

“ ” ;

 Search


Fighting for a better future

Last year, protesters in Ukraine called for an end to corruption and ineffective governance at the highest levels. Now, with the country under threat following Russia’s annexation of Crimea, Global Insight assesses the issues likely to shape the outcome of the current crisis.

SCOTT APPLETON

Last autumn, Ukraine’s then president Viktor Yanukovich decided unilaterally to call off a proposed trade treaty with the European Union in favour of closer and more lucrative economic ties with Russia. The decision became a catalyst for popular protests focused on Kiev’s *Maidan Nezalezhnosti* (Independence Square), bringing to the surface underlying tensions.

With the protesters supported by the West, Yanukovich fled to Russia in February, taking with him an estimated \$32bn in state funds. The result was the collapse of his authoritarian regime and the appointment by the Ukrainian Parliament of an interim President, Olexander Turchynov, ahead of formal elections in May.

Yanukovich’s ousting seemed to herald a new economic direction, as well as the promise of a more transparent and accountable government. ‘Last November we really felt that we were just a few weeks away from an historic agreement with the EU and that real change was coming,’ says Wolfram Rehbock, Senior Partner at Arzinger in Kiev and the IBA Power Law Committee’s Advisory Board Member for Europe.

In fact, an unforeseen consequence of the unrest was that it prompted Kremlin-backed forces to seize control of Crimea, home of Russia’s Black Sea Fleet. The local population of Crimea then voted to join Russia, in a referendum on 16 March that both the government in Kiev and the West consider illegal. The apparent success of the referendum, despite such claims, fuelled renewed separatist demands for increased self-rule in parts of eastern Ukraine, notably the industrial Donetsk region, home to a large ethnic Russian population. At the time of writing, controversial referendums had been held in Donetsk and Luhansk with the results in favour of independence from Ukraine; however, their validity had been called into question by Kiev and international commentators.

‘After the events of recent months it is fair to say that Ukraine is still in a state of shock. But the government to my mind is moving in the right direction. We are now seeing wholesale reform, including of our legal institutions and framework. Reducing the powers of the state was fundamentally what the *Maidan* was about,’ says Daniel Bilak, Managing Partner of CMS Cameron McKenna in Kiev.

International rules

The antecedents to the annexation of Crimea can be traced in the region’s Soviet past. Having first become a member of the Russian Soviet Federative Socialist Republic (RSFSR) in 1921, Crimea was ceded to the then Ukrainian Soviet Socialist Republic in 1954. With the collapse of the Soviet Union in 1991, Crimea was affirmed as part of independent Ukraine by the Alma-Ata Protocol. Ukraine’s borders were further guaranteed when it signed the 1994 Memorandum on Security Assurances in Budapest, along with Russia, the United States and the United Kingdom, in exchange for giving up its nuclear arsenal.

The territorial integrity of states is a key foundation of international law, on which there is clear jurisprudence, including through United Nations Security Council and General Assembly resolutions. ‘The moment Russian troops began moving out of their Crimean bases – with or without insignias – they were committing an act of aggression under international law and under the UN definition of aggression,’ says Malcolm Shaw QC, a practising barrister at Essex Court Chambers in London and a Senior Fellow at the Lauterpacht Centre for International Law at Cambridge University.

‘Ukraine is a sovereign state,’ says Mark Ellis, IBA Executive Director. ‘Russia, as a UN Member State,

is bound by the UN Charter's prohibition on the use of force against it. The prohibition against force has only three exceptions: when authorised by the UN Security Council under Chapter VII; when there is consent from the territorial state; and when it is in self-defence. The first two exceptions do not apply in this case, as the Security Council has not issued a Chapter VII resolution authorising Russia to use force, and Ukraine has not consented to Russia's military intervention. The third exception of self-defence applies only in response to an armed attack. Ukraine has not perpetrated an armed attack upon Russia and, accordingly, Russia cannot employ the self-defence exception.'

The 1994 Memorandum and Russia's renegotiation in 2010 of a 1997 agreement allowing it to retain a military presence and its Black Sea Fleet base in Crimea underlined the integrity of Ukraine's territory. Crimea was part of Ukraine when Russian troops took to the streets, up until the referendum on 16 March, and under international law it remains part of Ukraine.

'Under Article 2 of the UN Charter the forceful acquisition of territory is illegal. This is clearly what happened in relation to Crimea. It doesn't matter what the result of the so-called referendum was, or what the will of the Crimean people may have been – it had no legitimacy under international law. Russia used force against the territorial integrity and political independence of Ukraine,' says Robert Volterra, an expert in public international law at London-based Volterra Fietta.

Experts say that it is not credible for Russia's President Vladimir Putin to claim that the region's ethnic Russians were facing an imminent risk, or that President Yanukovich requested intervention. By the time Russian troops entered Crimea, Yanukovich had deserted his office, left the country and the Ukrainian Parliament had already sworn in a new interim President.

Occupying powers

The consequences of events in Crimea are still being digested. But the obligations imposed on the Russian forces in Crimea to safeguard the people and property of the Peninsula are clear under the 1907 Hague Regulations, Geneva Convention and International Law of Occupation. Based on the current facts, the Law of Occupation may also extend to Russia's troops active elsewhere in Ukraine.

'There is little doubt that Russia is pulling the strings of many of the so-called separatists in East Ukraine. Local militia tend not to use heavy artillery or carry military grade weaponry. Nobody is fooled by the deployment of troops devoid of any insignia on their uniforms,' says John Vernon, partner at Dallas-based Vernon Law Group and Vice-Chair of the IBA Human Rights Law Working Group.

Bilak offers a similar perspective. 'People need to understand that Ukraine is not being pulled apart by competing ideologies. What is happening in Donetsk is not another popular uprising. A recent poll showed that less than 20 per cent of its citizens are in favour of uniting with Russia – the truth is that many of the ethnic Russians that live there chose to do so because they are only too aware of the realities of life in the neighbouring *oblasts* [Federal Russian Administrative Regions].'

Russian tanks may not be on the ground in East Ukraine as they are in Crimea, but Moscow nonetheless has to bear its share of responsibility for the events unfolding there.

'The onus on ensuring that any captured personnel or detained citizens in East Ukraine are treated responsibly would seem to extend to Russia. These are basic rights that an occupying power cannot derogate from. Yet in East Ukraine we have seen captured journalists, international observers and Ukrainian troops all paraded before the cameras,' says Vernon.

Malcolm Shaw QC agrees that assigning direct responsibility for the rising tensions across Ukraine may not be as clear-cut as in Crimea, but international law still offers precedents. 'Media reports indicate that Russia is engaged in efforts to destabilise the Ukrainian regime by exploiting local ethnic tensions. It is clear law that intervention in the internal affairs of one state by another may still amount to aggression under the UN definition.'

In support Shaw points to a International Court of Justice (ICJ) decision in 1986, which upheld a claim by The Republic of Nicaragua against the US. The claim was that the US had violated international law by supporting the Contras in their rebellion against the Nicaraguan government, and by mining Nicaragua's harbours.

Analogue agency

The key issue facing Ukraine now is not whether Russia *has* breached its international obligations, but what can be done about the fact that it has done so. Leaders in

'Foreign investors want good governance and the rule of law, which was fundamentally what the protesters in Maidan were also demanding'

Berlin, Brussels, London and Washington may be unified in their condemnation of Russia's actions, but there is no suggestion of any military response.

'A recurring question is "who enforces international law?" There is a big difference between being in breach and being held accountable. The sad reality is that the bigger and more powerful the aggressor, the more likely they are to get away with it,' says Shaw.

There is little chance of a UN rebuke because Russia is a Permanent Member of the Security Council. What remains, then, is numerous countries' attempts to exert soft power through diplomacy and the application of limited economic sanctions. So far, sanctions have targeted Yanukovich and his inner circle, as well as the holdings of a number of advisers close to Russia's President Putin (see feature, [Guilty until proven innocent](#)).

For some, such a situation merely strengthens the call to look again at the practicality of key international institutions. Three of the five Permanent Members of the UN Security Council – the US, China and Russia – do not recognise the

'After the events of recent months it is fair to say that Ukraine is still in a state of shock [...] We are now seeing wholesale reform, including of our legal institutions and framework'

Daniel Bilak
Managing Partner
CMS Cameron McKenna, Kiev

Neil Williamson
Director, Emerging Law

jurisdiction of the International Criminal Court. The make-up of the Security Council itself is more reflective of the world order at the end of 1945, rather than at the beginning of the 21st Century.

'There is the sense that the UN is an analogue agency in a digital world. It has done nothing about the situation in Crimea, it is watching events in East Ukraine from the side lines and has not intervened in Syria, despite the clear human rights violations occurring in all three,' Vernon states.

Dr Irina Paliashvili, Co-Chair of the CIS Forum at RULG-Ukrainian Legal Group and an Advisory Board Member for the IBA's Law Firm Management Committee is clear: 'The guarantors of Ukraine's territorial integrity: the US, the UK and France must get much more serious about fulfilling their international-law commitments to Ukraine by all available means'.

Legal certainty

Lawyers in Ukraine are understandably more focused on events in the here and now, which includes considerable analysis of the legal situation that exists in Crimea.

'Ukraine's renewable energy sector had previously seen a lot of interest because of very favourable regulatory and legislative inducements. But we have clients who seem to have lost everything in Crimea now – the government took a clear decision that power units on the Peninsula are no longer subject to a green tariff and Russia is unlikely to pay any compensation,' says Rehbock.

It is well known that under Yanukovich corruption was rife and Ukraine was not an easy place for foreign investors to conduct business. The degree of political and economic uncertainty that is now perceived to exist across the country seems to be prompting even those investors comfortable with high levels of risk to put on hold any plans they might still have.

'Foreign investors want good governance and the rule of law, which was fundamentally what the protesters in *Maidan* were also demanding – they were fed up with the corruption and self-serving behaviour of the Yanukovich regime. Investors will be focused on the forthcoming Presidential elections and whether a leader will emerge who can tackle corruption and bring political stability to the country,' says Neil Williamson, a director at London-based Emerging Law, who has strong links to the region.

Lawyers are doing their best to help clients make sense of the situation as it unfolds. However, the truth is that across parts of Ukraine the legal status of property and even people is uncertain: Kiev still recognises Crimea's citizens as Ukrainian.

'Even clients that are able to find buyers for their Crimean assets face difficulties. The company register in Simferopol no longer functions, so it is impossible to get clear title. For all intents and purposes business across the Peninsula is on hold and where in any event Russian law now applies,' says Bilak.

His fear is that Crimea may turn into another Northern Cyprus – a territory recognised only by the occupying power and which nobody can objectively call an economic success.

'Alongside the legal issues clients want to understand the reputational issues of doing business in Crimea – how might any expanded international sanctions affect business interests they have there? It may actually be better for some clients to re-domicile their business in mainland Russia.'

Regional impact

Concern over events in Ukraine is not restricted to the country itself. Lawyers elsewhere in the region are alive to the potential knock-on effects of any wider instability.

'The view you take of the rights or wrongs of events in Ukraine and Russia's role in them clearly differs depending on whether you are looking at things from a western or eastern European perspective. Within Ukraine both sides have clearly received outside help,' says Jörg Menzer, Managing Partner of Noerr in Bucharest, Romania, and Co-Chair of the IBA European Regional Forum. 'But I do not doubt that US and Asian investors, for example, may well now be spooked by what is unfolding and will rein back any immediate plans.'

In recent years Ukraine has attracted investment that would otherwise have gone to EU countries such as Hungary and Bulgaria because both wages and manufacturing costs are cheaper. But this sentiment may now change.

'Aside from the relative production cost differences, a market of nearly 50 million people should be attractive in its own right. But regional investors now state that they are more willing to absorb higher operating costs if it means they can operate in a more stable market. Ukraine is also still not a member of the EU, despite the desire of many in Kiev for it to be so,' says Menzer.

He also questions the practical impact of the sanctions targeting the Yanukovich and Putin inner circles. 'There is no rush of investors coming out of Russia and little fear of engagement with Russian business. I see the same levels of investment there as this time last year. The reality is that the sanctions imposed by the West have been very limited and are yet to act as any sort of deterrent on Russia's key decision-makers.'

UKRAINE'S BUSINESS BROKERS

Mikhail Fridman

Born: 1964, Lviv, Ukraine
Business interests: Banking; oil; telecoms
Estimated wealth: \$17.5bn

Rinat Akhmetov

Born: 1966, Donetsk, Ukraine
Business interests: Football; finance; metals; mining
Estimated wealth: \$12.2bn

German Khan

Born: 1961, Kiev, Ukraine
Business interests: Finance; oil; telecoms
Estimated wealth: \$11.3bn

Influence: Together with fellow billionaires German Khan and Alexei Kuzmichev, Fridman shares control of Alfa Group, Russia's biggest financial and industrial investment group. In 2013, with billionaire partners Viktor Vekselberg and Leonard Blavatnik, he sold a 50 per cent stake in joint oil venture TNK-BP to state-owned oil company Rosneft for \$28 billion. In 2011 Alfa-controlled telecom provider VimpelCom became the sixth-biggest telecom company in the world. Alfa also has a stake in Russia's second-biggest retailer, X5.

Viktor Pinchuk

Born: 1960, Kiev, Ukraine
Business interests: Finance; manufacturing; media
Estimated wealth: \$3.1bn

Influence: Founder of Interpipe, one of Ukraine's leading pipe, wheel and steel producers, and London-based international investment and financial advisory company EastOne Group. Pinchuk is the owner of four Ukrainian TV channels and the country's biggest-selling newspaper, Fakty i Kommentarii. Formerly a member of the Ukrainian Parliament, he is married to Olena Pinchuk, the daughter of the former Ukrainian President, Leonid Kuchma.

Influence: Wealth reportedly built around coal and coke investments in Donetsk. Founder of SCM Group, one of Ukraine's leading financial and investment businesses, which includes METINVEST, Ukraine's largest private business and the Russian-language newspaper Segodnya. Owner of Ukraine's most successful football club, Shakhtar Donetsk, and London's most expensive private property, One Hyde Park. Former member of the Ukrainian Parliament and Governor of Donetsk.

Valeriy Khoroshkovskyi

Born: 1969, Kiev, Ukraine
Business interests: Media; metals; retail
Estimated wealth: unknown

Influence: Previously owner of Ukraine's leading furniture manufacturer Merks, leading bank UkrSotsbank (sold to Viktor Pinchuk) and national broadcaster InterMedia Group (sold to Dmytro Firtash). Was previously head of FTSE listed steelmaker Evraz, owned by Russian billionaires Alexander Abramov and Roman Abramovich. Khoroshkovskyi has been a prominent politician in Ukraine holding posts including Head of the Security Service (USB), Minister of Finance and First Vice-Prime Minister. He is reported to retain numerous business interests and to be one of Ukraine's richest people.

Influence: Together with fellow billionaires Mikhail Fridman and Alexei Kuzmichev, Khan shares control of Alfa Group, Russia's biggest financial and industrial investment group. He now oversees the operation of Alfa-owned LetterOne Holdings, which holds its foreign assets and handles foreign acquisitions.



Dmytro Firtash

Born: 1965, Bohdaniivka, Ukraine
Business interests: Banking; fertiliser production; gas; media; metals
Estimated wealth: \$500m

Influence: Founder of DF Group, which controls interests in the natural gas, fertiliser and titanium industries. Formerly co-owner of RosUkrEnergo (a subsidiary of Gazprom) which held the monopoly on the import of Russian natural gas, and now owner of InterMedia Group, Ukraine's leading broadcaster.



Power and influence

The hope in Ukraine is that while Crimea may be lost, the tensions that have been stoked in the country can be reduced. The Presidential elections in May will be a crucial test of the success of the reforms already underway.

The IMF has delivered the first \$3.19bn tranche of a promised \$17bn loan to Ukraine, and the EU has promised a further \$15bn in development finance – matching the amount originally promised by Russia to Yanukovich last November – while the US has committed an additional \$1bn to Ukraine.

'The IMF conditionality is driving a certain amount of change, but most is being driven from within. We have a new more transparent Procurement Code and the Government has already begun to roll back the power of the state and to decentralise administrative decision-making,' says Bilak.

Polish advisers are already in Kiev helping to formulate a new Constitutional model, he adds. 'Decentralisation is the issue most Ukrainians identify as key to the country successfully moving forward. Federalism, cultural diversity and language are a long way down the list of most rational peoples' priorities. The new Government is facing resistance in some quarters, but it comes predominantly from those that most benefitted under the previous regime and who probably still do.'

From a legal and business perspective gaps do now exist, but efforts also need to be made to counter the international media's portrayal of the depth of tensions within the country, some have stated.

'The honest truth is that 95 per cent of people's lives in Ukraine are unaffected by what you see on the news. There are flashpoints, notably in parts of Donetsk, but these are isolated events. The country is not about to split in two,' asserts Wolfram Rehbock, who is based in Kiev. 'Ukraine doesn't want it, the West doesn't want it and I don't believe Russia truly wants it – Crimea may have been strategically important, but there is no advantage in absorbing East Ukraine.'

For Dr Irina Paliashvili 'day-to-day life means staying on a high alert and taking an active part in the transition processes that are happening in our country. We have been witnessing fundamental changes', she argues, 'ordinary citizens no longer wish to tolerate lawlessness and corruption, no longer accept "business as usual".'

President Putin, for his part, does seem to be downplaying any military ambitions, despite the continued presence of Russian troops on the border of East Ukraine, and the desire of some in East Ukraine for closer ties with Moscow. Some commentators are convinced, however, that international pressure still has to be applied. Sanctions may yet discourage US and EU companies from doing business with key Russian holdings. Further, it is not possible to simply let Russia get away with the annexation of Crimea, even if much of Central and Eastern

'Day-to-day life means staying on a high alert and taking an active part in the transition processes that are happening in our country'

Europe remains reliant on its oil and gas.

'Putin is clearly troubled by the apparent weakening of Russia's sphere of influence but is in the fortunate position of being able to use the country's substantial cash reserves to go on the offensive, at least for the time being. But there is the sense that if you had fallen into a coma in the 1970s and just awoken, the policies being employed by Russia are not that different from Soviet times,' says Vernon.

Dr Irina Paliashvili

Co-Chair, CIS Forum at RULG-Ukrainian Legal Group; Advisory Board Member IBA Law Firm Management Committee

The sad fact is that Crimea may well be a lost cause, despite the clear illegality of its annexation. 'The issue of how much influence Russia can continue to exert over Ukraine has yet to be resolved, but my sense is that for the majority of people in the country life goes on,' says Menzer. 'And whether Moscow likes it or not, Ukraine has now signed an association agreement with the EU and the trade and economic aspects will almost inevitably follow.'

Scott Appleton is a freelance journalist. He can be contacted at scootappleton@hotmail.com

Like

Share

Tweet

Share

International Bar Association 2007

Our other websites

- [Rule of Law Directory](#)
- [Regulation of the legal profession](#)
- [IBA Anti-Money Laundering Forum](#)
- [IBA International Pro Bono](#)
- [Anti-Corruption Strategy for the Legal Profession](#)
- [IBA ICC Programme](#)
- [Media Law and Freedom of Expression](#)
- [International Human Rights Fact-Finding Guidelines](#)
- [Managing Partners Toolkit](#)



Twitter updates



IBA News @IBAnews

15h

Right to be forgotten ruling sparks fresh debate over privacy and freedom of expression #ECJ #Google ibanet.org/Article/Detail...

Expand



IBA News @IBAnews

20h

@AIJAASSOCIATION & IBA joint confs today/tmrw: Family Business Governance/Foundations&Trusts in Int'l Estate Planning ibanet.org/Article/Detail...

Expand

Our London office

International Bar Association
4th Floor, 10 St Bride Street
London, EC4A 4AD
United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

[Our other offices](#)

[Powered by e-mango](#)