

National Ratification of an Internationally Wrongful Act: The Decision Validating Russia's Incorporation of Crimea

Constitutional Court of the Russian Federation Decision of 19 March 2014, No. 6-P

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INTRODUCTION

Amidst echoes of the international community's collective denunciations of what Western countries call Russia's illegal 'annexation' of Crimea, Russia has recently celebrated the second anniversary of what it officially refers to as its 'reunification' with the storied peninsula.¹ One largely overlooked but crucial judicial development in this respect was the decision of Russia's Constitutional Court (the 'Decision') of 19 March 2014 on the 'Treaty between the Russian Federation and the Republic of Crimea on Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation New Constituent Entities' of 18 March 2014 (the 'Crimea Treaty').² The Court, petitioned by President Putin to review the Crimea Treaty for compliance with the Constitution of the Russian Federation of 1993 (the 'Constitution') before its approval by the Federal Assembly, declared the Crimea Treaty constitutional.

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¹President of the Russian Federation Vladimir Putin, 'Congratulations on the second anniversary of Crimea and Sevastopol's reunification with Russia', 18 March 2016, <en.kremlin.ru/events/president/news/51535>, visited 30 June 2016.

²Decision No. 6-P of 19 March 2014, *Rossiyskaya Gazeta*, Federal issue No. 6335, 19 March 2014.

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The Decision of arguably the most significant³ court in Russia has been qualified as merely a symbolic act of a perfunctory judiciary.⁴ However, it raises questions not only as to the lawfulness of Crimea's incorporation under Russia's constitutional law, but also on the role that the Court played in the eventual ratification of an internationally wrongful act committed by Russia against Ukraine that led to the conclusion of the Treaty. Indeed, this case note argues that the Court failed to address the legality of the Treaty under international law, as it should have done on the basis of Russia's constitutional rules on the incorporation of new territories. More specifically, it shows that the Court should have declared the treaty unconstitutional since Crimea did not have the capacity to enter into it under the domestic law governing the admission of new territories read in light of international law criteria for statehood. Moreover, the conclusion of the Crimea Treaty was unconstitutional because it conflicted with a peremptory norm of international law within the meaning of the Vienna Convention on the Law of Treaties (Vienna Convention), and because it impaired Russia's treaty obligations regarding the status of Crimea.

This note is structured as follows: after providing the factual background surrounding the conclusion of the Crimea Treaty, a summary of the Decision will be given. The subsequent analysis will first detail the competence of the Court to effect constitutional control of a treaty and the scope of its review governing the admission of new constitutive entities into Russia. It will then identify the sources of law that the Court had to employ in vetting the contents of the Crimea Treaty and the procedure for the Crimea Treaty's conclusion. The next part of the analysis will show that the Court should have declared the Treaty unconstitutional because Crimea was not a state at the time of its conclusion, and because the Treaty violates peremptory norms of international law and several of Russia's treaty obligations.

BACKGROUND

The events culminating in Russia's incorporation of Crimea can be traced back to the Maidan protests in Kiev, when between 26 and 28 February 2014 unidentified gunmen in combat uniforms, likely Russian soldiers or special forces directing

³The Constitutional Court is the authoritative voice on the interpretation and application of the Constitution, and its decisions constitute binding precedent. S. Marochkin, 'International Law in the Courts of the Russian Federation: Practice of Application', 6 *Chinese Journal of International Law* (2007) p. 329 at p. 332.

⁴E. Lukyanova, 'O prave nalevo' [*On the Right of Left*], *Novaya Gazeta*, 19 March 2015, <www.novayagazeta.ru/politics/67715.html>, visited 30 June 2016; A. Merezhko, 'Okkupaciya kryma I antipravovoe gosudarstvo putina' [*Occupation of Crimea and non-Rule of Law State*], *Forumdaily*, <www.forumdaily.com/okkupaciya-kryma-i-antipravovoe-gosudarstvo-putina/>, visited 30 June 2016.

members of local pro-Russia militias,⁵ seized administrative buildings and hoisted Russian flags in Crimea's capital Simferopol, secured Crimea's main airports, and blocked roads connecting Crimea with Ukraine.⁶ Around the same time, a number of deputies in the seized Crimean parliament building voted to hold a referendum in Crimea on the issue of enlarging the region's autonomy.⁷ The choice in the referendum, scheduled for 16 March, was about Crimea either joining Russia or remaining part of Ukraine.⁸

Anticipating Crimea's wish to join Russia, on 28 February several deputies of Russia's State Duma, the lower house of the Federal Assembly, introduced an amendment to the 2001 law on the incorporation of new territories (the 'Draft Amendment to the Incorporation Law').⁹ The 2001 Federal Constitutional Law No. 6-FKZ on the Procedure of Admission to the Russian Federation and Creation of a New Subject Within the Russian Federation (the 'Incorporation Law') implements the provision of the Constitution authorising the admission of a new entity into the Federation and sets out the law and procedure for incorporation.¹⁰ Under Article 4 of the Incorporation Law, a 'foreign state' or a 'part thereof' may be admitted into Russia based on mutual accord and by way of a treaty concluded between Russia and the 'foreign state'. The Draft Amendment to the Incorporation Law, which was reviewed by the Venice Commission for compliance with international law, sought to add a clause obviating the requirement to conclude an international treaty 'when it is not possible to conclude an international treaty because of the absence of efficient sovereign state government in the foreign state.'¹¹

⁵ President Putin admitted in April 2014 that 'Russian servicemen did back the Crimean self-defence forces', and that in Crimea 'Russia created conditions – with the help of special armed groups and the Armed Forces ... for the expression of the will of the people living in Crimea and Sevastopol'. 'Direct Line with Vladimir Putin', 17 April 2014, <eng.kremlin.ru/news/7034>, visited 30 June 2016.

⁶ 'Ukrainian Crisis Timeline', 13 November 2014, <www.bbc.com/news/world-middle-east-26248275>, visited 30 June 2016.

⁷ *Supra* n. 6. On 6 March 2014 the Supreme Council of the Autonomous Republic of Crimea adopted a resolution 'On the All-Crimean Referendum' on the basis of the Arts. 18(1)(7) and 26(2)(3) of the Crimean Constitution. See I. Bilych, et al., 'The Crisis in Ukraine: Its Legal Dimensions', *Razomforukraine*, 14 April 2014, <razomforukraine.org/report>, visited 30 June 2016.

⁸ *Supra* n. 6, p. 21.

⁹ Opinion of the European Commission for Democracy Through Law (the 'Venice Commission') on 'Whether Draft Federal Constitutional Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject within the Russian Federation is Compatible with International Law', Opinion no. 763/2014, Venice 21 March 2014 (the 'Venice Commission Opinion').

¹⁰ Federal Constitutional Law No. 6-FKZ of 17 December 2001, *Rossiyskaya Gazeta*, Federal issue No. 247, 20 December 2001.

¹¹ Art. 4 (2.1) Draft Amendment to the Incorporation Law.

On 1 March, President Putin asked the Federation Council, the upper house of the Federal Assembly, to grant him the right to use a limited military contingent outside the Russian Federation and received authorisation to move the military into the Ukrainian territory for the purpose of ‘normalizing the socio-political situation in that country.’¹²

Back in Crimea, on 11 March, the Crimean Parliament approved the ‘Declaration of Independence’ of the Autonomous Republic of Crimea and the port city of Sevastopol, which proclaimed that if the upcoming referendum resulted in a decision for reunification with Russia, Crimea would be ‘announced an independent and sovereign state with a republican order’.¹³ The Declaration added that ‘[i]f the referendum brings the respective results, Crimea, as an independent and sovereign state, will turn to the Russian Federation with the proposition to accept the Republic of Crimea on the basis of a respective interstate treaty into the Russian Federation as a new constituent entity’.

The results of the 16 March referendum (the ‘Crimea Referendum’) showed that almost 97% of the voters answered ‘yes’ to joining Russia.¹⁴ Russian authorities, in coordination with the newly installed pro-Russian government of Aksyonov, moved swiftly to finalise Crimea’s incorporation. On the following day, 17 March 2014, the Crimean Parliament declared independence and sought to join Russia,¹⁵ and President Putin signed the presidential order ‘On the Recognition of Crimea’ as a sovereign and independent State.¹⁶ On the same day the authors of the Draft Amendment of the Incorporation Law also requested the withdrawal of the project.¹⁷ On 18 March, Russia and Crimea entered into the Crimea Treaty, which was upheld as constitutional by the 19 March Decision that is the subject of this paper. The following day, 20 March, the State Duma approved the act transforming the Crimea Treaty into Federal law by a vote of 445 to 1.¹⁸ On the same day the Draft Amendment of the Incorporation Law was

¹²E. Lukyanova, ‘On the Rule of Law in the Context of Russian Foreign Policy’, 3 *Russian Law Journal* (2015) p. 10 at p. 20.

¹³See ‘Statement by the Russian Ministry of Foreign Affairs regarding the adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol’, 11 March 2014, <www.mid.ru/bpr_4.nsf/0/4751D80FE6F93D0344257C990062A08A>, visited 30 June 2016.

¹⁴V. Tomsinov, ‘“Crimean law” or legal basis for the reunification of the Crimea and Russia’, 11 *Vestnik of the Moscow State University* (2014) p. 3 at p. 4.

¹⁵See ‘Crimean Parliament Formally Applies to Join Russia’, 17 March 2014, <www.bbc.com/news/world-europe-26609667>, visited 30 June 2016.

¹⁶Decree of the President of the Russian Federation No. 147 ‘On the Recognition of the Republic Of Crimea’, 17 March 2014.

¹⁷See Venice Commission Opinion, *supra* n. 9, at para. 2.

¹⁸Draft Federal Constitutional Law No. 475944-6 ‘On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol’, 20 March 2014.

scrapped from the agenda of the Duma.¹⁹ On 21 March, the Federation Council adopted and President Putin promulgated the Federal constitutional law on the admission of Crimea into Russia, thereby completing the ratification process.²⁰

THE DECISION

After setting out the applicable authority for its mandate to evaluate the Crimea Treaty, stemming from Articles 125(2) and 128(3) of the Constitution and Article 4(7) of the Incorporation Law, the Court outlines the scope of its review under Article 86 the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation' ('Law on the Constitutional Court'),²¹ requiring the Court to vet the treaty for its contents, form of enactment, the procedure for its signature, conclusion, publication and entry into force, and for conformity with the rules on the separation of power and the delimitation of competences, jurisdictions and powers between federal entities and between organs of Federal and constituent entities.²² Before embarking on the actual analysis of the treaty, the Court emphasises the judges' obligation to assess the 'substance of the matter' and to consider the pending entry in force Crimea Treaty 'in its entirety'.²³

The Court eventually makes its first substantive finding on page four of the fourteen-page opinion concerning the procedure for the signing of the Crimea Treaty, holding that President Putin's signature of the treaty conforms to constitutional provisions authorising the president to sign international treaties.²⁴ The Court then shifts its analysis to the requirement to observe the terms of separation of powers, holding that the signatures of the Crimea Treaty also conform to such terms as prescribed by the Constitution, since plenipotentiary signatures fulfil the procedural steps for ratification of treaties respecting the separation of powers and competencies of government entities stipulated by the Incorporation Law.²⁵ The Court then ostensibly proceeds to evaluate each specific provision of the Crimea Treaty.

¹⁹ Venice Commission Opinion, *supra* n. 9, at para. 2.

²⁰ Federal Constitutional Law No. 6-FKZ 'On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol', 21 March 2014, *Rossiyskaya Gazeta*, Federal issue No. 6338, 24 March 2014.

²¹ Federal Constitutional Law No. 1-FKZ 'On the Constitutional Court of the Russian Federation', 21 July 1994.

²² *Supra* n. 2, p. 5, Section 2.

²³ *Supra* n. 2, p. 4.

²⁴ *Supra* n. 2, p. 6, citing Art. 80(3)-(4), Art. 86(a)-(b) of the Constitution.

²⁵ *Supra* n. 2.

The Court engages in limited substantive analysis of Article 1(1) of the Treaty, which states that ‘the incorporation of the Republic of Crimea into the Russian Federation is effective as of the date of the signing of the treaty’. Here the Court raises the issue whether the Crimea Treaty could be implemented prior to its ratification by the Federal Assembly. It is in this context that the Court makes the reference to international law, citing Article 25 of the Vienna Convention to explain that a treaty may be applied provisionally pending its entry into force if ‘the negotiating States have in some other manner so agreed.’²⁶ The Court does not explain exactly how this Convention enters its scope of review. Nevertheless, relying on the Vienna Convention and a similar provision in the Law on Treaties, a federal statute implementing that Convention, and a previous judgment dealing with the provisional implementation of international treaties, the Court concludes that the Crimea Treaty complies with the Constitution with respect to the prescribed procedure for ‘its signing, conclusion, and entry into effect’.²⁷

The remaining pages of the Decision contain a concise evaluation of the rest of the provisions of the Crimea Treaty. The Court finds Article 2, which is the heart of the Treaty and makes the Republic of Crimea and the Federal city Sevastopol new constituents parts of the Russian Federation, to be in conformity with the federal order prescribed by the Constitution.²⁸ It holds that Article 3 of the Treaty, which guarantees all three main Crimea language groups (Russians, Ukrainians and Crimean-Tartars) the right to use their native languages, conforms to the Constitution’s provision granting Republics within the Federation the right to enact their own official languages.²⁹ In the last four pages of the opinion, the Court finds the remaining provisions of the treaty constitutional; including those relating to the recognition of Crimeans as Russian citizens, the institution of a transitional period for the integration of Crimea’s economic, financial and judicial systems into the Russian ones, and those concerning the conduct of compulsory military service and of governmental elections.³⁰ Lastly, the Court sanctions the provision making Russian Federal law and other normative acts of Russian Federation applicable on the territory of Crimea effective as of the date of its incorporation into Russia. The Court thus holds that the Crimea Treaty in its entirety is in conformity with the Constitution.³¹

²⁶ *Supra* n. 2, p. 7.

²⁷ *Supra* n. 2, pp. 7-8.

²⁸ *Supra* n. 2, p. 9.

²⁹ Art 68 Constitution; *supra* n. 2, p 9.

³⁰ *Supra* n. 2, pp. 9-14.

³¹ *Supra* n. 2, pp. 14-15.

ANALYSIS OF THE DECISION

In the analysis below we will first discuss the status of international law in the Russian legal order and the domestic normative framework for the incorporation of new subjects. As we will see, the latter instructed the Court to review the Crimea Treaty substantively and procedurally not only against national constitutional law, but also against international law binding upon Russia.³² However, the Court selectively restricted its analysis to only some of the substantive and procedural aspects of the Crimea Treaty and only used national legal sources as parameters for review. For example, although Article 2 of the Crimea Treaty reiterates that the law guiding the conclusion of the Crimea Treaty is inter alia the Incorporation Law, the Court conducts no analysis of the treaty's compliance with its Article 4(2), which dictates that Russia could only enter into a treaty with Crimea if the latter had been a 'state' by the time the Crimea Treaty was concluded.³³ Moreover, the Court did not review the Treaty against other Treaties to which Russia is a party or against peremptory norms of international law. Both reviews would have led to the finding that the Treaty was unconstitutional.

THE APPLICABLE LAW

The place of international law in the domestic hierarchy of norms

Article 15(4) of the Constitution demonstrates the post-Soviet trend of according greater prominence to international law in the legal order emerging out of isolationist Soviet practices.³⁴ The provision states that 'generally recognized principles and norms of International Law and international treaties shall be an integral part of its legal system.'³⁵ This is a novum in Russian history. The Constitutional Court has consistently recognised the high rank that both treaties

³² Constitutional Court of the Russian Federation, 9 July 2012 Decision No. 17-P, *On the Matter of constitutional review of a pending entry into force treaty of the Russian Federation – Protocol on the accession of Russian Federation to the Marrakesh Agreement Establishing the World Trade Organization* (the 'World Trade Organization Accession Judgment'), para. 2.4; Art. 86(2) Law on the Constitutional Court.

³³ *Supra* n. 2, p. 7, para. 3.

³⁴ G. Danilenko, 'Implementation of International Law in Russia and Other CIS States', 10 *EJIL* (1999) p. 13.

³⁵ This exact formulation is restated in Art. 5 of the Federal law on International Treaties of the Russian Federation of 15 July 1995, No. 101 – FZ (the 'Law on Treaties'), which also commits Russia to the 'unwavering observance of treaty and other norms', and affirms 'its adherence to the fundamental principle of international law – the principle of performance in good faith of international obligations'. Art. 1 Law on Treaties.

and customary rules of international law occupy within Russia's legal order.³⁶ In the 1995 decision on the constitutionality of several presidential orders concerning the use of military force in Chechnya (the 'Chechnya Judgment'), the Court elucidated that:

Pursuant to the tenets of the rule of law, espoused in the Constitution, organs of the authorities are bound not only by internal, but also by international law. Generally recognized principles and norms of international law and international treaties are, according to Article 15(4) of the Constitution, constitutive parts of the judicial system of the Russian Federation and must be scrupulously observed, including through their consideration in domestic legislation.³⁷

The exact status of international treaties or customary law in the Russian hierarchy of norms is hard to pinpoint, however. The second sentence of Article 15(4) of the Constitution states that '[i]f an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international treaty shall be applied.' This provision ostensibly places international treaties in force for Russia above all domestic law. But Article 15(1) of the Constitution endows the Constitution with 'supreme legal force'. It stipulates that '[l]aws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation'. Read in conjunction with Article 15(4), this clause arguably subordinates only domestic legislative acts to the Constitution, not international norms to which Russia is bound.³⁸ As regards international treaties, however, in the ruling of 14 July 2015 on the enforcement of judgments of the European Court of Human Rights in Russia, the Constitutional Court held that Russia could deviate from its obligation to

³⁶ See e.g. World Trade Organization Accession Judgment, *supra* n. 32, Section 2.4; Constitutional Court of the Russian Constitution, 27 March 2012 Decision No. 8-P 'On the Matter of constitutional review of Section 1 Article 23 of the Federal law "On the International treaties of the Russian Federation" in connection with the individual complaint of Ushakov' (the 'Ushakov Judgment'), Sections 2-3.

³⁷ Constitutional Court of the Russian Federation, Decision No. 10-P 31 July 1995 'On the Measures to Restore Constitutional Law and Order on the Territory of Chechen Republic', Point 5.

³⁸ G. Vajpan and A. Maslov, 'Ot dogmatiki k pragmatike: postanovlenie Konstititsionnogo Suda Rossiiskoi Federatsii po 'delu Markina' v kontekste sovremennykh podhodov k sootnosheniju mezhdunarodnogo i natsionalnogo prava' [*From dogmatics to pragmatics: the judgment of the Constitutional Court of the Russian Federation in the 'case of Markin' in the context of contemporary approaches on the relationship of international and national law*], 2 *Comparative Constitutional Review* (2014) p 127 at p. 130. Vajpan and Maslov argue that Art. 17(1) of the Constitution, according to which human rights in Russia are recognised and guaranteed pursuant to 'generally recognized principles and norms of international law and in accordance with the present Constitution', militates against placing constitutional norms above general principles concerning human rights.

implement a European Court of Human Rights judgment if its enforcement conflicted with the fundamental principles and norms of the Constitution.³⁹ It would appear then that international treaties in force for Russia rank lower than the Constitution, but higher than other domestic norms they come into conflict with, even Federal constitutional laws.⁴⁰

The status of customary international law or generally recognised principles in the Russian hierarchy of norms is harder to conceptualise. The Constitution offers no guidance in case of their collision with national norms.⁴¹ However, the Constitution (indirectly) obliges the Constitutional Court not only to review unratified treaties against treaties to which Russia is bound, but also against customary international law and generally recognised principles of international law, as we will see in the following paragraphs.

The Constitutional Court's competence to review the Crimea Treaty

The Constitutional Court was created in 1993 as an organ of constitutional control and empowered to conduct independent and impartial judicial review of legislative and executive acts.⁴² The 2010 'Commentary to the Constitution of the Russian Federation' (the 'Commentary'), edited by the president of Constitutional Court, Valery Zorkin, defines 'constitutional control' as 'the review and assessment of the constitutionality of laws, other normative acts, (and)

³⁹ Constitutional Court of the Russian Federation, 14 July 2015, Decision No. 21-P.

⁴⁰ Both the 1995 and the 2003 decrees of the Plenum of the Supreme Court of the Russian Federation addressing the application of international law classify ratified treaties that have been properly transformed into Federal law as superior to other domestic laws. Plenum of the Supreme Court of the Russian Federation, 31 October 1995, Decree No. 8, para. 5; Plenum of the Supreme Court of Russian Federation, 10 October 2003, Decree No. 5 (the '2003 Decree'), para. 8. *But see* B. Tuzmukhamedov, 'Implementation of International Humanitarian Law in the Russian Federation', 850 *International Review of the Red Cross* (30 June 2003) p. 385 at p. 387, arguing that read in conjunction with Art. 15(1), Art. 15(4) has been interpreted to mean that in case of a conflict between an internal regulation other than the Constitution and an obligation arising out of an international treaty, the latter must not necessarily cancel the earlier.

⁴¹ The 1996 Federal Constitutional Law on the Judicial System of the Russian Federation provides that in such matters a court, having considered the Constitution, federal constitutional law, federal law, generally recognised principles and norms of international law, and international treaties of the Russian Federation, 'shall render a decision in accordance with the legal provision having the greatest legal force'. Art. 5 Federal Constitutional Law No. 1 FKZ on the Judicial System of the Russian Federation, 31 December 1996.

⁴² V.D. Zorkin and L.V. Lazareva (eds.), *Kommentarii k Konstitucii Rossijskoj Federacii: Konstitucija 1993 goda – pravovaya legitimizacija novoy Rossii* [Commentary to the Constitution of the Russian Federation: Constitution of the year 1993 – legal legitimization of the new Russia] (Eksmo 2010), Section 4, available at <kommentarii.org/konstitutc/page1.html>, visited 30 June 2016.

treaties' of the Russian Federation, based on competences conferred on the Constitutional Court by the Constitution.⁴³

The principle jurisdiction of the Court is set out in Article 125 of the Constitution. It mandates the Court, upon request of inter alia the President, to 'consider cases on the correspondence to the Constitution ... of: (2) international treaties and agreements of the Russian Federation which have not come into force'.⁴⁴ The competences of the Court also derive from Article 128(3) of the Constitution, which provides that the competences of the Constitutional Court shall be 'fixed by federal constitutional law.'⁴⁵ The provision is an example of what is called a 'referential norm' (in Russian *otsylochnaya norma*), i.e. a provision that refers to another act (legislative act, international treaty) to implement or concretise it.⁴⁶ Federal constitutional laws of the Russian Federation are similar to the *lois organiques* in France: they deal with constitutional questions and are hierarchically superior to ordinary federal laws.⁴⁷ The act adopted to give effect to Article 128(3) is the Law on the Constitutional Court. It reasserts the Court's competence to review the conformity with the Constitution of international treaties concluded but not yet approved and ratified.⁴⁸ It also provides that if the treaty is declared constitutional, it can be presented to the Federal Assembly for ratification.⁴⁹ In the alternative, if it is unconstitutional 'the international treaty shall not be brought into effect or applied'.⁵⁰

⁴³ *Ibid.*

⁴⁴ Art. 125(2) Constitution.

⁴⁵ *Supra* n. 42, Art. 125(2) <kommentarii.org/konstituc/page135.html>, visited 30 June 2016. Its competences can also be established by other laws pursuant to Art. 3(7) of the Law on the Constitution Court.

⁴⁶ V.M. Syryh, 'Sposoby svyazi zakona s drugimi pravovymi aktami' [*Methods of Connection of Laws with other normative acts*] in Y. Tikhomirov (ed.), 'Zakonodatel'naja tehnika: nauchno-prakticheskoe posobie' [*Legislative technique: scientific application guide*] (Gorodetz 2000) p. 168-169.

⁴⁷ E. Bakhtova, 'Kommentarij k Konstitucii Rossijskoi Federacii' [*Commentary to the Constitution of the Russian Federation*] (Prospect 2010), Art. 108(1), online edition available at <constitution.garant.ru/science-work/comment/5817497/>, visited on 30 June 2016 (the 'Bakhtova Commentary'). These might also resemble what in the Spanish constitutional discourse is referred to as the *bloque de constitucionalidad*, the legal norms recognized by the 1978 constitution as detailing and complementing the constitution. M. de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2013) p. 263.

⁴⁸ Art. 3 Law on the Constitutional Court.

⁴⁹ Art. 74(2) Law on the Constitutional Court mandates the Court to evaluate not only the literal meaning of the treaty, but also its meaning in light of other authoritative statements, judicial practice, and the role of the treaty in the domestic legal order. E. Gilligan, *Defending Human Rights in Russia: Sergei Kovalyov, Dissident and Human Rights Commissioner, 1969-2003* (Routledge 2004) p. 180-181.

⁵⁰ Art. 91(2) Law on the Constitutional Court.

Albeit the Decision is the first on an accession treaty of a foreign territory into the Federation, the Court had previously reviewed an unratified treaty. In July 2012, the Court, at the request of a number of parliamentarians, reviewed the 'Protocol on the accession of Russian Federation to the Marrakesh Agreement Establishing the World Trade Organization'.⁵¹ The review of the Crimea Treaty thus falls squarely within the competence of the Constitutional Court. The question of what law governs the Court's review, and consequently what is meant by the terms 'contrary to the Constitution' in this context, is addressed in the following sections.

Applicable law governing the procedure for the admission of a new territory

Neither the Constitution nor the Law on the Russian Constitutional Court directly mentions the sources of law that the Court must use in its assessment of a treaty. However, Article 86 of the latter provides that the Court must review treaties both procedurally and substantively for their 'conformity with the Constitution'.

Procedurally, Article 86 of the Law on the Russian Constitutional Court requires the Court to review the constitutionality of treaties as to their form of enactment and the procedure for their signing, conclusion, adoption, promulgation and entry into effect.⁵² Moreover, Article 4 of the Incorporation Law stipulates that the admission must be carried out pursuant to an international treaty between Russia and a 'foreign State'. For a definition of international treaties and procedures regarding their adoption, recourse must be made to another relevant federal statute, the Law on Treaties, which incorporates verbatim the definition of a treaty laid down in the Vienna Convention.⁵³ Article 1 of the Law requires that the treaties entered into by Russia are to be 'concluded, performed and cancelled in accordance with the generally recognized principles and norms of international law, the treaty itself, the Constitution of the Russian Federation and the present law'.⁵⁴ The 'norms of international law' in this context include the UN Charter and generally recognised principles and norms of international law, including customary international law,⁵⁵ while 'generally recognized principles' refers to imperative non-derogable norms, or *jus cogens*.⁵⁶

⁵¹ World Trade Organization Accession Judgment, *supra*, n. 32.

⁵² Art. 86(2), (3) Law on the Constitutional Court.

⁵³ Art. 2(a) Law on Treaties.

⁵⁴ Art. 1 Law on Treaties.

⁵⁵ W. Butler, 'National Treaty law and Practice: Russia', in D.B. Hollis et al. (eds.), *National Treaty Law and Practice* (Martinus Nijhoff 2005) p. 537 at p. 557.

⁵⁶ The 2003 Decree, *supra* n. 40, Point 1; *supra* n. 42, Art. 15(4).

Article 86 also requires the Court to review the constitutionality of treaties as regards the delimitation of competences, jurisdiction and powers between federal entities and between organs of federal and constituent entities.⁵⁷ Article 86 therefore requires the Court to look to Chapter 3 of the Constitution for provisions dealing with Russia's 'Federal Structure', and thus to Article 65 of the Constitution, which is the first Article of that Chapter. That provision regards the Crimea Treaty directly: the second paragraph of Article 65 is a 'referential norm' regulating the admission of new territories to the Federation. It provides that such admission 'shall be carried out according to the rules established by federal constitutional law', i.e. the 2001 Incorporation Law.⁵⁸ In turn, Article 2(1) of the Incorporation Law provides that the incorporation must be carried out in accordance with the Constitution, '*international (inter-state) treaties of the Russian Federation, the present Federal constitutional law, as well as [other] federal constitutional laws on the admission of new entities into the Russian Federation*' (emphasis added). Because the Incorporation Law fleshes out provisions of a referential norm of the Constitution, Article 65(2) of the Constitution, and the subject matter of the Crimea Treaty is the admission of Crimea into Russia, its constitutionality had to be assessed not only against the Constitution, but also against other Federal constitutional laws and international treaties affecting the incorporation of Crimea.⁵⁹

This position is consistent with the 1995 decree of the Plenum of Russia's Supreme Court 'On Some questions concerning the application of the Constitution of the Russian Federation by courts in administering justice' ('1995 Decree'). The Plenum, whose decrees are binding⁶⁰ on all Russian courts, held that where a provision of the Constitution is 'referential', courts are bound to apply not only the Constitution, but also the referenced act and the legal norms to which that act refers.⁶¹ Indeed, on the basis of Article 2(1) Incorporation Law, the Venice Commission concluded that a proposed Draft Amendment to the

⁵⁷ Art. 86(1)-(6) Law on the Constitutional Court; *supra* n. 2, p. 5.

⁵⁸ The Incorporation Law was enacted to give force to Art. 65(2) of the Constitution. Its preamble provides that 'in conformity with part 2 of Article 65 of the Constitutional of the Russian Federation [this law] establishes the main conditions and procedure for the admission to the Russian Federation and for formation of a new constituent entity of the Russian Federation.'

⁵⁹ See e.g. Bakhtova Commentary, *supra* n. 47, Art. 125(2), noting that while the Constitutional Court decides exclusively matters of law, practice of the Constitutional Court shows that the Court relies not only on the Constitution, but also on ordinary laws arising out of references found in the Constitution. Indeed, the Court confirms the same in the Decision itself by stipulating that the admission of Crimea under Art. 65(2) of the Constitution must be realised according to the procedures established by the Incorporation Law. *Supra* n. 2, pp. 1,7.

⁶⁰ Butler, *supra* n. 55, p. 554.

⁶¹ 1995 Decree, *supra* n. 40, Point 2. As the website of the Supreme Court explains, the Plenum of the Supreme Court 'evaluates and decides questions concerning petitions to the Constitutional

Incorporation Law (*supra*) would violate international treaties in force for Russia, and would therefore be 'unlawful both under international law and under the Constitution of the Russian Federation and could be challenged ... in the Constitutional Court.'⁶²

The aggregate referential norms regulating the Court's substantive review of the Crimea Treaty therefore required the Court to take into account the Incorporation Law and international treaties previously concluded by Russia affecting the incorporation of Crimea. When evaluating the procedure for the Treaty's conclusion, the Court was also bound by the Incorporation Law, the Law on Treaties, customary international law, including norms of *jus cogens*, and general principles of international law.⁶³ This approach is consistent with the Plenum's instruction to courts, 'in administering justice [to] proceed from the fact that the generally recognized principles and norms of international law enshrined in international treaties, conventions and other documents ..., and the international treaties of the Russian Federation are ... part of its legal system'.⁶⁴ It is also consistent with the Court's own practice. In the World Trade Organization Accession Judgment, the Court not only reviewed the unratified Protocol against the Constitution, but also against unwritten general principles and norms of international law stemming from Article 15(4) of the Constitution, such as the Vienna Convention, Federal constitutional laws and ordinary statutes, including the Law on Treaties.⁶⁵ In this and in other decisions, the Court has confirmed the systemic applicability of these sources.⁶⁶

The Constitutional Court has also stressed the concomitant duty of the Federal legislature, who, though accorded discretion with respect to the 'conclusion,

Court of the Russian Federation on requests for constitutional review of laws and other normative acts', <supcourt.ru/>, visited 30 June 2016.

⁶² Venice Commission Opinion, *supra* n. 9, para. 45.

⁶³ As to the general competence of the Court to apply international law, Art. 3 of the Law on the Judicial System, which regulates the activities of all courts in Russia, ensures the unity of the judicial system by, among other things, mandating the courts to apply 'generally recognized principles and norms of international law and international treaties of the Russian Federation.' See also *supra* n. 42, Art. 15(4).

⁶⁴ 1995 Decree, *supra* n. 40, Point 5.

⁶⁵ World Trade Organization Accession Judgment, *supra* n. 32, Sections 3.2-3.4. The definition provided in Art. 15(4) has served as the normative basis for the application of international treaty law, and general principles and customary rules of international law, including *jus cogens*, in Russia's domestic judicial practice. Danilenko, *supra* n. 34 at p. 62.

⁶⁶ *Ibid.*; *Ushakov* Judgment, *supra* n. 36, Sections 2-3. In the *Ushakov* Judgment, the Constitutional Court invoked general principles and norms of international law, treaty norms arising out of the Vienna Convention and the International Covenant on Civil and Political Rights, and Federal laws to validate the provision of the Law on Treaties allowing for temporary application of a treaty prior to its entry into force.

execution and termination of international treaties', must nevertheless 'conform to demands of the Constitution ... arising out of in particular provisions containing direct references to international treaties of the Russian Federation' in effecting the appropriate 'legal control'.⁶⁷ Ensuring the supremacy of the Constitution with respect to activities of all branches of the government, the Court thus appears to incorporate the same set of referenced norms in its judicial review of international treaties as those that ought to have been considered by the executive or legislative organs in concluding them.

UNCONSTITUTIONALITY OF THE CRIMEA TREATY

In this part of the analysis, several arguments will be presented which should have led the Court to declare the Crimea Treaty unconstitutional.

Crimea was not a state at the time of the conclusion of the Crimea Treaty

Even if an agreement between a state and a secessionist entity like Crimea could be deemed a treaty under international law, the Incorporation Law prohibits the incorporation of a new subject into Russia by a treaty between Russia and a sub-state entity.⁶⁸ The Russian parliamentarians sought to circumvent this requirement by introducing the 'Draft Amendment to the Incorporation law'. If adopted, the amendment would have allowed the admission of Crimea to be carried out solely on the basis of Russia's constitutional law, with no need to conclude a treaty with the foreign state.⁶⁹ Before the Venice Commission had a chance to opine on the lawfulness of the amendment under international law, however, Russian authorities opted to rescind the amendment and to instead coordinate its efforts with the Crimean authorities to pursue Crimea's statehood in order to conclude the treaty without the involvement of Ukraine.⁷⁰

International law is the only source of legal authority determinative of Crimea's statehood. The overwhelming majority of states and international law scholars today support the view that at the time of the signing of the Crimea Treaty the seceding entity did not constitute a state under either the constitutive or declaratory theory of statehood.⁷¹ The first of these theories considers the act of

⁶⁷ World Trade Organization Accession Judgment, *supra* n. 32, Section 3.2; *Ushakov* Judgment, *supra* n. 36, Section 2.

⁶⁸ Art. 4(2) Incorporation Law.

⁶⁹ Venice Commission Opinion, *supra* n. 9, para. 10.

⁷⁰ *Ibid.* paras. 2, 35.

⁷¹ See e.g. G. Fox, 'Guest Post: The Russia-Crimea Treaty', *OpinioJuris*, 20 March 2014, <opiniojuris.org/2014/03/20/guest-post-russia-crimea-treaty/>, visited 30 June 2016; C. Borgen, 'From Intervention to Recognition: Russia, Crimea, and Arguments over Recognizing Secessionist

recognition by other states as decisive for the creation of a new state, not the process by which it actually obtained independence; according to the second theory a new state comes into existence by virtue of fulfilment of the factual international law criteria for statehood.⁷² The fact that only Russia recognised Crimea as a state at the time of signing of the Crimea Treaty evidences that it had not become a state by virtue of consent of already-existing states, preventing statehood under the constitutive theory.⁷³ As regards the declaratory theory: Crimea became effectively independent from Ukraine on 16 March, the day of the Crimea Referendum. On the same day the Crimea Treaty was signed. In the time span between these two events, Crimea had not developed the capacity to function as a normal state, independently of either Russia or Ukraine, meaning that it did not fulfil the factual criteria for statehood.⁷⁴

Moreover, it was Russia's aggression against Ukraine that enabled the Declaration of Independence in the first place, in particular by securing with its armed forces the administrative infrastructure necessary in order to carry out the Crimea Referendum.⁷⁵ The International Court of Justice in the *Kosovo* judgment held that under such circumstances a declaration of independence is contrary to international law because it is 'connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character.'⁷⁶

The Constitutional Court never broaches the issue of Crimea's statehood however, implicitly affirming that Russia's treatment of Crimea as a state in and of itself confers constitutive statehood status at least with respect to the bilateral

Entities', *OpinioJuris*, 18 March 2015, <opiniojuris.org/2014/03/18/intervention-recognition-russia-crimea-arguments-recognizing-secessionist-entities/>, visited 30 June 2016; A. Dolidze, 'Ukraine Insta-Symposium: Potential Non-recognition of Crimea', *OpinioJuris*, 17 March 2014, <opiniojuris.org/2014/03/17/ukraine-insta-symposium-potential-non-recognition-crimea/>, visited 30 June 2016.

⁷² 'A new state comes into existence when a community acquires not momentarily, but with a reasonable probability of permanence, the essential characteristics of a state, namely an organized government, a defined territory, and such a degree of independence from control by any other state as to be capable of conducting its own international relations.' A. Clapham, *Brierly's Law of Nations* (Oxford University Press 2012) p. 149.

⁷³ *Ibid.*

⁷⁴ See Fox, *supra* n. 71.

⁷⁵ See C. Marxsen, 'Crimea's Declaration of Independence', <www.ejiltalk.org/crimeas-declaration-of-independence/>, visited 30 June 2016. See also 'Girkin rasskazal, kak "sgonyal deputatov" v Krymu golosovat za prisoedinenie k RF' ['Girkin tells how he "rounded up deputies" to vote for joining the RF'], <www.pravda.com.ua/rus/news/2015/01/24/7056252/>, visited 30 June 2016.

⁷⁶ International Court of Justice 22 July 2010 General List No. 141, *Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, para. 81.

relations between the recognizing state and the new international subject.⁷⁷ The Court therefore fully defers to the executive branch regarding both the question of whether Crimea was an independent state at the time of conclusion of the treaty, as well as the decision to enter into a treaty with the emergent entity. Perhaps this is what the Court means when, before engaging in the substantive analysis of the Crimea Treaty, it disclaims that as a judicial organ it is not evaluating ‘the political soundness of the conclusion of the treaty.’⁷⁸

Violation of peremptory norm of international law

Even if the Constitutional Court was right to defer to the executive on the treatment of Crimea as a state, the Court should have found that the contents of the treaty, and the way it was procured, was contrary to the *jus cogens* prohibition on the use of force, either directly or through Article 53 the Vienna Convention, which provides that a treaty is void if at the time of its conclusion it conflicts with a *jus cogens* norm, and consequently contrary to Article 65(2) of the Constitution.⁷⁹ While the Court does address the procedure for and the effect of the signature of the Crimea Treaty, superficially as it may be, it makes findings as to the conclusion of the treaty without any examination of how the treaty was procured. Because the Court recognised the Vienna Convention as a source of review with respect to the treaty’s signature, the Law on the Constitutional Court at the very least required it to conduct a comparable analysis under the Vienna Convention of the procedure for the treaty’s conclusion and entry into effect.

A treaty is void *ab initio* under Article 53 of the Vienna Convention ‘if, at the time of its conclusion, it conflicts with a peremptory norm of general international law’. The provision does not define the term ‘conclusion’ and gives no guidance on

⁷⁷ Even though one view regards international legal personality as pre-determined by the legal order, according to another, title to rights and duties is established directly rather than preventively. This means that an entity that is the addressee of international rights and duties enjoys international personality, irrespective of the pre-determination of the personality of that very entity by the legal order. Here, the treatment of Crimea as a state was evidenced by Russia’s express recognition of Crimea, as well as the conclusion of the Crimea Treaty, which purports to give rise to rights and obligations of Crimea under international law. Arts. 2(1)(a) and 6 Vienna Convention; International Court of Justice 11 April 1949, *Advisory Opinion on the Reparations for Injuries Suffered in the Service of the United Nations*, para.178. See also J. Barberis, ‘Nouvelles questions concernant la personnalité juridique internationale’, 179 *RCADI* (1983) p. 145 at p.165; and P.M. Dupuy, ‘L’unité de l’ordre juridique international’ 297 *RCADI* (2002) p. 9 at p. 110.

⁷⁸ *Supra* n. 2, pp. 5-6.

⁷⁹ The Vienna Convention was formally ratified by the USSR on 23 May 1990, see Decision of the Supreme Soviet of the USSR of 23 May 1990, No. 1511-1, published by the *Vedomosti of the Congress of people’s deputies of the USSR and Supreme Soviet USSR*, No. 23, 6 June 1990. By virtue of the Russian Federation’s succession of the USSR in all of the latter’s international obligations, the Vienna Convention entered into force for Russia effective 1 September 1991.

when a conflict between a treaty and a *jus cogens* norm arises. A commentary to the Convention notes that the conflict may arise at the time the text of the treaty is adopted, or at any other moment leading up to its entry into force.⁸⁰ It also states that Article 53 is triggered where the treaty's 'object or its execution' infringes a *jus cogens* rule.⁸¹ In his report on the draft of the Vienna Convention, Lauterpacht explained that 'a treaty between two States the execution of which contemplates the infliction upon a third State of what customary law regards as a wrong is illegal and invalid *ab initio*.'⁸²

Although the Vienna Convention does not include any specific examples of *jus cogens* norms in the text of the article, the International Law Commission included principles of the UN Charter prohibiting the unlawful use of force as one example of the most obvious and settled rules of a peremptory norm in its draft report to the Vienna Conference.⁸³ A corollary to the prohibition on the use of force is the prohibition under customary law on annexation, the forcible acquisition of territory by one state at the expense of another.⁸⁴

Russian authorities no longer deny that Russian armed forces and other government agents directed and carried out the seizure of government buildings, airports and ports around the time of the Crimea Referendum.⁸⁵ Through these actions Russian armed forces either occupied or blockaded Crimea, or both, and likely used its armed forces already present in Crimea in contravention of an earlier agreement with Ukraine permitting Russia to station its Black Sea Fleet.⁸⁶

⁸⁰ O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties: a Commentary* (Oxford University Press 2011) p. 1230.

⁸¹ *Ibid.*, at p. 1226.

⁸² Vol. II, *ILC Yearbook* (1953) p. 154.

⁸³ Vol. II, *ILC Yearbook* (1966) p. 248. Cf. ILC 'Report on the work of its fifty third session', A/56/10, 112, para. 4. On the prohibition of aggression as peremptory norm see the Commentary to Art. 26 of the Articles on State Responsibility, para. 5. See also Report of the ILC, UN Doc. A/56/10, p. 85. Such an obligation is of an *erga omnes* nature and could be invoked by any State, regardless of whether it suffered a breach or not. See 2008 Commentary to Art. 40 of the ASR, p. 114.

⁸⁴ See e.g. R. Hofmann, 'Annexation', in *Max Planck Encyclopedia of Public International Law*, para. 21, available online at <opil.oup.com/home/EPIL>, visited 30 June 2016. This has been reaffirmed by the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, providing that '[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.' G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/8082 (24 October 1970). See also UNGA Res. 3314 (XXIX) (14 December 1974), Art. 5(3).

⁸⁵ President Putin confirmed the presence of troops in Crimea in several televised statements. See e.g. 'Ukraine Conflict: Putin "was ready for nuclear alert"', <www.bbc.com/news/world-europe-31899680>, visited 30 June 2016.

⁸⁶ Agreement No. 643_076 'On the Status and Conditions of the Presence of the Russian Black Sea Fleet on the Territory of Ukraine', 8 August 1997.

Any one of these scenarios constituted an act of aggression by Russia with respect to Ukraine in violation of the *jus cogens* prohibition on the use of force, as embodied in the UN Charter.⁸⁷ One might add here that there is no threshold of harm for triggering this prohibition. It is telling in this respect that the customary prohibition of aggression includes occupation, including where no armed resistance is encountered by the occupying power.⁸⁸ The effective occupation of Crimea by Russian forces, or those under the ‘overall control’ of Russia, even without any armed resistance by Ukrainian armed forces, would therefore be sufficient to constitute aggression.⁸⁹ Russia’s violation of the peremptory prohibition on the use of force was inseparably connected to and brought about the Crimea Referendum and Russia’s acquisition of Crimea formalised by the Crimea Treaty.⁹⁰ The treaty’s very object and execution, namely the annexation of Crimea to the detriment of Ukraine, and consequently its conclusion, therefore conflicted with the peremptory norm of international law within the meaning of Article 53 Vienna Convention.

There are several ways in which Russia has attempted to justify its use of force in Crimea that the Court could have entertained and ultimately rejected.⁹¹ That Russia *de lege lata* falls on the losing side of each of these justifications is relatively uncontroversial, as will be argued shortly hereunder.

First, the Court could have dispensed quickly with any variant of Russia’s self-defence or humanitarian intervention arguments, the likes of which it had put forth immediately after the reunification of Crimea but has not substantiated with any reliable evidence.⁹² There have been no reliable reports of threats to or human rights violations committed against Russia’s citizens, ethnic Russians, or Russia’s armed forces, let alone an extraterritorial armed attack by Ukraine against Russia.⁹³

⁸⁷ UNGA Res. 3314, *supra* n. 84, Art. 3(e); R. Geiß, ‘Russia’s Annexation of Crimea. The Mills of International Law Grind Slowly but They do Grind’, 91 *Int’l L. Stud.* 425 (2015) p. 426 at p. 432; A. Sari, ‘Ukraine insta-symposium: when does the breach of a status of forces agreement amount to an act of aggression? The case of Ukraine and the Black Sea Fleet of SOFA’, *OpinioJuris*, 6 March 2014, <opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/>, visited 30 June 2016.

⁸⁸ See e.g. Art. 2 Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3217.

⁸⁹ See Geiß, *supra* n. 87, pp. 432, 444, also arguing that a strong case could be made for the most straightforward option, namely that Russia was itself exercising effective control over Crimea prior to the 16 March referendum.

⁹⁰ See Geiß, *supra* n. 87, pp. 432-3.

⁹¹ See e.g. W. Hague, ‘Oral statement to Parliament: Russian actions in Crimea’, 18 March 2014, <www.gov.uk/government/speeches/russias-actions-in-crimea>, visited 30 June 2016.

⁹² See R. Allison, ‘Russian “deniable” intervention in Ukraine’, 90 *International Affairs* (2014) p. 1255 at p. 1263.

⁹³ Allison, *supra* n. 92, p. 1262; Geiß, *supra* n. 87, p. 432.

Secondly, the Court could have also addressed the possible contention by the government that Russia's threat or use of force was proffered in support of Crimea's legitimate struggle for self-determination, and to that end created conditions allowing for the exercise of that right.⁹⁴ However, as it stands today, international law does not permit intervention by force of a third state to support secession by a non-state entity, even if the latter can be justified by a legitimate claim for self-determination, such as in the case of a remedial secession.⁹⁵ Any 'support' proffered must be in accordance with the principles of the UN Charter, that is, it must in any case not run afoul of the prohibition on the use of force.⁹⁶ Notably, the Constitutional Court agreed with these international norms in the Chechnya Judgment, where it confirmed that the right of peoples to self-determination cannot trump the territorial integrity of states.⁹⁷ As a consequence, and because the Crimea Treaty was procured as a result of Russia's aggression against Ukraine, no valid claim of military assistance for the expression of a claim for self-determination may stand.

Lastly, Russia has repeatedly challenged the classification of its actions in Crimea as aggression due to former President Yanukovich's invitation of Russian troops to intervene in Crimea.⁹⁸ The question of Yanukovich's consent turns on whether he had 'effective control' over the territory of a state to constitute its legitimate government. At the time of the invitation, the deposed and expelled leader without popular or political support was not in a position to extend such an invitation to foreign troops.⁹⁹ At that moment, only the de facto central government in Kiev could have issued it.¹⁰⁰

To put it succinctly: the blockade of ports, the control of major infrastructure, and the involvement and influence of Russian troops and special services in the conduct of the 16 March referendum constituted a violation of Article 2(4) of the

⁹⁴ See Art. 7 UNGA Res. 3314, *supra* n. 84, which states that 'nothing in the Definition could in any way prejudice the right to self-determination, particularly peoples under colonial and racist regimes or other forms of alien domination ... nor the right of these peoples to struggle to that end and to seek and receive support in conformity with the Declaration on Principles of international Law concerning Friendly Relations and Cooperation among States and the UN Charter'.

⁹⁵ See e.g. 1970 Declaration on Friendly Relations, *supra* n. 84.

⁹⁶ *Ibid.* Such military support would also constitute intervention in the internal or external affairs of another state, in violation of the principle of non-intervention. See International Court of Justice 26 November 1984, General List No. 70, *Nicaragua v United States of America*, at para. 195.

⁹⁷ Chechnya Judgment, *supra* n. 37, para. 2.

⁹⁸ Allison, *supra* n. 92, p. 1264.

⁹⁹ Geiß, *supra* n. 87, p. 445. See also D. Wisehart, 'The crisis in Ukraine and the prohibition of the use of force: a legal basis for Russia's intervention?', *EJILTalk*, 4 March 2014, <www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/>, visited 30 June 2016.

¹⁰⁰ Geiß, *supra* n. 87, p. 445.

UN Charter peremptory prohibition on the use of force. The Crimea Treaty conclusion would not have been possible but for Russia's aggression against Ukraine.¹⁰¹ The inseparability of the treaty from the use of force extends to Crimea's Declaration of Independence, which sprang Crimea's statehood and formed another basis of the Crimea Treaty.¹⁰²

As such the treaty contemplates the execution of the unilateral Declaration of Independence made in reliance on the unlawful presence of Russian troops in Ukraine's territory.¹⁰³ These were substantial grounds to invalidate the Crimea Treaty as contrary to a peremptory norm of international law embodied in Article 53 of the Vienna Convention. Curiously, the Decision contains no reference to peremptory or customary norms of general international law that Article 15(4) of the Constitution introduces and integrates into the Russian legal system. This omission is all the more glaring in light of the Preamble to the Crimea Treaty, characterised by extensive references to international law and notions of sovereign equality, the right to self-determination, and other customary rules and 'generally recognized principles and norms of international law'.

Violations of previous treaty obligations with respect to Ukraine

Although it purported to evaluate the substance of the accession treaty, the Court did not review its Preamble and Articles 1(1) and 2 of the Crimea Treaty. These provisions express the treaty's *raison d'être*: that the Russian Federation now comprises two more constituent entities, namely Crimea and the 'city of Federal significance' Sevastopol.¹⁰⁴ As discussed above, treaty-making authorities and the Constitutional Court were bound to consider the other treaties entered into by Russia affecting the status of Crimea and its borders, and creating rights and obligations under international law that may be impaired by the Crimea Treaty.¹⁰⁵

The Crimea Treaty infringed on three of five treaties affecting the territory of Ukraine.¹⁰⁶ First, in December 1994, the leaders of Russia, Ukraine, the United Kingdom and the United States signed the Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (the 'Budapest Memorandum'), where parties affirmed their commitment 'to respect the independence and sovereignty and the existing

¹⁰¹ Preamble, Crimea Treaty.

¹⁰² *Ibid.*

¹⁰³ See Marxsen, *supra* n. 75.

¹⁰⁴ *Supra* n. 2, p. 13.

¹⁰⁵ Venice Commission Opinion, *supra* n. 9, paras. 44-45.

¹⁰⁶ Only those treaties that the author considers still binding on the Russian Federation are addressed here.

borders of Ukraine', and 'to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations.'¹⁰⁷ It must be noted that this document was not approved by the Russian parliament; the absence of approval in this case is no bar to the treaty's application, however. The Budapest Memorandum did not explicitly require ratification in order to come into force between the contracting states and the Law on Treaties, which would have required such ratification for matters of disarmament, was yet to be enacted.¹⁰⁸ The Memorandum therefore constitutes a binding international agreement within the meaning of the Vienna Convention.¹⁰⁹

Secondly, in May 1997, Russia and Ukraine entered into the bilateral Treaty of Friendship and Cooperation (the 'Friendship Treaty'), in which the parties agreed to 'respect each other's territorial integrity and confirmed the inviolability of the borders between them existing at the time.' Article 40 of this Treaty, which was duly approved by the Russian Federation on 2 March 1999, provides that:

This Treaty is concluded for a period of 10 years. It shall subsequently be extended automatically for further 10-year periods unless one of the High Contracting Parties notifies the other High Contracting Party in writing of its desire to terminate it at least six months before the expiry of the current 10-year period.¹¹⁰

The treaty was never repudiated by Russia and was supplemented by the 2012 bilateral 'Declaration on the Terms of Russia-Ukraine Strategic Partnership', signed by Presidents Putin and Yanukovich, that in its Article 1 reaffirms that the partnership is 'based on the generally recognized principles of international law,

¹⁰⁷ Arts. 1 and 2 Budapest Memorandum, available at <www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484>, visited 30 June 2016.

¹⁰⁸ Art. 15 Law on Treaties.

¹⁰⁹ Art. 11 Vienna Convention provides that 'The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.' Notably, even if the Budapest Memorandum did not constitute a treaty within the scope of the Vienna Convention; according to Art. 3 of the Vienna Convention an agreement falling outside of the definition of a treaty nevertheless retains its legal force. See also V. Ryabtsev, 'Russia strayed from the norms of the Budapest Memorandum back in 1999', *Forbes Ukraine*, 6 March 2014, <forbes.net.ua/nation/1366750-vladimir-ryabcev-ot-norm-budapeshtskogo-memoranduma-rossiya-otstupila-eshche-v-2003-godu>, visited 13 July 2016.

¹¹⁰ Federal law No. 42-FZ of 2 March 1999, available at <kremlin.ru/acts/bank/13509>, visited 30 June 2016.

including the respect for state sovereignty and independence, territorial integrity and the inviolability of the borders...¹¹¹

Thirdly, in 2003, Russia and Ukraine entered into the 'Treaty between the Russian Federation and Ukraine on the Russia-Ukraine border', agreeing to abide by the delineated Ukrainian border as described by Addendum I (the 'Border Treaty').¹¹² Pursuant to the Law on Treaties, this Treaty was properly transformed into Russian Federal law, and was ratified on 22 April 2004.¹¹³ Notably, the demarcation of that border has never been completed, and the present author has not been able to determine the contents of Addendum I or if it exists at all. Nevertheless, the Border Treaty decidedly settled the question of borders, including Ukraine's indisputable sovereignty over Crimea.¹¹⁴

The object and purpose of the Crimea Treaty, as expressed in its Preamble and Articles 1, 2, 4, among others, was to effectively legitimise the annexation of Crimea, a territory of Ukraine. The subject matter of the Crimea Treaty therefore conflicted with the core provisions of mentioned treaties that obliged Russia to respect the borders and territorial integrity of Ukraine. Russian treaty-making authorities should have considered the Budapest Memorandum, the Friendship Treaty and its accompanying declaration, and the Border Treaty. The failure to do so constitutes not only a material breach of these Treaty obligations, but also of Russia's constitutional law which obliges the national authorities to abide by them. The Venice Commission has confirmed that '[b]y virtue of Article 15(4) of the Constitution of the Russian Federation, such treaties are binding both upon and within the Russian Federation.'¹¹⁵ Once enacted, the Commission concluded, the 'Draft Amendment to the Incorporation Law' would most likely constitute a violation of these international treaties and consequently of Russia's Constitution.¹¹⁶

¹¹¹ Preamble bases the document on the Friendship Treaty. 'Declaration on the Terms of Russia-Ukraine Strategic Partnership', available at <news.kremlin.ru/ref_notes/1258>, visited 30 June 2016. 'Yanukovich, Putin to sign declaration of strategic partnership between states', *Kyiv Post*, <www.kyivpost.com/content/ukraine/yanukovich-putin-to-sign-declaration-of-strategic-309785.html>, visited 30 June 2016.

¹¹² The text of the treaty is available, in Russian and Ukrainian, at <flot2017.com/file/show/normativeDocuments/26152>, visited 30 June 2016.

¹¹³ Federal law No. 24 –FZ of 22 April 2004, available at <kremlin.ru/acts/bank/20833>, visited 30 June 2016.

¹¹⁴ L. Mälksoo, 'Crimea and (the lack of) Continuity in Russian Approaches to International Law', *EJIL:Talk!*, 24 March 2014, citing P.P. Kremnev, *Raspad SSSR: mezhdunarodno-pravovye problemy [Dissolution of USSR: international legal issues]* (2005) p. 68-91, <www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law/>, visited 30 June 2016.

¹¹⁵ Venice Commission Opinion, *supra* n. 9, para. 44.

¹¹⁶ *Ibid.*, paras. 44-45.

CONCLUSION

This note argues that Russia's constitutional framework and the Constitutional Court's previous practice required the Court to apply international law to the constitutionally prescribed process for the incorporation of new territories. Surprisingly, the Decision makes but one reference to a provision of the Vienna Convention, and no mention at all of Article 15(4) of the Constitution integrating customary and preemptory rules of international law into the Russian legal system. As to some aspects of the Crimea Treaty that invited an international law analysis and were addressed in this paper, a conscientious court would have invalidated the Crimea Treaty for lack of Crimea's standing to conclude it even before proceeding to the substance of the agreement, since at the time of its conclusion Crimea was not a State.

With respect to how the treaty was procured and to its contents, the Constitutional Court should have found that the treaty was unconstitutional because, due to Russia's actions violating *jus cogens* prohibition on the use of force, it was the proverbial fruit of the poisonous tree. Indeed, to the extent that it was bound to examine the plain meaning of the treaty as well as its context, the Constitutional Court unjustifiably avoided any consideration of the treaty's Preamble, which bases the agreement on the Crimea Referendum, and 'on the generally recognized principles and norms of international law, while recognizing the interconnectedness of other basic fundamental principles of international law, as established, in particular, in the United Nations Charter, the Helsinki Final Act of the Conference of Security and Cooperation of Europe...'.¹¹⁷ None of the principles or norms of international law embodied in this provision were acknowledged in the Decision. As to the contents of the rest of the norms of the Crimea Treaty, the Court should have held that the treaty not only conflicted with the *jus cogens* prohibition of aggression, but also effectively repudiated other treaties affecting the status of Ukraine. Since they provide for the complete eradication of Ukraine's administration of Crimea, most provisions of the Crimea Treaty in some way infringe on Ukraine's sovereignty and territorial integrity and therefore conflict with Russia's obligations under the Budapest Memorandum, the Friendship Treaty and the Border Treaty. Because all of these norms were hierarchically superior to the accession treaty, the Crimea Treaty should have been found to be unconstitutional.

The Constitutional Court's reluctance to conduct a full-fledged constitutional review demonstrates more than the Court's flagrant disregard for international law in connection with Russia's annexation of Crimea. Perhaps even more

¹¹⁷ Lukyanova, *supra* n. 12, pp. 23-24.

alarmingly with respect to the state of the rule of law in Russia, the Court's failure to conduct an earnest review of an executive act of such magnitude signals an unwillingness to abide by the very document the spirit and letter of which it purports to safeguard.

