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The Annexation of Crimea and Attempts to Justify It in the Context of International Law

The article carries out an assessment of the "reunification of Crimea with Russia" from the point of view of contemporary international law and examines the arguments of Russian legal scholars who try to deny the annexation, i.e. the acquisition of territory by force. The assessment reveals recent changes in the interpretation of the principle of the self-determination of peoples in the Russian official position and legal doctrine, compared to the interpretation of this principle prevalent before the International Court of Justice adopted the Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. The analysis carried out in the article identifies the arguments and strategies that are employed in seeking to offer an interpretation of international legal norms that corresponds to the political interests of the Russian Federation. The examination reveals how new content is attached to international legal concepts in the works of Russian legal scholars who construct a position favourable to the Russian Federation, and in what way legal arguments are combined with statements and theoretical constructs that are irrelevant from the point of view of contemporary international law, thus deleting the boundaries between legal and non-legal reasoning and producing a pseudo-legal narrative that serves the political interests of Russia.

Introduction

The annexation of part of the territory of Ukraine – namely, the Crimean peninsula – was unexpected by both the international and academic community. It was conducted in violation of the fundamental principles applicable to interstate relations, in particular, the prohibition of the use of force and the

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principle of territorial integrity, which have been regarded as the basis of stability in the European region since World War II. The annexation was widely identified as a major challenge to the contemporary system of international law. This shocking incident, as well as the subsequent and ongoing armed hostilities in the Donbas region of East Ukraine, generated intense discussions about the relationship between the concepts of armed attack and aggression, about the content of the principle of the self-determination of peoples, the legal meaning of referendums, the nature and extent of the duty of non-recognition, and the role of international law in conflicts of interests of major powers. These discussions are reflected in the plethora of recent publications and monographs analysing political and legal aspects of the so-called "Ukrainian crisis".[1] The actions of Russia in Ukraine have also found their reflection in broader studies, such as studies analysing the attitude adopted by Russia towards international law.[2]

The scholarly discussion providing legal assessment of the actions of Russia in Ukraine and examining the ensuing challenges to international law is dominated by Western authors, whereas the number of publications by Russian legal scholars on these questions is rather limited. Nevertheless, the publications of the latter authors, in particular those making attempts to justify the actions of Russia, are important for identifying how the established international legal concepts, norms, and principles are adjusted for the purpose of justifying *prima facie* unlawful actions.

The article aims to assess the actions of Russia towards Crimea from the perspective of contemporary international law and to identify the arguments and strategies used in the Russian academic sphere for justifying the incorporation of Crimea into Russia, thus denying the fact of illegal annexation.

The current relevance of the assessment carried out in the article should be associated not only with its informative function, but also with the need to understand the ways in which international law is manipulated in the Russian academia. In this respect, the concept of "lawfare", which has been increasingly employed and assumes particular importance in the context of hybrid war,

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[1] E.g.,Thomas D.G., *Aggression against Ukraine. Territory, Responsibility, and International Law,* Palgrave Macmillan, 2015; Задорожний А., Российская доктрина международного права после аннексии Крыма (under preparation for publication). Mention should also be made about the collections of publications on issues related to the incorporation of Crimea into the Russian Federation, e.g., the papers of the Symposium "The Incorporation of Crimea by the Russian Federation in the Light of International Law", published in *Zeitschrift für ausländisches* öfentliches *Recht und Völkerrecht. Heidelberg Journal of International Law*, Vol. 75, No. 1, 2015, Special issue of *German Law Journal* (*German Law Journal* 16 (3), 2015, http://www.germanlawjournal.net/vol-16-no-3, 10-10-2015).

[2] Mälksoo L., *Russian Approaches to International Law,* Oxford: Oxford University Press, 2015.

is especially significant. In general terms, this concept means the use of law through the exploitation of legally unfounded arguments in order to weaken the positions of the opponent in the international arena, as well as to shape public opinion.[3] As pointed out by Christian Marksen, "Since Russia is powerful enough to pursue its interests anyway, it does not need an ultimately convincing legal justification. A justification that is at least not totally absurd, but somehow arguable, is already good enough for making a case in the international political sphere".[4] A similar position is taken by Christian Borgen, who maintains that "using legalistic rhetoric can muddy the waters, even when the legal argument is doctrinally weak".[5] Given the close link between the Russian official rhetoric and the absolute majority of publications by Russian legal scholars on the issue of "the reunification of Crimea with Russia",[6] the arguments that are set out in these publications and develop the position expressed in the official statements of Russian politicians should be viewed as promoting the implementation of a "lawfare" strategy.

The article starts with a discussion of the main aspects relevant to the assessment of the annexation of Crimea from the point of view of international law. Next the analysis identifies the arguments and strategies used by Russian legal scholars for constructing an evaluation of the situation that is favourable to the Russian Federation. In view of the fact that Russia has denied its involvement in the armed conflict in the Donbas region of Eastern Ukraine, as well as that the corresponding position has been followed in Russian academia, the article concentrates only on publications expressing legal evaluations with regard to "the reunification of Crimea with Russia".

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[3] E.g., see Tiefenbrun S., "Semiotic Definition of 'Lawfare'", *Case Western Reserve Journal of International Law* 43, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1866448, 10-10-2015.

[4] Marksen Ch., Crimea's Declaration of Independence, EJIL: TALK! BLOG (18 March 2014), http://www.ejiltalk.org/crimeas-declaration-of-independence/, 23-10-2015.

[5] Borgen Ch. "Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea", *U.S. Naval War College. International Law Studies* 91, 2015, p. 277, http://stockton.usnwc.edu/ils/vol91/iss1/7/, 10-10-2015.

[6] An alternative position is taken by Elena Lukyanova and Vladimir Kryazhkov, the scholars of the Higher School of Economics (see Кряжков В., "Крымский прецедент: конституционно-правовое осмысление", Сравнительное *конституционное обозрение,* 5, 2014, с. 82-96; Lukyanova E., "On the Rule of Law in the Context of Russian Foreign Policy", *Russian Law Journal* 3 (2), 2015, p. 17-36); also Maria Isaeva, a specialist in international law (e.g., see Давлетбаев М., Исаева М., "Архаичный язык российской дипломатии", http://www.vedomosti.ru/opinion/articles/2014/08/13/arhaichnyj-yazyk-rossijskoj-diplomatii, 10-10-2015).

1. The Annexation of the Crimean Peninsula: the Perspective of Contemporary International Law

1.1. The Principle of the Prohibition of the Use of Force

For the legal assessment of the Russian annexation of the Crimean peninsula, the most important principles of international law are the prohibition on the threat and use of force and the free self-determination of peoples. Although, in the context of the events that took place in Crimea, both principles are closely interrelated, the first principle is crucial for evaluating the actions of Russia, whereas the second one is important considering the arguments about the right of Crimea to unilateral secession from Ukraine in terms of international law.

The principle of the prohibition of the use of force is entrenched in Article 2(4) of the UN Charter, which consolidates the duty of the Member States to refrain from "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[7] According to the prevailing interpretation, this principle is violated in the event of any use of armed force by one state against another state, irrespective of the scope and aims of the use of force, unless force is used in realising the inherent right of self-defence or in carrying out collective security operations authorised by the UN Security Council.[8] It should be noted that the prohibition on the unauthorised use of armed force in interstate relations is established as one of peremptory norms, i.e. *jus cogens,* which permit no derogations.[9]

The content of the prohibition on the use of armed force is tightly linked with the concepts of aggression and armed attack. The concept of the use of force is regarded as broadest among them; it includes both the direct[10] and

[7] *Charter of the United Nations,* http://www.un.org/en/sections/un-charter/chapter-i/index.html, 10-10-2015.

[8] E.g., see Gray C., "The Use of Force and the International Legal Order" in Evans, M.D., ed., *International Law*, Oxford: Oxford University Press, 2003, p. 593-594.

[9] E.g., see International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment of 27 June 1986, § 190.

[10] The direct use of force occurs when, under the responsibility norms applicable to states, armed actions are attributed to a state (e.g., actions by regular military units, irregular forces, or other armed groups acting under instructions or control of that state).

indirect[11] use of armed force. However, not every instance of the use of force amounts to aggression, which is deemed to be "the most serious and dangerous form of the illegal use of force".[12] The concept of aggression was defined in the UN General Assembly Resolution on the Definition of Aggression of 1974, which was adopted to provide guidance for the Security Council in determining the existence of acts of aggression. Although this resolution, as a source of international law, is not in itself binding, its provisions reflect international customary law and serve as a source of reference for the UN International Court of Justice (ICJ).[13] Moreover, the principal provisions of this resolution, including the list of enumerated acts of aggression, were transposed to Article 8bis of the Rome Statute of the International Criminal Court, which consolidates the definition of the crime of aggression.

Under Article 1 of the Definition of Aggression, "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition". Article 2 of this resolution provides that the use of armed force by a state in contravention of the UN Charter constitutes *prima facie* evidence of an act of aggression; Article 3 establishes an inexhaustive list of acts that qualify as acts of aggression.

Under Article 3(a) of the aforementioned resolution, aggression is "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof". In the event of the actions taken by Russia in Crimea, the use of force was exercised through the operations carried out by the deployed armed forces of the Black Sea Fleet of the Russian Federation and Russian Special Forces (including the so-called "little green men"). During these operations, state institutions were seized, Ukrainian military units were blocked, and the coastal blockade was carried out, thus providing conditions for holding the so-called "referendum", which served as a pretext to formalise the annexation. It must be observed that the aforementioned operations, which were carried out with the support of local separatists, and the following process of

[11] The indirect use of force generally means the technical or organisational involvement of a state in an international armed conflict, or else in a non-international armed conflict, for example, by providing one of the conflicting sides with weapons, armed bands, or mercenaries. Sayapin S., *The Crime of Aggression in International Criminal Law,* the Hague: Asser Press, 2014, p. 83-84.

[12] UN General Assembly, *Resolution on the Definition of Aggression,* see http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314(XXIX), 27-11-2015.

[13] Sayapin, (*supra* note 11) p. 107.

formalising the annexation,[14] took place at a time when the authorisation by the Federation Council of the Russian Federation to use Russian armed forces on the territory of Ukraine was in force.[15] In view of these circumstances, the annexation of the Crimean peninsula definitely meets the definition of an act of aggression.[16]

In qualifying the above-mentioned actions of the Russian Federation as aggression, due consideration should also be given to Articles 3(c) and 3(e) of the Definition of Aggression. Under Article 3(c), an act qualifies as aggression if it constitutes "the blockade of the ports or coasts of a State by the armed forces of another State" and, under Article 3(e), if it constitutes "the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement". The Black Sea Fleet of the Russian Federation was deployed in Crimea on the grounds of the agreements between the Russian Federation and Ukraine that were concluded in 1997 and entered into force in 1999.[17] In accordance with Article 6(1) of the Agreement on

[14] The so-called "referendum" was held on 16 March 2014. On 17 March, the results of the "referendum" were announced; on the same day, Putin signed the Executive Order on recognising the Republic of Crimea as a sovereign and independent state. On 18 March, the "international treaty" was signed between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea in the Russian Federation and on forming new constituent entities within the Russian Federation. On 19 March, the Constitutional Court of the Russian Federation passed the judgment declaring that the above-mentioned "treaty" is in compliance with the Constitution of the Russian Federation. On 20 March, the "treaty" was ratified.

[15] See Постановление Совета Федерации Федерального Собрания РФ от 1 марта 2014 г. № 48-СФ Об использовании Вооруженных Сил Российской Федерации на территории Украины, http://council.gov.ru/activity/documents/39979, 10-10-2015.

[16] E.g., see Bilkova V., "The Use of Force by the Russian Federation in Crimea", *Zeitschrift für ausländisches* öfentliches *Recht und Völkerrecht. Heidelberg Journal of International Law* 75 (1), 2015, p. 49; Tancredi A., "The Russian Annexation of the Crimea: Questions Relating to the Use of Force", *Zoom out* I, 2014, p. 18-21, http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/, 10-10-2015.

[17] See Соглашение между Российской Федерации и Украиной о статусе и условиях пребывания Черноморского флота Российской Федерации на территории Украины, Киев, 28 мая 1997 г. (http://zakon0.rada.gov.ua/laws/show/643_076, 10-10-2015); Соглашение между Российской Федерации и Украиной о параметрах раздела Черноморского флота, Киев, 28 мая 1997 г. (http://zakon2.rada.gov.ua/laws/show/643_075, 10-10-2015); Соглашение между правительством РФ и правительством Украины о взаиморасчетах, связанных с разделом Черноморского флота и пребыванием ЧФРФ на территории Украины, Киев, 28 мая 1997 г. (http://zakon0.rada.gov.ua/laws/show/643_077, 10-10-2015). As these agreements were to expire in 2017, an additional agreement was concluded on 21 April 2010 on extending the term of validity of the above-mentioned agreements until 2042 (Соглашение между Украиной и Российской Федерацией по вопросам пребывания Черноморского флота Российской Федерации на территории Украины, Харьков, 21 апреля 2010 г. (http://zakon5.rada.gov.ua/laws/show/643_359, 10-10-2015)).

the Status and Conditions of the Black Sea Fleet Stationing on the Territory of Ukraine, Russian military units were obliged to "respect the sovereignty of Ukraine, observe its legislation and do not allow interference in the internal affairs of Ukraine".[18] In addition, under Article 15(5) of the same agreement, movement associated with the activities of military units outside their areas of deployment could be carried out after coordination with the competent authorities of Ukraine.[19] Thus, there are no doubts that the use of these armed forces for seizing strategic objects, blocking Ukrainian troops, and blockading ports amounted to a substantial breach of the conditions agreed for the presence of the armed forces of the Russian Federation on the territory of Ukraine (e.g., in February 2014, the Balaklava Bay border control unit and the Belbek airfield were blockaded;[20] on 5 March 2014, the Russian Black Sea Fleet sank a mothballed cruiser in the inlet to Donuzlav Lake, thus blocking access to the sea for the Ukrainian warships trapped in the port of Novoozerne).[21]

The actions taken by Russia in Crimea provoked certain discussions about whether an act of aggression can be carried out without significant military confrontation or the actual use of arms. The necessity of the evidence of actual armed confrontation for determining acts of aggression was referred to by Vladimir Putin in his speech of March 18, 2014 ("Crimean speech"), addressed to the members of the State Duma and the Federation Council, heads of Russian regions, and representatives of civil society. In this speech, Putin maintained that he could not "recall a single case in history of an intervention without a single shot being fired and with no human casualties".[22] Analogous discussions ensued regarding the concept of an armed attack *(aggression armée),* which, under Article 51 of the UN Charter, gives rise to the inherent right of self-defence.

As is clear from Article 1 of the Definition of Aggression, the key fact in defining aggression is the conduct of military actions by a state against the

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[18] See Соглашение между Российской Федерации и Украиной о статусе и условиях пребывания Черноморского флота Российской Федерации на территории Украины, Киев, 28 мая 1997 г. (http://zakon0.rada.gov.ua/laws/show/643_076, 10-10-2015).

[19] *Ibidem.*

[20] Ministry of Foreign Affairs of Ukraine, *On Violations of Ukraine's Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine,* 3 March 2014, http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shhodo-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinsyko-rosijsykih-ugod-vijsykovimi-formuvannyami-chf-rf-na-teritoriji-ukrajini, 4-10-2015.

[21] *Russia Isolates Ukraine's Navy,* 6 March 2014, https://www.stratfor.com/analysis/russia-isolates-ukraines-navy, 10-10-2015.

[22] Обращение Президента Российской Федерации, Москва, Кремль, 18 марта 2014 года, http://kremlin.ru/events/president/news/20603, 10-10-2015.

sovereignty, territorial integrity, or political independence of another state; in addition, considerable importance is placed on the consequences of such actions. It is obvious that the actions by the Black Sea Fleet and special forces of the Russian Federation were taken with the aim of preventing the Ukrainian government from exercising its sovereign powers in the Crimean peninsula, as well as with the aim of creating conditions for a smooth scenario of the annexation of Crimea, i.e. these actions were aimed against the sovereignty and territorial integrity of Ukraine. The crucial role performed by Russian forces in creating the conditions for holding the "referendum" has been recognised in the publications of Russian authors;[23] moreover, the importance of Russian forces in "returning Crimea to Russia" has been publicly admitted by Putin.[24] In light of these circumstances and, eventually, the consequences of these processes, i.e. the annexation of part of the territory of Ukraine, there should be no doubt about the existence of the fact of aggression. In fact, not only the ultimate annexation, but also the seizure of actual control over the territory by Russian forces before the formalisation of the annexation should be treated as aggression. This position is confirmed by the use of the concept of aggression in the documents adopted by international organisations, e.g. the Resolution of the European Parliament on the Invasion of Ukraine by Russia (13 March 2014),[25] the Resolution of the European Parliament on Russian Pressure on Eastern Partnership Countries and in Particular the Destabilisation of Eastern Ukraine (17 April 2014),[26] the Resolution of the Parliamentary Assembly of the Council of Europe on Recent Developments in Ukraine: Threats to the Functioning of Democratic Institutions (9 April 2014),[27] and the Resolution of the OSCE Parliamentary Assembly on the Continuation of Clear, Gross and Uncorrected Violations of OSCE Commitments and International Norms by the Russian Fe-

[23] E.g., see Zorkin V., *Civilization of law and development of Russia,* Petersburg: St. Petersburg International Legal Forum, 2015, p. 264; Томсинов В.А., "Международное право с точки зрения воссоединения Крыма с Россией", Законодательство 7, 2014, с. 19.

[24] E.g., *Putin admits Russian forces were deployed to Crimea,* 17 April 2014, http://uk.reuters.com/article/2014/04/17/russia-putin-crimea-idUKL6N0N921H20140417, 10-10-2015; *Putin reveals secrets of Russia's Crimea takeover plot,* 9 March 2015, http://www.bbc.com/news/world-europe-31796226, 10-10-2015.

[25] European Parliament, *Resolution 2014/2627(RSP) on the Invasion of Ukraine by Russia (13 March 2014),* § 1, 11, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2014-0267+0+DOC+XML+V0//LT, 10-10-2015.

[26] European Parliament, *Resolution 2014/2699(RSP) on Russian Pressure on Eastern Partnership Countries and in Particular the Destabilisation of Eastern Ukraine (17 April 2014),* § 3, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0457+0+DOC+XML+V0//LT, 10-10-2015.

[27] Parliamentary Assembly of the Council of Europe, *Resolution No. 1988 on Recent Developments in Ukraine: Threats to the Functioning of Democratic Institutions (2014),* § 14, http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20712&Lang=EN, 26-11-2015.

deration (2015).[28] Such a consensus reached at multilateral political forums by states on the actions of Russia in Crimea should be regarded as significant proof attesting to the view taken by the states *(opinio juris)* with regard to the concept of aggression as not necessarily involving the intense use of arms.

In this respect, the conclusion set out as early as in the judgment of October 1, 1946, by the International Military Tribunal at Nuremberg regarding the Austrian Anschluss is worth quoting:

> It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; that there were many matters in common between the two peoples that made this union desirable; and that in the result the object was achieved without bloodshed. These matters, even if true, are really immaterial, for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered.[29]

In the same vein, the purported assent by the state to the act of aggression was exploited to justify the actions of the Third Reich against Czechoslovakia, Denmark, Belgium, and Luxembourg; the same method was used by the USSR in order to carry out the occupation and annexation of the Baltic States.[30]

Once the actions taken by Russia qualify as aggression, doubts about whether Ukraine had the right to self-defence might seem rather odd.[31] As is evident from the jurisprudence of the ICJ, although the exercise of the right to self-defence is associated with the use of force against the state concerned to the scope exceeding "a mere frontier incident",[32] there is no rule requiring an invasion on a significant scale. For instance, in the *Oil Platforms* case, the ICJ did not exclude the possibility that the mining of a single military vessel

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[28] Parliamentary Assembly of the Organization for Security and Co-Operation in Europe, *Resolution on the Continuation of Clear, Gross and Uncorrected Violations of OSCE Commitments and International Norms by the Russian Federation (2015),* § 16, 21, https://www.oscepa.org/meetings/annual-sessions/2015-annual-session-helsinki/2015-helsinki-final-declaration/2282-07, 10-10-2015.

[29] International Military Tribunal (Nuremberg), *Judgment of 1 October 1946,* p. 31 (427), http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf, 26-11-2015.

30 See Žalimas D., "The International Legal Status of Lithuania and its Resistance to the Soviet Union", in Korzeniewska K. et al., eds., *Lithuanians and Poles against Communism after 1956. Parallel Ways to Freedom?,* Vilnius, 2015, p. 351-353.

[31] E.g., see Janik R., *Russia, Ukraine and the Right to Use Force in Self-Defence,* 27 March 2014, https://www.juwiss.de/42-2014/, 26-11-2015; Marc Weller reports on the legality of events in Crimea, 19 March 2014, http://www.newlawjournal.co.uk/nlj/content/shadow-gun, 26-11-2015; doubts regarding the right of Ukraine to self-defence are also expressed in Murray E., *Russian's Annexation of Crimea and International Law Governing the Use of Force,* p. 42, https://www.academia.edu/10068890/RUSSIA_S_ANNEXATION_OF_CRIMEA_AND_INTERNATIONAL_LAW_GOVERNING_THE_USE_OF_FORCE, 26-11-2015.

[32] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment of 27 June 1986, § 195.

might be sufficient to give rise to the right of self-defence.[33] Additionally, the "threshold" for the exercise of the right to self-defence should be considered to have been met in those cases where the use of armed force (even without resort to the actual use of arms) is directly aimed against the sovereignty, territorial integrity, or political independence of a state. Otherwise, a paradoxical conclusion may be reached that not every act of aggression amounts to an armed attack, and, therefore, it is possible that, in certain cases, a state may not have the right to self-defence even though it is directly faced with aggression, which, as mentioned before, is deemed to be the most dangerous form of the illegal use of force. Such an interpretation would contradict the essence of the inherent right of states to the defence of their sovereignty, territorial integrity, and political independence.

As noted by Marxsen, the use of force in Crimea was systematic; it was conducted on a rather large scale; and it served the purpose of ensuring that Ukrainian military forces would not dare to oppose the military actions taken in Crimea. In addition, creating a scenario in which Ukraine would be unable to oppose the separatists was the aim publicly declared by Russia. Therefore, the "threshold" of the gravity of an "armed attack" (which must not become an obstacle for the state concerned to take effective measures to defend its territorial integrity) was undoubtedly met in the case of the Crimean events. Consequently, Ukraine had the right to self-defence exercised in accordance with the criteria of necessity and proportionality, as established in customary international law (however, as Marxsen observes, the conclusion that there was the right to self-defence is not related to the assessment whether it would have been politically advisable to exercise this right).[34] The right of Ukraine to necessary and proportionate self-defence remains equally valid after the annexation has been accomplished; the conclusion to the contrary "would ultimately justify the *fait accompli* forcefully imposed by the aggressor".[35]

As aggression constitutes a grave violation of the peremptory norm of international law, the duty arises for the international community not to reco-

[33] International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment of 6 November 2003, § **72.**

[34] Marxsen Ch., "Territorial Integrity in International Law – Its Concept and Implications for Crimea", *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht. Heidelberg Journal of International Law,* 75 (1), 2015, p. 24-25.

[35] Tancredi A., "The Russian Annexation of the Crimea: Questions Relating to the Use of Force", *Zoom out* I, 2014, p. 34, http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/, 25-11-2015.

gnise any alterations in the status of the Crimean peninsula.[36] It is noteworthy that, in general terms, the international community has fulfilled this duty; Crimea as part of the Russian Federation has so far officially been recognised only by several states.[37] The principal position of Lithuania, expressing support for the Ukrainian territorial integrity, condemning the Russian aggression, and affirming the duty of non-recognition, is consolidated in the Resolution "On the Situation in Ukraine" passed by the Parliament (Seimas) on April 24, 2014.[38]

The conclusion should be drawn that the actions of Russia in conducting the annexation of the Crimean peninsula violated the principle of the prohibition on the use of force and amounted to aggression and an armed attack.[39] It must be noted that these actions also violated other fundamental international legal principles entrenched in the UN Charter (1945), the Declaration of the UN General Assembly on Principles of International Law (1970), and the Helsinki Final Act (1975), including the principle of non-interference in the internal affairs of another state, which prohibits interference by means of coercion in the internal and external policy areas belonging to the exclusive competence of the state, as well as the principles of territorial integrity and the inviolability

[36] See the Draft Articles on State Responsibility, Articles 40-41, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, 25-11-2015. For more on the duty of non-recognition, see Milano E., "The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and one Unanswered Question", *Zoom out* I, 2014, p. 35-55, http://www.qil-qdi.org/the-non-recognition-of-russias-annexation-of-crimea-three-different-legal-approaches-and-one-unanswered-question/, 25-11-2015.

[37] It should be noted that legal *(de jure)* recognition must be formulated explicitly and unambiguously. An example of such recognition is the announcement by the office of the President of Afghanistan about the official recognition by Afghanistan of new borders (see Rosenberg M., *Breaking With the West, Afghan Leader Supports Russia's Annexation of Crimea,* http://www.nytimes.com/2014/03/24/world/asia/breaking-with-the-west-afghan-leader-supports-russias-annexation-of-crimea.html?ref=asia&_r=1, 25-11-2015). Ambiguous statements, e.g., regarding support for the "self-determination of Crimean people", should not be treated as constituting the legal recognition of the Crimean annexation. Neither was the Crimean annexation officially recognised by vote against the Resolution of the UN General Assembly (No. 68/262) on Territorial Integrity of Ukraine, which called on all states not to recognise alterations in the status of Crimea; such a vote should be regarded as a political move, with no legal effect. All the more so, the recognition of annexation cannot be associated with membership in international organisations to which Russia is a member (e.g., membership in the Eurasian Economic Union). The list of states that have recognised the annexation of Crimea in Internet sources can include Afghanistan, Cuba, Syria, Venezuela, Nicaragua, and Nauru (e.g., *Russia testing recognition of its annexation of Crimea,* http://gucaravel.com/russia-testing-recognition-of-its-annexation-of-crimea/, 25-11-2015). Providing a concrete list of the states having recognised the annexation of Crimea, however, would require additional investigation based on a detailed analysis of the position taken by each state.

[38] Register of Legal Acts, 2014, No. 2014-04752.

[39] For a detailed assessment of the justifications provided by Russia, such as the invitation by President of Ukraine Viktor Yanukovych, the application of the responsibility to protect, and the protection of Russian citizens, see Bilkova, (note 16) p. 37-49; Маркссен К., "Крымсский кризис с точки зрения международного права", Институт Макса Планка по зарубежному публичному и международному праву, Дайджест Публичного Права 3, 2014, с. 207-217, http://dpp.mpil.de/03_2014/03_2014_201_230.pdf, 25-11-2015.

of borders, which imply the illegality of territorial alterations accomplished through the illegal use of force. At the same time, the bilateral agreements concluded with Ukraine were violated, in particular the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation (1997),[40] the above-mentioned Agreement on the Status and Conditions of the Black Sea Fleet Stationing on the Territory of Ukraine (1997), and the Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border (2003).[41] In addition, the Budapest Memorandum (1994)[42] must be mentioned; by this trilateral statement, the Russian Federation, along with the USA and the UK, reaffirmed their political commitment to respect the independence, sovereignty, and existing borders of Ukraine.

1.2. The Principle of the Self-Determination of Peoples

The principle of equal rights and self-determination of peoples, referred to in Article 1(2) of the UN Charter, in later international documents, such as the International Covenant on Civil and Political Rights (1966),[43] the International Covenant on Economic, Social and Cultural Rights (1966),[44] the Declaration on Principles of International Law (1970),[45] the Helsinki Final Act (1975),[46] and the Vienna Declaration (1993),[47] is defined as meaning, among other things, that all peoples *(peuples, народы)* have the right to freely determine their political status and freely pursue their economic, social, and cultural development.

In spite of the universally recognised importance of this principle and the fact that, by its very nature, this principle is an *erga omnes* norm binding

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[40] Договор о дружбе, сотрудничестве и партнерстве между Российской Федерацией и Украиной, http://kiev1.org/text-dogovora-13.html, 25-11-2015.

[41] Договор между Российской Федерацией и Украиной о российско-украинской государственной границе, http://zakon5.rada.gov.ua/laws/show/643_157, 25-11-2015.

[42] *Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the NPT,* https://www.msz.gov.pl/en/p/wiedenobwe_at_s_en/news/memorandum_on_security_assurances_in_connection_with_ukraine_s_accession_to_the_treaty_on_the_npt, 25-11-2015.

[43] Official Gazette *Valstybės žinios,* 2002, No. 77-3288.

[44] Official Gazette *Valstybės žinios,* 2002, No. 77-3290.

[45] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* http://www.un-documents.net/a25r2625.htm, 27-11-2015.

[46] *Conference on Security and Cooperation in Europe Final Act,* Helsinki, 1975, https://www.osce.org/mc/39501?download=true, 10-10-2015.

[47] *Vienna Declaration and Programme of Action,* adopted by the World Conference on Human Rights in Vienna on 25 June 1993, http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx, 10-10-2015.

on the whole international community,[48] the content of the principle remains a subject of ongoing debate insofar as this principle is applicable to peoples other than those of former colonies, non-self-governing territories, or occupied or annexed territories. First of all, neither international treaties nor soft law documents that do not create formally binding legal obligations consolidate the concept of a "people" as an entity holding the right to self-determination. There is general agreement that "a people" in the sense of an entity entitled to self-determination refers to, collectively, all inhabitants of a non-self-governing territory and, collectively, all inhabitants of an occupied or annexed territory[49] (the latter is connected with the concept of peoples subjected "to alien subjugation, domination and exploitation" as consolidated in the Declaration on Principles of International Law), as well as to the entire population of a state (political nation). However, the question as to which subgroups existing within a state should be treated as "peoples" in terms of the right of peoples to self-determination remains unresolved.[50] In legal doctrine, a "people" as a subgroup of the population of a state is often defined by invoking both objective (a historical relationship with a particular territory, common ethnic origin, language, religion, etc.) and subjective (collective identity, the perception of themselves as a unique group – "a people" – distinct from other groups) criteria.[51] In this respect, a people can be understood not only as an ethnic community, but also as a political community that has a connection with a certain territory and holds a group identity distinct from other peoples. Nevertheless, there is no common consensus on this issue; little clarity was provided by the ICJ in its Advisory Opinion of 22 July 2010 in respect of Kosovo, as the Court did not assess whether Kosovars should be treated as a "people". Therefore, international law gives no conclusive answer whether and, if so, under what conditions the inhabitants of an administrative territorial unit of a state, or another subgroup within a state, are to be unequivocally considered a "people" in the sense of an

[48] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, § 155.

[49] E.g., see the resolutions of the UN General Assembly on universal realisation of the right of peoples to self-determination: General Assembly, *Resolution No. 47/83 on Universal Realisation of the Right of Peoples to Self-Determination of 16 December 1992,* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/47/83, 10-10-2015; General Assembly, *Resolution No. 68/153 on Universal Realisation of the Right of Peoples to Self-Determination of 8 December 2013,* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/153, 10-10-2015; *Vienna Declaration and Programme of Action,* adopted by the World Conference on Human Rights in Vienna on 25 June 1993, http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx, 10-10-2015.

[50] For more, see Borgen, (note 5) p. 225-227.

[51] For more, see Laurinavičiūtė L., "'Peoples': the Perspective of International Public Law", *Jurisprudencija* 20 (1), 2013, p. 108-112.

entity entitled to self-determination. For this reason, the question whether, at least theoretically, it would be possible to claim that there exists a multi-ethnic "Crimean people", who perceives themselves to be a unique community distinct from Russians, Ukrainians, and Tatars, remains open. In reality, however, the existence of such a people is denied by the fact that, before the Russian intervention in Ukraine, there was no indication of any either already existing or evolving identity of the "Crimean people".

Due to the indeterminacy of the notion of a "people" as an entity entitled to self-determination, the interpretation of the principle of the right of peoples to self-determination has been focused mainly on the forms of the realisation of self-determination.

According to the prevailing understanding of the principle of the self-determination of peoples, this principle includes both internal and external aspects; with regard to subgroups existing within a state, priority is given to the internal aspect of self-determination, i.e. the possibility for a subgroup to freely determine their political status and freely pursue their economic, social, and cultural development within the existing state. This means that self-determination in the case of these groups is primarily associated with the possibilities of their political or cultural autonomy, as well as with the possibility of their full-fledged participation in political processes, the development of their identity, and so forth.

The external aspect of the principle of the self-determination of peoples, which is understood as meaning the determination of the political status of a territory inhabited by a certain "people" (creation of an independent state, accession to another state, etc.), is mainly associated with the situations of non-self-governing territories, occupation, etc. As held by the ICJ, "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation".[52] With regard to other situations, the Court only pointed out that whether the principle of self-determination "confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed" by the states. Similar differences were established regarding the issue of whether international law provided for the right of "remedial secession" (i.e. the right to secede from the existing state if the rights of a certain people in that state

[52] International Court of Justice, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* Advisory Opinion of 22 July 2010, § 79.

are blatantly violated) and, if so, in what circumstances.[53] In other words, the Court did not find there was any sufficiently unanimous position *(opinio juris)* among the states on the applicable international law leading to the conclusion on the existence of the right to secession in general (customary) international law. However, neither did the ICJ, taking account of the practice existing in the states, establish that there was any customary norm prohibiting the declaration of independence outside the contexts of decolonisation or external exploitation.[54]

This situation is generally described as the "silence of international law" with regard to secession: on the one hand, there is no sufficient ground for admitting the existence of the right to secession in international law; on the other hand, international law does not, in principle, prohibit the unilateral declaration of independence, either. As noted by Borgen, "international law treats secession as a fact"[55] rather than as a legal claim or prohibited action.

Nevertheless, as emphasised by Theodore Christakis, international law is not "neutral" on this matter and stands clearly on the side of central governments, which enjoy the right to take any legal measures to defend the territorial integrity of their state; in addition, state practice creates a presumption against the effectiveness of secession (the secession of an entity must be not a temporary, but an irreversible situation); above all, international law prohibits secession when it results from a violation of a fundamental norm such as the prohibition of aggression.[56]

The latter aspect was revealed by the ICJ in its advisory opinion on Kosovo. The opinion of the Court makes it clear that, under international law, unilateral declarations of independence are illegal if they are connected with the unlawful use of force or other egregious violations of general international legal norms (i.e. international customary rules binding on international community), in particular, those of a peremptory character *(jus cogens).*[57] In this respect, the Court, among other things, invoked the resolutions of the Security Council urging not to recognise Northern Cyprus and the Republika

[53] *Ibidem,* § 82.
[54] *Ibidem,* § 79.
[55] Borgen, (note 5) p. 229.
[56] Christakis T., "Self-Determination, Territorial Integrity and *Fait Accompli* in the Case of Crimea", *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht. Heidelberg Journal of International Law* 75 (1), 2015, p. 92-99.
[57] Peremptory international legal norms *(jus cogens)* are universally binding norms from which no derogation is permitted in any circumstances. Norms of such a nature have been declared by the UN International Court of Justice to include the norms prohibiting aggression, genocide, war crimes, and crimes against humanity.

Srpska and to respect the territorial integrity of the Republic of Cyprus and Bosnia and Hercegovina, respectively.[58] Therefore, the fact alone that the "Crimean referendum" on accession to Russia was conducted in the context of the threat and use of armed force – in the presence of Russian and Russia-controlled illegal military and paramilitary forces who performed an actual takeover of the territory of Crimea, in the face of wide-scope military manoeuvres along the Ukrainian borders, as well as the constant declarations of the preparedness to use force – is sufficient to deny the legality of the Crimean declaration of independence and "secession". Against this background, the circumstance that the "referendum" did not comply with the minimum international standards that guarantee the free expression of will[59] assumes a secondary role. The broad consensus among the states on this issue is expressed in the UN General Assembly Resolution (No. 68/262) on the territorial integrity of Ukraine, adopted on March 27, 2014. This resolution calls on all states to refrain from any attempts to modify the borders of Ukraine through the threat or use of force or other unlawful means; it underlines that the referendum of March 16, 2014, has no validity and urges all states not to recognise any alteration in the status of the Autonomous Republic of Crimea and the city of Sevastopol.[60] The illegality of the "referendum", which took place under control by Russian armed forces, is also acknowledged in the resolutions adopted by the European Parliament, the Parliamentary Assembly of the Council of Europe, and the OSCE Parliamentary Assembly.[61] Thus, the involvement of Russia in the process of the Crimean secession excludes the possibility of invoking the principle of effectiveness, which, under the conditions of the silence of international law on the issue of

[58] International Court of Justice, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* Advisory Opinion of 22 July 2010, § 81.

[59] The European Commission for Democracy through Law (Venice Commission), in its Opinion of 21 March 2014, held that "circumstances in Crimea did not allow the holding of a referendum in line with European democratic standards" (http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e, 10-10-2015). Circumstances indicating disregard for democratic standards are similarly referred to in the report of the UN High Commissioner for Human Rights of 15 April 2014 on the human rights situation in Ukraine, § 6.

[60] General Assembly, *Resolution No. 68/262 on Territorial Integrity of Ukraine of 27 March 2014,* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262, 10-10-2015. The resolution received votes in favour from 100 states and was voted against by 11 states, with 58 abstentions; representatives from 24 states did not participate in voting.

[61] See European Parliament, *Resolution 2014/2699(RSP) on Russian Pressure on Eastern Partnership Countries and in Particular the Destabilisation of Eastern Ukraine (17 April 2014)*; Parliamentary Assembly of the Organization for Security and Co-Operation in Europe, *Resolution on the Continuation of Clear, Gross and Uncorrected Violations of OSCE Commitments and International Norms by the Russian Federation (2015);* Parliamentary Assembly of the Council of Europe, *Resolution No. 1988 on Recent Developments in Ukraine: Threats to the Functioning of Democratic Institutions (2014)* and *No. 1990* on *Reconsideration on Substantive Grounds of the Previously Ratified Credentials of the Russian Delegation (2014).*

secession, could provide a ground for the legality of a successful and irreversible secession only in the absence of any circumstances violating fundamental international norms *(ex factis jus oritur* – "the law arises from the facts").

The norm that rules out the legality of the declaration of independence, as well as of secession, in the context of military intervention should be considered an expression of the general legal principle *ex injuria jus non oritur.* This norm can also be linked to the provision of the Declaration on Principles of International Law that specifies the content of the principle of equal rights and self-determination of peoples and prohibits invoking this principle as an instrument for violations of the principle of territorial integrity: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country".[62]

Ultimately, as far as "remedial secession" is concerned, consideration should be given to the position set out in the Opinion of March 21, 2014, by the European Commission for Democracy through Law (Venice Commission), acting as an advisory institution of the Council of Europe on issues of constitutionalism. Having observed that "remedial secession" remains controversial under international law, the Venice Commission indicated that:

> <…> a secession would only be an option of last resort in a situation where a people's right to internal self-determination has been persistently and massively violated and all other means have failed. Such a secession would thus have to be based on the mentioned material conditions and also be pursued in forms and procedures satisfying international law. If a people sought to secede from a state under the given narrow conditions, exercising its right to self-determination, it would be free to decide whether it will establish a new state or become a part of an already existing one. A state that would unify with such an entity or would incorporate it into its territory, would not act in violation of international law.[63]

It is obvious that, in the case of Ukraine, it is not possible to speak about discrimination against the Crimean population, which has been granted broad autonomy under the Ukrainian Constitution, or discrimination against any other inhabitants of Ukrainian territories, or about the prohibition on participation in the process of making political decisions, or the prohibition on the development of national identity, etc. For example, in the report by the Office of the UN High Commissioner for Human Rights, it was assessed that Russian-

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[62] UN General Assembly, *Declaration on Principles of International Law* (note 45).

[63] European Commission for Democracy through Law (Venice Commission), *Opinion on whether Draft Federal Constitutional Law No. 462741-6 On Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject of the Russian Federation within the Russian Federation is Compatible with International Law,* 21 March 2014, § 26-27, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)004-e, 10-10-2015.

speakers in Crimea had not been subject to threats; whereas serious concerns were expressed regarding the violations of civil and political rights of the Crimean inhabitants not supporting the processes taking place in Crimea.[64] Thus, the report by the Office of the UN High Commissioner for Human Rights, also the Opinion of the Venice Commission on "Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles," as well as other sources, indicate that the organisation and conduct of the "Crimean referendum" did not meet the established international standards, and that additionally there were no negotiations among the stakeholders.[65] In the light of this, the so-called "safeguard clause" of the Declaration on Principles of International Law (stipulating that the principle of the self-determination of peoples may not be "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"),[66] which constitutes the basis for the reasoning provided by the proponents of the legality of "remedial secession", becomes yet another argument in favour of the territorial integrity of Ukraine.

2. The Assessment of the Crimean Annexation in the Publications of Russian Legal Scholars

The publications of Russian authors dealing with the legal assessment of "the reunification of Crimea with Russia" are not numerous. In part this can be accounted for by the challenging task facing these authors, which requires them to find original decisions falling outside the existing consensus on the interpretation of international legal norms relevant to the assessment of the situation in question. It is also evident that the arguments provided by these scholars mainly develop the official position of the Russian Federation; in par-

[64] "It is widely assessed that Russian-speakers have not been subject to threats in Crimea" (Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine of 15 April 2014,* § 89).
[65] See note 59.
[66] UN General Assembly, *Declaration on Principles of International Law* (note 45).

ticular, they extensively reflect statements put forward in the "Crimean speech" by Putin, even if there is no direct reference to this speech. A close connection between the statements by Russian officials and the publications justifying the actions of Russia determines that, in these publications, along with legal arguments, a lot of attention is given to political considerations; in addition, legal reasoning is deliberately intertwined with arguments that appear to be irrelevant or obviously erroneous from the point of view of contemporary international law. For example, after Putin had contended that the change of regime in Ukraine could be considered a revolution, as a result of which there had emerged a new state, with which Russia had signed no binding agreements,[67] this argument equating the concept of statehood with one of its criteria – the government – was reiterated as purportedly a legal one in the publication of Kira Sazonova.[68]

The aspect of the self-determination of peoples invoked with the aim of justifying the legality of the "secession" of Crimea is dominant in the Russian official rhetoric, as well as in Russian scholarly argumentation. Whereas the principle of the prohibition of the use of force and, at the same time, possible justifications for the actions of Russia in connection with the use of armed force are, as a rule, excluded from the scope of analysis or are mentioned only fragmentally.[69] The self-determination of peoples is referred to in the preamble to the "treaty" on the accession of the Republic of Crimea to the Russian Fede-

[67] "Yes, but if this is revolution, what does this mean? In such a case it is hard not to agree with some of our experts who say that a new state is now emerging in this territory. This is just like what happened when the Russian Empire collapsed after the 1917 revolution and a new state emerged. And this would be a new state with which we have signed no binding agreements" (Владимир Путин ответил на вопросы журналистов о ситуации на Украине, стенограмма пресс-конференция от 4.3.2014, http://kremlin.ru/events/president/transcripts/press_conferences/20366/audios, 10-10-2015). This is an application of the soviet international law postulate that no legal obligations of the tsarist Russia were binding on the USSR (Маркссен, (note 39) c. 207).

[68] See Сазонова К.Л., Международное право и украинский конфликт: что было, что будет, чем сердце успокоится, Электронный журнал «*NB: Международное право*» 1, 2014, с. 1-15, http://e-notabene.ru/wl/article_11666.html, 25-11-2015. A variation of this argument is put forward by Georgiy Velyaminov, who maintains that it may not be claimed that Russia has breached the Budapest Memorandum, since, upon the change of the Ukrainian government, Ukraine has changed in substance as a legal entity (Вельяминов Г.М., Воссоединение Крыма с Россией: Правовой ракурс, http://www.igpran.ru/articles/3556/, 25-11-2015).

[69] This can be accounted for, among other things, by the position expressed in the "Crimean speech" by Putin that there are no grounds for speaking of aggression in the situation "without a single shot being fired and with no human casualties" (see Обращение Президента Российской Федерации от *18* марта *2014* года, http://kremlin.ru/events/president/news/20603, 10-10-2015). In addition, the arguments aimed at justifying the use of Russian military forces in Ukraine are mostly used in connection with the decision of the Federation Council of 1 March 2014, which allowed Putin to use the military forces of the Russian Federation on the territory of Ukraine.

ration.[70] Furthermore, the expression of the will of the population of Crimea (the referendum results) serves as a ground for such documents as the Executive Order of the President of the Russian Federation (No. 147) "On Recognising the Republic of Crimea" of 17 March 2014[71] and the Federal Constitutional Law "On Admitting to the Russian Federation the Republic of Crimea".[72] Therefore, for the purposes of this article, focus is placed on the main aspects of the interpretation of the principle of self-determination in the Russian legal doctrine, as well as on the application of this principle to the situation of Crimea.

2.1. The Reinterpretation of the Principle of the Self-Determination of Peoples in the Russian Official Position and Legal Doctrine

2.1.1. The Interpretation of the Principle of the Self-Determination of Peoples "Before Kosovo"

In Russian legal doctrine, the concept of the principle of the self-determination of peoples, insofar as it applied to the context outside the decolonisation process, could for a long time be defined by certain characteristic features.

Firstly, in view of the existing indeterminacy of the notion of a "people" in international law, the general position was that a "people" as an entity entitled to self-determination must be understood in broader terms than a "nation" in the ethnic sense, but must not be equated with the population inha-

[70] "The Russian Federation and the Republic of Crimea, [...] based on the free and voluntary expression of will by the peoples of Crimea at a nationwide referendum, [...] during which the peoples of Crimea made the decision to reunite with Russia on the rights of a subject of the Russian Federation [...]" (Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов, http://kremlin.ru/events/president/news/20605, 10-10-2015).

[71] "Given the declaration of will by the Crimean people in a nationwide referendum held on 16 March 2014, the Russian Federation is to recognise the Republic of Crimea as a sovereign and independent state, whose city of Sevastopol has a special status" (Указ «О признании Республики Крым», http://kremlin.ru/events/president/news/20596, 10-10-2015).

[72] "The Republic of Crimea shall accede to the Russian Federation on the following grounds: 1) the results of the nationwide referendum [...] in the Republic of Crimea" (Paragraph 2(1) of Article 1) (Федеральный конституционный закон от 21.03.2014 г. № 6-ФКЗ, О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов – Республики Крым и города федерального значения Севастополя, http://kremlin.ru/acts/bank/38220, 25-11-2015).

biting a certain part of the territory of the state.[73] In other words, priority was given to the concept of a "people" as a *people-populus,* which can be multi-ethnic, rather than a *people-natio;* thus, a "people" was primarily perceived as the entire population of a state. For example, Stanislav Chernichenko maintained that the right to self-determination belonged to the whole people of Cyprus, whereas the creation of a separate Turkish state contradicted the principle of self-determination and violated the territorial integrity of Cyprus.[74] Although it was recognised that the right to participate in the process of self-determination and not to be subject to discrimination must be equally guaranteed to persons not belonging to the so-called title-nation of the state, the possibility of recognising the right of national minorities to secession was categorically rejected.[75]

Secondly, although an emphasis was placed on self-determination exercised primarily within the framework of the existing state (internal self-determination), the right to "remedial secession" as a form of realising self-determination was recognised, as well. Nevertheless, the right to secede from the existing state was linked with exceptional situations: where internal self-determination was impossible,[76] as well as where a given people were not represented in the government and certain ethno-territorial parts of a state were discriminated.[77] At the same time, it was stressed that, before resorting to secession, all the attempts to secure the rights of a given people through internal self-determination must be exhausted.[78]

Thirdly, the provision, deriving from the documents consolidating the principle of the self-determination of peoples, that self-determination must be realised "freely, without outside interference" was emphasised and the illegality of armed intervention by third states without authorisation by the UN Security Council was underlined.[79]

Fourthly, it was recognised that a state was entitled to use force, inclu-

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[73] Chernichenko S.V., Kotliar V.S., "Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends" in Dahlitz J., ed., *Secession and International Law – Conflict Avoidance – Regional Appraisals,* The Hague: T.M.C. Asser Press, 2003, p. 77-78, 84.

[74] Черниченко С.В., Теория международного права: Старые и новые теоретические проблемы, Москва: НИМП, 1999, с. 184.

[75] Chernichenko S.V., Kotliar V.S., (note 73) p. 77-78.

[76] Остроухов Н.В., Территориальная целостность государств в современном международном праве и ее обеспечение в Российской Федерации и на постсоветском пространстве, Москва: Российский университет дружбы народов, 2010, с. 10.

[77] Кузнецов В.И., Тузмухамедов Б.Р., отв. ред., Международное право: Учебник, Москва: Норма, 2010, с. 186.

[78] Chernichenko, S.V., Kotliar V.S., (note 73) p. 83.

[79] *Ibidem*, p. 80, 85.

ding armed force, in defence of its territorial integrity where the question of self-determination was raised in contravention of the constitutional order and violence was used.[80]

Fifthly, in cases of external self-determination, the necessity was also recognised for taking account of the rights and interests of other peoples,[81] and due consideration was given to challenges posed by the abuse of the principle of self-determination where "political, nationalist, separatist, or other factors become the driving force in the use of this principle for self-interest".[82] For example, in summing up the Russian international legal doctrine concerning the relationship between the principles of the self-determination of peoples and the territorial integrity of states, Aleksey Moiseyev pointed out that:

> if the territorial self-determination of peoples is connected not with a voluntary peaceful expression *of the will of the whole people of the state* [emphasis added], but with serious international disagreements and conflicts, then the acquisition of political sovereign independence is in conflict with international law.[83]

Stanislav Chernichenko and Vladimir Kotliar, when commenting on the final documents adopted at the Americas' and European legal conferences on the issues of secession in 2001, claimed that the position of the USA and Western Europe, according to which international law remained neutral on the matter of the right to secession, was inadequate to protect against separatism and terrorism, since it left open the possibility of proclaiming any separatist movement as legitimate.[84] According to these authors, the position of CIS lawyers was more advantageous, since the recognition of the legality of unilateral secession in cases where secession is opted by peoples as an ultimate resort to achieve self-determination, at the same time, underlined the aim of secession – i.e. the achievement of self-determination – and, thus, precluded the use of secession for purposes other than the realisation of self-determination.[85]

It should be noted that the issue of self-determination was raised in the Russian Federation not only in theoretical discussions, but also in constitutional justice cases. On March 13, 1992, the then Constitutional Court of the Russian Soviet Federative Socialist Republic passed the judgment on the constitutionality of the Declaration on the State Sovereignty of the Tatar Republic

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[80] *Ibidem,* p. 79-80.

[81] Блищенко И.П., «Международно-правовые проблемы государств, входящих в СНГ», Российский ежегодник международного права 1996-1997 1, с. 5; Кузнецов В.И., Тузмухамедов Б.Р., (note 77), с. 186.

[82] Кузнецов В.И., Тузмухамедов Б.Р., (note 77), с. 186-187.

[83] Моисеев А.А., Суверенитет государства в международном праве, Москва: Восток-Запад, 2009, с. 50.

[84] Chernichenko, S.V., Kotliar V.S., (note 73) p. 84-85.

[85] *Ibidem,* p. 83-84.

and the decision to hold a referendum on the state status of the Republic of Tatarstan. Based on the Declaration of the UN General Assembly on Principles of International Law, the Helsinki Final Act, and other international documents, the Constitutional Court of the RSFSR emphasised that "without denying the right of a people to self-determination, realised through the legal expression of will, regard should be had to the fact that international law restricts it by requiring conformity with the principles of territorial integrity and respect for human rights."[86] The Court held that "any actions aimed at violating territorial integrity and the national unity of the people undermine the constitutional order of the RSFSR and are incompatible with international norms regulating human rights and the rights of peoples."[87] Interpreting the principle of the self-determination of peoples from the perspective of the combination of different principles, the Constitutional Court held that the only legitimate and fair means of solving the question of the status of Tatarstan was the negotiation process that must be based on law and involve the participation of all the interested subjects of the RSFSR.[88]

The relationship between the principles of the self-determination of peoples and the territorial integrity of states, albeit indirectly, was also addressed in the judgment of the Constitutional Court of the Russian Federation of July 31, 1995, on the use of the armed forces on the territory of the Chechen Republic. In this judgment, the Constitutional Court pointed out that "the constitutional aim of preserving the integrity of the Russian State is in conformity with the universally recognised international norms concerning the right of peoples to self-determination"; in addition, the Court noted that the international treaties to which the Russian Federation was a party (e.g., the Additional Protocol (II) to the Geneva Conventions relating to the protection of victims of non-international armed conflicts) were "premised on the possibility of using armed forces by a state to defend its national unity and territorial integrity".[89] Thus, the Constitutional Court of the Russian Federation declared the use of armed forces for the purpose of preserving the territorial integrity of the state to be in conformity with the international obligations of Russia, including the obligation to respect the principle of the self-determination of peoples.

Ultimately, in the judgment of June 7, 2000, on the constitutionality of

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[86] Постановление Конституционного Суда РСФСР от 13 марта 1992 года, Москва, http://doc.ksrf.ru/decision/KSRFDecision40636.pdf, 25-11-2015.

[87] *Ibidem.*

[88] *Ibidem.*

[89] Постановление Конституционного Суда Российской Федерации от 31 июля 1995 года, Москва, http://doc.ksrf.ru/decision/KSRFDecision30248.pdf, 25-11-2015.

certain provisions of the Constitution of the Republic of Altai, the Constitutional Court of the Russian Federation ruled that the sovereignty of the Russian Federation belongs to "the multinational people of Russia taken as a whole" and that:

> under the Constitution of the Russian Federation, the sovereignty of the Federation, as well as the constitutional legal status of the constituent republics of the Federation, is linked not with the expression of the will of these republics in the form of a treaty, but with the expression of the will of the multinational Russian people, which, realising the principle of the equality and self-determination of peoples, constituted the revived sovereign statehood of Russia as the historically established state unity in the present federal form. [...] The republics, as constituent subjects of the Russian Federation, have no right to endow themselves with features of a sovereign state, even on the condition that their sovereignty would be recognised as limited.[90]

The Constitutional Court also held that peoples living on the territory of the constituent subjects of the Russian Federation must be guaranteed the protection and use of land and other natural resources, as the basis of their lives and activities; nevertheless, no constituent subject of the Russian Federation may proclaim ownership over natural resources on its territory, since this would violate the sovereignty of the Russian Federation.[91]

From the above-mentioned judgments, it is obvious that the Constitutional Court of the Russian Federation expressed the position in favour of such understanding of the principle of the self-determination of peoples that guarantees the preservation of the territorial integrity of a state; the Court declared the people of the entire state (of the Russian Federation) to be an entity entitled to self-determination and rejected the possibility of entitlement to self-determination for the constituent entities of the federation and, respectively, for the population of these administrative-territorial units.

A similar interpretation of the principle of the self-determination of peoples oriented towards the protection of the territorial integrity of states was set out in the written statement of the Russian Federation submitted to the ICJ in the case on Kosovo. In this written statement, it is indicated that:

> the population […] of an existing state, taken as a whole, undisputedly, qualifies as a people entitled to self-determination. Whether and under which conditions an ethnic or other group within an existing state may qualify as a "people" is said to be subject to extensive debates.[92]

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[90] Постановление Конституционного Суда Российской Федерации от 7 июня 2000 года, Москва, http://doc.ksrf.ru/decision/KSRFDecision30359.pdf, 25-11-2015.

[91] *Ibidem*.

[92] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion). Written Statement of the Russian Federation*, § 81 http://www.icj-cij.org/docket/files/141/15628.pdf, 10-10-2015.

In assessing the situation of Kosovo, the Russian Federation maintained that neither the Constitutions of 1991-1992 and of 1999 of the Socialist Federal Republic of Yugoslavia, nor the position of the international community, had ever provided any grounds for considering the population of Kosovo to have been a people entitled to self-determination, in particular, in terms of the creation of an independent state.[93] In addition, the Russian statement set out a particularly strict view on the circumstances determining the legality of unilateral secession. It was noted that the primary purpose of the "safeguard clause" of the Declaration on Principles of International Law[94] was to serve as a guarantee of the territorial integrity of states, and that, although this clause might be construed as authorising secession under certain conditions,

> those conditions should be limited to truly extreme circumstances such as an outright armed attack by the Parent state, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the Parent state and the ethnic community concerned within the framework of the existing state.[95]

Thus, in the official statement submitted to the ICJ, the right to secession was associated not with every manifestation of discrimination, but with situations that, in principle, would amount to genocide, ethnic cleansing, crimes against humanity, or war crimes.

2.1.2. The Reinterpretation of the Principle of the Self-Determination of Peoples

The official Russian position and, at the same time, the Russian doctrine on the principle of the self-determination of peoples took a new direction in the context of the armed Russian-Georgian conflict and the subsequent formation of certain territorial entities. For instance, during the round-table discussion held by the Russian Ministry of Foreign Affairs on September 5, 2008, it was emphasised that "the constant threat from the Georgian side to resolve the problem of South Ossetia and Abkhazia by military means has given the right to *the peoples* [emphasis added] to raise the issue of separation". During the discussion, it was argued that military action against South Ossetia and the preparation of military actions against Abkhazia determined that "the princi-

[93] *Ibidem*, § 90-91, 97, Conclusions.
[94] See the text at note 66.
[95] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion). Written Statement of the Russian Federation*, § 88.

ple of territorial integrity in these circumstances was no longer applicable".[96] Along with these statements, contrasting with the previously mentioned conclusions of the Constitutional Court of Russia that point to a people as the entire population of a state and give priority to the territorial integrity of a state, pseudo-legal rhetoric was developed. In his article, Sergey Lavrov, the Russian Minister of Foreign Affairs, contended the following:

> We cannot regard people as an "adjunct" of whoever's territory that may arbitrarily, without their consent, pass under the sovereignty of a state in breach of the principles of international law, especially as the Tbilisi authorities, having proclaimed independence in 1991, referring to the Soviet Law on Secession of Union Republics from the USSR, denied the autonomies within the Georgian SSR the right to decide their own fate, as required by the same Law.[97]

Accordingly, the arguments used to present the incorporation of Crimea to Russia as a legitimate case of the realisation of self-determination can be viewed as a coherent continuation of the position and rhetoric developed in the context of the South Ossetian and Abkhazian "secessions". In substance, this position is at variance with the way the right of peoples to self-determination was interpreted by Russian lawyers before the Advisory Opinion of the ICJ on Kosovo.

The examination of arguments of the Russian legal specialists constructing the narrative of the "reunification of Crimea with Russia" brings to light certain aspects characterising the "new" interpretation and application of the principle of self-determination and of an entity entitled to self-determination in the context of the Crimean situation. The following analysis focuses on five key aspects of this "new" interpretation.

First, the adopted line of reasoning draws on a flexible concept of a "people". In this usage, the term denotes a certain population that inhabits a particular territory and shares common political self-consciousness. For example, Anatoly Kapustin argues that the inhabitants of Crimea have developed into a political-ethnic community that should be considered entitled to self-determination. According to this author, in the referendum on independence a multi-ethnic people of Crimea, composed of all ethnic groups living in Crimea, "showed themselves as one self-determined people and overwhelmingly opted for a reunification with Russia".[98] Based on the conclusions by the Internatio-

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[96] «Круглый Стол» в Дипакадемии МИД РФ, http://www.dipacademy.ru/news288.shtml, 25-11-2015.
[97] Lavrov S., "Russian Foreign Policy and a New Quality of the Geopolitical Situation", *Diplomatic Yearbook 2008,* http://archive.mid.ru//brp_4.nsf/0/19E7B14202191E4AC3257525003E5DE7, 25-11-2015.
[98] Kapustin A., "Crimea's Self-Determination in the Light of Contemporary International Law", *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht. Heidelberg Journal of International Law* 75 (1), 2015, p. 115.

nal Commission of Jurists on East Pakistan (Bangladesh),[99] as well as on the precedent of Kosovar Albanians, Vladislav Tomsinov similarly contends that the inhabitants of Crimea have every reason to be considered a people holding the right to self-determination.[100] The political character of a people is also underlined by Vladislav Tolstykh. In his opinion, the understanding that a people is a political union, which considers that the right to self-determination, including the right to secession, can be invoked by groups excluded from political communication, since such an exclusion implies that these groups are concurrently excluded from the people of the state.[101]

Although the authors defending the "secession" of Crimea avoid disclosing the features of "the people of Crimea" in greater detail, these features could be linked with the arguments about the historical and cultural relationship of Crimea with Russia as the "historical homeland", as well as with the arguments about the "Russianness" of Crimeans. For example, Tomsinov maintains that the political and cultural autonomy of Crimea, consolidated in the Constitution of May 6, 1992, adopted by the Supreme Council of the Crimean Autonomous Republic,

> ensured *the retention of its Russianness* [emphasis added here and afterwards]. This autonomy was a compromise, on the one hand, between Russia and Ukraine and, on the other, between Crimea and Ukraine. Such a compromise gave *the Russian people [russkim lyudiam]* a possibility for the full-fledged realisation of their right to self-determination without seceding from Ukraine, i.e. within the Ukrainian state.[102]

An open letter addressed to the Executive Council of the International Law Association, signed by Kapustin on behalf of the Executive Board of the Russian Association of International Law, emphasises that ethnic Russians

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[99] The International Commission of Jurists held that the population of East Pakistan (Bangladesh) should be considered to constitute a "people" in the sense of the principle of the right of peoples to self-determination. In its conclusions, the Commission held that certain general characteristics possessed in common, such as historical, racial, ethnic, religious, linguistic, etc. common features, are not by themselves either essential or sufficiently conclusive to prove that a particular group constitutes a people; a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist; therefore, the fact of constituting a people is a political phenomenon *(The Events in East Pakistan. A Legal Study by the Secretariat of* the International Commission of Jurists, Geneva, 1972, § 70, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1972/06/Bangladesh-events-East-Pakistan-1971-thematic-report-1972-eng.pdf, 25-11-2015; also Томсинов В.А., «Крымское право», или Юридические основания воссоединения Крыма с Россией, *Вестник Московского университета. Серия 11. Право,* 5, 2014, с. 17).

[100] Томсинов, (note 99) с. 17-18, 29.

[101] Tolstykh V., "Three Ideas of Self-Determination in International Law and the Reunification of Crimea with Russia", *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht. Heidelberg Journal of International Law* 75 (1), 2015, p. 124.

[102] Томсинов, (note 99) с. 26.

in Crimea are not a minority, since Crimea historically was part of Russia.[103] Thus, although this discourse is formally about the multi-ethnic "people of Crimea" (the official documents on the incorporation of Crimea into the Russian Federation refer to "Crimean peoples"), emphasis is placed on the importance of the ethnic Russians. At the same time, attempts are made to deny their status as a national minority (a group holding no right to self-determination in the form of secession under the established doctrine).

Secondly, in order to substantiate the right of Crimea to unilateral secession, the concept of "remedial secession" is brought into play. For this purpose, two interrelated lines of argumentation are used: the first line, which is dominant, centres around the alleged restrictions on the Crimean autonomy and the exclusion of Crimeans from participation in political processes; the second one highlights the alleged violations of human rights and threats faced by "the people of Crimea". Although priority is declared to be given to internal self-determination,[104] suggesting that self-determination through secession can be invoked only in exceptional circumstances,[105] continuity with the previously prevailing official and doctrinal provisions concerning the content of the right to self-determination becomes totally formal. In order to validate the right of Crimea to unilateral secession, the conditions for the exercise of the right to secession and the concept of internal self-determination itself are reformulated in substance.

For example, Kapustin maintains that the people of Crimea initially sought "national independence within the framework of Ukraine"; but, as the process of the Crimean statehood was terminated by Ukraine, Crimeans acquired the right to secession:

> [Autonomy] was the result of a long and consistent struggle of the people of Crimea. [...] Consent to be a part of Ukraine was expressed freely in the Constitution of Crimea in 1992, but it was accompanied by the proclamation of its supremacy in relation to natural resources, material, cultural and spiritual values and the exercise of sovereign rights within the whole territory of the Crimean Republic. It was also established that the Republic of Crimea in the face of its public bodies and officials shall have in its

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[103] Открытое письмо в Исполнительный совет Ассоциации международного права, http://www.ilarb.ru/html/news/2014/5062014.pdf, 10-10-2015.

[104] E.g., Tomsinov argues that "only when the right to self-determination is realised internally within the state, this right is properly compatible with the territorial integrity of states, which is particularly important for the contemporary international legal order, the foundations of which rest upon both of these principles" (Томсинов, (note 99) c. 29).

[105] E.g., Kapustin indicates that "without prejudice to the radical approach to the right to self-determination, allowing its implementation by all peoples, including ethnic groups, we consider a more cautious approach, which allows secession of a territory [...] only in exceptional circumstances" (Kapustin, (note 98) p. 106-107).

> territory all powers, except those which the Republic voluntarily delegates to Ukraine [...]. Nevertheless, the development of the Crimean State was forcibly terminated by the central government of Ukraine, without any hint of a desire to take into account the will of the people of Crimea. The republic was deprived of all its rights, except the right to be called an Autonomous Republic.
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> Ukraine did not allow the people of Crimea to freely determine its will by means of internal democratic procedures (plebiscite, referendum, etc.). This can be interpreted in the spirit of the Friendly Relations Declaration of 1970 as depriving a people of the right to internal self-determination, rather than acting in a spirit of respect for that right and promoting and assisting in its implementation. This illegal coercion prevented the free exercise of the right to internal self-determination. However, this coercion brings into play the right to external self-determination and freedom to choose the path of its development, including the right to determine freely its historical destiny in accordance with international law.[106]

Similar arguments, which evidently contradict the position of the Constitutional Court of the Russian Federation concerning the indivisibility of state sovereignty, are provided by Tomsinov, who considers the autonomy of the Crimean Republic as consolidated in the Constitution adopted by the Supreme Council of Crimea in 1998 definitely insufficient.[107]

This line of argumentation about the purportedly denied possibility of internal self-determination distorts the concept of "internal self-determination", which is generally understood as the right to certain autonomy and the possibility of full-fledged participation, free of any discrimination, in the political life of the state.[108] Instead, the above-mentioned authors equate the internal form of the realisation of self-determination with the right of the inhabitants of a certain part of the state territory to determine unilaterally their political status, including the opportunity to seek sovereignty. As a result, the boundaries between internal and external self-determination are blurred. Furthermore, Kapustin goes as far as to directly accuse Ukraine of having not created the proper conditions for the separation of the Republic of Crimea. He points out that, on 5 May 1992, the Supreme Council of Crimea adopted the act on state independence of the Republic of Crimea, which was suppo-

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[106] *Ibidem,* p. 114-115.

[107] Томсинов, (note 99) с. 26-28.

[108] E.g., Chernichenko points out that internal self-determination is the choice of a certain form of association with other peoples within the state, e.g., on the grounds of autonomy or as a federal entity (Черниченко С.В., Право народов на самоопределение. Защита меньшинств в современном международном праве, Лекция от 2 марта 2004, Москва, http://www.terralegis.org/terra/lek/lek_27.html, 25-11-2015). An essential feature of internal self-determination is considered to be the ensuring of an adequate representation of all peoples living in the state in the central governmental bodies (Малов Д., «Принцип равноправия и самоопределения народов в системе современного международного права: особенности толкования и проблемы субъектности», Вестник международных организаций 2 (41), 2013, с. 145-146).

sed to take effect after confirmation by the Crimean referendum, scheduled for September 2 of the same year. However, on 13 May 1992, the Supreme Council of Ukraine found the proclamation of the act on state independence and on the referendum to be unconstitutional, suspended the actions of the Supreme Council of Crimea, and dissolved the Crimean Parliament. On 9 July 1992, the Supreme Council of Crimea declared a moratorium regarding the decree on the referendum.[109] According to Kapustin, "this suggests that the people of Crimea was clearly refused its right to *external self-determination* [emphasis added]".[110]

Ultimately, Kapustin claims that the inhabitants of Crimea were excluded from political representation. He points out that "an unconstitutional coup […] deprived the Crimean people of the right to representation in the central government of Ukraine".[111] This argument is elaborated by Tolstykh, who links the direct exclusion of the Crimean population from participation in political communication with the removal of Viktor Yanukovych from the office of the President of Ukraine, also with the campaign directed against the Party of Regions and the Communist Party of Ukraine, as well as with an inadequately representative transitional Ukrainian government and the lustration process.[112]

The arguments aimed at showing the consistent striving of the Crimean inhabitants towards self-determination and underlining the concurrent denial of their possibilities of exercising this right are supplemented with statements about threats posed to "the people of Crimea". Kapustin considers these threats

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[109] Kapustin, (note 98) p. 110-111.

[110] *Ibidem,* p. 111.

[111] *Ibidem,* p. 116.

[112] "The right to secession arises when a nation is excluded from internal political communication, when its will is not taken into account in political decision making" (Толстых В.Л., «Воссоединение Крыма с Россией: правовые квалификации», Евразийский юридический журнал 5 (72), 2014, § 5, http://www.eurasialaw.ru/index.php?option=com_content&view=article&id=6186%3A2014-06-25-08-34-35&catid=442%3A2014-06-25-08-30-09&showall=1, 25-11-2015); also "Indeed, a number of pieces of evidence suggest that after the coup d'état at the end of February 2014 in Ukraine, the Crimean population found itself in that position. For example, the coup removed from power the president who had been elected in 2010 by 78.24% of voters in Crimea and 84.35% in Sevastopol (Ukraine in total – 48.95%). Secondly, after the coup a campaign directed against two parliamentary parties was started: the Party of Regions, which in 2012 was supported by 52.26% of voters in Crimea and 46.90% in Sevastopol (Ukraine in total – 30%) and the Communist Party of Ukraine (19.41%, 29.46% and 13.18%, respectively). At the official level these parties have been declared anti-national, certain functionaries have been harassed, party offices and party members have been attacked, including during parliamentary sessions; about 80 of 180 deputies left the Party of Regions faction in Parliament. Thirdly, after the coup the transitional government was formed representing only two of the five parliamentary parties: "Batkivshchyna" and "Svoboda", which collectively received 36% of votes in the parliamentary elections of 2012 […]. Fourthly, almost all branches and levels of government were subject to lustration; the key positions were occupied by the representatives of the political forces that came to power. Fifthly, the new government refused to carry out measures aimed at restoring the social consensus (referendum, parliamentary elections, and negotiations with other stakeholders)" (Tolstykh, (note 101) p. 135.

by employing the terminology of the Russian position in the case on Kosovo and by referring to the alleged human rights violations and a threat of the emergence of mass-scale violations:

> Radical nationalist elements came to power in Kiev; they openly expressed threats against all those disagreeing with them, especially persons acting for the preservation of the Russian language and culture in the territory in which they lived. The population of Crimea […] did not hide their cultural and linguistic affinity to Russia. […] In the Crimean situation *the physical existence of the people was at stake* [emphasis added] and therefore a secession from Ukraine was justified under the requirements of "remedial secession". Of course, compared to Bangladesh, Kosovo and other examples of this kind, the situation in Crimea was different. In fact there were no mass killings of civilians or full-scale military actions, but this was not to the merit of the Ukrainian government or the international community.
>
> […] the political and legal situation prevailing after the unconstitutional coup in Ukraine caused a real threat to the life, health and human rights of the majority of the population of Crimea, which from the beginning rejected unconstitutional methods of political struggle.[113]

The strategy combining arguments about the continuity of aspirations for self-determination and a threat to the physical existence of peoples was also used in 2008 in a statement by then Russian President Dmitry Medvedev concerning the decision to recognise the independence of South Ossetia and Abkhazia:

> Saakashvili opted for genocide to accomplish his political objectives. By doing so he himself dashed all the hopes for the peaceful coexistence of Ossetians, Abkhazians and Georgians in a single state. The peoples of South Ossetia and Abkhazia have several times spoken out at referendums in favour of independence for their republics. It is our understanding that after what has happened in Tskhinvali and what has been planned for Abkhazia they have the right to decide their destiny by themselves.[114]

The threat to the existence of "the people of Crimea" is constructed in a different way by Tomsinov and Tolstykh, who emphasise the cultural rather than physical aspect of this threat and, thus, take a position completely different from the official position of the Russian Federation as submitted to the ICJ in the case on Kosovo.

According to Tolstykh, the purpose of the principle of self-determination is to ensure participation in the political process rather than to protect human rights (the latter function is fulfilled by the principle of human rights). Consequently, the observance of human rights does not constitute sufficient proof that political communication involves the participation of all the authorised subjects. For this reason, "the absence of human rights violations in Cri-

[113] Kapustin, (note 98) p. 116-117.

[114] *Statement by President of Russia Dmitry Medvedev,* http://archive.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml, 10-10-2015.

mea similar to those that had taken place in Kosovo may not serve as a ground for refusing its population, excluded from political communication, the right to self-determination".[115] As maintained by Tolstykh:

> the political meaning of the principle of self-determination […] involves not only ensuring the possibility of participation in the political process, but also ensuring the possibility of retaining the identity of a nation. Therefore, the violation of the principle of self-determination occurs not only in cases where a nation is directly excluded from the political process, but also where the identity of a nation is threatened as a result of a destructive impact on its subjective and objective features […]. In this respect, it is also possible to speak about exclusion from the political process: not a direct but an indirect one – carried out through the imposition of cultural requirements, which can be overcome only at the expense of the loss of the identity of a nation.
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> Some events in Ukraine can be viewed as an attempt to impose the aforementioned requirements; such events include the initiative for the repeal of the law on regional languages, numerous cases of the demolition of monuments to Lenin (which are rather national than political symbols), anti-Russian proclamations […],[116] as well as forced spreading of ideas of European integration and European identity.[117] […] A massive scale and systematic character of these events and support or approval from the new government heightened the threat posed by these measures and have justified the separation of Crimea to a significant extent.
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> The imposition of cultural requirements can be qualified as genocide, though not in the narrow sense as defined by the Convention on Genocide […], but in the broad sense as defined by Lemkin.[118]

In addition, "the choice made by Crimea is not only political but also ideological", since, by opting for incorporation into Russia, the Crimeans rejected the liberal systems that have served as an instrument for the ideology of Western colonisation in the 21st century.[119]

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[115] Толстых, (note 112) § 8.

[116] *Ibidem,* § 9.

[117] Tolstykh, (note 101) p. 136.

[118] Толстых, (note 112) § 9. Authors' note: Raphael Lemkin, the author of the term "genocide", understood genocide not just in terms of the mass killing of individuals belonging to a certain national group, but also as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group" (Lemkin R., *Axis Rule in Occupied Europe,* Clark, New Jersey: The Lawbook Exchange Ltd, 2005, p. 79); Article 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide consolidates the concept of genocide that underlines the physical destruction of a national, ethnical, racial, or religious group: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group (https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf, 10-10-2015).

[119] Толстых, (note 112) § 10.

Cultural threats faced by "the people of Crimea" are similarly highlighted by Tomsinov, who indicates that situations where a people cannot realise its self-determination unless seceding from the existing state and creating its own independent and sovereign state, or being incorporated into another state (as happened in the case of Crimea), should be linked not only with colonial dependence, but also with the cases where part of the population of a state is persecuted on national, ethnical, or cultural grounds:

> The preservation of a people is inconceivable without the preservation of its culture, language, faiths, way of living, historical memory, and sanctities. Therefore, egregious violations of human rights, coercion against a people and its annihilation, should be understood as meaning not only genocide, the physical extermination of a people, but also a policy conducted by state authorities on the eradication of all the enumerated elements of the spiritual life of a people.
>
> The first [...] steps [of radicals-zapadniks] on the state arena, their first assertions, showed the Crimeans that virtually the principal aim of the activity of these people was the eradication of the Russian culture, the Russian language, and the historical memory of the Russian and Ukrainian peoples.
>
> For that matter, there were all grounds for the people of Crimea to make the decision about the impossibility of ensuring its right to self-determination within the framework of the Ukrainian state.[120]

The third aspect that becomes evident in the publications of the authors justifying the "secession" of Crimea and its incorporation into Russia is an emphasis on the importance of a referendum, thus assigning international legal significance to the institute regulated at the level of national law. For example, according to Viacheslav Evdokimov and Timur Tukhvatulin, "the only proper way of creating new states is the separation of a part of the state upon the decision of its population, expressed in a general voting according to democratic principles and norms of international law".[121]

Although international law does not consolidate "the right to a referendum", Sazonova maintains that, based on the International Bill of Human Rights, the conclusion can be drawn that the right of the inhabitants of Crimea to the referendum derives from fundamental human rights rather than from national legislation.[122] A similar position is followed by Georgiy Velyaminov, who argues that assertions about the illegality of the Crimean referendum directly contradict the Covenants of 1966, which consolidate the right of peoples to self-determination. According to this author, states are under the obligation to ensure that their legislation makes a provision for the effective guarantee

[120] Томсинов, (note 99) с. 29-30.

[121] Евдокимов В.Б., Тухватуллин Т.А., Принятие Республики Крым и города Севастополя в состав Российской Федерации, http://lexandbusiness.ru/view-article.php?id=4251, 10-10-2015.

[122] Сазонова, (note 68).

of the right to self-determination. Because all-state voting prevents the self-determination of a specific people, Article 73 of the Constitution of Ukraine, under which the territory of Ukraine may be altered only by an all-Ukrainian referendum, is claimed to be inconsistent with the international legal obligations of Ukraine to comply with the principle of self-determination.[123] Finally, according to Tomsinov, "the legality of the referendum should not raise any doubts: in the light of the Western European legal tradition, conducting a referendum is considered legitimate even where no provision for it is made by the Constitution of the state concerned".[124] However, he provides no further arguments to support this conclusion.

The weight attached to referendums is also pointed to by Borgen; with respect to the official rhetoric of Russian politicians, he notes that the process of referendums becomes a substitute for the substantive law of self-determination, and notes that referendums and plebiscites, although they "are emblematic of democracy", have been more than once historically used as a mask for territorial expansion.[125]

The role of the referendum in the process of the Crimean annexation is definitely reflected, among other things, in the words of Valery Zorkin, President of the Constitutional Court of the Russian Federation: "Russia had – and, besides, once again – to react urgently (among other things, through the agency of the Constitutional Court) to a new threat faced by the citizens living in Crimea. This time—*by considering and adopting legal decisions, following from the lawful and democratic expression of the will of those citizens* [emphasis added]".[126] Zorkin emphasises the importance of the referendum and subsequent Crimean population surveys as denying "the myth of armed Russian annexation of the peninsula".[127] Velyaminov similarly argues that "under international law, the right of Russia to incorporate Crimea would have been restricted only in the event of a forceful incorporation, the annexation of the territory of a self-determined people. But, as the results of the referendum showed, the incorporation was, in principle, the shared aspiration of the people of Crimea".[128]

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[123] Вельяминов, (note 68).

[124] Томсинов, (note 99) с. 28.

[125] Borgen also draws on the examples given by Wilhelm Grewe: e.g., to disguise the policy of territorial expansion, Napoleonic France used the language of self-determination, as well as the process of referendums; the 1795 plebiscite in Austrian Netherlands (present Belgium) was later called a "bitter comedy" (Borgen, (note 5) p. 248).

[126] *Зорькин В. Д., «Право – и только право», Российская газета* 6631 (60) от 24 марта 2015 г., http://m.rg.ru/2015/03/23/zorkin-site.html, 10-10-2015.

[127] Zorkin V., *Civilization of law and development of Russia,* Petersburg: St. Petersburg International Legal Forum, 2015, p. 265.

[128] Вельяминов, (note 68).

Along these lines, Kapustin draws attention to the circumstance that the transfer of Crimea to Ukraine in 1954 "was a purely domestic administrative matter […] [which] did not take into account the will of the population living there, especially since no referendum was held on the issue".[129]

A particularly radical position in terms of the importance of the referendum is expressed by Tomsinov, who contends that:

> from the perspective of the contemporary Western European legal tradition, founded on the principle of government by the people, *the principal legal ground for the reunification of Crimea with Russia* [emphasis added] was the referendum of 16 March 2014, which showed the genuine striving of the overwhelming majority of Crimeans to join Russia.[130]

Thus, this author regards the referendum as an independent and, in principle, unconditional ground for the "secession" of Crimea. Nevertheless, from the perspective of international law, the most original position, suggesting that "the will of a people" is absolute, was expressed in the open letter of the Russian Association of International Law, where it was held that

> the destiny of Crimea was decided by the expression of the will of the Crimean people and the people of its historical homeland – Russia. Mass meetings in all big cities of Russia in support of reunion with Crimea after twenty three years of a break are a peculiar will expression of the multimillion people of Russia concerning its historical rights for Crimea.[131]

At the same time, while most authors remain silent on the circumstances of the organisation of the "referendum" in Crimea, Tolstykh sets out his distinct approach to international standards for organising referendums. In his view, these standards (e.g., the Code of Good Practice on Referendums, adopted by the Venice Commission in 2007),

> regardless of their legal force, should not be considered as addressed to the nation; rather they are addressed to third States ascertaining the fact of formation of the general will. The circumstances enumerated in the standards (peacefulness; universal, equal, free and secret voting; freedom of the media and the neutrality of the government; international supervision; exhaustion of negotiations and others) should be treated as convincing evidence of the general will's blamelessness. The absence of some of them, however, should not automatically entail the conclusion that the general will was vicious. Such a conclusion can only be made on the basis of an examination of the particular situation and in the presence of strong evidence of fraud, error or external coercion. Thus, the military presence of a third state may be considered as a coercion only if it was accompanied by an impact on the general will; in other cases (for example, when it was intended to protect the free formation of the general will) it does not disqualify a referendum.[132]

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[129] Kapustin, (note 98) p. 110.
[130] Томсинов, (note 99) с. 28.
[131] Открытое письмо в Исполнительный совет Ассоциации международного права, (note 103).
[132] Tolstykh, (note 101) p. 133-134, 137.

> [...] Failure to observe the freedoms of expression and assembly, even if this was the case, can hardly be regarded as fraud. Finally, the question of secession of Crimea from Ukraine and of its unification with Russia is clear (unlike the question of the association of Ukraine and the European Union); in this context it is difficult to assume that the population of Crimea made its choice under error. The referendum results were determined by other factors, much more stable, powerful and obvious – notably the historical and cultural links between Crimea and Russia, which came to the fore as a result of the coup.[133]

The fourth aspect crucial for unfolding the narrative constructed by the Russian authors on "the reunification of Crimea with Russia" is the interpretation of the role of Russian military forces in Crimea. Russian international legal doctrine, as well as the position submitted in the case on Kosovo, was formerly consistent in underlining the provision, deriving from the Declaration on Principles of International Law, that the right to self-determination must be exercised "through the free choice by the people concerned, without outside interference".[134] The main strategy currently adopted in order to circumvent this norm is the assertion that the aim of the Russian armed forces was not to influence the expression of free will, but to create conditions for expressing this will, i.e. to help "the people of Crimea" to realise self-determination. As Velyaminov notes, "there has not been a single reliable fact established about any kind of pressure or, the more so, pressure imposed by the force of arms on people who came to the referendum".[135] According to Tomsinov, the Russian forces were called upon "to protect the people of Crimea against the forcible actions by the Ukrainian authorities or radical nationalists depriving the citizens of the possibility of holding the referendum".[136] As claimed by this author, under the Declaration on Principles of International Law, peoples who strive to realise their right to self-determination and face obstacles in their way have the right to resist forcible actions, to seek support in their pursuit of self-determination, and "to receive support in accordance with the purposes and principles of the Charter".[137] In this way (ignoring the provision of the same declaration that "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any

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[133] *Ibidem*, p. 138.

[134] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion). Written Statement of the Russian Federation,* § 80, http://www.icj-cij.org/docket/files/141/15628.pdf, 10-10-2015.

[135] Вельяминов, (note 68).

[136] Томсинов В.А., «Международное право с точки зрения воссоединения Крыма с Россией», Законодательство 7, 2014, с. 19.

[137] *Ibidem*.

other State or country"),[138] Tomsinov puts forward the position that stands in contrast to the dominant interpretation of the content of the Declaration on Principles of International Law, according to which military force in support of self-determination outside the decolonisation context can be linked at the most with the application of the doctrine of "the responsibility to protect", i.e. when it comes to preventing or stopping genocide, ethnic cleansing, crimes against humanity, or war crimes.[139]

Kapustin and Zorkin use rhetoric associated with the doctrine of "the responsibility to protect",[140] as well as with the highly controversial conception entrenched in Russian national law regarding the protection of Russian nationals abroad. In fact, these authors do not mention that, according to the existing interpretation of the doctrine of "the responsibility to protect", as based on the consensus of states, the use of armed force in response to genocide, ethnic cleansing, crimes against humanity, or war crimes may be implemented as a means of last resort, acting through the UN Security Council.[141] Irrespective of this, Kapustin maintains that

> the discussions in the United Nations, the OSCE, and European Institutions on the "Crimean issue" are strongly one-sided. This confirms that the people of Crimea had to rely on their own strength and that a remedy through the international community was not to be expected. Rather, only an appeal to neighbouring states, in this case Russia, for assistance in ensuring the basic right to life and the right to freedom of expression, promised to secure the right to self-determination of the Crimean people.[142]

A similar position is expressed by Zorkin:

> Did Russia help to hold this referendum? Certainly it did. The Russian Black Sea Fleet in Crimea blocked both the attempts of Crimea-based terrorist Islamic organisations *(Hizub ut-Tahrir* and others) to destabilize the socio-political situation, and the attempts of armed neo-Nazi militants from Western and Central Ukraine to break into the peninsula for "pacification" of Russians.
>
> May these actions on behalf of Russia seem questionable according to international law? I assume they might. However, I must emphasize that it was a necessary and

[138] UN General Assembly, *Declaration on Principles of International Law* (note 45).
[139] See Bilkova, (note 16) p. 43-45.
[140] It should be pointed out that the official Russian position is highly critical of this doctrine as, purportedly, enabling the arbitrary use of armed force by Western states against third states. In the Foreign Policy Conception of the Russian Federation approved on 12 February 2013, it is maintained that "It is unacceptable that military interventions or other forms of outside interference, undermining the foundations of international law based on the principle of the sovereign equality of states, be carried out under the pretext of implementing the 'responsibility to protect' conception" (Item 31(b)) (Концепция внешней политики Российской Федерации, http://archive.mid.ru//brp_4.nsf/0/6D84DDEDEDBF7DA644257B160051BF7F, 25-11-2015).
[141] See UN General Assembly, *2005 World Summit Outcome*, § 139, http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf, 30-11-2015.
[142] Kapustin, (note 98) p. 117.

> inevitable response to blatantly illegal actions of the Kiev authorities that performed a coup, as well as to a direct military threat to security of the Russian population of Crimea by Islamic and Ukrainian neo-Nazis. Russia could not regard these threats as anything but military. And we all know that a military threat has a different legal framework of action as opposed to peacetime.[143]
>
> Russia could not fail to call to memory still another, relatively recent, fundamental international legal principle, which has not yet been officially included in the UN Charter, but has already been universally recognised and widely applied. Namely, we speak about the principle of "the responsibility to protect", which requires that international community directly defend the citizens of a state that flagrantly violates their fundamental rights, including the right to life and security, and does not wish or is unable to stop these violations.[144]

A notably unconventional interpretation of the role of Russia in Crimea is further developed by Tolstykh. Along with the assertions that the participation of Russia was not aimed at interfering with the process of the formation of the will of Crimeans and that, thus, the actions of Russia, which prevented the Kiev government from intervening in the course of events, cannot be viewed as coercion against the inhabitants of Crimea, this scholar indicates that "the main circumstance justifying the participation of Russia in the process of Crimean self-determination is the breakup of the statehood of Ukraine".[145] Invoking the ideas of Jean-Jacques Rousseau, this author argues that, due to the coup that took place in Ukraine, the Ukrainian state broke up; as a result, the social contract was broken and the inhabitants of Crimea were transferred to the state of nature. Therefore,

> the configuration of international relations changed: instead of Russian-Ukrainian relations, relations between Crimea and new Ukraine, between Crimea and Russia, and between Russia and new Ukraine have emerged. The actions of Russia, which prevented the extension of the jurisdiction of the new Ukraine to the territory of Crimea, were lawful, since they were based on the consent of the population of Crimea. These actions cannot be qualified as support for one of the sides in a civil war, as, from the moment of the breakup, Crimea and the new Ukraine ceased to be parts of one state. In these circumstances, the additional arguments provided by Russia (invitation by the President, right to self-defence, humanitarian intervention) are unnecessary.[146]

It should be noted that such an interpretation, obviously transcending the "boundaries" of international law, is not a case of an isolated occurrence. From the point of view of international law, rather absurd or legally irrelevant arguments are similarly set out in the publications of other Russian scholars of international law. Such arguments, for the most part reflecting the related

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[143] Zorkin, (note 127) p. 264.
[144] *Зорькин, (note 126).*
[145] Толстых, (note 112) § 11.
[146] *Ibidem*.

statements of politicians, are apparently intended to reinforce the narrative of self-determination and to construct the legality of "the reunification of Crimea with Russia". The use of this type of argument constitutes the fifth aspect of the way in which the principle of self-determination is exploited by Russian scholars in the context of the Crimean events. In this respect, the key role should be attributed to arguments concerning the restoration of "historical justice"; they include the statements on the unconstitutionality of the transfer of Crimea to the Ukrainian SSR in 1954, as well as statements highlighting the historical belonging of Crimea to Russia. Crucially, this historical argument was dominant in the "Crimean speech" by Putin and was used by Vitaly Churkin, Russian Ambassador to the UN, in his address of March 27, 2014, to the UN General Assembly:

> Historical justice has triumphed. For ages Crimea has been an integral part of our country, we share history, culture and, the main thing, people. And only the voluntaristic decision by the USSR leaders in 1954, which transferred Crimea and Sevastopol to the Ukrainian Republic, although within one state, has distorted this natural state of affairs.[147]

Invoking the historical argument, Tomsinov maintains that the status of Crimea as part of Ukraine was factual rather than legal, since the transfer of Crimea to Ukraine was carried out in blatant violation of the constitutional norms of the USSR; therefore, this transfer should be considered legally null and void from the very beginning.[148] Kapustin, though admitting that "a reference to the historical basis is extremely rare in international law" (the historical argument is recognised in cases of historically established rights to certain coastal areas, e.g., the right to historic bays or the right to transit passage), nevertheless, indicates that

> [historical justification] also cannot be ignored when it comes to reuniting historically united nations. The division of Russia and Crimea was largely artificial and in the process of the disintegration of the USSR a satisfactory legal settlement of territorial issues was, for historical reasons, not implemented. Subsequently, the conclusion of bilateral agreements between the Russian Federation and Ukraine, as well as documents of the Commonwealth of Independent States stated only the *status quo* and did not address the question of the legal status of some of the disputed territories, which means that there are still some unresolved territorial disputes and conflicts on the territory of CIS member states.[149]

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[147] *Speech by Russia's Permanent Representative to the United Nations Vitaly Churkin at the session of the UN General Assembly,* New York, 27 March 2014, http://archive.mid.ru//brp_4.nsf/0/BCAB331DBCBDBE6F-44257CA900450F92, 10-10-2015.

[148] Томсинов, (note 99) c. 21.

[149] Kapustin, (note 98) p. 113.

In the open letter of the Russian Association of International Law, it is also pointed out that, as a result of "holding the Crimean referendum, the expression of will in favour of the return of the Crimean people to the historical homeland – Russia became the restoration of historical justice, realization of historically developed legal grounds".[150] In this way, as noted by Borgen, shared history is presented as a factor that somehow lessens the sovereign rights of Ukraine over its territory, thus bringing back the times of pre-UN Charter norms.[151]

At the same time, the works of some Russian international legal specialists include an even more ambitious application of historical argumentation. From the perspective of the USSR constitutional law, Alexander Salenko evaluates not the actions of Nikita Khrushchev when transferring Crimea to Ukraine, but the liquidation of the USSR as an international legal entity. He comes to the conclusion that the decision-makers of the RSFSR who prepared, signed, and ratified the Belavezha Accords[152] concerning the termination of the existence of the USSR violated the will of the people of Russia on the preservation of the USSR in the form of a renewed federation, as expressed in the Soviet Union Referendum of March 17, 1991. According to this author, since the Belavezha Accords on creating the CIS was not approved by the Congress of People's Deputies of the RSFSR, it was thus illegal and had no validity with regard to the termination of the existence of the USSR. Furthermore, since "the results of the Referendum of the USSR […] retain validity", the reunification of Crimea with the Russian Federation:

> became a practical realisation of the initial will and aspiration of the people to live in one single democratic and constitutional state, which was clearly stated in the Soviet Union Referendum on 17 March 1991 and was clearly expressed again in the Crimean Referendum on 16 March 2014.[153]

It is obvious, however, that arguments substantiating the illegality of the disintegration of the USSR have a potentially much broader area of application than the justification of the "return" of Crimea. These arguments perfectly fit

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[150] Открытое письмо в Исполнительный совет Ассоциации международного права, (note 103).

[151] Borgen, (note 5) p. 255.

[152] The Belavezha Accords is an agreement signed on 8 December 1991 by RSFSR President Boris Yeltsin, Ukrainian President Leonid Kravchuk, and Belarusian Parliament Chairman Stanislav Shushkevich. The agreement declared that "the USSR, as a subject of international law and a geopolitical reality, is ceasing its existence" and established the Commonwealth of Independent States (CIS) in its place (for the text of this agreement, see http://rusarchives.ru/statehood/10-12-soglashenie-sng.shtml, 25-11-2015).

[153] Salenko A., "Legal Aspects of the Dissolution of the Soviet Union in 1991 and Its Implications for the Reunification of Crimea with Russia in 2014", *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht. Heidelberg Journal of International Law* 75 (1), 2015, p. 165-166.

with the fluid concept of the "Russian World" *(Russkyj Mir)*, designed in order to justify actions in the so-called "Near Abroad". As described by Marlene Laruelle,

> the concept of the Russian World offers a particularly powerful repertoire: it is a geopolitical imagination, a fuzzy mental atlas on which different regions of the world and their different links to Russia can be articulated in a fluid way. This blurriness is structural to the concept, and allows it to be reinterpreted within multiple contexts. First, it serves as a justification for what Russia considers to be its right to oversee the evolution of its neighbours, and sometimes for an interventionist policy. Secondly, its reasoning is for Russia to reconnect with its pre-Soviet and Soviet past through reconciliation with Russian diasporas abroad. Lastly, it is a critical instrument for Russia to brand itself on the international scene and to advance its own voice in the world.[154]

Before concluding the analysis of different aspects characterising the application of the principle of self-determination to the case of Crimea by Russian legal scholars, we note that it is apparently not coincidental that, in the judgment of the Constitutional Court of the Russian Federation of March 19, 2014, in the case "On the verification of the constitutionality of the international treaty, which has not yet entered into force, between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea to the Russian Federation and the formation of new constituent entities within the Russian Federation", there is not a single mention—not even a formal one—of Article 15 of the Constitution of the Russian Federation, under which universally recognised principles and norms of international law, as well as international agreements of the Russian Federation, should be an integral part of its legal system. The Constitutional Court did not carry out any assessment of the nature of the "treaty" (whether this agreement can indeed be considered an international treaty), nor of the compliance of the content of the "treaty" with international law. The sole aspect in connection with which reference is made to international law in this judgment is the possibility of the operation of an international treaty before its ratification and entry into force. Specifically, in assessing the provisions under which Crimea was considered incorporated into the Russian Federation before the moment of the ratification of the treaty, the Constitutional Court invoked the provisions of the Vienna Convention on the Law of Treaties that provide for such a possibility.[155] For this reason, it is in some way ironic that, in its judgment of July 14, 2015, when assessing whether the decisions of the European Court of Human Rights were binding

[154] Laruelle M., *The „Russian World". Russia's Soft Power and Geopolitical Imagination,* Center of Global Interests, 2015 p. 1.

[155] Постановление Конституционного Суда Российской Федерации от 19 марта 2014 года *№ 6-П,* http://doc.ksrf.ru/decision/KSRFDecision155662.pdf, 10-10-2015.

for the Russian Federation, the Constitutional Court held that the principle of the sovereign equality of states and respect for the sovereign rights of states and the principle of non-interference in the internal affairs of another state are peremptory international legal norms *(jus cogens)*.[156]

In summary, Russian legal specialists, in constructing the narrative on the legality of the "secession" of Crimea and its "incorporation" into Russia, revise the interpretation of the content of the right to self-determination followed by Russia before the case on Kosovo. Concepts such as "internal self-determination", "remedial secession", and "free expression of will" appear to be given new content, pre-modelled for a concrete case (and, possibly, for other similar cases). The concept of "remedial secession" is applied to the Crimean situation based on the interpretation of the conditions required for the exercise of self-determination that is contrary to the Russian view expressed in the case on Kosovo: a different definition of a "people" is favoured; considerable significance is placed on the aspirations of a territorial entity for statehood; instead of an "outright attack" and a "threat to the very existence of a people", hypothetical and mostly ideological and cultural "threats" are viewed to be sufficient to remove the necessity of exhausting all possible means "to settle the tension between the parent State and the ethnic community concerned within the framework of the existing State";[157] consequently, the right of a state to defend its territorial integrity is denied. The issues of the organisation of referendums and the constitutionality of the change of government are raised to the level of international legal significance, irrespective of the fact that they constitute matters for regulation under national law. Finally, the concepts of international law are supplemented with irrelevant historical and philosophical arguments, blurring the boundaries between legal and non-legal reasoning.

2.2. The Strategies of Manipulating International Law to Deny the Crimean Annexation

The arguments used by the authors examined above clearly rest on particular strategies. In this section consideration is given to the strategy directed at diminishing the sovereignty and statehood of Ukraine; then, the discussion concentrates on the strategy of a "distorted reflection", which exploits the Cri-

[156] Постановление Конституционного Суда Российской Федерации от *14 июля 2015 года № 21-П,* http://doc.ksrf.ru/decision/KSRFDecision201896.pdf, 10-10-2015.

[157] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion). Written Statement of the Russian Federation*, § 88.

mea-Kosovo parallel, distorts the established content of international legal concepts, and questions the adequacy of international law with regard to Russian geopolitical interests.

2.2.1. Arguments Diminishing the Sovereignty and Statehood of Ukraine

At the core of the narrative constructed by Russian politicians and lawyers to deny the annexation as an illegal acquisition of territory is the *coup d'état* carried out in Ukraine by right-wing radicals in February of 2014, which was followed by the purported collapse of the Ukrainian state; consequently, Crimea, holding close ties with Russia, and its population, fearing possible persecution, acquired the right to secede from Ukraine and join Russia. In this narrative, questioning the status of Ukraine as a sovereign state fulfils an important role. This questioning is based on the arguments pointing to the unconstitutionality of the coup, as well as to the influence exerted by Western states on the new Ukrainian government. For example, at a meeting of the UN Security Council, Churkin claimed that:

> the implementation of the right of self-determination in the form of separation from the existing state is an extraordinary measure. In Crimea such a case apparently arose as a result of a legal vacuum, which emerged as a result of unconstitutional, violent *coup d'état* carried out in Kiev by radical nationalists, as well as direct threats by the latter to impose their order on the whole territory of Ukraine.[158]

In this context, it is essential to point out that a *coup d'etat* and the issues of constitutionality in general are matters of national rather than international law. In terms of international law, importance falls not on the constitutionality of the government, but on its effectiveness, i.e. its capability to efficiently control the territory of the state and to ensure compliance with international commitments. Even where the government is unable to carry out effective control (in political science, the concept of a "failed state" is used to refer to these cases), relations with such a state must be continued based on the principles of sovereign equality, the prohibition of the use of force, respect for territorial integrity, and other fundamental international legal principles; other states are not released from the obligations with respect to this state. Additionally, the international legal status of a state is in no way affected by the change

[158] *Crimea referendum opponents manipulate detached norms of intl law – Churkin, meeting of the Council on the crisis in Ukraine,* 13 March, 2014, https://www.rt.com/news/unsc-ukraine-meeting-crimea-694/, 27-11-2015.

of government, even if it takes place in the form of a *coup d'état*.

Irrespective of this, a completely different approach is taken in the publications of the Russian authors. According to Tomsinov, one of the features determining the specificity of the Crimean secession is that:

> the reunification of Crimea with Russia took place largely as a result of the perception by the people of Crimea that periodic state coups, […] the inability of the changing governments to ensure smooth economic development and the essential conditions of normal human life are not accidental: they indicate not temporary ailments of Ukrainian society and of its political and legal consciousness, but its permanent vices precluding the emergence of normal self-reliant Ukrainian statehood. The inability of Ukrainian society to create a full-fledged state capable of ensuring the essential conditions of normal human life to all its citizens […] provides one more reason for the separation of Crimea from Ukraine and its reunification with Russia.[159]

As Tomsinov argues, political instability in a recently built sovereign state serves as a sufficient ground for solving the question of the secession of its certain territory not under the norms of internal law, but under international law.[160] In support of this statement, the disintegration of the USSR is referred to as a precedent:

> All the declarations on independence and sovereignty that were adopted by the union and autonomous republics in 1990-1991 violated the USSR Constitution. For example, the USSR Constitution was violated by the Declaration on State Sovereignty of Ukraine […].
>
> [These events] took place at the time when the state was already deprived of power capable of maintaining the constitutional order, i.e. its constitution, although not repealed *de jure*, ceased to exist *de facto*. […] Consequently, in such situations, legal grounds must be derived not from the letter but spirit of […] international law.[161]

At the same time, such a position suggests that, in the case of "stable states", priority should be given to national (constitutional) law; thus, it seems to exclude questions of the right to self-determination, for example, in the case of entities within the Russian Federation.

The statehood of Ukraine is similarly questioned by Tolstykh, who, as mentioned before, puts forward the argument concerning the disintegration of the state to justify the participation of Russian armed forces in organising the referendum in Crimea. In addition, according to Tolstykh,

> having not been involved in the *coup d'état,* Russia cannot be held responsible for its consequences, one of which came to be the transfer of the population of Crimea to the state of nature. In this respect, the Russian policy with regard to Crimea can be contested only by the Crimean population; the referendum results, however, clearly at-

[159] Томсинов, (note 99) с. 30.
[160] *Ibidem*, с. 6-7.
[161] *Ibidem*, с. 9-10.

test support for this policy.[162]

After contending that the dissolution of the Soviet Union was illegal and illegitimate from the perspective of the USSR constitutional legislation, Salenko draws the conclusion that a "warped legal groundwork" was laid as a foundation of the statehood of the new independent states, including Ukraine, because the elite of nine republics consciously violated the will of the people, expressed in the referendum of 17 March 1991 on the future of the USSR.[163] Furthermore, according to Salenko,

> the violation of the initial and obligatory will of the people of Ukraine and the unilateral arbitrary revision of the results of the Soviet Union Referendum have become the main reasons for the disintegration of Ukraine, including the recent acts of self-determination of Crimea whose people were the least enthusiastic about the separatism of Kiev in 1991.[164]

Attempts to diminish the sovereignty of Ukraine are also obvious when the situation in Ukraine after the annexation of Crimea is described. As the holding of the election in October 2014 removed the possibility of relying on the argument about the unconstitutionality of the government, this line of argumentation has shifted towards views highlighting the subordinate status of Ukraine. Tomsinov presents this view in rather extreme terms:

> The reluctance by the leaderships of the USA and the European Union, as well as by the Ukrainian ruling groups, which are completely dependent on the USA and EU, to solve the question of the belonging of Crimea by way of negotiation […] leaves the only actually possible means of solving this controversy, i.e. the total disintegration of the existing Ukrainian state and its liquidation as an international legal entity. Such a possibility of releasing the relationship of Russia with Western states from the burden of the Crimean problem is completely implementable in practice, mainly as a result of increasing destructive processes within the Ukrainian state. These processes have an objective character and cannot be stopped by means of any external forces.
>
> […] As a result, Ukraine has definitely become subordinate to the governing Western groups, primarily those of the USA, and, in principle, has lost even that small degree of independence of its state that it had been granted after the dissolution of the Soviet Union. Decisions primarily important and essential to the Ukrainian state are being made not in Ukraine. The Ukrainian authorities, including the President and the Head of the Government, are mere agents of foreign will, executives of decisions made by the leaderships of the USA and the European Union.
>
> A particular weakness of the current Ukrainian state renders its ruling layer […] absolutely ineffective in fulfilling its role as the agent of Western policy […]. Namely this circumstance does not allow the West to prevent the ultimate demise of the Ukrainian state.[165]

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[162] Толстых, (note 112) § 5.

[163] Salenko, (note 153) p. 162.

[164] *Ibidem,* p. 165.

[165] Томсинов В.А., «Крымское право», или Юридические основания воссоединения Крыма с Россией, Москва: Зерцало, 2015, с. 118-119.

Borgen is correct when he writes that sovereignty in the Russian rhetoric "becomes ephemeral" and shifts from being the core value, protected by international law, to simply a fact that may or may not come into play in particular circumstances. At the same time, sovereignty itself becomes redefined in such a way that enhances the scope of Russian sovereignty, while minimizing the sovereignty of post-Soviet states ("Near Abroad").[166]

2.2.2. The Strategy of a "Distorted Reflection"

As the foregoing assessment of the aspects characterising the narrative constructed by Russian legal scholars on the right of Crimea to secession has revealed, specific meanings designated for a particular case are attached to the established concepts of international law. This strategy employed by Russia has been aptly defined by Lauri Mälksoo, who indicates that such concepts as "peacekeepers", "genocide", or occasionally even "international law" are used like in a simulacrum or concave mirror, compared to their Western uses; the words are the same, but the meanings are different.[167] In developing these ideas, it should be noted that, in the context of the annexation of Crimea, it is possible to witness not only an unconventional interpretation of international legal norms, but also the tendency to draw parallels between the cases that are unparalleled in legal terms; the latter tendency can be identified as the strategy of a "distorted reflection".

One of the most obvious manifestations of a "distorted reflection" in the official Russian discourse is the so-called Crimea-Kosovo parallel, employed to deny the illegal annexation of Crimea. A reference to the Advisory Opinion of 22 July 2010, in which the ICJ stated that unilateral, i.e. declared without the consent of the central government of Serbia, declaration on the independence of Kosovo is not in violation of international law, is included in the Preamble to the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol, adopted on 11 March 2014.[168] In his "Crimean speech",

[166] Borgen, (note 5) p. 261-262, 273.

[167] Mälksoo L., *Russian Approaches to International Law*, Oxford: Oxford University Press, 2015, p. 185.

[168] "We, deputies of the Supreme Council of the Autonomous Republic of Crimea and the Sevastopol City Council, having regard to the Charter of the United Nations and a whole range of other international documents and taking account of the confirmation of the status of Kosovo by the United Nations International Court of Justice on 22 July 2010, which states that unilateral declaration of independence by a part of the state does not violate any international norms, make this decision jointly […]" (Декларация о независимости Автономной Республики Крым и г. Севастополя, http://www.crimea.gov.ru/news/11_03_2014_1, 27-11-2015).

Putin referred to Kosovo 7 times, including quotes from the position of the USA in the case on Kosovo.[169] The parallel with Kosovo is either made directly or occurs as a reflection of the "special case" rhetoric used by Western powers. For example, in one of his interviews, Lavrov emphasised that "Crimea was a very special case".[170]

Undoubtedly, where the case of Kosovo and the Advisory Opinion of the ICJ are invoked, there is no mention of the circumstance that "the referendum of Crimea" took place in an atmosphere of the threat and use of Russian armed force, including the takeover of the territory of Crimea by the military and paramilitary forces controlled by Russia, the conduct of large-scale military manoeuvres along the borders of Ukraine, and the constant emphasis on the preparedness to use force; however, this circumstance alone is sufficient to deny the plausibility of the Crimea-Kosovo parallel. It should also be stressed that, in the case of Crimea, the state that used force had the direct interest to incorporate the territory of "self-determining" Crimea. Moreover, those who compare the situations of Crimea and Kosovo "forget" that the Russian Federation has up to now refused to recognise the statehood of Kosovo.

Regardless of the aforementioned circumstances, Russian legal scholars establish parallels between Crimea and Kosovo. For instance, Tomsinov relies on argumentation that is in substance identical to the statements of Russian politicians when he claims that there is a range of common aspects between Crimea and Kosovo: the peoples of Crimea and Kosovo were subjected to persecution, their autonomy was violated, their secession took place in contravention of the constitution of the parent state, and, ultimately, both cases were special.[171] The treatment of the Crimean secession as a "special case" is grounded by Tomsinov in the fact that there will be no more such situations as the disintegration of the USSR; hence, there will be no more analogous situations; the incorporation of Crimea into Russia is the continuity of the process of the USSR disintegration and rearrangement of the space of this empire, similar to the case of Kosovo, which emerged as a consequence of the disintegration of Yugoslavia.[172] The specificity of the Crimean case is also linked by this author with the supposed perception of the vices of the Ukrainian statehood by the

[169] Обращение Президента Российской Федерации от 18 марта 2014 года, http://kremlin.ru/events/president/news/20603, 10-10-2015.
[170] *Interview of the Russian Foreign Minister Sergey Lavrov to ITAR-TASS,* 10 September, 2014, http://archive.mid.ru//brp_4.nsf/0/d8c4dd75d09c784844257d5000374f29, 10-10-2015.
[171] Томсинов, (note 99) с. 24-25.
[172] *Ibidem,* с. 19, 5.

inhabitants of Crimea.[173]

At the same time, the publications of Russian authors include more attempts to draw parallels between substantially different situations. For example, Tolstykh compares the role of Russian forces in organising the referendum on the independence of Crimea with the presence of US forces in the US-administered territories of Puerto Rico and the Northern Mariana Islands at the time when the inhabitants of these territories were determining their status in the referendums of 2012 and 1975, respectively,[174] although the US forces had no impact on the voting. It is obvious that, at the very least, such parallels are ill-drawn, since the presence of US forces in the US-administered territories cannot be compared with an intervention by a foreign state interested in annexation.

In addition, Salenko draws a parallel between the secession of Crimea from Ukraine and the separation of Ukraine from the USSR. He indicates that, reacting to the Putsch of 1991 in Moscow, the Supreme Soviet of the Ukrainian SSR adopted the Declaration of Independence of Ukraine, which referred to "the mortal danger surrounding Ukraine in connection with the state coup in the USSR on 19 August 1991". Salenko underlines that this declaration was adopted three days after the end of the August Putsch, and also that, as a result of the said state coup in Moscow, only three people were killed, whereas "the mortal danger" to the population of Crimea was much more tangible and explicit, considering 106 victims killed in "Euromaidan [*sic*]", 48 killed in the Trade Unions Buildings in Odessa, and thousands of people killed in the military operations in the East Ukraine;[175] thus Salenko also includes the events following the annexation of Crimea.

Furthermore, according to Salenko, the Ukrainian referendum of December 1, 1991, held on the Act of Declaration of Independence, not only clearly violated the applicable legislation (as neither the Ukrainian authorities, nor the citizens of Ukraine, had the right to unilaterally revise the decision adopted by the Soviet Union Referendum, the results of which could be changed only by a new all-Union referendum, which, according to the law regulating exit from the USSR, could be held not earlier than in 10 years),[176] but also failed to meet any of the criteria against which the Venice Commission

[173] *Ibidem,* c. 30.
[174] Tolstykh, (note 101) p. 134.
[175] Salenko, (note 153) p. 159-160.
[176] *Ibidem,* p. 161.

assessed the Crimean referendum of 2014:[177] in 1991, Ukraine did not have any law regulating a republican referendum; in addition, on 11 October 1991, the Verkhovna Rada confirmed the Act of Declaration of Independence of Ukraine, and this "raised doubt with respect to the legal effects of the referendum and the neutrality of the authorities"; the principles that "authorities must provide objective information" and "public media have to be neutral, in particular, in news coverage", were obviously violated, since, in 1991, the authorities of Ukraine "conducted a one-sided information campaign and whipped up mass hysteria by the broad use of the slogan 'the mortal danger surrounding Ukraine'". Instead of promoting unilateral secession, the author claims that "serious negotiations among all stakeholders" should have been organised. Moreover, no regard was paid to the most important provision of international law and an essential element of the basic democratic principles that self-determination must primarily be understood as internal self-determination within the framework of the existing state.[178] Consequently, Salenko comes to the conclusion that "besides the personal ambitions of the Ukrainian political leadership and mass hysteria about the 'bloody putsch' and the unspecified 'mortal danger surrounding Ukraine', there were no other rational arguments in favour of the secession of Ukraine".[179]

Unsurprisingly, when drawing the Crimea-Ukraine parallel, Russian legal scholars do not mention the fact that the declaration of the independence of Ukraine did not result from any external military intervention carried out by a state interested in the incorporation of a certain part of the territory of Ukraine. In addition, by drawing this parallel, these authors deny the significance of the Belavezha Accords (whereby the founding states of the USSR declared the termination of the existence of the USSR) and "forget" that the Russian Federation, as the legal continuator of the USSR, has recognised the statehood of Ukraine.

A peculiar application of the strategy of a "distorted reflection" emerges in connection with Salenko's arguments about the "secessions" of Lithuania, Latvia, and Estonia as purportedly having laid the foundation for the direct

[177] On 21 March 2014, the Venice Commission adopted the Opinion on "Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles", where the Venice Commission drew the conclusion that the circumstances in Crimea did not allow holding a referendum in line with European democratic standards (http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e, 10-10-2015).
[178] Salenko, (note 153) p. 164-165.
[179] *Ibidem,* p. 164-165.

negligence of the existing legal requirements.[180] These arguments assessing the restoration of the independence of the Baltic States illustrate well how law is manipulated by ignoring the fact of the illegal occupation and annexation of the Baltic States. According to Salenko, President of the USSR Mikhail Gorbachev and other participants of Novo-Ogaryovo meetings, who, on April 23, 1991, signed a treaty between the central leadership of the USSR and nine union republics (which had to turn the Soviet Union into a federation of independent states), consciously violated the fundamental constitutional norms of the USSR, since the results of the Soviet Union referendum of March 17, 1991, were obligatory to all union republics, including those six (Lithuania, Latvia, Estonia, Georgia, Armenia, Moldova) that had boycotted the referendum.[181] Salenko maintains that, in an attempt to preserve the unity of the state in the "format 9+1", Gorbachev took extraordinary steps. He officially recognised the independence of "the self-proclaimed Baltic republics"; these actions constituted a direct violation of the applicable law, because none of the three republics fulfilled any requirement of the USSR law "Concerning an order of the solution of the questions with regard to an exit of the union republic from the USSR" of April 3, 1990. In addition, Salenko claims that the leaderships of these republics failed to comply with the democratic standards recognised at the international level.[182]

Another manifestation of a "distorted reflection" unfolds with the ideas expressed by Tomsinov about "the revolution of legitimacy" in international law, as well as about the inadequacy of existing international law. According to this author, the majority of assessments of the reunification of Crimea with Russia are made from the perspective of the international law that was prevalent before the dissolution of the USSR. The international law of the bipolar world (the USA vs. the USSR) was essentially founded on the principles of sovereign equality, non-interference in the internal affairs of another state, the inviolability of borders, and territorial integrity; thus, from this perspective, the illegality of the Crimean referendum is associated with the violation of the principle of the prohibition of the use of force.[183] However, upon the disintegration of the USSR and the rise of the USA as the sole major power, a unipolar order was created

[180] *Ibidem*, p. 156.

[181] Salenko, drawing on Tretyakov, maintains that "The Soviet Union Referendum on 17.3.1991 became an indicator that those union republics striving for independence from 'Soviet Imperialism' aimed to create their 'own microempire and, having received […] freedom for their own nations, do not want to give even a little of this freedom to other nations living in territories of their states" (in Salenko, (note 153) p. 149).

[182] *Ibidem,* p. 156-157.

[183] Томсинов В.А., «Международное право с точки зрения воссоединения Крыма с Россией», Законодательство 7, 2014, с. 21.

and accordingly reflected in international law. Tomsinov maintains that "new international law" found its significant reflection in the report of the Independent International Commission on Kosovo, in which the Commission held that the NATO military intervention in 1999 was "illegal but legitimate".[184]

Tomsinov further argues that, since international law is formed on the grounds of consensus, its normative content has always contained gaps and contradictions. Therefore, a legal assessment of certain events frequently requires addressing not the letter, but the spirit of international law, interpreting international legal norms, and referring to the case law of the ICJ as well as actual events in search of legal arguments.[185] According to Tomsinov, the actions of states as a general rule are never in full conformity with international law. International law appears to be even less capable of performing its role of the regulator of interstate relations in times of acute international crises. Thus,

> where it is impossible, either fully or at least partly, to justify the legality of one or another action of a certain state, the concept of legitimacy comes as a way out, which is based not only on legal, but also moral norms, also on the practice of international dispute solving, legal consciousness, works of international legal specialists, and opinions of internationally influential political groups.[186]

Consequently, Tomsinov draws the conclusion that

> events similar to the reunification of Crimea with Russia can be fully understood if they are viewed objectively not only in terms of international law, moral values, and the political situation, but also in terms of the geopolitical interests of Russia, Ukraine, and leading world powers.
>
> Namely such, the broadest possible, attitude to international events is presupposed once these events are assessed against the concept of legitimacy.[187]

In other words, Tomsinov advocates attaching international legal significance to the geopolitical interests of major powers *(derzhav)* and interpreting international law in the context of geopolitical interests, since the balance of the economic, political, and cultural interests of major powers, "as cement mortar, is laid in the foundations of international law".[188] The domination of the interests of Western states, in particular those of the USA, in the interpretation of international law is identified by Tomsinov to be the greatest fault of existing international law, whereas the recognition of the geopolitical interests

[184] *Ibidem,* c. 22-23.
[185] *Ibidem,* c. 24.
[186] *Ibidem,* c. 25.
[187] *Ibidem*.
[188] Томсинов В.А., «Украинский кризис»: метаморфозы геополитики и международное право, Законодательство 8, 2014, с. 11.

of Russia is regarded as a critically important direction in the development of international law:

> [The case of Crimea] should have been assessed [...] against the criteria of both legality and legitimacy. [...]
>
> [This case] could have stimulated the development of international law, could have contributed to its renewal and enrichment with a wealth of new ideas. Instead of this, it [...] showed what a deplorable state the international community [...] and international law are in. [...]
>
> The Ukrainian crisis [...] has become a convincing testimony to a complete atrophy of the mechanisms indispensable to international law in the practice of international relations for reconciling divergent geopolitical interests. And the main responsibility for this falls on leading Western states".[189]

Thus, as Borgen notes, "Russia is building a revisionist conception of international law to serve its foreign policy needs".[190] From the above-cited works, it is clear that these aims are not disguised; they are openly declared by certain Russian scholars.

Conclusions

From the point of view of contemporary international law, the actions of the Russian Federation in the Crimean peninsula, which is part of the territory of Ukraine, constitute an illegal use of force and should be qualified as aggression. These actions meet the concept of an "armed attack", which gives rise to the right of Ukraine to self-defence under Article 51 of the UN Charter. In view of the fact that the Crimean peninsula remains annexed, this ongoing annexation should be considered continuing aggression (since annexation is a form of aggression). Although in a general sense international law does not regulate the right to secession, the systemic interpretation of the principle of the self-determination of peoples, along with the principle of the prohibition on the threat or use of armed force and the principle of territorial integrity, determines that independence may not be proclaimed under conditions of the use of armed force by a foreign state. For this reason, the "secession" of Crimea, which took place as a result of the use of the armed force of Russia, as well as the incorporation of Crimea into Russia, is illegal in terms of international law and cannot be interpreted as a case of the realisation of the right of peoples to self-determination.

The publications of Russian legal scholars who adopt a position favourable to the Russian Federation mainly develop the line of arguments put forward

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[189] Томсинов, Международное право с точки зрения воссоединения Крыма с Россией (note 183), с. 26.
[190] Borgen, (note 5) p. 279.

by Russian politicians. Consequently, when producing their arguments, these authors manipulate international legal concepts, attach new content to the established terminology, combine legal and pseudo-legal reasoning with considerations and theoretical constructs that are irrelevant from the point of view of contemporary international law, claim that contemporary international law is inadequate with regard to Russian geopolitical interests, and, ultimately, blur the borderlines between legal and political argumentation.

The purportedly legal assessment of "the reunification of Crimea with Russia", as provided by the aforementioned Russian scholars, does not consistently draw on international legal norms, the jurisprudence of the ICJ, and international legal doctrine. The interpretation of the content of the principle of self-determination is based on the construction of a position that is contrary to that which predominates in the official Russian discourse and legal doctrine before 2010: a new definition is attached to a "people" as an entity entitled to secession; the right of a state to defend its territorial integrity is denied; and the right to "remedial secession" becomes, in principle, absolute, i.e. the exercise of the right to "remedial secession" is justified not only on the grounds of an actual physical threat to a certain political-territorial community, but also on the grounds of vague cultural and ideological threats, or temporary political instability in the state. It is obvious that such an interpretation is intrinsically linked to an *ad hoc* evaluation of the situation, which shows that in the Russian Federation the science of international law has become a political instrument used for constructing concepts and meanings necessary for the realisation of geopolitical interests or territorial ambitions.

The analysis of the ways in which international legal concepts are manipulated reveals that these manipulations pose a threat in cases when the boundaries between law and politics are blurred and an alternative pseudo-legal reality is constructed. At the same time, these threats highlight the necessity to defend the established interpretation of the content of international legal norms and principles; this can be achieved by, among other things, clear identification of cases violating the fundamental provisions of international law, as well as by a principled response to such violations. Otherwise, preconditions will be created for an unrestrained realisation of visions of the "Russian World" where this process is disguised under a veil of international legal concepts.

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