the rights set forth in the ICCPR. Consequently, when a sovereign state violates the fundamental rights recognised in United Nations documents, including 'natural law' rights, then that sovereign State has violated its international law obligations and gives rise by negative implication to a right of secession by the 'people' harmed by unlawful State action.

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[20] The ICECSR provides equivalent language in Art. 2(1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

3. An Alternative Reading of the 'Right of Secession'

Law is an interpretive enterprise whereby a reader of law, whether a judge, scholar, or advocate imposes order and coherence upon related but not necessarily consistently written texts. Dworkin provides that 'the concept of law is fundamentally an interpretive enterprise aiming to describe the values, interests and goals embodied in the law,' and further elaborates that '[c]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it belongs.'[21] Posner provides an important restraint: '[W]hile a literary critic may be an influential person, he or she is a private individual. The exercise of power by appointed officials with life tenure . . . is tolerated only in the belief that the power is constrained; and the principal, though not sole, constraint is authoritative texts.'[22] Article 31 of the Vienna Convention instructs:

> A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The fusion of Dworkin and Posner's views, plus traditional principles of statutory construction, partially embodied in the Vienna Convention, provide a methodology to interpret the law governing a right to secession.[23] A right of secession may be derived from principal public international law texts using the above methodology without reliance upon secondary and tertiary sources of law.[24]

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[21] John J.A. Burke, Political Foundation of Law and the Need for Theory with Practical Value: The Theories of Ronald Dworkin and Roberto Unger 178 (Austin & Winfield 1992).

[22] Richard A. Posner, Law and Literature 243 (Harvard University Press 1970).

[23] The primary canons of construction used are: 1) plain meaning rule: follow the plain meaning of the text, except when text suggests an absurd result or a scrivener's error; 2) *expressio unius est exclusio alterius*: expression of one thing suggests the exclusion of others; 3) follow ordinary usage of terms, unless the text gives them a specified or technical meaning; 4) follow dictionary definitions of terms, unless the text provides a specific definition; and 5) consider extrinsic sources, such as legislative history and statements of drafters, only if a term is ambiguous. These canons of statutory construction are consistent with the Vienna Convention, though the canons precede the Vienna Convention (Arts. 31–32).

[24] In the context of self-determination and secession, certain scholars yield to the view that statements made by political leaders, such as President Woodrow Wilson, drafters or observers, whether living or dead, involved in treaty process, carry great, if not, definitive weight, to the interpretation of terms, in spite of the ordinary meaning of the terms contained in the treaty. This article rejects that view on grounds that the meaning of a covenant intended to have enduring effect need not get stuck in the mud of history, and, if the term has an ordinary meaning then that meaning trumps the «travaux préparatoires.» *See generally* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. Rev. 1179. Professor Miller demonstrates striking similarities between ancient interpretive texts and modern canons. Modern canons are similar to older interpretive tools, including norms and conventions used to construe ancient Hindu texts, medieval Christian commentary on interpreting the Bible, Talmudic commentary on construing the Old Testament, and rules governing the interpretation of Roman law.

The most authoritative statement of the absence of a universal right to secession is contained in the UN General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970.[25] The 1970 Declaration states that the 'right of self-determination' cannot be construed as 'authorising or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of sovereign and independent States.' The majority view provides that the 'right of self-determination' encompassing a right of secession is an exclusive right held by 'peoples' of a colony.[26]

Most documents and pronouncements, including the United Nations Charter are broadly drafted, contain ostensibly conflicting objectives, and therefore are susceptible to varying interpretation. The 1970 Declaration is no exception.[27] That Declaration contains an explicit exception to denying a right of secession to 'people' within an existing sovereign State by predicating that denial upon adherence by the sovereign State to conduct itself 'in compliance with the principle of equal rights and self-determination of peoples.' Hence, a violation of the obligations in Art. 2 of the ICCPR and Art. 2 of the ICESCR opens the door to support an argument of secession for 'peoples' within a sovereign State subject to domination and exploitation.

Further support for this position is found in Art. 1(2) and (3) of the Preamble of the UN Charter setting forth its purposes, not limited to Nation States:

> 2. To develop 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.
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion* (emphasis added).

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[25] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/5217 (1970), at <http://www.un-documents.net/a25r2625.htm> (accessed Mar. 7, 2015) [hereinafter 1970 Declaration]. An abundance of scholarly articles exist on this subject, but Stephen C. Neff, Some Considerations on Secession and Independence: The Cases of Kosovo and Georgia, 1 Amsterdam Law Forum 33 (2009), available at <http://papers.ssrn.com/abstract_id=1509320> (accessed Mar. 8, 2015), expresses concisely and elegantly the debate over positive and negative secession, as well as his fine analysis of UN documents (*id.* at 35).

[26] Christakis, *supra* n. 16, at 23.

[27] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1961), at <http://www.refworld.org/docid/3b00f06e2f.html> (accessed Mar. 7, 2015).

The invitation for peace-loving states to join the United Nations implicitly requires that a state manage its internal conflicts without engaging in war with a class of its citizens.[28] Except for self-defence, the exclusive means to resolve breaches of international peace is recourse to the Security Council under Ch. VII, Arts. 39–51. Chapters XII–XIII are inapplicable to the extant question.

4. The Meaning of the Term 'People'[29]

Following the principle of construction to give words their ordinary meaning, the *Oxford / Collins English Dictionary* defines the term 'people' as follows: 1) 'persons collectively or in general;' and 2) 'a group of persons considered together' unified by some common element. The term 'people' is to be distinguished from the term 'the people' that has the following meanings: 1) 'the mass of persons without special distinction, privileges, *etc.*;' and 2) 'the body of persons in a country, esp. those entitled to vote.'[30]

The French text arguably provides a more precise definition of the term 'people.' The *Larousse Dictionnaire de la Langue Française* provides: '[A]n ensemble of persons constituting a social or cultural community.'[31] Finally, the Russian text provides the most compelling definition of the term 'people,' as distinct from a nation state, by reference to those persons who possess the same language, interests, inhabit a particular region, and ethnic background.[32] The common thread among the three definitions is that 'people' refers to distinct groups of persons sharing a range of common traits that unite them together.

A persuasive event from American history illustrates the ordinary meaning of the term 'people:' the Mayflower Compact, regarded as the first constitutional document of North America. While *en route* to America, the Mayflower was occupied by Pilgrims and non-Pilgrims. When conflicts arose during the voyage and peril threatened its success, the 'people' of the Mayflower entered into a covenant under which they would be governed. The non-Pilgrims did not want to be ruled by the Puritans, and the Puritans realized the importance of unification, thereby resulting in a mutually acceptable pact.

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28 U.N. Charter, Art. 4, para. 1.

29 This part of the Article is the most contentious; relations between Ukraine and the Russian Federation are deep, complex, and political. Further complicating matters is the evasive meaning of the term 'ethnic group,' loosely equivalent to the term 'people.' In any event, no citation will soften the inflexible position of West Ukrainians. In addition, Posner explains the inherent flaws of reliance upon dictionary definitions. Posner, *supra* n. 22, at 180.

30 Collins Dictionary, <http://www.collinsdictionary.com/dictionary/english/people?showCookiePolicy=true> (accessed Mar. 7, 2015).

31 Dictionnaire de la langue française compact (Larousse 1995).

32 *Даль В.* Толковый словарь живого великорусского языка [Dal' V. *Tolkovyi slovar' zhivogo velikorusskogo yazyka* [Vladimir Dal, Explanatory Dictionary of the Living Great Russian Language]], <http://dic.academic.ru/dic.nsf/enc2p/275610> (accessed Mar. 7, 2015).

The United States Declaration of Independence arguably contains the most celebrated use of the term 'people.' The Declaration provides:

> When in the Course of human events, it becomes necessary for *one people* to dissolve the political bands which have connected them with another . . . they should declare the causes which impel them to the separation (emphasis added).

The simple explanation of the term 'one people' is a reference to the members of the thirteen colonies. Without undertaking a deviation into American history, the members of the colonies were 'one people' only to support the separation from the British Empire; they certainly were not one people in other respects. They were composed of the 'haves' and 'have-nots,' divided along lines of industrial and agricultural economies, and slave-holding and non-slave-holding States. Slaves *per se* were not regarded as persons entitled to legal protections. The two examples from American history indicate that the term 'people' encompasses those people united by a common situation and single or multiple purposes, often under duress.

The term 'people' often is deemed equivalent to the term 'ethnic group.' However 'ethnicity' evades definition, more problematically than the term 'people.' 'Ethnic group' is a 'socially defined category of people who identify with each other based on common ancestral, social, cultural or national experience.'[33] There are at least five independent criteria to define an 'ethnic group:' 1) race; 2) religion; 3) language; 4) political identity; and 5) regional / geographic identity.[34] In the absence of science, based upon genetic studies, that is, shared DNA among people, ethnicity is reduced to 'self-identification,' a definition that is an absurd tautology.

The firmest ground to posit a 'people' is the scientific study of race and genetics.[35] The invisible hand of evolution arguably is responsible for conventions collectively understood as social instincts and culture. Russians are an East Slavic ethnic group native to Russia whose language is Russian.[36] 'Genetic studies show that modern Russians do not differ significantly from Poles, Slovenians, or Ukrainians.'[37] Approximately, eight

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33 *Ethnic Group*, Wikipedia, <http://en.wikipedia.org/wiki/Ethnic_group> (accessed Mar. 7, 2015).

34 *Id*.

35 Nicholas Wade, *What Science Says about Race and Genetics*, Time (May 9, 2014), <http://time.com/91081/what-science-says-about-race-and-genetics/> (accessed Mar. 7, 2015). This view accords with Richard Dawkins explanation of evolution as set forth in Richard Dawkins, The Selfish Gene (30th ed., Oxford University Press 2006), *idem*, The Blind Watch Maker (Penguin 1986), and *idem*, The Extended Phenotype (Penguin 1982). There is no reason to think that human behaviour, including its creation of legal systems, is exempt from the power of evolution.

36 *Russians*, Wikipedia, <http://en.wikipedia.org/wiki/Russians> (accessed Mar. 7, 2015).

37 *Id*. (with reference to Oleg Balanovsky et al., *Two Sources of the Russian Patrilineal Heritage in Their Eurasian Context*, 82(1) Am. J. Hum. Genet. (2008) doi:10.1016/j.ajhg.2007.09.019).

million Russians live in present Ukraine.[38] An observer has stated: 'One should keep in mind that Russians and Ukrainians, together with the Byelorussians of Byelorus just north of Ukraine, *are historically one people*, each however with its linguistic and cultural differences.'[39] Nevertheless, science does not draw the borders of Nation States; that matter generally is left to history.

5. Why Residents of Eastern and Southern Ukraine Constitute a 'People'

The territory of what is called 'Ukraine,' inhabited for at least 44,000 years, has a lengthy, tumultuous history. Except for modern Ukraine, successive external empires ruled the constantly morphing territory. The term 'Oukraina,' commonly understood as borderlands, 'first appeared in historical documents of the 12th century and then on history maps of the 16th century period.'[40] The term 'Oukraina' implies the absence of critical mass required to establish a single unitary State, as demonstrated by the history of Ukraine. In 1654, while certain territories of present Ukraine were under Polish rule, Bohdan Khmelnytsky signed the 'Treaty of Pereyaslav,' forming a military and political alliance with Russia to protect Cossack controlled territory, called the 'Zaporozhian Host.'[41] After the war with Poland, the latter gave Kyiv and the Cossack lands, east of the Dnieper, to Russia. 'Most of Ukraine fell to the Russian Empire under the reign of Catherine the Great (1729–1796); in 1793 right-bank Ukraine was annexed by Russia in the Second Partition of Poland.'[42] Excepting a fleeting period after World War II, Ukraine was never an independent country.[43] Various powers controlled the territory of present Ukraine and the latter never was a political entity of its own; arguably, Russia controlled and ruled Ukraine from 1654 until 1917.

The Russian Revolution opened a period of civil war in the region designated 'Ukraine.' Subsequently, during the period 1919–22, central parts of what is 'now known' as Ukraine became the Ukrainian Soviet Socialist Republic and in 1922 became a member of the USSR.[44] At this time, Lenin decided to integrate 'Novorossiya' into the Ukrainian SSR.[45] After World War II, the Ukrainian SSR increased by absorption

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38 *Russians*, *supra* n. 36.

39 Gaither Stewart, *Russia and Eurasia: Who Are the Russians?*, Global Research (Aug. 29, 2014), <http://www.globalresearch.ca/russia-and-eurasia-who-are-the-russians/5398204> (accessed Mar. 7, 2015).

40 *History of Ukraine*, Wikipedia, <http://en.wikipedia.org/wiki/History_of_Ukraine> (accessed Mar. 7, 2015).

41 *Id.*

42 *Id.*

43 *Id.*

44 This territory is illustrated at <http://upload.wikimedia.org/wikipedia/commons/0/07/Ukraine-growth.png> (accessed Mar. 7, 2015).

45 *Novorossiya*, Wikipedia, <http://en.wikipedia.org/wiki/Novorossiya> (accessed Mar. 7, 2015).

of the western territories, including the Carpathians. In 1954, Nikita Khrushchev, who from 1938 until 1949 served as the First Secretary of the Communist Party of the USSR, by *fiat* gave the Crimea to Ukraine.

Ukraine became an independent nation after the collapse of the USSR in 1991. While one may parse the history of Russia and Ukraine, Archpriest Andrei Tkachev has stated: 'The word "Ukrainian" was seldom used in the Russian empire until 1917. Both Belarusians and Ukrainians were considered Russians – inhabitants of White Russia [future Belarus] and Little or South Russia [future Ukraine].' Tkachev adds: 'One of the biggest problems of modern Ukraine is that it does not want to learn from history, which it has shared with Russia for at least 300 years. Many Ukrainians think that this is not THEIR history, that it was forced on them, so one should not learn from it. This is a mistake.'[46] In addition, in 1991, many persons who formerly held the nationality of Russia in their USSR passports suddenly were Ukrainians, without having anything to do with Ukraine except accidental location.

Ukraine's linguistic map is telling for parsing Ukraine. Russian is the dominant language in the following provinces: 1) Lugansk, and 2) Donetsk, where more than 66% of residents identified Russian as their native tongue. A substantial portion (41–65%) of residents of three additional provinces identified Russian as their native language: 1) Kharkiv, 2) Zaporizhia, and 3) Odessa. A significant portion (11–40%) of residents of four additional provinces identified Russian as their native language: 1) Sumy, 2) Dnepropetrovsk, 3) Kherson, and 4) Mykolayiv.[47] If language is the driving factor of national identity, as in the case of Latvia and Estonia, then it follows that the linguistic statistics of Eastern and Southern Ukraine provide a ground to posit a 'people' within the meaning of public international law.

Further, the political preferences of Eastern and Southern Ukrainians differ from other regions of Ukraine.[48] The current political conflict is over whether the country will lean toward the European Union or the Russian Federation. A November 2013 poll found that 45% of those questioned expressed a desire to join the EU, 14% expressed a desire to join the tri-lateral Eurasian Customs Union, and 41% were undecided. The divide primarily comprises differences of political preference between Eastern and Southern Ukraine and the remainder of Ukraine. Noteworthy is the rise of Ultra-Nationalism in Westhern Ukraine and Ultra-Nationalists holding political office, softly recalling Ukraine's collaboration with Nazi Germany.

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[46] Dmitry Babich, *Russia and Ukraine: A Painful Rift with History*, Sputnik International (Aug. 28, 2014), <http://en.ria.ru/authors/20140826/192345532/Russia-and-Ukraine-Painful-Rift-With-History.html> (accessed Mar. 7, 2015).

[47] *Ukrainian Census 2001*, Wikipedia, <http://en.wikipedia.org/wiki/Ukrainian_Census_(2001)> (accessed Mar. 7, 2015).

[48] Max Fischer, *This One Map Helps Explain Ukraine's Protests*, The Washington Post (Dec. 9, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/12/09/this-one-map-helps-explain-ukraines-protests/> (accessed Mar. 7, 2015).

Consequently, residents of Eastern and Southern Ukraine constitute a 'people' on three grounds: 1) language; 2) shared history with Russia; and 3) political preference to strengthen ties with the Russian Federation thereby distinguishing themselves from residents of other Ukraine provinces.

6. The Delict

It is common ground that distinctly sharp political preferences divide Eastern and Southern Ukraine from Western Ukraine. These differences are profound and arguably beyond settlement by negotiation. Eastern and Southern Ukraine, often referred to as 'Russian speaking' oblasts, seek closer ties with the Russian Federation, while West Ukraine seeks closer ties, if not, admission, to the European Union. These political objectives are polar opposites. These differences escalated into conflict in November 2013 when 'Euromaidan,' a political movement whose name derives from the main square in Kiev where demonstrations were held, protested against the government's decision to suspend talks with the EU and resume negotiations with the Russian Federation to join the tri-lateral Customs Union.[49] In February 2014, the protest culminated in what is deemed the February 2014 Revolution. President Yanukovych and his Party of Regions were removed from office.[50] Olexander Turchynov became the transitional President of the Ukraine. The new Government was not only pro-West but also extremely conservative, if not ultra-nationalist.[51] Illustrations include: Arseniy Yatsenyuk, Prime Minister (member of the Fatherland Party); Oleksander Sych, Deputy Prime Minister (member of the far-right nationalist Freedom Party); Arsen Avakov, Interior Minister (member of the Fatherland Party); Andriy Parubiy, National Security Chief (member of the Fatherland Party), and Dmitry Yarosh, Deputy National Security Chief (member of far-right nationalist Freedom Party).[52] Naturally, but notably absent, is any official representing the minority parties. The Poroshenko government, though comprised of different personnel, has followed through on the interim government's promise to sign an 'historic' trade deal with

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[49] *Euromaidan*, Wikipedia, <http://en.wikipedia.org/wiki/Euromaidan> (accessed Mar. 7, 2015).

[50] Under one observer's well-reasoned argument, the removal of Yanukovych did not accord with law; the interim government is illegitimate, and the Russian Federation has not violated any principle of public international law. The reader is Stefan Soesanto. Ashley Deeks, *Russia in Ukraine: A Reader Responds*, LAWFARE (Mar. 5, 2014), <http://www.lawfareblog.com/2014/03/russia-in-ukraine-a-reader-responds/> (accessed Mar. 7, 2015).

[51] Turchynov was closely associated with Yulia Tymoshenko. 'WikiLeaks documents suggest that during his [Turchynov's] role as security service chief in 2005 he destroyed documents that allegedly implicated Tymoshenko as having links to organised crime – allegations she has always denied,' but the source of her personal wealth and rise as an oligarch are shrouded in mystery. Harriet Salem, *Who Exactly is Governing Ukraine?*, The Guardian (Mar. 4, 2014), <http://www.theguardian.com/world/2014/mar/04/who-governing-ukraine-olexander-turchynov> (accessed Mar. 7, 2015).

[52] *Id*.

the European Union. Prime Minister Arseniy Yatsenyuk's extreme nationalist stance against the Russian Federation is consistent with the post-Yanukovych regime.[53]

The East and South then raised the question of creating a federation, maintaining that Ukraine was not a single unitary State.[54] Laws then were enforced to criminalize expressions of dissent against the government.[55] Professor James Petras states: 'They [Kiev Government] moved ahead and outlawed the pro-Russian speaking minority and that provoked people in the east who were long time critics of centralism and the imposition of policies from the west (Kiev).'[56] Any person supporting the concept of 'federalization' was labeled a 'separatist' or 'terrorist.' In addition, the government conducted discussions to limit the use of the Russian language.[57] Initially, East and West peacefully protested against these government initiatives. During this period, 'Euromaidan' took by force administrative buildings in the East and West.[58] In response, Anti-Maidan groups followed suit by seising government buildings in the East, insisting on federalization of Ukraine, and retaining the Russian language.[59]

Subsequently, Donetsk and Lugansk proposed to hold referenda on April 6, 2014, to join the Russian Federation.[60] On April 14, 2014, Turchynov authorised military action against 'separatists' in the East and South thereby leading to civil war.[61] On May 11, 2014, the DPR held a referendum to approve 'self-rule' supported by 89% of voters.

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53 David Blair, *Russians Are Trying to 'Eliminate' Our Country, Says Ukrainian Prime Minister*, The Telegraph (Sep. 13, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11094351/Russians-are-trying-to-eliminate-our-country-says-Ukrainian-prime-minister.html> (accessed Mar. 7, 2015).

54 *Pro-Russian Protesters Storm Donetsk Offices*, BBC News (May 12, 2014), <http://www.bbc.com/news/world-europe-27369980> (accessed Mar. 7, 2015); and *Ukraine's East on Fire: Kharkov Demands Referendum, Donetsk's Prosecutor's HQ Stormed*, RT (Mar. 16, 2014), <http://rt.com/news/Ukraine-kharkov-rights-donetsk-202/> (accessed Mar. 7, 2015).

55 *Law and Disorder*, Law and Disorder Radio (May 17, 2014), <http://lawanddisorder.org/2014/05/> (accessed Mar. 7, 2015).

56 *Id.*

57 On February 23, 2014, the second day after the flight of Viktor Yanukovich, while in a parliamentary session, a deputy from the Fatherland Party, Vyacheslav Kyrylenko, moved to include in the agenda the bill to repeal the 2012 Law 'On the Principles of the State Language Policy.' The motion was carried with 86% of the votes in favor – 232 deputies in favor vs. 37 opposed against the required minimum of 226 of 334 votes. The bill was included in the agenda, immediately put to a vote with no debate and approved with the same 232 voting in favor. The bill would have made Ukrainian the sole state language at all levels. *Language Policy in Ukraine*, Wikipedia, <http://en.wikipedia.org/wiki/Language_policy_in_Ukraine> (accessed Mar. 7, 2015).

58 *Seizure of Police Building in Krasnyi Liman, Eastern Ukraine*, Youtube.com (Apr. 12, 2014), <http://www.youtube.com/watch?v=Mc7wzgujphw> (accessed Mar. 7, 2015).

59 *Euromaidan*, *supra* n. 49.

60 *Donbass Status Referendums, 2014*, Wikipedia <http://en.wikipedia.org/wiki/Donbass_status_referendums,_2014> (accessed Mar. 7, 2015).

61 *Ukraine Says Donestk 'Anti-Terror' Operation under Way*, BBC News (Apr. 15, 2014), <http://www.bbc.com/news/world-europe-27035196> (accessed Mar. 7, 2015).

That same day, LPR held an identical referendum, supported by 96.2% of voters. On May 22, 2014, the confederate state of Novorossiya was proclaimed, incorporating both the DPR and the LPR. In spite of the 'cease fire' agreement, Poroshenko has continued the 'anti-terror' military campaign under conditions that are not required to respect the Geneva Conventions. 'Both sides accuse each other of continuing the fighting and breaking the ceasefire.'[62]

On May 2, 2014, more than 40 persons were murdered in the city of Odessa in what is called the 'Odessa Massacre.'[63] 'Anti-Kyiv protestors were ambushed, trapped, butchered, shot, beaten to death, and some were possibly raped, by the neo-nazis of Right Sector, backed by the Kyiv government, and their street armies – ultras, mainly from Kharkov. This has been the best-documented massacre in history, but it is considered by "civilized" leaders as "law enforcement."'[64] Firefighters and police failed to stop the violence, and carry out their functions to protect citizens. The photographs and video film of the episode depict burned bodies, show Maidan supporters making Molotov cocktails, and Maidan and Right Sector activists blockading the building to prevent any person from escaping. Whatever spin Western media wants to place on this event, by providing alternative interpretations of images, one conclusion is beyond doubt: delict by omission and the countenance of murder.

The war in Donbass has left substantial casualties of dead and captured. According to the separatists, the Donbass region has suffered 1,017 killed and 1,200 captured.[65] According to the Government, the Donbass region has suffered 2,000 killed and 310 captured. The statistics do not distinguish between 'insurgents' and civilians, including women and children, and fail to include wounded. The government's military action designed solely to preserve a unitary State has killed civilians, displaced populations, and destroyed property, including hospitals and schools.

Ukraine is a signatory to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts.[66] Article 4 provides fundamental guarantees for non-combatants

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62 *Ukrainian President Attacks 'Fake' Elections Planned by Rebels in East*, Euronews (Oct. 19, 2014), <http://www.euronews.com/2014/10/19/ukrainian-president-attacks-fake-elections-planned-by-rebels-in-east/> (accessed Mar. 7, 2015).

63 *The Odessa Massacre – What Really Happened*, SCG News (May 12, 2014), <http://scgnews.com/the-odessa-massacre-what-really-happened> (accessed Mar. 7, 2015).

64 Jennifer Baker, Neo-nazi Massacre in Odessa, May 2, 2014 – Video Blog *Graphic* – Behind Ukraine's Walls of Fire, Revolution News! (May 31, 2014), <http://revolution-news.com/neo-nazi-massacre-in-odessa-may-2-2014-video-blog-graphic-behind-ukraines-walls-of-fire/> (accessed Mar. 7, 2015) (noting that '[o]n May 2, 2014 anti-Kyiv protestors were ambushed, trapped, butchered, shot, beaten to death, and some were possibly raped, by the neo-nazis of Right Sector, backed by the Kyiv government, and their street armies – ultras, mainly from Kharkov').

65 *War in Donbass*, Wikipedia, <http://en.wikipedia.org/wiki/War_in_Donbass> (accessed Mar. 7, 2015).

66 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

and children who shall be protected against acts of violence, terrorism, and infringements of their human rights. Article 7 provides protection for the wounded and sick by requiring sufficient medical care. Article 9 protects medical and religious personnel from interference in the performance of their duties. Article 13 prohibits attacks against civilian populations, and protects any object necessary for the survival of the civilian population. Ukraine has violated each Article of the Protocol II as the following select events illustrate:

1) October 1, 2014, Ukraine military forces attacked Donetsk, and specifically targeted school No. 57 and a nearby bus stop. At least one teacher and more than 10 bystanders died or injured in the attack.[67] As of September 1, 2014, in Donetsk alone, 93 schools, 11 colleges, nine university buildings, and 27 kindergartens were partially or fully destroyed;[68]

2) since the start of hostilities, numerous churches were destroyed and several priests were killed and or subjected to torture;[69]

3) Ukraine military forces indiscriminately bombed civilian buildings, and did not confine their mission to buildings controlled by the 'separatists;'[70]

4) Ukraine military action destroyed public services, food supplies, and impeded the provision of humanitarian aid;[71] and

5) unlawful arrests and torture of civilians.[72]

International law does not recognize the notion of a 'lawful combatant' in a non-international armed conflict.[73] Government forces usually have an advantage in terms

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67 Кровавый День знаний в Донецке унес жизни более 10 человек [*Krovavyi Den' znanii v Donetske unes zhizni bolee 10 chelovek* [*Bloody Day of Knowledge in Donetsk: More Than 10 People Killed*]], *NTV*, (Oct. 1, 2014) <http://www.ntv.ru/novosti/1226397/#ixzz3I18qo3ud> (accessed Mar. 7, 2015).

68 Почти сотня школ и 30 детсадов были разрушены в Донецке из-за обстрелов [Pochti sotnya shkol i detsadov byli razrusheny v Donetske iz-za obstrelov [Nearly a Hundred Schools and 30 Kindergartens Were Destroyed in Donetsk because of Shelling]], *RIA Novosti Ukraina* (Sep. 1, 2014), <http://rian.com.ua/incidents/20140901/356579582.html> (accessed Mar. 7, 2015).

69 Храмы и священники, пострадавшие на востоке Украины [*Khramy i svyashchenniki, postradavshie na vostoke Ukrainy* [*Churches and Priests Affected in Eastern Ukraine*]], *PRAVMIR.RU* (Aug. 25, 2014, <http://www.pravmir.ru/hramyi-i-duhovenstvo-postradavshie-na-yugo-vostoke-ukrainyi/> (accessed Mar. 7, 2015).

70 В Донецке под обстрел попал детский сад [*V Donetske pod obstrel popal detskii sad* [*In Donetsk Kindergarten Subject to Attack*]], *TV Tsentr* (Oct. 2, 2014), <http://www.tvc.ru/news/show/id/51674> (accessed Mar. 7, 2015).

71 Красный Крест не смог доставить гумпомощь в Луганск из-за обстрела [*Krasnyi Krest ne smog dostavit' gumpomoshch v Lugansk iz-za obstrela* [*Red Cross Could Not Deliver Humanitarian Aid to Lugansk because of Firing of Missiles*]], *RIA Novosti Ukraina* (Sep. 6, 2014), <http://rian.com.ua/incidents/20140906/356801755.html> (accessed Mar. 7, 2015).

72 Бывшая пленная медсестра рассказала о пытках украинских силовиков [*Byvshchaya plennaya medsestra rasskazala o pytkakh ukrainskikh silovikov* [*Former Captured Nurse Told about Tortures by Ukrainian Armed Forces*]], *Khar'kov – Novostnoe agentstvo* (Nov. 2, 2014), <http://nahnews.com.ua/99324-byvshaya-plennaya-medsestra-rasskazala-o-pytkax-ukrainskix-silovikov/> (accessed Mar. 7, 2015).

73 Peter Rowe, *Freedom Fighters and Rebels: The Rules of Civil War*, 95(1) J. R. Soc. Med. (2001), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1279138/> (accessed Mar. 7, 2015).

of military equipment and manpower. Rebels are deemed 'terrorists.'[74] However, although public international law provides rules of war mainly for international conflicts, the ethical principles embodied in the Geneva Conventions may be applied by analogy to the internal Ukraine conflict.[75] Without the application, even by analogy, of the law of armed conflict, a government of a Nation State may not, without compunction, bomb the opposition into submission, and then prosecute, convict, and punish insurgents for a spectrum of crimes against the State.

Underlying the political strife is the energy assets in East Ukraine. Ukraine's role as a transit country for gas supplied to the EU and the discovery of shale gas fields in the East and West are matters that cannot be overstated, since it raises EU gas security issues. In 2013, *Gazprom* delivered $ 10 billion worth of gas to Ukraine.[76] Due to mismanagement and corruption, *Naftogaz Ukrayiny*, has run up debt of $ 3.3 billion to *Gazprom*. Ukraine's financial condition as demonstrated by its 'balance of payments' is not sustainable. In addition, Ukraine's 'total shale gas deposits are estimated around 7 trillion cubic meters, which places the country at the third place in Europe after Poland and Norway.'[77] The largest shale gas field is located in 'Eastern Ukraine [Donetsk and Kharkiv regions] in the Dnipro-Donbas petroleum basin.' *Royal Dutch Shell* entered into a contract with the Donetsk and Kharkiv regional councils without consultation, and over the objection, of local stakeholders. *Royal Dutch Shell* would have to commit up to $ 50 billion in foreign investment to develop the gas field, begin production, and recover its investment.

Economic interests often, if not consistently, underlie shifts in political status and armed conflict, and stand in stark contrast to the language of ethics and morality found in political and legal texts.[78] In the context of the present Ukraine crisis, the economic interest at stake is 'oil and gas.' Michael Hudson, a renowned economist, has stated:

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74 In theory obviated by the Minsk Protocol, *supra* n. 2.

75 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75. U.N.T.S. 287 (providing protection to hospitals and children located in territories of conflict).

76 Simon Pirani et al., *What the Ukrainian Crisis Means for Gas Markets*, The Oxford Institute for Energy Studies (Mar. 10, 2014), <http://www.oxfordenergy.org/2014/03/what-the-ukrainian-crisis-means-for-gas-markets/> (accessed Mar. 7, 2015).

77 Tania Marocchi & Taras Fedriko, *Shale Gas in Poland and Ukraine: A Great Potential and Uncertain Future*, PECOB, <http://www.pecob.eu/shale-gas-pl-ua> (accessed Mar. 7, 2015).

78 In the context of decolonisation, John Kenneth Galbraith writes: 'The engine of economic well-being was now within and between the advanced industrial countries. Domestic economic growth – as now measured and much discussed – came to be seen as far more important than the erstwhile colonial trade . . . The economic effect in the United States from the granting of independence to the Philippines was unnoticeable, partly due to the Bell Trade Act, which allowed American monopoly in the economy of the Philippines. The departure of India and Pakistan made small economic difference in Britain. Dutch economists calculated that the economic effect from the loss of the great Dutch empire in Indonesia was compensated by a couple of years or so of domestic post-war economic growth. The end of the colonial era is celebrated in the history books as a triumph of national aspiration in the former colonies and of benign good sense on the part of the colonial powers. Lurking beneath, as so often happens, was a strong current of economic interest – or in this case, disinterest.' New World Encyclopedia,

> The basic principle to bear in mind is that finance today is war by non-military means. The aim of getting a country in debt is to obtain its economic surplus, ending up with its property. The main property to obtain is that which can produce exports and generate foreign exchange. For Ukraine, this means mainly the Eastern manufacturing and mining companies, which presently are held in the hands of the oligarchs. For foreign investors, the problem is how to transfer these assets and their revenue into foreign hands – in an economy whose international payments are in chronic deficit as a result of the failed post-1991 restructuring.[79]

The United States and the European Union are engaged in a new 'Cold War' against Russia.

Consequently, the central government of Ukraine has committed acts of delict sufficient to give rise to a derivative right of the 'people' of the East and South to make a pragmatic choice as to their political affiliation.

8. Eastern and Southern Ukraine Have a Right to Secede from Ukraine

The population of the Eastern and Southern Ukraine are a 'people' within the meaning of the ICCPR and ICESCR since the term 'people' encompasses 'persons' by its ordinary language (the preambles) and distinct groups of persons within a single nation state. Recourse to recognized dictionaries is dispositive. Hence, there is no need to go outside the four corners of these conventions. The population in Eastern and Southern Ukraine constitute a class of persons, in other words a 'people,' tied together by language, culture, religion, ethnicity, and economic interest.

The claim that the ICCPR and ICESCR were designed for decolonization is unpersuasive. Dworkin instructs: 'ignore authorial intent.'[80] The treaties were adopted at a time when decolonization was well established. Equally significant, decolonisation has nothing to do with protecting human dignity of persons within the colonies, but with the economic interests of former colonial powers in newly independent states.[81] Put simply, the colonies are worth more in trade and commerce to colonial powers as independent nations, than as colonies.

<http://www.newworldencyclopedia.org/entry/Decolonization> (accessed Mar. 7, 2015) (citing John K. Galbraith, A Journey Through Economic Time: A Firsthand View (Houghton Mifflin 1994)).

79 Michael Hudson, *No to Currency Slavery* (Jul. 10, 2014), <http://michael-hudson.com/2014/07/no-to-currency-slavery/> (accessed Mar. 7, 2015).

80 Posner supports the interpretation of legal texts independent from author and historical context. Posner, *supra* n. 22, at 19.

81 Galbraith, *supra* n. 78.

The UN Charter does not prohibit secession and therefore the Charter is not dispositive. In addition, the ICJ Decision in *Kosovo*, while not a precedent, arguably provides support for regional Ukrainian secession. The ICJ noted: 'During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.'[82] The ICJ found that nothing in international law prohibits secession, and stated that 'general international law contains no applicable prohibition of declarations of independence' thereby holding that the Kosovo declaration of independence was consistent with international law.

Although the Decision of the ICJ is rooted in the particular historical circumstances of Kosovo / Serbia and UN Resolutions, the ICJ concluded, 'that the adoption of the declaration of independence of 17 February 2008 [by Kosovo] did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework.'[83] Combined with the ICCPR and ICESCR, people, under given circumstances, have a right to secession. Therefore, the view that secession is solely an internal matter must be rejected.[84]

A central thread of secession is oppression and abuse of a minority 'people' by a majority 'people.' Take the Civil War in the USA as an illustration. While there are myriad reasons why Southern States seceded from the 'Union,' a central tenet was the imposition by the Northern States of a political, economic, and social regime that was anathema to the South, including non-Slave owning Southerners. Under public international law, as understood today, Lincoln may be regarded as a war criminal for authorizing the killing not only of Southern soldiers but also of civilians and the destruction of property as demonstrated by Sherman's 'March to the Sea.'

The government of Ukraine has abrogated its obligations under both the ICCPR and ICESCR by failing to provide a mechanism to ensure that 'self-determination' is handled internally without armed conflict. Treating the 'separatists' as enemies of the State and 'terrorists' (a term that international law cannot even define), and authorizing the use of military force to kill its own citizens, including violations of Protocol II, amounts to undeniable breaches of Arts. 2(1)–(2) of the ICCPR and Arts. 2(1)–(2) ICESCR.

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82 Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 403, 436.

83 *Id*. at 452.

84 This article rejects the view of Professor Borgen who has stated that '[t]he norm of self-determination is not a general right of secession. It is the right of a people to decide on their culture, language, and government. It has evolved into the concepts of "internal self-determination," the protection of minority rights within a state, and "external self-determination," secession from a state. While self-determination is an internationally recognized principle, secession is considered a domestic issue that each state must assess itself.' Borgen, *supra* n. 6, at 6.

Therefore, the 'separatists' in East and South Ukraine have a right to secede from Ukraine. The 'separatists' are a 'people' within the ordinary meaning of that term; they have suffered harm by the mother state and the reply of the mother State to launch a military operation against the 'separatists' is adequate proof of Kiev's lack of diplomatic initiative. Secession need not lead to a new state since given the linguistic, cultural, and historical ties with Russia, the separatists may seek a pragmatic solution by seeking annexation to an already existing Nation State – the Russian Federation.

9. Text Based Argument

Legal texts are autonomous objects, accessible to understanding without the reader's having to know, at a profound depth, about the drafters' intentions and the historical circumstances in which the text came into being.[85] Refusal to follow this critical approach results in endless, and futile debate, about what terms meant decades, if not centuries ago. If history of a region is woven into the picture, then the interpretive process is destined for failure, as it would be unlikely to achieve a widespread consensus. The extant public international law texts are sufficient to yield a plausible answer to the question of whether Eastern and Southern Ukraine have a legal right to secede. Legal rules are best conceived in instrumental terms: 'contestability, revisability, and mutability.'[86] In the case of Ukraine, what is done is done. The separatist 'republics,' the large swathe of territories, or whatever one calls the regions in Eastern and Southern Ukraine are not coming back to post-1991 Ukraine as preferred by the United States and the European Union. The pragmatic answer is clear: acknowledge autonomy for Eastern and Southern Ukraine based on popular vote.

10. The Illegality of Economic Sanctions against the Russian Federation

Article 39 of the United Nations Charter provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 further provides:

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[85] Posner, *supra* n. 22, at 19.

[86] *Id*. at 29.

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The 1970 Declaration provides:

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure form it advantages of any kind.

The United States and the European Union, among other UN members, have imposed economic sanctions upon the Russian Federation for its alleged interference in the internal affairs of Ukraine. The Security Council of the United Nations has not made any fact-finding resolution that the Russian Federation has violated a principle of international law. In addition, the Security Council has not authorized the implementation of economic sanctions against the Russian Federation. Therefore, based upon member state obligations, the economic sanctions imposed by the United States, the European Union and other sovereign States are illegal.

An elusive question is what has the Russian Federation *in fact* done to interfere in the internal affairs of Ukraine as to justify any UN sanction? The argument may be turned upside down and it may be argued that the United States and the European Union have interfered in the internal affairs of Ukraine, therefore violating their public international law obligations. Hence, the economic sanctions against the Russian Federation violate the United Nations Charter and may violate WTO obligations.[87]

11. Conclusion

The Ukraine has violated the rights of the people of Eastern and Southern Ukraine, under the ICCPR and ICESCR, not to mention the soft law of the Universal Declaration of Human Rights. Given the breach of its treaty obligations and its reliance on military force, the 'people' of Eastern and Southern Ukraine, under the ordinary meaning of the terms 'people' and 'self-determination,' have a right to secede from Ukraine to vindicate their political, social and economic rights. Notwithstanding legal niceties,

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[87] General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XX, 61 Stat. A-11, 55 U.N.T.S. 194, does not provide an exception from the Most-Favoured-Nation principle based on political differences. Neither does the United Nations Convention on Contracts for the International Sale of Goods that may apply to the sale of goods between France and the Russian Federation.

Ukraine has an obligation to give complete autonomy to the 'people' of Eastern and Southern Ukraine that no longer support political dominion from Kiev. *De facto* it is done. Thus leaving the question does *de jure* have any meaning left in this crisis.

Second, it follows that the USA and EU, members of the UN, cannot take unilateral action against a State purportedly acting contrary to UN principles without a resolution of the Security Council that first requires a finding of the 'crime of aggression' addressed in Art. 5(d) of the Rome Statute or at the least 'aggression.' This defiance of UN procedures of due process brings into question the validity of USA, EU, and any other country imposing sanctions against the Russian Federation. Statements by the United States and the European Union that the activity in the separatist zone constitutes a breach of international law or national Ukrainian law requires full substantiation. Propaganda disseminated by the United States and European Union to justify intervention into the internal affairs of Ukraine is a violation of UN Charter principles.[88] Security Council approval is required to impose economic sanctions against the Russian Federation.

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[88] While the Russian Federation vetoed a UN Security Council Resolution declaring the March 2014 referendum on the future of the Crimean peninsula illegal, the UN has not issued any resolutions regarding sanctions against the Russian Federation related to the separatist movement in Eastern and Southern Ukraine.

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