

*David A. Jones**

Quid pro Quo: Dependent Relative Revocation and Quixotic Military Dis-encirclement

Introduction

Boundaries between and amongst nations are not drawn customarily by popular vote as the Russian Federation appears to imagine, naïvely or conveniently. They are delineated by global political agreement in the 21st century, in the past once having been decided by right of conquest. Nor are national boundaries recast periodically and whimsically by fleeting ethnic sentiments, language preferences, religions or migrations. Pressure to alter existing and relatively long standing political boundaries such as between the Russian Federation and Ukraine Republic increased recently, due in large measure to the perception if not the reality of encirclement. Stated more simply, Russia considers itself to be threatened by its perception of a steadily Eastward-moving North Atlantic Treaty Organisation (NATO) that is ready to annex Ukraine at the expense of that nation's Russian language speakers and at the ultimate expense of the Russian Federation itself as the successor to the Soviet Union.

Undoubtedly, also, Russia considers China to be trying to encircle it with the planned construction of a deep water port on the Crimean Peninsula near Yevpatoria, slightly Northwest of the Russian Federation's Black Sea naval fleet headquarters at Sevastopol. This project, initially estimated to cost USD 10 Billion, was planned as a joint venture between Crimean Kievgidroinvest, LLC, owned by Aleksey Mazyuk, and the Chinese Beijing Interoceanic Canal Investment Management Co., Ltd. (BICIM), headed by billionaire Wang Jing who also is the chairman of

* Prof. dr **David A. Jones** – Director of the United States Law Program, University of Warsaw.

Beijing Xinwei Telecom Enterprises Group.¹ The transparent objective of this venture is to cut the distance required to deliver goods made-in-China to the EU by 6,000 km “catalyzing the trade between China and Eurasian countries.”² Xinwei Telecom continues its parallel plan to also provide broadcasts in Ukraine.³ In 20 other countries in which Xinwei lists operating telecommunications businesses, none appear to have succeeded.⁴ Together, such Chinese joint ventures give the appearance of information, economic, and trade encirclement of Russia by China, possibly in cooperation with the EU or other powers.⁵ Also, information encirclement so close to the naval base could involve military or naval encirclement, at least for intelligence gathering purposes, with so many merchant ships planned to enter and exit from this new port, some undoubtedly carrying reconnaissance equipment and personnel. If construction and operation of this Chinese port were to continue, the likely outcome will be to expand Sino-European trade volume by 140 million tons annually, also enlarging Sino-European trade value from USD 1.1 Trillion, the annual turnover in 2011.⁶ Nevertheless, China said that it will continue its plan to construct and operate this deep water port notwithstanding re-annexation of the Crimean Peninsula to the Russian Federation in 2014 as successor to the Soviet Union.⁷ In question is whether the Russian Federation will consider this “encirclement” to be tolerable with the Crimean Peninsula under Russian control?

¹ Chinese Billionaire to Invest \$10 Billion in Ukrainian Port, “World Property Channel” 06 Dec. 2013. <http://www.worldpropertychannel.com/europe-commercial-news/chinese-billionaire-to-invest-ukraine-canal-wang-jing-nicaragua-canal-panama-canal-kievhidroinvest-llc-7737.php>.

² P. Mozur, J.T. Areddy, Y. Jie, *Canal Champion turns Eye to Ukraine*, “The Wall Street Journal”, 06 Dec. 2013, <http://blogs.wsj.com/chinarealtime/2013/12/06/canal-champion-turns-eye-to-ukraine/>.

³ *Ukrainian regulator clears use of 3G equipment*, “Telecompaper”, 21 August 2014. <http://www.telecompaper.com/news/ukrainian-regulator-clears-use-of-3g-equipment--1032196>.

⁴ M. Weissenstein, L.M. Galeano, *Spotty Record for Chinese Exec with Canal Dream*, “Associated Press”, 31 Aug. 2013, <http://bigstory.ap.org/article/spotty-record-chinese-exec-canal-dream>.

⁵ Probably this encirclement is not being maneuvered in cooperation with the United States, given that the construction of a canal in Nicaragua by XinWei that appears to be a covert Chinese operative probably would violate the Roosevelt Corollary to the Monroe Doctrine, and be prohibited by an effective United States president, now or in future.

⁶ M. Snytkova, *China Breathes Fire on Ukraine’s Crimea*, “Pravda”, 10 Dec. 2013, http://english.pravda.ru/business/companies/10-12-2013/126346-china_ukraine_crimea-0/.

⁷ *China to Link Crimea to Silk Road*, “Russian Radio”, 24 April 2014. http://indian.ruvr.ru/2014_04_24/China-Crimea-Silk-Road/.

Some aspects of any nation's foreign policies will encircle other countries, such as what some perceive favorably or unfavorably to be the "American" encirclement of the EU and China with a *potpourri* of products ranging from fast food to cinema, music, sports, and other forms of entertainment: collectively cultural encirclement. Both China and Europe welcome this prospect. This is because cultural encirclement is the free choice of the consuming public: store shoppers, restaurant patrons, sports fans, cinema watchers, music listeners, automobile drivers. Cultural encirclement is perceived very differently from military or naval, information, economic, or even trade encirclement that are considered to be nonconsensual and designed to preclude or to erode a balance of power either regionally or globally.

At issue in this paper is something different that the author calls "quixotic encirclement," or the encirclement of a nation or group of countries by one or more other nations or group of countries, including NATO, for idealistically ideological and strategic aims and purposes. Some recipients of quixotic encirclement consider themselves lucky and welcome protection by more powerful partners. An example of this is the EU that allowed its Common Security and Defence Policy (CSDP) to experience erosion in favor of reliance upon NATO and the United States. Recipients that are not allies such as China and the Russian Federation, and even some nominal allies such as India and Japan, resist quixotic military encirclement, considering themselves as victims, contending that their way of life and sovereign independence, usually aggregated as "security," is threatened by military including air and naval encirclement, information encirclement, economic encirclement, and sometimes even trade encirclement. Encirclement may be for the encircled nation's or region's benefit, or for the benefit of the encircling powers. Recent encirclement by the United States, the Russian Federation, and increasingly by China, involve submarine upgrades and expanded deployments, including the Akula-II class submarine deployments by Russia and the development of the Jin-class ballistic submarine with its JL-2 missile capable of striking 4,000 nautical miles to reach America's Pacific shoreline from inside of East Asian waters.⁸

⁸ K. Osborn, *US Navy Issues Warnings on Russia, China's Submarine Fleets*, "Military.com News", 20 Sep. 2014, <http://www.military.com/daily-news/2014/09/20/us-navy-issues-warnings-on-russia-chinas-submarine-fleets.html?comp=7000023317843&rank=1>.

1. Quixotic Circles

What are “Quixotic Circles,” who has devised them, and what for? This name, Quixotic Circles, is derived from the early 17th century Spanish novel, *El ingenioso hidalgo don Quijote de la Mancha* [*The Ingenious Gentleman Don Quixote of La Mancha*] by Miguel de Cervantes de Saavedra.⁹ This novel provoked the imagery of social change and also of remolding one society in the image of another, sometimes ineptly, more often than not rather unrealistically so. In the context of Ukraine, in the opinion of the Russian Federation leadership, the West is attempting to erode Russia’s past by gnawing away at its Western frontier.

Construction of a Chinese port is important to and viewed as a threat by the Russian Federation, and to understand this we need only to look back to the “opening” of China to the West by President Richard M. Nixon, Chairman Mao Zedong, Premier Zhou Enlai, and Nixon’s national security advisor Dr. Henry A. Kissinger that resulted in the signing of an innovative *Joint Communiqué of the United States of America and the People’s Republic of China* at Shanghai on 28 February 1972. What became known as the *Shanghai Communiqué* functioned as a pivotal axis when the United States turned to China to back down the Soviet Union, ultimately paving the way for *Glasnost* and *Perestroika*. It startled the Soviet leadership, and thereupon the Soviet Union improved its *rapprochement* with the United States out of fear of China and the United States working together. When Soviet Premier Leonid I. Brezhnev learned that Mao and Nixon had met face to face, according to Georgy Arkadyevich Arbatov, the chief “Amerikanist” on Brezhnev’s team, “it was a great scare for our leaders who decided that an anti-Soviet coalition was being formed, which included not only America and NATO but also China. We felt we were being *surrounded*.”¹⁰ It is quite possible that NATO extension Eastward coupled with Chinese port construction Westward have converged to cause Russian Federation leaders to have similar concerns of encirclement again in 2014. This is a classically concrete example of the value of what is termed “peace through strength” and became a foundation of the foreign policy subsequently used by President Ronald W. Reagan a decade and a half afterwards so effectively to build on the *Shanghai Communiqué* and to add to that dimension his own Strategic Defense Initiative (SDI), known colloquially as “Star Wars.”

⁹ Madrid: 1605 and 1615, Juan de la Cuesta.

¹⁰ G.A. Arbatov, *Cold War*. Session 1, Episode 16, “Détente: 1969–1975”, Atlanta 1998. <http://www.docstoc.com/docs/38048168/CNN-THE-COLD-WAR-EPISODE-16---Detent%c3%a9>. See also, G.A. Arbatov, *The System: An Insider’s Life in Soviet Politics*, New York 1993.

That the Russian Federation is displeased with what it considers to be encroachment of NATO along its Western borders is evident from its hostile behavior and rhetoric beginning early in 2014 that has followed with a crescendo of actions that have included Russian bombers and fighters entering American and Canadian defensive circles known as Air Defense Identification Zones (ADIZs), requiring interception by the North American Aerospace Defense Command (NORAD).¹¹ Such incursions have not been unusual, although recently the Russian Federation commenced to tighten its own encirclement of the North American seacoasts with submarine approaching closer to American and Canadian sovereign territory and with its plan to develop naval bases in the Arctic and in Cuba,¹² all arguably in violation of the Monroe Doctrine or one of its corollaries, especially the (Theodore) Roosevelt Corollary that forbids the accumulation of debt by Western Hemispheric nations in favor of foreign lenders that might be tempted to secure that debt against default by actual or constructive occupation of the debtor's territory, and the (Henry Cabot) Lodge Corollary that forbids construction of naval or military facilities anywhere in the Western Hemispheres that will give a foreign state "practical power" over an asset such as a harbor.

Initially, Russia seemed interested primarily in safeguarding its Black Sea naval fleet, headquartered near Sevastopol on the Crimean Peninsula. Subsequently, Russia directed attention to several Ukrainian cities positioned along Ukraine's eastern border with Russia, appearing to give political then military support to independence operatives in violation of the spirit of the Budapest Memorandum of 1994 on which Ukraine relied in transferring nuclear ordnance that had belonged to the former Soviet Union but that remained within Ukrainian territory following collapse of the Soviet state. Ukraine transferred its nuclear arsenal to the Russian Federation as the successor to the permanent seat the Soviet Union once held on the United Nations Security Council, recognized as one of five Permanent Members ("P5" Powers) and viewed globally as a legitimate nuclear power. In effect, Ukraine trusted the administration of former Russian Federation president Boris N. Yeltsin, a trust that has been betrayed by his successor, Vladimir V. Putin, by all outward appearances.

¹¹ J. Queally, *U.S., Canadian Fighter Jets Intercept Russian Aircraft*, "Los Angeles Times", 19 Sep. 2014 <http://www.latimes.com/world/mexico-americas/la-fg-fighter-jets-intercept-russian-aircraft-20140919-story.html>.

¹² M.D. Nazemroaya, *Military Encirclement and Global Domination: Russia Counters US Missile Shield from the Seas*, "Global Research", 04 Nov. 2012, <http://www.globalresearch.ca/russia-counters-the-us-missile-shield-from-the-seas/5310516>.

Displeasure of one nation at the actual or potential international relations of another is not justification for invasion, much less for annexation or occupation, under existing international laws that have evolved largely from tradition, sometimes by agreement. Some exceptions do exist, only by agreements that extend beyond the parties themselves to the larger global community as a whole. Among such agreements is the Monroe Doctrine reached in 1823 between the United States and the European empires, nominally with Imperial Russia, functionally with Great Britain at the time *primus inter pares*. Without question, a Eurasian Monroe Doctrine would enhance the posture of the Russian Federation toward NATO today. No Eurasian Monroe Doctrine exists, perhaps one should.

Configuration of boundaries in Eastern Europe is governed by agreements reached among nations, some longstanding, others recent. Besides the Budapest Memorandum, signed by the Russian Federation, Ukraine, the United Kingdom and the United States at Budapest, Hungary on 05 December 1994, there is the 1774 Treaty of Küçük Kaynarca signed by Imperial Russia and the Ottoman Empire late in the reign of H.I.M. Yekaterina Alexeevna or Yekaterina II (Catherine the Great), under which the Crimean Peninsula would revert to Turkey as successor to the Ottoman Empire in the event that it became independent. Russia's occupation of Crimea also appears to violate the 1739 Treaty of Niš that ended the Russo-Turkish War and granted Russia access to the Sea of Azov. Although the Russian Federation appears to be keen on the enforcement of treaties signed in favor of its predecessors, Imperial Russia and the Soviet Union, it is averse to honoring commitments its predecessors made that seem to be against its current interests.

Of course, the real importance to the present conflict is neither the Treaty of Küçük Kaynarca nor the Treaty of Niš nor really even the Budapest Memorandum of 1994, but the Protocol of Proceedings of the Crimea Conference that took place at Yalta, Crimean Peninsula, between 04–11 February 1945, signed by the United States, the United Kingdom, and the Soviet Union that changed the configuration of Europe. Article II thereof provides that:

Article 12 (a) of the Surrender terms for Germany should be amended to read as follows:

“The United Kingdom, the United States of America and the Union of Soviet Socialist Republics shall possess supreme authority with respect to Germany. In the exercise of such authority they will take such steps, including the complete dismemberment of Germany as they deem requisite for future peace and security.”

The procedure for the dismemberment of Germany was referred to a committee consisting of representatives of three victorious powers:

Sir (Robert) Anthony Eden,¹³ British representative, Ambassador John Gilbert Winant,¹⁴ American representative, and Fedor Tarasovich Gusev, Soviet representative, who together would consider adding a fourth member representing France. This became an outline for a United Nations Security Council permanent membership structure. is Consequently, the “dismemberment” of Germany became wholly dependent upon fulfillment of the terms and conditions reached at Yalta. Where does this lead?

2. Dependent Relative Revocation

What is known as the equitable doctrine of Dependent Relative Revocation (DRR) evolved across English and American history in the context of Last Wills and Testaments and their probate in the disposition of property from decedents’ estates. It is applicable here in a different context. As to decedents’ estates, DRR arises when a testator makes changes in testamentary dispositions by destruction of a former Will or by execution of a subsequent Will, usually under mistaken impressions, such as by surmising inaccurately that by destroying a more recent Will an earlier Will automatically will be revived. In this case, although a court may lack jurisdiction to revive the earlier Will, it may exercise discretion to revive the destroyed Will if in the court’s determination the terms of the destroyed Will more closely effectuate the testator’s intent than would disposition by operation of law pursuant to the rules of intestate succession. Similarly, a court may exercise discretion to revive an older Will a decedent intended to be replaced by a more recent Will when the newer Will turns out to be invalid but the court determines that the terms of the older will more closely effectuate the testator’s intent than would disposition by operation of law pursuant to the rules of intestate succession.¹⁵ This paper will explore intent of the doctrine of DRR and its application to international relations.

Very clearly, the Russian Federation desires to revisit decisions made by its predecessor, the Soviet Union, and this should be respected more than

¹³ Sir (Robert) Anthony Eden, K.G., afterwards first Earl of Avon, was prime minister of the United Kingdom, 1955–1957.

¹⁴ Gov. John Gilbert Winant was U.S. Ambassador to the Court of St. James, 1941–1946, serving as President Franklin Delano Roosevelt’s third and final ambassador to the United Kingdom and President Harry S. Truman’s first ambassador.

¹⁵ See, inter alia, A.M. Dobie, *Dependent Relative Revocation of Wills: The Doctrine and Its Limits*, “Virginia Law Review” 1915, vol. 2, no. 5, p. 327–337. Feb. See also J. Dukeminier, R.H. Sitkoff, J.M. Lindgren, S.M. Johanson, *Wills, Trusts and Estates*, New York 2005, p. 259.

it has been. Some Soviet decisions were wrong in principle, either for the world order or the Soviet Union itself. Amongst decisions of questionable value must be included that of Premier Nikita S. Khrushchev to declare Crimea as being Ukrainian instead of Russian regardless of his reasons be they economic¹⁶ or political.¹⁷ However, if in the early 21st century the Russian Federation will revisit Crimean sovereignty as it appears to have done, the West should revisit companion designations including Königsberg as a traditionally German city, and Western Ukraine that historically was part of the Lithuanian and Polish kingdoms but currently is situated geographically much nearer to Poland. In addition, if understandably the Russian Federation prefers not to have NATO unpalatably close to its borders it should understand that the EU prefers not to have the Russian Federation's Baltic Sea fleet at Kaliningrad [formerly Königsberg] in its backyard, either. If Russia is to stay as sovereign of the Crimean Peninsula, it must leave Kaliningrad and return Königsberg to Germany for reasons that are largely the same as the reasons Russia has advanced to justify its seizure of the Crimean Peninsula that are a blending of historical population and modern security requirements.

If political change is to occur on the Crimean Peninsula, it does not follow axiomatically that this change should favor ethnic Russian inhabitants. What about ethnic Tartars?¹⁸ Similarly, in Kaliningrad, the ethnic Russian population that inhabits this oblast currently was repopulated at the end of World War II, with deportation of the indigenous German population.

¹⁶ Khrushchev's son argues that transfer of Crimea from Russia to Ukraine was an economic decision grounded in principle largely on the Soviet Union's decision to construct a hydro-electric dam on the Dnieper River. A. De Nesnera, *Khrushchev's Son: Giving Crimea Back to Russia Not an Option*, "Voice of America", 06 Mar. 2014, <http://www.voanews.com/content/khrushchevs-son-giving-crimea-back-to-russia-not-an-option/1865752.html>. This argument is corroborated from a different perspective by the chairman of the Shevchenko Scientific Society who has contended that Ukraine offered to construct that dam and relieve Russia of the burden of developing the Crimea. P. Volvach, *How Ukraine Rebuilt Crimea ("Khrushchev's Gift")*, "Voices of Ukraine /ua.Vlasenko.net", 2011, <http://maidantranslations.com/2014/03/16/how-ukraine-rebuilt-crimea-khrushchevs-gift/comment-page-1/>.

¹⁷ Ukrainian Institute of International Relations Department of International Law head Volodymyr G. Butkevych argues that transfer of Crimea from Russia to Ukraine was a political decision to bolster Khrushchev's power base when he was locked in a battle for international recognition in competition with Georgy Malenkov. See V.G. Butkevych, *Who Has a Right to Crimea? Khrushchev's 'Gift': The Truth Behind the Calculation*, "Infoukes.com.", 1992, <http://infoukes.com/history/crimea/page-12.html>.

¹⁸ N. Belitser, *Indigenous Status" for the Crimean Tatars in Ukraine: A History of a Political Debate*, Washington 2002, <http://www.iccrimea.org/scholarly/indigenous.html>.

3. Quixotic Military Encirclement

Encirclement of a country by the military or naval forces of another country or a coalition of nations for “quixotic” reasons occurs frequently, sometimes with untoward consequences of one kind or another. Quixotic encirclement as an international relations strategy takes on its most common form as a military or naval strategy or tactic, either offensively, defensively, or both. Offensive military encirclement consists of one army or navy unit completely or almost completely surrounding another army or navy unit, usually of an adversary, laying siege to compel its surrender. Historically, many battles have ended in this manner, usually with the encircling army victorious, sometimes with reinforcements from the encircled army or its allies in turn encircling the encircling army, in effect pinching it between themselves (the reinforcements) and the encircled force, as is remembered most vividly from the Battle of Stalingrad in 1943 where Hungarian and Romanian reinforcements encircled the Nazi German forces and their Italian allies that had laid siege to the city.¹⁹ This is a primary reason why the Russian Federation is fearful of encirclement by NATO forces in the 21st century, and explains part of its reaction to governance changes in Ukraine in 2014.

A similar engagement took place in November 1950 at the Battle of Chosin Reservoir in what is now the Democratic People’s Republic of Korea (DPRK), or North Korea, near its mountainous border with Manchuria. In that encounter, 15,000 United Nations troops, primarily American from the Fifth Marine Division attached to the Seventh Infantry Division, together with British Royal Marines, were encircled by 120,000 troops from eight divisions of communist forces, mostly from the People’s Republic of China, who reportedly were ordered to annihilate the Allied forces. When Major General (MG) Oliver P. Smith ordered his forces to reverse direction and head back toward the coast,²⁰ they took the adversaries by surprise much as had Polish king and general H.M. Jan III Sobieski on 12 September 1683 when he attacked Ottoman Empire forces who were surrounding him at the Battle of Vienna, charging the encircling forces downhill!²¹ At Chosin Reservoir, not only did MG

¹⁹ W. Craig, *Enemy at the Gates: The Battle for Stalingrad*, New York 1973.

²⁰ R. Appleman, *Escaping the Trap: The US Army X Corps in Northeast Korea, 1950*, Texas A&M University Military History Series, vol. 72, College Station, Texas 1990, p. 223.

²¹ A. Palmer, *The Decline and Fall of the Ottoman Empire*, New York 1992. From 1674 until his death in 1696, H.M. Jan III Sobieski was Poland’s king, elected for life. At the Battle of Vienna, he commanded forces of the Holy Roman Empire of

Smith's forces break siege, only 750 Allied troops were killed, in contrast to 25,000 communist forces killed under the command of Gen. Song Shi-lun in the Ninth People's Liberation Army (PLA) group. That the Allied forces came so close to annihilation terrified United States president Harry S. Truman, who soon replaced General Douglas MacArthur as commander-in-chief in Korea, fearing war with China, apparently either ignorant of or disregarding the fact that China sent "volunteers" to Korea instead of PLA regulars, fearing a war with the United States. This is a primary reason why China is fearful of encirclement by the United States in the 21st century, especially a naval encirclement of China's assets and claimed territories along coastal areas within the East and South China Seas.

Encirclement began long ago as a military or navel strategy in warfare. Chinese general Sun Wu, better remembered as Sun Tzu ("Master Sun"), 535–487 B.C.E., old style, c. 544–496 B.C.E., addressed encirclement as a military strategy in *The Art of War*, the classical book attributed to him and traditionally said to have been written in that epoch of Chinese history known as the Spring and Autumn Period (771–476 B.C.E.) but in the 21st century thought to have been written slightly later during the Warring States Period (475–403 B.C.E.) based on writing styles.²² General Sun cautioned against complete encirclement even in battle, advising the encircling victor to afford the vanquished encircled army an ability to retreat, to avoid a fight to the death that would be costly to both armies, and reminding us that the objective of warfare should be conquest, even hegemony, not annihilation. General Sun thus introduced into both the theory and practice of military strategy an element of choice. Most commanders historically have heeded this advice. Exceptions have included the recent annihilation of Shia Iraqi soldiers by the Islamic "State" of Iraq and Syria (ISIS), evidence of its profound danger to the West and to its own region, requiring its own immediate elimination through any means necessary. Parallels do exist between tactical and strategic maneuvers and objectives. Normal nations will not stand by without taking action in the wake of tactical genocide, crimes against humanity, or war crimes. They must not stand by idly when nefarious strategic actions take place, either.

If as Russian President Vladimir V. Putin appears to contend, the Crimean Peninsula is properly belonging to the Russian Federation because of historical ties, then equally as clearly Königsberg properly

the German Nation as well as of the Kingdom of Poland. See also, M. Varvounis, *Jan Sobieski: The King Who Saved Europe*, Crossways, Dartford 2012.

²² R.D. Sawyer, *The Seven Military Classics of Ancient China*, New York 2007, p. 147–150, 423.

belongs to Germany, having been a part of Prussia since 1255 and the capital of the German Duchy of Prussia since 1525, until it was severed from Germany at the Potsdam Conference, awarded to the Soviet Union by the Potsdam Agreement, then renamed [Kaliningrad] and repopulated with Russians once Germans were deported. None of this is consistent with any core values expressed in the Atlantic Charter. Also, much of both Northern and Western Poland rightfully belongs to Germany for the same reason, and much of Western Ukraine rightfully belongs to Poland. Application of the legal “but for” test is helpful to this understanding: but for concessions the West made to the Soviet Union in 1945 and several times thereafter, German borders should be today as they were in December 1937, and likewise the boundaries of Poland. What should be the actual boundary between Germany and Poland is an internal European Union (EU) question. What should be the Eastern boundary of the EU with the Republic of Ukraine, together with sovereignty of Königsberg, is an international question.

Ethnicity should not be allowed to play a dominant role in boundary configuration, where as here the Soviet Union repopulated land over which it obtained sovereignty by deportation of indigenous people. So an “election” among Russian speakers who repopulated the Crimean Peninsula should not be dispositive of the outcome of the question of Crimean sovereignty, nor should a similar election by the population currently inhabiting Western Ukraine following the forced relocation of Polish inhabitants from Western Ukraine to what had been Eastern Germany once the Allies resolved resolved at Yalta rather improvidently to “move Poland West.”

4. Move Poland East

What the Soviet Union did in 1954 or subsequently to subdivide its territory is an internal matter and not dependent upon Yalta. What the Russian Federation does currently to reconfigure Ukraine’s eastern boundaries is an international matter and is dependent upon Yalta. Legitimately, it may affect the permanent border between Germany and Poland and require alteration of the German-Polish Border Treaty of 1990 and its predecessor agreements: The Potsdam Agreement of 1945, the Treaty of Zgorzelec of 1950, the Treaty of Warsaw of 1970. That the German-Polish Border Treaty of 1990 might have to be reconsidered was recognised by Polish foreign minister Anna Elżbieta Kawaćka in 2006 following compensation claims filed by the Prussian Claims Society

(Prussian Trust) before the European Court of Human Rights.²³ Since July 2014, Fotyga has been chair of the European Parliament subcommittee on security and defence. Some aspects of the understanding reached at Yalta should be considered for reversal along a paradigm: “Move Poland East.”

Ukrainian presidential elections reflect the divided wishes of the Ukrainian population. Voters living roughly East of the Dnieper River tended to vote in favor of Moscow-leaning candidates, although voters living West of the Dnieper River tended to vote strongly in favor of Western-leaning candidates. This line of demarcation is significant. Much of Ukraine’s territory located West of the Dnieper River should be protected by NATO against any actual or potential advance by the Russian Federation. Toward this security objective, NATO troops should be soon deployed to the Dnieper River basin region, for “maneuvers” or otherwise, as a safeguard against the erosion of any Ukrainian territory West of the Dnieper River area.

Similarly, NATO forces should be deployed to encircle Kaliningrad along its borders with Lithuania and Poland, by invitation of the EU, Lithuania and Poland, not to be withdrawn unless one of two events occurs: either the Russian Federation withdraws from the Crimean Peninsula or a permanent recognition is reached whereby the Russian Federation will be recognized internationally as sovereign of Crimea and in return will cede Kaliningrad to the EU. This deployment will have the added effect of protecting the three Baltic States from further threats of invasion or occupation from the Russian Federation including reported saturation with “fifth column” operatives. Neither the United States nor NATO should capitulate to Russian Federation propaganda, including its recent contention that a sudden “breakthrough” has altered the balance of nuclear power in its favor by rendering United States nuclear defenses inadequate, as Russia’s deputy prime minister Dimitry Ragozin contended on 26 January 2015, patently fallacious and as the Royal United Services Institute retorted, probably intended for domestic consumption by its own population that continues to believe the Putin team’s rhetoric.²⁴ The West should test such an outrageous

²³ PREUSSISCHE TREUHAND GmbH & Co. KG a.A. against Poland, Application No. 47550/06. This application was denied unanimously as inadmissible on 07 October 2008, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{„,dmdoc number”:\[„841872”\],”itemid”:\[„001-88871”\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{„,dmdoc number”:[„841872”],”itemid”:[„001-88871”]}).

²⁴ Ch. Harress, *Russian Deputy Prime Minister: US Defenses Can't Stop Our Nukes Anymore*, “Business Insider”, 27 Jan. 2015, <http://www.businessinsider.com/russian-deputy-pm-us-defenses-cant-stop-nukes-2015-1>.

allegation by encircling the Russian Federation's military advance in Ukraine, laying siege to it, to demonstrate once and for all NATO's vast superiority.

5. Russia's "Gift" to Ukraine

On 25 January 1954, Nikita S. Khrushchev as premier of the Soviet Union announced to some comrades on their way to lunch that the Presidium of the Central Committee of the Communist Party of the Soviet Union would be asked to approve transfer of the Crimean Province from the Russian Soviet Socialist Republic (SSR) to the Ukrainian SSR, a decision that became a *fait accompli* on 19 February 1954 when taken up by the Presidium following only 15 minutes of discussion and a unanimous vote by the 13 out of 25 members who were present. That that vote was iniquitous mattered little at the time or thereafter until 1992 when the Supreme Council of the Russian Federation declared that that transfer was unlawful.

Eight days afterwards, this decision was announced to the Soviet Union and the world with the following announcement posted in Pravda:

"Decree of the Presidium of the USSR Supreme Soviet transferring Crimea Province from the Russian Republic to the Ukraine Republic, taking into account the integral character of the economy, the territorial proximity and the close economic ties between Crimea Province and the Ukraine Republic, and approving the joint presentation of the Presidium of the Russian Republic Supreme Soviet and the Presidium of the Ukraine Republic Supreme Soviet on the transfer of Crimea Province from the Russian Republic to the Ukraine Republic."²⁵

Premier Khrushchev's territorial transfer marked the 300th anniversary of Ukraine's merger into the Russian Empire in 1654, and also was a personal gesture by a man who had gone to work as a coal miner in Ukraine as a teenager, then married a Ukrainian woman, according to his great grand-daughter, Nina Khrushcheva, an American:

"It was somewhat symbolic, somewhat trying to reshuffle the centralized system and also, full disclosure, Nikita Khrushchev was very fond of Ukraine. So I think to some degree it was also a personal gesture toward his favorite republic. He was ethnically Russian, but he really felt great affinity with Ukraine."²⁶

²⁵ "Pravda", 27 Feb. 1954.

²⁶ K. Calamur, *Crimea: A Gift To Ukraine Becomes A Political Flash Point*, "National Public Radio (NPR) Parallels", 27 Feb. 2014, <http://www.npr.org/blogs/>

Is this transfer now legally binding, or was it *ultra vires*? The West argues the former, while the Russian Federation alleges the latter. When translated, the word “Ukraine” means “The Edge” or marchland, a militarized border [of Russia], and to Russians it is “Little Russia,”²⁷ a sort of buffer zone that the Russians believe is intended to protect the Russian homeland, “Big Russia,” from invasion by outside forces. Ukraine is fundamental to the Russian view of defensive quixotic military encirclement.

6. Historically Polish

Western Ukraine historically belonged to Poland in the reign of Władysław II Jagiełło, grand duke of Lithuania (1377–1434), king of Poland with his spouse, Jadwiga (1386–1399), sole king following her death (1399–1434). As the map below reflects, much of present Ukraine even East of Kiev belonged to Poland, corresponding rather accurately with Ukrainian voting patterns in its 2010 presidential elections, as the second map below confirms. So was Ukraine “The Edge” of Russia or the border of Europe? This question and its answer may be dispositive of the solution to the current Ukrainian controversy.

In that time period, the authority of Poland over Western Ukraine extended Eastward at least to the Dnieper River.

Most of what is presently considered Ukraine, other than by the Russian Federation and the separatists it appears to support, belonged to the Polish-Lithuanian Commonwealth before an uprising of 1648–1654 led by Bohdan Zenobi Chmielnicki (Bohdan Zynoviy Mykhailovych Khmelnytsky, in Russian) who became hetman of the Zaporozhian Host, a 17th century version of a real or imaginary “state” formed when this region Southeast of the Dnieper river purported to secede from Poland. Pertinent to the 17th century and possibly pertinent to the current moment may be the 1654 Treaty of Pereyaslav reached between the Cossack Hetmanate in that region and H.I.M. Tsar Alexei Mikhailovich (Alexey I), the second Romanov emperor, creating a military alliance that the Cossacks desired and that escalated into an autonomous region united with Russia according to Soviet historiographers. In any event, the Treaty

parallels/2014/02/27/283481587/crimea-a-gift-to-ukraine-becomes-a-political-flash-point.

²⁷ N. Khrushcheva, *For Moscow, Ukraine is always ‘Little Russia’*, “Reuters”, 20 Feb. 2014, <http://blogs.reuters.com/great-debate/2014/02/20/playing-the-ukrainian-card/>. See also, N. Khrushcheva interviewed by D. Greene, *The Lost Khrushchev: A Journey into the Gulag of the Russian Mind*, “National Public Radio (NPR)” 2014.

of Pereyaslav became undermined by the Truce of Vilna in 1656, then bypassed by the Truce of Andrusovo in 1667 that ended the Russo-Polish War, under the terms of which Eastern Ukraine was ceded to Russia, all without Cossack involvement.

Viewed historically, far Eastern Ukraine does have Russian roots in principle, and it does make sense to consider unification of limited areas in Eastern Ukraine with the Russian Federation with proper concessions from the latter. This will make for a smaller Ukraine that will have fewer EU parliamentary votes and so be accepted more easily into the EU structure. From the map above it is easy to note that the 1656 concessions Poland made to Imperial Russia formed an outer circle suitable as an “edge” or borderland. If Russia considers all of Ukraine as it is configured presently to be its “edge” or buffer zone border area, that is patently ridiculous and unnecessary. Then what will happen to the part of the present Ukraine West of the Dnieper really becomes an EU question: it could all remain an independent Ukraine, all go to Poland, that part between the Dnieper and the Eastern most Curzon Line could remain an independent Ukraine with its capital city at Kiev, and that West of the Eastern most Curzon Line could be returned to Poland.

7. China’s Quixotic Information Encirclement

Military encirclement and allegations of its abuse abound in the international relations of the West with the Russian Federation and, arguably to a more limited extent, in China’s relations with the United States. Quixotic encirclement involving China and East Asia tends more to be information encirclement than military encirclement, with China encircling itself and its own population with a “Great Wall” of Internet blockades that seem to evoke a two-fold ambition: to keep the Chinese population ignorant to global events the Chinese government appears to fear as potential inspiration to domestic uprisings, and to keep the Chinese population as well as foreign residents of China from broadcasting to the world events that take place inside of China that its government believes are embarrassing or even shameful. In some ways China’s encirclement of information is extremely “Quixotic” because it is so unrealistic. Most technology savvy Chinese students know how to avoid Internet encirclement with “Break Prison,” a computer program that facilitates more or less free Internet access. Secondly, Chinese citizens have become global travelers as students and tourists abroad as well as members of the work forces of foreign nations or of Chinese enterprises overseas.

Once the Chinese diaspora learn accurate details of events in the world including events that have occurred back home in China, they lose face internationally, and when they return home they share this knowledge with family and friends. An example of this are the events that occurred on 4 June 1989 at Tiananmen Square in Beijing, a date that is blacklisted on domestic Chinese Internet, although almost all educated Chinese know about it.

With a frequency and an intensity both of which have expanded exponentially in recent years, China has tightened its censorship of the Internet in several ways: by requiring identity card registration as a condition precedent to being allowed to use a public Internet café called a *wang ba* in Chinese, thus enabling government censors to come back on anyone who exercises too much freedom of speech online or who forwards politically sensitive Internet postings to a large number of recipients; by blocking certain key words including the names of some officials from free passage over the Internet; and by more Draconian tactics such as outright blocking of Google, Facebook, Twitter, YouTube and local messaging services such as Didi, TalkBox, and Vover across China with the exception of Hong Kong and Macau. A cadre of presumably otherwise unemployed censors known as the *Wu Mao Tang* [“Five Dime Party”] has emerged, taking this name from their commission: RMB 50 cents, or *Wu Mao*, for each deletion they make. Some reportedly earn up to RMB 500 each day, rather a good salary for a Chinese student. In March, 2010, Google commenced to reroute its network through Hong Kong to avoid or at least to minimize Mainland Chinese information encirclement,²⁸ precipitating a different result from what it expected: a clamping down by the Chinese government on freedom of expression in Hong Kong, long thought to possess the same rights following its 1997 “turn over” or “return” to China as its population had enjoyed under British rule as a Crown colony.

8. Hong Kong

Territory referenced as “Hong Kong” includes Hong Kong island, neighboring Kowloon, and the “New Territories.” Hong Kong island was occupied by Great Britain on 20 January 1841 and then ceded by

²⁸ K. Bradsher, P. Mozur, *China Clamps Down on Web, Pinching Companies Like Google*, “The New York Times” 21 Sep. 2014, http://www.nytimes.com/2014/09/22/business/international/china-clamps-down-on-web-pinching-companies-like-google.html?partner=yahoofinance&_r=1.

China's Qing Dynasty to Great Britain in perpetuity on 29 August 1842 as part of the Treaty of Nanking, the first of the "unequal treaties" the Chinese call "intolerable treaties" because Great Britain incurred no reciprocal obligations, having won the First Opium War.²⁹ Thereupon Great Britain founded Hong Kong as a crown colony, then established the city of Victoria in 1843. Following victory by Great Britain in the Second Opium War, China ceded the Kowloon Peninsula south of Boundary Street together with Stonecutters Island to Great Britain on 24 October 1860, in perpetuity, in Article VI of the Convention of Peking. What were called collectively the "New Territories," land on Kowloon Peninsula north of Boundary Street and south of the Sam Chun River that forms the border between Hong Kong and Mainland China, including some 200 outlying islands, was leased by China to Great Britain at the end of the Sino-Japanese War for a period of 99 years pursuant to the Second Convention of Peking (Convention for the Extension of Hong Kong Territory) signed on 9 June 1898. It is this agreement that ended in June 1997 and that precipitated the "return" or "hand over" to China of all of Hong Kong by Great Britain under the terms of the *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* (Sino-British Joint Declaration) signed in Beijing on 19 December 1984.

It is important to remember that this "hand over" or "return" as the Chinese prefer to call it reflected the grace of the United Kingdom as to Hong Kong Island and Kowloon, and was obligatory under international laws only as to the leased "New Territories," not as to Hong Kong Island or Kowloon south of Boundary Street that were ceded to Great Britain *in perpetuity*.³⁰ Be the 19th century treaties "unequal" or "intolerable" H.I.H. Prince Gong of the First Rank possessed internationally recognized apparent authority as Regent of China to give Imperial Assent to them by authority of the Zongli Yamen established in 1861 to take charge of China's foreign affairs.³¹ By the same token, the 1984 Sino-British Joint Declaration that became effective on 1 July 1997 required and received Chinese presidential assent and Royal Assent from H.M. Queen Elizabeth II, but this Joint Declaration is predicated upon each term and condition

²⁹ S. Hoe, D. Roebuck, *The Taking of Hong Kong: Charles and Clara Elliot in China Waters*, London 1999, p. 203.

³⁰ K. Tso, *The Legal Implications of the Sino-British Treaties Regarding Hong Kong*, "Loyola of Los Angeles International and Comparative Law Review" 1981, vol. 4, p. 111-136.

³¹ S.M. Meng, *The Tsungli Yamen: Its Organization and Functions*, Cambridge 1962.

that was recited therein as registered on 12 June 1985 at the United Nations. International law requires that the rights and duties of states be determined in the first instance by their agreement as expressed in treaties, reaffirmed in Article 38 of the United Nations Charter.

Consequently, fulfillment of the terms and conditions of this Declaration must be met by China on peril of DRR, at least during the 50 year period that is scheduled to expire in 2047. That expiry also would abate in the event that China fails to abide by its obligations under the Declaration, unless justified. Is any departure justified?

Article 62 of the Vienna Convention on the Law of Treaties permits nonperformance under terms and conditions of a treaty under very limited conditions: fundamental change of circumstances not foreseen by the parties to the treaty, of those circumstances constituted a basis for consent to the treaty, and the change radically transforms the extent of the treaty obligations that remain to be performed. Essentially, the Vienna Convention leaves in tact the element of tradition, *pacta sunt servanda*, that requires treaties to be performed in good faith as agreed.³² Article 16 of the Vienna Convention does permit a “new” state to escape from obligations incurred by its predecessor as sovereign over its territory under the *rebus sic stantibus* doctrine,³³ where changes in a country have been substantial. An argument arises whether the doctrine of *rebus sic stantibus* together with duress occasioned by the unequal nature of the 19th century Intolerable Treaties, together with “Liberation” on 1 October 1949, would release China from its obligations to Great Britain under the Conventions of Peking.³⁴ It is more difficult for China to argue both that the older treaties as well as the recent Sino-British Joint Declaration are avoidable under *rebus sic stantibus*. If this was the case in 1984, then China should have raised it squarely at that time.³⁵ What are China’s obligations? With what term or condition, if any, has China failed to abide thus far?

9. Universal Suffrage

³² *Pacta sunt servanda* means promises must be kept, substantially as each promise was made.

³³ *Rebus sic stantibus* means things thus standing at the moment, following one or more changes.

³⁴ K. Tso, op.cit., p. 111–136.

³⁵ See, inter alia, W.H. Liu, *Britain’s China Policy*, “China Report” 1978, vol. 14, no. 5–6, p. 47–56.

Protests in Hong Kong have increased recently concerning the letter and the spirit of universal suffrage, especially in the election of the Hong Kong chief executive in whom expansive powers are invested under the Basic Law of Hong Kong. When the United Kingdom resolved to review Chinese performance under the Joint Declaration, the foreign affairs committee of the Chinese National People's Congress responded with a declaration that the "constitutional development" of Hong Kong as well as its "other affairs fall completely within China's internal affairs and brook no interference... from the UK or any other external forces."³⁶ The United Kingdom went ahead with a cursory investigation in the foreign affairs committee of the House of Commons to determine if China is maintaining its promise of "one country, two systems" of governance in its relations with Hong Kong. Demonstrators in Hong Kong have complained that this promise is breached by China's insistence that its central government approve a slate of candidates that it deems qualified to stand for election as Hong Kong's chief executive. Incumbent Hong Kong chief executive Leung Chun-ying is disfavored by many Hong Kong residents who contend that he was a CPC operative under British rule, and Leung argues that the Basic Law does not require universal suffrage at all, one reason being that British Royal Governors themselves were not elected but held Crown appointments, a position with which the last Hong Kong Royal governor, Christopher Patten, afterwards Lord Paten of Barnes and chancellor of Oxford University, disagrees, strongly contending that the United Kingdom has a "moral and political obligation" to enforce universal suffrage promises.³⁷

Universal suffrage is not a traditional custom in Hong Kong, but it became a condition to Great Britain's "hand over" of Hong Kong to China by the Conservative Party government that prime minister Margaret Thatcher headed in 1984, as the Sino-British Joint Declaration states clearly. Planning well in advance of the elections scheduled for 2017 in Hong Kong, a group that favors democracy, known as "Occupy Central," staged an informal referendum in 2014 at which 800,000 Hong Kong residents voted to improve democratic participation. Over 500,000 protesters demonstrated on 01 July 2014, prompting Beijing to threaten military encirclement, a decision it has been reluctant to implement,

³⁶ F. Ching, *Will Hong Kong See China Deliver Its Promises?*, "The Nation" 12 Sep. 2014, <http://www.nationmultimedia.com/opinion/Will-Hong-Kong-see-China-deliver-its-promises-30243051.html>.

³⁷ Hong Kong's Leader Questions British Contribution to City's Democracy, "Asia One" 04 September 2014, <http://news.asiaone.com/news/asia/hong-kong-leader-questions-british-contribution-citys-democracy>.

fearing negative ramifications on the Asian financial world at the center of which is Hong Kong.³⁸ Then on 22 September 2014 thousands of Hong Kong students went on strike for a week and threatened emigration because of limitations on universal suffrage. What is happening is Hong Kong gaining global publicity by protesting China encircling it in the media when it limits universal suffrage.³⁹ It remains to be determined what China's response will be, although the "Flashlight Revolution" as it became dubbed from the flashlights students held at night during their protests soon fizzled. Demands of the Hong Kong students reached an impasse thereafter, with China ignoring their reasonable demands.

Freedoms clearly enumerated in the official version of the Sino-British Joint Declaration include expressly "freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely."⁴⁰ That the Joint Declaration does not define specifically the concept of "universal suffrage" does not mean that it is silent on related matters. Article 19 of the Hong Kong Basic Law provides that military interference in "local affairs" is prohibited under Article 14 of the Hong Kong Basic Law, that states expressly: "[t]he courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained."⁴¹ This is strong evidence, by inference, that continuity is intended under both the Basic Law and the Joint Declaration, and that military encirclement of Hong Kong for the purpose of coercing or threatening its population not to demonstrate in favor of freedoms they harbor legitimate expectations to gain is prohibited.

³⁸ M. Badkar, *Here's Why China Isn't Ready to Send its Military into Hong Kong*, "Business Insider Australia" 04 Jul. 2014, <http://www.businessinsider.com.au/chinese-military-intervention-in-hong-kong-2014-7>.

³⁹ C. Baldwin, J.F. Pomfret, *Hong Kong Students Boycott Class to Protest China Curbs on Democracy*, "Reuters" 20 Sep. 2014, <http://www.reuters.com/article/2014/09/20/us-hongkong-china-idUSKBN0HF0MR20140920>.

⁴⁰ *Official Publication: Sino-British Joint Declaration on the question of Hong Kong*, "Loyola of Los Angeles International and Comparative Law Review" 1984, vol. 7, 139–164, XIII, 156. *Accord, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 11, Article 27. http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

⁴¹ *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 7, Article 19. http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

Conclusion

International agreements and legitimate expectations must be clear, must be enforced. Unless an international agreement is enforced punctiliously, it is a sham. Agreements that the West and most of the rest of the world believed governed the boundaries of the Ukrainian Republic seem to have been ignored, at least from 2014, particularly by the Russian Federation with impunity. So also does the Sino-British Joint Declaration that governs legitimate expectations of the people of Hong Kong following its “turn over” or “return” to China seem to be in the process of becoming ignored. Changes in life at every turn must be foreseen. Each action provokes reaction. In the relations of nations, a “*quid pro quo*” is a legitimate expectation in the 21st century. From the Doctrine of Dependent Relative Revocation (DRR) we may justify the substitution or even the withdrawal of terms and conditions pertinent to any given agreement when parties thereto have relied to their detriment in performing their own duties without reciprocation.

This argument applies to Hong Kong and Ukraine and to other locations worldwide. If it is necessary or expedient for the Russian Federation to invade and occupy the Crimean Peninsula or other regions of Eastern Ukraine, it is equally necessary and desirable to return Königsberg to Germany and Western Ukraine to Poland. If it is undesirable for China to honor in principle the legitimate expectation of the Hong Kong citizenry to universal suffrage with full and fair election of their chief executive, then Hong Kong Island and Kowloon that were ceded to Great Britain *in perpetuity* should be returned to the United Kingdom, especially if this is the wish of the people of Hong Kong expressed in an internationally supervised election much as the United Kingdom offered recently to Scotland but failed to provide to Hong Kong.

“Quixotic Encirclement” will continue in many areas of the world, by the West and also by the Eastern Bloc. Military encirclement as well as information, economic, and trade examples of encirclement will continue to prevail. Each encircling party must understand that the more it encircles its adversaries, actual or potential, real or imaginary, it should expect to be encircled itself by those same adversaries including some that were not adversaries before they felt encircled. What once was an arms race in the 1950s and for the duration of the Cold War has become a veritable encirclement race. This is entirely evident in the reaction by the Russian Federation to NATO encirclement and to the reaction

by China to United States encirclement. Is encirclement worth the cost structure of both conducting the encircling and defending against counter-encirclement? Encirclement is very expensive and counter-productive in many respects.