

4. Lessons from the (un)rule of law in Crimea

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4.1 INTRODUCTION: CRIMEA AS AN AREA OF LIMITED STATEHOOD AND CONTESTED SOVEREIGNTY

The potential disintegration of Ukraine has been a recurring subject of political analysis ever since the country became independent on 24 August 1991.¹ Until recently, however, such analyses were nothing more than mere hypotheticals. Few experts, if any, anticipated the present crisis. Over the course of approximately four weeks, practically overnight in terms of history, the Autonomous Republic of Crimea and the city of Sevastopol, two of Ukraine's administrative territorial units, became internationally contested territory. It all started on 20 February 2014, with Russian military forces crossing the Ukrainian–Russian border into Ukraine, and ended on 21 March 2014, with the entry into force of the Accession Treaty between the Russian Federation and the Republic of Crimea, which finalized what can be easily defined as a coup d'état of a regional scale.² As a result, the Crimean peninsula can now be defined as an area of limited statehood (ALS) and contested sovereignty.

The relevant literature has come to understand limited statehood as a deficit of effective sovereignty, the latter being essentially determined by a State's monopoly on the use of force and ability to enforce political decisions.³

¹ See, among others, Samuel Huntington, *The Clash of Civilizations and the Remaking of the New World Order* (Simon and Schuster 1996); Mykola Riabchuk, 'Two Ukraines?' (1992) 5(4) *East European Reporter* 18; Mykola Riabchuk, "'Two Ukraines'" Reconsidered: The End of Ukrainian Ambivalence?' (2015) 15(1) *Studies in Ethnicity and Nationalism* 138.

² For a detailed chronology of the events surrounding the annexation of Crimea, see Yuri Smelianski, 'Crimea: Anatomy of Annexation' (2016) (in Russian) <http://crimea.mfa.ua.org/anatomy>.

³ Thomas Risse and Ursula Lehmkuhl, 'Governance in Areas of Limited Statehood: New Modes of Governance?' (2006) SFB-Governance Working Paper Series, Working Paper No. 1, 10, <https://d-nb.info/1019023007/34>.

Consequently, ALS are defined as territories that still belong to internationally recognized States, but in which the central government lacks the ability to implement and enforce rules and decisions and/or in which the legitimate monopoly over the means of violence is lacking.⁴ At first sight, the case of Crimea appears to fall neatly under the baseline definition of an ALS in that, *de jure*, it remains a part of Ukraine whereas, from a *de facto* perspective, Ukraine's domestic sovereignty in the Crimean peninsula is severely circumscribed. However, having regard to its specific features, the Crimean case does not entirely fit within the models of limited statehood thus far described in the relevant literature.

ALS, as a concept, implies that statehood is limited: on the one hand, there is a gap in governance by the State that retains a sovereign title over the respective area; on the other hand, non-state actors (NSAs) such as mixed international–domestic bodies, non-governmental organizations, rebels and warlords, or *de facto* regimes often step in to fill the void.⁵ These alternative governance configurations are also the main focus of the bulk of the literature on ALS. The Crimean case stands out in this respect in two ways: first, Ukraine's statehood in post-annexation Crimea is not so much limited as it is practically absent; second, since Russia has extended its sovereignty to the peninsula and has fully integrated it into its State structure, alternative governance is not, as usual and as seen throughout the various chapters of this volume, exercised by NSAs but by a sovereign State, meaning that statehood as such is abundant in Crimea. Considering that both Ukraine and Russia claim the territory as their own, the specific situation in Crimea could more readily be defined as a substitution of legitimate statehood leading to an instance of contested sovereignty rather than a void in statehood. Crimea is an instance not of 'governance without a State',⁶ but of governance without State A and by State B.

⁴ Tanja Börzel and Thomas Risse, 'Governance without a State: Can It Work?' (2010) 4 *Regulation and Governance* 113, 118; Thomas Risse, 'Governance Configurations in Areas of Limited Statehood. Actors, Modes, Institutions, and Resources' (2012) SFB-Governance Working Paper Series, Working Paper No. 32, 6, https://www.sfb-governance.de/en/publikationen/sfb-700-working_papers/wp32/SFB-Governance-Working-Paper-32.pdf; Thomas Risse, 'Governance in Areas of Limited Statehood: Introduction and Overview' in Thomas Risse (ed), *Governance Without a State? Policies and Politics in Areas of Limited Statehood* (Columbia University Press 2011) 4–5.

⁵ On *de facto* regimes as alternative governors, see Linda Hamid and Jan Wouters, 'De Facto Regimes in Areas of Limited Statehood and the International Rule of Law', Chapter 3 in this volume.

⁶ Thomas Risse (ed), *Governance Without a State? Policies and Politics in Areas of Limited Statehood* (Columbia University Press 2011).

Thomas Risse contends that ‘thinking in terms of configurations of limited statehood also implies thinking in degrees of limited statehood rather than using the term in a dichotomous sense’.⁷ Arguably, framed in these terms, the situation in Crimea would be placed at an extreme end of the continuum. Indeed, as mentioned above, with the rightful sovereign’s statehood severely limited and in view of Russia’s competing sovereign claim, Crimea is not only an ALS, but also an area of contested sovereignty. However, this particular situation has not yet been accommodated by the relevant literature.⁸ Then again, devising an exhaustive list of typologies of ALS is practically unattainable given the myriad possibilities that could lead to such a state of affairs. On the other hand, occupation is by no means a new phenomenon; rather, it is one that was not expected to occur, or at least not in this manner and not in the twenty-first century. Everything new is merely well-forgotten old. This chapter thus proposes a new ALS typology in the form of areas of contested sovereignty, with occupation as a mode of alternative governance and the (covert) occupier as an external actor providing governance in lieu of the legitimate sovereign.⁹ This particular case demonstrates that a single ALS may exhibit limitedness in connection to multiple nexuses. As any other ALS, an area of contested sovereignty may suffer from any one of a combination of security, capacity, legitimacy, human well-being or collaborative sovereignty or governance gaps, all of which have been outlined in the introductory chapter

⁷ Risse, ‘Governance Configurations’ (n 4) 7.

⁸ See Risse, ‘Governance in Areas of Limited Statehood’ (n 4); Börzel and Risse (n 4); Stephen Krasner and Thomas Risse, ‘External Actors, State-Building, and Service Provision in Areas of Limited Statehood: Introduction’ (2014) 27(4) *Governance* 545; Cord Schmelzle, ‘Evaluating Governance: Effectiveness and Legitimacy in Areas of Limited Statehood’ (2011) SFB-Governance Working Paper Series, Working Paper No. 26, 1, https://www.sfb-governance.de/publikationen/sfb-700-working_papers/wp26/SFB-Governance-Working-Paper-26.pdf.

⁹ This chapter views Ukraine as a whole prior to and since the crisis, the Eastern provinces of Donetsk and Lugansk and the occupied Crimea as analytically distinct ALS, focusing on the latter only. The isolation of the Crimean case is purely analytical. Empirically, however, the events in Crimea and in Eastern Ukraine, Russia’s role therein and Ukraine’s and the international community’s response thereto are closely intertwined. See Outi Korhonen, ‘Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars’ (2015) 16(3) *German Law Journal* 452; Ulrich Schneckener, ‘Fragile Statehood, Armed Non-State Actors and Security Governance’ in Alan Briden and Marina Caparini (eds), *Private Actors and Security Governance* (DCAF 2006) 31–35; Melissa Lee, Walter-Drop and John Wiesel, ‘Taking the State (Back) Out? Statehood and the Delivery of Collective Goods’ (2014) 27(4) *Governance* 635.

to this volume.¹⁰ However, it is at the capacity, legitimacy and collaborative levels that the situation in Crimea poses the most distinct challenges to the rule of law (RoL) at both domestic and international levels. This chapter will therefore examine these three sovereignty gaps and the respective RoL dilemmas that they raise.

Two analytical remarks are necessary here. Firstly, with Crimea being an area of contested sovereignty, not one but two States and their respective domestic legal orders are relevant alongside the international one: that of the dispossessed State (Ukraine) and that of the occupier (Russia). The question ‘*whose rule of law?*’ thus emerges next to one of the central questions examined in this volume, which is ‘*how much rule of law?*’ Additionally, as will be further discussed, since the alternative governor in this case is another State and not an NSA, as is usually the case with ALS, the international standing and collaborative sovereignty of both States is affected. Therefore, the following three sections of this chapter will examine the emerging RoL dilemmas at both international and domestic levels. While it is true that scholarly work has thus far abundantly analysed and qualified the events in Crimea from an international law perspective, none of these analyses has been framed in terms of RoL dilemmas in a Crimea conceptualized as an ALS. Moreover, the implications of the situation for the two domestic legal regimes have also largely evaded scholarly attention. This chapter thus makes an important contribution to the literature in this regard. Secondly, the temporal dimension is also important, mainly because the act of annexation is preceded and followed by the process of occupation. Consequently, if one thinks of a limited statehood continuum, the position of Crimea on this continuum may also differ at various points in time. Furthermore, the continuing nature of occupation arguably leads to a proliferation of violations, both of law and of the RoL, thereby complicating an eventual transition from an illegal regime under international law.¹¹

The blunt takeover of Crimea by Russia has spurred a wealth of scholarship on the topic. The outcomes of this scholarship, however, have almost exclusively concerned the events of February–March 2014, namely the annexation and brief occupation before that; little, if anything at all, is written on the violations of international humanitarian law (IHL) and international human rights law (IHRL) in Crimea in the years since. By addressing the latter, this chapter aims to extend the empirical scope of the existing knowledge on the situation

¹⁰ Linda Hamid and Jan Wouters, ‘Rule of Law and Areas of Limited Statehood: Introduction and Perspective’, Chapter 1 in this volume.

¹¹ See generally, Yaël Ronen, *Transition from Illegal Regimes under International Law* (Columbia University Press 2011).

in Crimea, as well as the analytical scope of the comprehension of the RoL dilemmas in ALS as such.

4.2 CRIMEA AND THE INTERNATIONAL RULE OF LAW

Being ‘the most recent in a series of political conflicts with a territorial component’ between no less than two founding members of the United Nations (UN) with explicit contractual obligations on the non-use of force, the conflict in Ukraine raises endemic theoretical, doctrinal, practical and moral questions.¹² This section further examines the challenges that the situation in Crimea poses to the international rule of law (IRoL), that is to the international community’s stride towards a world governed by rules and not by force.

By occupying and annexing Crimea, Russia has struck a blow at the international legal order. Virtually all of the fundamental elements of international law and post-UN Charter world order are at stake: territorial integrity and sovereign equality of States, non-intervention and the prohibition of the threat or use of force, the crime of aggression, internal and external self-determination of peoples, (unilateral) secession–accession versus occupation–annexation, self-defence and the protection of nationals abroad, compliance with multilateral and bilateral international commitments and, finally, the non-recognition of situations that result from unlawful international acts. In this sense, ‘the situation in Ukraine is not a conflict over the *existence* of international legal order, but rather one over the *meaning* of its foundational building blocks’.¹³

International legal scholars, just like the parties to the conflict, differ greatly in how they qualify this chain of events. The most widely held opinion is that the resulting situation is legal in principle but illegal in this particular case: Crimea did not meet the criteria for external self-determination to begin with, it does not compare with other cases in which secession was deemed legal and, therefore, everything that happened is illegal by default and cannot be justified under any label.¹⁴ Others opine that the situation is legal in this case

¹² Zoran Oklopcic, ‘Introduction: The Crisis in Ukraine between the Law, Power and Principle’ (2015) 16(3) *German Law Journal* 350.

¹³ *Ibid* 350–351.

¹⁴ See William Burke-White, ‘Crimea and the International Legal Order’ (2014) 56(4) *Survival* 65; Robin Geiss, ‘Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind’ (2015) 91(1) *International Law Studies* 425; Thomas Grant, ‘Current Developments: Annexation of Crimea’ (2015) 109(1) *American Journal of International Law* 68; Christian Marxsen, ‘The Crimea Crisis: An International Law Perspective’ (2014) 74(2) *Heidelberg Journal of International Law* 367.

but not following this procedure, thus arguing for the applicability of the principle of external self-determination in the case of Crimea but contending, however, that this possibility has been nullified by Russia's covert intervention and occupation, as well as the manner in which the so-called referendum was held, rendering the outcome illegal.¹⁵ Finally, some scholars believe that the situation is legal in this case and following this procedure, but not if used to this end, meaning that the eventual annexation of Crimea by Russia cancels out whatever ambiguities in interpretation might have existed in favour of Crimea's right to external self-determination and the legality of the events as they unfolded.¹⁶ All commentators eventually conclude that both the occupation and annexation of Crimea were, at least at some level, in violation of international law and, in this sense, that Crimea never emerged as an independent State, was never in a capacity to accede to Russia and thus remains de jure a part of Ukraine's territory.

Russia's occupation of Crimea is an act of aggression as defined by United Nations General Assembly (UNGA) Resolution 3314¹⁷ and violates principles of international law as enshrined in the UN Charter,¹⁸ UNGA Resolution 2131,¹⁹ the Helsinki Final Act 1975, the Alma-Ata Declaration 1991, the Budapest Memorandum 1994,²⁰ the Ukraine-Russia Treaty on Friendship 1997²¹ and the Ukraine–Russia Black Sea Fleet Agreement 1997 (extended in 2010). Russia's legal arguments on the relevance of the principle of external self-determination and remedial secession in the case of Crimea lower the threshold of oppression and urgency in a way that transforms the principle 'from an unusual and extraordinary remedy for severely oppressed peoples to a potentially regular occurrence that could be applicable to almost any minority around the world'.²² Since the Crimean peninsula was never treated as a non-self-governing territory, it did not have a right for external self-determination under Chapter XI of the UN Charter; and since individual complaints of human rights violations by the ethnic Russian majority in

¹⁵ Amandine Catala, 'Secession and Annexation: the Case of Crimea' (2015) 16(3) *German Law Journal* 581.

¹⁶ Carina Lamont, 'Some Legal Aspects of the Illegal Annexation of Crimea' in Granholm, Mamlinen and Persson (eds), *A Rude Awakening: Ramifications of Russian Aggression Towards Ukraine* (FOI 2014).

¹⁷ UN General Assembly Resolution 3314 (14 December 1974) UN Doc A/RES/3314.

¹⁸ Charter of the United Nations (adopted 24 October 1945, entered into force 31 August 1965) 1 UNTS XVI Article 2(4).

¹⁹ UNGA Res 2131 (21 December 1965) UN Doc A/RES/2131.

²⁰ Arts 1–6.

²¹ Arts 2, 3, 4, 6 and 11.

²² Burke-White (n 14) 71.

Crimea were negligible, Crimea did not qualify for remedial secession.²³ Some scholars recognize the Crimean peoples' right for self-determination, but conclude that Crimea's regional autonomy (that is, its internal self-determination), in the long run, would have been better respected within Ukraine than within Russia.²⁴ Others argue that the referendum for Crimea's independence was not 'a peaceable and transparent referendum' (which would by definition preclude dubious hastiness, aggressive propaganda and military occupation observed in the case of Crimea) and, as such, is 'procedurally illegitimate'.²⁵ Yet others contend that, given the fact that Ukraine did not pose any resistance, 'nothing about the situation invited an armed takeover' of Crimea.²⁶

Similarly, Russia's legal arguments on the protection of so-called Russian compatriots in Crimea, be it Russian nationals, ethnic Russians or Russian-speakers, constituted a pretext for other aims and should therefore be considered illegal irrespective of one's interpretation of Article 51 of the UN Charter and the legality of the extraterritorial use of force for protecting one's nationals abroad.²⁷ Moreover, 'justifications for an armed intervention, even if accepted, are not justifications for the forcible acquisition of territory': even if a valid case for intervention could be made, it would not give Russia any basis for title or even a claim to title.²⁸ Russia's claim to a very broad right of intervention to protect one's nationals abroad, if accepted, risks 'rendering international borders more permeable and the international system itself far less secure'.²⁹ Similarly, Russia's contention that it intervened upon invitation from the ousted Ukrainian President Viktor Yanukovich does not withstand legal scrutiny.³⁰ Given all these irregularities, Crimea's declaration of independence is illegal.³¹ Under international law, Crimea remains a part of Ukraine, whatever the *de facto* situation. As such, while Ukraine retains a sovereign title over Crimea, Russia has acquired none.

Russia, however, considers itself a sovereign over Crimea's territory and population and denies its occupant status. Yet, under international law, belligerent occupation occurs when the occupier exercises effective control over the seized territory (be it a State or part of a State), regardless of whether the

²³ Geiss (n 14) 437–443; Grant (n 14) 71–77; Marxsen (n 14) 384–389.

²⁴ Ayelet Banai, 'Territorial Conflict and Territorial Rights: The Crimean Question Reconsidered' (2015) 16(3) *German Law Journal* 630.

²⁵ Catala (n 15) 601–602; Marxsen (n 14) 382.

²⁶ Grant (n 14) 85.

²⁷ Lamont (n 16) 68–69; Marxsen (n 14) 372–374.

²⁸ Grant (n 14) 77 and 87.

²⁹ Burke-White (n 14) 68.

³⁰ Marxsen (n 14) 374–379.

³¹ Jure Vidmar, 'The Annexation of Crimea and the Boundaries of the Will of the People' (2015) 16(3) *German Law Journal* 383.

occupier accepts this or not.³² The notion of effective control comprises ‘the unconsented-to military presence of foreign forces in the territory concerned, the foreign forces’ ability to exercise authority over that territory in lieu of the local government, and the related potential inability of the local government to exert its authority in the territory in question’.³³ Since all of these elements are present in the case of Crimea, Russia qualifies as an occupier despite its own stance on the matter.³⁴ Consequently, Russia’s actions are in violation of the law of occupation, as well as IHL and IHRL,³⁵ including provisions on the non-transfer of populations, respect for private property, lawfulness of resistance to occupation and unlawfulness of prosecution for crimes preceding occupation.³⁶ Similarly, Russia (as the one in control of the territory) fails to respect its own international human rights commitments and those of Ukraine (as the lawful sovereign who cannot fulfil its obligations because it has no control over the territory). Grave human rights violations in Crimea are reported by all international human rights monitoring bodies and local (human rights) non-governmental organizations who have investigated the issue. The list of violations is comprehensive and includes, among others, abuses of the rights to life; liberty; security of person; freedom of assembly, association and movement; freedom of expression, media and religion; property rights; the right to education; and cultural rights.³⁷ The ongoing nature of occupation

³² Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227, Regulations: arts 42–56 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 arts 27–34 and 47–78. For more on belligerent occupation, the legislative, judicial and executive rights of the occupying power and its obligations to the civilian population, see Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009).

³³ Tristan Ferraro, ‘Determining the Beginning and End of an Occupation under International Humanitarian Law’ (2012) 94(885) *International Review of the Red Cross* 133, 163.

³⁴ Geiss (n 14) 443–445.

³⁵ On the applicability of IHL and IHRL to an occupied territory, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (specifically, para 101 on the applicability of the Fourth Geneva Convention and para 111 on the applicability of the International Covenant on Civil and Political Rights).

³⁶ Natalia Shapovalova and Olga Burlyuk, ‘The Situation of National Minorities in Crimea Following Its Annexation by Russia’ (2016) European Parliament Study, Committee on Human Rights 30–34; Ivanna Bilych, Adreas Neumann and Victor Okpara, *Human Rights on Occupied Territory: Case of Crimea* (Razom 2015) 14–16; Geiss (n 14).

³⁷ Shapovalova and Burlyuk (n 36) 12–24.

inevitably results in the proliferation of such violations and the emergence of new RoL challenges.

From an international law perspective, accepting Russia's 'absorption of Crimea' is 'wholly inconceivable' and the issue of recognition 'does not even arise'.³⁸ Unlike in typical cases of ALS when the international community is faced with non-state alternative governors which cannot be held accountable at international level, in the case of Crimea the alternative governor is a State. One would have expected this situation to provoke a tough response from the international community and severely reduce Russia's ability to engage in diplomacy, cooperation and collective problem-solving with other States and regional and global international organizations, thus creating a collaborative sovereignty and governance gap. The repercussions have been disproportionately modest, however. The international response to these grave violations of international law has been characterized by 'the minimum resistance of non-recognition',³⁹ with some additional sanctions imposed by the European Union (EU), the USA and some other States and international organizations.⁴⁰ 'Reaffirming the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations', UNGA Resolution 68/262 on the subject affirms the international community's commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders.⁴¹ However, only 100 States voted in favour of the Resolution, with 11 votes against, 58 abstentions and 24 absentees, thus revealing a deep divide and exposing the weakness of the international community when it comes to Russia's actions on the international plane. Notwithstanding, the majority of States have upheld a policy of non-recognition towards Crimea's annexation for normative, communitarian or realist reasons.⁴² While non-recognition is generally criticized as a weak response,⁴³ it remains nonetheless an important and widely used countermeasure. As for other forms of international response, certain restrictive measures against persons and entities involved in actions against Ukraine's territorial integrity were introduced by the EU, the USA, Canada, Australia, Norway,

³⁸ Geiss (n 14) 426 and 447.

³⁹ Marxsen (n 14) 391.

⁴⁰ Shapovalova and Burlyuk (n 36) 49; Jaroslaw Cwiek-Karpowicz and Stanislaw Secieru (eds), *Sanctions and Russia* (Polski Instytut Spraw Międzynarodowych 2015).

⁴¹ UNGA Resolution 68/262 (1 April 2014) UN Doc A/RES/68/262, Preamble, para 1.

⁴² Grant (n 14) 88–90; Enrico Milano, 'The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question' (2014) 1 *Questions of International Law* 35.

⁴³ Mikulas Fabry, 'How to Uphold the Territorial Integrity of Ukraine' (2015) 16(3) *German Law Journal* 416, 432–433.

Switzerland, Japan and several other States, followed by diplomatic measures and eventually sanctions targeting Russia as a State. However, such sanctions have failed to enforce compliance. The Council of Europe's 'surrender' to Russia in June 2019, when the Parliamentary Assembly suspended its sanctions and restored voting rights of the Russian delegation after a 'five-year standoff',⁴⁴ was rather symbolic in this regard. Moreover, since sanctions were in fact introduced in response to the armed conflict in the East of Ukraine, not the annexation of Crimea as such, they fail to reflect the continuous worsening of the situation in the occupied Crimea.

Whether one looks at this situation as a matter of principle or as a matter of degree, the fundamentals of international law and world order are at stake.⁴⁵ The IRoL and the international community's stride towards a world governed by rules and not by force has been bluntly violated by Russia. However, the collaborative sovereignty gap that emerged within the current parameters of the international system is disproportionately modest. The UN, the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe – all international organizations which are designed to deal with various parts of the problem and of which both Ukraine and Russia are members – failed to prevent the occupation and annexation of Crimea, to restore Ukraine's sovereignty over Crimea or to protect the local population from IHL and IHRL violations under occupation. The crisis in Ukraine has, yet again, 'called into question the coherence and stability of international law both as a language for mediating particular types of international disputes (...) and as a set of institutions capable of serving as fora for the resolution of these disputes'.⁴⁶ For all one knows, these mechanisms might nonetheless bear fruit in the long term: 'the mills of international law grind slowly but they do grind'.⁴⁷

4.3 CRIMEA AND THE RULE OF LAW IN UKRAINE

In Ukraine, the sudden occupation and annexation of Crimea by Russia are unanimously regarded as illegal at the State level and equally condemned at

⁴⁴ Alexandra Stiglmeier, 'The Council of Europe's Surrender to Russia' (EUobserver, 27 June 2019) <https://euobserver.com/opinion/145282>; Steven Erlanger, 'Council of Europe Restores Russia's Voting Rights' (*The New York Times*, 25 June 2019) <https://www.nytimes.com/2019/06/25/world/europe/council-of-europe-russia-crimea.html>.

⁴⁵ Olga Burluk, 'The Crimea Crisis in Ukraine: Stakes Are High' (2014) 4(3) *Atlantic Voices* 8, 9.

⁴⁶ Boris Mamlyuk, 'The Ukraine Crisis, Cold War II, and International Law' (2015) 16(3) *German Law Journal* 479.

⁴⁷ Geiss (n 14) 427.

the societal level.⁴⁸ The legal commentaries on the situation, however, are limited to the subject of the previous section, namely the illegality of the situation under international law. There is surprisingly little legal scholarly analysis written on the current situation and few legal formulae developed to deal with it in terms of Ukraine's Constitution and domestic law.⁴⁹ The legal status of Ukrainian citizens and their property in Crimea, the human rights of internally displaced persons (IDPs) and the violations of the human rights of Crimean residents have dominated public debate in the five years since the annexation; this debate, however, has been led by civil society activists, not legal scholars. This section further examines the governance gaps and the RoL dilemmas that an area of limited statehood and contested sovereignty may pose to the dispossessed State (Ukraine).

Just as under international law, the developments in Crimea qualify as occupation and annexation under Ukrainian national law as well. On 20 March 2016, the Ukrainian Parliament adopted a declaration stating that 'the people of Ukraine will never recognize the annexation of an integral part of its territory captured by Russia' and that 'Crimea was, is and will remain a part of Ukraine'.⁵⁰ Ukraine's Ministry of Foreign Affairs (MFA) formally and unambiguously qualifies Russia's actions as continuous, systematic and impudent acts of aggression against Ukraine.⁵¹ The referendum on the status of Crimea was in violation of the Constitution of Ukraine,⁵² the Constitution of Crimea⁵³ and the Law 'On an all-Ukrainian referendum'.⁵⁴ As such, it has been declared

⁴⁸ According to a public opinion poll conducted by the Kyiv International Sociology Institute in March 2016, 80% of Ukrainians condemn the annexation of Crimea and only 5% of respondents support it. See results at <http://www.unian.ua/society/1291032-aneksiyu-krimu-rosieyu-ne-pidrimuyut-80-ukrajintsiv-ta-13-rosiyan-opituvannya.html>.

⁴⁹ The author reviewed contents of *Pravo Ukrainy*, *Bulletin of the Constitutional Court of Ukraine*, *Justinian*, *Kyiv-Mohyla Law and Politics*, *KNU Law Journal* and *Juridicheskaya Praktika* from 2014 until June 2016: the first five journals had not even one (!) relevant publication; *Juridicheskaya Praktika* (which is a quality legal newspaper, not a journal) had a special issue in 2014, with five contributions on the private law issues raised by the annexation of Crimea.

⁵⁰ The Verkhovna Rada of Ukraine, Declaration No. 1139-VII 'On a struggle for Ukraine's liberation'.

⁵¹ Ukraine MFA Note No. 610/22-110-2095.

⁵² Arts 2, 69, 70, 73, 132, 134, 135, 138.

⁵³ Art 28.

⁵⁴ Art 3.

invalid by the Constitutional Court of Ukraine,⁵⁵ as well as the OSCE Chair,⁵⁶ the Venice Commission⁵⁷ and UNGA Resolution 68/262, mentioned above.⁵⁸ Under the Constitutions of Ukraine and Crimea,⁵⁹ Crimea is an integral part of Ukraine and de jure remains one, granting Ukraine international legal sovereignty over the peninsula. De facto, however, Ukraine has lost all effective control over Crimea's territory and population, with dire consequences for Ukraine's domestic capacity and legitimacy.

While the situation merits the state of martial law under Ukrainian law,⁶⁰ Ukrainian authorities are reluctant to introduce one.⁶¹ Instead, rejecting the finality of the situation, they have developed a new set of temporary measures to give the status quo a legal shape. The so-called 'Law on temporarily occupied territory' of 14 May 2014⁶² designates Crimea as a 'temporarily occupied territory', reasserts that Crimea remains an integral part of Ukraine where its laws remain in effect and bids that Ukraine is to take all measures to de-occupy Crimea.⁶³ The law stipulates that all Ukrainian citizens residing in Crimea at the time of annexation retain their Ukrainian citizenship (forced or automatic admission to Russian citizenship is not recognized by Ukraine), and Ukraine bids to take all measures to guarantee human rights to Ukrainian citizens residing in Crimea and formally places responsibility for human rights violations and all respective damages on Russia as the occupying State.⁶⁴ IDPs from Crimea enjoy full citizenship rights in mainland Ukraine, while all Ukrainian passport-holders enjoy the right of free entry to and exit from the

⁵⁵ See the Constitutional Court of Ukraine, Decision 02-rp/2014 and Decision 03-rp/2014.

⁵⁶ OSCE, 'OSCE Chair Says Crimean Referendum in its Current Form is Illegal and Calls for Alternative Ways to Address the Crimean Issue' (*Press Release*, 11 March 2014) <http://www.osce.org/cio/116313>.

⁵⁷ CoE Venice Commission, 'Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles"' (Opinion No. 762/2014) (21 March 2014) CDL-AD(2014)002 .

⁵⁸ UNGA Res 68/262 (n 41) para 5.

⁵⁹ Arts 1 and 134 and art 1, respectively.

⁶⁰ Specifically, the Constitution of Ukraine (art 106), the Law 'On the defence of Ukraine' (art 4), and the Law 'On legal regime of the state of martial law'.

⁶¹ Ukraine introduced a temporary (30 days long) martial law regime on parts of Ukraine's territory in November 2018, in response to Russia seizing three Ukrainian vessels and detaining 24 sailors off the coast of Crimea.

⁶² Law 'On the legal regime in the temporarily occupied territory of Ukraine'.

⁶³ Arts 1, 3, 17.

⁶⁴ Arts 5.

temporarily occupied territory.⁶⁵ Finally, the law stipulates that all authorities in Crimea outside the effective control of Ukraine are illegal, any legal acts issued by them are invalid and property rights are recognized as at the moment of occupation.⁶⁶ A separate law established a free economic zone ‘Crimea’ for an indicative period of 10 years, set its administrative border, designated all physical and legal persons with a Crimean address as non-residents for tax purposes and formally introduced a multi-currency regime.⁶⁷

Aimed at reaffirming Ukraine’s domestic capacity over Crimea’s territory and population, this ‘temporarily occupied territory’ regime does nothing more than extend Ukraine’s capacity to the residents of Crimea while in mainland Ukraine – and not without issues, either. As discussed in the previous section, Russia denies its occupant status, with all respective consequences. It has forced its citizenship upon the occupied population and treats individuals as holders of Russian passports only, even in those instances where they explicitly refuse Russian citizenship. In the absence of any representation in Crimea, Ukraine cannot offer consular or other support to its citizens in the area, entrapped by its own stance on the matter. A situation where the sovereign title-holding State *de jure* ‘retains ultimate responsibility’ but *de facto* ‘lacks the capacity to fulfil even its most elementary duties, namely to protect and promote basic human rights’ is emblematic of ALS.⁶⁸ Crimean residents face numerous problems in obtaining civil documents from Ukraine or having Ukraine recognize those issued by the *de facto* authorities. Despite additional legislation,⁶⁹ those who have fled the peninsula and relocated to mainland Ukraine also suffer from interruptions in the provision of social benefits and medical care as well as encountering difficulties in obtaining documents and accessing their bank accounts in branches based on mainland Ukraine.⁷⁰ Furthermore, the creation of a free economic zone ‘Crimea’ has been criticized

⁶⁵ Arts 9 and 10.

⁶⁶ Arts 9 and 11.

⁶⁷ Law of Ukraine ‘On the creation of a free economic zone “Crimea” and the peculiarities of conducting economic activity in the temporarily occupied territory of Ukraine’ (27 September 2014).

⁶⁸ Daniel Jacob, Bernd Ladwig and Andreas Oldenbourg, ‘Human Rights Obligations of Non-State Actors in Areas of Limited Statehood’ (2012) SFB-Governance Working Paper Series, Working Paper No. 27, 6, https://www.sfb-governance.de/en/publikationen/sfb-700-working_papers/wp27/wp27.pdf.

⁶⁹ Law ‘On ensuring rights and freedoms of internally displaced persons’ (28 December 2014) and various ministerial regulations and procedures have been adopted to facilitate the realization of IDPs’ rights.

⁷⁰ See regularly updated reports on the human rights situation in Ukraine by the Office of the UN High Commissioner for Human Rights at <http://www.ohchr.org/EN/Countries/ENACARegion/Pages/UAREports.aspx>.

for having provided a legislative basis for strengthening the occupying authorities,⁷¹ triggering an economic blockade by civilians, which eventually received the backing of the Ukrainian authorities.⁷²

Overall, this special legal regime has had mixed results. Despite its international legal sovereignty over Crimea, Ukraine has little to no domestic capacity regarding Crimea's territory and population and struggles to extend its domestic authority even to Crimean residents who have relocated to mainland Ukraine. This has drastic side-effects for Ukraine's statehood. Moreover, the inconsistency of Ukraine's leadership in defining the legal regime it applies to resist Russian aggression leads to disorientation among both Ukrainian society and the international community, undermining Ukraine's legal position in bringing Russia to justice as the aggressor State.⁷³ The ambiguity and weakness of Ukraine's approach to the situation in Crimea erodes Ukraine's legitimacy among Crimeans, as well as in the eyes of IDPs from Crimea and Ukrainian citizens at large. Public opinion polls reveal high levels of dissatisfaction with the central authorities among the Ukrainian population (excluding the population of the occupied territories) and declining hope in the reintegration of Crimea.⁷⁴ In turn, Russian opinion polls in Crimea reveal an average of 80% support rate for the Russian regime/satisfaction with the so-called reintegration.⁷⁵ Even if half true, these results indicate loyalty to Russia among large parts of the Crimean population. Crimea being an arena of contestation for legitimacy, Ukraine needs to find a way to reach and support those in the peninsula who remain loyal to Ukraine despite Russia's oppressive policies.

⁷¹ Volodymyr Vasylenko, 'Mizhnarodni ta Natsionalno-Pravovi Aspekty Protydii Rosiyskiy Agresii [International and National Legal Aspects of Resisting Russian Aggression]' (2016) 1(2) *Universum* 14, 17.

⁷² For an expert discussion of the civic economic blockage and its effects in light of Crimea's dependence on Ukraine, see Iryna Bezzub, 'Hromadianska Blokada Krymu: Otsinky Ekspertiv [Civic Blockage of Crimea: Expert Opinions]' (Social Communication Research Centre, 2015) http://nbuviap.gov.ua/index.php?option=com_content&view=article&id=1568:gromadyanska-blokada-krimu-otsinki-ekspertiv&catid=8&Itemid=350.

⁷³ Vasylenko (n 71) 17.

⁷⁴ According to surveys by the Ilko Kucheriv Democratic Initiatives Foundation conducted in 2016–2017, 67% of Ukrainians are unhappy with the authorities and their policies (see results at <http://dif.org.ua/article/2016-y-politichni-pidsumki-zagalnonatsionalne-opituvannya> and as little (or as much) as 54% believe that Crimea will ever be reintegrated with Ukraine. See results at <http://dif.org.ua/article/maybutne-krimu-chi-mozhliva-reintegratsiya-yak-i-koli-zagalnonatsionalne-ekspertne-opituvannya>).

⁷⁵ The latest survey by Open Opinion shows that 49% of Crimeans are 'fully satisfied' with the state of affairs and 34% are 'largely satisfied'. See results (in Russian) at https://www.gazeta.ru/politics/2016/07/21_a_9704009.shtml.

The best and essentially the only way for Ukraine to restore its domestic capacity and legitimacy in Crimea is through de-occupation. A crucial step towards regaining Crimea would be to have a solid de-occupation/reintegration strategy, but this is a challenge on its own. The Ukrainian National Security and Defence Council should develop such a strategy but lags years behind on its own schedule. While the text is not public at the time of writing, the strategy's two key elements are reported to be politico-diplomatic (focused on international solidarity, non-recognition, and sanctions) and informational (reaching out to Crimeans and countering Russian propaganda so as to restore Ukraine's legitimacy on the peninsula).⁷⁶ This will not be the first or the only 'strategy', however, as alternatives have been formulated by other State institutions and various civil society actors.⁷⁷ In the absence of a unified vision on the course of action that Ukraine should follow, more tension between the Ukrainian State and society and within Ukrainian society itself is likely.

Meanwhile, Ukraine takes up the role of a clamorous observer, invoking its international legal sovereignty to appeal for international solidarity and justice. At the international diplomatic track, Ukraine has been pursuing four challenging tasks: negotiating the de-occupation of Crimea and Russia's withdrawal from the peninsula; keeping Crimea on the agendas of the UN, OSCE, NATO, EU and Council of Europe; strengthening and prolonging international sanctions against Russia; and, finally, securing international presence on the peninsula, which is currently non-existent.⁷⁸ At the international justice track, Ukraine has been lodging or preparing cases against Russia with the European Court of Human Rights,⁷⁹ the International Court of Justice,⁸⁰ the International

⁷⁶ NV.ua, 'Holova MZS Ukrainy Rozpoviv pro Strategiu Deokupatsii Krymu [Head of Ukrainian MFA Told about the Crimea De-Occupation Strategy]' (26 February 2016), <http://nv.ua/ukr/ukraine/politics/glava-mzs-ukrajini-rozpoviv-pro-strategiji-deokupatsiji-krimu-99985.html>.

⁷⁷ For example, the 'White Paper on the de-occupation of Crimea' by the Ministry of Temporarily Occupied Territories, the 'Crimea regain strategy' by the Maidan of Foreign Affairs, and the formal and informal strategies by the Crimean-Tatar community.

⁷⁸ Andras Racz, 'The Frozen Conflicts of the EU's Eastern Neighbourhood and Their Impact on the Respect of Human Rights' (European Parliament Study, April 2016) 15, [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578001/EXPO_STU\(2016\)578001_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578001/EXPO_STU(2016)578001_EN.pdf).

⁷⁹ Four *Ukraine v Russia* cases have been lodged before the European Court of Human Rights (App no. 20958/14, app no. 42410/15, app no. 8019/16 and app no. 70856/16).

⁸⁰ See information about the proceedings on the Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v Russian Federation*) and all related documents at <https://www.icj-cij.org/en/case/166>.

Criminal Court⁸¹ and the International Tribunal for the Law of the Sea.⁸² Moreover, Ukrainian private and State companies have lodged multiple cases against Russia before various international tribunals and arbitrations under private international law (for example, the United Nations Commission on International Trade and the United Nations Convention on the Law of the Sea) seeking reimbursement of damages caused by the annexation. Aware that it cannot go at it alone, Ukraine has vested much effort in seeking international solidarity and justice. However, with the crisis in Ukraine being increasingly overshadowed by other crises and uncertainties in world politics, the results of this process leave a lot to be desired.

4.4 CRIMEA AND THE RULE OF LAW

What Ukraine and the international community regard as the annexation of Crimea by Russia and what Russia regards as the reunification of Crimea with Russia, enjoys undivided backing from the Russian authorities and overwhelming support from Russian society.⁸³ Russia has extended its rule to Crimea's territory and population and exercises a strong de facto domestic capacity there despite the international community's policy of non-recognition of Crimea's annexation, or the fact that the annexation occurred in breach of the very parameters of both the international and domestic (Russian) RoL and that the legitimacy of Russia's rule is contested within Crimea and, to a lesser extent, within Russia itself. And while the establishment of Russia's governance in Crimea did not satisfy even the thinnest understanding of the RoL as the rule of Kremlin's law, the ongoing nature of occupation and suppression of dissent in Crimea requires Russia to bend its national RoL even further.

The situation in Ukraine is not so much a conflict over the existence of an international legal order, as it is a conflict over the meaning of its foundational building blocks. Russia demonstrates an understanding of the need to justify its own actions under international law, and Russian legal scholarship actively formulates such justifications for domestic and foreign audiences. However,

⁸¹ For further details on the ongoing preliminary examination of the situation in Ukraine see <https://www.icc-cpi.int/ukraine>.

⁸² More information about Case No. 26, concerning the detention of three Ukrainian naval vessels (*Ukraine v Russian Federation*) and all related documents can be found at <https://www.itlos.org/cases/list-of-cases/case-no-26/>.

⁸³ According to recurring public opinion polls by Levada Center (2014–2016), public support for the annexation of Crimea has grown from 64 to 87%. See results (in Russian) at <http://www.levada.ru/2016/04/07/krym-dva-goda-spustya-vnimanie-otsenki-sanktsii/>. According to a public opinion poll by the All-Russian Centre for Studying Public Opinion, 95% Russians support the reunification decision as of March 2016. See results (in Russian) at <http://wciom.ru/index.php?id=236&uid=115622>.

most scholars speak in stock phrases used by Russian authorities⁸⁴ and, upon careful investigation, appear to closely follow the ‘legal substantiation of Russia’s position on Crimea and Ukraine’, issued on 27 October 2014 by Russia’s MFA.⁸⁵ The multitude of scholarly and pseudo-scholarly commentaries on the conflict in and with Ukraine by Russian authors creates an impression that they have been authorized by the State for propagandist purposes, to overwhelm the international community with the sheer number of arguments and to rehearse Russia’s position in future international trials.

The annexation of Crimea constitutes a classic example of the violation of the RoL through the interpretation of meanings and the manipulation of procedures. Previous sections argued that the occupation and annexation of Crimea happened in breach of international and Ukrainian law. Ironically, it also happened in breach of the parameters of international and domestic RoL set in Russia itself. To begin with, under the Russian Constitution,⁸⁶ universal principles and norms stipulated in international agreements to which Russia is a party are integral elements of Russia’s legal system and take primacy over national legislation. Therefore, the violations discussed earlier also breach Russia’s domestic law.⁸⁷ The so-called Law ‘On the rule of Russian law’, which allowed Russia’s Constitutional Court to decide whether Russia is to comply with a decision of an international court against it and thereby cancelled out the rule of international law, was adopted on 14 December 2015 only and, as such, it did not apply at the time of Crimea’s annexation.

Also noteworthy is the fact that Russia generally does not recognize a right to external self-determination or so-called remedial secession and upholds a policy of non-recognition towards entities that invoke such a right to substantiate their secessionist claims. Remedial secession is against the Russian Constitution and the Constitutional Court’s interpretations thereof. ‘Separatism’ was criminalized in the Russian Criminal Code⁸⁸ and more severe penalties were introduced in July 2014, shortly after the annexation of Crimea. Moreover, although Russia has never recognized the independence

⁸⁴ Vladislav Tolstykh, ‘Three Ideas of Self-Determination in International Law and the Reunification of Crimea with Russia’ (2015) 75(1) *Heidelberg Journal of International Law* 119; Vladislav Tolstykh, ‘Reunification of Crimea with Russia: A Russian Perspective’ (2014) 13(4) *Chinese Journal of International Law* 879.

⁸⁵ Full text (in Russian) at http://www.rusembdprk.ru/images/documents/Crimea_the_legal_basis.pdf.

⁸⁶ Art 15.

⁸⁷ Yuriy Shulipa, ‘Rossiya, Ukraina i Krym s Pozitsyi Zakona v Voprosah i Otvetah. Chast 1 [Q&A on Russia, Ukraine and Crimea from a Legal Point of View. Part 1]’ (EchoMSK, 31 March 2014) <https://echo.msk.ru/blog/yshulipa/1290778-echo/>.

⁸⁸ Article 280.1 added on 28 December 2013.

of Kosovo,⁸⁹ it often references Kosovo in justifying Crimea's 'secession'. The Russian State Duma's Declaration 'On political repressions in Ukraine'⁹⁰ essentially justified the violent seizure of power, extremism, separatism and radicalism directed at violating the territorial integrity of Ukraine – all those things that are banned in Russia under a threat of severe punishment.⁹¹ Similarly, Russia's military intervention in Ukraine occurred in violation of the 'Law on the deployment of Russian military abroad'.⁹² Even more so, the very address by President Putin to the Federal Assembly on 1 March 2014 – requesting the deployment of Russian armed forces on the territory of Ukraine 'to normalize [the] socio-political situation in that country' – violated Article 7 of this law in that it contained no information on the tasks of respective military units, their size, type and ammunition, subordination, duration of deployment, procedures for replacement and withdrawal nor any legally prescribed guarantees and compensations to military personnel and their families.⁹³

Moreover, the Russian Constitutional Court's decision on the constitutionality of the Accession Treaty constituted a bright illustration of the anti-RoL state of affairs in Russia. The Court's disregard for its own procedures and Russian legislation included: the admissibility of the request to examine the Treaty (which the Constitutional Court should have deemed inadmissible); the violation of the examination procedure; violations in the scope of examination (the Constitutional Court decided not to examine the content of the Treaty and its form, reducing the scope of examination to 'the quality of the ink' used to sign the Treaty⁹⁴); missing references to the constitutional law and case-law on accession; and total neglect for the qualitatively different legal status of

⁸⁹ See 'Written Statement by the Russian Federation on Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo' before the International Court of Justice (16 April 2019) <https://www.icj-cij.org/files/case-related/141/15628.pdf>.

⁹⁰ Said declaration was adopted on 4 April 2014.

⁹¹ Yuriy Shulipa, 'Rossiya, Ukraina i Krym s Pozitsiyi Zakona v Voprosah i Otvetah. Chast 2 [Q&A on Russia, Ukraine and Crimea from a Legal Point of View. Part 2]' (1 April 2014) EchoMSK, <https://echo.msk.ru/blog/yshulipa/1291334-echo/>.

⁹² Law 'On procedure for assigning Russian military and civilian personnel to participate in operations aimed at maintenance and restoration of international peace and security' Article 2.

⁹³ Full text of the Address (in Russian) at <http://kremlin.ru/events/president/news/20353>.

⁹⁴ Elena Lukyanova, 'O Prave Nalevo: K Voprosu o Verkhovnstve Prava v Kontekste Rossiyskoi Vneshnei Politiki, Ili Pochelu, Soglasno Zakonu Rossiyskoi Federatsyi, Krym Vse-Taki Ne Nash [On the Right to Go Left: On the Rule of Law in the Context of Russian Foreign Policy, or Why, According to the Legislation of the Russian Federation, Crimea is not Ours in the End]' (Novaya Gazeta, 19 March 2015) <https://novayagazeta.ru/articles/2015/03/19/63473-o-prave-nalevo>.

the city of Sevastopol, which could not, in fact, have become an independent State.⁹⁵ The Court found the Treaty to be in accordance with the Russian Constitution ‘as to the procedure of signing, conclusion and entry into force’, even though the Treaty bluntly violated fundamental principles of international law and Russia’s legal obligations on the international plane, the Constitution, several federal laws, as well as the Court’s own earlier doctrinal position on self-determination and territorial integrity.⁹⁶

These violations, however, have met almost no internal resistance within Russia’s State and societal structures, with an astounding 90% of the Russian population supporting the annexation at the time.⁹⁷ Moreover, the response of the international community has been disproportionately modest and has limited Russia’s collaborative sovereignty only marginally. A permanent seat on the UN Security Council and the role Russia plays in Syria and other ongoing international conflicts allow it to enjoy a degree of collaborative sovereignty despite the violations described here. Furthermore, the lack of international legal sovereignty over Crimea and the contestation of the legitimacy of occupation and annexation by a large part of the Crimean population (10–20% according to Russian surveys and arguably higher in reality) did not preclude Russia from fully extending its domestic capacity to the peninsula. It has taken over the monopoly on the use of violence, the provision of internal security and the policing of borders, as well as the provision of public goods in the occupied territory. Crimea has been fully integrated into Russia’s State structures within record time.

This has two important implications for our understanding of governance gaps and the RoL dilemmas in areas of contested sovereignty as a type of ALS. Firstly, the case of Crimea illustrates that there is no real void in governance, no void in statehood in an area of contested sovereignty in terms of domestic capacity, because one State fully replaces another (as Russia replaced Ukraine). The contestation of the legality and legitimacy of this substitution at the international level, as well as among the populations of the occupied territory, the sovereign title-holding State and the occupying State itself can

⁹⁵ Ibid; Aleksandr Merezhko, ‘Okkupatsiya Kryma i Antipravovoe Gosudarstvo Putina [The Occupation of Crimea and Putin’s Anti-Rule-of-Law State]’ (Forum Daily, 2014) <https://www.forumdaily.com/okkupaciya-kryma-i-antipravovoe-gosudarstvo-putina/>.

⁹⁶ Summary of the Judgment No. 6-II/2014, the Constitutional Court of the Russian Federation, Appraisal of Constitutionality of the International Treaty Between the Russian Federation and the Republic of Crimea (19 March 2014) in English at <http://www.ksrf.ru/en/Decision/Judgments/Documents/Resume19032014.pdf>.

⁹⁷ Results of public opinion polls in March 2014 and March 2016 (in Russian) at <https://ria.ru/society/20140317/999843494.html> and <http://www.rbc.ru/society/17/03/2016/56ea5e219a7947372b63d7b2> respectively.

potentially constrain the discretion of the occupying State in exercising its domestic capacity. However, in the case of Crimea, Russia appears to be just strong enough to disregard it all. Secondly, the strong domestic capacity of the occupying State logically entails that the RoL standard provided in an area of contested sovereignty is as high (or as low) as in the occupying State and worse, given the additional RoL violations specific to this area and directed at suppressing dissent. In Crimea, the situation closely resembles the one in Russia: the limitations to the RoL, as well as individual and collective rights and freedoms that took decades to institute in mainland Russia took only months to implement in Crimea. Moreover, owing to the persisting contestation of the legitimacy of annexation among large portions of the local population, measures employed to maintain the occupation undermine the RoL in Crimea further. Paradoxically, limitations on human rights and fundamental freedoms are being explicitly justified by reference to the law. Thus, it is not lawlessness, but the use of Russian laws ‘in a kind of “lawfare”’ in order to silence or eliminate dissent, to accomplish the subordination of less powerful groups, that causes fear and anxiety among the Crimean population.⁹⁸ The situation in Crimea, like the one in Russia, is often described as ‘Crimeastan’, ‘a state of exception’, ‘a spectacle of law’ and ‘a simulation and counterfeiting of law and order’.⁹⁹ Indeed, disguised as genuine law and order, the setting in which discourses of legality and sovereignty proliferate is rather a spectacle of law and order.¹⁰⁰ Retroactive application of criminal law to non-nationals for actions committed prior to the annexation, as in the ‘Case of 26 February’ against seven Crimean Tatar activists, is a good illustration of this.¹⁰¹ Yet, for those Crimeans who have genuinely welcomed Russia’s presence, Russia is perceived as ‘an unusually benign occupier’.¹⁰² These divisions among the

⁹⁸ Greta Uehling, ‘Everyday Life after Annexation: The Autonomous Republic of Crimea’ in Agnieszka Pikulicka-Wilczewska and Richard Sakwa (eds) *Ukraine and Russia: People, Politics, Propaganda and Perspectives* (E-International Relations 2015) 69, 74.

⁹⁹ Ibid 76. See also Greta Uehling, ‘Crimeastan’ (Society for Cultural Anthropology, 2014) <https://culanth.org/fieldsights/crimeastan>; Giorgio Agamben, *State of Exception* (University of Chicago Press 2005) 34; John Comaroff and Jean Comaroff, ‘Law and Disorder in the Postcolony: An Introduction’ in John Comaroff and Jean Comaroff (eds), *Law and Disorder in the Postcolony* (University of Chicago Press 2006); Jakob Rigi, ‘The Corrupt State of Exception: Agamben in Light of Putin’ (2012) 56(3) *Social Analysis* 69; Andrew Wilson, *Virtual Politics: Faking Democracy in the Post-Soviet World* (Yale University Press 2005).

¹⁰⁰ Uehling, ‘Everyday Life after Annexation’ (n 98) 77.

¹⁰¹ ‘26 February Criminal Case’.

¹⁰² Geiss (n 14) 446.

local population regarding the legitimacy of annexation will have significant implications for the prospects of Crimea's reintegration within Ukraine.

Overall, the annexation of Crimea has served a heavy blow to the IRoL and Ukraine's territorial integrity, as well as to constitutionalism and the idea of the RoL in Russia itself, having consolidated an essentially anti-RoL State. In this context, Russia has had to bend its laws and legal procedures to somehow legitimize the annexation and maintain the occupation. The events around Crimea fit neatly into the context of Russia's broader legal paradigm: the English 'rule of law' and its Russian equivalent 'verkhovenstvo zakona' (rule by the law) are two completely different philosophical concepts.¹⁰³ Putin's regime is incompatible with the former.¹⁰⁴ In the end, as far as administrative autonomy and RoL standards are concerned, Crimea would indeed have been better off within Ukraine, as Ukraine systematically scores higher than Russia in various global RoL, democracy and governance indicators.¹⁰⁵

4.5 CONCLUSION: LESSONS LEARNED FROM THE (UN)RULE OF LAW IN CRIMEA

This chapter examined the case of Crimea as a recently emerged ALS to reveal ensuing gaps in governance and RoL dilemmas. Crimea also being an area of contested sovereignty, the focus of the chapter was on the various dimensions of domestic capacity, legitimacy and collaborative sovereignty and governance.

By occupying and annexing Crimea, Russia has violated a plethora of international law principles and provisions, as well as its bilateral and multilateral commitments to Ukraine, Ukraine's domestic legislation and its very own domestic law. Whichever way one looks at it, Ukraine retains international legal sovereignty over Crimea, whereas Russia has acquired none and qualifies as an occupier regardless of its denial of this status. Notwithstanding, the international community was neither able to prevent the occupation and annexation of Crimea and restore its legitimate status, nor to protect the affected population from systemic human rights violations by Russia. International response in the form of non-recognition of the annexation by a majority (but not entirety) of States, as well as the implementation of restrictive measures against Russia by some are rather weak responses compared with the gravity of the offence. Moreover, Russia's permanent seat on the UN Security Council

¹⁰³ Lukyanova (n 94).

¹⁰⁴ Merezko (n 95).

¹⁰⁵ These include, among others, World Justice Project Rule of Law Index, Freedom House Freedom in the World and Nations in Transit scores, Transparency International Corruption Perceptions Index.

and its involvement in other international crises has allowed it to retain a degree of international collaborative sovereignty despite having unlawfully annexed Crimea. The fact that the alternative governor in this case is a State, which could have been held accountable at the international level had there been political will, and not an NSA, which is usually the case in ALS, seems to have made no practical difference. The IRoL, understood in its simplest form as the international community's stride towards a world governed by rules and not by force, has suffered a blow. The idea that 'might is right' has once again reduced the international system to nothing more but 'a shared vocabulary and a set of institutional practices'.¹⁰⁶

Its de jure title over Crimea notwithstanding, from a de facto perspective, Ukraine has no domestic capacity in the peninsula. The strength and consistency of Ukraine's international and domestic response and a solid de-occupation/reintegration strategy with respect to Crimea are essential in sustaining the legitimacy of Ukraine's sovereignty over Crimea, and to eventually restoring its capacity. In the absence of a formal strategy and in light of a problematic, temporarily occupied, territory regime developed to frame the situation, Ukraine's record is mixed. For now, Ukraine cannot uphold the RoL in Crimea and even struggles to provide it to those Crimeans who relocated to mainland Ukraine.

In turn, Russia has a strong domestic capacity in Crimea, disregarding the absence of a formal title or the contestation of the legitimacy of its rule internationally, locally and in Russia itself. It has fully integrated Crimea within its legal and institutional structures and has waged a lawfare on Crimea, not least to suppress opposition to the occupation. The existing international rules are vastly insufficient to ensure that alternative governors such as (covert) occupying States respect basic RoL standards: specialized international organizations cannot get as much as physical access to the peninsula to monitor the humanitarian and human rights situation. Additionally, while in an area of contested sovereignty resulting from occupation there may be no gap in governance in terms of domestic capacity (as the occupying State fills the void entirely), there are significant gaps at all other levels. Moreover, the RoL standard in such a territory is as thin/thick as in the occupying State, reduced by the ambiguities of transition and any measures implemented to suppress local dissent. Ultimately, it appears that the RoL cannot exist, in theory or in fact, in the absence of an advanced, democratic, Weberian State.

Under conditions of contested sovereignty (as in the case of Crimea), the application of two legal regimes to a territory – one de jure (Ukraine) and one

¹⁰⁶ Martti Koskenniemi, 'The Future of Statehood' (1991) 32(2) *Harvard International Law Journal* 397, 404.

de facto (Russia) – creates a reality that does not satisfy the RoL threshold in either of the two domestic legal orders involved and poses significant challenges to the IRoL too. Protraction of the situation results in a proliferation of legal ambiguities and RoL deficiencies, whereas the emergence and continuing existence of areas of contested sovereignty distorts the common vision of a rule-based international order.