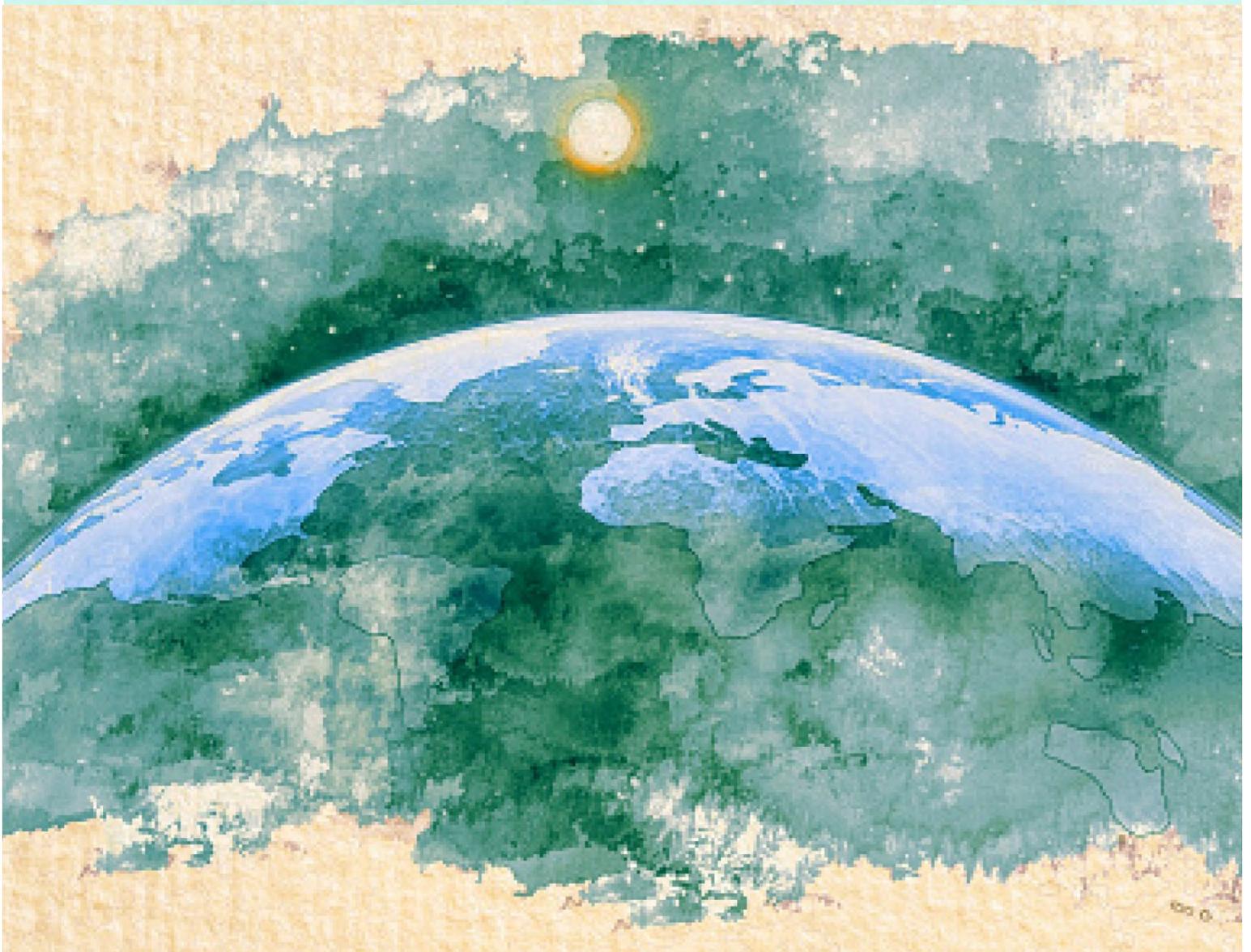


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**REIMAGINING CONSERVATION PARADIGMS:
STEWARDSHIP, RIGHTS, AND THE ENVIRONMENT**



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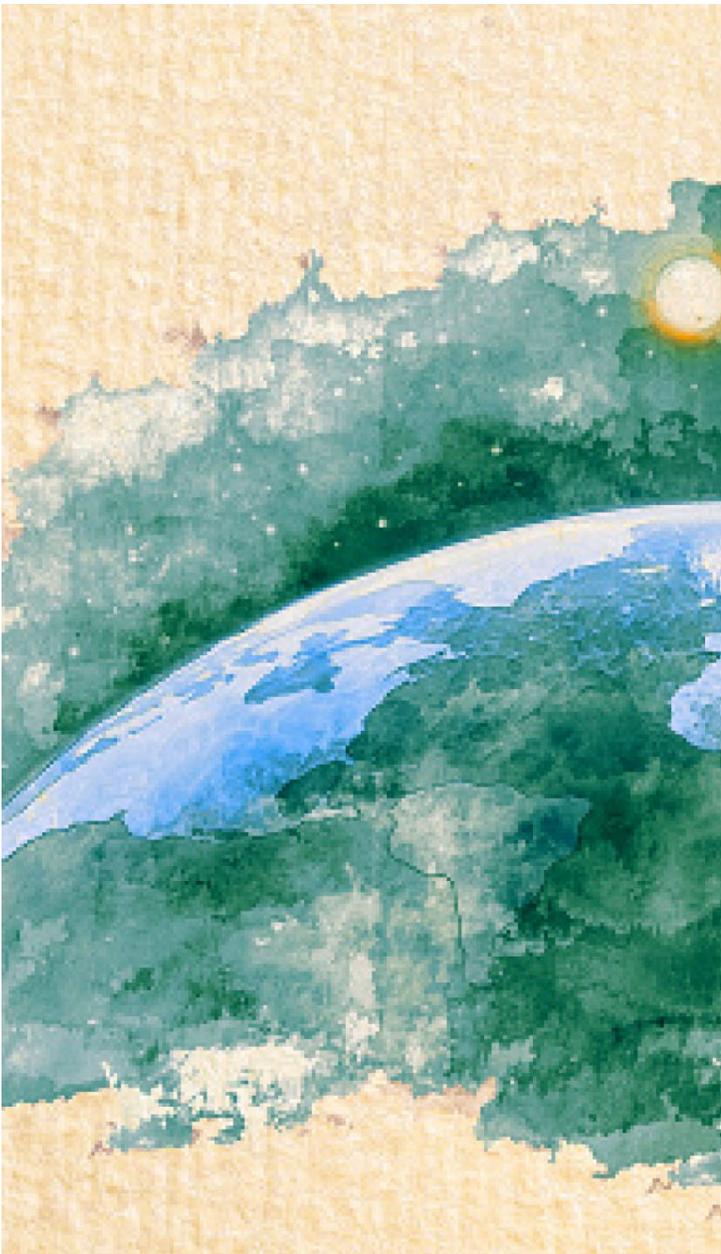
VOLUME 50 / ISSUE 1 / FALL 2022

CONTENTS

- 3** Special Edition – Reimagining Conservation Paradigms: Stewardship, Rights, and the Environment
- 4** Sudden Leap Into Darkness: The Case of Maasai Exclusion and Marginalization in Ngorongoro, Northern Tanzania
Joseph Moses Oleshangay
- 8** Balancing Environmental Protection with Indigenous Rights: The Creation of Conservation Refugees
Marlyse Sime
- 10** Does the International Cultural Heritage System Adequately Protect Minority and Indigenous Rights?
Kate Fitz Gibbon
- 12** Counterpoint: Does the International Cultural Heritage System Adequately Protect Minority and Indigenous Rights?
Liz Fraccaro
- 15** A Transnational Legal Framework to Combat Wildlife Crime
Neil Ellis, Elizabeth Niles and Christina Scaringe
- 18** Trouble in Eden: Forced Evictions, Crimes Against Humanity, and Genocide
Regina Paulose
- 20** The Beleaguered Batwas: Conservation Refugees
Elizabeth Barad
- 24** Achieving a Sustainable Future for All via Non-Traditional Actors
Michelle Keith and Mandalena Prelashi
- 27** A Crossborder Waterway (or Not): The North Crimean Canal's Place in Russia's Ukraine Invasion
Paul Stanton Kibel

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A Crossborder Waterway (or Not): The North Crimean Canal's Place in Russia's Ukraine Invasion

Paul Stanton Kibel

I. Introduction: A Tale of Two Maps

The North Crimean Canal (Canal) was built during the Soviet era to deliver water from the Dnieper River in Ukraine to the Crimean Peninsula (Crimea) on the Black Sea. When constructed in the 1960s, the Canal was located entirely in Ukraine as Crimea was part of Ukraine. At the time the canal was built Ukraine was a republic of the former Union of Soviet Socialist Republics (USSR). With the disintegration of the USSR, Russia and Ukraine recognized each other as sovereign independent nations pursuant to bilateral treaties and agreed to the national borders separating the two nations.

The construction and operation of the North Crimean Canal led to an increase in farming and population in Crimea in subsequent decades. The Canal also became the primary source of water to support the Russian Black Sea naval fleet based in Crimea. As part of the post-USSR treaties between Ukraine and Russia, Ukraine allowed Russia to retain possession of its Crimean naval base.

In 2014 Russia unilaterally seized Crimea from Ukraine and declared it formally annexed. At the time the Canal accounted for 85 percent of the water supply in Crimea. Ukraine responded to the seizure and purported annexation by constructing an earthen (and later concrete) dam on the Canal to suspend Dnieper River water deliveries to Crimea. The effect of this dam was devastating on Crimea, both in terms of irrigation water for agriculture and drinking water supplies.¹

In early 2022, as one of the first actions pursuant to its military invasion of Ukraine, Russia blew up the dam Ukraine had built on the Canal in an effort to restore water deliveries to Crimea.² While it would be an overstatement to assert that water supply is the root cause of Russia's Ukraine invasion, the military priority given to removal of the canal dam indicates that water supply is an important and perhaps overlooked underlying component of the conflict.

Ukraine and Russia have both sought to justify their actions regarding the Canal under sources of international law. An assessment of what sources of international law should properly apply to Ukrainian and Russian actions pertaining to the Canal hinges on what map one accepts in regard to Crimea's status. That is, does one accept the map that depicts Crimea as now part of Russia or does one accept the map that continues to depict Crimea as part of Ukraine?

II. Historical Context for The North Crimean Canal

The history of conflict between Ukraine and Russia is long and contentious.

During the Tsarist era, although Ukrainians had their own language and culture, Ukraine was part of the broader Russian empire. In the late 1800s, there was a flourishing of Ukrainian literature and this led to the development of a stronger Ukrainian political national identity.

During the Soviet era, Crimea served as the base for the USSR's Black Sea naval fleet. As a result, there was a more significant Russian presence in Crimea during this period than in most other areas of Ukraine – more persons from Russia were stationed there and more Russian spoken there than in most other parts of Ukraine.

In the first part of the 20th century, there was also significant conflict between Russia and Ukraine. Following the 1917 communist revolution in Russia that overthrew the Tsarist regime, there were factions in Ukraine that favored establishment of a more European-style independent republic rather a Bolshevik communist-based regime directed from Moscow. Within weeks of the 1917 Bolshevik communist overthrow of the Russian Tsar, building on the nationalist political identity that had been growing over the past several decades, Ukraine declared itself an independent nation (the Ukrainian Peoples Republic) and raised the blue and yellow flag in Kiev. Vladimir Lenin (the leader of Russia following the 1917 revolution) responded by

¹ Polina Vynogradova, *Background: The Water Crisis in Crimea*, Geopolitical Monitor (April 24, 2020).

² Mehmet Alltingoz & Saleem Ali, *Hydropolitics in the Russian-Ukrainian Conflict*, New Security Beat (March 1, 2022).

sending in the Russian Bolshevik army to disband the Ukrainian government. The Ukrainian government then retreated to western Ukraine, regrouped, and was able to briefly retake Kiev (and again proclaim the Ukrainian Peoples Republic). Russia's Bolshevik army then quickly re-captured Kiev and was able to destroy or subdue most of the fleeing Ukrainian nationalist army. In 1922, under heavy political and military pressure from Russia, the Ukrainian Socialist Republic was created and became part of the larger USSR (controlled largely from Moscow in Russia).³ The blue and yellow flag of the Ukrainian Peoples Republic was replaced with the red and yellow/hammer and sickle flag of the Ukrainian Socialist Republic.

When Joseph Stalin took over as leader of the USSR in the 1920s, he bore a strong animosity towards Ukraine and Ukrainians. Stalin believed Ukraine's nationalist identity and aspirations were a threat to the USSR and undertook a series of repressive measures. Ukraine was a major center for growing wheat in the USSR. In the early 1930s Stalin implemented a program in which Ukrainians were forced to harvest wheat but were not allowed to eat it or sell it.⁴ The wheat was stored in silos for export to other parts of the USSR, Russia in particular. Several million Ukrainians starved to death in the shadow of silos filled with grain.⁵

During World War II, when Nazi Germany invaded the USSR, Hitler was aware of Ukrainian resentment towards Russia and suggested that the German invasion might serve to liberate Ukraine from the USSR. Although most Ukrainians served in the USSR army resisting the invasion, there were some Ukrainians (seeing a potential path to independence) that collaborated with the Nazis. When the German invasion of the USSR faltered, and USSR troops pursued the Germans west through Ukraine, Stalin killed many Ukrainian civilians along the way as payback for this collaboration. This experience left a deep and lasting, negative impression of Ukrainians on many Russians, as well as a deep and lasting, negative impression of Russians on many Ukrainians.

In 2020, prior to Russia's Ukraine invasion, Vladislav Surkov (a senior foreign policy advisor to Russian President Vladimir Putin) stated: "There is no Ukraine.

There is Ukraineness. That is a specific disorder of the mind. An astonishing enthusiasm for ethnography driven to the extreme . . . But there is no nation."⁶ Similarly, Putin has often referred to parts of the Ukraine as "New Russia," a historical, administrative name for portions of Ukraine during the time when Ukraine was a part of the Russian Tsarist empire.⁷

Crimea's water crisis



III. Ukraine's Map: North Crimean Canal As A Domestic Ukrainian Waterway

In 2014, Russian President Vladimir Putin tapped into this historical legacy and animosity toward Ukraine among many Russians to drum up support for the seizure of Crimea. President Putin sought to justify the seizure of Crimea with the claim that Russia was liberating Russians living in Crimea from harassment by the Ukraine government and even went so far as to label Ukrainians as "Nazis" for such harassment (playing into the anger of many older Russians at those Ukrainians who collaborated with Nazi Germany).

Putin tapped into these same sentiments in early 2022 to justify Russia's invasion, claiming that it was necessary to liberate Russian-speaking residents in the Donbas region of eastern Ukraine from harassment by local Ukrainians and the Ukrainian government. Prior to

³ Bjorn Alexander Dubin, *There is No Ukraine: Fact-Checking the Kremlin's Version of Ukrainian History*, LSE International History (July 1, 2020).

⁴ See Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror Famine* (1986).

⁵ Noel King, Miles Bryan & Lauren Katz, *The Real and Imagined History of Ukraine*, Vox (February 26, 2022).

⁶ Bjorn Alexander Dubin, *There is No Ukraine: Fact-Checking the Kremlin's Version of Ukrainian History*, LSE International History (July 1, 2020).

⁷ *Id.*

2022, for many years President Putin had been providing military support for Russian-speaking residents in the Donbas interested in severing ties with Ukraine (whose efforts Putin could then later point to justify Russia's broader invasion of Ukraine).

Although President Putin has sought to affix the Nazi label on Ukraine, his provided justification for both the annexation of Crimea in 2014 and the 2022 invasion are similar to the justifications offered by Adolf Hitler for Germany's seizure and annexation of the Sudetenland in Czechoslovakia and the Alsace in France in the early days of World War II. That is, Hitler claimed that the seizure and annexation of these areas outside of Germany was necessary to liberate the ethnic Germans and German-speaking residents that lived in the Sudetenland and Alsace from harassment by the Czech and French governments, respectively. In terms of relevant international law supporting Ukraine's map, following the collapse of the USSR in 1997, Ukraine and Russia signed the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation. In this 1997 treaty Russia and Ukraine agreed to borders that acknowledged that Crimea and the North Crimean Canal were geographically part of Ukraine. Then in 2003, Ukraine and Russia signed another border agreement which again confirmed that Crimea and the North Crimean Canal were located in Ukraine. Ukraine therefore maintains that Russia's unilateral 2014 seizure and annexation are inconsistent with these earlier agreements.

Beyond the 1997 agreement and 2003 border agreement, there are also United Nations Resolutions 2625 and 3314. Resolution 2625 provides that "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the [United Nations] Charter." (bold added.)⁸ Resolution 3314 defines unlawful aggression as "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state."⁹

Relying on the terms of the 1997 agreement, the 2003 border agreement and the provisions of United Nations Resolutions 2625 and 3314, Ukraine maintains that Russia's unilateral military seizure of Crimea was and is unlawful and illegitimate under international law.

That is, current Russian military occupations notwithstanding, Ukraine maintains that Crimea is considered part of Ukraine and that the Canal should be viewed as entirely within Ukraine.

In discontinuing water deliveries to Crimea via the North Crimean Canal following the 2014 seizure, Ukraine views the cessation of such water deliveries as a justified response to Russia's illegitimate and unlawful seizure of Crimea. Moreover, if Crimea is considered part of Ukraine rather than Russia then the Canal is not a crossborder waterway.

As detailed below, to the extent the Canal was recognized as a crossborder waterway, there may be sources and principles of law that could potentially support Russia's claims to entitlement to continue to receive deliveries from the waterway. But these sources and principles of law would likely not apply if the Canal was a domestic waterway entirely within Ukraine. To make this distinction more salient to an American audience, consider the California Aqueduct which transports water diverted from the Sacramento River and San Joaquin River in northern California to cities in southern California. The California Aqueduct, the Sacramento River and the San Joaquin River are all located entirely in the United States. Mexico might be interested in receiving water from these waterways located in the United States but would not have an entitlement under international law to insist on such deliveries. This can be contrasted with the Colorado River, which flows from the United States across the border into Mexico and is therefore a crossborder waterway. As indicated below, international law offers support to Mexico's claim to divert and use a portion of the Colorado River.

IV. Russia's Map: North Crimean Canal as a Crossborder Waterway

Pursuant to Russia's map, Crimea should be recognized as a part of Russia since 2014. If Crimea is part of Russia then the Canal spans both Ukraine and Russia and should be considered a crossborder waterway. If the North Crimean Canal is recognized as a crossborder waterway, then Russia may be in a position to contend that there are certain sources and principles of international law that support its claim to continue to receive deliveries from the waterway.

⁸ United Nations General Assembly 2625 (October 1970).

⁹ United Nations General Assembly 3314 (December 14, 1974).

For instance, a key principle in the 1997 United Nations Transboundary Watercourse Convention is that of “equitable utilization,” which calls for sharing the waters of transboundary watercourses.¹⁰ Putting aside the question of whether or not the Canal qualifies as a “watercourse” under the Transboundary Watercourse Convention (which focuses on natural rivers rather than man-made canals) there is a sub-principle of the “equitable utilization” principle which provides that paramount concern should be given to water to meet “vital human needs.”¹¹ If Crimea is considered part of Russia and the Canal is considered a transboundary watercourse, then Russia may be in a position to assert that Ukraine is obligated under international water law principles to share the waters of the cross-border Canal to meet the vital human needs of people in Crimea.

If Crimea is considered part of Russia and the Canal is considered a crossborder waterway, Russia may also be in a position to appeal to the emerging right to water in international law. In 2010, the United Nations General Assembly adopted Resolution 292 on “The Right to Water and Sanitation” which established the obligation of signatory nations to provide clean and safe drinking water.¹² This obligation bolsters the provisions of the Transboundary Watercourse convention giving paramount concern to “vital human needs.” Pursuant to Russia’s map which shows Crimea as part of Russia, it could allege that the emerging human right to water provides additional support under international law for why Ukraine is obligated to share the waters of the crossborder Canal with Russia and people living in Crimea.

In a 2021 complaint filed with the European Court of Human Rights, Russia made similar claims, alleging that Ukraine’s damming of the Canal after 2014 amounted to a violation of international water law and emerging international human rights law.¹³

Yet, if one recognizes Ukraine’s map rather than Russia’s map, Russia’s arguments under international water law and the emerging international right to water begin to evaporate. This is because (to date) the international water law principles of equitable utilization and vital human needs pertain to transboundary rather

than domestic waterways. And this is because currently the emerging human right to water focuses on the obligation of signatory nations to provide water to their own citizens rather than an obligation to deliver water from an entirely domestic waterway to another bordering nation.

V. Conclusion: Different Maps Implicate Different Sources of International Law

In the end, it is all about which map is used to frame the situation. If the map used recognizes Crimea as a permanent part of Russia then the North Crimean Canal can be perceived as a crossborder waterway shared by Russia and Ukraine. In contrast, if the map used recognizes Crimea as part of Ukraine that has been temporarily and illegitimately seized by Russia then the Canal is perceived as a domestic Ukrainian waterway. These competing maps in turn point to contrasting rights under and violations of international law in connection with the Canal in the context of Russia’s invasion of Ukraine.

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¹⁰ See Article II and V of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, United Nations General Assembly A/RES/51/229 (July 8, 1997). Under the Convention “watercourse” is defined as “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing to a common terminus.”

¹¹ See Article X of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, United Nations General Assembly A/RES/51/229 (July 8, 1997).

¹² United Nations General Assembly Resolution 292 (July 28, 2022).

¹³ Milena Inglevic-Citak, *Russia Against Ukraine Before the European Court of Human Rights: The Empire Strikes Back?*, Polish Political Science Yearbook (December 2021).