

COMMENTS

ECONOMIC SANCTIONS AGAINST THE RUSSIAN FEDERATION ARE ILLEGAL UNDER PUBLIC INTERNATIONAL LAW

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In response to the Russian Federation's purported 'annexation' of Crimea and the conflict between separatists in the Donbass region and the central government of Ukraine, the United States, the European Union, Japan, and Australia, the principal countries, have imposed economic sanctions upon Russian officials, firms, and private individuals. The economic sanctions imposed upon the Russian Federation violate public international law on three grounds: 1) lack of authorisation under the United Nations Charter; 2) inapplicability of Art. XXI GATT ('Security Exceptions'); and 3) lack of legal authority based on the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. Fidelity to the 'rule of law' requires an immediate withdrawal of all economic sanctions. By contrast, the international community 'ought to' condemn Ukraine's indiscriminate killing of innocent citizens living in the Donbass region and support the efforts of the Russian Federation to provide humanitarian aid to the region.

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

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1. Introduction¹

The argument that sanctions and restrictions imposed against Russian officials, firms, and agencies do not constitute economic sanctions against the Russian

¹ This article does not support the characterization of the integration of Crimea into the Russian Federation as an 'annexation,' but as an event of 'democratic secession.' See Steven Wheatley, *Modelling Democratic Secession in International Law*, in *Nationalism and Globalisation: New Settings, New Challenges* (Stephen Tierney, ed.) (Hart Pub. forthcoming), available at <<http://ssrn.com:abstract=2511216>> (accessed Jul. 28, 2015). Other countries participating in economic sanctions against the Russian Federation are: Canada, Greenland, Iceland, Norway, French Guiana, and several Caribbean islands.

Federation as a Sovereign State is disingenuous. A Sovereign State, meeting the criteria of the Montevideo Convention on the Rights and Duties of States,² is a juridical entity incapable *per se* of taking action without representatives or agents of the State. The multiple rounds of ever expanding sanctions against Russian officials, firms, and private individuals effectively constitute sanctions against the Russian Federation for two reasons. First, public officials, firms, and private individuals are the instrumentalities through which a Sovereign State exercises its right as a juridical entity and takes action. Second, the economic sanctions are intended to cause a change in the foreign policy of the Russian Federation. Further support for this conclusion derives from the nature of the sanctions. The economic sanctions threaten Russian national security interests by targeting the Russian Federation's military industry, and oil and gas sector, and assets held abroad. Travel restrictions are imposed upon private individuals deemed to have acted for the Russian Federation in the 'Ukraine' affair. The failure of France to deliver two Mistral-class warships to the Russian Federation, based on a contract between the two Sovereign States, demonstrates that the 'Russian Federation' is the objective target of the economic sanctions and restrictions. Carefully worded declarations fail to provide an exemption from the mandate of international law.

The United Nations is the singular institution, emerging from the close of the World War II, established to maintain international peace and security and to avoid the perils of another war.³ It is the exclusive forum for States to resolve differences peacefully and is the world's sole authority to set rules governing the use of military and non-military force by Member States for actions deemed to threaten international peace and security, the predominant objective of the UN Charter.⁴ Member States cannot exercise force outside the ambit of the UN Charter or determine, individually or severally, whether an action taken by a State constitutes a threat to international peace and security. The Security Council is vested with the exclusive authority to sanction the use of force against belligerent States deemed to have violated a mandatory international norm.⁵ Without Security Council authorization, Member States forfeit an attribute of sovereignty and are prohibited from deploying force against another Sovereign State. The UN General Assembly's adoption of five resolutions, starting with the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty (1965), clarify that a 'State may no longer claim a general legal right to impose economic sanctions against other

² Convention on Rights and Duties of States, December 26, 1933, 49 Stat. 3097 [hereinafter Montevideo Convention].

³ U.N. Charter Art. 1, para. 1.

⁴ *Id.* Preamble, para. 1.

⁵ *Id.* Art. 2, para. 4.

States.⁶ The economic sanctions imposed against the Russian Federation run afoul of this fundamental axiom of the UN Charter to prohibit rogue action by individual Member States pursuing their economic, military, and political agenda outside the parameters of the UN Charter.

Equally devoid of authority for justifying unilateral imposition of economic sanctions against the Russian Federation is reliance upon Art. XXI of the General Agreement on Tariffs and Trade.⁷ Article XXI states that the GATT will not prevent a WTO member 'from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations . . .' Since the GATT does not define critical terms, such as 'considers necessary,' 'essential security interests,' 'time of war,' and 'emergency in international relations,' it arguably allows a State to determine subjectively whether there is a war or 'other emergency in international relations.' However, this reading is predicated upon false assumptions. 'War' is a term of art in public international law and does not countenance subjective determination; although the phrase 'other emergency in international relations' is not a term of art, it does not follow that States may self-judge its meaning, because the GATT rules are not designed to be self-judging.⁸ In any event, Art. XXI GATT, a provision

⁶ *Economic Measures as a Means of Political and Economic Coercion against Developing Countries: Report of the Secretary-General*, U.N. Doc. A/52/459 (1997). See: *Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, ¶ 2, U.N. Doc. A/6014 (1965), at <<http://www.un-documents.net/a20r2131.htm>> (accessed Jul. 28, 2015); *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, Annex, U.N. Doc. A/5217 (1970), at <<http://www.un-documents.net/a25r2625.htm>> (accessed Mar. 7, 2015); *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, G.A. Res. 36/103, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1982), at <<http://www.un.org/documents/ga/res/36/a36r103.htm>> (accessed Jul. 29, 2015); *Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion*, G.A. Res. 51/22, U.N. GAOR, 51st Sess., Supp. No. 49 I, U.N. Doc. A/51/49 (1996), at <<http://www.un.org/documents/ga/res/51/ares51-22.htm>> (accessed Jul. 29, 2015); and *Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries*, G.A. Res. 52/181, U.N. GAOR, 52nd Sess., Supp. No. 49 I, U.N. Doc. A/52/49 (1997), at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/181> (accessed Jul. 29, 2015).

⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XXI, 61 Stat. A-11, 55 U.N.T.S. 194, at <https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> (accessed Jul. 29, 2015) [hereinafter GATT].

⁸ Mitsuo Matsushita et al., *The World Trade Organization: Law, Practice, and Policy* 597 (2nd ed., Oxford University Press 2006); see also *Law of Armed Conflict Deskbook* (2012), at <http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2012.pdf> (accessed Jul. 29, 2015) that defines the term 'war' as comprising four elements: '(a) a contention; (b) between at least two nation-states; (c) wherein armed force is employed; (d) with an intent to overwhelm' (*id.* at 7). By contrast, the term 'armed conflict' comprises '[a]ny difference arising between two States and leading to the intervention of armed forces' (*id.* (quoting Convention I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary 32 (Jean S. Pictet, ed.) (International Committee of the Red Cross 1952), available at <http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf> (accessed Jul. 29, 2015))). Ukraine, never mind the Rest of the World, would be hard pressed to meet either definition.

within a multi-lateral trade agreement, cannot be invoked to undermine the foundations and design of the UN Charter.⁹ In addition, except for Ukraine, Art. XXI is not germane for countries participating in the economic sanctions against the Russian Federation, since national security interests are not open-ended, unless they are taken to a point of absurdity, an interpretation not countenanced by principles of legal interpretation.¹⁰

Further unavailing is recourse to the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹¹ First, the Draft Articles are not primary law, as adopted only by the International Law Commission. Second, the Draft Articles are subordinate to the UN Charter thereby bringing the matter back full circle to the sole institution charged with regulating breaches of international peace and security.¹² Third, the Draft Articles require objective proof of a predicate act: the target State has breached an international obligation under international law.¹³ Omission of proof of the predicate act cuts off all countermeasures ostensibly authorized by the Draft Articles.

Consequently, countries imposing economic sanctions against the Russian Federation violate public international law principles to achieve a common political agenda: contain the renaissance of the Russian Federation, eviscerate its political influence, and protect the hegemony of the United States and European Union. Moreover, the conduct of the EU and Ukraine, as it 'shells' its citizens into submission in defiance of their rights, conflicts with their obligations under the

⁹ See Mosunova, *infra* n. 35.

¹⁰ The United States Department of Defense maintains that US national security rests upon three pillars:

'Protect the homeland, to deter and defeat attacks on the United States and to support civil authorities in mitigating the effects of potential attacks and natural disasters.

Build security globally, in order to preserve regional stability, deter adversaries, support allies and partners, and cooperate with others to address common security challenges.

Project power and win decisively, to defeat aggression, disrupt and destroy terrorist networks, and provide humanitarian assistance and disaster relief' (Quadrennial Defense Review 2014, at v, at <http://www.defense.gov/pubs/2014_Quadrennial_Defense_Review.pdf> (accessed Jul. 29, 2015)). The egomaniacal character of this position is self-evident. The troubling expansion of US notions of its security interests are well-noted in Laura K. Donahue, *The Limits of National Security*, 48 Am. Crim. L. Rev. 1573 (2011), available at <<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2027&context=facpub>> (accessed Jul. 29, 2015).

¹¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), reprinted in 2 Y.B. Int'l L. Comm'n 20 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1, at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> (accessed Jul. 29, 2015) [hereinafter Draft Articles].

¹² *Id.* Art. 59, at 143.

¹³ Article 3 of the Draft Articles provides: 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law' (*id.* at 36).

European Convention on Human Rights [hereinafter ECHR] and the International Covenant on Political and Civil Rights.¹⁴

2. The United Nations Charter

Member States of the United Nations do not have a right to impose economic sanctions upon another Member States or any Sovereign State. Article 2(4) of the UN Charter 'prohibits all UN members from resorting to the threat or use of force against the territorial integrity or political independence of any State.'¹⁵ While the word 'force' initially was generally understood to refer to military force, various resolutions adopted by the General Assembly and culminating in the 1997 UN Secretariat's convening of an *ad hoc* group on the use of economic sanctions dispelled any doubt that basic principles of international law limited the meaning of the word 'force' to military action.¹⁶ The *ad hoc* group concluded that 'basic legal norms' proscribe 'the imposition of coercive economic measures as instruments of intervention in matters that are essentially within the domestic jurisdiction of any State.' Dr. Szasz states: '[A]s the twentieth century reaches its close, at least *de lege ferenda* no State may any longer claim a general legal right to impose economic sanctions against other States . . .'¹⁷

Therefore, the question of authorizing the imposition of economic sanctions upon States falls squarely within the authority of the Security Council under Ch. V of the UN Charter. Article 24(1) clarifies this mandatory obligation: 'Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'¹⁸ The process leading to a Security Council decision to impose sanctions follows a multi-step procedure comprising formal requirements. The first step is a determination by the Security Council under Art. 39 of

¹⁴ See, e.g., *Ushakov and Ushakova v. Ukraine*, no. 10705/12 (Eur. Ct. H.R., Jun. 18, 2015) (Ukraine was found to have violated Art. 3 of the European Convention on Human Rights); see also *Report: War Crimes of the Armed Forces and Security Forces of Ukraine: Torture of the Donbass Region Residents (English)*, Free Ukraine Now (Mar. 13, 2015), <<http://freeukrainenow.org/2015/03/13/report-war-crimes-of-the-armed-forces-and-security-forces-of-ukraine-torture-of-the-donbass-region-residents-english-pdf/>> (accessed Jul. 29, 2015) (among other things, Liliya Rodionova, deputy head of the Committee for Refugees and Prisoners of War (Donetsk), remarks in part: 'Some were thrown into a pit with dead bodies, crushed with a shovel bucket, had a smoldering iron stuck in their mouth. People were kept in iron containers with no source of oxygen. The torture techniques are sophisticated and brutal, they leave the victims maimed. Those in need of medical treatment, even with diabetes, receive no medical assistance').

¹⁵ Paul Szasz, *Chapter XVII. The Law of Economic Sanctions*, in *The Law of Armed Conflict: Into the Next Millennium* (= 71 *International Law Studies*) 455, 456 (Michael N. Schmitt & Leslie C. Green, eds.) (Naval War College 1998), available at <<https://archive.org/details/lawofarmedconfli71schm>> (accessed Jul. 29, 2015).

¹⁶ *Id.* at 456–58

¹⁷ *Id.* at 458.

¹⁸ U.N. Charter Art. 24, para. 1.

'the existence of any threat to the peace, breach of the peace, or act of aggression.'¹⁹ This first step requires the Security Council to investigate a purported dispute under Art. 34 'to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace or security.'²⁰ Having made an investigation under Art. 34, and having made a determination under Art. 39, the Council may, pursuant to Art. 40, 'call upon the parties concerned to comply with such provision measures as it deems necessary or desirable.'²¹ Article 41 gives the Security Council exclusive authority to decide which measures, short of military force, are to be employed to effectuate its decisions:²² '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.'²³ Article 51, the only exception to this procedure, articulated as the inherent 'right of self-defense' is inapplicable regarding the economic sanctions imposed against the Russian Federation.

The Security Council has not found that the Russian Federation has committed an act of aggression, likely to endanger international peace and security, or an act to destabilize the peace or stability of Ukraine.²⁴ Despite the spate of scholarship critical of the annexation of Crimea by the Russian Federation, these articles are not dispositive of the question, since it is the Security Council, not the collective thoughts of scholars ensconced in the citadels of academia, that determine whether the annexation of Crimea constituted an act likely to endanger international peace and security. In addition, the scholarship, marginalizes the 97% approval rating under the Referendum (dismissing the results out of hand by unproven allegations of voting irregularities), and focuses primarily upon the alleged use of force to annex Crimea, historically part of Russia, and an autonomous region under Ukraine. The annexation raises political, as much as legal questions and, under the post-World War II structure to resolve international disputes, is exclusively a matter for Security Council review and determination.

Equally ambiguous as to transgressions committed by the Russian Federation are references to the destabilization of the Donbass region in Eastern Ukraine. Advocates of human rights such as Barack Obama, Angela Merkel, and David Cameron blithely observe the central government in Kiev maim and kill children in the Donbass, destroy schools, hospitals, living quarters, and essential infrastructure, apparently

¹⁹ U.N. Charter Art. 39.

²⁰ *Id.* Art. 34.

²¹ *Id.* Art. 40.

²² *Id.*

²³ *Id.* Art. 41.

²⁴ See *infra* n. 42 (referring not to a Security Council Resolution, but a General Assembly Resolution 68/262 adopted March 27, 2014).

justifying these actions upon scant, and debatable evidence of Russian Federation interference.²⁵ The international media has demonstrated its impotence to conduct a non-biased inquiry into events in the Donbass. Satellite images taken by NATO are too imperceptible to establish the use of Russian military force in the Donbass, and the source of the images is non-neutral: NATO.²⁶ The accusations made against the Russian Federation may be deemed reckless, provocative, and contrary to principles underlying the international order implemented by Bretton Woods.

Consequently, the following conclusions ineluctably follow the analysis of the UN Charter: 1) absent Security Council authorization, no State may impose economic sanctions against the Russian Federation; 2) the economic sanctions are intended to violate the principle of equality embodied in the UN Charter, by aiming to secure an internal change in the foreign policy of the Russian Federation. Although the countries participating in the economic sanctions are countries with substantial GDP, and high rates of per capita income, the UN Charter does not allocate influence by economic development and wealth. The large majority of member countries of the UN do not participate in the US / EU led use of economic sanctions against the Russian Federation.

The Security Council has not found that the Russian Federation has threatened the peace or stability of Ukraine, or has committed an act of aggression. Ample opportunity exists to confirm the presence of Russian military in Ukraine through the Open Skies Treaty and the deployment of other surveillance technology available to the US and its allies. No data supports the allegations of President Obama, his representatives, and counterparts in the EU, Japan, and Australia, that the Russian Federation has mobilized troops and artillery in Ukraine to support insurgents in the Donbass. The accusations may be deemed reckless, provocative, and contrary to principles underlying the international order to resolve disputes short of 'force.'

3. Article XXI 'Security Exceptions' GATT

Advocates justifying economic sanctions against the Russian Federation by invoking Art. XXI GATT exemplify acts both desperate and cunning. The acknowledged ambiguity of Art. XXI has the potential to bury the 'security exception' in a bottomless quagmire and to generate a debate obfuscating rather than illuminating the

²⁵ See, e.g., *Ukrainian Army Shells Donetsk Monastery*, PRAVMIR.COM (Sep. 19, 2014), <<http://www.pravmir.com/ukrainian-army-shells-donetsk-monastery/>> (accessed Jul. 29, 2015).

²⁶ See *More Evidence of Russian Invasion: NATO Satellite Imagery Shows Russian Artillery in Ukraine*, YouTube (Aug. 29, 2014), <<https://www.youtube.com/watch?v=H8VcXDzBsEs>> (accessed Jul. 29, 2015). Only an expert in reading satellite photography could make sense of these images? Importantly, in 2015, a NATO Commander admitted lying about the Russian invasion of Ukraine. See Stephen Lendman, *NATO Commander Lied Claiming 'Russian Invasion of Ukraine'*, Global Research (Jan. 23, 2015), <<http://www.globalresearch.ca/nato-commander-lied-claiming-possible-russian-invasion-of-ukraine-coming/5426437>> (accessed Jul. 29, 2015).

exception.²⁷ It is time to confine the scope of this pernicious provision of the GATT, and recognize the 'exception' for what it is: a vestigial remnant of a right lost through development of modern legal rules. First, the UN Charter takes precedence over the WTO to settle threats to international peace and security, since the WTO is a multilateral trade agreement with objectives distinguishable from preservation of international peace and security. Second, the series of UN General Assembly resolutions reinforcing the concept that the imposition of economic measures is within the exclusive competence of the Security Council, have amended effectively Art. XXI under the legal principle of *lex specialis derogat lex generalis* as the General Assembly resolutions follow in time the adoption of Art. XXI, and the overriding obligation to read law as comprising a matrix of harmonized rules discredits flamboyant efforts to resuscitate this dead norm. Third, Matsushita, Schoenbaum and Mavroidis clarify that no individual country may self-judge a state of 'war' and the term 'emergency' must be confined to serious matters determined by WTO dispute settlement panels.²⁸ No panel decision dealing with Art. XXI has ever been adopted principally for procedural rules: lack of WTO jurisdiction.

Article XXI provides:

- Nothing in this Agreement shall be construed
- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; [*not applicable*] or
 - (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests,
 - (i) relating to fissionable materials or the materials from which they are derived [*not applicable*];
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment [*not applicable*];
 - (iii) taken in time of war or other emergency in international relations; or
 - (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

A concrete case demonstrates the absurd consequences of Art. XXI(b)(iii) when its terms are construed literally, that is, to allow a nation to self-judge the phrase 'emergency in international relations.' In 1985, the United States justified, on the basis

²⁷ See, e.g., Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 Duke L.J. 1277 (2003), available at <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1192&context=dlj>> (accessed Jul. 29, 2015).

²⁸ Matsushita et al., *supra* n. 7, at 597.

of Art. XXI, measures prohibiting all imports of goods and services of Nicaraguan origin as well as all US exports to Nicaragua, stating that the exception left it to each contracting party to judge what action it considered necessary for the protection of its own essential security interests.²⁹ At the insistence of the United States, the terms of reference of the GATT Panel that considered the matter, precluded the Panel from examining the validity of the US invocation of Art. XXI. While the GATT Panel's final report was not adopted, it did state that a nation relying on the exception must balance its need to do so against the more fundamental need for stable trade regulation, not to mention, in the view of this author, world peace. In 1986, the International Court of Justice found the US imposed Nicaraguan embargo to be in violation of international law. Laying mines in the waters of Nicaragua to enforce the embargo constituted an additional violation of customary international law.³⁰ Typical of the United States, the pre-eminent forerunner in violations of international law, President Reagan ignored the orders of the ICJ.

According to Ms. Desierto, Professor of Law at the University of Hawaii, '[t]he escalating trade wars between the US and EU against Russia bring to the forefront interrelated questions on the nature of self-judged security exceptions under international trade law, and the largely unsettled state of international, law on unilateral economic sanctions.³¹ She states: '[T]heir international legality depends on their scope, the modalities of their implementation, and territorial (or extraterritorial) effects on the targeted State'³² (unhelpful legal jargon). Eventually, Ms. Desierto notes, rightly, that unilateral imposition of economic sanctions had the capacity to undermine UN Charter obligations.³³ However, she fudges her position by providing that the key to the legality of the unilateral economic sanctions is to be found in a non-law instrument: the Draft Articles, a mistake that if repeated enough may raise this reference to the International Law Commission [hereinafter ILM] to the level of doctrine.³⁴

Taken to its logical conclusion, a liberal reading of the Art. XXI 'Security Exceptions' would destabilize the foundations of the UN Charter, unwind 60 years of developing

²⁹ GATT Council, *Minutes of Meeting. Held in the Centre William Rappard on 29 May 1985*, C/M/188, at 2–16 (Jun. 28, 1985), at <https://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf> (accessed Jul. 29, 2015); GATT Council, *Minutes of Meeting. Held in the Centre William Rappard on 17–19 July 1985*, C/M/191, at 41–46 (Sep. 11, 1985), at <https://www.wto.org/gatt_docs/English/SULPDF/91160043.pdf> (accessed Jul. 29, 2015).

³⁰ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 190 (June 27).

³¹ Diane A. Desierto, *The EU/US v. Russia Trade Wars: Revisiting GATT Article XXI and the International Law on Unilateral Economic Sanctions*, EJIL: Talk! (Sep. 22, 2014), <<http://www.ejiltalk.org/the-euus-v-russia-trade-wars-revisiting-gatt-article-xxi-and-the-international-law-on-unilateral-economic-sanctions-2/>> (accessed Jul. 29, 2015).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

a system of international law to resolve disputes by peaceful negotiations, and promote the fragmentation of national states by allowing any state, in its self-interest, to disturb both free trade and the coordinated use of sanctions under the rubric of the UN Charter. Therefore, any interpretation of Art. XXI capable of destroying the entire dispute system of international peace and security must be rejected.

By analogy, this conclusion is supported by the jurisprudence of the WTO on Art. XX ostensibly designed to protect non-trade values. These non-trade values encompass a spectrum of values, including public morals, human, animal or plant life, the products of prison labour, and exhaustible natural resources. Only one case of twenty attempts has been successful in justifying GATT-inconsistent measures.³⁵ Ms. Mosunova argues persuasively, that a predicate of invoking Art. XX is that its application should not undermine the WTO multilateral trading system.³⁶ Further, the author states: '[T]he purpose of the WTO's establishment was not promotion of human rights but "peaceful and predictable interstate economic relations free of political maneuvering."³⁷

Likewise, the WTO dispute settlement system ought to constrain the application of Art. XXI even further. The WTO is not a forum to settle political disputes about threats to national security, and an expansive reading of this exception would undermine the entire WTO multilateral trading system and the UN Charter. The United States, European Union, Japan, and Australia lack essential security interests in a civil war in Ukraine, unless the concept of 'essential security interest' is stretched to an absurdity, as it was under the Clinton Administration when the Caspian Sea was deemed a matter of national security interest.³⁸ The Russian Federation has not taken any action against the United States or its allies. Indeed, the Russian Federation has taken the opposite tack, providing information within its possession and offering to broker a settlement. Ukraine arguably is the only State that could rely upon Art. XXI, but Ukraine has not invoked this provision of the GATT.

However, the US, EU, Japan, Australia and other countries that have imposed economic sanctions against the Russian Federation may have violated peremptory norms of international law by intervening in the internal affairs of the Russian Federation to cause a modification of its foreign policy, and may have violated peremptory norms of internal law by providing military assistance to Ukraine in its effort to defeat by lethal means its internal conflict in the Donbass region. Ukraine is indiscriminately killing its citizens, and committing appalling atrocities in Eastern

³⁵ Natalya Mosunova, *Are Non-Trade Values Adequately Protected under GATT Art. XX?*, 2(2) Russian Law Journal 102 (2014), available at <<http://www.russianlawjournal.org/index.php/jour/article/download/34/30>> (accessed Jul. 29, 2015). doi:10.17589/2309-8678-2014-2-2-101-113

³⁶ *Id.* at 105.

³⁷ *Id.* at 111.

³⁸ Steve Levin, *The Oil and the Glory: The Pursuit of Empire and Fortune on the Caspian Sea* (Random House 2007).

Ukraine, who are exercising rights of self-determination under Treaties signed by Ukraine, US, EU, and Australia.³⁹

While public international law is razor thin on what actions a Sovereign may take to quell an internal conflict, killing its citizens, including civilians, children, the sick and elderly, does not accord with the moral principles espoused publicly by the US / EU axis. In addition, the US / EU support of the Kiev regime has enabled Ukraine to destroy schools, hospitals, residences, and transport infrastructure in the Donbass. The international community of States must question, if not condemn, the aggression of the US / EU, and any other countries involved in imposing punitive measures against the Russian Federation in the absence of independent corroboration and a Security Council determination.

4. International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts

The ILM does not have the authority to implement binding legal instruments, though its draft legislation often serves as the basis of international norms adopted by UN authorities. Nevertheless, the Draft Articles are not law and are the product of the ILC, a commission that drafts model legislation.⁴⁰ With the single exception that the Draft Articles partially embody customary law of State responsibility, the Draft Articles may be used as guidelines, but nothing more. Article 2 defines 'an internationally wrongful act of a State' as: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of a State.' The predicate act requires a determination by the Security Council.⁴¹

The only objective evidence offered by the UN related to any wrongful act of the Russian Federation is contained in the Resolution 68/262 adopted by the General Assembly on March 27, 2014, and entitled 'Territorial Integrity of Ukraine'⁴² (Resolution 68/262 never adopted by the Security Council). This two-page resolution consists of conclusory statements and notes only as a basis for violation of Ukraine territorial

³⁹ Amnesty International reports torturing and killing of prisoners of war from the Donbass. See *Донецкий иеромонах рассказал, как его пытали украинские силовики* [*Donetskii ieromonakh rasskazal, kak ego pytali ukrainskie siloviki*] [*Donetsk Hieromonch Told How He Was Tortured by the Ukrainian Security Officers*], PRAVMIR.RU (Apr. 11, 2015), <<http://www.pravmir.ru/donetskiy-ieromonah-rasskazal-kak-ego-pytali-ukrainskie-siloviki-video/>> (accessed Jul. 29, 2015).

⁴⁰ The fact that General Assembly Resolution 56/83 of December 12, 2001, 'annexed the text of the articles and commended them to governments' gives them weight, it fails to elevate their status to law. See Malcolm N. Shaw, *International Law* 568 (7th ed., Cambridge University Press 2014).

⁴¹ This conclusion follows from the fact that 'it is international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of municipal law' (*id.* at 569).

⁴² *Territorial Integrity of Ukraine*, G.A. Res. 68/262, U.N. GAOR, 68th Sess., U.N. Doc. A/RES/68/262 (2014), at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262> (accessed Jul. 29, 2015).

sovereignty that 'the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine.' The Resolution did not find that the Russian Federation committed an internationally unlawful act against Ukraine, which forms the basis of State responsibility and provides remedies for breach of that fundamental principle of international law. Rather, the Resolution identified a municipal law violation. Further, the Resolution called upon 'all States . . . not to recognize any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.' The language is precatory and not expressed in terms of mandatory obligations of States. Hence, if despite the 'call,' the Russian Federation does not heed it, it does not follow that the Russian Federation has breached an international norm of State responsibility thereby rendering inapposite recourse to reprisals or countermeasures articulated by the ILC.

Compelling is the absence of any language in the Resolution authorizing 'all States' to impose economic sanctions upon the Russian Federation. The only reference to the 'Russian Federation' in the Resolution is contained in a paragraph in the Preamble referencing the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of May 31, 1997. The Resolution was approved by 100 States, with 11 States voting for rejection, 58 States abstaining from the vote, and 24 States absent from the voting, hardly constituting worldwide unequivocal support of the contents of the Resolution.

Further, while due respect must be accorded to the Resolution, the language is strikingly conclusory in character. Although this article is not the venue to deconstruct the reasoning of the Resolution, the Resolution fails to consider the right of self-determination of the voting population of Crimea that cannot be dismissed outright because the domestic constitution of Ukraine did not provide for such procedure, since that logic would preclude the exercise of self-determination, since populations wanting to exercise that right would be required to receive the blessing of the very State it seeks to leave. Public international law cannot countenance such an absurd result. The Resolution also ignores the distinct history of the Russian Federation and the disintegration of the Soviet Union, which left Russians in many former republics of the USSR.⁴³

Subsequent to the disintegration of the USSR, Crimea was an autonomous republic within Ukraine. Crimea had its own legislature and capitol, Simferopol, and a city, Sevastopol, granted special state significance within Ukraine, since the Russian Federation maintained its Black Sea Fleet in Sevastopol. In 1991, the people of Crimea participated in several referendums. One referendum proclaimed the

⁴³ Hugo Flavie, *Russia's Normative Influence over Post-Soviet States: The Examples of Belarus and Ukraine*, 3(1) *Russian Law Journal* (2015), available at <<http://www.russianlawjournal.org/index.php/jour/article/download/67/73>> (accessed Jul. 29, 2015) doi:10.17589/2309-8678-2015-3-1-6-32. Following the logic of the United States, that the entire world is its province of national security, the Russian Federation is entitled to regain its standing as a great State. *Id.* at 8.

region an Autonomous Republic within the Soviet Union, with 93.26% of the voters supporting the measure. As events quickly unfolded, another referendum asked if the electorate of Crimea supported the independence of Ukraine from the Soviet Union – a question gathering 54% of the vote. However, a referendum on Crimea's independence from Ukraine was indefinitely banned from being held, leading critics to assert that their lawful rights were oppressed by Kiev authorities. The 2014 referendum followed the installation of an illegal central government in Kiev and a law banning the use of Russian language. The 2014 referendum is reminiscent of the suppressed 1991 referendum providing for Crimea to leave Ukraine.⁴⁴

Even if the integration of Crimea into the Russian Federation is characterized as an annexation, and presumed to violate the customary law of State responsibility, it does not follow that the Russian Federation must 'return' Crimea to Ukraine. Without reviewing in-depth defenses available to the Russian Federation, it is useful to look at the legal consequences of an internationally wrongful act (Art. 28 of the Draft Articles). Article 30 is inapposite as the annexation will never be unwound.⁴⁵ Article 31 speaks of reparation. But what reparation is due to Ukraine for the annexation of a territory consistently ignored by Ukraine since its independence, in terms of financial contribution to infrastructure improvement over a period of 20 years, not to mention the investment in Crimea made by the USSR prior to its disintegration. The burden of proof rests upon Ukraine to open its national accounting records to determine the amount of investment in Crimea since Ukraine's independence. The Russian Federation has assumed a multi-billion euro liability, since the central government in Kiev has evinced its interest principally in gold-paving the capitol of Kiev, particularly the Khreshchatyk, and in siphoning off funds raised both locally and internationally to enrich corrupt public officials.⁴⁶ The integration of Crimea into the Russian Federation, including the assumption of pension, medical service debt, and the cost of modernizing the infrastructure of Crimea, particularly its educational, manufacturing and shipbuilding industries, involves two States: Ukraine and the Russian Federation. How the interests of the United States, EU, Japan, and Australia, to mention only the principal actors, are implicated must await comprehensive reports by each State. Simply put, without Security Council determination, these countries lack any basis to interfere with the internal affairs of the Russian Federation. The US / EU axis cannot usurp control of the United Nations to advance their foreign affairs agenda.

⁴⁴ *The Crimean Referendums of 1991 and 1994*, <<http://culturedarm.com/2014/03/19/the-crimean-referendums-of-1991-and-1994/>> (accessed Jul. 29, 2015).

⁴⁵ Following that rationale, the United States that illegally annexed Hawaii in the 19th century would be under an international and moral imperative to return the islands to the indigenous population of Hawaii.

⁴⁶ Oliver Bullough, *Welcome to Ukraine, the Most Corrupt Nation in Europe*, *The Guardian* (Feb. 6, 2015), <<http://www.theguardian.com/news/2015/feb/04/welcome-to-the-most-corrupt-nation-in-europe-ukraine>> (accessed Jul. 29, 2015).

5. The Regional Protection of Human Rights

Ukraine is a member of the ECHR.⁴⁷ Unlike international treaties of the classic kind, the Convention comprises more than reciprocal engagements between contracting states. It creates, over and above a network of mutual and bilateral undertakings, objective obligations, which in the words of the preamble, benefit from a collective enforcement.⁴⁸ Assume, for purposes of argument, that Ukraine is undertaking a systematic killing of citizens in the Donbass, the question that arises is: what are the consequences under the ECHR? The answer is clear: Ukraine is in violation of Art. 1 entitled 'Obligation to Respect Human Rights,' that states: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Section I protects 'the rights of beneficiaries under the ECHR' providing for a right to life, prohibition against torture, right of freedom of expression, right to a fair trial, and no punishment without law. Article 15 is of dubious merit, since there is no 'war' and, if there is an 'emergency' within the meaning of Art. 15, it was created by the Kiev central government. The EU has a moral obligation to make certain that a State within its 'neighborhood' fulfills its obligations under the ECHR.

6. Conclusion

First and foremost, any dispute regarding recent developments in Crimea involve only two States: Ukraine and the Russian Federation. Economic sanctions imposed against the Russian Federation by third party states violate the UN Charter, since they lack Security Council sanction and, contrary to the principle of equality of States embodied in the UN Charter, amount to impertinent interference in the internal affairs of the Russian Federation.

Second, Art. XXI GATT, if applicable at all, is applicable to Ukraine only, and not the meddling third party States.⁴⁹ In addition, Art. XXI cannot be read to undo the comprehensive system for resolving international disputes set forth in the UN Charter, as clarified by numerous General Assembly resolutions. Third, characterizing Crimea's integration within the territory of the Russian Federation as an illegal annexation is a premature rush to judgment that disregards complex facts of Crimean history and diminishes the illegal regime change in Kiev.

⁴⁷ European Convention on Human Rights (as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13), at <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (accessed Jul. 29, 2015).

⁴⁸ Shaw, *supra* n. 40, at 251.

⁴⁹ In particular, the denunciation of the Russian Federation by the US, a country based upon theft (land and property), ethnic cleansing, unchecked military aggression, illegal annexations, and dubious moral imperatives to expand its powers is a caricature of hypocrisy. Equally unavailable to the EU is the doctrine of 'clean hands.'

Practically speaking, the Russian Federation has legal options to right the series of wrongs. First, the Russian Federation has standing to bring suit against third party countries before the International Court of Justice on the ground of the illegality of the sanctions. The Respondents should be unable to raise the question of the status of Crimea as a defense, since the latter question is irrelevant to the main claim of the Russian Federation. Second, the Russian Federation may file a claim with the WTO for violation of the principles of non-discrimination. While that tactic would inevitably involve a defense under Art. XXI, it is difficult to imagine how remote third party States have standing to argue 'harm.' Third, the Russian Federation may offer free legal assistance to people and legal entities in the Donbass harmed by the military action undertaken by Kiev to file claims against Ukraine with the European Court of Human Rights. Fourth, the Russian Federation has the option of doing nothing. The strategy of 'doing nothing' is very powerful.⁵⁰

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⁵⁰ Sun Tzu, *The Art of War* 34 (Thomas Cleary, trans.) (Shambhala Pub. 2005) ('Therefore those who win every battle are not really skilful – those who render others' armies helpless without fighting are the best of all').

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