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RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *Russian Law Journal* is designed to encourage research especially in Russian law and legal systems of the countries of Eurasia. It covers recent legal developments in this region, but also those on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from government authorities.

The RLJ is published in English and appears four times per year. All articles are subject to professional editing by native English-speaking legal scholars. RLJ is indexed by Scopus and ESCI Web of Science.

Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and must be submitted in English. The RLJ does not accept translations of original articles prepared in other languages. The RLJ welcomes qualified scholars, but also accepts serious works by Ph.D. students and practicing lawyers.

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Citations in footnotes must conform to *The Bluebook: A Uniform System of Citation*. A References section is required: entries must conform to the author-title system, such as that described in the *Oxford Style Manual*.

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GUEST EDITOR'S NOTE ON THE THIRD ANNIVERSARY OF THE REFERENDUM IN CRIMEA

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As well-known phrase of Hugo Grotius sounds "law is that which does not contradict fairness." Obviously, one of the eternal questions is whether it is always true. The question of the correlation between existing positive law ("the black letter of the law") and reality, as well as historical fairness, is of current interest for all legal systems. This question is especially important as regards international law. The latter is to be the primary instrument for the international community, which has set ambitious goals for itself in the UN Charter, among them "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" (Preamble). Moreover, the principles of justice and international law are designated as the basis for the maintenance of peace and security of mankind (pt. 1, Art. 1).

The issue of the correspondence of the "letter of law" and fairness (justice) sharply manifested itself in the problem of Crimea, which arose for lawyers, political scientists, historians more than three years ago. From the collapse of the USSR in 1991 until March 2014, little attention was paid by the international community to the Crimean people but, since its reunification with Russia, the Crimean peninsula has become an object of intense geopolitical interest. And all this time the debate on the legal assessment of the events and actions that have taken place has not abated. This issue of the *Russian Law Journal* is mainly devoted to the situation regarding Crimea over the past three years.

During that period, a number of international conferences have been held, many resolutions of international bodies and organizations have been adopted, and the

amount of scholarly and columnist publications has been avalanche-like. The series of aspects discussed varies broadly: the modern interpretation of secession, the reasons and motives for it, the legality of the referendum, the protection of human rights versus humanitarian intervention, state recognition, and the justification of secession.

Among the variety of opinions, there are three prevailing approaches.[1] According to the "pro-Ukrainian approach," the Crimean people had a broad range of rights as well as an autonomous status within the former state borders. The "people" of that autonomy was not an ethnic group or nation, so could not be granted the right to self-determination and separation from the state. As a result, the referendum for secession could not be recognized. For foreign scholars, the explanation of Russian doctrine on the annexation of Crimea looks like a set of arguments involving the domestic affairs of Ukraine, use of force by the "West," and Russia's self-proclaimed lawful intervention.

According to the so-called "diplomatic" or "soft" view, in November 2013 there was *coup d'etat* in Ukraine and, as a result, the Crimean people was excluded from the political decision-making process. New Ukrainian politicians intended to limit the use of the Russian language on the peninsula which could damage the collective identity of all Russian-speaking people and violated the principle of equal rights under international law. The Crimean population was under the autonomous status of the Republic of Crimea and had the right to self-determination as a people (not an ethnic group or a nation) at the constitutional level. It could not ask for any help to secede since there were no international norms for any state to guide its territorial referendum. Only in case of visible violations could the international community react as a neutral party to prevent the military conflict.

As for the "pro-Russian approach," there was a threat to the safety of Crimean population from nationalists. The main aim of Russian forces was to prevent the military escalation and to guarantee a secure referendum process which ought to define the will of people according to the right to self-determination. At that moment people of Crimea held referendum on withdrawal from Ukraine and chose integration with the Russian Federation due to their common culture, language and history. The Russian Government interpreted those actions as "historical rights" to integration and the protection of human rights. The attitude of Russia to the Crimea secession was based on the free will of the people.

It wouldn't be an exaggeration to say that most of the opinions and publications demonstrate unison, i.e. a confluence in the pitch of sounds and notes: violation of the basic principles and norms of international law, unlawful deprivation of part of the territory of a sovereign state, unlawful occupation of the territory by another

[1] I thank Elena S. Aleksandrova, PhD candidate and researcher of the secession issue in public international law, for collecting and reviewing publications and the principal approaches to Crimea's secession.

state, lack of the right of population of the constituent part of the country to express an opinion on leaving the country, etc.

The explanation of the actions in Crimea in 2014 were met with scepticism by international lawyers in many countries, including experts from Russia.[2] So, it is not fair to "tar everyone with the same brush," as some authors do, asserting that, among Russian international legal scholars, there were almost no critical voices on Crimea events.

Most of the critics interpreted the facts and the law, and still continue to do this, in order to respond to the question of whether all the actions fell under the scope of the existing international legal framework. So, as it appears the initial and main platform (sphere) of argumentations, points and debate is only currently effective international law. However, while interpreting the same applicable treaties and rules, international legal commentators from the two opposite sides of the debate resort to entirely different structures of argumentation. The interpretation of each step depends on the political interests and preferences of those sides.

Again, all discussions mainly proceed from and involve matters of general international law. But can international law serve as the basis for answering all the questions that have arisen? Does it comprise the necessary regulations for such issues as self-determination, secession, recognition, etc.? International law should keep balance between the parties in the international arena to prevent military conflicts but how can it protect human rights, for example, in case of a *coup d'etat*?

To search for a complete solution to this and other possible future similar problems in currently effective international law is meaningless, since it simply does not fully regulate such situations, and does not provide answers to many related questions. It contains norms mostly for particular interests of states as sovereigns, their statuses, relationship and goals. It does not concern, in principle, the interests of the territorial parts of states, people(s) and individuals. Current international law largely remains the law for and about states and interstate structures.

That is why the problem of Crimea and other existing and future situations of self-determination and secession should be considered not only in terms of law (domestic, constitutional and international) but first of all in terms of history, historic possession of the territory, historical cohesion of the people living on the territory, its language, its culture and ethnic aspects.

And then one must inevitably take into account such things as: Catherine the Great's 1793 integration of Crimea within the Russian empire, the Russian possession of this territory for 161 years, the transfer of this territory from one entity of the single highly centralized state of the USSR (though a federal one under the "letter"

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[2] *See, e.g.*, Elena Lukyanova, *On the Rule of Law in the Context of Russian Foreign Policy*, 3(2) Russian Law Journal 10 (2015); *see also*, the article published in this Issue: Maria Issaeva, *Quarter of a Century on from the Soviet Era: Reflections on Russian Doctrinal Responses to the Annexation of Crimea*, 5(3) Russian Law Journal 86 (2017).

of the Constitution) to another entity (a purely administrative act within one state), possession of this territory by another state (by a former part of the unified Soviet Union) for only 60 years, the remaining linguistic and kinship ties and the national identity of the people of that territory.

An analysis of the problem in question is suggested by the authors of another article in this Issue of the *Journal* from the point of view of the entire spectrum of the mentioned aspects.[3] They have come to the following conclusions: Crimea and the City of Sevastopol justifiably separated from Ukraine and reunified with the Russian Federation. Support for this proposition is found in historic, economic, and political reasoning. Public international law sanctions a monopoly of power by states and lacks rules to resolve matters such as the Crimean case. The pragmatic argument relies upon multiple disciplines such as history, economic analysis, and political reasoning; principles of "economic analysis" have the capacity to reshape public international law to improve an understanding of state behavior. The redrawn border of the Crimean Peninsula is consistent with logic and what must constitute the ultimate objective of public international law: the end of human suffering.

One can read in one article of this Issue about the era of growing scepticism regarding the universality of international law among international lawyers and, at the same time, about the opposite inclination of the "Russian school" as a continuing legacy of strong Soviet rhetoric. "Guardians" of the closed system of "Russian international law" view and present it as the leading "science" of international law in the world.[4]

This, in fact, is too general and simplified an attempt to "tar everyone with the same brush." Such a perception facilitates to ease author's argumentation. Meanwhile, the correlation of approaches and assessments of Western and Russian doctrines regarding many aspects of international law has long been noted.[5] As for the "growing scepticism," the current state of international law and its underdevelopment and stagnation have been noted not only in Western but also in Russian writings.[6] Real actions and behavior of states often diverge from their literal intentions for the wording of the international documents they adopt. Key international problems are resolved not on the basis of law. In other words, the actual attitude of states to international law in the most important aspects of communication is often the exact opposite of the principle of the rule of law, a commitment to which they clearly and

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[3] John Burke & Svetlana Panina-Burke, *The Reunification of Crimea and the City of Sevastopol with the Russian Federation*, 5(3) Russian Law Journal 29 (2017).

[4] *See*, Issaeva, *supra* note 2.

[5] *See, e.g.*, Sergey Yu. Marochkin, *Contemporary Approaches of the Russian Doctrine to International Law: Identical to Western Ones?*, 12 Baltic Yearbook of International Law 29 (2012).

[6] *See, e.g.*, Международное право: Учебник для бакалавров [*International Law: Textbook for Bachelor Students*] 267–277 (R.M. Valeev & G.I. Kurdyukov (eds.), Moscow: Statute, 2017).

unambiguously expressed and fixed in the documents. There is a discrepancy between the "black letter of the law" and "real law," and the actuality of its implementation. In everyday practice, the problems in bilateral and international relations often lead to political and even military confrontations, stand-offs, or conflicts. The usual reason for this is states' aspirations and ambitions to solve the given problems primarily based not on law, but on political and military means.

International law has developed little in the most important and urgent issues of international life from the end of 20th century to the beginning of the 21st century, even without drastically opposing social systems. Instead of possible development, there are unipolar tendencies in international relations, i.e. attempts to diverge them from a separate center. Obviously, there is reason to talk about the stagnation of general international law in the current period. The reality leads to a conclusion about the discrepancy between the intentions of states in international documents (the "black letter" of the law) and their actual behavior regarding international law and its role in the international affairs ("real law").

International law does not obviously serve as the leading regulator in international life. States often try to use the positive international (written) law to justify their selfish individual or group interests and claims without taking into account historical, moral, ethnic, national and other realities and peculiarities, as if the law operates in a vacuum.

Bearing this in mind, it should be clear that the current "black letter" of the law does not coincide with historic fairness, since universal international law does not obviously move ahead, lags far behind the actual needs and reality of the modern international community, and fails in its mission to be fully right and fair. And then it should also be obvious that attempts to assess and solve the entire problem of Crimea and other similar or possible situations only from the position of the "letter" of international law are futile.

ARTICLES

POST-CRIMEAN TWISTER: RUSSIA, THE EU AND THE LAW OF SANCTIONS

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EU-Russia relations have never been simple. On the one hand, these two international actors have common values and interests. On the other, they have a conflictual relationship, which has become particularly acute after the Ukrainian crisis that started in 2014. After Ukrainian crisis, the EU and Russia have entered a new era. Unfortunately, it is an era of brinkmanship. This brinkmanship is marked, prima facie, by mutual sanctions. After 20 years of partnership and good neighborliness it sounds illogically, but it is a reality. The strategic nature of the EU-Russia partnership has been placed in doubt.

The aim of this article is to show that the "war of sanctions," which has frozen official contacts and negotiations have not achieved anything. This crisis can only be overcome through dialogue. However, at the moment, the main critics of the EU sanctions amongst EU Member States are too weak to convince the other members to lift them.

The article concerns the modern legal aspects and modern legal circumstances surrounding EU-Russia relations in the light of recent events and the deterioration of relations between Russia and the EU in general. In this framework, an account is given of the EU's reaction to the Ukrainian conflict in the context of the EU Common Foreign and Security Policy and of the EU restrictive measures as well as in the context of the Russian countersanctions. A special attention is paid to the EU Court of Justice case-law in the field of the restrictive measures.

Keywords: European Union; Russia; law; bilateralism; restrictive measures; sanctions; EU Court of Justice.

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Introduction[1]

In 2017, the EU and Russia celebrate the 20th anniversary of the EU-Russia Partnership and Cooperation Agreement (PCA)[2] entering in force. However, current situation, even legally, is not as cloudless and as hopeful as it was 20 years ago. The PCA has become obsolete; most of its provisions are out of force. In spite of the depletion of the EU-Russia legal basis, the negotiations on a New Basic Agreement have stagnated. In best case scenarios, it has led to the increase of soft law instruments.

After the Ukrainian crisis of 2014, the EU and Russia have entered a new era. The Russian Ministry of Foreign Affairs stressed in its official Statement regarding the anniversary of the PCA that the strategic nature of the EU-Russia partnership has been placed in doubt.[3] This was clearly expressed by the EU High Representative, Mogherini, in 2014[4] and more recently by the European Parliament in the Resolution of 10 June 2015. The European Parliament stressed that the EU cannot envisage a return to "business as usual" and has no choice but to conduct a critical re-assessment of its relations with Russia. It highlighted that due to its actions in Crimea and in Eastern Ukraine, Russia can no longer be treated or considered as a "strategic partner."[5]

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[1] Certain conclusions of this article were presented within the framework of the International Conference "Development of Russian Law-IX: Russian Law and Globalization" at the University of Helsinki, 7 October 2016, and during the open lecture at the Princeton University, 24 March 2016.

[2] Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and the Russian Federation, of the Other Part, OJ L 327, 28 November 1997, p. 3–69.

[3] Statement by the Russian Ministry of Foreign Affairs regarding the anniversary of the signing of the Cooperation and Partnership Agreement between Russia and the EU, 24 June 2014 (Jun. 1, 2017), available at http://www.mid.ru/en/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNIr/content/id/54686.

[4] Andrew Rettman, *Mogherini Backs Western Balkan Enlargement*, EUobserver, 2 September 2014 (Jun. 1, 2017), available at https://euobserver.com/enlargement/125442.

[5] European Parliament resolution of 10 June 2015 on the State of the EU-Russia Relations (2015/2001(INI)), pt. 2.

Unfortunately, the new era of the EU-Russia relations is an era of confrontations, an era of brinkmanship. It is likely that this contestation might breed even more brinkmanship further down the road. The Ukrainian crisis of 2014 is more likely a question of competition for the Parties than a question of conflict. After 20 years of partnership and good neighborliness, it sounds illogical, but it is a reality. This brinkmanship is marked by mutual sanctions between the EU and Russia. The EU-Russia bilateral sanctions have led to mutual disbenefits but they have failed to succeed in crushing the EU-Russia balanced relations in main sectors of economic interconnections such as energy, investments and manufactured goods trade. Of course, a new era of the EU-Russia relations won't be smooth and simple. It is down but not out.

This article concerns the modern legal aspects and modern legal circumstances surrounding the EU-Russia relations in the light of recent events and the deterioration of relations between Russia and the EU in general. In this framework, an account is given of the EU's reaction to the Ukrainian conflict in the context of the EU Common Foreign and Security Policy and of the EU restrictive measures as well as in the context of the Russian countersanctions. Special attention is paid to the EU Court of Justice case-law in the field of the restrictive measures.

1. Pre-Sanctions Experience in the EU-Russia Relations

The years of the EU-Russia strategic partnership brought a number of positive results, especially in creating a comprehensive legal basis between the parties. Modern EU-Russia relationships are essentially based on three legal layers. The first layer is the EU-Russia PCA and other EU-Russia bilateral agreements. The second layer consists of "roadmaps" for the establishment of four EU-Russia Common Spaces, which should be considered soft law instruments. The third layer covers the Russian legislation and the EU *acquis* within the EU-Russia sectoral cooperation.[6]

Unfortunately, due to its diversified nature, this legal framework is not sustainable and has in the meantime become significantly depleted. Russia's WTO accession in 2012 resulted in many provisions of the EU-Russia PCA having become outdated.[7] To accommodate this new legal context, the EU and Russia concluded a number of sectoral trade agreements in 2011 but their effective implementation may face difficulties due to the lack of a new EU-Russia framework agreement.[8]

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[6] Paul Kalinichenko, *Legislative Approximation and Application of EU Law in Russia* in *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* 246, 247 (P. Van Elsuwege, R. Petrov (eds.), Abingdon, Oxon; New York: Routledge, 2014).

[7] Peter Van Elsuwege, *Towards a Modernisation of EU-Russia Legal Relations?*, 5 CEURUS EU-Russia Papers 2 (2012).

[8] EU and Russia Sign Bilateral Agreements Ahead of Russia's WTO Accession Ceremony (16 December 2001) (Jun. 1, 2017), available at http://eeas.europa.eu/delegations/wto/press_corner/all_news/news/2011/20111216_kdg_rf_signature.htm.

In 2006 Russia initiated negotiations on a New Basic Agreement between Russia and the EU to replace the PCA. This initiative was generally supported by the EU. Negotiations began in 2008.[9] Between 2008 and 2011, the parties agreed on several key points of the future agreement, but in December of 2011 they decided to delay the negotiations. During the EU-Russia Summit in Yekaterinburg in June 2013, the parties agreed to reconsider the negotiation process.[10] However, the Ukrainian crisis pulled the New Basic Agreement negotiation process from the EU-Russia agenda.[11]

At the same time, the EU-Russia PCA continues to set out the basic principles of EU-Russia relations. Art. 2 of the PCA considers respect of human rights and other democratic principles of the Helsinki Act 1975 and the Charter of Paris for a New Europe 1990 as an essential element of the partnership. Although these provisions do not take into account the Russian membership in the Council of Europe and the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as well as the adoption of the EU Charter of Fundamental Rights in 2000, they constitute an important aspect of the "shared values" between Russia and the EU.[12] Moreover, Russian courts in practice recognize a direct link between these provisions of the PCA and the provisions of the Constitution of Russia 1993.[13]

The principles and other provisions of the Helsinki Act 1975 have always impacted on the relations between Russia and the EU and its Member States. In particular, the good neighbourliness principle is manifestly reflected in such common measures as the facilitation of visa treatment,[14] encouraging local cross-border traffic[15] and supporting cross-border cooperation programmes. Russia signed new agreements

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[9] Joint Statement of the EU-Russia Summit on the Launch of Negotiations for a New EU-Russia Agreement, Khanty-Mansiysk, 27 June 2008, 11214/08 (Presse 192).

[10] Yekaterinburg Hosts EU Russia Summit 3–4 June (Jun. 1, 2017), available at http://eeas.europa.eu/top_stories/2013/030613_eu-russia_en.htm.

[11] *See* European Council Conclusions of 21 March 2014, EUCO 7/14.

[12] Päivi Leino & Roman Petrov, *Between "Common Values" and Competing Universals – The Promotion of the EU's Common Values though the European Neighbourhood Policy*, 5(15) European Law Journal 654, 669–670 (2009).

[13] Roman Petrov & Paul Kalinichenko, *The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine*, 60(2) International and Comparative Law Quarterly 325, 337–339 (2011).

[14] Agreement between the European Community and the Russian Federation on the Facilitation of the Issuance of Visas to the Citizens of the European Union and the Russian Federation, OJ L 129, 17 May 2007, p. 27–34.

[15] Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 Laying Down Rules on Local Border Traffic at the External Land Borders of the Member States and Amending the Provisions of the Schengen Convention, OJ L 405, 30 December 2006, p. 1–22.

with Latvia[16] and Estonia[17] on the delimitation of borders. The EU created a special instrument to facilitate the production of transit documents for Russian citizens transiting EU territory from the Kaliningrad region to other parts of Russia and back.[18] Both parties in the framework of the Common Space on Freedom, Security and Justice have made beneficial practical steps in the field of border migration control and combating cross-border crime. Russia has never been a part of the European Neighbourhood Policy but the Parties have historically tried to implement good neighbourliness in the practice of their partnership

2. The EU Sanctions Due to the Crimean Crisis

A new era in the EU-Russia relations started during the Ukrainian crisis of 2013–2014. The political games of the Ukrainian President Yanukovich, who was preparing the New Association Agreement with the EU and, at the same time, was searching for ways to enter the Eurasian Economic Union to acquire double benefit from a discordance between two integration projects, led to the worst case scenario. After the rebellion in Kiev and Yanukovich's escape from the country, Ukraine faced challenges of centrifugal forces from its East and South ends which were supported by Russia.

The Crimean Autonomy and City of Sevastopol refused to recognize a new Ukrainian Government in Kiev. They declared its independency on 11 March 2014[19] clashing with the Ukrainian Constitution 1996 and appointed the referendum on their union with Russia within 5 days. Earlier in the beginning of March the leaders of the self-declared *Crimean Republic* appealed to Russia to "protect" them from the new Kiev Government.[20] The Russian President, Putin, requested from the Federal

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16 Договор между Российской Федерацией и Латвийской Республикой о российско-латвийской государственной границе, Собрание законодательства РФ, 2008, № 7, ст. 555 [Treaty between the Russian Federation and the Republic of Latvia on the Russian-Latvian State Boarder, Legislation Bulletin of the Russian Federation, 2008, No. 7, Art. 555].

17 Договор между Российской Федерацией и Эстонской Республикой о российско-эстонской государственной границе [Treaty between the Russian Federation and the Republic of Estonia on the Russian-Estonian State Boarder], not officially published (Jan. 31, 2017), available at http://www.mid.ru/foreign_policy/international_contracts/2_contract/-/storage-viewer/bilateral/page-35/44211.

18 Council Regulation (EC) No. 693/2003 of 14 April 2003 Establishing a Specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and Amending the Common Consular Instructions and the Common Manual, OJ L 99, 17 April 2003, p. 8–14.

19 Декларация о независимости Автономной Республики Крым и города Севастополь от 11 марта 2014 г. [Declaration on Independency of the Autonomous Republic of Crimea and the City of Sevastopol of 11 March 2014] (Jun. 1, 2017), available at http://www.rada.crimea.ua/app/2988.

20 Обращение Председателя Совета Министров АРК Сергея Аксенова [Communication from Sergey Aksyonov, Chairman of the Minister's Council of the Autonomous Republic of Crimea] (Jun. 1, 2017), available at http://www.rada.crimea.ua/news/01_03_14.

Council, a mandate to use military force outside the Russian Federation[21] and received a positive response.[22] The Russian military forces had already stationed in Sevastopol in accordance with the Russian-Ukrainian Agreement 1997.[23] The Russian army supported the self-independent Crimean Government incognito, wearing no insignia, without any official information and without any shoot.[24]

The urgent Referendum of 16 March 2014 held at the barrels of the Russian troops "doing back the Crimean self-defense forces" demonstrated results in a "managed democracy" style. Almost 97% of population of Crimea and almost 96% of population of Sevastopol had given their votes towards a union to Russia.[25] Of course, the Russian officials immediately recognized the results of the referendum[26] and accepted the proposal of a new Crimean government to enter the Russian Federation and signed the Treaty on Admitting the Republic of Crimea to the Russian Federation of 18 March 2014.[27] On 21 March 2014 the State Duma adopted the Federal Constitutional Law "On Admitting the Republic of Crimea to the Russian Federation and Establishing

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21 Vladimir Putin Submitted Appeal to the Federation Council (Jun. 1, 2017), available at http://eng.kremlin.ru/news/6751.

22 Постановление Совета Федерации Федерального Собрания Российской Федерации от 1 марта 2014 г. № 48-СФ «Об использовании Вооруженных Сил России на территории Украины», Собрание законодательства РФ, 2014, № 9, ст. 862 [Ordinance of the Federal Council of the Federal Assembly of the Russian Federation No. 48-SF of 1 March 2014. On Using the Military Forces of Russia within the Territory of Ukraine, Legislation Bulletin of the Russian Federation, 2014, No. 9, Art. 862]. This document was repealed by Постановление Совета Федерации Федерального Собрания Российской Федерации от 25 июня 2014 г. № 296-СФ, Собрание законодательства РФ, 2014, № 26 (ч. II), ст. 3442 [Ordinance of the Federal Council of the Federal Assembly of the Russian Federation No. 296-SF of 25 June 2014, Legislation Bulletin of the Russian Federation, 2014, No. 26 (part. II), Art. 3442].

23 Соглашение между Российской Федерацией и Украиной о статусе и условиях размещения Черноморского флота Российской Федерации на территории Украины, Собрание законодательства РФ, 1999, № 31, ст. 3991 [Agreement between the Russian Federation and Ukraine on Status and Conditions of Dislocation of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine, Legislation Bulletin of the Russian Federation, 1999, No. 31, Art. 3991].

24 Answering the question about "little green men" V. Putin recognized that "the Russian servicemen did back the Crimean self-defense forces. They acted in a civil but a decisive and professional manner." Direct Line with Vladimir Putin (Jun. 1, 2017), available at http://eng.kremlin.ru/news/7034.

25 Official Results of the Crimean Referenda 2014 (Jun. 1, 2017), available at http://www.rada.crimea.ua/en/referendum/resultaty.

26 Указ Президента Российской Федерации от 17 марта 2014 г. № 147 «О признании Республики Крым», Собрание законодательства РФ, 2014, № 12, ст. 1259 [Decree of the President of the Russian Federation No. 147 of 17 March 2014. On Recognition of the Republic of Crimea, Legislation Bulletin of the Russian Federation, 2014, No. 12, Art. 1259].

27 Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов от 18 марта 2014 г., Собрание законодательства РФ, 2014, № 12, ст. 1259 [Treaty on Admitting the Republic of Crimea to the Russian Federation and Establishing New Subjects within the Russian Federation of 18 March 2014, Legislation Bulletin of the Russian Federation, 2014, No. 12, Art. 1259].

Two New Regions of the Russian Federation – the Republic of Crimea and the City of Federal Significance of Sevastopol" which came into force on 25 March 2014.[28]

The world community refused to recognize the Crimean independency and the results of the Referendum in March which criticized the Russian position in this case. Considering the US's reactions, the 3–4 March 2014 EU Council and 21 March 2014 European Council, adopted their conclusions stressing that the EU had condemned Russia for the "illegal annexation" of Crimea and would never recognize it.[29] The EU postponed all negotiations and cancelled regular Summits with Russia. The European Commission was engaged to work out the sanctions against Russia according to Art. 29 of the Treaty on European Union (TEU) and Art. 215 of the Treaty on the Functioning of the European Union (TFEU), as well as to support sanctions at an international level.

Although the UN Security Council could not take any decision on Crimea due to the Russian veto and China's distinct position on the matter, on 27 March 2014 the UN General Assembly adopted their Resolution 68/262 where the Crimean Referendum was recognized as "having no validity."[30] Declaiming against separatism, the British Premier Minister, Cameron, referred to the Crimean Referenda as "farcical."[31]

There is no debate in the academic community outside Russia: scholars consider the activity of Russia in the *Crimean* case as an "illegal annexation."[32] Müllerson agrees that the Russian activity in Crimea is characterized as "aggression" in accordance with the UN Resolution 1974 and is in breach of the Helsinki act 1975.[33] However, Müllerson notes that "Russia had good teachers"[34] in the *Kosovo* case[35] and is trying to follow the Kosovo formula, "illegal but legitimate" in the *Crimean* case.[36]

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[28] Федеральный конституционный закон от 21 марта 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», Собрание законодательства РФ, 2014, № 12, ст. 1201 [Federal constitutional law No. 6-FKZ of 21 March 2014. On Admitting the Republic of Crimea to the Russian Federation and Establishing Two New Regions of the Russian Federation – the Republic of Crimea and the City of Federal Significance of Sevastopol, Legislation Bulletin of the Russian Federation, 2014, No. 12, Art. 1201].

[29] Council of the European Union Conclusions of 4 March 2014 "Relations with Ukraine," COEST 62, 7208/14; European Council Conclusions of 21 March 2014, EUCO 7/14.

[30] UN General Assembly Resolution 68/262, Territorial Integrity of Ukraine, A/RES/68/262.

[31] David Cameron: Russia May Face EU Sanctions within Days, BBC News UK Politics, 10 March 2014 (Jun. 1, 2017), available at http://www.bbc.com/news/uk-politics-26517583.

[32] *See* James A. Green, *Editorial Comment: The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited*, 1(1) Journal on the Use of Force and International Law 3 (2004); Enrico Milano, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, 1 Questions of International Law 35 (2014); Antonello Tancredi, *The Russian Annexation of the Crimea: Questions Relating to the Use of Force*, 1 Questions of International Law 5 (2014).

[33] Rein Müllerson, *Ukraine: Victim of Geopolitics*, 13(1) Chinese Journal of International Law 133, 141 (2014).

[34] *Id.* at 143.

[35] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Advisory Opinion of 22 July 2010, General List No. 141.

[36] Müllerson 2014, at 140–141.

Russian academics differ in the appraisal of the Crimean situation.[37] Some of them are recognizing the illegal nature of the annexation of Crimea,[38] and others are support the Russian official position on *reunification* of Russia and Crimea.[39] They often make historical evaluations. Indeed, Crimea was detached from the Russian Soviet Federative Socialist Republic and was handed over to the Ukrainian Soviet Socialist Republic on the grounds of outrage of the Communist Party by the Decision of Presidium of Supreme Soviet of the USSR 1954 without any legitimate procedures, consultations or plebiscites.[40] It stands to reason that Gorbachev qualified the Crimean referenda as an act of "correct mistakes" of the Soviet past.[41]

Some Russian academics agree with Müllerson that the key for understanding the *Crimean* case lays in a corridor of the International Court of Justice (ICJ) opinion on *Kosovo*.[42] The next question to be raised is whether it really makes sense to search for parallels with the Scottish Referenda on independency in September 2014 or with the aborted "unconstitutional" Independence Referendum in Catalonia in October 2014 in context to the *Crimean* case.[43] It is obvious that we are living in an era of new challenges for international law.

Maidan and followed conflicts within the territory of Ukraine, including the issue of Crimea, have poisoned both the Ukrainian-Russian relations and the EU-Russia relations. The EU has introduced political and economic sanctions against Russia.

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37 At the same time, an academic legal qualification of the Crimean events 2014 remains under serious political pressure in Russia. *See* Elena Lukyanova, *On the Rule of Law in the Context of Russian Foreign Policy*, 3(2) Russian Law Journal 10 (2015).

38 Vladislav Inozemtsev, *Why Economic Growth Doesn't Matter in Russia*, The Moscow Times, 24 June 2014 (Jun. 1, 2017), available at https://themoscowtimes.com/articles/why-economic-growth-doesnt-matter-in-russia-36703.

39 Толстых В. Воссоединение Крыма с Россией: правовая квалификация, 5(72) Евразийский юридический журнал 40 (2014) [Vladislav Tolstykh, *Reunification of Crimea with Russia: Legal Qualifications*, 5(72) Eurasian Law Journal 40 (2014)]; Толкачев К. «Крымский вопрос» и современное право: дискуссия о легитимности референдума, 5(72) Евразийский юридический журнал 90 (2014) [Konstantin Tolkachev, *«Crimean Issue» and the Modern Law: A Discussion on the Legitimacy of the Referendum*, 5(72) Eurasian Law Journal 90 (2014)].

40 In 1994 Russia signed the Budapest Memorandum on Security Assurances in Connection with Ukraine's Accession to the Non-Proliferation Treaty. However, the Crimean question was not directly mentioned in this political document.

41 Gorbachev Says Outcome of Crimea Referendum Corrected Historical Mistakes, The Moscow Times, 18 March 2014 (Jun. 1, 2017), available at https://themoscowtimes.com/news/gorbachev-says-outcome-of-crimea-referendum-corrected-historical-mistake-33066.

42 Кожеуров Я. Провозглашение независимости Крыма не нарушает международное право, Российский совет по международным делам, 11 марта 2014 г. [Yaroslav Kozheurov, *Declaring the Crimean Independency Doesn't Infringe the International Law*, Russian International Affairs Council, 11 March 2014] (Jun. 1, 2017), available at http://russiancouncil.ru/blogs/riacexperts/1031/.

43 Ksenia Zubacheva, *Just How Different is Scotland from Crimea?*, Russia Direct, 18 September 2014 (Jun. 1, 2017), available at http://www.russia-direct.org/content/just-how-different-scotland-crimea.

All the "packages" of the sanctions were coordinated by the EU with its Atlantic partners – the USA and Canada. Russia has responded to them accordingly.

The "first package" of the EU sanctions against Russia were introduced in accordance with the Council Conclusions on the Ukraine case of 3–4 March 2014 after the above-mentioned events regarding Crimea. The EU Council's conclusions supported international sanctions against Russia (canceling the G8 summit in Sochi, suspending negotiations on entering Russia to the OECD, supporting efforts at the UN level) and introducing sanctions at EU-Russia bilateral level. At EU-Russia level, the group of the EU sanctions against Russia include:

– suspending negotiations on the New Basic Agreement;

– suspending visa dialog;

– canceling the next EU-Russia summit, and

– sanctions on the ground of the Commission proposal according to Art. 29 of the TEU and Art. 215(2) of the TFEU.[44]

Sanctions in accordance with Art. 29 of the TEU and Art. 215(2) of the TFEU were imposed *via* two legal acts which were adopted on 17 March 2014. This group of acts include the Council Decision 2014/145/CFSP[45] and the Council Regulation (EU) 269/2014.[46] They involved visa bans and asset freezes for Russian officials and companies and contained similar lists of 21 Russian persons who had been engaged in the Crimean events.[47] On 21 March 2014 after the Crimean admission to Russia, an additional 12 new names appeared on the list.[48] Notably, Russia is not mentioned in the title of these acts.

The "second package" of the EU sanctions were implemented in May 2014 as a reaction to the Russian position on Crimea and South and East Ukraine. Measures

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[44] However, negotiations on the NBA and visa matters were practically suspended earlier. EU didn't revise processes of entering in force of a New Enlargement Protocol to the EU-Russia PCA or renewal the EU-Russia S&T Agreement.

[45] Council Decision 2014/145/CFSP of 17 March 2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 78, 17 March 2014, p. 16–21.

[46] Council Regulation (EU) No. 269/2014 of 17 March 2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 78, 17 March 2014, p. 6–15.

[47] Annex to the Council Decision 2014/145/CFSP and Annex I to the Council Regulation (EU) No. 269/2014.

[48] Council Implementing Decision 2014/151/CFSP of 21 March 2014 Implementing Decision 2014/145/CFSP Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 86, 21 March 2014, p. 30–32; Council Implementing Regulation (EU) No. 284/2014 of 21 March 2014 Implementing Regulation (EU) No. 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 86, 21 March 2014, p. 27–29.

of the "second package" consist of expanding the list of banned physical persons as well as including Crimean legal entities in it.[49]

The EU support of the military anti-terrorist operation, which was implemented by President Poroshenko after his election in May against the self-declared *Donetsk People's Republic* and the *Lugansk People's Republic*, backed by the Russian "*volunteers*,"[50] and the Russian position in relation to the East Ukrainian *separatists* have been the primary cause for the subsequent terms of the EU sanctions against Russia. The EU restricting measures of the "third package" included three groups of action.

The First group of measures was adopted on 23 June 2014. It was covered by the Council Decision 2014/386/CFSP[51] and the Council Regulation (EU) 692/2014.[52] These documents contained restrictions on economic activities relating to trade, including brokerage and insurance services, and development projects in Crimea and Sevastopol, including financial and technical assistance. Projects in the fields of transport, infrastructure and energy have fallen directly under the prohibitions. Nevertheless, in the light of Art. 10 of the Regulation 692/2014 these prohibitions were mainly addressed to European companies.[53]

3. The EU Sanctions Due to the Donbass Crisis

However, the most significant EU sanctions against Russia were introduced after the tragedy with the *Malaysian Airlines Flight MH17* which had been shot down in the rebel controlled areas of Ukraine on 17 July 2014.[54] Prior to this, the European

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[49] Council Decision 2014/265/CFSP of 12 May 2014 Amending Decision 2014/145/CFSP Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 137, 12 May 2014, p. 9–12; Council Implementing Regulation (EU) No. 477/2014 of 12 May 2014 Implementing Regulation (EU) No. 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 137, 12 May 2014, p. 3–5.

[50] Answering the question about Russian soldiers within the Ukrainian territory, the Russian Foreign Minister Lavrov recognized only that "there are many volunteers there, many of them are Russians". Interview by Russian Foreign Minister Sergey Lavrov to Bloomberg TV, 21 September 2014 (Jun. 1, 2017), available at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/aa16d47f7f3fe55b44257d03004c4fb3!OpenDocument. *See also* footnote 62.

[51] Council Decision 2014/386/CFSP of 23 June 2014 Concerning Restrictions on Goods Originating in Crimea or Sevastopol, in Response to the Illegal Annexation of Crimea and Sevastopol, OJ L 183, 24 June 2014, p. 70–71.

[52] Council Regulation (EU) No. 692/2014 of 23 June 2014 Concerning Restrictions on the Import into the Union of Goods Originating in Crimea or Sevastopol, in Response to the Illegal Annexation of Crimea and Sevastopol, OJ L 183, 24 June 2014, p. 9–14.

[53] *Id.* Art. 10.

[54] According to the conclusions of the Dutch Safety Board's accident investigation, the aircraft was shot down with a Soviet-designed 9M38 Buk missile. *See* Crash of Malaysia Airlines flight MH17, Dutch Safety Board, The Hague (October 2015) (Jun. 1, 2017), available at https://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf. However, the role of Russia in this incident is

Council Conclusions of 16 July 2014 had already prescribed to enlarge the restrictive measures against Russia and asked the EIB and the Commission to re-assess and suspend new social-economic projects with Russia.[55] Adopted on 31 July 2014, the Council Decision 2014/512/CFSP[56] and the Council Regulation (EU) No. 833/2014[57] directly concerned Russia as a state and aimed to introduce the sectoral economic restriction in the EU-Russia relations. These measures form the second group of the EU restrictions in the framework of the "third package" of sanctions against Russia.

This group of sanctions is not heterogeneous. It means that measures taken were a result of a compromise between the EU Member States. First of all, in the banking sector, Decision 2014/512/CFSP and Regulation 833/2014 imposed restrictions on the purchasing of European financial instruments to the Russian state participation banks.[58] A list of these banks is contained in Annex I to the Decision 2014/512/CFSP and in Annex III of the Regulation 833/2014. They include five of the largest banks of Russia.[59] Imposed by the EU Council, restrictions refer to using the financial instruments – not relating to lending, attracting deposits and transferring payments but not affecting branches of the credit institutions. Secondly, these measures have prohibited supplying arms and military equipment from the EU to Russia (Art. 2 of the Decision 2014/512/CFSP). Thirdly, they have prohibited supplying the dual-use goods from the EU to Russia, (Art. 3 of the Decision 2014/512/CFSP).[60] Fourthly, the documents have introduced a prior approval (authorization) for trade in products and technologies with Russia within energy industry.

The third group of sanctions is aimed at expanding the ban list.[61] After this amendment the EU black list accounted 118 positions. It has covered 95 persons, 9 associations and groups and 14 legal entities, including one bank.

still unclear legally. Besides, it is obvious that the Ukrainian authorities are partly responsible for the tragedy: the incident happened within the Ukrainian territory and Ukrainian official had not closed the flight routes above the zone of combat activity. On these grounds family members of the wreck passengers have broken actions against Ukraine before the European Court of Human Rights. *See Ioppa v. Ukraine* (communicated case), applications no. 73776/14, 973/15, 4407/15 and 4412/15.

55 European Council Conclusions of 16 July 2014, EUCO 147/14.

56 Council Decision 2014/512/CFSP of 31 July 2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, OJ L 229, 31 July 2014, p. 13–17.

57 Council Regulation (EU) No. 833/2014 of 31 July 2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, OJ L 229, 31 July 2014, p. 1–11.

58 Art. 1 of the Council Decision 2014/512/CFSP; Art. 5 of the Council Regulation (EU) No. 833/2014.

59 They are *Sberbank, VTB Bank, Gazprombank, Vnesheconombank (VEB), Rosselkhozbank*.

60 List of these goods is contained in the relevant EU Regulation 2009.

61 Council Decision 2014/508/CFSP of 30 July 2014 Amending Decision 2014/145/CFSP Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 226, 30 July 2014, p. 23–26; Council Implementing Regulation (EU) No. 826/2014 of 30 July 2014 Implementing Regulation (EU) No. 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 226, 30 July 2014, p. 16–19.

In September 2014 the deteriorating situation in eastern Ukraine and violent fighting between the Ukrainian army and the so-called "pro-Russian rebels" pushed the EU to add to the conditions of the terms of the sanctions.[62] These additions to the EU sanctions against Russia included new restrictions through amendments of existing EU acts. However, these measures were adopted by the Council at the same time the First Minsk arrangements on ceasing fire were reached. It has put such sanctions under question since the beginning of its implementation. Russia refrained from any responding measures.

Firstly, The EU ban list has expanded by 24 new persons.[63] Secondly, the EU Council has introduced three new ban lists: (a) List of Russian enterprises of defense industry, which were excluded from the EU investments and credit market, (b) List of Russian enterprises of energy industry, which were excluded from the EU investments and credit market, (c) List of Russian enterprises of defense industry, which were under prohibition in relation to export dual-use goods from the EU.[64] Moreover, the EU novels have stepped the restrictive measures up concerning the access of several of the largest Russian banks to the EU financial market.

All sets of sanction terms are repeatedly extended and updated. They exist until present day.

4. Russia's Countersanctions

Russia did not seriously react on the first two sets of sanctions. The State Duma and the Federal Council adopted their Statements from where they had condemned

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[62] The EU and Ukrainian authorities distrust Russia in cases of using its military forces in the Ukrainian East. Russian authorities officially reject all apprehensions and explain the detention of the Russian soldiers within the Ukrainian territory as confusion at the Ukrainian-Russian boarder. *See* Heather Saul, *Ukraine Crisis: Russian Soldiers Captured in Conflict Area Crossed Border "By Accident*," The Independent, 26 August 2014 (Jun. 1, 2017), available at http://www.independent.co.uk/news/world/europe/ukraine-crisis-russian-paratroopers-captured-in-conflict-area-crossed-border-by-accident-9690752.html.

[63] Council Decision 2014/658/CFSP of 8 September 2014 Amending Decision 2014/145/CFSP Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 271, 12 September 2014, p. 47–53; Council Regulation (EU) No. 959/2014 of 8 September 2014 Amending Regulation (EU) No. 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 271, 12 September 2014, p. 1–2; Council Implementing Regulation (EU) No. 961/2014 of 8 September 2014 Implementing Regulation (EU) No. 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine, OJ L 271, 12 September 2014, p. 8–13.

[64] Council Decision 2014/659/CFSP of 8 September 2014 Amending Decision 2014/512/CFSP Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, OJ L 271, 12 September 2014, p. 54–57; Council Regulation (EU) No. 960/2014 of 8 September 2014 Amending Regulation (EU) No. 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, OJ L 271, 12 September 2014, p. 3–7.

the EU for the sanctions against Russian officials.[65] "You should be ashamed," answered the Russian Ministry of Foreign Affairs, spotting Cold War-style language.[66]

Besides, Russia responded to the EU sanctions against the economic sectors. In accordance with the Russian President's Decree of 6 August 2014,[67] the Russian Government introduced certain special economic measures aimed to provide security.[68] These measures included the banning of importing agricultural products, raw and food from countries which had introduced sanctions against Russia before. Thus Russia blocked European agricultural exports to Russia totalling 11.8 billion euros.[69]

More recently, in May 2015 Russia imposed travel bans on 89 EU citizens, including politicians and officials from EU member states such as Germany, Poland, the Baltic states, UK and Sweden who criticized Moscow's annexation of Crimea. The decision was taken in response to hostile acts against the Russian Federation, including the blacklisting of Russian citizens.[70]

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[65] Заявление Государственной Думы Федерального Собрания Российской Федерации от 18 марта 2014 г. «О санкциях Соединенных Штатов Америки и ЕС», Собрание законодательства РФ, 2014, № 12, ст. 1226 [Statement of the State Duma of the Federal Assembly of the Russian Federation of 18 March 2014. On the United State of America and the EU Sanctions, Legislation Bulletin of the Russian Federation, 2014, No. 12, Art. 1226]; Заявление Совета Федерации Федерального Собрания Российской Федерации от 21 марта 2014 г. «Относительно санкций Соединенных Штатов Америки и ЕС», Собрание законодательства РФ, 2014, № 12, ст. 1205 [Statement of the Federal Council of the Federal Assembly of the Russian Federation of 21 March 2014. Concerning the United State of America and the EU Sanctions, Legislation Bulletin of the Russian Federation, 2014, No. 12, Art. 1205].

[66] Comment by the Information and Press Department of the Russian Ministry of Foreign Affairs Regarding EU's Sanctions against Russia, 29 April 2014 (Jun. 1, 2017), available at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/7ca65cede1928e8e44257cca00558fca!OpenDocument.

[67] Указ Президента Российской Федерации от 6 августа 2014 г. № 560 «О применении некоторых специальных экономических мер, направленных на обеспечение безопасности Российской Федерации», Собрание законодательства РФ, 2014, № 32, ст. 4470 [Decree of the President of the Russian Federation No. 560 of 6 August 2014. On Application of Certain Special Economic Measures Aimed to Provide Security of the Russian Federation, Legislation Bulletin of the Russian Federation, 2014, No. 32, Art. 4470].

[68] Постановление Правительства Российской Федерации от 7 августа 2014 г. № 778 «О мерах по реализации Указа Президента Российской Федерации от 6 августа 2014 г. № 560 «О применении некоторых специальных экономических мер, направленных на обеспечение безопасности Российской Федерации»», Собрание законодательства РФ, 2014, № 32, ст. 4543 [Ordinance of the Government of the Russian Federation No. 778 of 7 August 2014. On Measures to Implement the Decree of the President of the Russian Federation of 6 August 2014 No. 560 "On Application of Certain Special Economic Measures Aimed to Provide Security of the Russian Federation," Legislation Bulletin of the Russian Federation, 2014, No. 32, Art. 4543]. However, the Russian Government mitigated the sanction later.

[69] Delphine d'Amora, *Putin Strikes Back against Sanctions with Food Import Bans*, The Moscow Times, 6 August 2014 (Jun. 1, 2017), available at http://www.themoscowtimes.com/business/article/putin-orders-agricultural-import-bans-on-countries-that-sanctioned-russia/504675.html.

[70] Available at http://www.ft.com/intl/cms/s/0/d2fee02a-077b-11e5-a58f-00144feabdc0.html?siteedition=intl.

Furthermore, the Russian economic countersanctions were contested in the Supreme Court of Russia. For the first time, it refused to exclude some seafood products from the Russian ban list for imported products in the case of the *Murmansk Rybokombinat* company in 2014.[71] In 2015, the Supreme Court of Russia rejected the claim of the Society for consumer rights protection "*Public control in action*" to annul President's and Government's acts on economic countersanctions.[72] The last thing, in March 2017 the Supreme Court considered the action of the *Oktoblu* company against the Customs body decision grounded on the Government's act on economic countersanctions. The result was similar; the Supreme Court dismissed the action.[73] Although these attempts were unsuccessful, they vividly demonstrate that the sanctions always concern both of Parties.

5. What is Wrong with the Sanctions?

It sounds rather strange but, in wider context, EU sanctions against Russia have always stood behind the EU-Russia relations. Of course, EU anti-dumping sanctions and sanctions within the framework of the EU competition policy[74] are impossible to compare with the recently adopted restrictive measures pursuant to Art. 29 of the TEU and Art. 215 of the TFEU. However despite the more negative impact on the economies of the parties, new sanctions have not crushed the EU-Russia balanced relations in the main sectors of economic interconnections, e.g. energy supplies, investments in industry or trade in manufactured goods.

Sanctions always have consequences for both parties. The European business community has reacted to the EU sanctions against Russia in a lukewarm manner.[75] An angry statement was released by the *SWIFT* community.[76] The *UEFA* has demonstrated

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[71] Решение Верховного Суда РФ от 11 ноября 2014 г. № АКПИ14-1124, Бюллетень Верховного Суда Российской Федерации, 2015, № 10 [Judgment of the Supreme Court of the Russian Federation No. AKPI14-1124 of 11 November 2014, Bulletin of the Supreme Court of the Russian Federation, 2015, No. 10].

[72] Определение Верховного Суда РФ от 11 ноября 2015 г. по делу № АКПИ15-1007 [Order of the Supreme Court of the Russian Federation of 11 November 2015 in the case No. AKPI15-1007], not officially published.

[73] Определение Верховного Суда РФ от 3 марта 2017 г. № 305-АД17-43 по делу № А40-146689/2015 [Order of the Supreme Court of the Russian Federation of 3 March 2017 No. 305-AD17-43 in the case No. A40-146689/2015], not officially published.

[74] The EU Commission launched the investigation against *Gazprom* in September 2012. If the Commission is able to prove the abuse of dominant position by *Gazprom*, Russian company will have to pay a penalty of about 8 billion euro. Antitrust: Commission Opens Proceedings against Gazprom, European Commission, Press release, 4 September 2012 (Jun. 1, 2017), available at http://europa.eu/rapid/press-release_IP-12-937_en.htm.

[75] Association of European Businesses Urges EU to Refrain from Sanctions against Russia, ITAR-TASS, 30 August 2014 (Jun. 1, 2017), available at http://en.itar-tass.com/economy/747335.

[76] European Parliament Resolution, The *SWIFT* Statement of 18 September 2015 (Jun. 1, 2017), available at https://www.swift.com/insights/press-releases/european-parliament-resolution.

its own attitude to the political sanctions.[77] Russian countersanctions have led to inflated prices on food within the Russian domestic market and have cost an arm and a leg for Russian people even more so than the EU sanctions.[78]

Moreover, the adoption of sanctions has not led to a change in behavior by Russia but has attracted negative reactions from the business world. If anything, the EU restrictive measures have exacerbated EU-Russia relations and have led Russia into cooperating more actively with China, South Korea, Vietnam and other Asian countries.[79]

Apart from debates about the legality or illegality of the sanctions in international law,[80] it is crucial to point out the archaic of these actions nowadays. Indeed, when we impose unilateral restrictive measures, we enter terms that can be qualified as kind of retorsions (stop lists) or reprisals (countersanctions). These things are common for the classical era of international relations; they have been obsolete for a long time. Archaic behavior requires an alternative in terms of the principle of the peaceful settlement of international disputes, which is opposed to all types of "annexations," "retorsions" and "reprisals."

The sanctions imposed by the EU are questionable due to their unilateral nature. In fact, they were adopted outside the context of the UN Security Council. They may also be incompatible with EU legal standards. As stated by the conference of the representatives of the Member State governments,

> respect for fundamental rights and freedoms implies, in particular that proper attention is given to the observance and the due process rights of the individuals or entities concerned [by restrictive measures]. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifications of each restrictive measure.[81]

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77 EU Unlikely to Sanction Russia's Big Sport Events, Brampton Guardian, 3 September 2014 (Jun. 1, 2017), available at http://www.bramptonguardian.com/sports-story/4820800-eu-unlikely-to-sanction-russia-s-big-sport-events/.

78 Bruce Kennedy, *Who Will Russia's Food Sanctions Hurt More?*, CBS MoneyWatch, 7 August 2014 (Jun. 1, 2017), available at http://www.cbsnews.com/news/will-russian-food-sanctions-affect-western-agriculture.

79 *See* the speech of Prime Minister Medvedev reported on the website http://www.presstv.ir/Detail/2015/06/12/415487/Russia-West-sanction-Ukraine.

80 *See* John J.A. Burke, *Economic Sanctions against the Russian Federation are Illegal under Public International Law*, 3(3) Russian Law Journal 126 (2015); Yaroslav Kozheurov, *The War of "Sanctions" and the Law of International Responsibility*, 2(4) Kutafin University Law Review 306 (2015).

81 *See* Declaration No. 25 on Articles 61 H and 188 K of the Treaty on the Functioning of the European Union, included in the Final Act of the Intergovernmental Conference, OJ C 306, 17 December 2007, p. 231–271.

Although the Council has a broad discretion to adopt CFSP decisions, including those freezing the assets of individuals, the Court of Justice has the authority to review these decisions, and where blacklisting an individual is based on facts that are materially inaccurate and there is a manifest error in the assessment of facts, the Court can annul that decision, as has happened in several cases.[82]

Although the Court considered these measures to be illegal, this has not prevented the Council from re-enacting them, after amending the statement of reasons at the basis of the listing. This is what happened in the *Ternavsky* case[83] concerning a Belarusian national.

Several Russian nationals have introduced annulment actions before the EU General Court, contesting the EU restrictive measures on human rights and other grounds (including the breach of the PCA)[84] or in terms of their legal basis.[85] In the *Rotenberg* case[86] the General Court demonstrated controversial results. Arkady Rotenberg is a Russian businessman, who is intimately affiliated with President V. Putin. In 2014 Rotenberg was introduced by the EU Council to the list of persons who are covered by the first set of sanctions. However, the Court upheld his claim partially. The Court recognized the whole scope of restrictive measures to be invalid against him in 2014, but confirmed the validity of the extension of these measures on him in March 2015 due the fact that Rotenberg's company was implementing projects for transport infrastructure between Crimea and the Krasnodar Region.

Besides, in the *Almaz-Antey* case[87] the General Court rejected the claims of the Russian company and retained the restrictive measures against it. The "Almaz-Antey" company is one of the largest producers of weapons in Russia, in particular, "ground-to-air" missiles, which were presented in Donbass in 2014. The Russian company denied any direct involvement in the process of the destabilization of Ukraine and demanded the defrosting of its assets for 2015–2016. However, the Court did not consider in detail the issue concerning manufactured weapons supplied to Donbass. The Court ruled that the risk of the company's illegal activity might be sufficient for a decision to freeze its assets.

A preliminary ruling before the Court of Justice was also initiated. This was raised in the UK by an oil company, *Rosneft*, owned in part by the British company

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82 *See* Judgement of 9 July 2014 in Joined Cases T-329/12 and T-74/13, *Mazen Al-Tabbaa v. Council of the European Union*, nyr. *See also* Judgement of 16 July 2014 in case T-572/11, *Hassan v. Council of the European Union*, of 16 July 2014, nyr.

83 *See* Judgement of 21 May 2015 in case T-163/12, *Ternavsky v. Council*, nyr.

84 *See* the pending cases, T-715/14, *NK Rosneft and Others v. Council*, [2014] OJ C 431/40; T-720/14, *Rotenberg v. Council*, [2015] OJ C 7/37; T-734/14, *VTB Bank v. Council*, [2015] OJ C 16/43.

85 Case T-732/14, *Sberbank of Russia v. Council*, [2015] OJ C 16/41.

86 Case T-720/14, *Rotenberg v. Council*, [2016] ECLI:EU:T:2016:689.

87 Case T-255/15, *Almaz-Antey Air and Space Defence v. Council*, [2017] ECLI:EU:T:2017:25.

BP and in part by the Russian state, which was affected by the sanctions against Russia. The UK Divisional Court raised questions on the validity of the CFSP decision regarding the restrictive measures against Russia[88] and on the interpretation of the EU Regulation implementing those measures.[89] Previously, on 31 May 2016 Advocate General Wathelet presented his Opinion in this case,[90] where he proposed to reject all the pleas of the Russian company. The court rarely discords from the Advocate General's conclusions.

After 10 months, the ECJ delivered its judgment in this case on 28 March 2017.[91] As expected, it acknowledged all basic conclusions of the Advocate General. Following the Advocate General Opinion, the Court confirmed its jurisdiction in this case.[92] Although the Advocate General Opinion contained some politically controversial evaluations regarding the Council motivations and reasons in imposing restrictive measures, the Court, in its judgment, did not analyze specific reasons and actions, but referred to a broad discretion of the Council powers to take political measures in the context of the CFSP. In fact, the Court resorted to the *political question* doctrine[93] confiding itself to a legal interpretation of the Treaties and related Council acts. It is also worth noting that the Court, for the second time in its practice, interpreted the EU-Russia PCA provisions in the *Rosneft* case.

Rotenberg was not the only individual from the ban list, who appealed to the EU Court of justice. In the *Kiselev* case,[94] the General Court also rejected all claims of the complainant. It seemed that the claim of the Russian pro-government journalist Dmitry Kiselev had to be satisfied against the backdrop of the judgment in the *Mikhalchanka* case,[95] where the Court excluded his Belarusian colleague from the EU's ban list. However, the Court pointed out that this was a different situation. In particular, the criterion of "active support," applied by the Council to the applicant, is broader than those, based on responsibility, at issue in the case that gave rise to

88 Council Decision 2014/145/CFSP of 17 March 2014, *supra* note 45.

89 Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, [2015] OJ C 155/12.

90 Advocate General's Opinion in Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, [2016] ECLI:EU:C:2016:381.

91 Judgment of the Court (Grand Chamber) of 28 March 2017 in Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, [2017] ECLI:EU:C:2017:236.

92 Peter van Elsuwege, *Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft Case*, Verfassungsblog, 6 April 2017 (Jun. 1, 2017), available at http://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case.

93 About application of this doctrine in courts *see* Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 University of Colorado Law Review 849 (1994); Ildikó Marosi & Lóránt Csink, *Political Questions in the United States and in France* in *Studia Iuridica Caroliensia Vol. 4* 113 (M. Hoe (ed.), Budapest: Mátyás Kapa, 2009).

94 Case T-262/15, *Kiselev v. Council*, [2017] ECLI:EU:T:2017:392.

95 Case T-693/13, *Mikhalchanka v. Council*, [2016] ECLI:EU:T:2016:283.

the judgment in the *Mikhalchanka* case.[96] In addition, the restrictions imposed by European law do not interfere with his journalistic activities in Russia and do not violate his right to express his opinions as a Russian citizen in his state.

These recent developments turned out to be bitterly disappointing for Russian individuals and companies affected by the EU restrictive measures. Currently, all further attempts to challenge the restrictive measures imposed due to the crisis in Crimea and Donbass will be useless.[97] All claims of this kind will be dismissed in accordance with the conclusions of the *Rosneft* case and the General Court established practice.

Conclusion

With the Ukrainian crisis, the deterioration in EU-Russia relations has reached its lowest point. The Parties have introduced mutual restrictive measures to each other. The EU has imposed two groups of sanctions against Russia due to the Crimean crisis and due to the situation in the South-East of Ukraine. Russia reacted to the second group of the EU sanctions by countersanctions.

Nevertheless, the EU-Russia relations have never deprived us of positive incentives and hopes.[98] The EU External Relations Council formulated five short term principles to relations with Russia in March 2016.[99] Furthermore, the idea of a Common economic area from the Atlantic to the Pacific is still on the agenda of Russian external activity in accordance to its Concept of foreign policy 2016.[100]

The "war of sanctions," which has frozen official contacts and negotiations has not achieved anything. This crisis can only be overcome through dialogue. However, at the moment, the main critics of the EU sanctions amongst EU Member States (Austria,

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96 Para. 78 of the Judgment of the General Court of 15 June 2017 in Case T-262/15, *Kiselev v. Council*.

97 Гландин С. Европейское право ограничительных мер после первых российских дел в Суде Европейского Союза, 2(22) Международное правосудие 80 (2017) [Sergey Glandin, *The European Law of Restrictive Measures after First Russian Cases before the European Court of Justice*, 2(22) International Justice 80 (2017)].

98 Paul Kalinichenko, *Shared Values and Interests in the Conflictual Relationship between the EU and Russia* in *The European Neighbourhood Policy – Values and Principles* 115 (Sara Poli (ed.), Abingdon, Oxon; New York: Routledge, 2016).

99 The five principles guiding the EU's policy towards Russia are: 1). Implementation of the Minsk agreement as the key condition for any substantial change in the EU's stance towards Russia; 2). Strengthened relations with the EU's eastern partners and other neighbours, including in Central Asia; 3). Strengthening the resilience of the EU (for example, energy security, hybrid threats, or strategic communication); 4). The possibility of selective engagement with Russia on issues of interest to the EU; 5). Need to engage in people-to-people contacts and support Russian civil society. *See* Outcome of the Council Meeting, 3457th Council Meeting, Foreign Affairs, Brussels, 14 March 2016 (7042/16, PR CO 16).

100 *See* Concept of the Foreign Policy of the Russian Federation approved by President of the Russian Federation on 30 November 2016, para. 63 (Jun. 1, 2017), available at http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/2542248.

Greece, Finland, Italy and Spain) are too weak to convince the other members to lift them. Perhaps, the Brexit and Donald Trump's US Presidency will be able to have a political effect in order to abolish the second set of European sanctions and the Russian countersanctions. These sanctions can be lifted in the meantime. The EU sanctions of the first group will be kept for a long time.

Hopefully, both of the Parties will be able to cancel their mutual "war of sanctions." The sanction policy is unreasonable and destructive, especially, concerning the Minsk II Arrangements and the beginning of peaceful resolvements in *the Donetsk region* and *the Lugansk region* of Ukraine.

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References

Burke J.J.A. *Economic Sanctions against the Russian Federation are Illegal under Public International Law*, 3(3) Russian Law Journal 126 (2015).

Green J.A. *Editorial Comment: The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited*, 1(1) Journal on the Use of Force and International Law 3 (2004).

Kalinichenko P. *Shared Values and Interests in the Conflictual Relationship between the EU and Russia* in *The European Neighbourhood Policy – Values and Principles* 115 (S. Poli (ed.), Abingdon, Oxon; New York: Routledge, 2016).

Leino P. & Petrov R. *Between "Common Values" and Competing Universals – The Promotion of the EU's Common Values though the European Neighbourhood Policy*, 5(15) European Law Journal 654 (2009).

Lukyanova E. *On the Rule of Law in the Context of Russian Foreign Policy*, 3(2) Russian Law Journal 10 (2015).

Marosi I., Csink L. *Political Questions in the United States and in France* in *Studia Iuridica Caroliensia Vol. 4* 113 (M. Hoe (ed.), Budapest: Mátyás Kapa, 2009).

Milano E. *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, 1 Questions of International Law 35 (2014).

Müllerson R. *Ukraine: Victim of Geopolitics*, 13(1) Chinese Journal of International Law 133 (2014).

Petrov R. & Kalinichenko P. *The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine*, 60(2) International and Comparative Law Quarterly 325 (2011).

Tancredi A. *The Russian Annexation of the Crimea: Questions Relating to the Use of Force*, 1 Questions of International Law 5 (2014).

Weinberg L. *Political Questions and the Guarantee Clause*, 65 University of Colorado Law Review 849 (1994).

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THE REUNIFICATION OF CRIMEA AND THE CITY OF SEVASTOPOL WITH THE RUSSIAN FEDERATION

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Crimea and the City of Sevastopol justifiably separated from Ukraine and reunified with the Russian Federation in 2014. Support for this proposition is found in historic, economic, and political reasoning. Extant principles of public international law, derived from the Treaty of Westphalia, and subsequently developed by Great Powers to facilitate their strategic interests, when applied to the Crimean/Russian reunification, produce absurd results: nailing a population to a cross of misery, oppression, and poverty. In addition, the principles invoked are underdeveloped, prejudiced toward Nation States holding the imprimatur of "Great Powers," and ignore individual and population preferences. Moreover, scholarly and jurist analyses repose upon an edifice of incomplete facts, and ignore the 1991 illegal annexation of Crimea by Ukraine. Crimea suffered twenty-three years of economic rot under Ukrainian rule. Under the Russian Federation, economic conditions in the peninsula are improving, despite the US/EU sanctions imposed upon the Crimean population, a cruelty that the Great Powers cannot justify. Exceptional circumstances that took place in Ukraine in 2013/14 permitted scheduling a referendum to seek independence from Ukraine. Polls taken after the 2014 referendum unanimously demonstrate that the population of Crimea and the City of Sevastopol prefer reunification with the Russian Federation, as opposed to going back and becoming a subject of Ukraine rule and exploitation under a US installed right wing regime. Repeated calls to "give back" Crimea to Ukraine are based on twisted historical narratives, solely designed to weaken the Russian Federation.

Keywords: Crimea; Russian Federation; secession; annexation; economic sanctions.

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Table of Contents

Introduction

Part One of this article sets forth a chronology of events that took place in Ukraine and the Crimean Peninsula, after the collapse of the Soviet Union and prior to Crimea's reunification with the Russian Federation. This Part is divided into three sections: (1) the period between 1991 and 2000, (2) the period between 2013 and 2014, and (3) the period in Crimea in 2014. Two preceding events merit mention: Catherine the Great's 1793 integration of Crimea within the Russian empire, and Khrushchev's transfer of the peninsula to the Ukrainian SSR in 1954.[1] The chronology corrects misstatements of fact found in the scholarly literature and popular press, both of which portray an abbreviated version of facts, and a piecemeal application of public international law, to maintain that: (1) Crimea seceded from Ukraine, (2) the purported "secession" was illegal under extant principles of public international law[2] and, (3) the Russian Federation illegally "annexed" Crimea in 2014.

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[1] In context, Crimea was part of Russia for 161 years, prior to its transfer to Ukraine during the existence of the USSR, when the transfer had no practical significance. Tacking on the period from 1954 to 1991, then Crimea was part of Russia for an additional 37 years. Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago*?, Wilson Center, CWIHP e-Dossier No. 47, 19 March 2014 (May 27, 2017), available at https://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago [noting that the two official rationales published in 1954: "noble act on the Part of the Russian people" and "territorial proximity of Crimea to Ukraine, commonalities of their economies, and the close agricultural and cultural ties between the Crimean oblast and the UkrSSS" do not hold up to scrutiny]. The document "February 19, 1954, Meeting of the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics" containing a transcript of the meeting at which Crimea was transferred to Ukraine is full of platitudes and devoid of argument is available at http://digitialarchive.wilsoncenter.org/document/119638.

[2] "There is no generally accepted definition of secession as a form of State creation." Peter Radan, *The Definition of "Secession,"* Macquarie Law Working Paper No. 2007-3 (August 2007), at p. iii. Professor Macquarie proposes the following definition: "Secession is the creation of a new State upon territory previously forming part of, or being a colonial entity of, an existing State." *Id*. at 2. In addition, Professor Radan emphasises the importance of "recognition" of a State produced by secession, at least as a foreign policy goal. *Id*. at 3. The closely related concept of "irredentism" is defined as "attempts by existing states

Part Two of this article distils key conclusions drawn from the comprehensive factual chronology found in Part One. Conventional interpretations of the Crimean crisis repose upon faulty factual premises thereby undercutting their profoundly misguided conclusions. Without an accurate statement of facts, the precise legal question to be answered cannot be drawn. In the absence of fully developed facts, the media spreads an unsustainable mythology of Euromaidan shaping public opinion. Part Two also argues that public international law sanctions a monopoly of power by States and lacks rules to resolve matters such as the Crimean case.

Part Three of this article constructs the argument from pragmatism to support the reunification of Crimea with the Russian Federation and to legitimate the redrawn borders of the Republic of Crimea. The pragmatist argument relies upon multiple disciplines: history, economic analysis, and political reasoning; posits that facts drive the application of "international law," and, asserts that principles of "economic analysis," exceptionally well-developed within municipal law, have the capacity to reshape public international law to improve an understanding of State behaviour. The redrawn border of the Crimean Peninsula is consistent with logic and what must constitute the ultimate objective of public international law: the end of human suffering.

1. Part One: History (1991–2000)

1.1. The story of Crimea's separation from Ukraine and re-unification with the Russian Federation begins in 1991, when the Soviet Union was disintegrating, but prior to its formal dissolution.[3] The declarations first of sovereignty and second of independence of the individual republics of the USSR, were acts of secession, as the Union of Soviet Socialist Republics, at that time, remained in existence and constituted the highest organ of power. These secessions have generated no legal analysis as to their validity under public international law, as the Great Powers of that epoch: the United States and Europe, did not object, as it was in their geo-political interest.[4]

to annex territory of another state that their co-nationals inhabit." *Id*. at 6. Further elaborations of the term "secession" are found: *e.g*., Susanna Mancini, *Secession and Self-Determination* (M. Rosenfeld & A. Sajo (eds.), Oxford: Oxford University Press, 2012), at Ch. 23 [asking ultimately "whether the constitutionalization of the right to secede can, in particular context, be regarded as a constructive response to secessionist challenges and what its implications are for constitutional law"]; and Emanuelle Dalle Mulle, *Secessionism and Separatism Monthly Series: "Secession and International Law" by Peter Radan*, HNationalism, 20 November 2015 (May 27, 2017), available at https://networks.h-net.org/node/3911/discussions/97535/secessionism-and-separatism-monthly-sries-% E2%80%9Csecession-and.

[3] The Soviet Union was formed in December 1922 "by four Soviet Socialist Republics: Russia, Ukraine, Belarus, and the Transcaucasian Federation." Serhii Plokhy, *The Last Empire: The Final Days of the Soviet Union* 309 (London: Oneworld, 2014). Arguably, the Soviet Union was destroyed by acts of treason, violation of Soviet internal law, political ambitions of select leaders of individual Republics, and the role of the United States.

[4] Malcolm N. Shaw, *International Law* 500 (6th ed., Cambridge: Cambridge University Press, 2008) states concisely the status of secession, "International law has sometimes to modify its reactions to the consequences of successful violation its rules to take into account the exigencies of reality."

1.2. On 26 April 1990, the USSR enacted a law identifying competences of the USSR as a federation and competences held by the Republics. Under the law, autonomous republics had rights of full governance over their territory without direct control of the USSR.[5] Earlier, in 1990, the second phase of foreign investment reform took place, as Gorbachev tried to jump-start the economy.[6] On 3 November 1990, a special commission of the Crimean government announced a project to formulate a temporary decree concerning the procedure of how to conduct a referendum on the territory of the Crimean oblast to permit a vote on re-establishing Crimea as an Autonomous Soviet Socialist Republic.[7] Subsequently, on 12 November 1990, the Crimean government held a special session, at which President Kravchuk was present, and found that the USSR decree of 30 June 1945 and law of the RSSR of 25 June 1946, abolishing the Crimean ASSR was unlawful, and that the Crimean population has the right to re-establish the Crimean ASSR as a subject of the USSR, and participant of the Union Agreement.[8] Simultaneously, the Crimean government decided to hold a referendum, scheduled for 20 January 1991, to decide the legal status of Crimea.[9]

1.3. In response to Gorbachev's planned reforms, in January 1991, prior to the Alma-Ata accords, Crimea held a referendum (the Crimean Sovereignty Referendum) where voters were asked whether they wanted to re-establish the Crimean Autonomous Soviet Socialist Republic, that had been abolished in 1954.[10] Specifically,

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5 Constitution Writing and Conflict Resolution, Soviet Union 1990 (May 27, 2017), available at https://www.princeton.edu/~pcwcr/reports/sovietunion1990.html.

6 *See* William G. Frenkel and Michael Y. Sukham, *New Foreign Investment Regimes of Russia and Other Republics of the Former U.S.S.R.: A Legislative Analysis and Historical Perspective*, 16(2) Boston College International and Comparative Law Review 321, 325 (1993) (noting "the Union republics increasingly began to assert political sovereignty and economic independence"). *See also* Randy Bregman & Dorothy C. Lawrence, *New Developments in Soviet Property Law*, 28 Columbia Journal of Transnational Law 189 (1990).

7 Временное положение о референдуме и порядке его проведения на территории Крымской обл. УССР (Проект), Крымская правда, 3 ноября 1990 г., № 253 (20168), с. 1–2 [Temporary Provision on the Referendum and the Procedure of Its Conduct on the Territory of the Crimean Oblast (Region) Ukr. SSR (Draft), Crimean Truth, 3 November 1990, No. 253 (20168), p. 1–2].

8 Декларация о государственном и правовом статусе Крыма, Крымская правда, 14 ноября 1990 г., № 260 (20175), с. 1. [Declaration on the State and Legal Status of the Crimea, Crimean Truth, 14 November 1990, No. 260 (20175), p. 1].

9 Временное положение о референдуме и порядке его проведения на территории Крымской обл. УССР, Крымская правда, 13 ноября 1990 г., № 259 (20174), с. 1–2; 16 ноября 1990 г., № 262 (20177), с. 1–2 [Temporary Provision on the Referendum and the Procedure of Its Conduct on the Territory of the Crimean Oblast (Region) Ukr. SSR, Crimean Truth, 13 November 1990, No. 259 (20174), p. 1–2; 16 November 1990, No. 262 (20177), p. 1–2].

10 Crimean sovereignty referendum, 1991, where voters were asked whether they wanted to re-establish the Crimean Autonomous Soviet Socialist Republic as a subject of the USSR. 94.3% of voters cast ballots in favour of the referendum (May 6, 2017), available at https://en.wikipedia.org/wiki/Crimean_sovereignty_referendum,_1991. *Note that the referendum did not involve any reference to joining Ukraine, that while in the process of unlawfully terminating the USSR, had not yet held its own referendum on sovereignty, not to mention independence* (authors' emphasis). *See also* Plokhy 2014, at 281.

the referendum asked whether Crimea wanted to become an Autonomous Soviet Socialist Republic *as a subject of the USSR*, not a subject of Ukraine.[11] Approximately, ninety-four percent (93.26%) of voters approved the referendum. On 25 January 1991, the Crimean government reported the results of the referendum to Kiev, asked for freedom from Ukraine to enable integration within the USSR. The request also asked Kiev to modify its constitution and to approve the drafting of a new constitution for Crimea as an ASSR.[12]

1.4. However, Kravchuk, committed to prevent Crimea from seceding from Ukraine, visited Crimea "on the day when its parliament was scheduled to vote on the law regulating the local referendum that was to put the question of the Crimea's secession to a popular vote."[13] He "convinced" the "former communist elite, who had worked with Kyiv since 1954, to postpone the vote on the law."[14] "Their opponents in parliament, represented by the Republican Movement of the Crimea, were outvoted."[15] On 12 February 1991, President Kravchuk issued a law composed of two articles. Art. 1 re-established the Crimean Autonomous Soviet Socialist Republic on the territory of the Crimean oblast within the Ukr. SSR.[16] Art. 2 appointed the interim government of Crimean ASSR.[17] Consequently, Kravchuk ignored the results of the referendum and cemented Crimea to Ukraine contrary to the will of the population of Crimea.[18]

1.5. On 17 March 1991, the USSR, acting in its federal capacity, held a union-wide referendum asking whether citizens wanted the USSR to continue to exist as a new federation comprised of equal sovereign republics.[19] In Ukraine, 70.5% of those who voted expressed a preference to remain in the revised USSR; noteworthy

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[11] Arina Tsukanova, *How Ukraine Annexed Crimea: A Frank Conversation with Nikki Haley*, Strategic-Culture Foundation, 8 February 2017 (May 5, 2017), available at https://www.strategic-culture.org/news/2017/02/08/how-ukraine-annexed-crimea-frank-conversation-with-nikki-haley.html.

[12] Крымская правда, 25 января 1991 г., № 18 (20233), с. 1 [Crimean Truth, 25 January 1991, No. 18 (20233), p. 1].

[13] Plokhy 2014, at 281.

[14] *Id*. at 281–282.

[15] *Id*. *See also* Arina Tsukanova, *So Who Annexed the Crimean Peninsula Then*?, Strategic Culture Foundation, 30 March 2017 (May 5, 2017), available at http://www.strategic-culture.org/news/2017/03/28/so-who-annexed-crimea-peninsular-then.html.

[16] Ведомости Верховного Совета УССР, 26 февраля 1991 г., № 9, с. 84, № 712-XII [Law Digest Ukr. SSR, 26 February 1991, No. 9, p. 84, No. 712-XII].

[17] *Id*.

[18] Inexplicably, despite the clarity of the referendum outcome, the Crimean government unilaterally began to discuss the creation of an Autonomous Republic within Ukraine. Правовой путь к государственности, Крымская правда, 26 января 1991 г., № 19 (20234), с. 1–2 [The Legal Path to Statehood, Crimean Truth, 26 January 1991, No. 19 (20234), p. 1–2].

[19] Бюллетень для голосования на Референдуме СССР, Керченский рабочий, 14 марта 1991 г., № 51 (18244), с. 1 [A Voting Ballot for the Referendum of the USSR, Kerch Worker, 14 March 1991, No. 51 (18244), p. 1].

is that western regions of Ukraine rejected the proposal.[20] Despite this expressed preference, political officials opposed to reform programmes and opposed to the Gorbachev Presidency planned to disintegrate the USSR.

1.6. Ignoring legal niceties, on 8 December 1991, Boris Yeltsin (then President of Russia), Leonid Kravchuk (then President of Ukraine), and Stanislav Shushkevich (then President of Belarus), at a meeting in Viskuli, Belarus, close to the Belavezha forest, dissolved the Soviet Union when they signed "The Agreement on the Establishment of a Commonwealth of Independent States," explicitly stating that "the USSR as a subject of international law and a geopolitical reality ceases its existence."[21] The Agreement was signed despite the fact that Mikhail Gorbachev was still President of the Soviet Union, and the laws of the individual republics were subordinate to the Union's laws. At Belavezha, the Head of the Belarusian KGB, Eduard Shirkovsky, in reply to a question posed by Prime Minister Kebich, said: "Of course! We are faced with high treason, betrayal, if we are to call things by their right names. Don't misunderstand me: I could not help reacting. I swore an oath."[22] Shortly after signing the "Agreement", and behind the back of President Gorbachev, Yeltsin called then President George H.W. Bush to inform of the *fait accompli*: the Soviet Union no longer exists. The *coup de grace*, then took place on 21 December 1991, in Almaty (then Alma-Ata), Kazakhstan, when representatives of eleven republics signed an Agreement dissolving the USSR and creating the Commonwealth of Independent States, even though Gorbachev still was President of the USSR.[23]

1.7. Subsequently, on 24 August 1991, the Supreme Court of Ukr. SSR declared the independence of Ukraine, arbitrarily identifying the Crimean ASSR as a territory of a newly established State, a *de facto* illegal annexation of Crimea.[24] By doing so,

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[20] Референдум, опрос: предварительные итоги, Керченский рабочий, 22 марта 1991 г., № 57 (18250), с. 1 [Referendum, Poll: Preliminary Results, Kerch Worker, 22 March 1991, No. 57 (18250), p. 1].

[21] Plokhy 2014, at 309.

[22] *Id*. at 312.

[23] *Id*. at 361–365. No attempt is made to elaborate the complex process of the disintegration of the USSR. Salient points are made to demonstrate that, if public international law takes seriously its rules governing secession and creation of new states, then the breakaway of the eleven republics and their unilateral declaration that the USSR no longer existed is inconsistent with relevant public international law, and Russian internal law as no Republic followed the 1990 Law on Secession. *See* Закон СССР от 3 апреля 1990 г. № 1409-I «О порядке решения вопросов, связанных с выходом союзной республики из СССР», Ведомости Съезда народных депутатов СССР и Верховного Совета СССР, 1990, № 15, с. 252 [The Law of the USSR No. 1409-I of 3 April 1990. On the Procedure for Addressing Issues Related to the Secession of a Union Republic from the USSR, Law Digest of the Congress of People's Deputies of the USSR and the Supreme Soviet of the USSR, 1990, No. 15, p. 252]. When President Bush refused to arrange a 15 billion USD loan for Gorbachev, and climbed aboard the Yeltsin bandwagon, the US sealed the demise of Gorbachev and the USSR.

[24] Union of Sovereign States, Wikipedia (May 5, 2017), available at https://en.wikipedia.org/wiki/Union_of_Sovereign_States, demonstrating that the 1991 Crimean sovereignty referendum referred to joining a Gorbachev initiated revised USSR.

the founders of Ukraine ignored a law requiring a separate referendum to be held in Crimea on the Crimean ASSR's status within Ukraine.[25] This action was taken deliberately, since Kiev knew perfectly well that the people of Crimea would never vote in favour of becoming part of Ukraine.[26] Since 1991, Crimea and Ukraine have engaged in a continuous struggle and irreconcilable conflict: Crimea's unambiguous goal of independence as an Autonomous Republic, and Ukraine's forced subjugation of Crimea.[27]

1.8. Acts of defiance followed. In February 1992, the Crimean Parliament transformed Crimea into the "Republic of Crimea," and on 5 May 1992, declared Crimea independent, a decision to be approved by a referendum scheduled for 2 August 1992.[28] In January 1992, the Russian Foreign Ministry and parliament condemned the transfer of Crimea to Ukraine in 1954. In April 1992, Russian Vice President Ruskoi visited Crimea and called for secession from Ukraine. In response, the Ukrainian parliament, on 15 May 1992, annulled the Crimean declaration of independence and ordered the Crimean parliament to cancel the referendum within one week. Ukraine's actions contradicted the results of the 1991 referendum whereby Crimea expressed its choice to become part of the Russian Federation, and dissolve any relationship with Ukraine.

1.9. On 25 September 1992, the Republic of Crimea adopted its first post-Soviet constitution. The preamble states:

> We, the People of Crimea, are free and equal in their rights and dignity of citizens of the Republic of Crimea of all nationalities that make up the people of Crimea, connected to the centuries-old ties of a common historical destiny, unequivocally condemned as criminal and inhuman acts committed by the totalitarian regime against the people of Crimea, recognizing the Universal Declaration of Human Rights based on the desire to ensure social, economic and civil rights of the individual and a decent standard of life for all, affirm

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[25] This conclusion is consistent with practices within the Republics during this period of profound change of government.

[26] Arina Tsukanova, *What America Should Know about "Annexed Crimea": We the People of Crimea…,"* Global Research, 9 February 2017 (May 5, 2017), available at http://www.globalresearch.ca/what-america-should-know-about-annexed-crimea-we-the-people-of-crimea/5573750.

[27] *E.g.*, Minorities at Risk Project, Chronology for Crimean Russians in Ukraine (2004) (May 5, 2017), available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=469f38ec2. Prior to its own independence, Ukraine demonstrated its presumptive control of Crimea when, on 30 March 1990, Ukraine required Crimean Russians to set their clocks to the same time as the rest of Ukraine, rather than align their time with Moscow. Data elaborating events that took place between 1991 and 2014 is difficult to stitch together due to inconsistent accounts in the media, the literature, and the efforts of foreign States to vindicate their political agenda.

[28] Wikipedia, *supra* note 24.

the Constitution and declare that the Constitution is the basic law of legal, democratic, secular State of Crimea.[29]

1.10. Art. I of Chapter I (General Provisions) provides: the "Republic of Crimea is a legal, democratic, secular *state* in part of Ukraine" (authors' emphasis).[30] Sec. I, Ch. 3, Art. 9 sets forth that all relationships between Crimea and Ukraine were to be governed by treaties between representatives of the respective governments. Art. 9 further provides that amendments to the constitution were within the sole province of Crimea, and Art. 9 lists explicitly matters under control of Crimea. Art. 107 lists the organs of Crimean government: Parliament, President, Executive government, Constitutional Court and High Court. Other key provisions include:

– Official Government Language (Russian) (Sec. I, Ch. 1, Art. 6);

– Right to hold referenda on matters within its jurisdiction (Sec. I, Ch. 3, Art. 9(2)(6));

– Can change government deputies within own framework (Sec. I, Ch. 3, Art. 9(2)(5));

– Own budget (Sec. I, Ch. 3, Art. 9(2)(13));

– Military bases of Ukraine need approval of Crimean Government (Sec. I, Ch. 3, Art. 10(1) and (2));

– National Guard drawn from population of Crimea (Sec. I, Ch. 3, Art. 11);

– Crimea has a Permanent Representative of the State in the capitol of Ukraine (Sec. I, Ch. 3, Art. 12(3));

– Can enter agreements with other States, international organisations; economy, culture, science, health, education, protection of environment and other (Sec. I, Ch. 4, Art. 14), and

– Own flag, symbol and anthem (Sec. II, Art. 15(1)).

In short, excepting the reference to Ukraine, the 1992 constitution established Crimea as a State virtually equal in legal status as Ukraine, with the legal personality to conclude accords with Third States.

1.11. Following the adoption of the 1992 Constitution, Ukraine mounted a persistent campaign of interference in Crimean self-rule, with a primary aim to obtain a new constitution under which Crimea would be "under the thumb" of Ukraine. In addition, during the 1990's, disputes arose over the division of the Black Sea Fleet, frequent anti-Ukraine protests took place, and Ukraine periodically enacted legislation to eliminate the Russian language.[31] In 1993 alone, there were three major protests opposing

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[29] Конституция Республики Крым от 6 мая 1992 г. (1-я версия), от 25 сентября 1992 г. (измененная версия, утвержденная на IX сессии ВС Крыма) [The Constitution of the Republic of Crimea (1st version was 6 May 1992; amended version was adopted by the 9th session 25 September 1992)].

[30] The original text did not include a reference to Ukraine. It may be inferred that Kiev managed to produce this result by undue political influence. Ukraine President Kravchuck had no intention of losing Crimea to Russia. *See* Chronology for Crimean Russians in Ukraine, *supra* note 27, at 3.

[31] Steven Erlanger, *Russia and Ukraine Settle Dispute Over Black Sea Fleet*, The New York Times, 10 June 1995 (May 6, 2017), available at http://www.nytimes.com/1995/06/10/world/russia-and-ukraine-settle-dispute-over-black-sea-fleet.html.

Ukraine rule.[32] On 10 January 1993, more than 2,000 protestors in the City of Sevastopol called for separation from Ukraine. During 18–20 January 1993, anti-Ukrainian demonstrations took place in Sevastopol and Simferopol. These demonstrations were organised by political groups. Their demands included the transfer of Crimea to Russia and the holding of new elections for all government institutions.[33] Meshkov, the future president of Crimea, led the demonstration in Simferopol supported by 5,000 sympathisers. On 26 July 1993, approximately 2,000 demonstrators demanded the transfer of the Black Sea Fleet from Ukraine to Russia.

1.12. Concurrent protests took place regarding the division of the Black Sea Fleet. On 24 May 1993, 115 ships of the Black Sea Fleet raised the Russian flag based on discrepancies between pay received by Russian and Ukrainian sailors.[34] On 1 June 1993, more than 200 ships of the Black Sea Fleet raised the Russian flag. On 29 July 1993, the Conference of Black Sea Fleet Officers protested the proposed division of the fleet. On 5 July 1993, 220 ships out of 223 flew the Russian flag.[35] Disputes regarding the division of the Black Sea Fleet continued until Russia and Ukraine entered the 1997 Partition Treaty on the Status and Conditions of the Black Sea Fleet.[36] Nevertheless, the Black Sea Fleet disputes demonstrate deep divisions between Crimea and Ukraine, and opposition to Ukraine rule over the territory of Crimea.

1.13. With unprecedented regularity, discord between Ukraine and Crimea continued during the decade of the 1990's. In March 1995, the Ukrainian parliament rescinded Crimea's 1992 constitution and abolished the post of Crimean President.[37] Ukrainian president Kuchma said the region's parliament could be dissolved if it

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[32] 1993 Documentary: Crimeans Protest Forced Ukrainianization, Demand Equality for All, New Cold War: Ukraine and Beyond, 27 February 2015 (May 6, 2017), available at https://www.newcoldwar.org/1993-documentary-crimeans-protest-forced-ukrainianization-demand-equality-for-all/, reinforcing the claim that in 1991 Kiev blocked Crimea from holding a referendum on its political future. The summary of the documentary notes that, "The city residents [of Sevastopol] are outraged by the attempts of Kiev officials to impose new national heroes, like Stephan Bandera, and to root out any reminder of Russia and Russian history in Crimea."

[33] Chronology for Crimean Russians in Ukraine, *supra* note 27, at 3, noting that the 18–20 January 1993 anti-Ukrainian demonstrations demanded the transfer of Crimea back to Russia and the holding of new elections for all government bodies.

[34] Black Sea Navy Fight Spreads to Politicians, UPI, 27 May 1993 (May 22, 2017), available at http://www.upi.com/Archives/1993/05/27/Black-Sea-navy-fight-spreads-to-politicians/4670738475200/.

[35] Ustina Markus, *The Ukrainian Navy and the Black Sea Fleet*, 3(18) RFE/RL Research Report 32, 35 (1994).

[36] Partition Treaty on the Status and Conditions of the Black Sea Fleet (1997) (May 22, 2017), available at https://en.wikisource.org/wiki/Partition_Treaty_on_the_Status_and_Conditions_of_the_Black_Sea_Fleet. Art. 6(1) provides: "Military units operate in places of deployment in accordance with the legislation of the Russian Federation, respect the sovereignty of Ukraine, observe its legislation and do not allow interference in the internal affairs Ukraine." The provision does not prohibit explicitly that Russian military must be confined to specific deployment centres.

[37] *See* The Crimean Referendums of 1991 and 1994, at 4 for a detailed explanation of these events (May 22, 2017), available at http://culturedarm.com/the-crimean-referendums-of-1991-and-1994/.

continued to violate Ukraine's Constitution.[38] By abolishing the presidency, Ukraine left regional power in Crimea in the hands of its Prime Minister Anatoliy Franchuk.[39] Officials said Ukrainian state ministries, including the military and police, would enforce Ukrainian laws and would dismantle the office of the Crimean president. As a result, unrest continued through May. Contrary to the will of Crimean authorities, Ukraine also recognized the Mejlis as the representative body of the Crimean Tatar people. On 18 March 1997, riot police in Crimea prevented about 1000 protestors from storming the parliament building in Simferopol during a demonstration calling for the return of the peninsula to Russia. Pro-Russian communist groups organized the demonstration attended by about 5000 people.[40]

1.14. In 1998, Ukraine finally achieved its goal of effacing Crimean independence, with the adoption of the 23 December 1998 Constitution of the Autonomous Republic of Crimea.[41] Sec. I, Ch. 1, Art. 1(1) states that the Autonomous Republic of Crimea "is an integral part of Ukraine and, within the limits of the powers defined by the Constitution of Ukraine, it decides issues that are related to its jurisdiction." However, the 1998 Constitution left nothing to be decided by Crimea without approval by Ukraine. The lack of independence of Crimea is exemplified by the following Constitutional provision: "Acts of the Council of Ministers of the Crimea are abolished by the President of Ukraine," when opposed by the President.[42] In addition, rights and freedoms of Crimean citizens derived from and were guaranteed by the Constitution and law of Ukraine.[43] The 1998 Constitution also changed the official language of government from Russian to Ukraine.[44] Consequently, the autonomy of the Republic of Crimea was left only in name, and turned the 1992 Constitution on its head. It may be inferred, based on the relentless interference of Kiev in Crimean politics, that the 1998 Constitution was the product of coercion.

1.15. In a parallel development, Ukraine unleashed its campaign to eradicate the Russian language.[45] Kuchma initiated a policy to assert control over media using

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38 Mary Mycio, *Ukraine Abolishes Crimea Constitution, Presidency: Black Sea: Measures Taken by Kiev Leadership Give It Broad Powers Over the Violence-Ridden Peninsula*, L.A. Times, 18 March 1995 (May 22, 2017), available at http://articles.latimes.com/1995-03-18/news/mn-44129_1_black-sea.

39 Franchuk was a Kuchma appointee. Franchuk's son is married to Kuchma's daughter. *Id*.

40 Chronology for Crimean Russians in Ukraine, *supra* note 27.

41 Закон Украины от 23 декабря 1998 г. № 350-XIV «Об утверждении Конституции Автономной Республики Крым» [The Law of Ukraine No. 350-XIV of 23 December 1998. On the Approval of the Constitution of the Autonomous Republic of Crimea]; Конституция Автономной Республики Крым от 21 октября 1998 г. [Constitution of the Autonomous Republic of Crimea of 21 October 1998].

42 Sec. I, Ch. 1, Art. 5(3) of the Constitution of the Autonomous Republic of Crimea.

43 *Id*. Sec. I, Ch. 3, Art. 1.

44 *Id*. Sec. I, Ch. 3, Art. 12.

45 Chronology for Crimean Russians in Ukraine, *supra* note 27, at 9.

Russian as its language. Kiev ultimately reduced the amount of Russian-language broadcasting to four hours per week.[46] On 15 January 1997, leaders of the Russian community in Crimea responded by claiming that the initiative amounted to a policy of "language aggression" aimed at driving the Russian language out of Ukraine. Subsequently, on 15 October 1997, the Crimean parliament voted to make Russian the official language in place of Ukraine.[47] On 5 November 1997, Kuchma issued a statement: Ukrainian is the only official language in Ukraine. On 4 February 1998, the Crimean parliament voted overwhelmingly to propose a referendum to include the following questions: (1) the peninsula's return to Russia, (2) restoration of the 1992 Constitution, and (3) the adoption of Russian language as the official language of Crimea. The ratification of the European Charter on Local Languages and the Language of Minorities failed to settle the language dispute, as the Constitutional Court of Ukraine held that in all spheres of public life and activity, the Ukrainian language was compulsory.

1.16. In conclusion, the Autonomous Republic of Crimea never recognised the legitimacy of government by Ukraine. The events of 2013–2014 were the logical result of preceding historical circumstances.

2. History of Ukraine and Crimea (2013–2014)

2.1. A chronicle of events in Kiev and in Crimea is required to establish the context of the decision of Crimea to separate from Ukraine and request integration to the Russian Federation. During the period 2013–2014, events in Crimea did not occur in isolation, but were responses to the *coup d'état* that took place in Ukraine. The Euromaidan Revolution, supported by external forces, opened systemic conflicts within Ukraine, and unleashed dormant and ultra-national extreme groups, with the imprimatur of the United States, revealing a vein of ultra-nationalism running the course of Ukraine history.[48] Words cannot replace the filmography and first-hand accounts found in two documentaries filmed during and after the Euromaidan Revolution. Hence, Part Two recounts only the most salient points of the

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[46] Chronology for Crimean Russians in Ukraine, *supra* note 27, at 10.

[47] *Id*. at 12.

[48] The chronology of the intertwined events is based mainly on four sources: official news publications of Crimea, the documentary entitled "Ukraine on Fire" June 16, 2016 (Director, Igor Lopatonok; Screenplay, Tommy Reid; Cinematography, Anthony Dod Mantle; Music, John Beck Hofmann; and Producers, Oliver Stone, Igor Lopatonok, Tommy Reid) (Oliver Stone, "Ukraine on Fire") (May 22, 2017), available at https://www.youtube.com/watch?v=-xJLfwiKaH8&t=2s (access now requires registration); the documentary entitled "Crimea: The Way Home", March 15, 2015 (Director, Sergey Kraus; Screenplay, Olga Dyomina; Program Creator, Andrey Kondrashov) (Andrey Kondrashov, "Crimea: The Way Home") (May 22, 2017), available at https://www.youtube.com/watch?v=t42-71RpRgI&t=1235s, and the scholarly writings of Ivan Katchanovski. Citations to individual scenes in the documentaries follow the format: hours, minutes, seconds.

documentaries and draws upon other sources to reconstruct accurately the 2013–2014 "happenings" on Maidan Square.

2.2. Preliminarily, relevant Ukrainian history is required to understand the "fascist" roots of Euromaidan. The Organisation of Ukrainian Nationalists (OUN) was established in 1929 in Western Ukraine. Stepan Bandera established and developed the ideology of OUN, and its military arm. Bandera's aim was to purge all non-Ukrainians from the new State of Ukraine. His ideology spread quickly throughout Ukraine. The symbol of the group is a black and red flag. Ukraine openly collaborated with Nazi Germany during World War Two.[49] During WWII, the OUN killed 80,000 Jews in Galicia. In 1941, in collaboration with Nazi Germany, the OUN was responsible for the deaths of 100,000 to 200,000 Jews. OUN also participated in the infamous "Babi-Yar" incident when Ukraine militia killed 33,771 Jews. Bandera did not limit his ethnic cleansing to Jews. The Ukrainian Insurgent Army, the military arm of OUN, massacred 35,000 to 60,000 Polish victims in Volhynia, and 25,000 to 40,000 in Eastern Galicia during the period 1943–1944.[50] "Declassified CIA documents and other sources show that the OUN and UPA after the war were used by the US and British intelligence services against the Soviet Union," until Bandera's death in Munich in 1959. Ukrainian Nazi's were not subject to the Nuremburg trials; the CIA granted Bandera and other members of OUN amnesty for their actions, citing "necessity" as the legal justification.[51]

2.3. After the USSR collapsed, Ukrainian nationalist and Neo-Nazi organisations proliferated. In 1991, consistent with OUN's radical nationalism, Oleh Tyahnybok established the Social-National Party (SNP) of Ukraine. The Party's symbol is the neo-Nazi "Wolfsangel." In 1994, SNP was renamed "Svoboda" ("Freedom" in Ukrainian). Other major far right organisations that were formed and played key roles in the Maidan Revolution were: the Right Sector, the Social National Assembly, Trident, the White Hammer, the UNA-UNSO, Bratstvo, and C-14.[52] Paramilitary factions provided military support for each group.[53] All major far right organisations participated in Euromaidan with one common goal: conduct a national revolution to overthrow the pro-Russian Yanukovych government and to forge a Ukrainian nation in their image.[54]

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[49] Oliver Stone, *supra* note 48, at 00:07:26.

[50] *See* Massacres of Poles in Volhynia and Eastern Galicia, Wikipedia (Apr. 7, 2017), at https://en.wikipedia.org/wiki/Massacres_of_Poles_in_Volhynia_and_Eastern_Galicia.

[51] Per Anders Rudling, *The Return of the Ukrainian Far Right: The Case of VO Svoboda* in *Analyzing Fascist Discourse: European Fascism in Talk and Text* 228 (R. Wodak & J.E. Richardson (eds.), London and New York: Routledge, 2013). Oliver Stone, *supra* note 48, at 00:13:47.

[52] Ivan Katchanovski, *The Far Right in Ukraine During the "Euromaidan" and the War in Donbas* (2016), at 2 (Jun. 2, 2017), available at http://ssrn.com/abstract=2832203. The Right Sector, formed at the beginning of Euromaidan, comprised an alliance of far-right groups, including Trident (named after Bandera), the Social National Assembly and its military arm called Patriot of Ukraine. The Right Sector is a fascist or semi-fascist organisation. *Id*. at 15.

[53] *Id*.

[54] *Id*. at 14.

Right-wing political parties played key and violent roles in the Maidan Revolution. Though members of organised far-right political groups comprised a minority of protesters during the 2013–2014 Euromaidan Revolution, they nevertheless conducted violent attacks, such as the "Snipers' Massacre" necessary to overthrow the government of Yanukovich.

2.4. US meddling in the internal affairs of Ukraine appeared as early as 1983 with the foundation of the National Endowment for Democracy (NED). According to then Ukraine Minister of Internal Affairs Zaharchenko, the NED was a CIA entity. The NED pushed US interests, and trained activists and journalists, especially in the art of using social media to advocate political position and to manipulate information and images to go "viral" in support of their cause. The use of NGO's and other foundations as CIA instruments had its roots in the Reagan era. Foreign journalists, including those in Ukraine, received US grants to encourage and support protests.[55] The US also issued manuals entitled "How to Counter Berkut," instructing how to pull off helmets, and providing instruction on a tactical manoeuvre entitled "Carpathian Beech" to disarm, defeat, and kill Berkut.[56] Early in November 2013, three new broadcasting channels emerged: hromadsk.tv, spilno.tv, and ecpreco.tv, each broadcasting support for the opposition.[57]

2.5. In November 2013, President Yanukovich declined to sign an association agreement with the EU, primarily on economic grounds, and after the IMF proposed unacceptable terms for a loan. The President signed an alternative agreement with the Russian Federation providing for greater integration of Ukraine and Russian markets. On 17 December 2013, on the basis of a Russian-Ukraine inter-governmental committee, President Yanukovich and President Putin held a meeting and signed agreements specifying, for example, that Ukraine would construct equipment, commercial vessels, airplanes, and the Kerch Strait bridge.[58] The value of these agreements exceeded billions of dollars of Russian investment in Ukraine. In addition, Ukraine would receive 30% discount on the price of gas. In contrast, the EU did not make any concrete proposals for investment.

2.6. In response, on 21 November 2013, the first mass protests took place on Maidan Square.[59] Police, deployed to the square, were unarmed and did not use any force against the protesters. However, radicals representing far right national

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55 Oliver Stone, *supra* note 48, at 00:31:30 to 00:33:00, interviewing Vitaliy Zaharchenko, then Minister of Internal Affairs, Ukraine.

56 Andrey Kondrashov, *supra* note 48, at 00:29:01 to 00:31:06, quoting Sergei Marchenko, Commander of Omon Berkut of Republic of Crimea, physically present on Maidan Square during attacks on Berkut.

57 *Id*. at 00:34:00.

58 Голос Крыма, 27 декабря 2013 г., № 52 (1042), с. 3 [The Voice of Crimea, 27 December 2013, No. 52 (1042), p. 3].

59 Minister of Internal Affairs Zaharchenko, interviewed by Oliver Stone, *supra* note 48, at 00:34:44. According to Minister of Internal Affairs Vitaliy Zaharchenko, protests were planned to begin in 2015, but Yanukovich's failure to sign the EU Agreement served as an excuse to protest immediately.

parties were spotted in the crowd.[60] On 24 November 2013, protesters engaged in the first aggressive action when they attacked a government office and attacked police guarding the building. On 25 November 2013, protesters attacked security officers.[61] Arseniy Yatsenyuk, leader of the Fatherland Party, Oleh Tyahnybok, leader of the Svoboda Party, and Vitaliy Klitschko, leader of the Udar Party, were already present on the square to organise protesters and to incite the crowd to pressure the government.[62]

2.7. On 30 November 2013, the first key turning point of Euromaidan, Minister of Internal Affairs Vitaliy Zaharchenko received a telephone call from Aleksandr Popov, Head of Kiev Administration seeking permission to install the annual Christmas tree on Maidan Square. Zaharchenko refused the request, stating that no action should be taken while protesters were on the Square. In addition, President Yanukovich explicitly refused to authorise the police to use force to disperse the protesters.[63] Although initial reports indicated that the crowd began to disperse at approximately 1 a.m., protesters attacked the police and the police used rubber bats against them. Best evidence shows that Serhiy Lyovchki, Head of Presidential Administration, and a close associate of Victoria Nuland and Geoffrey Pyatt, ordered the use of force.[64] Further, the protesters were expecting the police, and groups of well-trained men arrived on the Square at the same time as police. The trained individuals, members of the Right Sector shipped to Kiev as muscle for the protesters, spread within the crowd and provoked police with insults, stones, and torches.[65] Violence erupted, news of events spread, and the next day more people gathered on the Square.

2.8. Subsequently, in December 2013, following a well-known pattern of "Colour Revolutions," the Euromaidan protest turned from a peaceful demonstration to a violent uprising. According to President Yanukovich, members of neo-Nazi organisations, armed with iron bars, bats, tractors, and Molotov cocktails, arrived on the Square and, with these weapons, attacked the police thereby escalating the violence. Concurrently, during this period, several US officials visited Kiev. Victoria Nuland, Assistant Secretary of State for European and Eurasian Affairs, went to the Maidan, condemned the actions of police, and voiced support for the protesters.[66]

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60 Oliver Stone, *supra* note 48, at 00:35:21.

61 *Id*. at 00:36:06.

62 *Id*. at 00:29:30 to 00:30:11, interview with Minister Zaharchenko.

63 *Id*. at 00:38:05, interviewed by Oliver Stone.

64 *Id*. at 00:38:23 to 00:38:34.

65 *Id*. at 00:39:27 to 00:40:07

66 *Id*. at 44:23 where, in film footage, Nuland is seen engaging the crowd and shaking hands with protesters. "During her December 2013 visit to Ukraine, US diplomat Nuland officially endorsed and encouraged protesters in Maidan square, including the National Socialist Svoboda party's protesters who honor former Ukrainian SS troops who carried out massacres in the country as 'liberators.' She

The US Senator from Connecticut, Chris Murphy, also stood on a stage telling the crowd present on Maidan Square that the US and EU jointly supported opposition to the Ukraine government.[67] Moreover, Senator John McCain, a former US presidential candidate, addressed the Maidan crowd, telling them, "[W]e will come here at this square to celebrate with you. Ukraine stands together with the EU and US."[68] President Yanukovich correctly observed that McCain, and his supporting cast of US officials, openly told the crowd to act against a democratically elected government.[69]

2.9. The Euromaidan Revolution did not "happen"; Euromaidan was made, principally by US government foreign policy. On 17 February 2014, BBC News published an article entitled, "Transcript of Leaked Nuland-Pyatt Call."[70] At the time of the conversation, Victoria Nuland was US Assistant Secretary of State and Geoffrey Pyatt was the US Ambassador to Ukraine.

Early in the conversation, Pyatt states, "I think we're in play. The Klitschko… piece is obviously the complicated electron here". Reference is made to an announcement that Klitschko, a former World Champion boxer, would serve as Deputy Prime Minister in the new government, a development objected to both by Nuland and Pyatt. Nuland states, "I don't think Klitschko should go into government. I don't think it's necessary. I don't think it is a good idea."

2.10. Pyatt agrees, and remarks, "The problem is going to be Tyahnybok [Leader of Svoboda] and his guys [Parenthetically, the fact that Pyatt refers to Yanukovich as President evidences that the telephone conversation preceded 22 February 2014, when Yanukovich was overthrown]." Nuland then breaks in and says, "I think Yats is

hit the pages of world media outlets by handing-out of buns and cookies to protesters becoming a graphic illustration of the US 'policy of non-interference.' An odd bit of American largesse. She went to meet demonstrators before meeting the head of state to teach him on the ways to deal with the opposition. The interference was outright and ostentatious, but that's the way Victoria Nuland promotes foreign policy goals. As confirmation of US neutrality, Senator McCain followed Nuland to Maidan Square." Andrei Akulov, *Victoria Nuland: The Bride at Every Wedding*, Ron Paul Institute for Peace and Prosperity, 5 February 2014 (May 12, 2017), available at http://www.ronpaulinstitute.org/archives/featured-articles/2014/february/05/victoria-nuland-the-bride-at-every-wedding/.

67 Ana Radelat, *Chris Murphy's Winding Road to Kiev*, The Connecticut Mirror, 2 January 2014 (May 29, 2017), available at https://ctmirror.org/2014/01/02/chris-murphys-winding-road-kiev/.

68 John McCain Tells Ukraine Protesters: "We are here to support your just cause," The Guardian, 15 December 2013 (May 29, 2017), available at https://www.theguardian.com/world/2013/dec/15/john-mccain-ukraine-protests-support-just-cause.

69 Oliver Stone, *supra* note 48, at 00:44:33 to 00:46:04. The appearance and actions of US officials on Maidan Square provide support for the position that the US, as demonstrated by the intercepted telephone call between Nuland and Pyatt, to be discussed later, planned the overthrow of the Yanukovich government, a clear violation of public international law.

70 Ukraine Crisis: Transcript of Leaked Nuland-Pyatt Call, BBC News, 7 February 2014 (May 6, 2017), available at http://www.bbc.com/news/world-europe-26079957. Although the exact date of the intercepted call is unknown, the conversation obviously took place prior to 7 February 2014, the date of the BBC article publication. Given that President Yanukovich was overthrown on 22 February 2014, the US had plenty of time to coordinate with Ukraine opposition leaders the new Kiev regime.

the guy who's got the economic experience, the governing experience… what he needs is Klitschko and Tyahnybok on the outside," providing stealth-like support. Pyatt agrees unreservedly with her planned scenario. Anticipating resistance from Klitschko about his US designated role in the new regime, Pyatt tells Nuland to call him for purposes of "personality management," and to cut off problems before Yatsenyuk, Klitschko, and Tyahnybok hold a planned meeting.

2.11. The subject matter of the call then turns to a conversation between Nuland and Jeff Feltman, the United Nations Under-Secretary General for Political Affairs, referring to a new appointee, Robert Serry.[71] Nuland states that, "Feltman has arranged, with the approval of UN Secretary General Ban Ki-moon, that Serry will visit Kiev on Monday or Tuesday," presumably the next week.[72] Having obtained the support of the UN, Nuland states, "Fuck the EU." Pyatt states that US plans for Ukraine must proceed in haste as he fears "the Russians will be working behind the scenes to torpedo it." Pyatt mentions that he will work with Yanukovich, while Nuland focuses upon recruiting someone with an "international personality" to come to Kiev, and "help mid-wife this thing." That "international personality" was US Vice-President Joseph Biden, who already had agreed to visit Ukraine.[73]

2.12. Simultaneously, the US opened its campaign to demonise neo-conservatives, identify "sacral victims," and create "martyrs," conventional "colour revolution" tactics.[74] These efforts partially were aimed at brainwashing the American public to secure popular support for US activity in Ukraine. The media portrayed Yanukovich in his worst light and blamed the ills of the region upon President Putin and the Russian Federation. In late 2013, there was no shortage of "sacral victims" to maintain protest momentum and to provide a trigger to set the planned chain of events in motion. One hundred victims of Euromaidan were mythologised as the "Heavenly Hundred,"[75] and on 30 November 2013, reports emerged of students being beaten, impliedly by improper police action.

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71 Robert Serry served as the first Dutch Ambassador to Ukraine; *see* NATO, Conferences, North Atlantic Treaty Organization, Who is who? (May 6, 2017), available at http://www.nato.int/DOCU/conf/2003/031016_bxl/cv-serry.htm.

72 Robert Serry, the UN special envoy to Ukraine, visited Crimea on 4 March 2014. His visit was unwelcomed, and he was escorted to the business lounge of the Simferopol airport to fly back to Kiev. *See* Kashmira Gander, *Ukraine: UN Special Representative to "End Mission in Crimea" After He Was Stopped by Armed Men in a Coffee Shop*, Independent, 5 March 2014 (May 12, 2017), available at http://www.independent.co.uk/news/world/europe/ukraine-un-special-representative-seized-by-armed-men-in-crimea-ukrainian-ministry-9171405.html.

73 Scott Wilson, *Biden Arrives in Ukraine to Show U.S. Support as Crisis with Russia Continues*, The Washington Post, 21 April 2014 (May 29, 2017), available at https://www.washingtonpost.com/politics/biden-arrives-in-ukraine-to-show-us-support-as-crisis-with-russia-continues/2014/04/21/e4a77800-c960-11e3-a75e-463587891b57_story.html?utm_term=.d5d4913dd225.

74 Oliver Stone, *supra* note 48, at 00:49:15 to 00:50:08, interviewing Robert Parry, investigative journalist, who disclosed the Iran-Contra Affair, and founder of consortiumnews.com.

75 *Id*. at 51:41.

2.13. On 25 December 2013, Tetiana Chornovol, a member of the Fatherland Party, and a journalist known for making, not reporting news, was found beaten. Images of her bloodied face quickly spread through social media and world media insisted that the beating was a political act.[76] She became a martyr of the Euromaidan revolution. Her heroic deeds include trespassing upon the President's summer residence and attacking the "Office of the Region's Party."[77] Claiming that the latter comprised a nest of criminals, Euromaidan death squads operated from the building during the "Snipers' Massacre" in 2014. On 22 January 2014, Sergei Nigoyan, an Armenian/Ukrainian protester, who recited poems on Maidan, was killed and, like Chornovol, became another martyr of the revolution. While police were blamed as his killers, Ukrainian prosecutors, after a two-year investigation, failed to confirm the claim and circumstances of his death remain unknown.[78]

2.14. On 20 February 2014, mass killings of protesters took place, preceded by mass killings of police. The "Snipers' Massacre" arguably was the key turning point in Ukrainian politics.[79] Katchanovski, a political studies expert at Ottawa University, conducted the most extensive investigation of the "Snipers' Massacre". He states, "This academic investigation concludes that the massacre was a false flag operation which was rationally planned and carried out with the goal of the overthrow of the government and seizure of power."[80] He further concludes that "concealed shooters," most likely drawn from the Right Sector and Svoboda, "were located in at least 20 Maidan controlled buildings or areas."[81] Quoting an interview given by a Maidan shooter to a Ukrainian newspaper, the Maidan shooter stated that "he was firing upon police from the Music Conservatory building for about 20 minutes around 6:00 a.m. and saw about 10 other Maidan shooters doing the same."[82] "A BBC investigation includes photos showing Maidan shooters armed with hunting rifles

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[76] *Ukraine Activist Chornovol's Beating Causes Outrage*, BBC News, 25 December 2013 (May 29, 2017), available at http://www.bbc.com/news/world-europe-25515838. *See also* US Condemns "Disturbing" Beating of Ukraine Opposition Journalist, Aljazeera America, 26 December 2013 (May 29, 2017), available at http://america.aljazeera.com/articles/2013/12/26/us-condemns-disturbingbeatingofukraineoppositionjournalist.html.

[77] Oliver Stone, *supra* note 48, at 54:05 to 54:13 where Perry maintains that her heroic deeds amounted to minor crimes.

[78] *Id*. at 54:40 to 55:18.

[79] Ivan Katchanovski, *The "Snipers' Massacre" on the Maidan in Ukraine* (September 2015) (May 6, 2017), available at http://ssrn.com/abstract=2658245, providing an extensive analysis of the event. The vents of 20 February were used as a source of Maidan government legitimacy, and later President Poroshenko awarded the killed protesters "Hero of Ukraine" titles.

[80] *Id*. at 2.

[81] *Id*.

[82] *Id*. at 14. The shooters account was supported by interviews with armed Maidan activists also shooting at police from the conservatory building.

and a Kalashnikov assault rifle inside the Music Conservatory shortly after 8:00 am."[83] In early morning, shooters from the Music Conservatory wounded at least 5 policemen on the Maidan, as a Berkut commander reported that "his unit's casualties increased to 21 wounded and three killed within half an hour."[84] Katchanovski concludes, "a rational explanation… is that the police retreated because of the use of live ammunition by small armed protestor units, who were using live ammunition against the police from concealed positions in these two buildings [the Music Conservatory and Trade Union Buildings]." Similarity of wounds found on protesters killed on Maidan indicate that they were equally victims of Maidan shooters.[85]

2.15. Three European Ministers: Laurent Fabius, Frank-Walter Steinmeier, and Radoslaw Sikorski came to Kiev, ultimately in vain, to broker a truce between the government and protestors.[86] Opposition leaders clarified immediately that they were unwilling to negotiate with the Yanukovich government. Andriy Parubiy, the self-proclaimed Maidan Commandant and leader of the radical opposition, stated that, "If our demands are not fulfilled," Maidan intends to take more action.[87] Klitschko informed the crowd "to be alert, to stay strong; we are not going anywhere".[88] Dmitry Yorosh of the Right Sector stated that the Right Sector will not lower its arms, and will not leave occupied buildings until all demands are met: the primary demand being the resignation of President Yanukovich.[89] The overthrow of the Yanukovich government was sealed.

2.16. The next day, 22 February 2014, Yanukovich, without resigning his office, left Kiev for Kharkov. Shortly after, the opposition, armed with weapons, seized the presidential office. Yanukovich asked President Putin for help and Putin agreed.[90] On 23 February 2014, the Ukrainian Parliament announced the appointment of Oleksandr Turchynov as acting president.[91] The removal of President Yanukovich did not follow the impeachment procedure, as impeachment required 338 positive votes out of 450

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83 *Katchanovski, supra* note 79, at 15.

84 *Id*. at 17.

85 *Id*. at 4. Katchanovski's conclusions are consistent with Minister of Internal Affairs Zaharchenko' statements provide in the Oliver Stone documentary, where the Minister stated that 67 police officers were declared missing, 14 officers were dead, and 43 wounded. In addition, another 20 people were killed and 150 wounded. Oliver Stone, *supra* note 48, at 00:58:40 to 00:58:48.

86 *EU Foreign Ministers Agree Sanctions against Ukrainian Officials*, The Guardian, 21 February 2014 (May 29, 2017), available at https://www.theguardian.com/world/2014/feb/20/ukraine-eu-foreign-ministers-agree-sanctions-officials.

87 Oliver Stone, *supra* note 48, at 00:58:00.

88 *Id.* at 00:59:16.

89 *Id*. at 1:01:03.

90 *Id*. at 1:02:02 to 1:02:50.

91 *Id*. at 1:03:24.

members, while only 328 voted for impeachment.[92] In spite of the illegal overthrow of the democratically elected Ukraine government, the United States immediately called the new Regime legitimate thereby closing any practical possibility to restore Yanukovich to power.[93] Paul Craig Roberts succinctly stated, "What… happened in Ukraine is the United States organised and financed a coup… the coup elements included ultra-right wing nationalists whose roots go back to organisations that fought for Hitler in the Second World War against the Soviet Union."[94]

2.17. The interim government, installed by the United States, consisted of: Interim President, Oleksandr Turchynov, the deputy leader of Fatherland; Prime Minister, Arseniy Yatsenyuk, also a member of the Fatherland Party[95]; Deputy Prime Minister, Oleksandr Sych, a member of the far-right nationalist Svoboda [Freedom] Party; Interior Minister, Arsen Avolkov, a member of the Fatherland Party; Foreign Minister, Andriy Deshchitsya, a supporter of the Maidan movement; National Security Chief, Andriy Parubiy, a member of the Fatherland Party and the so-called Commander of the protest movement; Deputy National Security Leader, Dmitry Yarosh, leader of the militant ultra-right wing group [Right Sector]; Sports and Youth Minister, Dmytro Bulatov, a businessman and leader of Avtomaidan, a mobile patrol group using cars to protect Euromaidan protesters, and Tetiana Chornovol, exact role unknown, the journalist and activist infamous for her seizure of government buildings. This motley

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92 Oliver Stone, *supra* note 48, at 1:03:45 to 1:04:11.

93 *Id*. at 1:04:15 to 1:04:26. *See also* Ronan Keenan, *The US Should Stop Calling Ukraine's New Government "Legitimate,"* Geopolitical Monitor, 30 March 2014 (May 29, 2017), available at https://www.geopoliticalmonitor.com/the-us-should-stop-calling-ukraines-new-government-legitimate-4955/ (noting "belligerent mobs of protesters continued to rout the city, effectively taking control of Kiev as police were forced into retreat. Yanukovych didn't hang around and fled for Russia amid claims his car came under attack from gunfire, allowing the parliament to call the emergency session that resulted in the president's removal. It was in nobody's safety interest to oppose the motion").

94 Mike "Mish" Shedlock, *Was Russia's Annexation of Crimea Illegal? Who Has the Right to Decide? Transformation of Mainstream Media* (May 8, 2017), available at http://globaleconomicanalysis.blogspot.fr/2014/03/was-russias-annexation-of-crimea.html, interviewing Paul Craig Roberts, former assistant secretary of the treasury and associate editor of the Wall Street Journal.

95 Yatsenyuk resigned from his positon as Prime Minister in April 2016, at the request of President Poroshenko, due to Yatsenyuk's failure to deliver "real change" and to curtail corruption. In Ukraine, the Prime Minister automatically holds the position of Head of Naftogaz, Ukraine's national gas company. "If Yats is behind the scenes, then that makes Naftogaz even more of a political tool. Naftogaz did not return requests for comments on the former Prime Minister's involvement with the company." Kenneth Rapoza, *Three Years after Euromaidan, Naftogaz Remains Hostage to Ukrainian Politics*, Forbes, 28 December 2016 (May 8, 2017), available at https://www.forbes.com/sites/kenrapoza/2016/12/28/naftogaz-ukraine-euromaidan-russia-poroshenko/#62ea0ae64251. Yatsenyuk is believed to have enabled a close ally to misappropriate billions from Naftogaz. Brian Bonner, *Poroshenko-Yatsenyuk Going Way of Yushchenko-Tymoshenko in Corruption Fight*, Kyiv Post, 13 September 2015 (May 8, 2017), available at www.kyivpost.com/opinion/op-ed/brian-bonner-poroshenko-yatsenyuk-going-way-of-yushchenkotymoshenko-in-corruption-fight-397818.html?flavour=mobile. Prior to his resignation, based on allegations of leading a corrupt government, US Vice-President Joseph Biden congratulated Yatsenyuk for his accomplishments.

group, and 21 cabinet members drawn mainly Yatsenyuk's Fatherland Party, were never elected to govern Ukraine.[96]

3. History (Events in Crimea in 2014)

3.1. The Crimean Peninsula, and its predominantly Russian speaking residents, were not insulated from the violent overthrow of the democratically elected Ukraine government. After the opposition took control of Kiev, the nationalists went after anyone who objected to their taking of power, including Crimean residents who had travelled to the Maidan to oppose the Euromaidan movement. The bus convoy, carrying Crimean residents back home, though escorted by police cars was led into an ambush, now called the Korsun massacre. Kondrashov's interview with drivers and passengers on the busses evidences the illegal killings, property destruction, and the appalling conduct of ultra-nationalist groups involved in the attack.[97]

3.2. Roman Yakovlev, the head of the Bus Convoy and Simferopol resident, stated that the convoy of buses was blocked in the Cherkossy region.[98] Alexander Belyi, an auto-mechanic and resident of Simferopol, and Alexander Bochkeryov, deputy regiment commander of the Crimean self-defence forces, both confirmed that the convoy was blocked at both ends thereby preventing its journey to Crimea.[99] According to Bochkeryov, men armed with clubs mounted the buses and started to beat passengers, and a man armed with a gun started shooting people at point blank range. Alexei Grebnev, a bus passenger and Simferopol resident, stated that his bus driver was shot in the head while seated in the driver's seat.[100] The mob began to smash bus windows and throw stones. They said, "Come out or we'll burn you alive." In addition, according to Belyi, the mob forced passengers to sing the Ukrainian national anthem and shout "Glory to Ukraine," while beating passengers with clubs.[101] Without detailing each act of criminality, seven members of the bus convoy were killed, four of the eight buses were burned, and 20 persons were missing.[102]

3.3. Meanwhile, President Putin in Moscow personally conducted the rescue operation of Yanukovich and members of his entourage from southern Ukraine. In response to the outburst of extreme nationalism, President Putin decided that, if

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96 Harriet Salem, *Who Exactly is Governing Ukraine?*, The Guardian, 4 March 2014 (May 12, 2017), available at http://www.theguardian.com/world/2014/mar/04/who-governing-ukraine-olexandr-turchynov.

97 Andrey Kondrashov, *supra* note 48, at 00:14:49 to 00:20:46.

98 *Id*. at 00:14:49.

99 *Id*. at 00:14:55 to 00:15:28.

100 *Id*. at 00:16:03

101 *Id*. at 00:16:21 to 00:17:36.

102 *Id*. at 00:20:44 to 00:20:46.

necessary, the Russian Federation would help avoid bloodshed and armed conflict in Crimea.[103] Subsequently, Kiev declared Simferopol the "seat of enemies" of Maidan and ordered the demolition of the Lenin monument within 10 days.[104] The ultimatum induced the local population to take to the streets and to form self-defence forces.[105] Sergei Aksyonov, Head of the Republic of Crimea and Leader of the All-Ukrainian Party Russian Unity (2008–2014), held daily training sessions for Crimean self-defence units.[106] Aksyonov was prepared to stop anyone from taking down the monument, a symbol of stability and a challenge to authorities to control the situation.[107]

3.4. When Aksyonov announced the "Crimean Spring," he did not know Russia would support Crimea. Addressing the crowd with a loudspeaker, he stated "Together: we will build our Crimea! Peace to Crimea!"[108] President Putin had never heard of Aksyonov. When he asked the Chairman of the Crimean Parliament about him, the Chairman replied, "he's like Che Guevara."[109] On 22 February 2014, Berkut officers returned to Sevastopol and to Simferopol. In Kiev, during Maidan protests, the opposition attacked members of Berkut with fire and guns. Kiev, nevertheless, accused Berkut of sniper fire, an accusation never confirmed after years of investigation. At this time, criminal cases were opened against Berkut officers and commanders throughout Ukraine.[110] Arsen Avokov, appointed Minister of Internal Affairs by the Verkhovna Rada, issued an order to disband Berkut, and declared that any army unit that did not obey order would be deemed an illegal armed gang.[111] Only in Crimea were Berkut treated as heroes.[112]

3.5. On 22 February 2014, Yuriy Abisov, Commander of the Crimean Berkut battalion, and later appointed Commander of the Special Rapid Response Unit of the Interior Ministry of the Republic of Crimea, stated, "the decision to separate from Ukraine was made on Lenin Square by Crimeans."[113] After, Abisov called a meeting of

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103 Andrey Kondrashov, *supra* note 48, at 00:21:00. Noteworthy is the absence of evidence that the Russian Federation participated in any way in the Euromaidan revolution aside from providing sanctuary for Yanukovich. During the interview with Kondrashov, President Putin expressed disapproval of Yanukovich's management of the Kiev coup, without making any judgment.

104 *Id*. at 00:21:22 to 00:21:27.

105 *Id*. at 00:21:33 to 00:21:40.

106 *Id*. at 00:21:45.

107 *Id*. at 00:21:53.

108 *Id*. at 00:22:06 to 00:22:17.

109 *Id*. at 00:22:30 to 00:23:02.

110 *Id*. at 00:23:30 to 00:23:57. In Rovno, all Berkut, were placed under control of the Right Sector.

111 *Id*. at 00:27:03.

112 *Id*. at 00:24:17.

113 *Id*. at 00:24:25 to 00:24:29.

all Berkut officers and asked them whether they preferred to maintain allegiance to Kiev or to defend Crimea. The officers unanimously decided to fight against Kiev.[114] After Maidan, the Crimean Berkut introduced new elements to their training regime by modifying the manner of self-protection based on experience in Kiev.[115] In the City of Sevastopol, officers and residents alike expressed unambiguously their objection to the new Regime in Kiev.[116] In December 2013, two months before the Snipers' Massacre on Maidan Square, Viktor Melnikov, member of the Third Rapid Response Company of Sevastopol, and Afghanistan war veteran, organised a self-defence force. Virtually all residents of Sevastopol joined the self-defence forces.[117] As of this date, the Russian Federation had not provided any support, military or otherwise, to Crimea.

3.6. On 26 February 2014, the Supreme Council of Crimea called an emergency meeting to discuss holding a referendum to determine the status of the autonomous region.[118] According to Aksyonov, Kiev instructed leaders of the Crimean Mejlis to prevent the government from holding meetings: the goal being the seizure of the Crimean parliament.[119] Kiev dispatched members of the Right Sector to support Mejlis. A large crowd assembled in front of the Government building in Simferopol. Members of the Right Sector waved "Bandera Flags." The first clashes began around mid-day. As the crowd pushed and shoved, one old man was trampled to death.[120] Bottles with water, sand, and a "strange powder" were thrown into crowd from areas occupied by Mejlis and the Right Sector, identified by their flags. In addition, men wearing gas masks used nerve gas and threw dust ground from fluorescent lamps into the crowd. Those covered by dust could not see. Approximately 30 people were injured and taken to the hospital. Injured Crimeans pressed back, and the crowd stormed the Parliament.[121]

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114 Andrey Kondrashov, *supra* note 48, at 00:27:32 to 00:27:46.

115 *Id*. at 00:28:27.

116 Sevastopol residents always considered their status special and never doubted their allegiance to the Russian Federation. *Id*. at 35:50. In his interview with Kondrashov, President Putin stated succinctly, "For Russians, the City of Sevastopol is a city of Russian Naval Glory". *Id*. at 33:08. He also remarked, "For Russians, Crimea is a heroic part of our history." *Id*. at 00:37:21. Crimea is not a terra incognito.

117 *Id*. at 36:11 to 36:45.

118 *Id.* at 00:37:58 to 00:38:04. Paval Taron, from the 3rd Company and Afghanistan veteran, filmed the events of 26 February 2014. The following persons also witnessed the event and provided their accounts to Kondrashov: Igor Georgiyevsky, a Cossack of the Terek Cossack Host in Crimea and Sevastopol, who tried to prevent crowd from breaking into the Supreme Council; Mikhail Sheremet, Commander of the Crimean self-defence forces; and Enver Kurtamentov, Commander of the 15th Company of the Crimean self-defence forces.

119 *Id*. at 00:38:30 to 00:38:41.

120 *Id*. at 00:40:28.

121 *Id*. at 00:40:51.

3.7. However, after the crowd entered the building and saw their compatriots sitting in session, the Crimean Tartars got flustered, and did not know what to do.[122] The Mejlis leader, Mustafa Dzhemilev, stopped issuing orders by telephone.[123] The Right Sector did not enter the building.[124] Aksyonov, his face beaten, moved from the central door, and tried to break the fight. Using a loud speaker, he said, "Crimeans are expecting people of all nationalities to come here for holiday, to work, and to be friends."[125] Enver Kurtamentov, Commander of the 15th Company of the Crimean self-defence forces, spoke directly to his compatriot Tartars to counter false statements made by the Mejlis leader and urged them to disband peacefully.[126] The Tartars were told that, if Crimea were returned to Russia, they would be deported to Magadan or the Urals.[127] Kurtamentov said, "your life can't get worse because it is already as bad as it can be."[128] The Parliament building never was seized, the protesters left without additional incident, and decided to disobey orders issued by Ukrainian authorities.[129]

3.8. On 27 February 2014, the so-called "Friendship Train" departed Kiev for Crimea. Ihor Mosiychuk, a Right Sector leader, said "Crimean separatists would pay for everything." Mosiychuk was the individual behind the "Friendship Train" initiative. The train was scheduled to arrive in Simferopol by 20:15, after which the Right Sector was to conduct a punitive operation.[130] Having notice of the operation, Mikhail Sheremet, Commander of the Crimean People's Defence Forces, organised a militia of approximately 1,500 members, to "prevent nationalists from entering our land."[131] The militia consisted of business people, ordinary workers, and people from all walks of life.[132] The militia carried bats, metal bars, and whatever was available,

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122 Andrey Kondrashov, *supra* note 48, at 00:41:14.

123 *Id*. at 00:41:42.

124 *Id*. at 00:41:48.

125 *Id*. at 00:43:31 to 00:44:00.

126 *Id*. at 00:45:11.

127 *Id*. at 00:42:34.

128 *Id*. at 00:45:11. The accuracy of Kurtamentov's statements is evidenced by conditions in the village of Mamut-Sultan, an historical territory for Tartars from the 14th to the 15th century, where Kurtamentov lived. According to interviews with residents of Mamut-Sultan, when the Tartars returned to Crimea, they returned to the Middle Ages. *Id*. at 00:45:44. There was no water, no heat, no electricity, no sewers and no roads. The State of Ukraine provided no help for more than 13 years, yet intended to use the Tartars as leverage against Russian speaking Crimeans to engender internal conflict. Kurtamentov immediately formed a multi-ethnic squadron to protect people from the Banderites. *Id.* at 00:46–51.

129 *Id*. at 00:50:16.

130 *Id*. at 00:50:34 to 00:50:53.

131 *Id*. at 00:51:32.

132 *Id*. at 00:51:55.

as they lacked firearms. They also carried tri-coloured painted steel shields forged especially for them by local blacksmiths to help protect them against gunfire, and particularly fire from Molotov cocktails.[133] After waiting on the train platform for three hours, Sheremet received a call that the train was about to arrive.[134] The militia used the shields to form a steel barrier.[135] When the train arrived two hours later, it was empty. Ukrainian Security Service forces alerted the Right Sector that a militia was waiting for them at the train station. Before arriving in Crimea, the Banderites stopped the train and unloaded their weapons.[136]

3.9. On 27 February 2014, Samvel Martoyan, the most famous self-defence commander, former Soviet officer, and resident of Crimea, received a combat order from Aksyonov to take control of the Simferopol airport. Earlier, he had formed the 4th Company. Intending to land an assault force in Simferopol, the airport became Crimea's main threat. Armed only with shovel handles, Martoyan and his militia arrived at the Simferopol airport.[137] They encountered armed police officers standing in their way. The police, sympathetic to local self-defence forces, let Martoyan and his group proceed.[138] Martoyan's plan was to set fire to fuel barrels that his militia had placed along the runway, making it impossible to land an aircraft.[139] The militia lit the torches, and Martoyan called Aksyonov for orders to proceed. Thirty seconds later, Aksyonov informed Martoyan that Kiev had been informed that the runway had been seized and that landing was impossible.

3.10. Immediately after, Ukrainian Security Service forces, and operatives from its Crimean Division who supported the Euromaidan government, arrived on the runway and encountered Martoyan.[140] The Security Service forces were armed with assault rifles. The spokesperson informed Martoyan that he and his militia had entered a restricted area and that the trespass constituted a terrorist act. The Security Service forces were given orders to shoot.[141] Martoyan heard trucks approaching; he did not know who was in the trucks.[142] Martoyan instructed his men to get ready for battle. The trucks pulled up and soldiers jumped out. Martoyan realised that they were Russian soldiers, the

133 Andrey Kondrashov, *supra* note 48, at 00:52:10 to 00:53:04.

134 *Id*. at 00:53:58.

135 *Id*. at 00:54:00.

136 *Id*. at 00:54:36 to 00:55:15.

137 *Id*. at 00:57:23 to 00:58:30.

138 *Id*. at 00:58:42.

139 *Id*. at 00:59:10.

140 *Id*. at 1:00:06 to 1:00:15.

141 *Id*. at 1:00:06.

142 *Id*. at 1:01:24–45.

"polite little green men."[143] Commandos from the Black Sea Fleet's Marine Force arrived from Sevastopol.[144] The Ukrainian Security Service disappeared. The Russian soldiers seized strategic positions and established control over the airport.[145] The seizure of the Simferopol airport was the first Russian armed intervention in Crimea.

3.11. President Putin argued that he had to ensure that the Crimean Parliament could operate, convene, meet, and carry out activities prescribed by law.[146] President Putin openly admitted that Russian intelligence was following unsecured communications within Ukraine and that Russia was aware of the institutional structure of military units on ground and Kiev commanders.[147] Vladimir Konstantinov, Head of the State Council of the Republic of Crimea, stated that security was important, so Russian protection was needed and welcomed.[148] Sergei Shoigu, Minister of Defence of the Russian Federation, stated, "soldiers never went to fight but to defend and protect."[149]

3.12. On 27 February 2014, Russian SWAT teams then secured government buildings in Simferopol.[150] Deputies of Parliament voted (68 out of 69) to change completely the members of the Ministry. The MPs elected Sergei Aksyonov as Head of Government and Temirgalyev as first Prime Minister.[151] Konstantinov reported that members of Parliament also voted in favour of holding a referendum to decide the future of the Autonomous Republic of Crimea.[152] On 1 March 2014, the Ministers of Cabinet decided to take all military on territory of Crimea, under their jurisdiction, and asked for Russian support as peace mission.[153] On the same date, Aksyonov asked Putin to provide help to maintain peace on territory of Crimea. Shortly after, Russian military in Sevastopol blocked Ukrainian military vessels from leaving their appointed

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143 Andrey Kondrashov, *supra* note 48, at1:02:18 to 1:03:01.

144 *Id*. at 1:03:25.

145 *Id*. at 1:03:30. Deputy general director, acting as press secretary, reported that airport was working as usual. No strangers within the airport; soldiers were outside the airport, and not interfering with any traffic. They were present outside and never entered the airport. They left at evening. Крымская правда, 1 марта 2014 г. [Crimean Truth, 1 March 2014], speaking of event 27–28 February. Noteworthy is that airport personnel and passengers noticed nothing unusual and the airport operated as usual. *Id*. at 1:03:39.

146 Andrey Kondrashov, *supra* note 48, at 1:08:36, and noting that Crimea's Parliament was legal. *Id*. at 1:09:01.

147 *Id*. at 1:36:37.

148 *Id*. at 1:10:54.

149 *Id*. at 1:12.

150 *Id*. at 1:08:20 [the operation taking thirty minutes].

151 Крымская газета, 1 марта 2014 г., № 38 (19463), с. 1 [The Crimean Newspaper, 1 March 2014, No. 38 (19463), p. 1].

152 Andrey Kondrashov, *supra* note 48, at 1:10:11–22.

153 Крым взят. Под охрану, Крымская правда, 4 марта 2014 г., с. 1 [The Crimea is Taken. Under Guard, Crimean Truth, 4 March 2014, p. 1].

ports in the same area.[154] On 4 March 2014, Aksyonov reported that Russian military were present in Crimea to protect Crimean people; the Russian soldiers blocked the Ukrainian military base near Simferopol, to prevent Ukraine military from entering Crimean territory. These Ukrainian military units were given the option to go back to Ukraine, or to join Russian forces. Starting 2 March 2014, 5,086 Ukraine soldiers present in different bases opted to protect Crimean population.[155]

3.13. Russian military forces acted in conjunction with local self-defence forces, Berkut fighters, Cossacks, and myriad volunteer groups committed to preventing Kiev from taking Crimea by assault. For example, the Cossack Kuban Host provided 450 members to help Berkut fighters to seal the border with Ukraine. The Cossacks and Berkut dug trenches and erected barriers to defend the Perekop Peninsula, and the Changar and Turetsky passes.[156] In response, the Right Sector asked Kiev to send reinforcements; troops and multiple rocket launchers were sent to the border.[157] Only then did Putin deploy weapon systems at the border to counteract any action taken by Kiev.[158] Alexander Ovcharenko, Deputy Commander of Berkut Special Police Forces, noted that when Kiev failed to pierce the border, Kiev adopted a new tactic: organise deliveries of equipment to create a Maidan-like event in Crimea.[159] Thus, on 10 March 2014, a Ukrainian military truck, carrying automatic weapons and ammunition, attempted to break through the Turetsky pass, but was stopped by Oleg Gorshkov, a Berkut soldier, who drove his car into the truck.[160]

3.14. On 11 March 2014, the Crimean Government made a Declaration of Independence, dependent on outcome of the referendum.[161] The Crimean parliament adopted the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol by 78 votes to 81.[162] The Declaration provided that if, the requisite number of votes are obtained, that the Republic of Crimea and the City of Sevastopol, would

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154 The Crimea is Taken, *supra* note 153.

155 *Id*.

156 Andrey Kondrashov, *supra* note 48, at 1:15:29–51 when the Kuban Cossacks arrived to support Berkut soldiers.

157 *Id*. at 1:19:47.

158 *Id*. at 1:20:30.

159 *Id*. at 1:22:04.

160 *Id*. at 1:22:42 to 1:23:05.

161 Декларация о независимости АРК и г. Севастополя, Константинов В. – председатель Верховной Рады АРК; Дойников Ю. – председатель Севастопольского городского совета, Крымские известия [газета Верховного Совета АРК], 12 марта 2014 г., № 45 (5456) [The Declaration of Independence of the ARC (Autonomous Republic of Crimea) and the city of Sevastopol, V. Konstantynov – Crimean Parliament Speaker (Chairman of the Supreme Council of ARC); Y. Doinikov – Sevastopol City Legislature Speaker (Chairman of the Sevastopol City Council), Crimean Izvestia [newspaper of the Supreme Council of the ARC], 12 March 2014, No. 45 (5456)].

162 An English translation of the text is available at http://www.voltairenet.org/article182723.html.

become an independent multinational State.[163] The Declaration further provided that the Republic of Crimea, an independent State, then would request that the Russian Federation, by means of an international treaty, integrate the Republic of Crimea as a constituent part of the Russian Federation.[164] Art. 137 of Ukrainian Constitution enabled Ukraine to stop the decision of Crimean government by issuing a formal order and petitioning the Constitutional Court to determine whether Crimean decisions were consistent with Constitution. These procedures never were followed and no order ever issued.[165]

3.15. On 16 March 2014, Crimea held the referendum. The total number of persons who voted comprised 1,274,096, or 83.10% of those eligible to vote. 1,233,002 voters, or 96.77% of eligible voters voted "Yes" to become part of the Russian Federation.[166] 31,997 (2.51% out of total votes) elected to revise the Constitution of the Republic of Crimea and remain as part of Ukraine. Improperly completed voting ballots amounted to 9097 (0.72%). On 18 March 2014, the "Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and on the Creation of New Federative Entities within the Russian Federation" was signed thereby incorporating Crimea and the City of Sevastopol into the Russian Federation.[167]

3.16. On 27 March 2014, the United Nations General Assembly adopted a non-binding Resolution affirming the General Assembly's commitment to the territorial integrity of Ukraine within its internationally recognised borders and underscored the invalidity of the 2014 Crimean referendum.[168] The non-binding resolution was supported by 100 United Nation Member States; eleven States voted against the Resolution; 58 States abstained; and 24 States were absent and did not vote.

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[163] Постановление Верховной Рады АРК о Декларации о независимости АРК и г. Севастополя, Крымские известия [газета Верховного Совета АРК], 12 марта 2014 г., № 45 (5456), с. 6 [Decree of the Supreme Council of the ARC on the Declaration of Independence of the ARC and the city of Sevastopol, Crimean Izvestia [newspaper of the Supreme Council of the ARC], 12 March 2014, No. 45 (5456), p. 6].

[164] *Id*. Art. 3.

[165] И.о. Президента Украины Александр Турчинов [O. Turchynov, Acting President of Ukraine].

[166] Крымские известия [газета Верховного Совета АРК], 18 марта 2014 г., № 49 (5460) [Crimean Izvestia [newspaper of the Supreme Council of the ARC], 18 March 2014, No. 49 (5460)].

[167] Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов, Крымские известия [газета Верховного Совета АРК], 19 марта 2014 г., № 50 (5461), с. 2 [Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and on the Creation of New Federative Entities within the Russian Federation, Crimean Izvestia [newspaper of the Supreme Council of the ARC], 19 March 2014, No. 50 (5461), p. 2] (Jun. 27, 2017), available at http://www.kremlin.ru/events/president/news/20605.

[168] Resolution adopted by the General Assembly on 27 March 2014, A/RES/68/262 (Jun. 27, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262.

4. Part Two: Factual Conclusions Drawn and the Poverty of Public International Law

4.1. In 1991, the Republic of Crimea and the City of Sevastopol declared political independence from Ukraine and elected to form an Autonomous Soviet Socialist Republic (ASSR) as a subject of the USSR.[169] The declaration contained no reference to being part of Ukraine, a Republic of the USSR, as Ukraine had not yet seceded from the USSR. During 1991, three Republics of the USSR: the Russian, Belorussian, and Ukrainian Republics, took it upon themselves, to disintegrate the Soviet Union, contrary to the federal law of the USSR. The Crimean declaration of independence conformed to the planned reform of the USSR and was recognised as legitimate by President Mikhail Gorbachev. Subsequently, in December 1991, Ukraine declared itself a Sovereign State distinct from the USSR.

4.2. The inconsistent Crimean and Ukrainian declarations never have been squared. The Crimean declaration severed ties with Ukraine, as the declaration unquestionably implied a preference to remain part of the Soviet Union. However, without articulating legal grounds, Ukraine swept the ASSR into its territorial compass, without the consent of the Crimean government and population. Subsequently, in 1992, the Republic of Crimea adopted its Constitution. Art. 1 states: the "Republic of Crimea is a legal, democratic, secular *state* in part of Ukraine" (authors' emphasis). The Constitution provided that all agreements defining the legal relationship between Crimea and Ukraine were to be embodied in international treaties, with Crimea having the authority to enter treaties with Third party states. While the concept of a "State within a State," arguably the product of historical vestige, requires reconciliation, nevertheless, the 1992 Constitution established Crimea as a State independent from Ukraine.

4.3. In international law, the requirements of statehood are set out in Art. 1 of the so-called Montevideo Convention of 1933.[170]A State should possess the following attributes: (a) a permanent population, (b) a defined territory, (c) government, and (d) a capacity to enter relations with other states. In international law, the function of "recognition," divided into two schools of thought, is a controversial issue in international law and does not require a digression from the present discussion. In 1992, the Republic of Crimea possessed the attributes of a state as defined by the Montevideo Convention of 1933, as confirmed by the 1992 Constitution. The dissolution of the USSR in 1991, the declaration of independence of the Republic of Crimea in 1991, and its 1992 Constitution establishing Crimea as a State were separate events that cannot be conflated.

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169 Importantly, the Russian Federation is the successor State of the USSR.

170 Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States, 26 December 1933, (1936) 165 LTNS 21031.

4.4. Consequently, when Ukraine declared its independence from the USSR in late 1991, the inclusion in its territory of the Republic of Crimea comprised an arbitrary decision made by then Ukraine President Kravchuk. It follows that Ukraine incorporated ("annexed") the Republic of Crimea in 1991 by coercion leading to the conclusion that since 1991, Ukraine has unlawfully occupied the Republic of Crimea. In 1994, Crimeans elected Yuriy Meshkov, a strongly pro-Russian candidate, as their president. A second referendum was held in 1994 whereby 78.4% of those who voted supported greater autonomy from Ukraine; 82.8% supported allowing dual Russian-Ukrainian citizenship; and 77.9% favoured giving Crimean presidential decrees the force of law.[171] The 1992 Constitution provided legal grounds for the election, the office of President, and holding of the Referendum.

4.5. In response, in March 1995, the Ukrainian parliament unilaterally abolished the office of President of Crimea and terminated the 1992 Constitution. The Crimean parliament was forced to draft a new Constitution, which the Ukrainian parliament ratified in 1998. The new constitution destroyed the autonomy of the Republic of Crimea, making all critical decisions taken by the Crimean parliament subject to approval of the Ukrainian parliament. No principle of municipal or public international law justified the unilateral decision of President Kuchma to "throw out" the 1992 Constitution of the Republic of Crimea, abolish the Crimean office of President, and coerce the Crimean parliament to draft a constitution to subordinate the Peninsula to Ukraine control. Therefore, the 1992 Constitution retained its validity until the Crimean reunification with the Russian Federation.

4.6. Consequently, the Republic of Crimea and the City of Sevastopol did not *secede* from Ukraine in 2014. Rather, the Republic of Crimea regained its independence as a State that had come into existence in 1991–1992. The decision by the Crimean government, supported overwhelmingly by the results of the 2014 referendum, to request "annexation" by the Russian Federation was lawful. Moreover, in 2014, the new regime in Kiev never followed constitutional procedures under Art. 131 of the Ukraine Constitution to oppose the breaking away of part of its territory (Crimea). Since formal opposition is a condition precedent to prohibit unilateral secession,[172] then the Republic of Crimea had the right of unilateral secession. Further, it is questionable whether the new regime had legal authority to act as an instrumentality of the State.[173]

4.7. Consistent with this interpretation, the Russian Federation did not "invade" the Crimean Peninsula in 2014. The Russian Federation had the right under the

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171 *See* The Crimean Referendums of 1991 and 1994, for a detailed explanation of these events (May 18, 2017), available at http://culturedarm.com/the-crimean-referendums-of-1991-and-1994/.

172 Plokhy 2014, at 334.

173 The new Regime was committed to eliminate opponents of Maidan ideology, evoking earlier calls of "cleansing" conducted by Stepan Bandera and the successors of the OUN.

1997 Partition Treaty to maintain troops in the territory of Crimea and the City of Sevastopol, subject to restrictions set forth in the Treaty. In response to the unlawful overthrow of the Yanukovich regime, and the installation of a non-elected regime comprising ultra-nationalists, with the external support of the United States, the population of Crimea formed self-styled militias to fight against subjugation by Kiev and to realise the goal of a twenty-three year Crimean struggle to liberate itself from Ukraine. The self-organised militia, Berkut officers committed to Crimean independence, the Kuban Cossack Host, and informal opposition groups, took the first steps to fend off efforts by the Right Sector and other military arms of far right political parties to occupy Crimea. Illustrative of acts by local militia to fight Kiev extremists, by whatever means necessary, is the "Friendship Train" incident.

4.8. First efforts to secure the Simferopol airport from military aircraft arriving from Kiev to assault Simferopol were taken by Samvel Martoyan's 4th Company on 27 February 2014. Members of his company were armed with shovel handles, and were over-matched by the well-armed Ukrainian Security Service that confronted Martoyan and his militia on the runway of the Simferopol airport. It was on this date, and with the consent of the Crimean parliament, that the Russian military made its first appearance outside military bases to prevent Kiev from delivering weapons to Crimea. The claims of unlawful "invasion" rest upon faulty factual premises. The Russian federation did not violate the "sanctity" of the territory of Ukraine, because, since 1991 the Republic of Crimea was an independent State.[174] The Russian Federation provided military support to Crimea to permit the population of Crimea to exercise political and civil rights in an orderly manner, absent a threat from foreign and armed Ukraine forces present in Crimea, and to avoid a civil war. While the State of Ukraine survived the US supported coup d'état, the Ukraine government, the sole instrumentality through which a State can act, lacked any authority to act as an instrumentality of the State. In this bizarre twist of events, the Russian Federation acted proportionately, under an invitation from Crimea, to protect ethnic Russians and other nationals residing in Crimea, and to avoid a War.

4.9. "Interventions aimed at restoring the legitimate government upon invitation have to be distinguished from interventions whose aim is regime change – that is, overthrowing the government in place."[175] The ICJ decision in the *Nicaragua* case, "that there is no general right of states to intervene in support of an internal opposition in another state, even if this opposition is deemed to pursue a politically or morally valuable cause," may be distinguished on the ground that the Crimean conflict in 2014 was international in character.[176]

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[174] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Art. 25 outlining the justification of "Necessity."

[175] Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52(2) Virginia Journal of International Law 355, 362 (2012).

[176] *Id*. at 362–363.

4.10. The extant literature fails to address the legal significance of these facts: (1) the 1991 declaration by the Republic of Crimea and the City of Sevastopol to become an Autonomous Soviet Socialist Republic (ASSR) under the then existing USSR headed by President Gorbachev and Ukraine's arbitrary incorporation of Crimea into the new State of Ukraine; (2) the 1992 Constitution of the Republic of Crimea whereby Crimea declared itself a State; (3) the 1995 unilateral termination of the 1992 Constitution by Ukraine and abolition of the Crimean office of President; (4) the adoption of the 1998 Constitution, the product of Coercion exercised by Ukraine against Crimea, effectively subjugating Crimea to Ukraine; (5) the legal effect of the coup d'état, with the demonstrable external support of the United States, and the installation of a non-elected interim government comprising far right-wing nationalists, upon the rights of self-determination and secession of the Crimean population,[177] and (6) the complex history of Crimea and, since 1991 its fierce struggle for independence from Ukraine.[178] Prior to evaluating the legality of Crimea's "secession" and "annexation" under public international law, the preceding and fundamental questions must be addressed.

5. The Poverty of Public International Law

5.1. The aim of the Crimean referendum in 2014 was not to become a "State" *per se*, but to join the Russian Federation, an already existing State, with international legal personality, a member of the United Nations, and a State holding the status of a "Great Power." Crimea wanted to switch "Masters." However, public international law does not provide a procedure to achieve this objective, as demonstrated by the *Åland Islands* case. Therefore, Crimea had to go through the formality of a Two-Day State.[179] The extant literature fails to address this precise question and produces uninspiring but endless and futile legal analysis.

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[177] The new Regime was committed to eliminate opponents of Maidan ideology, evoking earlier calls of "cleansing" conducted by Stepan Bandera and the successors of the OUN.

[178] *E.g.*, Simone F. van den Driest, *Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, 62(3) Netherlands International Law Review 329 (2015) [arguably one of the best articles of its kind and finding the Crimean "secession" illegal on the grounds of the Russian military invasion]; Theodore Christakis, *Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international*, 3 Journal du Droit International 23 (2014) [finding also that the Crimean secession was illegal but arguing that it must be accepted as a fait accompli]; Hassan Kouzehgar & Mohsen Vaseqi, *Annexation of Crimea to Russia: Contrast between Right to Self-Determination and Territorial Integrity Preservation in International Law*, 5(4) International Journal of Asian Social Science 189 (2015) [finding that the Russian military invasion invalidated any right to secession]. Numerous articles may be found on the 2014 events in Crimea, but the aforementioned illustrate the conventional argument and employ virtually identical legal sources.

[179] The phrase "Two-Day State" is borrowed from Anatoly Pronin, *Republic of Crimea: A Two-Day State*, 3(1) Russian Law Journal 133 (2015) (taking issue with the legal recognition of Crimea as a State, and incorporation of that State into another State in a single agreement and arguing that Crimea never fit

5.2. Public international law reposes primarily upon monopoly of State power. Secession is not tolerated for no more complex a reason than that States oppose it. However, since World War II, in raw numbers, the number of states quadrupled from 45 to 195.[180] In addition, there were 55 violent revolutions, 54 non-violent regime changes, and in the last 60 years alone 227 military coups occurred.[181] The "right of self-determination," exercised by former colonies or non-self-governing territories and peoples, accounts for the proliferation of many, but not all, new states. Doctrines, such as "remedial secession," have introduced further complexity into the relationship between States and subordinate units seeking independence. Efforts to impose coherence upon public international law have produced tortured legal analyses as demonstrated by decisions such as the ICJ *Advisory Opinion in Kosovo*[182] and the Canadian Supreme Court opinion in *Reference re Secession of Quebec*.[183]

5.3. The Canadian Supreme Court parsed the question of whether a hypothetical secession of the Province of Quebec would violate the Canadian constitution. Adopting a broad reading of the Canadian Constitution, the Court observed that "a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize."[184] In other words, the terms of secession would be subject to negotiations with all other provinces. The Court's remark, "Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a *de facto* secession is not ruled out" is *obiter dictum* and does

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the requirements of a State). Like most scholars, Mr. Pronin's analysis is limited to facts of March 2014. As argued, the legal status of Crimea as a State (or not) requires an extensive examination of facts and the application of relevant municipal and international law to produce a compelling outcome.

180 According to the Correlates of War System Membership Data (from 1911 through 2011) (Jun. 2, 2017), available at correlatesofwar.org.

181 The time period surveyed for revolutions and regime changes was 1900–2006 and for military coups, 1950–2010 (Jun. 2, 2017), available at www.prio.no/CSCW/Datasets/; www.systemicpeace.org/polity/polity4.htm.

182 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Rep. 2010, p. 403 (ICJ Kosovo Decision).

183 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, in which the Canadian Supreme Court was asked to give an advisory opinion on three questions: (1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?; (2) Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?; and (3) In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

184 *Id*. at 220.

not formulate a general principle of international law to follow.[185] The question raised is: why a decision of a municipal Court in Canada is invoked to evaluate the secession in the Republic of Crimea.

5.4. The ICJ Advisory Opinion in *Kosovo* is equally non-dispositive. The UN General Assembly referred the following question to the ICJ: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[186] The ICJ found that "State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence."[187] However, although Kosovo declared itself a State, and certain States recognized Kosovo as a State, the ICJ refused to address the question of statehood. The ICJ expressly observed that the question referred, "does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood."[188] Likewise, the ICJ skirted the question of "whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State," and equally refused to address the issue of "remedial secession."[189]

5.5. The individual cases often cited by the paradigmatic argument do not provide guidance as to the right of secession and cannot distinguish away the Crimean incident. The "stock inventory" cited is: the Åland Islands, Bangladesh, and Kosovo (a client State of the US/EU and non-member of the UN).[190] The cases

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185 *Reference re Secession of Quebec, supra* note 183, at 223.

186 ICJ Kosovo Decision, *supra* note 182, at 407.

187 *Id*. at 436.

188 *Id*. at 423.

189 *Id.* at 438.

190 The *Åland Islands* case took place in 1921 involving a legal dispute between Sweden and Finland and concerning whether the population of the Åland Islands, an archipelago in the Baltic Sea, had the right to secede from Finland and integrate with Sweden. *Åland Islands Case*, (1920) L.N.O.J. Spec. Supp. No. 3. While the Committee of Rapporteurs rejected the existence of an absolute right to unilateral secession, the Committee left open the option of secession in the presence of oppression. Bangladesh, formally known as East Pakistan, declared independence from Pakistan in 1971, after the government of Islamabad refused to recognise the results of the 1970 election whereby the Bengali Awami League pressed for greater autonomy for East Pakistan. In the context of an armed conflict, the Awami League proclaimed the independence of East Pakistan. India intervened to fight Pakistani forces that committed violations of human rights. In early 1974, Pakistan recognised the State of Bangladesh. Notes, Lawrence S. Eastwood Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 Duke Journal of Comparative & International Law 299, 310 (1993). In 1998, the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia. The declaration followed an armed conflict with Serbia, the intervention of NATO, and a complex UN supervision of an interim government for Kosovo. The declaration of independence followed a finding by the UN Special Envoy that a negotiated agreement between Kosovo and Serbia to resolve differences was impossible.

share the common ground of a subordinate territory controlled by a malevolent master: an internationally recognized State. Although the minority populations in the cases of Bangladesh and Kosovo suffered atrocities, it would be perverse to order a population, such as the population of Crimea, to undergo wrongs of an equivalent nature before the right of secession comes into existence, although the authors maintain that "secession" was unnecessary as the Republic of Crimea was a state.

5.6. Public international law purportedly obliges States not to interfere in the internal matters of other States.[191] However, State practice, at least as measured by the behavior of the United States, is that this fundamental obligation is honoured more in the breach than in the observance. It cannot seriously be argued that the United States had a right to support the overthrow of the Yanukovich government.

5.7. Pronouncing that Crimea's unilateral secession from Ukraine was illegal under international law implies that the Crimean/Russian reunification must be unwound, returning the Republic of Crimea to Ukraine.[192] This argument thus leads to the following result: the population of Crimea, contrary to its will, is to be nailed to a cross of misery, despair, and economic inefficiency, as evidenced by 23 years of misrule under Ukraine. Calls to "give back" Crimea to Ukraine are ambiguous: what exactly is to be given back: the territory of the peninsula, the territory plus its living population, or the territory minus the population and exhumation of the dead. If a strict application of public international law requires a repatriation of Crimea to Ukraine, then public international law fails to fulfil its ultimate objective of international peace and the vindication of individual rights. Additional support for this conclusion is found in the arguably perverse requirement that a population must await atrocity to invoke the right of remedial secession.

5.8. If a principal goal of public international law is to mitigate human suffering, the question arises: what should the Russian Federation have done in response to developments in Kiev and Crimea. The paradigmatic argument answers: "do nothing." However, the inaction of the Russian Federation most likely would have resulted in a civil war in the Republic of Crimea. As President Putin observed, "the Republic of

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[191] UN Charter, Art. 2(4), providing "All Members shall refrain in their international relations 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."

[192] The authors take umbrage at scholars or jurists ensconced in prestigious universities or law firms, in the European Union and elsewhere, dictating how residents of Crimea should live. These individuals have no idea of the collapsing infrastructure, destruction of seaports and industrial enterprises, and provision of minimal and unreliable public services provided by Ukraine. In addition, during the 23 years of Ukraine rule, the peninsula was pillaged, not a Hryvna invested in transportation, housing, education and hospitals. Rather, Kiev oligarchs started building, contrary to any conceivably rational zoning regulation, preposterous mansions. Not to mention the negative effects of US/EU sanctions that prevent the authors from obtaining books and other information while present in Crimea.

Crimea is not a *terra incognito*." In addition, Crimea is located proximate to the territory of the Russian Federation and falls within its domain of national interest.[193]

6. Part Three: Constructing a Pragmatic Argument for Crimean Independence

6.1. The redrawn border of the Republic of Crimea and the City of Sevastopol is consistent with history, politics, and economic analysis. In 1991, the borders of the Republic of Crimea were redrawn by exogenous variables, an unfavourable development under the economic analysis of law, resulting in a heterogeneous population in Ukraine destined for internal and irreconcilable conflict.[194] Aside from theoretical constructs of economic optimisation, Ukraine single-handledly destroyed the economic potential of Crimea: (1) closure and deterioration of seaports, (2) closure and deterioration of industrial enterprises, (3) failure to invest in essential infrastructure such as roads, rail other methods of transportation, and (4) appropriation of public assets of any value.[195] With exceptions of post-2014 Russian investment, Crimea today looks like Crimea in 1991. Taken together, these factors minimise the relevance of law requiring a rescission of the 2014 reunification of Crimea and the Russian Federation. When the quality of human like is at stake, the dead hand of the law is best buried.

6.2. The history of Crimea's connection with Russia dates back over two hundred years to the time of Catherine the Great.[196] In 1991, after the dubious gifting of Crimea to Ukraine in 1954, "more than 67 percent of the population consisted of ethnic Russians, who dominated Crimean politics and culture."[197] In addition, "There were

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193 The Ministry of Foreign Affairs of the Russian Federation, National Security Concept of the Russian Federation, 10 January 2000, Part III. Threats to the Russian Federation's national security, stating in pertinent part: "Internationally, threats to Russian national security are manifested in attempts by other states to counteract its strengthening as one of the centers of influence in a multipolar world, to hinder realization of its national interests and to weaken its positions in Europe, the Middle East, Transcaucasia, Central Asia and the Asia-Pacific Region." *See also* Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on 30 November 2016), (Jun. 3, 2017), available at http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/2542248, setting forth a comprehensive foreign policy for the Russian Federation and including a commitment to protect the rights of Russian citizens living abroad.

194 Enrico Spolaore, *National Borders, Conflict and Peace* (June 2010), at 773 (Jun. 3, 2017), available at http://socsci-dev.ss.uci.edu/~mrgarfin/OUP/papers/Spolaore.pdf. The paper is also published by the National Bureau of Economic Research and is available at http://www.nber.org/papers/w15560.

195 Jon Hellevig, *The Hidden Story of Crimea's Economic Success*, Russia Insider, 23 March 2016 (Jun. 4, 2017), available at http://russia-insider.com/en/business/hidden-story-crimeas-economic-success/ri13539.

196 Sam Lord, *Ukraine Has No Legitimate Claim to Crimea*, It's a Political World, 11 March 2014 (Jun. 3, 2017), available at https://itsapoliticalworld.wordpress.com/2014/03/13/ukraine-has-no-legitimate-claim-to-crimea.

197 Plokhy 2014, at 281.

no Ukrainian language schools in Crimea; few ethnic Ukrainians used the Ukrainian language in everyday life, and only half claimed Ukrainian as their native tongue – an indication that their Ukrainian identity was anything but strong."[198] "The entire history of the peninsula from the breakup of the Soviet Union to the [2014] has been one of its residents demonstrating time and time again that they are not a natural part of Ukraine and do not feel at home there."[199] On 17 March 1995, the Verkhovna Rada abolished the May 1992 Constitution of the Republic of Crimea. In 1998, Ukraine finally achieved its goal of effacing Crimean independence, with the adoption of the 23 December 1998 Constitution of the Autonomous Republic of Ukraine.

6.3. The destabilised government of Ukraine during 2013–2014 implicated the national security interests of the Russian Federation. Under its national security policy, the Russian Federation has the right to curtail spill-over effects of regime crises proximate to its border. Without Russian Federation support, conditions in the Republic of Crimea likely were to deteriorate into an internal conflict, like that in the Donbas. In addition, the Russian Federation has reserved the right to protect nationals abroad. Arguably, these policies are derivative of the right of self-defence that is an exception to the prescription in Art. 2 of the United Nations Charter. If the United States may invoke threats to America's "national interest," based on events in Ukraine, to support sanctions against the Republic of Crimea, then it logically follows that the Russian Federation had every right to ensure that the population of Crimea could exercise its right of choice of sovereign through a referendum.

6.4. Support for the reunification of Crimea with the Russian Federation is found in the "economic analysis" of public international law. "[N]ational borders are not taken as given, but are the endogenous outcomes of decisions by agents who interact with each other while pursuing their goals under constraint."[200] "Borders are not a fixed, given feature of the geographical landscape, but human-made institutions, affected by decisions and interactions of individuals and groups, and can be analyzed as part of the growing field of political economy." In addition, "A central role for states is the supply of public goods to their citizens: a legal and justice system, security and crime prevention, public health… and protection against catastrophic events."[201] Defence and security are historically the most important public goods provided by governments.

6.5. Economies of scale reduce the cost of providing public goods: bigger is cheaper.[202] Unlike private goods, public goods do not compete in the market,

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198 Plokhy 2014, at 281.

199 Lord, *supra* note 196, at 2.

200 Spolaore, *supra* note 194, at 764.

201 *Id*. at 765.

202 *Economic Analysis of International Law* (E. Kontorovich & F. Parisi (eds.), Cheltenham: Edward Elgar, 2016); Enrico Spolaore, *The Economics of Political Borders*, CESifo Working Paper Series No. 3854 (June 2012), Ch. 1, at 13 (Jun. 3, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094955.

allowing each citizen to consume public goods without reducing consumption by other citizens. Even when the population increases and the total costs of publicly provided services increases, the average cost still decreases because fixed costs are independent of population size. Public goods are cheaper when more taxpayers pay for them. Empirical studies demonstrate that government spending on public goods as a share of GDP decreases as a function of increasing population. Hence, "smaller countries tend to have proportionally larger governments."[203]

6.6. A negative correlation exists between heterogeneous populations and national borders.[204] An artificial state is one whose "political borders do not coincide with a division of nationalities desired by the people on the ground."[205] Artificial states may result from splitting a single ethnic group into two distinct states, or by incorporating a distinctly different group into an existing single state. "Consider the long-term effects of the 'scramble for Africa' by colonial powers. They find that partitioned ethnic groups have suffered significantly longer and more devastating civil wars."[206] When borders are drawn to incorporate heterogeneous populations with different languages, religion, culture, and habits, "disagreements over the fundamental characteristics of the State are likely to emerge and render reconciliation more difficult. In short, heterogeneity increases political costs."[207]

6.7. Since 1954, the border of Crimea was drawn by political fiat, an ultimately inexplicable gifting of the peninsula to the State of Ukraine. After the collapse of the USSR, the State of Ukraine exerted control over Crimea, contrary to the democratic preferences of Crimean residents, to vindicate its self-interests, and to exploit assets located on the peninsula. The "coerced annexation" of the Republic of Crimea raised the political costs of border redrawing, as the population of Crimea introduced a significantly high level of heterogeneity into the larger Ukrainian community. Following the logic of economic analysis, this degree of heterogeneity led exactly to what the economic model forecasts: dissension about political leadership and denial of individual preferences. Moreover, the Republic of Crimea did not receive "pubic goods" equivalent to those provided in Ukraine *per se*. Under Ukrainian rule, the population of Crimea was deprived of reliable provision of public goods, such as water, electricity, and gas required to heat private and commercial properties. The industrial infrastructure of Crimea was dismantled to enrich Ukraine oligarchs, raising the spectre of "rents." Ordinary people were left to survive in conditions equivalent to those existing in the pre-industrial revolution period.

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203 *Spolaore, supra* note 202, at 13.

204 *Id*. at 17.

205 *Id*.

206 *Id*.

207 *Id*.

6.8. Heterogeneity costs are associated with the likelihood of civil conflict over domestic polices, including disagreement about borders, leading to separatist wars. Assume the following analytical model.[208] People in different regions have different preferences over types of public goods. One region is dominant and the other region is subordinate. When each region chooses its preferred type of government, everyone's utility from government services is gi = g*, where "g" denotes government, "i" denotes an independent government, and "g*" denotes equality between utility and preferences. In contrast, if the "dominant region" imposes a political union upon the subordinate region, then everyone in the "dominant region" gets his/her first-best utility from government services "g*," but citizens in the subordinate region obtain a lower utility gu = g*– h < gi, where the parameter h > 0 captures heterogeneity costs. Symmetrically, a union where the "subordinate region" selects its preferred type of government, then everyone in the "subordinate region" receives utility g*, while citizens in the dominant region receive utility g*– h.

6.9. The tenuous ties between Kiev and Simferopol were unsustainable under the economic analysis model. The border of Ukraine incorporating the Republic of Crimea was artificially drawn, leading to the creation of an artificial state, subject to destabilisation due to heterogeneity costs. In addition, the two regions had preferences for different governments, demonstrably true in historical context. Since Ukraine forced its government policies upon the "subordinate region" of the Republic of Crimea, citizens in Crimea received public goods bearing the costs of "h," and suffered a denial of their preferred type of government.

6.10. When transfers and compensation are unavailable, differences are settled by armed conflict. The probability of breakup is "π" where "π" = Ws/Ws + Wd, where "W" denotes military capacity or "weapons" and, for our purposes, "s" denotes the "subordinate" region and "d" denotes the dominant region. If "Ws" increases relative to "Wd," then the citizens of "Ws" win the conflict and withdraw from the political union formed by the dominant region. In the case of Crimea, the self-defence forces operating on the territory of Crimea enjoyed a strategic advantage due to the overthrow of the democratically elected government and the installation of a new regime, whose military forces consisted not only of traditional troops but also of paramilitary arms of diverse political groups, raising problems of coordination and deployment. The Republic of Crimea also had the advantage of being a peninsula permitting the border to be sealed, preventing Kiev from using military ground transportation. When the Russian Federation intervened, the matter was settled: "Ws" increased exponentially relative to "Wd" thereby sustaining the break-up of Crimea from Ukraine. In the case of Crimea, the armed conflict was hypothetical.

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[208] *Spolaore, supra* note 202, at 30. The analytical model drawn here is modelled upon the illustration of Prof. Spolaore. Modifications are made to fit the Crimean case.

6.11. The "economic analysis" model leads to the conclusion that the Republic of Crimea is best suited to governance under the Russian Federation. The Russian Federation has the capacity to provide "public goods" to Crimea without incurring substantial expense, while, at the same time, the Republic of Crimea receives public goods of a superior quality at the same or lower cost than under the sovereignty of the State of Ukraine. Second, integration of the Republic of Crimea into the Russian Federation reduces to zero, the costs posed by heterogeneity. The Republic of Crimea always was Russian in its language, culture, and history. By contrast, the Republic of Crimea never fit the State of Ukraine. Rather, since its independence from the USSR, Ukraine has had an "unstable political system," "irrational and impulsive leadership" and "citizens that do not enjoy stable expectations."

6.12. Setting aside analytical models, the Republic of Crimea is better off under Russian Federation governance, as measured against Pareto optimization. The Russian Federation has invested billions of dollars into infrastructural improvements in Crimea: On 27 March 2014, the Russian Federation immediately started paying pensions and increasing the value of payments; started to lay fibre optic cables to provide improved telephone and internet service;[209] rebuilt the main road between Kerch and Simferopol stretching approximately 100 kilometres (prior to re-pavement, one needed an all-terrain vehicle to navigate the potholes and uneven roadway). In addition, the Russian Federation has planned to develop alternate routes between Kerch and Simferopol, parallel to the existing main highway. The Russian Federation also has begun construction of bridges across the Kerch Strait to connect the Russian mainland to the peninsula at costs exceeding billions of dollars. In 2016, China committed to invest 120 billion in the Crimean Peninsula.[210]

Conclusion

The comprehensive factual restatement of the history of the Republic of Crimea has corrected misrepresentations of fact permeating the media and scholarly analysis of the 2014 reunification of Crimea with the Russian Federation. Legal conclusions found in the extant literature rest on faulty factual premises. Public international law lacks a complete set of rules to deal with the Crimean case. Moreover, under rational choice theory, the Republic of Crimea belongs with the Russian Federation. In any event, the Republic of Crimea and the City of Sevastopol will never be returned to Ukraine. The Crimean population has expressed its preferences for government under the Russian Federation, and these preferences prime abstract legal rules.

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209 Керченский рабочий, 27 марта 2014 г., с. 1–2 [Kerch Worker, 27 March 2014, p. 1–2].

210 *China to Invest $120bn in Crimean Peninsula*, China Go Abroad, 19 April 2016 (Jul. 23, 2017), available at http://www.chinagoabroad.com/en/recent_transaction/20313.

References

Bregman R. & Lawrence D.C. *New Developments in Soviet Property Law*, 28 Columbia Journal of Transnational Law 189 (1990).

Burke J.J.A. *Economic Sanctions against the Russian Federation are Illegal under Public International Law*, 3(3) Russian Law Journal 126 (2015).

Christakis T. *Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international*, 3 Journal du Droit International 23 (2014).

Frenkel W.G. & Sukham M.Y. *New Foreign Investment Regimes of Russia and Other Republics of the Former U.S.S.R.: A Legislative Analysis and Historical Perspective*, 16(2) Boston College International and Comparative Law Review 321 (1993).

Kouzehgar H. & Vaseqi M. *Annexation of Crimea to Russia: Contrast between Right to Self-Determination and Territorial Integrity Preservation in International Law*, 5(4) International Journal of Asian Social Science 189 (2015).

Pronin A. *Republic of Crimea: A Two-Day State*, 3(1) Russian Law Journal 133 (2015).

Van den Driest S.F. *Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law*, 62(3) Netherlands International Law Review 329 (2015).

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THE CASE OF THE CITY OF SEVASTOPOL: DOMESTIC AND INTERNATIONAL LAW

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This article deals with an issue which went largely unremarked at the time – the role of the city of Sevastopol in Crimea's declaration of independence. The Declaration of Independence of the Republic of Crimea was a joint resolution adopted by the Supreme Council of Crimea and the City Council of Sevastopol. One may state that the city of Sevastopol declared its independence as an entity possessing an international identity.

Initially, only States were treated as recognized subjects of international law. But now other kinds of actors also share this recognition. However, from the point of view of classical international law, cities have no legal identity in international law and they are not granted the status of subjects of international law. The legal activities of cities on the international stage results in the need for a new approach to the treatment of cities under international law.

The author has examined the legality of Sevastopol's action in the light of both domestic and international laws. An analysis of the status of Sevastopol in Ukrainian law, as well in Soviet law is also included in this article. The author presents examples of actions of cities on the international scene which might prove that cities could be treated as non-state actors. However, the conclusion states that it remains questionable whether the city has truly acquired the status of being a subject of public international law. It is doubtful that the case of Sevastopol will contribute to the development of doctrine of non-state actors.

Keywords: Declaration of Independence of the Republic of Crimea; city of Sevastopol; non-state actors; subject of public international law; secession.

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Introduction

March 2014 saw Crimea, previously an integral part of Ukraine, accede to the Russian Federation. This event called into question the validity of certain principles of international law. On 17 March 2014 the Republic of Crimea proclaimed itself an independent and sovereign state, with Sevastopol as a city with a special status.[1] And on 18 March 2014 an Agreement was signed between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea and Sevastopol to the Russian Federation.[2] Researchers of international law initially reacted with disbelief and the Crimea case re-opened the debate over several fundamental issues in international law, such as the legal status of entities seeking to secede from a country, the legitimacy of such acts and their legal effects.[3] However, one particular issue has been largely left undiscussed. The Declaration of Independence of the Republic of Crimea was

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[1] Постановление Верховной Рады Автономной Республики Крым от 17 марта 2014 г. № 1745-6/14 «О независимости Крыма», Сборник нормативно-правовых актов Республики Крым, 2014, № 3 (ч. 1), ст. 244 [Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1745-6/14 of 17 March 2014. On the Independence of Crimea, Collection of Normative Legal Acts of the Republic of Crimea, 2014, No. 3 (part 1), Art. 244].

[2] Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов (подписан в г. Москве 18 марта 2014 г.), Собрание законодательства РФ, 2014, № 14, ст. 1570 [Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Federal Constituent Entities within the Russian Federation (signed in Moscow on 18 March 2014), Legislation Bulletin of the Russian Federation, 2014, No. 14, Art. 1570].

[3] Natalia Cwicinskaja, *Krym w świetle prawa międzynarodowego* in *Rewolucja w imię godności. Ukraiński Euromajdan 2013–2014* 179 (G. Skrukwa & M. Studenna-Skrukwa (eds.), Toruń: Wydawnictwo Adam Marszałek, 2015); Natalia Cwicinskaja, *The Legality and Certain Legal Consequences of the "Accession" of Crimea to the Russian Federation*, 34 Polish Yearbook of International Law 61 (2014); Robin Geiss, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91(1) International Law Studies 425 (2015); Christian Marxsen, *The Crimea Crisis – An International Law Perspective*, 74(2) Heidelberg Journal of International Law 367 (2014).

a joint resolution adopted on 11 March 2014 by the Supreme Council of Crimea and the Sevastopol City Council: "We, the members of the parliament of the Autonomous Republic of Crimea and the Sevastopol City Council, […] make this decision jointly: 1. […] Crimea including the Autonomous Republic of Crimea and the city of Sevastopol will be announced an independent and sovereign state with a republican order. […]."[4] The Declaration was approved by the Resolution of the Supreme Council of the Autonomous Republic of Crimea (hereinafter – ARC) at the extraordinary plenary session on 11 March 2014 and by the Decision of the Sevastopol City Council at the extraordinary plenary session on 11 March 2014 and was signed by both the Chairman of the Supreme Council of the ARC and by the Chairman of the Sevastopol City Council. Thereby, it could be stated that the city of Sevastopol declared its independence as an entity possessing an international legal identity. Modern international law has extended to include an increasing number of non-state actors, e.g. individuals, NGO's, liberation movements. Recent practice suggests that this group could also be joined by cities. Some of legal scholars identified a new phenomenon: the emergence of cities as a new type of actor in international law.[5] Obviously, one should agree with a statement that sovereign nation-states are no longer the sole owners of the rights and obligations laid down by international law. However, it remains questionable whether cities have acquired a legal status in international law that would enable them to establish their legal international status individually. This article will analyze the legality of Sevastopol's action. First, the action of the city in this subject will be presented. Second, the status of Sevastopol under Ukrainian law, as well under Soviet law will be addressed. Third, the article will analyze whether the city is the subject of public international law. Finally, a summary and conclusions will be provided.

1. The City of Sevastopol and the Declaration of Independence of the Autonomous Republic of Crimea

In February and March 2014 profound socio-political changes associated with the general Ukrainian political crisis occurred in Crimea.[6] From 23 February to 27 February 2014 the heads of the executive branches of both Sevastopol and the ARC

[4] Декларация независимости Автономной Республики Крым и города Севастополя, Сборник нормативно-правовых актов Республики Крым, 2014, № 3 (ч. 1), ст. 230 [Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol, Collection of Normative Legal Acts of the Republic of Crimea, 2014, No. 3 (part 1), Art. 230].

[5] Yishai Blank, *The City and the World*, 44(3) Columbia Journal of Transnational Law 875 (2006); Gerald Frug & David Barron, *International Local Government Law*, 38(1) Urban Lawyer 1 (2006).

[6] *See widely*, Бышок С., Кочетков А. Евромайдан имени Степана Бандеры. От демократии к диктатуре [Stanislav Byshok & Aleksej Kochetkov, *Euromaidan of Stepan Bandera. From Democracy to Dictatorship*] (Moscow: Knijnyj mir, FRIGO Narodnaya diplomatiya, 2014); *Documenting Maidan*, Прostory # 8 (December 2013/February 2014) (Jun. 21, 2017), available at http://www.rosalux.de/fileadmin/rls_uploads/pdfs/Ausland/Osteuropa/maidan_RLS2.pdf.

were replaced. The new leaders did not recognize the legitimacy of the incoming Ukrainian government and called on the Government of the Russian Federation for cooperation and assistance.[7] The City Council of Sevastopol decided to create a new executive body for the city – the Coordinating Council for the establishment of the Sevastopol municipal administration. This took place at an extraordinary session of the City Council on 24 February.

On 27 February 2014 the authority of the ARC decided to hold a referendum with questions about improving the status and competence of the region.[8] On 1 March the Sevastopol City Council voted in support of a referendum in the Crimea and gave the relevant powers to the Coordinating Council for the establishment of the Sevastopol municipal administration.

However, the political situation in Ukraine developed so rapidly that on 6 March 2014 the Presidium of the Supreme Council of Crimea adopted Resolution No. 1702-6/14 "On Holding the Crimean Referendum."[9] According to this document, the referendum was to be held on 16 March 2014. This document also stated that ARC decided to become a constituent subject of the Russian Federation. The Sevastopol City Council, in turn, on 6 March 2014 adopted the Decision No. 7151 "On Participation in the Conduct of the Crimean Referendum," in accordance to which the city of Sevastopol also decided to become a constituent subject of the Russian Federation. The city also supported the decision of the Supreme Council of the ARC to hold the Crimean referendum on 16 March 2014 with the same questions, as well as forming a city commission to hold the referendum in Sevastopol.[10] Decision No. 7154 "On Approval of the Provisional Regulations on the Referendum in the City of Sevastopol" was adopted the following

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[7] Обращение Председателя Совета министров АРК Сергея Аксенова, Государственный совет Республики Крым, 1 марта 2014 г. [Handling of the Prime Minister of the ARC Sergei Aksenov, The State Council of the Republic of Crimea, 1 March 2014] (Jun. 21, 2017), available at http://crimea.gov.ru/news/01_03_14.

[8] Постановление Верховной Рады Автономной Республики Крым от 27 февраля 2014 г. № 1630-6/14 «Об организации и проведении республиканского (местного) референдума по вопросам усовершенствования статуса и полномочий Автономной Республики Крым», Сборник нормативно-правовых актов Республики Крым, 2014, № 3 (ч. 1), ст. 203 [Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1630-6/14 of 27 February 2014. On the Organization and Conduct of the Republican (Local) Referendum on Improving the Status and Powers of the Autonomous Republic of Crimea, Collection of Normative Legal Acts of the Republic of Crimea, 2014, No. 3 (part 1), Art. 203].

[9] Постановление Верховной Рады Автономной Республики Крым от 6 марта 2014 г. № 1702-6/14 «О проведении общекрымского референдума», Сборник нормативно-правовых актов Республики Крым, 2014, № 3 (ч. 1), ст. 208 [Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14 of 6 March 2014. On Holding the Crimean Referendum, Collection of Normative Legal Acts of the Republic of Crimea, 2014, No. 3 (part 1), Art. 208].

[10] Решение внеочередной сессии Севастопольского городского совета от 6 марта 2014 г. № 7151 «Об участии в проведении общекрымского референдума» [Decision of the extraordinary session of the Sevastopol City Council No. 7151 of 6 March 2014. On Participation in the Conduct of the Crimean Referendum] (Jun. 22, 2017), available at http://meridian.in.ua/news/12523.html.

day.[11] The City Commission for holding the referendum was created in Sevastopol. It should be noted, that the preparation and holding of the referendum was funded from the city budget of Sevastopol. Lists of voters were created separately for the ARC and Sevastopol, and separate ballots were printed for the ARC and Sevastopol.[12] The referendum results were announced separately for the ARC and for the city Sevastopol,[13] and the referendum results were approved separately.[14]

Just before the referendum, on 11 March, the Supreme Council of Crimea and the Sevastopol City Council adopted "Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol."[15] In accordance with the provisions of this document, if the referendum supported the decision to become part of Russia on 16 March 2014 Crimea, including the ARC and the city of Sevastopol, would declare itself an independent and sovereign state with a republican order. That Declaration was approved by the Resolution of the Supreme Council of the ARC at the extraordinary plenary session of 11 March 2014 and by the Decree of the Sevastopol City Council at an extraordinary plenary session of 11 March 2014.

The day after the referendum, the Supreme Council of Crimea adopted the Resolution "On the Independence of Crimea."[16] In that document Crimea declared itself an independent sovereign state, the Republic of Crimea, and the city of Sevastopol was granted a special status within it. The same day, the Sevastopol City Council adopted a resolution on the accession of the city of Sevastopol into the Russian Federation as a separate subject – a federal city, which endorsed the Resolution "On the Independence of Crimea".[17] The Chairman of the Coordinating

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11 Горсовет Севастополя принял положение о проведении референдума, Forbes, 7 марта 2014 г. [The Sevastopol City Council Adopted a Regulation to Hold a Referendum, Forbes, 7 March 2014] (Jun. 22, 2017), available at http://www.forbes.ru/news/251812-gorsovet-sevastopolya-prinyal-polozhenie-o-provedenii-referenduma.

12 Справка о проведении на территории Автономной Республики Крым и города Севастополя общекрымского референдума 16 марта 2014 года, Консульский отдел Посольства России в Государстве Израиль [Information about the Conduct of the Territory of the Autonomous Republic of Crimea and the City of Sevastopol the Crimean Referendum on 16 March 2014, The Consular Section of the Embassy of the Russian Federation to the State of Israel] (Jun. 22, 2017), available at http://telaviv.dks.ru/content/doc/referendum160414.pdf.

13 Референдум о статусе Крыма 16 марта 2014 года, Выборы Украины [Referendum on the Status of Crimea on 16 March 2014, Ukraine Elections] (Jun. 22, 2017), available at http://ukraine-elections.com.ua/nodes/novosti-vyborov/referendum-o-statuse-kryma-16-marta-2014-goda.

14 Утверждение результатов референдума, Крымская весна: Хронология событий воссоединения Крыма с Россией [Approval of the Referendum Results, Crimean Spring: Chronology of Accession of Crimea to Russia] (Jun. 22, 2017), available at http://журналкрым.рф/special/russkaya_vesna_2014/page/23/.

15 *Supra* note 4.

16 *Supra* note 1.

17 Решение внеочередной сессии Севастопольского городского совета от 17 марта 2014 г. «О статусе города Севастополя» [Decision of the extraordinary session of the Sevastopol City Council of

Council for the establishment of the Sevastopol municipal administration was unanimously authorized to sign an interstate agreement on Sevastopol's accession to the Russian Federation.

On the same day, 17 March, the President of the Russian Federation signed an executive order on recognition of the Republic of Crimea in which the city of Sevastopol had a special status as a sovereign and independent state.[18] On 18 March 2014 the Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation was signed by the President of the Russian Federation, the Chairman of the State Council of the Republic of Crimea, the Prime Minister of the Republic of Crimea and the Chairman of the Coordinating Council for the establishment of the Sevastopol municipal administration.[19] The Agreement was applied provisionally from the date of its signature and came into force on the date of ratification. The State Duma and the Federation Council of the Russian Federation ratified the Agreement on 20 and 21 March respectively. The Federal constitutional law "On Accession to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities – the Republic of Crimea and the City of Federal Importance Sevastopol" was also adopted.[20] According to Art. 1, p. 3 of this Law, Crimea's and Sevastopol's admission to the Russian Federation was considered retroactive to 18 March.

This analysis of the actions of the Sevastopol City Council indicates that the Council acted as a territorial authority with extensive powers in respect of both domestic and foreign policy. The City Council took the decision to change the status of the city, about accession to another entity, and even accession to another State. Moreover, this new executive body was created without any permission from the Ukrainian authorities. In order to determine limits of the powers of the city authorities, it is necessary to address domestic law. Because Sevastopol has had a special status since its establishment, both Soviet and Ukrainian legislation will be discussed.

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17 March 2014. On the Status of the City of Sevastopol] (Jun. 18, 2017), available at https://www.ridus.ru/news/156633.

18 Указ Президента Российской Федерации от 17 марта 2014 г. № 147 «О признании Республики Крым», Собрание законодательства РФ, 2014, № 12, ст. 1259 [Order of the President of the Russian Federation No. 147 of 17 March 2014. On Recognition of the Republic of Crimea, Legislation Bulletin of the Russian Federation, 2014, No. 12, Art. 1259].

19 *Supra* note 2.

20 Федеральный конституционный закон от 21 марта 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», Собрание законодательства РФ, 2014, № 12, ст. 1201 [Federal constitutional law No. 6-FCL of 21 March 2014. On the Accession to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation New Constituent Entities – the Republic of Crimea and the City of Federal Importance Sevastopol, Legislation Bulletin of the Russian Federation, 2014, No. 12, Art. 1201].

2. The Status of Sevastopol in Domestic Law

2.1. Soviet Law

In the beginning it should be noted that the city Sevastopol has had a special status almost since its foundation, specifically from 1787. During the Russian Empire, it was "gradonachalstvo" (a city self-authority), the same as Saint Petersburg, Odessa, Kerch, Nikolaev, and Rostov-on-Don. Those cities formed completely independent territorial and administrative units.[21] However, the history of the city is not the subject of this essay and therefore only the status of Sevastopol under the Soviet law will be considered.

Initially, the city of Sevastopol was a part of the Sevastopol okrug in the Autonomous Crimean Soviet Socialist Republic (hereinafter – ACSSR) of the Russian Soviet Federative Socialist Republic (hereinafter – RSFSR); the ACSSR was established on 18 October 1921 by the Decree of the All-Russian Central Executive Committee and the Council of People's Commissars (Art. 1 of the Decree).[22] The first constitution of Crimean autonomy, as adopted in 10 November 1921[23] and the subsequent constitution adopted in 5 May 1929[24] didn't grant any special status to the city. The first change in the status of Sevastopol in Soviet history occurred in 1930. On 30 October 1930 the Presidium of the All-Russian Central Executive Committee issued the Decree "On

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[21] Грибовский В.М. Государственное устройство и управление Российской Империи (из лекций по русскому государственному и административному праву) [Viacheslav M. Gribovskij, *The State Structure and Governing of the Russian Empire (from Lectures on Russian Public and Administrative Law)*] 132 (Odessa: Tipografia "Tehnik," 1912).

[22] Декрет Всероссийского Центрального Исполнительного Комитета и Совета Народных Комиссаров от 18 октября 1921 г. «Об Автономной Крымской Советской Социалистической Республике» [Decree of the All-Russian Central Executive Committee and Council of People's Commissars of 18 October 1921. On the Crimean Autonomous Soviet Socialist Republic] in Собрание узаконений и распоряжений правительства за 1921 год [Collection of Decrees and Decisions of the Provisional Government of 1921] (Moscow: Uprav. Del. Sovnark. SSSR, 1944).

[23] Конституция Крымской Социалистической Советской Республики (принята 1-м Всекрымским Учредительным Съездом Советов 10 ноября 1921 г.) [Constitution of the Crimean Soviet Socialist Republic (adopted by the 1st Crimean Constituent Congress of Soviets of 10 November 1921)] (Jun. 18, 2017), available at http://sevkrimrus.narod.ru/ZAKON/1921.htm; Пащеня В.Н. Этнонациональный вопрос в государственном строительстве Крыма в первой половине XX в. (1900–1945 гг.), 90 Культура народов Причерноморья 8, 61–70 (2006) [Vladislav N. Pashchenia, *The Ethnonational Issue in the State Construction of the Crimea in the First Half of the Twentieth Century (1900–1945)*, 90 Culture of People of the Black Sea Region 8, 61–70 (2006)].

[24] Конституция Крымской Автономной Советской Социалистической Республики (принята VI Всекрымским Съездом Советов 5 мая 1929 г.) [Constitution of the Crimean Autonomous Soviet Socialist Republic (adopted by the 6th Constituent Congress of Soviets on 5 May 1929)] (Jun. 18, 2017), available at http://sevkrimrus.narod.ru/ZAKON/1929.htm; Конституция КрымАССР и положения, постановления и инструкции о строении органов власти КрымАССР, объеме их прав и круге деятельности. Выпуск I [*The Constitution of the Crimean ASSR and the Provisions, Regulations and Instructions Concerning the Structure of Authorities of the Crimean ASSR, the Extent of Their Rights and a Range of Activities. Issue I*] 10–29 (Simferopol: 2 Gostipografia "Krympoligraftresta," 1930).

the Reorganization of the Network of Okrugs of the Crimean Autonomous Soviet Socialist Republic," which withdrew five Crimean cities (Simferopol, Kerch, Sevastopol, Yalta and Feodosia) from the existing Crimean okrugs. This document constituted those cities as a separate independent administrative unit, directly subordinate to the Central Executive Committee of the Crimean Autonomous Soviet Socialist Republic (hereinafter – CASSR).[25] The constitutional status of Sevastopol was changed only in 1937. On 4 June 1937 Sevastopol became a city of republican subordination to the CASSR (Art. 14 of the Constitution of the CASSR).[26] It meant that the city was directly subordinate to the supreme bodies of state power of the autonomous republic. At this moment, we shall note that Crimean Autonomy was determined as an integral part of the RSFSR by all three of the above-mentioned Constitutions. Foreign affairs and foreign trade of the CASSR were entirely the responsibility of the RSFSR.[27] Neither the republic, nor the okrugs or cities of republican subordination of this republic could represent this entity in foreign affairs. So, Sevastopol's special status as a city of republican subordination, which the city acquired in 1937, only affected the status of the city under domestic law.

According to the Decree of the Presidium of the USSR Supreme Council of 40 June 1945 and the Law of the RSFSR Supreme Soviet of 25 June 1946, the CASSR was downgraded to the status of an oblast (province). Accordingly, the status of Sevastopol was downgraded too. It was transferred from the category of cities of republican subordination to the category of cities with provincial subordination.[28]

Later, the status of the city was changed once again on 29 October 1948. On that day, the Order of the Presidium of the RSFSR "On the Allocation of Sevastopol as an Independent Administrative and Economic Center" was adopted.[29] According to this

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[25] Постановление ВЦИК от 30 октября 1930 г. «О реорганизации сети районов Крымской АССР», Собрание узаконений РСФСР, 1930, № 60, ст. 717 [Resolution of the Central Executive Committee of 30 October 1930. On the Reorganization of the Network of the Crimean Autonomous Soviet Socialist Republic, Collection of Laws of the RSFSR, 1930, No. 60, Art. 717].

[26] Конституция (Основной закон) Крымской Автономной Советской Социалистической Республики [*The Constitution (Fundamental Law) of the Crimean Autonomous Soviet Socialist Republic*] (Simferopol: Gosudarstvennoe izdatelstvo Krymskoj ASSR, 1 tipografiaja Krympolgraftresta, 1937).

[27] Воронцов С.А. Спецслужбы России: Учебник для студентов высших учебных заведений, обучающихся по специальности «Юриспруденция» [Sergej A. Vorontsov, *The Security Services of Russia: A Textbook for University Students Enrolled in the Specialty "Jurisprudence"*] 276–310 (Rostov-on-Don: Feniks, 2006).

[28] Шевчук А.Г. и др. Административно-территориальное устройство Крыма в документах и картографических образах XVIII–XXI вв. [Aleksandr G. Shevchuk et al. *The Administrative-Territorial Unit of the Crimea in the Documents and Cartographic Images of XVIII–XXI Centuries*] 37, 63 (A.V. Ishin (ed.), Simferopol: Tavrija, 2006).

[29] Указ Президиума Верховного Совета РСФСР от 29 октября 1948 г. № 761/2 «О выделении города Севастополя в самостоятельный административно-хозяйственный центр» [Order of the Presidium of the Supreme Soviet of the RSFSR No. 761/2 of 29 October 1948. On the Allocation of Sevastopol as an Independent Administrative and Economic Center] in Сборник законов РСФСР и указов

document, Sevastopol became an independent administrative and economic unit with his own budget and was directly subordinate to the RSFSR. This decision was caused by Sevastopol's need for rapid restoration after the war.[30] The Council of Ministers of the RSFSR decided to "allocate the city of Sevastopol as a separate line in the state plan and the budget," and ordered the Ministry of Finance of the RSFSR, in conjunction with the Crimean Regional Executive Committee, to separate the budget and plans for the construction and supply of the city of Sevastopol from the Crimean regional budget and transfer it to the state budget.[31] It should be noted that under the Soviet Constitution of 1936 and the Constitution of the RSFSR in 1937, cities of republican subordination were not, from the constitutional-legal point of view, removed from the oblast to which they were allocated from an economic and administrative point of view.[32] De facto, Sevastopol stayed in the Crimean oblast. All Sevastopol's state services continued to report to the oblast (e.g. the police to the Department of Internal Affairs of the Crimean oblast, the system of education to the province's Department of Education, health services to the province's Department of Health).

In February 1954, the Presidium of the Supreme Council of the RSFSR decided to transfer the Crimean oblast to the Ukrainian SSR.[33] That was confirmed by the Order of the Presidium of the Supreme Council of the USSR of 19 February 1954[34]

Президиума Верховного Совета РСФСР 1946–1954 гг. [Collection of Laws of the RSFSR and Decrees of the Presidium of the Supreme Soviet of the RSFSR. 1946–1954] 99 (Moscow: Izvestija Sovetov deputativ trudiashchihsa SSSR, 1955).

30 Постановление Совета Министров СССР от 25 октября 1948 г. № 403 «О мероприятиях по ускорению восстановления Севастополя» [Resolution of the Council of Ministers of the USSR No. 403 of October 25, 1948. On Measures to Accelerate Recovery of Sevastopol] in Россия, Крым и город русской славы Севастополь. Документы и материалы 1783–1996 [Russia, Crimea and City of Russian Glory Sevastopol. Documents and Materials 1783–1996] 55 (Moscow: Olimp, 1996).

31 Постановление Совета Министров РСФСР от 29 октября 1948 г. № 1082 «Вопросы города Севастополя» [Resolution of the Council of Ministers of the RSFSR No. 1082 of October 29, 1948. Issues of the City of Sevastopol]; Бабурин С. Крым навеки с Россией. Историко-правовое обоснование воссоединения Республики Крым и города Севастополь с Российской Федерацией [Sergei Baburin, *Crimea with Russia Forever. Historical and Legal Justification for the Reunification of the Republic of Crimea and the City of Sevastopol and the Russian Federation*] (Jun. 20, 2017), available at http://iknigi.net/avtor-sergey-baburin/105208-krym-naveki-s-rossiey-istoriko-pravovoe-obosnovanie-vossoedineniya-respubliki-krym-i-goroda-sevastopol-s-rossiyskoy-federaciey-sergey-baburin.html.

32 Балытников В.В. О некоторых аспектах юридической дискуссии, касающейся оценки содержания Договора о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов, 4(46) Журнал конституционного правосудия 7 (2015) [Vadim V. Balytnikov, *Some Aspects of the Legal Debate Concerning the Evaluation of the Content of the Treaty on the Accession of the Republic of Crimea into the Russian Federation and the Formation of New Subjects in the Russian Federation*, 4(46) Journal of Constitutional Justice 7 (2015)].

33 *See widely*, Как это делалось, Российская газета, 19 февраля 2004 г. [*How It Was Done*, Rossiyskaya Gazeta, 19 February 2004] (Jun. 20, 2017), available at http://rg.ru/2004/02/19/sssr.html.

34 Указ Президиума Верховного Совета СССР от 19 февраля 1954 г. «О передаче Крымской области из состава РСФСР в состав УССР», Ведомости Верховного Совета СССР, 1954, № 4, с. 64 [Order of the Presidium of the Supreme Soviet of the USSR of 19 February 1954. On the Transfer of the Crimean Region of the RSFSR in the Ukrainian SSR, Bulletin of the Supreme Council of the USSR, 1954, No. 4, p. 64].

and by the Law of the USSR of 26 April 1954.[35] Those documents make no mention of Sevastopol, but after the transition of the Crimean province to the Ukrainian SSR in 1954, Sevastopol was financed directly from the budget of the Ukrainian SSR, and was allocated a separate line as a city of republican subordination to the Ukrainian SSR from 1955.[36] And already in Art. 77 of the Constitution of the Ukrainian SSR of 1978 it was stated that Sevastopol, along with Kiev, is one of two cities of republican subordination to the Ukrainian SSR.[37] The city held that status until 1991, prior to the announcement of Ukraine's independence.

It is clear that Sevastopol had the status of a city of republican subordination. Initially, it was the city of republican subordination to the CASSR, then the city of republican subordination to the RSFSR and finally to the Ukrainian SSR. In Soviet legislation, cities of republican subordination were considered integral parts of the area in which they were located. The status concerned only the sourcing of budgetary funds allocated to the city. Cities of republican subordination were funded directly from the republican budget, alongside the area of which it was a part. Those cities didn't have permission to take any action in the sphere of foreign policy. Even international contacts of cities of the USSR were part of the external policy of the central government and were in the purview of the central bodies of the USSR.[38]

2.2. Ukrainian Law

After Ukraine proclaimed its independence on 24 August 1991 the situation of Crimea became very uncertain. A number of social organizations were formed in Crimea, beginning a struggle for self-determination on the peninsula. This issue has been examined by a number of authors, literature on the subject is extensive and, therefore, this thread will not be discussed in this article.[39] Moreover, the principle

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[35] Закон СССР от 26 апреля 1954 г. «Об утверждении Указов Президиума Верховного Совета СССР» [Law of the USSR of 26 April 1954. On Approval of Decrees of the Presidium of the Supreme Council of the USSR], Заседания Верховного Совета СССР четвертого созыва. Первая сессия (20–2 апреля 1954 г.) [*The Meetings of the Supreme Council of the USSR of the Fourth Convocation. The First Session (20–2 April 1954)*] 554–550 (Moscow: Izdanie Verhovnogo Soveta SSSR, 1954).

[36] Закон УССР о государственном бюджете УССР на 1955 год, Ведомости Верховного Совета УССР, 1954, № 4 [Law of the Ukrainian SSR on the State Budget of the Ukrainian SSR for the Year 1955, Bulletin of the Supreme Council of the Ukrainian SSR, 1954, No. 4].

[37] Конституция (Основной закон) Украинской Советской Социалистической Республики (принята 20 апреля 1978 г.) [Constitution (Fundamental Law) of the Ukrainian Soviet Socialist Republic (adopted on 20 April 1978)] (Jun. 23, 2017), available at http://gska2.rada.gov.ua/site/const/istoriya/1978.html.

[38] Максимов В.Б. Международные контакты городов СССР как часть внешней политики правительства, 2(22) Вестник Волгоградского государственного университета, Серия 4. История. Регионоведение. Международные отношения 96 (2012) [Vladimir B. Maksimov, *International Contacts of Cities of the USSR as Part of the Government's Foreign Policy*, 2(22) Bulletin of the Volgograd State University, Series 4. History. Regional Studies. International Relationships 96 (2012)].

[39] *See widely*, Natalya Belitser, *The Constitutional Process in the Autonomous Republic of Crimea in the Context of Interethnic Relations and Conflict Settlement, International Committee for Crimea*, International Committee for Crimea (ICC), 20 February 2000 (Jun. 20, 2017), available at http://www.iccrimea.org/

of *uti possidetis* was applied to the emergence of independent states in place of the former Soviet republics, according to which the new states were formed within the borders of the former units.[40] So, from the point of view of international law at the moment of Ukraine's declaration of independence, Crimea constituted an integral part thereof. It is also obvious that Ukraine also considered Crimea an integral part. In 1992, Ukraine passed a Law "On the Status of the Autonomous Republic of Crimea."[41] That Law defined the division of powers between the state authorities of Ukraine and the Autonomous Republic of Crimea and declared that this republic is an integral part of Ukraine. As for Sevastopol, its status was defined in Ukrainian law as well. The Decree of the President of Ukraine of 11 March 1992 "On the State Executive Authorities of the City of Sevastopol" reaffirmed the status of Sevastopol as a city of republican subordination, directly subordinated to the central authorities of Ukraine.[42] Also, it was allocated a separate line in the state budget, in the same way as Kiev.[43] It should be noted that before adopting the Constitution of Ukraine in 1996, the main legal document that regulated the issues of administrative-territorial structure of Ukraine was the "Provision on the Order of Decision of the Administrative-Territorial Structure of the Ukrainian Soviet Socialist Republic," approved on 12 March 1981.[44] According to this document the city of republican subordination was a territorial-administrative unit within the State.

The Constitution of Ukraine was adopted on 28 June 1996, defining Ukraine as a unitary state.[45] It is composed of administrative-territorial formations without the legal status of state entities. According to Art. 133 of the Constitution, "1. The

scholarly/nbelitser.html; Maria Drohobycky, *Crimea: Dynamics, Challenges and Prospects* (Lanham, Md.: Rowman & Littlefield, 1995).

40 *See widely* for principle of *uti possidetis*, Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 British Yearbook of International Law 75 (1996).

41 Закон Украины от 29 апреля 1992 г. № 2299-XII «О статусе Автономной Республики Крым», Ведомости Верховной Рады Украины, 1992, № 30, ст. 419 [Law of Ukraine No. 2299-XII of 29 April 1992. On the Status of the Autonomous Republic of Crimea, Bulletin of the Verkhovna Rada of Ukraine, 1992, No. 30, Art. 419].

42 Указ Президента Украины от 11 марта 1992 г. № 153/92 «Об органах государственной исполнительной власти города Севастополя», Сборник указов Президента, 1992, № 1 [Order of the President of Ukraine No. 153/92 of 11 March 1992. On the Executive Authorities of the City of Sevastopol, Collection of Decrees of the President, 1992, No. 1].

43 Закон Украины от 9 апреля 1993 г. № 3091-XII «О Государственном бюджете Украины на 1993 год», Ведомости Верховной Рады Украины, 1993, № 20, ст. 212 [Law of Ukraine No. 3091-XII of 9 April 1993 «On State Budget of Ukraine for Year 1993», Bulletin of the Verkhovna Rada of Ukraine, 1993, No. 20, Art. 212].

44 Указ Президиума Верховного Совета УССР от 12 марта 1981 г. № 1654-X «О порядке решения вопросов административно-территориального устройства Украинской ССР» [Order of the Presidium of the Supreme Council of the Ukrainian SSR No. 1654-X of 12 March 1981. On the Issue of Administrative-Territorial Structure of the Ukrainian SSR] (Jun. 20, 2017), available at http://search.ligazakon.ua/l_doc2.nsf/link1/UP811654.html.

45 Конституция Украины, Ведомости Верховной Рады Украины, 1993, № 20, ст. 212 [Constitution of Ukraine, Bulletin of the Verkhovna Rada of Ukraine, 1993, No. 20, Art. 212].

system of the administrative and territorial structure of Ukraine shall include: the Autonomous Republic of Crimea, oblasts, rayons, cities, city districts, settlements and villages. 2. Ukraine shall be composed of the Autonomous Republic of Crimea, Vinnytsia Oblast, Volyn Oblast, Dnipropetrovsk Oblast, Donetsk Oblast, Zhytomyr Oblast, Zakarpattia Oblast, Zaporizhia Oblast, Ivano-Frankivsk Oblast, Kyiv Oblast, Kirovohrad Oblast, Luhansk Oblast, Lviv Oblast, Mykolayiv Oblast, Odessa Oblast, Poltava Oblast, Rivne Oblast, Sumy Oblast, Ternopil Oblast, Kharkiv Oblast, Kherson Oblast, Khmelnytskyi Oblast, Cherkasy Oblast, Chernivtsi Oblast and Chernihiv Oblast, the City of Kiev, and the City of Sevastopol. 3. The cities of Kiev and Sevastopol shall have special status determined by the law of Ukraine." As one can see, the Ukrainian Constitution granted a special status to the city of Sevastopol, but there is no clear statement of what that status entails.[46] That status has had to be determined by a special law. The Law "On the Capital of Ukraine – City-Hero of Kiev" was adopted on 15 January 1999. Unfortunately, the status of Sevastopol was never determined by any law prior to 2014.

However, the special legal status of the cities of Kiev and Sevastopol led to a special procedure for the exercise of executive power and local self-government in those cities. According to Ukrainian legislation, the City Council acted in Sevastopol as legislature, while the executive authority was the Sevastopol city state administration, which was headed by a Chairman, appointed by decree of the President of Ukraine. The exclusive competence of the City Council was determined in the Art. 26 of the Law of 21 May 1997 "On the Local Government in Ukraine."[47] The territorial structure of Ukraine was not applied to them. It was determined exclusively by the laws of Ukraine. The Constitution of Ukraine also proclaimed that any changes with regard to the territory of Ukraine should be made exclusively on the basis of a national referendum (Art. 73 of the Constitution of Ukraine). In addition, the Law of Ukraine "On the National Referendum in Ukraine" states that any territorial changes affecting Ukraine are subject to a national referendum (Art. 3.3(2)).[48] So, the City Council of Sevastopol, when taking the decision to declare independence and to hold a referendum had exceeded its powers. This was confirmed by the judgment of the Constitutional Court of Ukraine of 14 March 2014, with reference to a local referendum in the Autonomous Republic

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[46] *See widely*, Anatolii Tkachuk et al., *Reforms in the Administrative and Territorial Structure of Ukraine: Lessons of History 1907–2009* 46–48 (Kyiv: Legal Status, 2012); Will Bartlett & Vesna Popovski, *Local Governance and Social Cohesion in Ukraine*, Search Working Paper WP5/22 (September 2013), at 9 (Jun. 20, 2017), available at http://docplayer.net/24260745-Local-governance-and-social-cohesion-in-ukraine.html.

[47] Закон Украины от 21 мая 1997 г. № 280-97-ВР «О местном самоуправлении в Украине», Ведомости Верховной Рады Украины, 1997, № 24, ст. 170 [Law of Ukraine No. 280/97-VR of 21 May 1997. On Local Government in Ukraine, Bulletin of the Verkhovna Rada of Ukraine, 1997, No. 24, Art. 170].

[48] Закон Украины от 6 ноября 2012 г. № 5475-VI «О всеукраинском референдуме», Ведомости Верховной Рады Украины, 2013, № 44–45, ст. 634 [Law of Ukraine No. 5475-VI of 6 November 2012. On National Referendum, Bulletin of the Verkhovna Rada of Ukraine, 2013, No. 44–45, Art. 634].

of Crimea.[49] According to the Court: "[…], withdrawal of any subject of administrative and territorial structure of Ukraine from its structure, change the constitutionally enshrined status of administrative-territorial unit, such as […] Sevastopol, as an integral part of Ukraine […] is contrary to […] constitutional principles." Moreover, the Sevastopol City Council had no authority to sign any international agreement. According to provisions of the Law "On Local Government in Ukraine" it only has limited powers in the field of foreign economic activity, such as e.g. choosing to join or withdraw from voluntary associations of local governments.

It could be stated that special status of the City Sevastopol in Ukraine, as well as its historical status in the USSR did not entitle the City Council to take decisions about the status of the city. Hence, the actions of the authorities of Sevastopol were illegal in the light of Ukrainian law.

3. Sevastopol and International Law

The actions taken by the authorities of Sevastopol, as well as authorities of the ARC, undoubtedly violated the domestic law of Ukraine. The authorities of the ARC have explained their actions by affirming that they were relying on international law. In this context they refer particularly to the right of people to self-determination, as well as the example of secession and unilateral declaration of independence by Kosovo. The case of the ARC is considered by the most international lawyers as a case of unilateral secession by a part of the State.[50] The question arises: what status does the city of Sevastopol hold under international law?

Initially, States were the only recognized subjects of international law. But now other kinds of actors also are recognized as subjects of international law.[51] According to A. Kaczorowska-Ireland, "These are: entities which can potentially become States […]; entities with State-like qualities such as the Holy See and the Order of Malta,

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[49] Решение Конституционного Суда Украины от 14 марта 2014 г. № 2-рп/2014 по делу по конституционному представлению Председателя Верховной Рады Украины и Уполномоченного Верховной Рады Украины по правам человека относительно соответствия Конституции Украины (конституционности) Постановления Верховного Совета Автономной Республики Крым «О проведении общекрымского референдума» (дело о проведении местного референдума в Автономной Республике Крым), Официальный вестник Украины, 2014, № 26, ст. 766 [Decision of the Constitutional Court of Ukraine No. 2-rp/2014 of 14 March 2014 in Relation to the Case Arising from the Constitutional Petition of the Acting President of Ukraine, Chairman of the Verkhovna Rada of Ukraine and the Ukrainian Parliament Commissioner for Human Rights on Compliance with the Constitution of Ukraine (Constitutionality) of the Resolution of the Supreme Council of the Autonomous Republic of Crimea "On Holding the Crimean Referendum" (the Case of Local Referendum in the Autonomous Republic of Crimea), Official Journal of Ukraine, 2014, No. 26, Art. 766].

[50] *Supra* note 3.

[51] *See widely*, Janne E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: T.M.C. Asser Press, 2004); Malcolm N. Shaw, *International Law* 223–225 (5th ed., Cambridge: Cambridge University Press, 2003).

intergovernmental organisations […]; and individuals."[52] A further list of entities whose status as subjects of international law is unclear includes nongovernmental organizations and multinational corporations. Those entities have already been widely described.[53] Unfortunately the status of a city from the point of view of international law is not well discussed. As mentioned by H.F. Aust, "Global cities have become a fashionable topic of research, at least in disciplines outside of law."[54] There are only a few works which relate to this topic in a certain sense.[55]

From the legal perspective, a city functions within the national legal order. From the point of view of classical international law, cities also have no legal identity in international law and they are not granted the status of subjects of international law. Sources of international law enumerated in the Statute of the ICJ. Art. 38 do not recognize cities as entities possessing a legal identity. Cities are treated as subdivisions of states. Classical international law has dealt with the international status of parts of a federal state and autonomous regions, but never dealt with the status of cities. However, recent legal activities of cities on the international stage begin to indicate the need for a different treatment of cities in a different way.

One may undoubtedly observe an increasing number of examples of actions by cities in areas traditionally governed by international law. Cities have established so-called International Relations Offices to develop international relations and initiatives.[56] Cities have signed bilateral agreements, very often called Memoranda of Understanding (e.g. the City of Milpitas and the City of Huizhou; the City of Miami Beach and the Canton of Basel-Stadt). Quite often, these memoranda are the basis for signing further agreements on the establishment of mutual relationships or are signed on the basis of such agreements (e.g. Memorandum of Understanding on Friendship and Cooperation between Shanghai and the City of Gothenburg). There are many international conferences organized by city authorities, e.g. the First World Conference on City Diplomacy in The Hague, 2008. Furthermore, the term "city diplomacy" deserves attention. The term is relatively new and it is not widely known. It could be applied to different international actions of the cities' authorities, but mainly to the involvement of local authorities in peace-building.[57] There are

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52 Alina Kaczorowska-Ireland, *Public International Law* 182 (4th ed., London: Routledge, 2010).

53 *See*, Shaw 2003, *supra* note 51.

54 Helmut P. Aust, *Shining Cities on the Hill? The Global City, Climate Change and International Law*, 26(1) European Journal of International Law 255, 256 (2015).

55 *Supra* note 5.

56 Janne E. Nijman, *Renaissance of the City as Global Actor. The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors*, T.M.C. Asser Institute for International & European Law 2016-02 (Jun. 20, 2017), available at www.asser.nl.

57 *City Diplomacy: The Role of Local Governments in Conflict Prevention, Peace-Building, Post-Conflict Reconstruction* (A. Musch et al. (eds.), The Hague: VNG International, 2008).

numerous global and regional networks in which cities cooperate, e.g. EUROCITIES, ICLEI – local governments for sustainability. And of course, one ought to point out the World Association of Cities and Local Authorities Coordination (WACLAC), which "was established in 1996 to provide a coordination mechanism for international local government associations in their work with the United Nations."[58] There are also examples of cooperation of international organizations with cities, e.g. UNICEF's Child Friendly Initiative, UNESCO's European Coalition of Cities against Racism. Hence, we could state that the new role of a city is recognized by the international community, especially by international organizations. But as I.M. Porras stressed, the succession of such a cooperation "can be attributed primarily to a recent coincidence of values and interests between cities and international organizations."[59]

The case of the City of Sevastopol once again showed us that a contemporary city may be an actor on the international stage. It seems that cities can be understood as a particular form of non-state actor in international law. Bearing that in mind, as J. Klabbers noted, traditional international law is far from exhaustive of the variety of today's global legal practices.[60] Initially only States were subjects of international law, while now the list of entities has expanded. In future it could be possible that international law will embrace actors that transcend the traditional framework.

But at this stage the official doctrine of international law doesn't recognize a city as a subject of international law. Furthermore, a case hinging on a city declaring its independence from a state is hardly conducive to changing the position of states – the main actors of international law – in this area. The respect for territorial integrity is essential for States.[61] It is doubtful that the case of Sevastopol will contribute to the development of doctrine of non-state actors (in particular, cities). No states would risk considering a city as a full entity of international law, fearing negative consequences.

Conclusion

The City of Sevastopol, a city with special status in Ukraine, declared independence from this state and became the federal city of the Russian Federation, after signing the agreement with the Russian Federation in 2014. The article examined issues

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58 Felipe de Jesus Cantu, *World Association of Cities and Local Authorities Coordination (WACLAC)*, International Conference on Financing for Development, 18–22 March 2002 (Jun. 20, 2017), available at http://www.un.org/ffd/statements/waclacE.htm.

59 Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36(3) Fordham Urban Law Journal 537, 548 (2008).

60 Jan Klabbers, *Law-Making and Constitutionalization* in Jan Klabbers et al., *The Constitutionalization of International Law* 81, 87 (Oxford: Oxford University Press, 2009).

61 William R. Slomanson, *Legitimacy of the Kosovo, South Ossetia and Abkhazia Secessions: Violations in Search of a Rule*, 6(2) Miskolc Journal of International Law 1, 15 (2009).

of Sevastopol's legal status in Ukraine, as well in the former USSR. From the very beginning the city had a special status. In the USSR, it was the city of republican subordination, first to the RSFSR, later to the Ukrainian SSR. In Ukraine, the city had a special status, granted in the Constitution. However, regardless of its special status, the city does not have the power in domestic law to declare independence, and its actions were illegal. As for international law, cities have no legal identity in international law and they are not granted the status of subjects of international law. Sevastopol's actions confirmed the thesis that cities may be recognized as actors on the international stage, but are treated by international law as subdivisions of states rather than subjects of international law.

References

Aust H.P. *Shining Cities on the Hill? The Global City, Climate Change and International Law*, 26(1) European Journal of International Law 255 (2015).

Belitser N. *The Constitutional Process in the Autonomous Republic of Crimea in the Context of Interethnic Relations and Conflict Settlement, International Committee for Crimea*, International Committee for Crimea (ICC), 20 February 2000 (Jun. 20, 2017), available at http://www.iccrimea.org/scholarly/nbelitser.html.

Blank Y. *The City and the World*, 44(3) Columbia Journal of Transnational Law 875 (2006).

Cantu F. de J. *World Association of Cities and Local Authorities Coordination (WACLAC)*, International Conference on Financing for Development, 18–22 March 2002 (Jun. 20, 2017), available at http://www.un.org/ffd/statements/waclacE.htm.

Cwicinskaja N. *Krym w świetle prawa międzynarodowego* in *Rewolucja w imię godności. Ukraiński Euromajdan 2013–2014* 179 (G. Skrukwa & M. Studenna-Skrukwa (eds.), Toruń: Wydawnictwo Adam Marszałek, 2015).

Cwicinskaja N. *The Legality and Certain Legal Consequences of the "Accession" of Crimea to the Russian Federation*, 34 Polish Yearbook of International Law 61 (2014).

Drohobycky M. *Crimea: Dynamics, Challenges and Prospects* (Lanham, Md.: Rowman & Littlefield, 1995).

Frug G. & Barron D. *International Local Government Law*, 38(1) Urban Lawyer 1 (2006).

Geiss R. *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91(1) International Law Studies 425 (2015).

Kaczorowska-Ireland A. *Public International Law* (4th ed., London: Routledge, 2010).

Klabbers J. *Law-Making and Constitutionalization* in Klabbers J. et al. *The Constitutionalization of International Law* 81 (Oxford: Oxford University Press, 2009).

Marxsen C. *The Crimea Crisis – An International Law Perspective*, 74(2) Heidelberg Journal of International Law 367 (2014).

Nijman J.E. *Renaissance of the City as Global Actor. The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors*, T.M.C. Asser Institute for International & European Law 2016-02 (Jun. 20, 2017), available at www.asser.nl.

Nijman J.E. *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: T.M.C. Asser Press, 2004).

Porras I.M. *The City and International Law: In Pursuit of Sustainable Development*, 36(3) Fordham Urban Law Journal 537 (2008).

Shaw M.N. *International Law* (5th ed., Cambridge: Cambridge University Press, 2003).

Shaw M.N. *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 British Yearbook of International Law 75 (1996).

Slomanson W.R. *Legitimacy of the Kosovo, South Ossetia and Abkhazia Secessions: Violations in Search of a Rule*, 6(2) Miskolc Journal of International Law 1 (2009).

Tkachuk A. et al. *Reforms in the Administrative and Territorial Structure of Ukraine: Lessons of History 1907–2009* (Kyiv: Legal Status, 2012).

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QUARTER OF A CENTURY ON FROM THE SOVIET ERA: REFLECTIONS ON RUSSIAN DOCTRINAL RESPONSES TO THE ANNEXATION OF CRIMEA

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The article is intended to give a reader a broader view of the post-Crimean academic discussion within Russia. The justifications offered by Russia for its actions in Crimea in 2014 were met with scepticism by the international community and international lawyers across various jurisdictions. Among Russian international legal scholars there were almost no critical voices willing to assess Crimea's annexation as at least questionable under international law. Rather, these scholars, in their overwhelming majority, spoke or wrote on the matter in feverish defence of Russia's actions. Some international scholars who study "Russian" approaches to international law or come across them as part of their research seem prepared to justify the striking unity of perspective among Russian academic international lawyers by reference to the historically authoritarian nature of the Russian state. This article counters arguments of such would-be deference, suggesting that Russian academia be looked at by reference to the emerging standard of international legal profession.

Keywords: Russia; Ukraine; Crimea; annexation; reunification; USSR; use of force; intervention; self-determination; territorial integrity; sovereignty; public international law; comparative international law; Russian approaches to international law; legal profession.

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Introduction

The justifications offered by Russia for its actions in Crimea in 2014 were met with scepticism by the international community and international lawyers across various jurisdictions.[1]

Among Russian international legal scholars there were almost no critical voices willing to assess Crimea's annexation as at least questionable under international law.[2] Rather, these scholars, in their overwhelming majority, spoke or wrote on the matter feverishly defending Russia's actions.

The epigraph to this article provides one example of many absurd dialogues the international legal community has had to have with representatives of the "Russian

[1] *See, e.g.*, Territorial Integrity of Ukraine, Resolution adopted by the General Assembly on 27 March 2014, A/RES/68/262; Anton Moiseienko, *Guest Post: What do Russian Lawyers Say about Crimea?*, Opinio Juris, 24 September 2014 (Jun. 20, 2017), available at http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea; Is International Law Effective? The Case of Russia and Ukraine, American Society of International Law: Proceedings of the Annual Meeting, Vol. 108 (2014), also available at https://www.youtube.com/watch?v=-x7EgVyv5Xk.

[2] Lauri Mälksoo, *Russian Approaches to International Law* 191 (Oxford: Oxford University Press, 2015); Moiseienko, *Guest Post*, *supra* note 1.

tradition of international law" after the annexation of Crimea.[3] This type of arguments has often been offered by a variety of Russian scholars coming from various leading Russian universities.[4]

To an outside observer, justifications offered by Russian doctrine in response to the annexation of Crimea may look like a bizarre, or preconceived, mix of arguments involving the domestic affairs of Ukraine (disguised as issues of its alleged failed statehood), use of force by the "West," and Russia's self-proclaimed lawful intervention on the basis of the above.

Although discussions on Crimea involve matters of general international law and seemingly interpret the same applicable treaties and rules, structures of argumentation derived from Russian doctrine appear to be based on entirely different premises when compared to those of all other international legal commentators.

As the acceptance of polyphony of different schools and traditions of international law across the world continues to grow, in an era of growing scepticism regarding the universality of international law among international lawyers, the "Russian school" might have a strong case. Yet, acknowledging the strength of one's case for regionalism without any reservation may, in extreme situations, lead to the dilution of the profession itself.

This article explores the interpretation of facts and law by the Russian doctrine seeking to respond to a question whether the argumentative structure offered for such interpretation is within the ambit of the existing international legal framework. It suggests that, academically, the Crimean situation should be taken as an example why it is extremely important to include issues of competence, professional integrity and ethical conduct in the comparative analyses of existing approaches to international law as proposed *sine qua non* features of the profession of an international legal academic.

In this article, the term "Russian doctrine" is used to denote the leading view on the legality of Crimea's annexation among Russian international scholars. In order to avoid a general *ad hominem* approach, the following critique will mostly focus on a number of positions voiced by leading proponents of the Russian doctrine, who have previously authored Russian international law textbooks or monographs, and who thus affect the teaching of international law in Russia.

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[3] The particular statement in the beginning of the article belongs to Evgeny Voronin, a former Russian diplomat, and currently a professor of international law at Moscow State University of International Relations (MGIMO).

[4] *See* Задорожний А.В. Российская доктрина международного права после аннексии Крыма [Alexander V. Zadorozhniy, *The Russian International Legal Doctrine after the Annexation of Crimea*] (Kyiv: K.I.S., 2015).

1. Interpretation of Facts in the Case of Crimea – A Flashback from the Soviet Past

Arguments presented by representatives of Russian international law doctrine in the course of 2014 and 2015 are typically based on a particular interpretation of facts, accompanied by a very specific choice of wording (designated in quotation marks in what follows). According to this interpretation, a "military"[5] "unconstitutional"[6] "coup d'état"[7] in Kyiv in February 2014 saw a new "illegitimate government"[8] come to power in Ukraine, and as the result of intervention by the West[9] – "sponsors of Kyiv"[10] who "handed out cookies on Maidan and exerted enormous pressure on president Yanukovich,"[11] thus organising[12] the Maidan revolution.[13] This new Ukrainian

[5] *E.g.*, Зорькин В.Д. Право – и только право. О вопиющих нарушениях, которые упорно не замечают, Российская газета, 23 марта 2015 г., № 6631(60) [Valery D. Zorkin, *Law – and Only Law*. *On Egregious Violations That Go Unnoticed*, Rossiyskaya Gazeta, 23 March 2015, No. 6631(60)] (Jun. 20, 2017), available at http://www.rg.ru/2015/03/23/zorkin-site.html; cf. Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine, President of Russia, 4 March 2014 (Jun. 20, 2017), available at http://en.kremlin.ru/events/president/news/20366; Вельяминов Г.М. Воссоединение Крыма с Россией: Правовой ракурс, ИГП РАН, 24 апреля 2014 г. [Georgy M. Velyaminov, *Reunification of Crimea with Russia: A Legal Perspective*, ISL RAS, 24 April 2014] (Jun. 20, 2017), available at: http://www.igpran.ru/public/articles/Rossiya-Krym.pdf.

[6] *E.g.*, Anatoly Kapustin, *Is International Law Effective? The Case of Russia and Ukraine*, American Society of International Law: Proceedings of the Annual Meeting, Vol. 108 (2014) (Jun. 20, 2017), also available at https://youtu.be/-x7EgVyv5Xk?t=26m20s; Вельяминов Г.М. и др. Круглый стол на тему: «Международно-правовые аспекты присоединения Крыма к России», Дипломатическая академия МИД России, Москва, 10 апреля 2014 г. [Georgy M. Velyaminov et al., *Round Table: International Legal Aspects of Integration of Crimea in Russia*, Diplomatic Academy of the Foreign Ministry of the Russian Federation, Moscow, 10 April 2014] (Jun. 20, 2017), available at https://www.youtube.com/watch?v=4k620BZKyto.

[7] *Id*. *See also* Vladislav Tolstykh, *Three Ideas of Self-Determination in International Law and the Reunification of Crimea with Russia*, 75(1) Heidelberg Journal of International Law 119 (2015); Alexander Salenko, *Legal Aspects of the Dissolution of the Soviet Union in 1991*, 75(1) Heidelberg Journal of International Law 141 (2015).

[8] *E.g.*, Толстых В. Воссоединение Крыма с Россией: правовые квалификации, 5(72) Евразийский юридический журнал (2014) [Vladislav Tolstykh, *Reunification of Crimea with Russia: Legal Qualification*, 5(72) Eurasian Law Journal (2014)] (Jun. 20, 2017), also available at http://www.eurasialaw.ru/index.php?option=com_content&view=article&id=6186%3A2014-06-25-08-34-35; Letter from Anatoly Kapustin, President of the Russian Association of International Law, to Executive Council, International Law Association, 5 June 2014 (Jun. 20, 2017), available at http://www.ilarb.ru/html/news/2014/5062014.pdf; Velyaminov et al., *Round Table*, *supra* note 6.

[9] *Id*. *See also* Vladislav Tolstykh, *Reunification of Crimea with Russia: A Russian Perspective*, 13(4) Chinese Journal of International Law 879 (2014).

[10] Vladimir Kotlyar, *Round Table*, *supra* note 6.

[11] *Id*.

[12] *See, e.g.*, Salenko 2015.

[13] Kapustin, *Is International Law Effective?*, *supra* note 6, after defining the events in Kyiv as "an armed [seizure] of power" and a "coup," added "or the so-called Maidan revolution."

government – or even "junta"[14] – is composed of "nationalists,"[15] "pro-Bandera"[16] and "Nazis"[17] or "neo-Nazis,"[18] and the "advocates of radicalism and even fascism."[19] This coup, which immediately subjected the Russian-speaking population of Ukraine to linguistic persecution on the basis of a draft law and deprivation of Crimeans of all seats in the Ukrainian Parliament,[20] gave rise to Russia's international law obligations to protect its "compatriots"[21] from "large-scale" and "grave" violations of human rights,[22] as well as to the right of Crimea to secede.[23] Russian soldiers left their military stations in Crimea, however, no unlawful use of force took place.[24] According to this interpretation of facts, no Russian troops have ever been present in Eastern Ukraine – any Russian soldier present on the territory is a volunteer helping Eastern Ukrainians in their civil war.[25]

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14 *See, e.g.*, Фархутдинов И. Евразийская интеграция и испытание украинской государственности в системе международного права, 12(79) Евразийский юридический журнал 15 (2014) [Insur Farkhutdinov, *Eurasian Integration and a Test of Ukrainian Statehood in the System of International Law*, 12(79) Eurasian Law Journal 15 (2014)].

15 *E.g.*, Ибрагимов А. Воссоединение Крыма и Севастополя с Российской Федерацией в призме международного права и мировой политики, 4 Юридический вестник Дагестанского государственного университета 75 (2014) [Akhmed Ibragimov, *Reunification of Crimea and Sebastopol with Russian Federation Through the Prism of International Law and World Politics*, 4 Law Herald of the Dagestan State University 75 (2014)]; Oleg Khlestov, *Round Table*, *supra* note 6.

16 *E.g.*, Khlestov, *Round Table*, *supra* note 6.

17 *E.g.*, Zorkin, *Law – and Only Law*, *supra* note 5.

18 *E.g.*, Профессор С.В. Черниченко о перспективах развития ситуации на Украине, 26 июня 2014 г. [Professor S.V. Chernichenko on the Perspectives of Development of the Situation in Ukraine, 26 June 2014] (Jun. 20, 2017), available at https://www.youtube.com/watch?v=SD2OHQRWiBg; Zorkin, *Law – and Only Law*, *supra* note 5.

19 Tolstykh, *Reunification of Crimea with Russia*, *supra* note 8; Kapustin, *RAIL Letter to ILA*, *supra* note 8; Khlestov, *Round Table*, *supra* note 6; Черниченко С. Лекция: Нерешенные проблемы международного права (ноябрь 2014 г.) [Stanislav Chernichenko, *Lecture: Unresolved Problems of International Law* (November 2014)] (Jun. 20, 2017), available at https://www.youtube.com/watch?v=T7ohudXoXU8.

20 *E.g.*, Tolstykh 2015. The draft on the cancellation of the Ukrainian law on the use of native languages in various regions was adopted by Ukrainian parliament on 23 February 2014, but the acting President of Ukraine vetoed it on 3 March 2014. The law has not been adopted, and as of February 2015 was subject to examination by the Constitutional Court of Ukraine. The argument regarding the number of seats in Parliament is refuted by Zadorozhniy in Zadorozhniy 2015, at 64.

21 *Vladimir Putin Submitted Appeal to the Federation Council*, President of Russia, 1 March 2014 (Jun. 20, 2017), available at http://en.kremlin.ru/events/president/news/20353.

22 *E.g.*, Tolstykh, *Reunification of Crimea with Russia*, *supra* note 8; Anatoly Kapustin, *Crimea's Self-Determination in the Light of Contemporary International Law*, 75(1) Heidelberg Journal of International Law 101 (2015); Kapustin, *RAIL Letter to ILA*, *supra* note 8; Velyaminov et al., *Round Table*, *supra* note 6.

23 *Id*.

24 *See* sec. *2.4. Use of Force: Adjustment of the Russian Doctrinal Scholars to the Changing Position of the Russian Government in the Course of 2014–2015* below.

25 Chernichenko, *On the Situation in Ukraine*, *supra* note 18.

As if to cause even more confusion, the ordinary meaning of the word "annexation" in the modern Russian language has turned out to be "an illegal and forcible seizure of territory" denoting lawful annexation, as opposed to the English meaning of the term which is more neutral.[26] Russian understanding of the term could possibly be echoing the old propaganda from early Soviet years.[27] Whatever the reasons, the Russian doctrine expressly refused to use the term "annexation" both in the Russian and English languages with regard to Crimea, adding to the above-described peculiar way of interpreting the facts of the crisis.

The above interpretation of facts does not have much to do with reality. As noted by some of the commentators,[28] it instead reflects the propagandist picture painted by the pro-governmental Russian mass media during the Ukrainian crisis.[29] As such, it is rather intended to emotionally affect its target audience than to act as a verifiable statement of facts on which to found proper legal analysis. Taking due note of the argument regarding the reverse impossibility to portray Western media as completely unbiased, too, I would like to note that the biases of any mass media are largely irrelevant as what matters is the academic approach and methodology in establishing the facts of the case. Thus, in assessing the ability of the Russian doctrinal academia to deliver an international legal argument, we should first and foremost pay attention to lack of attention they demonstrated to the points of view outside the Kremlin-dictated position on the situation in Ukraine and their failure to address facts as established by international governmental and non-governmental organisations.

Importantly, this method of factual interpretation by the Russian doctrine is not new: "*The international drama in the simplified Soviet arrangement is reduced to the struggle of heroes without blemish – the Soviet Union and her partners – against utterly black characters – the Western Powers with the United States as their head*," wrote Wladyslaw Kulski in his comments on the Soviet State and Law journal in 1952.[30]

As if in a time-loop, according to statements made by the Russian state with regard to the Ukrainian crisis, no matter what actions it took during 2014, it

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[26] *Black's Law Dictionary* 71 (Union, N.J.: Lawbook Exchange, 1995).

[27] One of the very first Soviet claims introduced by the Bolsheviks after the 1917 Revolution in the Decree of Peace was "peace without annexations and contributions." This Soviet claim was rejected in the 1918 Treaty of Brest-Litovsk. Possibly, the words "annexation" and "contributions" (indemnities) fell the victim of demonization together with the image of the "imperialistic" capitalist countries following this important episode of early Soviet history.

[28] Zadorozhniy 2015; Thomas D. Grant, *Aggression against Ukraine: Territory, Responsibility and International Law* (New York: Palgrave Macmillan, 2015); Anne Peters, *Crimea: Does "The West" Now Pay the Price for Kosovo?*, EJIL: Talk!, 22 April 2014 (Jun. 20, 2017), available at http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/.

[29] *See also Vladimir Putin on the Situation in Ukraine*, *supra* note 5.

[30] Władysław Kulski, *Soviet Comments on International Law*, 46(1) American Journal of International Law 131 (1952).

continuously maintained the role proclaimed by its 2013 Foreign Policy Concept[31] – that of a defender and guardian of international law.

Furthermore, as Julian Ku writes on *Opinio Juris*,

> Russia could be understood to be arguing the facts (see, Crimea really is threatened by the fascists in Kiev) rather than the law. I think it is a pretty ludicrous factual argument, but there it is.[32]

In this regard, if we look at the history of the USSR, a similar rhetoric of "fascist putsches" by "reactionary and fascist-like elements" of "black reaction and counterrevolution" forces was used by the Soviet government during the German uprising, the Czech and Hungarian crises of the twentieth century.[33]

Likewise, Russia's "failed state" rhetoric with respect to Ukraine appears to be a replica of the USSR's behaviour during the pre-WWII time of the occupation of Poland by Germany.[34] Russia's lack of involvement in the "civil war" in Eastern Ukraine brings to mind the USSR's lack of involvement in the "civil war" in Finland in 1939–1940.[35]

Since 2014, there appears to have been conducted a complex work within Russia to justify its actions in Crimea. While the rhetoric by Russian officialdom with regard to Crimea may be explained through political rather than legal considerations, with most political invocations being aimed principally at a domestic audience, it would, it seems, be of crucial importance and value at this time to have a professional legal community capable of responding critically to political statements and exaggerations.

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[31] Concept of the Foreign Policy of the Russian Federation, approved by President of the Russian Federation V. Putin on 12 February 2013 (Jun. 20, 2017), available at http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/122186.

[32] Julian Ku, *Is the Crimea Crisis a Factual or Legal Disagreement*, Opinio Juris, 14 March 2014 (Jun. 20, 2017), available at http://opiniojuris.org/2014/03/14/fair-balanced-russias-legal-position-crimea/.

[33] Cf. statements by the USSR: "*The provocative plan of the reactionary and fascist-like elements has been wrecked… the provocation was prepared in advance, organized and directed from Western sectors of Berlin. Simultaneous actions in the majority of the big cities of the GDR, the same demands of rebels everywhere, as well as the same anti-state and anti-Soviet slogans, serve as proof for this conclusion*," Report from A. Grechko and Tarasov in Berlin to N.A. Bulganin, 11:00 p.m., 17 June 1953, History and Public Policy Program Digital Archive (Jun. 20, 2017), also available at http://digitalarchive.wilsoncenter.org/document/110024; "*…the forces of black reaction and counterrevolution*," Statement of the Soviet Government, 30 October 1956, Modern History Sourcebook: Hungary 1956 (Jun. 20, 2017), available at http://legacy.fordham.edu/halsall/mod/1956hungary.html; or "*a threat emanating from the counter-revolutionary forces which have entered into collusion with foreign forces hostile to socialism […] safeguarding peace in Europe against the forces of militarism, aggression, and revanche, which have more than once plunged the peoples of Europe into war*," The Soviet Invasion, 14 Keesing's Record of World Events 22909 (1968) (Jun. 20, 2017), also available at http://web.stanford.edu/group/tomzgroup/pmwiki/uploads/0346-1968-09-KS-a-EYJ.pdf.

[34] Mikhail Geller & Alexander Nekrich, *Utopia in Power: The History of the Soviet Union from 1917 to the Present* 340, 344 (London: Hutchinson, 1986).

[35] *Id*. at 344.

The situation of Crimea, however, conclusively reveals that Russia's doctrinal community of international lawyers is incapable of resisting the mainstream political will of the day. Indeed, it does not even see such critical engagement as among its principal tasks.[36]

The next sections address legal, rather than factual, argumentation offered to the situation with Crimea by the Russian doctrine of international law.

2. Overview of the Russian Legal Argumentation in the Case of Crimea

The various *ex cathedra* and official legal arguments founded on the above factual interpretation, normally include a combination of the following assertions: firstly, Russia did not unlawfully use force in the case of Crimea because it never exceeded the numbers of personnel allowed under the Black Sea Fleet Agreements,[37] and no-one was killed during the secession or annexation (or, as routinely referred to, re-integration) of Crimea.[38] Even if Russia did use force in Crimea, it did so to protect the Russian speaking population on the invitation of the legitimate leaders of Ukraine and Crimea.[39] Furthermore, the Crimeans are a people,[40] and they lawfully seceded from Ukraine on the basis of their own free will and a referendum scheduled and run in accordance with the applicable rules of international law.[41] Russian troops were present in Crimea over the course of this referendum in order to ensure that Ukrainian forces did not intervene in this expression of free will by the Crimean people.[42] A special operation ordered by the Russian President to "return Crimea to Russia"[43] on 22 February 2014 had no bearing on the free expression of the will of the Crimean people.[44] No treaties between Russia and Ukraine were in effect at the

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[36] Kapustin, *RAIL letter to ILA*, *supra* note 8.

[37] *See* sec. *2.4. Use of Force: Adjustment of the Russian Doctrinal Scholars to the Changing Position of the Russian Government in the Course of 2014–2015* below.

[38] *Id*.

[39] Statement by Mr. Churkin, UNSC 7125th meeting, 3 March 2014 (Jun. 20, 2017), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7125.pdf; *Vladimir Putin on the Situation in Ukraine*, *supra* note 5; cf. Kotlyar, *Round Table*, *supra* note 6.

[40] *See, e.g.*, Kapustin 2015.

[41] *See* sec. *3. The Admitted Presence of Russian Troops and Russian Involvement Vis-à-Vis the Free Choice Made by Crimea* below.

[42] *Id*.

[43] Крым. Путь на Родину [Vladimir Putin in *Crimea. The Road Home*, a documentary], released on 15 March 2015, Rossiya-1 TV Channel (Jun. 20, 2017), available at https://www.youtube.com/watch?v=t42-71RpRgI.

[44] I note the lack of any discussion on this matter among Russian doctrine.

time of secession because Ukraine had lost its statehood, and a new state emerged, to which Russia owed no obligations under international law.[45] The 1994 Budapest Memorandum and the 1975 Helsinki Final Act are political documents, which never implied any legal obligations for their parties, except for the obligation not to use nuclear weapons, which is being complied with.[46] These arguments constitute the mainstay of the Russian response. Later in the course of 2014, a new set of arguments was added, to the effect that the transfer of Crimea to Ukraine in 1954 had been unlawful, and Ukraine had been performing a peaceful annexation of Crimea since the collapse of the Soviet Union in 1991.[47]

The arguments given by the Russian doctrine to justify Crimea's annexation are analysed below through issues of statehood, territorial integrity vis-à-vis self-determination, R2P and use of force. It will be shown how the positions on each of these four cornerstone concepts of international law underwent a radical shift as compared to the prior academic views of the Russian doctrinal academics.

2.1. Issue of Ukraine's Statehood

The argument concerning Ukraine allegedly being a failed state is apparently rooted in the following remark by the Russian President made in early March 2014:

> 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.[48]

It would be difficult to imagine a more confused – or confusing – statement on the subject of international legal personality, and a more illustrative one for the purpose of this article. In the remark, the President confuses the issue of recognition of states with the issue of recognition of governments, and does so displaying an astonishing ignorance of Russian history. The example of the Soviet Russia lack of continuity after the Russian Empire as a State is completely wrong on the facts. Indeed, the USSR continued after the Russian Empire, despite the new Soviet government's claims

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[45] *See* sec. *2.1. Issue of Ukraine's Statehood* below. *See also* Velyaminov, *Reunification of Crimea with Russia*, *supra* note 5.

[46] *See, e.g.*, Chernichenko, *Unresolved Problems of International Law*, *supra* note 19; Statement by the Russian Ministry of Foreign Affairs Regarding Accusations of Russia's Violation of Its Obligations under the Budapest Memorandum of 5 December 1994, 1 April 2014 (Jun. 20, 2017), available at http://www.mid.ru/en/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNIr/content/id/68078.

[47] *See, e.g.*, Salenko 2015.

[48] *Vladimir Putin on the Situation in Ukraine*, *supra* note 5.

to be a new State, but other states did not accept this proposition.[49] The transition between the Russian Empire and the USSR (and then from the USSR to modern Russia) has in fact been among the building blocks of the modern theory of statehood and state succession, with its strongest possible presumption in favour of the existing states, including in the event of changes in government. To claim otherwise is to go back to the understanding of the issues of statehood and recognition of the XVIII–XIX centuries.[50] The advice of "some experts" referred to in the statement could not go more wrong from the standpoint of international law.

In such case, one would expect that Russian international scholars pick up on this – one of the most fundamental – issue of international law and history of Russia.

However, that was entirely not the case.

At the round table on the international legal aspects of joining of Crimea to Russia professor Stanislav Chernichenko from the Diplomatic Academy of Russia – one of the most senior representatives of Russian doctrine[51] – said:

> Who did we have to enter an agreement regarding the transfer of Crimea to Russia with? [There was] no one. I mean the position of Russia. Yes, Ukraine is a subject of international law, yes, we indeed had an agreement with Ukraine concerning the territorial integrity of Ukraine. Furthermore, we can recall the [Budapest memorandum]. Yes, indeed. However, when they say that we annexed the Crimean peninsula, that we failed to comply with a provision of the relevant agreements, the question arises – excuse us, have we violated those provisions? We violated none of the provisions of these agreements. In the situation that we faced, in a legal sense, there was no public authority in Ukraine, it did not exist. This is our position. Who could we negotiate with? Hence, in this situation we could only by guided by the expression of will of the Crimean population. Only after [the declaration of independence of Crimea and the referendum] we could speak of restoration of our historical rights to Crimea.[52]

In two articles published in 2014, professor Vladislav Tolstykh from the Novosibirsk State University argued:

> Thus, the coup produced the "contraction of the state": the creation of the smaller state, consisting of those who supported the coup and excluding

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[49] Rein Mullerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42(3) International and Comparative Law Quarterly 473 (1993).

[50] *See, e.g.*, James R. Crawford, *The Creation of States in International Law* 43 (2nd ed., Oxford: Oxford University Press, 2006).

[51] "The Tunkin of the Post-Soviet Era," according to Mälksoo 2015.

[52] Stanislav Chernichenko, *Round Table*, *supra* note 6.

> those who did not support it. Thirdly, automatic recovery of the "big state" has not happened: many people refused to recognize the new government, and the latter, in turn, did not want to take into account their interests and failed to secure obedience to its will. Those who had not supported the coup returned to their natural state and received the right to enter into a new social contract or to join an existing contract. Under these conditions, the population of Crimea chose to implement this right through an alliance with Russia. Fourthly, the liability for the secession of Crimea is not on its population but on the political forces that initiated the dissolution of the social contract and claimed the representation of the general will without proper justification. Fifthly, not being implicated in the coup in Ukraine, Russia cannot bear the liability for its consequences, one of which is the return of the Crimean population to its natural state.[53]

In the Russian version of the article, Tolstykh is even more explicit:

> The main reason justifying participation of Russia in the process of self-determination of Crimea is the dissipation of Ukrainian statehood which entailed […] creation of a smaller state.[54]

In a stark contrast to their above statements, in their textbooks Tolstykh and Chernichenko both acknowledge population, territory, and public authority as necessary elements of a state;[55] distinguish between recognition of states and governments;[56] and both appear to give prevalence to the declaratory theory of state recognition.[57]

Furthermore, according to Tolstykh,

> [t]he necessary condition for recognition of a government is its effectiveness, that is, the exercise of control over a significant part of state territory. The legality of the new government's coming to power from the standpoint of domestic law is not a precondition for its recognition. Making it a condition may be qualified as illegal intervention into domestic affairs.[58]

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53 Tolstykh 2015.

54 Tolstykh, *Reunification of Crimea with Russia*, *supra* note 8.

55 Толстых В.Л. Курс международного права [Vladislav L. Tolstykh, *International Law Course*] 291 (Moscow: Wolters Kluwer Russia, 2009); Международное право: Учебник [*International Law: Textbook*] 193; chapters VI and VII by Chernichenko (S.A. Egorov (ed.), 5th ed., Moscow: Statute, 2014).

56 Tolstykh 2009, at 374.

57 Tolstykh 2009, at 362–363; Chernichenko, *International Law*, at 205.

58 Tolstykh 2009, at 375.

With respect to the matter of succession, in his textbook Tolstykh expressly concludes, referring to the Tinoco Arbitration, that "a question of succession should not arise in the event of a change in a political regime, even if such change is followed by a dramatic breakage of social and economic mechanisms."[59]

Chernichenko, however, is more careful with choosing positions in his textbook. In the relevant chapter, he makes the following statement:

> the public authority that ousted the previous government with the use of military force, may not substantially differ from the government in a traditional sense.[60]

The following passage explains the choice of the verb "may" by Chernichenko in the previous sentence: "A lot in this regard depends on the particular situation, political far-sightedness and other circumstances."[61]

The topic of succession in the following chapter is addressed even more vaguely:

> The doctrine is not unanimous on the matter of emerging of a new subject of international law in case of radical social changes as a result of revolution. In the events of dramatic restructuring of a society and the breakage of the old state machine (such as, for example, in France in 1789) the question on succession did not always arise. If the subject were not changed in such situation, then there would be no issue of succession. However, if we admit that subject changes in such situations, then, seemingly, the new subject should be completely free of the rights and obligations of its predecessor for the exact reason of it being a new subject. However, such a question has never arisen.[62]

Notably, Chernichenko writes repeating the Soviet style of drafting textbooks that seemed to be designed specifically to "hide" any international law interpretations existing outside of the Soviet bubble: Soviet textbooks contained almost no footnotes, presented authors' knowledge of international law without or with minimal references to sources, and had conclusions and opinions of the authors formulated in a very vague manner.

In view of this, it is hardly surprising that this Soviet textbook style used by Chernichenko has proven to be quite practical in yet another "particular situation" which required a shift in academic international law interpretation – the Russian position on Crimea after 2014.

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59 Tolstykh 2009, at 382.

60 Chernichenko, *International Law*, at 205.

61 *Id*.

62 *Id.* at 209.

2.2. Territorial Integrity vs Self-Determination

The inability of Tolstykh and Chernichenko to maintain consistency with their own reasoning, as described above, is not unique to these writers as regarding the situation in Crimea. Not only is it that most of the positions written or spoken about by representatives of the Russian doctrine since 2014 cannot be aligned with their own declared approaches to territorial sovereignty, statehood and treaty interpretation before the situation of Crimea, but they also fail to address Russia's previous practice and *opinio juris*.

First of all, there is a remarkable shift in position observable on the part of vocal proponents of the legality of Crimea's annexation, who had previously spent endless pages establishing the predominance of territorial integrity over self-determination (including in the case of Kosovo),[63] though it does not seem to raise any concern on the part of these authors. The shift also clearly contradicts the Russian domestic approach to the right of its regions to secede, as reflected, for example in the pronouncements of the Russian Constitutional Court in 1992 and 1995 with respect to, accordingly, Tatarstan and Chechnya.[64]

Furthermore, readings of international law according to which a people residing in a particular territory have the right to external self-determination without the consent of their home country contradicts the position taken by Russia during the 2009 Kosovo proceedings before the ICJ. Here, Russia averred that "the words 'the will of the people' […] could very well encompass the whole population of the country concerned, or else reflect the general notion of 'popular will' as a principle of democracy."[65] In practical terms, if applied to the situation in Crimea, this earlier Russian reading of international law would have required the holding of a Ukrainian-wide referendum on Crimea's secession.[66] When combined with Russian argumentation in the Kosovo proceedings, according to which a Ukraine-wide referendum on Crimea's

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[63] This position was in every major textbook in Russia, and was a generally prevailing view. *See, e.g.*, Theodore Christakis, *Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea*, 75(1) Heidelberg Journal of International Law 75 (2015); Lauri Mälksoo, *Crimea and (the Lack of) Continuity in Russian Approaches to International Law*, EJIL: Talk!, 28 March 2014 (Jun. 20, 2017), available at http://www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law/.

[64] Постановление Конституционного Суда РСФСР от 13 марта 1992 г. № 3-I [Resolution of the Constitutional Court of the RSFSR No. 3-I of 13 March 1992] (Jun. 20, 2017), available at http://www.szrf.ru/doc.phtml?nb=edition10&issid=1992013000&docid=1430; Постановление Конституционного Суда Российской Федерации от 31 июля 1995 г. № 10-П [Resolution of the Constitutional Court of the Russian Federation No. 10-P of 31 July 1995] (Jun. 20, 2017), available at http://www.szrf.ru/doc.phtml?nb=edition00&issid=1995033000&docid=181.

[65] Public sitting held on Tuesday 8 December 2009, at 10 a.m., at the Peace Palace, President Owada, presiding, on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion submitted by the General Assembly of the United Nations) (2009) (Jun. 20, 2017), available at http://www.icj-cij.org/files/case-related/141/141-20091208-ORA-01-00-BI.pdf.

[66] *See, e.g.*, Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, 91 U.S. Naval War College. International Law Studies 216 (2015); Mälksoo, *Crimea and Continuity*, *supra* note 63.

secession would have been required,[67] the use of the Russian military to incorporate Crimea in February – April 2014 clearly amounted to coercive intervention in the domestic affairs of Ukraine by Russia which is prohibited by international law.

The lack of any sensible discussion of the correlation of the arguments developed by the Russian doctrine before and after 2014 is, to say the least, startling.

2.3. Shift in Approach to R2P

Active opponents of permissibility of the Responsibility to Protect (R2P) without an authorisation of the UN Security Council, are now those same Russian international law scholars that readily make use of this concept with regard to Crimea – doing so as if these arguments were axiomatic, and applying it to a highly questionable, as discussed earlier, interpretation of the facts of the Crimean question.

As summed up by "The Legal Justifications of the Position of Russia on Crimea and Ukraine" prepared by the Ministry of Foreign Affairs of Russia at the end of 2014, the official argument is framed as follows:

> Such form of implementation of the right to self-determination was the only means to protect the vitally important interests of the Crimean people facing the outburst of nationalist radical elements in Ukraine which exert enormous influence on how decisions are adopted in the country which, in turn, leads to ignoring of the interests of Ukrainian regions and the Russian speaking population.[68]

According to statements of Kapustin made in 2009, the UN Charter prohibited states to resort to the use of force to protect the population from grave human rights violations in another state without its authorization.[69] Statements to the same effect were made by many scholars in Russia including Chernichenko,[70]

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[67] "[T]he words 'the will of the people' do not necessarily refer to the population of Kosovo only and could very well encompass the whole population of the country concerned, or else reflect the general notion of 'popular will' as a principle of democracy," Statement of the Russian Federation during Kosovo Oral Proceedings, *supra* note 65.

[68] Правовые обоснования позиции России по Крыму и Украине, Министерство иностранных дел Российской Федерации, 27 октября 2014 г. [Legal Justifications of the Position of Russia on Crimea and Ukraine, Ministry of Foreign Affairs of the Russian Federation, 27 October 2014] (Jun. 20, 2017), available at http://www.rusembdprk.ru/images/documents/Crimea_-_the_legal_basis.pdf.

[69] Проблемы гуманитарной интервенции и защиты граждан за рубежом, Viperson.ru, 18 сентября 2009 г. [The Problems of a Humanitarian Intervention and Protection of Compatriots, Viperson.ru, 18 September 2009] (Jun. 20, 2017), available at http://viperson.ru/articles/problemy-gumanitarnoy-interventsii-i-zaschity-grazhdan-za-rubezhom.

[70] Круглый стол: «Ответственность за защиту (новые тенденции в международном праве и международных отношениях)», 22 марта 2012 г. [Round Table: Responsibility to Protect (New Tendencies in International Law and International Relations), 22 March 2012] (Jun. 20, 2017), available at https://www.youtube.com/watch?v=VEudC0Ifpt8.

Tolstykh,[71] Kotlyar,[72] and others. In October 2013 professor Kapustin furthermore raised concerns regarding situations whereby certain States or organs, and not judicial bodies or special commissions, give legal qualification of grave human rights violations for the purposes of application of the R2P, concluding that

> to say that commitment of such violations gives rise to the application of R2P measures is not grounded in international law, which does not contain a provision of this kind.[73]

Several months after the last statement, Kapustin began to use the claim of grave human rights violations to justify the Russian intervention in Crimea. According to his statement at the ILA-ASIL session in April 2014, for example,

> under international law the actions by international organizations in situations involving grave human rights violations do not exclude actions taken on these matters by other states, including neighbouring states.[74]

In employing the R2P arguments, or otherwise silently or expressly agreeing with the use of force by Russia without the prior authorisation (and even notification) of the UN Security Council, the Russian scholars neither seemed to be frustrated by the fact that they had to leave their prior first positions, nor did they expressly mention anymore that R2P was not, in fact, an established concept in international law. Furthermore, the issue of "grave violations of human rights" by the new government of Ukraine appeared always to be taken for granted without any additional research on the topic.

The most recent statements by the Russian President that he prioritises "people's lives" over "borders and state territories"[75] may serve as an indication that the extensive use of R2P by the Russian doctrine is likely to continue.

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71 Tolstykh 2009, at 626.

72 Котляр В.С. Международное право и современные стратегические концепции США и НАТО [Vladimir S. Kotlyar, *International Law and Modern Strategic Concepts of the USA and NATO*] (Moscow: Tsentr Innovatsionnyh Tehnologiy, 2008).

73 Конференция на тему: «Суверенитет государств и концепция «ответственности по защите»: эволюция международной ситуации и интересы России, 31 октября 2013 г. [Conference: State Sovereignty and Responsibility to Protect: Evolution of the International Situation and Russian Interests, 31 October 2013] (Jun. 20, 2017), available at https://www.youtube.com/watch?v=tFegybXT2zA.

74 Kapustin, *ASIL Meeting 2014*, *supra* note 6.

75 Nikolaus Blome & Kai Diekmann, *BILD-Interview with Russian President Vladimir Putin (Part 1)*, 5 January 2016 (Jun. 20, 2017), available at http://www.bild.de/politik/ausland/wladimir-putin/russian-president-vladimir-putin-the-interview-44092656.bild.html.

2.4. Use of Force: Adjustment of the Russian Doctrinal Scholars to the Changing Position of the Russian Government in the Course of 2014–2015

Russia's official position on its actions in Crimea was first presented by its president[76] and Ministry of Foreign Affairs,[77] including at the UN Security Council, [78] as events in Crimea were evolving in early 2014. This position was later consolidated in a document (in Russian) produced by the Ministry of Foreign Affairs and titled "The Legal Justifications of the Position of Russia on Crimea and Ukraine."[79]

The Black Sea Fleet Agreements were denounced[80] by Russia on 2 April 2014.[81] Russia does not appear to dispute the fact that the Black Sea Fleet Agreements had been in force in February and March 2014 when the actual events pertaining to Russian troops leaving their military bases were taking place.

In the first several weeks of the Crimean crisis, given the limited information supplied by the highest Russian officials at that time, allegations of the use of force against Ukraine by Russian military forces (at that time, unidentified "polite men in green") were pitted against claims by Russia that all actions taking place were being undertaken at the hands of separatists, raising questions regarding attribution. In his address to the Russian Parliament on 18 March 2014 the Russian President stated:

> …what exactly are we violating? True, the President of the Russian Federation received permission from the Upper House of Parliament to use the armed forces in Ukraine. However, strictly speaking, nobody has acted on

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[76] Address by President of the Russian Federation, President of Russia, 18 March 2014 (Jun. 20, 2017), available at http://en.kremlin.ru/events/president/news/20603.

[77] Speech by the Russian Foreign Minister, Sergey Lavrov, during the high-level segment of the 25th session of the United Nations Human Rights Council, Geneva, 3 March 2014 (Jun. 20, 2017), available at http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/72642?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB.

[78] Vitaliy Churkin, Statements at the UNSC (2014) (Jun. 20, 2017), available at http://www.securitycouncilreport.org/un-documents/ukraine/.

[79] Statement of the Russian Federation during Kosovo Oral Proceedings, *supra* note 65.

[80] This was done with reference to Arts. 61 ("Supervening impossibility of performance") and 62 ("Fundamental change of circumstances") of the Vienna Convention on the Law of Treaties 1969 (VCLT). However, this denunciation clearly falls outside the ambit of the same VCLT's provisions which explicitly prohibit invoking either the impossibility of performance or a *rebus sic stantibus* clause if either circumstance has occurred as the result of a breach of international law by the invoking party.

[81] Федеральный закон от 2 апреля 2014 г. № 38-ФЗ «О прекращении действия соглашений, касающихся пребывания Черноморского флота Российской Федерации на территории Украины» [Federal law No. 38-FZ of 2 April 2014. On Termination of the Agreements Concerning the Stay of the Black Sea Fleet in the Territory of Russia] (Jun. 20, 2017), available at http://static.kremlin.ru/media/acts/files/0001201404020002.pdf; Press Release: Note by the Russian Ministry of Foreign Affairs on the Black Sea Fleet, 3 April 2014 (Jun. 20, 2017), available at http://www.mid.ru/web/guest/maps/ua/-/asset_publisher/ktn0ZLTvbbS3/content/id/67406?p_p_id=101_INSTANCE_ktn0ZLTvbbS3&_101_INSTANCE_ktn0ZLTvbbS3_languageId=en_GB.

> this permission yet. Russia's armed forces never entered Crimea; they were there already in line with an international agreement. True, we did enhance our forces there; however – this is something I would like everyone to hear and know – we did not exceed the personnel limit of our armed forces in Crimea, which is set at 25,000, because there was no need to do so.[82]

Indeed, Russia had the right to deploy military personnel in Crimea under the 1997 Status and Conditions Agreement within the specified numbers, and that number was indeed not exceeded in February and March 2014. However, it was only one part of the Russian obligations. Under the same agreement, Russia was also obliged not to allow its troops to leave their military stations and not to use its military personnel to violate Ukrainian territorial sovereignty and political independence under Art. 6(1) of the same Agreement. Furthermore, Russia had an obligation to respect political and territorial integrity of Ukraine under the UN Charter, as well as the 1975 Final Act of the Conference on Security and Co-operation in Europe; the Protocol to the Commonwealth Pact, signed in Alma-Ata on 21 December 1991; and the 1994 Memorandum on Security Assurances, signed in Budapest between Russia, the United Kingdom and the United States, and entered into in connection with Ukraine's accession to the 1968 Nuclear Non-Proliferation Treaty.

One of the first Russian doctrine statements on Crimea was made at that time by Kapustin, President of the Russian Association of International Law (RAIL), who, speaking at the International Law Association (ILA), strongly objected to any contention that Russia had engaged in the use of force in Crimea.[83]

A few days after these rebuttals at the ILA, during a "Direct Line" with Russian President on 17 April 2014, Russia's official position regarding the involvement of its soldiers shifted:

> Russia did not annex Crimea by force. Russia created conditions – with the help of special armed groups and the armed forces, I will say it straight – but only for the free expression of the will of the people living in Crimea and Sevastopol. […] when the world becomes unipolar, or when someone tries to make it so, then this one pole has the illusion that all issues can be settled through power. And only when there is a balance of power does the desire to negotiate appears. I hope that we will be moving along the path to strengthen international law.[84]

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82 Address by President of the Russian Federation, *supra* note 76.

83 Kapustin, *ASIL Meeting 2014*, *supra* note 6.

84 Direct Line with Vladimir Putin, President of Russia, 17 April 2014 (Jun. 20, 2017), available at http://en.kremlin.ru/events/president/news/20796.

Since then, official statements by Russia's Ministry of Foreign Affairs have further confirmed the participation of Russian troops in Crimean events.[85] Furthermore, as mentioned in the previous section, according to an interview of the Russian president in a documentary "Crimea. The Road Home," the launch of a special operation to return Crimea to Russia had been ordered by him as early as on 22 February 2014.[86]

Yet in his article for the Heidelberg Journal of International Law in 2015 Kapustin completely ignored the issue of the use of force by Russia. In an open letter on behalf of the RAIL to the members of the ILA, Kapustin chose to limit his arguments on the non-use of force to the issue of the Black Sea Fleet:

> contrary to false information from the leaders of the USA and EU countries Russia didn't send its military fleet into Crimea for holding a referendum. The Russian Black Sea military fleet has been staying in Crimea long ago (long before a referendum) during many centuries! And this fact is well-known.[87]

Chernichenko simply continued to refer to the integration of Crimea into Russia as a "completely peaceful" process,[88] and according to Tolstykh,

> Russian presence […] was not designed to intervene in the process of formation of the will of Crimean population and therefore cannot be considered as violence (although, of course, this presence was an obstacle for jurisdiction of the Kiev authorities).[89]

Here, it would seem that the enormous amount of literature written by Soviet and Russian scholars on the prohibition of aggression and unauthorized the use of force has been intended to address the behaviour of states other than Russia.

2.5. The Admitted Presence of Russian Troops and Russian Involvement Vis-à-Vis the Free Choice Made by Crimea

According to "The Legal Justifications of the Position of Russia on Crimea and Ukraine" by the Ministry of Foreign Affairs of Russia,

> the proclamation of independence of the Republic of Crimea and its incorporation into the Russian Federation is a lawful form of implementation

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85 *See, e.g.*, Legal Justifications of the Position of Russia on Crimea and Ukraine, *supra* note 68.

86 *Crimea. The Road Home*, *supra* note 43.

87 Kapustin, *RAIL Letter to ILA*, *supra* note 8.

88 Chernichenko, *Unresolved Problems of International Law*, *supra* note 19.

89 Tolstykh, *Reunification of Crimea with Russia*.

> of the right of the Crimean people to self-determination in a situation of a coup d'etat in Ukraine which was directed from the outside with the use of force.[90]

Even assuming, for the sake of argument, that the Crimean population qualified as a people under international law, Russia's self-acknowledged commencement of a special operation on 22 February 2014[91] and stationing of troops outside its military bases and in government buildings when the Crimean referendum was formulated, announced and held raises a serious question under international law.

Russia had a fundamental duty to "refrain from the… support, direct or indirect, of… secessionist activities within other States."[92] Even taken against the right to support a people's realization of their right to self-determination,[93] such a right does not release a State from its obligation to act in accordance with the UN Charter.[94]

The ICJ Advisory Opinion on Kosovo unequivocally precludes the legality of declarations of independence connected with "the unlawful use of force or other egregious violations of general international law in particular those of peremptory character (*jus cogens*)."[95]

However, this is not even an important subject of discussion among Russian academics. Russian scholars prefer to focus their attention exclusively on the often-quoted passage of the opinion in para. 84, according to which "general international law contains no […] prohibition of the declarations of independence," and generally tend to limit their observations on the matter to the discussion of legality of self-determination under positive international law *in abstracto*,[96] including with the use of clearly out-of-date or inapplicable arguments.[97]

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[90] Legal Justifications of the Position of Russia on Crimea and Ukraine, *supra* note 68.

[91] *Crimea. The Road Home*, *supra* note 43.

[92] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res. 2131 (XX), 21 December 1965; *see also* Security Council 7176th Meeting, 15 May 2014 (Jun. 20, 2017), available at http://www.un.org/press/en/2014/sc11398.doc.htm.

[93] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. 136; *Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain)*, Second Phase, [1970] I.C.J. 3.

[94] Declaration on Intervention; Definition of Aggression, UNGA Res. 3314 (XXIX), 14 December 1974.

[95] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. 403, para. 165.

[96] Kapustin 2015.

[97] For example, the reunification of Northern Schleswig with Denmark in 1921 through plebiscite has been consistently referred to. Nevertheless, that situation of almost one hundred years ago involved extensive negotiations and at least a two-year preparation – a backdrop dramatically different from the Crimean referendum, which was announced and held within less than three weeks. History knows other examples of referenda which were used as a pretext for expansion of a third state territory – but those are not part of the analysis of prior state practice by Russian scholars. Cf. a comprehensive analysis of the topic

Furthermore, in the translated citation below, professor Kotlyar from the Diplomatic Academy of Russian Ministry of Foreign Affairs appears to see no problem with the Kremlin taking certain crucial decisions on secession, instead of Crimea (nor does he find problematic the solution found by Russia to the issue of a "people"):

> There is a nuance – indeed international law only speaks of the right to self-determination of a "people," not a population of a specific territory. An elegant solution in this regard was found by the lawyers and Administration of our President [*sic*], as three days before the referendum Crimea declared itself an independent State. And an independent State will always comprise a "people," and not just a "population."[98]

It is commonplace in the Russian discourse to start arguments on the legality of self-determination with the unquestionable desire of Crimeans to join Russia.[99] Yet it is hardly a verifiable premise: a claim of external self-determination was nowhere to be found on the Crimean parliament's agenda over the decade preceding its introduction into the parliament on 27 February 2014, that is, five days after the Russian President's order to start a "special operation."

In his article on the topic,[100] professor Kapustin addresses the past developments in Crimea very briefly, and leaves an obvious gap in describing events between 1992 and 2014. However, issues concerning use of the Russian language and the autonomy of the region, which caused notable turmoil in the 1990s, seemed to have settled down following the provision of a guaranteed number of seats for Crimea in the Ukrainian parliament and the applicable Russian language policy in the region.[101] As such, these issues had not sparked any significant tension since around the year of 2000.[102] In 2010 regional parliamentary elections saw the only pro-Russian party

by Anne Peters, *Das Gebietsreferendum im Völkerrecht. Seine Bedeutung im Licht der Staatenpraxis nach 1989* (Baden-Baden: Nomos, 1995); *see also* Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law*, EJIL: Talk!, 16 April 2014 (Jun. 20, 2017), available at http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/.

98 Kotlyar, *Round Table*, *supra* note 6.

99 Probably the most striking verbalized quote in this regard belongs to Tolstykh: "the residents of Crimea were initially predisposed in favor of political union with Russia," Tolstykh, *A Russian Perspective on Crimea*.

100 Kapustin 2015.

101 *See* Grant 2015. For the statistical data on education in Russian, *see* Мазука Л. Языковая политика в Крыму: спекуляции и реалии, Украина сегодня, 17 марта 2010 г. [Leonid Mazuka, *Language Policy in Crimea: Speculations and Reality*, UA Today, 17 March 2010] (Jun. 20, 2017), available at http://old.ua-today.com/modules/myarticles/print_storyid_31245.html.

102 The issue that stayed unresolved and where the debate was ongoing was the autonomy and language rights of the Crimean tatars, however, their aspirations and claims to the central Ukrainian government never took the direction of any pro-Russian claims, rather to the contrary.

in the region secure a mere three of 100 regional parliamentary seats.[103] Russia, for its part, also never publicly raised any claims regarding "return" of Crimea before 2014.[104] A claim regarding alleged linguistic persecution and underrepresentation in the Ukrainian parliament after the "coup" starting 23 February 2014 which required "remedial secession"[105] of the region on 16 March 2014 (that is, already after it was vetoed) is completely unpersuasive.

Kapustin also fails to address any of the applicable legal standards to the conduct of a referendum – the article is completely silent on applicable state practice, the existence of such standards, and whether they were or should have been complied with.

The situation on 27 February 2014, according to publicly available sources, already raises questions concerning the independence of the parliament. On that day, then unidentified armed groups – arguably those that were later admitted by Russia to have been elements of the Russian army – seized the governmental buildings in Crimea.[106] The number of Crimean deputies present in the parliament building on that day, including during the referendum resolution vote, remains unclear.[107] According to one of the eventual leaders of the self-declared Donetsk People's Republic, Igor Strelkov, who was also present in Crimea at the end of February 2014, the military gunmen were "forcing deputies to go into the building and vote."[108]

Furthermore, the date of the referendum announced and scheduled by the parliament on that day later moved forward three times: it was initially scheduled for 25 May 2014, then moved to 30 March 2014, and on 6 March 2014, and was then rescheduled for and held on 16 March 2014 – just 10 days after it was finally scheduled. The questions forming the basis of the vote were also revised twice.[109] This

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103 For discussion of the 2010 results of the Crimean parliamentary elections, *see, e.g.*, Денисов Д. Результаты региональных выборов на Украине: укрепление вертикали власти или тенденции федерализации страны [Denis Denisov, *Results of the Regional Elections in Ukraine: Strengthening of the Power Vertical or Tendency of the Country's Federalisation*] (Jun. 20, 2017), available at http://www.materik.ru/problem/detail.php?ID=11544.

104 Moreover, in 1997 Russia signed and ratified the Treaty of Friendship, Cooperation, and Partnership with Ukraine without any reservations, in which both parties agreed to "respect each other's territorial integrity, and confirm the inviolability of the borders existing between them," Treaty between the Russian Federation and Ukraine on Friendship, Cooperation and Partnership, 31 May 1997 (Jun. 20, 2017), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N97/155/47/PDF/N9715547.pdf?OpenElement.

105 Kapustin 2015; Tolstykh 2015.

106 *See, e.g.*, Number of Crimean Deputies Present at Referendum Resolution Vote Unclear, Interfax-Ukraine, 27 February 2014 (Jun. 20, 2017), available at http://en.interfax.com.ua/news/general/193292.html.

107 *Id*.

108 И. Стрелков vs Н. Стариков «Центрсилы/Силацентра» [Igor Strelkov vs Nikolay Starikov "Center of Power/Power of Center"], Neyromir TV, 22 January 2015 (Jun. 20, 2017), available at https://www.youtube.com/watch?v=G04tXnvKx8Y.

109 The wording of the question proposed for the referendum on 27 February 2014 was as follows: "The Autonomous Republic of Crimea possesses statehood and is part of Ukraine on the basis of treaties

hastiness alone raises serious questions concerning due process.[110] The population of Crimea had only ten days to consider its destiny while being surrounded by armed forces, and, according to the final wording of the questions put to the referendum, was not even offered the option of maintaining the status quo within Ukraine. The unreasonableness of this timeline is one of the first factors playing against the Russian argument, especially when combined with statements describing the Crimean events as a "special operation." A region with a population of two million people could not reasonably be expected to form an opinion and find a "consensual solution" for all Crimean ethnic groups on a matter of such public importance as secession from their home state in less than sixteen days, even in a situation where the freedom of expression is not impeded, which in Crimea it was.[111]

None of these considerations find proper reflection and analysis in positions on the legality of the Crimean referendum and its subsequent secession espoused by Russian legal scholars.

The inconsistent and often rudimentary level of the Russian doctrinal interpretation as shown above has grave consequences.

First of all, it affects official Russian decision-making and its application of international law, at least by virtue of a lack of professional legal advice that might otherwise be provided by an independent and well-informed Russian academia to the Russian government.

Secondly, it results in a growing public perception of international law in Russia as either a meaningless "fig leaf" used exceptionally to cover State self-interest, or "idle talk" between politicians. This badly simplified misperception affects all layers of Russian society and adds to Russia's intellectual isolation from the world, thus further entrenching the never-ending vicious cycle of the Soviet legacy.

3. The Russian Doctrinal Response to Crimea in a Broader Context of Post-Soviet International Legal Academia

The crucial general observation one might make with respect to the positions espoused by Russian academics, is that they generally reflect – occasionally with slight improvisation, but often word-for-word – the official Russian line expressed by the Russian President and Ministry of Foreign Affairs, including at the UN Security Council.

and agreements ('in favour' or 'against')." The wording was modified on 6 March 2014 to include the two following questions "Choice 1: Do you support the reunification of Crimea with Russia with all the rights of the federal subject of the Russian Federation? Choice 2: Do you support the restoration of the Constitution of the Republic of Crimea in 1992 and the status of the Crimea as part of Ukraine?"

110 Peters, *Sense and Nonsense*, *supra* note 97.

111 Venice Commission, Opinion No. 762/2014 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, 21 March 2014 (Jun. 20, 2017), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e.

Whatever positive developments in Russian academia since 1990, the case of Crimea has made it obvious that Russian international legal doctrine continues to speak with unity of voice, and that voice continues to purport to be that of the Russian state. The Crimean situation has conclusively revealed that the seeming most important change from a "monolithic" Soviet doctrine to pluralism of opinions[112] has remained mostly a declaration, at least in the minds of the leading Russian names in Russian international law.

In reflecting such official positions, the Russian academia ignores or denounces, often with extreme hostility, not only interpretations of international law by other State, but also interpretations offered by foreign academics, international organizations and even its own prior interpretations, including, as shown above, own positions earlier developed by the same doctrinal authors.

Some international scholars who study "Russian" approaches to international law or come across them as part of their research seem prepared to justify this striking unity of perspective among Russian academic international lawyers by reference to the historically authoritarian nature of the Russian state and the pressure exerted by the Russian government on NGOs and civil society in the recent years.[113]

Yet the proximity of these scholars to government[114] has, since the 1990s, been mostly voluntary – such scholars have willingly sought to act as advocates of the government position in the two and a half decades since the end of the USSR, without, to the best of my knowledge, any pressure from the government itself. It also seems obvious that Russian scholars have always proudly spoken of their own "Russian approach to international law" to justify the singularity of their perspective on that law. It should also be borne in mind that the present-day autocracy characteristic of Russian universities and the lack of academic freedom among Russian international law scholars in the 1990s and early 2000s have been mutually constitutive. It was in fact the Russian international law scholars themselves and the academic system they inherited from the USSR that were responsible for most of the restrictions, self-limitations, and dehumanization in post-Soviet academia well before the conflict with Ukraine.

Eastern European mythology speaks of a very dark figure named Koschei the Deathless. Koschei was unable to die because he took his soul out of his body and hid it "inside a needle, in an egg, in a duck, in a hare, in an iron chest, buried under an oak tree, on a hidden island." Russian international law doctrine may be regarded as one such "horcrux" wherein the soul of Russia's totalitarian past has been in hiding for the past quarter of a century.

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112 Lauri Mälksoo, *International Law in Russian Textbooks: What's in the Doctrinal Pluralism?*, 1(2) Göttingen Journal of International Law 279 (2009).

113 *See, e.g.*, Mälksoo 2015; Tarja Langstrom, *Transformation in Russia and International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2003); Borgen 2015.

114 Mälksoo 2015, at 81.

The collapse of the USSR had no immediate impact on the teaching of international law in Russia. When a new edition of the most authoritative Soviet international law textbooks co-authored by Tunkin was published in 1999, most of its chapters repeated the previous 1981 version of the same textbook word-for-word, with references to "bourgeois" science of international law in the 1981 edition simply replaced by global change to "Western" science of international law in the 1999 edition. The ideological split between the "communist" and the "capitalist" systems invented by the USSR (and, therefore, the hostility underlining the ideological division between the socialist camp and the rest of the world) thus remained untouched in the Russian international law mentality despite Russia's declared transition to democracy and free market in the 1990s. In such circumstances, the requirement to cite the Russian doctrine in every scholarly work presented for defence in Russia and lack of English language knowledge among the Russian international legal scholarly community[115] has always added to the never-ending circle of reproducing the Soviet dogma in contemporary Russian public international law literature.

Another example of the continued totalitarian tradition in Russian public international law academia is backing of the traditional "Russian school of international law" by Soviet structures that survived the collapse of the totalitarian regime, such as, for example, the Soviet Association of International Law (simply renamed, now the RAIL, and a branch of the ILA).

In the situation with Crimea representatives of Russian international law doctrine have defaulted to taking the extreme positivist and voluntarist approach to law that characterised the perspective of the Soviet Union as a totalitarian great power.[116] The undeniable "flashbacks" to Russia's Soviet past as regards events in Ukraine are eliciting old "learned" reactions from members of institutions that continue to carry the Soviet legacy. Trapped in this approach, these scholars are able only to regard international law as the word spoken by their sovereign. Where a subject of international law choses to violate that law, such lawyers are led down the path of illegality – proclaimed, however, to be the new "legality" – together with the violating State.

A word, however, should be spoken of the new generation of international lawyers in Russia.

In a heated debate on the pages of the Russian newspapers in the course of 2015, Elena Lukyanova, a professor of constitutional law at the Higher School of Economics, clashed with one of the most active proponents of the legality of Crimean annexation, Valery Zorkin, the chairman of the Russian Constitutional Court. Although her main criticism was aimed at the Constitutional Court's attitude during the Crimean crisis, Lukyanova started the debate by noting the existence of the "two worlds" among Russian international and constitutional lawyers:

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[115] Mälksoo 2015, at 97.

[116] Alwyn Freeman, *Some Aspects of Soviet Influence on International Law*, 62(3) American Journal of International Law 710 (1968). Cf. the perception of customary international law in the Soviet theory of international law, *see, e.g.*, Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 Yale Law Journal 202 (2010).

> [Russia] counts numerous highly professional independent experts in the field of law. However, they are usually barred from decision-making within the government […] because, over twenty years, the state has selected the sort of legal doers it found convenient for itself. The rest, one way or another, were gradually removed beyond the bounds of the state's legal activities. As a result, two legal communities have evolved; they speak completely different languages and use different legal constructs. One community comprises officials "in the field of law," judges, parliament members, election commissioners, and law enforcement officers. The other community is made up of lawyers, human rights activists, and some of the independent scholars.[117]

In public international law, the independent thought that was forming in Russia in the course of the twenty-five years following the disintegration of the USSR has had to find its way through (or around) an extremely isolated and self-referential system of the post-Soviet international law tradition of teaching. In the attempt of self-preservation, this system strongly reacts to any critical or simply differing opinions[118] and openly disregards a systemic study of international jurisprudence and international legal scholarship in most of the Russian textbooks and monographs. The notorious lack of English language knowledge often compounds a lack of interest in filling law libraries with legal literature of the XX century – a time when the Soviet Union was a closed territory.

Holders of dissenting opinions on any matter of importance in the post-Soviet academic international law school in Russia put themselves at risk of not being conferred their Russian degree and of ostracism within the system. Most Russian universities are apparently still quite hostile to foreign professors and disdainful of degrees obtained outside Russia, and this becomes a serious obstacle for the younger generation of Russian international law scholars whose chosen career is to teach in Russia and to improve the level of public international law at Russian universities.

In the "backstage" of Russian academic life a new trend has emerged in recent years, namely the issue of "funding" of scholars. Scholars who express an opinion critical of any actions on the part of the Russian government from the standpoint of international law are now likely to face pointed questions about the sources of funds supposedly paid to them to make such statements (it is generally presumed that the money "comes from the West"), and their works and commentaries are likely to be disparaged as "articles for pay." Strikingly, a scholar's previous reputation and integrity apparently has no bearing on these presumptions. The stance that academic affiliation with a state-

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[117] Elena Lukyanova, *On the Rule of Law in the Context of Russian Foreign Policy*, 3(2) Russian Law Journal 10 (2015).

[118] *See, e.g.*, Международная и национальная уголовная юстиция: совместимость и взаимодействие, 3 августа 2015 г. [International and National Criminal Justice: Compatibility and Interaction, 3 August 2015] (Jun. 20, 2017), available at https://www.youtube.com/watch?v=6fq6018wLoI.

funded university should preclude "affiliated" scholars from raising arguments critical of the government is also being increasingly voiced. Importantly, such voices are heard on a "horizontal" level, that is, within the Russian legal community itself. They represent an uninterrupted continuation of the post-Soviet "horizontal" tradition in academia (at least in the area of public international law in Russia) of *ad hominem* attacks on those who express a dissenting or simply a differing opinion. The very presence of such attacks, and their recent intensification, indicates however that independently thinking scholars and practitioners of international law in Russia are very much in the picture, and suggests that their voices may be starting to be heard.

Conclusion

In the case of Crimea, representatives of Russian doctrine may have fallen victims to the State propaganda machine precisely because they never strayed beyond their dogmatic understanding of law and the role of the international lawyer as anything other than advocate of the State, which they had developed during the Soviet times. This now continues to foment their reductivist inter-State thinking whereby all those not supportive of the State's position are viewed as agents of another State.

Building upon a legacy of strong Soviet rhetoric, guardians of the closed system of "Russian international law" continue, domestically, to view and present it as the leading "science" of international law in the world – a world that unfairly fails to likewise accord it such status. A fair question can be (and indeed has been) asked as to whether international scholars adhering to "Western" paradigms may indeed be more biased in favour of blaming Russia for violations of international law than they would be in case of international law violations committed by a "Western" state.[119] Indeed, there does appear to be a certain distrust of the Russian positions voiced. However, I hope this article will leave the reader with the following question: is such distrust coming from "the West" and is due to Russia's position as a country on the world stage – as some post-Soviet scholars are trying to claim,[120] – or does it come from a professional legal community and is due to logical, communicational[121] and

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[119] *See, e.g.*, Forum: The Situation in Ukraine, 15 September 2015 (Jun. 20, 2017), available at http://www.jus.uio.no/pluricourts/english/news-and-events/events/2015/esil-2015-en/video-and-streaming/the-situation-in-ukraine.html.

[120] *See, e.g.*, Томсинов В.А. «Крымское право», или Юридические основания для воссоединения Крыма с Россией, 2 Вестник Московского университета. Серия 11: Право 3 (2014) [Vladimir A. Tomsinov, *"Crimean Law" or a Legal Basis for the Reunification of the Crimea and Russia*, 2 Moscow State University Herald. Series 11: Law 3 (2014) (Jun. 20, 2017), also available at http://tomsinov.com/russia_contemp/krymskoe_pravo.pdf; Rein Müllerson, *Ukraine: Victim of Geopolitics*, 13(1) Chinese Journal of International Law (2014); Zorkin, *Law – and Only Law*, *supra* note 5.

[121] *See, e.g.*, Alexander Gabuev, *Russia's Performance at the Munich Security Conference: A Symptom or a Cause?*, Carnegie Moscow Center, 10 February 2015 (Jun. 20, 2017), available at http://carnegie.ru/2015/02/10/russia-s-performance-at-munich-security-conference-symptom-or-cause.

even linguistic fallacies in the rhetoric of Russian international legal doctrine (and of the Russian government)? In other words, can we assess if the Russian doctrinal scholars play the instrument of international law, or if they simply smash on its keys pretending that it is some form of avant-garde music?

As the voice of the international legal profession worldwide has grown to become incomparably polyphonic over the past century, a fundamental difference in understanding the nature and function of the profession may be at the very root of the inability of the two approaches – indeed, one might go so far as to say two professions – to accept each other.

References

Вельяминов Г.М. и др. Круглый стол на тему: «Международно-правовые аспекты присоединения Крыма к России», Дипломатическая академия МИД России, Москва, 10 апреля 2014 г. [Georgy M. Velyaminov et al., *Round Table: International Legal Aspects of Integration of Crimea in Russia*, Diplomatic Academy of the Foreign Ministry of the Russian Federation, Moscow, 10 April 2014] (Jun. 20, 2017), available at https://www.youtube.com/watch?v=4k620BZKyto.

Задорожний А.В. Российская доктрина международного права после аннексии Крыма [Alexander V. Zadorozhniy, *The Russian International Legal Doctrine after the Annexation of Crimea*] (Kyiv: K.I.S., 2015).

Зорькин В.Д. Право – и только право. О вопиющих нарушениях, которые упорно не замечают, Российская газета, 23 марта 2015 г., № 6631(60) [Valery D. Zorkin, *Law – and Only Law*. *On Egregious Violations That Go Unnoticed*, Rossiyskaya Gazeta, 23 March 2015, No. 6631(60)] (Jun. 20, 2017), available at http://www.rg.ru/2015/03/23/zorkin-site.html.

Grant T.D. *Aggression against Ukraine: Territory, Responsibility and International Law* (New York: Palgrave Macmillan, 2015).

Kapustin A. *Crimea's Self-Determination in the Light of Contemporary International Law*, 75(1) Heidelberg Journal of International Law 101 (2015).

Mälksoo L. *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015).

Salenko A. *Legal Aspects of the Dissolution of the Soviet Union in 1991*, 75(1) Heidelberg Journal of International Law 141 (2015).

Tolstykh V. *Three Ideas of Self-Determination in International Law and the Reunification of Crimea with Russia*, 75(1) Heidelberg Journal of International Law 119 (2015).

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COMMENTS

THE CHALLENGE OF THE "ECONOMIC INDEPENDENCE" AND THE "SOVEREIGNTY OF STATES": A REVIEW OF THE PROBLEM OF LEGITIMACY OF ECONOMIC SANCTIONS IN THE REALITY OF THE INTERNATIONAL LEGAL ORDER

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One of the problems faced by the international community is to find a basis for regulating economic relations between the states. While the third world states still emphasize their economic sovereignty to encounter and maintain their positions against the North States, the analysis of the international legal realities shows that merely relying on the "economic independence" and "permanent sovereignty over natural resources" cannot be a practical way to achieve the ideals of states known as the "South." Like the Sword of Damocles, sovereignty can pave the way for maintaining the "status quo" or the domination of the premier economic powers in the international equation. Merely relying on international law as a branch based on the states' sovereignty will be actually misleading to change the status quo. By a realistic analysis of the less positive role of sovereignty in the procedure of regulating the relations between the North and the South, this study seeks to focus on the fact that going out of the impasse of unjust economic relations between the North and the South will be possible only by creating a gap in the traditional concept of economic sovereignty in a sense that has been formed by the third world states in the 60s and 70s of the past century.

Keywords: economic independence; sovereignty; economic sanctions; globalization; new economic order.

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Introduction

Today, we witness the development of the phenomenon of globalization around the globe. Globalization has affected widely all aspects of human life. Globalization of economy, science, technology, communications and transactions along with the globalization of the information world is only a part of this epidemic reality. This phenomenon has led to a process of "uniformity" in the international community.[1] However, it must be admitted that the emergence of the given phenomenon has not been without reaction. In fact, while we are moving towards uniformity in the international community, a vigorous process is trying to defend strictly its identity. This process attempts to save itself from being melted into a raging sea by returning to the past or by its local or regional compositions. What should be noted here is the paradoxical effect that the two phenomena have on our current world.[2] On the one hand, the world is moving towards "globalization," while on the other hand, the resistance of the process of "search for identity" has caused serious ruptures in the plan of "One World, One Order."[3]

Globalization and the expansion of foreign economic relations along with the intervention of each of the states through exercising their national economic policies within the framework of economic rules have led to serious complexities, both for states and the private sector involved in the international economic relations.[4] While

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[1] Mary Kaldor, *Nationalism and Globalization*, 10(1/2) Nations and Nationalism 161, 166 (2004).

[2] This contrast could be found also at the time of compilation of the UN Charter; the United Nations was among the proponents of universalism when the UN Charter was compiled, whereas United Kingdom, Latin America, Arab states as well as the member states of the Commonwealth Nations preferred regionalism and accordingly, different categories were formed and the only agreement was that the regional institutions should be subject to a global organization. Finally, the UN Charter was formulated in such a way that in addition to exercising a collective security system through the United Nations, the global character of the UN Charter was adjusted largely by inserting the concept of decentralization and regionalism in the Chapter VIII of the Charter and the concept of legitimate individual and collective defense in Art. 51 of its Chapter VII, then a mutual compromise was formed between globalists and regionalists at the time of the compilation of the UN Charter. *See* Borzu Sabahi, *The Role of Regional Organizations in the Implementation of Security Council Resolutions* 35–38 (Tehran: Ayneh Asar, 2000); *see also* for further study, Alvin LeRoy Bennett, *International Organizations: Principles and Issues* 218–220 (London: Prentice Hall, 1992).

[3] Davood Mirmohammadi, *Globalization: Dimensions and Approaches*, 11 National Studies Quarterly 72 (2002). *See also* for further study, Hamid Ahmadi, *Globalization: Ethnic Identity or National Identity*, 11 National Studies Quarterly 36 (2002).

[4] Mahmoud Bagheri, *The Rights of the National Economy in the International Legal Order*, 23 Public Law Research Quarterly 261 (2007).

attempt is made to form a united community by emphasizing the common human aspects, where humanity is one voice to fight common threats, the second process with an emphasis on areas of differentiation in many cases has even paved the way for the disintegration of the states, the stem cells of the international community. This is the recent process that tells us to what extent the concept of sovereignty is still of fundamental importance in the modern world. The truth is that the international community has now has faced a paradox more than ever: while the components of the community see themselves as interdependent more than any time, world order continues to be settled in a decentralized way. What seems more interesting in this area is the economic order that has linked global units together. According to some of the lawyers, as the economic process of globalization has intensified, the economic sovereignty has also entered its devastating stages and it is expected that the battle is further intensified. Thus, we witness a sense of danger, or in other words, a sense of crisis felt by the developing countries: these countries are trying to prevent the dilution of what they call the wall of their economic sovereignty and to strengthen their measures.[5]

A notable point in the context of this process is that the economic independence of developing countries has been targeted. The procedures of the economic behaviors of third world states show that the states are trying to respond both individually and collectively to the governing political and economic domination. In this regard, the states are trying to account for a greater portion of the process of global economic decision-making. It is considered inevitable and essential by the states to keep the remainder of their economic sovereignty.[6] These efforts have shown at best their presence in the rules governing economic relations between the states. Several statements published by the legal institutions of the world on the principles governing economic relations between the states try to be an interpretation to keep the economic sovereignty of the developing states and what is called the economic self-determination of the states.[7]

This approach has been interpreted at the same time as a "return backwards." While the international community is striving to pass quickly all the boundaries built by itself and to achieve a kind of unity, we witness a kind of return backwards in terms of economy. The concern of the developing states in this regard has led the "economic independence and freedom of the states" to be established as a fundamental principle of the economic legal relations between the states. However, such a situation cannot be considered without its evil consequences: from

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5 Wenhua Shan et al., *Redefining Sovereignty in International Economic Law* 140 (Oxford: Bloomsbury, 2010).

6 *Id.*

7 In this case, *see, for example*, the fifth section of the Declaration of International Rights Association in Seoul (1988). *See also* Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* 119 (Cambridge: Cambridge University Press, 2010).

the perspective of economic sanctions – which are mainly imposed economically by strong states on weak states – economic freedom of states can somehow be detrimental for the developing countries. In other words, when we emphasize the freedom and independence of the states in economic affairs, it is the developed countries that can take the initiative when necessary and put pressure on the developing countries, and with an emphasis on their economic sovereignty, they can stabilize somehow their economic sovereignty by refraining from economic exchange with the developing states.[8] Can such an understanding of freedom of sanctions be considered correct in the economic relations between the states?

1. The Economic Independence of States and the Basics of Sovereignty in International Economic Law

The logical consequence of the economic sovereignty of states in traditional international law has been the "freedom of national economies in the regulation of their trade relations." It has been said that each state is free to establish trade and economic relations with other states, companies, and private individuals or arbitrarily interrupt these relations. In this situation, the only guide of the state is the desire of its people and its sublime political interests. Actually, in a system whose primary foundation has been formed based on "satisfaction," such an understanding is not strange at all.[9] In fact, in traditional public international law, sanctions which are imposed in the form of refusing to do business with the other party are rooted in the doctrine of sovereign equality. Thus, regardless of the reasons behind this action, the economic boycott performed by a country seems legitimate. In other words, political reasons which lie behind such economic action are not basically related to the domination of international law. The study of the thoughts of ancient international law confirms this theory. For example, Grotius in his famous book "On the Law of War and Peace" stipulates that the states, like people, have no obligation to sell their goods, or in the same way, Christian Wolff adds that the states have no obligation to purchase goods or services and the nations can freely make their own decisions about doing business. In fact, according to Wolff, only the free will of the states can determine the direction of the regulation of the commercial affairs.[10]

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[8] *See more* Andreas F. Lowenfeld, *International Economic Law* 733–741 (Oxford: Oxford University Press, 2002).

[9] John H. Jackson, *Constitutional Treaties: Institutional Necessity and Challenge to International Foundaments* in *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* 194 (M. Cremona et al. (eds.), Leiden: Martinus Nijhoff, 2013).

[10] Mortimer N.S. Sellers, *Economic Sanctions against Human Rights Violations* in *Economic Sanctions in International Law* 483 (L. Picchio Forlati & L.-A. Sicilianos (eds.), Leiden: Martinus Nijhoff, 2004). For example, this author quotes de Vattel who is considered as one of the pioneers of the modern international law that: "So, no nation can be naturally entitled to selling a commodity to a party that does not want to buy it... and finally business consists of mutual buying and selling of all kinds of

However, analysis of the problem suggests that even in traditional international law, the economic freedom of states to impose economic sanctions is subject to three categories of rights: economic rights of citizens of a country to impose sanctions, economic rights of citizens of the targeted state and finally, the economic rights of the third states. These economic rights soon find their relationships with human rights and, thus, affect the economic freedom of the states as the basis of international economic law. In this regard, it is worth noting that the Universal Declaration of Human Rights has guaranteed the rights of all human beings, regardless of race, language or nationality, and accordingly, international responsibility of states towards the economic rights of the people in a country have been accepted so that the development and prosperity of the character of every human being can be achieved by it, the rights that include economically the minimum standards needed for health and welfare (Arts. 2, 22 and 25).[11] In this connection, the International Covenant on Economic, Social and Cultural Rights has also accepted the universal right to enjoy a minimum standard of living (para. 1 of Art. 11),[12] a standard whose minimum can be interpreted with respect to another article of the Covenant, "being free from hunger" (para. 2 of Art. 11).[13] Therefore, it has been said that if a country refuses to sell a particular commodity and this along with other conditions influences the

commodities. It is clear that this depends on the will of any nation to do trade with the other party or refuse it." In this case, *see* Emer de Vattel, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Leiden: Aux depens de la Compagnie, 1758), Sec. 92, cited by *id.* at 483.

[11] "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty" (Art. 2). "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (Art. 22). "(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection" (Art. 25). UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[12] "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

[13] "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation…" UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

survival of a nation, the human rights obligations should overshadow the principle of economic freedom of states.[14]

On the other hand, the economic freedom of a country's citizens to impose or not to impose sanctions for a specific purpose is another element that must be considered in relation to the freedom of states to impose sanctions. However, it has been claimed that this freedom has lost its reason for existence in the context of Western democratic countries and such countries as Japan. In fact, since people in these countries delegate their powers in this area to their states on the basis of a social contract, the problem is virtually "negative proposition because of its subject."[15] Nonetheless, such simplification of the issue is a kind of getting round the legal logic. Whether in democratic or non-democratic countries, the question of the balance between the purpose of sanction and the level of the state interference in the economic rights of the country's people should be considered. In many cases, this issue is analyzed as a civil issue rather than a matter of international law, which has been taken into consideration depending on the growth of the "fundamental rights" order in each country. But what should be considered in this regard is that the question of the economic rights of citizens of the state imposing sanctions is not merely a civil issue. The procedure of the formulation of UN Charter suggests that this question has been considered by the legislators at the time of the formulation of the Charter. Since it was clear that sanctions imposed by the Security Council could affect the economic rights of citizens of the state imposing sanctions, the UN Charter deemed it necessary to consider the question explicitly.[16]

In this connection, sometimes economic sanctions against a foreign state can impose an additional economic burden on the citizens of a third State. Imagine a country is economically dependent entirely on a foreign state and it is sanctioned because of its own specific behavior. In this case, should the rights of the citizens of the third state not be considered? It is clear that the legal logic dictates that a balance must be established between the interests of the international community and the economic interests of third parties, a balance which is rooted in the respect for the "proportionality principle."

However, the study of the public policy of the international community shows that the standards limiting economic sanctions are not so transparent and the doctrine of "economic independence" has predicted such a high threshold for intervention

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[14] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* 87 (Princeton: Princeton University Press, 1996).

[15] Gregory H. Fox & Brad R. Roth, *Democratic Governance and International Law* 67 (Cambridge: Cambridge University Press, 2000).

[16] "If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems" (Art. 50). United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

that they should actually be forgotten against the will of states imposing sanctions. It is true that the International Covenant on Economic, Social and Cultural Rights "accepts the right of all nations to freely dispose of their natural resources,"[17] and only the strong economic effects such as famine and starvation can be a barrier to limit the primary right, which of course can be rarely observed and proved.[18] In other words, except in cases of serious humanitarian effects, the international policy does not tend to prefer "human rights" considerations over the "freedom of the states in the management of their economic and business affairs."

The truth is that the right of freedom of individuals and states to manage their natural resources and wealth can affect the economic relations with third parties. These effects, which can play the role of "secondary sanctions," have taken into consideration the question of the economic sovereignty of the states and their freedom to act. However, the established international policy shows that the right to suspend trade with a commercial party has been defined in the doctrine of the international economic law as a fundamental right so that it has been remembered as a civil issue in the "exclusive jurisdiction" of the states, which can be subject to the intervention of international law only with the signing of a treaty of friendship or business.[19]

Such treaties that are signed bilaterally or multilaterally to stabilize and promote friendship among states can predict concessions to the third parties to be able to claim compensation if the interruption of a business relationship harms these states. In such cases, the legitimacy of such compensation finds a treaty basis. However, the signing of the comprehensive agreements such as the GATT and the WTO in recent years has caused that the impact of sanctions on the member states of these treaties takes a form of common and complex problem. For example, in the case of sanctions against Libya and Iran, the question raised repeatedly by economic lawyers was whether the legal effects of the sanctions on the third member states of the GATT and the WTO can be justified within the framework of the provisions of these organizations.[20]

What can be said concisely as a permission of these measures is that a minor breach of the international norms can hardly be considered as a reason for the interruption of a business relationship when there is a treaty of friendship and trade. The explanation of this issue can be searched in the consensual structure of international law: as long

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[17] "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence" (Art. 1, sec. 2 of the International Covenant on Economic, Social and Cultural Rights).

[18] Hadewych Hazelzet, *Assessing the Suffering from "Successful" Sanctions: An Ethical Approach* in *United Nations Sanctions: Effectiveness and Effects Especially in the Field of Human Rights: A Multidisciplinary Approach* 71 (W.J.M. van Genugten & G.A. de Groot (eds.), Antwerpen: Intersetia, 1999).

[19] Sellers 2004, at 483.

[20] In this case, *see specially* Andrea Giardina, *The Economic Sanctions of the United States against Iran and Libya and the GATT Security Exception* in *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of His 80th Birthday* 863–865 (G. Hafner (ed.), The Hague: Kluwer Law International, 1998).

as the state itself does not limit its will by an international treaty, the sovereignty principle which expresses economically its freedom to create or interrupt economic relations requires the state to act autonomously and free from any external factor when it imposes economic sanctions. Only a severe and exceptional breach, like famine conditions, which can be regarded as a humanitarian situation, can be considered an obstacle to the freedom. But when the state itself changes this situation by signing an economic agreement in the form of a brotherhood or friendship treaty, the conditions change completely and it is the state imposing sanctions that not only should be responsive to imposing sanctions, but also should account for the effects of these sanctions on third parties which are a party of the country's treaty.[21]

However, do these understandings seem too traditional? Whether we must continue in the twenty-first century to abide by the ancestors of international law such as de Vattel and Grotius and accept only "in exceptional cases" the right to limit the free will of the states to regulate their commercial relations. It seems that the results of the change in the approach to the concept of sovereignty, which has been raised in recent years as the responsible sovereignty on the world stage, can help us to regulate legally the economic relations. In fact, if we accept that economic sovereignty over natural resources is not only an advantage but rather a responsibility, we can use the results of this approach in the management of the state's will to regulate economic relations.

1.1. The Theory of Responsible Sovereignty and the Problem of Organizing International Economic Order

The truth is that the responsible approach to the states' sovereignty in economic international law has a much longer history than the concept which was raised in the past decade as "the responsibility to protect." In fact, from the very beginning of the signing of the UN Charter, it has been accepted that the exercise of the economic sovereignty of states should not conflict with the independence of other states. In other words, any economic pressure imposed, which can be interpreted as an abuse of the right, should not affect survival or independence of other countries.[22] This restriction has always been interpreted in some way with the restrictions included in para. 4 of Art. 2 of the UN Charter, according to which any threat or aggression against the territorial integrity of a country is contrary to the principles and purposes of the United Nations.[23] Thus, an economically responsible sovereignty cannot use

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[21] Sellers 2004, at 486. Of course, this is on condition that the basic treaty on friendship or trade is still in force.

[22] In this case, *see specially* Leland M. Goodrich & et al., *Charter of the United Nations: Commentary and Documents* 48 (New York: Columbia University Press, 1979).

[23] "All Members shall refrain in their international relations 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" (Art. 2, para. 4 of the UN Charter).

its economic potential to harm "political independence" of another state. In fact, this part of the obligations contained in the Charter constitutes a part of negative economic obligations of any sovereignty.

Nevertheless, the responsive obligations of an economic sovereignty are not limited only to these negative obligations. Existing Treaty Law has put the states in charge of some positive obligations which can be interpreted as the positive economic obligations of the states. Supreme examples of these obligations can be found in Arts. 55 and 56 of the UN Charter. In these articles, the UN member states have pledged to take joint and separate action in co-operation with the Organization for the achievement of such purposes as the promotion of solutions to the international economic problems and the improvement of economic conditions and the social and economic development.[24] Of course, in this case, the provisions of the UN Charter suffer from a serious flaw: lack of a serious mechanism for bringing these positive obligations from potentiality to actuality. However, it is undeniable that with the adoption of the UN Charter, the economic sovereignty mechanism has moved towards a kind of "responsible cooperation" instead of being merely profit-oriented. The states' obligation to responsible cooperation can be in fact considered as a result of the interpretation of the provisions of the UN Charter on the basis of the principle of good faith. However, there is no doubt that the states are observed sometimes in the condition of violating these fundamental obligations, but such cases should not be interpreted as the undermining of this basic principle.

At the regional levels, this interpretation of the responsible approach to the economic sovereignty can be seen frequently. The Organization of American States is an example of these approaches. In the statute of this regional organization, not only the use of military force against the territorial integrity or political independence of another member state has been prohibited, but also the use of economic or cultural elements has been clearly considered as an act inconsistent with the responsible obligations of a state.[25]

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[24] "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 55). "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55" (Art. 56).

[25] "The right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State" (Art. 15). "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind" (Art. 20). "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof" (Art. 22). Organization of American States (OAS), Charter of the Organisation of American States, 30 April 1948.

Perhaps a full manifestation of the responsible approach to economic sovereignty can be seen in the famous Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. In this Declaration which has been compiled by the General Assembly of the United Nations, both negative and positive aspects of a responsible economic sovereignty is visible: In fact, the states have committed not to use the economic means to impose pressure on each other, in addition, they have accepted to use positively the economic means for peaceful coexistence.[26]

Since then, the UN General Assembly has repeatedly emphasized this responsible approach. In 1996, by adopting the Resolution 51/22, the UN General Assembly emphasized on the elimination of unilateral economic coercive measures as a means of political and economic pressure against developing countries.[27] Two years later, on 26 October 1998, by adopting a similar resolution, the UN General Assembly considered the economic pressures on the developing states as a breach of the rules of peaceful coexistence between states.[28] Such an approach to understanding the dimensions of economic sovereignty and its change from the time of the founding ancestors of this branch have been very important. It is clear that this approach can be useful to some extent in the understanding of the unilateral economic sanctions.

One of the important aspects of international economic law has been the regulation of the treatment of the states with foreigners. A state cannot exercise its economic sovereignty without attention to the established rights of the foreigners in its civil law. This has had many instances in nationalizing the foreigners' property and taxation for them.[29] However, no doubt it also applies to the issue of sanctions and economic pressures. In fact, it has been accepted that foreigners may be subject to less favorable treatment than the citizens of a state. Nonetheless, a foreigner should not be subject to a taxation which is not in proportion to his activity. Undoubtedly, when a state tries to affect the situation of another state by putting pressure on the

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[26] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

[27] UN General Assembly, Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, 27 November 1996, A/RES/51/22.

[28] For example, we read in this resolution that: "The General Assembly calls upon all States not to recognize extra-territorial coercive economic unilateral measures or legislative acts imposed by any State." *See* UN General Assembly, Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, 26 October 1998, A/RES/53/10.

[29] 1929 Harvard draft plan on the responsibility of the states for the damages in their territory to the foreigners and their property is one of the first conditions proposed concerning the responsibility of states, which is still a modest realm in this regard. *See* Milka Dimitrovska, *The Concept of International Responsibility of State in the International Public Law System*, 1(2) Journal of Liberty and International Affairs 8 (2015).

citizens of that country and refers to economic sovereignty to justify its action, the subtleties of the above-mentioned argument should be considered.

After all, the question of responsible economic sovereignty is linked with the implementation of extraterritorial economic rights. This question arises when the state attempts to induce the economic entities outside its territorial jurisdiction, which have extensive economic relationships with it, to act in accordance with its political criteria; otherwise, this state will use the means of its economic power to influence those entities or individuals. The use of the responsible sovereignty approach that moves in the direction of the states' economic coexistence can be an answer to this question. By the responsible sovereignty approach that we face today, the states try to use economic incentives instead of sanctions in their positive and negative sense to stimulate an economic entity, which sometimes its dimensions go beyond their sovereignty. This especially happens when a group of states has come close to each other within the framework of a market economy. Meantime, we will see that the economic aspects of their sovereignty are divided among them in a spreading form and a state can use the means of sanction – of course, positive sanction[30] – to stimulate the private economic sectors of another state. Some examples of such an approach can now be seen in the dimensions of the European Union and the International Monetary Fund.[31]

In this regard, one of the issues which can be referred to as a function of responsible economic sovereignty in the context of imposing sanctions is the subject of "state's obligation to due diligence" to not damage the economy of the other states.[32] This issue and its relationship with economic sanctions will be discussed at below.

1.2. An Obligation to the Due Diligence and Economic Restrictive Measures

The basis of a state's obligation to due diligence before taking any economic restrictive measures should be searched in the traditional rules of international law. However, the content of this rule should be considered with regard to the developments in the international community and its necessities. From this perspective, each state

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[30] The term of positive sanctions was described by David A. Baldwin, professor at Princeton University, in an article entitled "The Power of Positive Sanctions," which include the economic sovereignty and the soft market power in the form of foreign aids, investment, trade and technology transfers; accordingly, positive sanctions mean the use of positive measures including the above-mentioned ones to achieve the same goals intended by the negative sanctions. For more information, *see* David A. Baldwin, *The Power of Positive Sanctions*, 24(1) World Politics 19 (1971).

[31] Laura Picchio Forlati, *The Legal Core of International Economic Sanctions* in *Economic Sanctions in International Law*, at 169.

[32] The Charter of Economic Rights and Duties of States containing this obligation emphasizes in its different articles on the economic obligations of states to the economic assistance and providing the fields of economic development and balance and equilibrium in the global economy and avoidance of discrimination and barriers to free trade, *see* Charter of Economic Rights and Duties of States, GA Res. 3281, UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974) 50.

is pledged to refrain from any action that could harm the rights of other states.[33] Initially, this rule was formed in relation to questions concerned with the neutrality in international law of hostilities and gradually the scope of its implementation was expanded over time and it entered into the area of the states' responsibility law. At first, this principle was considered in relation to measures which were done by the people of a country against the foreigners and then the scope of its implementation included environmental damages that could occur to the environment by the private companies. Now, in many contemporary legal systems, this principle has been accepted in civil, environmental law and through it, many responsibilities have been imposed on the shoulders of the states.

In the evaluation of the effects of economic sanctions, this principle should also be considered as a fundamental principle. The basis of this obligation is that the effects of economic sanctions, especially their economic effects on the environment, and even their extraterritorial effects on the other countries should be considered primarily when any kind of economic sanctions is imposed. This obligation applies not only to the states, but also should be considered in the performance of the Security Council. In fact, this obligation of the Security Council is rooted in the responsibility of this Council to maintain international peace and security. The states that entrusted the authority of imposing sanctions to the Security Council on the issues related to the international peace and security, in return they are entitled to be safe from any possible damage caused by the measures of the Council on their economies. The non-compliance with this rule can be considered as a breach of the purpose of the Council to maintain international peace and security.[34]

In practice, both the states and the Security Council should predict economic and non-economic effects of such measures before proceeding to any economic sanction. Such an obligation is the result of exclusive jurisdiction of the states over their territories. In fact, if we accept that any right in the juridical world is associated with a duty, we must accept that the exclusive rights of the states' sovereignty over their territory involve the obligation to "protect the sovereign rights of other states," which can be manifested in the form of the principle of obligation to due diligence.[35]

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[33] Horst Blomeyer-Bartenstein, *Due Diligence* in *Encyclopedia of Public International Law Vol. 10* 138–140 (R. Bernhardt (ed.), Amsterdam: North Holland, 1987).

[34] "If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems" (Art. 50 of the UN Charter).

[35] This point can be deduced from the famous decision of Max Huber in the *Island of Palmas* case. In this decision, we read: "Territorial sovereignty… involves the exclusive right to display the activity of a States. The right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." *See Island of Palmas Case*, Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829.

However, the content of this obligation is not so clear. Professor Pierre-Marie Dupuy believes that this principle is a kind of obligation to the means and mere effort by a state makes it innocent of the remaining results.[36] However, it does not seem such a conclusion to be consistent with what has been seen in the performance of some international judicial institutions. For example, in the *Velásquez Rodríguez* case, the American Court of Human Rights has held the states liable for want of reasonable care on the behavior of private individuals. Actually, the style of the expression of this regional Court shows that since the states have all decision-making and implementation means and resources in their possession, they are responsible in the event of damage to the interests of the states or private parties; unless they prove that they have taken all necessary measures to prevent this damage.[37]

This approach to the question of responsible sovereignty over the exercise of sanctions should be considered in economic international law. In fact, it is true that the decision of the American Court of Human Rights has been issued in the style of the human rights issues, but it should be noted that the question of obligation to due diligence is not only dedicated to the human rights issues and can be considered much more in the economic subjects of sanctions. In this regard, some of the lawyers have paid attention to the customary character of this rule and have been announced that if the exercise of sanctions deprives the citizens of a third state(s) of their commercial rights or harms their interests, this principle which is a customary rule has been violated.[38]

Nevertheless, the main difficulty should be sought in the way this principle is implemented. In this regard, it has been said that there is no single standard for the implementation of this principle and there is not also much sensitivity to the strict implementation of this principle in the economic issues.[39] However, the lack of sensitivity in this area should not be taken as the unimportance of this principle in the economic affairs. The principle of due diligence in the economic activities and the performance of such organizations as the WTO have repeatedly been considered. Any extraterritorial commercial action in the arena of the WTO should consider this principle. But the question that has strongly attracted the attention of lawyers in recent decades in the so-called relations between North and South Poles is the use of an economic weapon to influence political or social decisions of the states. Much has been said about the political or the social legitimacy of such measure;

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[36] Djacoba Liva Tehindrazanarivelo, *Le Droit des Nations Unies et les Limites au Pouvoir de Sanction du Conseil de Sécurité* in *Economic Sanctions in International* Law, at 252.

[37] *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* 125–126 (D. Alland et al. (eds.), Leiden: Martinus Nijhoff, 2014).

[38] *Sanctions, Accountability and Governance in a Globalised World* 180 (J. Farrall & K. Rubenstein (eds.), Cambridge: Cambridge University Press, 2009).

[39] *Id.*

however, this question remains that how this phenomenon can be described in the current international legal order and the question of the states' sovereignty. In the next section, we will try to analysis a reality called economic sanctions from the perspective of the economic sovereignty of states and the positions of the North and the South to this political-legal concept.

2. Economic Sovereignty of the States and the Question of Extra-Territorial Sanctions: The Clash of Legal Realities with Political Ideals

Each state can embark on drawing up legislations to set up arrangements to have reasonable territorial or personal relationship with another country. In other words, every state can embark on legislation about what happens in its territory. In this regard, the existence of the "extraterritoriality" aspect of the law is not necessarily a breach of the rules of international law. For example, each state can enact some laws in connection with its citizens and these laws can find consequently "extraterritorial" dimensions. It is fully consistent with international law. In this connection, some of the lawyers consider the basics of the possibility of extraterritoriality of the laws as quite consistent with the reality of "globalization" of the world of economy.[40] Although many questions have been raised about the dimensions of this right, the lawyers' community continues to face with this fundamental question that can a state, under the pretext of some activities which are carried out outside its territory and affect its country, enact some laws that are related to activities outside the territory of the state?[41] It has been said that the principle of territorial jurisdiction in international law has originated from the decision of the Permanent Court of International Justice in the famous *Lotus* case in 1927. According to this decision, the principle of sovereignty expresses more than anything "the exclusiveness of the right to intervene" in the coercive means of a sovereign state.[42] Pierre-Emmanuel Dupont says:

> The most important objection to unilateral sanctions from the perspective of international law is related to the system of collective security. When a situation

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[40] Seyed Yaser Ziaee, *Extraterritorial Jurisdiction in International Investment Law*, 22 Law of Nations Quarterly 160 (2016).

[41] Regulations related to foreign trade are indeed a part of the civil economic law that enables the state to restrict the freedom of its inhabitants. Exchange control regulations and import and export regulations for political purposes are the most important examples of the national economy that are focused on international economic relations. For example, the law of the United States allows the president to limit the exports of this country by referring to the protection of national security, achieving foreign policy objectives, compliance with United States international obligations or maintaining scarce resources. *See* Mahmoud Bagheri, *A Market-Based Economy and Private Law Shortcomings*, 19 Journal of Law and Politics Research 74 (2006).

[42] *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). *See also* Alexander Marie Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction* (Dordrecht: Springer, 1946).

> is on the agenda of the Security Council and the Council decides personally on the situation, the member states of the United Nations cannot, whether individually or collectively, attempt to impose a sanction on that situation.[43]

The states imposing unilateral sanctions resort principally to the principle of countermeasures contained in the plan of the international responsibility of states to justify their measures. To reject this justification, Alain Pellet, a leading international lawyer, believes that

> if the Security Council decides to impose sanctions in response to an internationally wrongful act, the right of states to adopt unilateral countermeasures will end.

In this regard, he refers to Art. 51 of the Charter, which stipulates:

> The right of self-defense in response to an armed attack is not destroyed until the Security Council takes necessary measures to protect international peace and security.

He argues that "this issue applies to countermeasures when the Security Council takes measures in accordance with Articles 41 and 42 of the Charter."[44] Even if according to some of the lawyers, Security Council sanctions cannot make an obstacle to the adoption of countermeasures, resorting to countermeasures requires compliance with certain conditions ordained in the plan of the International Law Commission on the international responsibility of states in 2001, which seems that the exercise of unilateral economic sanctions requires deliberation.[45] In this part, after explaining the probable basis of a sovereign state's intervention within the scope of its economic borders, we will explain the challenges of imposing extraterritorial

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[43] Pierre-Emmanuel Dupont, *Countermeasures and Collective Security: The Case of the EU Sanctions against Iran*, 17 Journal of Conflict & Security Law 301 (2012).

[44] *Id.*

[45] For example, we can refer to the economic sanctions imposed by the United States of America and Europe Union beyond the resolutions of the Security Council, in which these conditions have not been met (Art. 52 of the Plan of International Responsibility) and the initial breach of the obligation and non-compliance with the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) by Iran are disputed and still no reliable document on the breach of these regulations by Iran has been provided by the states and organizations claiming the breach. For further study, *see* International Law Commission, *International Responsibility of the State, the Text and Description of the Articles of the International Law Commission* 310–306 (Ali Ibrahim Gul (trans.), Tehran: Institute of Legal Studies and Research in Science, 2009); Seyed Ghasem Zamani & Jamshid Mazaheri, *Smart Sanctions of the Security Council in the Light of Resolution 1029: Protecting or Threatening Peace*, 44 Journal of International Law 145 (2010); Seyed Yaser Ziaee & Mahnaz Rashidi, *Sanctions against Islamic Republic of Iran's Shipping from the Perspective of International Law*, 54 Journal of International Law 91 (2016).

economic sanctions and the dimensions of its acceptance in the current international community.

2.1. Territorial Sovereignty: Searching a Basis for the Regulation of the Intergovernmental Economic Relations

As it was said, the principle of territorial jurisdiction in international law has originated from the decision of the Permanent Court of International Justice in the famous *Lotus* case in 1927. According to this decision, the principle of sovereignty expresses more than anything "the exclusiveness of the right to intervene" in the coercive means of a sovereign state.[46] Although the solution proposed in the *Lotus* case has been repeatedly criticized by the doctrine since then, any international judicial authority has not yet found an opportunity to revise generally this principle. The general international policy has also been always looked with suspicion on the uncontrolled expansion of the extraterritorial jurisdiction.

The truth is that the position of some influential states such as the United States in the economic sphere is significantly different from the position of other states in terms of the jurisdiction of the extraterritorial legislation and this has affected the exercise of extraterritorial economic sanctions. From the perspective of the United States, any behavior, regardless of the location of its formation, that affects the territory of the United States, or at least is intended to affect the country, can cause the United States authorities embark on the legislation in connection with that behavior; this broad interpretation in relation to the territorial jurisdiction of the United States has been referred in para. 402 of the third document governing the America's foreign policy called "Restatement of the Law Third." This interpretation is based on this philosophy that such an interpretation should be accepted with regard to the very close interaction of the world economies in the context of globalization. Therefore, with such an interpretation, it should be admitted that there is no constraint in relation to limiting the legislative jurisdiction of the United States. But the truth is that the United States itself has put a restriction on the extraterritorial legislation in para. 403 of the above-mentioned document that is worthy of reflection.[47] In this paragraph, we read that

> even when there is a basis for jurisdiction in accordance with paragraph 402, if the exercise of this jurisdiction is unreasonable, a state cannot use its jurisdiction to legislate about individuals or actions related to another state.[48]

However, because of both the base and the content of this criterion, there is no consensus among international lawyers and some explicitly claim that the criterion

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[46] *S.S. Lotus*, *supra* note 42. *See also* Stuyt 1946, at 127.

[47] *Restatement of the Law, the Foreign Relations Law of the United States Vol. 1* 238 (St. Paul: American Law Institute, 1987).

[48] *Id.*

of reasonableness cannot be a basis for legislation to regulate legal relationships outside the territory of a state.[49]

However, the performance of other countries, including the European Union, has been different in relation to this subject and some lawyers have spoken a "reasonable procedure" in this regard. While these states have embarked on drawing up extraterritorial legislations in some cases, it must be admitted that the difference between the approach of these states and the approach of the United States is quite remarkable: in the case of such countries as the members of the European Union, the purpose of the extraterritorial legislation, especially in the field of competition law, is to prevent a crime that affects the inside of the country, while in accordance with the United States law, even if a crime occurs which it's all effects of the crime take place outside of the United States, this country simply embarks on the legislation from a superior position and influences foreign policy of the targeted country. The European Union position seems completely transparent in this case. For example, in the *Gazodok* case, European Union officials addressed bluntly the United States that "the theory of effects does not enjoy much acceptance in international law."[50]

With regard to what has been said, it should be acknowledged that in relation to the extraterritorial legislation, "the theory of effects" has been strongly criticized by an important part of the international law doctrine. But even if we respect the basics of "the theory of effects" for the extraterritorial legislation, it must be recognized that very rare lawyers approve the position of the United States of America on the broad interpretation of extraterritorial legislation. For example, we can refer to the opinion of the committee of the Organization of American States, which looks at the theory of effects to find a basis for the territorial legislation. In a report, this committee interprets the principles governing the territoriality principle as follows:

> In the exercise of its territorial jurisdiction, a state can apply its own laws with regard to an action which its constituent elements affect partly the territory of the legislating state; namely, when an action begins outside the territory of a state and ends finally within the state or vice versa an action exits the territory of the state, and finally reaches its end result abroad, a state can partly justify the exercise of its territorial law [in relation to the abroad] in this way that the act committed outside the territory has a direct, basic and predictable effect on the country so that the exercise of the extraterritorial jurisdiction of the state is considered reasonable.[51]

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[49] John H. Knox, *A Presumption against Extrajurisdictionality*, 104(3) American Journal of International Law 351, 352 (2010).

[50] *Coercive Diplomacy, Sanctions and International Law* 115 (N. Ronzitti (ed.), Leiden: Martinus Nijhoff, 2016).

[51] Joaquin Roy, *Cuba, the United States, and the Helms-Burton Doctrine: International Reactions* 95 (Gainesville: University Press of Florida, 2000).

This principle has also been emphasized in the decisions of GATT.[52]

This approach has led to the reaction of the European Union against the United States in the 80s and 90s of the last century. Historically, the first confrontation between the European Union and the United States on the extraterritorial sanctions dates back to the 80s of the last century. At the beginning of this decade, the construction of gas pipelines to connect Siberia in the Soviet Union of the time to the Western Europe caused a deep rift between the NATO partners. At that time, in response to this project, the United States not only banned the participation of American companies in this project, but also imposed some restrictions on the contribution of the branches of the companies which were formed in accordance with the laws of the country where they were admitted and not the America law and their headquarters were mainly in Western European countries. This measure of the United States encountered with a strong reaction of other state members of NATO, such as Germany, Belgium, Canada, France, Finland, Mexico, the Netherlands and Sweden. Some of these countries decided by legislation to not recognize the judicial decisions of the United States of America in this context and banned information exchange in this field with the United States. The law doctrine of the European Union considered firmly the measures of the United States in this field as a breach of international law.[53] The Commission of the European Community announced in the framework of international law that the measures imposed by the Reagan administration are considered as a breach of the sovereignty of states that America laws affect them. As a result of the measures of the United States, European companies were placed in a delicate situation: on one hand, these companies had to surrender raw materials to the Soviet state under the contracts signed, and on the other hand, if they did their obligations, these companies faced with the risk of being blacklisted by the United States. In these contracts, the failure to perform the contract was associated with a very heavy damage. In legal terms, resorting to force majeure could not be referred with certainty. In fact, an arbitration court was predicted for this problem and it was not clear that the presence of the law of a third country could be interpreted as force majeure in the arbitration court.

However, in this case, it was not legal arguments that forced the United States to withdraw at that time. In fact, in the case of legal chaos governing the exercise of extraterritorial jurisdiction, "countermeasures" of European states to disarm the opposite party in a real "economic war" prepared the way for a return to the former situation. It also prepared the way for the withdrawal of the America state. In fact, the measures of the Reagan administration at the time did not enjoy the full internal support and were also criticized in the House of Representatives. Given the resistance

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[52] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 133.

[53] It is argued that since each country is a part of the international community, the rules that specify the jurisdiction of the country should be resulted from taking into account the needs of the community and especially the need for non-aggression by the members; *see* Bagheri 2007, at 273.

of the European parties, the sanctions imposed by the United States, instead of affecting the Soviet Union, had largely turned into a measure against America's allies in the North Atlantic Treaty. With regard to all these considerations, referring to the changed political situation in Poland and the release of the leader of the opponents in this country, Lech Walesa, the Reagan administration announced the abolition of its extraterritorial sanctions on 13 November 1982.

The case of the gas pipeline between Siberia and Western Europe showed for the first time the incompetency of legal procedural solutions in the equation of economic relations between Europe and the United States. However, it also revealed explicitly that a state, no matter how big and economically strong, cannot alone propel its extraterritorial sanctions. In this equation, the European Economic Community of the time proposed itself as an essential link to implement such sanctions. With the failure of the sanction program of the United States, the gas pipeline project between Siberia and Western Europe was completed in 1984 and the plan of transporting gas to Europe was conducted successfully.[54]

Nonetheless, the fundamental question was the relationship between the facts and legal considerations. In the disputes between the economic realities and the law, is it the economic realities that can take an upper hand? And will international law as a branch based on the sovereign will of the states affirm this supremacy as a procedural tool?

The Helms–Burton and D'Amato laws should be considered as the second confrontation between the Europe and the United States on the extraterritorial sanctions, which show better the nature of this confrontation. The Helms–Burton law adopted in the first place against Cuba. This law which was signed actually on 12 March 1996 by Bill Clinton banned the conduction of business activities by individuals and companies in Cuba, and the D'Amato law which was signed a few months after the Helms–Burton law on 5 August 1996 in the presence of the victims of Pan Am flight 103 imposed trade restrictions against Iran and Libya. It was announced that the purpose of the D'Amato law was primarily to deprive Iran and Libya of access to financial resources and to prevent the political pursuit by these states which "threatened national security and foreign policy interests of the United States of America." In fact, in those years, both Iran and the Libya had been accused by the state of the United States of America to acquire weapons of mass destruction and to support the international terrorism. This law targeted directly Europe and the companies operating in the European Union because it prohibited the investment of more than forty million dollars in the oil and gas industry in the two countries to any natural or legal person in the world.[55]

Legally, the conflict of extraterritorial laws with the traditional approaches to international law seemed completely evident. At the time of the legal review of the

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[54] Pieter Jan Kuijper, *The European Community and the U.S. Pipeline Embargo: Comments on Comment*, 27 German Yearbook of International Law 72 (1984).

[55] Brigitte Stern, *Striving for Universalizing the Law: Helms–Burton and D'Amato–Kennedy Law*, 20 International Journal of Law 46 (1996).

Libertad Act in the Congress of the country, the United States Department of State declared explicitly by sending a memo that

> the solutions foreseen by the Libertad (Helms–Burton) Act are considered as the unprecedented extraterritorial implementation of the law of America. Although the United States are facing the property which is in a foreign country and has been confiscated by a breach of international law, but the conditions stipulated in international law to enact this law have not been met, because it is hard to imagine how trade with this property can have a substantial effect on the United States... The principles of the third part of the law are inconsistent with the traditions of the international legal order and no state has not passed the laws similar to this law...[56]

However, the law and the similar approaches could open their way to economic realities. Nuclear, human rights and terrorist sanctions of the United States and Europe against Iran are a good example of the prevailing reality in international politics. In this context, how can we provide an analysis of the resultant law and economics in today's world?

2.2. Efforts to Organize the International Economic Order and Rein in Dominant Economic Power: Challenges and Gaps

The consideration of traditional international law and the famous decision of the International Court of Justice in the *Nicaragua* case can provide a strong basis for us to condemn this policy of the United States. The study of traditional law can lead us to the point that the recent changes can be considered in some way as ignoring the principles of sovereignty and non-interference in the internal affairs of other countries. The International Court of Justice in the *Nicaragua* case has mentioned this principle as follows:

> ...In accordance with generally accepted frameworks, this principle (non-interference) prohibits a state or group of states from interfering directly or indirectly in the internal or external affairs of another state. Thus, the indirect intervention should focus on the issues that the principle of the states' sovereignty allows them to freely decide on them. Some of these issues are the free choice of political, economic, social and cultural system as well as the structuring of the foreign relations. When the means of pressure are used in relation to the issues about which there should be primarily the right to free choice, intervention is illegitimate.[57]

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[56] Roy 2000, at 76.

[57] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Rep. 1986, p. 14.

However, it is not all description of the story. It seems clear that at this point, the United States seeks to pass the existing international law and enact extralegal norms in interaction with other trade partners, including the European Union. But the European Union has not also given up the fight and confronts the positions of the United States when they do not match the interests of the country.

The European Union announced the enactment of such a law as a violation of the WTO trade rules and GATT rules and attempted to lay a legal complaint against the Organization. At the same time, the European Union did not satisfy by the complaint and embarked on a countermeasure by enacting regulations regarding such extraterritorial measures: the Council of the European Union adopted regulations on 22 November 1996 in support of the effects of extraterritorial laws. In practice, the French oil company Total signed also a contract on 28 September 1997, namely one year after the adoption and signing of the D'Amato law, with the National Iranian Oil Company on the development of the South Pars gas field. In this area, Total replaced American company Conoco that had been abandoned actually the work in this gas field with the enactment of the aforementioned law.[58]

The review of this case illustrates perfectly the economic competition of two sides of the Atlantic.[59] This case is a perfect example of the further failure of the unilateral attempt of the United States to impose extraterritorial economic sanctions without the participation of its European allies. With the practical pressures imposed by the European Union, finally the United States of America and Europe reached a compromise agreement in May 1998: in front of the European Union obligation to try to persuade Iran to abandon the access to weapons of mass destruction, the United States also canceled economic sanctions imposed in the form of the D'Amato law against European companies. This is the second example of the unsuccessful attempt of the United States to unilaterally impose its will on its partners across the Atlantic, which failed with the resistance from the European side.

As can be seen, the lack of political convergence between the two sides of the Atlantic in the late 80s and early 90s led eventually to the failure of effective sanctions of the United States against a number of countries, including Iran. However, the increased convergence in the past decade has increased practically the capacity of the effectiveness of the secondary sanctions from the United States and has led to creating a new process in the international economic relations.[60]

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[58] Francesco Giumelli, *The Success of Sanctions: Lessons Learned from the EU Experience* 69 (Farnham: Ashgate, 2013).

[59] The inclusion of acts performed outside the country indicates the widespread extent of internal rules of competition law which even includes the behavior of all foreigners. The United States is not the only country that seeks to exercise extraterritorially its competition law. It seems that the European Union is also moving towards the acceptance of a hypothesis near to the "theory of effect" as a basis for extraterritorial exercise of its competition law. For further study, *see* Bagheri 2007, at 279–285.

[60] Anyway, for many years, the performance of the United States has been a clear example of the exercise of jurisdiction on this basis. The United States has exercised its laws to be used in the fields of

In this regard, it should be noted that a kind of hierarchy can be seen in the policy of the WTO and the countermeasures that can be exercised by the states.[61] The countermeasures by the states and what is exercised by the private companies in the territory of the states should not affect the peremptory norms of international law such as the global environment and climate change. Any lack of attention of the states to these norms cannot be justified in any way and the states cannot escape the burden of this responsibility under their internal sovereignty.[62]

According to Art. 11 of these Regulations, "all legal entities established in the [European] community" have been subject to protection. What is remarkable in this respect is the mere attention to the criterion of being established in the territory of the European Union and disregarding the criteria that can be taken into consideration in the judicial precedent of many member states in the framework of the "control criterion." There is no doubt that such an extended criterion should be described as a function of the political circumstances of the 90s; however, it is evident that the historical tendency of the European Union and the legal structure of this regional organization will finally consider in the same conditions the maximum protection of European trading companies under the legal title of "European legal entities," although the insertion of some rigors in this area will be possible depending on the time bucket.

In Art. 2 of the Regulations, the conditions of protecting European trading companies against the extraterritorial measures of the United States have been considered in detail:

> When economic interests and/or the property of any person [legal or natural] [...] are affected directly or indirectly [...], the [legal] person should notify it to the Commission of European Union within thirty days of being informed.

In the case of trading companies, this task has specifically assigned to the directors, managers and other members of the Board of Directors.

competition, exports control, income taxes and provisions related to the securities exchange outside the territory of the country. Recently, the European community has decided based on the theory of effects and consequences to exercise the rules of its public law outside its territory. *See* Alan V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* 1–4 (Cambridge: Grotius, 1983).

61 The Director-General of the GATT, even before the adoption of Helms–Burton and D'Amato–Kennedy laws, had warned against the tendency of the United States of America towards unilateral acts, which is opposed to the multilateral system that the GATT and then the WTO are trying to encourage and stimulate it. These warnings were against retaliation unilateral and discriminatory measures that the United States of America had adopted according to sec. 301 of the Commercial Code (1974) or Art. 1302 of America's new law on trade (23 August 1988), which have been called sometimes "Cloud 301." We know that the rules of the international trade are moving towards the creation of a globally liberal and open system; a system which is based on the principles of freedom of trade, non-discrimination and reciprocity and therefore condemns any restrictions on the freedom of trade. The Helms–Burton law is clearly in conflict with these principles. *See* Stern 1996, at 71–72.

62 Rüdiger Wolfrum et al., *WTO: Trade in Services* 327–328 (Leiden; Boston: Brill, 2008).

However, it should be noted that the European Union support for trading companies referred to in the Regulations has not been a passive support. The Commission may obtain spontaneously information from the companies about the rate of the effect of the above-mentioned extraterritorial measures and in this case, the company is obliged to notify (para. 2 of Art. 2).

According to Art. 6 of the Regulations, each of the legal and natural persons – including trading companies established in the territory of the European Union – are entitled to receive compensation and even can claim their legal costs. The notable point is that in these Regulations, the practical way is to receive compensation without getting into difficulties of jurisdictional immunity: according to these Regulations, in the case of enforcement of extraterritorial laws, American companies affecting the sanctions and even their agents and mediators as the cause of damages are bound to compensate them. This solution, although seems at first glance certain of these Regulations, in fact, is a general solution and is applicable in the same conditions, regardless of the presence of the executive regulations on the part of the European Union. In this case, any European company can initiate proceedings in the courts of any of the EU member states base on the general rules of civil liability against a US company or its agents and mediators which have caused damage or harm to the company as a result of the implementation of the secondary sanctions of the United States.

The Brussels Convention[63] should be considered as the basis of the effectiveness of the decisions of the judicial authorities of the European Union, which has been adopted in connection with jurisdiction and enforcement of civil and commercial decisions. Accordingly, each of the American companies or their agents which caused losses to European companies can be prosecuted according to the second to sixth sections of the Title II of the Convention and each of the courts of the EU member states will be competent to handle and possibly seize and sell the property of the companies.

The above-mentioned solution seems remarkable in several respects:

Firstly in respect of the compensation for the damages to the European companies, which has been justified on the basis of the general rules of civil liability for the damages caused by the American operating companies; secondly, the elegance of getting round the jurisdictional immunities of US officials who don't actually help to compensate the damages to the European private parties unless they complicate a legal dispute and finally, documented use of the judicial capacities of the courts of the EU member states, which can find practically an operational and administrative form under the 1968 Brussels Convention and high volume of the trade between the European Union and the United States of America.

[63] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 15 J.O. Comm. Eur. (No. L 299) 32 (1972).

However, the measures of the European Union to support European companies are not only limited to the judicial capacity of the courts of the member states: two political actions have been anticipated according to Arts. 8 and 9 of these Regulations.

According to Art. 8, a committee composed of the representatives of the EU member states in Europe and a representative of the Commission will be formed. Based on the advisory opinion of the Committee, which is adopted by a majority of votes, the Commission takes some measures and suggests as a proposal to the Council. It should be noted that the Commission is not required to accept the opinion of the committee and can offer another opinion to the Council. Finally, the Council will comment with a specific majority on the Commission's proposal.

According to Art. 9, each member state can also embark on countermeasures to defend their economic interests against the given extraterritorial laws. Under this Article, the given measures must be effective, proportionate and dissuasive.

Although the above-mentioned Regulations has limited themselves only to the laws of the United States in 1996 about Iran, Cuba, Libya, it should not be doubted that the above model can be considered in similar situations in the future economic conflicts between two sides of the Atlantic.

Conclusion

As a result, we should acknowledge that the flexible and soft legal space which governs international economic law has inevitably caused the mere resorting to the general legal rules and regulations on the sovereignty of states to act less on behalf of victims of extraterritorial sanctions. Securities provided by the traditional implementation of international law and relying on the international public opinion had also not been able to change the status quo. Meantime, what is important is the attention to the delicacies of the socio-political realities of the today's world. If the mere legal weapon has clearly demonstrated its inefficiency to stop the economic invasion of powerful actors of the international community, a set of political, economic and legal approaches should be used to stop this process and emerging attacks, an approach which is doomed to failure without attention to the legal-economic means of the actors of the economy of today's world.

It seems that the only way to deal with this broad approach to sovereignty, which is applied by the United States in economics, is a careful attention to the balance of economic power in today's world. The observation of the delicate relations between the two sides of the Atlantic and the use of legal capacities of the European Union can be the most effective solution for the extraterritorial and sovereignty-escaping approach of the United States. For more explanation, the model of the performance of the European Union against the Helms–Burton law can be expressed. In 1996, following the enactment of the extraterritorial laws of the United States, which had imposed secondary sanctions against Cuba, Iran and Libya, the Council of the

European Union adopted a joint action base on the sec. V of the Treaty of European Union at the time,[64] which contained important considerations about the right of member states to adopt protecting measures to protect "the interests of natural and legal persons" – under the exceptional conditions. In addition, the Council adopted at the same time Regulations that are very important in terms of attention of the European Union Commission to the interests of the European trading companies.[65] In addition to the historical considerations, this importance is due to a pattern that is likely to be prosecuted in similar events by the European institutions.

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References

Ahmadi H. *Globalization: Ethnic Identity or National Identity*, 11 National Studies Quarterly (2002).

Bagheri M. *A Market-Based Economy and Private Law Shortcomings*, 19 Journal of Law and Politics Research (2006).

Bagheri M. *The Rights of the National Economy in the International Legal Order*, 23 Public Law Research Quarterly (2007).

Baldwin D.A. *The Power of Positive Sanctions*, 24(1) World Politics 19 (1971).

Blomeyer-Bartenstein H. *Due Diligence* in *Encyclopedia of Public International Law Vol. 10* (R. Bernhardt (ed.), Amsterdam: North Holland, 1987).

Calamita N.J. *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42(5) Vanderbilt Journal of Transnational Law 1393 (2009).

Dimitrovska M. *The Concept of International Responsibility of State in the International Public Law System*, 1(2) Journal of Liberty and International Affairs 8 (2015).

Dupont P.-E. *Countermeasures and Collective Security: The Case of the EU Sanctions against Iran*, 17 Journal of Conflict & Security Law 301 (2012).

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[64] Joint Action 96/668/CFSP of 22 November 1996 adopted by the Council on the basis of Articles J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29 November 1996, p. 7. *See also* Bernardo Cortese, *International Economic Sanctions as a Component of Public Policy for Conflict-of-Laws Purposes* in *Economic Sanctions in International* Law, at 720.

[65] Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29 November 1996, p. 1–6.

Fox G.H. & Roth B.R. *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).

Giardina A. *The Economic Sanctions of the United States against Iran and Libya and the GATT Security Exception* in *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of His 80th Birthday* (G. Hafner (ed.), The Hague: Kluwer Law International, 1998).

Jackson J.H. *Constitutional Treaties: Institutional Necessity and Challenge to International Foundaments* in *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (M. Cremona et al. (eds.), Leiden: Martinus Nijhoff, 2013).

Kaldor M. *Nationalism and Globalization*, 10(1/2) Nations and Nationalism 161 (2004).

Knox J.H. *A Presumption against Extrajurisdictionality*, 104(3) American Journal of International Law 351 (2010).

Lowe A.V. *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (Cambridge: Grotius, 1983).

Lowenfeld A.F. *International Economic Law* (Oxford: Oxford University Press, 2002).

Mirmohammadi D. *Globalization: Dimensions and Approaches*, 11 National Studies Quarterly (2002).

Restatement of the Law, the Foreign Relations Law of the United States Vol. 1 (St. Paul: American Law Institute, 1987).

Sabahi B. *The Role of Regional Organizations in the Implementation of Security Council Resolutions* (Tehran: Ayneh Asar, 2000).

Sanctions, Accountability and Governance in a Globalised World (J. Farrall & K. Rubenstein (eds.), Cambridge: Cambridge University Press, 2009).

Sellers M.N.S. *Economic Sanctions against Human Rights Violations* in *Economic Sanctions in International Law* (L. Picchio Forlati & L.-A. Sicilianos (eds.), Leiden: Martinus Nijhoff, 2004).

Stern B. *Striving for Universalizing the Law: Helms–Burton and D'Amato–Kennedy Law*, 20 International Journal of Law (1996).

Stuyt A.M. *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction* (Dordrecht: Springer, 1946).

Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy (D. Alland et al. (eds.), Leiden: Martinus Nijhoff, 2014).

Zamani S.G. & Mazaheri J. *Smart Sanctions of the Security Council in the Light of Resolution 1029: Protecting or Threatening Peace*, 44 Journal of International Law 145 (2010).

Ziaee S.Y. & Rashidi M. *Sanctions against Islamic Republic of Iran's Shipping from the Perspective of International Law*, 54 Journal of International Law 91 (2016).

Ziaee S.Y. *Extraterritorial Jurisdiction in International Investment Law*, 22 Law of Nations Quarterly 160 (2016).

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THE COURT OF JUSTICE OF THE EUROPEAN UNION AND INTERNATIONAL LEGAL ORDER

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The author discusses the relationship between two legal orders: international law and European Union (EU) law. The main provisions of this relationship have been established through the precedential practice of the Court of Justice of the European Union – the EU's main judicial body.

This kind of research seems important because of the gap in the theory of international law caused by the immutable dogma of the supremacy of international law. However, modern legal practice demonstrates a certain fragmentation of the international legal order because of the impact of the existence and development of regional supranational legal orders. The EU legal order, with its own special nature (sui generis), is undoubtedly one of the most developed among them.

The Court of Justice of the European Union performs a crucial role in the EU legal system concerning application and interpretation of EU law. It provides a uniform interpretation of this law for the purposes of development of supranational integration. In this context the Court of Justice the European Union establishes the status of European law and its relationship with the national legal systems and international law. The Court acts as protector of the EU legal order against the influence of other legal orders.

The Court's precedential practice reveals EU law's tendency towards its constitutionalization and the development of its autonomy. The latest practice indicates the Court's powers to review the EU institutions' acts in relation to the implementation of UN Security Council resolutions. This proves the Court's ability to establish indirect control even over UN acts.

Keywords: Court of Justice of the European Union; hierarchy of international law norms; European Union; EU law constitutionalization.

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Introduction

The current status of European Union (hereinafter – EU) law theory confirms that the issues of the relationship between the EU legal order and the international legal order, as well as the issues of the Court of Justice of the European Union (hereinafter – CJEU, Court) practice concerning this problem, are clearly undervalued and have not been researched yet because of the immutable dogma concerning the supremacy of international law.

Fragmentation has recently become a clear and ever stronger tendency within current international law. This was especially evident with the emergence and further development of a powerful new entity, the EU, which has established its own legal system dissimilar to both the international legal order and the national legal order. The CJEU has had a significant role in the development of EU law's autonomous status. It is the CJEU that occupies the central position in the application and interpretation of EU law. The Court provides a uniform interpretation of this law to promote integration. The CJEU established the status of EU law and its relationship with national and international law. In this respect, there arises an urgent need to analyze the new stage of the EU court practice development concerning these issues. Systematization of the CJEU practice enables to analyze the basic trends in relations between multiple levels of legal orders, although it is too early to expect a solution to all problem areas.

1. Constitutionalization of EU Law

The first CJEU judgment that defined the status of the Communities' new legal system was the decision in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*[1] (hereinafter – *van Gend & Loos v. Netherlands*), which declared:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals.

This decision became fundamental in the subsequent practice of the Court. It should be noted that though the Court defined the law of the Community as a new type of legal order, but nevertheless – as a part of international legal order. At that stage of development of the integration the Court paid attention to the separation of the European legal order from legal orders of the members states and to the establishment of its absolute supremacy, while not emphasizing its autonomy from the international legal order.

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[1] Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1.

Later on, with the speed of integration increasing, the Court began developing the concept of this legal order increasing autonomy from international law, it developed its *sui generis* nature. As early as 1964, in its decision in *Costa v. E.N.E.L.*,[2] the Court stated:

> As opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order which was integrated with the national order of the member-States the moment the Treaty came into force; as such, it is binding upon them.

Thus, CJEU practice emphasizes the uniqueness of the nature of the integrational law and its difference from both national legal orders and international legal order. At the present stage of EU development, the Court notes that EU Founding Treaties (hereinafter – Founding Treaties) constitute a "basic constitutional charter based on the rule of law"[3] or even an "internal constitution."[4]

It is obvious that, with the deepening of the European integration, the Court started constitutionalizing EU law which is understood as a process in which the Founding Treaties evolved from a set of arrangements, only binding for the member states, to the Founding Treaties which provide a basis for a unique legal regime. This regime grants rights and assigns duties to all public persons and individuals in on the territory of the EU because norms of the Founding Treaties have a direct effect and absolute supremacy, and they form a peculiar integrational legal system. Thus, this legal regime acquired the features of a constitution.

When speaking about the CJEU's influence on the EU legal order, the key thing to mention is the development of EU law principles that enabled it to acquire the features of a constitution. The said principles also explain the uniqueness of EU law and its legal order and its distinctiveness from all other legal systems. These issues are extremely important when it comes to dealing with the problem of relations between international and EU law.

Alongside the EU legal system, there exist the member states' national legal systems. For this reason, the CJEU formulated and rationalized the principles of the supremacy of European Community (hereinafter – Community) law over the member states' national law and approved it as the highest principle that regulates the relations between the Community law and the national legal systems. With the entering into force of the Lisbon Treaty, this principle became applicable to EU law. Furthermore, it is important to note that all member states, while drafting the Lisbon

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[2] Case 6/64 *Flamino Costa v. E.N.E.L.*, [1964] E.C.R. 585.

[3] Case 294/83 *Parti écologiste "Les Verts" v. European Parliament*, [1986] E.C.R. 1339.

[4] Opinion 1/76 *Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels*, [1977] E.C.R. 741.

Treaty, signed Declaration 17 on the highest legal validity, where the principle of the supremacy of EU law over the laws the member states became entrenched. The supremacy principle was embodied in the Declaration exactly in the wording that had been formulated in CJEU practice. This fact clearly emphasizes the CJEU's role in the development of supranational law.

The principle of the supremacy of Community law was initially absent in the Founding Treaties and that was a problem because the legal systems of some of member states lacked any provision for the supremacy of European or international law and, therefore, they could theoretically cancel, for example, some provisions of the Founding Treaties by adopting a later national act. In response to this threat, in 1964, the Court adopted the decision in *Costa v. E.N.E.L.*, already mentioned above, which stated:

> The transfer by the states from their domestic legal system to the Community legal system of their rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[5]

The subsequent CJEU practice resulted in the introduction of fundamental supranational law supremacy principle into permanent use by the member states as the one based on the nature of the Community law. In the decision in *Amministrazione delle Finanze v. Simmenthal SpA*[6] (hereinafter – *Simmental*), the Court once again, but in a bolder manner, established the supremacy of Community law. The decision stated:

> Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but… also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

The Court established that incompatibility between the national law and the Community law has to lead not only to the automatic non-application of the former, but should also prevent the adoption of any new national legal norms which do not meet the standards of supranational law. Such conclusions, undoubtedly, have

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[5] *Flamino Costa v. E.N.E.L.*, *supra* note 2.

[6] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] E.C.R. 629.

promoted the efficiency of the entire EU legal system and helped the member states fulfill their obligations within the European Union.

It is very important that the decision in *Simmental* established the supremacy of integrational law, even over the member states' constitutions. The CJEU once again emphasized that no national legal act can be opposed to the Community law, which is autonomous in its nature. The principle of the supremacy of Community law also applies to the national constitutions, otherwise the legal basis of integrational law and legal order could be called into question. Dealing with the Community law, the Court did not limit it to the Founding Treaties only, but also includes in it the secondary law, i.e. institutional acts or agreements with third parties, irrespective of when they were signed: before or after the national regulation adoption. For example, in 1996, the Belgian Council of State (the Supreme Administrative Court of Belgium) recognized the supremacy of the Community act over the national Constitution. The same occurred in Austria in 1999.

The CJEU practice has developed a norm under which the supremacy of the EU law does not mean automatic cancellation of the national norms which do not correspond to EU law, such norms just cannot be applied (they are null and void). The reason is that the CJEU has no powers to interpret or repeal the member states' national legislation and, consequently, the duty to cancel such norms is assigned to the state which adopted them. It is worth mentioning that, despite the fact that it was an innovative and unknown principle, all EU member states have now recognized the supremacy of Community law. Nowadays it is generally accepted despite attempts to protect national autonomy.

The next fundamental tenet developed by the CJEU is the EU law direct effect principle that was initially related to the Community law and was then extended to EU law. This principle means that this law applies to the entire territory of the EU and all its subjects, i.e., member states and EU institutions, and, most importantly, it grants rights to individuals and legal entities without any implementation on the national level. It is well-known that the direct effect of norms is not inherent in public international law because, as was decided by the UN International Court of Justice, the parties to international treaties can decide to allocate some of their provisions with direct effect,[7] but such instances are the exceptions to the rule. In integrational European law, this provision became a fundamental principle and demonstrates the uniqueness of the EU law system.

The principle of the direct effect of EU law is absent in the Founding Treaties (Art. 288 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) states that only regulations have a direct effect) and its existence is the CJEU's

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[7] Permanent Court of International Justice. International Court of Justice Permanent Court of Arbitration. Compétence Des Tribunaux De Dantzig (Réclamations Pécuniaires Des Fonctionnaires Ferroviaries Dantzikois Passés an Service Polonais Contre l'Administration Polonaise Des Chemins De Fer) [Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, against the Polish Railways Administration)] (Leyde: Société d'éditions A.W. Sijthoff, 1928).

unquestionable achievement. The Court's first rationalization of the direct effect principle was fixed in the decision in *van Gend & Loos v. Netherlands*:

> Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to center upon them rights which come [*sic*] part of their national heritage.[8]

The case concerned a direct effect of the Founding Treaty provision, but did not have any effect on the application of secondary law. The subsequent CJEU practice in the 1970s resulted in a broad interpretation of this principle to promote EU law efficiency and extended it to the acts of the institutions which had initially not been allocated the direct effect status provided they met a number of requirements. Such requirements provide that: the norm granting the rights shall be obvious and unambiguous (i.e. having a precise nature and clear assignment), it shall be unconditional and its application shall not depend on the adoption of any other EU or member states' norms. But the Court added that it was necessary to treat the precise nature criterion with due care as the need to explain the norm by judicial interpretation cannot prevent its direct effect.

Therefore, the direct effect principle can be extended not only to the regulations and certain provisions of the Founding Treaties but, in part, to other EU acts as well. As regards the direct effect of directives, the CJEU specified that a directive can have a direct effect only if the state did not fulfill the obligation to implement it and only after the end of the period established for the implementation of the directive into the national legal orders. If a member state neglects the directive implementation obligation within the established period, then, according to the CJEU, it is possible to refer to a provision of such directive before a domestic court, despite the rules of the national law.[9] This is another indication of the uniqueness of the EU legal order since individuals cannot be deprived of their rights protection mechanisms only because the member state did not fulfill its obligation on directive implementation. This is the confirmation of the fact that the EU is not a mere association of states, but a union of European peoples. It is possible to state with complete confidence that the EU legal mechanisms are orientated on individuals and that is not inherent to international law and its legal order.

It should be noted that, even with a considerable amount of CJEU judgments concerning the direct effect of directives, this issue has caused a set of doctrinal discussions, especially regarding the horizontal effect of directives (meaning that individuals cannot refer to the provisions of the directive in their relations with other individuals, but only concerning their relations with the state, i.e., the direct effect is used only in vertical relations because of the directives being oriented towards the

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8 *Van Gend & Loos v. Netherlands*, *supra* note 1.

9 Case 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt*, [1982] E.C.R. 53.

states and not towards individuals). There is no doubt that the extension of the direct effect principle to the directives is probably an exception as otherwise the obligation of the states to carry out the measures to implement the directives would be nullified.

The principle of the direct effect of EU law norms also means that, except when granting rights directly to individuals, the EU's bodies' acts do not need the member states' parliaments' approval. These acts can oblige member states to carry out certain actions and domestic courts to apply these acts irrespective of any contradictions with the national laws. The value of the direct effect principle is that EU law can act even when the state has not fulfilled its obligation on EU law implementation, as was confirmed in *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*[10] (hereinafter – *Francovich*). This principle establishes the most profitable interaction between the member states' national and supranational European law which helps to achieve the EU goals.

The principles of EU law supremacy and its direct effect may be viewed as the two fundamental pillars of the entire EU legal system. By allotting the supremacy and direct effect to EU law, the CJEU in fact began the process of integrational law constitutionalization. At the same time, it is important to emphasize that EU law constitutionalization enabled the use of its norms – primary or secondary – directly in the member states' national legal orders, as well as by individuals. Unprecedentedly for the international community, EU law constitutionalization resulted in the domestic courts' effective EU law application (sometimes even in the absence of the relevant national norms), and this, in turn, changed the national court practice which started adapting itself to EU law basic principles. Moreover, individuals began playing an active role in this law implementation within the framework of the national legal systems, which is extremely unusual for regular international organizations.

Another important aspect of EU law constitutionalization is the doctrine of responsibility for violations of EU law reflected in the *Francovich* decision.[11] This doctrine is based on the *ubi jus ibi remedium* principle according to which the state shall pay the damages caused to individuals because of an EU law violation. In such cases, domestic courts can rule that the state must pay compensation for harm done to individuals as a result of a violation of EU law. This doctrine is an important element of the efficiency of the EU legal order since not all of its norms have a direct effect, so individuals in domestic courts cannot use all of them for the protection of their rights. For example, directives have no direct horizontal effect, therefore, the doctrine of responsibility for EU law violation (including the directives provisions) is extremely important for providing individuals with effective protection mechanisms.

In the context of constitutionalization of EU law, in a number of its decisions, the CJEU formulated three conditions required for responsibility for a violation of EU

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[10] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, [1991] E.C.R. I-05357.

[11] *Id.*

law: 1) EU acts shall grant rights to individuals; 2) the violation of these rights by the state shall be rather serious; 3) there shall be a direct link between the losses and violation.[12] At the same time, what is extremely important is that the responsibility falls on the state in case of any EU norm violations, irrespective of whether it is a direct action norm or not.

The Court adopted a unitary approach concerning the state-violator, i.e., the responsibility is placed on the state irrespective of the branch of power that committed the violations. The Court's interpretation of executive power is broad since it includes both the traditional departments of central power and municipal authorities, and constitutionally independent bodies to which the obligation to keep public order and safety is assigned, etc.[13]

As regards the second condition (the seriousness of a violation by a member state), serious violations include failure to apply an EU act, a delay in its implementation, and interpretation of national law contrary to EU law or CJEU case law. The degree of seriousness issue has been ascribed to the domestic courts' discretion, though some researchers indicate the need for the CJEU's centralized control over national courts in this sphere. The CJEU has not offered any consolidated provisions in this respect, but many such provisions are contained in CJEU practice. For example, if the state attempted to implement the act within the terms indicated in it, then this case does not meet the seriousness requirement, and the state will not be liable for the damages inflicted on the individuals. It happened in *The Queen v. H.M. Treasury, ex parte British Telecommunications plc.*,[14] which concerned Directive 90/351 on the procedure for acquisition of the telecommunications sector organization. This Directive was implemented by Great Britain on time, but in the wrong manner. The CJEU came to the conclusion that, because the Directive's formulation was not sufficiently clear, its interpretation in the process of its implementation could not be regarded as a violation serious enough to justify the state's compensation of British Telecommunications.

The compensation shall generally correspond to the loss which was caused by the state's misconduct. In the absence of supranational norms concerning the amount of damage compensation by member states, it is necessary to develop precise criteria for the determination of those amounts. Such criteria shall be as favorable as those concerning similar claims based on national norms and shall correspond to the principles of equivalence and efficiency.

The CJEU noted that the states' responsibility doctrine and their obligations to compensate losses to individuals for their violations despite the fact that it is not mentioned in the Founding Treaties, constitute an integral part of them because it guarantees the exercise of individuals' rights. The Court thereby declared the functional integrity of the rights and the means of their protection.

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12 Case 103/88 *Fratelli Costanzo SpA v. Comune di Milano*, [1989] E.C.R. 1839.

13 Case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] E.C.R. 1651.

14 Case C-392/93 *The Queen v. H.M. Treasury, ex parte British Telecommunications plc.*, [1996] E.C.R. I-01631.

Thanks to the developed concepts of EU law supremacy and its direct effect, as well as the possibility of holding member states responsible in case of non-compliance with the integration law (through the CJEU's centralized procedure or the domestic courts' decentralized system), the process of the EU law constitutionalization becomes more effective. The CJEU thereby maintains the main idea of Europe, a strong union between the peoples which is, in many respects, provided for by authority of supranational law.

2. The Position of International Law in the Hierarchy of Sources of EU Law

Taking into account the development and uniqueness of EU law, there naturally arises the issue of its relationship with international law, which, at the current stage of the European Union's development, is extremely important.

The Court first expressed its opinion on the position of international law in EU law in its judgment in the *Haegeman v. Belgium* case,[15] stating that international agreements ratified by Community institutions are part of the Community law (now EU law). The CJEU is responsible for a unified interpretation of these agreements and the interpretation of EU law in light thereof in order to effectively implement the provisions of these international agreements.[16]

The Founding Treaties, in turn, establish that the EU and its institutions facilitate the strict observance of international law, including respect for the principles of the UN Charter (Arts. 3(5) and 21(1) of the Treaty on European Union (hereinafter – TEU)). The CJEU is obliged to comply with international law in its practice and in its control over other EU institutions but, formally, none of the Founding Treaties' provisions discloses the place that international law occupies in EU law hierarchy.

2.1. International Agreements to Which the EU is a Party

In the context of this research, there is an important problem regarding the place international agreements occupy in the hierarchy of sources of EU law. As regards the international agreements to which the European Union is a party, Art. 216(2) of the TFEU includes them in sources of EU law which are binding on EU institutions and member states. Taking into account the procedure for granting consent to such agreements, they are lower than the Founding Treaties but higher than secondary EU legislation. This is proven by the fact that, in the negotiation and conclusion of such international agreements, a member state, the European Parliament (hereinafter – Parliament), the European Council (hereinafter – Council) or the European Commission (hereinafter – Commission) may obtain the opinion

[15] Case 181/73 *R. & V. Haegeman v. Belgian State*, [1974] E.C.R. 00449.

[16] Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, [1982] E.C.R. 03641.

of the Court as to whether an agreement is compatible with the Founding Treaties (Art. 218(11) of the TFEU). Where the opinion of the Court is that it is not compatible, the agreement envisaged may not enter into force unless it is amended or the Founding Treaties are revised. Otherwise it will be considered that the Founding Treaties have primacy over international agreements entered into by the EU.

It is interesting that the practice of using TFEU Art. 218(11) confirms that EU institutions rarely choose the option of amending the Founding Treaties, and usually make changes to international agreements. This fact also indirectly indicates the appropriate hierarchy of these sources of law. In this way the respect to EU law basics, the so-called *acquis communautaire*, is confirmed. This seems logical since the Founding Treaties have a different, more constitutional character, than typical international agreements because the majority of the Founding Treaties' norms have a direct effect and concern the rights of individuals. Therefore, because of their characteristics, they cannot be changed frequently. These differences were highlighted by the Court itself in its *Opinion on an Agreement between the Community and the Countries Forming the European Free Trade Association*.[17] The Court pointed out that the agreement on the European Economic Area is a classic international agreement that does not involve the transfer of the member states' sovereign rights to intergovernmental bodies. In contrast, the Founding Treaties, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of the Community based on the rule of law.

There are only a few cases where the Founding Treaties were amended because of incompatibilities with international agreements. One example is the case of the EU's accession to the World Trade Organization and to the Convention for the Protection of Human Rights and Fundamental Freedoms (when the TFEU was amended by Protocol (No. 8) relating to Art. 6(2) of the TEU on the accession to the Convention for the Protection of Human Rights and Fundamental Freedoms).[18]

Indirectly, Art. 351 of the TFEU also indicates the primacy of the Founding Treaties over international agreements. It stipulates that, to the extent that such agreements are not compatible with the Founding Treaties, the member state or states concerned shall take all appropriate steps to eliminate the incompatibilities established. This provision allows the Court to effectively protect the EU's legal order from the undesirable effects of international law, thereby strengthening its autonomy. Because of this, there is no doubt that Art. 351 of the TFEU has constitutional significance.

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[17] Opinion 1/91 delivered pursuant to the second subparagraph of Article 228(1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] E.C.R. I-06079.

[18] Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228(6) of the EC Treaty, [1994] E.C.R. I-05267; Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] E.C.R. I-01759.

It should be noted that, in practice, Art. 351 of the TFEU has not often been used[19] but the CJEU's practice set certain trends. This practice shows that, in cases where this article applies, the Court is inclined to unquestioningly protect EU law. The doctrine even witnessed the emergence of the view that the CJEU began formulating a new approach to the assessment of agreements concluded by member states with third countries.[20]

If, previously, the Court could recognize an international agreement concluded by member states as incompatible with EU law, the new approach shows that it can do so even in the case of "hypothetical incompatibility." Examples of this can be found in the decisions in *Commission v. Republic of Austria*,[21] *Commission v. Kingdom of Sweden*,[22] *Commission v. Republic of Finland*.[23] The cases concerned a large number of bilateral investment agreements of Austria, Sweden and Finland, which had been concluded before their accession to the EU. There were no actual contradictions between these agreements and the Founding Treaties but, in the Commission's and the CJEU's opinion, under certain conditions, contradictions may occur in the future. Therefore, according to Arts. 64(2), 66 and 75(1) of the TFEU (which have similar wording to that of Arts. 57(2), 59 and 60(1) of the TEU), the Parliament and the Council may adopt measures on the movement of capital to or from third countries involving direct investment, including investments in real estate, concerning the establishment, provision of financial services or the admission of securities to capital markets. Bilateral investment agreements, in turn, included provisions on the freedom of payment transfers related to investments, without delay and in freely convertible currency. According to the CJEU, this constituted potential or hypothetical incompatibility with the Founding Treaties, despite the fact that the Parliament and the Council have never implemented its powers in that sphere.

The Court focused on whether the potential conflicts could be a sufficient ground for recognizing the agreements as incompatible with EU law and the Court concluded

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19 Cases C-812/79 *Attorney-General v. Burgoa*, [1980] E.C.R. 02787; C-84/98 *Commission v. Portugal*, [2000] E.C.R. I-05215; C-62/98 *Commission v. Portugal*, [2000] E.C.R. I-05171; C-307/99 *OFT Fruchthandelsgesellschaft*, [2001] E.C.R. I-03159; T-2/99 *T. Port v. Council*, [2001] E.C.R. II-02093; T-3/99 *Banatrading v. Council*, [2001] E.C.R. II-02123; C-203/03 *Commission v. Austria*, [2005] E.C.R. I-00935; C-216/01 *Budvar*, [2003] E.C.R. I-13617; Joined cases C-466, 467, 468, 469, 471, 472, 475 and 476/98 *Commission v. UK, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria and Germany (Open skies)*, [2002] E.C.R. I-09519.

20 *See* Nikolaos Lavranos, *Protecting European Law from International Law*, 15(2) European Foreign Affairs Review 265 (2010); Исполинов А.С., Ануфриева А.А. Право ЕС и международное право: последствия нового подхода Суда ЕС к договорам, заключенным государствами-членами с третьими странами, 3(34) Евразийский юридический журнал 66 (2011) [Alexey S. Ispolinov, Alexandra A. Anufrieva, *The EU Law and International Law: Consequences of the EU Court's New Approach to Agreements, Concluded by Member States with the Third States*, 3(34) Eurasian Law Journal 66 (2011)]; Allan Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, 34(5) Fordham International Law Journal 1304 (2011).

21 Case C-205/06 *Commission v. Republic of Austria*, [2009] E.C.R. I-01301.

22 Case C-249/06 *Commission v. Kingdom of Sweden*, [2009] E.C.R. I-01335.

23 Case C-118/07 *Commission v. Republic of Finland*, [2009] E.C.R. I-10889.

that, in order to ensure the effectiveness of the provisions of Arts. 64(2), 66 and 75(1) of the TFEU, the Council and Parliament should be able to immediately apply the measures that restrict the movement of capital, and investment agreements may prevent this. Therefore, Art. 351 of the TFEU can be used for the recognition of investment agreements as being in conflict with EU law. On the basis of the Court's judgments, three respondent states were found to have violated EU law.[24] Researchers point out that the CJEU received preventive powers to preserve the unity and uniform application of EU law. Other researchers have reacted negatively to the Court's position, because, in their opinion, it violates the principle of proportionality.[25]

In any case, Art. 351(2) of the TFEU establishes the obligation of member states to take appropriate measures to remove all incompatibilities with the Founding Treaties in such agreements. Member states shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. Any action can be recognized as appropriate provided it eliminates the existing contradictions, including the denunciation of international agreements by the member state.

The CJEU indicates that if the member states do not take appropriate steps, they lose the opportunity to refer to Art. 351(1) of the TFEU, which states that the Founding Treaties do not affect their rights and obligations under the agreements concluded before those states joined the EU.[26]

Special attention should be paid to the point that, as acts of a constitutional nature, the Founding Treaties can be only interpreted by the CJEU. This means that the existence of other judicial mechanisms established by international agreements adopted by the EU cannot influence this monopoly. Moreover, Art. 344 of the TFEU is intended to protect this monopoly:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

This Article was first applied in the *MOX Plant* case.[27] The main issues of the case concerned the following. Ireland had commenced proceedings against the United Kingdom in the Arbitral Tribunal provided for by the United Nations Convention on the Law of the Sea to settle a dispute relating to the MOX nuclear fuels reprocessing plant at Sellafield on the coast of the Irish Sea. The Court ruled that Ireland had

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[24] For more detail about the procedure of enforcement actions against member states, *see* Комарова Т.В. Припинення невиконання зобов'язання державами – членами ЄС, 91 Проблеми законності 173 (2007) [Tetyana V. Komarova, *Cessation of Failure to Fulfill Obligations by the EU Member States*, 91 Problems of Legality 173 (2007)].

[25] Lavranos 2010, at 280.

[26] *Commission v. Austria*, *supra* note 19.

[27] Case C-459/03 *Commission v. Ireland*, [2006] E.C.R. I-04635.

disregarded its exclusive jurisdiction. Ireland breached the treaty by failing to respect the exclusive jurisdiction of the Court to resolve disputes concerning the interpretation and application of the Community law provisions. Moreover, the Court held that Ireland had breached ex-Art. 10 of the Treaty by bringing proceedings in the Arbitral Tribunal without having first informed and consulted the competent Community institutions.

Another example is CJEU Opinion 1/09[28] on the establishment of the European Patent Court, in which the Court noted that an international agreement on the appropriate procedure for establishing such court would contradict EU law because the newly created court will have jurisdiction to interpret not only the agreement but also the provisions of EU law concerning European patents. In addition, the European Patent Court could take the power of preliminary references from the member states' national courts and tribunals to the CJEU in matters of patent law, and this directly affects the rights of individuals. The CJEU's preliminary ruling procedure is the achievement of the European Union and is a system of relations between the judicial systems of two levels, which ensures a uniform interpretation and proper application of EU law. Changing these relationships can affect the nature of EU law. But the Patent Court decision will not be subject to appeal procedures in the CJEU and this, in the Court's opinion, is also a threat to the rights of individuals. Therefore, the CJEU decided that the Agreement on the establishment of the European Patent Court is contrary to the Founding Treaties of the EU.

A classic and quite illustrative example of such situation is the long process of the accession of the EU to the ECHR. In its second Opinion 2/13 on EU accession to the ECHR, the CJEU[29] noted that the draft agreement on the accession contradicts Art. 344 of the TFEU, since the CJEU has exclusive jurisdiction over any dispute between member states and the EU concerning the compliance of the Convention. According to the draft agreement, there is a possibility that the EU or member states may complain to the ECHR concerning the alleged violations of the Convention by an EU member state or by the EU. This possibility is completely contrary to the provisions of the TFEU in the context of EU law. The project could insert the exclusion from the ECHR's jurisdiction of disputes between the member states or between the latter and the EU itself concerning the application of the ECHR in the context of EU law, but these provisions were not included in it.

In addition, the CJEU noted that Protocol 16 of the ECHR, signed on 2 October 2013 (but not yet in force), allows higher courts and tribunals of the member states

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[28] Opinion 1/09 delivered pursuant to Article 218(11) TFEU – Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties, [2011] E.C.R. I-01137.

[29] Opinion 2/13 pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, 18 December 2014 (Jun. 25, 2017), available at http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002&lang1=en&type=TXT&ancre=.

to ask the European Court of Human Rights (hereinafter – ECtHR) to provide advisory opinions on the fundamental issues relating to the interpretation or exercising the rights and freedoms guaranteed by the ECHR and its Protocols. This situation could affect the autonomy and efficiency of the CJEU's preliminary rulings procedure in cases when the rights protected by the EU Charter on Fundamental Rights correspond to the rights provided for by the ECHR.

Therefore, the signing of the Agreement did not take place because of its incompatibility with integrational law, including the dispute settlement procedures. It was this opinion that caused the indignation of many researchers.[30] Their position is very tough because of the fact that the CJEU ignored the strengthening of human rights and justified this with rather dubious concerns about the autonomy of EU law. They accused the Court of "selfish concern" with preserving its own power.[31] However, it should be noted that it was the uniform interpretation of EU law that allowed the EU to achieve its level of development.

The Court's practice also provides examples of international agreements already in force being recognized void when member states or other institutions challenged the acts of the institutions that provided consent to them. For example, by the decision on joint cases C-317/04, C-318/04[32] the CJEU annulled the Council decision on the Community's agreement on the processing and transfer of personal data between the Community and the United States because the Community does not have competence in that sphere. This violates the redistribution of competence between the Community and the member states established in the Founding Treaties. A similarly well-known case is the "banana decision" regarding the cancellation of the results of the Uruguay Round.[33]

Though cancellation by the EU of the implementation of international agreements may look like a violation of international obligations, the CJEU does respect international law and the *pacta sunt servanda* principle. In its decision on joint cases C-317/04 and C-318/04, the CJEU pointed out that, in light of the fact that international obligations have already arisen for the EU under the international agreement and the fact that the EU considers itself a *bona fide* subject of international law, it made the Council decision cease to apply within ninety days of its termination in order to avoid serious losses of contractors due to the termination of the agreement. The CJEU gave such term to parties to reach a new agreement. Or, if a member state is a party to a multilateral Convention which is contrary to EU law, the state must

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30 Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU Law Analysis, 18 December 2014 (Jun. 25, 2017), available at http://eulawanalysis.blogspot.ru/2014/12/the-cjeu-and-eus-accession-to-echr.html.

31 Christoph Krenn, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13*, 16(1) German Law Journal 147 (2015).

32 Joined cases C-317/04 and C-318/04 *Parliament v. Council and Parliament v. Commission*, [2006] E.C.R. I-04721.

33 Case C-122/95 *Germany v. Council*, [1998] E.C.R. I-00973.

denounce it in accordance with Art. 351 of the TFEU, but if the Convention provides for certain procedures of denunciation or withdrawal (e.g., every 10 years), the state must respect and adhere to these procedures.[34]

All the above cases are related to the collisions between international agreements and primary EU law. As for secondary law, the position of the CJEU is univocal – the primacy of international law.[35] The Court stressed that the principle of good faith is a principle of customary international law, the existence of which has been repeatedly declared by the UN International Court of Justice and which is codified in Art. 18 of the Vienna Convention on Law of Treaties[36] and that is why such principle is binding on the EU.

2.2. International Agreements to Which the EU is Not a Party

Special attention should be paid to the issues concerning the legal power of international agreements to which the EU is not a party. The CJEU demonstrates respect to international law in cases where all member states are parties to an international agreement but the EU itself is not. In *Intertanko et al. v. Secretary of State for Transport*[37] the Court took into account the fact that all member states, without exception, are parties to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), and this Convention is also mentioned in the EU Directive on pollution from ships. That is why the CJEU decided to use the Convention for the interpretation of EU law in its light. Two principles formed the legal basis of such use: a general principle of good faith and the principle of sincere cooperation, indicated in Art. 4(3) of the TEU:

> Pursuant to the principle of sincere cooperation, the European Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Therefore, the CJEU used the provisions of MARPOL 73/78 in its interpretation of the EU Directive. This should not be confused with giving direct effect to the rules of MARPOL 73/78 because the Court specifically only referred to "the opportunity to take it into consideration."

The CJEU has treated the possibility of using international agreements to which the EU is not a party with care and applies them only when all member states are parties to the agreement. Let us take, for example, at the decision in *Commune*

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[34] *Commission v. Austria*, *supra* note 19.

[35] Cases C-61/94 *Commission v. Germany*, [1996] E.C.R. I-03989; C-311/04 *Algemene Scheeps Agentuur Dordreht BV v. Inspecteur der Belastingdienst*, [2006] E.C.R. I-00609; C-344/04 *The Queen ex parte IATA and ELFAA v. Department of Transport*, [2006] E.C.R. I-00403.

[36] Case T-115/94 *Opel Austria v. Council*, [1997] E.C.R. II-00039, paras. 90, 91.

[37] Case C-308/06 *Intertanko et al. v. Secretary of State for Transport*, [2009] E.C.R. I-04057.

de Mesquer v. Total France SA and Total International Ltd.,[38] which concerned the interpretation of the Community Directive on Waste. In this case, an incident with a tanker resulted in an oil spill which caused the pollution of the coast of France. The question arose regarding the use of the International Convention on Civil Liability for Oil Pollution Damage, to which the majority of the EU member states, but not the European Union itself, are parties. The Court did not use the provisions of the Convention because the Convention is not binding on all member states and, therefore, logically its use would violate the principle of good faith. In addition, the Community Directive on Waste does not mention this international source, so it does not enter into the legal system of the EU.

Returning to the aforementioned possibility of giving direct effect to the norms of international agreements, the Court's practice in this regard is also interesting in the light of our research topic. However, such practice applies to agreements concluded directly by the EU. In EU law, this issue is of particular importance because individuals are its direct actors. The decisive case regarding this issue was *Meryem Demirel v. Stadt Schwäbisch Gmünd*,[39] where the Court ruled that the provisions of international agreements concluded by the Community can have a direct effect.

The process of drafting an agreement, its nature and purpose should be taken into account. The direct effect of such an agreement may be present if it includes clear and specific obligations which do not require additional approval decisions or additional measures to be taken for its implementation.[40] So the criteria for the direct effect of international agreement norms are similar to those that apply to EU law. The rules must be clear, precise and unconditional. Therefore, the Court ruled that the rules of the Convention on the Law of the Sea had not passed this test, and that, therefore, they cannot have a direct effect on the legal order of the EU.[41] Having analyzed the Convention provisions, the Court concluded that individuals can be granted some rights on its basis only after specific steps made by the member states. For example, individuals can take advantage of the freedom of navigation, but only if their ship is flying the flag of a state. It is the state that establishes the conditions for granting its nationality to ships, for their entry into its register of ships and for flying its flag. This intermediate link, based on the national legislation of individual states, excludes the existence of a direct effect of the Convention norms.

Under these criteria, it is clear that it is more difficult to speak about the direct effect of international customary law than that of international agreements, since the former is often less specific than agreements. That is why it is very difficult to imagine individuals' direct application of international customary law.

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38 Case C-188/07 *Commune de Mesquer v. Total France SA and Total International Ltd.*, [2008] E.C.R. I-04501.

39 Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd*, [1987] E.C.R. I-03719.

40 *Id.*

41 *Intertanko et al. v. Secretary of State for Transport*, *supra* note 37.

It is worth mentioning some situations where the Founding Treaties contain a reference to other international agreements to which the EU is not a party. Art. 52(3) of the Charter of Fundamental Rights of the EU (hereinafter – Charter) states:

> In so far as this Charter contains rights which correspond to the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Indeed, in the late 1960s, the Court of Justice underlined that the protection of fundamental human rights is a constant concern of the Communities. Since then, the Court has repeatedly referred to the ECHR, stressing that it is of particular importance in determining the general principles of EU human rights law.[42] Since the 1990s, when it can be confidently said that the Communities got engaged not in purely economic issues but started effectively dealing with human rights, the Court began using the practice of the ECtHR. The Founding Treaties show that the ECHR is the document that inspired the EU's concern for human rights. Art. 6(3) of the TEU states that fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the member states, shall constitute the general principles of the European Union's law.

This does not mean that direct effect is given to ECHR norms, because Art. 52(3) of the Charter establishes the possibility of the European Union providing more extensive protection of rights than the ECHR does. Incidentally, according to the research, the CJEU's interpretation of rights and freedoms sometimes differs from that of the ECtHR. The areas in which these divergences can be seen are: the Common European Asylum System based on the Dublin Regulation; EU practice in using the European arrest warrant, which is claimed as significantly divergent from the standard ECtHR practice on the application of Arts. 3 and 6 of the ECHR, and EU anti-monopoly practice, with its extremely high fines and the sometimes unjustified extensive powers of the European Commission to investigate violations and impose of fines.[43]

Art. 78(1) of the TFEU provides that a common policy on asylum must comply with the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol and other agreements in this area. Accordingly, the EU Qualification Directive (Directive 2011/95/EU), which creates a single system for asylum in member states, specifies and develops the provisions of the aforementioned international acts. In

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[42] Cases 29/69 *Erich Stauder v. City of Ulm – Sozialamt*, [1969] E.C.R. 00419; 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] E.C.R. 01125.

[43] Исполинов А.С. Практика ЕСПЧ в отношении Европейского Союза: некоторые уроки для ЕврАзЭС, 3 Журнал зарубежного законодательства и сравнительного правоведения 108, 112–114 (2012) [Alexey S. Ispolinov, *The ECtHR Practice Concerning the European Union: Some Lessons for EurAsEC*, 3 Journal of Foreign Legislation and Comparative Law 108, 112–114 (2012)].

several cases, when interpreting the Qualification Directive, the CJEU referred directly to the 1951 Geneva Convention interpreting EU Law on the basis thereof.[44]

It should be noted that the CJEU pointed out that the guidelines which should be used to determine fundamental rights as general principles of EU law can be found in international agreements on human rights, which have been signed by the member states.[45] Accordingly, the CJEU used the Universal Declaration of Human Rights of 1948, the European Social Charter of 1961,[46] the International Covenant on Economic, Social and Cultural Rights of 1966, the International Covenant on Civil and Political Rights of 1966, the Convention on the Rights of Child of 1989 and so on.[47] The Founding Treaties stress the strict compliance with the principles of the UN Charter several times (Arts. 3(5) and 21 of the TEU).

2.3. International Customary Law

The application of customary law, which is one of the most important parts of international law, has always had a lot of nuances. EU law is not an exception in this regard. Based on the case law of the CJEU, it is clear that, in the EU, member states' relations the norms of international customary law are displaced by the norms of the Founding Treaties, particularly in the areas of the EU's exclusive competence, which is precisely regulated at the EU level. Pieter Jan Kuijper gives a good example of the impossibility of using classical international legal remedies for the breach of international agreements, such as unilateral sanctions in the form of suspension of other agreement obligations or other countermeasures, since the EU has its own perfect mechanism. This is a judicial procedure of enforcement actions against member states based on Arts. 258–260 of the TFEU, which is comprehensive and effective.

Regarding the EU's relations with countries outside the EU, the CJEU often uses customary international law. For example, the Court uses customary rules for the interpretation of international agreements listed in Arts. 31–33 of the Vienna Convention on the Law of Treaties of 1969.[48] A classic example of use of customary international law by the CJEU is its judgment in *Anklagemyndigheden v. Poulsen and Diva Navigation Corporation*[49] concerning the prohibition on salmon fishing in the North Atlantic high

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[44] Joined cases C-175-179/08 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, [2010] E.C.R. I-01493; Case C-31/09 *Nawras Bolbol. v. Bevándorlási és Állampolgársági Hivatal*, [2010] E.C.R. I-05539.

[45] Case 4/73 *Nold v. Commission*, [1974] E.C.R. 00491.

[46] Cases C-540/03 *Parliament v. Council*, [2006] E.C.R. I-5769; C-438/05 *Viking*, [2007] E.C.R. I-10779.

[47] Concerning the binding force of international agreements on human rights to the EU, *see* Israel de Jesus Butler & Olivier De Schutter, *Binding the EU to International Human Rights Law*, 27 Yearbook of European Law 277, 293–298 (2009).

[48] Case C-386/08 *Brita v. Hauptzollamt Hamburg-Hafen*, [2010] ECR I-01289. *See also* Pieter Jan Kuijper, *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, 25(1) Legal Issues of European Integration 1 (1998).

[49] Case C-286/90 *Anklagemyndigheden v. Poulsen and Diva Navigation Corporation*, [1992] E.C.R. I-06019.

seas. The Court relied on the norm of custom contained in the Geneva Conventions on the High Seas of 1958 and the UN Convention on the Law of the Sea of 1982 on the nationality of the ship, its crew and about various marine zones.

When postponing the entry into force of the Agreement on Cooperation with Yugoslavia, which contradicted the terms provided in the Agreement, the CJEU referred to the customary rule that allows such actions in case of a substantial change of circumstances, namely, the civil war in the country.[50] This customary rule of international law was mentioned earlier in the Judgment of the International Court of Justice in *Gabčíkovo-Nagymaros*.[51]

Therefore, though the CJEU is not officially bound by the agreements to which EU is not a party, it is bound by customary international law and that is why such international agreements (of general codification) are an important proof of the existence such customary rules.

In CJEU practice, we cannot find the use of customary law norms that had not been codified or confirmed by the decisions of other courts. In this respect, scholars rightly point out that the Court has positioned itself as a "modern" entity that seeks evidence of existence of customs exclusively in declarations or conventions which have not yet come into force, as opposed to adopting a traditional approach based on the search of international custom in the durable state practice and the *opinio juris*.

3. The *Kadi* Case as a Symptom of the Contemporary Autonomy of EU Law

In the context of the problems under consideration, the correlation of the EU legal order with international law, especially with that of the United Nations (hereinafter – UN), seems to be of special importance. The CJEU raised this issue in *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*[52] (hereinafter – *Kadi*), a case which is quite different from the Court's regular practice. This is a high-profile case that demonstrate the CJEU's position on the hierarchy of, and the relationship between, EU law and international law.

The issue of the hierarchy of EU and UN law has not been sufficiently researched because the subjects of these two systems are quite different. Usually, individuals are outside the UN's scope of interests and actions because it focuses mainly on the classical subjects of international law, i.e., states, unlike the EU, which has proclaimed itself a union of European peoples functioning for the EU citizens. The UN has only started directing its law at individuals in recent years, and this is carried out indirectly through states. We are talking about anti-terrorist actions and the UN Security Council sanctions mechanism against individuals.

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[50] Case C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] E.C.R. I-03655.

[51] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I.C.J. Rep. 1997, p. 7.

[52] Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005] E.C.R. II-03649.

The *Kadi* decision was significant not only for understanding of the relationship between EU law and the UN law, but it also caused a huge amount of doctrinal debates. The judgment resulted a huge number of emotive debates comparable to very few preceding CJEU decisions. The main issues of this case are as follows: a citizen of Saudi Arabia, Yassin Abdullah Kadi, who had very significant business interests in the EU, brought a direct action to the Court of the First Instance (hereinafter – CFI) to annul Council Regulation EC 2580/2001,[53] which concerned persons suspected of supporting terrorism. The Annex to this Regulation contained a list of persons and organizations suspected of supporting terrorism and among them there was Yassin Abdullah Kadi. The aim of the Regulation was to freeze, in the EU, all funds of the persons listed in the Annex. The Regulation was adopted for the implementation of several UN Security Council resolutions concerning the fight against terrorism which were adopted on the basis of Part VII of the UN Charter.[54] The resolutions required all UN member states to take appropriate steps to freeze the accounts and assets of the individuals and organizations that, according to the opinion of the UN Committee on Sanctions, had links with Osama bin Laden, the Al-Qaida network and the Taliban. The list of such persons and organizations was prepared by the UN Committee on Sanctions in 2001 and was expanded several times. Later, the UN Security Council resolution allowed some softening on the freezing of funds of suspected persons and allowed such funds to be used for humanitarian purposes with the consent of the UN Committee on Sanctions. The EU, in turn, also changed the Council regulation in accordance with the UN resolution's additions and allowed the suspected persons to use the funds for food, for medical purposes and for the payment of taxes.

In his CFI action, the plaintiff, Yassin Abdullah Kadi, insisted that he was the victim of a serious breach of justice because he had never supported terrorist activities, and thus his name was unreasonably entered into the list. He referred to the fact that the council regulation violated his fundamental rights such as the right to property guaranteed by Art. 1 of Protocol 1 of the ECHR, the right to a fair trial under Art. 6 of the ECHR and the right to a fair hearing which is established by the practice of the CJEU.

The plaintiff explained his position that, first, he had not been notified about being listed as a person suspected of terrorism, and, therefore, he was unable to conduct his defense. Second, there were no grounds in the regulation for including the plaintiff in this list and this fact also affects the efficiency of judicial protection since the plaintiff could not effectively defend himself without clearly understanding the grounds of the accusation. The plaintiff relied on the practice of the CJEU which stated that fundamental

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[53] Regulation (EC) No. 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism, OJ L 344, 28 December 2001, p. 70.

[54] S.C. Res. 1390 (2002) of 16 January 2002 (Jun. 25, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1390(2002); S.C. Res. 1267 (1999) of 15 October 1999 (Jun. 25, 2017), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267%281999%29; S.C. Res. 1333 (2000) of 19 December 2000 (Jun. 25, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1333(2000).

rights recognized and guaranteed by the constitutions of the member states, especially those enshrined in the ECHR, form an integral part of the legal order of the EU.

In its judgment, the CFI noted that, under customary international law and Art. 103 of the UN Charter, the obligations of member states under the UN Charter must prevail over all other obligations or national law, or international law, or EU law.[55] The obligations under the UN Charter include the obligations imposed by the binding acts of the Security Council. The CFI said that the EU had complied with such obligations, even despite the fact that it is not directly bound by the UN Charter provisions, because the EU is not a party thereto. The CFI underlined that the EU is not only forbidden to violate the obligations under the UN Charter, but also has a duty to do its best to facilitate the implementation of these commitments by its member states. Therefore, the CFI completely denied the plaintiff's argument that the EU legal order is independent of the UN legal order and governed by its own rules of law, and it emphasized the duty of the EU to obey the UN Charter norms, which set standards for its member states. The CFI added that, under international law and EU law, it would be unfair to verify the binding acts of the Security Council on their compliance with the human rights standards recognized by the EU. Therefore, the review of the UN Security Council resolution, even indirectly, is unacceptable on the part of the EU judicial authorities.

It would seem that the CFI's decision is fully consistent with the unitary concept of international law and the classical idea about the EU. But the CFI added that, in spite of the above, it has the power to review Security Council resolutions for compliance with *jus cogens*. This change in the CFI's argument was unexpected. Indeed, the norms of *jus cogens* are binding on all subjects of international law, including the UN Security Council. As Peter Hilpold appropriately notes, norms of *jus cogens* in relation to UN activities have a dual purpose: they extend the powers of the Security Council, since they are related to the needs of guaranteeing peace and security, but they also serve as the limit beyond which the Security Council cannot go to avoid an *ultra vires* act.[56] This argument is contained in a separate opinion of *ad hoc* Judge of the UN International Court of Justice, Elihu Lauterpacht, in the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, who emphasized that the concept of *jus cogens* is higher than customary international law and treaties. Art. 103 of the UN Charter (which provides that, in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail) cannot be applied in case of contradiction of Security Council resolutions with the norms of *jus cogens*.[57]

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55 *Kadi*, *supra* note 52.

56 Peter Hilpold, *EU Law and UN Law in Conflict*: *The Kadi Case*, 13 Max Planck Yearbook of United Nations Law 141, 171 (2009).

57 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 8 April 1993, Provisional Measures, Separate Opinion of Judge Lauterpacht, I.C.J. Rep. 1993, p. 440, para. 100.

The question is whether the judicial authority of another international organization can verify the legitimacy of the decisions of the Security Council and precisely this question seems very controversial. The CFI has concluded that it is empowered with such competence. In addition, the CFI noted that the right to property is the norm of *jus cogens*. By definition, *jus cogens* are peremptory principles or norms from which no derogation or limitation are permitted. However, the right to property and the right to a fair trial mentioned by the plaintiff do not enjoy absolute protection. In themselves, they are not absolute. In the interests of the society, and especially of the international community, they may be limited, so it is impossible to qualify them as *jus cogens*. Some member states, France, the Netherlands and the United Kingdom among them, objected to such qualification in the CFI's decision. Moreover, it became a ground for scientific criticism.[58]

Having analyzed the resolution, the CFI concluded that, since the UN Security Council resolution provided humanitarian exceptions and the states could appeal the resolution to the Committee on Sanctions, the freezing of Kadi's funds did not constitute a violation of *jus cogens*. Similarly, the CFI found no violation of the right to a fair hearing and the right to a fair trial under *jus cogens*. Therefore, it can be concluded that the main provisions of the CFI's decision are as follows: 1) the CFI denied the dualist concept concerning the EU's position in the international legal order and categorically subjected the EU to the UN decisions; 2) despite such subordination, the CFI reserved for itself a possibility to review the Security Council's acts on their compliance with the peremptory norms of international law, not just the norms on the protection of human rights recognized by the EU; 3) the CFI defined the position of the EU as a subordinated to the UN, but with its own control mechanisms that will be implemented on behalf of the international community.

The CFI decision was appealed by the plaintiff to the European Court of Justice (predecessor of the CJEU; hereinafter – ECJ) and, as a result, it was canceled on the ground that the Council regulation significantly limited the fundamental rights of the plaintiff and the regulation was annulled. The Court noted that it annulled the relevant EU rules, but extends their action for the following three months to provide time for the Council to adopt a new act and appropriate legal mechanisms for its implementation.

The analysis of *Kadi* confirms that it is fully consistent with the concept which the Court formulated concerning the uniqueness and autonomy of the EU legal order. This concept established the EU as a supranational, integrative organization that is significantly different from classical intergovernmental organizations. Thus, the Court continued the development of the dualistic model of the relationship between international and EU law. The Court had been developing the constitutional characteristics of the Founding Treaties for too long to deny it in one decision. The Advocate General Poiares Maduro, appointed in this case, also emphasized the idea

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[58] Piet Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit*, 3(2) European Constitutional Law Review 183 (2007); Christian Tomuschat, *Case Note on Kadi v. Council*, 43(2) Common Market Law Review 537 (2005).

that provisions of international agreements cannot restrict the constitutional principles of the Founding Treaties. And actually, this decision stressed that the Founding Treaties' provisions shall have primacy over the norms of international law because of the EU's uniqueness. In addition, the Court stated that it did not cancel or review the norms of the Security Council resolution or of the UN Charter, but the internal EU regulation, which implemented the resolution, i.e., the Council regulation. The Court stressed that international agreements cannot affect the distribution of powers provided by the Founding Treaties, or the autonomy of the EU's legal system. Therefore, the obligations imposed by international agreements cannot be more important than the EU's constitutional principles. At the same time, the Court found that EU law must respect international law and all EU measures must be interpreted in the light of international law and particular attention should be paid to the application of UN resolutions based on Chapter VII of the UN Charter. But this does not affect the status of international law – it remains a parallel system that cannot change the power and primacy of the fundamental EU law principles. Therefore, the Court stated that, even if the rules established by the Security Council resolution could be classified as part of EU law, their position would be higher than secondary EU law, but lower than general principles of the Founding Treaties and EU law, which include fundamental rights.

The position of the Court in *Kadi* was criticized by scientists. Moreover, the Court was accused of doing injustice to international law[59] and even of the revival of the idea of nationalism.[60] Grainne de Burca, while analyzing the decision, concluded that, by adopting this very decision, the Court "proclaimed the primacy of its internal constitutional values over the norms of international law" and adopted "a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international domain."[61] He suggested that instead of seeking compromise and doctrinally building a hierarchy between the sources of international and EU law, the Court demonstrated to all subjects that international law can be conquered by the constitutional principles of EU law.

But other authors supported the Court's position which was based on the primacy of the principles of protection of human rights.[62] Some researchers have pointed out that the Court was forced to take this decision because the UN's human rights protection mechanisms are far from perfect.[63]

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59 Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 51(1) Harvard International Law Journal 1, 44 (2010).

60 Christian Tomuschat, *The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?*, 28(1) Yearbook of European Law 654, 658, 663 (2009).

61 De Burca 2010, at 49.

62 Juliane Kokott & Christoph Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, 23(4) European Journal of International Law 1015 (2012).

63 Martin Scheinin, *Is the ECJ Ruling in Kadi Incompatible with International Law?*, 28(1) Yearbook of European Law 637 (2009).

The situation with *Kadi* is very similar to the one which the European Community (hereinafter – EC) faced in the 1970s when the German Federal Constitutional Court questioned the supremacy of EC law because it did not establish the proper level of human rights protection which is required in legitimate and democratic constitutional systems. A comparison of the human rights system of the EC and Germany demonstrated the weakness of the former (like the weakness of the UN mechanisms compared to the EU mechanisms in *Kadi*). Then the German Federal Constitutional Court took the well-known decision in *Solange I*,[64] according to which Germany could review the Community acts on their compliance with national standards of human rights. Only in 1984, the decision in *Solange II*[65] concluded that the level of human rights protection in the Community had reached an adequate level, so the need for reviewing control no longer existed.

In 1998 the ECtHR declared the existence of a developed mechanism for human rights protection in the EU. This was in *Bosphorus Airways v. Ireland*,[66] the circumstances of which were as follows: Bosphorus Turkish Airlines rented an aircraft, which belonged to the Republic of Yugoslavia, and transferred it to Ireland. Irish authorities confiscated the plane on the basis of Regulation 990/93, which implemented sanctions against Yugoslavia. Bosphorus Airlines challenged the confiscation of the aircraft at the Court of Justice on the ground of a violation of the right to property, but the Court rejected the application. Then the airline addressed a complaint to the ECtHR that, in its decision, adopted the concept of "equivalent protection" – the presumption that the EU has high standards of human rights. Without having the competence to review EU acts, the ECtHR made a presumption that they met the ECHR standards. This presumption holds good until evidence of any control mechanism dysfunctions or shortcomings in the protection of human rights emerge. Incidentally, the ECtHR focused on the fact that all EU institutions observe the general principles of Community law, which also include the provisions of the ECHR.[67]

It is important to remember that, in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,[68] the ECtHR did not extend the equivalent protection doctrine to the UN legal order but, at the same time, recognized the lack of jurisdiction to review the acts of the Security Council on their compliance with the ECHR. The ECtHR, unlike the CJEU, did not engage in an open legal conflict with the UN.

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64 BVerfGE 37, 271 [1974] (*Solange I*).

65 BVerfGE 73, 339 [1986] (*Solange II*).

66 *Bosphorus Airways v. Ireland, no. 45036/98, 30 June 2005, ECHR 2005-VI*.

67 In this regard, I would like to recall the opinion of the Advocate General Walter *Van* Gerven in *S.P.U.C. v. Grogan*, where he said that despite the fact that precedential practice does not give direct effect to international agreements in the Community's legal order, some international agreements, together with constitutional traditions common to all Member States, help to define the general principles of Community law (Case C-159/90 *S.P.U.C. v. Grogan*, [1991] E.C.R. I-04685, AG Van Gerven's Opinion, para. 30).

68 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos. 71412/01 and 78166/01, 2 May 2007, [2007] 45 EHRR SE10.

The Security Council took into account the ECJ's position and adopted a new Resolution[69] which took into consideration the gaps in human rights standards the Court had pointed out. The Security Council found that the lists of persons and organizations suspected of terrorism should be openly published in every state and each person or organization on the lists should be informed personally about it. This indirectly supported the ECJ's position in *Kadi*. Moreover, the resolution bound the UN Committee on Sanctions to argue its suspicions on the involvement of individuals and organizations in terrorist activities. In 2010, within the UN Committee on Sanctions an independent institution of Ombudsperson was introduced.[70] The Ombudsperson is empowered to examine requests from individuals, groups, businesses or entities seeking to be removed from the Security Council's ISIL and Al-Qaida sanction list.[71] Since that time, the Ombudsperson has gained considerable political influence, despite the fact that his/her reports have no binding power. A considerable amount of the Ombudsperson's procedural rules were borrowed from the ECJ decision in *Kadi*. At present, 70 cases initiated by the Ombudsperson have been completed and 8 more delisting requests are being considered by the Ombudsperson.[72]

It should also be emphasized that there have been no political statements or positions on the part of the UN, which would prove the protest against the Court's position. Moreover, the individual sanctions regime has been constantly criticized for violations of the presumption of innocence and the right to a fair trial,[73] etc., because even the UN Committee on Sanctions' meetings were closed. It could be concluded that the ECJ decision contributed to the improvement of the UN mechanisms. Therefore, the commitment of the ECJ to human rights issues has made an impact on international law and UN decision-making activities.

In this regard, Grainne de Burca rightly pointed out that the challenges encountered in *Kadi* are indicators of the growing complexity of the international legal environment.[74,75] Indeed, it is quite difficult to talk about the prevalence of the

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69 S.C. Res. 1822 (2008) of 30 June 2008 (Jun. 25, 2017), available at http://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/404/90/PDF/N0840490.pdf?OpenElement.

70 S.C. Res. 1904 (2009) of 17 December 2009 and its Annex II (Jun. 25, 2017), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904%20%282009%29.

71 Concerning legal analysis of this institution, *see* Adele J. Kirschner, *Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?*, 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 585 (2010).

72 After the reforms, in 2008 the Committee on sanctions gave Yassin Abdullah Kadi the opportunity to present his comments on the accusation. After researching his comments, the Committee concluded that it has reason to include Yassin Abdullah Kadi in the list of suspected persons.

73 Enzo Cannizzaro, *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3(2) International Organizations Law Review 189 (2006); Jessica Almquist, *A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions*, 57(2) International and Comparative Law Quarterly 303 (2008).

74 De Burca 2010, at 8.

75 The UN also drew the attention on this. In this regard, in 2002 the International Law Commission established the Study Group on researching the fragmentation of international law and, in 2006, as

constitutional approach concerning international law, which coincides with the monistic approach.[76] With the emergence of powerful integrative players in the international arena, the EU being one of the most successful ones, we cannot talk about the homogeneity of international law and the existence of a uniform world system with unified standards of legal relations. On the contrary, there is a regional constitutionalization, for example, within the EU, with its own principles of primacy in its unique legal system – *sui generis*.[77]

The CJEU upheld the pluralistic concept of international legal order, distinguishing the EU and the international law systems with their own hierarchies of norms. The Court offered a world regime model with horizontal, non-hierarchical, separate orders. The EU competence does not extend to review the rules of the parallel order, but may concern its own legal acts that implement those rules. By its decision in *Kadi*, the Court continued its systemic work to establish the concept of the autonomous EU legal order. The Court has shown itself as guarantor of the EU constitutional system and it could not help provoking a strong reaction on the part of international law researchers who accused the Court of a selective attitude to international norms and of giving preference to EU values.

The said EU constitutional values are the cornerstone of the EU constitutional system which actually originate in international law and can never be deviated from. In this regard, I would like to note that the concept of "general principles of EU law," which, since the Lisbon Treaty came into force, have been called "common values of EU law," is a concept which has entirely been developed by the CJEU. It includes a rather wide range of rules which are common to the constitutional traditions of all member states, international agreements on human rights and the ECHR. The Court has always put this category of rules on the top of the legal norms hierarchy. The CJEU claims that the aim of the EU is to protect the value of its own constitutional order including European standards of human rights, regardless of whether it results in an indirect refusal to follow the Security Council instructions. The essential thing here is that, in identifying the source of human rights, the Court does not rely on

a result of its work, it presented to the General Assembly the Report "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (Jun. 25, 2017), available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[76] *See* Erica de Wet, *The International Constitutional Order*, 55(1) International and Comparative Law Quarterly 51 (2006); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36(3) Columbia Journal of Transnational Law 529 (1998); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19(3) Leiden Journal of International Law 579 (2006); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Collected Courses of the Hague Academy of International Law 217 (1994); Armin von Bogdandy, *Constitutionalism in International Law: Comments on a Proposal from Germany*, 47(1) Harvard International Law Journal 223 (2006).

[77] *See* Комарова Т. Влияние Суда ЕС на конституционализацию права Европейского Союза, 3 Право Украины 64 (2013) [Tetyana Komarova, *The Influence of the CJEU on Constitutionalization of the European Union Law*, 3 Law of Ukraine 64 (2013)].

the internal rules of the EU, but on the International Bill of Rights, which is binding on all parties, including the UN Security Council.

Conclusion

The international legal order is in the process of constant evolution, but its current status indicates its fragmentation and lack of homogeneity. It is impossible to talk about the existence of a supreme legal order and secondary ones. Therefore, the EU legal order, which started its development as a purely highly specialized one, cannot, for example, currently be viewed as subordinated to the UN. This legal order has developed its own principles which, though they respect the basic principles of general international law, have their own specific character.

The CJEU continues its systemic work on strengthening the autonomy of the EU legal order. The Court's case law shows that the EU will not deviate from their constitutional principles such as the principles of EU law supremacy and respect for human rights. At the same time, we should pay tribute to the EU for its great respect towards general international law. The CJEU indicates the place of international law in the hierarchy of sources of EU law – in all cases it is lower than the Founding Treaties because, otherwise, the EU would be deprived of its indispensable autonomy.

The decisions in *Kadi* open a new era in relations between EU law and international law because these decisions repeat the dogma of respect for international law provided there are no violations of the general principles of EU law, including respect for human rights, which transforms the EU from a union of states into a union of peoples and citizens.

References

Almquist J. *A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions*, 57(2) International and Comparative Law Quarterly 303 (2008).

Cannizzaro E. *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3(2) International Organizations Law Review 189 (2006).

De Burca G. *The European Court of Justice and the International Legal Order after Kadi*, 51(1) Harvard International Law Journal 1 (2010).

De Wet E. *The International Constitutional Order*, 55(1) International and Comparative Law Quarterly 51 (2006).

Eeckhout P. *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit*, 3(2) European Constitutional Law Review 183 (2007).

Fassbender B. *The United Nations Charter as Constitution of the International Community*, 36(3) Columbia Journal of Transnational Law 529 (1998).

Hilpold P. *EU Law and UN Law in Conflict*: *The Kadi Case*, 13 Max Planck Yearbook of United Nations Law 141 (2009).

Kirschner A.J. *Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?*, 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 585 (2010).

Kokott J. & Sobotta C. *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, 23(4) European Journal of International Law 1015 (2012).

Krenn C. *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13*, 16(1) German Law Journal 147 (2015).

Kuijper P.J. *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, 25(1) Legal Issues of European Integration 1 (1998).

Lavranos N. *Protecting European Law from International Law*, 15(2) European Foreign Affairs Review 265 (2010).

Rosas A. *The Status in EU Law of International Agreements Concluded by EU Member States*, 34(5) Fordham International Law Journal 1304 (2011).

Scheinin M. *Is the ECJ Ruling in Kadi Incompatible with International Law?*, 28(1) Yearbook of European Law 637 (2009).

Simma B. *From Bilateralism to Community Interest in International Law*, 250 Collected Courses of the Hague Academy of International Law 217 (1994).

Tomuschat C. *Case Note on Kadi v. Council*, 43(2) Common Market Law Review 537 (2005).

Tomuschat C. *The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?*, 28(1) Yearbook of European Law 654 (2009).

Von Bogdandy A. *Constitutionalism in International Law: Comments on a Proposal from Germany*, 47(1) Harvard International Law Journal 223 (2006).

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