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RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *Russian Law Journal* is designed to encourage research especially in Russian law and legal systems of Eurasia countries. It covers recent legal developments not only of this region, but also on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from the government authorities.

It is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

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Citations must conform to the *Bluebook: A Uniform System of Citation*.

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CHIEF EDITOR'S NOTE ON ARBITRATION REFORM IN RUSSIA

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Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The USSR was one of the original Member States to sign the Convention in 1958. There is a distinction between international and domestic arbitration. Arbitration in Russia was regulated by the Federal Law on Arbitral Tribunals in the Russian Federation (2003) (domestic arbitration) and the Federal Law on International Commercial Arbitration (1993) (international arbitration). This law was drafted on the basis of the UNCITRAL Model Law on International Commercial Arbitration.

The general rule of arbitrability states that any dispute is arbitrable unless otherwise directly stated by the law. The arbitrators cannot be state court judges; if the panel consists of three members, then at least one of them should be a lawyer. It is possible to appoint foreign nationals as arbitrators in international arbitral proceedings. A court cannot intervene in the selection of arbitrators. An arbitral tribunal can decide on its own jurisdiction. The parties have the right to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings. Parties are free to agree on a language other than Russian being used in the proceedings. An arbitration award cannot be appealed. A party shall make an application to the competent court for enforcement of the award that should be heard within three months.

The following disputes could not be resolved by arbitration, but only by state commercial courts: corporate disputes (before 2016); intellectual property disputes; bankruptcy; public law disputes; *etc.* There is also a risk of non-arbitrability of other types of disputes due to the lack of legal regulation and different courts'

interpretations. For example, the Russian courts recently confirmed that disputes arising from government-related contracts are not arbitrable.

Most arbitration in Russia is institutional. *Ad hoc* procedures are not popular in Russia. There are around 500 arbitral institutions in Russia and only 7–10 of them could be considered important, with their own set of rules and the option of cross-border disputes. The leading such institution is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow [hereinafter ICAC]. Its history dates back in 1932 when the USSR founded the Foreign Trade Arbitration Commission. It is the most frequently used court for international arbitration in Russia and handles an average of 200 to 250 cases per year. In 2013, the national Russian Arbitration Association was created as an independent arbitration institution and an alternative to ICAC.

The previous system of arbitration had several disadvantages. One of them was the dramatic increase the number of arbitral institutions over the last 15 years. Many arbitral institutions were established by major corporations and are influenced by them; this is known as a 'pocket' arbitration.

The most recent reform of arbitration in Russia started in 2014. The first draft law on arbitration was introduced by the Russian Ministry of Justice in January 2014, but it was returned by the Government for revision. In May 2015, the Government introduced a revised draft law in parliament. Finally, the President signed the Federal Law on Arbitration in the Russian Federation and the Federal Law on Changes to Related Laws of the Russian Federation. The first law regulates domestic arbitration, while the second concerns international arbitration.

There are three important aspects to the recent reform: first, the arbitrability of corporate disputes; second, the more detailed regulation of the arbitral proceedings; third, the licensing of the arbitral institutions.

Corporate disputes were non-arbitrable before the reform. This rule was stipulated not by the legislation but by court practice. The new laws determine the arbitrability of this category of disputes. However, there are some limitations. For example, the seat of arbitration of corporate disputes must be only in Russia.

The new laws establish a number of administrative requirements for arbitral institutions. They introduce very strict rules of arbitration. The new laws are similar to procedural codes. State courts have more influence over arbitration which could eventually lose its effectiveness as an alternative form of state litigation. Many details are now stipulated in the legislation (*e.g.*, the duty of an arbitral institution to publish information about its cases on the Internet).

Most of the institutions must obtain the licences provided by the Government. All foreign arbitral institutions should also get certification from the Government. The new Council of Arbitral Development is established under the supervision of the Ministry of Justice. It gives preliminary approval in the licensing proceedings. In general, the new laws make *ad hoc* arbitration less preferable than institutional arbitration due to

the increasing control by the state courts over them as well as a number of restrictive rules (*e.g.*, by excluding *ad hoc* in corporate dispute resolution).

There are other novelties in the laws. They allow retired judges to act as arbitrators. There is also a very important regulation that clarifies that a foreign arbitral award, which does not require enforcement, is recognized in Russia automatically without any recognition proceedings.

It could be concluded that the general trend of the reform is the increasing state control over arbitration. However, the new regulation is very important, it makes huge changes and could be qualified as the start of a new era of the arbitration in Russia.

ARTICLES

THE SUKHOI SU-24 INCIDENT BETWEEN RUSSIA AND TURKEY

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This note presents an analysis from the viewpoint of public international law of the event that occurred on November 24, 2015, when a Russian Sukhoi Su-24 bomber jet was downed by the Turkish Air Force over the border region between Syria and Turkey. While some of the basic circumstances of the case remain controversial, enough elements have emerged from media coverage to permit for the identification of the main legal issues, if not also to assess the legality of the Russian behavior and of the Turkish reaction in all its details. The known facts warrant the conclusion that the attack and the downing of the Russian jet can be seen as a disproportionate reaction on the part of the Turkish Government and, therefore, as a violation of the prohibition of the use of military force under Art. 2(4) of the UN Charter and under the corresponding customary rule of international law.

Keywords: jus ad bellum; aerial intrusion; aerial sovereignty; use of force; necessity; proportionality.

Recommended citation: Etienne Henry, *The Sukhoi Su-24 Incident between Russia and Turkey*, 4(1) RLJ (2016).

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1. Introduction

It is an understatement to say that the downing of a Russian Sukhoi Su-24 military jet by the Turkish Air Force on Tuesday, November 24, 2015, has increased the tensions between the states involved in the Syrian crisis.[1] The precise circumstances of the incident remain disputed and are likely to remain unclear for some time. Ideally the facts should be unveiled through a thorough and independent investigation – as asserted by, among others, UNSG Ban Ki-Moon[2] and US President Barack Obama.[3] While certain elements seem accepted as established facts according to public declarations and media coverage, some crucial factual elements remain disputed. The present analysis thus attempts to identify the main legal issues raised by these events by examining the differing accounts available in public media. It proceeds by trying to reconstitute the general circumstances of the incidents (Ch. 2.), before assessing them in the light of the relevant rules and principles of international law (Ch. 3.).

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1 *See*, for the historical background and the more recent context of Russian-Turkish relationships (from a Turkish standpoint), Akin Unver, *Clash of Empires: Why Russia and Turkey Fight*, Foreign Affairs (Nov. 29, 2015), <https://www.foreignaffairs.com/articles/turkey/2015-11-29/clash-empires> (accessed Mar. 5, 2016). *See*, for a political analysis (from a Russian perspective), *Пастухов В.* Не дарите спички пироманам. Два сценария выхода из кризиса в российско-турецких отношениях [Pastukhov V. *Ne darite spichki piromanam. Dva stsenariya vykhoda iz krizisa v rossiisko-turetskikh otnosheniyakh* [Vladimir Pastukhov, *Don't Give Matches to a Pyromaniac. Two Exit Scenarios for the Crisis in Russian-Turkish Relationships*]], *Rossiya v global'noi politike* (Dec. 7, 2015), <http://www.globalaffairs.ru/global-processes/Ne-darite-spichki-piromanam-Dva-stcenariya-vykhoda-iz-krizisa-v-rossiisko-turetckikh-otnosheniyakh--> (accessed Mar. 5, 2016).

2 *Ban Concerned over Downing of Russian Plane by Turkish Air Force, Urges Measures to Lower Tensions*, UN News Center (Nov. 24, 2015), <http://www.un.org/apps/news/story.asp?NewsID=52641#.VqtEeln4NPZ> (accessed Mar. 6, 2016).

3 *See supra* n. 1.

2. The Facts: An Attempt at Reconstitution

On November 24, 2015, a Russian bomber was undertaking an operation in the northwest of Syria, in a region controlled by opposition forces, near the Turkish border region of Yayladağı. The bomber was intercepted and downed by an air-to-air missile fired from a Turkish F-16 jet and crashed on Syrian territory. It is disputed whether the Russian plane entered Turkish airspace. The pilot and the co-pilot managed to activate their ejection seats and escape the destroyed aircraft. It appears that at least the co-pilot, Lieutenant Colonel Oleg Peshkov, was shot and killed by ethnic Turkmen rebel forces in Syria.[4] Some early media coverage reported that both crew members were shot and killed.[5] According to the Syrian newspaper *al-Watan*, the pilot, Captain Konstantin Murakhtin, was allegedly rescued by Syrian special forces.[6] Other sources, including the Russian Ministry of Defence, mention a joint Russian and Syrian operation resulting in the death of soldier Aleksandr Pozynich, one of the Russian soldiers involved in the rescue.[7] A video – purportedly filmed by members of the US trained Free Syrian Army's First Coastal Division – emerged in which a militant is seen while he attacks and destroy a Russian-made helicopter with a BGM-71 TOW anti-tank missile.[8] This event took place in the proximity of the crash site – about six kilometres away. Soon after, on November 25, violent demonstrations took place in front of the Turkish Embassy in Moscow, with stones thrown at the building causing

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[4] *See, e.g.*, Meg Warner & Jason Silverstein, *Russian Pilot Rescued from Downed Warplane Says Turkey Gave No Warning before Firing Despite Cockpit Audio: 'Change Your Heading South Immediately,'* New York Daily News (Nov. 25, 2015), <http://www.nydailynews.com/news/world/pilot-downed-russian-warplane-alive-article-1.2446187> (accessed Mar. 6, 2016). Other sources identified the dead co-pilot as Major Sergei Aleksandrovich Rumyantsev. *See, e.g., Syrian Rebels Reveal Identity of Dead Russian Su-24 Pilot*, UNIAN Information Agency (Nov. 24, 2015), <http://www.unian.info/world/1193193-syrian-rebels-reveal-identity-of-dead-russian-su-24-pilot.html> (accessed Mar. 6, 2016).

[5] *See, e.g.*, *Turkmen Forces in Syria Shot Dead Pilots of Downed Russian Jet: Deputy Commander*, Reuters (Nov. 24, 2015), <http://www.reuters.com/article/us-mideast-crisis-syria-turkey-shooting-idUSKBN0TD1T620151124> (accessed Mar. 6, 2016); Sara Malm et al., *Helpless Russian Pilots 'Were Shot Dead as They Parachuted to the Ground:' Furious Putin Accuses Turkey of 'Treachery' after It Downs Jet over Syrian Rebel Territory*, The Daily Mail (Nov. 24, updated Nov. 30, 2015), <http://www.dailymail.co.uk/news/article-3331558/Turkey-shoots-fighter-jet-Syrian-border-Local-media-footage-flaming-plane-crashing-trees.html> (accessed Mar. 6, 2016).

[6] *Syrian Paper Recounts Rescue of Downed Russian Pilot*, NDTV (Nov. 26, 2015), <http://www.ndtv.com/world-news/syrian-paper-recounts-rescue-of-downed-russian-pilot-1247966> (accessed Mar. 6, 2016); *Sukhoï abattu: une opération commando de 12 heures pour sauver le pilote russe*, L'Orient – Le Jour (Nov. 26, 2015), <http://www.lorientlejour.com/article/957179/sukhoi-abattu-une-operation-commando-de-12-heures-pour-sauver-le-pilote-russe.html> (accessed Mar. 6, 2016).

[7] *Missing Russian Jet Pilot 'Alive and Well' in Syria*, BBC (Nov. 25, 2015), <http://www.bbc.com/news/world-middle-east-34917485> (accessed Mar. 6, 2016) [hereinafter *Missing Russian Jet Pilot*].

[8] *FSA Video Claims Russian-Made Helicopter Hit with US-Made TOW Missile near Su-24 Crash Site*, RT (Nov. 24, 2015), <https://www.rt.com/news/323306-video-russia-helicopter-syria/> (accessed Mar. 6, 2016).

material damage. According to some media, the Moscow police did not intervene to restore order and to ensure the Embassy's security.[9]

The parties differ on the precise circumstances leading to the attack. Russian President Vladimir Putin – who qualified the act as 'a stab in the back' committed by accomplices of the Islamic State – asserts that the aircraft neither crossed the Turkish border nor threatened Turkey's security.[10] He states that, when hit by the missile, the aircraft was flying at an altitude of roughly 6,000 meters in Syrian airspace at a distance of one kilometre from the Turkish border. According to a leaked letter from the Permanent Mission of Turkey to the UN to the British President of the United Nations Security Council, Mr. Matthew Rycroft, and statements by Turkish Prime Minister Ahmet Davutoğlu and Turkish President Recep Tayyip Erdoğan, Turkey asserts that the attack occurred in response to a violation of Turkish sovereignty and in conformity with its rules of engagement.[11] The letter to the UN states:

> This morning (24 November), 2 SU-24 planes, the nationality of which are unknown have approached Turkish national airspace in Yayladağı/Hatay region. The planes in question have been warned 10 times during a period of 5 minutes via 'Emergency' channel and asked to change their headings south immediately.
>
> Disregarding this warning, both planes, at an altitude of 19,000 feet, violated Turkish national airspace to a depth of 1.36 miles and 1.15 miles in depth in length for 17 seconds from 9.24'.05" local time.
>
> Following the violation, plane 1 left Turkish national airspace. Plane 2 was fired at while in Turkish national airspace by Turkish F-16s performing air combat patrolling in that area in accordance with the rules of engagement. Plane 2 crashed onto the Syrian side of the Turkish-Syrian border.[12]

While this specific event's important repercussions in international affairs commands particular attention – not the least because it represents the first direct military clash between Russia and a NATO country – it has to be placed in the broader

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9 *La Russie 'ne fera pas la guerre à la Turquie, malgré une provocation,'* Radio Télévision Suisse (Nov. 25, 2015), <http://www.rts.ch/info/monde/7283415-la-russie-ne-fera-pas-la-guerre-a-la-turquie-malgre-une-provocation.html> (accessed Mar. 6, 2016); *Missing Russian Jet Pilot*, *supra* n. 7.

10 *Turkey Downing of Russia Jet 'Stab in the Back' – Putin*, BBC (Nov. 24, 2015), <http://www.bbc.com/news/world-middle-east-34913173> (accessed Mar. 6, 2016).

11 Tulay Karadeniz & Maria Kiselyova, *Turkey Downs Russian Warplane near Syria Border, Putin Warns of 'Serious Consequences,'* Reuters (Nov. 25, 2016), <http://www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKBN0TD0IR20151125> (accessed Mar. 6, 2016).

12 *Turkey's Statement: Claims Russia Violated Airspace for Just '17 Seconds' with Very Slow 243 Miles/Hour Jet*, Wikileaks (Nov. 24, 2015), <https://twitter.com/wikileaks/status/669204928984915968> (accessed Mar. 6, 2016).

framework of the ongoing armed conflict in Syria and the tensions it has caused between Turkey and the Syrian government. Since the outbreak of the conflict in 2011, several border clashes have occurred between Syria and Turkey—including the shooting down of a Turkish F-4 Phantom jet by the Syrian Air Force in June 2012 and a Syrian helicopter by a Turkish fighter jet in September 2013.[13]

3. Legal Issues

From an international legal perspective, these facts raise several important questions relating to general international law on the use of force[14] and the laws of armed conflict. Assuming that a violation of the Turkish airspace did occur, was the Turkish action in accordance with international law? Could a Russian incursion in Turkish airspace lasting 17 seconds be qualified as an armed attack triggering the right of self-defence by Turkey? Was the Turkish reaction necessary and proportionate to the threat posed by such an – arguably minor – infringement of Turkish sovereignty? Conversely, assuming that the Russian aircraft did not enter Turkish airspace, does the Turkish attack amount to an armed attack under Art. 51 of the UN Charter? From the perspective of *jus in bello*, one can also wonder whether the targeting of the aircraft's crew members by a rebel Syrian armed group during their descent violated international humanitarian law. And, finally, one can also wonder whether the Russian authorities complied with their obligations arising from diplomatic law in their treatment of the demonstrations occurred in front of the Turkish Embassy in Moscow.

3.1. Does an Overflight by a Military Aircraft Amount to a 'Use of (Military) Force' under Art. 2(4) of the UN Charter?

The first issue regarding the *jus contra bellum* is whether the alleged infringement of Turkish territory by the Russian aircraft amounts to a use of military force in violation of Art. 2(4) of the UN Charter. If this is the case, it remains to be determined if such a use of force amounts to an 'armed attack' or if it is an instance of a 'less grave form.' It is thus generally understood that not all uses of force amount to 'armed

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[13] *See Syria-Turkey Tension: Assad 'Regrets' F-4 Jet's Downing*, BBC (Jul. 3, 2012), <http://www.bbc.com/news/world-middle-east-18685250> (accessed Mar. 6, 2016); Kareem Fahim & Sebnem Arsu, *Turkey Says It Shot Down Syrian Military Helicopter Flying in Its Airspace*, N.Y. Times (Sep. 16, 2013), <http://www.nytimes.com/2013/09/17/world/europe/turkey-syria.html> (accessed Mar. 6, 2016).

[14] *See also* Kubo Mačák, *Was the Downing of the Russian Jet by Turkey Illegal?*, EJIL: *Talk!*, (Nov. 26, 2015), <http://www.ejiltalk.org/was-the-downing-of-the-russian-jet-by-turkey-illegal/> (accessed Mar. 6, 2016); Nicolás Carrillo Santarelli, *¿Derecho de Turquía a defender su espacio aéreo… a sangre y fuego? Por supuesto que no (actualizado)*, Jus Orbi (Nov. 26, 2015), <https://jusorbi.wordpress.com/2015/11/26/derecho-de-turquia-a-defender-su-espacio-aereo-a-sangre-y-fuego-por-supuesto-que-no/> (accessed Mar. 6, 2016).

attack' in the meaning of Art. 51 UN Charter.[15] Of course, if Russia's actions do not reach the threshold for the use of military force – as we will argue – their qualification as 'armed attacks' is *ipso jure* excluded.

Aerial incidents of this kind are not uncommon in international practice. Some famous precedents involving civilian aircrafts include the downing of Korean Air Lines flight KAL-007 by Soviet planes on September 1, 1983,[16] and the downing of Iran Air flight 655 by the *USS Vincennes* on July 3, 1988.[17] Indeed, the first of these incidents catalyzed the development of a set of standards applying to air intercept of civilian aircrafts with the adoption of the Montreal Protocol of May 10, 1984, relating to an amendment to the Convention on International Civil Aviation (Art. 3 *bis*).[18]

But international law seems more indeterminate – and to a certain extent even confusing – as regards cases involving military aircraft. The downing of a US Lockheed U-2 reconnaissance aircraft over Soviet territory, on May 1, 1960,[19] and the downing

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15 *See, e.g.,* Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 101 (June 27); Oil Platforms (*Islamic Republic of Iran v. U.S.*), 2003 I.C.J. 161, ¶¶ 186–87 (November 6); Eritrea-Ethiopia Claims Commission – Partial Award: *Jus Ad Bellum* – Ethiopia's Claims 1–8, 26 R.I.A.A. 457, ¶ 12 (U.N. 2005). *See*, for a critical analysis of this case-law, Yoram Dinstein, War, Aggression and Self-Defence 207–13 (5th ed., Cambridge University Press 2012).

16 *See*, for this event leading to the adoption of the 1984 Protocol, Gilbert Guillaume, Les grandes crises internationales et le droit 61–78 (Seuil 1994); Jacqueline de la Rochère, *L'affaire de l'accident du Boeing 747 de Korean Airlines*, 29 Annuaire français de droit international (AFDI) 749 (1983). doi:10.3406/afdi.1983.2579; Gerald F. Fitzgerald, *The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident*, 22 Can. Y.B. Int'l L. 291 (1984); Farooq Hassan, *The Shooting down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers*, 33 Int'l & Comp. L.Q. 712 (1984); Ingrid L. Jahn, *Applying International Law to the Downing of Korean Air Lines Flight 007 on September 1, 1983*, 27 German Y.B. Int'l L. 444 (1984); Masahiko Kido, *The Korean Airlines Incident on September 1, 1983, and Some Measures Following It*, 62 J. Air L. & Com. 1049 (1997); Jeffrey D. Laveson, *Korean Airline Flight 007: Stalemate in International Aviation Law – A Proposal for Enforcement*, 22 San Diego L. Rev. 859 (1985); Nicholas J. Mullany, *The Legal Implications of the Soviet Union's Assertions Concerning the Downing of Kal Flight 007*, 19 U. W. Austl. L. Rev. 419 (1989), available at <http://www.austlii.edu.au/au/journals/UWALawRw/1989/21.html> (accessed Mar. 6, 2016); Eugene Sochor, *ICAO and Armed Attacks against Civil Aviation*, 44 International Journal: Quarterly of the Canadian Institute of International Affairs 134 (1988–89); *Legal Argumentation in International Crises: The Downing of the Korean Air Lines Flight 007*, 97 Harv. L. Rev. 1198 (1983); *KAL007 – The Sequel – ICAO Assembly Resolution*, 1984 Austl. Int'l L. News 344.

17 *See* David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 Yale J. Int'l L. 245 (1991); *Excerpts from Report of ICAO Fact-Finding Investigation Pursuant to Decision of ICAO Council of July 14, 1988*, 83 Am J. Int'l L. 332 (1989); Harold G. Maier, *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 Am. J. Int'l L. 325 (1989).

18 *See* Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3 *bis*), May 10, 1984, 2122 U.N.T.S. 337, 346–47. *See, e.g.*, Ruwantissa Abeyratne, Convention on International Civil Aviation: A Commentary 67–73 (Springer 2014); Kimberley N. Trapp, *Uses of Force against Civil Aircraft*, EJIL: *Talk!* (Jun. 28, 2011), <http://www.ejiltalk.org/uses-of-force-against-civil-aircraft/> (accessed Mar. 6, 2016); Jean-Claude Piris, *L'interdiction du recours à la force contre les aéronefs civils, l'aménagement de 1984 à la Convention de Chicago*, 30 Annuaire français de droit international (AFDI) 711 (1984). doi:10.3406/afdi.1984.2630; William J. Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. Air L. & Com. 595 (1980).

19 *See in particular* Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 Am. J. Int'l L. 836 (1960); Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 Am. J. Int'l L. 559 (1953); Rupchand C. Hingorani, *Aerial Intrusions and International Law*, 8 Neth. Int'l L. Rev. 165 (1961). doi:10.1017/S0165070X0003196X

of a Breguet Atlantic of the Pakistani Air Force by Indian jets in the Rann of Kutch on August 10, 1999,[20] count among the most famous and well-documented incidents. Moreover, accusations of violation of air sovereignty frequently occur in cases of territorial dispute. Indeed, in this context, the overflight of disputed territory or adjacent maritime zone often represent a means for a state to signify the rejection of exorbitant territorial claims by another state – thus precluding the possibility that its inaction may be interpreted as acquiescence. This is attested to in, for instance, Greek-Turkish relations in the Aegean Sea, in the context of the territorial and maritime disputes in the South China Sea,[21] and in the Gulf of Sidra incident of August 19, 1981, when a US F-14 aircraft downed two Libyan Sukhoi Su-22 over international waters.[22] In any case, as reaffirmed in Art. 3(c) of the 1944 Chicago Convention,[23] flights of state aircrafts over the territory of another state without its consent constitute a breach of the latter's territorial integrity.[24] Depending on the circumstances, aerial intrusion by military aircrafts can be considered as instances of threats of military force in contradistinction with Art. 2(4) of the UN Charter.[25] But do they automatically qualify in themselves as uses of military force which are prohibited by Art. 2(4) of the UN Charter?

This raises the question of the existence of a *minimal threshold* of coercion for acts to fall under the aegis of Art. 2(4) of the UN Charter. According to Olivier Corten, state practice shows that cases that do not imply explicit hostile intent fall below the threshold and are generally not dealt with by reference to Art. 2(4).[26] The

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[20] *See* J.G. Merrills, *The Aerial Incident of 10 August 1999 (Pakistan v. India), Judgment on Jurisdiction*, 50 Int'l & Comp. L.Q. 657 (2001); Rajiv Nanda, International Law and the Aerial Incident Case: Pakistan vs. India (Universal Law Pub. 2002); *Shootdown! The Atlantique Incident and the Phantom of the Syria*, Bill the Butcher (Jun. 27, 2012), <http://bill-purkayastha.blogspot.ch/2012/06/shootdown-atlantique-incident-and.html> (accessed Mar. 6, 2016).

[21] *See* Vivek Kapur, *Chinese Aerial Patrols over Senkaku Islands*, Institute for Defence Studies and Analyses (Dec. 24, 2012), <http://www.idsa.in/issuebrief/ChineseAerialPatrolsOverSenkakuIslands_VivekKapur_241212> (accessed Feb. 9, 2016).

[22] *See, e.g.,* Steven R. Ratner, *Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements*, 10 Yale J. Int'l L. 59 (1984). *See*, for the broader context of Libyan claims over the Gulf of Sidra, Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 Am. J. Int'l L. 668 (1986); John M. Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 Ocean Dev. & Int'l L. 65 (1983). doi: 10.1080/00908328309545720

[23] Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295.

[24] Article 3(c) Chicago Convention: 'No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.' *See also* Art. 2(1) UN Charter; Military and Paramilitary Activities in and against Nicaragua, *supra* n. 15, ¶ 251; Ki-Gab Park, La protection de la souveraineté aérienne 51–62 (A. Pedone 1991); Marcus Schladebach, Lufthoheit: Kontinuität und Wandel (= 236 Jus Publicum) 216, 253–61 (Mohr Siebeck 2014).

[25] *See* Park, *supra* n. 24, at 190–92.

[26] *See* Olivier Corten, Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain 67–118 (A. Pedone 2014) [hereinafter Corten, Le droit]; Park, *supra* n. 24, at 74 (noting

Independent Fact Finding Mission's Report on the 2008 War between Georgia and Russia thus stated – quoting Robert Kolb – that the 'the interception of a single aircraft' lies below the threshold of Art. 2(4) of the UN Charter.[27] The main difficulty with this approach is to draw the line between such instances of *de minimis* recourse to coercion, calling for 'strictly necessary police measures' as a matter of maintenance of public order, and cases of use of military force falling under the scope of Art. 2(4) of the UN Charter. According to Corten, this has to be done by assessing the criteria of gravity and intent of the 'attacking' state.[28]

Obviously, the political context – as well as other circumstances – will weigh heavily in the subjective appreciation of the states involved. In the present case, although tension are palpable in public declarations, it seems that both Russia and Turkey have been willing – at least in a first stage – to de-escalate the situation and lower the tone. NATO's Secretary General Jens Stoltenberg stated: 'Diplomacy and de-escalation are important to resolve this situation.'[29] This stance is also reflected in United Nations Security Council President Matthew Rycroft's declaration.[30] At the outset of the crisis, both countries consciously avoided using *jus contra bellum* terms in their declarations; Turkey referring to the notion of 'national security' rather than 'self-defence.' This tends to confirm the fact that the actors involved do not envisage the initial alleged violation of Turkish airspace through the lens of Art. 2(4) of the UN Charter.

3.2. Was the Turkish Reaction Lawful?

This is not to say that a state experiencing a violation of its airspace by military airplanes may in no situation use force when the incursion fails to amount to an 'armed attack.'[31] But air intercept in these cases are governed by another set of rules

that state practice tends to distinguish between 'simple' aerial incidents and more serious acts involving for instance the bombardment of the territory). *But see*, on the question of a 'minimal threshold' for the application of Art. 2(4) of the UN Charter (and rejecting this approach), the critical remarks of Tom Ruys, *The Meaning of 'Force' and the Boundaries of the Jus ad bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?*, 108 Am. J. Int'l L. 159 (2014).

27 2 Independent International Fact-Finding Mission on the Conflict in Georgia: Report (Sep. 2009) 242, <http://web.archive.org/web/20110706223037/http:/www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf> (accessed Mar. 6, 2016).

28 Corten, Le droit, *supra* n. 26, at 88–118. *See also* the comments by Benedetto Conforti (Institute of International Law, Belgium) in 72 Annuaire de l'Institut de droit international 150–51 (2007), available at <http://www.justitiaetpace.org/idiF/annuaireF/2007/Roucounas.pdf> (accessed Mar. 6, 2016).

29 *Statement by the NATO Secretary General after the Extraordinary NAC Meeting*, NATO (Nov. 24, 2015), <http://www.nato.int/cps/en/natohq/news_125052.htm> (accessed Mar. 6, 2016).

30 *UNSC Calls for 'Measured Response' over Russian Su-24 Incident*, Sputnik (Nov. 24, 2015), <http://sputniknews.com/world/20151124/1030677162/su24-turkey-unsc-russia.html> (accessed Mar. 6, 2016).

31 *See*, for the view that any, even minor, intrusion in airspace amounts to an armed attack, Stefan Hobe, *Airspace* in 1 The Max Planck Encyclopedia of Public International Law 263, 266 (Rüdiger Wolfrum, ed.) (Oxford University Press 2012).

and principles pertaining to police operations in time of peace rather than by more general rules of *jus contra bellum*.[32] This approach is reflected in the Resolution adopted by the *Institut de droit international* in 2007 at the session in Santiago.[33] Paragraph 5 of the Resolution states in its relevant part:

> Acts involving the use of force of lesser intensity [than armed attacks] may give rise to counter-measures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack.[34]

These so-called 'measures of police,' which – in the case of aerial intrusions – imply the intercept of the foreign aircraft, if necessary by force, are grounded on what Benedetto Conforti calls 'the "internal force" of the State, *i.e.* the *coercive* measures which a State can take against individuals or communities within its territory.'[35] They can thus be adopted in certain circumstances even in the absence of a prior 'armed attack' in the meaning of Art. 51 of the UN Charter. Although it is sometimes delicate to assess an incident in maintaining a strict analytical distinction, recourse to coercive means in this context should only occur when several cumulative conditions are respected.

3.2.1. Was Turkey's Reaction Confined to Its Territory?

Although recourse to coercive means may be allowed both if we were to consider these cases through the lens of Art. 51 of the UN Charter self-defence and 'police enforcement actions,' this last point could make a big difference in the present case. Since it flows in the last instance from the principle of state sovereignty, the right to adopt coercive 'police enforcement actions' of such magnitude is necessarily limited to individual action – as opposed to collective self-defence – on the national territory – as opposed to the territory of a third state and without touching upon the question of enforcement actions in international spaces.[36]

In this case, it seems plausible that the attack might have taken place – at least partly – when the Russian aircraft was (already) outside of Turkish airspace. According

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[32] *See, e.g.*, Park, *supra* n. 24, at 291–98.

[33] *Present Problems of the Use of Armed Force in International Law – A Self-Defence*, <http://www.justitiaetpace.org/idiE/resolutionsE/2007_san_02_en.pdf> (accessed Mar. 6, 2016).

[34] *Id*. *See also* the discussion in Olivier Corten, *Les résolutions de l'Institut de droit international sur la légitime défense et sur les actions humanitaires*, 2007(2) Revue belge de droit international (R.B.D.I.) 608–13.

[35] 72 Annuaire de l'Institut de droit international 150 (2007).

[36] *See* Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in 1 The Charter of the United Nations: A Commentary 200, 215 (Bruno Simma et al., eds) (3rd ed., Oxford University Press 2012). *See also* the discussion in Raphaël van Steenberghe, La légitime défense en droit international public 253 (Larcier 2012).

to a declaration by President Vladimir Putin, 'the plane had been attacked when it was 1 km (0.62 mile) inside Syria.'[37] This is obviously a point that would call for further investigation.

3.2.2. Did Turkey Issue Warnings?

Except in circumstances where the intention of the trespassing aircraft are manifestly hostile, repeated warnings must have been issued and proven ineffective.[38] This condition should be seen as an aspect of the condition of necessity according to which recourse to forceful means must be the only available means of ending the unlawful aerial intrusion.[39] In this case, Turkey maintains that 10 warnings were issued in the five minutes preceding the intercept[40] while the Russian side – basing itself on the testimony of the pilot, Captain Konstantin Murakhtin – deny that any warning were given.[41] To assess the respect of this condition, an inquiry on the exact circumstances of the incident should not only aim to establish whether the warnings were effectively issued but whether they were given in a manner that could be effectively received and understood by the Russian aircraft's crew. It is symptomatic in this regard that the most recent press release of the Turkish Ministry of Foreign Affairs issued on January 30, 2016, the day following a new alleged Russian aerial incursion in Turkish airspace insists on the fact that warnings have been issued both in English and Russian languages.[42]

3.2.3. Was Turkey's Reaction Necessary and Proportionate to the Objective of Restoring Its Aerial Sovereignty?

The condition of absolute necessity and proportionality of the measures undertaken with the aim of ensuring aerial security must be respected.[43] Necessity

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37 *Supra* n. 11.

38 *See, e.g.,* Wright, *supra* n. 19, at 850; Lissitzyn, *supra* n. 19, at 587; Hingorani, *supra* n. 19, at 167; Schladebach, *supra* n. 24, at 257.

39 *See infra* n. 44 and accompanying text.

40 *See, e.g.,* Shaun Walker & Kareem Shaheen, *Turkish Military Releases Audio of Apparent Warning to Downed Russian Jet*, The Guardian (Nov. 25, 2015), <http://www.theguardian.com/world/2015/nov/25/second-russian-pilot-shot-down-turkey-alive-ambassador> (accessed Mar. 6, 2016).

41 *See 'Turkish Jets Gave Us No Warning before Shooting' – Rescued Pilot of Downed Russian Su-24*, RT (Nov. 25, 2015), <https://www.rt.com/news/323431-saved-pilot-turkish-su24/> (accessed Mar. 6, 2016). The authenticity of the testimony as well as the identity of the interviewee have been questioned by some. *See, e.g.,* Gregory Feifer, *Putin's Game of Chicken*, Foreign Affairs (Nov. 30, 2015), <https://www.foreignaffairs.com/articles/turkey/2015-11-30/putins-game-chicken> (accessed Mar. 6, 2016).

42 *No: 33, 30 January 2016, Press Release Regarding the Violation of Turkish Airspace on 29 January 2016 by a RF Aircraft*, Republic of Turkey, Ministry of Foreign Affairs (Jan. 30, 2016), <http://www.mfa.gov.tr/no_-33_-30-january-2016_-press-release-regarding-the-violation-of-turkish-airspace-on-29-january-2016-by-a-rf-aircraft.en.mfa> (accessed Mar. 6, 2016) [hereinafter *Press Release*].

43 *See* Park, *supra* n. 24, at 191.

means that force must be the *ultima ratio* to restore security on the territory.[44] The requirement of proportionality means the proportion that has to be observed between the action taken and its purpose, namely the reestablishment of territorial sovereignty and the maintenance of public order.[45]

As regards airspace violations, the (very) short duration of an incursion is not necessarily an indication that measures of coercive intercept were out of proportion with the perceived threat. The speed of aircrafts and the potentially devastating consequences of inaction have to be taken into account, as illustrated by the attacks on Pearl Harbour on December 7, 1941, and particularly on September 11, 2001. In some cases, an incursion by several aircraft might constitute the first stage of an impending aggression. States have a legitimate need to be able to react quickly and effectively to such an upcoming attack.[46] This might involve an intercept through forcible means if warnings remained ineffective.

But given the surrounding circumstances of the present case, it is difficult to infer a hostile intent of the Russian Government towards Turkey. In this regard, one has to admit though that the Russian Air Force's practice of flying with the transponder turned off – if the accounts are true – do not speak in its favor.[47] Although similar violations of Turkish sovereignty by Russian aircrafts occurred in the previous months, communications were regular on the issue, and Russia had been willing to admit an infringement of Turkish airspace in October 2015.[48] In this context, it would have

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[44] *See Addendum to the Eighth Report on State Responsibility, by Mr. Roberto Ago 'The Internationally Wrongful Act of the State, Source of International Responsibility' (part 1)*, ¶ 120, U.N. Doc. A/CN.4/318/Add.5–7 (1980), in 2(1) Y.B. Int'l L. Comm'n 13, 69 (1982), U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1), U.N. Sales No. E.81.V.4 (Part I), at <http://legal.un.org/ilc/documentation/english/a_cn4_318_add5_7.pdf> (accessed Mar. 6, 2016) [hereinafter *Addendum*]: 'The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.' *See also* Military and Paramilitary Activities in and against Nicaragua, *supra* n. 15, ¶ 222 (dissenting opinion of Judge Schwebel); Giovanni Distefano, *Use of Force*, in The Oxford Handbook of International Law in Armed Conflict, 545, 554–55 (Andrew Clapham & Paola Gaeta, eds) (Oxford University Press 2014). doi: 10.1093/law/9780199559695.003.0022; Judith Gardam, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, 87 Am. J. Int'l L. 391 (1993).

[45] *See Addendum*, *supra* n. 44, at 69.

[46] *See* Jonathan G. Odom, *A 'Rules-Based Approach' to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation*, 47 Belg. Rev. Int'l L. 65, 67 (2014), available at <http://papers.ssrn.com/abstract_id=2673927> (accessed Mar. 6, 2016).

[47] *See, e.g.,* Simon Johnson, *Sweden Intercepts Russian Military Planes Flying with Their Transponders Off over Baltic Region*, Business Insider UK (Mar. 24, 2015), <http://uk.businessinsider.com/r-sweden-intercepts-russian-planes-over-baltic-amid-regional-tensions-2015-3?r=US&IR=T> (accessed Mar. 6, 2016); Carol Matlack, *Russia's 'Dark' Warplanes Are Spooking Europe*, Bloomberg (Mar. 9, 2015), <http://www.bloomberg.com/news/articles/2015-03-09/russia-s-dark-warplanes-are-spooking-europe> (accessed Mar. 6, 2016).

[48] *See, e.g., Turkey 'Cannot Endure' Russian Violation of Airspace, President Says*, The Guardian (Oct. 6, 2015), <http://www.theguardian.com/world/2015/oct/06/nato-chief-jens-stoltenberg-russia-turkish-airspace-violations-syria> (accessed Mar. 6, 2016).

been scarcely plausible to infer an aggressive intent of the Russian side. Furthermore, the very short duration of this particular case over a relatively peripheral part of its territory did not seem to call for such a forceful response.[49] The circumscribed and publically stated goal of Russia's military presence in the region tends to indicate that its intention was not to attack Turkey.

These troubled circumstances led Russian Foreign Minister Sergei Lavrov to state that the intervention had been pre-planned and that the downing of the Sukhoi Su-24 was the result of a Turkish 'ambush.'[50] In any case, the downing of a plane causing – though indirectly – the death of a crew member appears to constitute a disproportionate response to the nominal violation of Turkey's territory. To sum up the analysis of the law relating to the use of force, the legality of the downing of the Russian plane is dubious, to say the least. According to Art. 31(1) of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter Draft Articles], Turkey is thus 'under an obligation to make full reparation for the injury caused by the internationally wrongful act.'[51]

3.3. Did the Downing of the Russian Aircraft Trigger the Right to Adopt Measures in Self-Defence?

In a first stage, President Vladimir Putin – arguably addressing mainly the Russian internal audience – used strong words to qualify Turkey' action – even calling them a 'crime' – but did not use terms such as 'aggression' or 'armed attacks.'[52] Russian Prime Minister Dmitry Medvedev later qualified Turkish actions as an 'act of aggression against our country.'[53] It is nevertheless debatable if the downing of one single aircraft amounts to an act of armed attack triggering the right of self-defence or if it is confined to the notion of a border incident.[54] Even if the downing of the Sukhoi Su-24 were to be considered as an act that passes the threshold of 'armed

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[49] *See also* Fyodor Lukyanov, *After Sukhoi Crash: A Bloc or a Coalition Dilemma*, Russia in Global Affairs (Nov. 25, 2015), <http://eng.globalaffairs.ru/redcol/After-Sukhoi-crash-a-bloc-or-a-coalition-dilemma-17836> (accessed Mar. 6, 2016).

[50] *Downing of Russian Su-24 Looks Like a Planned Provocation – Lavrov*, RT (Nov. 25, 2015), <https://www.rt.com/news/323404-lavrov-syria-s24-turkey/> (accessed Mar. 6, 2016).

[51] *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(2) Y.B. Int'l L. Comm'n 1, 91 (2007), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), U.N. Sales No. E.04.V.17 (Part 2), at <http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> (accessed Mar. 6, 2016).

[52] *Supra* n. 11.

[53] Chris Enloe, *In Response to Turkey's Aggression, Russia Plans to Retaliate with a Number of Economic Sanctions*, The Blaze (Nov. 26, 2015), <http://www.theblaze.com/stories/2015/11/26/in-response-to-turkeys-aggression-russia-plans-to-retaliate-with-a-number-of-economic-sanctions/> (accessed Mar. 6, 2016).

[54] *See* the references *supra* n. 15.

attack,' it is nevertheless doubtful that it could be deemed as triggering Russia's right of self-defence. Since the attack ceased immediately after the downing of the plane and both parties expressed willingness to settle the incident through peaceful means, there appears to be no necessity for Russia to act in self-defence. The Russian Government confirmed this when it opted for the adoption of peaceful countermeasures against Turkey in the days following the event.

3.4. Was the Killing of the Aircraft's Crew a Violation of International Humanitarian Law?

As regards *jus in bello*, the targeting of the aircraft's crew members by the Syrian rebels is a violation of international humanitarian law. According to Art. 42(1) of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977 [hereinafter AP I], '[n]o person parachuting from an aircraft in distress shall be made the object of attack during his descent.'[55] This provision is nevertheless not applicable to this case since the armed conflict opposing Syrian governmental forces, assisted by Russia, should be qualified as non-international.[56] Moreover, Syria is not a party to AP I.

But this rule is deemed to be a reflection of international humanitarian customary law applicable to non-international armed conflicts by the ICRC[57] as well as by the Manual on International Law Applicable to Air and Missile Warfare.[58] The violation

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[55] 1125 U.N.T.S. 3, 22. *See* Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 494–97 (Yves Sandoz et al., eds) (ICRC; Martinus Nijhoff 1987), available at <http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf> (accessed Mar. 6, 2016); Frits Kalshoven, Reflections on the Law of War: Collected Essays (= 17 International Humanitarian Law Series) 69–70, 268–71 (Martinus Nijhoff 2007); Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 144–45 (Cambridge University Press 2004); Stefan Oeter, *4. Methods and Means of Combat*, in The Handbook of International Humanitarian Law 119, 178 (Dieter Fleck, ed.) (2nd ed., Oxford University Press 2008).

[56] *See, e.g., Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* ¶ 165, U.N. GAOR, Human Rights Council, 30th Sess., Agenda Item 4: Human Rights Situations That Require the Council's Attention, U.N. Doc A/HRC/30/48, at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.48_AEV.pdf> (accessed Mar. 6, 2016).

[57] *See Rule 48. Attacks against Persons Parachuting from an Aircraft in Distress*, in 1 Customary International Humanitarian Law 170, 170 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds.) (ICRC; Cambridge University Press 2005), available at <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (accessed Mar. 6, 2016): 'Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited.' *See also* William J. Fenrick, *9. Specific Methods of Warfare*, in Perspectives on the ICRC Study on Customary International Humanitarian Law, 238, 242–43 (Elizabeth Wilmshurst & Susan Breau, eds) (British Institute of International and Comparative Law; Chatham House; Cambridge University Press 2007).

[58] *See Rule 132(a)*, in Manual on International Law Applicable to Air and Missile Warfare: Program on Humanitarian Policy and Conflict Research at Harvard University (Bern, 15 May 2009) 44 (Harvard College 2009), available at <http://ihlresearch.org/amw/HPCR%20Manual.pdf> (accessed Mar. 6, 2016): 'No person descending by parachute from an aircraft in distress may be made the object of

of the rule is nevertheless not recognized as a war crime in international treaties. As is well known, the Geneva Conventions and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977 (AP II), do not contain any provision relating to international criminal responsibility. The Rome Statute of July 17, 1998, of the International Criminal Court does not make it a specific war crime to target these individuals neither in international armed conflict nor in non-international armed conflicts.

3.5. Did Russia Violate Its Obligations under the Law of Diplomatic Relations?

Finally, the alleged passivity of the police in reaction to the material damages caused to the Turkish Embassy in Moscow appears to constitute a breach of Russia's 'special duty' as a receiving state 'to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.'[59] In application of this 'special duty,' receiving states have the obligation to prevent public demonstrations – whatever the political motives of the demonstrators – from disturbing the peace or dignity of the diplomatic mission or from causing damage to its buildings.[60] This 'special duty' may be accomplished through the criminal prosecution of trespassers or of persons that have committed acts of depredation on the diplomatic premises.

The omission of the Moscow police authorities may easily be understood as a covert form of 'retaliation' – although such behaviour does not contribute to de-escalating tensions – and it is in no way justified under international law. According to Art. 50(2) of the Draft Articles, countermeasure can in no case justify a breach of the inviolability of diplomatic premises.[61] As the International Court of Justice [hereinafter ICJ] affirmed in the classic *Tehran Embassy Hostages* case,

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attack during his descent.' *See also* Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare: Program on Humanitarian Policy and Conflict Research at Harvard University 270 (Harvard College 2010), available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> (accessed Mar. 6, 2016): 'Rule 132(a) applies also in non-international armed conflict.'

59 Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Art. 22(2), 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 108: 'The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.'

60 *See, e.g.,* Stanisław E. Nahlik, Development of Diplomatic Law: Selected Problems (= 222 (1990-III) Recueil des Cours / Collected Courses of the Hague Academy of International Law) 310–19 and especially 323 (Martinus Nijhoff 1991); Jean d'Aspremont, *Premises of Diplomatic Missions*, in 8 Max Planck Encyclopedia of Public International Law 413, 418 (Rüdiger Wolfrum, ed) (2nd ed., Oxford University Press 2012); Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations 140–145 (Eileen Denza, ed.) (4th ed., Oxford University Press 2016).

61 *Supra* n. 51, at 131: 'A State taking countermeasures is not relieved from fulfilling its obligations . . . (*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.'

> [e]ven in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State.[62]

Indeed – as is illustrated by the use, by the ICJ, of the term 'self-contained regime' – the rules on diplomatic privileges and immunities are generally excluded from the scope of ordinary rules on countermeasures.[63] If the alleged passivity of the authorities could be confirmed, Russia would incur responsibility for all the damages caused to the Turkish diplomatic premises.

4. Concluding Remarks

Since the beginning of the Russian intervention in Syria, Russia and Turkey have been accusing each other of adopting provocative behavior. In this kind of context, the '(over-)reactions' of one side to the perceived 'provocations' of the other side might well be seen as new 'provocative actions,' thus launching an infernal sequence of reciprocal provocations. This vicious cycle threatens to go on and further heighten political tensions among the involved actors. When such a crisis implicates, on the one side, one of the biggest military and nuclear power of the planet and, on the other side, a middle power integrated in a military alliance such as NATO, there are good reasons to worry about the consequences and to try and prevent the escalation by all available means. Despite the worrying rhetoric by some akin to war-mongering,[64] the Russian Government wisely decided not to react militarily to the unlawful downing of its aircraft and opted for the adoption of peaceful countermeasures. But the magnitude of the measures adopted leaves little room

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62 United States Diplomatic and Consular Staff in Tehran (*Islamic Republic of Iran v. U.S.*), 1980 I.C.J. 3, ¶ 86 (May 24). *See also* Eritrea-Ethiopia Claims Commission – Partial Award: Diplomatic Claim – Ethiopia's Claim 8, 26 R.I.A.A. 407, ¶ 24 (U.N. 2005): '[T]he Commission does not accept that the Parties could derogate from their fundamental obligations under the Vienna Convention on Diplomatic Relations, notably those relating to the inviolability of diplomatic agents and premises, because of the exigencies of war.' *See also* Eritrea-Ethiopia Claims Commission – Partial Award: Diplomatic Claim – Eritrea's Claim 20, 26 R.I.A.A. 381, ¶ 20 (U.N. 2005).

63 United States Diplomatic and Consular Staff in Tehran, *supra* n. 62, ¶ 86: 'The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.' *See also*, on the sometimes misunderstood notion of 'self-contained regime,' Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 Eur. J. Int'l L. 483 (2006), available at <http://www.ejil.org/pdfs/17/3/202.pdf> (accessed Mar. 6, 2016). doi:10.1093/ejil/chl015

64 Polina Tikhonova, *Nuclear War over Turkey Shooting Down Russian Jet 'Likely' – Russia's Top Defense Analyst*, ValueWalk (Nov. 25, 2015), <http://www.valuewalk.com/2015/11/russia-vs-turkey-nuclear-war-likely/> (accessed Mar. 6, 2016).

for further escalation in the realms of peaceful means in the hypothetical case of a new incident. This is particularly worrying in the light of the recent accusations of the Turkish Ministry of Foreign Affairs, according to which, a Russian Sukhoi Su-34 bomber has violated Turkish airspace on January 29, 2016.[65]

On NATO's side, decision-makers would do well to take Turkish assertions with a grain of salt. While understandably willing to reaffirm the political unity of the alliance, NATO and its member states should endeavour to take a breath before expressing unconditional support for the Turkish side.[66] By ignoring this advice of prudence, the alliance risks precipitating itself and the rest of the world in a potentially cataclysmic storm before even realizing it. Hopefully the parties will strive to reach a solution through peaceful means in accordance with their international obligations.

References

Blum, Yehuda Z. *The Gulf of Sidra Incident*, 80 Am. J. Int'l L. 668 (1986).

Corten, Olivier. *Les résolutions de l'Institut de droit international sur la légitime défense et sur les actions humanitaires*, 2007(2) Revue belge de droit international (R.B.D.I.) 608–13.

D'Aspremont, Jean. *Premises of Diplomatic Missions*, in 8 Max Planck Encyclopedia of Public International Law 413, 418 (Rüdiger Wolfrum, ed.) (2nd ed., Oxford University Press 2012).

Dinstein, Yoram. The Conduct of Hostilities under the Law of International Armed Conflict 144–45 (Cambridge University Press 2004).

Dinstein, Yoram. War, Aggression and Self-Defence 207–13 (5th ed., Cambridge University Press 2012).

Distefano, Giovanni. *Use of Force*, in The Oxford Handbook of International Law in Armed Conflict, 545, 554–55 (Andrew Clapham & Paola Gaeta, eds) (Oxford University Press 2014). doi: 10.1093/law/9780199559695.003.0022

Fenrick, William J. *9. Specific Methods of Warfare*, in Perspectives on the ICRC Study on Customary International Humanitarian Law, 238, 242–43 (Elizabeth Wilmshurst & Susan Breau, eds.) (British Institute of International and Comparative Law; Chatham House; Cambridge University Press 2007).

Fitzgerald, Gerald F. *The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident*, 22 Can. Y.B. Int'l L. 291 (1984).

Gardam, Judith. *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, 87 Am. J. Int'l L. 391 (1993).

Guillaume, Gilbert. Les grandes crises internationales et le droit 61–78 (Seuil 1994).

[65] *See* Republic of Turkey, Ministry of Foreign Affairs, *supra* n. 42.

[66] *See also* the harsh critics of US policy expressed by Santarelli, *supra* n. 14.

Hassan, Farooq. *The Shooting down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers*, 33 Int'l & Comp. L.Q. 712 (1984).

Hingorani, Rupchand C. *Aerial Intrusions and International Law*, 8 Neth. Int'l L. Rev. 165, 167 (1961). doi:10.1017/S0165070X0003196X

Hobe, Stefan. *Airspace* in 1 The Max Planck Encyclopedia of Public International Law 263, 266 (Rüdiger Wolfrum, ed.) (Oxford University Press 2012).

Hughes, William J. *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. Air L. & Com. 595 (1980).

Jahn, Ingrid L. *Applying International Law to the Downing of Korean Air Lines Flight 007 on September 1, 1983*, 27 German Y.B. Int'l L. 444 (1984).

Kalshoven, Frits. Reflections on the Law of War: Collected Essays (= 17 International Humanitarian Law Series) 69–70, 268–71 (Martinus Nijhoff 2007).

Kido, Masahiko. *The Korean Airlines Incident on September 1, 1983, and Some Measures Following It*, 62 J. Air L. & Com. 1049 (1997).

Laveson, Jeffrey D. *Korean Airline Flight 007: Stalemate in International Aviation law – A Proposal for Enforcement*, 22 San Diego L. Rev. 859 (1985).

Legal Argumentation in International Crises: The Downing of the Korean Air Lines Flight 007, 97 Harv. L. Rev. 1198 (1983).

Linnan, David K. *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 Yale J. Int'l L. 245 (1991).

Lissitzyn, Oliver J. *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 Am. J. Int'l L. 559, 587 (1953).

Maier, Harold G. *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 Am. J. Int'l L. 325 (1989).

Merrills, J.G. *The Aerial Incident of 10 August 1999 (Pakistan v. India), Judgment on Jurisdiction*, 50 Int'l & Comp. L.Q. 657–662 (2001).

Mullany, Nicholas J. *The Legal Implications of the Soviet Union's Assertions Concerning the Downing of Kal Flight 007*, 19 U. W. Austl. L. Rev. 419 (1989), available at <http://www.austlii.edu.au/au/journals/UWALawRw/1989/21.html> (accessed Mar. 6, 2016).

Nahlik, Stanisław E. Development of Diplomatic Law: Selected Problems (= 222 (1990-III) Recueil des Cours / Collected Courses of the Hague Academy of International Law) 310–19, 323 (Martinus Nijhoff 1991).

Nanda, Rajiv. International Law and the Aerial Incident Case: Pakistan vs. India (Universal Law Pub. 2002).

Odom, Jonathan G. *A 'Rules-Based Approach' to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation*, 47 Belg. Rev. Int'l L. 65, 67 (2014), available at <http://papers.ssrn.com/abstract_id=2673927> (accessed Mar. 6, 2016).

Oeter, Stefan. *4. Methods and Means of Combat*, in The Handbook of International Humanitarian Law 119, 178 (Dieter Fleck, ed.) (2nd ed., Oxford University Press 2008).

Park, Ki-Gab. La protection de la souveraineté aérienne 51–62, 74, 190–92, 291–98 (A. Pedone 1991).

Piris, Jean-Claude. *L'interdiction du recours à la force contre les aéronefs civils, l'aménagement de 1984 à la Convention de Chicago*, 30 Annuaire français de droit international (AFDI) 711 (1984). doi:10.3406/afdi.1984.2630.

Ratner, Steven R. *Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements*, 10 Yale J. Int'l L. 59 (1984).

Rochère, Jacqueline de la. *L'affaire de l'accident du Boeing 747 de Korean Airlines*, 29 Annuaire français de droit international (AFDI) 749 (1983). doi:10.3406/afdi.1983.2579

Ruys, Tom. *The Meaning of 'Force' and the Boundaries of the Jus ad bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?*, 108 Am. J. Int'l L. 159 (2014).

Schladebach, Marcus. Lufthoheit: Kontinuität und Wandel (= 236 Jus Publicum) 216, 253–61 (Mohr Siebeck 2014).

Wright, Quincy. *Legal Aspects of the U-2 Incident*, 54 Am. J. Int'l L. 836, 850 (1960).

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GERMANY JOINS THE CAMPAIGN AGAINST ISIS IN SYRIA: A CASE OF COLLECTIVE SELF-DEFENCE OR RATHER THE UNLAWFUL USE OF FORCE?

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On December 4, 2015, the Bundestag agreed to the participation of German troops in the Western-led military campaign against the so-called Islamic State or ISIS in Syria.

This article will discuss whether the military campaign Germany is now supporting is justified under international law. The main argument put forward by the German Government is that the use of force against ISIS targets in Syria is justified based on UN Security Council Resolution 2249 (2015) and Art. 51 of the UN Charter. Germany thus seems to be claiming that it is engaged in collective self-defence against ISIS in support and at the request of Iraq and France.

It will be shown that this line of argument is not convincing. Resolution 2249 does evidently not authorize the use of force. Article 51, on the other hand, while explicitly permitting the use of force in response to an armed attack, is limited to attacks imputable to another state. ISIS, however, is neither a state, nor is it directed by a state.

Having found the German Government's arguments to be unpersuasive, the article will then turn to customary international law as a possible source of justification. Has customary international law, especially in the aftermath of the use of force against Afghanistan under the Taliban in the aftermath of 09/11, evolved in such a way so as to now permit the use of force in self-defence against non-state actors on another state's territory without that state's consent?

Based on state practice prior and subsequent to Afghanistan it will be shown that customary international law does currently not justify the Western-led military campaign against ISIS in Syria. Bearing in mind that Syria's Government, in contrast to the Afghan Taliban Government's attitude towards Al-Qaeda in 2001, is itself attempting to fight ISIS, it must therefore be concluded that Germany's participation in the Western-led military campaign is unlawful.

Keywords: terrorism; self-defence; United Nations; Security Council Resolution 2249; Germany; Syria; ISIS.

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1. Introduction

On December 4, 2015, and in the aftermath of the Paris terrorist attacks of November 13, 2015, the German Parliament, the *Bundestag*, agreed to the participation of German troops in the Western-led military campaign against the so-called Islamic State or ISIS in Syria at a time when Canada has decided to withdraw from its combat role there.[1] This includes the deployment of six Tornado airplanes for reconnaissance purposes, refuelling aircraft and the dispatch of a frigate to the eastern Mediterranean. Altogether around 1,200 soldiers will initially be involved. Currently it is not anticipated that Germany will actively participate in the military campaign, which currently mainly consists of the aerial bombardment of ISIS targets in Syria conducted chiefly by the USA, France, and, more recently the UK, with intermittent Arab and Turkish support.

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[1] *Canada to Withdraw Fighter Jets from Syria and Iraq Airstrikes*, BBC News (Oct. 21, 2015), <http://www.bbc.com/news/world-us-canada-34589250> (accessed Mar. 7, 2016).

Many have questioned the wisdom of the undertaking, considering the limited success the campaign, ongoing for more than a year now, has so far achieved, and bearing in mind the disastrous results of past Western interventions in Iraq (2003) and Libya (2011) and the far from successful intervention in Afghanistan (since 2001). This article will, however, discuss whether the military campaign Germany is now supporting is justified under international law. Certainly, Syrian President Assad has claimed that the UK's contribution, following a vote in the House of Commons on December 2, 2015, was illegal under international law.[2]

The main argument put forward by the German Government is that the use of force against ISIS targets in Syria is justified based on UN Security Council Resolution 2249 (2015) and Art. 51 of the UN Charter. Furthermore, some claim that the German military contribution in support of France is also justified by France's invocation of Art. 42(7) of the Treaty on European Union [hereinafter TEU]. Germany thus seems to be claiming that it is engaged in collective self-defence in support and at the request of Iraq and France, in the latter case following the ISIS-directed attacks on Paris, which have so far caused the death of 130 people and the injury of many more.

It will be shown that this line of argument is not convincing. Resolution 2249 does evidently not authorize the use of force and Art. 42(7) TEU does not provide additional legal grounds to what is already permitted under Art. 51. Article 51, on the other hand, while explicitly permitting the use of force in response to an armed attack is limited to attacks imputable to another state. Despite ISIS often being referred to as the 'Islamic State,' no other state has recognized it as such and the turmoil surrounding its expansion on the territory of Syria and Iraq would at most allow it to be described as a 'jihadist state in formation.'[3] Having found the German Government's arguments to be unpersuasive, the article will then turn to customary international law as a possible source of justification. Has customary international law, especially in the aftermath of the use of force against Afghanistan under the Taliban in the aftermath of 09/11, evolved in such a way so as to now permit the use of force in self-defence against non-state actors on another state's territory without that state's consent? When discussing this, it will, however, be necessary to bear in mind that Syria's Government, in contrast to the Afghan Taliban Government's attitude towards Al-Qaeda in 2001, is itself attempting to fight ISIS.

While it will be concluded that customary international law has so far not yet evolved to justify the current Western-led military campaign against ISIS in Syria, it will be acknowledged that a future change in the law cannot be ruled out.

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[2] *Assad: Der Westen wird scheitern*, Stuttgarter Zeitung, Dec. 7, 2015, at 1; *see also* Christoph Vedder, *Bundeswehr im Krieg?*, Süddeutsche Zeitung, Dec. 9, 2015, at 2.

[3] Volker Perthes, as quoted by David Butter, Associate Fellow at Chatham House (Audio tape: Event Speech: Syria, Military Intervention and International Law (Oct. 9, 2014), <https://www.chathamhouse.org/file/event-speech-syria-military-intervention-and-international-law> (accessed Mar. 7, 2016)).

2. Resolution 2249, Art. 42(7) TEU

In the aftermath of the terrorist attacks in Paris of November 13, 2015, the Security Council, on November 20, 2015, passed Resolution 2249 in which the Security Council

> *Calls upon* Member States . . . to take all necessary measures, in compliance with international law . . . to prevent and suppress terrorist acts committed specifically by ISIL . . .[4]

Although the authorization to 'take all necessary measures' is, in other contexts, generally viewed as a euphemism permitting the use of force,[5] the Security Council, in adopting Resolution 2249, was not acting under Ch. VII of the UN Charter, which is a prerequisite for council authorization of the use of force. This procedure is also in marked contrast to, for example, the Security Council's reaction to the Al-Qaeda attacks on the USA in 2001: in Resolution 1373 (2001) the Security Council explicitly stated that it was acting under Ch. VII.[6] Neither the United Kingdom[7] nor Germany[8] are claiming explicit UN Security Council authorization as far as their participation in the use of force against Syria is concerned.

France, the first state to do so, also invoked Art. 42(7) TEU. However, there is general agreement that Art. 42(7) does not authorize military action beyond what is already permitted under Art. 51 of the UN Charter. In fact, Art. 42(7) explicitly demands that any assistance given by EU Member States must be in accordance with Art. 51 of the UN Charter. Consequently neither the UK nor Germany are justifying their military actions on the basis of Art. 42(7) TEU as far as international law is concerned.[9]

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4 S.C. Res. 2249, ¶ 5, U.N. Doc. S/RES/2249 (Nov. 20, 2015), at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249(2015)> (accessed Mar. 7, 2016).

5 *E.g.*, U.N. Security Council Resolution 678 (1990) authorizing the use of force against Iraq subsequent to its occupation of Kuwait.

6 S.C. Res. 1373, Preamble, U.N. Doc. S/RES/1373 (Sep. 28, 2001), at <http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf> (accessed Mar. 7, 2016).

7 *Legal Basis for UK Military Action in Syria*, House of Commons Library (Dec. 1, 2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7404> (accessed Mar. 7, 2016).

8 Antrag der Bundesregierung vom 01.12.2015, Drucksache 18/6866, at <http://dip21.bundestag.de/dip21/btd/18/068/1806866.pdf> (accessed Mar. 7, 2016).

9 *See supra*, nn. 7, 8. The German Government is, however, relying on Art. 42(7) TEU in order to justify its actions under German constitutional law. *See also* Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL: *Talk!* (Nov. 21, 2015), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> (accessed Mar. 7, 2016) (they agree that the Resolution does not authorize the use of force but argue that it is worded in such an ambiguous way to allow the USA and other states to claim the use of force to be legal while permitting Russia and Iran to claim the opposite).

Neither Resolution 2249 nor Art. 42(7) TEU thus provide a legal justification for German participation in the military action targeted at ISIS in Syria.

3. Article 51 of the UN Charter

The main argument put forward by the German Government appears to be that German military action is justified under Art. 51 of the UN Charter. By contributing toward the bombing campaign against ISIS targets in Syria Germany was coming to the aid of Iraq and France at those states' request. Therefore Germany was acting in collective self-defence which is a permitted exception to the ban on the use of force under Art. 2(4). It is therefore necessary to examine whether the requirements laid down in Art. 51 are met.

3.1. Past Security Council Confirmation of Art. 51 Situation

Without going into any detail, as to whether the anti-ISIS operations actually conform to the criteria laid down in Art. 51, it has been argued that the Security Council had in the past declared the use of force in response to terrorist acts as justified under Art. 51.[10] This argument is based on Resolutions 1368 (2001) and 1373 (2001) which were adopted by the Security Council in the aftermath of the Al-Qaeda attacks on the USA in 2001 in respect of the use of force against Afghanistan.[11]

For a number of reasons that view is, however, incorrect. Since the USA and the UK at the time decided not to proceed on the basis of a UN approved military intervention in Afghanistan, this obviously means that the Security Council did not have the chance to express its views on the actual use of force by the two allies.[12]

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[10] *Eine juristische Hilfskonstruktion dient als Grundlage*, Stuttgarter Zeitung, Dec. 5, 2015, at 4.

[11] Yoram Dinstein, *Terrorism and Afghanistan*, in The War in Afghanistan: A Legal Analysis (= 85 International Law Studies) 43, 46 (Michael N. Schmitt, ed.) (Naval War College 2009), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1117&context=ils> (accessed Mar. 7, 2016) [hereinafter Dinstein, *Terrorism*]; Lindsay Moir, Reappraising the Resort to Force: International Law, *Jus ad Bellum* and the War on Terror (= 27 Studies in International Law) 53–54 (Hart Pub. 2010) (despite acknowledging that international law prior to 09/11 demanded an attack to be imputable to a state in order to qualify under Art. 51, and accepting the fact there was no UN authorization, Moir then concludes that the UN Security Council had – apparently – authoritatively decided that, on 09/11, an 'armed attack' on the United States under Art. 51 had occurred, and that the US could therefore respond by using force in self-defence; he therefore obviously deems the UN Security Council resolutions on the matter sufficient to assume Art. 51 was basically adhered to; Moir then proceeds to examine only the questions of necessity and proportionality); Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism since September 11th*, 35 Cornell J. Int'l L. 475, 481 (2002), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1512&context=cilj> (accessed Mar. 7, 2016); Jane E. Stromseth, *New Paradigms for the Jus ad Bellum?*, 38 Geo. Wash. Int'l L. Rev. 561, 566 (2006).

[12] *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. S/2001/946 (2001), at <http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf> (accessed

There is not one Security Council resolution that explicitly declares the attack on Afghanistan to be in accordance with Art. 51.[13]

It is correct that the Security Council, 'recognized,' and 'reaffirmed' the right of self-defence in the aftermath of 09/11, in Resolutions 1368 and 1373. However, both resolutions were adopted *prior* to the initiation of any hostilities on October 7, 2001. The Security Council could obviously not declare that *any* action *subsequently* undertaken by the USA would necessarily conform to the prerequisites of the right of self-defence as laid down in Art. 51.[14] Furthermore, Afghanistan was not even explicitly mentioned in those resolutions as a possible target of the use of force.[15] The phrases the Security Council employed in reaction to 09/11 were thus markedly different from the language used in Resolution 661 (1990) authorizing the use of force against Iraq: then the Security Council had declared it was

> *[a]ffirming* the inherent right of individual or collective self-defence, in response to the *armed attack* by Iraq against Kuwait, in accordance with Article 51 of the Charter . . .[16] (second emphasis added).

Mar. 7, 2016); *Letter Dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. S/2001/947 (2001), at <http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-947e.pdf> (accessed Mar. 7, 2016); *see* excerpts in *Operation Enduring Freedom and the Conflict in Afghanistan: An Update* 10 (House of Commons Library Research Paper 01/81, October 31, 2001), <http://researchbriefings.files.parliament.uk/documents/RP01-81/RP01-81.pdf> (accessed Mar. 7, 2016).

13 Noëlle Quénivet, *The World after September 11: Has It Really Changed?*, 16 Eur. J. Int'l L. 561, 576 (2005), available at <http://www.ejil.org/pdfs/16/3/309.pdf> (accessed Mar. 7, 2016) doi: 10.1093/ejil/chi131 (she argues that the Security Council 'preferred to abstain from judging the legality of the British and American intervention'); Eric P.J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. Conflict & Sec. L. 5, 9–13 (2002) (they describe the Security Council's reaction as one of 'deliberate ambiguity,' and accuse it of 'doing its best to ignore the crucial issue of the legal basis of the US response'); John Quigley, *The Afghanistan War and Self-Defense*, 37 Val. U. L. Rev. 541, 553–54 (2003), available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1287&context=vulr> (accessed Mar. 7, 2016) (in his view the Security Council reaction was one of 'inaction' and 'silence' in response to Operation *Enduring Freedom*); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 Eur. J. Int'l L. 993, 996 (2001), available at <http://www.ejil.org/pdfs/12/5/1558.pdf> (accessed Mar. 7, 2016) doi:10.1093/ejil/12.5.993 [hereinafter Cassese, *Terrorism*]; Christine Gray, International Law and the Use of Force 206–07 (3rd ed., Oxford University Press).

14 Jan Wouters & Frederik Naert, *Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 411, 446 (Cyrille Fijnaut et al., eds.) (Martinus Nijhoff 2004).

15 Moir, *supra* n. 11, at 53; Quigley, *supra* n. 13, at 549; Jörg Kammerhofer, *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 Leiden J. Int'l L. 89, 99–100 (2007), available at <http://papers.ssrn.com/abstract_id=1551758> (accessed Mar. 7, 2016).

16 S.C. Res. 661, Preamble, para. 7, U.N. Doc. S/RES/661 (Aug. 6, 1990), at <https://www.treasury.gov/resource-center/sanctions/Documents/661.pdf> (accessed Mar. 7, 2016).

Ruys and Verhoeven have correctly pointed out that the Security Council, in Resolutions 1368 and 1373, avoided any explicit reference to an 'armed attack' having occurred, and instead only described them as a 'threat to international peace and security.' This implies the Council – far from confirming an Art. 51 situation – was in truth 'hesitant in accepting the right of self-defence in response to attacks by private actors.'[17] Reisman has gone even further, and claims that the language used by the Security Council, especially in Resolution 1368, actually 'kept' terrorist acts 'from falling under Article 51's right of self-defence.'[18]

Furthermore, even if a different view of Security Council Resolutions 1368 and 1373 were taken, the underlying situations in Afghanistan in 2001 and Syria in 2015 are not comparable. Thus Resolutions 1368 and 1373 can in any case not be automatically applied to Syria. At the time many argued that the Taliban Government of Afghanistan was at least 'harbouring' Al-Qaeda terrorists, if not even actively cooperating with them, allegedly justifying the use of force against that state. Nobody is claiming that Syria is tolerating or actively supporting ISIS. In fact, it is uncontroversial that the Syrian Government is itself, with Russian support, attempting to fight the ISIS terrorists. Obviously that raises different issues as to whether the use of force against Syria is justified.

The conclusion must therefore be that neither did the Security Council in 2001 declare Operation *Enduring Freedom* to be in accordance with Art. 51, nor would such a declaration be automatically applicable to the Syrian situation.

3.2. Are ISIS Terrorist Actions against Iraq and France 'Armed Attacks' According to Art. 51?

In order to justify the use of force in collective self-defence under Art. 51 it is necessary for an 'armed attack' to be occurring against a member of the UN.

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[17] *See* Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10(3) Journal of Conflict & Security Law 312 (2005) doi:10.1093/jcsl/kri016; Myjer & White, *supra* n. 13, at 9–11 (they make the same point); Sean D. Murphy, *Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter*, 42 Harv. Int'l L.J. 41, 46 (2002) [hereinafter Murphy, *Terrorism*] (he makes a similar point in respect of the General Assembly's Resolution in reaction to the events of September 11, 2001 (Resolution 56/1 (2001)). *See also* Wouters & Naert, *supra* n. 14, at 446; Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 Transnat'l L. & Contemp. Probs. 771, 780 (2003) (he points out that GA Resolution 56/1 'explicitly declines to characterize the acts as an armed attack under Article 51 of the Charter').

[18] W. Michael Reisman, *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan*, in The War in Afghanistan, *supra* n. 11, at 59, 64–65, available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1118&context=ils> (accessed Mar. 7, 2016) [hereinafter Reisman, *International Legal Dynamics*] (he bases this conclusion on the fact that the Council, in Resolution 1368, chose to refer to 'threats to the peace,' instead of 'breaches of the peace' or 'acts of aggression,' when categorizing the attacks of 09/11; he also refers to Resolution 1378 (2001) in which the Council had declared its support for 'international efforts to root out terrorism,' but that these efforts were to 'be in keeping with the Charter of the United Nations;' in Reisman's view this is 'code for the Charter's prohibition on the unilateral use of force in any circumstance other than exigent self-defense').

There can be little doubt that ISIS actions in Iraq and France meet one of the controversial aspects of the definition of the term 'armed attack,' namely the 'gravity' criterion, referred to by the ICJ. In 2014 alone more than 17,000 civilians were killed in Iraq, almost double the number of 2013. The steep rise is mainly attributed to ISIS activities in the country.[19] On November 13, 2015, various simultaneous terrorist attacks were carried out in France for which ISIS later claimed responsibility: 130 civilians were killed,[20] more than 350 civilians injured.[21] Furthermore, it seems likely the terrorists were originally planning to kill thousands of spectators at a football match in the *Stade de France* in St. Denis.[22] Overall, these attacks were the worst in France since World War II.[23] The gravity of the ISIS terrorist activities is thus undoubtedly sufficient to meet any reasonable application of the controversial 'scale and effect' criteria outlined by the ICJ.

Whether an attack has to meet additional criteria in order for it to be classified as an 'armed attack' under Art. 51 is very controversial.

3.2.1. State Involvement in Attack is Not Necessary under Art. 51

The question that has aroused most controversy is whether an 'armed attack,' as demanded in Art. 51, can only be carried out by a state, or whether it can originate from any other source as well. This is particularly relevant when deciding whether a state can resort to the use of force in self-defence under Art. 51 in response to a terrorist attack. It is, after all, the very nature of terrorist attacks that they are often not carried out by states, or at the behest of states. Demanding state participation in any attack for it to be judged an 'armed attack' would thus preclude an attacked state's recourse to Art. 51 in response to most terrorist attacks. This is particularly relevant as far as the bombing campaign against ISIS targets in Syria is concerned. After all, it is beyond doubt that the state of Syria neither supports ISIS nor tolerates, *i.e.* 'harbours,' ISIS terrorists on its territory. Rather, Syria itself is attempting to combat ISIS and has availed itself of Russian support in this quest.

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19 *Civilian Death Toll in Iraq Doubles to 17,000 in 2014 'Due to Rise of ISIS,'* RT (Jan. 1, 2015), <https://www.rt.com/news/219223-iraq-civilian-death-toll/> (accessed Mar. 7, 2016).

20 *Paris Death Toll Rises to 130*, RTÉ News (Nov. 20, 2015), <http://www.rte.ie/news/2015/1120/747897-paris/> (accessed Mar. 7, 2016).

21 Mary B. Marcus, *Injuries from Paris Attacks Will Take Long to Heal*, CBS News (Nov. 19, 2015), <http://www.cbsnews.com/news/injuries-from-paris-attacks-will-take-long-to-heal/> (accessed Mar. 7, 2016).

22 Stacy Meichtry et al., *Behind François Hollande's Snap Decision at Stade de France and the Unfolding Terror in Paris*, The Wall Street Journal (Nov. 15, 2015), <http://www.wsj.com/articles/behind-francois-hollandes-snap-decision-at-stade-de-france-and-the-unfolding-terror-in-paris-1447634427> (accessed Mar. 7, 2016).

23 Tracy McVeigh & Emma Graham-Harrison, *Parisians Throw Open Doors in Wake of Attacks, but Muslims Fear Repercussions*, The Guardian (Nov. 14, 2015), <http://www.theguardian.com/world/2015/nov/14/paris-attacks-people-throw-open-doors-to-help> (accessed Mar. 7, 2016).

There are, broadly speaking, two lines of argument in support of the argument that state participation in an 'armed attack' is *not* a requirement of Art. 51. Both rely on a literal interpretation of the wording of Art. 51, especially in comparison to the wording of Art. 2(4). While Art. 2(4) requires '*all Members*' to 'refrain . . . from the threat or use of force against . . . *any State*,' Art. 51 *only* refers to armed attacks occurring '*against a Member* of the United Nations,' *without* specifying from whom the attack must originate. Based on the wording of Art. 51, the argument goes, any 'armed attack,' no matter who carries it out, is sufficient to trigger the right of self-defence[24] (emphases added).

This interpretation is, some argue, confirmed by the legal discussions surrounding the *Caroline* incident of 1837, usually analyzed in the context of anticipatory self-defence. In 1837 the American ship *Caroline*, which was in the hand of Canadian rebels, was set on fire by British troops while moored in American territorial waters, and two people were killed. The Americans subsequently demanded compensation from the British, who in return claimed to have acted in self-defence. Although the question of whether the British had acted in self-defence was contentious between the two states, the fact the Canadian rebels were non-state actors was, judging by the notes, obviously not deemed relevant by the two states. Some therefore conclude that the Anglo-American exchange of notes confirms that the right of self-defence has always also been available in response to attacks carried out by non-state actors.[25]

The slight *difference* between the two strands of thought in support of the view that, under Art. 51, attacks carried out by non-state actors, are sufficient, is one more

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[24] Moir, *supra* n. 11, at 47; Ruys & Verhoeven, *supra* n. 17, at 311; Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 Am. J. Int'l L. 839, 840 (2001); Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Carsten Stahn, *Terrorist Acts as 'Armed Attack:' The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 Fletcher F. World Aff. 35, 35–36 (2003), available at <http://dl.tufts.edu/file_assets/tufts:UP149.001.00054.00005> (accessed Mar. 7, 2016); Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L. J., 533, 534–35 (2002), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1518&context=cilj> (accessed Mar. 7, 2016); Stromseth, *supra* n. 11, at 566; Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 Yale J. Int'l L. 559, 564 (1999), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3277&context=fss_papers> (accessed Mar. 7, 2016); Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 Int'l & Comp. L.Q. 963, 969–70 (2006); Dinstein, *Terrorism*, *supra* n. 11, at 45–46; Idem, War, Aggression and Self-Defence 245–47 (4th ed., Cambridge University Press 2005) doi:10.1017/CBO9780511841019 [hereinafter Dinstein, War]

[25] Paust, *supra* n. 24, at 535; W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 42–46 (1999), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2029&context=fss_papers> (accessed Mar. 7, 2016) [hereinafter Reisman, *International Legal Responses*]; Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 Case W. Res. J. Int'l L., 243, 268–69 (1987), available at <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1726&context=jil> (accessed Mar. 7, 2016); Wilmshurst, *supra* n. 24, at 970, Dinstein, War, *supra* n. 24, at 248–49; for extracts of the notes exchanged between Britain and the USA in 1841–42, *see* <http://avalon.law.yale.edu/19th_century/br-1842d.asp> (accessed Mar. 7, 2016).

of emphasis than of substance. While some simply rely on a literal reading of Art. 51, others acknowledge that the authors of the Charter, in the immediate aftermath of World War II, did not envisage massive terrorist attacks, so automatically assumed that armed attacks could only be carried out by states.[26] The latter, however, insist that times had changed, because terrorist organizations had since then gained the ability to carry out armed attacks on states. The wording of Art. 51 made it possible to now interpret its content in such a way, so as to include attacks not launched by states in the definition of 'armed attack.'[27]

It cannot be disputed that the arguments just set out do have some merits. The literal interpretation of Art. 51 is certainly in accordance with Art. 31(1) Vienna Convention on the Law of Treaties, the provisions of which are, despite having only been codified in 1969, generally seen as reflective of longstanding international customary law.[28] Furthermore, the arguments are seemingly reinforced by NATO's decision, on September 12, 2001, to invoke Art. 5 of the North Atlantic Treaty, in response to Al-Qaeda's attacks on the USA. Article 5 also requires an 'armed attack' in order to justify mutual assistance.[29] In addition, France's invocation, in the aftermath of the terrorist attacks on November 13, 2015, of Art. 42(7) TEU, which requires an 'armed aggression' against a Member State of the EU and explicitly refers to Art. 51, met a positive response from the other 27 EU Member States.[30]

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[26] Moir, *supra* n. 11, 47; Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Stuart G. Baker, *Comparing the 1993 Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 Ga. J. Int'l & Comp. L., 99, 107–08 (1994), available at <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1412&context=gjicl> (accessed Mar. 7, 2016); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 156 (2000); Rein Müllerson, *Jus ad Bellum: Plus ça change (le monde), plus c'est la même chose (le droit)?*, 7(2) Journal of Conflict & Security Law 172, 177 (2002) doi:10.1093/jcsl/7.2.149; Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism*, 12(1) Journal of Conflict & Security Law 104, 108–111 (2007) doi:10.1093/jcsl/krm006 (his stance seems contradictory: he argues that Art. 51 includes 'the activities of non-state actors in the case of an armed attack,' but then goes on to claim that the use of force against 'non-state actors' is only justified when the acts are 'attributable to a state').

[27] Moir, *supra* n. 11, at 47; Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Stahn, *supra* n. 24, at 41–43; Baker, *supra* n. 26, at 108; Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 Willamette J. Int'l L. & Disp. Res. 100, 108–09 (2004); Shah, *supra* n. 26, 104–08; Sir Franklin Berman, *The UN Charter and the Use of Force,* 10 Sing. Y.B. Int'l L. 9, 10–11 (2006), available at <http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2006/3.pdf> (accessed Mar. 7, 2016); Müllerson, *supra* n. 26, at 171–79; Tarcisio Gazzini, The Changing Rules on the Use of Force in International Law 183 (Manchester University Press 2005); Christopher Greenwood, *International Law and the 'War against Terrorism,'* 78(2) International Affairs 307 (2002) doi:10.1111/1468-2346.00252 (he accuses adherents of the opposite view of 'strange formalism').

[28] Ruys & Verhoeven, *supra* n. 17, at 290; Wouters & Naert, *supra* n. 14, at 430.

[29] *Statement by the North Atlantic Counsel*, NATO (Sep. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm> (accessed Mar. 7, 2016); Franck, *supra* n. 24, at 840.

[30] *Terror-Serie in Paris: Frankreich beantragt offiziell Hilfe bei der EU*, Spiegel Online (Nov. 17, 2015), <http://www.spiegel.de/politik/ausland/frankreich-beantragt-offiziell-hilfe-bei-der-europaeischen-union-a-1063179.html#> (accessed Mar. 7, 2016).

3.2.2. State Involvement in Attack is Necessary under Art. 51

Nevertheless, arguments that are more convincing can be made in favor of the opposite point of view, namely of requiring state participation in any armed attack that triggers the right of self-defence under Art. 51.

The drafters of the Charter would simply not have deemed it necessary to specify, in Art. 51, possible perpetrators of an 'armed attack,' as it would have been self-evident to them that such an attack could *only* be carried out by a state. The difference to Art. 2(4) is that non-state actors, such as secessionist insurgents, could conceivably also resort to the prohibited use of force.[31]

A purely textual interpretation of Art. 51 does, however, most likely not only contradict the Charter drafters' intentions, but is also difficult to reconcile with the Charter's aims. Allowing the use of force in self-defence against a state *not involved* in an 'armed attack,' simply based on the fact that the perpetrators happen to be within that state's territory would necessarily not only undermine the Charter's aim of preserving peace, but would also threaten the concepts of sovereign equality and of sovereignty as such.[32] It robs the sovereign state that is willing to combat the terrorists on its territory of the possibility of deciding how to go about that endeavour, and, even more importantly, with whose support.

Since an armed attack by a non-state actor would, under such a literal interpretation of Art. 51, automatically trigger the right of self-defence, the victim state would be justified in ignoring another state's independence and sovereignty by attacking presumed 'terrorist bases' on that other state's territory (with all the resulting risks of civilian casualties, *etc.*). This would occur even if the attacked state could not be accused of any violation of international law. Such a state of affairs would necessarily run the risk of turning a major terrorist attack into a war, thus possibly even furthering the terrorists' cause.[33] Application of a purely textual understanding of Art. 51 to the India-Pakistan conflict, as far as the troubles in Kashmir are concerned, should give any adherent of the opposite view pause for thought.[34]

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[31] Richard H. Heindel et al., *The North Atlantic Treaty in the United States Senate*, 43 Am. J. Int'l L. 633, 645 (1949) doi:10.2307/2193257; Ian Brownlie, International Law and the Use of Force by States 278–79 (Oxford University Press 1963 (reprint 1968)) (he states that it is 'doubtful' whether the phrase 'armed attack' could possibly apply to the activities of armed bands or other irregulars).

[32] Cassese, *Terrorism*, *supra* n. 13, at 997; Travalio, *supra* n. 26, at 179–80.

[33] Cassese, *Terrorism*, *supra* n. 13, at 997; Ian Johnstone, *The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counterterrorism*, 43 Colum. J. Transnat'l L. 337, 369 (2005); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 Yale J. Int'l L. 537, 542–43, 556 (1999); Travalio, *supra* n. 26, at 156–57, 159, 179–80; Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 Am. J. Int'l L. 415, 438 (1969); Reisman, *International Legal Dynamics*, *supra* n. 19, at 70–71 (in a general discussion of the legality of the use of force in the aftermath of terrorist attacks, he points to that danger; he cites the example of Afghanistan's President Karzai, in June 2008, threatening neighbouring Pakistan with 'cross-border attacks' to deal with the 'militants' there, thereby relying on Afghanistan's right of self-defence as justification; Pakistan reacted by reminding Karzai of its 'sovereignty,' despite acknowledging the presence of militants in the Afghan-Pakistani border area).

[34] Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 Am. J. Int'l L. 905, 917–18 (2002), available at <http://users.polisci.wisc.edu/kinsella/ratner.pdf> (accessed Mar. 7, 2016).

The argument that, based on the *Caroline* incident of 1837, a strict interpretation of Art. 51 is unjustified, is also not convincing. As the Anglo-American exchange of notes demonstrates, the phrase 'armed attack' was neither discussed, nor even mentioned in the exchange between the two states: a consequence of the fact that an 'armed attack' was not a prerequisite of the right to use force in self-defence in 1837, in contrast to the situation under the Charter. The views on self-defence expressed by the British and American representatives in 1841–42 can therefore have no bearing on the interpretation of the phrase 'armed attack.'

That Art. 51 should be understood as requiring an 'armed attack' to be attributable to a state is also confirmed by state practice and *opinio juris*.[35] Prior to the terrorist attacks of September 11, 2001, most states assumed and argued that any armed attack triggering the right of self-defence must be attributable to a state.[36] As even Judge Kooijmans of the International Court of Justice [hereinafter ICJ] – despite arguing that changes in the law may have taken place in the aftermath of 09/11– acknowledged in his separate opinion in the *Wall* case, the view that an 'armed attack,' as understood in Art. 51, had to be carried out by another state had been 'the generally accepted interpretation for more than 50 years.'[37] This was notably also the position taken by the USA, the International Law Commission,[38] and NATO.[39]

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[35] These are relevant criteria as confirmed by Art. 31(3)(b) Vienna Convention on the Law of Treaties (1155 U.N.T.S. 331, 340).

[36] Ruys & Verhoeven, *supra* n. 17, at 290–91, 312; Myjer & White, *supra* n. 13, at 7; Kammerhofer, *supra* n. 15, at 100; Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Cassese, *Terrorism*, *supra* n. 13, at 997; Gray, *supra* n. 13, at 199; Moir, *supra* n. 11, at 47–48, 52 (although he personally disagrees with this interpretation of Art. 51; he acknowledges that the ICJ's judgement in the *Nicaragua* case – analyzed in detail later – in that respect 'was probably justified in light of the practice of states, and of the Security Council').

[37] Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 35 (July 9) (separate opinion Judge Kooijmans) [hereinafter Legal Consequences]; *see also* John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, in The War in Afghanistan, *supra* n. 11, at 79, 98–99, available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1119&context=ils> (accessed Mar. 7, 2016) (writing in 2008–09, states that there was 'considerable scholarly comment in support of the notion that there is no right of self-defense under Article 51 against an armed attack by a non-state actor'); Gazzini, *supra* n. 27, at 139.

[38] Draft Articles on State Responsibility, in Report of the International Law Commission, U.N. GAOR, 32nd Sess., Supp. No. 10, U.N. Doc. A/35/10 (1980), reprinted in 2(2) Y.B. Int'l L. Comm'n 1, 52–53 (1981), U.N. Doc. A/CN.4/SER.A/1980/Add.l (Part 2), U.N. Sales No. E.81.V.4 (Part II), at <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1980_v2_p2.pdf> (accessed Mar. 7, 2016); the International Law Commission was, however, more hesitant in *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(2) Y.B. Int'l L. Comm'n 1, 75 (2007), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), U.N. Sales No. E.04.V.17 (Part 2), at <http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> (accessed Mar. 7, 2016).

[39] *The Alliance's Strategic Concept*, NATO (Apr. 24, 1999), <http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en> (accessed Mar. 7, 2016) (especially ¶¶ 10 ('Security,''Deterrence and Defence') and 24). The way of the Concept (¶ 24) is formulated it is clear that terrorist attacks were not seen as 'armed attacks' covered by Arts. 5 and 6 of the Washington Treaty: '*Any armed attack* on the territory of the Allies, from whatever direction, *would be covered by Articles 5 and 6 of the*

The Foreign Relations Committee of the US Senate, when reporting on the North Atlantic Treaty to the full Senate prior to ratification, defined the term 'armed attack' in Art. 5 of the North Atlantic Treaty as follows:

> The committee notes that Article 5 would come into operation *only when a nation* had committed an international crime *by launching an armed attack* against a party to the treaty.[40] (emphasis added).

Three staff members on the US Senate Committee on Foreign Relations at the time concurred with this assessment in a subsequent article elaborating further:

> But what is an armed attack? Does any violence perpetrated upon any member or upon any of its nationals constitute an armed attack under the Treaty? Since the principal objective of the Treaty is to safeguard the security of the North Atlantic area, only such armed attacks as threaten that security are contemplated. *This rules out violence of irresponsible groups and refers, as Article 51 of the Charter clearly contemplates, to an armed attack of one state against another.* Purely internal disturbances and revolutions are not included, although aid given to revolutions by outside Powers can conceivably be considered an armed attack.[41] (emphasis added).

Similarly, the *Definition of Aggression*[42] (Art. 1), passed unanimously by the General Assembly, defined an act of aggression as follows:

> Aggression is *the use of armed force by a State* against the sovereignty, territorial integrity or political independence *of another State*, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. (emphases added).

This obviously reflects widespread consensus, as far as the necessity of state attribution is concerned. The fact that Resolution 3314 (1974) did not define the term 'armed attack' is not relevant in this context, as there can be no serious doubt that an 'armed attack,' as understood in Art. 51, is probably the most serious manifestation of an act of aggression.[43]

Washington Treaty. However, Alliance security must also take account of the global context. *Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism*, sabotage and organised crime, and by the disruption of the flow of vital resources.' (emphasis added).

40 Excerpts from the *Executive Report of the Committee on Foreign Relations*, U.S. Senate, Executive Report No. 8, 81st Congress, 1st session, June 6, 1949, reprinted in 20 Dep't St. Bull. 787, 789 (1949).

41 Heindel et al., *supra* n. 31, at 645.

42 Annex to UNGA Resolution 3314 (XXIX) of December 14, 1974.

43 Wouters & Naert, *supra* n. 14, at 431; Gray, *supra* n. 13, at 199–200.

Resolution 3314, passed in 1974, refutes the argument that states, certainly at that time, interpreted Art. 51 in such a way so as to include attacks carried out by non-state actors. It is far-fetched to assume that states would have wanted to exclude some of the manifestations of an 'armed attack' under Art. 51 from the definition of aggression.[44] This is further confirmed by Art. 3(g) of the *Definition of Aggression*, which explicitly deals with non-state actors, and declares their actions to be acts of aggression *only* in those cases when they have been 'sent by or on behalf of a State,' or when another state is otherwise 'substantially involved.'

Denying the necessity of state participation in an 'armed attack' would thus lead to the unsatisfactory conclusion that terrorist attacks would qualify as 'armed attacks' under Art. 51, but would not be deemed to be 'acts of aggression' under the unanimously passed *Definition of Aggression*.

It may be countered that Resolution 3314 is out-dated and has been overtaken by events.[45] Still, when this resolution was adopted in 1974, terrorists were already steadily strengthening their capabilities. It is also the case that the resolution, generally viewed as reflective of customary international law, has so far not been repudiated or disowned by any state. Although not directly relevant to the issue discussed here, it should be noted that the state parties to the Rome Statute of the International Criminal Court, have, in their resolution of June 11, 2010, in fact again relied on Art. 3(g) of the *Definition of Aggression* in their attempt to define the equivalent crime.[46]

3.2.3. The International Court of Justice's View

The ICJ, too, has indicated that it believes that an armed attack under Art. 51 must be imputable to a state.[47] In the 1986 *Nicaragua* case the ICJ had the opportunity to deal with the use of force by non-state actors, when it had to decide whether US-support for the Nicaraguan rebels, the *Contras*, in their armed struggle against the Nicaraguan Government, amounted to an 'armed attack' against that state. *Inter alia,* the Court declared:

> In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. . . . There appears now to be *general agreement* on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action

44 Roberts, *supra* n. 25, at 263.

45 Reisman, *International Legal Responses*, *supra* n. 25, at 39.

46 *The Crime of Aggression*, Annex I, Art. 2, ICJ Resolution RC/Res.6 (2010), at <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> (accessed Mar. 7, 2016).

47 Johnstone, *supra* n. 33, at 367–68; Moir, *supra* n. 11, at 24–25 (he, however, seems to disagree with the ICJ's interpretation).

> by regular armed forces across an international border, *but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries*, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, '*or its substantial involvement therein*.' This description, contained in Article 3 paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. . . . But the Court *does not believe that the concept of 'armed attack' includes* not only acts by armed bands where such acts occur on a significant scale *but also assistance to rebels in the form of the provision of weapons or logistical or other support*. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[48] (emphases added).

By relying on Art. 3(g) of the *Definition of Aggression*, when interpreting the term 'armed attack,' the ICJ emphasized that state involvement was necessary for sufficiently grave acts, committed by 'armed bands,' to be classified as 'armed attacks.' This conclusion is further confirmed by the fact that the ICJ proceeded to exclude even a state's 'mere' provision of weapons or logistical support for such an attack by 'armed bands' from the concept of 'armed attack.'[49]

As far as the *Nicaragua* judgement, handed down in 1986, is concerned it is – again – sometimes argued that the ICJ's view had been overtaken by events.[50] However, in much more recent rulings, the ICJ seems to be inclined to confirm its earlier view on the matter.

In its 2004 Advisory Opinion as to the legality of the Israeli-constructed wall on occupied Palestinian territory, the ICJ declared:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*. However, Israel does not claim that the attacks against it are imputable to a foreign State.[51] (emphasis added).

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[48] Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. USA*), 1986 I.C.J. 14, ¶ 195 (June 27) [hereinafter Military and Paramilitary Activities].

[49] Murphy, *Terrorism*, *supra* n. 17, at 44; Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 Int'l & Comp. L.Q. 401, 407–08 (2002), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5575&context=faculty_scholarship> (accessed Mar. 7, 2016) doi:10.1093/iclq/51.2.401 [hereinafter Byers, *Terrorism*]; Kammerhofer, *supra* n. 15, at 105, 107, 109; Lobel, *supra* n. 33, at 541; Gray, *supra* n. 13, at 200.

[50] Reisman, *International Legal Responses*, *supra* n. 25, at 39; Johnstone, *supra* n. 33, at 370; Travalio, *supra* n. 26, at 173–74; Müllerson, *supra* n. 26, at 183–85 (he, however, uses this argument in respect of the threshold of state responsibility developed by the ICJ in the *Nicaragua* case).

[51] Legal Consequences, *supra* n. 37, ¶ 139.

This statement leaves little room for doubt as to the ICJ's view on the matter and was certainly understood that way by judges not agreeing with this interpretation of Art. 51.[52] Nevertheless, it has been argued that the ICJ's statement should not be taken literally, as the ICJ was dealing specifically with alleged incidents originating from territory occupied by Israel itself.[53] Based on the clarity of the ICJ's statement, however, that argument has no basis in fact, as also confirmed by the disagreeing judges' interpretation of it.[54]

That the ICJ continues to be unwilling to reinterpret Art. 51 in such a way, so as to allow any 'armed attack' – no matter whether a state was involved or not – to suffice is also strongly implied by its 2005 judgements in the *Armed Activities* cases.[55] Uganda's claim of self-defence – based on attacks carried out by an Ugandan rebel group (the Allied Democratic Forces (ADF)), very likely partly based in the DRC – made in the face of the Democratic Republic of Congo's allegation of the illegal use of force on the part of Uganda was rejected by the Court.[56] It declared:

> It is further to be noted that, while Uganda claimed to have acted in self-defence, it *did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC*. The 'armed attacks' to which reference was made came rather from the ADF. The Court has found above (paragraphs 131–135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. *The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression*, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.[57] (emphases added)

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52 Legal Consequences, *supra* n. 37, ¶ 33 (separate opinion of Judge Higgins) ('I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State.'); ¶ 35 (separate opinion of Judge Kooijmans); ¶ 6 (declaration of Judge Buergenthal).

53 Ruys & Verhoeven, *supra* n. 17, at 305; Johnstone, *supra* n. 33, at 374–75; Berman, *supra* n. 27, at 10 (he simply describes the ICJ's view as 'strange'); Dinstein, *Terrorism*, *supra* n. 11, at 46 (he, nevertheless, disagrees with the ICJ's decision); Gazzini, *supra* n. 27, at 184.

54 Ruys & Verhoeven, *supra* n. 17, at 305; Murphy, *supra* n. 37, at 99.

55 Kammerhofer, *supra* n. 15, at 89, 96, 105.

56 *Id*. at 91.

57 Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), 2005 I.C.J. 168, ¶ 146 (December 19) [hereinafter Armed Activities].

In by now familiar vein, it has been argued that the ICJ's had, as far as Art. 51 is concerned, not taken a clear position, because Uganda's statements regarding the justification of its actions had, as the ICJ acknowledged, been contradictory, and Uganda had not been able to prove many of its allegations against the DRC. The view that the ICJ did not specifically deal with 'armed attacks' carried out by non-state actors is allegedly further confirmed by a statement the ICJ made elsewhere in the judgement:[58]

> Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.[59]

The ICJ, however, made this statement after having just rejected Uganda's claim of self-defence, due to a lack of imputability to the DRC in the previous paragraph. Having acknowledged that many of the attacks relied on by Uganda in its defence had actually taken place,[60] and having further acknowledged that the ADF was perhaps indeed partly operating from Congolese territory,[61] the ICJ, nevertheless, denied that any 'armed attack' imputable to the DRC had taken place, and therefore rejected Uganda's claim of self-defence. Furthermore, its reliance, once again, on Art. 3(g) of the *Definition of Aggression* strongly suggests that the ICJ still regards imputability to a state of any attack as a necessary requirement of any claim of self-defence under Art. 51. This interpretation of the judgement is once again also confirmed by the statements made by those judges who disagreed with the ICJ's reasoning on the matter.[62]

It must therefore be concluded that the ICJ as late as 2005, and thus after the terrorist attacks of 09/11, still adhered to the view that an attack must be attributable to a state for it to be judged an 'armed attack' according to Art. 51.[63]

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58 Dinstein, *Terrorism*, *supra* n. 11, at 49 (Dinstein claims the majority of judges at the ICJ had 'glossed over' the issue); Murphy, *supra* n. 37, at 99 (Murphy claims the Court had 'arguably backed off' from its earlier statements on self-defense it had made in its 2004 Advisory Opinion); Berman, *supra* n. 27, at 10 (in this context Berman, without elaborating, claims that the ICJ had 'more by its silences than by clear words' 'corrected' the 'unfortunate aspects of its earlier decision in the *Nicaragua* case'); Gray, *supra* n. 13, at 202.

59 Armed Activities, *supra* n. 57, ¶ 147.

60 *Id*. ¶¶ 132–33.

61 *Id*. ¶ 135.

62 *Id*. ¶¶ 20–32 (separate opinion of Judge Kooijmans); to some extent, *see also id.* ¶¶ 8–14 (separate opinion of Judge Simma).

63 Kammerhofer, *supra* n. 15, at 112–13.

3.2.4. Conclusion as to the Justification of the Use of Force in Syria under Art. 51

Interpreting Art. 51 in such a way so as to require the imputability of any attack to a state, before the victim state can resort to the use of force in self-defence, is much more in line with the UN Charter's aims and principles than the contrary view. Letting an armed attack by non-state actors suffice would greatly endanger world peace, and would raise serious issues as far as sovereignty and sovereign equality are concerned.[64] This is also confirmed by the ICJ's jurisprudence, which in 2005, and thus after the attack on Afghanistan in 2001, maintained that an armed attack needed to be imputable to another state for the resort to force in self-defence to be justified under Art. 51. The *Armed Activities* cases are particular relevant to the Syrian situation as the ICJ had implied that the presence, on Congolese territory, of the Ugandan rebels was perhaps due to the DRC's 'inability to control events along its border,'[65] making the Congolese comparable to the Syrian situation.

It must thus be concluded that neither Iraq nor France can claim to be acting in self-defence under Art. 51 when attacking Syrian territory so that German is consequently barred from claiming to be acting in collective self-defence. Iraq's claim to self-defence is further undermined by the fact that many of the terrorist attacks are carried out by Iraqi citizens on Iraqi territory, which makes the situation comparable to the one in the Israeli-occupied territories. As already pointed out the ICJ, however, rejected Israel's self-defence argument as far as attacks emanating from there were concerned.

4. Customary International Law

The conclusion the use of force against ISIS in Syria cannot be reconciled with Art. 51 does not necessarily mean that the military action is contrary to international law. It is possible that new rules have developed in customary international law as far as a state's response to terrorist attacks is concerned.[66]

Some argue that the international legal rules on the use of force in response to terrorist attacks have evolved because of the growth of international terrorist organizations, and the development of their capacity to launch massive attacks. After

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[64] Kammerhofer, *supra* n. 15, at 105, 110 (Kammerhofer adds another argument in favor of assuming that an 'armed attack' under Art. 51 must be imputable to a state: targeting individuals who committed terrorist attacks is not a use of force banned under Art. 2(4); he therefore concludes that an 'armed attack' under Art. 51 must be imputable to a state, in order for the use of force against the 'host state' to be justified under Art. 51; although the argument has some merit, it is not wholly convincing; it could just as well be argued that Art. 51 justifies the use of force against the 'host state,' based on the fact that the attack by the non-state actor was severe enough to qualify as an 'armed attack'); *see also* Vedder, *supra* n. 2.

[65] Armed Activities, *supra* n. 57, ¶ 135.

[66] Antonio Cassese, *The International Community's 'Legal' Response to Terrorism*, 38 Int'l & Comp. L.Q. 589, 591 (1989). doi:10.1093/iclqaj/38.3.589

all, recent terrorist activities have caused the deaths of thousands of people, such as in the case of the Al-Qaeda attacks on the USA in 2001 or current ISIS activities in / against Iraq.

Notably, the USA and Israel have claimed to be legally entitled to combat terrorists in other states. In 1986, US Secretary of State Shultz declared:

> It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations . . . or from using force against states that support, train and harbour terrorists or guerrillas. International law demands no such result.[67]

Whether this proposition has gained sufficient international support to justify the conclusion that it reflects customary international law must now be examined in detail. It should, first of all, be pointed out that Arts. 2(4), 51 do not – *per se* – create a bar to the development of new rules in customary international law on the use of force.[68] As the ICJ emphasized in the *Nicaragua* case, customary international law on the use of force exists side by side with the Charter rules.[69] Although the ICJ, in 1986, argued that customary international law and Arts. 2(4), 51, had become near identical since the Charter had come into force, it did allow for some differences in detail, and by doing so certainly allowed for the development of new rules in the future.[70]

Such new rules would not necessarily contravene the generally accepted *jus cogens* status of the ban on the use of force. It is overwhelmingly agreed that the *jus cogens* status applies to the core of the ban on the use of force, but does not automatically outlaw all changes in the detail of when the use of force is exceptionally permitted.[71]

Before proceeding to examine whether any such new rules have developed in customary international law, it should be noted that there is one major problem when assuming such new rules exist – the lack of a consensual definition of the term 'terrorist.'[72]

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[67] George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity, Address before the Low-Intensity Warfare Conference, National Defense University, Washington D.C. (Jan. 15, 1986)*, reprinted in 25 I.L.M. 204, 206 (1986) (Shultz's remarks, as quoted here, are sometimes referred to as 'the Shultz Doctrine'); Quigley, *supra* n. 13, at 558.

[68] Moir, *supra* n. 11, at 11; Myjer & White, *supra* n. 13, at 16–17; Wouters & Naert, *supra* n. 14, at 427.

[69] Military and Paramilitary Activities, *supra* n. 48, ¶¶ 172–81.

[70] *Id*. ¶¶ 172–81; Moir, *supra* n. 11, at 11; Myjer & White, *supra* n. 13, at 16–17; Wouters & Naert, *supra* n. 14, at 427.

[71] Cassese, *Terrorism*, *supra* n. 13, at 1000; Müllerson, *supra* n. 26, at 169.

[72] Ben Saul, Defining Terrorism in International Law 5 (Oxford University Press 2006); Rostow, *supra* n. 11, at 475, 480, 488–89; Jackson N. Maogoto, *America's War on Terror: Rattling International Law with Raw Power?*, 32(2) Newcastle Law Review 35 (2004); Quénivet, *supra* n. 13, at 562–64; Roberts, *supra* n. 25, at 248–51; Gazzini, *supra* n. 27, at 181.

As this is not particularly relevant in respect of ISIS as there is, if not universal, certainly absolutely overwhelming consensus within the international community that this is a terrorist organization – it suffices to refer to that often quoted statement 'one man's terrorist is another man's freedom fighter,'[73] in order to pinpoint the complexities surrounding the topic.[74]

The conflicts surrounding India / Kashmir and Israel / Palestine are just two examples of when states have come to very different conclusions, as to whether specific groups should be categorized as 'terrorist' or not,[75] leading to potentially explosive disputes when trying to apply apparent customary international law rules in response to 'terrorist' attacks.[76] The evolving attitude towards fighters of *Partiya Karkerên Kurdistan* (Kurdistan Workers' Party) [hereinafter *PKK*] before and after the problem of ISIS emerged is another example of the difficulties involved. Nevertheless, as there can be no doubt that ISIS is a terrorist organization, this problem can be put aside in the context discussed here.

There are three basic constellations, as far as terrorist attacks are concerned, to which states have responded by using force against another state. As the international community's reaction to these events may lead to differing conclusions on the precise content of customary international law, these constellations must be judged separately.

The three categories are as follows: *firstly*, a state resorted to the use of force against a state it accused of either having let its officials carry out a terrorist attack, or of having directly instructed a group of people to carry out the attack. This was, for example, the case when the USA attacked Libya in 1986 following a terrorist attack against a discotheque in Berlin frequented by US military personnel. The USA accused Libya of having ordered the attack.

Secondly, a state has responded to a terrorist attack by not only attacking the alleged terrorist bases, but by also launching military action against the state in which the terrorists were located when that state was accused of having tolerated the presence of the terrorists on its territory, *i.e.* 'harboured' them. This was the case in 2001 when the USA and the UK attacked Afghanistan and alleged that the Taliban government had harboured the Al-Qaeda terrorists.

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[73] A statement sometimes attributed to former US President Reagan. *See* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 Harv. Int'l L.J. 1, 12 (2002), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1883&context=faculty_scholarship> (accessed Mar. 8, 2016); Roberts, *supra* n. 25, at 249.

[74] Saul, *supra* n. 72, 121–22 (Saul also lists a few examples where public perception has rapidly evolved, especially in Western states (Nelson Mandela, Yasser Arafat, Gerry Adams); Slaughter & Burke-White, *supra* n. 73, at 9, 11–12.

[75] Saul, *supra* n. 72, at 2, 50, 188; Wedgwood, *supra* n. 24, at 561 (referring to Öcalan, the *PKK* leader).

[76] Quénivet, *supra* n. 13, at 564 (she provides further examples where states disagree on the classification of specific groups as 'terrorists').

And *thirdly*, as a result of a terrorist attack, a state has responded by directly targeting alleged terrorist bases in another state without that state being accused of any wrong-doing in that respect beyond not being capable of dealing with the terrorist threat. This is the relevant category as far as the use of force against Syrian territory is concerned. It has already been pointed out that Syria is not accused of being in any way complicit as far as ISIS terrorist activities are concerned.

This last constellation is therefore the one that needs to be examined in more detail. Has customary international law developed in such a way so as to permit an attack on terrorist bases in another state without that state's consent?

This constellation has in the past not been as common as many assume. Analyzing the 1998 US airstrikes on Afghanistan and Sudan, following the Al-Qaeda terrorist attacks on the US Embassies in Kenia and Tanzania, the Congressional Research Service [hereinafter CRS], for example, concluded 'the fact remains that this is the first time the U.S. has . . . (2) launched such a strike within a territory of a state which presumably is not conclusively, actively and directly to blame for the action triggering retaliation . . .'[77]

Nevertheless, there have been a number of such cases in state practice. Again, notably Israel has, beginning in the late 1940^{s} – early 1950^{s}, frequently relied on that justification, when launching attacks on neighbouring states. Israel repeatedly attacked alleged terrorist bases in Egypt, Jordan, Lebanon, and Syria. These attacks were, however, routinely condemned by the UN Security Councils as 'reprisals,' and therefore as contrary to international law, and as violations of the Armistice Agreements Israel had signed with its neighbours.

In 1985 a group called 'Force 17,' associated with the Palestine Liberation Organization [hereinafter PLO], killed three Israelis on their yacht off Cyprus. Israel claimed a right of self-defence, and responded by destroying the PLO-Headquarters in Tunis in an air raid.[78] This action was condemned by the Security Council in a resolution passed by an overwhelming vote, with only the USA abstaining.[79] The Security Council declared that it '*[c]ondemns vigorously* the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct . . .'[80]

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[77] Raphael F. Perl, *Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?* 3 (CRS Report 98-733 F, September 1, 1998), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB55/crs19980901.pdf> (accessed Mar. 8, 2016) [hereinafter Perl, *Terrorism: U.S. Response*].

[78] Ruys & Verhoeven, *supra* n. 17, at 292; Gray, *supra* n. 13, at 195–96.

[79] Moir, *supra* n. 11 at 27; Ruys & Verhoeven, *supra* n. 17, at 293; Murphy, *Terrorism*, *supra* n. 17, at 46–47; Byers, *Terrorism*, *supra* n. 49, at 407; Reisman, *International Legal Responses*, *supra* n. 25, a 38; Wouters & Naert, *supra* n. 14, at 419; Gazzini, *supra* n. 27, at 192 (n. 53); Gray, *supra* n. 13, at 196.

[80] S.C. Res. 573, ¶ 1, U.N. Doc. S/RES/573 (Oct. 4, 1985), at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/573(1985)> (accessed Mar. 8, 2016).

Although perhaps less relevant to the development of customary international law, given the two states' racist regimes, and the nature of the resistance against them, South African attacks on alleged ANC terrorist bases of the *Armée Nationale Congolaise* (National Congolese Army) [hereinafter *ANC*] in neighbouring Angola,[81] and Southern Rhodesia's incursions into Mozambique[82] fared little better. In a resolution passed in 1980, for example, the Security Council declared South Africa's attacks on *ANC* bases to be 'a flagrant violation of the sovereignty and the territorial integrity' of Angola.[83]

The US response to the embassy bombings in Africa in 1998 poses the most difficult questions, as far as the development of customary international law is concerned. In August 1998 the US embassies in Kenya and in Tanzania suffered simultaneous terrorist attacks; 235 people were killed, many more injured, and both embassies were severely damaged.

The USA blamed Al-Qaeda for the attack, and decided to launch cruise missile attacks on alleged terrorist bases in Afghanistan and on a chemical factory in Sudan, the latter allegedly a facility that was producing chemical weapons and was partly owned by Osama Bin Laden.[84] These actions were justified as measures taken in self-defence.[85] International reaction to these attacks was muted, especially as far as the attacks on Afghanistan were concerned.[86] A request by Sudan and others for the Security Council to deal with the matter was not heeded.[87]

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81 Ruys & Verhoeven, *supra* n. 17, at 292–93; Gray, *supra* n. 13, at 136–37.

82 U.N. Security Council Resolution 411 (1976) (the UN Security Council 'strongly condemned' Southern Rhodesia's 'recent acts of aggression against the People's Republic of Mozambique').

83 S.C. Res. 475, ¶ 1, U.N. Doc. S/RES/475 (Jun. 27, 1980), at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/475(1980)> (accessed Mar. 8, 2016). Many other resolutions on the incursions of South African troops into Angola were passed, such as Resolution 387 (1976), Resolution 428 (1978), and Resolutions 447 and 454 (both 1979). The UK Representative to the *International Conference for Immediate Independence of Namibia* declared on July 8, 1986: 'South Africa has also, in defiance of international law, continued its armed incursion into Namibia's neighbours, particularly Angola, thus imperilling their sovereignty and creating a grave danger to peace and security in the region.' A sentiment repeated in a statement issued by the Foreign Office on August 13, 1986, in response to further South African incursions into Angola. Both quoted in *United Kingdom Materials on International Law 1986*, 57 Brit. Y.B. Int'l L. 487, 621–22. *See also* Ruys & Verhoeven, *supra* n. 17, at 293.

84 Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, Am. J. Int'l L. 161, 161–63 (1999), available at <http://myweb.clemson.edu/~maloney/download/RussianNucs/journ-cut/seanmurphy.pdf> (accessed Mar. 8, 2016) [hereinafter Murphy, *Contemporary Practice*]; Reisman, *International Legal Responses*, *supra* n. 25, at 47–49; Lobel, *supra* n. 33, at 537.

85 Murphy, *Contemporary Practice*, *supra* n. 84, at 162–63; Reisman, *International Legal Responses*, *supra* n. 25, at 47–49; Gray, *supra* n. 13, at 197.

86 Murphy, *Contemporary Practice*, *supra* n. 84, at 164–65; Idem, *Terrorism*, *supra* n. 17, at 49–50; Wouters & Naert, *supra* n. 14, at 442–44; Gray, *supra* n. 13, at 197.

87 Murphy, *Contemporary Practice*, *supra* n. 84, at 165; Ruys & Verhoeven, *supra* n. 17, at 295; Gray, *supra* n. 13, at 197.

The muted reaction to the 1998 attacks is often argued to evidence the emergence of new rules in customary international law, allowing at least the use of force against terrorist bases located in other states.[88]

This, however, seems doubtful. As Gray has pointed out, states supportive of the US, were 'careful not to adopt the US doctrine of self-defence.'[89] Furthermore, especially the attacks on Sudan did come in for some heavy criticism.[90] It was expressly condemned by the Arab League, which, however, did not mention the attack on Afghanistan.[91] Pakistan deemed the attack on Afghanistan illegal,[92] and, as Pakistani airspace had been violated, claimed its sovereignty had not been respected.[93] Iran, Iraq, Libya, Yemen, and, notably, Russia also declared both the attacks on Afghanistan and Sudan to be illegal.[94]

Scepticism as to the legality of the US attacks was also expressed at the subsequent summit of the Non-Aligned Movement.[95] Having condemned the terrorist attacks in Kenya and Tanzania in the preceding paragraph, the assembled leaders went on to declare:

> The Heads of State or Government emphasised that international co-operation to combat terrorism should be conducted in conformity with the principles of the United Nations Charter, international law and relevant international conventions, and *expressed their opposition to selective and unilateral actions in violation of principles and purposes of the United Nations Charter*. In this context, they called upon the competent United Nations

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88 Murphy, *Terrorism*, *supra* n. 17, at 49–50; Stahn, *supra* n. 24, at 48; Johnstone, *supra* n. 33, at 372; Gazzini, *supra* n. 27, at 192–93.

89 Gray, *supra* n. 13, at 197; Wouters & Naert, *supra* n. 14, at 443 (quoting Gray); Ruys & Verhoeven, *supra* n. 17, at 295; Murphy, *Contemporary Practice*, *supra* n. 84, at 165 (he makes a similar point, when stating that 'other states' had 'expressed support . . . or at least understanding for the attacks'); Michael Byers, War Law, International Law and Armed Conflict 63 (Atlantic Books 2005) [hereinafter Byers, War Law] (he makes the point that, as far as Germany, France, and the UK were concerned, US President Clinton made sure their support was forthcoming by telephoning the respective leaders in advance of the attacks and ensuring their support, without them being able to consult their legal advisors; such a chain of events would, of course, undermine the attempt to attribute legal significance to those states' statements, as far as the 1998 attacks are concerned).

90 Quigley, *supra* n. 13, at 560–61; Lobel, *supra* n. 33, at 544–47; Wouters & Naert, *supra* n. 14, at 443–44.

91 Murphy, *Contemporary Practice*, *supra* n. 84, at 165; Ruys & Verhoeven, *supra* n. 17, at 295; Reisman, *International Legal Responses*, *supra* n. 25, at 49.

92 Moir, *supra* n. 11, at 30.

93 Byers, War Law, *supra* n. 89, at 63.

94 Murphy, *Contemporary Practice*, *supra* n. 84, at 164; Moir, *supra* n. 11, at 30; Ruys & Verhoeven, *supra* n. 17, at 295; Byers, War Law, *supra* n. 89, at 63; Reisman, *International Legal Responses*, *supra* n. 25, at 49; Wouters & Naert, *supra* n. 14, at 443–44; Gray, *supra* n. 13, at 197; Lobel, *supra* n. 33, at 538 (Lobel adds China, and UN Secretary General Kofi Annan to the critics / opponents of the 1998 airstrikes).

95 Byers, *Terrorism*, *supra* n. 49, at 407; Lobel, *supra* n. 34, at 538; Gray, *supra* n. 13, at 197.

> Organs to promote ways and means to strengthen co-operation, including the international legal regime for combating international terrorism.[96] (emphasis added).

Lastly, there seem to have been some doubts within the US Government, as far as the legality of the 1998 airstrikes under international law are concerned. In two Reports for Congress, from 1998 and 2001, the CRS analyzed the 'arguments against' / the 'risks' of using force against terrorists in other states. In its Report of September 1, 1998, dealing explicitly with the 1998 airstrikes, the CRS stated that '[s]uch a policy: (1) undermines the rule of law, violating the sovereignty of nations with whom we are not at war . . .'[97]

This concern was reiterated in its Report of September 13, 2001, where one of the 'risks' of the use of 'military force' against terrorists listed was the '(6) perception that U.S. ignores rules of international law.'[98]

Based on these reactions, it is not possible to assert that the 1998 US response to the terrorist attacks created customary international law, allowing the targeting of terrorist bases in other states. Not only was sufficient affirmation of the legality of the action lacking, but those states analyzing the legality of the US response tended to raise doubts as to their compatibility with international law.[99] When it is considered that both Afghanistan and Sudan had, by 1998, become something akin to pariah states, this becomes even more remarkable.[100]

The conclusion must therefore be that prior to the attack on Afghanistan in 2001 no rule in customary international law had developed allowing states to respond to terrorist attacks by attacking terrorist bases in other states, thereby violating their sovereignty.[101]

Many have, however, argued that Operation *Enduring Freedom* against Afghanistan in 2001, led to changes as far as customary international law is concerned. As has already been pointed out the attack on Afghanistan in 2001 is only of limited relevance as far as Syria is concerned. Even if Afghanistan had developed into a precedent for a new rule in customary international law, its application to Syria would be doubtful. Afghanistan was accused of 'harbouring' Al-Qaeda, Syria is accused of no such thing.

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96 *Final Document of the 12th Summit of the Non-Aligned Movement (Durban, South Africa, 2–3 September 1998)* ¶ 159, <http://www.nam.gov.za/xiisummit/chap1.htm> (accessed Mar. 8, 2016).

97 Perl, *Terrorism: U.S. Response*, *supra* n. 77, at 4.

98 Raphael F. Perl, *Terrorism, the Future, and U.S. Foreign Policy* 8 (CRS Issue Brief IB95112, September 13, 2001), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB55/crs20010913.pdf> (accessed Mar. 8, 2016).

99 Lobel, *supra* n. 33, at 538; Gray, *supra* n. 13, at 197–98.

100 Lobel, *supra* n. 33, at 556.

101 Cassese, *Terrorism*, *supra* n. 13, at 996; Lobel, *supra* n. 33, at 557 (he argues that the US, in 1998–99, would actually have opposed the creation of any such rule in customary international law out of fear of other states exploiting it).

Nevertheless, it is instructive to consider how the international community has subsequently responded to the use of force against terrorist targets in other states. Although there have been numerous terrorist attacks since 09/11, which have been condemned by the Security Council, the Council has avoided referring to the right of self-defence in any of its resolutions.[102] This is especially significant as many of these subsequent resolutions were passed in reaction to attacks attributed to Al-Qaeda (such as the Madrid bombings of 2004, or the London bombings of 2005).[103] Resolutions 1368 and 1373 therefore obviously did not set a precedent, as far as the reaction of the Security Council to terrorist attacks is concerned. As has already been pointed out, even these two resolutions, moreover, avoid any explicit reference to an 'armed attack' against the USA having actually taken place.[104]

Furthermore, the Security Council, in Resolution 1456 (2003) – which deals with the struggle against terrorism in more general terms – refrained from mentioning the right of self-defence, or the use of force.[105] The Council limited itself to the statement that it was 'reaffirming' that 'any acts of terrorism are criminal and unjustifiable'[106] and emphasized:

> States must ensure that any measure taken to combat terrorism comply [*sic*] with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law; . . .[107]

The lack of reference to the use of force in response to terrorism is also noticeable in *The United Nations Global Counter-Terrorism Strategy*, passed by the General Assembly in 2006,[108] and in the Inter-American Convention against Terrorism, adopted by the OAS in 2002.[109]

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102 Ruys & Verhoeven, *supra* n. 17, at 312; Gray, *supra* n. 13, at 227–28.

103 *See, e.g.,* U.N. Security Council Resolution 1440 (2002) in response to the taking of hostages in a Moscow theatre; Resolution 1450 (2003) – bomb attack in Kenya; Resolution 1465 (2003) – bomb attack in Colombia; Resolution 1516 (2003) – bomb attacks in Istanbul; Resolution 1530 (2004) – bomb attacks in Madrid; Resolution 1611 (2005) – bomb attacks in London.

104 Ruys & Verhoeven, *supra* n. 17, at 312.

105 Gray, *supra* n. 13, at 228.

106 S.C. Res. 1456, Preamble, para. 4, U.N. Doc. S/RES/1456 (Jan. 20, 2003), at <http://www.refworld.org/docid/3f45dbdb0.html> (accessed Mar. 8, 2016).

107 *Id.* ¶ 6.

108 *The United Nations Global Counter-Terrorism Strategy*, G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (2006), at <http://www.refworld.org/docid/468364e72.html> (accessed Mar. 8, 2016) (passed without a vote); *see also* Gray, *supra* n. 13, at 228.

109 Inter-American Convention against Terrorism, Jun. 3, 2002, S. Treaty Doc. No. 107-18, OAS Treaty A-66 (2002).

State practice, since the launch of Operation *Enduring Freedom*, does also not confirm the existence of newly-created customary international law in favor of the use of force in response to terrorism.

Russia / Chechen terrorists in Georgia (2002). Notably the USA has taken the view that other states should not have the right to resort to the use of force against terrorist bases abroad. When Russia, in August / September 2002, decided to launch airstrikes against Chechen rebel bases in Georgia, and informed the Security Council it would take 'necessary measures to defend itself,' it came in for harsh criticism from the USA.[110]

Significantly, the USA agreed with the Russian view that the Chechen rebels were terrorists,[111] *and* acknowledged that Georgia had not dealt with the threat from these terrorists on its territory, despite undisputed repeated Russian warnings.[112] In reaction to the Russian airstrikes on Chechen guerrilla bases in Georgia, the USA, nevertheless, declared it 'deplored the violation of Georgia's sovereignty,'[113] and later informed the Russian Government it took 'strong exception to the possibility of Russian military intervention against Chechen rebels in Georgia' in the future.[114]

Israel / Palestinian terrorists in Syria (2003). In October 2003, following a terrorist attack on a restaurant in Haifa, Israel launched an air raid against Syria on the grounds that it was targeting Islamic Jihad bases there.[115] This military action met with strong international condemnation.[116] The UN Secretary General declared that he

> strongly deplores the Israeli air strike on Syrian territory earlier today. He is especially concerned that this further escalation of an already tense and difficult situation has the potential to broaden the scope of current conflicts in the Middle East, further threatening regional peace and security. The

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110 Gray, *supra* n. 13, at 230–31.

111 Anatol Lieven, *The Secret Policemen's Ball: The United States, Russia and the International Order after 11 September*, 78(2) International Affairs 252 (2002) doi:10.1111/1468-2346.00249. This is also confirmed by the former US Secretary of State, Condoleezza Rice, in her memoirs (No Higher Honour A Memoir of My Years in Washington 99 (Simon & Schuster 2011)).

112 *Correspondent Report*, Voice of America (Aug. 28, 2002), <http://www.globalsecurity.org/wmd/library/news/russia/2002/russia-020828-335d9eb7.htm> (accessed Mar. 8, 2016); Nick P. Walsh, *British Anti-Terror Units to Train Georgian Army: MoD and Secret Service Help to Fight Rebels Linked to al-Qaida*, The Guardian (Nov. 21, 2002), <http://www.theguardian.com/world/2002/nov/21/alqaida.terrorism> (accessed Mar. 8, 2016); Ian Traynor, *Kidnap Suspects Abound in Notorious Pankisi Gorge*, The Guardian (Nov. 8, 2002), <http://www.theguardian.com/world/2002/nov/08/uk.iantraynor> (accessed Mar. 8, 2016); Gray, *supra* n. 13, at 230–31.

113 Nick P. Walsh, *US Rebukes Russia for Pankisi Raid*, The Guardian (Aug. 26, 2002), <http://www.theguardian.com/world/2002/aug/26/chechnya.nickpatonwalsh> (accessed Mar. 8, 2016).

114 *US Warns Russia over Georgia Strike*, BBC News (Sep. 13, 2002), <http://news.bbc.co.uk/1/hi/world/europe/2254959.stm> (accessed Mar. 8, 2016).

115 Gray, *supra* n. 13, at 236.

116 *Id*. at 236–37.

> Secretary-General urges all concerned to respect the rules of international law and to exercise restraint.[117]

Spain, France, Germany, and China explicitly declared the Israeli action to be in violation of international law, as did Mexico and Jordan.[118] The UK referred to the actions as 'unacceptable,' while the US limited itself to 'calling for restraint.'[119]

Israel / Hezbollah in Lebanon (2006). Following a cross-border attack on Israel in July 2006, carried out by Hezbollah, which resulted in the death of eight Israeli soldiers, and the abduction of another two, Israel, in response, notified the Security Council of its intentions to resort to its rights under Art. 51 if necessary. This was followed by Israel's launch of a massive assault on Lebanon where Hezbollah operates.[120]

The international community was divided in its response to the Israeli actions. While many – though by no means all – Western states, at least initially, showed some sympathy for Israel's reaction,[121] Arab and other predominantly Muslim states, as well as China and Venezuela, condemned the attack on Lebanon as a violation of international law.[122] The Non-Aligned Movement, representing 118 states, declared:

> The Heads of State or Government *expressed* strong condemnation of the relentless Israeli aggression launched against Lebanon and the serious

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117 *Secretary-General Strongly Deplores Israeli Air Strike on Syrian Territory*, United Nations Information Service (Oct. 6, 2003), <http://www.unis.unvienna.org/unis/pressrels/2003/sgsm8918.html> (accessed Mar. 8, 2016).

118 Gray, *supra* n. 13, at 236–37.

119 *Id*. at 237.

120 *Id*. at 237–44.

121 *Id*. at 238. For US and German reactions, *see, e.g., In quotes: Lebanon Reaction*, BBC News (Jul. 13, 2006), <http://news.bbc.co.uk/1/hi/world/middle_east/5175886.stm (accessed Mar. 8, 2016); for British reaction, *see Britons Warned on Lebanon Crisis*, BBC News, <http://news.bbc.co.uk/1/hi/uk_politics/5180116.stm> (accessed Mar. 8, 2016). There were, however, some Western states that immediately condemned the Israeli attacks as contrary to international law, such as Spain (*El embajador Israeli lamenta la 'completa falta de comprension' de Espana en el conflicto con Libano*, Informativos Telecinco.com (Jul. 14, 2006); *see also* <http://www.gettyimages.co.uk/detail/news-photo/spanish-prime-minister-jose-luis-rodriguez-zapatero-briefly-news-photo/71488269> (accessed Mar. 8, 2016)), and Norway (Nina Berglund, *Norway Condemns Israeli Attacks on Lebanon*, Aftenposten (Jul. 13, 2006) (*Aftenposten* has since stopped its English-language service, but *see Norge fordømmer Israels angrep*, VG Nyheter (Jul. 30, 2006), <http://www.vg.no/nyheter/utenriks/stoltenberg-regjeringen/norge-fordoemmer-israels-angrep/a/124908/> (accessed Mar. 8, 2016))). *See also Middle East Crisis: Diplomacy: Old Divisions Resurface*, The Guardian, Jul. 18, 2006, at 5.

122 Gray, *supra* n. 13, at 238. Venezuela withdrew its ambassador in protest (*see Venezuela Recalls Ambassador From Israel*, The Washington Post (Aug. 3, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301386.html> (accessed Mar. 8, 2016)), as far as Islamic states are concerned (*see* Final Communiqué of the Annual Coordination Meeting of Ministers of Foreign Affairs of Member States of the Organization of the Islamic Conference ¶ 32, at <http://www.oic-oci.org/english/conf/fm/acm/FC-ACM-06-FINAL.pdf> (accessed Mar. 8, 2016)).

> violations by Israel of the Lebanese territorial integrity and sovereignty, and in this regard *charged* Israel with full responsibility for the consequences of its aggression.[123]

As the Israeli attack continued, moreover, even many of Israel's erstwhile supporters began to view the use of force by Israel as 'disproportionate.'[124]

Ethiopia / Somalia (2006–07). Ethiopia belatedly attempted to justify its 2006–07 intervention in Somalia's civil war against the Union of Islamic Courts [hereinafter UIC] as self-defence, based on alleged UIC plans to launch 'terrorist attacks' against Ethiopia.[125] However, there were so many factors that led to Ethiopia's decision to intervene, it is difficult to assert any of the facts.[126] For example, Ethiopia's foe, Eritrea, supported the UIC, while Ethiopia supported the virtually powerless Transitional Federal Government.[127] It also remains unclear, whether the UIC could reasonably be classified as a terrorist organization, even though the USA tended to claim that it was.[128] Certainly, the whole episode received so little international attention and attracted so little comment, that it cannot serve as a precedent in any way.[129]

Turkey / Kurdish terrorists (PKK) in Iraq (2007–08). In response to repeated terrorist attacks, carried out by *PKK* terrorists, often based in the Kurdish-controlled areas of Northern Iraq, the Turkish Parliament approved a measure allowing the Turkish Government to deploy forces to Iraq without that state's consent.[130] It was not in dispute that Iraq, at the time, was incapable of dealing with the situation in northern Iraq. In late 2007 – early 2008 Turkey mounted some air raids on Iraq, and on occasion Turkish ground troops crossed the border into Iraq.[131] Turkey did not report these

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123 *Final Document of the 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement (Havana, Cuba, 11–16 September 2006)* ¶ 142, <http://namiran.org/Files/14thSummit/Final+Document+(NAM+2006-Doc.1-Rev.3).pdf> (accessed Mar. 8, 2016); Gray, *supra* n. 13, at 243.

124 *See, e.g.*, European Union statement and Russian Government statement (*In quotes: Lebanon Reaction*, *supra* n. 121); *see also* Gray, n. 13, 238–39, 241.

125 Despite apparently having sent troops to Somalia as early as summer 2006, the Ethiopian Government denied having any soldiers there. Only in December 2006 did the Ethiopian Government acknowledge the fact, and then proceeded to claim self-defence, without, however, ever reporting its actions to the Security Council, as it would have been obliged to do under Art. 51. *See* Gray, *supra* n. 13, at 244, 248, 250.

126 *Id*. at 244–52.

127 *Id*. at 246.

128 *Id*. at 249, 251.

129 *Id*. at 249–51.

130 *Id*. at 143; Tom Ruys, *Quo Vadis Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq*, 9 Melb. J. Int'l L. 334 (2008), available at <http://documents.mx/documents/quo-vadis-jus-ad-bellum.html> (accessed Mar. 8, 2016).

131 Gray, *supra* n. 13, at 142–43.

actions to the Security Council, and did not offer any legal justification for them.[132] It was perhaps for that reason that international reaction was more muted.

However, as far as there was international reaction, it was – in the main – not positive. The EU warned Turkey against using force on Iraqi territory.[133] In a statement in reaction to the Turkish Parliament's authorization to do so, the EU emphasized: 'The EU and Turkey have regularly reiterated that they remain committed to the independence, sovereignty, unity and territorial integrity of Iraq.'[134]

Even the USA initially opposed Turkish military intervention,[135] although it later became increasingly ambivalent.[136]

The Western European Union, too, sought refuge in ambiguities. While reiterating Turkey's respect for Iraq's sovereignty, and emphasizing Turkey's right to 'protect its citizens' against terrorist acts carried out by the *PKK*, it also called on Turkey to 'refrain from any disproportionate military action in its fight against PKK terrorism.'[137]

Despite international reaction to Turkish incursions into Iraq in 2007 thus being less adverse than in previous cases, the negative attitude expressed by many states, and the lack of any legal reasoning seem to confirm that even those states most closely associated with the 'war on terror' do not find it possible to claim a right to use force against terrorists in other states based on customary international law. The fact that Turkey itself refrained from providing any legal justification for its actions, further undermines the claim that a new rule of customary international law has been created.

More recent events. In March 2008 Colombian troops attacked alleged *FARC* camps[138] within Ecuador. Colombia claimed to be acting in self-defence.[139] Nevertheless, the Permanent Council of the OAS, on March 5, 2008, passed a resolution condemning

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[132] Gray, *supra* n. 13, at 143.

[133] *EU Urges Turkey Not to Attack Kurdish Rebels in Iraq*, DW (Oct. 17, 2007), <http://www.dw-world.de/dw/article/0,,2828232,00.html> (accessed Mar. 8, 2016).

[134] Quoted in *id.*

[135] Simon Tisdall, *US Struggles to Avert Turkish Intervention in Northern Iraq*, The Guardian (Mar. 23, 2007), <http://www.theguardian.com/world/2007/mar/22/turkey.kurds> (accessed Mar. 8, 2016); Gray, *supra* n. 13, at 143.

[136] *President Bush and Prime Minister Tayyip Erdogan Discuss Global War on Terror*, The White House (Nov. 5, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071105-3.html> (accessed Mar. 8, 2016).

[137] *Terrorist Activities on the Turkey/Iraq Border: Report Submitted on Behalf of the Political Committee by Robert Walter, Rapporteur (United Kingdom, Federated Group)*, Assembly of Western European Union, 53rd Sess., Doc. A/1994 (2007), at <http://arsiv.setav.org/ups/dosya/17845.pdf> (accessed Mar. 8, 2016). The Report in the following year (*Terrorist Activities on the Turkey/Iraq Border – Part II: Report Submitted on Behalf of the Political Committee by Robert Walter, Rapporteur (United Kingdom, Federated Group)*, Assembly of Western European Union, 55th Sess., Doc. A/2017 (2008), at <http://arsiv.setav.org/ups/dosya/17846.pdf> (accessed Mar. 8, 2016)) went slightly further in that it, for the first time, 'confirmed Turkey's right of self-defence,' but then went on to again call on Turkey 'to refrain from disproportionate military action.'

[138] '*FARC*' stands for '*Fuerzas Armadas Revolucionarias de Colombia*' ('Revolutionary Armed Forces of Colombia'). This group is considered to be a terrorist organization by many states.

[139] *Ecuador Pulls Diplomat from Bogota*, CNN (Mar. 2, 2008), <http://edition.cnn.com/2008/WORLD/americas/03/02/chavez.colombia/index.html?iref=allsearch> (accessed Mar. 8, 2016); Ruys, *supra* n. 130, at 357–58.

the Colombian incursion as 'a violation of the sovereignty and the territorial integrity of Ecuador and of principles of international law.'[140]

In a repetition of events described above, Turkey, in 2011, again entered Iraqi territory in order to combat *PKK* terrorists. Turkey once more refrained from offering a legal justification, or informing the Security Council and international reaction was again muted. Furthermore, the true attitude of the Iraqi Central Government and the Kurdish regional government to the Turkish actions in northern Iraq remained ambiguous.[141]

In October 2011, Kenyan troops entered Somali territory to combat Al-Shabaab terrorists, blamed for abductions of foreign tourists in Kenya. Kenya claimed to have received the prior consent of the officially recognized Somali Government.[142]

Regarding the recent and current 'targeted killings' of terrorists in Yemen and in Pakistan, carried out by the USA, it is generally assumed that both Yemen[143] and Pakistan[144] have, certainly in the past, given their consent to these actions.

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[140] Permanent Council of the Organization of American States, OAS Doc. CP/RES.930 (1632/08) (March 5, 2008), at <http://www.oas.org/council/resolutions/res930.asp> (accessed Mar. 8, 2016); Ruys, *supra* n. 130, at 358.

[141] Sebnem Arsu, *Turkey Vows to Keep up Attacks on Militants in Iraqi Kurdistan*, International Herald Tribune, Aug. 24, 2011, at 3; Justin Vela, *Turkey Launches Raid into Iraq after an Attack by Kurdish Rebels*, The Independent (Oct. 20, 2011), <http://www.independent.co.uk/news/world/middle-east/turkey-launches-raid-into-iraq-after-attack-by-kurdish-rebels-2373151.html> (accessed Mar. 8, 2016); *Iraqi Politicians Condemn Turkish Bombing of Iraqi Kurds*, Radio Free Europe (Aug. 20, 2011), <http://www.rferl.org/articleprintview/24302813.html> (accessed Mar. 8, 2016); Karzan Kanabi, *Turkey-PKK Clashes May Reignite Civil War, Says Kurdish Presidency*, AK News (Aug. 18, 2011); Sebnem Arsu, *Turkey Vows to Pursue Kurdish Attackers*, International Herald Tribune, Oct. 20, 2011, at 4. As far as the Iraqi / Iraqi Kurdish attitude is concerned, many reports stress the official protests lodged by both the national and the regional governments in Iraq against the Turkish incursions. On the other hand, the *International Herald Tribune* reported that the Iraqi Government was offering the Turkish Government a joint offensive against the *PKK* in northern Iraq, and many reports point out that the Kurdish regional government was attempting to 'sit on the fence,' as far as Turkey's actions in Iraq are concerned.

[142] *Kenianische Armee rückt in Somalia vor*, Frankfurter Allgemeine Zeitung, Oct. 19, 2011, at 6; Daniel Howden, *Kenya Plans Fresh Assault in Somalia after Hostage Dies*, The Independent (Oct. 20, 2011), at <http://www.independent.co.uk/news/world/africa/kenya-plans-fresh-assault-in-somalia-after-hostage-dies-2372977.html> (accessed Mar. 8, 2016).

[143] For example, on November 29, 2010, the *International Herald Tribune* reported, referring to a cable from the Ambassador at the US Embassy in Yemen to Washington D.C. dated January 4, 2010 (leaked via Wikileaks), the following on a conversation between Yemen President Ali Abdullah Saleh and US Gen. David H. Petraeus (Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. Times (Nov. 28, 2011), <http://www.nytimes.com/2010/11/29/world/29cables.html?pagewanted=all&_r=0> (accessed Mar. 8, 2016)): 'For instance, it has been previously reported that the Yemeni government has sought to cover up the American role in missile strikes against the local branch of Al Qaeda. But a cable's fly-on-the-wall account of a January meeting between the Yemeni president, Ali Abdullah Saleh, and Gen. David H. Petraeus, then the American commander in the Middle East, is breathtaking.' *See also General Petraeus' Meeting with Saleh on Security Assistance, AQAP Strikes* ¶ 5, at <https://search.wikileaks.org/plusd/cables/10SANAA4_a.html> (accessed Mar. 8, 2016): '"We'll continue saying the bombs are ours, not yours," [President] Saleh [of Yemen] said, prompting Deputy Prime Minister Alimi to joke that he had just "lied" by telling Parliament that the bombs in Arhab, Abyan, and Shebwa were American-made but deployed by the ROYG [Republic of Yemen Government];' Robert Booth & Ian Black, *WikiLeaks Cables: Yemen Offered US 'Open Door' to Attack al-Qaida on Its Soil*, The Guardian (Dec. 3, 2010), <http://www.guardian.co.uk/world/2010/dec/03/wikileaks-yemen-us-attack-al-qaida> (accessed Mar. 8, 2016).

[144] Pakistan has officially condemned the American strikes on Pakistani territory. It is, however, widely assumed that Pakistan has privately granted the US permission to carry out such strikes (*see, e.g.,* Greg

That there is no new rule in customary international law, permitting the use of force against terrorist targets in other states without consent, is also implied by Iraq's reaction to Turkey's incursions in December 2015. Despite there being reports that Turkey had sent troop reinforcements to Iraq in order to help reconquer Mossul from ISIS, the Iraqi Government condemned Turkey's actions as a violation of international law bar its consent and demanded Turkey's immediate withdrawal. Turkey denied sending troops and claimed it was only replacing soldiers deployed there in agreement with the Iraqi Government.[145]

It must therefore be concluded that customary international law does not (yet) allow the use of force against terrorist bases in other states without those states' consent. Germany can therefore not claim its actions to be justified under customary international law.

5. Conclusion

Germany's planned participation in the Western-led bombing campaign against ISIS targets in Syria is currently unlawful. It has been shown that Security Council Resolution 2249 and Art. 42(7) TEU do not authorize the use of force beyond what is already justified under Art. 51 of the UN Charter.

While the ISIS activities in Iraq and the terrorist attacks on France certainly meet the gravity criterion of the 'armed attack' requirement in Art. 51 it was argued that the more convincing view is that any such attack must be imputable to the state bombed. There can be no doubt that ISIS activities are not imputable to Syria as the Syrian Government is itself involved in a military campaign against the terrorist organization. At most Syria can be accused of currently being incapable of dealing with the problem. This, however, is not sufficient to invoke Art. 51. As neither Iraq nor France can claim to be acting in self-defence against Syria, Germany can consequently not be acting on the basis of collective self-defence.

It was then discussed whether customary international law had developed in such a way to allow the use of force in such cases. Based on an analysis of state practice it was argued that state's have, at best, taken an inconsistent, if not overwhelmingly negative attitude to other states' actions in that respect. There is therefore insufficient evidence to claim that customary international law has evolved in a way that it permits such military action.

Bruno, *U.S. Drone Activities in Pakistan*, Council on Foreign Relations (Jul. 19, 2010), <http://www.cfr.org/publication/22659/us_drone_activities_in_pakistan.html#p6> (accessed Mar. 8, 2016) (alleges a possible secret agreement in 2008 between the two states). Furthermore, a UN report has called upon states such as Pakistan to 'publicly disclose the scope and limits of any permission granted for drone strikes on their territories' (Charlie Savage, *U.N. Report Highly Critical of U.S. Drone Attacks*, N.Y. Times, Jun. 3, 2010, at A10, available at <http://www.nytimes.com/2010/06/03/world/03drones.html> (accessed Mar. 8, 2016)).

[145] *Streit um türkische Truppen im Irak*, DW (Dec. 6, 2015), <http://www.dw.com/de/streit-um-t%C3%BCrkische-truppen-im-irak/a-18897402> (accessed Mar. 8, 2016).

The possibility that new norms may be emerging cannot be ruled out. However, given states' inclination to applaud allies' actions while deploring other states' use of force in similar circumstances, it seems doubtful whether that will happen any time soon.

Based on the overwhelmingly negative outcome of the Western states' more recent military activities in the Middle East that is probably for the best. It remains to be seen whether the effort in Syria will be more successful. Any scepticism in that respect is certainly not groundless.

References

Byers, Michael. *Terrorism, the Use of Force and International Law after 11 September*, 51 Int'l & Comp. L.Q. 401, 407–08 (2002), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5575&context=faculty_scholarship> (accessed Mar. 7, 2016). doi:10.1093/iclq/51.2.401

Byers, Michael. War Law, International Law and Armed Conflict 63 (Atlantic Books 2005).

Cassese, Antonio. *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 Eur. J. Int'l L. 993, 996–97, 1000 (2001), available at <http://www.ejil.org/pdfs/12/5/1558.pdf> (accessed Mar. 7, 2016). doi:10.1093/ejil/12.5.993

Cassese, Antonio. *The International Community's 'Legal' Response to Terrorism*, 38 Int'l & Comp. L.Q. 589, 591 (1989). doi:10.1093/iclqaj/38.3.589

Dinstein, Yoram. *Terrorism and Afghanistan*, in The War in Afghanistan: A Legal Analysis (= 85 International Law Studies) 43, 45–46, 49 (Michael N. Schmitt, ed.) (Naval War College 2009), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1117&context=ils> (accessed Mar. 7, 2016).

Dinstein, Yoram. War, Aggression and Self-Defence 245–49 (4th ed., Cambridge University Press 2005). doi:10.1017/CBO9780511841019

Falk, Richard A. *The Beirut Raid and the International Law of Retaliation*, 63 Am. J. Int'l L. 415, 438 (1969).

Franck, Thomas M. *Terrorism and the Right of Self-Defense*, 95 Am. J. Int'l L. 839, 840 (2001).

Gazzini, Tarcisio. The Changing Rules on the Use of Force in International Law 139, 181, 183–84, 192 (n. 53), 192–93 (Manchester University Press 2005).

Gray, Christine. International Law and the Use of Force 136–37, 142–43, 195–200, 202, 206–07, 227–28, 230–31, 236–52 (3rd ed., Oxford University Press).

Greenwood, Christopher. *International Law and the 'War against Terrorism,'* 78(2) International Affairs 307 (2002). doi:10.1111/1468-2346.00252

Guruli, Erin L. *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 Willamette J. Int'l L. & Disp. Res. 100, 108–09 (2004).

Heindel, Richard H., et al. *The North Atlantic Treaty in the United States Senate*, 43 Am. J. Int'l L. 633, 645 (1949). doi:10.2307/2193257

Johnstone, Ian. *The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counterterrorism*, 43 Colum. J. Transnat'l L. 337, 367–70, 372, 374–75 (2005).

Kammerhofer, Jörg. *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 Leiden J. Int'l L. 89, 91, 96, 99–100, 105, 107, 109–10, 112–13 (2007), available at <http://papers.ssrn.com/abstract_id=1551758> (accessed Mar. 7, 2016).

Lieven, Anatol. *The Secret Policemen's Ball: The United States, Russia and the International Order after 11 September*, 78(2) International Affairs 252 (2002). doi:10.1111/1468-2346.00249

Lobel, Jules. *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 Yale J. Int'l L. 537, 537–38, 541–47, 556–57 (1999).

Maogoto, Jackson N. *America's War on Terror: Rattling International Law with Raw Power?*, 32(2) Newcastle Law Review 35 (2004).

Moir, Lindsay. Reappraising the Resort to Force: International Law, *Jus ad Bellum* and the War on Terror (= 27 Studies in International Law) 11, 24–25, 27, 30, 47–48, 52–54 (Hart Pub. 2010).

Müllerson, Rein. *Jus ad Bellum: Plus ça change (le monde), plus c'est la même chose (le droit)?*, 7(2) Journal of Conflict & Security Law 169, 171–79, 183–85 (2002). doi:10.1093/jcsl/7.2.149

Murphy, John F. *Afghanistan: Hard Choices and the Future of International Law*, in The War in Afghanistan: A Legal Analysis (= 85 International Law Studies) 79, 98–99 (Michael N. Schmitt, ed.) (Naval War College 2009), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1119&context=ils> (accessed Mar. 7, 2016).

Murphy, Sean D. *Contemporary Practice of the United States Relating to International Law*, Am. J. Int'l L. 161, 161–65 (1999), available at <http://myweb.clemson.edu/~maloney/download/RussianNucs/journ-cut/seanmurphy.pdf> (accessed Mar. 8, 2016).

Myjer, Eric P.J., & White, Nigel D. *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. Conflict & Sec. L. 5, 7, 9–13, 16–17 (2002).

Nabati, Mikael. *International Law at a Crossroads: Self-Defense, Global Terrorism and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 Transnat'l L. & Contemp. Probs. 771, 780 (2003).

Paust, Jordan J. *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L. J., 533, 534–35 (2002), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1518&context=cilj> (accessed Mar. 7, 2016).

Perl, Raphael F. *Terrorism, the Future, and U.S. Foreign Policy* 8 (CRS Issue Brief IB95112, September 13, 2001), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB55/crs20010913.pdf> (accessed Mar. 8, 2016).

Perl, Raphael F. *Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?* 3–4 (CRS Report 98-733 F, September 1, 1998), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB55/crs19980901.pdf> (accessed Mar. 8, 2016).

Quigley, John. *The Afghanistan War and Self-Defense*, 37 Val. U. L. Rev. 541, 549, 553–54, 558, 560–61 (2003), available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1287&context=vulr> (accessed Mar. 7, 2016).

Ratner, Steven R. *Jus ad Bellum and Jus in Bello after September 11*, 96 Am. J. Int'l L. 905, 917–18 (2002), available at <http://users.polisci.wisc.edu/kinsella/ratner.pdf> (accessed Mar. 7, 2016).

Reisman, W. Michael. *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan*, in The War in Afghanistan: A Legal Analysis (= 85 International Law Studies) 59, 64–65, 70–71 (Michael N. Schmitt, ed.) (Naval War College 2009), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1118&context=ils> (accessed Mar. 7, 2016).

Reisman, W. Michael. *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 38–39, 42–49 (1999), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2029&context=fss_papers> (accessed Mar. 7, 2016).

Roberts, Guy B. *Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 Case W. Res. J. Int'l L., 243, 248–251, 263, 268–69 (1987), available at <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1726&context=jil> (accessed Mar. 7, 2016).

Rostow, Nicholas. *Before and After: The Changed UN Response to Terrorism since September 11th*, 35 Cornell J. Int'l L. 475, 480–81, 488–89 (2002), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1512&context=cilj> (accessed Mar. 7, 2016).

Ruys, Tom, & Verhoeven, Sten. *Attacks by Private Actors and the Right of Self-Defence*, 10(3) Journal of Conflict & Security Law 290–93, 295, 305, 311–12 (2005). doi:10.1093/jcsl/kri016

Ruys, Tom. *Quo Vadis Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq*, 9 Melb. J. Int'l L. 334, 358 (2008), available at <http://documents.mx/documents/quo-vadis-jus-ad-bellum.html> (accessed Mar. 8, 2016).

Saul, Ben. Defining Terrorism in International Law 2, 5, 50, 121–22, 188 (Oxford University Press 2006).

Shah, Niaz A. *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism*, 12(1) Journal of Conflict & Security Law, 104, 104–111 (2007). doi:10.1093/jcsl/krm006

Shultz, George. *Low-Intensity Warfare: The Challenge of Ambiguity. Address before the Low-Intensity Warfare Conference, National Defense University, Washington D.C. (Jan. 15, 1986)*, reprinted in 25 I.L.M. 204, 206 (1986).

Slaughter, Anne-Marie, & Burke-White, William. *An International Constitutional Moment*, 43 Harv. Int'l L.J. 1, 9, 11–12 (2002), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1883&context=faculty_scholarship> (accessed Mar. 8, 2016).

Stahn, Carsten. *Terrorist Acts as 'Armed Attack:' The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 Fletcher F. World Aff. 35, 35–36, 41, 43,

48 (2003), available at <http://dl.tufts.edu/file_assets/tufts:UP149.001.00054.00005> (accessed Mar. 7, 2016).

Stromseth, Jane E. *New Paradigms for the Jus ad Bellum?*, 38 Geo. Wash. Int'l L. Rev. 561, 566 (2006).

Travalio, Gregory M. *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 156–57, 159, 173–74, 179–80 (2000).

Wedgwood, Ruth. *Responding to Terrorism: The Strikes Against bin Laden*, 24 Yale J. Int'l L. 559, 561, 564 (1999), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3277&context=fss_papers> (accessed Mar. 7, 2016).

Wouters, Jan, & Naert, Frederik. *Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism*, in Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue 411, 419, 427, 430–31, 442–44, 446 (Cyrille Fijnaut et al., eds.) (Martinus Nijhoff 2004).

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HOW DOES THE INTERNATIONAL COMMUNITY RECONCILE THE PRINCIPLES OF TERRITORIAL INTEGRITY AND SELF-DETERMINATION? THE CASE OF CRIMEA

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This paper explores the ambiguous nature of two principles of international law – self-determination and territorial integrity – illustrating the controversial nuances of international law on a political level, nuances with which the Crimean crisis has been described. Multiple paradigms will be applied to interpret the juristic status of the quoted principles. The foundation of this research is the collision between Russia and the West over the legal interpretation of these two principles throughout history and particularly in the case of Crimea. From the very beginning, the legal interpretation of the situation in Crimea was that Russia's legal rhetoric was groundless and that her legal justification for the secession of Crimea was simply not plausible, and therefore could not be linked to either legal or moral theories. After exposing the fragility of these principles in international law, the paper then concludes by proposing an alternative approach that utilizes a different philosophical logic, thus further illustrating the hidden nature of such contradictions in politics.

Keywords: self-determination; territorial integrity; international law; Crimean crisis; Russia.

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1. Introduction

In March 2014, with Russia's support, Crimea's secession from mainland Ukraine alarmed the international community and ignited two contradictions of international law: 1) historical ambiguity – the principle of self-determination against the principle of territorial integrity); 2) historical confrontation – Russia and the West's legal battleground on the interpretation of these principles, which have been questioned from the early 20th century. This paper explores the historical evolution of this ambiguity and the confrontation between Russian and Western lawmakers and policymakers. It looks at the reconciliation of self-determination and territorial integrity, whilst demonstrating ambiguity and confrontation as seen in the case of Crimea.

Self-determination of people *versus* territorial integrity of states are controversial international issues when they are implemented. However, nations and states have been acquainted with these complicated norms for decades, and as a principle of international law, territorial integrity was included in the Treaty of Westphalian (1648), and the principle of self-determination enshrined in the UN Charter in 1945. Up until 1945 – illustrating the principle of self-determination in the UN Charter – territorial integrity was an uncomplicated norm of international law. When the principle of self-

determination gained juristic status, it triggered a legal inconsistency with the principle of territorial integrity in international law. The principle of self-determination has since been converted into practice, such as in the independence of Bangladesh, the secession of states from Yugoslavia, Nagorno Karabakh in Azerbaijan, Kosovo, Abkhazia, Ossetia in Georgia, *etc.* This juxtaposition became the main agenda of international negotiations and perplexed lawmakers and policymakers. The Crimean case resonates most amongst these examples, demonstrating the incompatibility of the principles.

The ambiguity of these principles is consistent with the historical confrontation that sprung from Lenin and Wilson's ideas of self-determination. Subsequently, during the Cold War, the Soviet Union-led socialist block and the United States-led Western capitalist block continued the contest as rival lawmakers in international law. When the Soviet Union fell, the Russians exited the legal ground as lawmakers, and for the first time since the collapse of the Soviet Union, Russia came up with its own legal interpretation of international law, as shown in this case study.

In today's legal battleground, Putin's Russia could see itself as lawmaker based on Lenin's idea of self-determination, while Wilson's liberal standpoint is an ideological origin for Western legal interpreters. Considering these historical ties, Ch. 2 acts as a timeline for this confrontation and investigates the ambiguity of the principles of self-determination and territorial integrity, a crucial cornerstone of knowledge that facilitates an understanding of the contemporary legal rhetoric between Russia and the West.

Chapter 3 explains the renewed theoretical deliberation upon the interpretation of the principle of self-determination. Contrary to historical evolution, the theoretical analysis omits the confrontation between Russia and the West. Rather, it is reviewed through various scholarly hypotheses, wherein the examination of self-determination is categorised in three concepts: Remedial Only, Primary and Just Cause theories.

Russia and the West's polarization on the interpretation of self-determination after the Soviet Union break-up did not disappear, however, the confrontation weakened. During that period, until Crimea, both Russia and the West encountered a series of conflicts in the case of Kosovo, Abkhazia and Ossetia, which led them to build up their legal grounds and create global alliances. However, this confrontation reached a pinnacle with Crimea.

In Ch. 4 the legal battleground up until Crimea will be described as a legal basis for Russia's justification of Crimea's secession. In the same way as through theoretical understanding, history is of paramount importance in this research. Russia's arguments about Crimea are mostly related to historical arguments that have to be highlighted for an understanding of Moscow's legal interpretation. In the legal assessment of Crimean secession, Russia's legal interpretation of the Crimean situation is mainly derived from President Vladimir Putin's speech on March 16, 2014, and speeches by other Russian ministers. Russia's interpretation has been dissected by scholars, lawyers, policymakers and analysts from the West. Following this, as a theoretical assessment, the Crimean case will be investigated according to the

three main concepts (Remedial Only, Just Cause, Primary theories), none of which work in Crimea's situation. The three theories did not help promote the situation because Crimea's secession was a long way from democracy, which will be discussed in more depth in later in this paper.

On the one hand, my investigation into the historical confrontation between Russia and the West on a legal basis will demonstrate that Russia's groundless argument essentially serves its political interests, with Crimea as the precedent for this. On the other hand, in concluding research on historical ambiguity, a thorough theoretical examination of the principle of self-determination *versus* territorial integrity stimulates a new theoretical approach based on the fuzzy logic[1] of mathematics.

2. Historical Evolution

2.1. Historical Development of Self-Determination and Territorial Integrity

Policy- and lawmakers have long grappled with differing interpretations of self-determination and territorial integrity, either as an enshrined postulate of international or customary law,[2] or as an ambiguous theory of international relations. Despite these norms having been accepted by peoples and states for a long time, and the extensive literature on the theoretical and legal status of self-determination and territorial integrity, much uncertainty remains among policy- and lawmakers about their political and legal meaning.

The core of the debate goes back to the Peace of Westphalia in 1648, signed after the settlement of the Thirty Years' War, in which the territorial integrity and sovereignty of states was enshrined and the state solidified as the dominant actor in international relations. On accepting these norms, states were able to demand dues for non-intervention from their citizens who then had protection from outside attack. The inviolability of territorial integrity and sovereignty thus became the deeper code of international relations between states. Philpott highlights the significance of sovereignty in the Peace of Westphalia, citing Leo Gross: 'Whatever evils occur within states, it is better to maintain the *modus vivendi*[3] than permit the manifold,

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[1] Fuzzy logic is a superset of conventional (Boolean) logic that has been extended to handle the concept of partial truth – truth values between 'completely true' and 'completely false.' *See, e.g.,* Shahariz A. Aziz, *You Fuzzyin' with Me?*, <http://www.doc.ic.ac.uk/~nd/surprise_96/journal/vol1/sbaa/article1.html> (accessed Mar. 10, 2016).

[2] According to Article 38(1)(b) of the ICJ Statute (59 Stat. 1055, 33 U.N.T.S. 993), customary international law is one of the sources of international law. Customary international law can be established by showing (1) state practice and (2) *opinio juris*. *See also Customary International Law,* Cornell University Law School Legal Information Institute, <https://www.law.cornell.edu/wex/Customary_international_law> (accessed Mar. 10, 2016).

[3] 'An arrangement or agreement allowing conflicting parties to coexist peacefully, either indefinitely or until a final settlement is reached.' (*Modus Vivendi*, in Oxford Dictionaries Languages Matters, <http://www.oxforddictionaries.com/definition/english/modus-vivendi> (accessed Mar. 10, 2016).

self-multiplying claims that can motivate, and serve as a pretext for, widespread intervention.'[4] The Peace of Westphalia cemented 'the order cluster' (sovereignty, non-intervention, and territorial integrity) of the state;[5] the state possessed its rights and a total authority over its territories, expressing its commitment to non-intervention. Meanwhile, the treaty paved the way for the emergence of 'the justice cluster' (the rights of individuals and groups of self-determination) relations.[6]

The political theory of international relations – nationalism – was the ground for the evolution of the principle of self-determination both as a political and legal postulate. When the territoriality and borderlines of states and nations appeared in Westphalia, it helped to establish among thinking peoples, sundry minorities and groups a sense of their own national identities, cultures, languages and own territory which distinguished them from others. In political meaning, Miller argued: 'The principle of nationality suggests that people who form a national community in a particular territory have a reasonable claim to political self-determination.'[7] In the light of this tendency, nationalism advanced and accelerated the ascription of people to different national identities. As the distribution of world populations spread, nationalist feelings prompted different groups to determine their own interests without cooperation from outside. The realization of this idea and the self-regulation of territories was only passing through a phase of secession that undermined the territorial integrity of states.

Dov Ronen rightly classifies, in periods, four manifestations of self-determination:

1) mid-nineteenth-century European national self-determination;
2) late-nineteenth-century Marxist class self-determination;
3) post-WW I Wilsonian minorities' self-determination;
4) post-WW II non-European / racial self-determination.[8]

Like Ronen, most scholars studying self-determination see the origin of the principle in the American Declaration of Independence (1776) and in Europe after the French Revolution (1789).[9] This does not imply that self-determination emerged in international relations in the 18th century but, as Monica Duffy Toft states, that 'empires were threatened

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4 Daniel Philpott, *Should Self-Determination be Legalized?*, 12(3-4) Terrorism and Political Violence 120 (2000). doi:10.1080/09546550008427572

5 Neil MacFarlane, *Sovereignty and Self-Determination: Where are We?*, 68 International Journal: Canada's Journal of Global Policy Analysis 609 (2013). doi:10.1177/0020702013511184

6 *Id*.

7 *Id.* at 614.

8 Enver Hasani, Self-Determination, Territorial Integrity and International Stability: The Case of Yugoslavia 44 (National Defence Academy 2003), available at <http://dataspace.princeton.edu/jspui/bitstream/88435/dsp01sq87bt69z/1/hasa03.pdf> (accessed Mar. 10, 2016).

9 Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge University Press 1995); Allen Buchanan, *Self-Determination and the Right to Secede*, 45 J. Int'l Aff. 347 (1992) [hereinafter Buchanan, *Self-Determination*].

by separatist movements; today, it is multi-ethnic states."[10] In the past, this separatism within empires could be achieved only through wars, clashes that were illegitimate, while for the first time Americans and French legalized it by coining self-determination as a human right and enshrining it in their constitutions. These constitutional acts, particularly in France, were not so genuine as to relate to people's destinies but emphasized rather the political aims of governments. For instance, the French legalized the plebiscite right of people to cover up the annexation of Belgium and the Palatinate,[11] and this kind of exploitation of the principles of international law has never disappeared from practice.

2.2. Marxist-Leninist Conception of Self-Determination

Ronen, in his classification of self-determination, coined 'alien rule' as that by those who guard the territorial integrity of empires, and showed the main aims of 'claimants' who desire self-determination to secede from alien rule.[12] However, the interpretation of 'alien' and 'claimant' is completely different in the Marxist school. The conflict is not between minorities and majorities or nations and indigenous peoples, but the polar groups are the 'working class' or 'proletariat,' and the intention is not secession of territory but the merging of these groups of people under Communism.[13] The Marxist concept of self-determination resonates more with the internal self-determination of the working class to determine their destiny. However, in the next stage of *communism*, self-determination was championed by Lenin, who stressed that the declaration of self-determination was a vital right of nations, and widened the interpretation of self-determination.

Going deeper, Cassese notes three cardinal components of self-determination for Lenin and other members of the Soviet political school:

- ethnic and national communities acquired the right to choose their destiny freely;
- after military friction between sovereign states, self-determination can be applied to assign territories between them;
- it was used in anti-colonial regimes that were set up by Europe and the US metropolis in Africa and Asia.[14]

Indeed, the components of self-determination that Lenin envisaged were most attractive as a theory, although largely useless in practice. They were in the interest of ideology and the state rather than being a justice cluster. As Neuberger noted,

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[10] Monica D. Toft, *Self-Determination, Secession, and Civil War*, 24(4) Terrorism and Political Violence 582 (2012). doi:10.1080/09546553.2012.700617

[11] Cassese, *supra* n. 9.

[12] Hasani, *supra* n. 8.

[13] *Id*. at 45.

[14] Cassese, *supra* n. 9.

self-determination for Lenin was only about 'political self-determination, political independence, and the formation of a national state.'[15]

Here was manifested the plebiscite or referendum as a means of expression of the people's vote, which was in line with reality and yet would seem alien and strange to its inheritor, present-day Russia. In reality, the supposed plebiscite or referendum was 'a political tool to bring the nationalities into the union,'[16] namely the ideas of imperialism. In the 1920 invasion the merging of five republics (Ukraine, Belarus and three Caucasus countries: Georgia, Armenia, Azerbaijan) with mainland Russia and the establishing Soviet Union showed the assent and eagerness of these states' people after conducting a referendum. However, except for a small number of communists in these countries, no one was keen to lose their independence and the Soviet Union made a decision on behalf of the populations of these countries.

Further, Antonov assesses Lenin's thesis about the ethnic and national community as 'determining the extent of their autonomy' and rather serving the interests of 'Bolsheviks to gain support of the national minorities during the civil war.'[17] The desire of Soviet Russia for imperialism, indeed never disappeared and in the case of Crimea Putin's speech, relating historical arguments, demonstrated that clearly. Putin's Russia repeated her own 'legal' referendum in Crimea as the Soviet Union did, while merging 15 republics around the empire so that Russia as the Soviet Union was organizer, supervisor and executer of the referendum.

Lenin's focus on rights to self-determination pertaining to anti-colonialism was well known, as it was the external weapon utilized for strategic foreign policy aims against the US and European countries. To be more precise, Lenin and his successors advocated their ideological and political purposes to preserve the rights of people. To exemplify that, even the name of 'Lenin's Theses on the Socialist Revolution and the Right of Nations to Self-Determination,' published in March 1916, permanently displays its ideological basis.[18] Lenin championed socialism and claimed that this was the only political structure that promoted democracy and human rights, indirectly referring to self-determination.

Despite a discrepancy between the first and second components of the Leninist conception of self-determination, Soviet scholars generally contributed to the colonial content of self-determination in international law and achieved legal decree in the UN.

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15 Benyamin Neuberger, *National Self-Determination: A Theoretical Discussion*, 29(3) Nationalities Papers: The Journal of Nationalism and Ethnicity 405 (2010). doi:10.1080/00905990120073672

16 Dajena Kumbaro, The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention 33 (NATO Office of Information and Press 2001), available at <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf> (accessed Mar. 10, 2016).

17 Mikhail Antonov, *Theoretical Issues of Sovereignty in Russia and Russian Law*, 37(1) Review of Central and East European Law 97 (2012). doi:10.1163/092598812X13274154886548

18 Cassese, *supra* n. 9, at 15.

2.3. Wilson's Liberal Interpretation of Self-Determination

Wilsonian understanding of self-determination was the closest parallel with today's understanding of it. Unlike the narrow framework of Lenin's self-determination, which is more dependent on anti-colonialism and its ideological discourse, Wilson propounded the 'universal implication' of self-determination for the first time, which reflected the rights of people to choose self-government (an internal form of self-determination) and subsequently, as an external version '[p]eoples were to be free to choose their sovereign.'[19] Wilson's conception originated in liberal democratic theory, and hence interpretation of internal self-determination as self-government was not unusual for democracies, which symbolize freedom and liberty for individuals and the right to determine their own destiny. However, in its external meaning it was an extraordinary novelty and not compliant with the conventions of its time, and it still faces resentment in the world community today. Even Wilson's secretary of state, Lancing, was faced with a sizeable list of people who were firmly against it. Lansing described Wilsonian external self-determination as a 'dynamite, that is, a principle with enormous destabilising force when faced with practical realization.'[20] Lansing was confused about the meaning of self-determination and scared of breeding global ethnic and political conflicts.

Cassese agreed with Wilson's argument that if self-determination was used fairly it would redraw the borders of Europe correctly and remove the conflicts between ethnic minorities in Europe. The international community unanimously rejected Wilson's point about self-determination from inclusion in the Covenant of the League of Nations, which postponed the enshrining of self-determination as a principle for around three decades. Despite the failure of Wilson's attempt to persuade the League of Nations, he 'brought the concept into the international spotlight as never before.'[21] Although it does not have any legal status, thousands of nations have claimed it in front of their governments, and subsequently it was turned into justification for political oppression such as Nazi abuse, 'as an excuse for German expansionism'[22] and for the annexation of Austria in 1938.

Among all these attempts, there exists a common point – self-determination. It aimed to realise people's political or ideological desires rather than simply creating a judicial term for them. For instance, in spite of Wilson's consistency on the question of self-determination of minorities in the Ottoman and Austro-Hungarian Empires, he did not have the same persistence when it came to the self-determination of colonial people. In his speech, Wilson claimed that he was working in the interests of

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19 Cassese, *supra* n. 9, at 19.

20 Hasani, *supra* n. 8, at 81 (citing Derek Heater, National Self-Determination: Woodrow Wilson and His Legacy 53 (Macmillan 1994)).

21 Ryan Griffiths, *The Future of Self-Determination and Territorial Integrity in the Asian Century*, 27(3) The Pacific Review 458 (2014). doi:10.1080/09512748.2014.909525

22 Michael Freeman, *National Self-Determination, Peace and Human Rights*, 10(2) Peace Review: A Journal of Social Justice 158 (2007). doi:10.1080/10402659808426138

metropolitans as well as their rights to self-determination. Whilst rights of referendum were given to indigenous populations and minorities in Europe, Germans were deprived of that right. Like Germans, Bulgarians and Turks in the Ottoman Empire were not allowed self-determination because they were collaborators with Germany in World War I. In addition, Ottoman territories were given to the control of the Great Powers, due to the mandates system of the League of Nations.

However, Allen Lynch conversely claims in his article that Wilson's intention was 'genuine,' unlike that of the French, British or Soviets who instrumented it as a weapon in politics; Wilson was unaware of European ethnic groups[23] and as such could not calculate the perils of the principle of self-determination.

2.4. Manifestation of Self-Determination in International Law

As discussed earlier, in the pre-United Nations era self-determination was neither a principle nor a right fully recognized in international law. As opposed to France and Britain, many countries intended to achieve the legalization of self-determination as an international legal principle that they saw as a solution to territorial disputes.

Once self-determination gained legal status in the UN Charter, it was accepted at the San-Francisco Conference. Article 1(2) of the UN Charter proposed:

> 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.

Furthermore, the United Nations refers to self-determination in Ch. 9, Art. 55, where it declares that peace and friendly relations should be based on equal rights and self-determination by people.[24] These are two verses of the UN Charter that directly refer to the self-determination of people. Apart from these, Chs. 11–13 indicate the administration of non-self-governing areas and concern about these territories, which narratives construe as the self-determination rights of people. However, these UN general articles were not adequate for dealing with forthcoming abstruse political situations related to self-determination, and as such they had to be partly supplemented by resolutions of the General Assembly or other decrees.

Due to its contents, these adopted resolutions on self-determination during the UN era can, according to Mahalingam,[25] be divided into three parts: internal,[26]

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[23] Allen Lynch, *Woodrow Wilson and the Principle of 'National Self-Determination:' A Reconsideration*, 28 Rev. Int'l Stud. 419, 434 (2002). doi:10.1017/S0260210502004199

[24] *Id.*

[25] Ravi Mahalingam, *Self-Determination in the UN Era: A Response to Peter Sproat*, 9(1) Terrorism and Political Violence (2007). doi:10.1080/09546559708427391

[26] Cassese, *supra* n. 9, at 101: 'Internal self-determination means the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime.'

external,[27] and colonial[28] self-determination. Mahalingam claims that internal and external self-determination is rooted in Wilson's Fourteen Points, while the rights of colonial people to self-determination descend from Leninist Communism, with both proceeding in their own way during the Cold War. Whereas the external version of self-determination was not accepted unanimously, it was claimed that when the UN discussed self-determination it was assumed to be within the borders of the state. In the Universal Declaration of Human Rights (1948), self-determination was clearly not seen as a right or principle but only endorsed as internal self-determination. Hasani affirmed that in declaring 'to set common standards of achievement in human rights for all people of all nations' the 1948 Declaration of Human Rights did not openly sanction any external self-determination of people.[29]

The same sentiments followed in the aftermath of the Declaration and paved the way for drafting twin International Covenants on Economic, Social and Cultural Rights and subsequently on Civil and Political Rights. In both Covenants, the article of self-determination included the following:

> 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.[30]

Lawmakers define the term self-determination in Covenants both internally and externally. Article 1(1) of Covenants grants to peoples the right to determine their political destiny, such as by choosing their own governing system or legislators, and meanwhile to determine their economic, social and cultural development. These were all internal rights under the sovereignty and territorial integrity of states.

The rights of minority groups were also placed in the Covenant on Civil and Political Rights within the principle of territorial integrity. As such, Article 27 of the Covenant granted individuals from different ethnic, cultural, religious minorities the right to self-determination. Cassese states that it is not within the rights of minorities to determine their external status but that they were granted the right to determine their own cultural, religious and linguistic freedom so as to maintain their identities.[31] Besides, it was also applied to individuals or groups, as in the 1948 Declaration, rather than referring to them collectively and territorially.

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[27] Mahalingam 'takes to imply a purported right of secession' (Mahalingam, *supra* n. 25, at 126). Besides that, merging states and breakup empires can be included in external self-determination if these are determined by people.

[28] Indeed, it is also part of external self-determination but in comparison with external self-determination it is only belonged to the people of colonies.

[29] Hasani, *supra* n. 8, at 94.

[30] Mahalingham, *supra* n. 25, at 113.

[31] Cassese, *supra* n. 9.

During the drafting of the Covenants between 1948 and 1966, there were endless disputes between Soviet Communists and the Liberal West on framing and defining the boundaries of self-determination. Owing to political objections, scholars from the Soviet Union called for the inclusion of self-determination rights for colonial people and minorities. Along with the Soviet Union, other socialist bloc countries advocated this view and claimed it 'was a precondition for the respect of individual rights.'[32] An established Special Committee supervised the implementation of the UN resolution about human rights, including the self-determination of people. The views of scholars on the works of this committee are not clear. Until 1970, the activity of this committee for Hasani 'was sterile as a result of Soviet Union's use of this organ for Communist propaganda,'[33] while Cassese rationally emphasizes the necessity of Soviet efforts to champion the right of self-determination for colonial peoples despite its extremely ideological nature. Third World and developing countries' approaches to self-determination were similar to that of the Soviet Union, and they were not surprisingly great advocates of colonial self-determination. With this broad supporting coalition, in 1960, the Soviet Union dictated debates over colonial self-determination that helped cement the Declaration on the Granting of Independence to Colonial Countries and Peoples that formally marked the end of colonialism and the beginning of independent movements.

The declaration was strengthened in the 1966 Human Rights Covenants in which colonials were described as dependents. The group of countries under the Soviet wing were trying to restrict the implementation of self-determination in colonial contexts. This framing was broken by the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, which for the first time referred to self-determination outside the colonial context. Despite that, the principle of self-determination was once more versed there, and territorial integrity and sovereignty of states were also enshrined as an inviolable principle within the same declaration. This was repeatedly emphasized in the subsequent documents of international law. In the Helsinki Final Act in 1975 it was manifested as 'the participating States will respect the territorial integrity of each of the participating States,'[34] and in that case the principle of self-determination is eligible.

In 1993, the Vienna Declaration and Programme of Action were adopted as a consensus between the members of General Assembly, which reassessed the self-determination of people. It was strongly emphasized that representation of the role of the government belonged to everyone, and if it was not provided by the

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32 Cassese, *supra* n. 9, at 47.

33 Hasani, *supra* n. 8, at 95.

34 *Conference on Security and Co-operation in Europe: Final Act (Aug. 1, 1975)* 5, at <https://www.osce.org/mc/39501?download=true> (accessed Mar. 10, 2016).

government then people had to apply for an internal form of self-determination so as to represent their destiny before secession.

Consequently, as Marxsen stressed, people can be granted autonomy within that political entity, but this does not allow for complete political separation in all these decrees.[35] Discussing the legal status of self-determination, Philpott claims that with the exception of colonial self-determination, 'self-determination is not a right and is understood by most international lawyers to be subordinate to territorial integrity.'[36]

The different dimension of self-determination was reflected in the above resolutions and declarations by the UN. However, in view of today's political world map, there are no colonial or non-self-governing territories in need of these documents. Rather, they form the basis of legal development and reformation of self-determination or territorial integrity.

After the Cold War, in the turmoil of mapping the new borders of the Soviet Union and Eastern Europe, a great many of the political fragilities were related to the principle of self-determination and the territorial integrity of the state. Ethnic and external self-determination replaced colonial and internal self-determination in the discourses of scholars and international documents respectively. Throughout the 1990^{s} all over the world, states confronted the dilemma of external self-determination of peoples such as Chechens, Armenians and Yugoslavians. At the beginning of the 21st century this was followed by Georgia, Kosovo and, today, Crimea.

Consequently, from the legal decrees it is obvious that all people have a primary right to internal self-determination. In external self-determination, only the rights of colonial people have been clearly manifested. Nevertheless, the question of who has rights to external self-determination and details about the territory are blurred in all decrees, and need to be reformed.

3. Theoretical Framework

3.1. Theories of Self-Determination

In spite of volumes of discourse about the legal and political status of self-determination and territorial integrity, as depicted above, these are not enough to clarify the political circumstances, and thus they always need to be newly interpreted by theorists. Apart from their interpretive functions, by furthering their understanding theorists also serve to understand and accelerate the evolution of international law. These interpretations did not develop in a linear fashion and led to a wave of new debates and discussions about the rights of self-determination.

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[35] Christian Marxsen, *The Crimea Crisis – An International Law Perspective*, 74 Heidelberg J. Int'l L. 367, 385 (2014), available at <http://www.mpil.de/files/pdf4/Marxsen_2014_-_The_crimea_crisis_-_an_international_law_perspective.pdf> (accessed Mar. 10, 2016).

[36] Philpott, *supra* n. 4, at 124.

These theoretical discussions raise hugely important issues that the international community is currently facing today.

From the discussion above, it can be seen that there is no systematic solution to the dilemma of self-determination in either historical theories or practices. Nevertheless, the current theoretical approaches that will be examined below provide many solutions to the problem of self-determination.

There is a persistent lack of clarity, both in historical approaches and in comprehensive theories, around the term of self-determination, about who is 'self,' and to whom and under what condition this right of international law can be applied. Indeed, these are the main questions that scholars have grappled with for decades. As in the historical classification of self-determination, modern narratives also apply self-determination at internal and external levels.

Traditionally, discussions about the internal self-determination of people have remained muted and it has been adopted as broadly as being the primary right of entire nations. Except in its colonial context, all documents of international bodies relate to the internal dimension of self-determination. However, nowadays it can be argued that the world community needs a comprehensive and fresh redrafting of the principle of self-determination. In this regard, developing moral theories of self-determination is more crucial than ever before.

3.2. Remedy Theory or Just Cause Theory

As referred to in Buchanan's statement 'Remedial Right Only Theory,' or as coined by Norman or Locke, the Just Cause Theory is one of the justice-based moral conceptions of secession. The core objective of the theory is to justify the morality of secession in different ways. This theory of secession was formulated by Buchanan in 1991 in *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*.

Moore states that after publishing his theory, 'he began by pointing out that the issue of the morality of secession has received very little consideration from a normative standpoint' whilst today Buchanan's discourse provides the groundwork for subsequent debates on the theme.[37] However, there is a need to rejuvenate the debate in the context of current conditions.

Secession is generally a strong version of self-determination that for Buchanan and other international legal scholars should only be applied if there are no other solutions. As with external self-determination, Borgen points out that 'there is no right to such "remedial" secession.'[38] Buchanan further notes that international law stands on the fence in terms of secession, neither supporting it nor rejecting it. The

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[37] Margaret Moore, *1. Introduction: The Self-Determination Principle and the Ethics of Secession*, in National Self-Determination and Secession 1, 6 (Margaret Moore, ed.) (Oxford University Press 2003).

[38] Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea*, 91 Int'l L. Stud. 216, 228 (2015), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1262&context=ils> (accessed Mar. 10, 2016) [hereinafter Borgen, *Law*].

International Court of Justice [hereinafter ICJ] gives a narrow justification for secession in two cases: 1) 'classic decolonization' and 2) 'the reclaiming of state territory that is subject to unjust military occupation.'[39] The decision of the ICJ is weighted as advisory opinion and has been exercised a few times in the international domain. Despite that, the decisions of the ICJ have caused international uproar, such as with Kosovo.

Scholars of moral theory propose and develop several assumptions on the grounds of external self-determination. Regarding secession, Buchanan argues that external self-determination should not be applied to all nations and that we must avoid classifying people as special religious or ethnic groups or as indigenous. In Buchanan's argument there is just one point that can defend the aspiration of nations to secede – arguments of justification. These are classified in his chapter as 'violation of human rights or structural violence,' 'discriminatory redistribution' and 'cultural self-preservation.'[40]

The first and second are the most compelling arguments for justification, while, with regard to cultural self-preservation, Buchanan states that it may be implemented as a final step if no other resolutions are found. Among these arguments, violation of human rights is illustrated as a stepping-stone and the reason for the next two conditions. It is arguable that violation of the human rights of a group of people is perhaps the most valid reason to claim secession.

The author in the discriminatory redistributions section implies that when states deal with people from a territory in terms of distribution of 'taxation schemes,' 'regulatory policies,' or 'economic program' it ought to be implemented fairly and without any discrimination or any privileges for them.[41] With regard to cultural self-preservation, Buchanan's belief was that secession can be a potential solution as it is dramatic and can be resolved in the frame of internal self-determination ('special minority group rights, a looser federalism, constitutional rights of groups of group veto or nullification').[42] If these could not be carried out, secession might be conducted.

Additionally, a historical grievance is also noted in the range of justifications in Buchanan's analysis, but it is not compelling as above. Supporting Moore's discourse, he shows that 'historical grievance and distributive justice concerns are interrelated' and that 'multiple decolonization movements across the planet have been driven by the perception of historical discrimination.'[43] However, it is the author's opinion that historical discrimination is not a rational justification in today's political situation where every group of people may have a historical grievance: scholars and theorists should avoid boosting their ideas in this way in order to prevent mass-scale protests

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[39] Allen Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law 333 (Oxford University Press 2004) doi:10.1093/0198295359.001.0001 [hereinafter Buchanan, Justice].

[40] Moore, *supra* n. 37; Buchanan, *Self-Determination*, *supra* n. 9.

[41] Buchanan, *Self-Determination*, *supra* n. 9, at 354.

[42] *Id*. at 357.

[43] Buchanan, Justice, *supra* n. 39, at 223.

for secession. At the very least, historical grievances can form the basis of the internal dimension of self-determination, such as federal units and autonomy.

Along with Buchanan, other Just Cause theorists, such as Norman, Locke and Seymour, follow the same argument in terms of required justification for secession, whilst their frame of justification is different: 'some on prior occupation and seizure of territory; some on serious violations of human rights, including genocide;'[44] while some of them, such as Seymour and Libarona, see the infringing of internal self-determination as a justification and criticize Buchanan's narrow approach to it.

Consequently, for their critics Remedial Rights Only or Just Cause theories put the burden on states and make it conditional for their sovereignty. From a positive angle, these coercive actions by people make states responsible for human rights, and besides 'it suggests a strong internal connection between the right to resist tyranny (exploitation, oppression, genocide, wrongful seizure of territory) and the right to self-determination.'[45]

3.3. Primary and Choice Theory

In contrast with Remediation, Primary Right conception, as the name may suggest, asserts rights as primary in secession and repudiates any justification and proof for secession. What Buchanan tries to convey is that the 'theory of self-determination ought to be consistent with well-entrenched, morally progressive principles of international law' while its 'more permissible view' towards secession is unacceptable in terms of triumphing territorial integrity without any reason and as such is always considered a threat to the existence of states.[46] Going further, Allen Buchanan, in a nationalistic light, points out that it can result in indefinite fragmentation of the world community which would 'bring with it quite unacceptable moral costs, in the form for instance of the disruption, displacement, or even annihilation of communities that turn out to be territorially in the wrong place.' Additionally Philpott, by advocating that argument, claims that 'there is no reason that a Primary Right Theory of self-determination, even if defensible as just, must be converted into law or policy.'[47]

However, Buchanan and Philpott neglected to consider the implementation of primary rights in the internal dimension of self-determination. Seymour directly demonstrates it, and contrary to Buchanan he claims that nations have a primary right to internal self-determination[48] and that if it is violated by elites, the determined group have the primary rights to secede.

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44 Moore, *supra* n. 39, at 7.

45 *Id*.

46 Philpott, *supra* n. 4, at 123.

47 *Id*. at 114.

48 Michel Seymour, *Secession as a Remedial Right*, 50(4) Inquiry: An Interdisciplinary Journal of Philosophy (2007). doi:10.1080/00201740701491191

Seymour's assertions on primary rights to secede were reflected more liberally in Harry Beran's proposal. Beran claims that 'states are voluntary associations' and that 'anyone may leave a state if he or she wishes to secede.'[49] Indeed his theory differs greatly from Remedial and Primary logics. Some scholars see Beran's theory as Primary Right theory to secede, as it is rationally related to secession, due to its unclear nature. Beran's primary right of people to secession was intended to show the individual right of people to choose their destiny, while it comes down to the determination of the territory where an individual lives, making his theory unclear and irrational.

Philpott names it Choice Theory rather than Primary theory because of its individualist feature. Primary theorists also claim that people do not need to have justification for secession and that they can easily express their desire for secession by 'referendum or plebiscite.'[50] Choice theorists comprehend secession as an individualistic choice rather than a collective one by a group or area. Moore and Horowitz, as in Beran's theory, see irrationality in Choice theory in its explaining of the territorial claim to secession. Consequently, despite these deep differences between current theories of self-determination, they all represent the common desire of an intended liberal form of secession through democratic referendum and plebiscite.

4. Data Analysis

4.1. Historical Grievance of Crimea in Terms of 'Self' and 'Territoriality'

Since the 1990[s], the principle of self-determination has become a frequently debated subject in the international community. To be precise, it did not randomly appear but was explicitly connected with the fall of the Soviet Union and Yugoslavia that encompassed hundreds of nations and ethnic groups, reigniting the right to self-determination debate.

Judging it historically, the Soviet Union and its harsh political line was a major culprit in today's turmoil. Crimea is a prime example of this.

In terms of identifying self-people, the Crimean peninsula is perhaps the most perplexing example with its unstable proportions in the ethnic composition of the population throughout its history. Malyarenko and Galbreath find the causes of this in its 'politicising factors' and see it as a reason for current political disputes.[51] Supporting this, Evison, narrating the Crimean crisis, emphasizes that the history of Crimea and its evolution of ethnicities led to the current crisis. Malyarenko and Galbreath account for this politicising factor of migration in the Soviet Union's mass deportation of Tatars, and the moving of Russians and Ukrainians to there.

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49 Freeman, *supra* n. 22, at 161.

50 Moore, *supra* n. 39.

51 Tatyana Malyarenko & David J. Galbreath, *Crimea: Competing Self-Determination Movements and the Politics at the Centre*, 65(5) Europe-Asia Studies 917 (2013). doi:10.1080/09668136.2013.805964

Indeed, utilizing demographic structures of territory by exiling people is not a new phenomenon by the Soviet Union in the Crimea, but it was one point in a long-term plan inherited from the Russian Empire called 'Russification.' According to historians, the sharp change in the composition of Crimea's population was directly rooted in early Russian imperial policy. Fisher's work elucidates this clearly. By citing an extract from a letter by Catherine the Great to Potemkin, Fisher makes it clear that Catherine stated that whoever did not choose Russian citizenship was free to leave Crimea. It was undoubtedly a Russian tactic to relocate non-loyal masses away from the peninsula and move Russians or other loyal groups such as Armenians there. The Tsar was successful and in the census of 1774 Russian scholars such as Sumarokov calculated that a total of 300,000 people, in the computation by Mordvinov two-thirds of the Crimean population, had fled after the Treaty of *Küçük Kaynarca* (1774). Instead of absence places non-Muslims settled and in a few years the composition of the peninsula had changed sharply. To express this change, Fisher emphasized that 'English visitors to the Crimea . . . expressed astonishment at how quickly Russians with their serfs had taken over large areas of the peninsula.'[52]

During the reign of the Stalin Crimean minority, Tatars, Greeks and Bulgarians in particular were all victims of his brutal deportation after World War II, and these areas became populated by Russians. Condemning the Soviet Union's brutality, Anton Bebler points out that 'they still have not been compensated for the losses of life and property.'[53]

From Catherine the Great to her successors, all had aimed at the Russification of the Crimean peninsula and by the time of Stalin it was concluded with full Sovietization, which was defined by Fisher as 'no more no less than Russification.'[54]

Consequently, the demographic structure made Russians the owners of the peninsula and in the last calculation in 2001, 'the Slavic (Russian and Ukrainian) population of Crimea is approximately 58.5% and 24.4% respectively.'[55] Politically, all of them are pro-Russian and proportionally they are more powerful than those in the group who are inclined towards the Ukraine. This implies that simply having different political views distinguishes them from each other, and that there is not any extreme discrimination in terms of ethnicity, culture or religion in Crimea today. Crimea's Russian-origin population links with the Russian Orthodox Church, while the minority Muslim Tatars adhere to Sunni Islam, which they acquired from the Ottoman Empire. These Muslims, compared to today's Sunnis in Turkey, are secular and as

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52 Alan W. Fisher, The Russian Annexation of the Crimea 1772–83 at 148 (Cambridge University Press 1970).

53 Anton Bebler, *Crimea and the Russian-Ukrainian Conflict*, 15 Romanian J. Eur. Aff. 35, 38 (2015), available at <http://papers.ssrn.com/abstract_id=2576142> (accessed Mar. 11, 2016).

54 Alan Fisher, Between Russians, Ottoman and Turks: Crimea and Crimean Tatars (= 33 Analecta Isisiana) 188 (Isis Press 1998).

55 Malyarenko & Galbreath, *supra* n. 51, at 917.

such in Crimea, in religious terms, there is no great difference between Muslims and Christians. In addition, this secularity led them to become closely linked each other well in cultural terms.

Like its people, the territorial status of Crimea is tied to one type of regulation but has shifted several times. After the Middle Ages, when it was under the rule of the Ottoman Empire, Crimea achieved short-term independence in the 1773 Treaty of *Küçük Kaynarca* until 1783, when it was annexed by the Russian Empire. Russian domination lasted until 1954 when Khrushchev handed it as a gift to Ukraine. In 1921, Crimea gained autonomy from the Soviet Union and subsequently this was provided by Ukraine until 2014. Although in 1991 there was an attempt to either gain independence or merge with Russia, it was averted by Ukraine at the expense of giving wide autonomous status to Crimea. The people of Crimea's separatist determination, and Russia's plan to annex Crimea, grew after 1991 more and more. Bebler acknowledged that 'annexation of Crimea has likely been prepared and regularly updated since, at least, two decades ago.'[56]

The Crimean Autonomous Republic with its strong Russian orientation was not satisfied with its political status under the administration of Ukraine, and in repeating its attempt at a secession government, especially, it tried to cavil to justification of secession. This historical moment, indeed, had come six years before in April 2008 in Bucharest when NATO suggested a MAP (Membership Action Plan) to Ukraine that was regarded as a milestone in Ukraine's movement from Russia to the West. However, the ousting of the pro-European leader of Ukraine, Timoshenko, and his replacement with pro-Russian Victor Yanukovich reduced the anger of Russian's supporters through his Russian-oriented policy and delayed the annexation of Crimea until 2014.

Towards the end of 2013, Yanukovich shifted his intensely Russian-oriented desire to balanced politics and smoothed his relations with EU countries. Indeed, the majority's desire for integration with the EU had forced him to improve his relations with the West. In practice, he was expected to sign the DCFTA[57] draft at the Vilnius Summit in November 2013, which was intended to diffuse the EU economically and politically whilst avoiding Russia. However, the hopes of the people of mainland Ukraine were dashed after Victor Yanukovych's rejection of it, and it led to thousands of people protesting in the Maidan movement and the eruption of civil war between pro-Russians and pro-Europeans. This turmoil was a historic moment for the elite and the Russian population of Crimea to secede from mainland Ukraine.

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[56] Bebler, *supra* n. 53, at 39.

[57] Supreme Council of Crimea is the parliament of Crimea Autonomous Republic that was directly regulated by central Kiev, and besides having its own election of parliament, all decisions were accepted by mainland Ukraine. In 2014 March, declaring to hold referendum about the destiny of Crimean Peninsula were out of Supreme Council's order and as such plebiscite was illegal.

The Supreme Council[58] of Crimea censored the protesters of Euromaidan and announced that they would hold an illegal referendum on the future status of Crimea by inviting the Russian Government to confirm it. In reality, the invitation was a formality while the Russian 'little green man' was there, since the Euromaidan movement and later Putin 'admitted deploying troops on the peninsula to "stand behind Crimea's self-defence forces"'.[59] A month later, Russia declared its annexation of Crimea to the Russian Federal unit in the administrative form of the Crimean Autonomous Republic and the city of Sevastopol.

On March 16, 2014, two referendums were held in two different places: the Crimean Autonomous Republic and the city of Sevastopol. According to the result '96.77 percent of them [Crimean citizens] voted for its separation from Ukraine and for reuniting with Russia.'[60] Furthermore, according to Russian news agencies the 96.77 came from over 80 percent of the residents of Crimea. However, some people denied it and claimed that Russian authorities exaggerated it. According to the *Washington Post*, Evgeny Bobrov, a member of the Human Rights Council in Russia, posted on his blog that 'only half voted for annexation – meaning only 15 percent of Crimean citizens voted for annexation.'[61]

4.2. Legal Assessment of Crimean Secession

'"What happened in Crimea was the people invoking the right of self-determination," he said. "You've got to read the UN Charter. Territorial integrity and sovereignty must be respected"'.[62]

This statement was made by Lavrov, the Russian Foreign Minister, at the Munich Security Conference after the invasion of Crimea. In contrast with Lavrov's words, the term self-determination, involved in the UN Charter, the Declaration on Principles

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58 'The EU and Ukraine signed the Deep and Comprehensive Free Trade Area (DCFTA) on 27 June 2014 as part of their broader Association Agreement (AA). . . . To avoid further destabilisation of the country and in particular to guarantee Ukraine's access to the CIS market under the Ukraine-Russia bilateral preferential regime, in September 2014 the EU postponed implementing the DCFTA until January 2016' (*Ukraine*, European Commission, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/> (accessed Mar. 11, 2016)).

59 *Putin Reveals Secrets of Russia's Crimea Takeover Plot*, BBC News (Mar. 9, 2015), <http://www.bbc.com/news/world-europe-31796226> (accessed Mar. 11, 2016).

60 Bebler, *supra* n. 53, at 42; *see also Crimea Parliament Declares Independence from Ukraine Ahead of Referendum*, RT (Mar. 11, 2014), <http://www.rt.com/news/crimea-parliament-independence-ukraine-086/> (accessed Mar. 11, 2016).

61 Ilya Somin, *Russian Government Agency Reveals Fraudulent Nature of the Crimean Referendum Results*, The Washington Post (May 6, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/06/russian-government-agency-reveals-fraudulent-nature-of-the-crimean-referendum-results/> (accessed Mar. 1, 2016).

62 Josh Rogin, *Europeans Laugh as Lavrov Talks Ukraine*, BloombergView (Feb. 7, 2015), <http://www.bloombergview.com/articles/2015-02-08/lavrov-s-comedy-routine-on-ukraine-isn-t-funny-to-europe> (accessed Mar. 11, 2016) (quoting Sergei Lavrov).

of International Law, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Covenant on Civil and Political Rights, the Helsinki Final Act and the Paris and Vienna Declarations, was not simply interpreted, but rather became a narrower, more debatable matter.

As discussed in previous chapters, outside its colonial meaning there is no verse in international decrees to justify territorial fragmentation directly. Territorial integrity and sovereignty of states are *jus cogens*[63] norms that are listed above all international and constitutional jurisprudences. In particular, the inviolability of the principle of territorial integrity appears in all international covenants and norms. According to the conditions that there was no other remedy for the situation, the area was occupied forcefully by a military group and that there is a consensus with the parent state, territorial integrity might be infringed. However, none of these were the case in the Crimean situation.

If it is true that neither the United States nor other African or South American nations had permission from the mainland states when they became independent, it can be reasonably assumed that the status of Crimea is not in compliance with the activity of colonial nations, but that it was part of Ukraine, and that after the independence of Ukraine it was recognized as an integral part of it. Whether or not it is supposed to be a colony or people have the right to secede according to a 1960 UN Declaration, Evison asserts that 'Ukraine can claim under *uti possidetis*[64] that Crimea is part of its sovereign territory'[65] due to the rule of *uti possidetis*.

In Crimea, the violation of territorial integrity had begun with the passing of the referendum, which was not consistent either with the Ukrainian Constitution or with the 'high democratic standard.'[66] In regard to the Ukrainian Constitution, '[a]ny changes to the territory of Ukraine shall be resolved exclusively by the all-Ukrainian referendum'[67] and, as can be seen in history, it is rarely the case that parent states grant permission for the

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[63] 'Jus cogens (or ius cogens) is a Latin phrase that literally means "compelling law." It designates norms from which no derogation is permitted by way of particular agreements' (Anne Lagerwall, *Jus Cogens*, Oxford Bibliographies (May 29, 2015), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml> (accessed Mar. 11, 2016) doi:10.1093/OBO/9780199796953-0124).

[64] Literal meaning of '*uti possidetis*,' from Latin, is 'as you possess' and 'the principle of *uti possidetis juris* mandated that the borders of former colonial entities became international borders of the state following decolonization' (Aleksandar Pavković & Peter Radan, *In Pursuit of Sovereignty and Self-Determination: Peoples, States and Secession in the International Order*, 3 Macquarie L.J. 1, 11 (2003), available at <http://www.mq.edu.au/public/download/?id=16205> (accessed Mar. 11, 2016)).

[65] Major Justin A. Evison, *MiGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination*, 220 Mil. L. Rev. 90, 105 (2014), available at <http://papers.ssrn.com/abstract_id=2475549> (accessed Mar. 11, 2016).

[66] Bebler, *supra* n. 53, at 42.

[67] *Judgement of the Constitutional Court of Ukraine on All-Crimean Referendum* ¶ 4.4, Ministry of Foreign Affairs of Ukraine (Mar. 19, 2014), <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/20137-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu> (accessed Mar. 11, 2016).

secession of their own units. Unlike Quebec in Canada or Scotland in the UK, Ukraine has not allowed Crimea to determine its destiny separately in the Ukrainian Constitution. From that viewpoint, Marxsen perceives attempts by the Crimean population to have a referendum for secession from Ukraine as the first illegal act that violated Ukraine's integrity.[68]

According to international law, the content of the Crimea referendum was not democratic and clear. It contained two options that did not offer people a *status quo* option, which is the main condition of a democratic referendum:

1) reunifying Crimea with Russia as a subject of the Russian Federation;

2) supporting the restoration of the 1992 Crimean constitution and the status of Crimea as part of Ukraine.[69]

In the 1992 Constitution of Ukraine, Crimea's status was that of an autonomous republic, which is inconsistent with the *status quo.* Furthermore, regarding the referendum about self-determination, the international community also acknowledged the 'yes' or 'no' options in international practice.[70] To exemplify a model pattern, the Scottish referendum is flawless and clear, as shown in a particular instance whereby this question was asked: 'Should Scotland be an independent country? Yes / No.'[71]

Yet another instance of flouting international law was the time when Bebler stated that lack of time did not permit a real and substantive public debate over such a momentous issue as this.[72] Regarding Bebler's statement, democratic plebiscite is not easily prepared in a few weeks or months, but rather requires long preparation, such as the Scotland referendum that was held in the September of the same year. It took decades for the Scottish to hold that referendum after achieving consensus with London.

Unlike Bebler, some scholars have identified intervention by Russia as infringement of territorial violability, rather than an attempt by the Crimean population to have a plebiscite. It shows, as Vidmar notes, that the referendum and declaration of independence in Crimea creates neither territorial illegality, nor territorial entitlement for Russia.[73] Territorial illegality was created by Russia's military involvement. Needless to say, it is easier to prove the illegality of the secession. Regarding Vidmar's assessment, it can be noted that Moscow's legal arguments about Crimea were mostly discussed with the principle of self-determination in mind rather than the justification of Russian

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68 Marxsen, *supra* n. 35, at 380.

69 *Is Crimea's Referendum Legal?*, BBC News (Mar. 13, 2014), <http://www.bbc.co.uk/news/world-europe-26546133> (accessed Mar. 11, 2016).

70 Marxsen, *supra* n. 35, at 382.

71 Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 German L.J. 365, 381 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8ce24b654f92cd6e49795/1456000550253/GLJ_Vol_16_No_03_Vidmar.pdf> (accessed Mar. 11, 2016).

72 Bebler, *supra* n. 53, at 42.

73 Vidmar, *supra* n. 71, at 366.

intervention. The fact that Russian intervention was categorically illegal is a crucial point Moscow tries to avoid at all costs.

Along with the international consensus on the sovereignty and territorial integrity that guarantees the inviolability of states' frontiers, in the case of Ukraine and Russia this inviolability was more secure with adopted bilateral agreements between them after the collapse of the Soviet Union. According to Marxsen, Ukraine and Russia in a few bilateral agreements affirmed the inviolability of the borders between both states and provided that both parties such as the 1994 Budapest Memorandum, the 1997 Treaty on Friendship, Cooperation, and Partnership and the Kharkiv Accords about the Black Sea Fleet Status.[74] He concludes that these documents had to be seen as legal obligations between states in which Russia agreed 'to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine' which means that Russia was deprived of possessing vessels in the Black Sea, but nuclear weapons of Soviet Union (Ukraine's allotment was also included) were abandoned to Russia.[75] However, all of the obligations were infringed by the annexation of Crimea.

Consequently, in the case of Crimea, there is not even one point that can exonerate the secession on a legal basis, and international law has always maintained neutrality on external self-determination (secession). However, it is important to note that this neutrality can be shifted from point zero so long as the assessment of the morality of the secession is democratic and sufficiently fair. Beyond the legality, the question of secession is open to moral theorists and as such, as well as the question of legality, the extent to which the secession of Crimea suits the morality of international norms is another part of my research.

4.3. Theoretical Assessment of Crimea's Secession

As aforementioned in the previous chapter, current highly contested theories of self-determination are divided into three main areas: Remedial theory, Just Cause theory and Primary theory. It was demonstrated that even though they had different interpretations of secession, all practitioners of these theories share a common point of view: they all choose to consider the feasibility of secession under democratic circumstances and liberal values. Contrary to this feature, in the case of Crimea, the path of self-determination was undermined by Russia's intervention and the procedural legitimacy of the Crimean referendum.

Since 1991 Buchanan, a political philosopher at Duke University, has developed arguments on Remedial theory, and argues 'that provinces might justify seceding if they are discriminated against.'[76] Regarding Remedial Right theory, Buchanan concluded that it could not be applied to the Crimean dispute which does not

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74 Marxsen, *supra* n. 35, at 371.

75 *Id*. at 370 (quoting Budapest Memorandum (¶ 2)).

76 *Whether Secession in Crimea Would Be Legal*, The Economist (Mar. 12, 2014), <http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-10> (accessed Mar. 11, 2016).

fall under any definition of a violation against the Crimean people. Going further, considering that the loss of Crimea would have a devastating effect and 'gravely harm' Ukraine in terms of economy, tourism, geostrategic location, Buchanan thinks that 'Ukraine has the right to force Crimea to stay.'[77]

Contrary to this, Vladimir Putin, in his speech after the Crimean referendum, attempted to indicate the remedial argument for allowing Russia's intervention in the peninsula: 'The new so-called authorities began by introducing a draft law to revise the language policy, which was a direct infringement on the rights of ethnic minorities.'[78] Since there was any discrimination against the Crimea people, it would firstly have to be characterized as oppression against the government rather than to any ethnic group; secondly this oppression by Ukraine cannot be compared to the Milošević genocide involving the Kosovars. Hence, implementation of Remedial theory is clearly unfounded in the Crimean case.

In terms of criticizing Buchanan's non-general and conditional approaches to self-determination, among scholars of Modern Choice theory Catala is well-known for her explicit standpoint, whereas MacLaren sees right of secession in terms of Crimea as individual rights of individual. However, in the view of both theorists, the procedure of referendum and its compliance with legal standards are stressed as crucial factors, something Crimea was far from achieving. MacLaren coins the term 'democratic secessionism,' which brings the rights of the individual to the forefront[79] and sees the possibility of territorial secession under the condition of democratic referendum. MacLaren then identifies this independent referendum as one of the legal essentials for external self-determination, whilst implying it in questions, '*i.e*. what constitutes a clear question, a fair process, and a decisive majority – and who exactly is to set these terms?'[80]

Whether regarding Choice theory as a relevant moral treatment for the secession of Crimea or not, it also fails to be implemented due to enshrining democratic referendum as a basic condition of conception. As Amandine Catala identifies 'any plausible moral case for secession previously requires a peaceable and transparent referendum,' and she stresses further that the Crimean referendum was 'neither peaceable nor transparent.'[81]

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77 *Whether Secession in Crimea Would Be Legal*, *supra* n. 76.

78 *Address by President of the Russian Federation*, President of Russia (Mar. 18, 2014), <http://en.kremlin.ru/events/president/news/20603> (accessed Mar. 11, 2016).

79 Zoran Oklopcic, *Introduction: The Crisis in Ukraine between the Law, Power, and Principle*, 16 German L.J. 350, 359 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8cde9b654f92cd6e49639/1456000490822/GLJ_Vol_16_No_03_Oklopcic+Intro.pdf> (accessed Mar. 11, 2016).

80 Malcolm MacLaren, *'Trust the People?' Democratic Secessionism and Contemporary Practice*, 16 German L.J. 631, 635 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8cf24b654f92cd6e49ce0/1456000806545/GLJ_Vol_16_No_03_MacLaren.pdf> (accessed Mar. 11, 2016).

81 Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 German L.J. 581, 601–02 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8cef8b654f92cd6e49bd9/1456000762433/GLJ_Vol_16_No_03_Catala.pdf> (accessed Mar. 11, 2016).

Considering Primary theory, the Crimean people were able to utilize their primary rights to internal self-determination just as all Ukrainians do. Externally speaking, Primary Right theory should be emphasized despite its rather mild nature regarding secession, whereas in previous theories democratic plebiscitary is the main proviso.

These heated debates were not limited to the discussion between Russia and Ukraine, but after the annexation of Crimea they were carried over to the agenda of supranational bodies, especially the UN. The UN Resolution on the territorial integrity of Ukraine on March 27, 2014, was a controversial moment in the international community. 100 Member States of the General Assembly reaffirmed the territorial integrity of Ukraine: while Armenia, Belarus, Bolivia, Cuba, North Korea, Nicaragua, Russia, Sudan, Syria, Venezuela and Zimbabwe voted for rejection of the territorial integrity of Ukraine, 58 states abstained, and the remaining 24 states were absent during voting. It was once again proved that territorial integrity was an ambiguous term and that each state had its own interpretation of self-determination when it came to Crimea.

It can be clearly seen that the states that rejected the Resolution, those that abstained and those that were absent were supporters of annexation and explicitly influenced by Russia in terms of their interpretation of self-determination, while the rest of who were against it supported the doctrine of the West (EU and US).

5. Findings and Discussions

5.1. Polarization on the Interpretation of Self-Determination

'[T]here is a strong belief that Russia's action is violating international law . . . I know President Putin seems to have a different set of lawyers making a different set of interpretations, but I don't think that's fooling anybody.'[82]

On March 4, 2014, US President Barack Obama's statement about the Crimean crisis explicitly indicated that the United States and Russia have their own legal rhetoric. This dissension is not unknown in international law but, as discussed in previous chapters, it sprung from the early 20th century confrontation between Wilson and Lenin. This was then continued by the Soviet Union and the West, especially in their interpretation of self-determination and territorial integrity. Inherited from Lenin, there was always suspicion and uncertainty about Western legal interpretation, and as such it encouraged Russian lawmakers to establish their own language of international law. Even establishing the UN in 1945 could not remove dissension or create common ground in international law. Borgen classifies these great powers as 'norm makers' and claims that by utilizing their own rhetorical language they can

[82] *Obama: 'Strong Belief' Russia Violating International Law*, NBC News (Mar. 4, 2014), available at <http://www.nbcnews.com/storyline/ukraine-crisis/obama-strong-belief-russia-violating-international-law-n44091> (accessed Mar. 11, 2016).

easily 'change the rules of the game and, ultimately change law' according to their political interest.[83] The weaker states were drawn towards the hegemonic powers and, according to Borgen, called 'norm takers' who side with either one of the great powers, with whom they ultimately form a horizon of great power.[84]

After the breakup of the Soviet Union, the feeling was that this confrontation had ended and the West's legal rhetoric had prevailed. However, Soviet nostalgia resurged and Soviet interpretation was then 'overtaken by a new assertiveness of Russian prerogatives and Russian conceptions of legality.'[85] Thus Russia, after the Soviet Union, could fill the vacuum and by keeping its matrix, attempted to juxtapose herself to the West as a lawmaker for those under her wing where the Soviet Union once dominated. Even in 2009, the Foreign Minister of Russia, Lavrov, asserted: 'Indeed, international law is our ideology in international affairs. To use Fyodor Tyutchev's phrase, we want "once and for all to establish the triumph of law, of historical legality over the revolutionary mode of action".'[86]

Many scholars approved of the notion of Russia as a rising power and of her willingness to interpret international law according to her liking. Even some scholars such as Burke-White, by citing from scholars on rising powers, emphasized: 'The present redistribution of power in the international political system has brought an end to that transatlantic moment in international law.'[87] As a result of this change, Russia and its new owners attempted to shape their own legal understanding of international law and to take on the international arena again, attempting to be a maker of international law right after the fall of the Soviet Union and to recover Soviet status again. Burke-White pointed out: 'In Crimea, Russia is, perhaps for the first time since the fall of the Soviet Union, asserting itself as a renewed hub for a particular interpretation of international law . . .'[88] Assessing Russia's legal activity pre-Crimea will assist in understanding Russia's Crimea trick. Even though Moscow's legal language pre-Kosovo and during Kosovo negated itself, Russia could carry on

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83 Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 Chi. J. Int'l L. 1, 30 (2009), available at <http://papers.ssrn.com/abstract_id=1472068> (accessed Mar. 11, 2016) [hereinafter Borgen, *The Language of Law*].

84 *Id.* at 31.

85 Borgen, *Law*, *supra* n. 38, at 237 (citing Tarja Långström, Transformation in Russia and International Law 169 (Martinus Nijhoff 2003)).

86 *Russian Minister of Foreign Affairs Sergey Lavrov's Article 'Russian Foreign Policy and a New Quality of the Geopolitical Situation' for Diplomatic Yearbook 2008*, The Ministry of Foreign Affairs of the Russian Federation, <http://archive.mid.ru//brp_4.nsf/e78a48070f128a7b43256999005bcbb3/bc2150e49da d6a04c325752e0036e93f?OpenDocument> (accessed Mar. 11, 2016); *see also* Borgen, *The Language of Law*, *supra* n. 83, at 26.

87 William W. Burke-White, *Crimea and the International Legal Order*, 56(4) Survival: Global Politics and Strategy 66 (2014). doi:10.1080/00396338.2014.941548

88 *Id.*

manoeuvring its legal aims. Pre-Kosovo independence, Russia supported (overtly or covertly) separatists under the banner of self-determination in Transnistria, Nagorno-Karabakh and South Ossetia and Abkhazia. However, in Kosovo, Moscow amended its legal rhetoric by initializing the vitality of territorial integrity and claimed inviolability of territory, whilst prevailing on the principle of self-determination. In Crimea, Moscow shifted its legal interpretation once more, by exploiting the ambiguity of the principle of self-determination as a *jus cogens*, and tried to justify its actions by referring to the UN Charter.

After its defeat in Kosovo, Russia claimed that EU countries who recognized the independence of Kosovo from Serbia were obliged to recognize the secession of South Ossetia and Abkhazia from Georgia. On the other hand, the West did not recognize this, which ignited Russian antagonism towards the EU's juridical conception and her desire to create her own legal framework. In Crimea, with Russia's declaration of its own hub in international law and an uncertainty about Western interpretations, this battle about the meaning of self-determination reached its peak. After Crimea, Russia's officials criticized European legal scholars and their domination. Even the Deputy Secretary for Russia's Security Council proposed that 'a global conference should be organized in order to rewrite international law.'[89]

For all scholars, Russia's legal language is not simply intended to justify its oppression in Crimea, more 'to reassert its role as a leader in a multi-hub international legal order.'[90] Additionally, it served 'to create sufficient uncertainty in the international community'[91] and to gather her supporters around her jurisdiction. The question of the integrity of Ukraine resulted in countries such as Armenia, Belarus, Bolivia, Cuba, North Korea, Nicaragua, Russia, Sudan, Syria, Venezuela and Zimbabwe voting for rejection of the territorial integrity of Ukraine, while 58 states abstained and the remaining 24 did not even attend the conference. This is a prime indicator of the true supporters of Russia. Looking at the result, there were 93 suspicions and uncertainties, which amounts to almost half of the world communities. These states were supporters of Russia's rationale of self-determination and denied the West's territorial integrity on the grounds of Ukraine's legal status; or at least, in the case of Crimea, they proved that they were not pro-West. It can thus be safely claimed that Russia has her own legal interpretation but, as Borgen asked, how successfully she utilized her legal language in Crimea should be discussed.

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89 Roy Allison et al., *The Ukraine Crisis: An International Law Perspective* 3, Chatham House (Jul. 11, 2014) <https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140711UkraineLaw_0.pdf> (accessed Mar. 11, 2016).

90 Burke-White, *supra* n. 87, at 67.

91 Roy Allison, *Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules*, 90(6) International Affairs 1297 (2014), available at <http://commonweb.unifr.ch/artsdean/pub/gestens/f/as/files/4760/39349_202339.pdf> (accessed Mar. 11, 2016). doi:10.1111/1468-2346.12170

5.2. Legal Battleground: Russia v. The West

There has never been a universal legal interpretation of international law, and in the case of Crimea the gap was especially large between Russia and the West. If for Russia intervention in Crimea is regarded as self-defence, for the West it was regarded as a violation of sovereignty. Whether the intervention of NATO in Kosovo was regarded as humanitarian or not, Russia accused the West of the violation of boundaries.

As seen above, such confrontation is directly derived from the most fragile principle of international law – self-determination and territorial integrity. In reality, the Crimean crisis was not a milestone in that confrontation but rather a continuation of Russia's legal struggle against the West. In Crimea Russia's version of the story, on a legal basis, was very different from the West's understanding of it.

Moiseienko was right in saying that, at that point, Russian academics and practitioners had largely remained in the shade. At least in the international arena and mostly in the legal arena, Vladimir Putin enforced legal interpretations.[92] If it this is true then it automatically verifies Allison's assertion that '[a]n assessment of Moscow's legal rhetoric, with a focus on Crimea, also improves our understanding of Russian policy . . .'[93] Moreover, regarding the Russian version of Crimea, Putin's speech on March 18, as Burke notes, 'should be read as more than a mere justification of Russia's annexation of Crimea'[94] and in terms of justification of Crimea's secession and annexation, political enthusiasm can be felt much more than pragmatism. Russian scholar Sarkisov suggests that the 'Crimean Peninsula lived in our hearts but not in our minds.'[95] It implies that in the speech on March 18, Putin's allegations were more weighted in historical, cultural and political contents, while in legal terms Putin's intention was to distort legal reality and negate the Western legal interpretation.

Putin, in his speech about historical ties with the Crimean peninsula, pointed out that 'Crimea was originally part of Russian territory' and 'without consulting the citizens' it was gifted to Ukraine.[96] Meanwhile, by recalling the demographic structure of the Crimean Peninsula as '2.2 million people, of whom almost 1.5 million are Russians, 350,000 are Ukrainians who predominantly consider Russian their native language, and about 290,000–300,000 are Crimean Tatars, who . . . also lean towards Russia'[97] he was monitoring the pro-Russian people of Crimea and their compliance in joining the area to Russia.

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92 Anton Moiseienko, *Guest Post: What Do Russian Lawyers Say about Crimea?*, Opinio Juris (Sep. 24, 2014), <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/> (accessed Mar. 11, 2016).

93 Allison, *supra* n. 91, at 1259.

94 Burke-White, *supra* n. 87, at 73.

95 Konstantin Sarkisov, *Russia's Annexation of Crimea and Its Implications for East Asia: A Russian Perspective*, PacNet (Apr. 3, 2014), <http://csis.org/files/publication/Pac1424A.pdf> (accessed Mar. 11, 2016).

96 Setsuko Kawahara, *Self-determination: People's Will or Strategic Interest*, 43 Hitotsubashi J.L. & Pol. 1, 14 (2015), available at <https://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/27102/1/HJlaw0430000010.pdf> (accessed Mar. 11, 2016).

97 *Address by President of the Russian Federation*, *supra* n. 78; *see also* Burke-White, *supra* n. 87, at 70.

The oddity lies in the fact that besides the Russian president, even his critics and other political figures in Russia backed the Crimea annexation. Maria Baronova protested against Putin; however, in the case of Crimea, she strongly criticized the West. Referring to the case of Kosovo in 1999, she felt that the West prevailed over Russia, and remarked that 'watching that gave us a deep inferiority complex.'[98] Russia's most prominent lawyer Mark Feygin who was, by that time, against Putin, also favored Putin's annexation of Crimea and saw Crimea under Ukraine as 'a historical injustice' that was gifted to Ukraine as 'some kind of toy.'[99] Even the former leader of the Soviet Union, Gorbachev, not only supported the invasion of Crimea but stated that 'all of southern Ukraine … is Moscow's rightful dominion' because 'its population is Russian, like Crimea.'[100] Furthermore, in a speech by the Russian Ambassador to the UN, Vitaly Churkin, identified Crimean annexation as repairing a 'historical injustice.'[101]

Contrary to these historical arguments, international legal doctrines of territorial integrity and self-determination and scholars, such as Buchanan, do not give weight to historical grievances. From a legal point of view, the Russian legal machine had focused its justification on two basic tasks in Crimea: 1) advocating the principle of self-determination by Crimea's population; and 2) defending its right to intervention in the peninsula in the name of the self-defence of its Russian population.

Regarding the second point (self-defence or intervention), self-defence appears in Art. 51 of the UN Charter: 'Nothing in the present Charter shall impair the inherent right of collective or individual self-defence if an armed attack occurs against a Member of the United Nations . . .' Also, Moscow based this on historical examples such as Afghanistan, Iraq and Libya, when the United States had intervened. Russia was thus able to act confidently in Crimea since its excuse for intervention was allegations in the name of self-defence, which 'were indefensible on a factual basis.'[102] The US action in Afghanistan, Iraq and Libya in contrast cannot be compared with Crimea as an argument. Firstly, there was not any form of peril or threat against the Russian citizens in Crimea, which the UN emphasized as a condition. Secondly, as dictated in the Charter, any conflict should be reported immediately to the Security Council or raised in the General Assembly of the UN. The US did so when it intervened in Afghanistan, Iraq and Libya. Olson discusses Russia's intervention as it was not the first action that infringed on elements of UN charter, 'but it is arguably the first to treat the UN as literally irrelevant to its actions.'[103]

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98 Simon Shuster, *Morning After in Crimea*, 183(12) Time International 12 (2014).

99 *Id.*

100 *Id.*

101 Borgen, *Law*, *supra* n. 38, at 238, 256.

102 Allison et al., *supra* n. 89, at 3.

103 Peter M. Olson, *Is International Law Effective? The Case of Russia and Ukraine*, 108 Proceedings of the Annual Meeting (American Society of International Law) 39, 42 (2014). doi:10.5305/procannmeetasil.108.0037

This action also contradicts Putin's September comment to *The New York Times*: 'We need to use the United Nations Security Council and believe that preserving law and order in today's complex and turbulent world . . .'[104]

Indeed, by ignoring the UN, Russia implicitly expressed its intention of reinterpreting its own law and as seen from above, exploited this for its own political ends.

Unlike self-defence, the principle of self-determination was not clearly set out in UN documents and this ambiguity laid the grounds for Moscow's rhetorical self-seeking policy in the interpretation of this principle. Despite what Remedial or Primary theorists have already concluded, in the case of Crimea there is no compliance with the elements of these theories in Russian moral jurisdiction, and as such secession of Crimea cannot be embraced in either theory.

As a primary right of self-determination, President Putin, defending Crimea's secession, stated that the 'Crimean situation, including the referendum, was a simple matter of self-determination'[105] and 'referred to the United Nations Charter, which speaks of the right of nations to self-determination.'[106] In the explanation of self-determination as a primary right, the President referred to an irrelevant precedent by comparing Ukraine's independence from the USSR with what the Crimean population did. For many reasons, they cannot be compared, at the very least because Ukraine was a unified republic within the Soviet Union, while Crimea is an integral part of the Ukraine due to the *uti possidetis* principle, which claims that Crimea was under the rule of Ukraine before the Soviet Union's dissolution. Confirming this, Evison claims: 'An examination of Kruschev's gift of Crimea to Ukraine, Ukrainian statehood, and domestic law all demonstrate the applicability of *uti possidetis* to Crimea.'[107]

It is possible to argue that Russia's strongest vindication of Crimean secession is consistent with Kosovo, as seen in Remedial theory. Up until 2010, if international law was uncertain about the secession, it was broken down by an acceptance of Kosovo Advisory Opinion that plainly validated the independence of Kosovo from Serbia and stated that 'the declaration of independence of 17 February 2008 did not violate general international law'.[108] Despite the Russian judge rejecting that advisory opinion, Russia was definitely against that decree and in Crimea, Russians used the document as a reference:

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104 Vladimir V. Putin, *A Plea for Caution from Russia*, N.Y. Times (Sep. 11, 2013), <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html> (accessed Mar. 11, 2016) (quoted in Burke-White, *supra* n. 87, at 73).

105 Olson, *supra* n. 103, at 40.

106 *Address by President of the Russian Federation*, *supra* n. 78.

107 Evison, *supra* n. 65, at 106.

108 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo: Summary of the Advisory Opinion*, ICJ (Jul. 22, 2010), <http://www.icj-cij.org/docket/files/141/16010.pdf> (accessed Mar. 11, 2015).

> We, the members of the parliament of the Autonomous Republic of Crimea and the Sevastopol City Council . . . taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on July 22, 2010, which says that unilateral declaration of independence by a part of the country does not violate any international norms, make this decision.[109]

Putin certified the declaration quoted from the ICJ, which he had rejected in the case of Kosovo, and asked: if 'Kosovo Albanians . . . were permitted to do' what 'Russians, Ukrainians and Crimean Tatars in Crimea are not . . . ?'[110] Further to this, the President brought an accusation against Western countries of 'blunt cynicism,' 'calling the same thing white today and black tomorrow.'[111] Putin was accusing the US and Europe of opportunism and of dealing with Crimea in a different way from Kosovo when it was in effect the same situation.

The common view of Russian scholars about Kosovo was widely held, and Moscow sees implementation of that in Crimea as eligible and rational. Contrary to this, the West claims that secession of Kosovo under remedial rights is a special case and that religiously, ethnically and territorially different Albanians were threatened by the harsh regime of Belgrade. Hence, Kosovo cannot be a precedent for Crimea or any other secession but is rather *sui generis* and applies only to Albanians who were victims of the genocide by Milošević. In Crimea however, due to the OSCE Human Rights assessment mission in Ukraine, it was confirmed: 'No increase in the manifestation of intolerance or escalation of violence against the Russian-speaking population was observed . . .'[112] Russia traditionally asserts its political and historical argument regarding remedial claims, and Mamlyuk identifies how Russia sees Ukrainians as 'ultra-nationalists, whom Russia brands fascists or neo-Nazis' who would be a threat to Crimean Russians.[113] Whether or not they claimed that Crimea would be annexed, Russians would have been threatened by what happened in Abkhazia and Ossetia, which has still not been recognized by any international bodies.

Finally, the President, by asserting the referendum and its result, claimed that 'the people of Crimea clearly and convincingly expressed their will and stated that they want to be with Russia.'[114] As noted before, firstly the referendum was not democratic

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109 *Crimea Parliament Declares Independence*, *supra* n. 60.

110 *Address by President of the Russian Federation*, *supra* n. 78.

111 *Id*.

112 *Ukraine, Human Rights Assessment Mission: Report on the Human Rights and Minority Rights Situation, March-April 2014* at 9, OSCE (May 12, 2014), <http://www.osce.org/odihr/118476?download=true> (accessed Mar. 11, 2016).

113 Boris N. Mamlyuk, *The Ukraine Crisis, Cold War II, and International Law*, 16 German L.J. 479, 479 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8ceb1b654f92cd6e49a8d/1456000693603/GLJ_Vol_16_No_03_Mamlyuk.pdf> (accessed Mar. 11, 2016).

114 *Address by President of the Russian Federation*, *supra* n. 78; *see also* Burke-White, *supra* n. 87, at 70.

because of Russia's intervention. At best, if Russia had not intervened and the referendum was highly consistent with international law, could Crimea's secession be counted as credible? The answer is a resounding no. Neither the Quebecois nor the Scottish case can be compared with this situation. Secession ought to be approved solely as a last resort, and as Bebler affirmed: 1) it may need long-term discussion; and 2) it requires permission from Kiev, as was the case with Scotland and Canada and the permission they sought.

According to Russia's critics, Moscow's rhetoric on Crimea did not succeed and even disclosed its hypocrisy in terms of legal grounds. This was also seen in its approach. Hausler and McCorquodale criticize Putin's discourse: they argue that '[w]e . . . believe that preserving law and order in today's complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not' was stated a few months ago, during the Syrian crisis.[115] This prompted UK and US intervention in Syria, and Russia soon followed up with an illegal intervention in Crimea. These biased actions reveal Russia's 'blunt cynicism.'

In general, both Russia's primary use of self-determination by exemplifying Ukraine's secession from Soviet Union, and its remedial use of self-determination by resorting to Kosovo's secession from Yugoslavia, are groundless justifications for their actions in Crimea.

6. Concluding Remarks with Different Semantics

The initial confusion about the interpretation of self-determination and territorial integrity, and the legal battlegrounds between the West and Russia over Crimea, aside from their political interests, are consistent with their absolute understanding of these principles. For example, as noted before, for Lavrov, the principle of self-determination is directly interpreted as the secession of Crimea, whilst for the West the strong and inviolable territorial integrity of Ukraine is at stake. They both see these two principles in contradictory ways, and for the West if there is territorial integrity in Ukraine, the right of external secession cannot be a subject for discussion. Today's confusions are caused by that absolute comprehension of the reconciliation of self-determination and territorial integrity.

Primary theory is absolute (external self-determination or secession) in its context to the principle of self-determination, and it is not appropriate to address and reconcile it in regards to the confusion between self-determination and territorial integrity. Buchanan's vision, contrary to Primary theory, embraces different options available prior to secession and defines it as a form of last resort and a strong

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[115] Kristin Hausler & Robert McCorquodale, *Ukraine Insta-Symposium: Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law*, Opinio Juris (Mar. 10, 2014), <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/> (accessed Mar. 11, 2016) (quoting Putin, *supra* n. 104).

version of self-determination. Like Buchanan, Shany, discussing the right to self-determination in international law, asserted that 'the right of all peoples to self-determination was never understood as being absolute'[116] in international decrees, and therefore self-determination or territorial integrity cannot be viewed separately as absolute. Similarly, Catala noted: 'Political self-determination is a matter of degree and does not necessarily require full political independence or sovereignty . . .'[117] Catala exemplifies this degree of self-determination as a 'federalism' in larger states such as provinces of Canada or states of the United States.

Consequently, political interpreters suggest various theories on the reconciliation of self-determination and territorial integrity, noting that until the infringing of territorial integrity of states by secession, there are various other options that can be considered. Otherwise, this vagueness about self-determination and territorial integrity cannot be viewed as having an absolute meaning, which polarizes the opponents into different sides, resulting in confusion between them similar to Russia's strong support of Crimea's self-determination while the West backed the territorial integrity of Ukraine.

This is not a situation unique to Crimea or one that is related only to self-determination and territorial integrity; it is a matter of the 'binary logic' of philosophy, when one exists while the other does not, simultaneously. Binary logic was considered a principle of mathematics and Aristotle introduced it as two-valued logic in social sciences. In mathematical terms, the rule differentiates black and not black, B or not B, and there is no space between them. In political and philosophical meaning, the Greek philosophers defined it clearly in 'Rhetoric for Alexander.'[118] In his logical arguments, Aristotle defined 'political issues' as 'declaring war or making peace, signing treaties or refusing, trusting or mistrusting a witness, whether or not to use torture to obtain trustworthy evidence, etc.'[119] On the relation between self-determination and territorial integrity, binary logic suggests that there is either territorial integrity or self-determination and that there is no mid-point when implementing binary logic in these situations. Like red or not-red semantics, they contradict each other and cannot exist simultaneously in the same object.

In 1960, the 'fuzzy paradigm' was introduced by Lotfi Zadeh as an alternative that could explain the vagueness of the world, even though it was applied more in mathematics, life sciences and economics. The founder of fuzzy logic, Lotfi Zadeh, emphasized that every statement is a matter of degree and that there are values

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116 Yuval Shany, *Does International Law Grant the People of Crimea and Donetsk a Right to Secede? Revisiting Self-Determination in Light of the 2014 Events in Ukraine*, 21(1) The Brown Journal of World Affairs 234 (2014).

117 Catala, *supra* n. 81, at 585.

118 Leonid I. Perlovsky, The Mind vs. Logic: Aristotle and Zadeh, 1(1) Critical Review (2007), available at <http://www.leonid-perlovsky.com/new-materials/26,%20CR,%20FL%20A%20%20Z%20-%20reprint.pdf> (accessed Mar. 11, 2016).

119 *Id*.

between 'completely true' and 'completely false' or between red or not red, and as such this interval was coined 'fuzzy logic.'[120] He further proved that 'any logical system can be fuzzified.'[121] Taking this into consideration, fuzzy logic could be plausibly applied to solving current problems, decision-making, law-making, *etc.* and, contrary to Aristotle, fuzzy logic naturally provides more alternatives in each of these fields.

In the matter of self-determination and territorial integrity, Buchanan's, Catala's and Shany's arguments embrace fuzzy logic easily as there is no strong territorial integrity or self-determination. Both of them (self-determination and territorial integrity) can be applied at the same time and meet roughly in the middle by producing cultural and economic independence and autonomy or a new form of state confederation. Suggesting that Crimea would be satisfied with the highest federal unit within Ukraine such as confederation, it promotes internal self-governing or cultural independence until secession. By doing so, both territorial inviolability and the will of the Crimean people would be satisfied, and on a legal basis both the West and Russia would be satisfied by fuzzing that contradiction in international law and therefore politics.

7. Conclusion

Politics and international law have always been side by side, and where international law is flabby, the exploitation of its norms is more so. The principles of self-determination and territorial integrity is an area where politics examines the fragility of law. The principle of self-determination is the most controversial part of international law, because, firstly, it can be seen as violating the principle of territorial integrity. The study of the precedent of Crimea clearly demonstrated conflict and confrontation between Russia and the West. Secondly, evident is the lack of description of the principle of self-determination in international legal documents. This research demonstrated that with the rare exception of Kosovo Advisory Opinion, there is no evidence in international documents of external self-determination or secession. The 2010 Kosovo Advisory Opinion, as seen from the name, could not be defined as the principle, or *jus cogens* norm; rather it was advisory opinion and bears only upon the Kosovo case, which could not be generalized for the resolution of a series of conflicts. As Allison pointed out, 'international law is generally neutral on questions of territorial secession and external self-determination . . .'[122]

It is silent, and this neutrality by international law has always been exploited by politics and has given ground for debates by political figures rather than by professional lawmakers. Thus, in external self-determination, secession could be identified as a political paradigm rather than a concept of international law. Referring

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120 Aziz, *supra* n. 1.

121 *Id*.

122 Allison, *supra* n. 91, at 1266.

to the Crimean crisis, an inability of international law to address the conflict from a legal prism was visible.

Enshrinement of the right to self-determination in French domestic law thus far has shown one unvarying dilemma: as the French utilized the right of self-determination for their political aims, today Russians use this for the secession of Crimea. Briefly, by utilizing its fragility, states used this page of international law as an instrument for their politics. The next unwavering aspect was that both in the early 20th century and in the Crimean crisis, the legal interpreters were Russian and Western scholars. Even their conceptions of the right of self-determination have stayed constant. Putin's legal interpretation mirrored Lenin's notion of self-determination, while the Wilsonian paradigm of self-determination combined the values of liberalism (right of people to self-governing, democratic referendums on self-determination) and was accepted as the inheritance of Western countries. The interpretation of self-determination was developed on two lines: Soviet *versus* Western understanding of self-determination due to the differing ideological and political orientations. In Crimea, this tendency did not disappear, and despite the single language of international law they interpreted the principle of self-determination through two different legal languages. Eventually, both the Lenin and Wilson lines of interpretation contributed to the legal basis of self-determination and territorial integrity, but they could not resolve the ambiguity of the principle, and as such the different theoretical propositions of self-determination set forth on demanding many secessionist conflicts, including that in Crimea. Applying the three most discussed (Remedial Right Only, Primary Right, Choice theories) concepts to the principle of self-determination, none of them enabled an addressing of the Crimean conflict, and proved that Russia's justification of Crimea was not only outside the legal decrees of international law, but could not be construed in the language of theories. Primary and Choice theories were far from working in the case of Crimea; only Buchanan's theory of Remedial Right worked as a justification for secession, seen in any violating act against the ethnic groups. However, the Crimean people had not been exposed to violation for their ethnic difference since 1954 (under the rule of central Kiev); rather, '[t]he human rights situation in Crimea has seriously deteriorated since the region's annexation by Russia in March,' the Council of Europe claimed.[123] The people who were terrorized were mainly the Tatars and Ukrainians of the Crimean peninsula. This fact demonstrates Russia's ethnic cleansing, at work since the early days of invasion, and permits us easily to imagine future conditions. In general, the deficiency of legal grounds allowed the ambiguity of the principle of self-determination, which created a vacuum for the state's exploitation and eventually resulted in the crisis of Crimea and similar territorial conflicts.

In conclusion, this research set out to resolve the dispute about the principle of self-determination and territorial integrity using 'fuzzy logic,' which suggests a mid-

[123] Gabriele Steinhauser, *Human Rights Worsen in Crimea, Report Says*, The Wall Street Journal (Oct. 27, 2014), <http://www.wsj.com/articles/human-rights-worsen-in-crimea-report-says-1414416579> (accessed Mar. 11, 2016).

way solution. Despite fuzzy being used as the logic of mathematical science, the meaning remains the same for social sciences – neither meaning absolute self-determination nor absolute territorial integrity – and finding the scope for both of these to be maintained.

References

Allison, Roy. *Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules*, 90(6) International Affairs 1259, 1266, 1297 (2014), available at <http://commonweb.unifr.ch/artsdean/pub/gestens/f/as/files/4760/39349_202339.pdf> (accessed Mar. 11, 2016). doi:10.1111/1468-2346.12170

Antonov, Mikhail. *Theoretical Issues of Sovereignty in Russia and Russian Law*, 37(1) Review of Central and East European Law 97 (2012). doi:10.1163/092598812X13274154886548

Bebler, Anton. *Crimea and the Russian-Ukrainian Conflict*, 15 Romanian J. Eur. Aff. 35, 38–39, 42 (2015), available at <http://papers.ssrn.com/abstract_id=2576142> (accessed Mar. 11, 2016).

Borgen, Christopher J. *Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea*, 91 Int'l L. Stud. 216, 228, 237–38, 256 (2015), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1262&context=ils> (accessed Mar. 10, 2016).

Borgen, Christopher J. *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 Chi. J. Int'l L. 1, 30–31 (2009), available at <http://papers.ssrn.com/abstract_id=1472068> (accessed Mar. 11, 2016).

Buchanan, Allen. Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law 223, 333 (Oxford University Press 2004). doi:10.1093/0198295359.001.0001

Buchanan, Allen. *Self-Determination and the Right to Secede*, 45 J. Int'l Aff. 347, 354, 357 (1992).

Burke-White, William W. *Crimea and the International Legal Order*, 56(4) Survival: Global Politics and Strategy 66–67, 70, 73 (2014). doi:10.1080/00396338.2014.941548

Cassese, Antonio. Self-Determination of Peoples: A Legal Reappraisal 15, 19, 47, 101 (Cambridge University Press 1995).

Catala, Amandine. *Secession and Annexation: The Case of Crimea*, 16 German L.J. 581, 585, 601–02 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8cef8b654f92cd6e49bd9/1456000762433/GLJ_Vol_16_No_03_Catala.pdf> (accessed Mar. 11, 2016).

Evison, Justin A., Major. *MiGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination*, 220 Mil. L. Rev. 90, 105–06 (2014), available at <http://papers.ssrn.com/abstract_id=2475549> (accessed Mar. 11, 2016).

Fisher, Alan W. The Russian Annexation of the Crimea 1772–83 at 148 (Cambridge University Press 1970).

Fisher, Alan. Between Russians, Ottoman and Turks: Crimea and Crimean Tatars (= 33 Analecta Isisiana) 188 (Isis Press 1998).

Freeman, Michael. *National Self-Determination, Peace and Human Rights*, 10(2) Peace Review: A Journal of Social Justice 158, 161 (2007). doi:10.1080/10402659808426138

Griffiths, Ryan. *The Future of Self-Determination and Territorial Integrity in the Asian Century*, 27(3) The Pacific Review 458 (2014). doi:10.1080/09512748.2014.909525

Kawahara, Setsuko. *Self-determination: People's Will or Strategic Interest*, 43 Hitotsubashi J.L. & Pol. 1, 14 (2015), available at <https://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/27102/1/HJlaw0430000010.pdf> (accessed Mar. 11, 2016).

Kumbaro, Dajena. The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention 33 (NATO Office of Information and Press 2001), available at <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf> (accessed Mar. 10, 2016).

Långström, Tarja. Transformation in Russia and International Law 169 (Martinus Nijhoff 2003).

Lynch, Allen. *Woodrow Wilson and the Principle of 'National Self-Determination:' A Reconsideration*, 28 Rev. Int'l Stud. 419, 434 (2002). doi:10.1017/S0260210502004199

MacFarlane, Neil. *Sovereignty and Self-Determination: Where are We?*, 68 International Journal: Canada's Journal of Global Policy Analysis 609, 614 (2013). doi:10.1177/0020702013511184

MacLaren, Malcolm. *'Trust the People?' Democratic Secessionism and Contemporary Practice*, 16 German L.J. 631, 635 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8cf24b654f92cd6e49ce0/1456000806545/GLJ_Vol_16_No_03_MacLaren.pdf> (accessed Mar. 11, 2016).

Mahalingam, Ravi. *Self-Determination in the UN Era: A Response to Peter Sproat*, 9(1) Terrorism and Political Violence 113, 126 (2007). doi:10.1080/09546559708427391

Malyarenko, Tatyana, & Galbreath, David J. *Crimea: Competing Self-Determination Movements and the Politics at the Centre*, 65(5) Europe-Asia Studies 917 (2013). doi:10.1080/09668136.2013.805964

Mamlyuk, Boris N. *The Ukraine Crisis, Cold War II, and International Law*, 16 German L.J. 479, 479 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8ceb1b654f92cd6e49a8d/1456000693603/GLJ_Vol_16_No_03_Mamlyuk.pdf> (accessed Mar. 11, 2016).

Marxsen, Christian. *The Crimea Crisis – An International Law Perspective*, 74 Heidelberg J. Int'l L. 367, 370–71, 380, 382, 385 (2014), available at <http://www.mpil.de/files/pdf4/Marxsen_2014_-_The_crimea_crisis_-_an_international_law_perspective.pdf> (accessed Mar. 10, 2016).

Moore, Margaret. *1. Introduction: The Self-Determination Principle and the Ethics of Secession*, in National Self-Determination and Secession 1, 6–7 (Margaret Moore, ed.) (Oxford University Press 2003).

Neuberger, Benyamin. *National Self-Determination: A Theoretical Discussion*, 29(3) Nationalities Papers: The Journal of Nationalism and Ethnicity 405 (2010). doi:10.1080/00905990120073672

Oklopcic, Zoran. *Introduction: The Crisis in Ukraine between the Law, Power, and Principle*, 16 German L.J. 350, 359 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8cde9b654f92cd6e49639/1456000490822/GLJ_Vol_16_No_03_Oklopcic+Intro.pdf> (accessed Mar. 11, 2016).

Olson, Peter M. *Is International Law Effective? The Case of Russia and Ukraine*, 108 Proceedings of the Annual Meeting (American Society of International Law) 39, 40–42 (2014). doi:10.5305/procannmeetasil.108.0037

Pavković, Aleksandar, & Radan, Peter. *In Pursuit of Sovereignty and Self-Determination: Peoples, States and Secession in the International Order*, 3 Macquarie L.J. 1, 11 (2003), available at <http://www.mq.edu.au/public/download/?id=16205> (accessed Mar. 11, 2016).

Philpott, Daniel. *Should Self-Determination be Legalized?*, 12(3-4) Terrorism and Political Violence 114, 120, 123–24 (2000). doi:10.1080/09546550008427572

Seymour, Michel. *Secession as a Remedial Right*, 50(4) Inquiry: An Interdisciplinary Journal of Philosophy (2007). doi:10.1080/00201740701491191

Shany, Yuval. *Does International Law Grant the People of Crimea and Donetsk a Right to Secede? Revisiting Self-Determination in Light of the 2014 Events in Ukraine*, 21(1) The Brown Journal of World Affairs 234 (2014).

Shuster, Simon. *Morning After in Crimea*, 183(12) Time International 12 (2014).

Toft, Monica D. *Self-Determination, Secession, and Civil War*, 24(4) Terrorism and Political Violence 582 (2012). doi:10.1080/09546553.2012.700617

Vidmar, Jure. *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 German L.J. 365–66, 381 (2015), available at <https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c8ce24b654f92cd6e49795/1456000550253/GLJ_Vol_16_No_03_Vidmar.pdf> (accessed Mar. 11, 2016).

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CLOSING THE GAP ON MORAL RELATIVITY: COMPARING HUMAN RIGHTS REGIMES IN THE UNITED STATES AND THE RUSSIAN FEDERATION

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Contemporary authors often overstate the differences within the human rights regimes in the Russian Federation and the United States. This article is meant to provide insight into why the two systems, although taking markedly different developmental paths, have come to be far more similar than is often realized. The first question raised is, how did the two human rights systems develop historically? The next question is, how did the Universal Declaration of Human Rights and its subsequent split into two separate Covenants affect the rights within each system? The third question raised is, what modern advancements have taken place within each system? And finally, what failures within each system are also demonstrative of similarities within the two systems? Thus, the article begins by tracing historical developments within the two systems in order to elucidate regional variances that exist, and to explain how such variance materialized. Next, the article will provide concrete examples by comparing specific rights – such as the right to a public education, the right to social security, the right to participate in political life, and the right to privately own land – in order to provide some insight into why the author believes the differences in the two systems are often overstated by commentators. Finally, the article will explore some shortcomings that also share marked similarities within both systems. The article concludes that while the human rights regimes within Russia and the United States took markedly different paths during their development, and have relied on vastly different political and social situations during their evolution, they have ultimately reached a much greater level of maturity and protection under the law than is often given credit.

Keywords: human rights; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; constitutional exceptionalism; federalism; comparative law; international law.

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1. Introduction

Eleanor Roosevelt, who chaired the United Nations Human Rights Commission from 1946 to 1952 and was instrumental in negotiating the Universal Declaration of Human Rights, once stated:

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. . . . Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.[1]

To the author, what Eleanor Roosevelt was trying to convey was the message that essential to the legitimacy of human rights is the notion that these are truly universal values, inherent in the worth of all human beings. That all human beings are born free and equal in dignity and rights. And as such, human rights are not adequately protected unless they have meaning everywhere. Yet, while studying the laws pertaining to human rights across the globe, the author began to notice that such laws, at least from a cursory glance, did not seem to be uniformly established. In fact, the influence of domestic principles of constitutionalism, state identity and

[1] Eleanor Roosevelt, *In Our Hands (Address delivered at the United Nations on the tenth anniversary of the Universal Declaration of Human Rights (1958))*.

sovereignty, international organizations, and how international laws are incorporated into domestic law, all factors into the practice of human rights across the globe and create a fabric rich with seemingly differing and sometimes competing values. As such, human rights do not seem to be truly universal. By focusing my attention on specific rights such as the right to a free public education, the right to social security, the right to participate in the political process and the right to private ownership of land, the author began to notice that while these rights may not be universal, the regional variance that exists among many state actors seems to be often overstated. In order to fully explicate the international law of human rights would take a work far greater than the time and space the author has to devote to this article. Therefore, the modest purpose of this article will be to focus primarily on the seemingly contrasting rights within the United States and the Russian Federation in order to model one subset of the larger phenomenon of regional variance amongst human rights regimes.

This article will hopefully accomplish two goals. First, it will trace the history of the development of human rights generally, as well as within the two systems specifically. The purpose will be to elucidate the regional variances that exist, and to explain how such variance materialized. Second, the article will provide concrete examples in order to provide some insight into why the author believes the differences in the two systems are often overstated by commentators.

2. Historical Developments

No discussion of human rights in the United States would be complete without mentioning *Magna Carta*. When the American Founding Fathers searched for historical precedent in asserting their rights against King George III and the English Parliament, they found it here. The document was the result of the disastrous foreign policy of King John. After losing an important battle to King Phillip II at Bouvines, and with it, all hope of regaining the French lands he had inherited, he returned home defeated and cash-strapped. In order to refill his coffers, King John demanded scutage from his barons who had not taken part in the war with King Phillip II. The barons refused, and instead assembled at Runnymede on June 15, 1215, and demanded their rights be written down and recognized by the King. The rights and liberties set forth in the document grew over time into one of the foundational documents of democracy and ancient liberties.[2] However, at the time, neither of these were the goals of the barons. The Charter was in reality a feudal document meant only to protect the rights and property of the top echelon on feudal society. Furthermore, the rights being asserted against King John were not newly created

[2] For a concise summary on the significance of *Magna Carta* to the development of the American Declaration of Independence, *see Magna Carta and Its American Legacy*, U.S. National Archives & Records Administration, <http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html (accessed Mar. 11, 2016).

rights, dreamed up by the barons for the first time. Instead, the barons were simply putting to pen ancient rights and liberties that already existed.

It was largely the work of Sir Edward Coke in the early 17th century that made the document legally significant for people other than the barons who initially created it. Lord Coke's view of the law was particularly relevant to the American experience, for it was during this period that the charters for the colonies were written. Each colonial charter included the guarantee that those sailing for the New World and their heirs would have 'all the rights and immunities of free and natural subjects.'[3] As the founding fathers developed legal codes for the colonies, many incorporated liberties guaranteed by *Magna Carta*, and later the 1689 English Bill of Rights, directly into their own statutes. Through Coke, whose four-volume *Institutes of the Laws of England* was widely read by American law students, young colonists such as John Adams, Thomas Jefferson, and James Madison learned of the spirit of the charter and the rights that it protected – or at least Coke's interpretation of them.

Thus, while the original *Magna Carta* may have simply been about barons and their taxation, much later the same principles came to be called no taxation without representation, and England lost its American colonies on the same basis. Over time, *Magna Carta* has been interpreted and reinterpreted into one of the most important documents to date in the field of human rights. Although it may be more accurate to state that what has transpired since the formation of the document is more worthy of note than the original document itself, either way, *Magna Carta* has grown to become what some consider the foundation of fundamental human rights and democracy.

At the same time that *Magna Carta* and the English Bill of Rights were lending their influence to the establishment of individual rights in the American colonies, the protection of individual rights in Continental Europe were being sculpted by the Peace of Westphalia.[4] Westphalia is a region in Northern Germany that was the location of the Peace Treaty that ended the Thirty Years War in 1648. The Treaty is actually two documents-- the Treaty of Münster and the Treaty of Osnabrück – named after the two towns where the documents were negotiated and signed. Although the Peace was essentially a great property settlement for Europe, a sort of quieting of title across the continent, it is also recognized as the beginning of modern concepts of state sovereignty and international relations.[5] For example, within the Treaty of Osnabrück

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[3] *See, e.g.*, *Charter of Connecticut – 1662*, The Avalon Project, <http://avalon.law.yale.edu/17th_century/ct03.asp> (accessed Mar. 11, 2016) ('That all, and every the Subjects of Us, Our Heirs, or Successors, which shall go to inhabit within the said Colony, and every of their Children, which shall happen to be born there, or on the Seas in going thither, or returning from thence, shall have and enjoy all Liberties and Immunities of free Did natural Subjects within any the Dominions of US, Our Heirs or Successors, to all Intents, Constructions and Purposes whatsoever, as if the they and every of them were born within the realm of England . . .').

[4] The turbulence of the times is reflected in two seminal works of political thought and jurisprudence: Thomas Hobbes' *Leviathan* (1651) and Hugo Grotius' *De iure belli ac pacis* (1625).

[5] The Peace of Westphalia is relevant because international law has contributed so much to the development of the field of human rights.

the drafters agreed upon, 'exact and reciprocal Equality amongst all Electors, Princes, and States of both Religions.'[6] While only concerning Protestants and Catholics, it is the first instance of protecting religious freedoms within an international agreement.

However, it is largely agreed upon that the origins of the modern human rights regimes lie in the Minority Treaties of the 20th century.[7] Minority Treaties refer to the treaties, League of Nations Mandates, and unilateral declarations made by countries applying for membership in the League of Nations and United Nations. Most of the treaties entered into force as a result of the Paris Peace Conference. Stateless individuals such as Romani peoples, colonized individuals, and those displaced by the Treaty of Versailles at the close of World War I, all helped to draw attention to the increasing need for human rights protections for certain minority groups. Thus they were more collective group rights being protected, as opposed to individual rights *per se*. The Treaty of Versailles reorganized the boundaries of Europe and substantial minority populations were displaced or found themselves under the authority of unfamiliar sovereigns. Take for example the recreation of the State of Poland where millions of ethnic Germans were left residing within the territory. Also consider the creation of new states in the Balkans such as Yugoslavia and Hungary. Each consisted of large populations of people who did not share linguistic of ethnic identity with the majority population. All of this displacement was seen as a real threat to peace, and a potential cause for further war. As such, Minority Treaties were meant to protect collective group rights in order to avoid potential armed conflict. The duty to respect these rights was imposed on governments of defeated states as a condition precedent to the restoration of sovereign authority over their territories.[8] Yet, the system was in no sense a universal mechanism to protect human rights. It was applicable only to states forced to accept minority rights as part of the terms of peace at the close of World War I.

As they say, hindsight is 20/20, and as history has now taught us, the threat to peace was in fact all too real. Germany aggressively sought to protect the rights of its *Volksdeutsche*[9] peoples. Nearly a third of all litigation before the World Court between 1920 and 1939 involved some aspect of the protection of minority rights in Europe, with Germany suing Poland nearly a dozen times.[10] The minority issue was ultimately the foremost ground cited by the Nazi party for its invasion of Poland,

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6 *Peace Treaties of Westphalia (October 14/24, 1648)*, GHDI, <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3778> (accessed Mar. 11, 2016).

7 James C. Hathaway, The Rights of Refugees under International Law 81–91 (Cambridge University Press 2005).

8 *Id*. at 81.

9 '*Volksdeutsche*' is a term meaning 'ethnic German' that arose in the early 20th century and was used by the Nazi party to describe ethnic Germans living outside of the Third Reich, although many had been in other areas for centuries.

10 The World Court was known as the Permanent Court of International Justice at this time, and its records are available at <http://www.icj-cij.org/pcij/index.php?p1=9> (accessed Mar. 11, 2016).

which sparked World War II. As then-US Secretary of State Cordell Hill, recalled, '[f]rom the moment when Hitler's invasion of Poland revealed the bankruptcy of all existing methods to preserve peace, it became evident . . . that we must begin almost immediately to plan the creation of a new system.'[11] In order that history not repeat itself once again, the victorious Allied powers in 1945 signed the Charter of the United Nations. Within the Preamble of the Charter, it states that one main purpose of the United Nations would be 'to reaffirm faith in fundamental human rights . . .'[12] Furthermore, Art. 55(c) called for 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'[13] When the atrocities committed by Nazi Germany became apparent after the war, the consensus within the world community was that the UN Charter did not sufficiently define the rights to which it referred. In order to better protect these 'fundamental human rights' there needed to be a clear iteration of which rights were being protected. Shortly thereafter, the United Nations faced the task of pronouncing what exactly those human rights norms were. A panel of intellectuals and human rights advocates, led by Eleanor Roosevelt, along with the input of national delegations, worked together on the project, which culminated in the 1948 Universal Declaration of Human Rights.[14]

The UDHR was designed to elaborate the commitment, inaugurated in the UN Charter, to promote human rights as indispensable to international as well as domestic peace and security. Article 1 proclaims straightaway: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[15] The corpus of the UDHR was the enunciation of those freedoms necessary for individuals to operate within a polity. Such human rights as freedom from slavery[16] and torture,[17] equality before the law,[18] freedom of movement,[19] freedom of thought, conscience and religion,[20] and right to participation in the political process,[21] are laid out and ring with authority and certainty. In addition

[11] Cordell Hull, 2 The Memoirs of Cordell Hull 1625 (Macmillan 1948).

[12] U.N. Charter, Preamble.

[13] *Id*. Art. 55(c).

[14] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., pt. 1, Resolutions, at 71, U.N. Doc. A/810 (Dec 10, 1948) [hereinafter UDHR].

[15] *Id*. Art. 1.

[16] *Id*. Art. 4.

[17] *Id*. Art. 5.

[18] *Id*. Art. 7.

[19] *Id*. Art. 13.

[20] *Id*. Art. 18.

[21] *Id*. Art. 21.

to these 'first-generation'[22] civil and political rights, the UDHR also prescribes some 'second-generation'[23] economic and social rights.[24] These include the right to work,[25] to rest and leisure,[26] to education,[27] and to participation in cultural life.[28]

Although the UDHR was adopted without dissent, the inclusion of both 'first-generation' rights and 'second-generation' rights created division right off the bat. Not every country operates under the same governmental structure, and not every government protects the same types of rights. For instance, the Soviets were concerned about Art. 17's enshrinement of the right to own property, and the United States was concerned about the First Amendment implications of Art. 12's requirement that attacks of individual honor and reputation be barred. It is not hard to recognize that the major division was between the United States and Soviet Russia, because this was a post-World War II document, and the US and Russia were the two major players on the international playing field at the time. Furthermore, their status within the United Nations, especially their being two of the permanent members on the United Nations Security Council, gave substantial weight to each of their respective positions regarding the UDHR.[29]

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[22] 'First Generation' human rights are negative rights concerned primarily with liberty and participation in political life, and were pioneered by the United States Bill of Rights and earlier in France by the Declaration of the Rights of Man and of the Citizen in the 18th century, although some of these rights and the right to due process date back to the *Magna Carta* of 1215 and the Rights of Englishmen, which were expressed in the English Bill of Rights in 1689. They were later enshrined in international law by the UDHR, the 1966 International Covenant on Civil and Political Rights, and in Europe by the 1953 European Convention on Human Rights.

[23] 'Second-generation' human rights are positive rights and weren't recognized until after World War II. They are fundamentally economic, social and cultural in nature. They were also enshrined in the UDHR, and later in the 1966 International Covenant on Economic, Social, and Cultural Rights.

[24] Debate over positive *versus* negative rights began in the 19th century. The idea of 'generations' seems to have been the work of Karel Vasak, a continental European scholar of Czech origin who wound up in France. He envisioned three generations of rights derived from the French trinity of liberty (first), equality (second) and fraternity (third – *i.e.* collective rights). Liberty, it seems to me, is the only component of the French formulation that can be empirically tested. Some tend to appeal more towards John Locke's trilogy because it is more concrete. One can observe whether a fellow citizen: is alive or dead (life); is on the street or in jail (liberty); and possessed or dispossessed of 'stuff' (property). Likewise, the government can tangibly respect or deprive these rights subject to due process of law.

[25] UDHR, Art. 23(1).

[26] *Id*. Art. 24.

[27] *Id*. Art. 26(1).

[28] *Id*. Art. 27(1).

[29] By holding a spot as a permanent member of the Security Council, both countries hold 'veto power' over any UN action taken. There are five permanent members on the Security Council: the United States, Russia, China, France, and the United Kingdom. Today there are also 10 non-permanent members elected for two-year terms by the General Assembly. In 1948, however, there were only six non-permanent member states: Argentina, Belgium, Canada, Colombia, Syrian Arab Republic, and Ukrainian Soviet Socialist Republic.

The reason the UDHR could be adopted by consensus, despite the deep rift over certain provisions, was that it was not a legally binding instrument, but was instead merely an aspirational assertion of what rights *ought to be* protected. The UDHR is a United Nations General Assembly Resolution, and thus only amounts to what some term 'soft law.'[30] In fact, within the preamble itself the UDHR states that it is merely 'a common standard of achievement,' something to be 'strive[d]' for by national governments through 'progressive measures.'[31] The United States went as far as to issue a statement after the UDHR's adoption, which noted: 'It is not a treaty; it is not an international agreement. It does not purport to be a statement of law or legal obligation.'[32] Yet even though it was not legally binding, both countries were concerned because 'soft law' has a tendency, over time, to harden into international legal obligations by becoming customary international law.[33]

The United States was concerned they needed to hold out to prevent customary international law from forming and trumping its own domestic laws on point. This is because within the United States Constitution, Art. VI, often referred to as the 'Supremacy Clause,' places treaties on the exact same playing field as constitutional and federal law. The exact language reads: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . .'[34]

Other articles of the UDHR which comprised 'second-generation' economic, social and cultural rights, such as Art. 22's 'right to social security' and Art. 25's 'right to a standard of living adequate for the health and well-being . . . including food, clothing, housing and medical care,' were seen as departures from the typical human rights recognized within the United States and similarly positioned countries. As such, the United States avoided these economic, social and cultural rights at all costs.

The Soviet's faced similar concerns that a number of the listed civil and political rights would develop into customary international law and directly conflict with their own form of totalitarian governmental rule, which largely denied its citizens these civil

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30 The term 'soft law' refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat 'weaker' than the binding force of traditional law, often contrasted with soft law by being referred to as 'hard law.'

31 UDHR, Preamble.

32 19 Dep't State Bull. 751 (1948).

33 There are two key elements in the formation of customary international law. They are expressed in Art. 38 of the International Court of Justice Statute (59 Stat. 1055, 33 U.N.T.S. 993), which states custom is 'evidence of a general practice accepted as law.' To show a rule of customary international law exists one must prove: 1) that the rule has been followed as a 'general practice;' and 2) that it has been 'accepted as law.' There is thus an objective, and a subjective element to the inquiry.

34 U.S. Const. Art. VI. Furthermore, the concept termed the 'Charming Betsy Principle' makes acts of Congress subject to conformity with international law.

and political rights. There are some deep-rooted philosophical underpinnings that both laid the foundation as well as supplement the division. Within Russia, especially during the Soviet period, many did and do adhere to Marxist ideology. In Marxism, Communism is seen as the ultimate stage of social development. As such, substantive law codes within Russia were meant to have an aspect of social engineering involved. This can still be seen in many of the law codes currently in effect in Russia today. This is not so in the United States, where Lockean theory largely prevails. These adherents would find capitalism as the ultimate stage of social development due to the labor theory of property, a theory of natural law that holds property originates by the exertion of labor upon natural resources. In the market-driven, individualistic West, how one fared economically, socially or culturally was your own problem, between you and the market. As Cold War ideology goes, any attempts to require the government to protect economic rights were considered communist and suspect. In the Soviet Bloc, the state was expected to provide the basics for economic survival, and any attempts to say otherwise were seen as capitalist and suspect.

In essence, the United States backed Western-inspired civil and political rights, which are typically considered first-generation human rights, while the Soviet Union and its allies backed the socioeconomic and cultural rights typically considered second-generation human rights. This requires some further explanation. In the constitutional culture of the United States, the prevailing attitude was, and still is, that the purpose of the right is to insulate and protect people from abusive governmental power. The American Constitution was designed specifically to limit the national government to enumerated areas of authority. The Constitution was drafted as an arm's-length agreement amongst the 13 newly independent states. While they were aware of the need for some national cooperation, especially in commerce and defense, they had just finished fighting a long and costly war against a distant king and parliament. Furthermore, each state already enjoyed a functioning, representative government. The idea of a national government was concerning to those different interests – such as large and small states or manufacturing and agrarian states – which feared their opponents would take control of the new national government and implement their own economic or political policies. According to Western legal theory, 'it is the individual who is the beneficiary of human rights which are to be asserted *against* the government.'[35] Thus, the only right that makes sense is one that places restrictions on government action taken against individuals, otherwise termed 'negative rights.'

In contrast, second-generation rights are, in essence, requirements that the government *provide* certain benefits and services to the public (such as education, work, social security, or culture), and are otherwise termed 'positive rights.' It is the United States position that such positive rights may be provided as necessary, but

[35] Doriane Lambelet, *The Contradiction between Soviet and American Human Rights Doctrine: Reconciliation through Perestroika and Pragmatism*, 7 B.U. Int'l L.J. 61, 66 (1989), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1744&context=faculty_scholarship> (accessed Mar. 11, 2016).

they are not legally required to do so (at least not by the Federal Constitution, of which the article will touch on more later). Russians saw such positive rights as the proper role of governmental administration.[36] The Soviet state was considered as the source of human rights. Therefore, the Soviet legal system regarded law as an arm of politics and courts as agencies of the government.[37]

American disinclination to positive rights can also be attributed in part to the ideological campaign against the Soviet Union during the Cold War. The Soviets gave a high place to the collective over the individual. Individual rights of expression, or political diversity, were not important in the collective state. This meant priority for positive liberty, which they believed empowered the state to take sweeping action to provide for the well being and 'self-realization' of its citizens, sometimes at the expense of individual civil and political rights, such as the right to political participation.[38] Everyone was to be set on the unitary goal of furthering the Soviet cause. Many in the West, however, viewed the Soviet position skeptically as a veiled attempt to return to the excesses of authoritarianism that the United Nations system of governance was designed to prevent.[39]

The political roadblock culminated in the follow up the UDHR with two separate treaties – the International Covenant on Civil and Political Rights[40] and the International Covenant on Economic, Social, and Cultural Rights[41] – each of which was adopted in 1966 and entered into force in 1976. In the end, the United States chose not to ratify the ICESCR, and still has not ratified the treaty to present day. Also of particular interest is the fact that the United States' reservations to the ICCPR made the international human rights exactly congruous to already existing domestic constitutional protections. To the extent that any international rights would have exceeded the domestic protections already afforded, they were repudiated. Furthermore, the United States has not signed onto the First Optional Protocol to the ICCPR, which grants individuals the right to bring claims before the Human Rights Committee, as opposed to the state bringing the claim on their behalf. And although Russia ratified both the ICESCR and the ICCPR, these documents were neither well known to people living under Communist rule nor taken seriously by

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36 *See generally* David A. Shiman, *Economic and Social Justice: A Human Rights Perspective* (Human Rights Resource Center 1999), available at <http://www1.umn.edu/humanrts/edumat/pdf/TB1.pdf> (accessed Mar. 11, 2016).

37 Richard Pipes, Russia under the Bolshevik Regime 402–03 (Vintage Books 1995).

38 *Id*.

39 *Id*.

40 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

41 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95–19, 999 U.N.T.S. 3, 6 I.L.M. 360 (1967) [hereinafter ICESCR].

the Communist authorities.[42] While the United States still to date has decided not to sign onto the First Optional Protocol to the ICCPR, Russia did later choose to sign the Optional Protocol. Russia did so on October 1, 1991, and with it, made the following Declaration:

> The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies.[43]

Only two months after signing the Optional Protocol, the Soviet Union dissolved into 15 post-Soviet states.[44] The Russian Federation has been recognized internationally as the successor state of the Soviet Union. Therefore, according to international law, Russia remains bound by any and all treaties entered into by the former Soviet Union and thus the Optional Protocol still applies.[45]

The 1977 USSR Constitution reflects that the entire country was designed around the idea of a social state surrounding a totalitarian country governed by the Communist party as the central rulers. It stated: 'The Soviet state and all its bodies function on the basis of socialist law, ensure the maintenance of law and order, and safeguard the interests of society and the rights and freedoms of citizens.'[46] In short, the Russian paradigm 'enjoy[s] no independent existence outside the network of law-relationships (*pravootnosheniia*) established by positive legislation (*zakonodatel'stvo*).'[47] And although many parts of the Soviet Constitution sounded as though it promoted

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[42] Daniel C. Thomas, *Human Rights Ideas, the Demise of Communism, and the End of the Cold War,* 7 J. Cold War Stud. 110, 117 (2005), available at <http://papers.ssrn.com/abstract_id=1333625> (accessed Mar. 12, 2016).

[43] A list of signatories and their reservations and / or declarations are available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en> (accessed Mar. 12, 2016).

[44] The post-Soviet states include Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Russia.

[45] *See* Vienna Convention on Succession of States in Respect to Treaties, Aug. 23, 1978, Arts. 15(b), 34(b), 1946 U.N.T.S. 3; *see also* Vienna Convention on Succession of States in Respect of State Property, Archives and Debt, Apr. 8, 1983, 22 I.L.M. 306 (1983).

[46] USSR Constitution Art. 4.

[47] Ronald Childress, *False Cognates and Legal Discourse*, 2(1) Journal of Eurasian Law (JEL) 3 (2009).

civil and political rights, such provisions did not have direct effect, and there was no legislation in place to enforce them.[48] In other words, constitutional rights of Russian citizens require 'concretization' before the can be adjudicated.[49] Take for instance Art. 59 of the RF Constitution. It claims that alternative service in place of military service is a right whether based on grounds of conscience, religious faith, or 'other reasons established by federal law.'[50] Yet, since no specific statute has been adopted, Art. 59 is completely inoperative in the Russian Federation. This is odd to an American's sensibilities, which would think about constitutional rights and protections as having direct effect simply by their being within the text of the Constitution itself.

3. Post-Split Developments

In 1787, Noah Webster poignantly articulated the need for citizens to take part in the political process when he penned the following:

> In the formation of . . . government, it is not only the *right*, but the indispensable *duty* of every citizen to examine the principles of it, to compare them with the principles of other governments, with a constant eye to our particular situation and circumstances, and thus endeavor to foresee the future operations of our own system, and its effects upon human happiness.[51]

Mr. Webster was suggesting that people should not simply educate themselves with the form of government that their own state practices, but to familiarize oneself with competing systems of government as well, so as to ultimately determine the best possible form of government. As a founding father of the United States, Mr. Webster was primarily concerned with American Constitutionalism and the structure of the newly established United States federal government. However, the same idea of comparative study should not be lost on other areas of state practice as well. Today, it is not governmental structure that is booming with innovation any longer, it is instead areas such as environmental protection, globalization of trade and commerce, the development of international laws and regulations, the establishment of intergovernmental organization, human rights and various other areas subject to rapid development and growth. Accordingly, the remainder of this article will

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48 For more information on the different legal paradigms at play, see *id.*

49 This is true even today, even though Art. 18 of the RF Constitution declares that such rights operate directly.

50 RF Constitution Art. 59.

51 Noah Webster, An Examination into the Leading Principles of the Federal Constitution 6 (Prichard & Hall 1787), reprinted in The Constitution of the United States: And Selected Writings of the Founding Fathers 669 (Barnes & Noble Inc. 2012).

utilize Mr. Webster's theory and provide a comparative study of the present state of human rights within these two systems. The following discussion will highlight the advancements made in each system following the splitting of the UDHR into the ICCPR and the ICESCR.

2.1. Russian Developments

Since the collapse of the Soviet Union in 1991, Russia has undergone a profound transformation in its political and constitutional systems, which have in turn affected its treatment of human rights. On September 21, 1993, President Boris Yeltsin declared the Supreme Soviet dissolved and issued Decree No. 1400 'On Progressive Constitutional Reform in the Russian Federation,'[52] which suspended the operation of most of the former 1978 Constitution. The ultimate result was the adoption of a new Constitution in 1993 that rejects the former communist dictatorship and calls for passage to a democratic government.[53] Article 1 begins by declaring that the Russian Federation is now a 'democratic federal rule-of-law state.'[54] Americans admired Yeltsin's efforts so much that they passed the Freedom Support Act to help underwrite his program of reforms.

The new Constitution went much further in recognizing human rights than did any of its predecessors. Article 2 provides that '[i]ndividuals and their rights and freedoms shall be of supreme value.'[55] And although the Constitution still makes it the 'duty of the state'[56] to protect such rights, it makes clear its departure from the Soviet model by proclaiming that '[f]undamental human rights and freedoms are inalienable and belong to everyone from birth.'[57] Another development that came along with the passage of the new Constitution was the introduction of the concept of separation of powers. Of particular importance to enforcing human rights in Russia is the guarantee of the independence of the judiciary and power of judicial review.[58] Furthermore, Art. 15(1) establishes the principle of constitutionalism by

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[52] «О поэтапной конституционной реформе в Российской Федерации» ['*O poetapnoi konstitutsionnoi reforme v Rossiiskoi Federatsii*'] (Collection of Acts of the President and Government of the Russian Federation, No. 39, item 3597).

[53] *See* Victoria Schwartz, *The Influences of the West on the 1993 Russian Constitution*, 32 Hastings Int'l & Comp. L. Rev. 101 (2009), available at <http://papers.ssrn.com/abstract_id=2117246> (accessed Mar. 12, 2016) (discussing the influences of Western constitutional ideology on the new Russian Constitution).

[54] RF Constitution Art. 1.

[55] *Id.* Art. 2.

[56] *Id.*

[57] *Id.* Art. 17(2).

[58] *Id.* Art. 10: 'State power in the Russian Federation shall be exercised on the basis of separation of the legislative, executive and judicial branches. Organs of legislative, executive and judicial power shall be independent.' This concept, while not specifically stated in the U.S. Constitution, is inherent in its structure, separating the first three articles in accordance with the three branches of government.

providing that '[t]he Constitution of the Russian Federation shall have supreme legal force and *direct effect*.'[59] The rules governing international law are also very important to the Russian Federation, which is apparent through Art. 10 of the RSFSR Declaration of Sovereignty of June 12, 1990, which declared: 'All citizens and persons without citizenship living on the territory of the RSFSR are guaranteed the rights and freedoms envisioned in the RSFSR Constitution, the USSR Constitution, *and the generally recognized norms of international law.*'[60] The same concept was applied in Art. 17(1) of the 1993 Constitution, which states: 'The rights and freedoms of the individual and citizen shall be recognized and guaranteed in the Russian Federation *in conformity with the generally recognized principles and norms of international law.*'[61] Not to mention, international law instruments take precedence over national legislation according to Art. 15(4) of the RF Constitution.[62]

Chapter 2 of the Constitution, which deals with the 'Rights and Freedoms of the Individual and Citizen,' contains an extensive list of rights. Not only does it include the familiar social and cultural rights, but it also contains many civil and political rights, such as free opinion and speech, freedom of assembly, freedom of association and political plurality. Russia has thus combined ideals from its socialist past by including economic, social, and cultural rights, based on the ICESCR with the more traditionally Western concepts of civil and political rights stemming from the ICCPR.[63] The catalog of civil, political, economic, social, and cultural rights are all based off of international human rights standards.

The next major step for Russia in the field of human rights came on February 28, 1996, when Russia signed the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR]. Russia in now a member of the Council of Europe and thus under the ECHR, it is subject to the jurisdiction of the European Court of Human Rights [hereinafter Eur. Ct. H.R.], an international tribunal with real bite.[64] By acceding to the ECHR, Russia not only agreed to abide by the ECHR's provisions, but also made itself subject to the case law of the Eur. Ct. H.R. In essence, they adopted a well-developed existing body of human rights law overnight. The ECHR begins with an enumeration of rights that blends both first and second-generation

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59 RF Constitution Art. 15(1) (emphasis added).

60 Emphasis added.

61 RF Constitution Art. 17(1) (emphasis added).

62 *Id.* Art. 15(1).

63 It would be unwise not to mention, however, that in post-Soviet Russia, the Communist Party became one of the strongest and most stable political parties, while the parties of the non-communist reformers have foundered. The absence of democratic organizations to counter the Communist Party continues to be a serious destabilizing force in the Russian political environment that may hamper the progress of human rights developments within Russia.

64 The council is made up of over 40 countries, and has rendered over 400 judgments against states.

rights. And furthermore, since these events the Russian parliament has been actively incorporating human rights principles into its domestic legislation.[65] In order to further ensure the protection of the newly established human rights concepts, Russia developed a special agency that deals exclusively with human rights violations – the Office of the Commissioner for Human Rights and Its Plenipotentiary (Ombudsman). There have also been efforts to develop a regional human rights enforcement system within the Commonwealth of Independent States [hereinafter CIS].[66]

One major area that has seen real change in Russia due to its membership in the Council of Europe deals with the death penalty. Although Russia has had an off-and-on relationship with the death penalty for some time, most recently, the all-time low (excluding when it was abolished) came when only four executions were carried out in 1993.[67] The primary reason that Russia has backed away and become more tentative of the death penalty has been its wish to become and remain a member of the Council of Europe. In order to join in 1996 Russia had to agree to an immediate moratorium on implementation of the death penalty and its elimination within three years.[68] The moratorium held the death penalty at bay until 1999, when the Constitutional Court declared in Ruling No. 3-P of February 2, 1999,[69] that it would not be allowed at all. However, in 2001 the Duma passed a new Criminal Procedure Code that clears up ambiguities surrounding when the death penalty may be applicable, and thus it may move toward imposing the death penalty once again. Even so, by virtue of the new Criminal Code, which came into force on January 1, 1997, the death penalty is prescribed for five offences, whereas in the 1970[s] there were 22. There is also provision for the substitution of a sentence of life imprisonment. And lastly, minors, women and persons over 60 years of age may not be sentenced to death.[70] Russia's spot on the Council of Europe is already tentative, and some commentators

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65 Including the new 2002 Civil Procedure Code, 2001 Criminal Procedure Code, 2001 Land Code, 2001 Law on Court Expertise, 2001 Labor Code, 2002 Bar (*advokatura*) Law & Code of Ethics and the 2004 Housing Code. Important because one of the lessons of Russia's Communist past is that constitutional and legislative guarantees of human rights are meaningless without some enforcement mechanism, which generally comes from a statute (*zakonodatel'stvo*) that can be adjudicated.

66 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, May 26, 1995, reprinted in 17 Hum. Rts. L.J. 159 (1996). However, many member states of the CIS are dictatorships that engage in widespread violations of human rights.

67 William Burnham et al., Law and Legal System of the Russian Federation 651 (3rd ed., Juris Pub. Inc. 2004).

68 *Id*. at 652.

69 In the case concerning the review of the constitutionality of certain provisions of Arts. 41 and 42(3) of the RSFSR Criminal Procedure Code (Collection of Legislation of the Russian Federation, 1999, No. 6, item 867). The Court held that it would not be allowed 'regardless of the composition of the tribunal that tries the case – whether a court with a jury, a court of three professional judges or a court with one professional judge and two lay assessors').

70 Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years On*, 4 Eur. H.R. L. Rev. 362, 369 (2000).

have made note that a 'move back toward imposing the death penalty may be the "last straw" as far as the Council of Europe is concerned, with all the international prestige and negative public opinion issues that this would raise.'[71] Currently, however, Russia has adhered to the unofficial moratorium announced by President Yeltsin on August 2, 1996, thanks to the practice of referring all death sentences to the President's Commission on Clemency who have commuted each sentence to life in prison and Russia's desire to remain part of the Council of Europe.[72]

The Russian Supreme Court has cited the ECHR in a number of cases, and has ordered all courts subordinate to it to apply such precedents where applicable. The Eur. Ct. H.R. has become overwhelmed with cases from Russia. President Putin even remarked in November of 2001:

> We do not consider the European Human Rights Court as a competitor of our own judicial system. On the contrary, this is the most important element of European values in the modern world and in Russia if we take into account its integration into the world community.[73]

Still, as of February 2009, 28 percent of pending cases before the Eur. Ct. H.R. were directed against the Russian Federation, amounting to 27,900 cases. And of those found admissible, the vast majority go against Russia. Also, findings of several organizations are far from complimentary. The UN Committee on Economic, Social and Cultural Rights noted that 'the process of transition to a democratic country with a market-based economy is being undermined by the development of corruption, organized crime, tax evasion and bureaucratic inefficiency and has resulted in inadequate funding for social welfare expenditure and payment of wages in the State sector.'[74] The Committee on the Elimination of Racial Discrimination noted increasing incidents of acts of racial discrimination on ethnic grounds and inter-ethnic tensions

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71 Burnham et al., *supra* n. 67, at 659 (noting that sensitivity about Russian membership in the Council is clear from the Council's vote in April 2000 to suspend Russia's voting rights on the Council because of human rights violations in Chechnya).

72 There is a clear difference in the treatment of the death penalty in the United States, because as a matter of state law, there is a myriad of viewpoints taken, whereas in Russia, it is the central government that has the last word.

73 Quoted in William Burnham et al., Law and Legal System of the Russian Federation 329 (6th ed., Juris Pub. Inc. 2015) (citing Peter Krug, *Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 Brook. J. Int'l L. 1, 7 (2006), available at <http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1255&context=bjil> (accessed Mar. 12, 2016)).

74 *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, U.N. ESCOR, ¶ 13, U.N. Doc. E/C.12/1/Add.13 (1997), at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F1%2FAdd.13&Lang=en> (accessed Mar. 12, 2016).

and conflicts in various parts of the Russian Federation.[75] The UN Special Reporter on Torture has mentioned that detention conditions are characterized by overcrowding and unsatisfactory sanitation and medical care.[76]

The United States is responsible for another important piece of the puzzle in the development of human rights in Russia. During the 1990[s], the United States intervened directly to export Western ideas and institutions into Russian society. With Russia's newly established commitment to democracy and the rule of law, observers in the United States saw it as their duty to provide what help that could in shaping this transition in Russia. In the early 1990[s], several Russian non-governmental organizations were formed with the purpose of seeking international assistant in Russia's transition. One such organization was ROSCON, whose acronym stood for 'Russian Society for Social Conservation' and whose goal was a broad, societal change in behavior through social marketing. ROSCON negotiated an agreement with Washington-based Academy for Educational Development [hereinafter AED] jointly to seek an award of funding from the United States Agency for International Development [hereinafter AID]. The ROSCON / AED team received millions of dollars from AID to educate Russians about free market economics. Many realized that the shift from Russia's command economy to that of a free-market would not only require large-scale effort from above by the government, but also cooperation and understanding from below as well. Another, purely American-based NGO that worked within Russia during this time was the Rule of Law Consortium [hereinafter ROLC], whose goal was to strengthen Russia's core legal institutions, and was a heavy influence in reviving jury trials in Russia. AID awarded ROLC US$22 million dollars to help support the rule of law in Russia.[77]

Many skeptics have argued that the change was too drastic to take hold in Russia. The author has spoken with Dr. Ronald M. Childress, a former member of the ROSCON

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[75] *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination Russian Federation*, U.N. CERD, 52nd Sess., UN Doc. CERD/C/304/Add.43 (1998), at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F304%2FAdd.43&Lang=en> (accessed Mar. 12, 2016).

[76] *Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1997/38*, U.N. ESCOR, Commission on Human Rights, 54th Sess., Agenda Item 8(a): Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 164, UN Doc. E/CN.4.1998/38 (1998), at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/145/96/PDF/G9714596.pdf?OpenElement> (accessed Mar. 12, 2016).

[77] The ROLC define Rule of Law as follows, pulling directly from the 1993 Vancouver Summit: 'Rule of Law means that all components of society, including the public bureaucracy, operate under the same legal constraints and with the same legal rights, thus enabling peaceful and predictable political and economic participation. Strengthening the rule of law requires that the legal system exist not only on paper, but also in practice. Written laws must also be implemented, enforced, understood, accepted, and used. Therefore, strengthening the rule of law requires the development of independent, efficient, and highly professional judicial and legal institutions capable of supporting democratic, market-oriented societies and protecting human rights. It also requires an increased awareness on the part of the population of the benefits to them of a law-based society, and a publicization and popularization of the new systems being created.'

team, who is now an Adjunct Professor at the University of South Carolina School of Law. Dr. Childress emphasized that many of these NGO's, in particular ROSCON, were ultimately failures in their attempts to weave Western institutions into Russia's fabric. However, not even Dr. Childress and his ROSCON comrades can deny that the collective efforts of countless individuals and NGO's bringing Western ideals into Russia had some tangible effect on Russia in areas such as privatization, market-liberalization, monetarism, rule of law, democracy, and most importantly for this paper, human rights.

2.2. United States Developments

Unlike the Russian Constitution that provides for limitations within its text,[78] the United States Constitution sets out individual rights in absolute terms. Take for instance the First Amendment's flat prohibition: 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .' But no one maintains this means exactly what it says. Limitations come from judicial decisions and include such things as subversive speech and words that lead to breach of the peace.[79] Thus the brevity of the US Constitution should not be cited as proof of vast differences between the two systems. Also unlike Russia, Americans have traditionally known their rights and have stood upon them. From *Marbury v. Madison*[80] to present day, Americans know that no arbitrary action of the government in violation of their rights can escape judicial review. However, Russians are today much more aware of their own rights. Copies of the 1993 RF Constitution are sold in mass quantities. As mentioned, it contains 47 articles declaring 'Rights and Liberties' of persons and citizens.

One large development in the United States actually predates the UDHR, but has had lasting effects on the landscape of individual rights within the United States nonetheless. After the stock market crash of 1929 wiped out many American's savings, and bank failures further exacerbated the problem, Franklin D. Roosevelt began to combat the rampant poverty with his New Deal government programs. The Acts were meant to address many dangers of modern American life, including old age, poverty and unemployment. By signing the Social Security Act on August 14, 1935, President Roosevelt became the first president to advocate for federal government assistance for the elderly.

The United States has also become a member to a regional human rights regime – the Inter-American Human Rights System, otherwise known as the Organization of American States. While generally not held in as high regard in terms of enforcement as with its European counterpart, the Inter-American System provides for regional oversight and acts as a regional 'watch-dog' nonetheless, and has strengthened the United States commitment to both positive and negative human rights. The Inter-

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78 RF Constitution Art. 55(3).

79 Like shouting 'Fire!' in a crowded theatre.

80 5 U.S. (1 Cranch) 137.

American System also contains the Inter-American Court on Human Rights. Another argument that is often made about why the situation in the two countries is so different is that of American 'constitutional exceptionalism.'[81] In essence, comparing the United States Constitution with other nation's constitutions and pointing out the lack of socioeconomic rights within the text is often used as proof of the lack of positive human rights protection within the United States.[82] Yet this argument is fundamentally flawed. Unlike Russia, who has drafted and redrafted its Constitution numerous times, the United States' Constitution is the oldest surviving national constitutional document in the world. The constitutions of the United States and the Russian Federation were written half a world and more than 200 years apart under immensely different political situations and traditions that shaped the drafters' choices. Furthermore, confining the study of constitutionalism in the United States simply to the text of the Federal Constitution ignores the reality of constitutionalism in the United States. Over the past two centuries, Americans have participated in extensive and ongoing constitution making at the state level, in the course of which they have evaluated and updated the choices reflected in the United States Constitution numerous times. Also, similar to Russia's Constitution, state constitutions tend to be rather long and elaborate, and include more detailed provisions. Furthermore, similar to Russia's Constitution, state constitutions are often amended and oftentimes even replaced outright.[83] For instance, just between 1971 and 1973, South Carolina passed 200 amendments to its own state constitution. And most importantly, like Russia's Constitution, state constitutions contain positive rights, such as a right to free education, labor rights, social welfare rights, and even so called 'third-generation' environmental rights.

The author will use the right to education as an example. While a social right constitutionally protected in Russia, the United States Supreme Court has declared education, 'is not among the rights afforded explicit protection under our Federal Constitution.'[84] The same is true for other socioeconomic rights, such as the right to health care, to a limited workday, to social security benefits, and to a healthy

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81 *See, e.g.,* Helen Hershkoff, *Horizontality and the 'Spooky' Doctrines of American Law*, 59 Buff. L. Rev. 455 (2011), available at <http://buffalolaw.org/past_issues/59_2/Hershkoff.pdf> (accessed Mar. 12, 2016); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391 (2008), available at <http://papers.ssrn.com/abstract_id=1287701> (accessed Mar. 12, 2016).

82 *See* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (University of Chicago Public Law & Legal Theory Working Paper No. 36, January 2003), <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1384&context=public_law_and_legal_theory> (accessed Mar. 12, 2016).

83 Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. Chi. L. Rev. 1641, 1672 (2014), available at <http://papers.ssrn.com/abstract_id=2416300> (accessed Mar. 12, 2016) (stating that 'Louisiana has had 11 constitutions, Georgia has had 9, Virginia and South Carolina have each had 7, and Florida and Alabama have each had 6. Combined, the states have produced a total of 149 documents to date.').

84 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

environment.[85] Thus, when looking only at the Federal Constitution, it appears that the United States and Russia differ greatly as to treatment of positive rights. But when one considers that Americans have enshrined many explicit positive rights in their state constitutions, the two systems do not seem so vastly different after all.[86]

There are also a large number of universal human rights instruments dedicated to specific issues that both countries adhere to. For instance, both nations adhere to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Furthermore, certain customary human rights norms, such as the prohibition against genocide, slavery and torture, have become *jus cogens*[87] obligations that may not be derogated by treaty by any nation. Moving forward, the following chapter will provide specific comparisons of the treatment of several rights within the two systems so as to present meaningful and justifiable examples of the broad ideas discussed earlier in the paper.

3. Comparison of Specific Rights

As the previous discussion has hopefully explained, the traditional argument posits that Russians enjoy better treatment when it comes to second-generation positive rights, while Americans enjoy better treatment in terms of first-generation negative rights. However, this is merely terminology used to describe certain types of human rights, and may not have as much meaning in practice. Thus, the following section will use specific examples of positive and negative rights, and juxtapose their treatment within the two systems, to elucidate the similarities between both states' practices. Much has already been written regarding some of the 'sexier' rights such as the right to life, liberty and freedom of religion. Therefore, this article will use corollary rights, equally as important, but lesser discussed, to explain its position. The following discussion will use two positive rights: the right to receive a free public education (Sec. 3.1) and the right to receive social security (Sec. 3.2), as well as two negative rights: the right to participate in political life (Sec. 3.3) and the right to own private property (Sec. 3.4).

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85 *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1133 & nn. 2–5 (1999).

86 *See* David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 13, 17 (UBC Press 2012) (stating as of 2012, 30 state constitutions included one or more provisions requiring the government to care for the poor or the disabled; 11 required the state to set minimum wages or a maximum workday; 16 protected the right to unionize; nine required the government to regulate workplace safety; and 14 protected the right to a clean and healthy natural environment; as these examples illustrate, Americans do not shy away from imposing positive constitutional duties on government).

87 A *jus cogens* norm is an international rule deemed so important that states are not allowed to opt-out of them. Some examples are genocide, committing war crimes, and waging aggressive wars.

3.1. The Right to Public Education

The right to a free public education is obviously a positive right, since it requires that the government provide some benefit to its citizens. And in accordance with the standard positive *versus* negative right tradition, it is explicitly enumerated within Russia's Constitution, and left out of the US Constitution. Article 43 of the 1993 RF Constitution provides that '[e]veryone shall have the right to education' and that '[p]re-school, elementary, secondary and vocational education in state or municipal educational institutions . . . shall be guaranteed to be accessible to all citizens free of charge.'[88] This right is not provided for in the US Constitution, and some mistakenly state that the right therefore does not exist in the US system as a constitutionally protected right. Furthermore, some even use the fact that the United States has not signed on to the United Nations Convention on the Rights of the Child[89] as evidence to bolster the argument that this positive right doesn't exist in the United States. But those commentators are wrong. It is well known that the right to free public education does exist in the United States. This is where federalism and the Tenth Amendment come into play. The reason the United States cannot sign on to the Convention, is because child's rights are an area relegated to state law, and thus by the Federal Government signing the treaty, it would be stealing power from the states.[90] The United States federalist structure is such that the federal government possesses only those powers delegated to it by the Constitution. All remaining powers are reserved for the states or the people.[91] And it is within state law that the right to a free public education is protected.[92]

It is worth noting that while Russia is also considered a federation, and thus also contains elements of federalism; the two systems do not work identically. In the United States, both the Federal Government, as well as the state governments, are

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88 RF Constitution Arts. 43(1)–(2).

89 The 1989 United Nations Convention on the Rights of the Child is now ratified by every nation except Somalia (which does not have a recognized government capable of ratifying a treaty) and the United States. In terms of human rights treaties, it is the most widely ratified human rights treaty in history, and a true step towards universal human rights standards. Interestingly, the ICCPR (Art. 24(1)) provides that '[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.' And the ICESCR (Art. 10(3)) states that '[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.' Yet it was not until the United Nations Convention of the Rights of the Child that an international instrument comprehensively covered children's civil, political, economic, social and cultural rights.

90 One might then ask why the United States doesn't simply take reservation to the articles that interfere with state rights. The answer is that it goes to the heart of the treaty, and thus reservations are not allowed according to the Vienna Convention on the Law of Treaties.

91 U.S. Const. amend. X: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

92 It is often noted that the right to a free public education is as close to a constitutional guarantee of a positive right in the United States as you can get.

considered sovereign in their own right. James Madison established this approach to sovereignty. According to his opinion,

> [t]he Constitution of the USA created a government in the strict sense of the word in the same way as state governments were initiated by their respective constitutions. Both federal and state governments have legislative, executive and judicial branches of power. Both federal and state constitutions state the limits of authorities of the organs of power. In some cases, the jurisdictions of the federal government and state government coincide, while in others they exclude each other, which constitutes one of the distinctive features of the existing system.[93]

In contrast, the current state of Russian federalism provides for very little power to the republics, and most of the power still resides in the Central Government. Thus, if the Russian republics are truly sovereign at all, their sovereignty is severely limited. It is therefore from the Central Government itself that Russia provides for the right to a free public education, while it is reserved for the states in the US.

Getting back to the development of the right to a free public education in the United States, it was not until the turn of the century that states began making free public education widely available. Yet today every state provides for the right. Take a number of South Carolina Supreme Court cases for example. The South Carolina Supreme Court held that because the South Carolina Constitution requires the General Assembly to provide public schools for all children, then the state is constitutionally required to provide at least 'a minimally adequate education' to its resident children.[94] A more recent South Carolina case, similarly taking place in Abbeville County, stated that providing children with a free public education was 'the most important function of state and local governments.'[95] Similar laws are present in every state of the Union. And as proof that the Federal Government backs these state initiatives, it provides funding to every state for assistance. Therefore, while the right to education may be a positive right, the terminology does not prevent the right from being realized within both Russia and the United States. The difference simply lies in how the government provides for the right.

3.2. The Right to Social Security

In the United States, the stock market crash in 1929 spurred the greatest economic depression the country had ever known. Rampant unemployment and poverty spread

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93 James Madison, *Letter to N.P. Trist (February 15, 1830)*, in The Complete Madison: His Basic Writings 195 (Saul K. Podover, ed.) (Harper & Brothers 1953).

94 *Abbeville County School Dist. v. State*, 335 S.C. 58, 58 (1999).

95 *Abbeville County School Dist. v. State*, 410 S.C. 619, 623 (2014).

throughout the country. Franklin D. Roosevelt, who was at the time Governor of New York, decided a change was needed. As Governor, FDR created the Temporary Emergency Relief Administration, the first state agency in the country to provide public relief for the unemployed, 'not as a matter of charity,' he said, 'but as a matter of social duty.'[96] Once taking office after being elected as President in 1932, FDR implemented his famed New Deal reforms, such as the Social Security Act. Opponents to the Social Security Act sounded alarms about the New Deal being too socialist. In a Senate Finance Committee hearing, one Senator asked Secretary of Labor Frances Perkins, 'Isn't this socialism?' when she answered that it was not, the Senator continued, 'Isn't this a teeny-weeny bit of socialism?'[97] The American Liberty League went so far as to compare FDR to Karl Marx and Vladimir Lenin.[98] Whether or not the New Deal opponents were right or wrong, it is an important development in the United States, because the Social Security Act provided, for the first time, positive rights to American citizens enshrined at the federal level. The opponent's were defeated through some keen political maneuvering on Roosevelt's part. Utilizing the Judicial Procedures Reform Bill of 1937, Roosevelt appointed six new Supreme Court Justices, and 44 judges to lower federal courts, instantly tipping the political balance in his favor. Two United States Supreme Court rulings also affirmed the constitutionality of the Social Security Act.[99] Although the original act was discriminatory towards minorities and women, the Act has gradually moved towards universal coverage.

In Russia, the social security system has always been the responsibility of the state, and has been administered by the Ministry of Labour and Social Protection (*Ministerstvo truda i sotsialnoi zashchity*). Peter the Great made a decree in 1691 about prohibiting poverty.[100] The system has since grown and been formalized, set in statute, and amended to reflect the needs of the times. However, being a social state, Russia has placed social security on a high pedestal for a long time, and continues to do so today. During the transition period between Soviet Russia and the Russian Federation, social protections were at risk due to instability during the change. However, in 1999 the Federal Law 'About the State Public Assistance' which together with the Federal Laws 'About a Subsistence Minimum in the Russian Federation' (1997) and 'About a Consumer Basket in General Across the Russian Federation' (1999) made sure that

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96 Franklin D. Roosevelt, *Call for Federal Responsibility*, <http://www.columbia.edu/~gjw10/fdr.newdeal.html> (accessed Mar. 12, 2016).

97 Nancy J. Altman, *President Barack Obama Could Learn from Franklin D. Roosevelt*, L.A. Times (Aug. 14, 2009), <http://articles.latimes.com/2009/aug/14/opinion/oe-altman14> (accessed Mar. 12, 2016).

98 Albert Fried, FDR and His Enemies 120–23 (Palgrave Macmillan 1999).

99 *See Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *see also Helvering v. Davis*, 301 U.S. 619 (1937).

100 Elizaveta N. Valieva & Jury V. Matveev, *Social Security in Russia: Institution-Historical and Financial Aspects*, 7(2) Review of European Studies 16 (2015), available at <http://papers.ssrn.com/abstract_id=2677583> (accessed Mar. 12, 2016). doi:10.5539/res.v7n2p15

public assistance was adopted into the new Russia.[101] Thus, in terms of social security rights, the two systems have developed into similar positions as well.

3.3. The Right to Participate in Political Life

While the United States has developed protections for many formerly absentee positive rights, Russia has also made great strides in recognizing negative rights as well. One concrete example is the right to participate in political life. During the Soviet era, the right to participate was largely illusory. Although the 1936 Soviet Constitution guaranteed direct universal suffrage through the secret ballot, in practice there was really only ever one candidate. Furthermore, the right to assemble and freedom of association were strictly limited. For instance, in the 1930^{s} and 1940^{s}, outright political repression was practiced by the Soviet secret police. An extensive network of civilian informants – either volunteers or those forcibly recruited – were used to collect information for the government and report cases of suspected dissent.[102]

However, because Russia is now subject to the ECHR and gives direct effect to international law, *Bowman v. the United Kingdom*[103] has had a large impact on the right to participate in political life in Russia. In *Bowman*, the Eur. Ct. H.R. held that free elections and freedom of speech, especially freedom of political discussion, form the basis of any democratic system, both rights are interrelated and strengthen one another. In stark contrast to the Soviet model, the 1993 Constitution proclaims in Art. 3 that people are 'the sole source of power in the Russian Federation' and that they may exercise their power directly and through representative government.[104] Further, it states: 'Referenda and free elections shall be the supreme direct manifestation of the power of the people.'[105] The Constitution also guarantees such political rights as majority rule, free opinion and speech, freedom of assembly, freedom of association and political plurality. Within the United States, the right to political participation has had to hurdle a few mountains in terms of equality and access for minorities and women, but has traditionally been a system that values representative democracy. So in terms of negative political rights, the systems are growing closer as well.

3.4. Private Ownership of Land

To properly understand the development of the right to private ownership of property, one must first understand the historical developments in the two systems that led to their contemporary approaches. Therefore, the article will provide a brief

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101 Valieva & Matveev, *supra* n. 100, at 19.

102 *See* John O. Koehler, Stasi: The Untold Story of the East German Secret Police 143 (Westview Press 1999).

103 *Bowman v. United Kingdom*, no. 24839/94 (Eur. Ct. H.R. Feb. 19, 1998).

104 RF Constitution Arts. 3(1)–(2).

105 *Id*. Art. 3(3).

comparison of the developments as to property rights first for normative Western tradition, and then its Russian counterpart. Perhaps the earliest debate over private property rights was one that took place in Classical Athens between Plato, and his Athenian compatriot, Aristotle. In Plato's writings he tended to extol a utopian vision of the past where all property was held in common, and thus no struggle over property took place. The collective ownership was deemed necessary to promote common pursuit of the common interest, and avoid social divisiveness.[106] Socialist thinkers later adopted Plato's moral view. In response to Plato, Aristotle argued on purely practical grounds that private ownership of property would promote efficiency and basically market incentives. Aristotle also spoke about how private land ownership helps one become a free man, and thus suitable for citizenship.[107] Aristotle's view on property ownership came to prevail in Western thinkers. Skipping ahead to mid-17th century England, we find Thomas Hobbes presenting a powerful case for the role of the state in protecting property rights. Essentially, Hobbes built upon Plato's argument, and placed the state before the individual. As such, private property ownership was not a birthright, but something guaranteed by the state. It is easy to see why Hobbes has often been used as a pretext for introducing authoritarian government. Towards the end of the same century, John Locke began promoting the opposite position. Tacking on to Aristotle's view, Locke essentially placed property in such regard as to be a birthright, and so property ownership predates sovereignty. Locke mainly argued the moral reasoning for property ownership, but in 1776, Scottish economist Adam Smith published *The Wealth of Nations*, in which he put forth the practical functions of property ownership.

A total merger of power and ownership marked the Soviet order. The Land Decree of the Communist Party, written by Vladimir Lenin and adopted on October 26, 1917, barred private ownership for decades to come. The 1918 Constitution made it clear: 'For the purpose of attaining the socialization of land, *all private property in land is abolished*, and the entire land is declared to be national property.'[108] As Soviet legal theory developed through the 1920s and 1930s, land law developed as a separate branch of law[109] characterized by the following principles: 1) all land is owned by the state; 2) land cannot be the subject of a sale or transaction; and 3) the state grants the limited right to use land to individuals and legal entities. The land could only be held in return for lifelong service, and so Soviet land rules closely tracked that of feudal England, except for the fact that in Western feudalism there was a strong

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106 Plato, Republic 462 (Robin Waterfield, trans.) (Oxford University Press 1993) (c. 370 BCE).

107 Aristotle, The Politics 1263 (Stephen Everson, ed.) (Cambridge University Press 1988) (c. 330 BCE).

108 RSFSR Constitution (1918) Art. 3(a) (emphasis added).

109 Unlike the system of law in place in the United States in which areas of law tend to affect one another (*i.e.* agency law affecting contract law), the Russia concept of *otrasl* states that each branch of law sits alone, and has no effect of other areas of law.

sense of mutual rights flowing between the lord and vassal, whereas Russian rulers followed the Mongol example of insisting on absolute obedience from below, with no accompanying sense of reciprocity.[110] Western feudalism went through a process of gradual strengthening of the rights of the vassals, and an eventual end to feudalism, whereas Russia went through a period of retrogression, where the power of the Tsar was gradually strengthened. The process of removing all sense of property rights in Russia was completed by the 16th century.

During *perestroika*,[111] widely publicized news regarding ecological damage and diminished productivity of agriculture led to a call for land reform. Timid reforms took place throughout *perestroika* and continued after Russian national independence. Amendments initially were strictly confined to the agricultural sector, but as the industry privatized, the privatization of land gradually extended as well. Private land ownership received final recognition in the present Constitution of the Russian Federation, adopted in December of 1993. Article 35 of the 1993 Constitution states: 'The right of private property shall be protected by law . . . Everyone shall have the right to have property, possess, use and dispose of it . . .'.[112] And Article 36 goes on to provide that '[c]itizens and their associations shall have the right to possess land as private property.'[113] The process was meant to transform the Russian people into a people of shareholders. Lands and business ownership were privatized and distributed to the people. The political agenda included visions of a birth of the Russian middle-class of property owners, who in turn would become the basis for a functioning Russian democracy and market-economy.[114] Because constitutional law requires statutory implementation before it is truly considered in effect, the Government issued a new Russian Federation Land Code in 2001.[115] The Land Code protects ownership (*sobstvennost'*) of land by private ownership.[116]

As for the United States, the system of land ownership developed in a somewhat unique atmosphere, although drawing on the ideas set forth by Aristotle, John

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110 Stefan Hedlund, *Property without Rights: Dimensions of Russian Privatisation*, 53(2) Europe-Asia Studies 221 (2001). doi:10.1080/09668130020032271

111 *Perestroika*'s literal meaning is 'restructuring' – referring to the political movement calling for reformation within the Communist Party of the Soviet Union during the 1980s. It is largely associated with Soviet leader Mikhail Gorbachev and his *glasnost* policy reform. Political rifts forming over the policies implemented during this period are often cited as the foremost reasons for the dissolution of the Soviet Union.

112 RF Constitution Arts. 35(1)–(2).

113 *Id*. Art. 36(1).

114 Hedlund, *supra* n. 110, at 215.

115 «Земельный кодекс Российской Федерации» от 25 октября 2001 г. № 136-ФЗ [*'Zemelnyi kodeks Rossiiskoi Federatsii' ot 25 oktyabrya 2001 g. No. 136-FZ* ['Land Code of the Russian Federation' No. 136-FZ of October 25, 2001]].

116 Land Code, Art. 8(4).

Locke and Adam Smith. America was seen as 'new land,' seemingly infinite in size. From the very beginning, land ownership by colonizers was established. In fact, in order to ensure the colonies would grow, inducements of personal land ownership were made to settlers to convince them to travel to the New World and set up roots. This was a unique concept, that average people could acquire land in return for settling it. The first tracts of land were sizeable land grants made by the English, Dutch, French and Spanish crowns to individuals who would further subdivide their property in return for services, such as settling and working the land. Once the colonies won independence, the system of land granting was simply shifted to the new state governments. And although a few hurdles had to be made regarding race and gender inequality here as well, land ownership, use and dispossession were all relatively established and seen as a legally protected right from the beginning.

Thus, one can see that while the two systems took markedly different paths in achieving the present state of private land ownership, both ultimately reached the same outcome. Whether they developed completely independent from one another, or whether Western ideals were later superimposed onto the Russian system is not necessarily important. What is important is that in both systems private ownership of land is a present reality, and is protected by law.

4. Failures within Each System

Putting aside the great strides both systems have made, there have also been some serious shortcomings in both systems. For instance, in 2013 the Eur. Ct. H.R. found a violation of the ECHR in 93 percent of judgments involving Russia.[117] As for the United States, on May 15, 2015, the United Nations Human Rights Council adopted a scathing report consisting of 348 recommendations that address a myriad of human rights violations within the United States. The report came out as part of the Universal Periodic Review, which examines the human rights record of all UN Member States.[118] Both the Eur. Ct. H.R.'s reports on Russia, and the UN reports on the United States, reflect that both systems need to reverse policies that are inconsistent with international human rights principles. The article will now use torture (Sec. 4.1), and incarceration (Sec. 4.2) – which affect such rights as the right to life, liberty, and freedom of movement – as concrete examples to show similar failures within each system. Torture and incarceration were chosen because they are some of the most cited abuses within both Russia and the United States.

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[117] *Russia 2014 Human Rights Report* 19, U.S. Department of State, <http://www.state.gov/documents/organization/236782.pdf> (accessed Mar. 12, 2016).

[118] Jamil Dakwar, *UN Issues Scathing Assessment of US Human Rights Record*, American Civil Liberties Union (May 15, 2015), <https://www.aclu.org/blog/speak-freely/un-issues-scathing-assessment-us-human-rights-record> (accessed Mar. 12, 2016).

4.1. Torture

The United States Department of State reported in 2013 that although the Russian Constitution prohibits such practices, there were numerous credible reports that law enforcement personnel engaged in torture, abuse, and violence to coerce confessions from suspects. Furthermore, authorities generally did not hold officials accountable for such actions. If law enforcement officials were prosecuted, they were typically charged with simple assault or exceeding authority.[119] In 2012, the Eur. Ct. H.R. found Russia to have violated the ban on torture and inhuman or degrading treatment in 55 of 134 cases heard by the Court.[120] Reports from human rights groups and former police officers indicated that police most often used electric shocks, suffocation, and stretching or applying pressure to joints and ligaments, as those methods are less prone to leave visible marks.[121] And although such abuses were detailed by the United States Department of State, the United States itself has recently been criticized for its own use of torture practice. Amnesty International reports that in the years since 9/11, the US Government has repeatedly violated both international and domestic prohibitions on torture and other cruel, inhuman or degrading treatment in the name of fighting terrorism.[122] For instance, the Justice Department's Office of Legal Counsel produced a series of 'torture memos,' which mutilated the law so as to restrict the definition of cruel, inhuman or degrading treatment and to make certain torture practices seem legal under US law;[123] US interrogations of suspects in the war on terror have included such cruel and inhuman techniques as prolonged isolation, sleep deprivation, intimidation by the use of a dog, sexual and other humiliation, stripping, hooding, the use of loud music, white noise, exposure to extreme temperatures, and waterboarding.[124] And worse still, when the US began gaining notoriety for such treatment, they began to send detainees for interrogation to countries known to use torture.[125] These actions taken both in the United States and Russia have had a corrosive effect on respect for human rights around the world.

4.2. Incarceration

It should also be mentioned that while the United States is the developed country with the highest percentage of its citizens behind bars, Russia is a very close second.

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119 *Russia 2013 Human Rights Report* 4, U.S. Department of State, <http://www.state.gov/documents/organization/220536.pdf> (accessed Mar. 12, 2016).

120 *Id*.

121 *Id*.

122 *Torture and Other Ill-Treatment*, Amnesty International, <http://www.amnestyusa.org/our-work/issues/torture> (accessed Mar. 12, 2016).

123 *Id*.

124 *Id*.

125 *Id*.

The United States has 702 prisoners per 100,000 people and Russia has 628 per 100,000.[126] By comparison, England has 139, Canada has 116, Italy has 100 and Germany has 91.[127] Conditions in Russian prisons and detention centers varied but were sometimes harsh and life threatening. They are marked by limited access to health care, food shortages, abuse by guards and inmates, inadequate sanitation, and overcrowding.[128] Human Rights Watch has noted that conditions in United States' prisons are not much better.

> Prisoners and detainees in many local, state and federal facilities, including those run by private contractors, confront conditions that are abusive, degrading and dangerous. . . . Such failures violate the human rights of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person, and to be free from cruel, inhuman or degrading treatment or punishment.[129]

Thus the gap is not only narrowing in terms of the rights provided by both systems, but on the opposite end of the spectrum, the gap is also narrowed when one takes into account the failures within each system.

5. Conclusion

In conclusion, the post-Soviet developments in regard to human rights generally, but especially with civil and political rights, has begun to develop into a model more familiar with Western thinkers. While it may not be perfected, true strides can be seen developing through implementing legislation, and a shifting of the paradigm on thought within the country generally. On the other hand, one can see that the United States, through its state legislatures and federal programs, has begun to enshrine the social, economic and cultural rights traditionally thought to be lacking in American society. Furthermore, at least within these two states, there are some serious shortcomings in terms of contemporary international human rights standards that need addressing as well. Thus, hopefully this article will serve as a small model on which the reader will take away some insight into the ever decreasing gap in varying regional human rights regimes. And on a larger scale, it seems as though forces are working globally to bring human rights regimes closer to universal norms. New international consensus on human rights, together with more effective human rights

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126 Burnham et al., *supra* n. 67, at 642.

127 *Id*.

128 *Russia 2013 Human Rights Report*, *supra* n. 119, at 6.

129 Quoted in Roy A. Graham, *Our Prisons*, Roy Alexander Graham Blog (Aug. 12, 2015), <http://royalexandergraham.blogspot.ru/2015/08/our-prisons.html> (accessed Mar. 12, 2016).

institutions, more domestic protections, and global pressure, are all lending towards the establishment of the universal rights that Eleanor Roosevelt envisioned in 1958.

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References

Bowring, Bill. *Russia's Accession to the Council of Europe and Human Rights: Four Years On*, 4 Eur. H.R. L. Rev. 362, 369 (2000).

Boyd, David R. The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 13, 17 (UBC Press 2012).

Burnham, William, et al. Law and Legal System of the Russian Federation 642, 651–52, 659 (3rd ed., Juris Pub. Inc. 2004).

Burnham, William, et al. Law and Legal System of the Russian Federation 329 (6th ed., Juris Pub. Inc. 2015).

Childress, Ronald. *False Cognates and Legal Discourse*, 2(1) Journal of Eurasian Law (JEL) 3 (2009).

Fried, Albert. FDR and His Enemies 120–23 (Palgrave Macmillan 1999).

Gardbaum, Stephen. *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391 (2008), available at <http://papers.ssrn.com/abstract_id=1287701> (accessed Mar. 12, 2016).

Hathaway, James C. The Rights of Refugees under International Law 81–91 (Cambridge University Press 2005).

Hedlund, Stefan. *Property without Rights: Dimensions of Russian Privatisation*, 53(2) Europe-Asia Studies 215, 221 (2001). doi:10.1080/09668130020032271

Hershkoff, Helen. *Horizontality and the 'Spooky' Doctrines of American Law*, 59 Buff. L. Rev. 455 (2011), available at <http://buffalolaw.org/past_issues/59_2/Hershkoff.pdf> (accessed Mar. 12, 2016).

Hershkoff, Helen. *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1133 & nn. 2–5 (1999).

Hull, Cordell. 2 The Memoirs of Cordell Hull 1625 (Macmillan 1948).

Koehler, John O. Stasi: The Untold Story of the East German Secret Police 143 (Westview Press 1999).

Krug, Peter. *Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 Brook. J. Int'l L. 1, 7 (2006), available at <http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1255&context=bjil> (accessed Mar. 12, 2016).

Lambelet, Doriane. *The Contradiction between Soviet and American Human Rights Doctrine: Reconciliation through Perestroika and Pragmatism*, 7 B.U. Int'l L.J. 61, 66 (1989), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1744&context=faculty_scholarship> (accessed Mar. 11, 2016).

Madison, James. *Letter to N.P. Trist (February 15, 1830)*, in The Complete Madison: His Basic Writings 195 (Saul K. Podover, ed.) (Harper & Brothers 1953).

Schwartz, Victoria. *The Influences of the West on the 1993 Russian Constitution*, 32 Hastings Int'l & Comp. L. Rev. 101 (2009), available at <http://papers.ssrn.com/abstract_id=2117246> (accessed Mar. 12, 2016).

Shiman, David A. *Economic and Social Justice: A Human Rights Perspective* (Human Rights Resource Center 1999), available at <http://www1.umn.edu/humanrts/edumat/pdf/TB1.pdf> (accessed Mar. 11, 2016).

Sunstein, Cass R. *Why Does the American Constitution Lack Social and Economic Guarantees?* (University of Chicago Public Law & Legal Theory Working Paper No. 36, January 2003), <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1384&context=public_law_and_legal_theory> (accessed Mar. 12, 2016).

Thomas, Daniel C. *Human Rights Ideas, the Demise of Communism, and the End of the Cold War* 7 J. Cold War Stud. 110, 117 (2005), available at <http://papers.ssrn.com/abstract_id=1333625> (accessed Mar. 12, 2016).

Valieva, Elizaveta N., & Matveev, Jury V. *Social Security in Russia: Institution-Historical and Financial Aspects*, 7(2) Review of European Studies 16, 19 (2015), available at <http://papers.ssrn.com/abstract_id=2677583> (accessed Mar. 12, 2016). doi:10.5539/res.v7n2p15

Versteeg, Mila, & Zackin, Emily. *American Constitutional Exceptionalism Revisited*, 81 U. Chi. L. Rev. 1641, 1672 (2014), available at <http://papers.ssrn.com/abstract_id=2416300> (accessed Mar. 12, 2016).

Webster, Noah. An Examination into the Leading Principles of the Federal Constitution 6 (Prichard & Hall 1787), reprinted in The Constitution of the United States: And Selected Writings of the Founding Fathers 669 (Barnes & Noble Inc. 2012).

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COMMENTS

LATEST AMENDMENTS IN THE FOREIGN INVESTMENT LAWS OF UZBEKISTAN: MANIFESTATION OF SERIOUS AMBITIONS FOR CHANGE?

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Attracting Foreign Direct Investment (FDI) has been priority issue for the Government of Uzbekistan (GOU) since the proclamation of the country's independence from the Soviet Union in the early 1990ˢ. Today the operating legal regulations provide adequate state guarantees of protection, tax incentives and other privileges for foreign investors, and the GOU has been introducing legal adjustments to honour its commitments in securing a more favorable investment climate. However, foreign investors in practice are facing serious legal problems in doing business in the country. Frequent modification of laws and their artbitrary application, erroneous interpretation of legal terms, ambiguous rules and procedures, lack of protection of property rights and an independent dispute resolution mechanism are the legal concerns that usually keep foreign investors from entering the market.

In this paper I will analyze some of the measures and changes recently adopted by the GOU that aim to make the country's investment climate more attractive and I will try to find answers for the following questions. How sincere can these efforts be considered by prospective investors? What novelties do those changes provide for the investors? Will such attempts emanate actual and immediate constructive results in the near future?

Keywords: foreign investment laws and regulations; Uzbekistan; state guarantees and incentives; comparative law.

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1. Key Statutory Guarantees to Foreign Investors and Limitations

The foreign investment laws in Uzbekistan[1] provide a framework, which appears to be open for foreign investment in all forms and in all areas available to a national investor. The entry requirements appear to be straightforward, the performance requirements are minimal, and investors are guaranteed the right of exit and fund repatriation, with some common exceptions.[2] In addition, foreign investors enjoy a 10 year guarantee against adverse legislative change,[3, 4], the right to address the dispute

[1] The main laws regulating foreign investment relationships are as follows:

1) Law of the Republic of Uzbekistan No. 609-I of April 30, 1998, 'On Foreign Investments' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1998, No. 5-6, item 91) [hereinafter Law on Foreign Investments];

2) Law of the Republic of Uzbekistan No. ZRU-380 of December 9, 2014, 'On Investment Activity' (New edition) (Collection of the Legislation of the Republic of Uzbekistan, 2014, No. 50, item 587) [hereinafter Law on Investment Activity];

3) Law of the Republic of Uzbekistan No. 611-I of April 30, 1998, 'On Guarantees and Means of Protection of Foreign Investors' Rights' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1998, No. 5-6, item 93) [hereinafter Law on Guarantees].

[2] The government may stop, in a non-discriminatory manner, the repatriation of a foreign investor's funds in cases of insolvency or bankruptcy of an enterprise with foreign investments or the protection of creditors' rights, criminal act or administrative infringement of a law by a foreign investor (natural persons), or when it is necessary according to an arbitral or a court decision (Art. 3(5)(2) of the Law on Guarantees).

[3] Article 3(4) of the Law on Guarantees provides that in case the subsequent legislation worsens the investment conditions compared to those that were in place at the moment of the conclusion of the investment agreement, the legislation that guarantees better conditions will be applicable. However, from the wording of Art. 3(5) it is presumable that such guarantee is not all-inclusive, and it shall extend only to particular predetermined conditions, deterioration of which will incite the realization of the stabilization clause. The following are the exceptional situations the occurrence of which will be qualified as worsening the investment conditions:

– increase in the rate of tax on incomes, received as dividends, paid to the foreign investor;

– introduction of additional requirements that complicate procedure of repatriation or reduce the size of foreign investor's income (profit), being transferred abroad, except for the cases when the state stops repatriation of cash of foreign investor on conditions of non-discriminative implementation of legislation acts in case of insolvency and bankruptcy of the enterprise with foreign investments or protection of the rights of creditors, criminal acts or the administrative offences accomplished by the foreign investor – the physical person, or other cases demanding necessity of stoppage of such repatriation according to judicial or the arbitral decision;

– introduction of quantitative restrictions to volumes of investments and other additional requirements to the size of investments, including in the form of an increase in the minimal volume of foreign investments in the enterprises with foreign investments;

– introduction of restrictions on the share of the foreign investor in the authorized capitals of the enterprises of the country;

– introduction of additional procedures of registration and prolongation of visas of foreign investors, as well as other additional requirements on making foreign investments.

[4] The recent amendments (Jan. 20, 2014) introduced to the Law on Foreign Investments extended the scope of the application of stabilization clause prescribed in Arts. 3(4)–(5) of the Law on Guarantees to the legislative changes on tax and other mandatory payments. According to Art. 12(3) of the Law on Foreign Investments, guarantee against changes in tax laws for 10 years from the moment of official registration of the company will cover newly-established foreign companies with a minimum investment in cash in the amount of US$5,000,000 provided that the list of those taxes and mandatory payments is approved by the decree of the President of Uzbekistan.

against the Government to the international arbitration institutions,[5] guarantee against nationalization, tax and other preferences for marginalized group of investors. However, most of the benefits and guarantees provided by the law cannot be implemented in practice, since 'attempts by foreign investors to apply this protection against adverse changes such as tax increases or changes in the foreign currency regime have proven fruitless.'[6] Lack of operative interpretation of vague and dubious provisions of investment by legislative or judicial bodies and lack of procedures by state executive institutions to implement them seriously affect the investors' decisions.[7]

Counteracting the incentives, privileges and guarantees, the Government has set a number of restraints and restrictions. There are 47 state bodies at distinctive administrative levels that fulfill regulatory functions in Uzbekistan. Foreign companies have no or limited access to ownership in spheres such as airline and railway services,[8] mass media,[9] banking, insurance[10] and tourism. Licensing is considered as one of

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[5] Uzbekistan has signed and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, at <https://icsid.worldbank.org/ICSID/StaticFiles/ basicdoc_en-archive/ICSID_English.pdf> (accessed Mar. 12, 2016)) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e. pdf> (accessed Mar. 12, 2016)). However, the legislation implementing the latter has not been adopted, and enforcement of a foreign arbitral decision against an Uzbek party may be problematic (*see* Doing Business in Uzbekistan 56 (Baker & McKenzie 2009), available at <http://www.ihk-krefeld.de/de/media/pdf/international/doing-business/usbekistan-doing-business-in-uzbekistan-2009.pdf> (accessed Mar. 12, 2016)). Article 10 of the Law on Guarantees provides that investment disputes can be settled at international arbitral tribunals. This provision was challenged as a state consent to arbitrate by a claimant in a recent case (*Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), at <http://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf> (accessed Mar. 12, 2016)). However, the tribunal found that Uzbekistan didn't consent to ICSID jurisdiction through Art. 10 (*Id.* ¶ 386). In 2006, the Constitutional Court of of the Republic of Uzbekistan released an official interpretation in regards to the right of an investor to submit investment dispute to international arbitration based on this provision of the Law on Guarantees. The Court held that the latter couldn't be interpreted as a general responsibility of the state before foreign investors, and such consent must be evidently indicated in the investment contract (*see* Collection of the Legislation of the Republic of Uzbekistan, 2006, No. 46-47, item 462).

[6] Mukhsinkhuja Abdurakhmonov, *FDI Scenario in Uzbekistan-Glancing at the First Decade after Independence*, 32 Econ. J. Hokkaido Univ. 183, 193 (2003), available at <http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/5386/3/EJHU_v32_p183-200.pdf> (accessed Mar. 12, 2016).

[7] Michael T. Paterson, Evolutionary Uzbekistan, Revolutionary Kazakhstan: An Explanation for the Differences in FDI Policy during the First Years of Economic Transition 68 (1997) (unpublished M.A. thesis, University of Guelph), at <http://www.nlc-bnc.ca/obj/s4/f2/dsk2/ftp03/MQ27535.pdf> (accessed Mar. 12, 2016).

[8] All the property of railway companies belongs to state. Individuals and legal entities can privatize only the part of the property which is not directly involved in the transportation process (Art. 3 of the Law of the Republic of Uzbekistan No. 766-I of April 15, 1999, 'On Railway Transport' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1999, No. 5, item 118)).

[9] Companies with more than 30 percent of foreign investment participation in charter capital are not eligible to own mass media organizations according to Art. 8(4) of the Law of the Republic of Uzbekistan No. ZRU-78 of January 15, 2007, 'On Mass Media' (New edition) (Collection of the Legislation of the Republic of Uzbekistan, 2007, No. 3, item 20).

[10] With recent (Apr. 11, 2012) amendments introduced to the Law of the Republic of Uzbekistan of April 5, 2002, 'On Insurance Activity' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 2002, No. 4-5, item 68), foreign insurance companies are confined from providing any insurance services in the territory of Uzbekistan (Art. 27(2)).

the central restrictive measures over the activities of local and foreign businesses.[11] Mandatory surrender of foreign exchange proceeds obtained from export transactions at the Central Bank fix rate,[12] draconian foreign exchange and other prohibitive regulations hold foreign enterprises back from leading full-scale undertakings.

2. Additional Guarantees and Measures of Protection (privileges and preferences)

In addition to the underlying guarantees, foreign investors can claim for additional guarantees and measures of protection in the form of: an assurance for absolute fulfillment by the partners of their obligations taken with respect to foreign investors; state guarantee; state support to finance investment projects; procurement of exclusive tax and payment regimes; state monitoring over the realization of an investment project; provision of external engineering and communication networks and other measures prescribed by existing laws.[13] However, the provisions of Order No. 180[14] set additional guarantees and measures of protection, which are not prescribed by the Law on Guarantees, like creation of special customs regime and admittance to the investment program.[15] These additional guarantees and measures of protection can be obtained on the basis of an exclusive decree of the President or order of the Government.[16] To be eligible for such guarantees and measures of protection, foreign investors have to satisfy a set of requirements:

1) requirements to the candidate foreign company;
2) requirements to the investment project; and
3) requirements for tax holidays.

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[11] The Law No. 71-II of May 25, 2000, 'On Licensing of Certain Types of Activity' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 2000, No. 5-6, item 142) enumerates an extensive list of activities contingent to obtaining permission.

[12] According to the Procedure for the Implementation of Mandatory Sale of Foreign Exchange Earnings by Economic Entitites (approved by the Order of the Cabinet of Ministers of the Republic of Uzbekistan No. 245 of June 29, 2000 (Collection of the Orders of the Government of the Republic of Uzbekistan, 2000, No. 6, item 33)), all companies regardless of ownership form are compelled to sell 50 percent of the proceeds gained from export of goods or services to the state. The Procedure enumerates the list of proceeds that are exempted from obligatory sale, like the proceeds of companies with foreign capital (with a minimum 50 percent participation in charter capital) specialized in manufacturing consumer goods, donations and grants, credits and others. Proceeds received from export of cotton fibre are subject to 100 percent mandatory sale.

[13] Articles 4(1) and (3) of the Law on Guarantees.

[14] Order of the Cabinet of Ministers of the Republic of Uzbekistan No. 180 of August 2, 2005, 'On Measures of Implementation of the Presidential Decree "On Additional Measures to Stimulate Attraction of Direct Private Foreign Investments"' (Collection of the Legislation of the Republic of Uzbekistan, 2005, No. 30-31, item 232) [hereinafter Order No. 180].

[15] Section 6(2) of the Regulations on Conclusion and Realization of Investment Contracts (Attachment No. 2 to Order No. 180) [hereinafter Regulations].

[16] Article 4(4) of the Law on Guarantees.

2.1. Requirements to the Candidate Foreign Company

To be eligible for additional guarantees and benefits, the foreign company first has to be acknowledged as an enterprise with foreign investment. For that, according to the Law on Foreign Investments, the foreign investor's contribution must be a purchase of at least 30 percent of the company shares or an equivalent investment in the charter capital and one of the participants of the company must be a foreign investor.[17] Decree No. UP-1652[18] places two more preconditions, one concerning the size of a charter capital, which must be equivalent to US$150,000,[19, 20] and the other related to the proportion of its own production in the total revenue from its business activities, which should be more than 60 percent[21] in case of manufacture involved enterprises. At first glance, this set of requirements does not seem overwhelming for most foreign investors, though this is only the beginning.

2.2. Requirements to the Investment Project

Until recent times, there were three main categories of projects investment to which could yield additional benefits, *i.e.*:

1) priority sectors that ensure sustainable economic growth, progressive structural changes in the economy;

2) priority projects that ensure the strengthening and expansion of production and export potential of the country and its integration into the world economy;

3) projects in the field of small entrepreneurship, the implementation of which is aimed at processing of raw materials, production of consumer goods and services, and procuring employment.[22]

With the 2014 amendments, foreign investors advancing their investment in projects involving modern high technologies and aimed at development of high-tech industries can be considered as potential candidates for additional benefits.[23]

The Government publishes an exhaustive list of priority economic sectors where foreign investors have to make their investment to qualify for government

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17 Article 6(2) of the Law on Foreign Investments.

18 Decree of the President of the Republic of Uzbekistan No. UP-1652 of November 30, 1996, 'On Additional Incentives and Benefits Granted to Enterprises with Foreign Investment' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 1997, No. 1, item 2) [hereinafter Decree No. 1652].

19 Section 1(1) of Decree No. UP-1652.

20 Exception exists for investment projects realized in the Karakalpakstan Autonomous Republic and the Khorezm region, where the amount of charter capital can be equivalent to US$75,000 (Sec. 1 of the Decree of the President of the Republic of Uzbekistan No. UP-3090 of June 11, 2002, 'On Additional Measures to Stimulate Development of Small Enterprises in the Republic of Karakalpakstan and Khorezm Region' (Bulletin of Oliy Majlis of the Republic of Uzbekistan, 2002, No. 6-7, item 107).

21 Section 2 of Decree No. UP-1652.

22 Article 4 of the Law on Guarantees.

23 Article 4(2)(2) of the Law on Guarantees.

privileges and benefits. Priority areas for foreign investment have not gone through significant transformation since the early times, with the exception of some recent minor amendments. In 2012, the number of sectors was extended from eight to 20,[24] including the petrochemical industry, medical industry, construction of power stations based on alternative sources of energy, coal industry, mechanical engineering, *etc*. Yet, this development has not produced any significant revolution in the volume of foreign investment inflow.

2.3. Requirements for Tax Exemptions and Recent Developments

Decree No. UP-3594[25] is one of the important practical regulations governing the issue of tax exemption. If the government grants such right, the foreign company will be exempted from corporate income tax, property tax, tax on the improvement and development of social infrastructure, unified tax payment for micro-firms and small enterprises, as well as mandatory contributions to the Republican Road Fund.[26]

3. Procedure of Consideration and Approval of Investment Projects

As it was described in the previous chapter, the state provides assorted combinations of benefits and preferences to foreign investors. However, 'requirements for obtaining these benefits are often ambiguous, the processes and procedures cumbersome, and the regulatory environment unpredictable.'[27] There is no single instrument that encompasses all possible procedures related to obtaining benefits and privileges. Instead, we have distinct perplex mechanisms dealing with peculiar types of benefits and preferences. Abundance of referential clauses in and frequent modifications of provisions complicates the situation to an even greater extent.

3.1. Procedure for Conclusion of Investment Agreement

Distinct from many other jurisdictions, in Uzbekistan, investment agreement related issues are regulated by the Government order[28] rather by the investment laws. It is worthwhile mentioning that the purpose of entering into an investment agreement is to *ensure appropriate fulfillment of investment obligations taken by*

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[24] Decree of the President of the Republic of Uzbekistan No. UP-4434 of April 10, 2012, 'On Additional Measures to Stimulate the Attraction of Foreign Direct Investment' (Collection of the Legislation of the Republic of Uzbekistan, 2012, No. 15, item 167).

[25] Decree of the President of the Republic of Uzbekistan No. UP-3594 of April 11, 2005, 'On Additional Measures to Stimulate Attraction of Foreign Direct Investments' (Collection of the Legislation of the Republic of Uzbekistan, 2005, No. 15-16, item 109) [hereinafter Decree No. UP-3594].

[26] Section 1(1) of Decree No. UP-3594.

[27] *2012 Investment Climate Statement – Uzbekistan*, U.S. Department of State (June 2012), <http://www.state.gov/e/eb/rls/othr/ics/2012/191261.htm> (accessed Mar. 13, 2016).

[28] Order No. 180.

the foreign investors, which is explicitly predetermined in the relevant regulation.[29] Another idiosyncrasy is that only foreign investors can be the parties to the investment agreement, while national investors are refrained from such a privilege. Though special regulation on conclusion and realization of investment agreements do stipulate the possibility of a state to enter into the investment agreement with a foreign company that will not yield additional guarantees and measures of protection (benefits and preferences),[30] the search for the document[31] that regulates such types of investment agreements didn't give any successful result.

Thus, according to the Uzbek legislation, investment agreement is a contract signed between the Government of Uzbekistan (Ministry of Foreign Economic Relations, Investments and Trade) [hereinafter MFERIT] and a foreign investor, where the former provides some guarantees and measures of protection (benefits and preferences) to the investor and the latter takes investment obligations[32, 33] noncompliance of which will lead to automatic annulment of the granted guarantees and measures of protection escorted with serious legal and financial consequences (*see infra*).

In order to prepare an investment agreement the concerned party must submit the following documents to the MFERIT:

1) project of the investment agreement;

2) basic economic indicators made on the basis of feasibility studies (technical and economic calculation) approved by the authorized bodies, if such requirement is stipulated by the law; and

3) conclusive resolutions of the Ministries of Justice, Finance, Economy and State Tax Committee.[34]

The authorized bodies and ministries have a limited term of two weeks to consider and decide on the provisions of the investment agreement with reference to the issues of their competence.[35] In case the project is returned for revision,

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29 Section 3 of the Regulations.

30 Section 1(2) of the Regulations prescribes that conclusion and realization of agreements with foreign investors, aimed at setting up investment commitments not inferring additional guarantees and measures of protection (benefits and preferences), are carried out in accordance with the set by the laws manner.

31 Free online database of legal documents is available at *www.lex.uz*.

32 The investor is obliged to comply with the requirements related to the investment and production volumes, guaranteed level of localization and of quality of products, export volume of the goods produced or services performed, procurement of return of credits extended under the State guarantee (Sec. 7(3) of the Regulations).

33 Foreign investor is bound to submit regular reports to the MFERIT on the implementation of the commitments taken in the investment agreement and the MFERIT has a total authority to control over the realization of those commitments (Sec. 14 of the Regulations).

34 Section 8 of the Regulations.

35 Regulation is not distinct on whether the two-week term encompasses the consideration and approval of the project by all ministries or each ministry taken separately.

computation of the term will commence from the moment of the resubmission of the project. Following the decisive conclusions of the authorized bodies and the abovementioned ministries, MFERIT will have a two-week term to scrutinize the project. The last step will be the decision of the Government on the investment agreement, when the latter will come into force.

If an *investment agreement is*: a) financed by centralized sources (proceeds of budgetary, extra-budgetary and exlusively established funds, foreign credits attracted under governmental guarantee or on behalf of the Republic of Uzbekistan, and proceeds of the Fund of Reconstruction and Development); b) realized under product sharing agreement; c) realized by a company with more than 50 percent of state share in the charter capital where the amount of investment exceeds US$10 million; or d) related to extraction and processing of strategic minerals with value of over US$10 million regardless of the source of funding, or a *foreign investor is* e) granted exemptions from tax and other obligatory payments by special presidential resolution, there is a special mandatory screening mechanism.[36]

3.2. Screening of Investment Projects

Order No. 110 specifies a step-by-step screening procedure of the examination and approval of potential foreign investment projects. According to a recent report of UNCTAD, 80 percent of green field investments realized in Uzbekistan in recent years belonged to extractive industries.[37] Besides, as it was mentioned above the investment agreements do accommodate tax and other financial preferences and incentives to foreign investors. Thus, an accurate scrutiny of the provisions of Order No. 110 is a prerequisite for every potential foreign investor.

Order No. 110 determines several stages any investment project has to endure: 1) prefeasibility study or prefeasibility calculation (PTEO or PTEP); 2) adjustment of sources and terms of funding / tender documentation; 3) detailed feasibility study or feasibility calculation (TEO or TEP); and 4) preparation of working documentation. Prefeasibility study or calculation is not required if the project is exempted from tax or compulsory payments under a special decree of the President.

Procedure of foreign investment project approval can be described as follows. The potential foreign investor independently prepares or employs the services of project designing or engineering companies to assemble the necessary documents in compliance with the set requirements and standards which should be approved

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[36] Section 1 of the Regulations on Development, Examination and Approval of Investment Project Documentation (approved by the Order of the Cabinet of Ministers of the Republic of Uzbekistan No. 110 of June 7, 2007 (Collection of the Legislation of the Republic of Uzbekistan, 2007, No. 23, item 238) [hereinafter Order No. 110]).

[37] World Investment Report 2012: Towards a New Generation of Investment Policies 68 (United Nations 2012), available at <http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf> (accessed Mar. 13, 2016).

by the sectoral ministry or agency[38] with the consent of the State Committee of Architecture and the Ministry of Economy. The project has to be approved by *Uztyazhneftgazkhimproyekt* if the project is related to basic industries. Upon its approval by *Uztyazhneftgazkhimproyekt* or the sectoral ministry, the project goes to the State Committee of Architecture, which requires a two-week term for its consideration. Upon the Committee's blessing, the project advances to the expertize of the Ministries of Economy and Foreign Economic Relations, Investments and Trade, which will necessitate another two weeks. The Ministry of Finance and the Servicing Bank, subject to the affirmative resolutions of previous entities, will need additional two weeks for the project deliberation. All these terms are impressive, if the project submitted by the investor is not returned for reconsideration by any of the controlling officials, for Order No. 110 does not regulate this issue.

With the exception of the time essential for *Uztyazhneftgazkhimproyekt* and the sectoral ministries (committees or agencies) to approve the project, which are determined by their internal regulations, and excluding the time necessary for modifications to satisfy the proposals and suggestions of the controlling entities, the foreign investor is required to allocate at least six weeks just for the project to be ready to be submitted to the Information-Analytical Department of the Government of Uzbekistan, which within three days has to get a document ready for the approval of the project. That document, together with all approved papers, is then delivered to the Consolidated Information-Analytical Department of the Government. The head of the Complex (Department) of the Cabinet of Ministers (Government) on Macroeconomic Development, Structural Transformations of the Economy and Complex of Territorial Development has to deliver its decision within two days. Subject to an affirmative decision, the investor gets approved its prefeasibility study project, which automatically turns into a feasibility study project, which requires a separate two-week term for reexamination by all institutions indicated above, with the exception of *Uztyazhneftgazkhimproyekt*. If everything goes well, the Cabinet of Ministers arranges the draft resolution on the project.

According to the author's acquaintance, who has been involved in the Government and later in the oil and gas industry for many years, the screening procedure in some cases can take up to several months. Thus, without direct and strong support for the project from the beginning by an influential bureaucrat, no one is recommended to experience such encumbrance.

The following chapter of the article deals with the current problems foreign investors encounter during the operation of their businesses in the territory of Uzbekistan.

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[38] There are 14 ministries, nine state committees and six state agencies.

4. The Current State of the Investors

Despite the extensive number of tax freedoms, preferences and state guarantees provided for successful business activities of foreign investors, the current situation leaves a lot to be desired for. Within the last 10 years, a significant number of foreign companies were compelled to discontinue their business activities in Uzbekistan. *Zarafshan Newmont* JV, *Amantaytau Goldfields* JV, *Wimm-Bill-Dann Tashkent*, *Spentex Tashkent Toytepa*, *Demir and Turkuaz*, *United Cement Group*, *Uzdunrobita*[39] are the major companies that constitute only the tip of the iceberg. Foreign investors who owned or had substantial interests in the above companies initiated several dispute settlement procedures before international arbitral institutions (International Center for Settlement of Investment Disputes [hereinafter ICSID] and United Nations Commission on International Trade [hereinafter UNCITRAL]) based on various allegations: expropriation of 50 percent shares in joint venture;[40] revocation of telecommunication licenses, the imposition of fines, detention of employees, and seizure of the company's assets;[41] expropriation of assets in a mining refinery;[42] breach of exclusive agreement.[43] Some of the disputes have resulted in arbitration decision[44] or parties' settlement[45] and suspension,[46] while others are still pending.[47]

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[39] The case of *Uzdunrobita*, a 100 percent subsidiary of Russian telecommunication company *Mobile TeleSystems (MTS)*, is unique. In fall 2012, *Uzdunrobita* was declared bankrupt by a court decision and four of its top managers were accused of violating tax and currency laws, embezzlement and acting without a licence and were sentenced to fines and different terms of correctional works. After a series of unsuccessful attempts to sell the company assets through auctions, the assets were transferred to the state telecommunication company *Uztelekom*. Early 2013, the Government resolved to establish a new national mobile company on the basis of *Uzdunrobita*'s frequency resources. Eventually, upon the settlement of a dispute between *MTS* (claimant) and Uzbekistan (respondent) at the ICSID, MTS was given a second chance to reenter the Uzbek telecommunication market, purchasing 50.1 percent share in the newly established joint venture *Universal Mobile Systems (UMS)*.

[40] David Elwards, *Panels Announced for Claims against DRC and Uzbekistan*, Global Arbitration Review (Aug. 6, 2010), <http://www.globalarbitrationreview.com/news/article/28633/panels-announced-claims-against-drc-uzbekistan/> (accessed Mar. 13, 2016).

[41] Clemmie Spalton, *Russian Phone Company Calls Uzbekistan to ICSID*, Global Arbitration Review (Nov. 20, 2012), http://www.globalarbitrationreview.com/news/article/30990/russain-phone-company-calls-uzbekistan-icsid/> (accessed Mar. 13, 2016).

[42] *Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan*, ICSID Case No. ARB/06/20.

[43] Matthew Pountney, Gold Mining Arbitration Gets under Way in Geneva, Global Arbitration Review (Feb. 8, 2012), <http://www.globalarbitrationreview.com/news/article/30152/gold-mining-arbitration-gets-geneva> (accessed Mar. 13, 2016).

[44] *Metal-Tech*, *supra* n. 5. Arbitral tribunal concluded that it didn't have jurisdiction over the dispute due to the illegality issue of the investments implemented within the framework of Israel-Uzbekistan BIT.

[45] *Newmont*, *supra* n. 42.

[46] *Mobile TeleSystems OJSC v. Republic of Uzbekistan*, ICSID Case No. ARB(AF)/12/7.

[47] *Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL; *Spentex Netherlands, B.V. v. Republic*

The underlying rationale for the state of Uzbekistan to deprive or restrict the ownership rights or interests of foreign investors in a particular enterprise might be varied, but in the majority of cases it is either the breach of investment obligations taken by the investor in the investment agreement[48] or breach of laws and regulations relevant to the operation of business activities.

In the first case, the Government attracts a foreign investor, guaranteeing a tax- and customs free environment, fiscal and export-import privileges, governmental support to push local executive authorities or contractual partners to fulfill the objectives settled in the Government resolution or contract obligations. Unless the newly established enterprise is specialized in an industry that is exceptionally strategic for the state, and thus is under the direct supervision of the President, it stays within an 'inviolability' program for several years. However, after the company's has been operating successfully for three-four years, the Uzbek authorities attempt to expel the investor in order to get hold of the nearly finished project.[49]

In the second case, any suspicious act or financial operation, non-observance or incomplete performance of investment obligations, laws or regulations can serve as a justification for such investigation. The Law on Investment Activity enumerates a non-exhaustive list of conditions, when the activity of a company can be limited, suspended or terminated, *i.e.* if the company is found bankrupt, in force majeure circumstances, and if company breaches law provisions on sanitation and hygiene, radiation, environment, architecture and planning, and any *other* requirements, or contravenes the rights and lawful interests of individuals and legal entities.[50] The decision on the limitation, suspension and termination can be delivered either by the investor, the state authorities or the court. Thus, the foreign company's activity can be suspended or terminated for any insignificant reason with an initiative of state units with subsequent backing by the court decision. Sometimes there is no need for such carelessness. '[T]he authorities [themselves] create problems with sales, currency conversion, supplies, *etc.* so that the investor fails to meet its commitments

of Uzbekistan, ICSID Case No. ARB/13/26; *Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/19; *Federal Elektrik Yatırım ve Ticaret A.Ş. and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/9; *Vladislav Kim and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/6).

48 Lack of qualified experts in the government structures capable of analyzing and countenancing key business decisions of foreign investors that could be derived from the diverse developments in the relevant world markets (most of the enterprises with foreign capital have been established to export the majority of their products) generated a single solution in case of discrepancies in implementation of investment commitments, *i.e.* to organize an extensive investigation of investor activities and punish the trespassers.

49 Evgeny Minchenko et al., Assessment of Political Risks for Foreign Investors in Central Asian Countries: Comparative Analysis 6 (Minchenko Consulting 2013), available at <http://www.minchenko.ru/netcat_files/File/CA%20political%20risks%20comparative%20analysis.pdf> (accessed Mar. 13, 2016).

50 Article 26(2) of the Law on Investment Activity.

in full. Next is the forced bankruptcy procedure, whereupon the government takes over the assets and sells off to another investor.'[51]

In any country with economy based on free market principles and rule of law, it is believed that companies take risks and sometimes pay the prices for their oversights. However, this is not the case for the foreign companies operating in Uzbekistan. *Since foreign investors are provided with preferences and freedoms sufficient to profit, they must be severly punished in case of any minor omission*.[52]

6. Conclusion

Uzbekistan has lagged far behind most former USSR countries in terms of economic reforms, liberalization, privatization of state enterprises, and protection of property (including intellectual) rights. However, it still has sufficient potentials to regain its leadership position in the region. The Government has to reconsider its strategic goals and get rid of the old style administrative tools of control and intervention into businesses. If the Government really desires to increase the FDI volume to a significant level it should carry out reforms in all spheres that have an impact to the overall investment climate in the country. Enactment of new laws or the amendment of existing ones in a system where the laws do not function properly will not generate the expected results.

References

Abdurakhmonov, Mukhsinkhuja. *FDI Scenario in Uzbekistan-Glancing at the First Decade after Independence*, 32 Econ. J. Hokkaido Univ. 183, 193 (2003), available at <http://eprints.lib.hokudai.ac.jp/dspace/bitstream/2115/5386/3/EJHU_v32_p183-200.pdf> (accessed Mar. 12, 2016).

Minchenko, Evgeny, et al. Assessment of Political Risks for Foreign Investors in Central Asian Countries: Comparative Analysis 6 (Minchenko Consulting 2013), available at <http://www.minchenko.ru/netcat_files/File/CA%20political%20risks%20comparative%20analysis.pdf> (accessed Mar. 13, 2016).

Paterson, Michael T. Evolutionary Uzbekistan, Revolutionary Kazakhstan: An Explanation for the Differences in FDI Policy during the First Years of Economic Transition 68 (1997) (unpublished M.A. thesis, University of Guelph), at <http://www.nlc-bnc.ca/obj/s4/f2/dsk2/ftp03/MQ27535.pdf> (accessed Mar. 12, 2016).

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[51] *Uzbekistan: Major Textile Company Goes Bankrupt*, Ferghana News (May 18, 2012), <http://enews.fergananews.com/news.php?id=2268> (accessed Mar. 13, 2016).

[52] The bankruptcy procedures of almost all enterprises with foreign capital have been accompanied by criminal cases.

World Investment Report 2012: Towards a New Generation of Investment Policies 68 (United Nations 2012), available at <http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf> (accessed Mar. 13, 2016).

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CONFERENCE REVIEW NOTES

REFORMING RUSSIAN CIVIL PROCEDURE

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The II Annual Symposium of the journal *Herald of Civil Procedure* '2015: The Civil Procedure 2.0: Reform and Current State' took place on October 9, 2015, at the Faculty of Law of Kazan (Volga region) Federal University.

The Symposium is now an established tradition for the University. In 2015 it brought together in Kazan eminent scholars of civil procedure from cities across the whole of Russia: Moscow, St. Petersburg, Saratov, Ekaterinburg, Omsk, Samara, Nizhnekamsk and others. This large-scale event attracted the attention not only of Russian scholars, but also of legal scholars from abroad: Elisabetta Silvestri (Professor, University of Pavia, Italy), William B. Simons (Professor, University of Tartu, Estonia), Jaroslav Turlukovsky (Professor, Warsaw University, Poland), Stuart H. Schultz (Practising Attorney, USA), Irina Izarova (Associate Professor, Taras Shevchenko National University of Kyiv, Ukraine).

The opening ceremony of the Symposium began with greetings to all participants and best wishes for productive discussions. Participants were welcomed with remarks by Marat Khairullin, Deputy Chair of the Supreme Court of the Republic of Tatarstan, Radik Ilyasov, Head of the Federal Bailiff Service of the Republic of Tatarstan, and Ildar Tarkhanov, Academic Supervisor at the Faculty of Law. They expressed their appreciation for the great value of the journal *Herald of Civil Procedure* in the growth

of the science of civil procedure and enforcement procedure, and for its contributions to the development of the judicial system of the Russian Federation.

In addition to hearing prepared reports and discussing viewpoints on current issues of civil and arbitration procedure, participants attended presentations by representatives from procedural law periodicals in the frame of the Symposium. The Editor-in-Chief of *Herald of Civil Procedure*, Damir Valeev, and the Commercial Director of the *Statut* Publishing House (Moscow), Kirill Samoilov, presented new books in the series 'Classics of Civil Procedure,' which is a joint publication of the University and *Statut*. Editors of law periodicals noted this great event, too. Professor Vladimir Gureev introduced the first publication of the new scientific and practical journal *Herald of Enforcement Procedure* and Professor Dmitry Maleshin presented the new book *Eurasian civil procedure: the 25th anniversary of the CIS and Baltic countries*.

The conference topics were devoted to the actual issues facing civil procedure and enforcement procedure in the Russian Federation, and in other countries, too.

1. The Code of Administrative Procedure

One of the main interests of the Symposium was the Code of Administrative Procedure, which was adopted and entered into force in 2015. Its passage produced much discussion and raised many issues between legal scholars and those practical workers who have to execute its requirements. First, it was noted that the Code is meant to be used by courts of general jurisdiction while arbitration courts will still be guided by the Code of Arbitration Procedure, though there is no significant difference between cases arising out of public relations involving citizens or organizations. Second, the text quality of the new code was subject to criticism. For instance, about 80 percent of the text was borrowed from the Code of Civil Procedure and the Code of Arbitration Procedure, and as a result of this there is a question about the expediency of the new code. In addition, the borrowings do not seem to be particularly well advised. For a long time scholars and practical workers have criticized many of the norms of the Code of Civil Procedure, yet there was no improvement of them in the process of implementation to the new code. Moreover, due to some unknown cause duplicated dispositions of the Code are not identical with source materials and were paraphrased without substantial reasons, which causes confusion of terms. Third, the principles of the Code of Administrative Procedure are placed in an illogical way, and some of them are not expanded upon for clarity. For example, the quite complex 'principle of fairness' is stated, but without any explanation of what that principle involves.

In spite of the these shortcomings, some positive aspects of the Code were also noted. With regard to the issue of the subjects of administrative procedure, a number of new categories were coined, such as administrative plaintiff and defendant, administrative claim, a group of individuals with a collective claim, and new order

of commutation of abolished bodies in the order of succession. The new norm on 'legal monopoly' is quite revolutionary, for it establishes the requirement that legal representatives have a law degree. The section on evidence is more detailed. Notifications by SMS, which have been used for quite a long time, are legal now. A new opportunity to recover fines from the personal funds of public officials was established, too.

2. Foreign Experience

Elisabetta Silvestri, Professor at University of Pavia, noted in her presentation 'Towards a European Code of Civil Procedure? Recent Initiatives for the Drafting of European Rules of Civil Procedure' that the approximation of the laws and regulations, as well as the promotion of the compatibility of the rules on civil procedure applicable in the Member States, seem to mark significant steps towards a full awareness that the objectives pursued by the EU, and in particular the implementation of both rights and freedoms granted to European citizens under EU law, cannot be attained unless the main differences existing in the rules governing civil procedure in different Member States are removed. She added it was necessary to mention a few elements that could limit the effectiveness of the process of a more significant involvement of the EU institutions in the regulation of civil procedure. First of all, in the field of judicial cooperation in civil matters, the EU has a legislative authority that coexists with the legislative powers of each Member State and that is exercised according to the principles of subsidiarity and proportionality. The harmonization of civil procedure among Member States can be achieved with a variety of normative instruments (*e.g.*, the so-called 'optional instruments' or sector-specific directives). At present, though, the EU institutions seem particularly interested in establishing minimum standards in the regulation of civil procedure, regardless of the subject matters of the cases at stake. The idea of drafting minimum standards of civil procedure is also the basis of a project undertaken in 2013 by the European Law Institute and UNIDROIT (International Institute for the Unification of Private Law) with a view to drafting a set of 'European Rules of Civil Procedure.' The goal of the project is to outline a set of general, uniform standards regarding the most sensitive areas of civil procedure; hopefully, these standards will be transposed in a directive that Member States will be required to implement in their rules of civil procedure, meaning the rules governing both domestic and cross-border litigation. This, Professor Silvestri noted, would be a significant step towards a true harmonization of civil procedure within the EU, since – at least so far – most initiatives in this field have laid down rules applicable only to cross-border cases, and not to domestic cases as well.

Also speaking at the Symposium was practising attorney *Stuart H. Schultz* (USA) who gave a presentation 'Discovery Reforms under the US Federal and State Rules of Civil Procedure.' His focus was the reform of civil procedure legislation in the

USA relating to the order for disclosure of evidence during application to the court, including the electronic form. It was noted that US federal law as well as Utah state legislation establish a ranking system that limits the amount of disclosed information relating to a case in proportion to the amount of the claim. For instance, if a case involves US$50,000 or less in damages, discovery is limited to a total of three hours of depositions, no interrogatories, five requests for production of documents, five requests for admission and 120 days in total to complete discovery.

3. Unified Code of Civil Procedure

The idea to prepare a Unified Code of Civil Procedure was first proposed in 2014, just a few months after the abolishment of the Russian Supreme *Arbitrazh* Court. At the beginning of 2015 the concept of the Code[1] was declared by a committee of the State Duma (the Russian parliament). And during 2015 discussions on the draft version of the Code took place in the Russian legal academic community, exemplified by the following two contributions.

Dmitry Maleshin, Professor at Lomonosov Moscow State University, prepared the report 'From the Unified Code of Civil Procedure to the Unified Code of Judicial Procedure.' He noted that the draft of the Unified Code of Civil Procedure had been hastily prepared and that the idea underlying the code was marred by a misunderstanding: the discussion should not be about drafting a unified code of *civil* procedure, rather, he proposed, it should be about a unified code of *judicial* procedure concerning civil, *arbitrazh* (commercial), administrative and penal procedures.

Dmitry Abushenko, Professor at Ural State Law University, spoke on this issue with the theme 'Unified Code of Civil Procedure: Is the Best the Enemy of the Good?'.

4. Some Other Issues of Civil Procedure

The talk given by *Askhat Kuzbagarov*, Professor at North-West Branch of the Russian University of Justice, was devoted to various details of the implementation of civil justice. The goals and tasks of civil – and now administrative and arbitration – justice should be considered common components (Art. 2 of the Code of Civil Procedure, Art. 3 of the Code of Administrative Procedure, Art. 2 of the Code of Arbitration Procedure); the same is true with respect to the principles of the work of the state courts, the guiding sources of law for the courts, as well as other aspects of procedure. In addition, all the participants in civil, administrative or commercial

[1] Concept of a Unified Civil Procedure Code of the Russian Federation (approved by the Decision of the Committee on Civil, Criminal, Arbitration and Procedural Legislation, State Duma No. 124(1) of December 8, 2014), at <https://www.consultant.ru/document/cons_doc_LAW_172071/> (accessed Mar. 13, 2016).

disputes should proceed from the concept of the significance and value of legal acts as the main source in Russian law. One of the important parts of the Russian understanding of the law today is the application and interpretation of substantive and procedural norms; and the elimination of ambiguity in the mechanism of the legal regulation of relations for the consideration and resolution of civil cases. The question as to the principles of civil law and their practical use is an especially important one. Principles, as fundamental ideas, are an essential basis for forming not only the legal position for a concrete case (or a future case), but also for forming civil order with its democratic elements and the concept of creating civil society within the state. Most of the attention was given to the 'principle of good faith,' a relatively young concept for the Russian legal system. Moral principles, spiritual and cultural values, which are held by the multi-national and multi-religious people of the Russian Federation, are an important component in the establishment and formation of the civil law principles. According to Professor Kuzbagarov, these institutions, which are divided into general and specific, require attention and should be used for guidance both in theory and in law enforcement activities.

Marat Fetyukhin, Associate Professor at Kazan (Volga region) Federal University, spoke on the current status and reform of arbitration procedure. Recently, a new law on arbitration was passed, which raised a large number of questions during the project stage;[2] however, the law has not yet entered into force and thus time remains for understanding its import.

Maria Zarubina, Associate Professor at Saratov State University, discussed her article 'Stages of Reforming the Compensatory Procedure in Russian Procedural Law: Results and Prospects.' She delivered her assessment of the present state of compensatory procedure, providing proof of the need for a complex approach in the formation of a unified mechanism for compensation of damage, which was caused by the judicial process, having regard to concrete cases. The historical experience should be taken into account in the analysis of modern legislation, too. She explained that in her article she examines the main characteristics of the modern state of compensatory procedure and the reason for the insufficient functioning of the mechanism of awarding compensation for the violation of the right to a fair trial in Russian national law. Formation of 'compensatory procedure'[3] (the procedure of the award of compensation for the violation of the reasonable length of proceedings and the execution of court decisions) functions chaotically and spontaneously in Russia. Her research shows that the reform of procedure for compensation for the violation of the right to trial within a reasonable time and the right of execution

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[2] Федеральный закон от 29 декабря 2015 г. № 382-ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации» [*Federal'nyi zakon ot 29 dekyabrya 2015 g. No. 382-FZ 'Ob arbitrazhe (treteiskom razbiratel'stve) v Rossiiskoi Federatsii'* [Federal Law No. 382-FZ of December 29, 2015, 'On Arbitration in the Russian Federation']] (Russian Gazette, Dec. 31, 2015, no. 297).

[3] *Fakhretdinov and Others v. Russia (dec.)*, nos. 26716/09, 67576/09 and 7698/10 (Eur. Ct. H.R., Sep. 23, 2010).

of the act within a reasonable time is not yet fully realized. Further work is needed on improving not only the procedural legislation, but also the substantive rules in this area. The list of cases in which such compensation may be recovered must be significantly extended. As practice shows, the mechanism of protection of the right to a fair trial is spreading in Russia, which means it must be effective. And the reason for this is not that it is recommended by the European Court of Justice. Rather, the Russian Government must act responsibly toward its citizens, no matter in what area a violation of their rights occurs, even if it takes place in the judicial system.

Also among the invited speakers at the Symposium, and their topics, were *Lydia Terekhova*, Professor and Head of the Department of Civil Procedure, Omsk State University, 'Current Status of the System of Review of Judicial Acts Which Have Entered into Force;' *Denis Latypov*, Associate Professor at Perm State University, 'The Procedural Conditions of Use of the Appropriate Method of Protection of Civil Rights;' *Vitaly Petrushkin*, Judge of the *Arbitrazh* Court of the Volga District, 'The Main Innovations in Arbitration Procedure Legislation: The Current Situation;' *Rafail Shakiryanov*, Judge of the Supreme Court of the Republic of Tatarstan, 'Issues on the Unification of Appellate Review of Decisions in the Frame of the Unified Code of Civil Procedure of the Russian Federation;' Marat Zagidullin, Associate Professor at Kazan (Volga region) Federal University, 'New Issues in Court Practice on Corporate Disputes.'

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